IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY KIRKLAND, Petitioner,

vs.

STATE OF OHIO, Respondent.

On Petition for a Writ of Certiorari to
the Supreme Court of Ohio

PETITIONER'S APPENDIX

(CAPITAL CASE: EXECUTION DATE IS SEPTEMBER 18, 2024)

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The Supreme Court of Ohio

State of Ohio

v.

Anthony Kirkland

Case No. 2018-1265

ENTRY

This cause came on for further consideration upon the filing of appellant's application for reopening under S.Ct.Prac.R. 11.06. It is ordered by the court that the motion is denied.

(Hamilton County Court of Common Pleas; No. B 0901629)

Maureen O'Connor
Chief Justice

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

March 16, 2021

[Cite as *03/16/2021 Case Announcements*, 2021-Ohio-717.]

MOTION AND PROCEDURAL RULINGS

2018-1265. State v. Kirkland.
Hamilton C.P. No. B 0901629. On application for reopening under S.Ct.Prac.R. 11.06. Application denied.

Donnelly, J., dissents and would grant the application as to proposition of law Nos. I through VI.

Brunner, J., dissents and would grant the application as to ineffective assistance for prosecutorial conduct.

2021-0071. State v. Sheldon.
Hardin App. No. 6-18-07, 2019-Ohio-4123. On motion for leave to file delayed appeal. Motion denied.

Kennedy, Donnelly, and Stewart, JJ., dissent.

2021-0084. State v. Smith.
Hamilton App. No. C-190473, 2020-Ohio-4977. On motion for leave to file delayed appeal. Motion denied.

Donnelly, J., dissents.

2021-0090. State v. Riley.
Cuyahoga App. No. 107073, 2019-Ohio-981. On motion for leave to file delayed appeal. Motion denied.

Kennedy, Donnelly, and Stewart, JJ., dissent.

Appendix A

State v. Kirkland

Supreme Court of Ohio

March 16, 2021, Decided

2018-1265.

Reporter
2021 Ohio LEXIS 465 *; 161 Ohio St. 3d 1473; 2021-Ohio-717; 164 N.E.3d 476; 2021 WL 977004

State v. Kirkland.

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: [*1] Hamilton C.P. No. B 0901629.

State v. Kirkland, 125 Ohio St. 3d 1427, 2010-Ohio-2261, 927 N.E.2d 1, 2010 Ohio LEXIS 1131 (May 24, 2010)

Judges: Donnelly, J., dissents and would grant the application as to proposition of law Nos. I through VI. Brunner, J., dissents and would grant the application as to ineffective assistance for prosecutorial conduct.

Opinion

MOTION AND PROCEDURAL RULING

On application for reopening under S.Ct.Prac.R. 11.06. Application denied.

Donnelly, J., dissents and would grant the application as to proposition of law Nos. I through VI.

Brunner, J., dissents and would grant the application as to ineffective assistance for prosecutorial conduct.

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THE STATE OF OHIO, APPELLEE, *v.* KIRKLAND, APPELLANT.

[Cite as *State v. Kirkland*, 160 Ohio St.3d 389, 2020-Ohio-4079.]

Criminal law—Aggravated murders—Death sentences imposed after resentencing hearing affirmed.

(No. 2018-1265—Submitted March 10, 2020—Decided August 18, 2020.)

APPEAL from the Court of Common Pleas of Hamilton County, No. B 0901629.

FRENCH, J.

{¶ 1} Between 2006 and 2009, appellant, Anthony Kirkland, murdered two teenaged girls, Casonya C. and Esme K., and two adult women, Mary Jo Newton and Kimya Rolison. Kirkland pleaded guilty to the murders of Newton and Rolison and was sentenced to 70 years to life in prison. A jury found Kirkland guilty of the aggravated murders of Casonya and Esme, and he was sentenced to death for each aggravated murder.

{¶ 2} This court initially affirmed Kirkland's convictions and sentence. *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818 ("*Kirkland I*"). However, upon Kirkland's subsequent motion for relief, we vacated the death sentences and remanded this case to the trial court for resentencing, in accordance with R.C. 2929.06(B), on the aggravated-murder convictions. 145 Ohio St.3d 1455, 2016-Ohio-2807, 49 N.E.3d 318 ("*Kirkland II*"). On remand, the jury recommended a death sentence for each murder and the trial court again sentenced Kirkland to death for the aggravated murders of Casonya and Esme.

{¶ 3} This is an appeal of right from those two death sentences. Kirkland presents 11 propositions of law. For the reasons we explain below, we affirm the judgment of the trial court.

APPENDIX B

I. FACTS

A. The Murders

1. Casonya C.

{¶ 4} Fourteen-year-old Casonya C. lived in Cincinnati with her grandmother, Patricia C. On May 3, 2006, around 11:00 p.m., Patricia learned that Casonya had left the house. The next day, Casonya was absent from school, and Patricia learned that Casonya's mother had not seen her. Patricia called the police and reported Casonya missing.

{¶ 5} On May 9, 2006, city workers called police after finding a body underneath a pile of old tires in a secluded area near the end of a dead-end road. The body was heavily charred and decomposed. Some teeth had been recently knocked out.

{¶ 6} Just past the end of the road, police found a charred area where it appeared that the body had been burned before being moved and covered with tires. Nearby they found a piece of timber that was charred at one end; it had apparently been used to stir the fire. The victim was later identified as Casonya C.

2. Mary Jo Newton

{¶ 7} On June 15, 2006, smoldering human remains were found near the end of a dead-end street, about half a mile from where Casonya's body had been found. An autopsy indicated that the victim was already dead when the body was set on fire. The victim was identified as Mary Jo Newton.

{¶ 8} Cincinnati homicide detective Keith Witherell interviewed Kirkland in March 2007 in connection with the homicides of Newton and Casonya. Kirkland admitted having had sex with Newton, but denied ever harming her. When he was shown a photograph of Casonya, he said he did not recognize her. Having no evidence to link Kirkland with these murders, police did not then arrest or charge him.

3. Kimya Rolison

{¶ 9} On June 13, 2008, the scattered bones of a third victim were found in a wooded area at the dead end of Pulte Street in Cincinnati. No specific cause of death could be determined. However, there was a cut on one of the cervical (neck) vertebrae that the coroner's office determined had been caused by a sharp instrument, such as a knife, being applied with significant force. The bones had been burned. In 2009, the remains were identified as those of Kimya Rolison, who had been missing since October 2006.

4. Esme K.

{¶ 10} On the afternoon of March 7, 2009, 13-year-old Esme K. went jogging around a reservoir near her home. She was wearing a purple wristwatch and carrying her iPod.

{¶ 11} Later that day, Esme's mother called 9-1-1 to report that Esme was missing. Responding to the call, police searched an abandoned house and a wooded area near the reservoir. Two officers spotted Kirkland sitting under a tree. They saw knives protruding from his pocket, so they disarmed and searched him. In his pockets they found a purple watch and an iPod with Esme's name on it. Esme's mother identified these items as Esme's.

{¶ 12} Kirkland initially gave a false name and claimed he had found the watch and iPod. After police efforts to confirm his identity failed, Kirkland gave his real name. As the search for Esme continued, police took Kirkland to the police station.

{¶ 13} Searchers found Esme's body in the woods. Her body was nude except for socks and shoes and was seated, with her back up against a fallen tree branch, legs apart. Her genitals, inner thighs, and left hand had been severely burned.

{¶ 14} An autopsy indicated that Esme had been killed by ligature strangulation. The large number of petechiae (ruptured blood vessels) on her face

was consistent with a long struggle, possibly eight to ten minutes. Hemorrhaging underneath her scalp showed that she had been struck on the back of the head.

{¶ 15} There was also evidence of premortem trauma to Esme's vagina and anus, possibly caused by an attempt to penetrate those areas with a penis or foreign object. DNA consistent with Esme's was found on Kirkland's hands, penis, and underwear.

B. Kirkland's Interrogation

{¶ 16} Detective Witherell interviewed Kirkland on March 8, 2009. During this interview, Kirkland told multiple inconsistent stories.

{¶ 17} At first, he claimed to have no idea his arrest was related to the missing girl. Kirkland said that while walking in the woods around the reservoir on the morning of March 7, he found a purple watch and a "pink radio" (Esme's iPod), which he pocketed. He repeatedly denied having seen anyone jogging near the reservoir, pretended he did not even know the missing girl's race, and expressed surprise when he was told that the watch and "radio" belonged to the missing girl.

{¶ 18} After further questioning, Kirkland admitted that he had met Esme at the reservoir. He claimed that he and Esme collided, causing him to drop his beer and lose his temper. He admitted that he had punched and kicked Esme, but claimed he had left her alive.

{¶ 19} After detectives told Kirkland that Esme's body had been found, he changed his story again, claiming to have no memory of what had happened. He then admitted that he had chased Esme into the woods. But he continued to claim that he had left her alive.

{¶ 20} Then Kirkland changed his story again, claiming he had left Esme alive with an acquaintance he knew only as Pedro. Finally, Kirkland admitted that he had known that Esme was dead and that he had gone back to the reservoir to move her body. He said, "She died because of my hatred." Still, he denied having killed her.

{¶ 21} About two hours later, Detective Bill Hilbert questioned Kirkland about Newton and Casonya C. Kirkland confessed to Newton's murder. According to Kirkland, on the day of the murder, he picked Newton up in the College Hill area. They drove around to various places, ending up in the Eden Park area, where they had an argument.

{¶ 22} According to Kirkland, during the argument, Newton struck him, and he then choked her to death. He drove to Avondale, dumped her body at the end of a dead-end street, and set her body on fire, using gasoline as an accelerant. According to Kirkland, he burned the body because "fire purifies" and burning the body was "a proper burial."

{¶ 23} Kirkland also confessed to murdering Casonya. He told Detective Hilbert that he first saw Casonya around 1:00 a.m. on a bridge near Walnut Hills High School. According to Kirkland, Casonya started a conversation with him and he paid her $20 to continue talking to him. But they had an argument, and Casonya threw the money back at him. Angry, Kirkland grabbed Casonya, and she kneed him. He then choked her to death. He carried her body to a wooded area and burned it, using lighter fluid as an accelerant. He then carried her body down a hill and covered it with tires.

{¶ 24} Kirkland then gave another account of Esme's murder. He said that he collided with Esme; she was apologetic, but he became enraged and chased her into the woods. When she tripped over a small fence, he caught her and choked her.

{¶ 25} At first, Kirkland denied having raped Esme. But he eventually told Hilbert, "[She] said that she would do whatever I wanted, just don't hurt her." He had sex with her but was unable to penetrate her completely, so he made her masturbate him. Esme said she would not tell anyone, but Kirkland did not believe her, so he choked her to death. (In a later interview, Kirkland explained that he had strangled her with a rag after failing to kill her with his bare hands.)

{¶ 26} Kirkland propped Esme's body up against a fallen tree branch and, using her clothes as an accelerant, partially burned her body. After staying with the body for a while, he went to find lighter fluid "to perform the [burning] ritual." He eventually returned to the woods but did not go back to the body; instead, he fell asleep under a tree, and that is where the police found him.

{¶ 27} In a third interview, detectives asked Kirkland about an unidentified burned body found in the Pulte Street area. At first, Kirkland claimed he had killed only three victims, but he finally admitted to having killed "one more."

{¶ 28} According to Kirkland, he knew the Pulte Street victim as Kim. She was working as a prostitute when he met her in December 2006. He picked her up in his van and paid her for sex. As they drove along, they began to argue; Kirkland pulled the van over and stabbed her in the throat with her own knife. He laid her body out on a bed of wood, sprayed it with lighter fluid, burned it, and covered it. Some of the information Kirkland provided during his confession enabled police to identify the Pulte Street remains as those of Kimya Rolison.

C. Procedural History

{¶ 29} In 2009, the state filed a 12-count indictment against Kirkland. The indictment included four counts of aggravated murder with death-penalty specifications. Count Two charged Kirkland with the aggravated murder of Casonya C. while committing or attempting to commit rape. Count Two included two death specifications: one alleging that the aggravated murder was part of a course of conduct involving the purposeful killing of or attempt to kill two or more people, R.C. 2929.04(A)(5), and one alleging felony-murder predicated on rape, R.C. 2929.04(A)(7). Count Four charged Kirkland with the aggravated murder of Casonya while committing or attempting to commit aggravated robbery. Count Four included death specifications for course of conduct and felony-murder predicated on aggravated robbery.

{¶ 30} Count Nine charged Kirkland with the aggravated murder of Esme while committing or attempting to commit rape, with death specifications for murder to escape detection for rape, R.C. 2929.04(A)(3), course of conduct, and felony-murder predicated on rape. Count Eleven charged Kirkland with the aggravated murder of Esme while committing or attempting to commit aggravated robbery, with death specifications for murder to escape detection for attempted rape, course of conduct, and felony-murder predicated on aggravated robbery.

{¶ 31} The indictment also included eight noncapital counts, including one charging Kirkland with the murder of Newton. A separate indictment charged Kirkland with the murder of Rolison and abuse of her corpse. The indictments were consolidated for trial.

{¶ 32} Kirkland pleaded guilty to the murder and corpse-abuse counts relating to Newton and Rolison. The trial court sentenced him to 70 years to life in prison for those murders. In 2010, a jury found Kirkland guilty on all remaining counts, including all the death-penalty specifications. Kirkland was sentenced to death for the aggravated murders of Casonya and Esme.

{¶ 33} In 2014, we affirmed Kirkland's convictions and death sentences. *Kirkland I*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818. However, on May 4, 2016, on Kirkland's motion, we remanded this case to the trial court for a new mitigation-and-sentencing hearing ("resentencing hearing"), in accordance with R.C. 2929.06(B), on the aggravated-murder convictions. *Kirkland II*, 145 Ohio St.3d 1455, 2016-Ohio-2807, 49 N.E.3d 318. At the resentencing hearing, a jury again recommended death sentences on all aggravated-murder counts and the trial court sentenced Kirkland to death on each count. Kirkland now appeals those death sentences.

II. DISCUSSION

A. Voir Dire Issues

1. Denial of Individual, Sequestered Voir Dire

{¶ 34} At the beginning of the resentencing hearing, during voir dire, 15 prospective jurors indicated either that they supported capital punishment in all cases or that they opposed it in all cases. These prospective jurors were subjected to further voir dire with respect to their views on capital punishment. Kirkland asked the trial court to conduct the death-qualification voir dire of these 15 prospective jurors individually and outside the presence of other prospective jurors. The trial court denied the request and instead death-qualified these prospective jurors in a group. In his first proposition of law, Kirkland contends that the trial court erred by denying his request for individual, sequestered voir dire.

{¶ 35} Capital defendants are not entitled to individual, sequestered voir dire. Rather, "[t]he determination of whether a voir dire in a capital case should be conducted in sequestration is a matter of discretion within the province of the trial judge." *State v. Mapes*, 19 Ohio St.3d 108, 484 N.E.2d 140 (1985), paragraph three of the syllabus; *see also State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 84.

{¶ 36} Kirkland contends that the group voir dire prejudiced him in two ways. He argues that because the first prospective juror examined was excused after stating that she would be unable to consider imposing a death sentence, "all the other prospective jurors in the room saw what they should say to get out of jury duty in a capital case." Kirkland seems to suggest that subsequent prospective jurors may have lied about their beliefs "to get out of jury duty," but nothing in the record supports that conjecture. Moreover, the voir dire process gave the defense a full opportunity to test the validity of any prospective juror's claim of being biased against the death penalty.

{¶ 37} Kirkland also contends that the prosecutor made two "improper remarks" during voir dire that tainted all prospective jurors in the courtroom. We examine each in turn.

{¶ 38} First, Kirkland points to the following statement by the prosecutor: "[I]f in doing that weighing process, the aggravating circumstances have the greater weight, you shall recommend a sentence of death." The defense objected to the use of the word "recommend" and moved for a mistrial, which the trial court denied.

{¶ 39} The prosecutor's use of the word "recommend" did not violate the Constitution. *See State v. Bey*, 85 Ohio St.3d 487, 496, 709 N.E.2d 484 (1999). A jury's verdict in favor of death *is* a recommendation, since the judge may impose a life sentence even if the jury recommends death, *see* R.C. 2929.03(D)(3), and we have "consistently rejected" arguments that an accurate instruction to that effect "impermissibly reduces the jury's sense of responsibility." *State v. Carter*, 72 Ohio St.3d 545, 559, 651 N.E.2d 965 (1995); *see also State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 88.

{¶ 40} Second, Kirkland points to the prosecutor's statement that jurors would be "required to sign a death verdict" if they found that the aggravating circumstances outweighed the mitigating factors. "It is * * * only if you make such a finding, not only can you sign a death verdict, the law says to sit on this case, you have to sign a death verdict." Kirkland does not explain how this statement was improper. And in fact, it is an accurate statement. *See* R.C. 2929.03(D)(2) (if the jury unanimously finds that the aggravating circumstances outweigh the mitigating factors, it "shall recommend * * * that the sentence of death be imposed").

{¶ 41} Kirkland "has neither recited facts showing abuse of discretion nor demonstrated prejudice resulting from the court's refusal to conduct a sequestered voir dire," *Carter* at 555. Accordingly, we reject his claim that the trial court erred by denying his request for individual, sequestered voir dire.

2. Excusals for Cause

{¶ 42} Kirkland also contends in his first proposition of law that the trial court erroneously excused prospective jurors for cause on the ground of their reservations about capital punishment.

{¶ 43} It is constitutionally impermissible to exclude an impartial prospective juror for cause simply because the prospective juror expresses reservations about imposing the death penalty. *State v. Keith*, 79 Ohio St.3d 514, 519-520, 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). The standard for determining when a prospective juror may be excluded for cause based on his views on capital punishment is whether the prospective juror's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980); *see also Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *State v. Rogers*, 17 Ohio St.3d 174, 478 N.E.2d 984 (1985), paragraph three of the syllabus, *vacated on other grounds*, 474 U.S. 1002, 106 S.Ct. 518, 88 L.Ed.2d 452 (1985). The trial court's finding is entitled to deference, *Witt* at 426, and will not be disturbed on appeal absent an abuse of discretion, *see*, *e.g.*, *Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, at ¶ 94.

{¶ 44} Kirkland's brief principally discusses three prospective jurors: prospective juror Nos. 2, 8, and 27.[1] The trial court excused each of these prospective jurors for cause.

a. Prospective Juror No. 2

{¶ 45} Prospective juror No. 2 stated that she could not fairly consider the imposition of a death sentence and that her views on capital punishment would prevent or substantially impair the performance of her duties as a juror in

1. In his brief, Kirkland mistakenly refers to prospective juror No. 2 as prospective juror No. 8, and vice versa.

accordance with her instructions and oath. She said: "I just can't do it"; "No, I couldn't do it"; and "I could not sentence a person to death."

{¶ 46} Defense counsel pointed out that on her questionnaire, the prospective juror had indicated that she agreed that the death penalty "should sometimes be used as punishment in certain murder cases." The prospective juror explained that she had given that response because "others have different opinions," but she did not think *she* could "do it" (i.e., impose a death sentence).

{¶ 47} She adhered to this position during most of the defense's voir dire. However, when defense counsel asked her whether "[d]espite [her] personal misgivings," she could "apply the law * * * and give reasonable, meaningful consideration to the death penalty," she said, "Perhaps."

{¶ 48} The trial judge asked the prospective juror whether she had a belief that would prevent her from signing a death verdict. She said, "Yes." In response to a defense follow-up question, she said, "Within me, I could not sign [a verdict] stating that someone should be put to death."

{¶ 49} Prospective juror No. 2's responses were consistent overall: she repeatedly proclaimed her inability to impose a death sentence. Only once did she waver even to the extent of saying, "Perhaps." The record supports a finding that this prospective juror's ability to apply the law in a capital case was at least substantially impaired. The trial court did not abuse its discretion when it excused prospective juror No. 2 for cause.

b. Prospective Juror No. 8

{¶ 50} Prospective juror No. 8 told the judge: "I would consider your instructions but ultimately, I couldn't sign a verdict for the death penalty." Under defense questioning, she elaborated: "I would certainly consider the Judge's instructions, and if the option of capital punishment is on the table, I would give that consideration, but I can tell you unequivocally that under no circumstances will I ever agree to put that sentence."

{¶ 51} Shortly after that, prospective juror No. 8 agreed that she "could give meaningful consideration" to the law, and she said that she "would absolutely follow the law." However, the trial judge then asked: "Bottom line is * * * you cannot put your name on a piece of paper that would seek the death penalty for any individual including this individual; is that correct?" The prospective juror replied: "That's correct, Your Honor," and the trial court then excused her.

{¶ 52} Notwithstanding her general promises to follow the law, prospective juror No. 8 stated "unequivocally that under no circumstances [would she] ever agree" to a death sentence. Her mind was made up, and the record fully supports excusing her.

c. Prospective Juror No. 27

{¶ 53} Prospective juror No. 27 gave varying answers during voir dire. Initially, he said that he could *not* fairly consider a death sentence and that his views would prevent or substantially impair his performance as a juror. Immediately after that, though, he told the judge that although he is opposed to the death penalty, he *could* follow the court's instructions and fairly consider a death sentence. He added, "If I am selected, I have no choice but to do it" (i.e., follow the law). But he then said, "I just ask not to be in that position," because the conflict between his opposition to capital punishment and his belief in following the law would be "very difficult."

{¶ 54} Prospective juror No. 27 then reverted to his initial position: he told the court that he could not sign a death verdict and "unequivocally" could not fairly consider a death sentence. He reiterated this position during the state's voir dire.

{¶ 55} Prospective juror No. 27 wavered slightly under defense questioning: he said he could weigh the mitigating factors against the aggravating circumstances. But then he flipped again, stating that he could not sign a death verdict. Defense counsel asked: "You wouldn't follow the law?" The prospective juror replied: "I don't know. * * * I am back and forth."

{¶ 56} Kirkland contends that prospective juror No. 27 should have been retained because he did not "unequivocally say he couldn't follow the law." In fact, he did say just that. The trial court asked, "Are you stating unequivocally that under no circumstance will you follow my instructions * * * in that you cannot and will not consider fairly the imposition of the sentence of death, if appropriate in this case?" The prospective juror answered, "Yes, Your Honor."

{¶ 57} In any event, the test is not whether the prospective juror *unequivocally* proclaims a bias; it is whether the prospective juror's views would prevent or substantially impair the performance of his duties. *Witt*, 469 U.S. at 424, 105 S.Ct. 844, 83 L.Ed.2d 841; *see also Rogers*, 17 Ohio St.3d 174, 478 N.E.2d 984, at paragraph three of the syllabus.

> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. * * * [T]his is why deference must be paid to the trial judge who sees and hears the juror.

(Footnote omitted.) *Witt* at 424-426. Thus, a trial court does not abuse its discretion when it excuses prospective jurors who give conflicting answers on voir dire, *see*, *e.g.*, *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112,

¶ 135, or prospective jurors who "[do] not know how they will react when faced with imposing the death sentence," *Witt* at 426.

{¶ 58} Prospective juror No. 27 said several times that he could not consider imposing death. A few of his responses pointed the other way. Perhaps he came closest to the truth when he said: "I don't know. * * * I am back and forth."

{¶ 59} When a prospective juror gives contradictory responses, as prospective juror No. 27 did, "it is for the trial court to determine which answer reflects the juror's true state of mind." *State v. Jones*, 91 Ohio St.3d 335, 339, 744 N.E.2d 1163 (2001). The voir dire gave the trial court good grounds for concluding that prospective juror No. 27's views would prevent or substantially impair the performance of his duties. His responses amounted to "substantial testimony," *State v. Wilson*, 29 Ohio St.2d 203, 211, 280 N.E.2d 915 (1972), supporting the trial court's decision to excuse him for cause. The trial court did not abuse its discretion by excusing him.

d. Prospective Juror Nos. 63, 66, 68, and 87

{¶ 60} According to Kirkland, prospective juror Nos. 63, 66, 68, and 87 were excused because "they said they couldn't handle the death penalty." Kirkland's brief does not make clear whether he is claiming that they were *erroneously* excused. If he is making such a claim, it lacks merit. Prospective juror Nos. 66, 68, and 87 all stated expressly that they could not fairly consider imposing a death sentence and could not sign a death verdict. As for prospective juror No. 63, he was excused on a *defense* challenge for cause due to his bias *in favor of* a death sentence; he favored an automatic death sentence for all murderers and said no possible mitigation could outweigh two aggravated murders. Thus, any error in excusing prospective juror No. 63 could only have benefited Kirkland. And if there was any error that benefited the state by excusing prospective juror No. 63, Kirkland invited it by challenging him for cause. *See State v. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶ 279.

3. Jury-Questionnaire Cover Page

{¶ 61} In his second proposition of law, Kirkland contends that the cover page of the jury questionnaire discouraged candid responses and thereby impaired the adequacy of voir dire. The cover page contained the following notice:

POTENTIAL JURORS

- Please be aware that the following questionnaire you will fill out may be subject to review by the media or others pursuant to a public records request.
- Please also note that no actual identification information will be released. Any information you provide on your questionnaires that could be used to individually identify you would be deleted or blacked out before any questionnaires would be released.

(Underlining and boldface sic.) Before voir dire, the defense requested that the cover page be omitted. The trial court denied the request.

{¶ 62} Kirkland argues that by giving the prospective jurors notice that the questionnaires were subject to disclosure, the cover page exerted a "chilling effect" on them, discouraging candid answers by calling their attention to the possibility that their answers could be made public. But we have said that "trial courts should * * * conspicuously advise prospective jurors in writing that * * * their responses may be subject to public disclosure." *State ex rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, 781 N.E.2d 180, ¶ 26.

{¶ 63} Moreover, the prospective jurors were not told *only* that the questionnaires were subject to disclosure; they were also told that personal identifying information would be deleted before any disclosure. In light of that assurance, Kirkland's claim of a "chilling effect" amounts to speculation. The trial court's suggestion that prospective jurors concerned about privacy would find the

assurance comforting—and as a consequence be more candid than otherwise—is at least equally plausible.

{¶ 64} And the trial court affirmatively encouraged candor when it told the prospective jurors to "answer the questionnaires as if you were answering the questions in the courtroom" and instructed, "[T]he oath that you took earlier to well and truly answer all questions applies to * * * the questionnaire." The prospective jurors understood that they were sworn to answer the questionnaire truthfully. The trial court reasonably declined to assume that the cover-page notice would cause prospective jurors to violate their oath.

{¶ 65} Finally, we note that the jury questionnaire is not the sole, or even the principal, means by which litigants learn about prospective jurors. It is the voir dire itself—the face-to-face exchange between the prospective jurors and counsel—that is central to obtaining an impartial jury. The voir dire process gave defense counsel a full opportunity to question the prospective jurors and thereby elicit complete and candid answers from them.

{¶ 66} The trial court did not deny Kirkland an adequate opportunity for voir dire by including the cover page with the questionnaire. Kirkland's second proposition of law is overruled.

4. Failure to Dismiss Allegedly Biased Juror

{¶ 67} In his third proposition of law, Kirkland contends that one of the prospective jurors who ended up seated on the jury, prospective juror No. 36, favored an automatic death penalty in every murder case and therefore should have been removed. However, Kirkland never challenged this prospective juror for cause; he has therefore forfeited this claim, absent plain error.

{¶ 68} On her questionnaire, prospective juror No. 36 checked boxes indicating that the death penalty is "[a]ppropriate in every case where someone has been murdered" and "should always be used as the punishment for every murder."

{¶ 69} On voir dire, defense counsel asked the panel members as a group whether they understood that the death sentence is not automatic:

> And just because Mr. Kirkland has been found guilty by a prior jury does not mean that Mr. Kirkland automatically gets the death penalty. Fair? Everybody gets that?
>
> Just because a jury has said guilty, that he is guilty of aggravated murder and specifications associated with aggravated murder, the case is not over. Everybody understands that, right? Good.

No prospective juror responded to these questions.

{¶ 70} Defense counsel also briefly questioned prospective juror No. 36 about the views expressed on her questionnaire:

> MR. CUTCHER [defense counsel]: I think you listed the death penalty is necessary?
>
> [Prospective juror No. 36]: Yes.
>
> MR. CUTCHER: Did you mean necessary in some cases, all cases?
>
> [Prospective juror No. 36]: *Some cases*.
>
> MR. CUTCHER: Thank you for correcting me so quickly. The death penalty should always be used as a punishment for every murder. You put you agreed with that.
>
> [Prospective juror No. 36]: In answering the question, yes, *at the time*, yes. I answered yes.
>
> MR. CUTCHER: So you don't think it is appropriate in every case?

> [Prospective juror No. 36]: In listening to—there are so many different cases that was discussed earlier today, I don't know how to answer that honestly.
>
> MR. CUTCHER: That's all right. I didn't mean to put you on the spot.

(Emphasis added.) Defense counsel asked no further questions of prospective juror No. 36. Neither did the trial court. The defense did not challenge prospective juror No. 36 for cause, and she served on the jury in the resentencing hearing.

{¶ 71} By declining to challenge prospective juror No. 36 for cause, Kirkland forfeited this claim. *See State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 78. For this court to consider this claim, Kirkland must show plain error: that an error occurred, that it was plain, and that it affected his substantial rights. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). If he makes this showing, we must decide whether we will, in our discretion, correct the error. *Id.*

{¶ 72} A plain error is "an 'obvious' defect in the trial proceedings." *Id.* To qualify as correctible plain error, the defect "must have affected 'substantial rights,' " which "mean[s] that the trial court's error must have affected the outcome of the trial." *Id.* We have held that a defendant must "demonstrate a reasonable *probability* that the error resulted in prejudice." (Emphasis sic.) *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22.

