Filing # 43162937 E-Filed 06/23/2016 04:10:33 PM

RECEIVED, 06/23/2016 04:13:37 PM, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

PAUL B. JOHNSON, :

Appellant, :

vs. : Case No. SC14-1175

STATE OF FLORIDA, :

Appellee. :

:

NOTICE OF SUPPLEMENTAL AUTHORITY

Appellant, PAUL B. JOHNSON, through his undersigned counsel, files this notice of the following supplemental authority, with regard to the arguments in his supplemental brief addressing Hurst v. Florida, 136 S.Ct. 616 (2016), and for the purpose of showing that the Ohio and federal death penalty schemes differ from Florida's, in that in those capital sentencing systems death eligibility and death selection are determined separately (and weighing the aggravators against the mitigators is part of the selection process), while in Florida (at least under the statutory system under which Paul Johnson was sentenced to death, see Hurst, 136 S.Ct. at 622) the weighing of aggravators against mitigators is essential to the determination of death eligibility:

> State v. Belton, case no. 2012-0902, 2016 WL 1592786 (Ohio, April 20,2016), paragraph 59 (emphasis in opinion):
>
> Ohio's capital-sentencing scheme is unlike the laws at issue in Ring and Hurst. In Ohio, a capital case does not proceed to the sentencing phase

until after the fact-finder has found a defendant guilty of one or more aggravating circumstances. *See* R.C. 2929.03(D); R.C. 2929.04(B) and (C); State v. Thompson, 141 Ohio St.3d 254, 2014-Ohio-4751,23 N.E. 3d 1096, [paragraph]147. Because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment. Moreover, in Ohio, if a defendant is tried by a jury, then the judge cannot impose a sentence of death unless the jury has entered a unanimous verdict for a death sentence. R.C. 2929.03(D)(2).

State v. Gumm, 653 N.E.2d 253,260 (Ohio 1995) (describing Ohio death penalty scheme)

State v. Wogenstahl, 662 N.E.2d 311, 319 (Ohio, 1995) (describing Ohio death penalty scheme)

Ohio Revised Code §2929.03

Ohio Revised Code §2929.04

United States v. Gabrion, 719 F.3d 511, 531-32 (6th Cir. 2013) (citing Jones v. United States, 527 U.S. 373, 376-77 (1999))

Jones v. United States, 527 U.S.373, 376-79 (1999) (describing federal death penalty scheme)

United States v. Umana, 707 F. Supp.2d 621, 629 (W.D.N.C. 2010) (describing federal death penalty scheme)

18 United States Code §3591

18 United States Code §3592

18 United States Code §3593

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to Assistant Attorney General Timothy A. Freeland at Capapp@myfloridalegal.com, on this 23rd day of June, 2016.

Respectfully submitted,

Steven L. Bolotin

/S/STEVEN L. BOLOTIN
Assistant Public Defender
Florida Bar Number 236365
P.O. Box 9000 - Drawer PD
Bartow, FL 33831
sbolotin@pd10.org
jingoglia@pd10.org
mlinton@pd10.org
appealfilings@pd10.org

HOWARD L. "REX" DIMMIG, II
Public Defender
Tenth Judicial Circuit
(863) 534-4200

2016 WL 1592786
Supreme Court of Ohio.

The STATE of Ohio, Appellee,
v.
BELTON, Appellant.

No. 2012–0902.
|
Submitted Jan. 26, 2016.
|
Decided April 20, 2016.

Synopsis

Background: Defendant was convicted on no-contest plea following hearing in the Court of Common Pleas, Lucas County, No. CR200802934, of capital murder and aggravated robbery and was sentenced to death. Defendant appealed as of right.

Holdings: The Supreme Court, Kennedy, J., held that:

[1] amended sentencing statute requiring that trial court impose punishment using minimum sanctions that it determined accomplished goals of sentencing did not implicitly repeal death penalty statutes;

[2] statutory scheme governing hearing before three-judge panel on plea of no contest to capital offense did not implicate defendant's right to jury trial under *Apprendi* and *Ring*;

[3] defendant's Eighth Amendment challenges to lethal injection protocol were not appropriate matters for consideration on direct appeal;

[4] defendant did not lack state court remedies to challenge constitutionality, under Eighth Amendment, of Ohio's lethal injection protocol;

[5] prospective juror's stated opposition to death penalty was appropriate ground for challenge for cause;

[6] defendant bore burden to prove existence of any mitigating factors by preponderance of evidence;

[7] trial court was under no obligation to review prosecutor's complete file on case in order to determine whether State complied with its *Brady* obligations;

[8] defendant's confession was knowing, voluntary, and intelligent;

[9] defendant was not entitled to relief based on claims of ineffective assistance of counsel;

[10] evidence supported finding of aggravating circumstance;

[11] aggravating factor outweighed mitigating factors; and

[12] death sentence was proportionate to death sentences approved in similar cases involving murder committed during course of robbery.

