

NO. 2019-1787

IN THE SUPREME COURT OF OHIO

CAPITAL CASE, APPEAL FROM
THE CUYAHOGA COUNTY COURT OF COMMON PLEAS
NO. CR-18-634069

STATE OF OHIO,

Plaintiff-Appellee

-vs-

MATTHEW NICHOLSON,

Defendant-Appellant

MERIT BRIEF OF APPELLEE STATE OF OHIO

CAPITAL CASE – NO EXECUTION DATE SET

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INTRODUCTION

On September 5, 2018, Defendant-Appellant Matthew Nicholson shot 19 year-old Giselle Lopez and her 17 year-old brother M.L. a total of thirteen times in their backs, killing them both. Tr. 3391; Exhibits 601, 652. Nicholson had been living with the children and their mother America Polanco for more than a few years at the time he took their lives. Tr. 3284-89.

Prior to killing Polanco's children, Nicholson had threatened the lives of Polanco and the children if they ever called the police. Tr. 3289. Nicholson had specifically threatened Polanco and her children with the guns he kept in the house. Tr. 3289-90. Nicholson killed M.L. and Giselle after two 9-1-1 calls were placed on September 5, 2018. Tr. 2527-36. Polanco placed the first call at approximately 9:35 P.M. Tr. 2541-44, 2530-32, 3306; Exhibits 313, 315, 318. M.L. placed the second call at approximately 9:37 P.M. Tr. 2532-35, 2541-44, 3555-56; Exhibits 314-15, 319. Garfield Heights police officers were dispatched to the scene at around 9:38 P.M. Tr. 2555. Officers arrived on scene at approximately 9:42 P.M. Exhibit 339.

Before shooting Polanco's children, Nicholson ran to the bedroom to get his gun from under the mattress. Tr. 3674. Polanco tried to get M.L. to intercept Giselle, who had just arrived home, and to run. *Id.* Polanco's children did not have a chance to run, and Nicholson shot them in their backs in their driveway. *Id.*

After the murders were committed, Nicholson barricaded himself in the home of the victims, refusing to come out for hours in a standoff with police. Tr. 2584, 2687; Exhibit 422. When Nicholson ultimately left the home, he was taken into custody. Tr. 2699.

The evidence of Nicholson's guilt at trial was overwhelming. Nicholson was arrested on scene and confessed to being the shooter. The murders were also witnessed by the mother of the murder victims, America Polanco, who testified at trial and provided a survivor's account of what

happened in the house before the murders, what happened in the driveway during the murders, and what Nicholson did after the murders. The autopsies demonstrated that each victim was shot exclusively in the back along with one shot striking one arm of each victim, and a thirteenth shot striking Giselle's bookbag, demonstrating that Nicholson's self-defense claim was meritless. Additionally, several witnesses including lay persons and police officers discredited Nicholson's claims that M.L. or Giselle had his service weapon at the time Nicholson shot them. A search of the Nicholson's vehicle on September 6, 2018 demonstrated that the service weapon was not in the trunk, contrary to Nicholson's testimony. The service weapon was eventually found in a bedroom closet on September 13, 2018 and moved to his vehicle along with several of Nicholson's other belongings. Nicholson never called 9-1-1 before, during, or after the shootings, and had no apparent injuries when he was taken into custody. Notes that Nicholson wrote after the murders were also collected and presented as evidence of his choice and reason for killing both victims.

The aggravating circumstances greatly outweighed any mitigation. Nicholson chose to kill two people with whom he had resided for years and known as children. Nicholson was found guilty of one death penalty specification attached to each count of aggravated murder for killing M.L. and Giselle.

STATEMENT OF THE CASE AND RELEVANT FACTS

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

A. Timeline of Events

Matthew Nicholson shot M.L. and Giselle Lopez to death in the driveway of their home on September 5, 2018.

Earlier in the evening before the murders, Nicholson became upset about a text message

sent to Polanco from Terricko Marshall, her former boyfriend. Tr. 3387. Nicholson grabbed Polanco's phone and made her unlock it after she received this message. *Id.* Nicholson then began grabbing Polanco by the neck, throwing her in the bed, and strangling her. Tr. 3378-88. At one point, Polanco felt like she stopped breathing. Tr. 3388.

Eventually Nicholson stopped strangling Polanco and she told Nicholson that Marshall had texted her. Tr. 3388. After that, Nicholson forced Polanco to call Marshall on speaker phone and discuss the text message. Tr. 3388. At some point Nicholson joined the call and discussed the fact that he and Polanco were in a relationship. *Id.* Marshall did not hear Nicholson making threats, although Polanco described threatening statements from Nicholson to Marshall. Tr. 3009, 3387-89.

Polanco described that after this, Nicholson kept yelling at her, "[y]our son is coming down here. I'll kill him and I'll kill your daughter too." Tr. 3389. Polanco explained that when M.L. came downstairs, he heard Nicholson punching the wall and screaming and asked if Polanco was okay. *Id.* Nicholson then told Polanco, "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. 3389-90.

Polanco explained that Nicholson then grabbed M.L., took him to the kitchen and started beating M.L., getting him on the floor. Tr. 3390. Polanco was pleading with Nicholson for him to leave her son alone. *Id.* Nicholson then grabbed Polanco and threw her, and M.L. was able to go around the table in the kitchen. *Id.* Nicholson then threw a chair at M.L. *Id.* After that, Polanco heard her daughter Giselle pulling in the driveway. *Id.*

Polanco told M.L. to call Giselle and tell her not to come into the house. *Id.* Nicholson was threatening M.L. and Polanco to not call the police. *Id.* M.L. did call the police. At this time, Nicholson ran to the bedroom and brought out a gun. *Id.* Polanco encouraged M.L. to get Giselle

and stop her from coming inside, but they did not have a chance to run. Tr 3674.

After Nicholson retrieved the gun from the bedroom, he put Polanco to the side and shot her children from not even three feet away. Tr. 3041-42, 3391. Polanco did not know what to do, she called for Mr. Vic and Connie Allshouse to call the police for her, to call for an ambulance. *Id.*

Connie Allshouse also described the night of September 5, 2018. Tr. 3404-15. After Mr. Vic arrived home between 9:20 and 9:30, they were in the kitchen together when they heard a noise they hadn't heard before, like glass on glass, or keys hitting really hard on glass. Tr. 3404-05. Allshouse described that her and Vic looked at each, "and then no sooner did we hear that noise, America was in our front yard." Tr. 3405.

Polanco was taken to Marymount Hospital's emergency room for treatment after the murders. Tr. 3677-78, Exhibit 406. Photographs were taken of her injuries and entered into evidence. Tr. 3679; Exhibits 253-58.

B. The Evidence Against Nicholson

1. Confession

The evidence against Nicholson is overwhelming. First, he was arrested on scene after a standoff with police, and never denied shooting the victims to death. First, he shot his victims a total of thirteen times, with each shot aimed at their backs. Evidence and testimony demonstrated that he fired these shots from approximately four feet away from the victims or less. Tr. 3041-42, 3391. He fired the gun thirteen times at M.L. and Giselle, one of the bullets was stopped in Giselle's bookbag. Tr. 2935-38. 3991; Ex. 564. The only bullet that did not strike either of the victim's bodies became stuck in a bookbag worn by Giselle when she was killed. Tr. 2935-38. This accuracy corroborated the testimony that Nicholson was close to the victims when he shot them.

At trial, Nicholson did not deny shooting both victims. Tr. 4142. The following exchange took place:

[Ms. Faraglia]: “You’re so weak you unloaded a whole clip in the back of two teenage kids? That’s how weak you were?”

[Mr. Nicholson]: “Yes m’am. It was not easy.”

[Ms. Faraglia]: “You did it though, didn’t you?”

[Mr. Nicholson]: “Yes m’am.”

Tr. 4142.

2. Threats made by Nicholson

Prior to killing Polanco’s children, Nicholson had threatened the lives of Polanco and the children if they ever called the police. Tr. 3289. Nicholson had specifically threatened Polanco and her children with the guns he kept in the house. Tr. 3289-90. Nicholson killed M.L. and Giselle after two 9-1-1 calls were placed on September 5, 2018. Tr. 2527-36. Polanco placed the first call at approximately 9:35 P.M. Tr. 2541-44, 2530-32, 3306; Exhibits 313, 315, 318. M.L. placed the second call at approximately 9:37 P.M. Tr. 2532-35, 2541-44, 3555-56; Exhibits 314-15, 319. Garfield Heights police officers were dispatched to the scene at around 9:38 P.M. Tr. 2555. Officers arrived on scene at approximately 9:42 P.M. Exhibit 339.

Before the 9-1-1 calls were placed on September 5, 2018, Nicholson also threatened the lives of M.L. and Giselle during a violent argument with Polanco. Tr. 3389-90, 3671. Nicholson threatened to kill both M.L. and Giselle at that time. *Id.* Nicholson made these threats after strangling, punching, and squeezing Polanco, causing M.L. to come down and check on her. Tr. 3706.

Before September of 2018, the issues between Nicholson, Polanco, and the children

became so problematic that their neighbor, Connie Allshouse made an agreement with her if the kids or her ever felt unsafe they could come to her house and that she would call the cops for them. Tr. 3402. Allshouse spoke to Polanco about these issues multiple times per week, and advised Polanco to go to the police. Tr. 3403-04. After her children were murdered, Polanco went to Allshouse and frantically yelled for her to call 9-1-1. Tr. 3405.

The issues with Nicholson also led one of Polanco's coworkers to suggest she do more to protect the family. Tr. 3519. Shondell Smith testified that although Polanco was a private person, she came to trust Smith and confide in him. *Id.* Smith came to view the relationship with Nicholson as kind of toxic. *Id.* After Polanco confided in Smith, Smith suggested, "if you feel that your home or your children or yourself is in danger, I'm a CCW licensed carrier, I do have a military background, and I'm more than happy to take her out, to help her purchase a weapon and to help her... to protect herself and her children and her home." *Id.* Smith was also aware of the issues between Nicholson and Polanco's children. Tr. 3522-23. Smith also offered his home as a place for Polanco and her children as a safe house for them from Nicholson. Tr. 3520. Smith also provided that when he saw on the news that there had been a shooting on Polanco's street on September 5, 2018, he woke his wife up and told her that he knew Nicholson had killed Polanco's children. Tr. 3524-25.

3. Autopsy of the victims

It is uncontroverted that Nicholson shot at the victims a total of thirteen times, with each bullet entering each victim through their respective backs. Tr. 3923-77; Ex. 601, 652. More specifically, one bullet was stopped in Giselle's bookbag, ten total bullets hit the victims in their backs, and one bullet each first entered each victim through one of their arms. Nicholson did not cross-examine or rebut the testimony and evidence presented by the medical examiner in any way.

At trial, the State withdrew 125 photographs of M.L., and 76 photographs of Giselle, and “just picked all the salient photos to articulate the cause and manner of death in this case.” Tr. 3908. Nicholson did not object to the photographs that were selected and offered as evidence. *Id.*

The deputy medical examiner had done approximately 1,095 autopsies at the time he testified. Tr. 3913. Based on the autopsy of M.L., he opined a cause of death for M.L. of multiple gunshots wounds of torso and right upper extremity. Tr. 3987-58. The manner of death was determined to be a homicide. Tr. 3958.

Trace metal detection tests were performed on the hands of both victims and each came back negative. Tr. 3028-29, 3074-75.

a. Wounds of M.L.

There were eight total gunshot wounds found on M.L.’s body. Tr. 3923; Ex. 601. Six of these were penetrating, with only an entrance wound and a bullet somewhere inside the body. *Id.* Two of these wounds were perforating, meaning they had both an entrance and an exit, with a bullet not left behind inside the body. *Id.* Of those two perforating wounds, one had an entrance wound, an exit wound, and a reentrance wound. Tr. 3923-24; Ex. 601.

The first diagnosed wound first entered M.L.’s upper arm. Tr. 3931; Ex. 601, 608. That bullet exited the inside of his arm and reentered into his right chest, with a trajectory going directly through when his arm was in position by his side. Tr. 3934; Ex. 611-12. Gunshot wound number 2 was caused by a bullet that entered M.L.’s right lower back. Tr. 3939; Ex. 601, 619. Gunshot wound number 3 also was caused by a bullet that entered M.L.’s right lower back. Tr. 3939; Ex. 601, 619. Gunshot wound number 4 was caused by a bullet that entered M.L.’s lower back near the midline. Tr. 3944-45; Ex. 601. Gunshot wound number 5 was caused by a bullet that entered M.L.’s left lower back. Tr. 3945; Ex. 601, 617A. Gunshot wound number 6 was caused by a bullet

that entered M.L.'s left lower back. Tr. 3947; Ex. 601. Gunshot wound number 7 was caused by a bullet that entered M.L.'s left hip and the left flank. Tr. 3947; Ex. 601. Finally, gunshot wound number 8 was caused by a bullet that entered M.L.'s left hip. Tr. 3948-49; Ex. 601.

Specifically, and in total, Nicholson shot M.L. five times in the lower back, twice in the left hip, and once in the arm. Tr. 3934-49; Ex. 601. Not one of the eight bullets entered any frontal portion of M.L.'s body. Ex. 601.

b. Wounds of Giselle

There were four total gunshot wounds on Giselle Lopez's body. Tr. 3960; Ex. 652, 654-83. Each of these wounds was penetrating. *Id.*

The first diagnosed gunshot wound in Giselle's body entered near her left shoulder in her left upper arm. Tr. 3962; Ex. 659-60. This bullet caused an exit wound in her left inner arm and a reentrance wound in her left chest. Tr. 3963; Ex. 660. Gunshot wounds 2, 3, and 4 were located in Giselle's lower back and left buttocks. Tr. 3966; Ex. 665A. Each of those were entry wounds without related exit wounds. Tr. 3966.

Specifically, and in total, Nicholson shot Giselle once in the left upper arm, once in the lower back, once in the left buttocks, and once in the left lower back and left buttocks. Tr. 3960; Ex. 652.

4. Nicholson's History with the victims

Nicholson and America Polanco met at work at Lincoln Electric in Cleveland, Ohio. Tr. 3276-77. Their relationships began normally, and Nicholson spoke frequently about his daughter. Tr. 3277. Months later, Nicholson moved into Polanco's home with her and her children. *Id.* The rule when Nicholson moved into the home was to have respect for Polanco's kids. *Id.*

After moving in, Nicholson left Lincoln Electric in January of 2015. Tr. 3282. In February

of 2015 the relationship with Nicholson began to change as Nicholson started getting aggressive. Tr. 3284.

Polanco recalled the first time that Nicholson became aggressive with her, using a bad mouth and grabbing her at one point. Tr. 3284-85. Nicholson called her a bitch multiple times, amidst a lot of nasty words. Tr. 3285. Polanco was scared and talked to Nicholson about it, she told him that she didn't want her kids "around nothing like that." *Id.*

After this incident, Polanco met with Nicholson's mother, Angel Nicholson, and discussed how Nicholson was treating Polanco. Tr. 3286-87. Specifically, Polanco told Angel that she couldn't live with someone like that, because she had her children and didn't want her children around situations like that. Tr. 3286. Polanco asked Angel for help. *Id.*

After this, Nicholson began a brief new position with a security company before going to work at the post office and finally working for Homeland Security with Paragon Systems. Tr. 3287. After Polanco met with Angel Nicholson, her relationship with Nicholson got worse and worse. Tr. 3288.

Polanco described arguing with Nicholson about every little thing. Tr. 3288. She described an argument over Nicholson's vacuum cleaner that led to Nicholson calling her names and grabbing her by the arms. Tr. 3288.

Polanco did not tell Nicholson she would go to the police because Nicholson threatened her, saying that if she ever went to the police, or if she ever called the police, Nicholson would kill her and her children. Tr. 3289. Nicholson also told Polanco that he would even kill neighbors and any police who came into the house, because he was prepared for anybody with guns. Tr. 3289.

Polanco told Nicholson that she wasn't comfortable with the guns he kept in the house but he told her that he had to be prepared. Tr. 3290. After the incident with the vacuum, Polanco told

her kids not to use it and spoke to Connie Allshouse about the relationship. Tr.3290-91. Polanco then tried to talk to Nicholson about him moving out and he became very angry at this request. Tr. 3291. Nicholson told Polanco that he would not leave the house because it was his house and that if he ever left, she would regret it. *Id.* Polanco understood this to be a threat. *Id.*

After speaking to Connie about the issue, Polanco went to Garfield Police Department, who referred her to a domestic violence hotline without taking a report. Tr. 3292-93, 3299. Polanco spoke to someone at the domestic violence hotline about the issue. Tr. 3293, 3299. After this, Polanco went back to living in the house. *Id.* At this point, her children and Nicholson didn't have much interaction. *Id.* After Nicholson started threatening Polanco and threatening her using her kids, Polanco talked to her kids and told them to avoid Nicholson as much as they could. Tr. 3293-94.

Prior to Polanco's son Roberto joining the army, all three of her children were at home along with Nicholson during the above-described events. Tr. 3299. Roberto went to the army on December 28, 2015. *Id.* When Roberto and Nicholson were in the house at the same time, they did not have a relationship. Tr. 3299-3300. After Roberto left, the relationship between Polanco and Nicholson got worse. Tr. 3300.

Polanco described that at that point, "Everything he come with excuse about my kids. It seems like he trying to put my kids between. And every little thing he find in the kids he'd come in and make it bigger, big deal. He started cussing me out, calling me names. To one point he told me that he hates my kids." Tr. 3300. Polanco and Nicholson were having arguments in their bedroom almost every day by this time. Tr. 3301. Polanco described that sometimes the arguments were little things, but Nicholson began calling her names, calling her a bitch, and started threatening her that he would never leave the house because that was his house. *Id.* Polanco also

recounted that Nicholson said, “before I leave I’ll burn this bitch down and I will be the only one who will leave alive.” *Id.*

Polanco described that Nicholson would come upstairs at night after being in the basement and start arguing with her, keeping her awake. Tr. 3302. Nicholson started telling her that she will never get sleep, nobody will get sleep. *Id.* Polanco testified that she would not sleep because she was afraid for whatever Nicholson wanted to do. *Id.*

Polanco explained at one time Nicholson put a big gun to her forehead. Tr. 3302. This scared her and made her scared for her kids. *Id.* Polanco “couldn’t tell [Nicholson] [to leave] that day because he probably [would kill her].” *Id.* Polanco described Nicholson later apologizing, telling her he didn’t mean to, and wouldn’t do it again. Tr. 3302-03.

By the time Roberto graduated from boot camp, after joining the army in December of 2015, the relationship between Polanco’s kids and Nicholson was observably poor. Tr. 3303-04. Nicholson was not invited to Roberto’s graduation because the relationship between Nicholson and the kids was not good. Tr. 3304.

Roberto provided that before he left, he and Nicholson “didn’t really communicate all that much, so it was not bad.” Tr. 3639. When Roberto returned to the home in June of 2017, he noticed more about the family relationship with Nicholson. Tr. 3648. Roberto described it as “really uneasy.” *Id.*

After the graduation, things got worse. Tr. 3305. Polanco described Nicholson as having no interaction with her kids at this point. *Id.* Polanco leased a car for Giselle after she got her driver’s license, about which Nicholson argued with Polanco. Tr. 3308. The additional car made further issues between Nicholson, Polanco, and Giselle, because it complicated parking at the house. Tr. 3309. Moving Giselle’s car out of the way for Nicholson’s sake led to Giselle getting a

parking ticket, and when Polanco tried to discuss this with Nicholson it started an argument. Tr. 3309-10.

Nicholson also sought marriage from Polanco, and when she denied him, he blamed her children. Tr. 3313. Nicholson began to ask Polanco to marry him daily. Tr. 3312-13. When Polanco reminded Nicholson that she had already told him no, Nicholson would get angry. Tr. 3313. Nicholson accused her of refusing to marry him because of her kids, because Polanco had told them it would only be her and them. *Id.* These arguments ended badly, with threats and with Nicholson telling Polanco how much he hated her kids because they were from another man. *Id.*

At another point, Nicholson was arguing with Polanco, grabbing her in the bed and hurting her. Tr. 3313. Polanco asked him to stop, attempting to keep her kids from hearing it, but Giselle came outside her room and asked if Polanco was okay through the door. Tr. 3313-14. This made Nicholson very angry. Tr. 3315.

In response to Giselle asking her mother if she was okay, Nicholson grabbed his gun, got it ready, and instructed Polanco to tell her daughter to shut up, to go in her room, or he would kill Giselle. Tr. 3315. Polanco was very scared that Nicholson would do that. *Id.* Nicholson also pointed to the wall, through Giselle's bedroom. *Id.*

Polanco therefore told Giselle that she was okay and told her to go to her room. Tr. 3315. Giselle then went upstairs to M.L.'s room, her own room was downstairs. *Id.* This was the first time that Nicholson had pointed a gun at Giselle's room.

Nicholson also pointed a gun at Polanco two times. Tr. 3316. Polanco did not tell Nicholson that she was going to tell the police. *Id.* This reluctance came from the fact that Nicholson was "always already threatening [Polanco] that if [Polanco] ever [called] the police he will kill [Polanco], [her kids], and every [police officer] who comes in the house. Because he [hates] the

police.” *Id.*

After the incident with Giselle, Polanco discussed Nicholson with her kids again. *Id.* Polanco told her kids that when they hear something like that, they just stay quiet, because she didn’t want Nicholson to hurt them. Tr. 3316.

Polanco described an incident in March of 2018 when Nicholson became violent with Giselle over laundry. Tr. 3358-60. In an argument related to Giselle’s clothes being left in the dryer, Nicholson got into Giselle’s face, threw Giselle’s laptop, and threw her little table against Giselle. Tr. 3361. Nicholson called Giselle a little whore and a bitch. *Id.* This led to Nicholson also grabbing Polanco and then pushing M.L. against the wall after M.L. came to help. Tr. 3361-62. Finally, Nicholson punched a hole in the living room wall. Tr 3362, 4037. Nicholson admitted to punching a hole in the wall based on this argument with Giselle. Tr. 4037. Nicholson added that Giselle accused him of wanting to touch her undergarments. Tr. 4035.

Connie Allshouse and Vic Sanuk were neighbors of Polanco, M.L., and Giselle from the time the victims moved to Garfield in 2011. Tr. 3396-97. Allshouse described the children as very polite, respectful, good, and super nice. Tr. 3398. Eventually, Allshouse and Vic met Nicholson, after he moved into Polanco’s house. Tr. 3398. She remembered this taking place around late 2014, early 2015. Tr. 3398-99.

Allshouse testified that there came a point in time when Polanco confided in her about the situation in the house and the relationship. Tr. 3401. Allshouse gave Polanco advice about ways in which to get Nicholson to move out of the house. Tr. 3402. The situation was such that Allshouse and Polanco “had an agreement that if the kids ever felt, and her, unsafe, you can come over to our house. We’ll call the cops. You don’t have to worry about the kids or you calling. We will do that.” *Id.*

Allshouse also provided that the jockeying of the cars took place every night. Tr. 3402. Allshouse and Vic provided their driveway to Giselle to help. Tr. 3403. Allshouse and Polanco spoke multiple times a week about Nicholson. *Id.* Allshouse advised Polanco to call the police. Tr. 3404.

Shondell Smith, one of Polanco's coworkers, also testified that he was concerned for the safety of her and her children, offering to help her get a weapon to protect herself, her children, and her home. Tr. 3519. Smith further offered his house as a safe house for Polanco and her children, after learning about the situation in their home. Tr. 3520.

Nicholson himself indicated consistent issues with Polanco's children, directly after killing them. Tr. 4099; Exhibit 231. After shooting M.L. and Giselle, one of the notes that Nicholson wrote said, "America I tried, you continually let your kids disrespect me. Why?" *Id.* Nicholson also testified that the children he killed had shown him disrespect a lot, telling him to "shut up; fuck you." Tr. 4119-20.

5. Nicholson had no apparent injuries after killing M.L. and Giselle and assaulting Polanco

After being taken into custody, a photograph was taken of Nicholson, and a full booking sheet was completed. Exhibit 422. Nicholson's photograph demonstrated no apparent injuries. Exhibits 306, 422. Additionally, under the victim questionnaire section, the response to whether Nicholson had fainted recently or had a recent head injury was 'No.' Exhibit 422. Additionally, the answer to whether Nicholson was sick or injured was 'No.' *Id.* This was consistent with the photograph of Nicholson in which there were no visible injuries or markings. Exhibit 306. This was also consistent with the visual opinion of the booking officer, which stated that Nicholson was conscious, and that he did not have any visible signs of trauma or illness requiring immediate medical care. Exhibit 422. Finally, this was consistent with Lt. Vargo's testimony that Nicholson

never told Lt. Vargo any type of self-defense theory and also never told him that Polanco was beating Nicholson with a Lysol can. Tr 4216-17.

The lack of any injuries to Nicholson contradicted his testimony that he was attacked by both M.L. and Polanco before shooting M.L. and Giselle to death. Tr. 4142-47.

A. Mitigation Phase Testimony

The mitigation phase of the case began on October 11, 2019. The defense presented testimony from several witnesses. The defense first presented testimony from Nicholson's family: Robert Nicholson (brother), Donna Kain (aunt) and Angela Nicholson (mother). The defense also presented testimony from John Fabian, Psy. D. and Cecil McDonnell, LISW to offer testimony with respect to their interviews with Nicholson's family members and a basis for the jury and the Court to evaluate Nicholson's z, to testify as to an MRI taken on July 24, 2019. The State in rebuttal called Dr. Richard Darby, a neurologist and Dr. Thomas Masaryk, a neuroradiologist.

1. Robert Nicholson, Jr.

Robert Nicholson, Jr. is the older brother of Matthew Nicholson. Tr. 4406-4407. Robert testified that when Nicholson was born, they were living at a house in Cleveland, Ohio. After a housefire, they moved to Beachwood and then to South Euclid. Tr. 4408. When asked about growing up in their household, Robert described the motivation to leave. Tr. 4408. Robert testified regarding incidents of domestic violence. Tr. 4410. He recalled specific incidents for the jury, including an incident when Nicholson was four or five years old and their father was choking their mother over the edge of a couch. Tr. 4410-4415. Robert Jr. described most of the abuse he received at the hands of his father as mostly verbal. Tr. 4422. He provided specific examples from his own memory, for example how Nicholson went to a private school and how Nicholson would get rides

to school, while he walked. Tr. 4423-4424. Robert Jr. conveyed that Nicholson did okay in school and at times Nicholson was the voice of reason for Robert Jr. Tr. 4431-4432.

But despite what Robert Jr. experienced, he graduated from high school and went to college at the University of Phoenix and his first business was building saltwater aquariums. Tr. 4403. Robert Jr. served in the United States Coast Guard for eight years, where he was on a counternarcotics team, and had policing experience. After serving in the United States Coast Guard, Nicholson was a police officer for the City of East Cleveland, where he worked on basic patrol, SWAT, and narcotics. Tr. 4403-4406. His parents valued and pushed education. Tr. 4422. However, Robert Jr. described domestic violence in the household as a daily occurrence. Tr. 4424-4425. But not all memories of his father appeared negative as Robert Jr. recalled a memory where his father told him that he was proud of him. Tr. 4426-4427.

On cross-examination, Robert Jr. lived in different parts of the Cleveland area including Beachwood and South Euclid. Tr. 4436. The house they, which included Robert Jr., Nicholson, and their parents, were clean and sanitary. Tr. 4437. There were no drugs in the home besides alcohol. Tr. 4437. There were no physical hazards and both children went to school. Tr. 4437-4438. Robert Jr., believed Nicholson was a good student and did not recall any behavioral issues. Tr. 4438. Their dad was an auto mechanic with sears while their mom had a series of jobs, including at Ohio Savings Bank. Tr. 4438. Both Robert Jr. and Nicholson went to college. Tr. 4440. Despite his descriptions of domestic violence, Robert Jr. was aware of only incident that would have had a police report. Tr. 4441-4442. Robert Jr. also described Nicholson as their dad's Rockstar. Tr. 4443. Robert Jr., believed Nicholson got preferential treatment and Nicholson was the do-no-wrong kid. Tr. 4443-4444. Robert Jr. further explained that aside from speeding tickets Nicholson wasn't a knucklehead kid. Tr. 4444-4445. He also acknowledged how Nicholson

believed that were lucky growing up the way they did. Tr. 4445-4446. The State elicited testimony from Robert Jr. that he did not want to talk over the phone because of concern that the State would be listening into the phone call. Tr. 4453.

2. Donna Kain

Donna Kain, the aunt of Nicholson, testified next. Tr. 4460-4461. Donna had a good relationship with Nicholson, which continued into Nicholson's adulthood. Tr. 4461-4462. Donna was close to her sister (Nicholson's mother), and when she found out about the "abuse", she did her best to be part of their lives. Tr. 4463-4464. Robert Jr. would be allowed to stay with Donna over the summers but not Nicholson. Tr. 4465. Donna talked about Robert Sr.'s drinking and her perceptions of the abuse. Tr. 4465-4775. It was Donna's opinion that Nicholson's growing up was "horrific," and believed their mother lived in fear. Tr. 4482-4485 Donna and Angel's father was a police officer and their mother worked for General Electric. Tr. 4488. Donna, Angel and their siblings all went to college. Tr. 4489-4490. Although Donna knew about the hotline for Children and Family Services, she never called it with respect to Robert Jr. and Nicholson. Tr. 4494-4497. Donna also testified on cross-examination that she considered the fact that she told her father about her sister's abuse as contacting the police. Tr. 4497-4499. Donna acknowledge that throughout the trial Angel and Robert Sr. were still married, living in South Euclid together and coming to court together for Nicholson's trial. Tr. 4501-4502.

3. Angel Nicholson

Angel Nicholson is the mother of Robert Jr. and Nicholson. Angel went to college, graduated high school, worked and at the time of trial was employed by the Department of Veteran Affairs. Tr. 4508-4511. Angel testified her mother and stepfather fought when she was growing up and that she left her home at the age of 17 or 18 when she witnessed her stepfather pull a gun

out on her mother. Tr. 4515. Angel claimed that she did not share the information that with Dr. Fabian because it was painful. Tr. 4516. Angel said that after Robert Jr. was born, Robert Sr. became violent. Tr. 4521-4522. Angel recalled an incident of violence where she jumped out of a bathroom window. Tr. 4522. At one point she left Robert Sr. and went to California but later returned. Tr. 4523. Angel testified there was an incident where Nicholson witnessed her being suffocated. Tr. 4524. Angel said that Robert Sr. drank and she later began to drink to “numb the pain.” Tr. 4525. Despite this, she managed to get the kids up, get them to school and go to work. Tr. 4525. Angel testified that Robert Sr. never respected her or her kids. Tr. 4526. According to Angel, she was abused and Nicholson was mentally abused. Tr. 4528. But Angel also talked about Nicholson’s passion for cars. Tr. 4529-4530. Angel explained that Nicholson was in car accidents when he was 16 or 17. Tr. 4523-4523. Angel claimed that Nicholson did not go to the hospital despite the claimed seriousness of these accidents. Tr. 4532-4534. Angel said she was unwilling to speak to Dr. Fabian about the information she was talking about in court because she was still married to Robert Sr. Tr. 4536-4537. On cross-examination, Angel re-iterated that she did not share information with Dr. Fabian because it was painful. Tr. 4538-4540. Angel said she could not remember if Nicholson told her not to share information with Dr. Fabian because the prosecutors would learn that information. Tr. 4540. Angel also claimed that she had on one occasion “whooped” Nicholson, spanked him, and was verbally abusive. Tr. 4541. Angel claimed that Robert Sr. was abusive towards Nicholson as well. Tr. 4543. Angel acknowledged that she did not share with Dr. Fabian that Robert Sr. being physically abusive with Dr. Fabian, even though he was an expert witness retained or working with the defense attorneys. Tr. 4545-4546. Angel acknowledged that she and her husband were still married. Tr. 4545.

4. Jack Aiken

Jack Aiken a professional with experience in the correctional system was also called to testify, and was qualified as an expert in correctional management security operations and inmate classification. Tr. 4552-4561. He was called to testify in order to provide an opinion that 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. However, despite his experience Aiken has never worked in the Ohio prison system. Tr. 4577-4578. Aiken agreed there is no crystal ball as to the future dangerousness of an inmate. Tr. 4584-4585. Aiken earlier testified that Nicholson was compliant in county jail but acknowledged that Nicholson had been in isolation while in Cuyahoga County Jail. Tr. 4585. Aiken also testified that Nicholson would be vulnerable in prison because Nicholson had shot two teenagers and was described as a former law enforcement officer. Tr. 4565-4569, 4586.

5. Dr. Matthew Fabian

Dr. Matthew Fabian would testify next for the defense and would be cross-examined by the State. Tr. 4593-4772. Dr. John Fabian, a forensic and clinical psychologist, diagnosed Nicholson with (1) Mild Neurocognitive Disorder Due to Traumatic Brain Injury Tr. 4670, (2) Attention Deficit Hyperactivity Disorder (ADHD) 4756, (3) Posttraumatic Stress Disorder (PTSD) Tr. 4758, (4) significant depression Tr. 4759, and (5) Borderline Personality Disorder. Tr. 4671. Dr. Fabian prepared a report which was identified during the mitigation phase as Defendant's Exhibit A. Tr. 4616.

The State proceeded with its cross-examination. Dr. Fabian acknowledged that in preparing his report he interviewed Nicholson's parents, his brother, and aunt. Tr. 4696-4697. Dr. Fabian explained that it was important for his report to get a family history for mitigation purposes

and acknowledged the importance of accurate information. Tr. 4704-4705. Dr. Fabian agreed that he was told that the domestic violence in the Nicholson household was primarily verbal abuse. Tr. 4705. Dr. Fabian could not quantify the amount of physical abuse in the home. Tr. 4706. Dr. Fabian said it appeared that Nicholson's mother was the primary target of the physical abuse and the children were more so verbally abused. Tr. 4706-4707. However, no Department of Children and Family Services records were found regarding Nicholson's family. Tr. 4708-4710. In further explaining the family history, Dr. Fabian testified the neither of Nicholson's parents had been arrested, Nicholson's father was a mechanic and gainfully employed for approximately 40 years, Nicholson's mother had an associates degree and worked for Veteran Affairs and the basic necessities were provided. Tr. 4711. Although there might have been evidence of alcohol abuse, there were no treatment or chemical dependency treatment records for either parent. Tr. 4712. Dr. Fabian agreed that any information he learned about alcoholism by Nicholson's parents came from either Nicholson or family members; however, Nicholson's father reported that he had been sober for 20 years. Tr. 4712. Nicholson was described to Dr. Fabian as do "do no wrong kid" and received preferential treatment. Tr. 4712-4713. Dr. Fabian also agreed that Nicholson was born into a better financial situation than his older brother. Tr. 4714. As far as Nicholson's education, Nicholson graduated high school, had advanced curriculum and graduated ranked 23 out of 40. Tr. 4714-4715. Nicholson was never held back in school and did not have any special education or behavioral classes. Tr. 4714-4715. Nicholson would go on to graduate college. Tr. 4715. Dr. Fabian agreed that Nicholson could be reckless in some areas but calculating in others. Tr. 4719. There were no records to corroborate Nicholson had been sexually abused, even though Nicholson's mother found out. Tr. 4720-4721. Nicholson's mother did not acknowledge any

sexual abuse to Dr. Fabian. Tr. 4721. Dr. Fabian did not believe that Nicholson's reported gender identity confusion warranted diagnosis of a disorder. Tr. 4722-4723.