{¶ 73} "Actual bias is 'bias in fact'—the existence of a state of mind that leads to an inference that the person will not act with entire impartiality." *United States v. Torres*, 128 F.3d 38, 43 (2d Cir.1997), citing *United States v. Wood*, 299 U.S. 123, 133, 57 S.Ct. 177, 81 L.Ed. 78 (1936). Here, the questionnaire contains an expression of partiality on the part of prospective juror No. 36. A juror who will automatically impose a death sentence is biased. *Morgan v. Illinois*, 504 U.S. 719,

729, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). Hence, by stating that capital punishment should be imposed on all murderers, prospective juror No. 36 revealed "a state of mind that leads to an inference that [she would] not act with entire impartiality," *Torres* at 43.

{¶ 74} But the expression of partiality does not end the analysis. A court will find actual bias when a prospective juror's unambiguous statement of partiality is "coupled with a lack of juror rehabilitation or juror assurances of impartiality." *Miller v. Webb*, 385 F.3d 666, 675 (6th Cir.2004).

{¶ 75} Prospective juror No. 36's questionnaire statement was not coupled with a lack of juror rehabilitation. While she did not say she could set aside the opinion expressed on her questionnaire, she did indicate that she no longer held that opinion. As soon as defense counsel brought up her statement on the questionnaire, she immediately contradicted it. These responses showed that prospective juror No. 36 had reconsidered her original opinion in response to what she heard during voir dire, and they indicated a newfound understanding that a single dogmatic response is not appropriate to every murder conviction.

{¶ 76} When a prospective juror gives contradictory answers, it is the trial judge's function to determine her true state of mind. *Jones*, 91 Ohio St.3d at 339, 744 N.E.2d 1163. The question whether a juror is impartial is "one of historical fact." *Patton v. Yount*, 467 U.S. 1025, 1036, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984); hence, a trial court's finding is entitled to deference on appellate review. *E.g.*, *State v. Webb*, 70 Ohio St.3d 325, 339, 638 N.E.2d 1023 (1994).

{¶ 77} Given the prospective juror's change of mind during voir dire, we cannot find that the trial court committed an obvious error in failing to dismiss her sua sponte. Accordingly, no plain error exists here. We therefore overrule Kirkland's third proposition of law.

B. Ineffective Assistance of Counsel

{¶ 78} In his sixth proposition of law, Kirkland contends that his counsel rendered ineffective assistance during the resentencing hearing. To establish ineffective assistance, Kirkland must show (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that but for counsel's errors, the proceeding's result would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraphs two and three of the syllabus. Kirkland contends that his trial counsel failed him in three ways, each of which we address below.

1. Ineffective Voir Dire

{¶ 79} In part one of his sixth proposition of law, Kirkland recasts his juror-bias claim regarding prospective juror No. 36, who ended up seated on the jury, as an ineffective-assistance claim. According to Kirkland, his counsel should have "question[ed prospective juror No. 36] specifically on [her] views on the death penalty" and should have "remov[ed her] from the pool" (i.e., challenged her for cause).

{¶ 80} There are two problems with this argument. First, as Kirkland concedes, to show prejudice, he must show that the juror was actually biased against him. *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶ 67. Here, the record does not show that the juror was actually biased, since she contradicted her questionnaire answers on voir dire. Second, there is no way to know what prospective juror No. 36 would have said if trial counsel had questioned her in greater depth. It would be speculative to assume that more or different questions would have exposed bias.

{¶ 81} At oral argument, Kirkland cited our recent decision in *State v. Bates*, 159 Ohio St.3d 156, 2020-Ohio-634, 149 N.E.3d 475, in which we reversed

a capital conviction for ineffective assistance of counsel. In *Bates*, we determined that defense counsel rendered constitutionally ineffective assistance by failing to challenge, or even question, a seated juror who had expressed racial bias on her questionnaire. But this case is easily distinguishable from *Bates*. Unlike Kirkland's counsel, defense counsel in *Bates* asked *no* questions of the juror relating to the biased answer on her questionnaire. *Id.* at ¶ 29, 31-32. And as a result, the juror in *Bates*—unlike prospective juror No. 36—said nothing on voir dire to counteract the biased statement on the questionnaire. *Id*. at ¶ 36.

{¶ 82} In this case, we can find neither deficient performance by counsel nor a reasonable probability that the result would have been different but for counsel's alleged errors. Accordingly, we reject Kirkland's claim of ineffective assistance with respect to prospective juror No. 36.

2. Failure to Cross-Examine Witnesses

{¶ 83} Kirkland also contends that his trial counsel performed deficiently by declining to cross-examine four prosecution witnesses: Casonya's grandmother, who reported her missing; Mary Jo Newton's sister, who testified about Newton's substance-abuse, behavioral, and psychiatric problems; Detective Witherell, whose video-recorded interrogation of Kirkland was played for the jury; and Detective Hilbert, who investigated the murders of Casonya and Newton and who also interrogated Kirkland.

{¶ 84} Kirkland concedes that to demonstrate that his counsel provided ineffective assistance by failing to cross-examine these witnesses, he must identify questions that counsel should have asked and provide some sense of the information that might have been elicited. *See State v. Beasley*, 153 Ohio St.3d 497, 2018-Ohio-493, 108 N.E.3d 1028, ¶ 155. Yet Kirkland fails to do so. He merely asserts that counsel "should have used these witnesses to bring out and develop mitigating factors as to the crimes and as to Kirkland." This claim is vague and speculative: Kirkland neither indicates what kind of mitigating information trial counsel could

have attempted to elicit from these witnesses nor gives any reason to suppose that the witnesses had any such information.[2]

3. Failure to Call Witnesses

{¶ 85} Finally, Kirkland contends that his trial counsel should have called more mitigation witnesses. He argues that counsel should have called family members who could have corroborated his claims of childhood abuse and neglect. He also argues that counsel should have called an expert on domestic violence and one or more of the doctors who treated Kirkland when he was admitted to the University of Cincinnati Hospital for depression in 2008.

{¶ 86} Kirkland's claim regarding his family rests on speculation. Nothing in the record shows what testimony his relatives would have given had they taken the stand. Accordingly, he can show neither deficient performance nor prejudice. *See State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, 857 N.E.2d 547, ¶ 121, 124.

{¶ 87} As for Kirkland's 2008 hospitalizations, the jury knew about them, because an expert witness called by the defense discussed them in her testimony. Kirkland does not say what further testimony on this point would have added, except to speculate that testimony from a doctor who had treated him "would have impressed upon the jury his compromised mental state." Likewise, Kirkland fails to explain what mitigation testimony a domestic-violence expert might have offered. Kirkland's sixth proposition of law is overruled.

2. We are unable to even guess what mitigating evidence Kirkland believes his trial counsel might have elicited from Casonya's grandmother or Newton's sister. Nothing in the record indicates that they knew anything about Kirkland or had any firsthand information about the murders.

C. Evidentiary Issues

1. Evidence Relating to Other Murders

a. Newton and Rolison Murders

{¶ 88} In his fourth proposition of law, Kirkland contends that the state violated Evid.R. 404(B) by introducing evidence relating to the murders of Mary Jo Newton and Kimya Rolison, because the resentencing hearing was not for those two murders—it was for only the aggravated murders of Esme and Casonya.

{¶ 89} This proposition is meritless. Evid.R 404(B) provides: "Evidence of *other* crimes, wrongs, or acts is not admissible to prove the character of a person in order *to show action in conformity therewith*." (Emphasis added.) At the guilt phase of Kirkland's original trial, the jury found Kirkland guilty of murdering Esme and Casonya as part of a course of conduct including two or more intentional killings. The Newton and Rolison murders were part of that course of conduct, and the jury was required to weigh the course-of-conduct specification in recommending a sentence. Thus, for purposes of the resentencing hearing that is the subject of this appeal, the Newton and Rolison murders were not "*other* crimes, wrongs, or acts."

{¶ 90} Nor were the Newton and Rolison murders introduced to prove Kirkland's character in order *to show that he acted in conformity therewith*. That is, they were not introduced to show that he was guilty of murdering Esme and Casonya. He had already been found guilty of those murders; guilt was not at issue in this resentencing hearing.

{¶ 91} Kirkland also contends that evidence relating to the Newton and Rolison murders should have been excluded because its probative value was substantially outweighed by the danger of unfair prejudice, Evid.R. 403(A). This assertion has even less merit. Again, the Newton and Rolison murders were part of Kirkland's course of conduct, which was one of the aggravating circumstances the jury was *required* to weigh against the mitigating factors. As such, they were

central to the sentencing determination the jury had to make and could not be unfairly prejudicial.

b. 1987 Leola Douglas Murder

{¶ 92} Kirkland also contends that during the cross-examination of a defense mitigation witness, the prosecutor introduced evidence that Kirkland had been convicted of a 1987 homicide, a homicide that was not part of the course of conduct.

{¶ 93} The 1987 homicide first came up on cross-examination during the video deposition of defense medical expert Joseph Wu. On direct examination, Dr. Wu had testified that damage to the brain's frontal lobe can impair the brain's ability to regulate aggression and cause significant changes in personality. Dr. Wu further testified that Kirkland had a history of multiple traumatic brain injuries, including one in 2004, after which, according to Dr. Wu, a friend of Kirkland's "reported that he became a completely different person," and another in 2006.

{¶ 94} On cross-examination, the prosecution asked Dr. Wu whether Kirkland "was exhibiting extremely violent behavior * * * well before 2004." And Dr. Wu admitted that Kirkland was. The prosecution then called his attention to a presentence investigation report "for a homicide [Kirkland] committed in * * * May 1987 when he killed his uncle's girlfriend and set the house on fire to cover that up."

{¶ 95} The defense objected, arguing that the 1987 homicide was irrelevant and that its probative value was significantly outweighed by its unfair prejudicial effect. During the resentencing hearing, the trial judge overruled this objection and Dr. Wu's video deposition was then played for the jury. Kirkland makes no claim that the trial court erred by overruling that objection.

{¶ 96} After the jury heard Dr. Wu's deposition, the defense presented another expert, psychologist Patti van Eys. On cross-examination, the prosecutor asked Dr. van Eys whether she had received a presentence report indicating that

"the defendant basically did the same thing to another woman when he was 18 years old." Dr. van Eys acknowledged that she had received the report. The prosecutor then asked:

> And * * * the defendant and the victim * * * engaged in a verbal altercation. According to the defendant, she * * * threatened to tell his uncle, who was her boyfriend, that they had been having sexual intercourse. And at that point the defendant became angry, choked her to death and then poured lighter fluid on her and set her on fire; is that correct?

{¶ 97} Later, the prosecutor asked Dr. van Eys two other questions about the 1987 murder. Explaining her belief that Kirkland did not display antisocial-personality disorder, Dr. van Eys testified that Kirkland did not "externalize all the blame" for his actions. The prosecutor asked: "Leola Douglas, the first victim, back in 1987, he killed her because she threatened to rat him out. * * * Isn't that externalizing the blame?" Finally, the prosecutor asked Dr. van Eys whether she knew that Kirkland had been suspected of the murders of Newton and Casonya in 2006 "because the police saw he had done something very similar years ago."

{¶ 98} The defense did not object to any of these references to the 1987 murder. Kirkland's failure to object forfeits this issue, absent plain error. We find no plain error here because the jury already knew about the 1987 murder. That murder was properly introduced during Dr. Wu's cross-examination, as the trial court ruled and as Kirkland does not dispute. Thus, Kirkland cannot show a reasonable probability that mentioning it during the cross-examination of Dr. van Eys resulted in prejudice. *See Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, at ¶ 22.

{¶ 99} We overrule Kirkland's fourth proposition of law.

2. Gruesome Photographs

{¶ 100} In his fifth proposition of law, Kirkland argues that gruesome autopsy photographs were improperly admitted into evidence at the resentencing hearing.

{¶ 101} "[T]he mere fact that a photograph is gruesome or horrendous is not sufficient to render it *per se* inadmissible." *State v. Maurer*, 15 Ohio St.3d 239, 265, 473 N.E.2d 768 (1984). However, this court has established "a stricter evidentiary standard" for admitting gruesome photographs in capital cases. *State v. Morales*, 32 Ohio St.3d 252, 257-258, 513 N.E.2d 267 (1987). "Properly authenticated photographs, even if gruesome, are admissible in a capital prosecution if relevant and of probative value in assisting the trier of fact to determine the issues or are illustrative of testimony and other evidence, as long as the danger of material prejudice to a defendant is outweighed by their probative value and the photographs are not repetitive or cumulative in number." *Maurer* at paragraph seven of the syllabus. Unlike Evid.R. 403, which turns on whether prejudice *substantially* outweighs probative value, this standard requires "a simple balancing" of prejudice and probative value. *Morales* at 258. In other words, if the probative value of a photograph in a capital case does not, in a simple balancing of the relative values, outweigh the danger of prejudice to the defendant, the evidence must be excluded. *Id.* A trial court's decision that a photo satisfies this standard is reviewable only for abuse of discretion. *State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, ¶ 69; *Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, at ¶ 96.

a. Autopsy Photographs

{¶ 102} Kirkland's argument focuses principally on the autopsy photographs that were introduced at the resentencing hearing. The trial court admitted the following autopsy photographs: state's exhibit Nos. 17A through 17J, 33A through 33P, 20A through 20E, and 23A through 23H.

{¶ 103} Ten photographs from Casonya's autopsy were admitted. One of these, state's exhibit No. 17D, depicts a bone with little or no flesh and is not gruesome. The others, which depict charred and partly decomposed portions of the body, are gruesome.

{¶ 104} A Hamilton County deputy coroner testified that because of the "serious severe burning" of the body, it "seemed to be very likely" that an accelerant had been used. Each photo is of a different body part, and each photo had probative value in that collectively, they show the full extent of the burning. And there was little repetition in this group of photographs; only one, state's exhibit No. 17G, appears to be repetitive in that it shows nothing that is not also shown in other admitted photographs.

{¶ 105} The trial court admitted 16 photographs from Esme's autopsy, state's exhibit Nos. 33A through 33P. Her body was found soon after the murder and was only partly burned. Only three of these photos qualify as gruesome: state's exhibit Nos. 33A, 33N, and 33P.

{¶ 106} State's exhibit No. 33A shows the body lying on a table and gives an overview of which areas were burned. State's exhibit No. 33P is a closer image of the burned areas. While graphic, this photograph also shows a genital injury not caused by burning. The Hamilton County chief deputy coroner, Dr. Karen Looman, testified that this injury could have been caused by "something attempting to penetrate [Esme's] vagina," a fact relevant to the attempted-rape felony-murder specifications. No other photograph shows this injury. State's exhibit No. 33N shows the head with the scalp peeled back to expose the skull. This shows that hemorrhaging took place underneath the scalp; from this, Dr. Looman concluded that Esme had been struck on the back of the head hard enough to at least stun her.

{¶ 107} In five other photographs, state's exhibit Nos. 33C, 33D, 33E, 33M, and 33O, some charred flesh is visible. In two of them, it is only barely visible. In no photograph is it prominently depicted. The eight remaining

photographs show nothing worse than small abrasions, petechiae, and ligature marks.

{¶ 108} Five photographs from Newton's autopsy were admitted. Only two are gruesome—state's exhibit Nos. 20A and 20B, which show Newton's charred body from different angles. State's exhibit No. 20A, a full-length view of the body lying face down on a table, illustrates the deputy coroner's testimony that the body went into "pugilistic posturing" when the fire's heat made the arm and leg muscles flex, indicating that the body was burned before rigor mortis set in. State's exhibit No. 20B shows the victim's face with the lips retracted, helping to confirm that the body was burned before rigor mortis set in. These photographs are not repetitive: each shows something the other does not. Both were used to support the same conclusion about when the body was burned with respect to rigor mortis, but using two photographs for that purpose was not unreasonably cumulative.

{¶ 109} State's exhibit Nos. 20C through 20E show Newton's skull and lower jaw *after* the burned flesh was removed. All were probative. State's exhibit No. 20C shows her head injuries; State's exhibit Nos. 20D and E show the dental work that was used to identify her.

{¶ 110} Finally, eight photographs show Rolison's skeletonized remains in the coroner's office. These photographs are not gruesome: they depict no discernible blood, bodily fluids, wounds, damaged or decomposed flesh, or insect activity.

{¶ 111} Kirkland contends that the trial court erred in admitting the autopsy photographs of Newton and Rolison because the resentencing hearing addressed only the aggravated murders of Esme and Casonya, and not the murders of Newton and Rolison. But as we noted earlier in response to Kirkland's fourth proposition of law, the Newton and Rolison murders were part of Kirkland's course of conduct and the jury was *required* to weigh that aggravating circumstance against the mitigating factors in making its sentencing determination.

{¶ 112} In all, 14 gruesome autopsy photographs were admitted. Repetition was minimal; with the one noted exception, each has some probative value not found in the others. We conclude that the trial court did not abuse its discretion in admitting them. The probative value of each photograph outweighed any prejudicial effect, and any repetition did not materially prejudice Kirkland. Moreover, our independent review of the sentence can minimize any improper impact on the sentence that may have arisen from the admission of these photographs. *See, e.g., State v. Twyford*, 94 Ohio St.3d 340, 358, 763 N.E.2d 122 (2002).

b. Crime-Scene Photographs

{¶ 113} Photographs of the victims at the crime scenes were also introduced during the resentencing hearing. Kirkland's brief makes cursory mention of these photographs but fails to provide any explanation to support his argument that the trial court erred in admitting them. "We are not obligated to * * * formulate legal arguments on behalf of the parties," *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 19, and we decline to do so here.

{¶ 114} Kirkland's fifth proposition of law is overruled.

D. Prosecutorial Misconduct

{¶ 115} In his seventh proposition of law, Kirkland contends that prosecutorial misconduct in closing arguments denied him a fair trial. When reviewing a claim of prosecutorial misconduct, our inquiry is twofold: we must first decide whether the prosecutor's actions were improper, and if so, we consider whether the conduct prejudicially affected the defendant's substantial rights. *State v. Clinton*, 153 Ohio St.3d 422, 2017-Ohio-9423, 108 N.E.3d 1, ¶ 228. "The touchstone of due process 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). Thus, "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction

a denial of due process.' " *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *see generally State v. Johnson*, 144 Ohio St.3d 518, 2015-Ohio-4903, 45 N.E.3d 208, ¶ 78. Kirkland cites three instances of alleged misconduct. First, Kirkland contends that the prosecutor committed misconduct by speculating as follows on the dying thoughts of Esme K.: "You know maybe earlier she would have said, please don't hurt me. At this point, *she probably is praying to God* as the vomit filled her throat, *please let me die*." (Emphasis added.) The trial court overruled an objection by the defense but immediately instructed the jury, "[T]his is closing arguments, not evidence. You make a decision what the evidence is."

{¶ 116} This court has said that it is improper for prosecutors to comment on what the victim was thinking when he or she died, as it " 'invites the jury to speculate on facts not in evidence.' " *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, ¶ 122, quoting *State v. Wogenstahl*, 75 Ohio St.3d 344, 357, 662 N.E.2d 311 (1996); *see also State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 147, citing *State v. Combs*, 62 Ohio St.3d 278, 283, 581 N.E.2d 1071 (1991).

{¶ 117} Although the trial court should have sustained the defense objection, it nevertheless mitigated the impact of the prosecutor's statement by instructing the jury that the closing argument was "not evidence" and that it was for the jury to decide what the evidence showed. And the court repeated that instruction before sending the jury out to deliberate. *See State v. Apanovitch*, 33 Ohio St.3d 19, 24, 514 N.E.2d 394 (1987) (jury instruction that closing arguments are not evidence contributed to determination that prosecutor's improper statements did not deny a fair trial).

{¶ 118} Kirkland also argues that the prosecutor improperly "belittled" and "personally attacked" Dr. Wu. The prosecutor said:

> First we have got Dr. Wu. * * * I have been in the prosecutor's office—this is my 38th year. *I have been doing this a long time.* I know I look too young to be that old. This is what I have done for a long time. *I have heard of experts like this forever. I have never personally seen someone I would hold in less repute* in an actual case than him.

(Emphasis added.) The defense objected that the prosecutor was "commenting on the veracity of a witness" and being "[p]ersonal." The prosecutor withdrew the comment, and the trial court made no ruling.

{¶ 119} An attorney may not express his personal opinion as to the credibility of a witness, *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984), unless the opinion is based on evidence presented at trial, *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 159. Thus, the prosecutor could properly attack Dr. Wu's credibility, so long as his attack was based on the evidence. But the above argument was not. The prosecutor instead cited his own experience and placed his personal credibility in issue. *See State v. Waddy*, 63 Ohio St.3d 424, 435-436, 588 N.E.2d 819 (1992) (argument inviting jury to substitute prosecutor's experience for its own evaluation was improper).

{¶ 120} However, the prosecutor's prompt withdrawal of the improper comment diminished its prejudicial effect. *See United States v. Jackson*, 990 F.2d 251, 255 (6th Cir.1993); *State v. Green*, 2d Dist. Greene No. 2007 CA 2, 2009-Ohio-5529, ¶ 141. Moreover, he immediately changed course and attacked Dr. Wu's testimony properly, by discussing Dr. Wu's cross-examination and the testimony of the state's rebuttal witnesses.

{¶ 121} Finally, Kirkland argues that the prosecutor improperly "disparaged" the defense for not putting on evidence to support its claim that

Kirkland was abused in childhood. The prosecutor stated that only Kirkland himself said he had been abused: "He is the only one who said he was abused. His sisters don't say it. His mom doesn't say it." The prosecutor noted that Kirkland could have subpoenaed witnesses to support his allegations but had not. The trial court overruled an objection by the defense.

{¶ 122} Like the trial court, we see nothing improper in these arguments. "[T]he state may comment upon a defendant's failure to offer evidence in support of its case. * * * Such comments do not imply that the burden of proof has shifted to the defense, nor do they necessarily constitute a penalty on the defendant's exercise of his Fifth Amendment right to remain silent." *State v. Collins*, 89 Ohio St.3d 524, 527-528, 733 N.E.2d 1118 (2000). This is especially true in the penalty phase of a capital case because the defendant has the burden of persuading the sentencer of the existence of mitigating factors. *See State v. Jenkins*, 15 Ohio St.3d 164, 171-172, 473 N.E.2d 264 (1984). The prosecutor committed no misconduct by asking the jury to consider whether Kirkland had shown that the mitigating factors he claimed to exist really did exist.

{¶ 123} Kirkland's claim that the arguments in question were "inflammatory" and "denigrate[d]" defense counsel is incorrect. Attacking the defense *case* as weak because it lacks evidentiary support is not the same as attacking defense counsel personally. The cited portions of the state's argument do not mention defense counsel, even by implication.

{¶ 124} When evaluating prejudice, we consider the effect any improper comments may have had on the jury in the context of the entire proceeding. *Clinton*, 153 Ohio St.3d 422, 2017-Ohio-9423, 108 N.E.3d 1, at ¶ 228, citing *State v. Keenan*, 66 Ohio St.3d 402, 410, 613 N.E.2d 203 (1993). Kirkland has identified two improper comments by the prosecution, both of which were mitigated to a degree. These isolated instances did not "pervade the trial to such a degree that there was a denial of due process," *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-

2128, 767 N.E.2d 166, ¶ 149. We therefore conclude that any error with respect to the prosecutor's comments did not prejudicially affect Kirkland's substantial rights. Kirkland's seventh proposition of law is overruled.

E. Jury Instructions and Verdict Forms

{¶ 125} In his eighth proposition of law, Kirkland contends that the trial court erred by denying his requests regarding the wording of two jury instructions and the verdict forms.

1. Parole-Eligibility Instruction

{¶ 126} Kirkland asked the trial court to instruct the jury as follows:

> Under no circumstances could Anthony Kirkland ever be released from prison on parole if under a sentence of life in prison without the possibility of parole. Likewise, if you were to select one of the other two life imprisonment options, then Anthony Kirkland would in fact stay in prison for a minimum of either twenty-five or thirty full years before he could even be considered for parole much less actually being granted parole.

The court did not give that instruction, but it gave this one:

> During your deliberations you will decide whether Anthony Kirkland shall be sentenced to, one, life imprisonment without parole eligibility for 25 full years, or, two, life imprisonment without parole eligibility for 30 full years, or, three, life imprisonment without the possibility of parole, or four, death.

{¶ 127} Kirkland contends that without his proposed instruction, the jury probably thought a defendant sentenced to life would "be released in less time than

the actual wording of the law allows." However, we have rejected such claims and upheld instructions similar to the one the trial court gave here. *See, e.g., State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 215-219; *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 102-103. The instruction that was given adequately conveyed to the jurors when, if ever, Kirkland would be eligible for parole if they chose one of the life-sentence options. *See Davis* at ¶ 219 and *Jackson* at ¶ 103.

2. Moral-Culpability Instruction

{¶ 128} Kirkland asked the trial court to provide the following instruction to the jury: "Mitigating factors are factors that *lessen the moral culpability or* diminish the appropriateness of a death sentence." (Emphasis added.) The trial court's instructions did not include the words "moral culpability." The court instructed the jury as follows:

> Mitigating factors are factors about an individual or an offense that weigh in favor of a decision that a life sentence rather than a death sentence is appropriate. Mitigating factors are factors that diminish the appropriateness of a death sentence.

{¶ 129} Factors that diminish the offender's moral culpability are mitigating. *See State v. Steffen*, 31 Ohio St.3d 111, 129, 509 N.E.2d 383 (1987); *State v. Sowell*, 39 Ohio St.3d 322, 325, 530 N.E.2d 1294 (1988). And a sentencing jury must be free to give a reasoned moral response to a capital defendant's mitigating evidence—"*particularly that evidence which tends to diminish his culpability*." (Emphasis added.) *Brewer v. Quarterman*, 550 U.S. 286, 289, 127 S.Ct. 1706, 167 L.Ed.2d 622 (2007).

{¶ 130} But it does not follow that a capital defendant is entitled to specific "moral culpability" language in the jury instructions. Mitigating factors "are not

necessarily related to a defendant's culpability but, rather, are those factors that are relevant to the issue of whether an offender * * * should be sentenced to death." (Emphasis added.) *State v. Holloway*, 38 Ohio St.3d 239, 527 N.E.2d 831 (1988), paragraph one of the syllabus.

{¶ 131} The trial court's instruction contained no language restricting the jury's ability to give a reasoned moral response to evidence tending to diminish Kirkland's culpability. Instead of singling out one category of mitigating factors (those related to moral culpability), the instruction was inclusive, allowing the jury to consider as mitigation *anything* that "diminish[ed] the appropriateness of a death sentence" or "weigh[ed] in favor of a decision that a life sentence * * * is appropriate." Moreover, the trial court instructed that mitigating factors included "any other factors that weigh in favor of a sentence other than death."

{¶ 132} The trial court further instructed that mitigating factors included the "history, character, and background of the defendant." This instruction allowed the jury to take account of Dr. van Eys's testimony that Kirkland was an abused child. Finally, the trial court instructed that the jury should consider as a mitigating factor whether Kirkland lacked the substantial mental capacity to conform his conduct to the law due to a mental disease or defect. Thus, "considered in context, the trial court's instructions adequately informed the jury as to the relevant mitigating factors it must consider." *State v. Wilson*, 74 Ohio St.3d 381, 397, 659 N.E.2d 292 (1996).

3. Verdict Forms (*Caldwell* Claim)

{¶ 133} Kirkland's final argument under this proposition of law relates to his request to amend the verdict forms. The verdict forms for each capital count contained the language: "We therefore unanimously find that the sentence of death *should* be imposed upon Anthony Kirkland." (Emphasis added.) Kirkland asked that "should" be changed to "shall" because "should" implied that a jury verdict in favor of death was a recommendation, which Kirkland claimed would

unconstitutionally diminish the jury's sense of responsibility for the death verdict. *See generally Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

{¶ 134} *Caldwell*, however, does not preclude accurately informing the jury that its verdict recommending death is a recommendation. *See*, *e.g.*, *Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, at ¶ 88. Kirkland was not entitled to have the verdict forms changed to reflect his erroneous reading of *Caldwell*. Kirkland's eighth proposition of law is overruled.

F. Requiring Defendant to Wear Stun Cuff

{¶ 135} In his tenth proposition of law, Kirkland contends that the trial court denied him due process of law by requiring him to stand trial wearing a "stun cuff," a remotely controlled taser worn around the ankle, underneath the pants leg.

{¶ 136} Due process "prohibit[s] the use of physical restraints *visible to the jury* absent a trial court determination * * * that they are justified by a state interest specific to a particular trial." (Emphasis added.) *Deck v. Missouri*, 544 U.S. 622, 629, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005). This applies to both phases of a capital proceeding. *Id*. at 632-633.

{¶ 137} Before trial, at the request of the Hamilton County sheriff's department, the trial court held a hearing on security measures. Deputy Sheriff Emily Rose testified, asking that Kirkland be ordered to wear a stun cuff. Although the defense questioned Rose, it did not object to or argue against the use of a stun cuff. The trial judge granted the request, cautioning, "[The cuff] needs to stay not visible" to the jury.

{¶ 138} Kirkland argues that the stun cuff was not needed to maintain courtroom security, because there was no evidence he was a security threat. He further contends that worrying about being tased distracted him from "adequately and effectively participat[ing] in his defense."

{¶ 139} By failing to object at trial, Kirkland forfeited all but plain error, and no plain error occurred here. The prohibition in *Deck*, 544 U.S. 622, 125 S.Ct. 2007, 161 L.Ed.2d 953, "concerned only *visible* restraints at trial," (emphasis sic) *Mendoza v. Berghuis*, 544 F.3d 650, 654 (6th Cir.2008), and thus, "a claim based on *Deck* 'rises or falls on the question of whether the [restraining device] was visible to the jury,' " *Leonard v. Warden*, 846 F.3d 832, 842 (6th Cir.2017), quoting *Earhart v. Konteh*, 589 F.3d 337, 349 (6th Cir.2009). The trial court's order specified that "[t]he physical restraints used at trial shall be concealed so as not to be visible to the jury." And nothing in the record suggests that the jury could see the stun cuff.