Affirmed.

O'Neill, J., concurred in part and dissented in part.

West Headnotes (70)

[1] Sentencing and Punishment
The Death Penalty

Amended sentencing statute requiring that trial court impose punishment using minimum sanctions that it determined accomplished goals of sentencing, namely, to protect public from future crime and to punish offender, without imposing unnecessary burden on State or local government resources, did not implicitly repeal statutes authorizing imposition of death penalty, based on defendant's claim that life without possibility of parole would achieve same goals as death sentence at fraction of cost; costs of execution versus lifetime incarceration was only one factor for trial court to consider, defendant acknowledged ongoing debate over whether death sentences had more of deterrent effect on homicides than long-term prison sentences did, and therefore, sentencing court could determine that death penalty was minimum

sanction in certain case, legislature's failure to expressly repeal death penalty indicated belief that death might be appropriate penalty in some cases, and while rehabilitation was factor for trial court to consider, it was not dispositive. R.C. §§ 2929.03, 2929.04, 2929.11(A).

Cases that cite this headnote

[2] **Statutes**
⇦ By Inconsistent or Repugnant Statute

If two affirmative statutes exist, one is not to be construed to repeal the other by implication unless they can be reconciled by no mode of interpretation.

Cases that cite this headnote

[3] **Criminal Law**
⇦ Right to Plead Guilty;Mental Competence

A criminal defendant does not have a constitutional right to enter a guilty plea or to have it accepted by the court.

Cases that cite this headnote

[4] **Criminal Law**
⇦ Plea of No Contest or Nolo Contendere

There is no absolute right to enter a no contest plea.

Cases that cite this headnote

[5] **Criminal Law**
⇦ Plea of Guilty

Criminal Law
⇦ Requisites and Proceedings for Entry

State law governs the exercise of the ability to plead guilty, and a defendant may plead no contest only with the consent of the court.

Cases that cite this headnote

[6] **Criminal Law**
⇦ Waiver of Rights, Defenses, and Objections

Criminal Law
⇦ Nature and Effect of Plea

In most cases, a defendant's plea of no contest or guilty to a felony amounts to a waiver of trial, meaning that the State need not present evidence of guilt.

Cases that cite this headnote

[7] **Criminal Law**
⇦ Statutory Provisions

Criminal Law
⇦ Requisites and Proceedings for Entry

Criminal Law
⇦ Requisites and Proceedings for Entry

In a capital case, before a defendant's plea of guilty or no contest to a capital offense may be accepted, a three-judge panel must examine witnesses, hear any other evidence properly presented by the prosecution, and unanimously determine whether the defendant is guilty beyond a reasonable doubt of aggravated murder or of a lesser offense. R.C. § 2945.06; Rules Crim.Proc., Rule 11(C)(3) .

Cases that cite this headnote

[8] **Jury**
⇦ On Demurrer or Plea of Guilty

Sentencing and Punishment
⇦ Matters Related to Jury

When a capital defendant waives a jury and enters a no-contest plea, a three-judge panel determines both guilt and the appropriate sentence; the statutory scheme governing such a plea contains no provisions permitting an accused charged with a capital offense to waive a jury, request that a three-judge panel determine guilt upon a plea of guilty, and then have a jury decide the penalty. R.C. § 2945.06; Rules Crim.Proc., Rule 11(C)(3).

Cases that cite this headnote

[9] **Jury**
On Demurrer or Plea of Guilty

Sentencing and Punishment
Matters Related to Jury

When a capital defendant has waived his right to jury trial and entered a no contest plea to the capital offense, trial courts are not at liberty to create a nonstatutory procedure to convene a jury for sentencing purposes. R.C. § 2945.06; Rules Crim.Proc., Rule 11(C)(3).