When asked about the reported car accidents, Dr. Fabian reviewed records from Marymount Hospital from a car accident in 2014. Tr. 4726. The records indicated, Nicholson went the hospital for reported neck and shoulder pain. *Id.* Although he had a CAT scan, it came back normal. Tr. 4726-4727. Aside from another documented incident in 2011 where Nicholson had a knee injury, there were no other documentation of any other hospitalization for Nicholson. Tr. 4727. Dr. Fabian did not believe Nicholson lost consciousness during any of the reported head injuries and there was no data that Nicholson lost consciousness. Tr. 4729. Again, Dr. Fabian agreed it was important for Nicholson to be truthful when he's giving his self-reporting. Tr. 4730. To that end, the prosecutor asked questions regarding Nicholson's account of the night of September 5, 2018 to Dr. Fabian. Tr. 4736-4746. Dr. Fabian agreed it was not consistent with what he knew about the trial testimony. Tr. 4746. However, any inconsistent did not give Dr. Fabian pause when it came to relying upon his self-reporting. Tr. 4746-4747.

As far as Dr. Fabian knew, Nicholson was not on or ever on any type of psychiatric medicine, had no history of inpatient or outpatient psychiatric history, had never been confined to an institution, and had never seen a psychiatrist or psychologist. Tr. 4747-4748. Nor did Dr. Fabian know of any formal suicide attempts. Tr. 4748. Nicholson reported having high self-esteem. Tr. 4749.

Dr. Fabian also confirmed reviewing domestic violence reports involving Nicholson and Lauren Thomas. Tr. 4751.

When asked about Dr. Fabian's review of Dr. Travis Snyder's reports, Dr. Fabian noted that Nicholson's frontal lobe was in the 29th percentile, that there was no evidence of contusions,

no hemorrhaging or brain bleeds, no evidence of scarring in Nicholson's brain. Tr. 4753-4754. Dr. Fabian agreed that he only diagnosed Nicholson with a mild traumatic brain injury. Tr. 4754.

There was no indication of intellectual disability and Dr. Fabian agreed that people with ADHD can have productive successful lives. Tr. 4756-4757. Dr. Fabian agreed that many people with ADHD have no problem with the law and that ADHD could cause a person to have problems on tests. *Id.*

Although, Dr. Fabian believed the cause of the PTSD was the domestic violence in Nicholson's family, he agreed that there was literature that a person who commits a violent act can have PTSD as a result of the act. Tr. 4758-4759. Dr. Fabian also said that PTSD can come from a car crash. Tr. 4759. When it came to the diagnosis of depression, Dr. Fabian acknowledged that he wrote that it appeared that it was exacerbated by Nicholson's legal situation. Tr. 4759.

In reviewing school records, there was no indication from high school to college of any significant change and Nicholson was always "low average". Tr. 4763.

6. Dr. Travis Synder

Dr. Travis Synder, a radiologist who works for SimonMed in Las Vegas. Tr. 4774. Dr. Snyder evaluated Nicholson's MRIs and prepared a report. Tr. 4784-4787. Dr. Snyder testified to his identification of three areas consistent with brain injuries in Nicholson's frontal lobes. Tr. 4791-4792, 4800. Dr. Snyder opined the areas were more of a mild traumatic brain injury. Tr. 4794. Also noted was that Nicholson's frontal lobes were in the 29th percentile, parietal lobes were in the 68th percentile, occipital lobes were in the 39th percentile, temporal lobes in the 53rd percentile, and the cerebellum was in the 86th percentile. Tr. 4806-4807. Dr. Snyder found that this was consistent with head trauma. Tr. 4808.

On cross-examination, Dr. Snyder agreed that traumatic brain injury could come from rotational forces, whiplash, and even a gunshot. Tr. 4821. Dr. Snyder agreed that a bump to the head would not cause a traumatic brain injury. Tr. 4821. Although, Dr. Snyder reviewed the MRIs on a computer screen, he did not apparently did not review the report by Dr. Volodymyr Statsevych, which indicated the MRI was performed on July 24, 2019, and indicated it was unremarkable with no medical history indicated. Tr. 4823-4824, State's Exhibit 708. Dr. Snyder agreed he did not review any actual medical records of Nicholson and agreed that the reported history of traumatic brain injury came from Dr. Fabian's report. Tr. 4825-4826. There was agreement what white matter hyperintensity or the white spots could be caused by other things such as aging and migraine headaches. Tr. 4827-4828, 4830.

In forming his opinion, Dr. Snyder did not review the medical records underlying the CAT scans and could not say for sure why one was ordered, and he only knew of the existence of the one. Tr. 4833-4836. Dr. Snyder did not have any other MRI scans of Nicholson's to compare the 2019 scan to. Tr. 4837.

With respect to literature reviewed, Dr. Snyder testified that an article by Dr. Reidy concluded that patients who had a head trauma had more white matter lesions than those without a head trauma. Tr. 4831. He also agreed that an article by JK Lee regarding boxers indicated that the boxers studied had more white matter lesions but agreed it was not statistically significant. Tr. 4832.

7. Mary Cecil McDonnell

Mary Cecil McDonnell is a social worker and was Nicholson's mitigation specialist. Tr. 4996-4999. Ms. McDonnell prepared a social history in the case by conducting interviews and gathering records. Tr. 5000. As part of her interviews, she interviewed Nicholson, Nicholson's

mother, Nicholson's brother, Nicholson's aunt, and Nicholson's grandmother. Tr. 5000. Ms. McDonnell went through the social history. Tr. 5001-5030. On cross-examination McDonnell acknowledged that she did not memorialize the fact she spoke with Donna Kain and to Georgia Gracy when she issued her report on September 1, 2019. Tr. 5035. In fact it was not until after she had written the report when Robert said she would verify what he was saying. Tr. 5036. There were no police reports to corroborate the incident Robert told her about his mother being choked in front of his friends. Tr. 5042. She also agreed that some of what Robert described occurred before Nicholson was born and during one incident Nicholson was only three. *Id.* No records from Cuyahoga County Department of Children and Family Services. Tr. 5043.

8. Dr. Thomas Masaryk

Dr. Thomas Masaryk is a neuroradiologist at the Cleveland Clinic who testified for the State as to his report. State's Exhibit 705, Tr. 4848-4849, 4854. Dr. Masaryk reviewed and interpreted Nicholson's July 2019 MRI study. Tr. 4853-4854, 4855. The doctor's observations and findings were, "some small areas of high signal intensity on what are called T2 weighted images or FLAIR images in the frontal white matter. And that was pretty much it." Tr. 4856. Dr. Masaryk explained that the white matter can be caused by trauma but other things as well. Tr. 4857. If there was trauma, Dr. Masaryk explained there would have to be a deformity of the skull or scarring of the brain where there was a prior contusion or areas of chronic hemorrhage. Tr. 4858. There were no such ancillary findings in Nicholson's case. Tr. 4858, 4860, 4865. Dr. Masaryk disagreed with Dr. Snyder's report and did not believe there was anything in the scans to conclude there was significant brain trauma. Tr. 4861-4862. There was nothing abnormal about Nicholson's MRI scan. Tr. 4868. He further explained that traumatic brain injury was a clinical diagnosis that is typically defined by the clinic presentation, which includes a Glasgow Coma

Scale and loss of consciousness. Tr. 4862. Dr. Masaryk explained that a CAT scan is not an indication that someone has in fact suffered a head injury but could also be ordered to rule it out. Tr. 4863. The doctor proceed to review the scans for the jury finding no shearing and found any white matter to be non-specific. Tr. 4869-4871. Dr. Masaray regarded Nicholson's brain volume withing the bell curve of the normal population and did not find it significant that Nicholson's frontal lobes were in the 29th percentile. Tr. 4875.

9. Dr. Ryan Darby

Dr. Ryan Darby, a neurologist and assistant professor for Vanderbilt University testified for the State and provided a report. State's Exhibit 707, Tr. 4921, 4969-4972. Dr. Darby is also the director of the frontotemporal dementia clinic at Vanderbilt University. Tr. 4908. The doctor testified he was retained to review records and to render his own opinion, not to rebut or disagree with anybody. Tr. 4916. As part of his review, Dr. Darby reviewed educational records, police reports, and medical records. Tr. 4916.

Dr. Darby's first opinion was that there was insufficient evidence to support a clinical diagnosis of traumatic brain injury and there were no police reports or medical records to show that Nicholson had ever suffered symptoms of a traumatic brain injury. Tr.4917, 4921. Dr. Darby's next opinion was that there was insufficient evidence to support the findings of traumatic brain injury on Nicholson's MRI. Tr. 4930. Dr. Darby's next opinion rejected Dr. Fabian's opinion that 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." Tr. 4952-4955, 4982-4985. Finally, Dr. Darby rejected Dr. Fabian's opinion that Nicholson had a traumatic brain injury that "resulted in an acquired frontal lobe behavioral syndrome that limited." Dr. Darby opined there was nothing

about Nicholson's case that would impair Nicholson's ability to conform his behavior to law. Tr. 4956-4962. In regards to Dr. Reidy's study cited in Dr. Snyder's report, Dr. Darby testified that the study concluded that white matter spots were not a reliable marker of traumatic brain injury. Tr. 4944.

10. Jail Calls

Defense counsel stipulated to the authenticity and the State played for the jury different jail calls. The first jail call, State's Exhibit 702, was a redacted version of a jail call dated September 22, 2019. Tr. 5049-5050. State's Exhibit 703, was a jail call from October 11, 2019. Tr. 5050. Also stipulated to were the accompanying call detail reports, State's Exhibits 710 and 711. Tr. 5050-5051.

B. Verdict

Exhibits were admitted into evidence. Tr. 5051-5052. The trial court provided instructions to the jury and closing arguments were made. Tr. 5054-5156. The jury returned a verdict finding that, "the aggravating circumstances that the defendant was found guilty of committing, aggravated murder, does outweigh the mitigating factors presented in this case beyond a reasonable doubt," as to both counts of aggravated murder. Tr. 5164-5165.

B. Trial court's sentencing opinion

On November 13, 2019, the trial court announced it found that the State has proven by evidence beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors and imposed a sentence of death as to counts 1 and 2. Tr. 5170. The trial court imposed the sentence of death on counts one and two with firearm specifications. With respect to count 8, attempted felonious assault associated with Polanco, the trial court imposed a three year sentence. Tr. 5192.

The trial court issued its sentencing opinion. (Sentencing Opinion of the The trial court indicated that it would consider the course of conduct, the aggravating circumstance, as both murders occurred in the same location, within seconds of each other, committed by Nicholson using the same weapon and motivation. R. 440, pgs. 5-6. The trial court considered the nature of Nicholson's relationship with Polanco, including how the relationship became volatile and toxic, and the circumstances underlying the crime not as an aggravating circumstance but for possible mitigating value. R. 440, pgs. 6-7. The trial court considered Nicholson's claims of remorse and claim of self-defense, but rejected them as the "concocted self-defense theory" defied the facts and testimony – the court recognized that the victims were shot in the back and found no mitigating factors surrounding the nature of the offense. *Sentencing Opinion*, pgs. 8-9.

The trial court next considered Nicholson's history, character, and background. *Sentencing Opinion*, pgs. 9-14. The trial court considered the reported history of domestic violence but noted that Nicholson's parents maintained employment, resided in a well-kept home, and provided the basic necessities. *Sentencing Opinion*, pgs. 10. The trial court noted that Nicholson went to high school, graduated from college, maintained employment and had a passion for rebuilding antique cars. *Sentencing Opinion*, pg. 10. The trial court noted that the history of domestic abuse was entitled to some weight, but not strong weight. *Id.*

Next, the trial court addressed the mental health diagnoses made by Dr. John Fabian. First, the trial court rejected the testimony of Dr. Fabian and Dr. Travis Snyder who both opined that Nicholson suffered traumatic brain injuries. The trial court found the testimony of Dr. David Darby and Dr. Thomas Masaryk more compelling. The trial court specifically noted that, "Both doctors opined that the MRIs taken on July 24, 2019 of Nicholson's brain were well within normal limits. Dr. Darby testified that the MRIs did not evidence bilateral frontal lobe atrophy. Further,

these doctors testified that with no history of loss of consciousness, amnesia or numbness in specific portions of one's body, there was no evidence of traumatic brain injuries." *Sentencing Opinion*, pg. 11. The trial court next found that Dr. Fabian's diagnosis of PTSD was based in part on the diagnosis of a traumatic brain injury that the trial court rejected. Even though it was also based on the reported history of domestic violence in the Nicholson household, it could have also been a result of Nicholson's reactions to the murders and resulting criminal charges. The trial court found that there was no testimony by Dr. Fabian that the diagnosis contributed to Nicholson's actions. The court gave some but not significant weight to this diagnosis. *Sentencing Opinion*, pg. 12. Next, the trial court addressed the diagnosis of ADHD, which was suggested by one of Nicholson's teachers when he attended school. However, there was no testimony as to how it affected Nicholson in relation to the offense. The trial court gave minimal mitigating value to this diagnosis. *Sentencing Opinion*, pg. 12-13. With respect to the diagnosis of borderline personality disorder with paranoid traits, the trial court afforded less weight because there was no indication that Nicholson did not have the ability to control his actions or to conform his behavior to the requirements of law. *Sentencing Opinion*, pg. 13. Finally, with respect to the diagnosis of major depressive disorder, the trial court gave no mitigating weight to the diagnosis because those findings were also consistent with defendant present legal situation. *Id.* As such the trial court found, "that the mental health diagnoses [***] had no significant impact on the [Nicholson's] ability to appreciate the consequences of his actions or to conform his behavior to the laws of society." *Sentencing Opinion*, pg. 13-14.

With respect to the fact that Nicholson did not have a significant criminal history, the trial court considered Polanco's testimony that explained the lack of a criminal history could be attributed to his repeated and credible threats of physical abuse against Polanco. *Sentencing*

Opinion, pg. 14. The trial court also considered Nicholson's admission to Dr. Fabian there was an allegation that he had threatened his ex-girlfriend Laura Thomas. *Id.* The trial court agreed that the lack of criminal convictions had to be tempered with Nicholson's "criminal-like" behavior and gave slight mitigating value to this factor. *Id.*

In considering Nicholson's future dangerousness, the trial court found that James Aiken's testimony was contradicted by the phone call Nicholson made after the verdict was rendered. Therefore, the trial court gave minimal mitigation value to Aiken's opinion. *Sentencing Opinion*, pg. 14-15.

The trial court weighed the aggravating factors against the mitigating factors. *Sentencing Opinion*, pg. 15-16. After weighing the aggravating circumstances and the mitigating factors, the trial court found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances. *Id.*

Finally, the trial court considered proportionality and found that the death penalty was not disproportionate considering recent cases in which the death penalty was affirmed for aggravated murder convictions with specification of a course-of-conduct and at least one felony. *Sentencing Opinion*, pgs. 16-17 citing *State v. Martin*, 151 Ohio St.3d 470, 2017-Ohio-7566, 90 N.E.3d 857, *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, *State v. Jackson*, 141 Ohio St.3d 171, 2014-Ohio-3707, 23 N.E. 3d 1023, *State v. Wilks*, 154 Ohio St.3d 369, 2018-Ohio-1562, 114 N.E. 3d 1092, *State v. Spaulding*, 151 Ohio St. 378, 2016-Ohio-8126, 89 N.E.3d 554, *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 112, *State v. Clemons*, 82 Ohio St.3d 438, 696 N.E.2d 1009 (1998).

C. Nicholson's Prosecution

Nicholson was arrested in connection with the above-described crimes on September 6,

2018. A Cuyahoga County grand jury initially indicted Nicholson on September 7, 2018 in case No. CR-18-632450-A. The original indictment included thirteen total offenses arising from the September 5, 2018 murders and assaults.

After reviewing the case, the State chose to seek the death penalty for Nicholson. Nicholson was re-indicted on October 30, 2018, by a Cuyahoga County grand jury in 18-CR-634069-A. The original charges in case 632450 were ultimately dismissed.

The capital indictment in 18-CR-634069-A included the following charges:

Count	Offense	R.C. Section	Level
1	Aggravated Murder – M.L.	2903.01(A)	UF
	Three-year firearm specification	2941.145(A)	n/a
2	Aggravated Murder – Giselle Lopez	2903.01(B)	UF
	Three-year firearm specification	2941.145(A)	n/a
3	Attempted Murder – America Polanco	2923.02 2903.02(A)	F-2
	Three-year firearm specification	2941.145(A)	n/a
4	Felony-Murder – Giselle	2903.02(B)	UF
	Three-year firearm specification	2941.145(A)	n/a
5	Felony-Murder –M.L.	2903.02(B)	UF
	Three-year firearm specification	2941.145(A)	n/a
6	Felonious Assault – M.L.	2903.11(A)(1)	F-2
	Three-year firearm specification	2941.145(A)	n/a
7	Felonious Assault – Giselle Lopez	2903.11(A)(1)	F-2
	Three-year firearm specification	2941.145(A)	n/a
8	Attempted Felonious Assault – America Polanco	2923.02 / 2903.11(A)(1)	F-3

Three-year firearm specification	2941.145(A)	n/a
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Nicholson originally retained counsel in case No. CR-18-632450-A. After being re-indicted, he claimed indigency and had two attorneys appointed to represent him in CR-18-634069-A. Journal Entry Filed 11/2/2018.

Significant pretrial proceedings, motions, and discovery occurred prior to a September 5, 2019 pretrial hearing. Tr. 54-81. At this time, the trial court ruled on the majority of the pretrial motions filed in the case. *Id.*

Death qualification voir dire began on September 13, 2019, with one hundred fifty prospective jurors appearing to complete juror questionnaires. Tr. 90-97, 141. This voir dire continued September 16, 2019 and was completed on September 23, 2019. Tr. 2242. From this death qualification voir dire, 58 prospective jurors were determined to be “death qualified” and were available for general voir dire.

General voir dire took place on September 25, 2019, with twelve jurors and four alternate jurors selected. Tr. 2257-2493. A jury view took place on September 26, 2019. Tr. 2496-99; *State’s Motion for Jury View*. Nicholson’s presence was waived from Court and from the jury view that day. Tr. 2496.

The Culpability phase took place between September 30, 2019, and October 9, 2019. Tr. 2503, 4348. The State called thirty-eight witnesses in its case-in-chief. Tr. 2528-3984. The jury was sequestered for deliberations. Tr. 4348. After deliberating, the jury returned guilty verdicts on all counts except the attempted murder of Polanco charged in count 3. Tr. 4353-62. The jury was polled and all twelve members affirmed that the trial court had correctly stated each individual juror’s verdict. Tr. 4361-62.

It is from these convictions and sentences that Nicholson now appeals to this Court, raising 20 propositions of law.

LAW AND ARGUMENT

Response to Proposition of Law I: Nicholson purposely, with prior calculation and design, caused the death of both victims and his convictions were neither based on insufficient evidence nor were they against the manifest weight of the evidence.

In his first proposition of law, Nicholson argues there was insufficient evidence to establish that he murdered both victims with prior calculation and design and/or that his convictions were against the manifest weight of the evidence. Nicholson argues this proposition despite the uncontroverted evidence that Nicholson shot at the victims a total of thirteen times at close range, with almost all of the bullets striking their backs. Nicholson's arguments under this proposition fail to appropriately address the relevant standards and the overwhelming evidence of his guilt keeps him from satisfying either standard.

A. Standard of Review

The legal standard for sufficiency of the evidence review is extremely deferential. To determine whether a conviction is supported by sufficient evidence, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Walker*, 150 Ohio St.3d 409, 412, 2016-Ohio-8295, ¶ 12, 82 N.E.3d 1124, 1127, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. "The standard of review governing sufficiency-of-the-evidence challenges is extremely deferential to the underlying guilty verdict and raises a high bar for a defendant to overcome[.]" *U.S. v. Wells*, 646 F.3d 1097, 1102 (8th Cir.2011).

A manifest weight challenge questions whether the state has met its burden of persuasion. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997). In making this determination, the court of appeals sits as a “thirteenth juror” and, after:

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.

Id. 386.

“In considering a manifest weight challenge, this court must remain mindful that the credibility of the witnesses and the weight to be given the evidence are primarily for the trier of fact to assess.” *State v. Wiley*, 8th Dist. Cuyahoga No. 99576, 2014-Ohio-27, ¶ 70. This is because it is the trier-of-fact “who heard testimony, observed body language, evaluated voice inflections, observed hand gestures, perceived the interplay between witness and examiner, and watched each witness’s behavior in the courtroom.” *State v. Doren*, 6th Dist. Wood No. WD–10–044, 2011-Ohio-5903, ¶ 38. A court will reverse a conviction on a manifest weight challenge “only in the exceptional case in which the evidence weighs heavily against a conviction.” *Thompkins* 387.

Nicholson was charged with two counts of aggravated murder pursuant to R.C. 2903.01(A) in counts one and two of the indictment. R.C. 2903.01(A) states: “[n]o person shall purposely, and with prior calculation and design, cause the death of another.” The element of prior calculation and design “require[s] a scheme designed to implement the calculated decision to kill.” *State v. McFarland*, Slip Opinion No. 2020-Ohio-3343, ¶ 31, citing *State v. Cotton*, 56 Ohio St.2d 8, 11, 381 N.E.2d 190 (1978). The phrase “prior calculation and design” by its own terms suggests advance reasoning to formulate the purpose to kill. Evidence of an act committed on the spur of the moment or after momentary consideration is not evidence of a premeditated decision or a studied consideration of the method and the means to cause a death.

Walker at ¶ 18. All prior-calculation-and-design offenses will necessarily include purposeful homicides; not all purposeful homicides have an element of prior calculation and design. *Id.*

This Court has repeatedly stated that there is no “bright-line test that emphatically distinguishes between the presence or absence of ‘prior calculation and design.’” Instead, each case turns on the particular facts and evidence presented at trial.” *State v. Taylor*, 78 Ohio St.3d 15, 20, 1997-Ohio-243, 676 N.E.2d 82 (1997); *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, 785 N.E.2d 439, ¶ 61; *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 148. Courts traditionally consider three factors in determining whether a defendant acted with prior calculation and design: “(1) Did the accused and victim know each other, and if so, was that relationship strained? (2) Did the accused give thought or preparation to choosing the murder weapon or murder site? and (3) Was the act drawn out or ‘an almost instantaneous eruption of events?’” *Walker* at ¶ 20, citing *Taylor* at 19. Shooting a person execution-style may also establish, at least in part, prior calculation and design. *State v. Palmer*, 80 Ohio St.3d 543, 569-570, 1997-Ohio-312, 687 N.E.2d 685 (1997); *Braden* at ¶ 65, citing *State v. Campbell*, 90 Ohio St.3d 320, 330, 2000-Ohio-183, 738 N.E.2d 1178 (2000). It is well-established that the firing of shots into a victim’s head at close range is crucial evidence of prior calculation and design and on the basis of which the Court has upheld juries’ findings of prior calculation and design. *Palmer, supra*; *State v. Goodwin*, 84 Ohio St.3d 331, 344, 703 N.E.2d 1251, 1263 (1999).

The jury was instructed on prior calculation and design as follows:

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

Tr. 4243-44.

This definition applies under R.C. 2903.01(A). Nicholson's actions were anything but spur of the moment and he did not commit them after only a momentary consideration. Nicholson had threatened the lives of M.L. and Giselle on multiple prior occasions, including just prior to the murders on September 5, 2018. After fighting with M.L., Nicholson went to his bedroom and retrieved a gun. Nicholson then went back downstairs and outside the house to find the victims. Nicholson then fired thirteen rounds towards the backs of the victims at close range. The only bullet that failed to hit one of the victims was stopped by Giselle's bookbag.

B. Overview of Argument

Nothing about the evidence presented suggests these were impulsive or chaotic shootings. And while just the evidence that the victims were shot at a close range may be enough to establish prior calculation and design standing alone, *see, e.g., State v. Campbell*, 90 Ohio St.3d 320, 330, 2000 Ohio 183, 738 N.E.2d 1178 (2000), the State presented a host of additional evidence proving Nicholson planned these deaths. Nicholson knew the victims and had strained relationships with each of them based on disagreements over vehicles, parking, perceived interference in his romantic relationship with their mother, and perceived lack of respect. The issues in the relationships were demonstrated by testimony of the victims' brother, mother, and neighbors, and were corroborated by text messages. Additionally, Nicholson's own notes and testimony indicated longstanding issues with the victims.

Prior to murdering the victims, Nicholson threatened their lives to their mother on multiple occasions. In addition to specifically telling Polanco that he would kill her children if she or they ever called the police – which they did twice directly before Nicholson killed them, he threatened to kill them on September 5, 2018. Nicholson similarly chose both the murder weapon and the

location, seeking out the victims in the driveway and choosing to shoot them thirteen total times. The act, finally, was not “almost instantaneous,” as Nicholson had the opportunity to cool down after getting into a physical altercation with M.L. At this point he went to his bedroom to retrieve his gun from under the mattress and found the victims outside the house, killing each of them. In addition to choosing not to call the police before or during the shooting, Nicholson did not call the police afterward, instead calling his mother, and telling her that police were on the way to his house. Tr. 3767. Nicholson never claimed that he tried to call the police at any point on September 5, 2018 during his testimony, despite asserting self-defense. Tr. 4015-4209.

Nicholson focused on self-defense at trial, but the circumstances of the shooting strongly negated this theory. “The purported claim of self-defense asserted at trial does not bear scrutiny in view of the shooting in the back of a victim moving away from the armed appellant.” *State v. Butler*, 10th Dist. Franklin NO. 84AP-60, 1985 Ohio App. LEXIS 6855, at *2-3 (July 11, 1985). “It is difficult, if not impossible, to reconcile Everett's self-defense claim with the physical evidence that both victims were stabbed in the back.” *State v. Everett*, 1st Dist. Hamilton No. C-140275, 2015-Ohio-5273, ¶ 24.

The number of shots fired at the victims also severely undercut Nicholson’s self-defense claim. “With that testimony, the jury could conclude defendant contemplated murder and killed Larise out of either anger or revenge, not self-defense. Such a conclusion is further supported with evidence indicating defendant fired at least three shots at the victim, one entering the top of his head, one going into his jaw, and the other into his chest. ‘The firing of multiple shots undercuts a claim of self-defense.’” *State v. McDaniel*, 10th Dist. Franklin No. 06AP-44, 2006-Ohio-5298, ¶ 15 citing *State v. Hall*, Franklin App. No. 04AP-17, 2005 Ohio 335, at P40, reversed on other grounds. See also *State v. Johnson*, 6th Dist. No. L-08-1325, 2009-Ohio-3500 (there are limitations

to the application of self-defense; it is not available unless the defendant demonstrates that the force used to repel the danger was no more than reasonably required by the circumstances, and it is not applicable if the force used is so grossly disproportionate to the danger so as to demonstrate revenge or an evil purpose; if the accused uses a greater degree of force than is necessary under the circumstances, the conduct is not justifiable on the grounds of self-defense).

Throughout Nicholson's first proposition, he rarely commits to either standard raised in this proposition, despite their significant differences. He only specifically addresses the sufficiency standard on its own at certain intervals in this proposition, focusing on prior calculation and design, and specifically that the State did not prove a plan to kill and that the length of time was insufficient for Nicholson to form a plan. Nicholson Br. 67, 73-74, 77-78, 89-91. Confusingly, the only time Nicholson seems to explicitly argue manifest weight after providing the standard under the law, he states, "[t]hus, the jury's verdict was not supported by sufficient evidence and/or was against the manifest weight of the evidence." Nicholson Br. 106. This confusion limits the merits of Nicholson's arguments, because although he generally references the sufficiency of the evidence and not the manifest weight of the evidence, he injects credibility arguments throughout, which are not applicable to sufficiency review. Nicholson Br. 76, 78, 90, 91, 96, 102-03, 107, 109. Regardless, a review of the evidence demonstrates that any rational trier of fact could have found the essential elements of the aggravated murders proven beyond a reasonable doubt. *Jenks*. Separately and distinctly, this is not the "exceptional case in which the evidence weighs heavily against a conviction." *Thompkins* 387.

C. The traditional factors supported prior calculation and design

An objective review of the evidence demonstrates that each of the traditional factors for the court's consideration supported prior calculation and design. Nicholson and the victims knew

each other well; they lived as household members for years, and their relationships were strained as evidenced by a variety of testimony and exhibits, including even the testimony of Nicholson and his mother. Regarding the place where Nicholson shot the victims, he went to the location they were in the driveway after going up to his bedroom and arming himself with a gun. After going back downstairs and out to the driveway, he shot each of the victims several times at close range. Finally, the shooting occurred after M.L. and Nicholson were separated from each other, after Nicholson went to his bedroom to retrieve a gun, and after Nicholson went to the location where M.L. and Giselle were, which was outside the house and away from Nicholson. The event of the murder was fully separated by time and space from the earlier issue between Nicholson and M.L., removing any possibility that it was instantaneous.

a. Nicholson and the victims knew each other, and the relationship was undeniably strained

Nicholson and Polanco's children had lived together for years at the time of the murders. Tr. 3277-78. They had disagreed about parking on a daily basis. Tr. 3308-11. They had issues of respect that went back years. Tr. 3369-70; Exhibit 341BB. Nicholson blamed the children for Polanco's repeated refusals to marry him, becoming angry when discussing the issue. Tr. 3312-13.

Nicholson's attempts to portray the relationship between himself and the victims in a more positive light amounts to recasting the several severe and long-term issues as no more than "distant relationship[s]." Nicholson Br. 71-73. In fact, varied evidence at trial established that the relationships were distant on their best days, while the strain was evidenced in myriad ways. As one key example of the strained relationships that existed before the murders, Nicholson admitted while testifying that Giselle had accused him of wanting to touch her undergarments in a load of laundry. Tr. 4035. Nicholson further admitted to hitting a wall based on this interaction. *Id.*

Nicholson denied calling Giselle any names at this time, but Polanco explained that Nicholson called Giselle a little whore and a bitch during the violent argument. Tr. 3361. Further, after Nicholson grabbed Polanco, M.L. got close to Polanco, and Nicholson pushed M.L. against the wall. Tr. 3361-62. This incident and others demonstrated that the relationships were truly strained in addition to being distant.

The issues were supported by testimony of Polanco, neighbors, and Nicholson's mother as well as text messages sent to and received by Nicholson. Nicholson's mother testified that months before the murders, Nicholson had been told to leave the house. Tr. 3772. Nicholson and his mother were looking for a new place for him to live for three months before the murders. Tr. 3775. Nicholson agreed to move out of the house in June of 2018. Tr. 4121. Nicholson testified that the disrespect he perceived from M.L. and Giselle included them telling him, "Shut up; fuck you" a lot. Tr. 4119-4120.

The issues between Nicholson and the kids were established through more than testimony. The State presented a text message from Nicholson to Polanco in July of 2018, Exhibit 34100. In that text, Nicholson wrote, "[o]kay. America, I really don't think you should rotate at work. I see terrible things happening at the house if it's your kids and me alone. I can see it now and you know it too. It's not a good idea. They already do whatever the hell they want, then add the fact you're not there. TV is loud and they wait until you get home, talking and laughing real loud when I try to go to sleep, parking in the driveway however the hell they want. Oh, no. Not a good idea girl." Exhibit 34100; Tr. 3379-3380. In the same message, Nicholson told Polanco that the kids would try torturing him. Exhibit 34100; Tr. 3381. Nicholson's own words in these messages demonstrate that he personally felt the relationships between him, M.L., and Giselle were strained. Nicholson listed numerous issues with the children and even a belief that they were trying to torture

him.

A review of the record demonstrates a truly strained and problematic relationship between Nicholson and the victims. Nicholson claims in his brief that the evidence amount to “several minor and not atypical disagreements or annoyances that the members of the household had with each other over the span of approximately four years.” Nicholson Br. 73. Punching walls in anger, referring to his girlfriend’s daughter as a little whore and a bitch, and pushing his girlfriend’s son into a wall after grabbing his girlfriend are all actions taken by Nicholson that demonstrate his current mischaracterization of the evidence.

In addition to these incidents, Nicholson’s threats to Polanco using her children caused additional relationship issues. Tr. 3293-94. Because of Nicholson’s threats, Polanco talked to her children and asked them to avoid Nicholson as much as possible. *Id.*

In review of whether the relationships were strained, there was abundant evidence that Nicholson knew the victims and that his relationship with them was strained. There had been verbal and physical altercations between them, consistent arguments and issues related to parking, and threats directed to Polanco about the children, which increased tension in the household and specifically the strain on the relationships between the victims and Nicholson.

b. Nicholson gave unmistakable thought and preparation to choosing both the murder weapon and the murder site

Prior calculation and design requires “a scheme designed to implement the calculated decision to kill.” *State v. Cotton*, 56 Ohio St.2d 8, 11, 381 N.E.2d 190 (1978). “[N]either the degree of care nor the length of time the offender takes to ponder the crime beforehand are critical factors in themselves,’ but ‘momentary deliberation’ is insufficient.” *State v. D’Ambrosio*, 67 Ohio St.3d 185, 196, 1993-Ohio-170, 616 N.E.2d 909 (1993), citing Legislative Service

Commission Comment to R.C. 2903.01. No bright-line test exists that “emphatically distinguishes between the presence or absence of ‘prior calculation and design.’ Instead, each case turns on the particular facts and evidence presented at trial.” *State v. Taylor*, 78 Ohio St.3d 15, 20, 1997-Ohio-243, 676 N.E.2d 82.

Before killing the victims, Nicholson told Polanco that he was going to kill her children. Tr. 3389-90, 3671. Prior to that night, Nicholson had also told Polanco that if the police were ever called on him he would kill Polanco and her children. Tr. 3289. This was especially notable because both Polanco and M.L. called the police before Nicholson followed through on this specific threat, killing M.L. and Giselle. Exhibits 313-314, 318-319.

In this case, Nicholson voluntarily withdrew from the attack to give himself an opportunity to retrieve his gun from his bedroom. “Appellant’s withdrawal from the confrontation to obtain a weapon was a sufficient lapse of time and provided sufficient opportunity to allow appellate to form a plan to carry out the purpose to kill.” *State v. Norman*, 10th Dist. Franklin No. 99AP-398, 1999 Ohio App. LEXIS 6454, *25 (Dec. 23, 1999), citing *State v. Robbins*, 58 Ohio St.2d 74, 79, 388 N.E.2d 755 (1979). Nicholson therefore had all of the time it took to get to his room, to pull the gun from under the mattress, to go back downstairs, and to go to the victims who were outside the house to form his plan.

In *Robbins*, the defendant “accosted the decedent in the hallway of their apartment building and struck the decedent, knocking him to the floor.” *Robbins* at 78. The defendant then “went into his adjacent apartment and got a long knife, or ‘sword,’ from under his mattress, returned to the hallway and stabbed the victim to death.” *Id.* This Court found that the defendant’s use of “extreme aggression against a helpless victim,” followed by the defendant leaving the altercation

and obtaining a weapon to kill the victim, was sufficient to support the jury's finding of prior calculation and design. *Id.* at 78-79.

In this case, Nicholson similarly used extreme aggression against helpless victims. Nicholson pursued the victims, one of whom had no prior interaction with Nicholson that evening before the shooting, and fired thirteen rounds at them at close range, with almost all of the bullets entering their backs.

Nicholson chose to go to the bedroom and arm himself with a gun, and then to seek out the victims in the driveway, where he killed them. The victims did not come to him, and there was no ongoing fight between Nicholson and the victims at the time he found them and began to shoot them, ultimately killing them both.