{¶ 140} Kirkland does not dispute that the cuff was concealed but argues that the officer holding the remote control was visible to the jury. Perhaps so, but nothing in the record suggests that jurors could see the remote control. Speculation about the remote control is not enough to establish plain error. Hence, Kirkland's tenth proposition of law is overruled.

G. Cumulative Error

{¶ 141} In his 11th and final proposition of law, Kirkland claims to have identified "numerous errors any one of which warrant * * * granting relief from a sentence of death," but he asks us to view the errors together if we determine that none of the errors is sufficient on its own to warrant relief. Invoking the doctrine of cumulative error, *see generally State v. DeMarco*, 31 Ohio St.3d 191, 196-197, 509 N.E.2d 1256 (1987), he claims that the total effect of these errors made his resentencing fundamentally unfair even if they were individually harmless. But, Kirkland has failed to identify any significant error; he was resentenced in a fundamentally fair proceeding. Accordingly, his 11th proposition of law is overruled.

H. Independent Sentence Evaluation

{¶ 142} Kirkland's ninth proposition of law invokes our statutory duty to independently review sentences of death. This court may affirm a death sentence "only if the * * * court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case," R.C. 2929.05(A), beyond a reasonable doubt, R.C. 2929.03(D)(1). In this proposition, Kirkland asks us to find on independent review that the aggravating circumstances do not outweigh the mitigating factors and to replace his death sentences with sentences of life in prison without parole for the murders of Casonya C. and Esme K.

{¶ 143} On independent review, we must determine whether the evidence supports the jury's finding of aggravating circumstances, whether the aggravating circumstances outweigh the mitigating factors, and whether the death sentences are proportionate to those affirmed in similar cases. R.C. 2929.05(A).

1. Merger

{¶ 144} We begin by noting that Counts Two and Four involve the aggravated murder of a single victim, Casonya, and therefore merge for sentencing purposes. *See State v. Lawson*, 64 Ohio St.3d 336, 350, 595 N.E.2d 902 (1992). The course-of-conduct specifications attached to those counts also merge with each other. *Id.* For the same reason, Counts Nine and Eleven (aggravated murder of Esme) merge, as do their course-of-conduct specifications.

2. Aggravating Circumstances

{¶ 145} In the guilt phase of Kirkland's original trial, the jury found him guilty of three aggravating circumstances as to each murder: felony-murder predicated on attempted rape, felony-murder predicated on aggravated robbery, and course of conduct involving two or more intentional killings. (The trial court merged the escaping-detection specifications with the felony-murder specifications for Counts Nine and Eleven.) As we found in *Kirkland I*, the evidence at trial was

sufficient to establish these aggravating circumstances beyond a reasonable doubt. 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, at ¶ 4-58 (recounting the state's evidence at trial).

3. Mitigating Factors

a. Traumatic Brain Injuries

{¶ 146} Dr. Wu testified on Kirkland's behalf at the resentencing hearing. Dr. Wu is a diplomate in psychiatry and professor emeritus at the University of California, Irvine. He has studied, and published peer-reviewed articles on, the use of positron-emission tomography ("PET") and magnetic-resonance imaging ("MRI") to diagnose various psychiatric conditions, including traumatic brain injury. He is not, however, a radiologist.

{¶ 147} Dr. Wu had three brain scans performed on Kirkland at the Wexner Medical Center: a PET scan, an MRI quantitative volumetric scan, and an MRI diffusion tensor imaging ("DTI") scan.

{¶ 148} According to Dr. Wu, the PET scan revealed two significant abnormalities in Kirkland's brain. Dr. Wu found that the frontal cortex showed "metabolic decrease" relative to the occipital cortex. He also found decreased activity in the neocortex compared to the cerebellum; normally, he explained, the neocortex has a significantly higher level of activity than the cerebellum. This pattern, Dr. Wu believed, was consistent with multiple head traumas.

{¶ 149} Dr. Wu analyzed the DTI scan using a "voxel-wise" quantitative analysis. According to Dr. Wu, this is a "much more reliable, much more sensitive way of detecting abnormalities" in DTI scans of people with histories of traumatic brain injury and this analysis showed abnormal decreases and increases in fractional anisotropy, indicating brain injury in Kirkland.

{¶ 150} Dr. Wu testified that the MRI quantitative volumetric scan showed an "abnormal increase in the right amygdala," and he stated, "[T]he only condition that I'm aware of that cause[s] a significant increase in the amygdala is significant

early childhood neglect." But only one side of the amygdala was enlarged; Dr. Wu was aware of no studies showing such a result. According to Dr. Wu, this is another indication of brain trauma, because trauma causes shrinkage; in Dr. Wu's opinion, trauma probably caused one side of Kirkland's enlarged amygdala to atrophy to normal size.

{¶ 151} Dr. Wu also looked at Kirkland's medical history. He found "at least four separate events" consistent with the abnormalities he found in his reading of the PET and MRI scans. Kirkland allegedly was abused by his father from age 6 to age 14, resulting in head contusions. At 17, he was involved in a workplace accident, following which he reported memory loss and numbness in his extremities. In 2004, at age 36, Kirkland fell off a bicycle, fracturing the right side of his face. Dr. Wu testified that in 2006, Kirkland "sustained a traumatic brain injury with a small hematoma in the left upper temporal area" in an auto accident. Dr. Wu testified that both the "significant abnormalities" in Kirkland's scans and his medical history were consistent with multiple traumatic brain injuries.

{¶ 152} Dr. Wu testified about how such injuries can affect the personality. Frontal-lobe damage can cause "significant alteration in your ability to regulate aggression," which can affect judgment and impulse control. The effect is exacerbated by "significant abuse and neglect" in childhood; the combination "cause[s] a dramatic increase in the inability of an individual to regulate aggression."

{¶ 153} Dr. Wu concluded that Kirkland lacks the ability to control his aggressive impulses in "an uncontrolled, unmanaged environment" because of the combination of brain injury, neglect, and abuse. When asked whether the degree of planning and execution involved in Kirkland's crimes was inconsistent with an inability to control impulses, Dr. Wu explained that a person whose history includes multiple brain traumas, neglect, and abuse loses the ability to calm his anger or

aggressive impulses; hence, instead of being "momentary," his aggressive impulses continue to "rage on."

{¶ 154} The state called three witnesses to rebut Dr. Wu's testimony: Drs. Chadwick Wright, Alan Waxman, and Daniel Boulter.

{¶ 155} Dr. Wright, a radiologist at the Ohio State University Wexner Medical Center, examined the images from Kirkland's PET scan. Dr. Wright found the scan to be "a normal appearing scan" that indicated that "the brain is functioning properly." He saw no evidence in the PET scan to indicate traumatic brain injury.

{¶ 156} Dr. Waxman is the director of nuclear medicine at Cedars-Sinai Medical Center in Los Angeles. He sharply criticized Dr. Wu's theories and methods regarding PET scans.

{¶ 157} According to Dr. Waxman, PET scanning is not accepted as a tool for diagnosing traumatic brain injury. Dr. Waxman noted that it is the view of the American College of Radiology that PET scans are "not usually appropriate" for diagnosing head injuries, that the American Academy of Neurology regards PET scanning as still "investigational" as a tool for diagnosing head trauma, and that the European Association of Nuclear Medicine also does not recognize or accept brain imaging as a method for diagnosing head trauma. Dr. Waxman also cited a United States Department of Defense study finding that PET scans are not useful for diagnosing head trauma and a peer-reviewed 2015 article in the *Journal of Neurotrauma* finding that PET scans do not yield a "recognizable pattern" for traumatic brain injury.

{¶ 158} Dr. Waxman examined Kirkland's PET scan and found it "textbook normal," yielding "no evidence of traumatic brain injury." According to Dr. Waxman, Kirkland's scan "looked really good."

{¶ 159} Dr. Waxman disagreed with Dr. Wu's contention that metabolic decreases in the frontal cortex relative to the occipital cortex are an abnormality. Dr. Waxman testified, "You can't prescribe a particular psychological construct to

these patterns" and, in fact, "a high percentage of people"—50 percent in one study—show metabolic decreases in the front of the brain relative to the back.

{¶ 160} In general, Dr. Waxman testified, Dr. Wu is wrong in seeing asymmetries as abnormal. Normal brains—including brains characterized as normal in Dr. Wu's database—have asymmetries. In Dr. Waxman's view, Dr. Wu is interpreting "normal variations" as abnormalities, resulting in false positives. Dr. Waxman testified that Dr. Wu "has read almost a thousand scans * * * and every single scan except one he has called abnormal." (On cross-examination, Dr. Wu testified that he has read about 100 scans, but he admitted that he had found abnormality in all but "a couple" of them.) In fact, Dr. Waxman said, "Dr. Wu has no idea what his error rate is" because it has never been scientifically determined.

{¶ 161} Dr. Waxman noted that the normal brains in Dr. Wu's database are usually those of people in their 30s, while Kirkland was nearly 50 at the time of his PET scan. Dr. Waxman testified that it would be normal for there to be a metabolic decrease in Kirkland's frontal lobe in comparison to those of people in their 30s. Indeed, according to Dr. Waxman, Kirkland's PET scan "is in the mid range of normal variation compared to Dr. Wu's own subjects."

{¶ 162} Dr. Boulter is a neuroradiologist and the clinical director of MRI at the Wexner Medical Center. He reviews MRI scans daily and has reviewed at least 20,000 brain MRI scans in his career. He reviewed the results of one of the MRI scans performed on Kirkland. He found no abnormality, and specifically, no evidence of traumatic brain injury.

{¶ 163} Unlike Dr. Wu, Dr. Boulter did not perform a voxel analysis. A voxel analysis, he testified, may be a useful tool in the future, but at present, it cannot be used to differentiate normal from abnormal. He further testified that the American College of Radiology's position is that it is not an appropriate tool for determining whether a person has suffered a traumatic brain injury.

b. Childhood Abuse and Neglect

{¶ 164} The second focus of Kirkland's mitigation evidence was the psychological effects of childhood abuse and neglect. He presented one witness on this point: Dr. van Eys, a clinical psychologist who works with children who have histories of abuse and neglect. Dr. van Eys interviewed Kirkland and administered the Adverse Childhood Experiences Survey and the Dissociative Experiences Scale. She also reviewed summaries of interviews with Kirkland, his mother, sister, and brother and a former girlfriend. She diagnosed Kirkland as suffering from posttraumatic stress disorder ("PTSD") with dissociation and "other specified dissociative disorder."

{¶ 165} Dr. van Eys testified that Kirkland told her that when he was young, his father beat him with his hands, brooms, and extension cords. Also, family members reported that Kirkland's mother was abused by Kirkland's father when Kirkland was a child. From the information provided to her, Dr. van Eys determined that Kirkland's father left the home when Kirkland was about 13 years old.[3] Kirkland also told Dr. van Eys that as a child, he was sexually abused by teenaged family members and a teenaged neighbor.

{¶ 166} Dr. van Eys explained that there are ten "adverse childhood experiences" that place a child at risk for adverse health, mental-health, and social outcomes. These are psychological abuse; physical abuse; sexual abuse; emotional and physical neglect; substance abuse by family members; parental absence, divorce, or separation; mental illness in a parent; a battered mother; domestic violence by a parent; and the incarceration of a family member. When these things happen between birth and age 18 years, they interrupt a child's neurodevelopment.

3. During Kirkland's original sentencing hearing in 2010, a different expert witness indicated that Kirkland's father left the home when Kirkland was nine or ten years old. *Kirkland I*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, at ¶ 147.

According to Dr. van Eys, only a small fraction of the population reports eight or more adverse childhood experiences. Kirkland reported nine.

{¶ 167} Dr. van Eys testified that the amygdala is the "survival part of the brain," the part that responds to perceived threats. Because the amygdala is connected to the prefrontal cortex, the "thinking part" of the brain, an incorrect threat alarm from the amygdala can be corrected. But toxic stress enlarges the amygdala while weakening its connection to the prefrontal cortex. As a result, the threat-response system can become overactive in abused children.

{¶ 168} According to Dr. van Eys, an abused child will read a facial expression as angry that a normal child would perceive as fearful. Dr. van Eys theorized that when Kirkland encountered Esme, she may have had a concerned or fearful facial expression; Kirkland may have misinterpreted her expression as threatening, or it may have reminded him of the helpless and scared expression of his mother when she was being abused. Such a misinterpretation would throw the amygdala into "survival mode," according to Dr. van Eys. Similarly, she noted, one of Kirkland's victims (presumably Rolison) allegedly produced a knife during their altercation, and another (presumably either Newton or Casonya) allegedly struck Kirkland; according to Dr. van Eys, these actions could have triggered a "survival response" from Kirkland, and after that, his acts would have been "survival actions, not thinking actions."

{¶ 169} Much of the information Dr. van Eys relied on in evaluating Kirkland's childhood came from Kirkland. Many of Kirkland's childhood memories lacked specificity, and Dr. van Eys admitted on cross-examination that this lack of specificity could raise questions about their credibility; however, she testified that Kirkland "presented like a person who has had trauma," not like somebody making things up.

c. Kirkland's Unsworn Statement

{¶ 170} Kirkland made a brief unsworn statement to the jury. He admitted responsibility for the deaths of the four victims and expressed remorse. He discussed his childhood abuse and his early use of drugs and alcohol "to cope with the lack of a sense of confidence and belonging." He said that he could offer no explanation for his acts, but added: "I am proof a young person deeply abused physically and emotionally and mentally becomes the abuser." He said that he did not deserve to live, but he asked the jury to spare his life.

d. Other Factors

{¶ 171} The factors set forth in R.C. 2929.04(B)(1) and (2) and (4) through (6) are inapplicable. Youth is not a factor. The degree of the defendant's participation is a factor only when the defendant is not the principal offender; here, Kirkland was the principal offender and, in fact, was the sole offender. He does not lack a substantial criminal record. There was no evidence that the victims induced or facilitated the murder and no evidence of duress, coercion, or provocation.

{¶ 172} Other mitigating factors, R.C. 2929.04(B)(7), include Kirkland's confession and his expression of remorse. However, the nature and circumstances of the aggravated murders offer no mitigation here.

4. Weighing

{¶ 173} Dr. Wu testified that Kirkland was unable to conform his conduct to the law (a mitigating factor under R.C. 2929.04(B)(3)) due to his trauma-induced brain abnormalities. But serious questions exist concerning Dr. Wu's theories and diagnostic methods. It does not appear that the relevant scientific communities accept either PET scanning or voxel analysis as a valid tool for diagnosing brain injury. Drs. Waxman, Wright, and Boulter all testified that Kirkland's scans were normal. We find that Dr. Wu's opinions are entitled to no weight in mitigation.

{¶ 174} Dr. van Eys testified that Kirkland's childhood abuse and neglect led to PTSD and dissociative disorder, and she expressed the opinion that because of these disorders, Kirkland "was not able to conform to the norms of the law." However, we have seldom ascribed much weight in mitigation to a defendant's unstable or troubled childhood. *See*, *e.g.*, *State v. Campbell*, 95 Ohio St.3d 48, 51-54, 765 N.E.2d 334 (2002); *State v. Cooey*, 46 Ohio St.3d 20, 41, 544 N.E.2d 895 (1989).

{¶ 175} Nor do we here. Kirkland, who was born in 1968, committed these murders when he was in his late 30s and early 40s. As we noted was true with regard to a different capital defendant, "[h]e had reached 'an age when * * * maturity could have intervened' and 'had clearly made life choices as an adult before committing [these] murder[s].' " *See Campbell* at 53 (Campbell committed aggravated murder at the age of 49), quoting *State v. Murphy*, 65 Ohio St.3d 554, 588, 605 N.E.2d 884 (1992) (Moyer, C.J., dissenting). He had "had considerable time to distance himself from his childhood and allow other factors to assert themselves in his personality and his behavior." *Id*.

{¶ 176} Kirkland's history of alcohol and drug abuse is entitled to some weight in mitigation. *See Kirkland I,* 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, at ¶ 158, citing *State v. Scott*, 101 Ohio St.3d 31, 2004-Ohio-10, 800 N.E.2d 1133, ¶ 108.

{¶ 177} Finally, a confession is entitled to some weight in mitigation, and Kirkland did confess. But he did it haltingly and grudgingly, telling an assortment of different stories that denied or minimized his responsibility. This diminishes the mitigating value of his confession and calls into question the sincerity of his remorse. Still, "in the peculiar circumstances here, * * * Kirkland's confession is entitled to serious consideration because the information he voluntarily provided enabled the police to identify the body of Kimya Rolison, and thus her family was able to learn what had happened to her." *Kirkland I* at ¶ 159.

{¶ 178} We conclude that collectively the mitigating factors in this case deserve only modest weight. The aggravating circumstances, on the other hand, are entitled to significant weight.

{¶ 179} Course of conduct and attempted rape are especially grave aggravating circumstances, and in this case, their gravity is exacerbated by the nature and circumstances of these aggravating circumstances. As to the course-of-conduct aggravating circumstance, Kirkland's course of conduct consisted of four murders committed from 2006 to 2009. As to the attempted-rape aggravating circumstance, we note that both victims were young—Casonya was 14, Esme 13—and in attempting to rape Esme, Kirkland beat her severely. Finally, Kirkland robbed Casonya and Esme; this aggravating circumstance is entitled to some weight.

{¶ 180} Against the mitigating factors, we have weighed the aggravating circumstances the jury found with respect to Casonya's aggravated murder. Likewise, we have separately weighed the aggravating circumstances of Esme's aggravated murder against the mitigating factors. *See Cooey*, 46 Ohio St.3d at 38, 544 N.E.2d 895. In both cases, we find that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.

5. Proportionality Review

{¶ 181} In *Kirkland I*, we concluded that Kirkland's death sentences were not excessive or disproportionate to the penalty imposed in similar cases:

> In [*State v.*] *Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, at ¶ 265, this court affirmed the defendant's death sentence for aggravated murder in the course of committing a rape. The court has also affirmed death sentences in cases combining a course-of-conduct specification with a robbery-murder specification. *See* [*State v.*] *Perez*, 124 Ohio St.3d 122,

> 2009-Ohio-6179, 920 N.E.2d 104, at ¶ 253, and cases cited therein. Therefore, we find that the sentence is appropriate.

Kirkland I, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, at ¶ 168. That conclusion remains sound. We find that the death sentences in this case are proportionate and appropriate.

III. CONCLUSION

{¶ 182} We affirm the sentences of death imposed for the murders of Casonya C. and Esme K. Accordingly, we affirm the judgment of the trial court.

Judgment affirmed.

O'CONNOR, C.J., and KENNEDY, FISCHER, DEWINE, and STEWART, JJ., concur.

DONNELLY, J., concurs in judgment only.

Joseph T. Deters, Hamilton County Prosecuting Attorney, Ronald W. Springman, Chief Assistant Prosecuting Attorney, and Adam Tieger, Assistant Prosecuting Attorney, for appellee.

Timothy J. McKenna and Roger W. Kirk, for appellant.

The Supreme Court of Ohio

State of Ohio

v.

Anthony Kirkland

Case No. 2018-1265

JUDGMENT ENTRY

APPEAL FROM THE
COURT OF COMMON PLEAS

This cause, here on appeal from the Court of Common Pleas for Hamilton County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the trial court is affirmed, consistent with the opinion rendered herein.

Furthermore, it is ordered by the court that the judgment and sentence of the Court of Common Pleas be carried into execution by the Warden of the Southern Ohio Correctional Facility or, in his absence, by the Deputy Warden on Wednesday, the 18th day of September, 2024, in accordance with the statutes so provided.

It is further ordered that a certified copy of this entry and a warrant under seal of this court be certified to the Warden of the Southern Ohio Correctional Facility, and that the Warden shall make due return to the clerk of the Court of Common Pleas for Hamilton County.

It is further ordered that a mandate be sent to and filed with the clerk of the Court of Common Pleas for Hamilton County.

(Hamilton County Court of Common Pleas; No. B 0901629)

Maureen O'Connor
Chief Justice

The official case announcement, and opinion if issued, can be found at http://www.supremecourt.ohio.gov/ROD/docs/

The Supreme Court of Ohio

State of Ohio

v.

Anthony Kirkland

Case No. 2018-1265

RECONSIDERATION ENTRY

Hamilton County

It is ordered by the court that the motion for reconsideration in this case is denied.

(Hamilton County Court of Common Pleas; No. B 0901629)

Maureen O'Connor
Chief Justice

Kirkland v. Ohio

Supreme Court of the United States

May 17, 2021, Decided

No. 20-7462.

Reporter
2021 U.S. LEXIS 2425 *; 209 L. Ed. 2d 763; __ S.Ct. __; 2021 WL 1951932

Anthony Kirkland, Petitioner v. Ohio.

Prior History: State v. Kirkland, 160 Ohio St. 3d 389, 2020-Ohio-4079, 2020 Ohio LEXIS 1835, 157 N.E.3d 716, 2020 WL 4760342 (Aug. 18, 2020)

Judges: [*1] Roberts, Thomas, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett.

Opinion

Petition for writ of certiorari to the Supreme Court of Ohio denied.

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THE STATE OF OHIO, APPELLEE, *v.* KIRKLAND, APPELLANT.

[Cite as *State v. Kirkland,* 140 Ohio St.3d 73, 2014-Ohio-1966.]

Criminal law—Aggravated murder—Substantially prejudicial prosecutorial misconduct can be cured by the court's independent evaluation of the capital sentence—Death penalty affirmed.

(No. 2010-0854—Submitted September 11, 2013—Decided May 13, 2014.)

APPEAL from the Court of Common Pleas of Hamilton County,

No. B-0901629.

FRENCH, J.

{¶ 1} This is a death-penalty appeal of right. Defendant-appellant, Anthony Kirkland, was convicted of the aggravated murder of two girls in Hamilton County between 2006 and 2009. He was also convicted of the murder of two other women.

{¶ 2} On the first morning of trial, Kirkland voluntarily pled guilty to the murders of Mary Jo Newton and Kimya Rolison, as well as to two counts of abuse of a corpse. The jury convicted Kirkland on all remaining charges, including aggravated murder with death specifications for the deaths of Esme K. and Casonya C., and recommended a sentence of death. The trial court accepted the recommendation and sentenced Kirkland accordingly.

{¶ 3} For the reasons explained below, we affirm Kirkland's convictions and sentence.

The State's Evidence at Trial

{¶ 4} On the night of May 3, 2006, around 11:00 p.m., 14-year-old Casonya C. left the home of her grandmother, Patricia C. She took her book bag,

Appendix E

gym shoes, and cell phone with her. Her grandmother assumed Casonya meant to spend the night at her mother's house.

{¶ 5} Around midnight, Casonya called her friend Tania H. from the front porch of her friend's house. Tania told Casonya she was already in bed and did not want to go out, so Casonya said she was going back home.

{¶ 6} After leaving Tania's house, as she headed for her grandmother's house, Casonya spoke on the phone with her boyfriend, Ra'Shaud B. The two were having an argument when suddenly the phone cut off. Ra'Shaud tried for three days to reach Casonya by telephone, but he never spoke to her again.

{¶ 7} The next morning, Casonya did not show up at school. Casonya's mother indicated that she had not seen her daughter, and calls to Casonya's cell phone went to voicemail.

{¶ 8} At approximately 1:30 p.m. on May 4, 2006, Patricia C. called the police to report that her granddaughter was missing.

{¶ 9} On May 9, 2006, city workers doing landscaping discovered a body underneath a pile of old tires. The body was located in a secluded wooded area, approximately ten feet down the hillside from the end of a dead-end road.

{¶ 10} The body was heavily charred and decomposed, so much so that the responding officer could not determine the race or gender of the body. The front teeth had been recently knocked out. The only clothing on the body was a sock on one foot.

{¶ 11} Just beyond the end of the road, police found a burn pit, a charred site where they believed that the body was burned before it was dragged down the hillside and buried under the tires. And near the pit they found a long piece of timber, charred at one end, that appeared to have been used as a poker to stir the fire.

{¶ 12} The forensic pathologist was unable to do a rape examination because the pelvic area was almost completely charred. Investigators were also

unable to look for DNA evidence under the victim's fingernails because the hands and forearms were completely charred.

{¶ 13} The body was positively identified as that of Casonya C. by comparison of dental x-rays.

{¶ 14} One month later, on June 15, 2006, the still hot and smoking remains of a second human body were found approximately 35 feet from the end of a dead-end street. The right foot was found 37 feet from the body. Tests indicated that the fire was started using either lighter fluid or paint thinner.

{¶ 15} The autopsy was unable to determine a cause of death but did demonstrate that the victim was already dead when the body was set on fire. The body was eventually identified as that of Mary Jo Newton by comparison of dental records.

{¶ 16} In the spring of 2008, skeletal remains of a third victim were discovered in a heavily wooded area at the end of another dead-end street. The bones were scattered, and the hands and feet were never found.

{¶ 17} The cause of death was a sharp-force injury to the neck caused by a cutting instrument. The bones showed traces of burning on the face, the front of the hip bones, and the thigh bones. A forensic anthropologist determined that the victim was most likely an African-American woman, probably between 30 and 55 years of age. However, the victim's identity remained unknown for nearly one year.

{¶ 18} On the afternoon of Saturday, March 7, 2009, 13-year-old Esme K. left her home to go jogging, wearing her iPod and a purple watch. Esme K.'s mother called 9-1-1 at 4:21 p.m. to report Esme missing.

{¶ 19} Police searched abandoned houses and nearby woods. Eventually, two canine-unit officers spotted a man, later identified as Anthony Kirkland, sitting underneath some fir trees in the nearby woods.

{¶ 20} The officers saw knives protruding from his left pants pocket, so they disarmed him and searched him. They found a purple watch and an iPod in his pockets. Etched on the back of the iPod were the words "Property of Esme [K]."

{¶ 21} The officers placed Kirkland in handcuffs. Kirkland initially gave his name as Anthony Palmore. He claimed that he had found the watch and iPod in the woods. The police read Kirkland his *Miranda* rights.

{¶ 22} Efforts to confirm his identity through police databases were unsuccessful, but after about 20 minutes, Kirkland gave his real name. As the search for Esme continued, police transported Kirkland to the police station.

{¶ 23} At around 3:00 in the morning, searchers found the body of Esme K. in the woods. She was naked except for her shoes and socks. Her body was propped up against a tree branch, with her arms crossed and her legs spread. Her groin, inner thighs, and left hand had all been severely burned.

{¶ 24} The official cause of death was asphyxiation due to ligature strangulation, confirmed by a fracture of the hyoid bone, ligature marks on the neck, and petechiae on her face consistent with a long struggle. There was also evidence of premortem trauma to Esme's vagina consistent with rape.

{¶ 25} Police found Esme's top a few days later in the parking lot of a nearby vacant building. The shirt had burn holes and had been cut open in the front. A trail of burnt clothing led police to a white plastic bag containing Esme's grey sweatpants and underpants. The zipper pocket of the sweatpants was burned, but the underwear was not.

{¶ 26} Investigators took DNA samples from Kirkland's hands, his penis, and a stain on his boxer shorts, and in all three cases, DNA consistent with Esme's was found. Partial shoe prints in the woods were consistent with the type of sneaker Kirkland wore at the time.

{¶ 27} On the morning of March 8, 2009, Detective Keith Witherell interviewed Kirkland. Witherell had previously interviewed Kirkland on March 15, 2007, in connection with the homicides of Casonya and Mary Jo. During the 2007 interrogation, Kirkland viewed a photograph of Casonya and said that he did not recognize her. He admitted that he knew Mary Jo and that the nature of their relationship was sexual, but denied having anything to do with her death.

{¶ 28} In 2007, police had no forensic evidence tying Kirkland to the murders, no eyewitnesses, and no admissions from Kirkland. Consequently, they were unable to arrest or charge him.

{¶ 29} The first March 2009 interview lasted over four hours. A video recording of that interview was introduced into evidence and played for the jury.

{¶ 30} During that interview, Kirkland offered multiple, inconsistent versions of events. At the outset, he professed confusion as to the reason for his arrest, telling officers that he thought they brought him in because of outstanding warrants relating to an altercation with his ex-girlfriend's current boyfriend and that he had no idea he was there because of the missing girl.

{¶ 31} He repeatedly denied seeing a young girl jogging (or anyone else) in the vicinity of the reservoir near where he was found. He acted as if he did not even know the race of the missing girl. And he professed surprise to learn that the watch and radio,[1] which he continued to insist he stumbled upon while walking in the woods, belonged to the missing girl.

{¶ 32} After further questioning, Kirkland admitted meeting Esme at the reservoir and told detectives that he could take them to her. He said that the two literally ran into one another and that the collision caused Kirkland to drop his beer and lose his temper. He punched Esme multiple times and kicked her. But he claimed to have left her alive.

1. What Kirkland initially called a radio was in fact Esme's iPod.

{¶ 33} After detectives told Kirkland that her body had been found, he changed his story. First claiming to have no memory of events, Kirkland then admitted chasing Esme into the woods. But he continued to claim that he left her injured but alive, and he repeatedly insisted that she was wearing clothes when he left her.

{¶ 34} As the questioning continued, Kirkland claimed to have left Esme alive with a man he knew only as Pedro. But when challenged, Kirkland confessed knowing all along that she was dead. He admitted that he had returned to the reservoir some hours after the murder to move the body.

{¶ 35} Kirkland said Esme died "because of my hatred." But when asked directly if he had killed her, he still said no, and as the interview concluded, Kirkland was still insisting that he had learned the location of the body from Pedro.

{¶ 36} A second interview of Kirkland began approximately two hours later. This time, Detective William Hilbert questioned Kirkland about Mary Jo and Casonya. The interview occurred in two sessions, the first lasting about two and one-half hours, and the second less than 90 minutes. Video recordings of those interviews were introduced into evidence, and a redacted version was played for the jury.