Cases that cite this headnote

[10] **Jury**
Statutory Provisions

Statutory scheme requiring three-judge panel to make determination of guilt and appropriate sentence upon defendant's entry of guilty or no contest plea to capital murder, which required panel to first make findings during guilt phase as to existence of aggravating factor, and then weigh aggravating and mitigating factors during penalty phase, did not implicate defendant's right to jury trial under *Apprendi* and *Ring*; case did not proceed to sentencing until after panel found defendant guilty of one or more aggravating circumstances, and therefore, it was not possible to make factual finding during penalty phase that exposed defendant to greater punishment. U.S.C.A. Const.Amend. 6; R.C. §§ 2929.03(D), 2929.04(B, C), 2945.06; Rules Crim.Proc., Rule 11(C)(3).

Cases that cite this headnote

[11] **Jury**
Sentencing Matters

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[12] **Jury**
Death Penalty

Once an aggravating factor has been found during the guilt phase of a hearing before a three-judge panel following the defendant's entry of a plea of guilty or no contest to a capital offense, the weighing of the aggravating factors against the mitigating factors is not a fact-finding process subject to the Sixth Amendment right to jury trial, because these determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination; instead, the weighing process amounts to a complex moral judgment about what penalty to impose upon a defendant who is already death-penalty eligible. U.S.C.A. Const.Amend. 6; R.C. § 2929.03(D).

Cases that cite this headnote

[13] **Jury**
Statutory Provisions

Statutory scheme governing sentencing for capital murder upon entry of guilty or no contest plea to offense, which required three-judge panel to make findings as to existence of any aggravating factors during guilt phase and then balance aggravating and mitigating factors during penalty phase, was consistent with United States Supreme Court's holding in *Lockett v. Ohio* that States could not preclude "sentencer" in capital case from considering "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"; nothing in *Lockett* required that defendant who waived right to jury trial by entering plea of guilty or no contest be granted right to jury trial on issue of mitigation and weighing of aggravating and mitigating factors at sentencing. U.S.C.A. Const.Amend. 6; R.C. §§ 2929.03(D), 2929.04(B, C), 2945.06; Rules Crim.Proc., Rule 11(C)(3).

Cases that cite this headnote

[14] **Sentencing and Punishment**
Remorse, Acceptance of Responsibility, and Cooperation

Evidence that a capital defendant accepted responsibility by entering a guilty plea is a relevant mitigating factor at sentencing. R.C. § 2929.04(B)(7).

Cases that cite this headnote

[15] **Criminal Law**
Requisites and Proceedings for Entry

Criminal Law
Requisites and Proceedings for Entry

Statutory scheme governing entry of guilty or no contest plea to capital murder, which required three-judge panel to determine existence of any factors in aggravation during guilt phase, and then weigh aggravating and mitigating factors during penalty phase, did not violate defendant's constitutional right to present defense, simply because he would present his case in mitigation to panel instead of jury. U.S.C.A. Const.Amend. 14; R.C. §§ 2929.03(D), 2929.04(B, C), 2945.06; Rules Crim.Proc., Rule 11(C)(3).

Cases that cite this headnote

[16] **Criminal Law**
Necessity and Scope of Proof

The United States Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense, meaning that they have a right to present relevant testimony and other evidence. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[17] **Criminal Law**
Sentence or Judgment

Defendant's Eighth Amendment challenges to lethal injection protocol, specifically, training of technicians performing procedure, reliability of any back up procedures in event of any difficulty, and efficacy of single drug protocol, were not appropriate matters for consideration on direct appeal from no contest plea to capital murder, where claims required consideration of evidence outside record. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[18] **Criminal Law**
Sentence and Punishment

Capital defendant did not lack state court remedies to challenge constitutionality, under Eighth Amendment, of Ohio's lethal injection protocol; postconviction remedies were available. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[19] **Sentencing and Punishment**
Procedure

Even assuming lack of available remedy in state court to challenge constitutionality of Ohio's lethal injection protocol, under Eighth Amendment, absence of state court remedies did not, in and of itself, prove that lethal injection protocol amounted to cruel and unusual punishment; lack of state court remedies implicated due process concerns, not substantive Eighth Amendment rights. U.S.C.A. Const.Amends. 8, 14.