Nicholson prepared for these murders by going to his bedroom and obtaining a firearm from his bedroom, then taking it outside the house to kill the victims. Taking the firearm, he went to the location of the victims, M.L. and Giselle, and shot them to death in their driveway. The actions Nicholson took before the shooting demonstrate that he prepared by obtaining a weapon and also chose the location by moving to the location of the victims and killing them where they were, outside of their house. He was able to give thought and preparation during the time it took to go to the bedroom, get the gun, go back downstairs, push America out of the way, and follow the children into the driveway where he began shooting them.

c. The murders were drawn out, occurring after Nicholson and the victims were fully separated and Nicholson chose to follow them outside the house and shoot them to death

The last *Walker* factor also supports prior calculation and design in the murders, as the murders were not an almost instantaneous eruption of events. The issues leading up to the murder began earlier in the evening, when M.L. came to Polanco's bedroom after Nicholson had begun

strangling her and yelling at her about the text message from Marshall. Tr. 3387-88. This led to an altercation between Nicholson and M.L. in which Nicholson beat M.L. and threw a chair at M.L., which left Nicholson with no visible injuries. Tr. 3672, 3390. Following this, M.L. and Nicholson fully separated, and Nicholson went to his bedroom. Tr. 3674, 3390. In his bedroom, Nicholson obtained a gun from under the mattress, went downstairs, and exited the house to shoot the victims. Tr. 3674. The thirteen gunshots that Nicholson fired, killing M.L. and Giselle, required thirteen separate pulls on the trigger. Tr. 3165-67.

This Court has affirmed convictions of aggravated murder with prior calculation and design in killings that involved less than a few minutes of planning. In *State v. Palmer*, 80 Ohio St.3d 543, 568-569, 1997-Ohio-312, 687 N.E.2d 685, this Court found prior calculation and design where the defendant killed two strangers in a road rage incident where the defendant exited his vehicle with a revolver that he only need time to cock before it would fire. In *State v. Taylor*, 78 Ohio St.3d 15, 1997-Ohio-243, 676 N.E.2d 82, this Court found prior calculation and design where the defendant shot an acquaintance after a brief argument in a bar over a juke box. “In light of the strained relationship between appellant and the victim, and the other factors mentioned above, two or three minutes is more than instantaneous or momentary under these circumstances, and is more than sufficient for prior calculation and design.” *State v. Taylor*, 78 Ohio St.3d 15, 22, 1997-Ohio-243, 676 N.E.2d 82. Here, in addition to ample evidence that the relationship between Nicholson, Giselle, and M.L. had long been strained, Nicholson had specifically threatened to kill them under the circumstances, as well as that night prior to killing them. Moreover, the circumstances here “are inconsistent with an ‘instantaneous eruption of events.’” *State v. Taylor*, 78 Ohio St.3d 15, 22, 1997-Ohio-243, 676 N.E.2d 82 citing *State v. Jenkins*, 48 Ohio App. 2d at 102, 2 Ohio Op. 3d at 75, 355 N.E.2d at 828.

M.L. went outside to try to run away with Giselle and was found there by Nicholson. At that time, Nicholson shot both M.L. and Giselle with a gun he had obtained after going to his room. Prior to killing Polanco's children, Nicholson had to go to his room and obtain the gun, then go outside to shoot the victims. Nicholson shot them a total of thirteen times in their backs. Details from the crime scene confirmed Polanco's testimony, including that Nicholson shot her children to death in the driveway, and based on the wounds, he shot them each in their backs, suggesting that they were running away from Nicholson when they were killed. All of this evidence was inconsistent with an instantaneous eruption of events.

D. Nicholson applies inapposite case law and an inappropriate standard in support of his insufficient evidence argument

Nicholson killed M.L. and Giselle directly after the police were called twice. Tr. 3674, 3389-91. This was especially important in light of threats that Nicholson had previously made that he would kill the children if the police were ever called on him. In an attempt to downplay this damning evidence, Nicholson argues at two separate points that a contingency to kill is not evidence of a preconceived plan to kill. Nicholson Br. 75-76, 91. In each instance, Nicholson inappropriately relies on *State v. Reed*, 65 Ohio St. 2d 117, 418 N.E.2d 1359 (1981).

This Court has clearly distinguished from *Reed*, however, an issue that Nicholson omits entirely. This Court has instructively provided that:

Whether a defendant's prior statement of intent to kill a police officer constitutes evidence of prior calculation and design depends largely upon the totality of other facts and circumstances surrounding the killing. In *State v. Reed* (1981), 65 Ohio St. 2d 117, 120-121, 19 Ohio Op. 3d 311, 313-314, 418 N.E.2d 1359, 1362-1363, we held that a defendant's isolated statement that "if a cop got in his way [during a robbery] he would blow him away" did not, by itself, establish prior calculation and design when the totality of the facts and circumstances indicated that the killing resulted from an instantaneous deliberation. More recently, in *State v. White* (1998), 82 Ohio St. 3d 16, 24, 693 N.E.2d 772, 779-780, we suggested that such statements could be used to establish prior calculation and design. The distinguishing factor in the *White* decision was the presence of other evidence

establishing prior calculation and design. Unlike in *Reed*, the defendant's threat to kill a police officer in *White* was repeated several times. In *White*, there was also evidence presented at trial indicating that the defendant, who was on probation, would do whatever necessary to avoid being returned to prison. Here, as in *White*, the totality of facts and circumstances surrounding the killing, including the manner in which appellant killed Officer Glover, clearly indicates that appellant's act of killing was not an instantaneous decision and that his prior statement of intent to kill a police officer was not merely an idle threat. Accordingly, we are willing to consider appellant's threat as evidence of prior calculation and design.

Viewing the evidence in the light most favorable to the prosecution, we find that the jury could have found the element of prior calculation and design proven beyond a reasonable doubt. Shortly before the murder, appellant informed his cousin that he "was going to shoot at the police if they ever tried to arrest him." On the day of the murder, appellant was armed with a .38 caliber revolver. When approached by the police, appellant followed up on his promise to his cousin, executing Officer Glover with two point-blank gunshots to the head. This evidence clearly establishes, beyond a reasonable doubt, that appellant killed Officer Glover with prior calculation and design.

State v. Jones, 91 Ohio St.3d 335, 346, 2001-Ohio-57, 744 N.E.2d 1163

As in *Jones*, when Nicholson killed M.L. and Giselle, firing thirteen gunshots at them at close range, directly after the police had twice been called that evening, Nicholson followed up on his threat to kill them. Additionally, Nicholson had threatened to kill M.L. and Giselle on prior occasions. Although Nicholson suggests that *Reed* made Nicholson's specific threats irrelevant to prior calculation and design, this suggestion is mistaken and his argument is inappropriate.

Beyond this issue, Nicholson attempts to use the wrong standard for sufficiency of the evidence. Nicholson Br. 91. Directly before discussing the evidence being viewed in a light most favorable to the prosecution, Nicholson argues that America's testimony was "not credible." *Id.*

Of course, this is not the applicable standard. "When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court's function is extremely limited."

State v. Byerly, 11th Dist. 97-P-0034, 1998 WL 637689, at *2.

"When the state has produced at least a modicum of evidence on each of the essential elements of the crime, the question on appeal is not whether we think the

accused is innocent of the charge. Instead the question is whether the quantum of evidence produced by the state, when viewed in a light most favorable to the prosecution, is sufficient to allow any rational trier of fact to draw the conclusion that the accused is guilty beyond a reasonable doubt. *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560. We are not to inquire into the weight, or persuasiveness, of the evidence presented, for that is within the purview of the trier of fact. Therefore, a motion for acquittal should only be granted in those exceptional cases where reasonable minds must have reasonable doubt as to the defendant's guilt. *State v. Apanovich* (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394. In other words, the motion should be granted where there is no need for formal deliberation on the evidence because a verdict of acquittal is, or should have been, a foregone conclusion.”

Id.

Under the standard of review for a sufficiency challenge, the appellate court is to “draw all reasonable inferences in favor of the prosecution[.]” *State v. Waldrop*, 10th Dist. No. 98AP-102, 1998 WL 598112, at *5. Therefore, in spite of Nicholson’s efforts to apply inappropriate case law under an inappropriate standard, the fact that Nicholson made good on his prior threats was relevant evidence and the credibility of the testimony is not at issue under this standard of review. As addressed above, by committing to neither standard nor generally arguing credibility issues in support of his sufficiency challenges, Nicholson’s arguments are ineffective.

E. Nicholson’s self-defense argument was unsupported by evidence

As to Nicholson’s self-defense argument, it rests on his claim that M.L. and Giselle were attempting to get his service weapon from the trunk of his vehicle. Tr. 4144-45, 4198. This argument relied on the unlikely claim that Nicholson routinely left his service weapon in the trunk of his vehicle in the driveway overnight. Tr. 4198. Beyond this, the service weapon at the heart of Nicholson’s self-defense claim was found inside the house, in a bedroom closet on September 13, 2018. Tr. 3243, 3656-58, 3730.

The trunk of Nicholson’s vehicle, where he claimed Polanco placed the service weapon after Nicholson shot Polanco’s children, was searched by two Garfield Heights Police Officers on the

morning of September 6, 2018. Tr. 2933. Nothing of evidentiary value, including no gun, was found at this time. *Id.* This was consistent with the testimony of every other witness besides Nicholson, and raised credibility issues with his testimony regarding September 5, 2018.

On September 13, 2018, multiple Garfield Heights Police officers again searched Nicholson's vehicle, this time pursuant to a search warrant, including its trunk. Tr. 2946-52. At this time, the Paragon service weapon was found in the trunk. Tr. 2952. Additionally, it appeared as though someone had opened the trunk and placed many things into it, including model cars, muscle powder containers, a gun, and a gun belt. Tr. 2946-52. All of this was consistent with testimony of the witnesses who found the gun inside the house on September 13, 2018, including Carlos Nieves and Roberto Lopez. Tr. 3666-67, 3730-31.

Polanco also testified that contrary to Nicholson's claims, Nicholson kept his service weapon in the bedroom closet. Tr. 3373. Several witnesses testified that the service weapon was found in this location on September 13, 2018, wholly undermining Nicholson's self-defense claim, and calling his testimony about keeping the weapon in the trunk of his vehicle into further question.

F. Nicholson's self-defense argument was unsupported by evidence

Nicholson's first proposition of law is therefore without merit and should be overruled.

Response to Proposition of Law II: The introduction and admission of other acts evidence in this case was constitutionally sound and failed to violate any of Nicholson's Federal or State Constitutional rights.

The State moved the trial court to allow relevant and admissible other acts evidence prior to trial. It did so after Nicholson filed Motions in Limine related to 404(B) evidence on both May 2, 2019 and August 22, 2019. The State filed, *State's 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*, on September 3, 2019. After a hearing, the trial court determined that

the evidence was appropriate and denied Nicholson's limine motions. Tr. 72-74.

In addition to the law and reasoning included in its motion, the State explained the reasons for seeking admission of the 404(B) evidence at the hearing. Tr. 68-71. Notably, the State explained that the case is "primarily about domestic violence. It's a culmination of years of abuse and psychological torture that the Defendant inflicted upon America Polanco and her children." Tr. 69. The State continued to explain, "[t]his case cannot be tried in a vacuum. It would not be fair, it would not be accurate for us to stand up in closing arguments and say that, one day, for absolutely no reason that anyone can discern, Matthew Nicholson picked up a gun and killed [M.L. and Giselle Lopez]." *Id.* Nicholson asked for the court to find the opposite, and now asks this Court to determine that the trial court abused its discretion by letting the jury have access to the prior threats, physical issues, and tensions that led to and informed the murders.

The trial court ultimately allowed the evidence for the purpose of showing the Defendant's motive, intent and lack of mistake pursuant to Evidence Rule 404(B). Tr. 72. The trial court made this decision based on the representations of the State and "given the nature of the history over time with respect to the relationship." Tr. 72.

A. Standard of Review

This Court has provided that "The admission of such [other-acts] evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that created material prejudice." *State v. Diar*, 120 Ohio St.3d 460, 2008 Ohio 6266, 900 N.E.2d 565, ¶ 66. "'Abuse of discretion' has been described as including a ruling that lacks a 'sound reasoning process.'" *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). A review under the abuse-of-discretion standard is a deferential review." *State v. Morris*, 132 Ohio

St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14. “It is not sufficient for an appellate court to determine that a trial court abused its discretion simply because the appellate court might not have reached the same conclusion or is, itself, less persuaded by the trial court's reasoning process than by the countervailing arguments. *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14 citing *AAAA Ent., Inc.*

Nicholson fails to address the standard of review for this proposition of law and therefore has not disputed that abuse of discretion is the appropriate standard. Nicholson Br. 118-141.

B. *State v. Thompson* and *State v. Nields* strongly support the admission of 404(B) evidence to demonstrate a strained relationship in a murder case to show motive, intent, and absence of mistake.

“The Ohio Supreme Court has held that evidence of domestic violence proving a ‘strained relationship’ between the defendant and victim is admissible in a murder case to show motive, intent, and absence of mistake.” *State v. Thompson*, 8th Dist. Cuyahoga No. 81322, 2003-Ohio-3939, ¶ 24, citing *State v. Nields*, 93 Ohio St.3d 6, 22, 752 N.E.2d 859 (2001). In *Thompson*, the Appellant challenged the trial court’s admissibility of other acts evidence. The Appellant was convicted of Aggravated Murder. *Thompson*, ¶ 1. The victim of the offense was his girlfriend. The offense occurred in June of 2001. *Id.* ¶ 8. The State offered evidence at trial that the Appellant had broken the victim’s ribs in March of 2001. *Id.* ¶ 11. The 8th District held that the other acts evidence was properly admitted by the trial court. The 8th District reasoned that “we find the domestic violence charge is evidence of motive and intent based on the abusive relationship.” *Id.* at ¶ 26.

In *Nields*, the State offered evidence from a police officer who responded to a domestic violence call involving the Appellant and the homicide victim several weeks before the murder.

The Ohio Supreme Court ruled that the evidence “illustrated the tumultuous relationship between defendant and [victim] in an incident that took place just weeks before the murder.” *Id.* at 22.

In the present case, Nicholson and the victims spent years living together. As demonstrated through various testimony and evidence, there was a growing tension over the years between Nicholson and the victims. Polanco described the relationship as getting worse and worse, beginning in 2015. Tr. 3288. Polanco also testified that in January of 2018, the relationship with Nicholson, “got really worse.” Tr. 3342. Most importantly, Nicholson had threatened the lives of M.L. and Giselle on prior occasions, specifically related to calling the police. Tr. 3289. On the night Nicholson murdered M.L. and Giselle, both Polanco and M.L. separately called the police.

This evidence was highly probative to the strained relationships at the heart of the murders. Nicholson caused strained relationships between himself, M.L., Giselle, and America through threats and violence. All of this was relevant to the strained relationships, and the threats were especially probative of Nicholson’s motive, intent, and absence of mistake when Nicholson shot M.L. and Giselle to death.

C. The other acts evidence elicited in this case was highly probative and not unduly prejudicial.

As the State argued in the motion hearing before trial, and the record bears out, this case is primarily about domestic violence. After threatening the victims and their mother for years while they shared a house, Nicholson murdered two of his household members. The strained relationship between Nicholson and the victims was highly probative and relevant to these murders. It was probative as to Nicholson’s choice not to call the police, as well as his choice to go to his bedroom and retrieve a gun before seeking out the victims and shooting them thirteen times in their backs.

Polanco’s testimony provided extensive information about the tensions and issues in the household. Additionally, the testimonies of Allshouse and Shondell Smith corroborated the long-

term issues including violence and safety concerns, and demonstrated that the issues in Polanco's household between herself, Nicholson, and her children caused so much concern that multiple people offered them safe places to stay if needed.

D. Nicholson's self-defense claim increased the probative value of the 404(B) evidence

Ohio courts have determined that 404(B) evidence can be relevant to negate a claim of self-defense. *State v. Mills*, 2016-Ohio-6985, 72 N.E.3d 76, ¶ 16 (12th Dist.). The 12th District has held that "[t]he trial court properly found that cross-examination of Mills and the recorded telephone conversation concerning the earlier incident were relevant as tending to negate Mills' claim of self-defense, as well as to prove the absence of mistake or accident. *Id.* Additionally, such evidence has also been used to demonstrate "intent pursuant to Evid.R. 404(B)." *State v. Machuca*, 3d Dist. Allen No. 1-15-01, 2016-Ohio-254, ¶ 45. Here, by claiming self-defense, Nicholson placed into issue his intent in shooting the children. Therefore, the prior threats, the strained relationships, and the prior physical and verbal abuse were all probative to the State's burden in demonstrating absence of mistake or accident as well as intent in the murders.

Shondell Smith's testimony was relevant and appropriate. Initially, Smith specifically testified that Polanco was a private person, which is highly relevant to claims that Nicholson makes throughout his brief about Polanco's limited reporting of the abuse Nicholson committed against both her children and Polanco herself. Smith's testimony further provided that the safety of Polanco and her children were potentially threatened by Nicholson. Tr. 3519. Additionally, Smith's testimony provided that the concern that Nicholson might hurt Polanco or her children was so great prior to the murders that he offered his home as a safe house for them. Tr. 3520. Given that Nicholson claimed self-defense and specifically suggested that he did not want to harm M.L. or Giselle, all of this information was highly relevant and proper. The danger Nicholson was

recognized as posing to Polanco and her children established that it was neither an accident nor a mistake when he shot them enough times to kill them both. Additionally, Nicholson's intent to kill the children was established by his consistent threats regarding them.

The testimony of Connie Allshouse was similarly relevant. Notably, Nicholson now says that the testimony of Smith and Allshouse was unnecessary because Polanco was testifying. Nicholson Br. 135. This disregards the probative nature of the testimony as establishing the long-standing issues between Nicholson and Polanco's family, including their strained relationships, which are a focal point in Nicholson's first proposition of law. Nicholson Br. 67-69. Indeed, testimony of Allshouse and Smith established that the relationships were so strained that multiple people were offering safe places for the family to go to get away from Nicholson.

Similarly, Nicholson claims in this proposition that Polanco's testimony rendered the testimony of Allshouse and Smith not probative. This incorrectly ignores the corroborative nature of the testimony provided by each witness, especially that the relationships between Nicholson and the victims were poor for long periods prior to the murder. This evidence is especially probative given Nicholson's significant attempts to attack Polanco's credibility and to suggest that she fabricated the issues. Nicholson Br. 96-102. The testimony of Allshouse and Smith provided third party information that Nicholson had long been viewed as a threat and also that the relationships between Nicholson and the victims had long been strained.

Nicholson inaccurately claims without reference to any authority that "[r]ebutting 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 [SIC] being told anything specifically about Mr. Nicholson's relationship with and/or conduct towards M.L. and/or Giselle." Nicholson Br. 135.

Nicholson's argument is further hindered by misrepresentation. Nicholson Br. 121. Nicholson assert that he "never claimed at any point that he was mistaken when he shot Giselle and M.L. on September 5, 2018." *Id.* The State's burden in multiple counts included the purposeful killing of Giselle and M.L. By asserting that he shot them to death in self-defense, Nicholson was placing at issue whether killing them was a mistake. Tr. 4091. 404(B) evidence related to the absence of mistake, as well as Nicholson's intent to kill Polanco's children was therefore highly probative. Nicholson's claim that he was not mistaken misdirects the issue from Nicholson's intent to kill the victims, onto the undisputed issue of whether he meant to shoot the victims. While Nicholson did not make an argue that he was mistaken in shooting the victims, he went to trial attempting to claim that when he shot the victims thirteen times he had no intent to kill and it was also a mistake for them to have been killed. His argument is therefore based at least in part on a misrepresentation of the issues at trial.

E. The trial court provided two limiting instructions that were sufficient

Nicholson acknowledges that the trial court provided two limiting instructions, without objection. Nicholson Br. 140-41. He fails to make an argument for plain error, and indeed there was no plain error. "In this case, the defense did not object to the court's instruction. And we decline to find plain error." *State v. Hartman*, 161 Ohio St.3d 214, 2020-Ohio-4440, 161 N.E.3d 651, ¶ 72.

The trial court in this case provided limiting instructions at two different times during Polanco's testimony. Tr. 3298-99, 3366-67. Although the limiting instructions listed several 404(B) purposes, there were multiple appropriate purposes for the evidence in this case, including motive, intent, and absence of mistake. Tr. 72. Additionally, while citing to *Hartman* for the proposition that the instruction should be tailored to the facts of the case, Nicholson fails to explain

how the jurors may have mistaken any of the 404(B) evidence as relating to opportunity, preparation, knowledge, or identity and confused the issues on this basis. Moreover, the limiting instructions each included that the evidence was not admissible to prove the character of Nicholson or to show action in conformity with the character. Tr. 3298-99, 3366-67.

F. Even if this evidence was admitted in error, the error was harmless as the evidence was overwhelming

This Court has long recognized that “an improper evidentiary admission under Evid.R. 404(B) may be deemed harmless error on review when, after the tainted evidence is removed, the remaining evidence is overwhelming.” *State v. Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 32 citing *State v. Williams*, 6 Ohio St.3d 281, 290, 6 Ohio B. 345, 452 N.E.2d 1323 (1983). Here, if all of the 404(B) evidence was removed, the remaining evidence is indeed overwhelming.

Nicholson undoubtedly shot both Giselle and M.L. to death in their driveway. Before shooting them a total of thirteen times, he went to his room, retrieved a gun, and then went outside to where the victims were attempting to run away, and shot them to death. Removing the earlier threats Nicholson had made to Polanco and the children, he had specifically threatened their lives while arguing with Polanco shortly before he killed the children on September 5, 2018.

In light of the overwhelming evidence that Nicholson intended to kill Giselle and M.L. when he sought them out and shot them thirteen times in their backs, Nicholson cannot demonstrate material prejudice based on any improper 404(B) evidence.

Nicholson also argues in his brief that “a large portion” of the evidence, in his opinion, “would not even amount to criminal or “bad” conduct. Nicholson Br. 133. In making this argument, Nicholson suggests that it would have been difficult for a large portion of the evidence

to prejudice him. If the other acts evidence was not even “bad,” it is difficult to conceive of how it could have materially prejudiced Nicholson if it was improperly admitted.

G. Conclusion

The 404(B) evidence in this case was highly probative and not prejudicial. Nicholson’s motive, intent, and absence of mistake were all at issue in his murder trial, where he testified and argued that he acted in self-defense and without intent to murder Giselle or M.L. Nicholson’s threats against the children were evidence of his motive, intent, and absence of mistake. Similarly, the violent outbursts that led to holes in the walls and confrontations with the victims were evidence of the strained relationships between Nicholson and the victims, tending to prove motive, absence of accident, and intent. *Nields* at 22. Similarly, Allshouse and Smith provided relevant and admissible evidence that demonstrated the strained relationships and the danger posed by Nicholson. By providing limiting instructions, the trial court properly direct the jury at multiple times not to use the evidence as character evidence. Finally, the overwhelming nature of the remaining evidence renders any potential error with regard to 404(B) evidence harmless. For each of these reasons, this proposition of law should be overruled.

Response to Proposition of Law III: The loss and/or destruction of photographic evidence by law enforcement not available to the defense denies a capital defendant none of his rights under the Ohio or U.S. Constitution when it could not have been materially exculpatory evidence and defendant cannot demonstrate bad faith.

In his third proposition of law, Nicholson attempts to elevate the significance of his service weapon’s location to an implausible degree of importance. Despite shooting each victim several times each, in their backs, he posits that the potential for one of these victims to have been holding a gun when they were shot in the back was material evidence in this case. This is wrong.

Nicholson concedes, as an afterthought, that this issue was not preserved for review. Nicholson Br. 147-48. The State did not object to Nicholson's Motion for Disclosure of Exculpatory Evidence and Motion for Disclosure of Impeaching Information. R. 32, 33. These were filed January 18, 2019 and granted September 5, 2019. Tr. 56. Notably, neither these nor any of Nicholson's pretrial motions indicated that he was specifically interested in the unfired gun belonging to Paragon security. As discussed below, and as conceded in Nicholson's merit brief, the State was not aware of Nicholson's claims related to this gun until approximately one month prior to trial. His unexpected self-defense claim appears to have been intended as a surprise, based on arguments made in his merit brief. Nicholson Br. 337-42.

A. Standard of Review

"The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects a criminal defendant from being convicted when the State either fails to preserve materially exculpatory evidence or destroys, in bad faith, potentially useful evidence." *State v. McClain*, 2016-Ohio-838, 60 N.E.3d 783, ¶ 21 (2d Dist.) "Evidence is 'materially exculpatory' if it (1) possesses 'an exculpatory value that was apparent before the evidence was destroyed' and (2) is 'of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.' *State v. McClain*, 2016-Ohio-838, 60 N.E.3d 783, ¶ 21 (2d Dist.) citing *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 856, P 74.

"In contrast, evidence is not materially exculpatory if it is merely potentially useful. Potentially useful evidence indicates that the evidence may or may not have incriminated the defendant. 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." *State*

v. McClain, ¶ 22 citing *State v. Cox*, 2d Dist. Montgomery No. 25477, 2013-Ohio-4941, P 88. "The term 'bad faith' generally implies something more than bad judgment or negligence. 'It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.'" (Citations omitted.) *Powell* ¶ 81. The defendant bears the burden to show that the evidence was materially exculpatory. *Powell* ¶ 74 citing *State v. Jackson*, 57 Ohio St.3d 29, 33, 565 N.E.2d 549 (1991).

B. Argument

a. Nicholson fails to establish that the evidence was materially exculpatory

Nicholson makes almost no argument in support of the evidence being materially exculpatory, and indeed fails to carry his burden in this regard. Nicholson Br. 142-48. Excepting that Nicholson's self-defense claim was undermined by other evidence including the volume of gunshots fired into the victims' backs, there are multiple reasons that photographs of his trunk were not "materially exculpatory." *Mcclain* ¶ 21. Nicholson has satisfied neither prong of the test for whether evidence is "materially exculpatory." *Id.*

Nicholson bears the burden of establishing that the photographs in question, "(1) possesses 'an exculpatory value that was apparent before the evidence was destroyed' and (2) is 'of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.'" *Id.* He has failed to establish either prong.

First, the exculpatory nature of the photographs was not apparent before the loss of the evidence. Nicholson repeatedly references state's exhibits 324B and 332A related to Nicholson's father saying "If somebody jumped you, they'll [law enforcement] figure all of that out." E.g. Nicholson Br. 104-5. This is the only evidence upon which he suggests that law enforcement

should have known the exculpatory value of the trunk photographs before they were lost. Obviously, this statement does nothing to suggest that the trunk of Nicholson's car was of any exculpatory importance. It fails to relate any information about the service weapon, the trunk of the vehicle, or anything else that could have arguably demonstrated that this unfired weapon had any exculpatory value.

Nicholson's argument in support of the evidence being materially exculpatory demonstrates that he cannot support his burden. Nicholson Br. 143. His argument is based entirely on the fact that the presence of the service weapon in the trunk was consistent with his self-defense claim. *Id.* This claim and its particulars were only established at trial. As Nicholson generally argues in his brief, the State was made aware of the particulars of his claim based on Dr. Fabian's report. Therefore, by Nicholson's own argument, at the time the photographs were lost, their potentially exculpatory nature was not apparent. Nicholson's other arguments necessarily and constructively concede as much.

After failing to establish the first prong, Nicholson makes no effort to discuss the second - whether the evidence was "of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *McClain* ¶ 21. Here, the State provided two additional witnesses that provided information about whether the service weapon was in the trunk after the shooting. Carlos Nieves and Estomarys Santos provided testimony regarding the location of the gun on September 13, 2018. Likely because their testimony did not aide in his self-defense claim, he avoids discussion of it here. Nevertheless, their testimony did provide relevant information that was comparable to the information which photographs would have provided – the location of the gun on September 13, 2018.

Reviewing the evidence, and especially in consideration of the best arguments put forward

by Nicholson, which establish neither of the mutually required prongs for evidence to be deemed “materially exculpatory,” this evidence was not materially exculpatory.

b. Nicholson fails to establish, in the alternative, that the evidence was lost in bad faith

Failing to establish that the evidence was “materially exculpatory,” Nicholson is left to establish that the loss of the photographs constituted “bad faith.” 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." *State v. McClain*, ¶ 22 citing *State v. Cox*, 2d Dist. Montgomery No. 25477, 2013-Ohio-4941, P 88. "The term 'bad faith' generally implies something more than bad judgment or negligence. 'It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud.'" (Citations omitted.) *State v. McClain*, ¶ citing *Powell* at P 81.

A court “cannot infer bad faith from the mere act of its destruction.” *D’Ambrosio v. Bagley*, N.D. Ohio No. 1:00 CV 2521, 2006 U.S. Dist. LEXIS 12794, *162 (Mar. 24, 2006). *See also United States v. Taylor*, D.D.C. No. 17-129, 2018 U.S. Dist. LEXIS 97845, *12 (June 12, 2018) (“bad faith cannot be inferred from the mere act of nonpreservation itself”).

Garfield Heights Police failed to preserve photographs of the service weapon, the potential value of which was not argued until Nicholson testified at trial. There is simply no basis for the loss of these photographs to constitute the bad faith required for a due process violation. Similarly, the return of the unfired weapon to its owner without DNA testing cannot be explained as bad faith, of which, according to multiple witnesses, was moved from inside the house to the trunk of the vehicle days after the incident. Again, Nicholson’s theory of the case was not, by his own argument, clear to law enforcement prior to his mitigation report. Nicholson Br. 338-39. Because Nicholson shot the victims several times each in their backs, a self-defense theory was not

something law enforcement could have reasonably anticipated. As well, in consideration of Nicholson's own brief, law enforcement only became aware of this surprising claim of self-defense when the mitigation report was received the month before trial. Therefore, Nicholson effectively concedes that the State could not have acted in bad faith regarding these photographs or the gun because it had no reason to believe that Nicholson would claim self-defense based in part on this unfired gun, prior to August 23, 2019, when the report was provided to the State, and long after the photographs were lost and the gun was returned to Paragon.

Nicholson fails to demonstrate bad faith. In fact, he makes no discernable argument as to how the loss of the photographs could constitute bad faith. He concludes at one point that because he views the lost evidence as related solely to his service weapon, which may have bolstered his self-defense claim, it "necessarily implies that bad faith must be at play here." Nicholson Br. 144-45. Nicholson also claims that Garfield Heights Police demonstrated a cavalier attitude toward the evidence. Nicholson Br. 146-47. Nicholson also attributes the return of the service weapon – which was not fired – to Paragon without collection of DNA evidence as some form of bad conduct by Garfield Heights, but this suggestion also falls flat. "Even assuming that pictures of the area or the items would be potentially useful, appellant has failed to point to any evidence to show how it was destroyed in bad faith." *State v. Pullin*, 5th Dist. Stark No. 2015CA00134, 2016-Ohio-1179, ¶ 46.

Nicholson attempts to support his argument with *State v. Durnwald*, 163 Ohio App.3d 361, 2005-Ohio-4867, 837 N.E.2d 1234 (6th Dist.), but that case is heavily distinguishable. Nicholson ignores the obvious and material distinctions between it and the present case in his attempt to support his argument with an inapposite case. Nicholson Br. 145-46. He begins by omitting that the Appellant in *Durnwald* had moved to suppress the testimony of the arresting

officer based upon the lost video of field sobriety tests. *Durnwald* ¶ 27-28. Although he fails to address this procedural distinction, he concedes as much by acknowledging at the end of his proposition that defense counsel did not move the trial court to suppress this evidence. Nicholson Br. 147-48.

The procedural distinction is not the only meaningful difference between *Durnwald* and the present case. *Durnwald* involved a DUI arrest and the tape at issue had “obvious evidentiary value and importance to substantiate a trooper’s version of the events leading up to an arrest,” its erasure was deemed incredible. *Durnwald* ¶ 35. Conversely, the evidence at issue here was not clearly relevant to the crime or the arrest. It involved a weapon not fired or apparently used at all during the incident. Moreover, multiple witnesses testified that it had been moved from inside the house to the trunk of the vehicle days after the incident. As explained above as well as in Nicholson’s merit brief, Nicholson’s claims regarding the weapon were unknown to law enforcement until roughly one month before trial. Conversely, in *Durnwald*, the relevance of the video demonstrating the appellant prior to the stop and during the performance of sobriety tests would have been immediately known to law enforcement. *Durnwald* ¶ 3. These distinctions from *Durnwald* are too significant to be ignored, and *Durnwald* is therefore not supportive of Nicholson’s bad faith argument.

c. Nicholson’s alternative theory of ineffective assistance is unsupported and contradicted by his own merit brief.

Nicholson additionally suggest an alternative issue at the end of this proposition, without supporting argument – that “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.” Nicholson Br. 148. This claim is dubious, as Nicholson failed to demonstrate that the evidence was either materially exculpatory or lost in bad faith,

meaning that he could not support an ineffective assistance claim related to counsel's actions in relation to it. "Therefore, it was not deficient for counsel not to raise a meritless issue. *State v. Kirby*, 12th Dist. Butler No. CA2019-05-078, 2020-Ohio-4005, ¶ 18 citing *State v. Kremer*, 12th Dist. Warren Nos. CA2017-07-115 and CA2017-07-116, 2018-Ohio-3339, ¶ 27. He also fails to provide any argument to support this meritless issue. Moreover, Nicholson did not raise an ineffective claim against his counsel based on the decision not to move for suppression of this evidence or dismissal of the related counts. Nicholson Br. 335-60. This is especially notable because Nicholson raised ten separate claims of ineffective assistance of counsel in his merit brief but said nothing of the ineffective claim he suggests here. *Id.*

Finally, in one of the ineffective assistance claims actually raised by Nicholson, he extensively criticizes his trial counsel for allowing the State access to his self-defense claim prior to trial through the mitigation report. Nicholson Br. 337-42. His argument there suggests that he wanted to be able to surprise the State with his unlikely self-defense claim ("Defense counsel was not required to share with the State that Mr. Nicholson intended to testify that he acted in self-defense that night, and the State admittedly did not, apparently, anticipate such testimony.") *Id.* 342. Here he fully contradicts that notion, suggesting that Nicholson should have betrayed his ultimately unsuccessful and unlikely defense strategy by filing motion(s) to suppress and/or dismiss based upon the evidence that would have provided the State the same information. Of course, because Nicholson makes no meritorious argument that would support suppression or dismissal, the motions would have done nothing more than provide the same information which he puts at issue in an unrelated ineffective assistance claim.

C. Conclusion

For each of the above reasons, Nicholson's third proposition of law is without merit and should be overruled. He has failed to support this proposition with appropriate analysis or supportive case law.

Response to Proposition of Law IV: A trial court does not abuse its discretion and deny a defendant a fair trial or any of his rights under the Ohio or United States Constitutions when it allows the introduction of photographs and body camera from the scene and of the deceased without objection from the defendant.

In his fourth proposition of law, Nicholson claims error by the trial court in allowing photographs and video evidence from the scene to be admitted at trial. Nicholson concedes that because there was no objection at trial to any evidence at issue under this proposition besides the life-saving measures in State's Exhibit 323A, this issue was not preserved for review and he has waived all but plain error. Nicholson Br. 153.

Nicholson cannot satisfy the plain error standard, and his arguments against the videos and photographs obliquely ignore the importance of the crime scene and the wounds to the victims in the face of Nicholson's self-defense argument. The two victims were shot several times in their backs. Nicholson then, surprisingly claimed self-defense. This placed great importance on the circumstances of the shooting and specifically the locations of the victims as well as the details of their wounds. Nicholson's self-defense claim placed great emphasis on the specific circumstances of the shooting, which necessitated photographs and videos from the scene and photographs from the autopsies to demonstrate not only the death of the victims, but all available details surrounding their deaths. Nicholson's claims that he shot at the victims thirteen times to protect himself made it necessary for the jury to have all available details of where the victims were when they were shot. The details of their wounds, the location of their blood, and the specific locations where they

were left lying in the driveway were all highly probative to Nicholson's claims and demonstrated among other things that they were shot in their backs. Their locations were highly probative to Polanco's claim that they were fleeing. Additionally, the fact that the victims were each completely outside of the house that Nicholson had left in order to pursue them, was an essential detail, which the State needed to demonstrate accurately.