{¶ 37} Kirkland gave the following account of Mary Jo's murder:

{¶ 38} He first met Mary Jo at the bus stop across the street from the downtown Justice Center. She worked as a prostitute to support a drug habit. She was just getting out of the Justice Center when Kirkland met her. He and Mary Jo had sex together a couple of times.

{¶ 39} On the day she died, Kirkland picked her up in the College Hill area. They went to a liquor store together, then to a Rally's for food. They took some drugs. Next they went by the house of Kirkland's girlfriend, who was at work at the time.

{¶ 40} As they continued to drive, an argument broke out. Kirkland choked Mary Jo to death from behind. Then he drove to Avondale and dumped her body at the end of a dead-end street. He had a gas can in his vehicle that he used to set the body on fire. According to Kirkland, he burned the body because fire purifies and burning the body was "a proper burial" like the Vikings did. It was still daylight at the time, but no one was around, so Kirkland stayed to watch the flames.

{¶ 41} Hilbert shifted the conversation to Casonya, and Kirkland offered this account:

{¶ 42} He first saw Casonya at the top of a bridge that crosses Interstate 71 near Walnut Hills High School. It was around 1:00 in the morning. Kirkland was sitting smoking marijuana. He heard Casonya having an argument with somebody on her cell phone, and when she saw him smoking, she hung up the phone.

{¶ 43} According to Kirkland, Casonya asked him about the marijuana, he asked if she was old enough for that, and she answered she was old enough to be doing a lot of things.

{¶ 44} That led to a conversation in which Kirkland gave her $20 and agreed to go as high as $60. He says the money was to pay her just to talk. The two had an argument about, according to Kirkland, "girls playing games." Casonya threw the money back at him. At that point, Kirkland got mad and grabbed Casonya. She kneed him, and he strangled her.

{¶ 45} Before the altercation, the pair had crossed the bridge together and descended to Victory Parkway. From there, Kirkland carried her dead body to a wooded area where he burned her, using lighter fluid he took from a nearby house. He then carried her burned body down the hill and covered the body with tires because he was scared. He stayed with the body all night long.

{¶ 46} Kirkland then offered the following account of Esme's murder:

{¶ 47} At around 3:00 in the afternoon, as he was walking near the reservoir, Esme ran into him. She was apologetic, which only enraged Kirkland. He punched her, called her names, and demanded to know her name and what music she was listening to. At some point, he chased her into the woods, she tripped over a small fence, and he continued to punch and choke her.

{¶ 48} At first, Kirkland denied raping Esme. But then he told Hilbert that Esme said that "she would do whatever I wanted, just don't hurt her," and he asked to have sex with her. However, he was unable to penetrate her completely, so he made her masturbate him manually. Then he choked her to death with his bare hands because he did not believe her when she said she would not tell anyone. In a subsequent interview, he elaborated that he had used a rag to strangle Esme when his efforts to kill her with his bare hands failed.

{¶ 49} He propped up her body against a tree and stayed for two hours talking to her, apologizing to her. Then he tried to start a fire using her clothes as an accelerant. It was dark when he left to find lighter fluid "to perform the ritual." He ate some food from a garbage can and eventually returned to the woods (but not the body), where he fell asleep until the police found him.

{¶ 50} A third interview of Kirkland—also shown to the jury—commenced 30 minutes later. In the interview, detectives asked him about the unidentified burned body found in the spring of 2008. At first, Kirkland claimed to have killed only three victims. And then, after a great deal of discussion, Kirkland announced, "I, three—I wasn't honest totally. * * * It was one more."

{¶ 51} Kirkland knew her as Kim. She was working as a prostitute when he met her on Reading Road in December 2006. He paid her $40, and they had sex. As they continued to drive together, an argument broke out, and Kirkland pulled the car over. He stabbed Kim in the throat with her own knife. He dumped her body up a dead-end hill. He laid the body out on a bed of wood and

sprayed it with lighter fluid, then covered the body. He returned a few weeks later, to find the skeleton still in place, but the leg bones missing.

{¶ 52} Police tried to identify those remains using information provided by Kirkland, including the fact that on the night she died, she and Kirkland had had an encounter with a uniformed police officer in Clifton who told them they could not be in a public park after dark. An investigator reviewed a month's worth of records showing license-verification requests sent by Cincinnati police to the state of California. The search revealed that on December 22, 2006, a police officer working in Clifton ran an inquiry on a California driver's license belonging to Kimya Bodi Iamaya Corrine Rolison, whose date of birth roughly matched the one Kirkland remembered seeing on her license. The Rolison family confirmed that Kimya was missing. Dental records confirmed the identity of the body.

{¶ 53} After the state finished playing the videotapes of Kirkland's confessions, and over the defense's objection, the state called Kylah W. to testify. Kylah testified that she was 13 years old in the fall of 2007. At the time, Kylah was living with her mother. Kirkland was a friend of her mother's who would sometimes stay with them.

{¶ 54} Kylah testified that on September 26, 2007, she arrived home from school at about 3:30 in the afternoon and found herself alone in the apartment with Kirkland. Kylah was hungry, so she decided to cook herself a hamburger. She left the food cooking on low to go into her bedroom to talk to a friend on the telephone.

{¶ 55} According to Kylah, Kirkland knocked on her bedroom door, then opened the door, put the hamburger on top of her dresser, and left the room, closing the door behind him. Kylah continued her telephone conversation. But a short time later, Kirkland opened her door again, and this time his "bottoms" were down and his privates were exposed. Kirkland stood in the doorway without

entering. Kylah repeatedly told him to get out of her room, which he eventually did.

{¶ 56} Five or ten minutes later, Kirkland returned again. He was still exposing himself. This time he was carrying a piece of paper, and he approached Kylah and held the paper so she could read it. The note read, "I want to be the first to eat you out and I'll pay you." Kylah continued telling him to leave, and Kirkland did.

{¶ 57} But he came to her room a fourth time. This time he was dressed. He walked into her room, placed five dollars on the dresser, and walked out.

{¶ 58} Unsure what to do, Kylah stayed on the phone with her friend for another ten minutes and then left the apartment. When she later told her mother what had happened, her mother told Kirkland to get out of the apartment, and then the two women went to the local police station to report the incident. Kirkland was eventually convicted of importuning and served about one year in prison, a fact the jury did not learn until the penalty phase.

The Defense Case

{¶ 59} The defense did not call witnesses during the guilt phase.

Procedural History of the Case

{¶ 60} On March 17, 2009, the state filed a 12-count indictment against Kirkland. The indictment included four counts of aggravated murder with death-penalty specifications. Count Two charged Kirkland with the aggravated murder of Casonya C. while committing or attempting to commit rape, a death-penalty specification under R.C. 2929.04(A)(7), and Count Four charged Kirkland with the aggravated murder of Casonya C. while committing or attempting to commit aggravated robbery, R.C. 2929.04(A)(7). Counts Two and Four included "course-of-conduct" death-penalty specifications. R.C. 2929.04(A)(5).

{¶ 61} Counts Nine and Eleven contained rape and robbery aggravated-murder charges in connection with the death of Esme K. Each of these counts

also included a course-of-conduct specification as well as an escape-detection-or-apprehension specification under R.C. 2929.04(A)(3).

{¶ 62} The indictment contained eight additional counts: Count One, attempted rape of Casonya; Count Three, aggravated robbery of Casonya; Count Six, murder of Mary Jo Newton; Count Eight, attempted rape of Esme K.; Count Ten, aggravated robbery of Esme K.; and Counts Five, Seven, and Twelve, gross abuse of a corpse.

{¶ 63} Kirkland was indicted separately for murder and abuse of a corpse relating to Kimya Rolison. Over objection, the two indictments were consolidated for trial.

{¶ 64} On the morning of trial, Kirkland voluntarily entered a plea of guilty to the murder and abuse-of-a-corpse charges relating to Mary Jo Newton and Kimya Rolison. On March 12, 2010, the jury found Kirkland guilty on all the remaining counts, including all the death-penalty specifications, and recommended a sentence of death. For purposes of sentencing, the court merged the escape-detection specifications with the specifications of felony murder while attempting rape or robbery. The court then sentenced Kirkland to death for the aggravated murder of Esme K. while committing or attempting to commit a rape and for the aggravated murder of Casonya C. while committing or attempting to commit a robbery. The court also sentenced Kirkland to 70 years to life for the murders of Mary Jo Newton and Kimya Rolison.

Legal Analysis

{¶ 65} Kirkland seeks reversal of his convictions of aggravated murder and the sentence of death in ten propositions of law.

1. The admission of Kylah W.'s testimony (Proposition of Law I)

{¶ 66} In his first proposition of law, Kirkland argues that the trial court violated Evid.R. 404(B) by allowing Kylah W. to testify that when she was 13

years old, Kirkland exposed himself to her and offered her $5 to engage in oral sex.

{¶ 67} The trial court has broad discretion in the admission and exclusion of evidence, including evidence of other acts under Evid.R. 404(B). *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 22. Unless the trial court has "clearly abused its discretion and the defendant has been materially prejudiced thereby, this court should be slow to interfere" with the exercise of such discretion. *State v. Hymore*, 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967). We have defined "abuse of discretion" as an "unreasonable, arbitrary, or unconscionable use of discretion, or as a view or action that no conscientious judge could honestly have taken." *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 23.

{¶ 68} Evid.R. 404(B) states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Such evidence may, however, be admissible for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evid.R. 404(B). Similarly, R.C. 2945.59 allows the admission of other-acts evidence tending to show a defendant's "motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question." Generally, evidence of other acts is admissible if it is offered for a purpose other than to prove the character of a person in order to show action in conformity with that character, Evid.R. 404(B), it is relevant when offered for that purpose, Evid.R. 401, and the danger of unfair prejudice does not substantially outweigh its probative value, Evid.R. 403. *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 20.

{¶ 69} The trial court did not abuse its discretion by admitting Kylah's testimony. The state introduced the evidence of her encounter with Kirkland for a

valid purpose other than proving character in order to show that he had acted in conformity with that character: to show that Kirkland offered money to Casonya not "just to talk" with her, as he told police, but that he had a sexual intent and motive for doing so. Nor did the trial court admit Kylah's testimony as proof of character. In fact, in its final instructions to the jury, the trial court told the jury that it could not consider evidence of any other acts for such a purpose. We presume that the jury followed this limiting instruction. *See id.* at ¶ 23. Kylah's testimony was relevant to the attempted-rape allegations involving Casonya because it tended to show a fact "of consequence," i.e., that Kirkland had a sexual interest in Casonya and a sexual purpose for approaching her. Evid.R. 401. Moreover, the attempted rape of Casonya was one of the only crimes the defense contested during the guilt phase, and Kylah's testimony was relevant to refute the defense's suggestion that Kirkland had an innocent purpose for offering Casonya money and that he did not have sex with her.

{¶ 70} Finally, the danger of unfair prejudice did not substantially outweigh the probative value of Kylah's testimony. The trial court reduced any danger of undue prejudice in its limiting instruction to the jury. *See State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 194 (limiting instruction "minimized the likelihood of any undue prejudice" caused by the admission of Evid.R. 404(B) evidence); *see also Williams* at ¶ 24. The only claim of prejudice in Kirkland's brief is his conclusory statement that Kylah's testimony "made the difference between life and death," a statement that seems to refer to the outcome of the mitigation phase rather than the guilt phase. Kirkland supports this claim by citing two newspaper articles that contain posttrial statements from the prosecuting attorney and one victim's stepmother. These materials are not in the record, and we cannot consider them. *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus ("A reviewing court cannot add

matter to the record before it, which was not part of the trial court's proceedings, and then decide the appeal on the basis of the new matter").

{¶ 71} We overrule Kirkland's first proposition of law.

2. Ineffective assistance of counsel (Proposition of Law II)

{¶ 72} In his second proposition of law, Kirkland alleges two incidents of ineffective assistance of counsel. First, Kirkland alleges that his trial counsel told the jury in the mitigation-phase opening statement that an uncle would testify to explain why Kirkland's parents were not in attendance and why Kirkland should receive a sentence other than death. But the uncle was not called to the stand, and the jury was given no explanation in closing argument for the uncle's absence.

{¶ 73} The record does not show defense counsel making any such representation to the jury in an opening statement, either at the guilt phase or the mitigation phase. Defense counsel told *the judge* that a family member might testify but later reported that the family would not cooperate. Those statements were made outside the presence of the jury. The record does not support this allegation of ineffective assistance.

{¶ 74} The second alleged deficiency concerns the testimony of Kirkland's mitigation expert witness, Dr. Scott Bresler, a forensic psychiatrist, who testified that Kirkland is a psychopath. Dr. Bresler testified that psychopaths have reduced serotonin levels and that a low serotonin level is associated with impulsive aggression. On cross-examination, Dr. Bresler conceded that no brain scans or chemical tests were performed on Kirkland. Kirkland now alleges that his counsel was ineffective for failing to arrange blood tests for possible lack of serotonin.

{¶ 75} To prove an allegation of ineffective assistance of counsel, a defendant must satisfy a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, he must establish that counsel's performance fell below an objective standard of reasonable representation. *Id*. at

687. And second, he must show that the deficient performance caused him prejudice. *Id*. A defendant can establish prejudice by showing a reasonable probability that but for counsel's errors, the result of the trial would have been different. *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus.

{¶ 76} Kirkland cannot prevail on this claim at this stage of the proceedings. To prove prejudice, he would need to show that the results of a serotonin test would support his case. In other words, he would need to supply proof outside the record, which this court cannot consider on direct appeal. *State v. Madrigal*, 87 Ohio St.3d 378, 390-391, 721 N.E.2d 52 (2000).

{¶ 77} We overrule Kirkland's second proposition of law.

3. Prosecutorial misconduct (Proposition of Law III)

{¶ 78} In his third proposition of law, Kirkland alleges prosecutorial misconduct in the course of penalty-phase closing arguments.

{¶ 79} Allegations of prosecutorial misconduct implicate due-process concerns, and the touchstone of the analysis is the " 'fairness of the trial, not the culpability of the prosecutor.' " *State v. Newton*, 108 Ohio St.3d 13, 2006-Ohio-81, 840 N.E.2d 593, at ¶ 92, quoting *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). The test for prejudice in closing arguments, including penalty-phase closing arguments, is " ' "whether the remarks were improper, and, if so, whether they prejudicially affected substantial rights of the defendant." ' " *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, 785 N.E.2d 439, ¶ 83, quoting *State v. Hessler*, 90 Ohio St.3d 108, 125, 734 N.E.2d 1237 (2000), quoting *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984).

{¶ 80} By the time the jury heard closing arguments in the penalty phase, Kirkland had already pled guilty to the murders of Mary Jo Newton and Kimya Rolison. In urging the jury to return a sentence of death for the other two murders, the prosecutor told the jury: "Finally, for the murder of Mary Jo and

Kimya, which he admitted to before opening statements, he's going to jail for the rest of his life now. He's gone. *So I guess Casonya and Esme are just freebies for him*—" (Emphasis added.) The trial court did not sustain the defense's objection. Thereafter, the prosecutor stated, "Again, and I'll be very clear about this, [life in prison] should not be something you even consider, okay. He's going to jail on those other two for the rest of his life."

{¶ 81} According to Kirkland, the message to the jury was plain: if you do not return a recommendation of death, Kirkland will receive no punishment for two murders. Kirkland challenges these statements as improper.

{¶ 82} We agree. "[I]t is improper for a prosecutor to argue that a sentence less than death is meaningless and would not hold the defendant accountable for a victim's death when he is already serving a life sentence." *Hanson v. State*, 2009 OK CR 13, 206 P.3d 1020, ¶ 24. In capital-sentencing deliberations, the jury must weigh the aggravating and mitigating circumstances of the offense. But by suggesting that Kirkland would receive no punishment for killing Esme and Casonya unless the jury returned a verdict of death for their murders, the state asked the jury to set aside its proper assignment and return a recommendation of death based on improper considerations.

{¶ 83} We also find that the prosecutor's closing argument prejudicially affected Kirkland's substantial rights.

{¶ 84} For a prosecutor's closing argument to be prejudicial, the remarks must be "so inflammatory as to render the jury's decision a product solely of passion and prejudice." *State v. Williams*, 23 Ohio St.3d 16, 20, 490 N.E.2d 906 (1986). To determine whether the remarks were prejudicial, the court must review the closing argument in its entirety. *State v. Slagle*, 65 Ohio St.3d 597, 607, 605 N.E.2d 916 (1992); *State v. Moritz*, 63 Ohio St.2d 150, 157, 407 N.E.2d 1268 (1980). Thus, the court must consider all of the prosecutor's remarks, irrespective of whether the defense preserved an objection. *State v. Keenan*, 66

Ohio St.3d 402, 410, 613 N.E.2d 203 (1993) ("even though the defense waived objection to many remarks, those remarks still form part of the context in which we evaluate the effect on the jury of errors that were not waived").

{¶ 85} The objectionable statements in the state's closing argument fall into a number of categories.

References to the subjective experiences of the victims

{¶ 86} It is error for a prosecutor to invite the jury to consider what the victim experienced and felt in her last moments of life, because it improperly " 'invites the jury to speculate on facts not in evidence.' " *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, ¶ 122, quoting *State v. Wogenstahl*, 75 Ohio St.3d 344, 357, 662 N.E.2d 311 (1996); *State v. Combs*, 62 Ohio St.3d 278, 283, 581 N.E.2d 1071 (1991). The state's closing argument employed this method on a number of occasions:

> What was it like for Casonya that night? It was dark, she's alone, and the only person escorting her is him. * * * What was it like for her then?
>
> * * *
>
> * * * [A]fter he confronts Esme on the back of that building, he talks about how she's cringing and he's calling her names. You're nothing but a lying bitch, this little girl, 4-foot-11. What did that evoke in her?
>
> And she's petrified.
>
> * * *
>
> What's this little girl going through naked in the woods except for her shoes and this little top? * * *
>
> We know at some point she's actually vomiting on herself, she's so terrified. * * *

> * * * [Y]ou saw all the scrapes and cuts and raw skin on her back and on her behind. She probably never even felt that because of the horrible pain between her legs at that point.

Facts outside the record

{¶ 87} A closing argument that goes beyond the record in order to arouse an emotional response in the jury may be prejudicial. *State v. Loza*, 71 Ohio St.3d 61, 78-79, 641 N.E.2d 1082 (1994). Although the prosecution is entitled to a degree of latitude in closing argument, it is improper for prosecutors to incite the jurors' emotions through insinuations and assertions that are not supported by the evidence and that are therefore "calculated to mislead the jury." *Smith,* 14 Ohio St.3d at 14, 470 N.E.2d 883.

{¶ 88} After graphically describing the strangulation of Esme, the prosecutor concluded by saying, "[S]he's not fighting anymore. She's not struggling. She just pounds her little hands on the ground and digs into the dirt. At that point she's no longer begging that man to let her live. *She's begging that man to let her die*." (Emphasis added.) Nothing in the record supports the claim that Esme begged Kirkland to let her die.

{¶ 89} To generate jury sympathy for Casonya, the prosecutor said, "[Y]ou talk about tough childhoods. How about her? Her dad is in prison when she's born. She hardly ever sees him. Her mom chose drugs over her little girl, and as a result she's brought up with some other brothers and sister and cousins by her grandma." None of this information is in the record. Casonya's grandmother, Patricia C., testified that she had custody of Casonya and two of her brothers "because the mother ran into problems and the children were placed with me." Patricia did not identify the nature of the problems, much less testify that Casonya's mother chose drugs over her daughter. Nor is there any testimony about the father being in jail or Casonya living with sisters or cousins.

The "nature and circumstances" of the murder as aggravating circumstances

{¶ 90} While a prosecutor in the penalty phase of a capital trial may refer in closing argument to the nature and circumstances of the offense, that prosecutor may not " 'make any comment before a jury that the nature and circumstances of the offense are "aggravating circumstances." ' " *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 209, quoting *Wogenstahl*, 75 Ohio St.3d 344, 662 N.E.2d 311, paragraph two of the syllabus; *see also State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 200.

{¶ 91} The state can describe the crime to prove the existence of the statutory aggravating factors. *Hale* at ¶ 199-200 (a prosecutor described the circumstances of the murder to prove that the defendant acted with prior calculation and design, which is a statutory aggravating circumstance); *Newton*, 108 Ohio St.3d 13, 2006-Ohio-81, 840 N.E.2d 593, at ¶ 54 (the facts of the case were relevant to prove that the murder occurred while the defendant was in a prison); *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, at ¶ 93 (the state could properly have victims testify in the penalty phase about their experience to establish the course-of-conduct aggravating circumstance).

{¶ 92} The state may also argue the nature and circumstances of the offense to suggest that there is nothing mitigating about the circumstances of the offense. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 324; *State v. Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 79; *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 178-179. And, if the defense argues that the nature or circumstances of the crime is actually mitigating, the state may argue the nature and circumstances of the offense to rebut the defense's assertion. *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-

5048, 873 N.E.2d 1263, at ¶ 184; *State v. Smith*, 87 Ohio St.3d 424, 443-444, 721 N.E.2d 93 (2000).

{¶ 93} And finally, the state may argue the nature and circumstances of the aggravating offense to explain why the aggravating circumstances outweigh the mitigation evidence. *State v. Sheppard*, 84 Ohio St.3d 230, 238, 703 N.E.2d 286 (1998).

{¶ 94} But the state may not tell the decisionmaker that the nature and circumstances of the murder itself are the aggravating circumstances. *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 165-166. Nor can the prosecutor tell the jury to weigh the circumstances of the murder as aggravating circumstances against the mitigation evidence. *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶ 189; *State v. Clemons*, 82 Ohio St.3d 438, 446-447, 696 N.E.2d 1009 (1998).

{¶ 95} In this case, the prosecution repeatedly urged the jury to weigh the specific details of the murder against the mitigation:

> [Kirkland] wants you to say, hey, I'm a psychopath, that outweighs what I did. It does just the opposite.
>
> And the last thing he tells us as he's choking the life out of that little girl and squeezing the last breaths out of her little body, he says she's not fighting anymore. She's not struggling. She just pounds her little hands on the ground and digs into the dirt. At that point she's no longer begging that man to let her live. She's begging that man to let her die. And thankfully it ended for her.
>
> *You'll never see a case with aggravating circumstances that weigh more or mitigation that weighs any less.*
>
> * * *

> * * * He takes a rag out of the back of his pocket. He twists it up and he slowly and methodically strangles Esme [K.] to death. She never fought. She dug her fingers into the dirt as she vomited and slowly died.
>
> *Now, let's weigh that against the mitigation* that he is a psychopath and a self-proclaimed monster. Again, ladies and gentlemen, strike four, not even a close call.

(Emphasis added.) With these remarks, the state led the jurors to believe that they had to weigh the circumstances of the murder itself against the mitigation.

{¶ 96} In sum, we find that the state's closing remarks in the penalty phase were improper and substantially prejudicial. Accordingly, we conclude that Kirkland's third proposition of law is well taken.

{¶ 97} Nevertheless, we decline to remand the case for a new sentencing hearing. Pursuant to R.C. 2929.05(A), this court must conduct its own independent evaluation of the capital sentence, and that evaluation can cure errors in penalty-phase proceedings. *See, e.g., Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, at ¶ 131-132 (improper questions of a penalty-phase witness were cured by the independent sentence review); *State v. Sanders*, 92 Ohio St.3d 245, 267, 750 N.E.2d 90 (2001) (the independent review can cure a trial court's erroneous decision to exclude a witness, whose testimony had been proffered, from the mitigation hearing). In *State v. Mills*, 62 Ohio St.3d 357, 373-374, 582 N.E.2d 972 (1992), for example, this court held that a prosecutor's sentencing argument was "clearly improper" but that the court's independent sentence evaluation would cure any prejudice the argument had caused.

{¶ 98} Accordingly, the issues raised in the third proposition of law will be cured by this court's review of the sentence, which will not consider the state's improper arguments.

4. "Automatic death" jurors (Proposition of Law IV)

{¶ 99} In his fourth proposition of law, Kirkland claims ineffective assistance of counsel based on his trial counsel's alleged failure to weed out those jurors who would automatically vote for death without regard to mitigating factors. Kirkland asserts that his counsel performed only a "garden variety" felony-jury selection, rather than a specialized, specific, and focused voir dire.

{¶ 100} This proposition of law does not satisfy either prong of the *Strickland* test. Kirkland does not identify a question that his attorneys should have asked but did not, a question that they did ask but should not have, or a specific objection that they failed to raise. Therefore, we have no basis on which to conclude that his counsel's performance was deficient.

{¶ 101} Likewise, we have no basis on which to conclude that the manner in which defense counsel conducted voir dire resulted in prejudice. In fact, defense counsel did identify at least one "automatic death" member of the panel and successfully had that person removed for cause.

{¶ 102} We overrule Kirkland's fourth proposition of law.

5. The weight of mitigation evidence (Proposition of Law V)

{¶ 103} In his fifth proposition of law, Kirkland challenges his sentence of death, given the alleged weight of mitigation. This presents an issue best addressed concurrently with the court's independent sentence evaluation, and we will discuss it in that context. *See Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, at ¶ 211 (consideration of a challenge to a trial court's weighing of aggravating and mitigating factors deferred until the independent sentence evaluation).

6. Constitutional challenges to the death penalty (Proposition of Law VI)

{¶ 104} Kirkland's sixth proposition of law consists of nine subparts (some with multiple subheadings) challenging the constitutionality of Ohio's death penalty. The court has addressed most of these issues in previous cases.

Subpart 1. "The death penalty is arbitrary and unequal punishment"

{¶ 105} We have rejected each argument presented in Subpart 1 at least once:

{¶ 106} ● *State v. Jenkins*, 15 Ohio St.3d 164, 169, 473 N.E.2d 264 (1984), citing *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (rejecting the claim that Ohio's death-penalty scheme is unconstitutional because it gives prosecutors unfettered discretion to indict);

{¶ 107} ● S*tate v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 137, and *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, ¶ 103 (both rejecting the claim that Ohio's death penalty is applied in a racially discriminatory manner);

{¶ 108} ● *State v. Buell*, 22 Ohio St.3d 124, 136, 489 N.E.2d 795 (1986) (rejecting an equal-protection challenge based on the geographic disparity of death sentences); and

{¶ 109} ● *Mink* at ¶ 103; *Jenkins,* 15 Ohio St.3d at 168, 473 N.E.2d 264 (rejecting the claim that the death penalty is unconstitutional because it is neither the least restrictive punishment nor an effective deterrent).

Subpart 2. Ohio uses "unreliable sentencing procedures"

{¶ 110} In *State v. Glenn*, 28 Ohio St.3d 451, 453, 504 N.E.2d 701 (1986), this court rejected the argument that allowing juries to weigh aggravating and mitigating factors leads to arbitrary and capricious imposition of the death penalty.

Subpart 3(A). Use of the same jury at trial and sentencing burdens a defendant's rights to counsel and an impartial jury

{¶ 111} This court rejected this argument in *State v. Mapes*, 19 Ohio St.3d 108, 116-117, 484 N.E.2d 140 (1985).

Subpart 3(B). Ohio's death-penalty statutes unconstitutionally fail to provide individualized sentencing because they require proof of aggravating circumstances during the guilt phase

{¶ 112} This court rejected this argument in *State v. Ferguson*, 108 Ohio St.3d 451, 2006-Ohio-1502, 844 N.E.2d 806, ¶ 88.

Subpart 3(C). Ohio imposes an impermissible risk of death on capital defendants who choose their right to trial because a trial judge, in the interest of justice, may dismiss the death-penalty specification

{¶ 113} This court rejected this argument in *State v. Van Hook*, 39 Ohio St.3d 256, 264, 530 N.E.2d 883 (1988).

Subpart 3(D). R.C. 2929.04(B)(7) unconstitutionally allows a sentencer to convert mitigation evidence into an aggravating factor

{¶ 114} This court rejected this argument in *State v. Scott*, 101 Ohio St.3d 31, 2004-Ohio-10, 800 N.E.2d 1133, ¶ 52-53.

Subpart 4. R.C. 2929.04(A)(7) is unconstitutional because, by setting forth as aggravating factors the same felony-murder specifications that distinguish aggravated murder from murder, R.C. 2929.04(A)(7) does nothing to narrow the class of persons eligible for the death penalty

{¶ 115} This court rejected this argument in *State v. Henderson*, 39 Ohio St.3d 24, 28-29, 528 N.E.2d 1237 (1988).

Subpart 5. R.C. 2929.03(D)(1) and 2929.04 are unconstitutionally vague

{¶ 116} This court rejected a vagueness challenge to R.C. 2929.03(D)(1) in *State v. McNeill*, 83 Ohio St.3d 438, 453, 700 N.E.2d 596 (1998). We upheld R.C. 2929.04 in *State v. Chinn*, 85 Ohio St.3d 548, 567-568, 709 N.E.2d 1166 (1999).

Subpart 6. The court's proportionality review is unconstitutional

{¶ 117} This court summarily rejected this argument in *Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, at ¶ 207, and *Scott*, 101 Ohio St.3d 31, 2004-Ohio-10, 800 N.E.2d 1133, at ¶ 51.

Subpart 7. Lethal injection is cruel and unusual punishment

{¶ 118} Kirkland argues that lethal injection violates the Eighth Amendment to the United States Constitution. However, the United States Supreme Court has affirmed the constitutionality of lethal injection as a method of execution. *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008). This court has reached the same conclusion. *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶ 131; *State v. Carter*, 89 Ohio St.3d 593, 608, 734 N.E.2d 345 (2000).