Cases that cite this headnote

[20] **Sentencing and Punishment**
Proportionality

Sentencing and Punishment
Torture

The Eighth Amendment addresses two aspects of a criminal sentence: (1) it prohibits specific torturous methods of execution, and (2) it requires proportionality between the crime and the punishment. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[21] **Criminal Law**
Issues Considered

Capital defendants who waive their right to a jury and enter a guilty plea cannot challenge pretrial rulings on appeal; instead, they are limited to attacking the validity of the plea itself.

Cases that cite this headnote

[22] **Criminal Law**
Issues Considered

Capital defendants who waive their right to a jury and enter a no-contest plea may challenge pretrial rulings. Rules Crim.Proc., Rule 12(I).

Cases that cite this headnote

[23] **Jury**
Punishment Prescribed for Offense

In prosecution for capital murder, prospective juror's stated opposition to death penalty was appropriate ground for challenge for cause.

Cases that cite this headnote

[24] **Jury**
Punishment Prescribed for Offense

A prospective juror may be excused for cause in a capital murder case if the juror's views on the death penalty would prevent or substantially impair the performance of his duties.

Cases that cite this headnote

[25] **Jury**
Punishment Prescribed for Offense

Even when a for-cause challenge against a prospective juror is not warranted in a capital murder case, the prosecutor may use peremptories to eliminate jurors based on opposition to the death penalty.

Cases that cite this headnote

[26] **Sentencing and Punishment**
Other Matters Related to Offender

Conditions of confinement in maximum security prison did not constitute factor in mitigation for jury to consider in sentencing for capital murder.

Cases that cite this headnote

[27] **Sentencing and Punishment**
Mitigating Circumstances in General

"Mitigating factors" relevant to sentencing for capital murder are facts about the defendant's character, background, or record, or the circumstances of the offense, that may call for a penalty less than death, but for Eighth Amendment purposes, this definition of "mitigating factors" does not include evidence of potential prison sentences, as alternative to death, or evidence about future conditions of confinement. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[28] **Sentencing and Punishment**
Degree of Proof

In sentencing for capital murder, the prosecutor bears the burden to prove beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors; however, the defendant bears the burden to prove the existence of any mitigating factors by a preponderance of the evidence.

Cases that cite this headnote

[29] **Sentencing and Punishment**
Sympathy and Mercy

Request for mercy was not mitigating factor, for purposes of sentencing for capital murder.

Cases that cite this headnote

[30] **Sentencing and Punishment**
Arguments and Conduct of Counsel

State, not defendant, had right to present final closing arguments to jury in sentencing phase of capital murder.

Cases that cite this headnote

[31] **Sentencing and Punishment**
Arguments and Conduct of Counsel

During the sentencing phase of a capital trial the State, having the burden of proving that aggravating circumstances outweigh the mitigating factors, has the right to open and close arguments to the jury.

Cases that cite this headnote

[32] **Criminal Law**
Burden of Showing Error

Criminal Law
Presumption as to Effect of Error; Burden

Any claim that the trial court erred in following the statutorily mandated order of proceedings must sustain a heavy burden to demonstrate the unfairness and prejudice of following that order.

Cases that cite this headnote

[33] **Sentencing and Punishment**
Admissibility

During penalty phase of capital murder proceeding, after defendant entered no contest plea to offense, State was not limited to evidence of aggravating factors found during guilt phase of proceeding before three-judge panel; rather, State was permitted to rely on evidence relevant to nature and circumstances of those aggravating factors for which he was found guilty, and evidence rebutting mitigation evidence put forth by defendant.

Cases that cite this headnote

[34] **Sentencing and Punishment**
Arguments and Conduct of Counsel

During penalty phase of capital murder proceeding before three-judge panel, following entry of no-contest plea to offense, prosecutor was not permitted to refer to nature and circumstances of killing unless and until defendant utilized nature and circumstances of offense as mitigating factor. R.C. § 2929.04(B, C).

Cases that cite this headnote

[35] **Criminal Law**
Sanctions for Failure to Disclose

Trial court was under no obligation to review prosecutor's complete file on case in order to determine whether State complied with its *Brady* obligations, in prosecution for capital murder, absent any allegation of *Brady* violation.