Nicholson fails to demonstrate an error, much less one that was plain or obvious as well as illustrative of affecting substantial rights. Instead, he makes arguments that ignore the obvious and essential evidentiary value of both the crime scene and the autopsy photos in determining whether the thirteen shots fired at the victims were done so in self-defense.

A. Standard of Review

Trial counsel's failure to object at trial to photographs that Nicholson now claims are gruesome constitutes waiver of all but plain error with respect to those exhibits. *State v. Trimble*, 122 Ohio St. 3d 297, 316, 2009-Ohio-2961, P132, 911 N.E.2d 242, 266, 2009 Ohio LEXIS 1833, *44 citing *State v. Twyford* (2002), 94 Ohio St.3d 340, 358, 2002 Ohio 894, 763 N.E.2d 122. Nicholson makes no argument to the contrary.

Generally, autopsy photos are admissible where they are probative of the defendant's intent and the manner and circumstances of the victim's death. See *State v. Craig*, 110 Ohio St.3d 305, 2006-Ohio-4571, 853 N.E.2d 621, ¶ 92. They may also be admissible where they "support the coroner's testimony" about the victim's injuries or cause of death. *Id.* ¶ 95. Even a series of such photographs is admissible when "they were from different perspectives and gave the jury a total appreciation of the nature and circumstances of the crimes." *State v. Evans*, 63 Ohio St. 3d 231, 251, 586 N.E.2d 1042 (1992).

The Supreme Court has provided that “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

"The prosecution is entitled to present evidence showing the cause of death, even if the cause is uncontested, to give the jury an 'appreciation of the nature and circumstances of the crimes.'" *State v. Catron*, 8th Dist. Cuyahoga No. 101789, 2015-Ohio-2697, ¶ 25, quoting *State v. Chatmon*, 8th Dist. Cuyahoga No. 99508, 2013-Ohio-5245, ¶ 41. This Court has affirmed admission of photographs entered over objection, even when the appellant stipulated to the cause of death. *State v. Maurer*, 15 Ohio St.3d 239, 265, 473 N.E.2d 768 (1984) (“The fact that appellant stipulated the cause of death does not automatically render the photographs inadmissible.”) Moreover, the state has latitude in constructing its case and determining the manner by which it meets its burden of proof. *See State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 99, 103 (“[T]he state bears the burden of proof and it has no obligation to meet that burden in the *least* gruesome way.”) (Emphasis sic.)” *State v. Johnson*, 8th Dist. Cuyahoga No. 109041, 2020-Ohio-5255, ¶ 95.

This Court has held that “sheer numbers alone do not establish prejudice or show that photographs are cumulative or repetitious” in another capital case where a plain error standard was properly applied. *State v. Awkal*, 76 Ohio St.3d 324, 333 1996-Ohio-395, 667 N.E.2d 960.

B. The evidence in question is highly probative and not prejudicial

This Court has long held that “[t]he state must prove, and the jury must find, that the killing was purposely done. The number of shots fired, the places where the bullets entered the body, and the resulting wounds are all probative evidence of a purpose to cause death. The total probative

value of these photographs was not outweighed by the danger of prejudicial effect upon the defendant." *State v. Maurer*, 15 Ohio St.3d 239, 265, 473 N.E.2d 768 (1984) citing *State v. Strodes* (1976), 48 Ohio St. 2d 113, 116 [2 O.O.3d 271], vacated in part on other grounds (1978), 438 U.S. 911. This probative value, deemed present in any case where purposeful cause of death is at issue, is significantly greater where self-defense is claimed.

This Court has also recognized that, "[Appellant] suffered no prejudice from the admission of these pictures. The victims died from multiple gunshot wounds. The autopsy photographs were introduced to illustrate the coroner's testimony and provide differing perspectives of the victims and their numerous wounds. Thus, several photographs of each victim were necessary in order to show all of the entry and exit wounds. The photographs in this case are neither repetitive nor cumulative in number, and are non-prejudicial." *Awkal* 333.

As the 12th District Court of Appeals recognized, "the photographs relating to the angle and location of the bullet holes were important to prove specific intent because of appellant's claim that he acted in self-defense. The photographs and oral testimony relating to the entry and exit wounds tended to refute any claim of self-defense and, therefore, had a high probative value which outweighed their prejudicial impact." *State v. Barnette*, 12th Dist. Butler No. CA2012-05-099, 2013-Ohio-990, ¶ 33 citing *State v. Taylor*, 8th Dist. No. 65711, 1995 Ohio App. LEXIS 4998, 1995 WL 663267, * 15 (Nov. 9, 1995), *affirmed*, 78 Ohio St.3d 15, 1997 Ohio 243, 676 N.E.2d 82 (1997).

Here, even excepting Nicholson's self-defense argument, which dramatically increased the importance of the details of the victims' wounds and the crime scene, the photographs as well as the video had great probative value in demonstrating both purposeful death as well as prior calculation and design. The location of the wounds on the bodies of each victim and the details

about where they entered and exited were of great probative value in allowing the jury to determine whether the shootings were meant to cause purposeful death as well as whether they were done with prior calculation and design.

There was no stipulation to the cause or manner of death of either of the two victims in this case. The State had to prove cause and manner of death for each victim. Additionally, the State had the burden to prove prior calculation and design in the each of the murders, as one element of the aggravated murder charge in the corresponding counts of the indictment. The State also had the burden to prove that gunshot wounds to the backs of the victims were not fired in self-defense by Nicholson.

These photographs were admissible to depict the injuries to each victim. This Court has held that autopsy photographs are admissible to depict “the number, type[,] and placement of the wounds, and the cause of death.” *State v. Allen*, 73 Ohio St.3d 626, 637, 653 N.E.2d 675 (1995). The placement and nature of the wounds were important to show the prior calculation for the murder of both M.L. and Giselle.

The photographs also corroborated the statements of the surviving victim, Polanco, regarding the circumstances of the murders. They demonstrated the accuracy of the statements made by Polanco, regarding the locations of the victims and Nicholson at the time of the shooting. For instance, as Polanco described, the victims were outside the house when Nicholson went to the door with his gun and shot them. The photographs and videos from the scene ensured that Nicholson could not claim that either victim was pursuing him at the time he shot them to death. Instead, Nicholson obtained his gun and went to the victims outside the house to kill them. This was consistent with Polanco’s statement that they tried to run away, but they did not have a chance.

Tr. 3674. The autopsy photos demonstrated that the shootings were consistent with the accounts of the murders provided by Polanco.

Additionally, the photographs demonstrated that the victims were shot while they were not threatening to anybody (M.L. and Giselle were each shot exclusively in their backs and in one arm each). The photographs demonstrated that each victim was shot in positions where they were not dangerous to Nicholson. This was necessary due to Nicholson's self-defense argument that suggested he needed to shoot them. Each victim was shot while moving away from Nicholson, and the photographs in question were necessary to establish this.

The State argued at trial that Nicholson shot the victims with prior calculation and design to kill them. The State also argued that several of the bullets were shot into the victims' torsos, which is probative to Nicholson's intent to kill them. The fact that both victims were shot in vital areas, and the subsequent injuries they suffered, were highly relevant to show the existence of prior calculation and design and intent to kill, respectively. *See State v. Kinley*, 2d Dist. Clark No. 2826, 1993 Ohio App. LEXIS 3272, *65 (June 24, 1993) ("Photographs which reveal the number and location of stab wounds are relevant to the issue of criminal intent").

Beyond the probative value based on the burden of proof facing the state under the indictment, Nicholson's self-defense argument added significantly more probative value to the details surrounding the crime scene and gunshot wounds. By arguing self-defense, Nicholson placed a greater emphasis on where the victims were shot, how many times they were shot, and where he and the victims were positioned at the time of the shooting. The vital importance of the coroner's testimony as well as the circumstances at the scene was owed in no small part to Nicholson's claim that he shot the victims several times each in their backs out of self-defense.

Nicholson makes no salient arguments to the alternative. He misleadingly argues that the photographs and video were not necessary because “the cause and manner of death were not contested.” Nicholson Br. 151. This is meaningless when the full case is considered. At the outset, Nicholson did not stipulate to causing the deaths of the victims, so regardless of his testimony after the State’s case in chief, the State had the burden of proving both cause and manner of death. Much more than this, however, Nicholson argued self-defense, placing the nature and number of victims’ wounds and the specific circumstances of the shooting at the center of the controversy in the case. Nicholson’s avoidance of the self-defense claim in an attempt to misrepresent the immense probative value of these photographs and videos may be most stark because this entire proposition, which references the details of the case extensively, avoids so much as a single mention of Nicholson’s self-defense claim. Nicholson Br. 148-54. This is especially telling when Nicholson did not avoid mention of his self-defense claim in any other of his first six propositions of law. Nicholson Br. 65-167.

Nicholson interestingly seems to acknowledge the failure of his argument at one point, stating, “[p]ut simply, there was no reason why far fewer photos could have been introduced.” Nicholson Br. 152.

C. Nicholson fails to specifically identify most of the photographs and videos as gruesome, cumulative or not probative and fails to articulate any basis by which this Court can conclude as much

The majority of Nicholson’s arguments criticize on a general level all of the photographs presented. Nicholson Br. 151-154. Albeit, the only specific photographic exhibits Nicholson identifies are Exhibits 633-636. Nicholson Br. 152. He argues that these were “particularly disturbing and wholly unnecessary given that the defense was not contesting the cause of death of M.L.” *Id.* This argument ignores the fact that “the state is entitled to offer evidence showing the

cause of death, even if the cause of death is uncontested, to give the jury an "appreciation of the nature and circumstances of the crimes." *State v. Chatmon*, 8th Dist. Cuyahoga No. 99508, 2013-Ohio-5245, ¶ 41, citing *State v. Evans*, 63 Ohio St. 3d 231, 251, 586 N.E.2d 1042 (1992). As addressed above, Nicholson's argument also conspicuously omits any reference to his self-defense claim, which is refuted by the circumstances of the shooting, including the numbers of shots fired into the back of each victim and the proximity of the victims' bodies to Nicholson.

Nicholson's argument is further deficient in that he "failed to identify any particular photograph as gruesome, cumulative or not probative and he fails to articulate any basis by which we can conclude as much. *See App.R. 16(A)(7)*. As such, he has failed to demonstrate plain error on the record." *State v. Johnson*, 8th Dist. Cuyahoga No. 109041, 2020-Ohio-5255, ¶ 98 (discretionary appeal not allowed by *State v. Johnson*, 2021-Ohio-717). Nicholson calls the autopsy photographs generally repetitive, without identifying any particular photographs at issue. Nicholson Br. 152. This fails to satisfy App. R. 16 and does not satisfy a plain error standard.

Nicholson's argument, apart from failing to satisfy the appellate rules and explain which photographs he deemed repetitive, gruesome, or not probative, also makes no meaningful argument against their relevance. Nicholson Br. 148-54. He repeats, to no effect, that the cause of death was not contested by the defense. Nicholson Br. 151-52. As addressed above, there is no legal authority supportive of Nicholson's argument here and perhaps more importantly, he claimed self-defense, placing great importance on the specific details of the shooting and especially on the injuries to the victims and the specific locations where they were shot, which are demonstrated by the places they fell as well as the blood and other evidence remaining on the crime scene.

Nicholson also includes that defense counsel did not ask any cross-examination questions of the deputy medical examiner, mistakenly asserting that this should be assumed as support for his

argument, when it is not. Nicholson Br. 152. Because the medical examiner's testimony totally undermined Nicholson's self-defense strategy, defense counsel likely wished to avoid any further information from this witness, and also to avoid and redirect testimony, which could have only further harmed Nicholson's chances of convincing a jury that the victims were shot thirteen times in self-defense.

D. Nicholson makes no more meritorious argument against the admission of the body camera video.

Nicholson includes in this proposition that he also believes the body camera footage from three officers at the crime scene was unduly prejudicial. Excepting only the life-saving measures portion of Officer Sabelli's footage, no error was preserved for review among exhibits 321A, 322A, and 323A. Besides the lack of preservation of issue in the admission of these exhibits, Nicholson provides no case law suggesting that they should be treated just as photographs are in the evaluation by a higher court. Nicholson Br. 148-54.

Just as with the photographs Nicholson fails to demonstrate any error in the admission of these videos. His argument is made hollow by its complete omission of his self-defense claim, which made the details of the scene essential. His claim that 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 the trial" is obviously false. Nicholson Br. 152. There was no emphasis made as to the gore at the scene or on victim impact evidence, but rather the details of the scene were provided to the jury, in large part out of necessity for the jury to understand the close range in which the victims were shot by Nicholson, which fully refuted his self-defense claim. By avoiding his claim entirely, Nicholson fails to accurately address the relevance and probative values of these videos and also

fails to meaningfully support his own arguments which are instead made with an inaccurate accounting of the case.

E. Conclusion

Nicholson cannot meet a plain error standard in this proposition, and he makes no meritorious argument to do so. He generally avoids the proper standard until the end of his argument and entirely avoids the self-defense argument which added pivotal importance to this now-disputed evidence. For these reasons, the fourth proposition of law should be overruled.

Response to Proposition of Law V: A trial court does not err and there is no deprivation of due process or fair trial rights when it overrules defendant's request to instruct the jury on a lesser included offense.

Nicholson requested a voluntary manslaughter instruction, but chose to base his defense, which included his own testimony, around self-defense, which is generally not compatible in the districts in which Nicholson asks this Court to look, and are incompatible in the district in which the trial took place. Nicholson did not present sufficient evidence to bring on sudden passion or a sudden fit of rage. Specifically, when he shot each victim in the back several times, he was not under provocation that would be sufficient to arouse the passions of an ordinary person beyond the power of his or her control. He failed this objective aspect of the test. Beyond that, however, his testimony at trial demonstrates that he could not satisfy the subjective portion of the test. His testimony exclusively suggested that he was in fear for his life, supportive of the self-defense instruction that was provided, and not that he was under a sudden fit of rage that would have supported the lesser included offense instruction.

A. Standard of Review

When reviewing a trial court's jury instruction, the proper standard of review is whether the refusal to give a requested instruction constituted an abuse of discretion under the facts and circumstances of the case. *State v. Sims*, 8th Dist. Cuyahoga No. 85605, 2005-Ohio-5846, ¶12. "Even though an offense may be a lesser included offense, a charge on the lesser offense is required 'only where the evidence presented at trial would reasonably support **both** an acquittal of the crime charged **and** a conviction upon the lesser included offense.'" *State v. Willis*, 8th Dist. Cuyahoga No. 99735, 2014-Ohio-114 citing *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶192. (emphasis added). In deciding whether to instruct the jury on a lesser-included offense, the trial court must view the evidence in light most favorable to the defendant. *Id.* However, a lesser-included offense instruction is not warranted every time some evidence is presented, rather a court must find sufficient evidence that would allow a jury to reasonably reject the greater offense and find the defendant guilty of the lesser-included offense. *Id.* citing *State v. Shane*, 63 Ohio St.3d 630, 632-33, 590 N.E.2d 272 (1992). Despite Nicholson's phrasing of the proposition of law, referring to voluntary manslaughter a "lesser included offense," "[v]oluntary manslaughter is an inferior degree of murder, for "'its elements are * * * contained within the indicted offense, except for one or more additional mitigating elements * * *.'" *State v. Shane*, 63 Ohio St.3d 630, 632, 590 N.E.2d 272 (1992) (internal citations omitted).

"'Abuse of discretion' has been described as including a ruling that lacks a 'sound reasoning process.' AAAA *Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). A review under the abuse-of-discretion standard is a deferential review." *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14. "It is not sufficient for an appellate court to determine that a trial court abused its discretion simply

because the appellate court might not have reached the same conclusion or is, itself, less persuaded by the trial court's reasoning process than by the countervailing arguments. *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14 citing *AAAA Ent., Inc.* “The term ‘abuse of discretion’ connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

B. The trial court did not abuse its discretion in following the precedent of its appellate court

The trial court followed its appellate court’s precedent in deciding not to provide a voluntary manslaughter instruction in addition to the self-defense instruction in this case. Tr. 4267-70. A decision based on such precedent cannot amount to an abuse of discretion.

This Court has provided that “[t]he doctrine of stare decisis generally compels a court to recognize and follow an established legal decision in subsequent cases in which the same question of law is at issue.” *State v. Henderson*, 161 Ohio St.3d 285, 2020-Ohio-4784, 162 N.E.3d 776, ¶ 28 (internal citations omitted). Further, this Court has held that “Stare decisis has two aspects: (1) that in the absence of overriding considerations courts will adhere to its [sic] own previously announced principles of law; and (2) that courts are bound by and must follow decisions of a reviewing court that has decided the same issue”) *Rural Health Collaborative of S. Ohio, Inc. v. Testa*, 145 Ohio St.3d 430, 2016-Ohio-508, 50 N.E.3d 486, ¶ 38 (internal citations omitted).

Here, Nicholson concedes the Eighth District’s longstanding holding that “an instruction on voluntary manslaughter and self-defense is erroneous because the two legal theories are incompatible.” Nicholson Br. 157; *State v. Jefferson*, 2012-Ohio-2387, 971 N.E.2d 469, ¶ 26 (8th Dist.) citing *State v. Williamson*, 8th Dist. No. 95732, 2011 Ohio 4095, citing *State v. Loyed*, 8th Dist. No. 83075, 2004 Ohio 3961. See also *State v. Brown*, 8th Dist. No. 93007, 2010 Ohio 2460.

It was based upon this binding precedent that the trial court therefore declined to give the voluntary manslaughter instruction. Tr. 4267-70.

Nicholson fails to make an argument for abuse of discretion and instead asks “this Court [to] denounce the steadfast rule of the Eighth District Court of Appeals.” Tr. 158. This is not an analysis under abuse of discretion, a deferential standard, of the trial court’s choice to follow the precedent of its appellate court. This is because under the appropriate standard, Nicholson has no argument. Nicholson avoids entirely the trial court’s reasoned approach in following the longstanding holding on the issue in Eighth District, instead making an irrelevant argument to this Court to “denounce” the Eighth District’s rule. Nicholson Br. 158. Nicholson cannot show that the trial court’s decision to follow longstanding precedent was arbitrary, unreasonable, or unconscionable. *Adams* 157.

For this reason alone, Nicholson fails to demonstrate an abuse of discretion, and this proposition of law should be overruled.

C. Regardless, the evidence provided at trial did not support adequate provocation

Alternatively, were the trial court’s decision to follow binding precedent not sufficient to determine that there was no abuse of discretion, the evidence at trial did not support adequate provocation.

There was scant evidence in this case that either victim seriously provoked Nicholson. “[P]rovocation, to be serious, must be reasonably sufficient to bring on extreme stress and the provocation must be reasonably sufficient to incite or to arouse the defendant into using deadly force. In determining whether the provocation was reasonably sufficient to incite the defendant into using deadly force, the court must consider the emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time.” *State v. Mack*, 82 Ohio

St.3d. 198, 200 694 N.E.2d 1328 (1998), quoting *State v. Deem*, 40 Ohio St.3d. 205, 533 N.E.2d 294 (1988).

This Court has employed a two-part test in determining whether provocation is reasonably sufficient. *See State v. Shane*, 63 Ohio St.3d 630, 634, 590 N.E.2d 272 (1992). “First, an objective standard must be applied to determine whether the alleged provocation is reasonably sufficient to bring on a sudden passion or fit of rage. That is, the provocation must be ‘sufficient to arouse the passions of an ordinary person beyond the power of his or her control.’ If this objective standard is met, the inquiry shifts to a subjective standard, to determine whether the defendant in the particular case ‘actually was under the influence of sudden passion or in a sudden fit of rage.’” *Mack*, 82 Ohio St.3d at 201, quoting *Shane*, 63 Ohio St.3d at 634-35. “[W]ords alone will not constitute reasonably sufficient provocation to incite the use of deadly force in most situations.” *Shane*, 63 Ohio St.3d at 637.

“A defendant is not entitled to an aggravated assault instruction simply because ‘some evidence’ shows that the defendant may have acted under serious provocation.” *Noble*, 2017-Ohio-1440 at ¶ 29, citing *Shane*, 63 Ohio St.3d at 633. “To require an instruction . . . every time ‘some evidence,’ however minute, is presented going to [serious provocation] would mean that no trial judge could ever refuse to give” the jury an aggravated assault instruction as an inferior degree to felonious assault. *Id.*

In the present case, Nicholson was not injured by anything that occurred on September 5, 2018, based on photographs and the booking report presented at trial. Exhibits 306, 422. Nicholson had not interacted at all with Giselle before shooting her in the back. Additionally, Nicholson endured, at most, anger from M.L., regarding Nicholson’s treatment of M.L.’s mother, Polanco. For this anger, which led Nicholson to no harm, to place an ordinary person beyond the power of

his or her control would be to lower the bar for society far too low. An ordinary person would not have their passions aroused beyond the power of his or her control when confronted by the child of their partner about potential abuse of that child's mother.

Beyond failing the objective standard, the evidence could not meet the subjective standard. The evidence on which Nicholson relies to suggest that he was under serious provocation is ancillary and unconvincing. His statements made hours after the shooting suggested remorse, more than that he was under the influence of sudden passion or fit of rage. More importantly, at trial Nicholson testified extensively and did so to build a theory of self-defense, adding nothing that suggested he was under the influence of sudden passion or fit of rage. He had the opportunity to fully explain his actions in shooting M.L. and Giselle to death and explained it as self-defense, omitting any details supporting serious provocation.

The lack of evidence supporting either standard is demonstrated most plainly by Nicholson's statement of the evidence he believes supported the instruction. Nicholson Br. 156-61. Here, he leans almost entirely on Lt. Vargo's phone call, testimony from Det. Biegacki, and the State's closing arguments for his evidence of his actions as under the influence of sudden passion or fit of rage. This evidence satisfied neither standard. None of the testimony from Vargo cited by Nicholson could support the objective standard, as it related to his retrospective thoughts on what he had done. Tr. 2763-69, 2776-77, 2780, 2792-93. Similarly, Det. Biegacki's testimony related to Nicholson being on a "rampage," which does not relate to the objective standard at all. Tr. 3893, 4297. Nicholson's citation to Polanco's testimony that stated that Nicholson was "extremely angry" has the same deficiency; it does not support the objective standard in any way. Nicholson Br. 156-57; Tr. 3710-11. Nicholson then repeatedly goes to the State's arguments to support his evidentiary burden, demonstrating his inability to do so with actual evidence.

Nicholson Br. 157, 160. This non-evidentiary argument that the incident began because Nicholson was upset from a text message about Terricko Marshall is mistaken for multiple reasons, none more apparent than that this was argument, not evidentiary support. Of course, this argument does not support the objective burden and also fails to suggest Nicholson was acting under sudden passion or a fit of rage.

Nicholson's attempt to rely on the State's other witnesses and even arguments to support his evidentiary burden, while avoiding citation to his own extensive testimony, demonstrates the failure of his argument. Nicholson Br. 155-61. He testified in a conspicuous effort to support a self-defense claim, leaving the record devoid of the necessary evidence to support an inferior offense instruction under either of the mutually required objective and subjective standards. Nicholson simply fails to provide the evidence that objectively and subjectively supported a sudden passion or fit of rage because it was not present at trial. Therefore, apart from his failure to properly demonstrate the trial court's error by following the Eighth District's longstanding holding, he also fails to demonstrate that it caused any issue in this case.

Response to Proposition of Law VI: A trial court does not commit plain error to deprive a defendant any of his due process or fair trial rights under the United States or Ohio Constitutions when it provides an accurate and complete instruction on Ohio's self-defense law without defense objection.

A. Standard of Review

In his sixth proposition of law, Nicholson raises another proposition that was not preserved for this Court's review, and in which he has waived all but plain error. He concedes as much, although he delays provision of this standard until the end of his argument. Nicholson Br. 166. The jury in this case, nevertheless, received an appropriate instruction on self-defense, and Nicholson cannot demonstrate plain error.

B. The instruction was properly given

Nicholson cannot demonstrate plain error here. Notably, he fails to establish that the instructions contained any error.

The trial court properly instructed the jury that:

The defendant is allowed to use deadly force in self-defense. If you find that the evidence was presented that tends to support the finding that the defendant used deadly force in self-defense, the State must prove beyond a reasonable doubt that the defendant did not use deadly force in self-defense. Self-defense means that, A, the defendant was not at fault in creating the situation giving rise to the death of M.L. and Giselle Lopez. And, B, the defendant had reasonable grounds to believe and an honest belief, even if mistaken, that he was in imminent danger of death or great bodily harm. And, C, the defendant did not violate any duty to retreat to avoid the danger. And D, the defendant used reasonable force. Deadly force means any force that carries with it a substantial risk that it will proximately result in the death of a person. Substantial risk means a strong possibility, as contrasted with a remote or even a significant possibility, that a certain result may occur or that certain circumstances may exist. Duty to retreat. The defendant had no duty to retreat unless he was at fault in creating the situation giving rise to the deaths of M.L. and Giselle Lopez. In deciding whether the defendant had reasonable grounds to believe and an honest belief that he was in imminent or immediate danger of death or great bodily harm, you must put yourself in the position of the defendant with his character, his knowledge, or lack of knowledge, and under the circumstances and conditions that surrounded him at that time. You must consider the conduct of M.L. and Giselle Lopez in deciding - - and decide whether their acts and words caused the defendant to reasonably and honestly believe that he was in danger of death or great bodily harm. If the defendant used more force than reasonably necessary and if the force used is greatly disproportionate to the apparent danger, then the defense of self-defense is not available. 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. 4258-61.

This is inarguably a correct recitation of self-defense. Nicholson's argument to the contrary

is unsupported by Ohio law, and claims without support that the instructions failed to clearly inform the jury as to findings and to accurately reflect Ohio’s self-defense common law regarding the revival of the right to use self-defense to an “initial aggressor.” Nicholson Br. 164. Neither of these criticisms demonstrate error.

In the first argument, Nicholson claims that, “by defining what self-defense is, the instructions impliedly suggest that self-defense is cumulative, meaning that the State could satisfy its burden of proof merely by disproving one of the four common law self-defense elements enumerated by the trial court.” Nicholson Br. 164. Nicholson fails to explain the issue here, however, after stating just one page earlier in his brief that “Ohio’s trial and appellate courts have interpreted the self-defense statute, R.C. 2901.05(B)(1), as p[la]cing the burden on the prosecution to disprove at least one of the common law elements of self-defense beyond a reasonable doubt.” Nicholson Br. 163. There, Nicholson fails to demonstrate a plain error in the implied suggestion of the trial court.

In the second argument, Nicholson argues that “created the situation” is “extremely vague and broad.” Nicholson Br. 164. His argument here is a failure, as he relies on *State v. Melchior*, 56 Ohio St.2d 15, 21, 381 N.E.2d 195 (1978) and *Melchior v. Jago*, 723 F.2d 486, 493 (6th Cir.1983), which is unsupportive of his argument. In *State v. Melchior*, this Court held that:

[e]ven 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.

State v. Melchior 21.

“In reviewing *Melchior*, the United States Sixth Circuit Court of Appeals found that “[i]n order for an initial aggressor to withdraw and regain the right to act in self-defense, he or she must

clearly manifest a good faith intention to withdraw from the affray and must remove any just apprehension of fear the original victim may possess.” *State v. Ferrell*, 2020-Ohio-6879, 165 N.E.3d 743, ¶ 28 (10th Dist.) citing *Melchior v. Jago* 493. The facts of the present case demonstrate that when Nicholson withdrew, he went to his bedroom and obtained a gun. Rather than attempting to call the police or to avoid the victims, he went to where they were, outside the home, and shot them several times each in their backs. This was not a fair announcement of his desire for peace, nor did going to the victims with a loaded gun in hand and shooting them in their backs “remove any just apprehension of fear” the victims possessed.

In view of the evidence in this case, the trial court’s instructions cannot be deemed error. Nicholson did not demonstrate a lack of clarity or an inaccuracy in the instruction. In a similar case, the 10th District determined that “the evidence at trial did not support an additional instruction on the revival of self-defense for an initial aggressor, and, thus, the revival instruction would not have affected the outcome of Ferrell’s trial.” *State v. Ferrell*, 2020-Ohio-6879, 165 N.E.3d 743, ¶ 31 (10th Dist.). In that case, the 10th District found that the appellant had not withdrawn. *Ferrell* ¶ 29. Similarly, in the present case, when Nicholson left the altercation, he went to his bedroom and obtained a loaded gun. From that point, he did not try to call the police or leave the house on foot; he went to where the victims were and shot them in their backs. This evidence does not demonstrate a withdrawal. Additionally, the 10th District recognized that, “although Ferrell asserts that placing his gun against DiPenti served as his intention to retreat from the initial encounter, his argument ignores that by brandishing his gun, Ferrell only escalated the situation rather than removed any just apprehension of fear DiPenti possessed. *See, e.g., State v. Campbell*, 10th Dist. No. 07AP-1001, 2008-Ohio-4831, ¶ 25-27 (defendant did not act in self-defense where, after becoming involved in a fight with people at a party, defendant ran to a van, retrieved his gun, and

started firing shots, and "[t]he weight of the evidence indicates that [defendant] was the aggressor and escalated the confrontation by retrieving his shotgun and being the first to shoot")." *State v. Ferrell*, 2020-Ohio-6879, 165 N.E.3d 743, ¶ 30 (10th Dist.) citing *Campbell* ¶ 25-27. Again, in this case, Nicholson escalated the situation by getting a gun, returning to the victims, who were now outside the house, and shooting them in their backs.

C. Conclusion

Nicholson has not demonstrated any error, much less plain error, with regard to the self-defense instructions provided by the trial court without objection. His sixth proposition of law should therefore be overruled.

Response to Proposition of Law VII: A trial court does not err when it admits testimony about the victims during the culpability phase of a death penalty trial.

A. Standard of Review

In his seventh proposition of law, Nicholson raises another proposition that was generally not preserved for this Court's review, and in which he has waived all but plain error. He concedes as much, although he delays provision of this standard until late in the argument. Nicholson Br. 179. Even where the issue was preserved, this Court has held that "'[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Lyles*, 42 Ohio St.3d 98, 99, 537 N.E.2d 221 (1989) citing *State v. Sage* (1987), 31 Ohio St. 3d 173, 31 OBR 375, 510 N.E.2d 343, paragraph two of the syllabus. This Court has further provided that "[w]here error in the admission of evidence is alleged, this court has held that "'* * * unless * * * [the trial court] has clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere.'" *State v. Lyles*, 42 Ohio St.3d 98, 99, 537 N.E.2d 221 (1989), citing *State v. Maurer* (1984), 15 Ohio St. 3d 239, 265, 15 OBR 379, 401, 473 N.E.2d 768, 791.

First, the State contends that most, if not all, of the testimony Nicholson complains of was properly admitted evidence relating to facts attendant to his offenses. True victim-impact evidence, pursuant to the terms of R.C. 2930.13, 2930.14 and 2947.051, shall be considered by the trial court prior to imposing sentence upon a defendant, not during the guilt phase of the proceedings. *State v. Fauntenberry*, 72 Ohio St.3d 435, 439-440, 650 N.E.2d 878, 882-883, 1995-Ohio-209. Evidence relating to the facts attendant to the offense, however, is clearly admissible during the guilt phase. *Id*; see also *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 98 (“[e]vidence relating to the facts attendant to the offense is ‘clearly admissible’ during the guilt phase, even though it might be characterized as victim-impact evidence.”). And evidence which depicts both the circumstances surrounding the commission of a murder and also the impact of the murder on the victim’s family may be admissible during both the guilt and the sentencing phases. *Fauntenberry* at 882-883.

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

Criminal Rule 52(A), which defines harmless error, provides: “[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.” In a review for harmless error, the State has the burden of proving that the error did not affect the substantial

rights of the defendant. *Morris*, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 23, citing *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, ¶ 15. Whether the error affected the substantial rights of the defendant has been interpreted to require that the error must have been prejudicial. *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761, 789 N.E.2d 222, ¶ 7, citing *United States v. Olano*, 507 U.S. 725, 732-733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). For the error to have been prejudicial, it must have affected the outcome of the trial court proceedings. *Id.*

Nicholson begin this proposition by discussing the testimony of two witnesses that did testify some information about the victims over defense objection. Nicholson Br. 168-170. The rest of the testimony he raises as issue was not preserved for review. Nicholson Br. 171-181.

B. The testimony of Henry Billingslea was not improper victim-impact testimony

Victim-impact testimony is admissible during the guilt phase of the proceedings only when it is relevant to the commission of the offense and it is not overly emotional. *State v. Graham*, 2020-Ohio-6700, ¶ 136. Billingslea’s testimony was in no way emotional, and Nicholson makes no argument to the contrary, therefore, if it was relevant, it was admissible. It was indeed relevant.

Billingslea testified as to how he knew M.L., including how well he knew M.L., as best friends. Tr. 3565-67. All of this information was relevant and necessary for the jury to understand how Billingslea acquired the information he offered and importantly to explain the significance of the interactions he did or did not see between Nicholson and the victims. As an obvious example, Billingslea’s description of the interactions he witnessed between M.L. and Nicholson as being “brief, like they didn’t even live together” were informed by the fact that Billingslea knew M.L. well, and knew how he interacted with other people he lived with. Tr. 3570. By explaining that

they were best friends, and that he knew both Polanco and Giselle as well, Billingslea provided important and even necessary context for his understanding of M.L.'s poor relationship with Nicholson. Tr. 3567-68. Without such details, the trier of fact would have been in a position of potentially thinking that M.L. was distant from everyone he lived with, instead of just Nicholson.

Billingslea's testimony and information about his closeness to M.L. was essential to providing context and perspective for almost all of his testimony. For example, the fact that Billingslea didn't know about M.L.'s girlfriend and the private nature explained by that detail, was only possible when the jury was made aware of how well he knew M.L. Tr. 3575-77. The deteriorating relationship with Nicholson that Billingslea explained would also have been inexplicable if Billingslea had never established how well he knew M.L. Tr. 3570-71.

Generally, Billingslea's testimony was highly relevant to the relationship between M.L. and Nicholson, which was inarguably relevant to Nicholson's eventual murder of M.L. As described above, Billingslea, speaking as friend that knew M.L. for years and knew his entire family, offered important information about how M.L. got along with his friends and peers, and how that contrasted with his relationship with Nicholson, which was a key issue in the case.

Nicholson makes no argument that this testimony was overly emotional, and therefore, in failing to demonstrate that it was not relevant to the murders, he has failed to demonstrate error. Regardless of error, such error would not have been reversible, as discussed below.

C. The testimony of Kristin Bailey was not improper victim-impact testimony

Kristin Bailey, like Billingslea, also provided her background of knowledge on the situation by explaining her relationship with Giselle, including their closeness. Tr.3841-43. Such details provided essential information to validate and qualify the testimony about Giselle's relationship with Nicholson. Tr. 3843-45. It was based on her closeness to Giselle and her

awareness of Giselle's life that Bailey's testimony about Giselle's relationship with Nicholson was understood as valuable.

As with Billingslea's testimony, Bailey's testimony related to the relationship of the victims to Nicholson and to the holes in the walls that each witness observed. These witnesses were providing this testimony as visitors to the home providing an outside perspective. Tr. 3843-45. Bailey provided that sometime after 2016 began, Nicholson and Giselle "typically did not really speak to each other. He may ask her lightweight conversation. And ask me, you know: How are you doing? Things like that. But other than that, that was it." Tr. 3844. Additionally, Bailey provided that walls in the kitchen and in the living room by the stairwell at 4838 East 86th St. seemed to have been patched and re-plastered. Tr. 3845.

Nicholson makes no argument that this testimony was overly emotional, and therefore, in failing to demonstrate that the testimony was not relevant to the murders, he has failed to demonstrate error. Regardless of error, such error would not have been reversible, as discussed below.