Subpart 8. The death penalty violates Ohio's obligations under international charters, treaties, and conventions

{¶ 119} This court has addressed most, but not all, of these claims before. In *State v. Phillips*, 74 Ohio St.3d 72, 103-104, 656 N.E.2d 643 (1995), we held that capital punishment does not violate obligations owed under the American Declaration of the Rights and Duties of Man. We reaffirmed this holding as to the Declaration in *State v. Issa*, 93 Ohio St.3d 49, 69, 752 N.E.2d 904 (2001). And in *Short*, we rejected claims that the death penalty is barred by the International Covenant on Civil and Political Rights, the United Nations Covenant against Torture, and the international-law norm. 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, at ¶ 138, citing *Buell v. Mitchell*, 274 F.3d 337, 370-372 (6th Cir.2001); *People v. Perry*, 38 Cal.4th 302, 322, 42 Cal.Rptr.3d 30, 132 P.3d 235 (2006); *Sorto v. State*, 173 S.W.3d 469, 490 (Tex.Crim.App.2005).

{¶ 120} However, we have not previously addressed the contention that Ohio's death-penalty scheme violates the International Convention on the Elimination of All Forms of Racial Discrimination or the Convention Against

Torture and Other Cruel, Inhuman, or Degrading Treatment of Punishment. But as noted above, we have repeatedly held that Ohio's death-penalty procedures are not unconstitutional or imposed in a racially discriminatory manner. *See, e.g., Short* at ¶ 137; *Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, at ¶ 103. And Kirkland "has not advanced any argument that these issues, as defined under international law, 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." *State v. Skatzes*, 2d Dist. Montgomery No. 15848, 2003-Ohio-516, ¶ 407; *see also State v. Tenace*, 6th Dist. Lucas No. L-00-1002, 2003-Ohio-3458, ¶ 175-185. In short, these claims fail for the same reasons as prior death-penalty challenges based on international law.

{¶ 121} Finally, in subpart 9, Kirkland presents a general challenge to the constitutionality of Ohio's death penalty. Because this claim is wholly conclusory, we summarily reject this argument. *Carter*, 89 Ohio St.3d at 607, 734 N.E.2d 345; *Jenkins*, 15 Ohio St.3d at 179, 473 N.E.2d 264.

{¶ 122} For these reasons, we reject Kirkland's sixth proposition of law in its entirety.

7. Ohio's jury instructions (Proposition of Law VII)

{¶ 123} Consistent with the definition set forth in R.C. 2901.05(E), the trial court instructed the jury that

> [r]easonable doubt is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt because everything relating to human affairs or

> depending on moral evidence is open to some possible or imaginary doubt.
>
> Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs.

Kirkland contends in his seventh proposition that the phrases "willing to act" and "firmly convinced" allowed the jury to convict based on a lower standard of proof, namely clear and convincing evidence, in violation of due process. And he alleges that the use of the phrase "moral evidence" allowed the jury to convict based on subjective moral decisions, rather than demanding proof beyond a reasonable doubt.

{¶ 124} We have repeatedly upheld the constitutionality of Ohio's reasonable-doubt instruction. *Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263, ¶ 242; *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶ 145. The phrases "willing to act" and "firmly convinced" adequately convey the difficult concept of reasonable doubt, and they do not establish a lower, clear-and-convincing standard. *State v. Nabozny*, 54 Ohio St.2d 195, 201-203, 375 N.E.2d 784 (1978), citing *Holland v. United States*, 348 U.S. 121, 139-140, 75 S.Ct. 127, 99 L.Ed. 150 (1954).

{¶ 125} This court has not specifically discussed the constitutionality of the phrase "moral evidence." *Compare State v. Frazier*, 8th Dist. Cuyahoga No. 62557, 1994 WL 50703 (Feb. 17, 1994), *with State v. Frazier*, 73 Ohio St.3d 323, 330, 652 N.E.2d 1000 (1995). However, the United States Supreme Court has considered the meaning of that phrase and concluded that the phrase "moral evidence" means the same thing as "beyond a reasonable doubt. *Victor v. Nebraska*, 511 U.S. 1, 10-12, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994).

{¶ 126} Based upon *Victor*, we reject Kirkland's seventh proposition of law.

8. Imposition of costs on indigent defendants (Proposition of Law VIII)

{¶ 127} In *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, 817 N.E.2d 393, we held that the imposition of court costs upon an indigent defendant does not violate the Equal Protection Clause. In a subsequent decision, this court held that "although costs in criminal cases are assessed at sentencing and are included in the sentencing entry, costs are not punishment." *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 15. If the imposition of costs does not constitute "punishment," it cannot implicate constitutional prohibitions on cruel and unusual punishment.

{¶ 128} Kirkland asks the court to reconsider its rulings in *White* and *Threatt* but provides no compelling reason, such as an intervening change in United States Supreme Court precedent, to do so.

{¶ 129} Alternatively, Kirkland suggests that the court should stay the collection of costs. But the logic of *White* suggests no reason why felons should be exempt from payment of costs while they remain incarcerated.

{¶ 130} Accordingly, we reject Kirkland's eighth proposition of law.

9. Insufficient evidence of attempted rape and/or aggravated robbery (Proposition of Law IX)

{¶ 131} Kirkland asserts that the state presented insufficient evidence to convict him of attempted rape or robbery in connection with the murder of Casonya C. At the close of the evidence, the defense moved for acquittal on these charges. The trial court denied the motion and allowed all the charges to proceed to the jury.

{¶ 132} When reviewing a record for sufficiency, we must consider whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Leonard*, 104 Ohio St.3d 54,

2004-Ohio-6235, 818 N.E.2d 229, ¶ 77; *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. The court must view the evidence in the light most favorable to the prosecution and defer to the trier of fact on questions of credibility and the weight assigned to the evidence. *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, ¶ 146.

Aggravated robbery

{¶ 133} Count Four of the indictment charged Kirkland with aggravated murder and included an aggravated-robbery specification. "Aggravated robbery" means a theft offense in which the offender inflicts or attempts to inflict serious physical harm on another. R.C. 2911.01(A)(3).

{¶ 134} The state provided sufficient evidence to support the charge based on the fact that Casonya's backpack and cell phone were never located. Tania H. testified that Casonya always carried her book bag with her. Patricia C. testified that the book bag was missing. And Kirkland and Ra'Shaud B. agreed that Casonya was talking on her cell phone at the time she encountered Kirkland. These facts are sufficient evidence to sustain a conviction for aggravated robbery. *See State v. Davis*, 76 Ohio St.3d 107, 115-116, 666 N.E.2d 1099 (1996).[2]

Attempted rape

{¶ 135} The relevant definition of rape is "engag[ing] in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." R.C. 2907.02(A)(2). A criminal attempt occurs when a person, "purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, * * * engage[s] in conduct that, if successful, would constitute or result in the offense." R.C. 2923.02(A). We have likened Ohio's definition of "attempt" to that in the Model Penal Code, which

2. The state argues that "[p]hone records demonstrated the continued use of the phone after Casonya's death," thus suggesting that Kirkland had possession of the cell phone. However, police testified at trial only that the phone continued to give off a locational signal for about a week, but that there were no calls or texts made from the phone after Casonya disappeared.

requires that the offender not only intended to commit the completed offense, but also engaged in conduct constituting a substantial step toward completing the offense. *State v. Woods*, 48 Ohio St.2d 127, 132, 357 N.E.2d 1059 (1976), *overruled on other grounds, State v. Downs*, 51 Ohio St.2d 47, 364 N.E.2d 1140 (1977). "To constitute a substantial step, the conduct must be strongly corroborative of the actor's criminal purpose." *Woods* at paragraph one of the syllabus.

{¶ 136} Kirkland confessed to killing Casonya after she rejected his offer of money "to talk." Any rational juror could have equated this offer with an offer of sex, and even Kirkland concedes "soliciting Casonya to have sex for hire" in his brief. Kirkland's description of the conversation with Casonya was replete with sexual innuendo. Kirkland told police that when he asked Casonya if she was old enough to smoke marijuana, she replied that "she was old enough to be doing a lot of things." According to Kirkland, he began arguing with Casonya about "girls playing games" and the "things that some women wouldn't do," and Casonya threw the money back at him.

{¶ 137} That Kirkland attacked Casonya *only after* she refused his sexual advances created a strong inference that he acted with a sexual purpose—that being, to forcibly compel from her what she had refused to give him. The physical evidence corroborated this purpose. Casonya's body was found in the woods, with nothing more than one sock, indicating that Kirkland transported her to a secluded area and forcibly undressed her. *See State v. Scudder*, 71 Ohio St.3d 263, 274-275, 643 N.E.2d 524 (1994) (finding that the location of the victim's pants around her ankles and underwear at midthigh supported the conclusion that she was forcibly undressed); *State v. Biros*, 78 Ohio St.3d 426, 448, 678 N.E.2d 891 (1997) (the fact that the victim's sweater, pants, and undergarments were never found revealed the defendant's "concealment or destruction" of evidence and "consciousness of guilt" for purposes of proving attempted rape). Moreover,

Kirkland burned Casonya's entire body so severely that her "pelvic area had almost been completely charred by fire," and so similarly to that of 13-year-old Esme K., whom he did confess to raping. This court has previously found that the "evisceration" of a victim's sexual organs can create a "reasonable inference" of an "attempt[] to conceal evidence of rape or attempted rape." *Id.* While there was no testimony about where the fire originated on Casonya's body, there was evidence that the burning of Esme's body originated in her pubic area. Kirkland's burning of Casonya revealed the consciousness of guilt.

{¶ 138} Viewing the evidence, including all permissible inferences, in favor of the state, we find that any rational trier of fact could conclude that Kirkland formed a purpose to forcibly rape Casonya and engaged in a course of conduct—i.e., grabbing, choking, transporting her to a secluded area, and undressing her—qualifying as a substantial step toward the completion of that crime.

{¶ 139} Accordingly, we overrule Kirkland's ninth proposition of law.

10. Cumulative error (Proposition of Law X)

{¶ 140} In his tenth proposition of law, Kirkland argues that the court should reverse his conviction based on the doctrine of cumulative error. Under that doctrine, this court will reverse a conviction when the cumulative effect of errors deprives a defendant of a fair trial even though each of the 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, at ¶ 223; *State v. DeMarco*, 31 Ohio St.3d 191, 196-197, 509 N.E.2d 1256 (1987). Cumulative error does not apply in cases such as this one where any error in the trial court is curable through the court's independent review. *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, 796 N.E.2d 506, ¶ 48.

Independent Sentence Evaluation

{¶ 141} Having considered Kirkland's propositions of law, this court must now independently review Kirkland's death sentence. First, the court must review and independently weigh all facts and other evidence disclosed in the record, "and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate." R.C. 2929.05(A).

Aggravating circumstances

{¶ 142} The evidence at trial established beyond a reasonable doubt that Kirkland murdered Esme K., with the aggravating circumstance of murdering her while committing or attempting rape or aggravated robbery. The evidence also established beyond a reasonable doubt that he murdered Casonya C. with the aggravating circumstance of murdering her while committing or attempting aggravated robbery or rape.

{¶ 143} The jury also found an additional aggravating circumstance in connection with each murder, namely that the murders were part of a course of conduct.

Mitigating evidence

{¶ 144} Against these aggravating circumstances, this court must weigh the evidence in mitigation submitted by Kirkland.

{¶ 145} Kirkland called a single witness to testify in mitigation. Dr. Scott Bresler testified that he had performed an evaluation of Anthony Kirkland. He diagnosed Kirkland as having "an adjustment disorder with mixed emotional issues and conduct" as well as an antisocial personality disorder. Kirkland's condition causes him to have trouble thinking as well as difficulty in emotions, interpersonal functioning, and impulse control. In lay terms, he is a psychopath.

{¶ 146} Dr. Bresler testified that the condition manifests in unlawful behaviors, a pattern of deceitfulness, impulsivity, irritability, extreme aggressiveness, reckless disregard for the safety of himself and others, "a consistent kind of irresponsibility over a life force," and lack of remorse. The problem manifests at an early age. Individuals appear to be genetically predisposed.

{¶ 147} At the same time, the circumstances of his upbringing played a role. Kirkland's biological father was alcohol-dependent and extremely violent toward Kirkland and his mother. Until his father left (when Kirkland was about nine or ten), Kirkland was often beaten by his father, often watched his father beat his mother, and was forced to watch his father rape his mother.

{¶ 148} By his early teens, Kirkland had engaged in extensive substance abuse. He often fought with other kids. He suffered from depression, for which he did not seek treatment until his adult years.

{¶ 149} Meanwhile, his mother remarried and got help for herself and some of the children, but not Kirkland, who was the oldest. As a result, his attachment to his family, which the forensic psychiatrist testified allows a person to adapt to the world and to live responsibly, was damaged. Throughout his adulthood, he formed no stable relationships, maintained no steady income, drank and took drugs, and, after his release from prison, became homeless. According to Dr. Bresler, Kirkland "cannot live responsibly in society ever."

{¶ 150} Dr. Bresler also testified that Kirkland was able to justify his crimes, with one exception: he cannot rationalize his killing of Esme K., and "so oftentimes when he talks about her he'll cry."

{¶ 151} Finally, Dr. Bresler stated that Kirkland would have a difficult time adjusting to life in prison, but prison can handle him, as shown by the fact that he had already spent 17 years in prison.

{¶ 152} This statement from Dr. Bresler was the first time the jury learned that Kirkland spent an extended period of time in jail. Kirkland went to prison in 1987 after murdering Leola Douglas and setting her on fire. And while he was incarcerated, he threatened various prison officials and staff.

{¶ 153} Finally, Dr. Bresler testified on cross-examination that Kirkland's sisters were sexually abused by their father, and also by Kirkland himself when he was 13.

{¶ 154} Kirkland made a brief unsworn statement to the jury. He accepted responsibility for the deaths of the four women. He said he "get[s] so angry and cannot stop [him]self," though he acknowledged that was no excuse. He expressed a desire to be locked away forever. "I cannot believe how horrible I am. I will never forgive—forget or rest or be at peace, nor should I." He said he confessed to the police because he wanted it to stop. And in conclusion, he told the jury: "I do not blame you if you kill me. I don't deserve to live, but please spare my life."

Sentence evaluation

{¶ 155} R.C. 2929.04(B)(7) provides that the court may consider as mitigation, in addition to other factors listed in the statute, "any other factors that are relevant to the issue of whether the offender should be sentenced to death." Kirkland has pointed to several facts that may have mitigating weight under division (B)(7):

{¶ 156} ● His personality disorder: This court has traditionally accorded personality disorders some, but little, weight. *State v. Cunningham*, 105 Ohio St.3d 197, 2004-Ohio-7007, 824 N.E.2d 504, ¶ 138; *Hoffner*, 102 Ohio St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, at ¶ 119.

{¶ 157} ● His abusive childhood: The court accords some, but not decisive, weight to evidence that the defendant suffered an abusive childhood.

Powell, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, at ¶ 276; *Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, at ¶ 265.

{¶ 158} ● His history of alcohol and drug abuse: A history of drug and alcohol abuse is entitled to weight in mitigation. *Scott*, 101 Ohio St.3d 31, 2004-Ohio-10, 800 N.E.2d 1133, ¶ 108.

{¶ 159} ● His confession and cooperation with police: A defendant's confession and cooperation with law enforcement are mitigating factors. *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶ 191. The mitigation value of Kirkland's confessions would usually receive little weight, given that he initially lied to police and tried to blame Esme K.'s murder on the fictitious Pedro. *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 247. However, in the peculiar circumstances here, we believe Kirkland's confession is entitled to serious consideration because the information he voluntarily provided enabled the police to identify the body of Kimya Rolison, and thus her family was able to learn what had happened to her.

{¶ 160} ● Remorse: Apologies and expressions of remorse in an unsworn statement are given some mitigating weight. *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, at ¶ 327. Although the transcript cannot capture his tone or affect, there is no question that Kirkland expressed a good deal of self-loathing in his unsworn statement.

{¶ 161} The sincerity of his remorse was a hotly contested issue. Dr. Bresler testified that Kirkland cried during their sessions when he talked about killing Esme K. Detective Hilbert, on the other hand, had the impression that when Kirkland cried during his police interviews, it was more out of self-regard than concern for the victims. Kirkland's allocution consisted of six simple words: "Offer an apology to the family." The statement is revealing: he apologized to the *family*, singular, probably the family of Esme K. Whatever credit he is due for his remorse over killing Esme is offset by his apparent lack of remorse for the pain

and suffering he caused his other victims and their families. His expressions of remorse are too infrequent, too ambiguous, and ultimately too self-serving to justify according them significant weight.

{¶ 162} ● Mercy: The trial court gave some mitigating value to Kirkland's request for mercy in his unsworn statement. But mercy is not a mitigating factor. *State v. O'Neal*, 87 Ohio St.3d 402, 416, 721 N.E.2d 73 (2000).

{¶ 163} In *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 97-106, this court vacated a death sentence on the grounds that the aggravating circumstances of the offense did not outweigh the mitigating factors. The court afforded great weight to the tragic circumstances of Tenace's childhood. Both his parents were criminals and substance abusers, and they were neglectful and abusive to the children. *Id*. at ¶ 103. Tenace was sexually abused himself, including being sold by his mother for sexual services, and forced to watch the sexual abuse of his sister. *Id*. at ¶ 102. He was exposed to substance abuse by his mother and her boyfriends, who encouraged him to commit crimes. *Id*.

{¶ 164} In contrast, we declined to vacate the death sentence based on childhood circumstances in *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶ 206. Mundt's mother had eight children by four different fathers. *Id*. at ¶ 192. A children's protective agency removed Mundt from his mother's custody for one month when he was an infant. *Id*. And when he was approximately five years old, his mother voluntarily surrendered custody of her children because she was homeless. *Id*. However, this court concluded that Mundt's mitigation evidence "present[ed] nothing comparable to *Tenace*." *Id*. at ¶ 206.

{¶ 165} Kirkland's case falls somewhere between the extremes represented by *Tenace* and *Mundt*. The testimony of pervasive physical and sexual abuse in Kirkland's home exceeds anything alleged by Mundt. At the

same time, it does not equate to the facts in *Tenace*. Kirkland was abused by one parent, his father, George Palmore. So unlike Tenace, Kirkland had one nonabusive parent in his life. Moreover, his father left the home when Kirkland was nine or ten years old, and there is no evidence that any abuse continued during his teen years when he lived with his mother. The fact that Kirkland is a psychopath from a dysfunctional home is tragic, but not sufficient to outweigh the aggravating circumstances of his crimes, even when coupled with the other mitigating factors identified above.

{¶ 166} We therefore affirm the sentence and, in doing so, reject Kirkland's contention that the aggravating circumstances did not outweigh the mitigating evidence.

Proportionality review

{¶ 167} The second part of the court's independent review requires us to decide whether a sentence of death satisfies the requirement of proportionality. R.C. 2929.05(A) requires this court to "consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases."

{¶ 168} In *Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, at ¶ 265, this court affirmed the defendant's death sentence for aggravated murder in the course of committing a rape. The court has also affirmed death sentences in cases combining a course-of-conduct specification with a robbery-murder specification. *See Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, at ¶ 253, and cases cited therein. Therefore, we find that the sentence is appropriate.

Judgment affirmed.

O'CONNOR, C.J., and O'DONNELL and KENNEDY, JJ., concur.

PFEIFER and LANZINGER, JJ., concur in part and dissent in part.

O'NEILL, J., dissents.

PFEIFER, J., concurring in part and dissenting in part.

{¶ 169} Ohio continues to employ the death penalty as part of our criminal-justice punishment scheme, and Anthony Kirkland's predatory, brutal, and heinous crimes clearly qualify him for that ultimate penalty. The state had a seemingly airtight case against Kirkland, but overzealousness in both the guilt and punishment phases has tainted its efforts; this court will taint the law if we bless the state's actions. In regard to the penalty phase, I concur in Justice Lanzinger's opinion that Kirkland should be resentenced due to the prejudicial effects of prosecutorial misconduct. In regard to the guilt phase, I write separately to dissent from the majority's holding sustaining Kirkland's conviction on the attempted rape of Casonya C.

I

{¶ 170} I dissent from the majority's holding regarding the "other acts" evidence introduced at trial through the testimony of Kylah W. Kylah testified that when she was 13 years old, Kirkland had exposed himself to her and solicited sex from her. In my judgment, Evid.R. 404(B) should have precluded the admission of that testimony; also, its admission was unfairly prejudicial pursuant to Evid.R. 403.

{¶ 171} The state's theory is that Kirkland's September 26, 2007 offer to pay Kylah for a sex act is evidence that is admissible to prove that Kirkland attempted to rape Casonya over a year earlier, in May 2006. There is no doubt that the testimony regarding Kirkland's exposing himself to Kylah and offering to pay her for a sex act are revelatory. The acts show him to be an evil person who sexualizes underage girls and is willing to pay for sex. That is, the evidence demonstrates his *character*. The state admitted as much in its closing argument when it told the jury that the kind of a man who would pay a girlfriend's child for sex acts is the kind of man who would rape Casonya:

First count, again, is a charge of attempted rape; that when he approached Casonya [C.] on that bridge, when he walked with her and when he offered her money, it was an act, it was an attempt to have sexual contact with her.

And, again, this is where the other acts testimony comes in. * * * This is a young girl [Kylah W.] that actually was the daughter of one of his girlfriends, but he sees her as he sees all women, as a sex object.

And what does he do, offers this little 13-year-old girl, whose mother actually is nice enough to let him live there from time to time, five dollars for, his words, to be the first to eat her out.

* * *

But he wants you to believe that when confronted by a stranger, a 14-year-old girl walking across the bridge, he offered her 20 dollars and it got up to 60 dollars to talk.

Well, I'm sure if this little girl was offered 60 dollars just to talk, she would have taken it, but something he said or did made her take that money, throw it back in this predator's face and knee him. Did she do that because he said let's talk, or did he say I want to have sex with you—

* * *

You look at his pattern. You look at what he does when he sees a woman. You see what's in his eyes. He sees sex. And he's going to get it. He'll barter for it, he'll pay for it, but he's gonna get it.

We don't know if he was successful or not [in raping Casonya C.]. He did a pretty good job destroying it.

As demonstrated by the state's use of the evidence in closing argument, Kylah's testimony was not relevant to prove any consequential fact. Its only probative value was to show that Kirkland is a very bad person who would pay for sex with an underage girl, and therefore he *must* have raped Casonya.

{¶ 172} Evidence that an accused committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused's propensity or inclination to commit crime, that is, to show that he acted in conformity with his bad character. *State v. Curry*, 43 Ohio St.2d 66, 68, 330 N.E.2d 720 (1975). Evid.R. 404(B) codifies the common law with respect to evidence of other acts of wrongdoing and is construed against admissibility. *State v. Lowe*, 69 Ohio St.3d 527, 530, 634 N.E.2d 616 (1994). The standard for determining the admissibility of such evidence is strict. *State v. Broom*, 40 Ohio St.3d 277, 533 N.E.2d 682 (1988), paragraph one of the syllabus.

{¶ 173} Evid.R. 404(B) establishes when other-acts evidence is admissible:

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

The majority rules that Kylah's testimony is admissible under Evid.R. 404(B) because Kirkland's act—soliciting Kylah—demonstrated that "he had a sexual intent and motive" for offering Casonya money. Majority opinion at ¶ 69. But Kirkland faces the death penalty for the death of Casonya not because he offered her money for a sex act but because he allegedly attempted to rape her before

killing her. Intent to solicit sex is not the same thing as intent to compel sex. And murder committed in anger because a sexual advance has been refused is not the same crime as murder in the course of rape. The state needed to show, pursuant to Evid.R. 404(B), that the act of soliciting Kylah established a motive for the attempted rape of Casonya or that the act of soliciting Kylah established that Kirkland's intent was to rape Casonya. On the pivotal question of whether Kirkland attempted to rape Casonya, Kylah's testimony sheds no light. When Kylah rejected Kirkland's proposition, he did not rape her. He walked away. Thus, Kirkland's bad act shows no intent or motive regarding the crime at issue, and the testimony is not admissible under Evid.R. 404(B).

{¶ 174} Further, I would find Kylah's testimony inadmissible under Evid.R. 403 because its probative value is substantially outweighed by the danger of unfair prejudice. Because of the complete lack of corresponding operative facts between the behavior toward Kylah and the murder of Casonya, Kylah's testimony was of limited probative value. Kylah was the daughter of a friend of Kirkland, and he would sometimes stay with the family. Kirkland exposed himself to Kylah while she was in her bedroom, but then left the room. He returned with a note offering to pay her for a sex act and then left the room again. Finally, after again entering the room—while dressed—he put a five-dollar bill on her dresser and then left. Kirkland did not react violently when Kylah refused his offer.

{¶ 175} In contrast, Casonya was a stranger. The encounter between Kirkland and Casonya occurred randomly, in public, and at night. There is no evidence that Kirkland solicited Casonya for sex or that Kirkland exposed himself to her. Finally, after offering money to Casonya, Kirkland responded with violence when she threw the money back at him. The question in this case is whether there was a rape at all. Kirkland's criminal but nonviolent activity with Kylah is being offered to show that a rape occurred. That is, a situation where no

rape occurred is being used as evidence that a rape occurred. The evidence is thus of limited probative value.

{¶ 176} Kylah's testimony was undoubtedly prejudicial, even to a defendant as demonstrably repugnant as Kirkland. The majority mentions a newspaper article that it dared not quote because it is not in the record. The defense claims that it demonstrates prejudice. I will save the reader the trip to the Internet: Hamilton County Prosecutor Joe Deters told the Cincinnati Enquirer that Kylah's testimony was pivotal in Kirkland's conviction for the capital murder of Casonya:

> Deters wonders if the jury would have recommended the death sentence in the case involving Casonya without the girl's testimony.
>
> "I think it would have been a coin flip," Deters said. "There is no question she made the difference in Casonya's case."

Perry, *Deters: Teen's testimony could seal killer Anthony Kirkland's fate,* The Cincinnati Enquirer (March 31, 2010). Certainly, Prosecutor Deters was attempting to publicly recognize a young girl for her courage and may have overstated her importance in the case, but there can be no doubt that Kylah's testimony was highly prejudicial against Kirkland.

{¶ 177} Without question, evidence that a grown man sexually solicited and exposed himself to a girl he knew to be 13 years old is prejudicial. The testimony was *unfairly* prejudicial because the state, by its own admission, used the testimony to convince the jury that Kirkland *must* have tried to rape Casonya. The state rested its entire opposition to Kirkland's Civ.R. 29 motion on Kylah's testimony: "Specifically in regard to the attempted rape on Casonya [C.], this last witness [Kylah] has shown there was a common scheme or plan."

{¶ 178} Because the other-acts testimony reflected on Kirkland's character, did not meet the requirements of Evid.R. 404(B), and was unfairly prejudicial under Evid.R. 403, I would find that Kirkland's first proposition of law has merit.

II

{¶ 179} Kirkland asserts in his ninth proposition of law that there was insufficient evidence to convict him of attempted rape in connection with the murder of Casonya C. At the close of the evidence, the defense made a Crim.R. 29 motion for acquittal on that charge. The trial court denied the motion and allowed all charges to proceed to the jury. I would find that there is insufficient evidence to convict Kirkland of attempted rape.

{¶ 180} When reviewing a record for sufficiency, the court must consider whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, at ¶ 77; *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. The court must view the evidence in the light most favorable to the prosecution and defer to the trier of fact on questions of credibility and the weight to assign evidence. *State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, at ¶ 146.

{¶ 181} The crime of rape is "engag[ing] in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." R.C. 2907.02(A)(2). The crime of attempted rape is complete when an offender purposely engages in conduct that, if successful, would constitute or result in the offense of rape. R.C. 2923.02(A). We have explained a "criminal attempt" as an act "constituting a substantial step in a course of conduct planned to culminate" in an offender's commission of the crime. *State v. Woods*, 48 Ohio St.2d 127, 357 N.E.2d 1059 (1976), at paragraph one of the syllabus. To

constitute a "substantial step," the conduct must be strongly corroborative of the offender's purpose to commit the crime, thus directing attention to the offender's overt acts. *State v. Group*, 98 Ohio St.3d 248, 2002-Ohio-7247, 781 N.E.2d 980, at ¶ 95.

{¶ 182} The element of force for purposes of proving the attempted rape of Casonya C. is obvious and indisputable. The question, then, is what overt acts were presented as evidence to prove that Kirkland attempted to compel sexual conduct. The police collected no physical evidence of rape from a rape kit, because the fire damage to Casonya's body, specifically her pelvic area, prevented the forensic pathologist from taking any specimens. And during his police interrogation, Kirkland repeatedly denied having sex with Casonya.

{¶ 183} The majority states that Kirkland's offer of money to Casonya "to talk" was an offer of sex. But without Kylah's testimony, the state had no evidence from which to conclude that the offer of money was for sexual services. And even if there were evidence that Kirkland offered Casonya money for sex, that evidence would not be probative of whether he attempted to rape her before he killed her.

{¶ 184} The majority points to physical evidence that it says is consistent with a sexual purpose behind the murder. Casonya was found naked save for a single sock. The state argues that that fact, standing alone, is sufficient to sustain the attempted-rape conviction. However, even in the cases cited by the majority, the naked condition of the body was not the sole evidence of sexual assault. *See State v. Scudder*, 71 Ohio St.3d 263, 274-275, 643 N.E.2d 524 (1994); *State v. Biros*, 78 Ohio St.3d 426, 447-448, 678 N.E.2d 891 (1997).

{¶ 185} This court's holding in *State v. Heinish*, 50 Ohio St.3d 231, 553 N.E.2d 1026 (1990), suggests that the naked condition of the body, standing alone, is insufficient to sustain a conviction for aggravated rape. In *Heinish*, the murdered victim was found with her jeans partially unzipped and pulled down

several inches from her hips. *Id*. at 232. Her shoes, jacket, and watch were missing, and there was no underwear on the body. There was also a saliva stain on the crotch of her jeans that, according to laboratory tests, was consistent with the defendant's. Despite this evidence, this court vacated Heinish's attempted-rape conviction, because "[e]vidence of finding the victim's body in the condition noted above does not allow the fact-finder to conclude beyond a reasonable doubt that an attempted rape has occurred." *Id*. at 239.