Cases that cite this headnote

[36] **Criminal Law**
Promises as to Sentence

Criminal Law
Threats; Fear of Injury

Defendant's confession to murder of convenience store clerk was knowing, voluntary, and intelligent, despite defendant's claim that confession was coerced by detectives' promises of leniency and threats of death penalty; defendant was 22 years old and had eleventh grade education, he was offered beverages before and during interviews and was permitted to smoke, he slept in period between arrest and first interview, he did not have trouble communicating and answered questions appropriately, detectives's suggestion that confession might be defendant's "saving grace" and that court might show mercy was not promise of leniency nor promise of death sentence if he did not cooperate, and they did not claim to have any authority to decide how defendant would be charged. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[37] **Criminal Law**
Review De Novo
Criminal Law
Evidence Wrongfully Obtained

Review of a trial court's ruling on a motion to suppress is a mixed question of law and fact: the appellate court accepts the trial court's factual findings as long as they are supported by competent, credible evidence, but it reviews de novo the application of the law to these facts.

Cases that cite this headnote

[38] **Criminal Law**
Form and Sufficiency
Criminal Law
Form and Sufficiency in General

Before police officers may question a suspect in a custodial setting, the Fifth Amendment requires them to warn the suspect that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires; the suspect may then knowingly and intelligently waive these rights and agree to answer questions or make a statement. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[39] **Criminal Law**
Form and Sufficiency in General

An express written or oral statement of waiver of the right to remain silent or of the Fifth Amendment right to counsel is usually strong proof of the validity of that waiver. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[40] **Criminal Law**
Waiver of Rights

If a defendant challenges a confession following the waiver of *Miranda* rights as involuntary, the State must prove a knowing, intelligent, and voluntary waiver by a preponderance of evidence. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[41] **Criminal Law**
What Constitutes Voluntary Statement, Admission, or Confession

To determine whether a confession was involuntary, the court considers the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement; however, the court will not conclude that a *Miranda* waiver was involuntary unless there is evidence of police coercion, such as physical abuse, threats, or deprivation of food, medical treatment, or sleep. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[42] **Criminal Law**
Coercion
Criminal Law
Promises;Hope of Benefit

A court may find coercion when law-enforcement officers persuade or deceive the accused, with false promises or information, into relinquishing his *Miranda* rights and responding to questions; however, the presence of promises does not as a matter of law, render a confession involuntary. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[43] **Criminal Law**
Admonition to Tell the Truth in General
Criminal Law

Coercion

Police officers may discuss the advantages of telling the truth, advise suspects that cooperation will be considered, or even suggest that a court may be lenient with a truthful defendant, without raising concerns that a confession is coerced. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[44] **Criminal Law**
Admonition to Tell the Truth in General

Admonitions by law enforcement for a suspect to tell the truth are considered to be neither threats nor promises that would render a confession involuntary. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[45] **Criminal Law**
Coercion

It is not unduly coercive for a law enforcement officer to mention potential punishments during an interview with a suspect. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[46] **Criminal Law**
Knowledge, Experience, and Skill

Detective was qualified to testify as fingerprint expert, in guilt phase of hearing on no-contest plea to capital murder; he had testified more than 20 times as fingerprint expert, he had collected fingerprints "hundreds of times" and made thousands of comparisons over period of 16 years, he completed 40-hour FBI course on fingerprinting, he studied fingerprint analysis as part of 80-hour crime scene course, he was member of Ohio Identification Officers for many years and regularly attended that organization's annual training updates, and although he had not attended any fingerprint training for three years and indicated that he was not aware of type of standards for collection and comparison of prints, these limitations went to weight and credibility of detective's testimony, not admissibility. Rules of Evid., Rule 702.

Cases that cite this headnote

[47] **Criminal Law**
Reception and Admissibility of Evidence

Criminal Law
Admissibility

Criminal Law
Rulings as to Evidence in General

Criminal Law
Opinion Evidence

A trial court's ruling on evidentiary issues, including the admissibility of expert opinions, will not be reversed on appeal absent an abuse of discretion and proof of material prejudice.

Cases that cite this headnote

[48] **Criminal Law**
Subjects of Expert Testimony

Criminal Law
Basis of Opinion

The trial judge has a special obligation to ensure that scientific testimony is not only relevant but reliable. Rules of Evid., Rule 702.

Cases that cite this headnote

[49] **Criminal Law**
Knowledge, Experience, and Skill

A witness need not have complete knowledge of the field in question to qualify as an expert; it is sufficient that the knowledge the expert possessed about scientific evidence at issue would aid the trier of fact in performing its fact-finding function. Rules of Evid., Rule 702.