D. Even if the testimony of Billingslea or Bailey was irrelevant it did not amount to reversible error

This Court has provided that where testimony is admitted in error, further analysis is required to determine whether it constitutes reversible error. *State v. Graham*, 2020-Ohio-6700, ¶ 120 ("Having concluded that the trial court erred in admitting Mr. Massa's testimony, we must determine whether the testimony resulted in reversible error.") This Court further provided, "[t]o 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. Graham*, 2020-Ohio-6700, ¶ 120 citing *State v. Arnold*, 147 Ohio St.3d 138, 2016-Ohio-1595, 62 N.E.3d 153, ¶ 50 (lead opinion).

In *Graham*, this Court also acknowledged that it “has yet to adopt or set a standard in determining whether the admission of victim-impact testimony resulted in error. In making this determination in the past, we have generally simply described the testimony and then stated whether or not the testimony was overly emotional and/or resulted in error.” *Graham* ¶ 124. This Court further recognized that “[i]n fact, it would not be prudent for us to establish a rigid set of factors to employ in evaluating this testimony, given the variables present in each case. This is apparent from our review of our precedent and that of our sister courts across the country.” *State v. Graham*, 2020-Ohio-6700, ¶ 125.

This Court then helpfully provided the following factors relevant to making the determination of whether the admission of victim-impact testimony resulted in error:

We find the following factors relevant to making the determination in this case: **(1) the length of the victim-impact testimony**, see *Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, at ¶ 238 (witnesses *briefly* summarized the victims' lives); *Lambert v. State*, 675 N.E.2d 1060, 1065 (Ind.1996) (victim-impact testimony that spanned 29 transcript pages was not brief and the error in admitting it was not harmless); *State v. Taylor*, 669 So.2d 364, 371 (La.1996) (victim-impact testimony took up only 10 pages of a 793-page penalty-phase transcript, and any possible prejudicial effect was diluted by the defendant's presentation of a lengthy and detailed mitigation case); *Malone* at ¶ 60-61 (victim-impact testimony that took up 36 pages of the transcript, 28 pages of which was uninterrupted, detailed narrative, went well beyond the limitations for appropriate victim-impact evidence); **(2) whether witnesses, jurors, and audience members showed physical signs of emotion during the testimony**, see *Reynolds*, 80 Ohio St.3d at 678-679, 687 N.E.2d 1358 (court noted that witness became distraught when [**55] asked about the effect his mother's death had on him, but it found that the victim-impact statement was not overly emotional); *State v. Glassel*, 211 Ariz. 33, 54, 116 P.3d 1193 (2005) (although victim-impact testimony was emotional and caused the witnesses and jurors to cry, it was not unduly prejudicial, because senseless murders create strong emotional responses); *Lawler v. State*, 276 Ga. 229, 232, 576 S.E.2d 841 (2003) (record showed that witnesses and jurors became

emotional during victim-impact evidence but there were no outbursts or displays of emotion that would have unduly prejudiced the defendant); **(3) the detail and depth of the victim-impact testimony with regard to the murder victim**, *see Salazar* at 336 (the case law allowing states to put on evidence providing a glimpse into the victim's life and background is not an invitation to give a replay of the victim's life); *Malone* at ¶ 60 (victim-impact statements were never meant to be eulogies); **(4) whether the victim-impact witness used emotionally charged language**, *State v. Rose*, 231 Ariz. 500, 513, 297 P.3d 906 (2013) (court noted that it did not condone the vengeful language used by the victim-impact witness or her reference to the defendant as a "cop killer"); *Conover v. State*, 1997 OK CR 6, 933 P.2d 904, 920 (statements that the victim was "butchered like an animal" and that the defendant "butchered him" have no place in a victim-impact statement), *abrogated on other grounds*, *Bosse v. Oklahoma*, __ U.S. __, 137 S.Ct. 1, 196 L.Ed.2d 1 (2016); **(5) the number of victim-impact witnesses**, *see Lawler* at 232 (five victim-impact witnesses testified, but because each witness's testimony was brief, the trial court did not abuse its discretion in allowing the testimony); and **(6) our precedent in similar cases involving allegedly overly emotional victim-impact testimony**, *see Wilks* at ¶ 79; *see also People v. Verdugo*, 50 Cal.4th 263, 298, 236 P.3d 1035, 113 Cal.Rptr.3d 803 (2010) (in determining whether victim-impact testimony was admissible, the California Supreme Court compared the testimony to victim-impact testimony that it had found admissible in the past). Clearly, this list is not exhaustive, and it also should not be treated as a checklist. We list these factors merely as matters to be considered.

State v. Graham, 2020-Ohio-6700, ¶ 126

A review of Billingslea and Bailey's testimonies makes plain that Nicholson has not demonstrated a reversible error. None of the *Graham* factors suggest that it did. Considering each factor, all of these factors suggest that any error was not a reversible error.

First, the length of the victim impact testimony, including all of the testimony from Bailey and Billingslea, much of which was not focused on Giselle or M.L.'s personal characteristics or the impact of their murders on their family, was calculated as 20 total pages from roughly 1,696 pages of guilt-phase witness testimony transcript by Nicholson. Nicholson Br. 179-80, *see State v. McKelton*, 148 Ohio St. 3d 261, 2016-Ohio-5735, 70 N.E.3d 508. Comparing this to the cases cited in *Graham*, the testimony is far from too long. Additionally, in reviewing the testimony,

Billingslea's statement of personal characteristics and or the impact of the murders was contained entirely within 5 total pages of transcript, (Tr. 3566-67, 3574, 3576-77) far less than the 14 pages of total testimony counted by Nicholson. Nicholson Br. 179. Similarly, in reviewing the testimony of Bailey, her personal statement of personal characteristics and the impact of the murders was contained entirely within 2 total pages of transcript, (Tr. 3842-43), bringing the total number of pages including any potential victim impact testimony to 7 pages.

Second, the record reflected only that two witness ever showed physical signs of emotion during testimony, including Lt. Petrick and America Polanco. Tr. 2938-39, 3391-93. Nothing in the record suggests that any jurors or audience members ever showed any physical signs of emotion during any testimony. With regard to Lt. Petrick, the Court specifically gave an instruction to disregard the statement of the detective at the request of defense, without objection from the state. Tr. 2938-41. With regard to Ms. Polanco, she became upset when describing the death of two of her children in front of her, prompting a recess that was explained to the jury. Tr. 3391-93. These are the only clear points in the record pointed to by Nicholson to suggest any physical signs of emotion from anyone in the courtroom. Further, Nicholson additionally claims that the instruction of the prosecutor to look up at one point in the transcript suggests that Polanco was upset at another time. This claim appears to be a desperate attempt by Nicholson to find additional areas of physical emotion, as there was nothing more than the instruction to look up, and this instruction did not specifically demonstrate anything, much less physical emotion. Nicholson Br. 173. In sum, of all the testimony placed at issue by Nicholson, the emotion shown by the mother of the victims at one point in the trial and the singular emotional struggle of a police officer at one other point do not weigh in favor of reversible error. Additionally, the fact that there is no suggestion of any juror or audience member showing any physical emotion during the testimony

weighs strongly against reversible error.

Third, the depth at which the victims were described weighs strongly against reversible error. This Court's history is instructive to this point. *see Salazar* at 336 (the case law allowing states to put on evidence providing a glimpse into the victim's life and background is not an invitation to give a replay of the victim's life); *Malone* at ¶ 60 (victim-impact statements were never meant to be eulogies). Here, none of the testimony about either victim could be confused for a replay of their lives, nor could it be confused for eulogies. It was brief information explaining just enough detail to demonstrate that each person existed, was not anti-social or unable to deal with other people as they struggled to with Nicholson, and in M.L.'s case, that he was also a private person. This factor too, does not support reversible error.

The fourth factor, like the third and sixth factors, was not even argued by Nicholson, and does not support reversible error. The witnesses did not use emotionally charged language, and Nicholson fails to even argue that they did. Nicholson Br. 179-80. Therefore, this too weighs against reversible error.

The fifth factor, related to the number of victim impact witnesses, certainly weighs against reversal. This Court has noted in *Lawler* at 232 (five victim-impact witnesses testified, but because each witness's testimony was brief, the trial court did not abuse its discretion in allowing the testimony). Here, Nicholson claims at least six witnesses who offered victim impact testimony at trial, as well as Lt. Petrick. Tr. 180. He acknowledges, but seems to ignore that only two of these witnesses testified over defense objection. He also appears to be including incredibly brief testimony by Vic Sanuk, Connie Allshouse, Terricko Marshall, and Carlos Nieves among the witnesses providing victim impact testimony. Nicholson Br. 171-172. These testimonies, even as recited by Nicholson, appear to reflect the briefest of anecdotes, such as that Giselle was "very

smart” and “was always by her mom’s side, whenever [Carlos] came over.” Tr. 3726. Such brief testimony has clearly been allowed by this Court previously and should be here.

Finally the sixth factor, as addressed throughout this argument, weighs in favor of admission. The testimony at issue here is similar to testimony allowed in other cases affirmed by this Court.

E. The other victim-impact evidence suggested by Nicholson was not preserved for review and Nicholson’s argument appears to use it only to bolster the arguments against Billingslea and Bailey.

As addressed in the previous section, none of the testimony placed at issue by Nicholson constituted reversible error. His argument, however, appears to discuss such evidence, entered without objection to allow a finding that “the victim-impact testimony of [Billingslea and Bailey] was nonetheless prejudicial when considered with the physical manifestations of emotion that did take place during the culpability phase of Mr. Nicholson’s trial.” Nicholson Br. 180. This argument is not based in law and as stated above, the only occurrence of emotion not addressed by the trial court was Polanco’s testimony related to the death of her children, which led to a pause in the trial and was not an issue after that point. Nicholson does not make an argument suggesting that he met a plain error standard, and as is clear on review, there was no plain error regardless.

F. Nicholson’s argument related to the mitigation phase is unsupported by law

Nicholson adds to his argument that he was also prejudiced in the mitigation phase because of the victim-impact testimony from the culpability phase. He provides no law supporting this and includes reference to an ambulance, which was not made known to the jury and therefore could not have influenced his rights. Nicholson Br. 181. He claims without evidence that the testimony “permeated into the mitigation phase of trial.” *Id.* This baseless claim should similarly be overruled.

G. Conclusion

For these reasons, Nicholson's seventh assignment of error is without merit. The testimony was relevant. It was also not overly emotional. Finally, regardless of any slight error, such error was not reversible.

Response to Proposition of Law VIII: The trial court committed no prejudicial error related to voir dire in this case and Nicholson's rights to a fair trial were protected by the adequate voir dire.

Nicholson's eighth proposition of law should be overruled. In it, Nicholson argues that the trial court failed to afford a constitutionally adequate voir dire based on four suggested errors, none of which are supported by law: 1) error for denying defense counsel's request for alternating questioning, 2) undue and unconstitutional reliance on general "follow the law" questions, 3) failure to grant a mistrial because prospective jurors did not understand the two-phase capital trial process and/or essential terms related to that process, 4) error when prospective jurors were erroneously told by the state and court that Nicholson was charged with four counts of aggravated murder during death qualification voir dire. Nicholson Br. 182-96.

In three of these issues, Nicholson fails to demonstrate any error whatsoever. In the fourth, he fails to articulate even a suggestion of how this numerical error could have prejudiced Nicholson, when this initial misstatement was not repeated throughout the trial and when he fails to provide how it could have frustrated the process of determining "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." *State v. Rogers* (1985), 17 Ohio St. 3d 174, 17 Ohio B. Rep. 414, 478 N.E.2d 984, paragraph three of the syllabus, vacated and remanded on other grounds (1985), 474 U.S. 1002, 106 S. Ct. 518, 88 L. Ed. 2d 452, following *Wainwright v. Witt* (1985), 469 U.S. 412,

105 S. Ct. 844, 83 L. Ed. 2d 841.

Nicholson indeed fails to demonstrate that the trial court committed any prejudicial error in this proposition, and it should be overruled.

A. Standard of Review

“The purpose of voir dire is to determine whether a prospective juror has the statutory qualifications to be a juror and is free from bias or prejudice, and to facilitate an ‘intelligent exercise’ of peremptory challenges.” *State v. Madison*, 160 Ohio St.3d 232, 2020-Ohio-3735, 155 N.E.3d 867, ¶ 30, citing *State v. Anderson*, 30 Ohio St.2d 66, 72, 282 N.E.2d 568 (1972). “It is not to indoctrinate jurors or instruct them in the law.” *State v. Madison*, ¶ 30.

A prospective juror may not be excluded for cause simply because the prospective juror expresses reservations about imposing the death penalty. *State v. Madison*, ¶ 87, citing *State v. Keith*, 79 Ohio St.3d 514, 519-520, 1997 Ohio 367, 684 N.E.2d 47 (1997), citing *Witherspoon v. Illinois*, 391 U.S. 510, 520-523, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). But a prospective juror may be excluded for cause if the prospective juror's beliefs about capital punishment “would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.” *Madison*, quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

In *Witherspoon*, the U.S. Supreme Court set forth the rule for juror disqualification in capital cases, recognizing that the Sixth Amendment’s guarantee of an impartial jury confers on capital defendants the right to a jury not “uncommonly willing to condemn a man to die.” *Id.* at 521. But the Court with equal clarity has acknowledged the State’s “strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes.” *Uttecht v. Brown*, 551 U.S. 1, 9, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007). The

Supreme Court thus balanced these interests by determining that only “a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause.” *Id.* A juror may be excused for cause “where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.” *Wainwright v. Witt*, 469 U.S. 412, 425-426, 105 S.Ct. 844, 83 L.Ed. 2d 841.

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

B. Nicholson fails to support his request for alternating questioning

None of Nicholson’s issues demonstrates a failure of the trial court to provide a constitutionally adequate voir dire. Beginning with his unsupported request for alternating questioning, his issues fall short of demonstrating any error, much less any prejudicial error. Nicholson Br. 185-88.

Nicholson’s May 3, 2019 motion requesting alternating questioning was based on a restriction upon the Supreme Court’s general statements regarding the restriction upon inquiries at the request of counsel being “subject to the essential demands of fairness.” *Aldridge v. United*

States, 238 U.S. 308, 310 (1931). He cited nothing requiring alternating questioning and no precedent for the same. When the trial court denied his motion, he added nothing in support of it. Tr. 62. Presently, he again adds no support that the trial court's decision was improper, and his argument that the ordering of the questioning caused him prejudice is hollow. He cites trial counsel's arguments during voir dire, that the outcome would have been different if he had been the first to question Jury No. 33. Nicholson Br. 186; Tr. 524. This speculative thought relies on a belief that the answers of the jurors could not be trusted, or that they could have been changed by defense counsel. This is not supported by the record and suggests a fundamental mistrust of voir dire by Nicholson, more than an issue with this specific decision. Following Nicholson's logic, voir dire is merely a process where jurors are manipulated, and this manipulation is most successfully achieved by whoever has the first word. It is no surprise, then, that Nicholson found no opinion supportive of his premise at the trial level, and he has failed to provide one to this Court.

Contrary to Nicholson's arguments, Ohio's courts including this Court have consistently upheld trial court decisions to deny alternating voir dire. see *State v. Joseph*, 3d Dist. Allen No. 1-91-11, 1993 Ohio App. LEXIS 6334, at *111 (Dec. 23, 1993) ("There is absolutely nothing in the court's refusal to break from tradition and allow alternating voir dire to indicate the court's attitude was unreasonable, arbitrary, or unconscionable.") affirmed by *State v. Joseph*, 73 Ohio St.3d 450, 1995-Ohio-288, 653 N.E.2d 285; see also *State v. Treesh*, 11th Dist. Lake CASE NO. 95-L-057, 1998 Ohio App. LEXIS 4886, at *145 (Oct. 16, 1998) ("Appellant's ninth motion, requesting alternating voir dire, was also properly overruled.") Appellant ignores this precedent, which he failed to confront before the trial court and omitted before this Court.

In this issue, Nicholson presents no error, much less any precedent. The trial court properly

denied an unsupported request, and Nicholson's arguments suggesting that order of questioning controlled the outcome of voir dire are not supported by law or fact.

C. Nicholson fails to demonstrate that "follow the law" questions were improper

The Due Process Clause requires fair and impartial jurors "to the extent commanded by the sixth amendment." *Morgan v. Illinois*, 504 U.S. 719, 727, 112 S. Ct. 2222, 119 L.Ed.2d 492 (1992). While voir dire exists to protect that right, nothing permits a defendant to confuse the jury or try to persuade jurors to commit to vote a certain way. "*Morgan* does not require that a capital defendant be allowed to determine at *voir dire* what a prospective juror's sentencing decision will be if presented with a specific state of evidence or circumstances." *Richmond v. Polk*, 375 F.3d 309, 310 (4th Cir. 2004).

Nicholson improperly suggests without supporting authority that follow the law questions were improper. Here, he misinterprets the Supreme Court's holding in *Morgan*, which does not prohibit "follow the law" questions. Nicholson Br. 184. "*Morgan* contains no prohibition against such questioning; rather, it requires that, in evaluating a prospective juror's ability to be impartial, more detailed questioning of prospective jurors beyond such simple questions must be allowed." *State v. Garza*, 216 Ariz. 56, 163 P.3d 1006, ¶ 25. Here, the trial court inquired and permitted inquiry consistent with *Morgan* to determine if the jurors were predisposed to vote for the death penalty without considering mitigation. This Court has recognized the importance that a juror demonstrate an ability to follow the law, stating, "[j]urors subject to challenge under *Witherspoon* because they refuse to follow the law not only render the jury impartial for the penalty phase, but also for the guilt phase, of the trial as well." *State v. Jenkins*, 15 Ohio St.3d 164, 188, 473 N.E.2d 264 (1984)

Nicholson's entire argument here is based on a misreading of *Morgan* and fails to explain how the State's or the Court's questions related to whether prospective jurors would follow the law caused him any prejudice. Nicholson Br. 188-191. Pursuant to *Morgan*, such questions are not improper, and Nicholson fails to support his argument that such questioning was "problematic because it is merely superficial. Most venirepersons would be unwilling to tell the court and/or the State that they are unwilling to follow the law. Nicholson Br. 190-91. This argument is unsupported by case law or fact.

Instead, nothing in the record suggests that the venirepersons were dishonest with the court or the State. More importantly, nothing suggests that Nicholson was prevented from asking questions he found more appropriate or searching, if he was interested in demonstrating that the State's questions were not "meaningful or effective." Nicholson Br. 190. Here again, Nicholson fails to demonstrate an error, much less any prejudice.

D. Nicholson fails to demonstrate that the jurors lacked such an understanding of the process before voir dire that a mistrial was appropriate

In the third issue raised under this proposition, Nicholson argues that many prospective jurors lacked the necessary understanding of the capital trial process and essential terms like "aggravating circumstances" and "mitigating factors." Nicholson Br. 191. Here again, Nicholson fails to demonstrate any error, much less a prejudicial error.

This Court has instructively provided that there is no error in voir dire due to "the trial court's failure to define the terms "aggravating circumstances" and "mitigating factors." But "[a]t the early stage of a trial, the trial court is not required to completely instruct the jury, for example, by defining mitigation." *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 202. This applies to aggravating circumstances as well." *State v. Madison*, 160 Ohio St.3d 232, 2020-Ohio-3735, 155 N.E.3d 867, ¶ 39.

Trial counsel ignored this court's precedent in his request for a mistrial. Tr. 853-55. Here, Nicholson fails to even address it. Instead, Nicholson focuses on the discourse between prospective Juror No. 3 and the State, imposing the requirement that she "fully understand" the concepts of "aggravating circumstances" and "mitigating factors" during this early stage of the trial. Nicholson Br. 191-92. This argument is unsupported by law, and the argument put forward by Nicholson suggests that all potential jurors should enter the process with a complete understanding of capital prosecution. Confusingly, Nicholson brands the State's initial questioning of this potential juror as "rehabilitative questioning," when the State was providing the information about the death penalty phases, aggravating circumstances, and mitigating factors that Nicholson complains were lacking. Tr. 114-18. From this, Nicholson calls the State's provision of information superficial, this being the same information Nicholson is placing at issue as lacking. Nicholson Br. 192. Notably, there was no motion for this potential juror to be removed for cause. Tr. 134-35.

Therefore, when Nicholson moved for a mistrial on the way individual voir dire was being conducted, the motion was made in contravention of this Court's precedent, and without a basis for changing the same. Tr. 853-55. Most notably, trial counsel indicated that he believed the "prosecutor has explained it well." Tr. 855. As noted by the prosecutor, the information being given was more than what was required. Tr. 854.

In this issue, Nicholson has not articulated an issue. He has branded the significant and accurate information provided by the court as well as the State and defense counsel as "superficial rehabilitation." Nicholson Br. 193. A review of the record, and especially the highlighted juror, indicates that this is an empty charge. The jurors were provided more information than is constitutionally required, and Nicholson can demonstrate no prejudice by their imperfect understanding of the entire death penalty process including some of its specific terms, long before

they were required to apply the terms in any way.

E. Nicholson fails to even suggest prejudice based on the erroneous statement of four counts of aggravated murder instead of two, for part of the death qualification voir dire

The final issue Nicholson raises is the only apparent error under this proposition, but it is an error that could not have caused any conceivable prejudice. As explained by Nicholson, most of the potential jurors heard that there were four counts involving aggravated murder at some point during death qualification voir dire. Nicholson Br. 193-96. In fact, Nicholson was charged with four counts of murder- two being aggravated. see Indictment. Besides this early period of the trial, there was no other confusion or misidentification of the number of aggravated murder charges. As explained by Nicholson's trial counsel when this issue was raised, "I think it's been made clear there are two victims. But just so there's not four, going forward." Tr. 1858.

Nicholson includes this lone actual error, although it could not have conceivably affected the outcome of trial, or even the voir dire process. Indeed, he fails to make any suggestion as to how such a miscounting during a preliminary stage of voir dire could have caused any prejudice. It did not, of course, and this issue does not change the outcome for this proposition of law.

F. Conclusion

Generally, this proposition of law is comprised of issues that are not even error. As to the sole error discussed, it could not have caused prejudice. For these and the reasons discussed above, this proposition of law should be overruled.

Response to Proposition of Law IX: A trial court does not abuse its discretion when it admits discoverable evidence at trial without objection from defense.

Nicholson's ninth proposition of law involves disclosure of two witnesses, to which defense counsel did not object. In Nicholson's protracted discussion of this proposition, he fails to

provide clarity as to the suggestion by defense that they would object to the admission of the two witnesses' testimonies and to the fact that following their investigator's requested interview with Santos, which was conducted prior to testimony, defense counsel did not object to the testimonies of Santos or the other witness related to this proposition. Tr. 2526, 3228-29, 3721-22.

Even if a discovery violation had occurred, and we do not find that one did, Crim.R. 16(L)(1), formerly Crim.R. 16(E)(3), allows the trial court to grant a continuance, as opposed to prohibiting the party from introducing the evidence that was not disclosed. "It is within the trial court's discretion to decide what sanction to impose for a discovery violation. A trial court should impose the least severe sanction for a discovery violation that is consistent with the purposes of the rules of discovery. A continuance, upon proper motion, is a favored method to avoid prejudice that may flow from a failure to provide discovery yet ensure that the charges against an accused are tried timely and fairly." (Citations omitted.) *State v. Bates*, 191 Ohio App. 3d 85, 2010 Ohio 5636, ¶ 11, 944 N.E.2d 1206 (2d Dist.).

State v. Nelson, 2d Dist. Montgomery No. 25026, 2012-Ohio-5797, ¶ 47

A. Standard of review

After the defendant's investigator met with Santos, Nicholson did not object to her testimony. Tr. 3228-3231. Nicholson also raised no objection to the testimony of Carlos, related to any discovery issue. Tr. 3721-22. Therefore, contrary to Nicholson's claim, this issue was not preserved for review and the abuse of discretion standard is not appropriate. Nicholson Br. 200.

Here, by not objecting to the testimony of either witness when they took the stand and/or at any time during their testimonies on the grounds of a Rule 16 violation, Nicholson has forfeited all but plain error review. *State v. Stembridge*, 9th Dist. Summit No. 23812, 2008-Ohio-1054, ¶ 12 ("Because defense counsel did not bring the alleged discovery violation to the trial court's attention when Robinson took the stand to testify, Defendant has forfeited any error, unless allowing Robinson to testify under the circumstances of this case rise to the level of plain error. Crim.R. 52(B). See, *State v. Cunningham*, 105 Ohio St. 3d 197, 2004 Ohio 7007, at

P47-48, 824 N.E.2d 504 (finding that defendant waived a Crim.R. 16(B)(1)(g) error for all but plain error where counsel did not preserve the issue for appellate review). See also, *State v. Penland* (1998), 132 Ohio App.3d 176, 187, 724 N.E.2d 841 (holding that all but plain error was waived for violation of Crim.R. 16(B)(1)(c) where defendant failed to bring discovery violation to trial court's attention”).

B. Background

After receiving supplemental witness lists in discovery no later than three days before the guilt phase of the trial began, defense counsel stated that it “wanted to go on the record concerning discovery [counsel] received over the course of really the last couple weeks, but we’ve received some discovery as recent as September 27th, 25th, of additional witnesses that the State anticipates calling in their case in chief . . . So we’re concerned about that. We’re going to object to those witnesses being called at the appropriate time.” Tr. 2526. The trial court indicated that it would hear arguments before those witnesses were called, but would not rule on it at sidebar. Tr. 2526.

Later in the day on September 30, 2019, counsel continued discussing the discovery. Tr. 2710-18. They specifically discussed Estomarys Santos a witness who was interviewed by Garfield Heights police on September 23, and whose statement was provided in discovery that same day. Tr. 2711. The statement was seven sentences long, and the report describing the statement was six sentences long. *Id.* The State further explained that additional witnesses were found based on information the State received on August 24th, related to the Defendant’s version of events in Dr. Fabian’s report. Tr. 2712-13. It was uncontroverted that the statement was given without delay once the State had it. Tr. 2714. The only prejudice suggested by counsel was that they would like to have their investigator speak to Santos. Tr. 2715. The State agreed to make the witness available for Nicholson’s investigator. Tr. 2715-16. Counsel then mentioned Carlos Nieves, but made no

specific request or claim of prejudice related to him. Tr. 2717-18. The State explained that his testimony would be “along the same lines of Estomarys Santos, he’s going to testify he was at the house.” Tr. 2718.

Pursuant to counsel’s request, Santos met with the defense investigator prior to her testimony. Tr. 3228-29. When the State called Santos to testify, counsel did not object to her testimony on a Crim. R. 16 basis. Tr. 3231-32. Similarly, when the State called Nieves to testify, counsel did not object to his testimony on Crim. R. 16 basis. Tr. 3721-24.

Although Nicholson goes to lengths to add importance to the time of disclosure and the potential issues it caused, the record demonstrates that when Santos testified, the only issue raised regarding her disclosure was cured- the defense investigator interviewed her. Tr. 2715, 3228-29. Regarding Nieves, counsel made no requests related to his disclosure, and did not object to his testimony. Tr. 2717-18, 3721-24. This issue was not preserved for review and Nicholson mistakenly seeks review under the wrong standard. Nicholson Br. 202.

C. The decision to allow testimony of Santos and Nieves was not plain error

The only concern raised about the disclosure of Santos was that there had been no interview from the defense investigator. Tr. 2715. Prior to her testimony, this had taken place, and no objection was made. Tr. 3228-29, 3231-32. No specific issue was raised related to Nieves, no objection was made to his testimony. Tr. 2717-18, 3721-24.

In the cases relied upon by Nicholson, objections were made to the admission of evidence. See *State v. Parson*, 6 Ohio St.3d 442, 444, 453 N.E.2d 689 (1983) (“The court over objection allowed the officer to testify concerning Neeley’s prior remarks.”); *State v. Heinisch*, 50 Ohio St.3d 231, 235, 553 N.E.2d 1026 (1990), (“Defense counsel objected and asked for a continuance for the purposes of interviewing the witness and performing time and distance tests. The court denied

the continuance”). Here, there was no such objection and the only request made by Nicholson – that Santos be interviewed prior to testifying- was obliged. Nicholson now builds an argument using inapposite cases and layers of inference, which could never amount to plain error.

On review, the arguments put forward by Nicholson demonstrate no error whatsoever, much less plain error. Nicholson argues that “[e]ffective representation generally requires more than an interview in a courthouse hallway.” Nicholson Br. 204. This argument is nonsensical when his investigator recorded an interview with Santos, the witness with whom he wished to have interviewed. Nicholson next argues that the defense 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.” *Id.* This supposed deprivation was never made clear in the record, and is an empty claim. Nicholson finally argues that the defendant’s investigator was never given the opportunity to speak with Nieves. *Id.* This was never requested, and as was made clear with the provision of Santos for an interview, a mere request from counsel would have surely provided the same opportunity with Nieves, if it was desired. Nicholson chose not to request such an interview, and cannot now demonstrate plain error for not getting such an opportunity.

Nicholson closes his argument discussing the sanctions that may have been granted by the trial court, and again, the trial court’s discretion. Nicholson Br. 205. Again, this is not the appropriate standard. As discussed above, no sanctions were requested, and Nicholson objected to the testimony of neither witness. Reviewing the transcript, no sanction was required. If one had been requested, the court could have evaluated it, but Nicholson fails to demonstrate how any sanction would have been appropriate, even if requested.

Nicholson finally argues inaccurately that, “[t]he 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 [SIC] witnesses and any available independent impeaching [SIC] their credibility." Nicholson Br. 205. As discussed above, there was no objection to the testimony of either witness. After counsel asked for the opportunity to have their investigator speak to Santos, and a statement was taken, no objection was raised. Similarly, counsel did not object to Nieves's testimony. The trial court did not abuse its discretion when no objection was made, and Nicholson has not argued this proposition of law under the correct standard of review.

Nicholson additionally suggest an alternative issue – that “defense counsel was clearly ineffective-as discussed *infra*-for failing to properly maintains is [SIC] objections to these two witnesses.” Nicholson Br. 205. This claim is dubious, as Nicholson has provided no issue, beyond mere speculation, that any delay in learning of these witnesses caused an issue at trial. The record simply demonstrates no concern of prejudice. Moreover, Nicholson did not raise an ineffective claim against his counsel based on the decision not to object to these two witnesses, as he suggests in his brief. Nicholson Br. 205, 335-60. This is especially notable because Nicholson raised ten separate claims of ineffective assistance of counsel but said nothing of the ineffective claim he suggests here. Nicholson Br. 335-360.

This proposition should be reviewed under a plain error standard. Because of Nicholson's factual mistakes, he has failed to provide relevant law and arguments in support of this review. Nevertheless, a review of the record and relevant law demonstrates that there was no such error, and there is nothing to suggest that the disclosure caused any issue to Nicholson or his defense.

D. Conclusion

Reviewing the record surrounding these witnesses, their disclosure did not amount to a discovery violation under Crim. R. 16. Even if there was some issue with their disclosure,

Nicholson cannot demonstrate prejudice based upon it. This proposition of law is therefore without merit and should be overruled.

Response to Proposition of Law X: The trial court did not err and deprive the defendant of his rights to due process and a fair trial under the United States and Ohio Constitutions as it did not fail it to limit the evidence presented in the mitigation phase of a capital trial.

Nicholson argues in his tenth proposition of law that the trial court erred in denying his motion to limit the State’s mitigation phase evidence. The tenth proposition of law should be denied because it was within the trial court’s discretion to allow the State’s exhibits and because his legal arguments lack merit.

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

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

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

State v. Ford, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶ 353.

And in any event, the jury must consider the nature and circumstances of the offense to determine whether they are mitigating.

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

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

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

Inclusion of all the exhibits admitted during the guilt phase is not *per se* error. *See State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 132-133. Although, the defendant in *Ketterer* did not object, the Court did not find plain error or otherwise, as a capital-phase hearing is not limited to evidence that pertains only to the aggravating circumstance. *Ketterer*, ¶133 citing *State v. Wogenstahl*, 75 Ohio St.3d at 352-354, 662 N.E.2d 311 and *State v. Gumm*, 73 Ohio St.3d 413, 1995-Ohio-24, 653 N.E.2d 253. Evidence that went to the aggravating circumstance, the course of conduct was important here: evidence that established that the victims were killed by the same murder weapon in the same manner and with a similar motive as the course of conduct was the aggravating circumstance in this case. In addition, the nature and circumstances was relevant under R.C. 2929.04(B)

Nicholson argues that numerous exhibits admitted during the guilt phase should not have been admitted during the penalty phase of the trial. Appellant’s Merit Brief, pg. 206 citing Tr. 4367-4368.

The trial court’s admission of the State’s exhibits from the guilt phase in the penalty phase was not plain error or otherwise. Not every exhibit from the guilt phase was submitted to the jury in the penalty phase as several exhibits were withdrawn. Tr. 5162. The trial court provided a limiting instruction to the jury regarding what it was permitted to consider during the penalty

phase, which included only evidence admitted in the trial phase that was relevant to the aggravating circumstances and to any mitigating factors. Tr. 5063-5064. Even assuming the admission of some of the State's exhibits was improper, the admission of those exhibits was not plain error. The mitigation for Nicholson was rebutted through the State's witnesses, and the aggravating circumstances greatly outweighed any value the mitigating factors

Nicholson also takes issue what the State's intention and subsequent introduction of a jail phone call, that Nicholson made just hours after the guilty verdict had been rendered in which Nicholson surmised that if he was sentenced to life in prison, he would probably have to join the gang, would probably have to go to a level 5 prison for about a year, and he'd probably have to stab someone just to get in. Tr. 4372-4737. Nicholson's own words were relevant given the testimony of Jack Aiken who provided an opinion that Nicholson could be incarcerated for the remainder of his life without causing an undue risk of harm to staff, inmates, or the general public. Tr. 4575.

The evidentiary rulings here was not in error. Nicholson's constitutional rights were not violated and a new trial and/or new mitigation hearing is not warranted. The tenth proposition of law is without merit and should be overruled.

Response to Proposition of Law XI: The death penalty was appropriate in this case and should be upheld pursuant to R.C. 2929.05 as the aggravating circumstance outweigh any mitigating factors.

Under his eleventh proposition of law, Nicholson argues that under this Court's authority, under R.C. 2929.05, to independently weigh the aggravating circumstances against the mitigating factors, the aggravating circumstances do not outweigh the mitigating factors beyond a reasonable doubt. This Court's independent weighting will result in affirmance of the death penalty imposed in this case.

R.C. 2929.05 requires this Court to independently review Nicholson’s death sentence. In conducting this review, the Court must determine whether the evidence supports the jury’s determination that 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.

When a jury recommends that the sentence of death should be imposed upon a defendant, the trial court must follow the process described in R.C. 2929.03(D)(3):

“Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender.”

The statute’s use of the word “shall,” a mandatory term, “creates an obligation impervious to judicial discretion.” *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35, 118 S. Ct. 956, 140 L.Ed.2d 62 (1998). The trial court in agreeing with the jury beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, was required to impose the sentence of death.

On the other hand, if the trial court found that the State has not proven that the aggravating circumstances outweigh the mitigating factors, the trial court was required to impose either life imprisonment without parole, life imprisonment with parole eligibility after serving 25 full years of imprisonment, or life imprisonment with parole eligibility after serving 30 full years of imprisonment. R.C. 2929.03(D)(3).

Either way, the trial court was required to issue a written opinion explaining its findings:

“The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.”

R.C. 2929.03(F). The trial court was not required, however, required to individually discuss each mitigating factor separately in its opinion. “While a sentencing court must consider all evidence of mitigation, it need not discuss each factor individually.” *State v. Phillips*, 74 Ohio St.3d 72, 102, 656 N.E.2d 643 (1995), citing *Parker v. Dugger*, 498 U.S. 308, 314-315, 111 S. Ct. 731, 112 L.Ed.2d 812 (1991).