{¶ 186} The burning of Casonya's body, coupled with other-acts evidence concerning Kirkland's sexual assault of another victim, Esme K., presents a closer call. According to the state, Kirkland's intent to rape Casonya is evident from the fact that he raped Esme: "The stark similarities between the defendant's attack on Esme [K.], i.e., the beating, the vaginal burning, the nude body, are particularly relevant."

{¶ 187} When Kirkland burned the body of Esme K.—a girl we know he did rape—he started the fire in her pubic area. Based on that evidence, the state argues for an inference of rape of Casonya C. because the fire was started in or was concentrated in the vaginal area, which the state characterizes as an obvious attempt to destroy any evidence of rape.

{¶ 188} However, the record does not support the state's assertion that the fire was started in or concentrated on Casonya's vaginal area. Obinna Ugwu, M.D., a deputy coroner and forensic pathologist employed by the county, offered no testimony as to the origin point of the fire on Casonya's body. The only opinion came from Elizabeth Murray, Ph.D., a forensic anthropology consultant. Dr. Murray testified that "[i]t looked like the center of the fire was at the center of the body." Dr. Murray was not asked to clarify whether, by "the center of the body," she meant the vaginal area or somewhere on the torso. However, it is clear in context that she meant the latter: she testified that the hands and forearms were most burned because they were likely folded across the body. Also, she noted

that the legs were not as severely burned, suggesting again that she believed the fire began higher on the body. In fact, Casonya's legs were the only part of the body not substantially charred by the fire.

{¶ 189} Burning Casonya's body may well have been an attempt to destroy evidence of her murder, not to destroy evidence of an attempted rape. Kirkland burned the bodies of all four of his victims, not just Esme and Casonya. Ultimately, all the state was able to prove was that Kirkland destroyed the bodies of his victims, including the bodies of two victims who were not raped. The fact that he burned Casonya's body is not probative evidence of whether he attempted to rape her first.

{¶ 190} In summary, the state presented insufficient evidence of attempted rape, and I would therefore reverse Kirkland's conviction on that charge.

III

{¶ 191} In conclusion, I believe that the case should be remanded for resentencing without a consideration of the attempted rape of Casonya Crawford as an aggravating circumstance. The protections afforded by state law and our Constitutions are only as meaningful as this court's willingness to recognize them.

LANZINGER, J., concurring in part and dissenting in part.

{¶ 192} I concur in the judgment affirming Kirkland's convictions. But because I believe that the prosecutorial misconduct in this case violated Kirkland's rights to due process, I respectfully dissent from the majority's decision to affirm his death sentence and would remand the case for a new sentencing hearing pursuant to R.C. 2929.06(B).

{¶ 193} Although I agree with the majority's conclusion that "the prosecutor's closing argument prejudicially affected Kirkland's substantial rights," majority opinion at ¶ 83, I disagree with the majority's decision declining to remand the case for a new sentencing hearing. Our procedures for sentencing

in capital cases charge two independent bodies with evaluating whether the death penalty is proper: the jury or a three-judge panel at the trial level and this court at the appellate level. In cases like this, where a jury has recommended a sentence of death, our independent review of a death sentence should occur only if proper sentencing-phase procedures were followed leading up to the jury's recommendation.

{¶ 194} While R.C. 2929.05(A) provides that we must conduct an independent evaluation of the death sentence, we should not conduct this evaluation when the sentence was recommended by a jury that was exposed to substantial and prejudicial prosecutorial misconduct. We have typically used our independent evaluation of the death sentence to correct errors of law by the trial court in its sentencing opinion. *See, e.g., State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 298; *State v. Fox*, 69 Ohio St.3d 183, 191, 631 N.E.2d 124 (1994). By declining to remand this case, the majority fails to preserve the unique role of the jury in capital cases.

{¶ 195} As noted in the majority opinion, a prosecutor's closing argument is prejudicial when it is "so inflammatory as to render the jury's decision a product solely of passion and prejudice." *State v. Williams*, 23 Ohio St.3d 16, 20, 490 N.E.2d 906 (1986). The majority opinion cites repeated remarks by the prosecutor that meet this standard in this case, and it concludes that "the state's closing remarks in the penalty phase were improper and substantially prejudicial." Majority opinion at ¶ 96. This conclusion is borne out by the record.

{¶ 196} Because the prosecutorial misconduct in this case potentially rendered the jury's decision recommending death "a product solely of passion and prejudice," it cannot be cured by this court's independent review of the sentence. While our own evaluation can cure errors occurring during the penalty phase, it cannot cure an error that may have caused the jury to recommend a sentence that is solely a product of prejudice. The majority cites *State v. Mills*, 62 Ohio St.3d

357, 373-374, 582 N.E.2d 972 (1992). In *Mills*, however, there were far fewer instances of prosecutorial misconduct, and the defendant failed to object. Most significantly, we did not conclude that the state's actions were substantially prejudicial. Kirkland's case, on the other hand, is not a case in which offhand remarks by the prosecutor may have had a negligible effect. Here, the majority *has* concluded that the prosecutorial misconduct was substantially prejudicial. I do not believe that we can conduct an independent review of a death sentence that was not properly recommended, and I therefore would reverse the judgment and remand for a proper sentencing hearing.

{¶ 197} Reversing the judgment sentencing Kirkland to death would not mean that he has escaped the death penalty for his actions. Because this case would be remanded due to an error that occurred during the sentencing phase of the trial, Kirkland would still be eligible for the death penalty pursuant to R.C. 2929.06(B). Although the crimes Kirkland is alleged to have committed are horrific, due process requires that a jury be free from prejudice before recommending the death penalty. Due process, in my view, demands a reversal and remand for resentencing.

O'NEILL, J., dissenting.

{¶ 198} As a justice and as a citizen, it is truly difficult in this case to separate personal outrage from clinical constitutional analysis. The latter, however, is required by my oath of office. Anthony Kirkland's actions were monstrous—he must be punished and society must be vigilantly protected from him. He deserves nothing less than life in prison without possibility of release, and the horror of his crimes certainly makes it easy to suggest that death is the only fit punishment for him. But because the death penalty "is inherently both cruel and unusual," *State v. Wogenstahl*, 134 Ohio St.3d 1437, 2013-Ohio-164, 981 N.E.2d 900, ¶ 2 (O'Neill, J., dissenting), I cannot accept that easy suggestion.

And because the majority's analysis results in a denial of the defendant's right to a fair jury trial, even if I believed that the death penalty could be constitutionally imposed, I would still be compelled to dissent in this case.

{¶ 199} The majority correctly concludes that the state's closing remarks in the penalty phase "were improper and substantially prejudicial." Majority opinion at ¶ 96. *Compare* Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied*, 28 Ga.L.Rev. 125, 131, 134 (1993) (discussing harmless, as opposed to prejudicial, error). But instead of reversing the sentence and remanding for a new sentencing hearing, the majority holds that our independent evaluation and approval of the capital sentence cured the errors in the penalty-phase proceedings. I disagree. This court has relied upon its independent review to "cure" trial-court penalty-phase deficiencies in preparing a written sentencing opinion, *State v. Gumm*, 73 Ohio St.3d 413, 424, 653 N.E.2d 253 (1995), allowing improper testimony from a state expert witness, *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 132, and giving erroneous jury instructions, *State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585, 805 N.E.2d 1042, ¶ 84. Today, it holds that independent review of a sentence can also "cure" prejudicial penalty-phase prosecutorial misconduct that this court has repeatedly determined to be improper: arguing facts outside the record, arguing the subjective experiences of the victim, and arguing that the circumstances of the murder are themselves aggravating factors. That holding, in my opinion, undermines the very foundation of the jury system in Ohio. And it does not comport with the Sixth Amendment to the United States Constitution, which in this context requires that the facts permitting the imposition of a death sentence must be found by a jury.

{¶ 200} In *Clemons v. Mississippi*, 494 U.S. 738, 745, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), the United States Supreme Court held that it was permissible for the Mississippi Supreme Court to impose a sentence of death based on its

independent reweighing of aggravating and mitigating circumstances after the state court struck down as unconstitutional one of the aggravating factors found by the jury. This court has recognized that Ohio's system for imposing and reviewing death sentences is analogous to the Mississippi system approved in *Clemons*. *See State v. Landrum,* 53 Ohio St.3d 107, 124, 559 N.E.2d 710 (1990).

{¶ 201} But in *Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the United States Supreme Court concluded that the Sixth Amendment right to a jury trial required that a jury, rather than a judge, find the presence of aggravating circumstances necessary for the imposition of the death penalty. The Supreme Court stated that "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." *Id.*

{¶ 202} When it is applied to this case, *Clemons*, standing alone, would compel the conclusion that this court does not violate the United States Constitution by "curing" prejudicial errors in the penalty phase of a death-penalty case by independently reviewing the death sentence. But I simply cannot accept the proposition that our independent review somehow comports with the Sixth Amendment right to have a jury weigh mitigating and aggravating circumstances. In my opinion, *Clemons* is inconsistent with the United States Supreme Court's pronouncement in *Ring,* because *Clemons* rests on a premise—"the Sixth Amendment does not require that a jury specify the aggravating factors that permit the imposition of capital punishment, nor does it require jury sentencing, even where the sentence turns on specific findings of fact"—that *Ring* has shown to be faulty. (Citation omitted.) *Clemons* at 746. As *Ring* demonstrates, the Sixth Amendment requires *precisely* those things: "enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' [and therefore] the Sixth Amendment requires that they be found by a jury." *Ring*

at 609, quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S.Ct. 2348, 147 L.E.2d 435 (2000), fn. 19. Moreover, in *Alleyne v. United States*, ___ U.S. ___, 133 S.Ct. 2151, 2155, 186 L.Ed.2d 314 (2013), the court concluded that any fact that increases the mandatory minimum punishment for a crime "is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *See also id.* at 2165-2166 (Sotomayor, J., concurring) (demonstrating how *Ring* compels the decision in *Alleyne*).

{¶ 203} In short, as one federal judge has observed, "[i]f a defendant has a right to have a jury find all the facts that make him eligible for the death penalty, he must also have the right to have a jury make the final determination that he actually will be sentenced to death." *Baston v. Bagley*, 420 F.3d 632, 639, fn.1 (6th Cir.2005) (Merritt, J., dissenting) (arguing that "*Ring* has overruled *Clemons*"). In light of *Apprendi*, *Ring*, and *Alleyne*, it seems obvious that *Clemons* is bad law that will someday be explicitly overruled. And given that this court has already concluded that the defendant's penalty-phase hearing was unfair, it compounds that unfairness for this court to simply reimpose the death penalty instead of remanding the case for a sentencing jury to make that determination.

{¶ 204} I have stated my belief that capital punishment itself is unconstitutional; with today's decision, the court plainly demonstrates that Ohio's system of imposing and reviewing death sentences is unconstitutional as well. Accordingly, I dissent.

Joseph T. Deters, Hamilton County Prosecuting Attorney, and William E. Breyer, Chief Assistant Prosecuting Attorney, for appellee.

Herbert E. Freeman and Bruce K. Hust, for appellant.

The Supreme Court of Ohio

State of Ohio

v.

Anthony Kirkland

Case No. 2010-0854

JUDGMENT ENTRY

APPEAL FROM THE
COURT OF COMMON PLEAS

This cause, here on appeal from the Court of Common Pleas for Hamilton County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the Court of Common Pleas is affirmed, consistent with the opinion rendered herein.

Furthermore, it appearing to the court that the date fixed for the execution of judgment and sentence of the Court of Common Pleas has passed, it is ordered by the court that the sentence be carried into execution by the Warden of the Southern Ohio Correctional Facility or, in his absence, by the Deputy Warden on Wednesday, the 11th day of January, 2017, in accordance with the statutes so provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this court be certified to the Warden of the Southern Ohio Correctional Facility, and that the Warden shall make due return to the Clerk of the Court of Common Pleas for Hamilton County.

It is further ordered by the Court that a mandate be sent to the Court of Common Pleas for Hamilton County to carry this judgment into execution, and that a copy of this entry be certified to the Clerk of the Court of Common Pleas for Hamilton County for entry.

(Hamilton County Court of Common Pleas; No. B0901629)

Maureen O'Connor
Chief Justice

Appendix E

State v. Kirkland

Supreme Court of Ohio

September 24, 2014, Decided

2010-0854.

Reporter
2014 Ohio LEXIS 2350 *; 140 Ohio St. 3d 1442; 2014-Ohio-4160; 16 N.E.3d 684

State v. Kirkland.

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: Hamilton C.P. No. B0901629. Reported at 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818 **[*1]** .

State v. Kirkland, 140 Ohio St. 3d 73, 2014-Ohio-1966, 2014 Ohio LEXIS 1043, 15 N.E.3d 818 (May 13, 2014)

Judges: Pfeifer, Lanzinger, and O'Neill, JJ., dissent.

Opinion

RECONSIDERATION OF PRIOR DECISION

On motion for reconsideration. Motion denied.

Pfeifer, Lanzinger, and O'Neill, JJ., dissent.

End of Document

Kirkland v. Ohio

Supreme Court of the United States

April 6, 2015, Decided

No. 14-7726.

Reporter
2015 U.S. LEXIS 2436 *; 575 U.S. 952; 135 S. Ct. 1735; 191 L. Ed. 2d 705; 83 U.S.L.W. 3785

Anthony Kirkland, Petitioner v. Ohio.

Prior History: State v. Kirkland, 140 Ohio St. 3d 73, 2014-Ohio-1966, 2014 Ohio LEXIS 1043, 15 N.E.3d 818 (May 13, 2014)

Judges: [*1] Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan.

Opinion

Petition for writ of certiorari to the Supreme Court of Ohio denied.

End of Document

State v. Kirkland

Supreme Court of Ohio

May 4, 2016, Decided

2010-0854.

Reporter
2016 Ohio LEXIS 1182 *; 145 Ohio St. 3d 1455; 2016-Ohio-2807; 49 N.E.3d 318

State v. Kirkland.

Notice: DECISION WITHOUT PUBLISHED OPINION

Subsequent History: Reconsideration denied by State v. Kirkland, 147 Ohio St. 3d 1440, 2016-Ohio-7681, 2016 Ohio LEXIS 2781, 63 N.E.3d 158 (Nov. 9, 2016)

Prior History: **[*1]** Hamilton C.P. No. B0901629.

State v. Kirkland, 125 Ohio St. 3d 1427, 2010-Ohio-2261, 927 N.E.2d 1, 2010 Ohio LEXIS 1131 (May 24, 2010)

Judges: Pfeifer, O'Donnell, and Kennedy, JJ., dissent and would deny the motion for order or relief.

Opinion

MOTION AND PROCEDURAL RULING

On application for reopening under S.Ct.Prac.R. 11.06. Application denied. On motion for order or relief. Motion granted. Cause remanded for new mitigation and sentencing hearing.

Pfeifer, O'Donnell, and Kennedy, JJ., dissent and would deny the motion for order or relief.

End of Document

The Supreme Court of Ohio

State of Ohio

v.

Anthony Kirkland

Case No. 2010-0854

RECONSIDERATION ENTRY

Hamilton County

It is ordered by the court that the motion for reconsideration in this case is denied.

(Hamilton County Court of Common Pleas; No. B0901629)

Maureen O'Connor
Chief Justice

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: **08/28/2018**
code: **GJEI**
judge: **198**

ENTERED
AUG 28 2018

Judge: **PATRICK T DINKELACKER** 8-28-18

NO: **B 0901629**

STATE OF OHIO
VS.
ANTHONY KIRKLAND

JUDGMENT ENTRY: SENTENCE: DEATH PENALTY

Defendant was present in open Court with Counsel **TIMOTHY CUTCHER and RICHARD WENDEL** on the **28th** day of **August 2018** for sentence.
The court informed the defendant that, as the defendant well knew, after defendant entering a plea of not guilty and after trial by jury, the defendant has been found guilty of the offense(s) of:
count 2: AGG MURDER W/SPECS #1 &# 2(DISMISS SPECS #3,#4,#5), 2903-01B/ORCN,CD,

count 4: AGG MURDER W/SPECS #1 & #2(DISMISS SPECS #3,#4,#5), 2903-01B/ORCN,CD

count 9: AGG MURDER W/SPECS#1,#2,#3 (DISMISS SPECS#4,#5,#6), 2903-01B/ORCN,CD

count 11: AGG MURDER W/SPECS#1,#2,#3 (DISMISS SPECS#4,#5,#6), 2903-01B/ORCN,CD,

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.

Defendant is sentenced as follows:
count 2: DEATH PENALTY IMPOSED.

count 4: DEATH PENALTY IMPOSED

count 9: DEATH PENALTY IMPOSED

count 11: DEATH PENALTY IMPOSED

THE DEFENDANT IS TO PAY COURT COSTS.

D122955283

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

STATE OF OHIO	:	Case Nos. B 0901629
Plaintiff	:	(Judge Pat Dinkelacker)
vs.	:	
ANTHONY KIRKLAND	:	***SENTENCING OPINION IN COMPLIANCE WITH OHIO***
Defendant	:	**REVISED CODE 2929.03(F)**

This opinion is rendered in compliance with O.R.C. 2929.03(F).

Ohio Revised Code 2929.03(F) requires in pertinent part the following:

"The Court ... 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."

* * *

"For cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995 ... the Court ... shall file the opinion required to be prepared by this division with the Clerk of the Supreme Court within fifteen days after the Court ... imposes sentence."

I. PROCEDURAL POSTURE

The defendant, Anthony Kirkland, ("Kirkland") was found guilty pursuant to a jury trial in 2010 of the aggravated murder of Casonya C[redacted] and the aggravated murder of Esme K[redacted]. The jury further found Kirkland guilty of aggravating

circumstances in both aggravated murders that qualified him for death penalty consideration by the jury.

Resultantly, after a full hearing in the penalty/sentencing phase, Kirkland was determined by the jury to be an appropriate person for the imposition of the death penalty.

Judge Charles Kubicki, Jr., the Judge assigned to the case and the Judge who presided over the case, concurred with the jury's recommendation and imposed the sentence of death on Kirkland.

Pursuant to an order of the Ohio Supreme Court dated May 4, 2016 that states "cause remanded for new mitigation and sentencing hearing", 145 Ohio St.3d 1455, 49 N.E.3d 318, 2010-Ohio-2807, this Court was assigned the duty of conducting a new trial on the sentencing phase only.

The Court conducted a new mitigation and sentencing hearing/trial which began on July 19, 2018 and ended with a verdict on August 6, 2018.

The jury returned verdicts on Counts 2, 4, 9 and 11. All of the verdicts found unanimously that the sentence of death should be imposed on Anthony Kirkland.

II. RETRIAL EVIDENCE – STATE

During the re-trial on the sentencing phase, the State presented extensive evidence regarding the aggravating circumstances surrounding the aggravated murder of each victim.

The State called the following witnesses who testified in Court in person, by way of deposition or by transcript:

Patricia Crawford, Barb McAvoy, Gary Rolison , Lisa Kenney, Dr. Gretel Stephens, Dr. Karen Looman, Sgt. Howard Grant, Sgt. Jennifer Mitsch, Detective Keith Witherell, Detective Bill Hilbert, Dr. Chadwick Wright, Dr. Alan Waxman and Dr. Daniel Boulter.

The State further produced numerous exhibits which were admitted into evidence.

All of the above were reviewed and considered by the Court regarding its decision.

B) Retrial Evidence - Defense

The Defense presented extensive evidence regarding mitigating factors on behalf of Kirkland.

The Defense called the following witnesses:

Dr. Joseph Wu, Patti Van Eys, Ph.D. and Kirkland who made an unsworn statement.

Further, the Defense presented and had admitted many exhibits including extensive material produced by the experts who testified for Kirkland.

All of the above was reviewed and considered by the Court regarding its decision.

III. ANALYSIS OF EVIDENCE

The evidence clearly showed the following:

1. Casonya C[redacted]

On May 4, 2006, Kirkland attacked, viciously beat, attempted to rape and then strangled to death Casonya C[redacted]. Ms. C[redacted] was 14 years old at the time of her death. He also took from her personal items.

Kirkland then burned the body of Ms. C[redacted] almost to the point of an inability to have her remains identified.

2. Esme K[redacted]

On March 7, 2009, Kirkland attacked, beat mercilessly, attempted to rape (causing significant injury) and ultimately strangled to death Ms. K[redacted] with some type of ligature. While this cruel and painful beating and death by strangulation was taking place, Kirkland (in his own words) acknowledged Ms. K[redacted] begged for her life.

Kirkland burned portions of Ms. K[redacted] body that may have contained evidence inculpatory to Kirkland.

3. Mary Jo Newton

On or about June 14, 2006 Kirkland strangled to death Mary Jo Newton. After her death, Kirkland burned her body.

4. Kimya Rolison

On December 22, 2006 Kirkland stabbed Kimya Rolison in the neck with a knife resulting in her death. Kirkland then burned the body of Ms. Rolinson almost to the point of never being able to identify her remains.

IV. SENTENCING PHASE – LAW – BURDEN OF PROOF

The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to 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 ..., if, after receiving ... the trial jury's recommendation that the sentence of death be imposed, the court 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.

Absent such a finding by the court..., the court ... shall impose one of the following sentences on the offender: ..., one of the following: [l]ife imprisonment without parole; ... life imprisonment with parole eligibility after serving twenty-five full years of imprisonment; ... ; life imprisonment with parole eligibility after serving thirty full years of imprisonment.

V. AGGRAVATING CIRCUMSTANCES

The aggravating circumstances applicable to each count are as follows:

Count 2 regarding Casonya C[redacted]:

1) The offense was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the defendant.

2) The offense was committed while the defendant was committing, attempting to commit, fleeing immediately after committing or attempting to commit the offense of RAPE and the defendant was the principal offender in the commission of the AGGRAVATED MURDER.

Count 4 regarding Casonya C[redacted]:

1) The offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by ANTHONY KIRKLAND.

2) The offense was committed while the defendant was committing, attempting to commit, fleeing immediately after committing or attempting to commit the offense of AGGRAVATED ROBBERY and the defendant was the principal offender in the commission of the AGGRAVATED MURDER.

Count 9 regarding Esme K[redacted]:

1) The offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by ANTHONY KIRKLAND.

2) The offense was committed while the said defendant was committing, attempting to commit, or fleeing immediately after committing or attempting to commit RAPE and the offender was the principal offender in the commission of the AGGRAVATED MURDER.

Count 11 regarding Esme K[redacted]

1) The offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by ANTHONY KIRKLAND.

2) The offense was committed while the said defendant was committing, attempting to commit, fleeing immediately after committing or attempting

to commit the offense of AGGRAVATED ROBBERY and the offense was the principal offender in the commission of the AGGRAVATED MURDER.

VI. MITIGATING FACTORS

* **LAW**: O.R.C. 2929.04(B)(1) – (7) defines the mitigating factors the Court must consider. The statute reads in pertinent part as follows:

> (B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 of the Revised Code, the court shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:
>
> (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 issues of whether the offender should be sentenced to death.
>
> (C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court against the aggravating circumstances the offender was found guilty of committing.

* * *

Mitigating factors are factors about an individual or an offense that weigh in favor of a decision that a life sentence rather than a death sentence is appropriate. Mitigating factors are factors that diminish the appropriateness of a death sentence. All of the mitigating factors presented must be considered.

VII. AGGRAVATED CIRCUMSTANCES WEIGHED AGAINST MITIGATING FACTORS

The Court has in weighing the aggravated circumstances against the mitigating factors considered each and every aspect of any mitigating factor and the mitigating factors as a whole. Further, the Court has used any aspect of a mitigating factor as it is weighed against the aggravating circumstance of each individual count.

VIII. THE WEIGHING PROCESS

O.R.C. 2929.04(B)

A) Nature and Circumstances of the Offenses

The nature and circumstances of the offenses are subject to consideration by the Court only if there is any mitigation for the Defendant.

In this case, Kirkland beat to death 14 year old Casonya C[redacted]. He attempted to rape her and did in fact commit the offense of aggravated robbery against her. Kirkland claims Ms. C[redacted] threw money back at him and "kneed" him.

Further, Kirkland beat severely, raped or attempted to rape causing serious injury while doing so and committed the offense of aggravated robbery against 13 year old Esme K[redacted]. Per Kirkland's statement, this horrifying episode began with Ms. K[redacted] accidentally running into Kirkland.

The Court is hard-pressed to find (even if Kirkland's statements are true) any semblance or trace amount of mitigation in the nature and circumstances of the offense.

Accordingly, the Court finds nothing positive for Kirkland in the nature and circumstances of the offense.

B) History, Character and Background of the Offender

The history, character and background of Kirkland were alluded to and discussed at various times during the trial.

The evidence presented at trial provides little to no mitigation whatsoever regarding Kirkland's history, character and background.

In order to comply with the law, the Court will not consider the aforementioned issues since they can only be considered for mitigation purposes.

O.R.C. 2929.04(B) following factors:

1) Whether the victim of the offense induced or facilitated it;

The Court finds that despite the statement of Kirkland in his statement to the police, Casonya C[redacted] and Esme K[redacted] in no way induced or facilitated their aggravated murders.

The Court finds no mitigation in this factor.

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;

Kirkland in his statement made mention of possible duress affiliated with the killing of Esme K[redacted]. But in viewing all of the evidence, Ms. K[redacted] did not lose her life to Kirkland because Kirkland was under duress.

Kirkland makes no claim of duress regarding his murdering Casonya C[redacted].

Further, nothing in the evidence indicates any form of coercion causing Kirkland to kill.

Finally, the Court finds nothing close to any strong provocation enacted by either victim.

The Court finds no mitigation in this factor.

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;

This factor was presented in full measure and vigorously argued by Kirkland during the trial.

Kirkland claimed that due to brain damage/injury suffered through various incidents in his life, the Court should afford some measure of mitigation.

Kirkland asserted this quest for finding of mitigation through the testimony and exhibits offered by Dr. Joseph Wu (Psychiatrist) and Patti Van Eys, Ph.D.

Dr. Wu testified extensively at two separate settings regarding his opinion that Kirkland suffered brain damage. The testimony speaks for itself. If taken as a medically sound expert opinion regarding the medical status of Kirkland's brain, one would have to surmise Kirkland suffered from some brain damage.

But further inquiry and evaluation of Dr. Wu's testimony, exhibits and reports show Dr. Wu uniformly, finds some aspect of brain damage to any subject he examines for forensic purposes.

Note: [There was testimony Dr. Wu did find one patient to not have brain damage subsequent to an examination by him. But no name of that patient was ever testified to].

Further, the methodology employed by Dr. Wu in his comparison of brain images or scans was of concern to the Court. The Court certainly questioned the reliability of Dr. Wu's opinion. This questioning of reliability was enhanced by Dr. Wu's consideration of statements by Kirkland as being true, the medical records not substantiating items Dr. Wu took as true and were unverified, and the testimony of three (3) State's witnesses offered as rebuttal.

Dr. Wu also, it must be noted, for some reason requested the radiologists at Ohio State Wexner Center (who performed the brain scans/brain imaging scans on Kirkland) to withhold interpretation of the scans... this, even though, is what Drs. Boulter and Wright do routinely on a daily basis.

Dr. Alan Waxman, Board Certified in Nuclear Medicine, offered a blanket and particularized rebuttal to Dr. Wu's opinion.

In direct contrast to Dr. Wu's opinion, Dr. Waxman opined Kirkland's brain was without any measurable brain damage and was normal.

Dr. Daniel Boulter, a Radiologist/Neuro Radiologist, employed at the Ohio State Wexner Medical Center, performed an MRI of Kirkland's brain and found no brain damage.

Dr. Chadwick Wright, a Radiologist and Nuclear Medicine Physician at the Ohio State Wexner Medical Center also opined findings in opposition to those of Dr. Wu.

The Court in light of all the evidence presented during the trial cannot find that Kirkland lacked substantial capacity due to a mental disease or defect to appreciate the criminality of his conduct or was unable to conform his conduct to the requirements of the law.

There is no proof before the Court that any alleged injury to Kirkland's brain provides any basis for mitigation.

Patti Van Eys, a Clinical Psychologist, performed a forensic evaluation on Kirkland, prepared a report and testified regarding that evaluation.

The report and the testimony of Dr. Van Eys speaks for itself.

Her ultimate opinion regarding Kirkland of post-traumatic stress disorder with disassociation and resultant lack of substantial capacity to conform to the norms of the law was considered strongly by the Court. If the Court were to find the aforesaid stated opinion were based on sound medical and psychological grounds, the Court would find substantial mitigation on behalf of Kirkland.

The Court can make no such finding.

Dr. Van Eys' foundation for her opinion is based on the findings of Dr. Wu and the statements of Kirkland. As stated earlier, the opinions and findings of Dr. Wu are found by this Court to be without any semblance of persuasion. Accordingly, Dr. Van Eys' opinions are without a proper basis to be afforded any value by the Court.

There was no discernible damage to Kirkland's brain and to base psychological opinions based on brain damage is of no benefit to the Court.

Further, Dr. Van Eys' opinions were also based in part on Kirkland's statements to her. It is obvious that many of Kirkland's assertions were without verification and, quite frankly, not true.

Again this certainly caused the Court to question the validity of Dr. Van Eys' opinions.

The Court therefore finds Dr. Van Eys' opinions provide no basis for the Court to assess any mitigation on this factor to Kirkland.

Despite the testimony of the two defense experts and all the evidence produced regarding this factor, the Court finds no mitigation value.

4) The youth of the offender;

This is not an aspect of consideration in this case.

5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

Without going into detail, there is nothing mitigating about Kirkland's history or prior criminal convictions.

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;

Kirkland was the principal and only person participating in the aggravated murders. There is no mitigation on this factor.