Cases that cite this headnote

[50] **Criminal Law**
Knowledge, Experience, and Skill

A witness can have expert status without having completed special education or

receiving a certification. Rules of Evid., Rule 702.

Cases that cite this headnote

[51] **Criminal Law**
Fingerprints

Detective's testimony as expert on science of fingerprint analysis was reliable, as prerequisite to admission, in guilt phase of no-contest plea to capital murder. Rules of Evid., Rule 702(C).

Cases that cite this headnote

[52] **Criminal Law**
Cause and Effect

Criminal Law
Ballistics and Weapons

Coroner's testimony about distance from which victim was shot in back of head, victim's injuries, length of time it took for victim to die after being shot, and what he must have experienced during that time, was relevant to establish facts and circumstances of murder, as required for three-judge panel to make determination of guilt following defendant's entry of no-contest plea to aggravated murder, and State was not limited to presenting evidence necessary to establish factual basis of plea. R.C. § 2945.06.

Cases that cite this headnote

[53] **Constitutional Law**
Prosecutor

Criminal Law
Duties and Obligations of Prosecuting Attorneys

When evaluating a prosecutorial-misconduct claim, the relevant question is whether the prosecutor's conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process, and to answer that question, court considers two factors: (1) whether the conduct was improper and (2) if so, whether it prejudicially affected the defendant's substantial rights. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[54] **Criminal Law**
Requisites and Proceedings for Entry

Criminal Law
Requisites and Proceedings for Entry

When a defendant enters a plea of guilty or no contest to a capital offense, the prosecutor is required to present sufficient evidence at the plea hearing to prove both aggravated murder and the capital specifications. R.C. § 2945.06.

Cases that cite this headnote

[55] **Criminal Law**
Requisites and Proceedings for Entry

Criminal Law
Requisites and Proceedings for Entry

When the defendant has entered a plea of guilty or no contest to a capital offense, the prosecutor is not limited to offering only that quantum of evidence necessary to establish a factual basis for the plea, so as to allow the three-judge panel to make a determination of guilt during the plea hearing; instead, the prosecutor may offer any evidence that is relevant to an element of the charged offense and is otherwise admissible. R.C. § 2945.06.

Cases that cite this headnote

[56] **Criminal Law**
Deficient Representation and Prejudice in General

To establish ineffective assistance of counsel, the defendant must (1) show that counsel's performance fell below an objective standard of reasonableness, as determined by prevailing professional norms, and (2) demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[57] **Criminal Law**
Presumptions and Burden of Proof in General

When performing a *Strickland* analysis of a claim of ineffective assistance of counsel, the court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[58] **Criminal Law**
Jury Selection and Composition

Defense counsel's advice for defendant to waive right to jury trial on charges for capital murder and aggravated robbery was not objectively unreasonable, as required to support claim of ineffective assistance of counsel; State's evidence included video recordings of defendant's confession and shooting itself, latter recording depicted victim's cooperation with robbery and defendant's proximity to victim when he shot victim in back of head, and counsel may have reasonably concluded that three-judge panel would be less likely to be emotionally swayed by evidence than jury. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[59] **Criminal Law**
Preservation of Error for Appeal

Defendant was not entitled to relief from convictions and sentences for capital murder and aggravated robbery based on claim that counsel was ineffective for failure to object during hearing before three-judge panel, following entry of no contest plea, and therefore, failure to preserve any objections for appellate review, absent citation in record or identification of any example of issue that counsel failed to preserve. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[60] **Criminal Law**
Argument and Comments

Defense counsel's decision to waive opening statement during mitigation phase of capital murder trial before three-judge panel, after prosecutor waived opening statement, was matter of reasonable trial strategy that did not support claim of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[61] **Criminal Law**
Adequacy of Investigation of Mitigating Circumstances

Defense counsel's decision not to hire neuropsychologist to perform neuroimaging and/or neuropsychological examination of defendant to determine whether defendant had suffered from brain impairment was matter of reasonable trial strategy that did not support claim of ineffective assistance of counsel, during mitigation phase of trial before three-judge panel after defendant entered no-contest plea to aggravated murder and aggravated robbery, even though counsel secured funding for neuroimage of defendant's brain; counsel consulted with neuropsychologist before deciding not to pursue evaluation, counsel may have been concerned that evaluation would yield negative results, which would damage defendant's mitigation case, and defendant's psychologist who recommended evaluation did not believe that indicators of potential brain impairment were strong enough to insist on evaluation. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[62] **Criminal Law**
Adequacy of Investigation of Mitigating Circumstances