1. The aggravating circumstances in this case are entitled to great weight and outweigh the mitigating factors beyond a reasonable doubt

The jury found Nicholson guilty of one death penalty specification attached to each count of aggravated murder, specifically a course of conduct specification under R.C. 2929.04(A)(5) for killing each victim as part of a course of conduct involving the purposeful killing of two or more persons, to wit: M.L. and Giselle Lopez.

a. The course of conduct specification.

“[T]he R.C. 2929.04(A)(5) multiple-murder aggravating circumstances carries great weight in aggravation.” *State v. Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607, 797 N.E.2d 948, ¶ 91. The evidence in this case proved that Nicholson shot and killed both M.L. and Giselle Lopez in the driveway of their home. Nicholson shot M.L. eight times and shot Giselle four times, with all of the bullets striking the victims in the back or on the back of their arms. Tr. 3923. 3960; Ex. 601, Ex. 652. Nicholson also fired a thirteenth bullet that struck the bookbag Giselle was wearing and lodged in a textbook. Tr. 2935-2938.

These two killings occurred as part of a single course-of-conduct. In weighing that course-of-conduct, this Court must consider the “factual link between the aggravated murder with which the defendant is charged and the other murders or attempted murders that are alleged to make up the course of conduct.” *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008, 822 N.E.2d 1239, ¶ 52. The factual link between the killings may “be one of time, location, murder weapon, or cause of death. It might involve the killing of victims who are close in age or who are related. It might involve a similar motivation on the killer’s part for his crimes, a common getaway car, or perhaps a similar pattern of secondary crimes (such as rape) involving each victim.” *Id.* All five factors apply to render the course-of-conduct specification of especially great weight in this case.

(1) **Time.** Nicholson killed both M.L. and Giselle within seconds of one another in a single continuous spray of gunfire. Tr. 4142.

(2) **Location.** Both M.L. and Giselle were shot as they ran out the side door of their house and down the driveway towards their backyard. Officer Robert Jarzembak’s bodycam video, State’s Exhibit 321-AB, showed the bodies of both victims lying next to one another, with M.L.’s body partially on top of Giselle’s. The BCI diagram of the driveway, State’s Exhibit 311, showed that M.L. and Giselle’s bodies were lying in a narrow space between the side of their house and a car parked in the driveway, a space that measured only 2.87 feet wide.

(3) **Murder weapon.** It was undisputed in this case that Nicholson killed both victims with his .45 caliber Glock 21 handgun that he kept under the mattress in his bedroom inside the home.

(4) **Cause of death.** It was undisputed in this case that both M.L. and Giselle died as a result of multiple gunshot wounds to their backs. Ex. 601, 652.

(5) Motivation. Extensive evidence in the guilt phase established that Nicholson killed M.L. and Giselle in an incident of domestic violence. That incident was the culmination of years of abuse that Nicholson directed at their mother, Polanco, and threats that he made against America and both of her children.

The facts of this case showed that Nicholson killed both victims as part of a single, indivisible course-of-conduct, linked by time, location, murder weapon, cause of death, and motive. That course-of-conduct specification is entitled to great weight in this case.

2. Nicholson’s mitigation deserves little weight by comparison to the aggravating circumstances

This Court must now weigh those aggravating circumstances against any mitigating factors, including “the nature and circumstances of the offense” and Nicholson’s “history, character, and background[.]” In addition, the Court considers the statutory mitigating factors under R.C. 2929.04(B):

- (1) Whether the victim of the offense induced or facilitated it;
- (2) 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;
- (3) 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;
- (4) The youth of the offender;
- (5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;
- (6) 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;
- (7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

During the mitigation phase, the defense did not identify any specific mitigating factors under (B)(1) through (B)(6) that they believed applied to this case. Instead, the defense relied exclusively upon (B)(7) (any other factors) as a catchall provision to encompass all the mitigation they offered. It should be noted that this Court is not limited to those factors identified by the parties. This Court can find mitigation wherever it feels appropriate. Nevertheless, the State submits that a review of the applicable mitigating factors shows that those factors deserve little weight.

a. The nature and circumstances of the offense.

This Court should weigh the nature and circumstances of the aggravated murders solely with an eye toward relating them to any mitigating factors that exist. This Court should find no mitigating factors here. There is nothing mitigating about Nicholson's act of shooting M.L. and Giselle repeatedly in the back as they tried to run away. This Court should afford this factor no weight.

b. Nicholson's upbringing.

Ceci McDonnell and Dr. John Fabian testified that Nicholson's upbringing was dysfunctional in various ways. Assuming the reporting of the dysfunction was truthful, this testimony is "entitled to some weight, but we have seldom accorded strong weight to a defendant's childhood." *State v. Murphy*, 91 Ohio St.3d 516, 547, 747 N.E.2d 765 (2001); *see also State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 265 ("Hale spent significant portions of his childhood in an unstable environment. But we have seldom given decisive weight to this factor").

The testimony regarding Nicholson's abusive father and sometimes-abusive mother must be offset by other, more positive evidence about his upbringing including some of the following:

- Nicholson had a positive, loving relationship with his brother Robert Jr.,
- Nicholson has a good close relationship with his parents, and he sees them regularly, Tr.

- Nicholson's was born into a better financial situation than his brother, Tr. 4713-4714
- Nicholson's parents were hard workers and reliable providers, and Nicholson and the basic necessities were provided, Tr. 4711
- Nicholson graduated from both high school and college, Tr. 4652

Additionally, Dr. Fabian testified that the abuse in Nicholson's childhood home was primarily verbal and was mostly directed against Nicholson's mother. Tr. 4705. Nicholson's brother Robert Jr. testified that Nicholson was his father's "everything[,] "his rock star[,] and that he was a "do-no-wrong kid" in his parents' eyes. Tr. 4422, 4444. It was reasonable to conclude from this that the abuse Robert Jr. and Angel described Nicholson's father perpetrating was directed more at them than it was at Nicholson.

A capital defendant's "punishment must be tailored to his personal responsibility and moral guilt." *Enmund v. Florida*, 458 U.S. 782, 801, 102 S. Ct. 3368, 73 L.Ed.2d 1140 (1982). The defendant's right to present mitigation is based upon "the principle that punishment should be directly related to the personal culpability of the criminal defendant." *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L.Ed.2d 256 (1989). Mitigation evidence is therefore that which is relevant to "a reasoned moral response to the defendant's background, character, and crime." *Id.* This Court's analysis of mitigation is limited to testimony relating to either Nicholson's history, character, or background, or to the nature and circumstances of his offense. Although much of what Angel and Robert Jr. described in their testimony was disturbing, very little of that testimony applied to the Nicholson, or even occurred after his birth in 1989. It should be noted that much of what was described was reported by the family members. This Court should afford some, but not decisive, weight to the dysfunctional aspects of Nicholson's upbringing.

c. Future dangerousness.

James Aiken testified that he believed Nicholson could be safely incarcerated in an Ohio prison for the rest of his life. Generally, “evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating.” *Skipper v. South Carolina*, 476 U.S. 1, 5, 106 S. Ct. 1669, 90 L.Ed.2d 1 (1986). Such evidence, however, is of limited usefulness; it “reveals nothing about a defendant’s character except that the defendant can exist in the highly structure environment of a prison without endangering others.” *Franklin v. Lynaugh*, 487 U.S. 164, 186, 108 S. Ct. 2320, 101 L.Ed.2d 155 (O’Connor, J., concurring).

Aiken admitted that he did not have a crystal ball and that his testimony was not an exact science. Tr. 4584-4585 He also testified that he would not put Nicholson in general population in prison because of safety concerns. Tr. 4865-4869, 4586.

However, Nicholson was recorded in a phone call from Cuyahoga County Jail less than five hours after the verdict on Friday, October 11 talking about joining a prison gang and stabbing someone if he received a sentence of life in prison:

“Either you join a gang and you live that kinda life, where, you know, you gonna be in and out of the hole, and where probably to join the gang you're probably going to have to go to a level 5 prison for about a year or so because they're going to make me stab somebody just to get in. But then after you get that over with, then you good. So either you join a gang or you try to steady yourself, and then the gangs try to come into the cell, steal your shit, you're always fighting, and you open target in the showers. So that's where we're at right now.”

See State’s Exhibit 703. This call diminished any weight that might have otherwise given to Aiken’s testimony that Nicholson could be safely incarcerated if sentenced to life in prison. This Court should afford no weight to this factor.

d. Lack of a criminal record.

R.C. 2929.04(B)(5) includes, as a statutory mitigating factor, the defendant's "lack of a significant history of prior criminal convictions and delinquency adjudications." Nicholson had no prior convictions or delinquency adjudications prior to the offenses in this case. In some cases, this factor is "entitled to significant weight in mitigation." *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶ 280. "However, this factor is diminished by the evidence presented at trial that he may have committed" other crimes, "even though he escaped prosecution for them." *Id.*

There was extensive evidence presented in the guilt phase of this case that Nicholson committed numerous prior acts of domestic violence against Polanco. The State corroborated that testimony with photographs from the download of Polanco's phone that she took documenting the injuries that Nicholson inflicted upon her. Nicholson threatened Polanco not to go to the police, saying that he would kill her and her children if she did. Dr. Fabian testified regarding reviewing a report that Nicholson pointed a gun at his ex-girlfriend Lauren Thomas and that he threatened to kill her as well. Tr. 4751-4752.

Under these circumstances, this Court should give no or very little weight to this factor. *See State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 238 (defendant's "lack of a significant criminal record is entitled to minimal weight" where he had "only one prior criminal conviction, for a fourth-degree misdemeanor. But that conviction was for domestic violence against [his ex-wife], and given that revenge against her was a motivating factor in these purposeful killings [of her children], we assign little mitigating weight to Mammone's lack of criminal history").

e. Any other factors relevant to whether the offender should be sentenced to death.

Dr. John Fabian, a forensic and clinical psychologist, diagnosed Nicholson with (1) Mild Neurocognitive Disorder Due to Traumatic Brain Injury, (2) Attention Deficit Hyperactivity Disorder

(ADHD), (3) Posttraumatic Stress Disorder (PTSD), (4) Major Depressive Disorder, and (3) Borderline Personality Disorder. The State will address each of these in turn.

Traumatic Brain Injury. Dr. Travis Snyder, a radiologist, testified that MRI scans of Nicholson's brain at the Cleveland Clinic showed a series of white spots (also known as white matter hypersensitivities) that he believed were consistent with traumatic brain injury. However, Nicholson's MRI, however, showed no evidence of contusions, brain bleeds, scarring, or skull fractures, which one would expect to see if a person suffered a traumatic brain injury. Dr. Masaryk reviewed and interpreted Nicholson's July 2019 MRI study. Tr. 4853-4854, 4855. The doctor's observations and findings were, "some small areas of high signal intensity on what are called T2 weighted images or FLAIR images in the frontal white matter. And that was pretty much it." Tr. 4856. Dr. Masaryk explained that the white matter can be caused by trauma but other things as well. Tr. 4857. If there was trauma, Dr. Masaryk explained there would have to be a deformity of the skull or scarring of the brain where there was a prior contusion or areas of chronic hemorrhage. Tr. 4858. There were no such ancillary findings in Nicholson's case. Tr. 4858, 4860, 4865. Dr. Masaryk disagreed with Dr. Snyder's report and did not believe there was anything in the scans to conclude there was significant brain trauma. Tr. 4861-4862. There was nothing abnormal about Nicholson's MRI scan. Tr. 4868.

Dr. Ryan Darby, a neurologist, rendered an opinion that there was not evidence to suggest that Nicholson suffered a traumatic brain injury. Tr. 4930. Dr. Darby's report was marked and admitted as State's Exhibit 707. Dr. Darby testified that the complete absence of any such corroborative findings made it impossible to conclude that the white spots in Nicholson's MRI were evidence of traumatic brain injury. Tr. 4930-4944. He further testified that similar white spots would be seen in the MRIs of 20-40 percent of patients around Nicholson's age, and could be caused by any

number of things, including migraine headaches. Tr. 4941-4942. Thomas Masaryk, a radiologist at the Cleveland Clinic, likewise testified that such spots would be common in 30-40 percent of people approximately Nicholson's age.

The evidence at trial demonstrated that Nicholson's MRI did not show evidence of a traumatic brain injury, and that there was no other credible evidence that Nicholson's suffered any brain damage. Under these circumstances, this Court should afford no weight to this factor.

ADHD. Neurodevelopmental disorders such as ADHD are generally "entitled to some weight in mitigation under R.C. 2929.04(B)(7)." *State v. Johnson*, 144 Ohio St.3d 518, 2015-Ohio-4903, 45 N.E.3d 208, ¶ 135. Dr. Fabian testified that 5-10 percent of children had ADHD. He also testified that many people with ADHD were able to live successful lives and never had any problem keeping their conduct within the confines of the law. Tr. 4756-4757. There was no other testimony as to how Nicholson's ADHD may have contributed to or affected his actions on the night of the murders. In this context, Nicholson's ADHD is "entitled to little weight." *State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 687, ¶ 168.

PTSD. Trauma- and stressor-related disorders such as posttraumatic stress disorder (PTSD) deserve "only modest mitigating weight as R.C. 2929.04(B)(7) mitigating factors." *State v. Stojetz*, 84 Ohio St. 3d 452, 472, 705 N.E.2d 329 (1999). Dr. Fabian made no attempt to tie Nicholson's potential PTSD to his actions in this case. While Dr. Fabian attributed the PTSD to the domestic violence in his family, he acknowledged literature that indicates a person who commits a violent act can have PTSD as a result of a violent act. Dr. Fabian acknowledged it could also come from a car crash. Tr. 4758-4759. This Court can give this factor some weight under the R.C. 2929.04(B)(7) catchall provision, but not significant weight.

Major Depressive Disorder. Even “severe depression is a weak mitigating factor.” *State v. Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, 824 N.E.2d 504, ¶ 137; *see also State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 119 (“As to Hoffner’s severe depression, it is, at best, a weak mitigating factor”). Dr. Fabian again testified that it was difficult to determine how much of Nicholson’s depression resulted from his incarceration prior to trial, and how much he suffered from depression before the murders. Tr. 4759. Moreover, Nicholson rated his own level of self-esteem as being 10 out of 10 in his interviews with Dr. Fabian. Tr. 4749.

Nicholson’s “history of depression does not qualify as an R.C. 2929.04(B)(3) factor because there was no evidence that [his] condition caused him to lack ‘substantial capacity to appreciate the criminality of [his] conduct.’” *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, ¶ 123, quoting *State v. Bey*, 85 Ohio St.3d 487, 508, 709 N.E.2d 484 (1999). This Court should consider depression solely under the catchall provision R.C. 2929.04(B)(7), and in doing so, should give it little weight.

Borderline Personality Disorder. Borderline personality disorder traditionally deserves “little weight in mitigation[.]” *State v. Davis*, 139 Ohio St.3d 122, 2014-Ohio-1615, 9 N.E.3d 1031, ¶ 106. “Personality disorders are often accorded little weight because they are so common in murder cases.” *State v. Wilson*, 74 Ohio St.3d 381, 401, 659 N.E.2d 292 (1996). Borderline personality disorder tends to deserve less weight in cases in which it does “not cause mental illness so severe as to inhibit a defendant’s ability to control his actions.” *State v. Cepec*, 149 Ohio St.3d 438, 2016-Ohio-8076, 75 N.E.3d 1185, ¶ 169.

There was no evidence in this case that Nicholson’s borderline personality disorder inhibited his ability to control his actions in any way. To the contrary, Nicholson was able to hold a job as a security guard for an extended period prior to the murders. Tr. 4563. Dr. Fabian found that

Nicholson's IQ was 80, which was within the low-average range. Tr. 4661. There was no testimony that borderline personality disorder caused or contributed to the murders or that it somehow inhibited Nicholson's ability to control his actions. "Therefore, little weight should be accorded to [the defendant's] antisocial * * * personality disorders." *Id.*

Other Mental Health Diagnoses To the extent that Nicholson argues that other mental health diagnoses be given weight, this Court should provide no weight to the extent that any "preservative thinking," is described as an effect of traumatic brain injury or Nicholson relies upon a traumatic brain injury to argue this factor deserves weight.

f. Conclusion.

Although several of the mitigating factors Nicholson presented deserve little or some weight, none of them are entitled to great or decisive weight as Nicholson now suggests. The aggravating circumstances, by contrast, deserve great weight. This Court should conclude that the aggravating circumstance outweigh the mitigating factors.

3. The death penalty in this case is proportionate to other recent defendants who have been found guilty of the same specifications

In *State v. Worley*, Slip Opinion No. 2021-Ohio-2207, this Court affirmed the death penalty and in considering proportionality found the death penalty appropriate and proportionate in comparing it to *State v. Lawson*, 64 Ohio St.3d 336, 1992-Ohio-47, 595 N.E.2d 902 (1992) and *State v. Stumpf*, 32 Ohio St.3d 95, 512 N.E.2d 598 (1987).

The same method can be done here. Nicholson's sentence is also proportionate when compared with similar cases in which the Supreme Court of Ohio affirmed a death sentence for a defendant found guilty of a course-of-conduct specification as the sole aggravating circumstance:

- *State v. Wilks*, 154 Ohio St.3d 369, 2018-Ohio-1562, 114 N.E.3d 1092 (defendant shot and killed his girlfriend's daughter with an AK-47, shot another man in the back, and shot at his girlfriend's brother)
- *State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, 89 N.E.3d 554 (defendant murdered his estranged girlfriend and her new boyfriend, several hours after shooting the boyfriend's nephew and leaving him paralyzed)
- *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112 (defendant shot and killed his boss after being fired, then proceeded to the parking lot, where he shot and killed the safety director of the company)
- *State v. Clemons*, 82 Ohio St.3d 438, 696 N.E.2d 1009 (1998) (defendant murdered three coworkers in a workplace shooting).
- *State v. Martin*, 151 Ohio St.3d 470, 2017-Ohio-7556, 90 N.E.3d 857 (defendant shot and killed victim execution style, then shot a second victim who survived)
- *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80 (defendant convicted of aggravated murder of victim and attempted murder of six other victims. Defendant committed a drive-by-shooting at a convenience store, then later shot additional people at a home)
- *State v. Jackson*, 141 Ohio St.3d 171, 2014-Ohio-3707, 23 N.E. 3d 1023 (defendant shot and killed a woman during an aggravated robbery of a laundromat and shot a second employee as part of a crime spree that spanned in three counties, and the attempted murder of a third man)

Accordingly, the death sentence imposed in this case is not disproportionate to the penalty imposed in similar cases; therefore it is appropriate.

4. Conclusion

Under the Court's independent review under R.C. 2929.05 the death penalty should be affirmed. As such the eleventh proposition of law are without merit and should be overruled.

Response to Proposition of Law XII: The death penalty in this case is not excessive or disproportionate.

In the twelfth proposition of law, Nicholson argues that the death sentence in this case is not proportionate to death sentences imposed in other cases. Therefore, Nicholson again argues that the death penalty is not appropriate.

First, it appears that Nicholson is asking this Court to determine it was wrong in deciding *State v. Steffen*, 31 Ohio St.3d 111, 509 N.E.2d 383 (1987) and argues that proportionality review should be expanded beyond cases in which the death penalty was imposed. Proportionality review is not constitutionally required and should not be expanded in the manner Nicholson suggests. The manner in which proportionality review is conducted is a settled issue as this Court has repeatedly followed *Steffen*. See e.g., *State v. Smith*, 80 Ohio St.3d 89, 118, 684 N.E.2d 668 (1997) ("We continue to adhere to the statement set forth in *Steffen*, 31 Ohio St. 3d 111, 31 Ohio B. Rep. 273, 509 N.E.;2d 383, at paragraph one of the syllabus, that 'the proportionality review required by R.C. 2929.05(A) is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed.'"); *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E. 2d 166, ¶23, *State v. Scott*, 101 Ohio St.3d 31, 2004-Ohio-10, 800 N.E.2d 1133, ¶51. The sentiments of the concurring opinion in *State v. Graham*, Slip Opinion No. 2020-Ohio-6700 is not new as they echo the dissenting opinion in *State v. Murphy*, 91 Ohio ST.3d 516, 562, 747 N.E.2d 765 (2001).

The Eighth Amendment does not require a court to compare a death sentence in the case before it with other penalties imposed in similar cases. *Pulley v. Harris*, 465 U.S. 37, 50-51, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). A reviewing court is only required to conduct “an abstract evaluation of the appropriateness of a sentence for a particular crime.” *Id.* Where the statutory scheme “adequately channel[s] the sentencer’s discretion, such proportionality review is not required.” *McCleskey v. Kemp*, 481 U.S. at 306, 107 S. Ct. 1756, 95 L.Ed.2d 262 (1987). The court’s focus must remain on the defendant’s culpability because “we insist on ‘individualized consideration as a constitutional requirement for imposing the death sentence,’ which means that we must focus on ‘relevant facts of the character and record of the individual offender.’” *Edmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

Nicholson’s desire to expand proportionality review is wrought with problems. As this Court has recognized, death penalty convictions “are necessarily so qualitatively different from all others that a comparison with non-capital offenses would be a profitless exercise.” *Steffen* at 123. The reasons that a death sentence may not be imposed are too numerous to count, and the comparison is “unrealistic since the reviewing court could not possess the requisite familiarity with the particular circumstances of such cases so essential to a determination of appropriateness.” *Id.*

For the remainder of his argument Nicholson distinguishes *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, *State v. Clemons*, 82 Ohio St.3d 438, 696 N.E.2d 1009 (1998), *State v. Wilks*, 154 Ohio St.3d 369, 2018-Ohio-1562, 114 N.E.3d 1092 and *State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, 89 N.E.3d 554 for the purpose of distinguishing the proof of prior calculation and design in those cases from what Nicholson alleges is weak evidence of prior calculation and design in this case. As argued in response to Nicholson’s first proposition of law, the State proved that Nicholson acted with prior calculation and design. With

this Court's independent review in mind and as addressed under the eleventh proposition of law, Nicholson's death sentence is not disproportionate to the death penalty imposed in similar cases.

The twelfth proposition of law is without merit and should be overruled.

Response to Proposition of Law XIII: The trial court did not err in its instructions to the jury during the mitigation phase.

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

Nicholson filed a generic motion asking the trial court to instruct on specific mitigating factors prior to trial on August 26, 2019. R. 193. That motion was granted on September 9, 2019. R. 237. The motion filed on August 26, 2019 included a non-exhaustive list of 16 points, and requested an instruction "on all statutory and nonstatutory mitigating factors the defense presents." However, after presenting its mitigating evidence, Nicholson did not object to the instructions given to the jury nor did he request any specific instructions based upon the mitigation evidence he presented.

Because Nicholson did not object to the jury instructions during the penalty phase, he has waived all but plain error. "An alleged error 'does not constitute a plain error or defect under Crim.R. 52(B) unless, but for the error, the outcome of the trial clearly would have been

otherwise.’’ *State v. Campbell*, 69 Ohio St.3d 38, 41, 630 N.E.2d 339 (1994), quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of syllabus. Notice of plain error “is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *Long* at paragraph three of syllabus.

During the mitigation phase, the defense did not identify any specific mitigating factors under (B)(1) through (B)(6) that they believed applied to this case. Instead, the defense relied exclusively upon (B)(7) (any other factors) as a catchall provision to encompass all the mitigation they offered. Nicholson appears to concede this fact, due to the arguments raised under his ineffective assistance of counsel claim.

The trial court was not required to instruct on mitigating factors in R.C. 2929.04(B)(1)-(7) not raised by the defense. *State v. DePew*, 38 Ohio St.3d 275 (1988), *State v. Hicks*, 43 Ohio St.3d 72 (1989), *State v. Cooley*, 46 Ohio St.3d 20 (1989). This instruction was in accordance with the proposed jury instructions contained within the Ohio Jury Instructions. *Compare* Tr. 5058-5060 with 2 Ohio Jury Instructions Section 503.011. Error, plain or otherwise, cannot exist where the jury was given a catch-all instruction, and where the specific instruction was not ultimately requested by Nicholson.

Nicholson now argues that trial counsel should have requested instructions regarding R.C. 2929.04(B)(2), R.C. 2929.04(3), and R.C. 2929.04(B)(5).

Nicholson’s self-defense testimony – which was rejected by a jury – explains why trial counsel did not request an instruction that Nicholson was under duress, coercion, or strong provocation. As such no instruction was requested or given regarding R.C. 2929.04(B)(2).

With respect to the instruction under R.C. 2929.04(B)(3), there was no testimony that Nicholson had 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 requirement of the law. No such instruction should have been given in this case. By arguing under the catch-all instruction, trial counsel was asking the jury to consider the evidence Nicholson presented holistically.

With respect to R.C. 2929.04(B)(5) although a specific instruction was not provided, Nicholson's trial counsel argued the point in closing arguments when counsel argued, "He's 30 years old. No prior criminal history. That's what you weigh. You don't weigh what happened in that house or what you believe happened in that house." Tr. 5123. And in any event, the trial court considered this factor in its sentencing opinion. R. 440, pg. 14. It cannot be said that Nicholson's lack of a significant criminal history was not considered.

For these reasons, the thirteenth proposition of law lacks merit and should be overruled.

Response to Proposition of Law XIV: The trial court did not err in its weighing process when it issued its sentencing opinion.

In his fourteenth proposition of law, Nicholson contends that the trial court erred by giving either insufficient weight or no weight at all to his mitigating evidence. Nicholson contends, that significant mitigating factors were unreasonable discounted or ignored. However, *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982) among other cases do not require the sentencer in a capital case to assign weight to any and all relevant mitigating evidence. The weight, if any, to be given to mitigating factors is within the sound discretion of the jury or the trial court. And in any event, any error in assigning weight to any of the mitigating factors may be cured during the Court's independent analysis of Nicholson's death sentence. *State v. Worley*, Slip Opinion No. 2021-Ohio-2207, ¶ 136 citing *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶ 143; *State v. Montgomery*, 148 Ohio St.3d 347, 2016-Ohio-5487, 71 N.E.3d 180, ¶ 155.

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

“*Eddings* does not require a court to give any particular weight to relevant mitigating evidence.” *State v. Davis*, 139 Ohio St.3d 122, 2014-Ohio-1615, 9 N.E.3d 1031, ¶ 59. Under *Eddings*, a sentencing court “may not give [mitigating evidence] no weight by excluding such evidence from [its] consideration.” *Eddings* at 114-115. “But *Eddings* does not preclude a court from considering mitigating evidence and determining that it deserves no weight.” *Davis*, ¶ 59. *Eddings* “expressly refused to dictate what weight or importance to assign to particular mitigating factors.” *State v. Brewer*, 48 Ohio St.3d 50, 56, 549 N.E.2d 491 (1990), citing *Eddings* at 114-115 and 117.

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

B. The trial court appropriately weighed the aggravating circumstances against the mitigating factors.

The trial court issued its sentencing opinion. The trial court indicated that it would consider the course of conduct, the aggravating circumstance, as both murders occurred in the same location, within seconds of each other, committed by Nicholson using the same weapon and motivation. *Sentencing Opinion*, pgs. 5-6. The trial court considered the nature of Nicholson’s relationship with Polanco, including how the relationship became volatile and toxic, and the

circumstances underlying the crime. *Sentencing Opinion*, pgs. 6-7. The trial court considered Nicholson's claims of remorse and claim of self-defense, but rejected them as the "concocted self-defense theory" defied the facts and testimony – the court recognized that the victims were shot in the back and found no mitigating factors surrounding the nature of the offense. *Sentencing Opinion*, pgs. 8-9. The trial court next considered Nicholson's history, character, and background. *Sentencing Opinion*, pgs. 9-14. Third, the trial court weighed the aggravating factors against the mitigating factors. *Sentencing Opinion*, pg. 15. Finally, the trial court considered proportionality and found that the death penalty was not disproportionate considering recent cases in which the death penalty was affirmed for aggravated murder convictions with specification of a course-of-conduct and at least one felony. *Sentencing Opinion*, pgs. 16-17 citing *State v. Martin*, 151 Ohio St.3d 470, 2017-Ohio-7566, 90 N.E.3d 857, *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, *State v. Jackson*, 141 Ohio St.3d 171, 2014-Ohio-3707, 23 N.E. 3d 1023, *State v. Wilks*, 154 Ohio St.3d 369, 2018-Ohio-1562, 114 N.E. 3d 1092, *State v. Spaulding*, 151 Ohio St. 378, 2016-Ohio-8126, 89 N.E.3d 554, *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 112, *State v. Clemons*, 82 Ohio St.3d 438, 696 N.E.2d 1009 (1998).

The State's arguments explained in Proposition of Law XI and Proposition of Law XII and the record in this case would show that the trial court did not err in its sentencing opinion.

C. Conclusion

The weight to be given mitigating factors "is necessarily an individual decision by the fact finder." *Richey* at 369-370. "It is subject to correction by means of independent appellate reweighing and is not a matter of law." *State v. Davis*, 139 Ohio St.3d 122, 2014-Ohio-1615, 9 N.E.3d 1031, ¶ 62. In this case, the trial court exhaustively considered all of the evidence presented and found that the mitigating evidence added up to little compared to the overwhelming weight of

the aggravating circumstances. It was the trial court's province to weigh that evidence as it did. Nicholson's fourteenth proposition is without merit and should be overruled.

Response to Proposition of Law XV: There was no prosecutorial misconduct during either phase of the capital trial and Nicholson was deprived of none of his rights under the Ohio or U.S. Constitutions.

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

A. Standard of Review

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

Nicholson did not object to any statements made during the State's argument in the guilt phase that he now argues were improper and prejudicial. *See generally* Tr. 2507-12. Therefore, Nicholson has waived all but plain error. "An alleged error 'does not constitute a plain error or defect under Crim.R. 52(B) unless, but for the error, the outcome of the trial clearly would have been otherwise.'" *State v. Campbell*, 69 Ohio St.3d 38, 41, 630 N.E.2d 339 (1994), quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Long* at paragraph three of the syllabus.

B. Carl Biegacki's testimony as it related to one specific issue was impeached directly and caused no prejudice

Nicholson first argues that the prosecution committed misconduct by knowingly eliciting false testimony from Det. Carl Biegacki, who was subsequently impeached during the guilt phase. Nicholson recounts the question that he argues as misconduct, as well as the almost immediate remedy that took place when his attorney impeached Det. Biegacki that day. Tr. 3898-3907. Although the trial court and defense counsel suggested it would be fine to conclude for the day and put the Detective back up the next day for the limited purpose of impeachment, the Assistant Prosecutor found the interview directly so that it could reviewed and played for the jury without delay. Tr. 3903-05. The statement was corrected at that time through impeachment. Tr. 3905-07. Because of the State's immediate action, the Detective was impeached immediately, removing any concern that this issue could have made for the "the fairness of the trial." *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). This was not an instance of prosecutorial misconduct.

C. The testimony elicited by the State was proper

Nicholson next argues that the testimony elicited by the State was improper and amounted to the state essentially testifying for multiple witnesses. He levels this complaint by accusing the state of improper leading questions about substantive matters during direct examinations. Nicholson claims that all three prosecutors engaged in this “improper tactic during trial,” but focuses his complaints and arguments solely on the examinations conducted by Assistant Prosecuting Attorney Anna Faraglia. Nicholson Br. 305.

"A leading question is 'one that suggests to the witness the answer desired by the examiner.'" *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 149, citing 1 McCormick, *Evidence*, Section 6, at 19 (5th Ed.1999). The Eighth District has followed other district courts in holding that “[i]t is wholly within the discretion of the trial court to permit the state to ask leading questions of its own witnesses. *State v. Miller* (1988), 44 Ohio App.3d 42, 45, 541 N.E.2d 105. As stated in *State v. Lewis* (1982), 4 Ohio App.3d 275, 278, 4 Ohio B. 494, 448 N.E.2d 487, ‘the exception ‘except as may be necessary to develop his testimony’ is quite broad and places the limits upon the use of leading questions on direct examination within the sound judicial discretion of the trial court.’” *State v. Johnson*, 8th Dist. Cuyahoga No. 82340, 2003-Ohio-6634, ¶ 11.

This Court has also explained that, “a party is permitted to ask leading questions under Evid. R. 611(C), and there is no limit on the number of leading questions the party may ask. “*State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 156. Nicholson begins by inaccurately characterizing “yes” or “no” questions as “improper. Nicholson Br. 305. He provides no bases for how such questions are improper. The 10th District Court of Appeals has provided that, “[w]hether a question may be answered “yes” or “no” is not the correct criteria

for determining if they were leading questions.” *State v. Oteng*, 10th Dist. Franklin No. 14AP-466, 2015-Ohio-1231, ¶ 43. “In fact, a “question to which an answer of yes or no would be conclusive of the matter in issue is not necessarily leading, where the question calls for a direct affirmative or negative answer but is no more suggestive of one than the other.” 81 American Jurisprudence 2d, Witnesses, Section 717 (2015).” *Id.* It is from this mistaken position that Nicholson proceeds into specific issues with various testimony.

Here, the questions specifically isolated by Nicholson were permitted by the trial court and necessary to develop the testimony. Notably, only some of these specifically identified questions were objected to by defense counsel, while others were not preserved for review. This Court has determined that without objection, a defendant waives all but plain error, “[e]xcept where noted, defense counsel did not object to leading questions asked of the three witnesses and thus waived all but plain error. See *State v. D’Ambrosio* (1993), 67 Ohio St.3d 185, 190, 1993 Ohio 170, 616 N.E.2d 909.” *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 137. Nicholson avoids this limitation in his argument. In each of Nicholson’s examples, he also fails to demonstrate prejudice caused by the questioning. See *McKelton* ¶ 264 (“Beyond this broad assertion, however, McKelton does not analyze any specific questions asked or how they prejudiced him. We therefore reject this claim of misconduct.”).

Nicholson goes on to discuss the testimony from America Polanco, citing different portions which largely went without objection. Nicholson Br. 306. In addition to failing to address the lack of objection or how he was prejudiced, Nicholson ignores that questions which direct the witnesses’ attention to the topic of inquiry are proper. *State v. D’Ambrosio*, 67 Ohio St.3d 185, 190, 1993-Ohio-170, 616 N.E.2d 909. Throughout the testimony of Polanco, Assistant Prosecutor Faraglia provided such direction, which is not inherently improper. Tr. 3291-92, 3299-3304, 3313-

16). Beyond this propriety, Nicholson fails to meet the standard of plain error and fails to argue how the questioning, even if improper, changed the outcome of the trial. For example, Nicholson claims that Faraglia improperly provided the date that Roberto moved away. Nicholson Br. 306. It is difficult to conceive-and Nicholson makes no claim as to how- such information could have changed the outcome of the trial.

Continuing this argument, Nicholson discusses additional testimony from Polanco about the parking situation and arguments about utility bills, without any objections that were explicitly based upon the nature of the questions. Nicholson Br. 306-07; Tr. 3308-11, 3316-10. Nicholson then discusses the sidebar, omitting that there was no objection from defense about the questions at that time, and that the sidebar was called because the court apparently believed enough background on the relationship was provided, not due to improper questions. Tr. 3319. Moreover, Nicholson fails to acknowledge that where some of these questions “[call] for a direct affirmative or negative answer but is no more suggestive of one than the other.” 81 American Jurisprudence 2d, Witnesses, Section 717 (2015).” *State v. Oteng*, ¶ 43. They are permissible questions, and are additionally not prejudicial to Nicholson.

Nicholson eventually arrives at what he deems “one of the most egregious instances of the state’s substantive leading questioning.” Nicholson Br. 307. Here, there was a defense objection, but this most egregious of examples related to a specific issue between Giselle and Nicholson related to washing and drying clothes. Tr. 3358-63. Here, the trial court properly used its discretion and allowed these two answers objected to by counsel where the questions did not “[suggest] to the witness the answer desired by the examiner.” *State v. Diar*, ¶ 149. This was a proper ruling, and Polanco’s answers were not suggested by the assistant prosecutor. Allowing the assistant prosecutor to direct the witness to specific events and concerns was a proper use of the court’s

discretion in light of the complicated history Polanco was describing, which spanned multiple years and involved several people.