7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

The Court in reviewing all the evidence and giving full consideration to the statutory authority regarding factors considered the following as possible mitigating factors:

A) Bad Childhood

If Kirkland suffered from a bad, abusive childhood, then certainly the Court would take that to be a possible mitigating factor. But the totality of the evidence does not support Kirkland's statement to Dr. Van Eys and to the police (or other statements to others in various reports). Cross-examination of Dr. Van Eys gives cause to question if in fact Kirkland did have an abusive childhood. The only alleged evidence of abuse comes from Kirkland.

The Court also notes that many, many years passed between the time the abuse was allegedly put upon Kirkland and the time he killed human beings. If Kirkland was abused it is still difficult to find any excuse tied to such abuse or find any real source of mitigation.

An alleged abusive childhood did not cause Kirkland to kill. The Court attaches minimal mitigation at best.

B) Cooperation With Police

The Court can attach some mitigation for Kirkland's cooperation with the police. Though he did lie to the police and tried to shift blame from himself, he did eventually admit to additional murders, besides those of Casonya C[redacted] and Esme K[redacted].

The Court assesses minimal mitigation.

C) **Remorse**

The evidence before the Court does indicate Kirkland may have shown some slight degree of remorse. He did indicate that Esme K[redacted] did not deserve to die the way she did.

Further, in his unsworn statement, Kirkland did state he "hurt so many people with these horrible crimes" and in talking to the families, friends and loved ones of the victims, he stated he was "truly sorry for your pain".

The Court is not impressed with the extremely late tokens of remorse by Kirkland. He lied for hours about what he had done to the victims. He gave no thought to the victims after his horrible deeds. All of his statements are basically aimed at helping himself with little to no true concern or remorse.

The Court finds a very small amount of mitigation, if any, regarding remorse.

D) **Unsworn Statement**

Kirkland's unsworn statement to the Court and jury was reviewed and analyzed by the Court.

Kirkland does take responsibility for the deaths of Casonya C[redacted], Mary Jo Newton, Kimya Rolison and Esme K[redacted]. He does refer to the crimes he committed as "atrocious acts" and "horrible crimes".

Further, he did apologize for the pain he caused to the "families, friends and loved ones" of the victims.

He also stated he was "... not here to beg for mercy nor your forgiveness".

He said also "I cannot offer any justifiable explanations for my senseless acts".

On one hand, Kirkland does admit responsibility for taking the lives of his victims. On the other hand, within the same short statement, he blames abuse by others and substance abuse for the vicious and purposeful attacks he committed.

The closing words uttered by Anthony Kirkland:

"I do not blame you if you kill me. I do not deserve to live. But please spare my life".

These words and all of the words uttered by Kirkland do not give rise to mitigation. The Court is hard-pressed to find plausible grounds within Kirkland's statement for anything more than a minimal amount of mitigation.

E) History of Drug and Alcohol Abuse

Though Kirkland may have had some history of abuse of drugs and alcohol, there is nothing of any significance that would constitute any mitigation or show the substance abuse caused him to perform the horrendous acts he did.

F) Mental Health

Some evidence was presented and or alluded to during the trial regarding Kirkland's mental health.

There was nothing presented that would allow the Court or require the Court to make a finding that any real or perceived mental health issue provided any or even minor mitigation.

IX. SEPARATELY WEIGHING EACH COUNT: AGGRAVATING CIRCUMSTANCES VERSUS MITIGATING FACTORS

In weighing the aggravating circumstances applicable to each count of the aggravated murders separately against these mitigating factors,

the Court finds that the aggravating circumstances as to each count outweighs the mitigating factors by proof beyond a reasonable doubt.

Specifically, the Court finds that each count included a "course of conduct involving the purposeful killing of or attempt to kill two or more persons by the defendant" specification. The R.C. 2929.04(A)(5) specification constitutes a severe aggravating circumstance that merits major consideration.

Also each of the counts at issue contains a felony murder specification:

* Ct. 2: Casonya C[redacted] – "... The defendant was committing, attempting to commit ... rape ..."

* Ct. 4: Casonya C[redacted] – " ... The defendant was committing, attempting to commit ... the offense of ... aggravated robbery ..."

* Ct. 9: Esme K[redacted] – " ... The defendant was committing, attempting to commit the offense of rape ..."

* Ct. 11: Esme K[redacted] – " ... The defendant was committing, attempting to commit ... the offense of ... aggravated robbery ..."

Count 2: Both aggravating circumstances attendant to Count 2 (Casonya C[redacted]) are egregious and atrocious. Ms. C[redacted] was killed during a vicious murder spree. The brutal sexual assault on the 14 year old victim also constituted egregious behavior.

The aggravating circumstances far, outweigh beyond a reasonable doubt the almost insignificant mitigation offered by Kirkland regarding Count 2.

Count 4: Both aggravating circumstances attendant to Count 4 (Casonya C[redacted]) are egregious and atrocious. Casonya C[redacted] was a murder victim who died as a result of Kirkland's murder spree. The aggravated robbery further showed the depravity of Kirkland.

The aggravating circumstances far outweigh beyond a reasonable doubt the almost insignificant mitigation offered by Kirkland regarding Count 4.

Count 9: Both aggravating circumstances attendant to Count 9 (Esme K[redacted]) are egregious and atrocious. Ms. K[redacted] was the last murder victim in a vicious murder spree conducted by Kirkland. The brutal sexual attack on the 13 year old Esme K[redacted] during her slow and agonizing descent into death was particularly egregious.

The aggravating circumstances far outweigh beyond a reasonable doubt the almost insignificant mitigation offered by Kirkland regarding Count 9.

Count 11: Both aggravating circumstances attendant to Count 11 (Esme K[redacted]) are egregious and atrocious. The aggravated Robbery further evidenced the depravity of Kirkland.

The aggravating circumstances far outweigh beyond a reasonable doubt the almost insignificant mitigation offered by Kirkland regarding Count 11.

X. CONCLUSION

The Court has carefully reviewed and considered all of the appropriate evidence legally before the Court, the arguments presented by counsel, the law and the unsworn statement of Kirkland.

Because of the reasons and findings stated in this sentencing opinion, the Court without any reservation whatsoever finds by proof beyond a reasonable doubt that the aggravating circumstances Defendant Kirkland was found guilty of committing outweigh the mitigating factors.

Accordingly, the Court whole-heartedly agrees with the findings of the jury as stated in the returned verdicts and finds as follows:

Count Two: For the aggravated murder of Casonya C[redacted], a special felony in violation of O.R.C. 2903.01(B) with specifications 1 and 2, in violation of O.R.C. 2929.04(A)(5) and O.R.C. 2929.04(A)(7) the Court imposes the sentence of death.

Count Four: For the aggravated murder of Casonya C[redacted], a special felony in violation of O.R.C. 2903.01(B) with specifications 1 and 2, in violation of O.R.C. 2929.04(A)(5) and O.R.C. 2929.04(A)(7) the Court imposes the sentence of death.

Count Nine: For the aggravated murder of Esme K[redacted], a special felony in violation of O.R.C. 2903.01(A) with specifications 1 and 2, in violation of O.R.C. 2929.04(A)(5) and 2929.04(A)(7), the Court imposes the sentence of death.

Count Eleven: For the aggravated murder of Esme K[redacted], a special felony in violation of O.R.C. 2903.01(A) with specifications 1 and 2, in violation of O.R.C. 2929.04(A)(5) and 2929.04(A)(7), the Court imposes the sentence of death.

XI. EXECUTION DATE

Pursuant to the dictates of O.R.C. 2947.08, the Court orders the execution of Anthony Kirkland on March 7, 2019.

IT IS SO ORDERED.

Pat Dinkelacker

Judge Patrick Dinkelacker 2-19-19

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

ENTERED
MAR 31 2010

date: 03/31/2010
code: GJEI
judge: 232

D87665303

Judge: CHARLES J KUBICKI JR

NO: B 0901629

STATE OF OHIO
VS.
ANTHONY KIRKLAND

JUDGMENT ENTRY: SENTENCE: INCARCERATION

Defendant was present in open Court with Counsel **A NORMAN AUBIN and WILLIAM WELSH** on the **31st** day of **March 2010** for sentence.
The court informed the defendant that, as the defendant well knew, after defendant entering a plea of not guilty and after trial by jury as to counts #1, #2, #3, #4, #5, #8, #9, #10, #11, and #12 and entering a plea of guilty as to counts #6 and #7, the defendant has been found guilty of the offense(s) of:
count 1: ATTEMPT (RAPE) (DISMISS SPECS #1, #2, #3), 2923-02A/ORCN,F2
count 2: AGGRAVATED MURDER WITH SPECS #1 &# 2
(DISMISS SPECS #3, #4, #5), 2903-01B/ORCN,CD, MERGED WITH COUNT #4
count 3: AGGRAVATED ROBBERY (DISMISS SPEC #1), 2911-01A3/ORCN,F1
count 4: AGGRAVATED MURDER WITH SPECS #1 & #2
(DISMISS SPECS #3, #4, #5), 2903-01B/ORCN,CD
count 5: GROSS ABUSE OF A CORPSE, 2927-01B/ORCN,F5
count 6: MURDER, 2903-02A/ORCN,SF
count 7: GROSS ABUSE OF A CORPSE, 2927-01B/ORCN,F5
count 8: ATTEMPT (RAPE) (DISMISS SPECS #1, #2, #3), 2923-02A/ORCN,F2
count 9: AGGRAVATED MURDER WITH SPECS #1, #2, #3
(DISMISS SPECS #4, #5, #6), 2903-01B/ORCN,CD
count 10: AGGRAVATED ROBBERY, 2911-01A3/ORCN,F1
count 11: AGGRAVATED MURDER WITH SPECS #1, #2, #3
(DISMISS SPECS #4, #5, #6), 2903-01B/ORCN,CD, MERGED WITH COUNT #9
count 12: GROSS ABUSE OF A CORPSE, 2927-01B/ORCN,F5

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned as follows:
count 1: CONFINEMENT: 8 Yrs DEPARTMENT OF CORRECTIONS

count 3: CONFINEMENT: 10 Yrs DEPARTMENT OF CORRECTIONS

Defendant was notified of the right to appeal as required by Crim. R 32(A)(2)

VERIFY RECORD

Appendix J

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: **03/31/2010**
code: **GJEI**
judge: **232**

Judge: **CHARLES J KUBICKI JR**

NO: **B 0901629**

STATE OF OHIO
VS.
ANTHONY KIRKLAND

JUDGMENT ENTRY: SENTENCE: INCARCERATION

count 4: CONFINEMENT: DEPARTMENT OF CORRECTIONS DEATH BY LETHAL INJECTION

count 5: CONFINEMENT: 12 Mos DEPARTMENT OF CORRECTIONS

count 6: CONFINEMENT: INDEFINITE TERM OF 15 Yrs - LIFE DEPARTMENT OF CORRECTIONS

count 7: CONFINEMENT: 12 Mos DEPARTMENT OF CORRECTIONS

count 8: CONFINEMENT: 8 Yrs DEPARTMENT OF CORRECTIONS

count 9: CONFINEMENT: DEPARTMENT OF CORRECTIONS DEATH BY LETHAL INJECTION

count 10: CONFINEMENT: 10 Yrs DEPARTMENT OF CORRECTIONS

count 12: CONFINEMENT: 12 Mos DEPARTMENT OF CORRECTIONS

COUNT #2 IS MERGED WITH COUNT #4 FOR THE PURPOSE OF SENTENCING.

COUNT #11 IS MERGED WITH COUNT #9 FOR THE PURPOSE OF SENTENCING.

SPECIFICATION #1 TO COUNT #9 IS MERGED WITH SPECIFICATION #3 TO COUNT #9 AT SENTENCING PHASE.

THE SENTENCES IN COUNTS #1, #3, #4, #5, #6, #7, #8, #9, #10, AND #12 ARE TO BE SERVED CONSECUTIVELY TO EACH OTHER.

Defendant was notified of the right to appeal as required by Crim. R 32(A)(2)

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 03/31/2010
code: GJEI
judge: 232

Judge: CHARLES J KUBICKI JR

NO: B0901629

STATE OF OHIO
VS.
ANTHONY KIRKLAND

JUDGMENT ENTRY: SENTENCE: INCARCERATION

THE TOTAL AGGREGATE SENTENCE IS TWO (2) DEATH SENTENCES AND TWO (2) INDEFINITE TERMS OF SEVENTY (70) YEARS TO LIFE IN THE DEPARTMENT OF CORRECTIONS.

THE DEFENDANT IS TO RECEIVE CREDIT FOR THREE HUNDRED EIGHTY NINE (389) DAYS TIME SERVED.

THIS SENTENCE IS TO BE SERVED CONSECUTIVELY TO THE SENTENCE IMPOSED IN CASE B0904028.

THE DEFENDANT IS TO PAY THE COURT COSTS.

PURSUANT TO R.C. 2947.08, THE DATE OF EXECUTION AS TO COUNTS #4 AND #9 SHALL BE THURSDAY, SEPTEMBER, 30, 2010.

PURSUANT TO R.C. 2950.01, THE DEFENDANT IS CLASSIFIED A TIER III SEX OFFENDER OR CHILD-VICTIM OFFENDER.

THE DEFENDANT HEREIN IS NOT ELIGIBLE FOR INTENSIVE PRISON PROGRAM, TRANSITIONAL CONTROL, JUDICIAL RELEASE, OR ANY OTHER EARLY RELEASE PROGRAM AND IS TO SERVE THIS SENTENCE IN ITS ENTIRETY.

FURTHER, IN ACCORDANCE WITH RC 2901.07, THE DEFENDANT IS REQUIRED TO SUBMIT A DNA SPECIMEN WHICH WILL BE COLLECTED AT THE PRISON, JAIL, CORRECTIONAL OR DETENTION FACILITY TO WHICH THE DEFENDANT HAS BEEN SENTENCED. IF THE SENTENCE INCLUDES ANY PERIOD OF PROBATION OR COMMUNITY CONTROL, OR IF AT ANY TIME THE DEFENDANT IS ON PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, THE DEFENDANT WILL BE REQUIRED, AS A CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, TO SUBMIT A DNA SPECIMEN TO THE PROBATION DEPARTMENT, ADULT

Defendant was notified of the right to appeal as required by Crim. R 32(A)(2)

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 03/31/2010
code: GJEI
judge: 232

Judge: CHARLES J KUBICKI JR

NO: B 0901629

STATE OF OHIO
VS.
ANTHONY KIRKLAND

JUDGMENT ENTRY: SENTENCE: INCARCERATION

PAROLE AUTHORITY, OR OTHER AUTHORITY AS DESIGNATED BY LAW. IF THE DEFENDANT FAILS OR REFUSES TO SUBMIT TO THE REQUIRED DNA SPECIMEN COLLECTION PROCEDURE, THE DEFENDANT WILL BE SUBJECT TO ARREST AND PUNISHMENT FOR VIOLATING THIS CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL.

AS PART OF THE SENTENCE AS TO COUNTS #1, #3, #8, AND #10 IN THIS CASE, THE DEFENDANT SHALL BE SUPERVISED BY THE ADULT PAROLE AUTHORITY AFTER DEFENDANT LEAVES PRISON, WHICH IS REFERRED TO AS POST-RELEASE CONTROL, FOR FIVE (5) YEARS.

IF THE DEFENDANT VIOLATES POST-RELEASE CONTROL SUPERVISION OR ANY CONDITION THEREOF, THE ADULT PAROLE AUTHORITY MAY IMPOSE A PRISON TERM, AS PART OF THE SENTENCE, OF UP TO NINE (9) MONTHS FOR EACH VIOLATION, WITH A MAXIMUM FOR REPEATED VIOLATIONS OF FIFTY PERCENT (50%) OF THE STATED PRISON TERM. IF THE DEFENDANT COMMITS A NEW FELONY WHILE SUBJECT TO POST- RELEASE CONTROL, THE DEFENDANT MAY BE SENT TO PRISON FOR THE REMAINING POST-RELEASE CONTROL PERIOD OR TWELVE (12) MONTHS, WHICHEVER IS GREATER. THIS PRISON TERM SHALL BE SERVED CONSECUTIVELY TO ANY PRISON TERM IMPOSED FOR THE NEW FELONY OF WHICH THE DEFENDANT IS CONVICTED.

AS TO COUNT #6, THE DEFENDANT IS NOT SUBJECT TO THE POST RELEASE CONTROL PROVISIONS OF OHIO LAW AS THIS IS A LIFE SENTENCE. PAROLE ELIGIBILITY FOR THIS OFFENDER IS GOVERNED BY OHIO REVISED CODE §2967.13(A)(1) AND THE DEFENDANT IS SO ADVISED.

Defendant was notified of the right to appeal as required by Crim. R 32(A)(2)

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

STATE OF OHIO	:	Case No. B 0901629
	:	
Plaintiff,	:	Judge Charles J. Kubicki, Jr.
	:	
vs.	:	
	:	**NOTICE OF FILING OF SENTENCING OPINION**
ANTHONY KIRKLAND	:	
	:	
Defendant.	:	

This Entry shall serve as notice that the Court has filed its attached Sentencing Opinion with the Supreme Court of Ohio.

CHARLES J. KUBICKI, JR., JUDGE

COPIES SENT VIA HAND DELIVERY:

Joseph Deters, Esq. & Mark Piepmeier, Esq., Prosecuting Attorneys
A. Norman Aubin, Esq., & William Welsh, Esq., Attorney for Defendant

Court of Common Pleas

HAMILTON COUNTY COURT HOUSE
1000 MAIN STREET, ROOM 520
CINCINNATI, OHIO 45202-1217

JUDGE
CHARLES J. KUBICKI, JR.

(513) 946-5760
FAX (513) 946-5757

March 31, 2010

Clerk's Office
Supreme Court of Ohio
65 South Front Street, 8th Floor
Columbus, OH 43215-3431

Re: State of Ohio v. Anthony Kirkland – B 0901629

Dear Sir/Madam:

Pursuant to O.R.C. 2929.03 (F), please accept for filing the enclosed document – Sentencing Opinion - regarding the above-captioned case.

Sincerely,

Charles J. Kubicki, Jr., Judge

Appendix J

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

STATE OF OHIO	:	Case No. B 0901629
	:	
Plaintiff,	:	Judge Charles J. Kubicki, Jr.
	:	
vs.	:	
	:	**SENTENCING OPINION**
	:	**R.C. 2929.03(F)**
ANTHONY KIRKLAND	:	
	:	
Defendant.	:	

I. BACKGROUND

a. CASONYA C[redacted]

On May 4, 2006, the defendant attacked, beat, attempted to rape, robbed and strangled to death 14 year old Casonya C[redacted]. The defendant then burned the body of Ms. C[redacted]. The body was recovered in a secluded area with no clothing except one sock.

b. *ESME K[redacted]*

On March 7, 2009, the defendant attacked, beat, attempted to rape, robbed and strangled to death 13 year old Esme K[redacted]. The defendant then partially burned the body of Ms. K[redacted]. The body was recovered in a secluded area with no clothing except shoes and socks.

c. *ADDITIONAL CRIMES*

On June 14, 2006, the defendant strangled Mary Jo Newton to death. The defendant then burned the body of Ms. Newton. On December 22, 2006, the defendant stabbed Kimya Rolison in the neck causing her death. The defendant then burned the body of Ms. Rolison.

d. *THE EVIDENCE*

Shortly after the crimes against Ms. K[redacted] the defendant was apprehended by police at the crime scene. The defendant had property belonging to Ms. K[redacted] Forensic evidence, including Ms. K[redacted]'s DNA on the defendant, supported the defendant's guilt. Ms. K[redacted]'s body also showed signs of rape.

After several hours of police interviews, the defendant confessed to the crimes involving Ms. K[redacted]. The defendant also admitted to murdering Casonya C[redacted] and burning her

body. The defendant denied attempting to rape and robbing Ms. C[redacted] The defendant also confessed to killing Ms. Newton and Ms. Rolison and burning their bodies.

2. THE INDICTMENTS

a. B0901629

On March 17, 2009, the defendant was indicted in case B0901629 and charged with the following offenses:

Count 1: Attempt (Rape) with specifications R.C. 2923.02(A)

Count 2: Aggravated Murder with specifications (CD) R.C. 2903.01(B)

Count 3: Aggravated Robbery with specifications R.C. 2911.01(A)(3)

Count 4: Aggravated Murder with specifications (CD) R.C. 2903.01(B)

Count 5: Gross Abuse of a Corpse R.C. 2927.01(B)

Count 6: Murder R.C. 2903.02(A)

Count 7: Gross Abuse of a Corpse R.C. 2927.01(B)

Count 8: Attempt (Rape) with specifications R.C. 2923.02(A)

Count 9: Aggravated Murder with specifications (CD) R.C. 2903.01(B)

Count 10: Aggravated Robbery with specifications R.C. 2911.01(A)(3)

Count 11: Aggravated Murder with specifications (CD) R.C. 2903.01(B)

Count 12: Gross Abuse of a Corpse R.C. 2927.01(B)

Counts 1 through 5 pertain to the victim, Casonya C[redacted]. Counts 6 and 7 pertain to the victim, Mary Jo Newton. Counts 8 through 12 pertain to the victim, Esme K[redacted].

In addition to the death penalty specifications contained in counts 2, 4, 9, and 11, the indictment contained repeat violent offender specifications; sexually violent predator specifications; and sexual motivation specifications. The State of Ohio dismissed all of the non-death penalty specifications before the trial began.

b. B 0904028

On June 22, 2009, the defendant was indicted in case B0904028 and charged with the following offenses:

Count 1: Murder R.C. 2903.02(A)

Count 2: Gross Abuse of a Corpse R.C. 2927.01(B)

Counts 1 and 2 apply to the victim, Kimya Rolison.

3. THE TRIAL PHASE

The indictments were consolidated for purposes of trial. However, after the jury was impaneled and before opening statements, the defendant pled guilty as charged to the murder and gross abuse of a corpse charges regarding the victim, Kimya Rolison in case B0904028.

At the same time, the defendant pled guilty to count 6, Murder and count 7, Gross Abuse of a Corpse in case B0901629. Both counts relate to the victim, Mary Jo Newton. Sentencing was deferred until after the trial.

Trial proceeded on the remaining counts in case B0901629 involving the two remaining victims, Casonya C[redacted] (counts 1-5) and Esme K[redacted] (counts 8-12). On March 12, 2010, the jury found the defendant guilty on all of the remaining counts, including all death penalty specifications.

4. MERGER OF THE AGGRAVATING CIRCUMSTANCES

For purposes of the sentencing phase, the Court merged the two "escape detection" specifications[1] with the "felony murders of attempted rape and aggravated robbery" specifications[2] contained in counts 9 and 11. The remaining specifications of "course of conduct"[3] and the "felony murders of attempted rape and aggravated robbery"[4] did not merge as they were not duplicative.[5] The jury was instructed to consider each aggravated murder count and accompanying specifications separately.

5. THE SENTENCING PHASE

The sentencing phase of the trial began on March 16, 2010.

During the sentencing phase, the defendant presented the expert testimony of Dr. Scott Bresler, psychologist and clinical director of the Division of Forensic Psychiatry at the University of Cincinnati School of Medicine. The defendant also made an unsworn statement.

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[1] Specification 1 to Counts 9 and 11; R.C. 2929.04(A)(3).
[2] Specification 3 to Counts 9 and 11; R.C. 2929.04(A)(7).
[3] Specification 1 to Counts 2 and 4; Specification 2 to Counts 9 and 11; R.C. 2929.04(A)(5).
[4] Specification 2 to Counts 2 and 4; Specification 3 to Counts 9 and 11; R.C. 2929.04(A)(7).
[5] *State v. Frazier* (1991), 61 Ohio St. 3d 247, 256; *State v. Smith* (1997), 80 Ohio St.3d 89, 116; *State v. Palmer* (1997), 80 Ohio St.3d 543, 573-574; *State v. Robb* (2000), 88 Ohio St.3d 59, 85.

The defendant elected to proceed under R.C. 2929.04(B)(7), any other factors that weigh in favor of a sentence other than death. On March 17, 2010, the jury returned verdicts with death recommendations involving the aggravated murders of Casonya C[redacted] and Esme K[redacted] (counts 2, 4, 9 and 11).

6. SENTENCING – COURT PROCEDURES WHEN DEATH RECOMMENDED

The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.[6] If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to R.C. 2929.03(D)(3).[7]

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 ..., if, after receiving ... the trial jury's recommendation that the sentence of death be imposed, the court 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.[8]

Absent such a finding by the court ..., the court ... shall impose one of the following sentences on the offender: ..., one of the following:[9] [l]ife imprisonment without parole;[10] ... life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;[11] ... life imprisonment with parole eligibility after serving thirty full years of imprisonment.[12]

7. AGGRAVATING CIRCUMSTANCES (AFTER MERGER)

a. COUNT 2 – CASONYA C[redacted]

The aggravating circumstances applicable to Count 2 are:

- The offense was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the defendant.[13]
- The offense was committed while the defendant was committing, attempting to commit, or fleeing immediately after committing or attempting to commit the offense of the May

[6] RC § 2929.03 (D)(1)
[7] RC § 2929.03 (D)(2)(c)
[8] RC § 2929.03 (D)(3)
[9] RC § 2929.03 (D)(3)(a)
[10] RC § 2929.03 (D)(3)(a)(i)
[11] RC § 2929.03 (D)(3)(a)(ii)
[12] RC § 2929.03 (D)(3)(a)(iii)
[13] Specification 1 to Count 2; R.C. 2929.04(A)(5).

4, 2006, rape of Casonya C[redacted] and the defendant was the principal offender in the commission of the aggravated murder.[14]

b. COUNT 4 – CASONYA C[redacted]

The aggravating circumstances applicable to Count 4 are:

- The offense was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the defendant.[15]
- The offense was committed while the defendant was committing, attempting to commit, or fleeing immediately after committing or attempting to commit the offense of the May 4, 2006, aggravated robbery of Casonya C[redacted] and the defendant was the principal offender in the commission of the aggravated murder.[16]

c. COUNT 9 – ESME K[redacted]

The aggravating circumstances applicable to Count 9 are:

- The offense was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the defendant.[17]
- The offense was committed while the defendant was committing, attempting to commit, or fleeing immediately after committing or attempting to commit the offense of rape of Esme K[redacted] and the defendant was the principal offender in the commission of the aggravated murder.[18]

d. COUNT 11 – ESME K[redacted]

The aggravating circumstances applicable to Count 11 are:

- The offense was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the defendant.[19]
- The offense was committed while the defendant was committing, attempting to commit, or fleeing immediately after committing or attempting to commit the offense of aggravated robbery of Esme K[redacted] and the defendant was the principal offender in the commission of the aggravated murder.[20]

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[14] Specification 2 to Count 2; R.C. 2929.04(A)(7).
[15] Specification 1 to Count 4; R.C. 2929.04(A)(5).
[16] Specification 2 to Count 4; R.C. 2929.04(A)(7).
[17] Specification 2 to Count 9; R.C. 2929.04(A)(5).
[18] Specification 3 to Count 9; R.C. 2929.04(A)(7).
[19] Specification 2 to Count 11; R.C. 2929.04(A)(5).
[20] Specification 3 to Count 11; R.C. 2929.04(A)(7).

8. *MITIGATING FACTORS*

Mitigating factors are factors about an individual or an offense that weigh in favor of a decision that a life sentence rather than a death sentence is appropriate. Mitigating factors are factors that diminish the appropriateness of a death sentence. All of the mitigating factors presented must be considered. Mitigating factors include, but are not limited to, the nature and circumstances of the offense, the history, character and background of the defendant, and:

a. ***WHETHER THE VICTIM OF THE OFFENSE INDUCED OR FACILITATED THE OFFENSE – R.C. 2929.04(B)(1)***

- The defendant did not request a jury instruction on the R.C. 29290.04(B)(1) mitigating factor or raise the issue in the sentencing phase. But during the trial phase, the defendant's statement to law enforcement was admitted. His statement included claims that Ms. C[redacted] threw the defendant's money back at him and that she kneed him. The defendant also claimed that Ms. K[redacted]ran into him.

b. ***ANY OTHER FACTORS THAT WEIGH IN FAVOR OF A SENTENCE OTHER THAN DEATH – R.C. 2929.04(B)(7)***

- ***PERSONALITY DISORDER*** During the sentencing phase, the defendant presented evidence that he has "an adjustment disorder with mixed emotional issues and conduct," and "he also suffers from ... an antisocial personality disorder." More specifically, the defendant presented evidence that he is a psychopath. Dr. Bresler also testified that the defendant has anger and rage directed at women. Dr. Bresler also talked about "Stockholm Syndrome" where an individual who has been abused by some antisocial individual begins to identify with and almost take on the persona of the life of that individual that perpetrates the abuse on them.

- ***REMORSE*** Dr. Bresler testified that "[a]fter the fact, [the defendant] will step back when he becomes a little calmer and try to justify why it is he did what he did. In other words, in his mind why it was okay to do it, so to speak. And he seems to have been able to do that almost with everyone of these people with the exception of one [Esme K[redacted]]"

  Dr. Bresler also testified, "I think he tries to put together in his mind, you know, some kind of rationalization and I don't think it works for him, so oftentimes when he talks about her he'll cry." Later, referring to why the defendant went back and allegedly "talked to the bodies" of Ms. C[redacted] and Ms. K[redacted], Dr. Bresler stated "I mean, he was pretty – I mean, he says he was pretty high. He says – I mean, he's conflicted about what he did, but, again, I don't know why."

- ***ASSIST/COOPERATE WITH THE POLICE*** The defendant confessed to murdering Ms. C[redacted] and Ms. K[redacted]. The defendant also confessed to murdering Ms. Newton and Ms. Rolison.

- ***DEFENDANT TOOK RESPONSIBILITY FOR 2 NON-CAPITAL MURDERS*** In addition to confessing to the two unsolved murders of Ms. Newton and Ms. Rolison, the defendant pled guilty to both murders.