Nicholson's next issue is also a question that was asked and answered without objection. Tr. 3673. In this instance, trial counsel's choice to forego an inappropriate objection seems properly based upon the fact that although Nicholson now claims "[t]his was problematic, because America never testified that she told M.L. to leave the house. (Tr. 3673)," Polanco had indeed testified earlier that, "Manny called the police. When Manny called the police, he ran to the bedroom. Bring the gun. I told Manny: Let's go." Nicholson Br. 308-09; Tr. 3390. Nicholson fails to demonstrate error in this instance. It is plain that the prosecutor paraphrased Polanco's earlier testimony, accurately representing it in this question. Tr. 3673. The weakness of Nicholson's argument is demonstrated by his vain attempt to make issues where there are none. Here, he ignores Polanco's earlier testimony to inaccurately claim a problem where there was none. Notably, Nicholson chose to highlight this proper question despite suggesting that the trial included many issues with leading questions about substantive matters. Nicholson Br. 305. This use of a proper question as something he claims was "[e]ven worse" undermines his suggestion that leading questions were a problem in the trial.

In Nicholson's argument related to the questioning of Angel Nicholson, Nicholson resorts to suggesting that yes or no questions are inherently leading, which is not accurate. Nicholson Br. 309. Again, "[w]hether a question may be answered 'yes' or 'no' is not the correct criteria for determining if they were leading questions." *State v. Oteng*, 10th Dist. Franklin No. 14AP-466, 2015-Ohio-1231, ¶ 43. "In fact, a 'question to which an answer of yes or no would be conclusive of the matter in issue is not necessarily leading, where the question calls for a direct affirmative or negative answer but is no more suggestive of one than the other.'" 81 American Jurisprudence 2d,

Witnesses, Section 717 (2015).” *Id.* Nicholson’s claim that Faraglia acknowledged she was asking improper leading questions is a misstatement of the sidebar proceedings.

Finally, with regard to Det. Biegacki’s testimony, there is no objection that appears to have related to any portion of this testimony based on a leading question. Tr. 3870-75. It does not appear that the assistant prosecutor provided Biegacki any answers, and it appears that the questions allowed for efficient questioning on issues that were not in controversy. Generally, this testimony was provision of the investigative steps taken by the Detective, not information that was in controversy at trial but which was relevant to explaining what the police had done and why. As with each of the issues raised in this section by Nicholson, even if there was an error, it is inconceivable to think that such error deprived him of a fair trial or prejudiced him. See *McKelton* ¶ 264.

In total, Nicholson has failed to demonstrate plain error in any instance. Generally, he demonstrates no issue whatsoever. His focus on specific portions of testimony that don’t contain error demonstrates that he cannot support his argument. His “most egregious” and “worse” examples hardly demonstrate an issue, much less error. Nicholson Br. 307-08. Where these fail to demonstrate error, Nicholson has conceded that there were no other errors that he chose to omit from this argument. Finally, there is no meaningful argument made by Nicholson that any of these questions prejudiced him or prevented a fair trial, and indeed they did not.

D. None of the assertions in the State’s opening statement amounted to prosecutorial misconduct

Nicholson next claims that the State’s opening statement included assertions that the State knew were not supported by evidence in the case. At the outset, none of the claimed issues were preserved for review, and therefore they should be reviewed for plain error. Nicholson directs this Court’s attention to three specific assertions that he believes were prosecutorial misconduct. None

of them were calculated to mislead. Nicholson fails to demonstrate a plain error with regard to any of them

"Prosecutors must avoid insinuations and assertions calculated to mislead. * * * [T]hey may not allude to matters not supported by admissible evidence." *State v. Lott*, 51 Ohio St.3d 160, 166, 555 N.E.2d 293 (1990). Although the expectations of the State with regard to evidence were not entirely demonstrated with evidence, there is no indication that these statements were calculated to mislead the jury or were unsupported by a factual predicate. *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 158.

Nicholson suggests error with regard to the statements that: 1) Nicholson had a habit of extending his hands and that her children would try to intercede to protect their mother, 2) Nicholson knew about Polanco's desire to sell her home and was upset about that issue on September 5, 2018, 3) Nicholson told Polanco that he would need to watch her kids die.

As none of these instances were objected to by counsel at trial, the issues were not preserved for review. The lack of objection from defense counsel suggests that all of the evidence suggested by the State was anticipated based on discovery.

As to the first issue raised by Nicholson, he concedes that Giselle had checked on Polanco during at least one earlier argument. Nicholson Br. 310, Tr. 3313-16. His example suggesting that Polanco's testimony contradicted the State was not at all contradictory, where Polanco told her kids not to intercede but the State said only that the children would try to intercede. Nicholson Br. 310. Indeed, as the record from trial extensively indicates, the children, specifically M.L., did try to intercede on September 5, 2018, before Nicholson shot him to death. This issue does not demonstrate any assertion calculated to mislead.

As to the second issue raised by Nicholson, he again fails to demonstrate any attempt by the State to mislead the jury. The State included that the interest in selling the house was an issue between Polanco and Nicholson. The record is clear, including from the testimony of Nicholson's mother, that Polanco was interested in getting Nicholson out of the house. That he testimony about this issue from Marshall did not track the same expectations presented by the State in its opening, there is no suggestion that the State attempted to mislead or did mislead the jury in this instance.

Finally, as to the third issue raised by Nicholson, he ignores that Polanco struggled to testify about the details surrounding the loss of her children. When she first attempted the testimony, she became emotional and had to delay the conclusion of her testimony until another day. Rather than confronting this reality, which Nicholson details extensively in his seventh proposition of law where he described her testimony as victim impact testimony, he chooses to ignore it in this instance. Nicholson Br. 168-181, 312. Nevertheless, a reading from the record demonstrates that Polanco was not able to give every detail about the deaths of her children when she first testified. Tr. 3391-93. It is not as though she testified that Nicholson did not say what the State expected her to relate, as Nicholson suggests, but rather that she stopped testifying at that point, only to resume later. Nicholson Br. 312. Nicholson seems to be aware of the shortcoming of his argument, attempting to buttress it with the statements made by Polanco to an officer on scene directly after the murders. This single statement, taken directly after witnessing her children being shot to death, obviously does not contain an exhaustive accounting of Polanco's memory. Therefore, there is no reason why it supports any claim by Nicholson that the prosecutor's expectations of her testimony were given in bad faith or with intent to mislead. Also, as with the other issues, counsel did not object to the statement, suggesting that it was based in fact and that counsel believed it was a reasonable expectation for such evidence to be presented.

E. The questioning of Angel Nicholson by the State was not prosecutorial misconduct

Nicholson next argues that the questioning of Nicholson's mother, Angel Nicholson, was improper for a variety of issues based on asking the witness if she was looking at defense counsel, being "flippant, dismissive, hostile, and disrespectful to Angel in front of the jury," cutting off Angel, and eventually impeaching her, for which an objection was sustained. Nicholson Br. 312-14. None of these issues constitute prosecutorial misconduct.

As Nicholson cited but ignored, "there is no rule saying that you can't be unfriendly or stern towards your own witness. The rule is that you cannot impeach your own witness. That is now what Ms. Faraglia is doing." Tr. 3764. Nicholson fails to account for this and instead brands the questioning with a variety of adjectives, never explaining how the questioning would constitute misconduct if it were even true. For clarity, the accusations made by Nicholson are not supported by the record. Additionally, his claim regarding asking whether the Angel Nicholson was looking at defense counsel is not explained as an error. Angel Nicholson's responses to the two questions similarly indicate that she was indeed "peering the room" and "trying to peer through [her] glasses and focus. These are not my normal glasses." Tr. 3755, 3759-60. These responses suggest that the prosecutor was reacting to the witness in a reasonable way, and further they do not suggest any misconduct that Nicholson can explain as such.

After making issue of these empty claims, Nicholson suggests that by impeaching Nicholson on re-direct, she committed prosecutorial misconduct. Here, Nicholson addresses a sustained objection that went without answer and ended the questioning by the assistant prosecutor. Tr. 3793. There is no argument as to how this question prejudiced Nicholson, and it is the only portion of the questioning referenced by Nicholson that demonstrates any issue whatsoever. In total, then,

there was one question, which was not answered, upon which this entire section is based. Again, there is no argument as to how this could have caused prejudice and indeed it did not.

F. The State's questioning of Mr. Nicholson regarding his mother's description of life at 4838 East 86th St. as a hellhole was not prosecutorial misconduct

Nicholson next claims that the State's question of Nicholson on cross-examination using the word hellhole was erroneous. Nicholson Br. 314. Again, Nicholson reaches to describe a proper question as though it could constitute prosecutorial misconduct. Also, Nicholson did not object to this questioning at trial. Here, Nicholson does not dispute that Angel Nicholson had described that Nicholson's living situation in America's home with Polanco, Giselle, and M.L. was a "hellhole." Nicholson Br. 314; Tr. 3771-72, 3774-3776; State's Exhibit 321A. From this, it was perfectly reasonable for the State to ask Nicholson if he had described it as a hellhole.

The source of this description was likely Nicholson, Angel Nicholson's son, who was inarguably the resident of 4838 East 86th St. with whom Angel Nicholson communicated the most. It would have made no sense for Angel Nicholson to render this description without input from at least one resident of the house, and the evidence at trial suggested she was close with her son and no one else who lived at the residence. Therefore, the question had a sound basis, regardless of Nicholson's oblique arguments to the contrary. As in the other issues raised by Nicholson under this proposition, he has failed to demonstrate misconduct, and has also failed to demonstrate or even argue prejudice based upon it.

G. The State's suggestion that gunshots could be heard at the end of the second 9-1-1 call was not prosecutorial misconduct

In his final allegation of prosecutorial misconduct for the culpability phase, Nicholson again makes issue of a statement that he did not object to at trial. Nicholson argues that because the State did include expert testimony about whether gunshots were heard in the call, the State

could not argue that it was in closing argument. Nicholson Br. 316. He provides no rule or law supporting this bar, and as his trial counsel correctly acknowledged – the sound was “subject to interpretation.” Tr. 4298. There was no misconduct in the State’s argument that it believed the sounds were Nicholson beginning to fire his gun. Similarly, there was no issue with defense counsel arguing that it sounded like a knock on the door. Tr. 4298. Viewing the time when the second 9-1-1 call took place approximately four minutes before the police arrived, the State’s inference was a reasonable interpretation of the evidence. Additionally, Officer Jarzembak testified that he was dispatched at around 9:38 PM to respond to a shots fired report. Tr. 2555.

Nicholson has failed to demonstrate any prosecutorial misconduct during the culpability phase of his trial. Additionally, none of the issues he raised could have caused prejudice to Nicholson or removed his ability to have a fair trial.

H. Alleged Misconduct During Mitigation Phase

Again, keeping in mind that the test for prosecutorial misconduct is whether the prosecutor’s remarks were improper and, if so, whether they prejudicially affected the accused’s substantial rights. *See State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). The touchstone of that analysis “is the fairness of the trial, not the culpability of the prosecutor.” *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). Prosecutorial misconduct constitutes reversible error only in “rare instances.” *State v. Keenan*, 66 Ohio St.3d 402, 405, 613 N.E.2d 203 (1993), quoting *State v. DePew*, 38 Ohio St.3d at 288, 528 N.E.2d 542. “The closing argument is considered in its entirety to determine whether it was prejudicial.” *State v. Slagle*, 65 Ohio St.3d 597, 607, 605 N.E.2d 916 (1992), citing *State v. Moritz*, 63 Ohio St.2d 150, 157, 407 N.E.2d 1268 (1992). Where, defendant failed to object, the claimed error is reviewed for plain error. *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, ¶40. “Under the plain-error

doctrine, reversible error occurs only if ‘but for the error, the outcome of the trial clearly would have been otherwise.’” *Id.* (citing *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, paragraph two of the syllabus).

1. Cross-Examination of Donna Kain

First, Nicholson alleges the State improperly solicited prejudicial evidence relevant to the jury’s culpability determination during the mitigation phase. Under this argument, Nicholson takes issue with the State’s cross examination of Donna Kain. Nicholson brands the line of question inflammatory, extremely prejudicial and improper. Nicholson Br. 318. None of these issues constitute prosecutorial misconduct.

Nicholson argues that it was improper for the prosecutor to ask Mrs. Kain, “You’ve indicated to this jury that your brother-in-law is really, for all practical purposes, the worst human being that God created, right?” Tr. 4496-4497. The question was asked in cross-examination as it was offered on direct that Nicholson grew up in an abusive household, which Nicholson wanted the jury to consider in mitigation. He argues that the question was offered regarding his culpability. It is unclear what Nicholson means by this, as it is abundantly clear that the testimony offered that alleged the Nicholson household was an abusive one was for mitigating value. The State was entitled to cross-examine Mrs. Kain. In any event, the objection was subsequently sustained.

Nicholson next takes issue with the following question, which he did not object to at trial:

All right. You consider yourself to be a loving, caring individual, but did you ever call 696-KIDS that your nephews were being beaten, your sister was being thrown out of a window? Did you ever call 696-KIDS, ma’am? Yes or no? It’s real simple. Yes or no.

Tr. 4497. Throughout, the passage Nicholson refers to, the trial court interjected once to allow the witness to explain her answer. No objection was made. Tr. 4496-4500. Again, this was fair cross-examination, since the jury was being asked to believe the truth of her testimony on direct

examination. This places credibility at issue. It was shown in any event, that there were no records from the Cuyahoga County Department of Children and Family Services to show an investigation into the Nicholson household was completed.

Finally, Nicholson takes issue with the prosecutor asking the following questions, “So, Mrs. Kain, you agree with me that a woman who loves her children stays with her abuser?” and “Even to the point that her kids get killed because she stayed with her abuser, right.” Tr. 4505. Even though, the trial court sustained defense counsel’s objection, defense counsel subsequently appeared to ask the witness respond and comment on the question. Tr. 320. Nicholson’s argues that this question is inflammatory and improperly referenced the culpability phase of the trial. Again, there is no complete prohibition on referencing any part of the culpability phase of the trial. It is appropriate for the jury to consider during the mitigation phase evidence that goes to the aggravating circumstance – here the course of conduct that Nicholson shot M.L. and Giselle Lopez multiple times in the back and to determine whether the nature of the circumstances are entitled mitigating weight.

2. The State did not improperly make remarks during the mitigation phase about irrelevant and unsubstantiated bad acts

Second, Nicholson alleges that the State improperly and repeatedly made remarks during the mitigation phase about prior bad acts and argues that any evidence should have limited to the events of September 5, 2018. Under this argument, Nicholson appears to argue the old bad acts or negative information that the jury can hear during the mitigation phase are those that relate to the aggravating circumstance, in this case the course of conduct of Nicholson shooting M.L. and Giselle Lopez multiple times in the back. Nicholson was also convicted of Attempted Felonious Assault as it relates to Polanco.

Ohio law requires all capital juries to consider whether there is anything mitigating about a defendant's character. R.C. 2929.04(B) provides that during the mitigation phase, the jury "shall consider, and weigh against the aggravating circumstances * * * the nature and circumstances of the offense [and] the history, character, and background of the offender * * *." "'Shall' means must." *Wilson v. Lawrence*, 150 Ohio St.3d 368, 2017-Ohio-Ohio-1410, 81 N.E.3d 1242, ¶ 13. "[W]e repeatedly have recognized that use of the term 'shall' in a statute connotes a mandatory obligation unless other language evidence a clear and unequivocal intent to the contrary." *Id.* There is no such other language in R.C. 2929.04(B). As a result, that statute creates a mandatory requirement that the jury weigh the defendant's character against the aggravating circumstances.

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

The requirement under R.C. 2929.04(B) that the jury consider the defendant's "history, character, and background" includes the defendant's criminal record. "[T]his court has recognized that a defendant's prior crimes are directly relevant to his 'history, character, and background,' R.C. 2929.04(B), which a sentencing jury must consider." *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88, ¶ 50, citing *State v. Waddy*, 63 Ohio St.3d 424, 428-429, 588 N.E.2d

819 (1992) (“Waddy assumes that the Wilson, Jackson, and Milligan crimes are irrelevant to whether he should be executed for murdering Mason. His assumption is erroneous. Waddy's record of criminal behavior is directly relevant to his ‘history, character and background,’ R.C. 2929.04(B), which a sentencing jury must consider”). In some cases, this factor (the lack of a significant prior criminal history) is “entitled to significant weight in mitigation.” *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶ 280. “However, this factor is diminished by the evidence presented at trial that he may have committed” other crimes, “even though he escaped prosecution for them.” *Id.*

Nicholson cites an exchange between the prosecutor and Dr. Fabian regarding the contents of his expert report. Nicholson Br. 320-321 citing Tr. 4750-4752. Dr. Fabian’s expert report contained information regarding the allegations from Polanco and Lauren Thomas. Def. Mitigation Exhibit A, pgs. 29-30. Therefore, it was fair cross-examination as it was contained in Dr. Fabian’s report and it is something the jury would have had available to them. See *State v. Greer*, 39 Ohio St. 3d 236, 253, 530 N.E.2d 382 (1988) (“once lawfully inserted into the sentencing considerations, such information is subject to fair comment by both parties). There is nothing to support a conclusion that the State was required to ignore this information or that the jury had to be given only information favorable to Nicholson. In addition it was fair to discuss in relation history, character, and background of Nicholson.

Nicholson cites to a portion of the transcript to suggest that the trial court precluded any reference to Lauren Thomas’s allegations. Nicholson Br. 325 citing Tr, 5039-5040. This does not lead to a conclusion that the State could not inquire into the contents of Dr. Fabian’s report. The sidebar exchange falls short of doing so and does not even remotely suggest that the trial court barred the State from inquiring into the details contained within Dr. Fabian’s report. Ms. McDonnell on the

other hand did not meet with Lauren Thomas. Nicholson's argument is rebutted by the trial court's sentencing opinion which considered the allegation of Lauren Thomas. R. 440, pg. 14.

Finally, Nicholson takes issue with the prosecutor's remark in closing argument, but again this was fair closing argument considering that Nicholson's history, character, and background were at issue. The State was not required to limit itself to only evidence relevant to the aggravating circumstance when it cross-examined witnesses.

3. The State did not erroneously representations of the "prior criminal history" statutory mitigating factor in its closing arguments

Third, Nicholson alleges that the State made erroneous representations of the "prior criminal history" statutory mitigating factors in its closing arguments. This was fair argument given the evidence heard by the jury.

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

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

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

Here, there is no indication that the trial court precluded any and all reference to Lauren Thomas. The information was contained in Dr. Fabian's report. Part of the State's argument was that in considering Nicholson's lack of a significant criminal history, the jury should consider why that was so. It was the State's argument that Nicholson's threatened, intimidated, and bullied Polanco into not turning him into police. Tr. 5104-5105.

4. The State did not improperly make remarks regarding mitigating factors not raised by Nicholson during the mitigation phase

Finally, Nicholson argues that the State made improper closing arguments regarding mitigating factors not raised by Nicholson during the mitigation phase. He supports his decision by citing to this Court's decision in *State v. DePew*, 38 Ohio St. 3d 275, 528 N.E.2d 542 (1988). Nicholson argues that the prosecutor impermissibly commented on factors not raised by

Here Nicholson takes issue with the following argument made by the prosecutor:

When we talk about the defendant never being in trouble before, this mitigating factor is kind of unique. Mitigation is usually not something that you have to do. It's a fact about who you are. You were born with this disorder, you were born into this situation; your IQ is at this level.

This factor is different. This factor has to be earned. It has to be earned by a good lifetime of law-abiding behavior.

Tr. 5102-5103. Nicholson omits portions of the prosecutor's closing argument and argues that this remark by the State was a commentary on his IQ. However, in its complete context the prosecutor made this remark in discussing the factor regarding Nicholson's lack of a criminal history. It was not an improper commentary by the prosecutor as to a mitigating factor not raised by Nicholson.

Reviewing the prosecutor's comments in the context of the entire record, it cannot be said the remark was in violation of *State v. DePew*, 38 Ohio St. 3d 275, 528 N.E.2d 542 (1988) and hardly has this Court reversed on this basis. Even then, because no objection was made, Nicholson must prove plain error which he does not.

I. Cumulative Error

Nicholson's several arguments for prosecutorial misconduct are all meritless. In none of them has he demonstrated an error by counsel. Adding all of these meritless issues together, he has not demonstrated that reversal is appropriate. Cumulative error requires underlying error, which Nicholson has failed to demonstrate.

J. Conclusion

As shown above, there was no prosecutorial misconduct, plain or otherwise, in the guilt or penalty phases.

Response to Proposition of Law XVI: Trial counsel's performance was not deficient and did not result in prejudice to Nicholson and his rights to effective assistance of counsel under the Ohio and U.S. Constitution were preserved.

In his sixteenth proposition of law, Nicholson argues ineffective assistance of counsel. First, counsel was not ineffective for not objecting to photographs of the victims at the scene. Second, counsel was not ineffective for turning over the mitigation report prior to the culpability phase of trial. Third, counsel was not ineffective for deciding not to attempt certain impeachment of Polanco using text messages. Fourth, counsel was not ineffective for deciding not to object to certain testimony. Fifth, counsel was not ineffective for deciding not to attempt certain impeachment of Lt. Todd Vargo regarding self-defense. Sixth, counsel was not ineffective for deciding not to attempt to elicit testimony and request a jury instruction on the affirmative defense of a blackout. Seventh, counsel was not ineffective for not objecting to the self-defense instructions given to the jury by the trial court. Eighth, counsel was not ineffective for not objecting to misstatements that Nicholson was charged with four counts of aggravated murder during the first several days of death qualification individual voir dire. Ninth, counsel was not ineffective for

not introducing the concepts of self-defense, prior calculation and design, or voluntary manslaughter during voir dire or its opening statement or in its argument of these concepts in closing arguments. Tenth, cumulative errors does not make reversal appropriate by stringing together Nicholson's several, insufficient claims of ineffective assistance to suggest that they affected his right to a fair trial as a group when they did not affect his right to a fair trial individually.

A. The legal standard for an ineffective assistance of counsel claim

A claim of ineffective assistance of counsel requires a defendant to satisfy a two-prong test. The defendant must demonstrate (1) "that counsel's performance was deficient," and that (2) "the deficient performance prejudiced the defense so serious[ly] as to deprive the defendant of a fair trial." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). To determine whether counsel was ineffective, *Strickland* requires courts to "[apply] a heavy measure of deference to counsel's judgments." *Id.* at 691. To establish prejudice under the second prong of *Strickland*, a defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" is a probability "sufficient to undermine confidence in the outcome." *Id.* "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112, 131 S. Ct. 770, 791, 178 L.Ed.2d 624 (2011).

B. Counsel was not ineffective for not objecting to photographs of the victims at the scene

Nicholson begins this proposition by reasserting his issues with the autopsy and crime scene photographs, and the body camera videos, which he raised in his fourth proposition of law. Once again, he mistakenly focuses his argument on the fact that there was no dispute that

Nicholson caused the deaths of M.L. and Giselle by shooting them. He ignores that his self-defense argument greatly increased the probative value of this evidence. He fails to account for that issue in any way here, as he failed to in the fourth proposition. In so doing, he ignores that his counsel could not be ineffective for failing to object to evidence that was of central importance to the issue.

His argument is woefully inadequate in addressing this issue. Nicholson argues that cause and manner of death information was not necessary because “no reasonable defense attorney could have argued that Mr. Nicholson did not shoot M.K. and Giselle, and that the gunshot wounds they sustained resulted in their deaths.” Nicholson Br. 336-37. First, this ignores the lack of stipulation, and the burden on the State to prove manner and cause of death regardless of the overwhelming evidence against Nicholson. But beyond this failure of his argument, it completely fails to account for the self-defense argument made by Nicholson, and the focal point that autopsy and crime scene evidence necessarily became based on his claims. By arguing that he shot M.L. in self-defense, the details including that he shot them in their backs, that they were outside the home, and that he shot them at close range, among other details, became essential, pivotal information that the trier of fact was entitled to so that Nicholson’s claims and the charges against him could be fairly evaluated. Failing to address this obvious concern, Nicholson fails to demonstrate deficient performance.

Moreover, Nicholson presumes prejudice, while ignoring that nothing in the record indicates that the senses of the jury were inflamed by any of the photographs or videos admitted as evidence. He does nothing to support an argument that this evidence caused prejudice and the record also fails to support his claim.

C. Counsel was not ineffective for turning over the mitigation report prior to the culpability phase of trial

Crim.R. 16(K) provides that an expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than 21 days prior to trial, which period may be modified by the court for good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.

State v. Gardner, 8th Dist. Cuyahoga No. 107573, 2019-Ohio-1780, ¶ 48

Nicholson's argument here completely ignores the plain language of the rule. He presents no case or rule that contradicts its plain meaning, and his argument is made without support. Defense counsel followed a proper court order, which Nicholson does not claim was improper.

Nicholson's baseless claim against his counsel is that they "failed to limit the mitigation report of Dr. Fabian, or otherwise object to turning over Dr. Fabian's entire unredacted mitigation report, thereby apprising the State of Mr. Nicholson's anticipated testimony and self-defense claim. His argument ignores that the court's order was proper under Crim. R. 16(K). Here, Nicholson begins by providing no rule or law supportive of his purported interest in keeping details of the mitigation report secret from the State. Indeed, the State was entitled to the report and Nicholson fails to demonstrate that it was not. Beyond this, Nicholson's arguments are based on the groundless assumption that counsel failed to "thoroughly review the report" before providing it. Nicholson Br. 341-42. Finally, Nicholson's claims about the report are undermined by his own testimony.

First, and most fundamentally, because Crim. R. 16(K) requires that expert reports be provided no less than 21 day prior to trial, Nicholson's argument fails. Nicholson suggests that his

counsel should have objected to the Court's order to turn over the report without any supportive law. Nicholson Br. 337-42. He acknowledges that the trial court ordered the report to be shared in discovery, and never claims that this order was improper. Nicholson Br. 337.

Nicholson's next issue leveled against his counsel contains no more support than his first. Although he claims that his counsel failed to thoroughly review the report, this is nothing more than an assumption. Nicholson argues that it can be surmised that a meaningful review did not take place, with no evidence in the record supporting this claim. Nicholson Br. 342. Nothing in the record suggests that counsel failed to review the report, and Nicholson's only argument in support of his claim is that the report was dated the day before it was turned over to the state. Defendant's Exhibit A; Tr. 2712. Nicholson cannot demonstrate that his counsel was ineffective based on an assumption.

Finally, Nicholson suggests that his attempts to surprise the State with his unlikely self-defense theory were thwarted by the report's "precise factual basis for Nicholson's self-defense claim." Nicholson Br. 338. Apart from Nicholson's inability to support his suggestion that he was somehow entitled to surprise the State with his self-defense claim, his testimony contradicts the State's argument at trial and Nicholson's argument here, that the report contained nearly so much information. At trial, Nicholson testified,

[Assistant Prosecutor]: Mr. Nicholson, do you remember that you made a prior statement with another individual at a different time in July of 2019? You met somebody? You met a doctor?

[Nicholson]: I met a doctor; that's correct.

[Assistant Prosecutor]: Okay. And do you remember making a statement with regard to the circumstances of September 5, 2018?

[Nicholson]: A statement, no. We talked generally about what happened.

[Assistant Prosecutor]: Okay. Did you provide him information about what happened?

[Nicholson]: Bits and pieces.

[Assistant Prosecutor]: All right. And some of the stuff that I just - - you and I just talked about, was that a fair representation of what you said?

[Nicholson]: Some things, yes.

Tr. 4139-4140.

The above exchange includes Nicholson severely downplaying the information provided to Fabian, which he now argues as the basis for deficient performance as well as prejudice. This is based on information that he indicated amounted to “Bits and pieces.” Tr. 4139. Quizzically, he refers to this section of the transcript and bolds the word, “defense’s” when referring to defense’s expert, although he did not refer to Fabian using either of those terms at that time. Nicholson Br. 340; Tr. 4139-40.

Again, Nicholson fails to demonstrate both deficient performance and prejudice. His argument for prejudice amount to his issue with the State’s ability to find additional witnesses related to his self-defense claim. Tr. 2712-13. The State’s continuous efforts to provide relevant witnesses as it learned about the case are not prejudicial to Nicholson, they are appropriate work by the State in its pursuit of a just result of trial. The fact that no witness presented by the State or Nicholson supported his self-defense claim cannot be the basis for ineffective assistance of counsel.

D. Counsel was not ineffective for deciding not to attempt certain impeachment of Polanco using text messages

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *State v. Rogers*, 11th Dist. Lake No. 2018-L-119, 2019-Ohio-4834, ¶ 36 citing *Strickland, supra*, at 689. Here, Nicholson insists that his counsel was deficient for not presenting text messages from his own phone during his direct examination, in order to impeach Polanco's testimony. Nicholson Br. 343.

His argument fails to demonstrate that these text messages could have been entered into evidence, were helpful to his case, and most importantly, that his counsel was deficient for choosing not to use them.

All of the text messages discussed by Nicholson that claim to demonstrate an affectionate relationship are dated 2016 or earlier. Nicholson Br. 344-48. Polanco described the relationship as getting worse and worse, beginning in 2015. Tr. 3288. Text messages from more than a year prior to the murders would have done little or nothing to impeach Polanco's testimony, which did not claim an absolute end to the relationship in 2015, or even that Nicholson sent her unpleasant text messages. Polanco also testified that in January of 2018, the relationship with Nicholson, "got really worse." Tr. 3342.

Examining the testimony and evidence in its entirety, Nicholson's suggestion that impeachment with text messages from 2016 was a necessary trial strategy is respectfully inappropriate. Polanco did not testify that the relationship became statically bad in 2015, but rather that it continued to decline in the years leading up to Nicholson murdering her children. The use of text messages from 2016 to impeach her, therefore, would not likely be effective. Additionally, besides this obvious failure in Nicholson's logic, he avoids the reality that some pleasant or not-

menacing text messages exchanged fail to demonstrate that nothing was wrong in the relationship. His trial counsel certainly understood what Nicholson fails to consider now – that any number of positive text messages do not necessarily prove that a relationship was going well.

Counsel was therefore not deficient for declining to try to use Nicholson’s text messages, some of which had been curiously deleted prior to his phone being seized, to impeach the testimony of Polanco while Nicholson testified. This was not deficient performance and Nicholson has not demonstrated prejudice. His framing this issue relies on his inaccurate suggestion that Polanco portrayed the relationship as being statically bad since 2015, when her actual testimony undermines his argument on this issue. Polanco testified that it continued to get worse until it got to the point where she was recording Nicholson every day in 2018. Tr. 3342. Text messages from 2016 were therefore not helpful in attacking her credibility, and trial counsel was therefore effective in choosing not to use such messages.

E. Counsel was not ineffective for deciding not to object to certain testimony

Nicholson next frames the arguments he made in Proposition of Law 15 as arguments for ineffective assistance of counsel. The arguments are no more effective here than there, and he fails to demonstrate either deficient performance or prejudice.

He begins by claiming that there was duplicative testimony elicited when Polanco again testified. First, he fails to demonstrate the testimony was indeed duplicative. Polanco’s testimony was stopped originally so that she could compose herself. Tr. 3391-93. This happened unexpectedly, and it was wholly appropriate for the State to retrace some of her testimony to allow for the complete details of the incident to be provided to the jury. Defense counsel’s objections to these details were as likely to harm Nicholson’s defense as to help, where Nicholson would have appeared interested in stopping her from describing the key details of the murders. While

Nicholson claims that the State “proceeded to go through again everything America had just testified about on October 4, 2019,” a review of the records demonstrates this is simply no true. The State was forced to go over some of the same information in order to gain a coherent narrative and to give context to Polanco’s testimony. That being said, the State certainly did not go through everything again.

Nicholson proceeds from this failing argument to again argue issue with the form of the State’s questions. Again, “[a] leading question is ‘one that suggests to the witness the answer desired by the examiner.’” *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 149, citing 1 McCormick, *Evidence*, Section 6, at 19 (5th Ed.1999). The Eighth District has followed other district courts in holding that “[i]t is wholly within the discretion of the trial court to permit the state to ask leading questions of its own witnesses. *State v. Miller* (1988), 44 Ohio App.3d 42, 45, 541 N.E.2d 105. As stated in *State v. Lewis* (1982), 4 Ohio App.3d 275, 278, 4 Ohio B. 494, 448 N.E.2d 487, ‘the exception ‘except as may be necessary to develop his testimony’ is quite broad and places the limits upon the use of leading questions on direct examination within the sound judicial discretion of the trial court.’” *State v. Johnson*, 8th Dist. Cuyahoga No. 82340, 2003-Ohio-6634, ¶ 11.

As address in the fifteenth proposition of law, Nicholson has failed to demonstrate error based on leading questions. Those arguments are incorporated here by reference. Nicholson specifically addresses Det. Biegacki’s testimony again here, while again failing to even argue prejudice based upon it. Moreover, it does not appear that the assistant prosecutor provided Biegacki any answers, and it appears that the questions allowed for efficient questioning on issues that were not in controversy. Generally, this testimony was provision of the investigative steps

taken by the Detective, not information that was in controversy at trial but which was relevant to explaining what the police had done and why. As with each of the issues raised in this section by Nicholson, even if counsel should have objected, he has failed to demonstrate any prejudice.

Nicholson's next issue is again repeated from his prior proposition of law. Nicholson Br. 308-09; Tr. 3673. In this instance, trial counsel's choice to forego an inappropriate objection seems properly based upon the fact that although Nicholson now claims "[t]his was problematic, because America never testified that she told M.L. to leave the house. (Tr. 3673)," Polanco had indeed testified earlier that, "Manny called the police. When Manny called the police, he ran to the bedroom. Bring the gun. I told Manny: Let's go." Nicholson Br. 308-09; Tr. 3390. Nicholson fails ineffective assistance in this instance. It is plain that the prosecutor paraphrased Polanco's earlier testimony, accurately representing it in this question. Tr. 3673. The weakness of Nicholson's effective assistance of counsel argument is demonstrated by his vain attempt to make issues where there are none. Here, he ignores Polanco's earlier testimony to inaccurately claim a problem where there was none. Notably, Nicholson chose to highlight this proper question despite suggesting that trial counsel failed to raise objections in many instances. This use of a proper question as an example meant to demonstrate ineffective assistance undermines his suggestion that leading questions were a problem in the trial.

In total, Nicholson has failed to demonstrate ineffective assistance of counsel in any instance. Generally, he demonstrates no deficient performance whatsoever. Finally, there is no meaningful argument made by Nicholson that any of these questions prejudiced him or prevented a fair trial, and indeed they did not.

F. Counsel was not ineffective for deciding not to attempt certain impeachment of Lt. Todd Vargo regarding self-defense

Here, counsel makes multiple assumptions the foundation of his argument for ineffective assistance of counsel related to impeachment of Todd Vargo. Nicholson attempts to use state's exhibits 324B and 332A related to Nicholson's father saying "If somebody jumped you, they'll [law enforcement] figure all of that out" to say 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" this to Nicholson. Nicholson Br. 352. This requires multiple assumptions. First, it assumes that Lt. Vargo heard everything said by Nicholson in the call. Secondly, and more importantly, it assumes that Nicholson said something about self-defense to prompt his father to say this. Finally, Nicholson omits entirely that State moved to admit the entire recording of the tape, in both the unenhanced and enhanced versions, and that the jury was able to review the evidence in question in its entirety, removing any potential issue that Nicholson suggests at this point. Tr. 4223-26; Exhibits 320, 324 A, B, C.

There is nothing besides mere assumption that Nicholson provides to suggest he indicated that he had acted in self-defense, or that Lt. Vargo heard him say anything to that effect. Nicholson's argument leads him to describing this supposed impeachment statement as "whatever it was that Mr. Nicholson was saying on the call at 10:30 PM that prompted Robert Sr. to say..." Nicholson Br. 352. This does not amount to information that is the basis of necessary cross-examination. Nicholson cannot use this to demonstrate that his counsel's performance was deficient. Similarly, the choice not to attempt impeachment using such information cannot demonstrate prejudice.

G. Counsel was counsel was not ineffective for deciding not to attempt to elicit testimony and request a jury instruction on the affirmative defense of a blackout

Nicholson's argument that counsel was ineffective for not eliciting testimony from Dr. Fabian to attain a blackout affirmative defense instruction is undermined by Nicholson's own testimony. Tr. 4130. At trial, Nicholson testified,

[Assistant Prosecutor]: Now, is it fair to say, Mr. Nicholson, that you've given us some various stories about what happened on September 5, 2018? Is that fair?

[Nicholson]: Fair.

[Assistant Prosecutor]: Okay. You blacked out, right?

[Nicholson]: Correct.

[Assistant Prosecutor]: Correct? What does "black out" mean to you?

[Nicholson]: I don't know.

[Assistant Prosecutor]: Did anybody see you black out?

[Nicholson]: No.

[Assistant Prosecutor]: Black out means loss of consciousness. Did you lose consciousness?

[Nicholson]: No.

[Assistant Prosecutor]: Okay. So you're with me, you knew exactly what you were doing that night?

[Nicholson]: Correct.

Tr. 4130-31.

This testimony contradicted any claim that Nicholson may have made for a blackout instruction. As this Court's opinion in *Ireland* demonstrated, the Defendant's awareness of his actions at the time of the incident are one of the requirements under R.C. 2901.05(D)(1)(b):

Only Ireland knows whether he was aware of the actions he took at the time of the incident; Ireland is the only person who could know the way that he felt and what he experienced during the alleged PTSD dissociative episode. Despite this, there were numerous ways in which Ireland could support his blackout defense, none of which are unfair to Ireland. Ireland used the testimony of an expert witness, Dr. Reardon, to demonstrate that Ireland had experienced a PTSD dissociative episode during his altercation with the victim.

State v. Ireland, 155 Ohio St.3d 287, 2018-Ohio-4494, 121 N.E.3d 285, ¶ 25

This is because a “blackout excuse is “peculiarly within the knowledge of the accused,” satisfying the second requirement of R.C. 2901.05(D)(1)(b), because only the accused could know or be able to describe his or her feelings and experiences during the alleged blackout.” *Ireland* ¶ 22. Here, Nicholson testified that he did not lose consciousness and knew exactly what he was doing that night. Tr. 4130-31. This obviated any need for or usefulness for Dr. Fabian to testify as to blackout during the culpability phase. This Court’s explanation in *Ireland* has clarified that no one knew better what Nicholson was aware of at the time of the murders more than him. Therefore, because Nicholson testified, and made clear that he suffered no lack of awareness when he killed M.L. and Giselle, counsel was not deficient for choosing not to attempt a blackout defense which was contradicted by Nicholson’s own testimony.

Nicholson misapplies *Ireland* to the instance case, ignoring that Ireland did not testify in his own trial, as Nicholson did. *Ireland* ¶ 3-5. Nicholson also ignores that Ireland did not testify in contradiction to the evidence which would have supported his affirmative defense of blackout, as Nicholson did in the present case. *Id.*; Tr. 4130-31. Following the *Ireland* decision, the testimony

of Dr. Fabian, or any other witness for that matter, could not undermine Nicholson's own testimony that he knew exactly what he was doing that night. For this reason, a blackout instruction was not appropriate.

For the above reasons, Nicholson could not demonstrate prejudice because his counsel did not request an inappropriate instruction. In addition, the testimony of Nicholson would have prevented any success in this defense, even if the instruction had been provided. Nicholson argues only that the defense could have been provided in addition to self-defense, but fails to explain or argue as to how a jury could have looked past Nicholson's testimony in order for the outcome of trial to be different. Nicholson's argument that, "[i]f the jury found that the State proved, beyond a reasonable doubt, that Mr. Nicholson did not act in self-defense, then Mr. Nicholson's [SIC] could have still [SIC] been found not guilty of the counts related to at least M.L. and Giselle, if not all counts." Nicholson Br. 356. As with Nicholson's other ineffective assistance claims, this falls well short of the *Strickland* standard for showing a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 694.

H. Counsel was not ineffective for not objecting to the self-defense instructions given to the jury by the trial court

Nicholson next frames the arguments he made in Proposition of Law 6 as arguments for ineffective assistance of counsel. The arguments are no more effective here than there, and he fails to demonstrate either deficient performance or prejudice.

As explained in Proposition of Law 6, the trial court provided an inarguably correct recitation of self-defense. Tr. 4258-61. The State has responded to all of Nicholson's arguments earlier in this brief. Nicholson focuses here on the initial aggressor aspect of the instructions, again

ignoring the relevant facts of the case to make his argument. Nicholson focuses on his argument with Polanco as the potential time when the situation was created, ignoring that he went to his bedroom, retrieved his gun, and sought out the victims to shoot them in their backs. As has already been explained, the instructions were correct, and Nicholson makes no new argument here to satisfy the first prong of *Strickland*. Additionally, because a request for alternate instructions would have been properly denied and because such instructions would not have changed the outcome of the trial even if provided, he has failed to demonstrate any prejudice from this choice by trial counsel.

I. Counsel was not ineffective for not objecting to misstatements that Nicholson was charged with four counts of aggravated murder during the first several days of death qualification individual voir dire

Nicholson next frames the arguments he made in Proposition of Law 8 as arguments for ineffective assistance of counsel. The arguments are no more effective here than there, and he fails to demonstrate either deficient performance or prejudice.

Here, he fails to demonstrate how counsel was deficient performance or prejudice under this issue. Nicholson fails to describe why the jury needed to have the number of charges explained to them, when at no other point in the trial was the indictment described as including four counts of aggravated murder. Nicholson was charged with four total counts of murder, and two of these counts were for aggravated murder. No argument was made based upon the initial miscounting of aggravated murder charges and there was nothing to suggest any confusion arose from it.

Beyond failing to establish the first prong of ineffective assistance, Nicholson provides the conclusory statement that this prejudiced Nicholson. Nicholson Br. 357. There is no conceivable way that this initial misstatement, never repeated throughout the trial, could have influenced the

outcome of the trial. Additionally, as Nicholson fails to offer any viable explanation of the same this issue is without merit.

J. Counsel was not ineffective for not introducing the concepts of self-defense, prior calculation and design, or voluntary manslaughter during voir dire or its opening statement or in its argument of these concepts in closing arguments

Counsel were not deficient for choosing not continue attempts to remove Juror No. 16 or to attempt to remove Juror No. 43. Nicholson fails to demonstrate that his counsel's decision not to continue pursuing dismissal of Juror No. 16 was deficient, much less that it caused prejudice. Similarly, he fails to support his claim with regard to Jury No. 43 with any basis demanding an attempt to exclude such a juror. Failing here, Nicholson also fails to demonstrate prejudice.

Specifically considering Nicholson's claims as to Juror No. 16, he makes no argument that further questioning of No. 43 could not have affected counsel's decision with regard to whether this juror should remain on the jury. In reviewing the general voir dire, when No. 43 was then Juror No. 5, there was a great deal of interaction from this juror which may have reasonably changed counsel's strategy with regard to him. Tr. 2275-2364. Additionally, there is no argument made in support of prejudice.

Considering the claims regarding Juror No. 43, Nicholson offers no law demonstrating that full support for the death penalty requires counsel to request removal of a potential juror. Beyond this, Nicholson ignores the potential strategic considerations counsel may have held in choosing not to exclude this juror. Failing to do this, Nicholson fails to demonstrate either prong of *Strickland*.

Here, Nicholson has demonstrated neither deficient performance nor prejudice based on counsel's voir dire. The two jurors isolated by Nicholson were discussed with extreme brevity, and Nicholson ignores that counsel's decisions were not limited to the single issue that he now raises with each of these jurors. Nicholson has not demonstrated that effective representation required continued attempts to remove either of these jurors, and has also failed to demonstrate that their presence caused him prejudice.

K. Counsel was not ineffective for not introducing the concepts of self-defense, prior calculation and design, or voluntary manslaughter during voir dire or its opening statement or in its argument of these concepts in closing arguments

In his final substantive claim of ineffective assistance, Nicholson argues that counsel provided ineffective assistance by not addressing specific issues in its opening statement. Nicholson again provides no legal basis for this claimed deficiency.

In denying a similar issue, the Ninth District Court of Appeals held that "[f]rom a review of the record, one might infer that defense counsel did not specifically argue self-defense because counsel may have planned to direct the defense's case in response to how the State's case developed. Therefore, counsel's failure to specifically argue self-defense in his opening statement appears to be a trial tactic, and does not amount to deficient performance." *State v. Thomas*, 9th Dist. Summit No. 27266, 2015-Ohio-2935, ¶ 12. As this Court has long recognized, "as we reminded the bench and bar not long ago, even 'debatable trial tactics' do not 'constitute a deprivation of the effective assistance of counsel.' * * * When, as here, 'there is no showing that counsel did not research the facts or the law, or that he was ignorant of a crucial defense' * * * and counsel makes a tactical choice to withhold certain evidence for a later stage of trial, sound policy reasons persuade us to defer to counsel's judgment in the matter." *State v. Clayton*, 62 Ohio St.2d 45, 49, 402 N.E.2d 1189 (1980) (internal citations omitted).

Additionally, “trial counsel's failure to specifically argue self-defense in opening statement did not foreclose counsel from raising it as an affirmative defense during trial, and Mr. Thomas testified that he shot Mr. Smith in self-defense. *See, e.g., State v. Kinsworthy*, 12th Dist. Warren No. CA2013-06-053, 2014-Ohio-1584, ¶ 46 (trial counsel not ineffective for failing to argue an alibi defense in opening argument where counsel did present alibi evidence through witnesses' testimony as the case progressed and referenced the alibi during closing arguments). *State v. Thomas*, 9th Dist. Summit No. 27266, 2015-Ohio-2935, ¶ 12.

Here, Nicholson fails to demonstrate that counsel's voir dire or opening statement was deficient because the strategy at that point did not include discussion of self-defense and prior calculation and design. Moreover, as with his other ineffective claims, he has failed to demonstrate prejudice.

L. Cumulative errors do not make reversal appropriate by stringing together Nicholson's several, insufficient claims of ineffective assistance to suggest that they affected his right to a fair trial as a group when they did not affect his right to a fair trial individually

Nicholson's several arguments for ineffective assistance of counsel are all meritless. In none of them has he demonstrated an error by counsel. Adding all of these meritless issues together, he has not demonstrated that reversal is appropriate. Cumulative error requires underlying error, which Nicholson has failed to demonstrate.

M. Conclusion

For each of these reasons, Nicholson's counsel was not ineffective. The evidence against him was overwhelming and his defense of self-defense was not persuasive.

Response to Proposition of Law XVII: Defendant was denied effective assistance of counsel during the mitigation phase.

Under the seventeenth proposition of law, Nicholson raises an ineffective assistance counsel claim with respect to the mitigation phase. Nicholson argues that his counsel was ineffective for failing to investigate, prepare, and/or present significant evidence in mitigation, that defense counsel was ineffective for failing to request the trial court instruct the jury on specific statutory and/or non-statutory factors raised by defense and/or failing to object to the jury instructions, for failing to ensure that Dr. Fabian was a competent, well-prepared expert when he testified, and for failing to object at points during the mitigation phase. Nicholson also argues cumulative error.

A claim of ineffective assistance of counsel requires a defendant to satisfy a two-prong test. The defendant must demonstrate (1) “that counsel's performance was deficient,” and that (2) “the deficient performance prejudiced the defense so serious[ly] as to deprive the defendant of a fair trial.” *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). To determine whether counsel was ineffective, *Strickland* requires courts to “[apply] a heavy measure of deference to counsel's judgments.” *Id.* at 691. To establish prejudice under the second prong of *Strickland*, a defendant must show a “reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A “reasonable probability” is a probability “sufficient to undermine confidence in the outcome.” *Id.* “The likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 112, 131 S. Ct. 770, 791, 178 L.Ed.2d 624 (2011). On the issue of counsel's ineffectiveness, the petitioner has the burden of proof because in Ohio, a properly licensed attorney is presumed competent. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 62

A. Alleged failure to investigate, prepare, and/or present significant evidence in mitigation

Although Nicholson has argued that the mitigating factors outweigh the aggravating circumstances, he also argues that trial counsel was ineffective in its presentation of mitigation. In particular, Nicholson argues that an expert should have been retained to look into allegations that Nicholson has suffered sexual abuse. This is not a circumstance where defense counsel in this case completely failed to make any mitigation investigation, indeed the defense called several witnesses on Nicholson's behalf including family members, and several expert witnesses. Compare *State v. Johnson*, 24 Ohio St. 3d 87, 24 OBR 282, 494 N.E.2d 1061 to *State v. Bradley*, 42 Ohio St. 3d 136, 538 N.E.2d 373 (1985). This was a legitimate strategy given the circumstances, since the decision not to retain a sexual abuse expert was made because it seemed that the PTSD allegedly stemming from Nicholson's childhood seemed like the more important aspect. Without knowing that a sexual abuse expert might opine, it is impossible for Nicholson to satisfy his burden of proving ineffective assistance of counsel. As this Court held:

"Generally, counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *State v. Treesh*, 90 Ohio St.3d 460, 490, 2001-Ohio-4, 739 N.E.2d 749 (2001). Defense counsel provided substantial mitigating evidence on Dean's behalf. Moreover, the record [*164] does not show that defense counsel failed to investigate the possibility of presenting additional lay testimony. See *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 244 (a court "cannot infer a defense failure to investigate from a silent record").

State v. Dean, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 286

Here, Nicholson's defense team presented a mitigation defense that included expert testimony and testimony from family members. Dr. Fabian explained that he believed it was better to pursue the PTSD aspect. Although the State rebutted much of Nicholson's expert testimony offered in mitigation, his trial team nonetheless, presented an in-depth mitigation defense. As such, the

record does not show that defense counsel failed to investigate or consider the possibility of presenting additional testimony as the decision was made not to pursue it. Instead, as a matter of trial strategy, Nicholson's trial team pursued what it believed was the more viable mitigation defense. Furthermore, Nicholson has not identified any comparative authority to suggest that the conduct here was ineffective and that such conduct prejudiced Nicholson. Trial counsel cannot be deemed ineffective with this respect.

B. Defense counsel was not ineffective for failing to request the trial court to instruct the jury on the specific statutory and/or non-statutory mitigating factors raised by the defense and/or failed to object to the trial court's instructions on the grounds that they did not contain such instruction

Next Nicholson takes issue with trial counsel's failure to object to the jury instructions that were given. Nicholson argues that trial counsel should have requested certain specific instructions on mitigating factors: (1) that Nicholson had no history of prior criminal convictions or delinquency adjudications; (2) that it was unlikely that the offenses would have been committed but for the fact that Nicholson was under duress, coercion, or strong provocation; and/or (3) that at the time of the offense, because of a mental disease or defect, Nicholson lacked substantial capacity to appreciate the criminality of his conduct to the requirements of law. In response to the thirteenth proposition of law, the State explained why it was not error to provide these instructions.

Nicholson's defense counsel provided extensive closing argument directing the jury to the evidence it wanted the jury to consider under the "catch all" instruction provided to the jury. Tr. 5118-5145. Counsel argued that Nicholson had no prior criminal history. Tr. 5122-5123. It argued Nicholson's childhood. Tr. 5124-5125. Counsel asked the jury to consider Nicholson's history and background and the impact of domestic violence on Nicholson. Tr. 5127-5128, 5130. Counsel argued to the jury the existence of brain injuries. Tr. 5136. Counsel asked the jury to consider Dr. Fabian's report and that there was impairment as to Nicholson and the existence of a

traumatic brain injury. Tr. 5137-5138. Counsel asked the jury to disregard Nicholson's jail call. Tr. 5142. And counsel asked the jury to consider James Aiken's testimony. Tr. 5142-5143. The points that trial counsel urged the jury to consider adequately shows that trial counsel was not ineffective in not objecting to the jury instructions that were given.

Furthermore, Nicholson has not identified any comparative authority to confirm or remotely suggest that trial counsel was ineffective for not objecting to the jury instructions that were provided to the jury and that such conduct prejudiced Nicholson. Therefore, it cannot be said that trial counsel was constitutionally ineffective for failing to request the trial court to provide additional instruction. As explained in response to the thirteenth proposition of law, there was no error with respect to the jury instruction given. Accordingly, this argument should be rejected.

C. Defense counsel did not fail to ensure that Dr. Fabian was a competent, well-prepared expert when he testified during the mitigation phase of the trial

Nicholson also argues that trial counsel did not adequately prepare its own expert Dr. Fabian. In support of this argument, Nicholson selects an isolated portion of Dr. Fabian's testimony in which he was asked what Nicholson told him about the nature and circumstances of September 5, 2018. Nicholson Br. 365-366 citing Tr. 4680, 4685. Nicholson takes issue with the following statement from Dr. Fabian, "hard to say [Mr. Nicholson] acted in self-defense if these children had injuries in what appeared to be a retreating type fashion." Tr. 4685. This is not evidence that Nicholson's trial counsel failed to prepare Dr. Fabian. The line of questioning in total appears to be directed at identifying the difference between what Nicholson told Dr. Fabian and Nicholson's testimony at trial and whether that affected Dr. Fabian's expert opinion, which Dr. Fabian said did not. Tr. 4685. Any remark about the victims being shot in a retreating type fashion was interrupted by defense counsel. Tr. 4685. With this in mind any matter testified to by Dr. Fabian and any matter within his report was subject to cross-examination by the State.

Nicholson also argues that resultingly, Dr. Fabian expressed doubts over Nicholson's credibility and claims about what had happened on September 5, 2018. Nicholson Br. 366 citing Tr. 4732. A careful review of this portion of testimony shows it is part of the State's cross-examination of Dr. Fabian. It is not apparent that Dr. Fabian expressed an opinion as to Nicholson's credibility. Although, Dr. Fabian agreed what was reported to him was not consistent with what he knew about the trial testimony it did not give Dr. Fabian pause when it came to relying upon his self-reporting. Tr. 4746-4747.

Nicholson also argues that Dr. Fabian should not have referred to M.L. and Giselle Lopez as "children". Nicholson Br. 366 citing Tr. 4685. This reference appears isolated and needs to be placed in the context of describing M.L. and Giselle Lopez as the children of Polanco. Tr. 4771, 4681. Other than this reference, there is nothing to show that the description of M.L. and Giselle Lopez negatively impacted the jury and elicited an emotional and inflammatory response that precluded them from properly considering and weighing the mitigating factors presented by Nicholson. Indeed, Dr. Fabian's testimony was extensive and he provided a detailed report.

Furthermore, Nicholson has not identified any comparative authority to confirm or remotely suggest that the portions of Dr. Fabian's testimony when considered in the entirety of his testimony demonstrates that trial counsel was ineffective and that such conduct prejudiced Nicholson. It cannot be said that trial counsel was ineffective its presentation of Dr. Fabian's testimony as a whole and considering the opinion expressed in his report.. Accordingly, this argument should be rejected.

D. Defense counsel was not ineffective for not objecting to the State's questioning and remarks during the mitigation phase of Nicholson's other acts

This Court has recognized that "failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel." *State. v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-

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

The inquiry regarding Nicholson’s alleged other acts against Polanco was proper. That information was contained within Dr. Fabian’s report as was the reported statement of Lauren Thomas. Again, while the lack of a significant criminal history, in some cases is “entitled to significant weight in mitigation.” *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, ¶ 280. “However, this factor is diminished by the evidence presented at trial that he may have committed” other crimes, “even though he escaped prosecution for them.” *Id.* Moreover, Nicholson’s trial counsel responded to the evidence in his closing arguments. Trial counsel regarded the case as an “extreme case of domestic violence” that Nicholson was allegedly spoon fed since he was a child, nevertheless, trial counsel urged the jury to weigh the fact that Nicholson had no prior criminal history and to not weigh what happened in the household. Tr. 5122-5124. Given these arguments there is nothing to suggest that the jury was precluded from considering Nicholson’s lack of a prior criminal history.

Furthermore, Nicholson has not identified any comparative authority to suggest that the conduct here was ineffective and that such conduct prejudiced Nicholson. Trial counsel cannot be deemed ineffective with this respect.

E. Cumulative error

A conviction will be reversed for cumulative error only “when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial-court error does not individually constitute cause for reversal.” *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 223, *State v. Madrigal*, 87 Ohio St.3d 378, 398, 721 N.E.2d 52 (2000). “[T]here can be no such thing as an error-free, perfect trial, and *** the Constitution does not guarantee such a trial.” *United States v. Hastings*, 461 U.S. 499, 508-509, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). However, as shown above, there were no errors committed in this case. In order to even consider whether “cumulative” error is present, this Court would have to find that multiple errors were committed in this case. *State v. Garner*, 74 Ohio St.3d at 64, 1995-Ohio-168, 656 N.E.2d 623. And even if there were, errors “cannot become prejudicial by sheer weight of numbers.” *State v. Hill*, 75 Ohio St.3d 195, 212, 661 N.E.2d 1068 (1996). Nicholson has failed to demonstrate significant errors in this case, and the cumulative effect of any errors did not deprive him of a fair trial. Nicholson’s twentieth proposition of law is without merit and should be overruled.

Response to Proposition of Law XVIII: The trial court was not required to provide a mercy instruction.

In his eighteenth proposition of law, Nicholson argues that the jury should have been instructed that it could consider mercy as a mitigating factor. The United States Supreme Court has prohibited considerations of “sympathy”, finding that such a prohibition “serves the useful purpose of confining the jury’s imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think, would be far more likely to turn the jury against a capital defendant than for him.” *California v. Brown*, 479 U.S. 538, 543, 107 S. Ct. 837, 93 L.Ed.2d 934 (1987). This rule also “fosters the Eighth Amendment’s ‘need for reliability * * *’” and “ensures the availability of meaningful judicial review [.]” *Id.*

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

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

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

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

Nicholson’s eighteenth proposition of law lacks merit and should be overruled.

Response to Proposition of Law XIX: Ohio's death penalty law is constitutional and is also constitutional as applied to Nicholson.

In his nineteenth proposition of law, Nicholson argues that Ohio's death penalty violates Ohio and international law. Nicholson also appears to seek a categorical exemption for the death penalty to be imposed on somebody with a traumatic brain injury. This Court should reject each of these arguments.

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

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

This Court in *Jenkins* held, "[a]bsent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts." *Id.* at 169, quoting *Gregg v. Georgia*, 428 U.S. 153, 225, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). To conclude otherwise would represent "an indictment of our entire criminal justice system which must be constitutionally rejected." *Jenkins* at 170, quoting *Gregg* at 226. Nicholson offers no facts supporting his argument, and this Court should again reject it.

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

B. Ohio's sentencing procedures are not unreliable

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

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

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

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

Nicholson argues that “the aggravating circumstances are vague.” Appellant’s Br. pg. 112. Once again, however, the Constitution does not require any particular definition, nor does it require any specific weighing process. Once a capital case proceeds to the mitigation phase, “the State is not confined to submitting specific propositional questions to the jury and may indeed allow the jury unbridled discretion.” *Buchanan v. Angelone*, 522 U.S. 269, 276, 118 S. Ct. 757, 139 L.Ed.2d 702 (1998), *citing Tuilaepa v. California*, 512 U.S. 967, 114 S. Ct. 2630, 129 L.Ed.2d 750 (1994).

C. This Court should decline to create a categorical exemption from the death penalty, any person alleged to suffer a traumatic brain injury at any point in life and regardless of severity

Nicholson next relies upon his eleventh proposition of law and argues that it is unconstitutional for any person with a traumatic brain injury to be sentenced to death. At the same time, recognizing the state of the evidence, Nicholson suggests that even a mild brain injury might preclude imposition of the death penalty. In essence Nicholson seeks a categorical exemption for any individual who has suffered a traumatic brain injury, even in mild cases, from the death penalty. Nicholson cites to no authority whatsoever that there should be a categorical exemption. Moreover, it is not even necessary to address this question as the evidence at trial demonstrated that Nicholson’s MRI did not show evidence of a traumatic brain injury, and that there was no other credible evidence that Nicholson’s suffered any brain damage. Based upon the testimony, this Court should decline to adopt such a categorical exemption in this case.

D. Ohio’s capital punishment statutory scheme does not violate a defendant’s right to a jury trial

Nicholson next argues that Ohio’s capital sentencing statute, R.C. 2929.03, is unconstitutional under *Hurst v. Florida*, 577 U.S. 92, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), because it violates his Sixth Amendment right to a trial by jury by requiring the judge to impose the actual sentence. This Court unanimously rejected this argument in *State v. Belton*, 149 Ohio

St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, ¶¶ 58-59, and again in *State v. Mason*, 153 Ohio St.3d 476, 2018-Ohio-1462, 108 N.E.3d 56. This Court should do so again here.

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

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

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

E. Ohio’s capital sentencing provisions do not unconstitutionally induce ineffective assistance of counsel nor does it deny an impartial jury

This Court has already rejected the argument that Ohio’s death penalty scheme is unconstitutional because it induces ineffective assistance of counsel and denial of an impartial jury. *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶111, *State v. Jenkins*, 15 Ohio St.3d at 173, 473 N.E.2d 264, fn. 11. *State v Mapes*, 19 Ohio St.3d 108, 116-117, 19 Ohio B. 318, 484 N.E.2d 140 (1985).

F. Ohio’s capital sentencing scheme does not “lack individualized sentencing”

This Court has already rejected the claim that Ohio’s death penalty statutes “* * * unconstitutionally fail to provide individualized sentencing because they require proof of aggravating circumstances in the guilty phase.” *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 850 N.E.2d 1064, ¶105; *Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818,

¶112; *Ferguson*, 108 Ohio St.3d 451, 2006-Ohio-1502, 844 N.E.2d 806, ¶88. Instead, it is the penalty phase where the jury weights the aggravating circumstance against the mitigating factors. *State v. White*, 85 Ohio ST.3d 433, 450, 1999-Ohio-281, 709 N.E.2d 140, *cert. denied* 528 U.S. 938 (“the requirement of individualized sentencing in capital cases is satisfied by allowing the [sentencer] to consider all relevant mitigating evidence”, *quoting*, *Blaystone v. Pennsylvania*, 494 U.S. 299, 307, 110 S.Ct. 1078, 108 L. Ed.2d 255 (1990)); *Mason*, 153 Ohio St.3d 476, 2018-Ohio-1462, ¶24 (When it comes to the issue of selecting a penalty, there is a requirement of individualized sentencing, and the process “*** must be expansive enough to accommodate relevant mitigating evidence so as to assure [sic] an assessment of the defendants culpability (internal citations and quotations omitted)); *Holloway*, 38 Ohio St.3d at 242, 527 N.E.2d 831 (“the weighing of aggravating circumstances against mitigating factors ‘*** is designed to guide the sentencing authority’s discretion by focusing on the ‘circumstances of the capital offense and the individual offender ***,’ thus reducing the arbitrary and capricious imposition of death sentences ***. The resulting individualized sentencing decisions are essential in capital cases to ensure the reliability of the determination that death is the appropriate punishment” (internal citations omitted). Nicholson’s argument that Ohio’s capital sentencing scheme lacks individualized sentencing should be rejected.

G. Ohio’s capital sentencing provisions does not burden a defendant’s right to a jury

Nicholson argues that Crim.R. 11(C)(3), is unconstitutional because it “imposes an impermissible risk of death on capital defendants who choose to exercise their right to a jury trial.” Appellant’s Br. pg. 113. Under Crim.R. 11(C)(3), if a capital defendant waives a jury trial and enters a guilty plea, a trial court may dismiss capital specifications “in the interests of justice.” But

there is no analogous rule that allows the court to do so in cases in which the defendant exercises his right to a jury trial.

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

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

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

I. Mandatory Death Penalty and Failure to Require Appropriate Analysis

Nicholson next argues that Ohio's death penalty scheme is unconstitutional because Ohio law does not require a mercy instruction in the absence of mitigation or when aggravating circumstances “outweigh” the mitigating factors. This issue was addressed under the fourteenth proposition of law.

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

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

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

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

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

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

The key here is that R.C. 2929.03(D)(1) refers to “the nature and circumstances of the aggravating circumstances[.]” not to the nature and circumstances of the underlying *offense*. The jury or panel certainly can weigh the nature and circumstances of the aggravating circumstances as aggravating factors. Nicholson’s argument lacks merit and should be denied.

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

Nicholson next contends that Ohio's death penalty scheme is unconstitutional because it fails to provide for adequate proportionality review. This Court has already rejected the argument that Ohio’s death penalty scheme’s proportionality and appropriateness review are unconstitutional. *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶117; *State v. Ferguson*, 108 Ohio St.3d 451, 2006-Ohio-1502, 844 N.E.2d 806, ¶93, *State v. Sowell*, 148 Ohio St.3d 554, 2016-Ohio-8025, 71 N.E.3d 1034, ¶151, *State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶183-185, *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, 16 N.E.3d 588, ¶241.

Nicholson faults the adequacy of data about capital indictments as required under R.C. 2929.021. *Id.* The Eighth District Court of Appeals recently rejected this claim, finding that the defendant “failed to demonstrate that the alleged inadequacies in the reporting system prejudiced the proportionality review conducted by the Supreme Court[.]” *State v. Hale*, 8th Dist. Cuyahoga

No. 103654, 2016-Ohio-5837, ¶ 48. The purpose of R.C. 2929.021's reporting requirement is merely "to provide the reviewing courts with some basis for reviewing the proportionality of the imposition of the death sentence in comparison with sentences entered in similar cases." *State v. Jenkins*, 15 Ohio St.3d at 209, 473 N.E.2d 264. The data compiled by the Clerk of Courts for the Supreme Court of Ohio is considerable, and is more than enough to fulfill that task.

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

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

Nicholson also claims that Ohio's "appropriateness" review is deficient and cursory.

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

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

By independently reviewing the proportionality of each death sentence, this Court fulfills its statutory mandate under R.C. 2929.05(A) to separately review the “appropriateness” of the sentence. This Court has, on several occasions, reversed a death sentence using its independent sentence review under R.C. 2929.05(A). *See State v. Johnson*, 144 Ohio St.3d 518, 2015-Ohio-4903, 45 N.E.3d 208, ¶¶ 98-141 (death sentence vacated); *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶¶ 67-106 (death sentence vacated). This Court’s review is not cursory, and Nicholson’s challenge lacks merit.

L. “Beyond a Reasonable Doubt Standard” is not unconstitutional

This Court, while being fully aware of the rule described in the United States Supreme Court’s decision in *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), has already determined that “[t]he standard of proof in capital prosecution is proof beyond a reasonable doubt as defined in R.C. 2901.05 and not proof beyond all doubt.” *State v. Jenkins*, 15 Ohio St.3d 164, 473 N.E.2d 264, ¶8 of the syllabus; *State v. Maurer*, 15 Ohio St.3d 239, 473 N.E.2d 768, ¶6 of the syllabus; *State v. Kirkland*, 140 Ohio ST.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶123-126; *State v. Jackson*, 141 Ohio ST.3d 171, 2014-Ohio-3707, 23 N.E.3d 1023, ¶270; *State v. Grant*, 67 Ohio St.3d at 481, 1993-Ohio-171, 620 N.E.2d 50 (rejecting appellant’s claim “*** that the jury be instructed that the burden of proof in the sentencing proceedings is proof beyond all doubt. Instead, the court correctly instructed that proof beyond a reasonable doubt is the correct standard”); *State v. Davis*, 116 Ohio St.3d, 2008-Ohio-2, 880 N.E.2d 31, ¶213 (Appellant”*** claims that the instructions on reasonable doubt are constitutionally defective. However, this claim

has no merit. *** We also reject (appellant's) claim that the burden of proof in capital cases must be proof beyond all doubt").

Put simply, "[t]he constitutionality of requiring a burden of proof beyond a reasonable doubt in criminal proceedings has been firmly established. *In re Winship* (1970), 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.E.2d 368 [51 O.O.2d 323]. There is no authority which holds that appellant's proposed burden of 'proof beyond all doubt' is constitutionally mandated". *State v. Jenkins*, 15 Ohio St.3d at 210-11, 473 N.E.2d 264.

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

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

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

[T]he determination of whether customary international law prevents a State from carrying out the death penalty, when the State otherwise is acting in full compliance with the Constitution, is a question that is reserved to the executive and legislative branches of the United States government, as it is their constitutional role to determine the extent of this country's international obligations and how best to carry them out.

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

The ICCPR “does not require its member countries to abolish the death penalty.” *Buell* at 371. In fact, the ICCPR “specifically recognizes the existence of the death penalty[,]” reserving it for “the most serious crimes in accordance with the law in force at the time of the commission of the crime[.]” *Id.*, quoting ICCPR, 999 U.N.T.S. 171, 174. When the United States ratified the ICCPR in 1992, it specifically reserved the right “to impose capital punishment on any person * * * duly convicted under existing or future laws permitting the imposition of capital punishment[.]” *Id.*, quoting 138 Cong. Rec. S-4781-01, S4783 (1992). This Court has rejected previous claims regarding the ICCPR. *S State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 119; *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 138.

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

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

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

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

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

Nicholson's arguments relate to the reservations and limitations imposed by the United States Senate are ineffectual for two reasons. First, though, it is not only through the senate's reservations and conditions that international law fails to restrict or render capital punishment unconstitutional. As explained above, Ohio's capital sentencing statutes are constitutional and do not conflict with international law. Second, the Supreme Court did not speak to the power of the senate in the case cited by Nicholson, but was speaking with great specificity to the power of the president.

Clinton v. City of New York, 524 U.S. 417, 440, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998). ("Our first President understood the text of the Presentment Clause as requiring that he either 'approve all the parts of a Bill, or reject it in toto.' What has emerged in these cases from the President's exercise of his statutory cancellation powers, however, are truncated versions of two bills that passed both Houses of Congress"). This decision speaks to the power of the president and Nicholson's attempt to use it as an argument in limitation of the Senate's powers with regard to lawmaking is inappropriate.

Nicholson also attempts to rely on *Clinton* in support of his argument against the Senate's ability to indicate that the ICCPR is not self-executing. This argument fails for the same reasons that the earlier attempt to rely on *Clinton* does; it speaks to the power of the president, specifically.

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

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

N. Conclusion

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

Response to Proposition of Law XX: There were no cumulative errors that deprived Nicholson to fair consideration of the appropriateness of the death penalty.

In his twentieth proposition of law, Nicholson argues cumulative error. A conviction will be reversed for cumulative error only “when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial-court error does not individually constitute cause for reversal.” *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 223. “However, to even consider whether ‘cumulative’ error is present, we would first have to find that multiple errors were committed in this case.” *State v. Madrigal*, 87 Ohio St.3d 378, 398, 721 N.E.2d 52 (2000). “[T]here can be no such thing as an error-free, perfect trial, and *** the Constitution does not guarantee such a trial.” *United States v. Hastings*, 461 U.S. 499, 508-509, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983).

As shown above, there were no errors committed in this case. Nicholson has failed to demonstrate significant errors in this case, and the cumulative effect of any errors did not deprive him of fair consideration during the mitigation phase. Nicholson’s twentieth proposition of law is without merit and should be overruled.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellee the State of Ohio has been served via e-mail on this 2nd day of August 2021, on: Jonathan T. Tyack, Esq. (jon@tyacklaw.com) and Holly B. Cline, Esq. (holly@tyacklaw.com) Counsel for Defendant-Appellant.

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