- ***ALCOHOL/DRUG ABUSE*** Dr. Bresler indicated that the defendant engaged "in extensive substance abuse beginning in early teenage years." Dr. Bresler opined that substance abuse complicates any issues the defendant may have. Dr. Bresler further stated that "[i]f there's anger it could get rid of the road blocks that keep him from acting out on that anger, et cetera et cetera." The defendant, during his confession, claimed he had consumed alcohol and/or consumed drugs prior to the C[redacted] and K[redacted] murders.

- ***ABUSIVE CHILDHOOD*** The defendant presented evidence, through the testimony of Dr. Bresler, that he had an abusive, violent and sadistic father. The defendant's biological father, George Palmore, was alcohol dependent and extremely violent toward the defendant and his mother. In addition to physically abusing the defendant, the defendant was forced to watch his father beat and rape the defendant's mother.

- ***PROBABILITY OF NO RELEASE FROM PRISON*** The defendant asked the jury to select the "life without parole" recommendation. The defendant also argued the jury should consider that the defendant was not going to be released from prison as a mitigating factor.

- ***MERCY*** The defendant, during his unsworn statement, took responsibility for his crimes and asked for mercy.

- ***THE DEFENDANT WAS PRODUCTIVE WHILE IN PRISON ON ANOTHER MATTER*** The defendant obtained a college degree while in prison. However, the State countered that while in prison, the defendant made several threats he would kill other inmates and prison staff. The defendant countered that there were only four reported incidents over approximately 17 years in prison.

- ***THE DEFENDANT CANNOT CONTROL HIMSELF AND HIS ANGER*** The defendant's expert testified that the defendant, as a psychopath, "has poor behavioral controls and impulsivity." Additionally, the defendant "can be extremely aggressive." The defendant also made statements regarding his anger and rage.

- ***THE DEFENDANT COULD BENEFIT SOCIETY*** The defendant argued to the jury that he could be a case study for his personality disorders which might benefit society by learning how, in the future, to treat persons with similar disorders.

9. ***WEIGHING AGGRAVATING CIRCUMSTANCES AND MITIGATING FACTORS***

No inference should be drawn from the order in which the mitigating factors and aggravating circumstances are discussed. The Court when weighing the aggravating circumstances against the mitigating factors considered the mitigating factors both individually and collectively against the aggravating circumstances that were proved beyond a reasonable doubt for each count separately against all of the mitigating factors raised by the defendant.

a. ***NO MITIGATING FACTORS APPEAR IN THE NATURE AND CIRCUMSTANCES OF THE OFFENSES***

The nature and circumstances of the offenses are only considered to see if they provided any mitigating factors. Each offense is considered separately to determine whether any mitigating factors exist.

The defendant beat and strangled to death each of his two victims during a separate robbery and attempted rape of each victim. During the defendant's confession, he claimed Ms. C[redacted] threw his money he offered her back at him and she kneed him. The defendant also claimed Ms. K[redacted] ran into him.

Even if Ms. C[redacted] forcibly resisted her encounter with the defendant or Ms. K[redacted] accidentally ran into the defendant, as the defendant claims, those facts would not be mitigating. Ms. K[redacted] did not resist. Discounting the defendant's uncorroborated and self-serving claims about the victims' actions, the defendant admitted that Ms. K[redacted] did not deserve what he did to her.

Ms. C[redacted] allegedly threw the defendant's money back at him when he gave it to her just to "talk." However, such an insult from a 14 year old child deserves no weight in mitigation.[21] The defendant also claims she kneed him. Even if true and unprovoked, the facts have very little mitigating value.

Accordingly, the Court finds that no mitigating factors appear in the nature and circumstances of the offenses. The Court also finds that there is no mitigating value with regard to a potential R.C. 2929.04(B)(1) mitigating factor. The Court does not hold the absence of R.C. 2929.04(B)(1) mitigating factor against the defendant. Instead, the Court only considered the possibility of the existence of such a factor for the potential benefit of the defendant since it was discussed by him during the trial phase.[22]

[21] *State v. Sapp* (2004), 105 Ohio St.3d 104

[22] Consider *State v. Depew* (1988), 38 Ohio St.3d 275; *State v. Benner* (1988), 40 Ohio St. 3d 301.

b. ***ABUSIVE CHILDHOOD***

The defendant's difficult childhood – an abusive father - is a mitigating factor.[23] However, he lived with his father only until he was 9 or 10.

Additionally, the Ohio Supreme Court has "seldom given decisive weight to" a defendant's unstable or troubled childhood.[24] Moreover, the defendant was in his late thirties when he killed Ms. C[redacted] and 40 years old when he killed Ms. K[redacted]. "In other words, he had reached 'an age when * * * maturity could have intervened,' and the defendant 'had clearly made life choices as an adult before committing [the] murder[s].' "[25]

Accordingly, the Court finds some mitigating value to the defendant's abusive childhood. However, the value is significantly minimized given the defendant's age when the offenses were committed.

c. ***ASSIST/COOPERATE WITH THE POLICE***

"A defendant's confession and cooperation with law enforcement are mitigating factors."[26] However, little weight in mitigation is assigned to the defendant's confession. The defendant initially lied to police, denying his own guilt and trying to blame someone named "Pedro."[27] He did not confess until one of the investigating officers indicated he was being criminally charged and the defendant knew he was caught at the K[redacted] crime scene with Ms. K[redacted]'s property.[28] The defendant had previously denied the earlier murders when there was no evidence against the defendant.

The defendant's confession to the additional murders deserves some mitigating value. But the value is diminished due to the fact that the defendant only confessed after he was caught for the K[redacted] murder.

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[23] *State v. Perez* (2009), 124 Ohio St.3d 122; See, e.g., *State v. White* (1999), 85 Ohio.St.3d 433, 456, 709 N.E.2d 140.

[24] *State v. Perez* (2009), 124 Ohio St.3d 122; *State v. Hale,* 119 Ohio.St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 265.

[25] *State v. Perez* (2009), 124 Ohio St.3d 122; *State v. Campbell* (2002), 95 Ohio.St.3d 48, 53, 765 N.E.2d 334, quoting *State v. Murphy* (1992), 65 Ohio.St.3d 554, 588, 605 N.E.2d 884 (Moyer, C.J., dissenting).

[26] *State v. Perez* (2009), 124 Ohio St.3d 122; *State v. Bethel,* 110 Ohio.St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶ 191.

[27] *State v. Perez* (2009), 124 Ohio St.3d 122; Cf *State v. Fox* (1994), 69 Ohio.St.3d 183, 195, 631 N.E.2d 124 (defendant confessed only after initially denying involvement; confession entitled to no weight); *State v. Hoffner,* 102 Ohio.St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 119 (defendant confessed, but had previously misled police as to his involvement).

[28] *State v. Perez* (2009), 124 Ohio St.3d 122; Cf *State v. Fox* (1994), 69 Ohio.St.3d 183, 195, 631 N.E.2d 124 (defendant confessed only after initially denying involvement; confession entitled to no weight); *State v. Hoffner,* 102 Ohio.St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 119 (defendant confessed, but had previously misled police as to his involvement).

Accordingly, the Court finds some mitigating value to the defendant's confession. On the other hand, his initial lying diminishes the weight of this factor. On balance, this factor is not impressive.

d. ***REMORSE***

The record contains some evidence of remorse. In his confession, the defendant expressed some regret with regard to the K[redacted] murder. He said she did not deserve to die like that.

The sincerity and depth of the defendant's remorse is questionable. His tardy, half-hearted, and self-serving expressions of remorse are belied by his callous attitude just after the murder. When asked what he did after the K[redacted] murder, the defendant went to get some food because he was hungry. Also during his confession, the defendant seemed more concerned about himself. Any expression of remorse is further minimized by Dr. Bresler's testimony that, as a psychopath, the defendant lacks the ability to have remorse and is a pathological liar.

Remorse deserves very slight, if any, weight in this case.[29]

e. ***PERSONALITY DISORDERS***

The defendant's expert testified that the defendant suffers from personality disorders. However, Dr. Bresler makes clear that any personality disorders that the defendant may have do not justify or excuse the defendant's behavior. Accordingly, the Court finds some mitigating value to the defendant's personality disorders.

f. ***DEFENDANT TOOK RESPONSIBILITY FOR 2 NON-CAPITAL MURDERS***

Similar to the Court's finding regarding the defendant's confession, the Court gives some value for taking responsibility for the murders of Ms. Newton and Ms. Rolison. However, the value is diminished by the defendant's initial denials. The value is further diminished by the fact that his guilty pleas were more due to trial strategy and this was a "mitigation case."

g. ***ALCOHOL/DRUG ABUSE***

Dr. Bresler indicated that the defendant engaged in substance abuse since his teenage years. The defendant claimed he used alcohol and/or drugs prior to the murders. Nevertheless, the Court gives little mitigating value to the defendant's substance abuse.

h. ***PROBABILITY OF NO RELEASE FROM PRISON***

The Court gives very little mitigating value to the fact that the defendant probably won't be released from prison.

[29] See *State v. Perez* (2009), 124 Ohio St.3d 122.

i. ***MERCY***

The Court gives some mitigating value to the defendant's request for mercy.

j. ***THE DEFENDANT WAS PRODUCTIVE WHILE IN PRISON ON ANOTHER MATTER***

The Court finds some value that the defendant obtained a college degree while in prison. However, the value is diminished by the fact that while in prison, the defendant made several threats he would kill other inmates and prison staff.

k. ***THE DEFENDANT CANNOT CONTROL HIMSELF AND HIS ANGER***

The Court finds little or no value that the defendant has anger, impulsivity, and control issues. The defendant's expert testified that the defendant behavior issues are not an excuse or justification for the crimes he committed.

l. ***THE DEFENDANT COULD BENEFIT SOCIETY***

The Court finds little, if any, value that the defendant could be a case study for his personality disorders which might benefit society by learning how to treat, in the future, persons with similar disorders.

m. ***WEIGHING THE AGGRAVATING CIRCUMSTANCES FOR EACH COUNT AGAINST THE MITIGATING FACTORS***

Weighing the aggravating circumstances applicable to each count of the aggravated murders separately against these mitigating factors, the Court finds and concludes that the aggravating circumstances as to each count outweighs the mitigating factors by proof beyond a reasonable doubt.

Specifically, the Court finds that each count included a "course of conduct involving the purposeful killing of or attempt to kill two or more persons by the defendant" specification. The R.C. 2929.04(A) (5) specification constitutes a grave aggravating circumstance that deserves great weight.[30]

Additionally, each count contains a "felony murder" specification that involves either an attempt to commit rape (counts 2 and 9) or aggravated robbery (counts 4 and 11). Each of the "felony murder" specifications deserves great weight.

As for all four aggravated murder counts, each of the "course of conduct" specifications contained in each count alone is a sufficient aggravating circumstance to outweigh the mitigating factors. The same is true for each of the "felony murder" specifications contained in each count.

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[30] See *State v. Sapp* (2004), 105 Ohio St.3d 104; *State v. Trimble* (2009), 122 Ohio St.3d 297; *State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, ¶ 80-81; *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, 785 N.E.2d 439, ¶ 162-163; *State v. Clemons*, 82 Ohio St.3d at 456-457, 696 N.E.2d 1009.

When weighing the aggravated circumstances for each count against the mitigating factors, the aggravating circumstances not only outweigh the mitigating factors by proof beyond a reasonable doubt, the mitigating factors pale by comparison.

i. ***Count 2 – Casonya C[redacted]***

As to Count 2, the two aggravating circumstances attached to Ms. C[redacted]'s murder constitute grave circumstances. The defendant's murder of Ms. C[redacted] included a course of conduct involving the murder of two or more people. The defendant's murder of Ms. C[redacted] after attempting to rape her is a particularly egregious circumstance. In contrast, the Court finds that as to each of these aggravating circumstances, the defendant's mitigating evidence has little significance.

The aggravating circumstances applicable to Count 2 outweigh the mitigating factors by proof beyond a reasonable doubt. Therefore, the Court finds, beyond a reasonable doubt, that the death sentence as to count 2 is appropriate.

ii. ***Count 4 – Casonya C[redacted]***

As to Count 4, the two aggravating circumstances attached to Ms. C[redacted]s murder constitute grave circumstances. The defendant's murder of Ms. C[redacted] included a course of conduct involving the murder of two or more people. The defendant's murder of Ms. C[redacted] after robbing her is an extremely serious circumstance. In contrast, the Court finds that as to each of these aggravating circumstances, the defendant's mitigating evidence has little significance.

The aggravating circumstances applicable to Count 4 outweigh the mitigating factors by proof beyond a reasonable doubt. Therefore, the Court finds, beyond a reasonable doubt, that the death sentence as to count 4 is appropriate.

iii. ***Count 9 – Esme K[redacted]***

As to Count 9, the two aggravating circumstances attached to Ms. K[redacted]'s murder constitute grave circumstances. The defendant's murder of Ms. K[redacted] included a course of conduct involving the murder of two or more people. The defendant's murder of Ms. K[redacted] after attempting to rape her is a particularly egregious circumstance. In contrast, the Court finds that as to each of these aggravating circumstances, the defendant's mitigating evidence has little significance.

The aggravating circumstances applicable to Count 9 outweigh the mitigating factors by proof beyond a reasonable doubt. Therefore, the Court finds, beyond a reasonable doubt, that the death sentence as to count 9 is appropriate.

iv. Count 11 – Esme K[redacted]

As to Count 11, the two aggravating circumstances attached to Ms. K[redacted]'s murder constitute grave circumstances. The defendant's murder of Ms. K[redacted] included a course of conduct involving the murder of two or more people. The defendant's murder of Ms. K[redacted] after robbing her is an extremely serious circumstance. In contrast, the Court finds that as to each of these aggravating circumstances, the defendant's mitigating evidence has little significance.

The aggravating circumstances applicable to Count 11 outweigh the mitigating factors by proof beyond a reasonable doubt. Therefore, the Court finds, beyond a reasonable doubt, that the death sentence as to count 11 is appropriate.

10. CONCLUSION AND SENTENCE

After consideration of all of the relevant evidence, the defendant's statement, arguments of counsel, legal authority and for the reasons and findings set forth in this Sentencing Opinion, the Court finds, by proof beyond a reasonable doubt that the applicable aggravating circumstances the defendant was found guilty of committing outweigh the mitigating factors. Therefore, the Court concurs with the jury's recommendation and orders sentence as follows:

i. Count 2 – Casonya C[redacted]

As to Count 2, for the offense of Aggravated Murder, a special felony, in violation of R.C. 2903.01(B) with specifications 1 and 2, in violation of R.C. 2929.04(A)(5) and R.C. 2929.04(A)(7), the offense is merged for purposes of sentencing in light of the sentence imposed in Count 4. Otherwise, the Court would impose a sentence of death.

ii. Count 4 – Casonya C[redacted]

As to Count 4, for the offense of Aggravated Murder, a special felony, in violation of R.C. 2903.01(B) with specifications 1 and 2, in violation of R.C. 2929.04(A)(5) and R.C. 2929.04(A)(7), the Court hereby sentences the defendant, Anthony Kirkland, to death.

iii. Count 9 – Esme K[redacted]

As to Count 9, for the offense of Aggravated Murder, a special felony, in violation of R.C. 2903.01(B) with specifications 2 and 3, in violation of R.C. 2929.04(A)(5) and R.C. 2929.04(A)(7), the Court hereby sentences the defendant, Anthony Kirkland, to death.

iv. Count 11 – Esme K[redacted]

As to Count 11, for the offense of Aggravated Murder, a special felony, in violation of R.C. 2903.01(B) with specifications 2 and 3, in violation of R.C. 2929.04(A)(5) and R.C. 2929.04(A)(7), the offense is merged for purposes of sentencing in light of the sentence imposed in Count 9. Otherwise, the Court would impose a sentence of death.

All counts are to be served consecutively to each other and all other counts contained in this case and B0904028.

i. Sentence Execution Date

Pursuant to R.C. 2947.08, the date of execution as to Counts 4 and 9 shall be Thursday, September 30, 2010.

IT IS SO ORDERED.

3.31.10

Judge Charles J. Kubicki, Jr.

S.Ct.Prac.R. 11.06. Application for Reopening.

(A) General

An appellant in a death-penalty case involving an offense committed on or after January 1, 1995, may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel in the Supreme Court. An application for reopening shall be filed within ninety days from the issuance of the mandate of the Supreme Court, unless the appellant shows good cause for filing at a later time.

(B) Requirements

An application for reopening shall contain all of the following:

(1) The Supreme Court case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(2) A showing of good cause for untimely filing if the application is filed more than ninety days after entry of the judgment of the Supreme Court;

(3) One or more propositions of law or arguments in support of propositions of law that previously were not considered on the merits in the case or that were considered on an incomplete record because of the claimed ineffective representation of appellate counsel;

Appendix K

(4) An affidavit stating the basis for the claim that appellate counsel's representation was ineffective with respect to the propositions of law or arguments raised pursuant to S.Ct.Prac.R. 11.06(B)(3) and the manner in which the claimed deficiency prejudicially affected the outcome of the appeal, which affidavit may include citations to applicable authorities and references to the record;

(5) If the application is filed more than ninety days after the issuance of the mandate of the Supreme Court, any relevant parts of the record available to the applicant;

(6) All supplemental affidavits upon which the applicant relies;

(7) Specific citations to the record, as necessary to support the claims raised in the application.

(C) Response to an application for reopening

Within thirty days from the filing of the application, the attorney for the prosecution may file and serve affidavits, parts of the record, and a memorandum of law in response to the application. Any memorandum in response shall include specific citations to the record, as necessary to respond to the claims raised in the application.

(D) Page limitation

An application for reopening and a response to an application for reopening shall not exceed fifteen pages, exclusive of affidavits and parts of the record.

(E) Grounds for granting application

An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(F) Notice and appointment of counsel

If the Supreme Court grants the application, the Clerk of the Supreme Court shall serve notice on the clerk of the trial court, and the Supreme Court will do both of the following:

(1) Appoint counsel to represent the applicant if the applicant is indigent and not currently represented;

(2) Impose conditions, if any, necessary to preserve the status quo during the pendency of the reopened appeal.

(G) Procedure after granting an application

(1) If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the Supreme Court may limit its review to those propositions of law and arguments not previously considered.

(2) The time limits for preparation and transmission of the record pursuant to S.Ct.Prac.R. 11.04 shall run from entry of the order granting the application. The parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(H) Evidentiary hearing

If the Supreme Court determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the Supreme Court or referred to a master commissioner.

(I) Supreme Court decision

If the Supreme Court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the Supreme Court shall vacate its prior judgment and enter the appropriate judgment. If the Supreme Court does not so find, it shall issue an order confirming its prior judgment.

Effective Date: June 1, 1994
Amended: April 1, 1996; April 1, 2000; July 1, 2004; January 1, 2008; January 1, 2010; January 1, 2013; January 1, 2017

(A break was taken.)

(Jury entered the courtroom.)

THE COURT: Please be seated. Thank you for your cooperation.

With that, Mr. Deters, whenever you are ready, sir.

MR. DETERS: Good morning, everybody. I had to break in the bad news in opening statements. You had to listen to nine hours of this stuff. And I am sure the Judge will tell you the same thing. Because he told you you are going to be sequestered doesn't mean you can't come to a decision even today and not be sequestered. I want to make sure you guys knew that. But deliberate fully.

I know we told you how horrible this was going to be for many of you and Mark and Rick and I have tried a lot of murder cases, and when you talk to lay people who aren't used to seeing the pictures and seeing the horrible things that happened with these families, it is hard. And I really very much on behalf

of the State of Ohio appreciate what you have done over the last couple of weeks because it is not pleasant.

But through that, everyone said they would listen to the evidence that you got from the witness stand, the depositions that you heard, the stipulations that you heard and you also said you would not base any of your verdicts on sympathy.

The Judge will instruct you on that. All we want you to do is what Judge Dinkelacker tells you to do. That is all we want you to do. And it is not subjective. It is not subjective. It is as Mark said, it is the weighing process. You decide what happened in these cases versus the mitigation presented to you. That's all you do.

And if you feel and you are sure that aggravation even to the slightest extent outweighs the mitigation, you need to tell the Judge you have returned a death verdict and we ask every single one of you, would you be able to be the

12th juror to sign that verdict form. And every one of you said, yes, I could do that.

I was listening to Defense Attorney's close, and he said Kirkland never had a chance. You know who didn't have a chance? These four girls right here that you see in front of you. They didn't have a chance. He had every chance in the world.

Mark laid out the whole weighing thing. We just want you to follow your oath. That's all we want. It is very simple, go back, the Judge will tell you you will select a foreman or forelady and decide at that point if the aggravation outweighs the mitigation. That's all you have to do. And if you are certain of it, you must do it. And I want to be very candid with you about something. If you do, Judge Dinkelacker is going to sentence him likewise. That's going to happen.

So let's look at the weighing process briefly.

Dr. Wu. How would you determine someone's credible? I know you, as jurors in everyday life you can tell when your kid is lying or can tell when somebody is not shooting straight with you. When no interpretation, when he asked for no interpretation of the scans from Ohio State, why would somebody do that? What's the purpose of that? I got news for you. The purpose is you don't want the answer. You just don't want that answer.

Kirkland had brain scans in 2007, 2009 and two months before he killed Esme, all normal. Everything is normal. Five different doctors said nothing was abnormal with him. Dr. Wu, on the other hand, has never seen a brain scan that was normal, so if he scanned you guys, you are all going to be abnormal, which excuses, go ahead, go kill five girls.

MR. WENDEL: Objection.

THE COURT: Overruled. It is closing argument.

MR. DETERS: Dr. Wu is a

psychiatrist, okay. He is not a radiologist. It would be like you saying, wow, I need to get open heart surgery. Let me go see my dentist. Really? When all the radiologists are saying he is normal, and they bring in Dr. Wu.

You know, sometimes when you watch the news on TV and they have the radar up and it is all lit up and they enhance the thing, looks like a huge storm is going to come rolling through and scares everybody to death and then nothing happens? They are just enhancing the color. That's all they are doing. It is the same thing Dr. Wu does.

When I was in college, I took this class called How To Lie With Statistics. And they talked about gee whiz graphs. Basically, there are these graphs they show the housing prices going straight through the roof. If you look at the other axis, there are $5 increments, so really it wasn't that much but it looks like it is big. That's what you are

dealing with Dr. Wu.

Dr. van Eys, she seems like a nice lady but she didn't have the information she needed to make a decision. And even when confronted with it, stood by her diagnosis. She says he is dissociative. But he remembers. You heard his confession. He remembers every detail of these murders, every detail down to the most disgusting detail you can imagine. And, unfortunately, you all and us, everybody, have to live with that the rest of your life. But he remembers it. That's not dissociative. He remembers that stuff.

The other thing you conjecture on, an astounding thing is she is asked directly when he is burning these bodies, do you think that was a purification ritual? And the answer is yes. She believes that.

He takes Casonya and throws her into a ditch and covers her with tires. Is that part of the ritual? It is amazing. She didn't have the information

she needed to have and she was not willing to change her opinion in the face of every piece of evidence pointing otherwise.

In terms of Kirkland and what he said, you're going to have all these records back with you. You can read it for yourself. You are going to have them all to yourself. And when you hear about this abuse of a child, when you listen to this nonsense coming out, try to find out who said it. Who said he was abused? Who said that? One person. Him. That's it. He is the only one who said he was abused. His sisters don't say it. His mom doesn't say it. And, by the way, if that was true, the defense has as much power to subpoena anybody in this case and bring them in in front of this jury and say my brother was abused by my father. And guess what, where are they?

MR. WENDEL: Objection. That's improper.

THE COURT: I don't believe that it is. I ask you to move on, Mr. Deters.

The objection is overruled at this point.

Go ahead, sir.

MR. DETERS: Where are they? Why aren't they in here telling you the story about the horrible abuse he was subject to? Where are they? They don't exist. That's why they are not here.

You know Kirkland spent time in prison like fourteen years or so for murdering his uncle's girlfriend before he got out, and he killed the other four. And you are going to have his prison records back there. Okay. So he is not drinking in prison, he is not doing drugs in prison.

You are going to have this exhibit back there, State's Exhibit 68. He went to see the nurse at the prison for some treatment of some minor ailment. I know in prison you are pressed for time and he wasn't willing to wait. And he started yelling at the nurse in the prison. You will have a whole packet of this nonsense he continues to do in his life.

He says, "I am doing time for

murder, motherfucker, and I will kill you, you punk ass motherfucker."

This is a nurse in the prison.

Look at 68 when you get back there. So his mitigation, I would submit to you, is zero, nothing. It comes out of his mouth.

You know many times when we deal with jurors, they always think, well, if somebody says something, they tend to believe it. They do. But who would lie to you? Who would lie to people? Who would lie to their doctors that says he was abused? Who would do that?

How about a guy that kills five girls? That's somebody who would lie to you. What kind of moral compass does this guy have? Nothing. Zip. So he has nothing in mitigation. He has nothing. He has Dr. Wu and a psychologist who didn't see everything.

The other thing about the psychologist when Mark said, do you believe their expert or ours. I mean, is there even a close comparison? I mean,

it is a joke. That guy had no idea what he was talking about.

So on that side of the scale we got paltry, at best, maybe.

What's on the other side of the scale? We have Sharee's murder. He tries to have sex with her, offers her $20, raises it to $60. Drags her up the hill, knocks out her teeth. Can you imagine how painful that would be? Punches out her teeth. He tries to rape her.

Remember, you have to accept the jury's verdict from the last case. They found him guilty of that. This is what Kirkland does to little girls. Okay. That's what he does.

So she is in incredible pain with her teeth knocked out. All of her personal property is taken, shoes, book bag, cell phone, ring. They are all taken from her.

So let's balance that atrocity against that mitigation which weighs nothing. And you all swore to uphold

your oath in this case that you would follow Judge Dinkelacker's instructions. I know it is not pleasant. It is no fun for anybody up here. But you swore to do it.

The other verdict form is for Casonya in this case, is that he did this in a continuing course of conduct to kill two or more people. Obviously.

He murdered Casonya. He murdered Kimya. He murdered Mary Joe. He murdered Esme. The human carnage that he committed is almost unimaginable. And if you compare it to mitigation, it is not even a close call.

The next two verdicts you will consider are the aggravated murder of Esme K[redacted].

First, again, the continuing course of conduct. He murdered Casonya, he murdered Mary Joe, he murdered Kimya, he murdered Esme. If you weigh that against the paltry amount of mitigation, the answer is very clear.

Mark brought this up on

Cross-examination. I want to show you something. I can't believe anybody -- and that psychologist is an educated woman, would believe this is some kind of purification ritual.

The only place Kirkland burned Esme were areas where they are going to find DNA. Her hand, her vagina, the only areas burned. He didn't have an accelerant. He couldn't burn the whole body. So he took his choice of where to burn her.

So Esme is out for a jog. It is about 3:30, 4 o'clock in the afternoon. And she is brutally attacked by him.

He tries to have vaginal intercourse with this little baby. I call her a baby. I mean, my kids are older now. Esme at 13 is a baby, to me.

He is 6'2" and 220 pounds. And he tears her vagina trying to force himself inside of her. He also tears her anus. He can't get inside of her. And -- excuse my language -- but when he is talking to the detective, he says, I fuck

like a champ. Really? And he can't get inside her, so what's he decide to do? He says to the detectives, he has to finish, so he makes this little girl masturbate him. What kind of a human being does something like that?

But he is not done, not Kirkland. You guys are weighing aggravation and mitigation. You know what he is weighing right now with Esme? Esme is doing and saying anything to get away from him. And he considers it consent. Really?

Don't leave your common sense at the courthouse steps, okay. You heard a lot of gobbledegook all week. His brain, all this other stuff. He is a college graduate, okay. He is a serial killer. So he is weighing, gee, um, do I let her go back to her mom and her dad? Do I do that? And maybe go back to jail for what I just did?

No, let's just strangle her. Let's do that. That's a good idea.

That's what he does. And he does it slowly. He can't get a good grip on

her from the front. Remember that statement he made? He can't get a good grip? So he sits on her back. Takes a rag out of his back pocket, twirls it up, and you saw the striations on Esme's neck, and slowly strangles her to death. And he talks about her little fingers digging into the ground as she vomits and gags.

What mitigation could possibly outweigh that?

He did the same thing to Casonya. Same thing. What could possibly outweigh that?

You know, he was raised in the same family with three other siblings. This abusive alcoholic. He is raised in the same family. Guess what they got? A traffic ticket. That's it. One traffic ticket.

There is no police reports of domestic violence. Nothing. But this abusive household is what he wants to hang his hat on, and there is no one saying that. Wasn't on the witness

stand. It is all from him, a serial killer. That's who says it.

You know, if we had an actual scale here to weigh aggravation versus mitigation, the aggravating side would be so heavy, it would drive through three floors of granite through this courtroom right now. That's how heavy it would be. Compared to that mitigation, that mitigation is a joke. It is almost insulting. I know they are doing their best, trust me. I get it. They are good lawyers. They are doing all they can do. But it is a joke.

MR. WENDEL: I must object to that.

THE COURT: Your objection is noted. It is overruled.

MR. DETERS: The entire strategy here is to find one juror who won't follow their oath. One. That's what they want.

You all swore to follow your oath, all of you. You can end this now. The police did their job. We did our job. The Judge has done his. Now do yours.

And tell the Judge the aggravation clearly outweighs the mitigation.

Thank you.

THE COURT: Thank you, Mr. Deters.

Everybody okay, ladies and gentlemen? You can stand up and stretch.

I should tell you by law I have to read this to you in open court. These documents will go back with you in the jury room. You paid good attention so far. One more time through this. In case you feel like you missed something, or whatever, you will have these exact jury charges with you back in the jury room.

Members of the jury, you have heard the evidence and the arguments of counsel and now it is my duty to instruct you on the law that is applicable to this proceeding.

The Court and the jury have separate and distinct functions. It is your function to decide the disputed questions of fact and determine what sentence should be imposed upon Anthony