Defendant was not prejudiced by counsel's failure to secure substance abuse expert to

testify as to effects of drugs and alcohol on defendant's life, as required to support claim of ineffective assistance of counsel during mitigation phase of trial before three-judge panel after defendant entered no-contest plea to capital murder and aggravated robbery, where such evidence was introduced through testimony of defendant's psychologist, and defendant provided no indication as to how psychologist's testimony on subject was inadequate nor proffered any evidence as to what substance-abuse expert would have provided. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[63] **Criminal Law**
⇦ Experts;Opinion Testimony

A defendant cannot establish ineffective assistance of counsel based on counsel's failure to secure an expert if counsel used alternative devices to fulfill the same functions as the expert assistance sought.

Cases that cite this headnote

[64] **Criminal Law**
⇦ Presentation of Evidence in Sentencing Phase

Defense counsel's decision to call forensic counselor on maximum security floor of prison where defendant was confined for three years prior to trial, who testified that defendant was polite and followed rules, was matter of reasonable trial strategy that did not support claim of ineffective assistance of counsel, during mitigation phase of hearing before three-judge panel following defendant's entry of no contest plea to capital murder and aggravated robbery, despite defendant's claim that counselor was impeached on cross-examination with evidence that defendant had been in fights and record indicating that defendant had been "hard placement," where counselor's testified that, to best of his knowledge, fights occurred soon after his arrest, testimony was consistent with defense mitigation argument that his behavior in prison improved over time as he adapted to environment, and State could have introduced same evidence regardless of whether counsel opened door to it by calling counselor to testify. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[65] **Criminal Law**
⇦ Presentation of Witnesses

Generally, trial counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court when considering a claim of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[66] **Criminal Law**
⇦ Grounds in General

The "cumulative error" doctrine provides that a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial-court error does not individually constitute cause for reversal.

Cases that cite this headnote

[67] **Sentencing and Punishment**
⇦ Scope of Review

Sentencing and Punishment
⇦ Proportionality

In conducting independent review of a death sentence, the Supreme Court must determine whether the evidence supports the finding of aggravating circumstances, whether the aggravating circumstances outweigh the mitigating factors, and whether the defendant's death sentence is proportionate to those affirmed in similar cases. R.C. § 2929.05(A).

Cases that cite this headnote

[68] **Sentencing and Punishment**
Sufficiency

Evidence was sufficient to support finding of aggravating factor that defendant, as principal offender, killed victim during course of aggravated robbery, for purposes of sentencing for capital murder; victim was working as convenience store clerk when defendant entered store, store's security camera videos showed single armed suspect approach victim at counter, confront victim with gun, take money and other items, and then shoot victim at close range in back of head, and defendant confessed to crimes during video recorded interviews with detectives. R.C. § 2929.04(A)(7).

Cases that cite this headnote

[69] **Sentencing and Punishment**
Comparison with Dispositions in Other Cases

In penalty phase of hearing before three-judge panel after defendant entered no contest plea to capital murder and aggravated robbery, aggravating factors that defendant, as principal offender, killed victim, a convenience store clerk, during course of aggravated robbery in which that he shot victim in back of head after victim had fully cooperated with robbery, and then went shopping for shoes after murder, outweighed mitigating factors including defendant's difficult childhood, physical abuse by father, defendant's, relative lack of significant criminal history, diagnoses of mental health disorders, and progressively good behavior in prison, as required to support imposition of death sentence as appropriate punishment. R.C. § 2929.04(B).

Cases that cite this headnote

[70] **Sentencing and Punishment**
Killing While Committing Other Offense or in Course of Criminal Conduct
Sentencing and Punishment
Vileness, Heinousness, or Atrocity

Death sentence for capital murder upon defendant's entry of no-contest plea, based on findings that defendant had entered convenience store where victim was working, confronted victim with gun, then shot victim in back of head after victim fully cooperated, was proportionate to death sentences approved in similar cases involving murders of victims during course of robbery. R.C. § 2929.05(A).

Cases that cite this headnote

Attorneys and Law Firms

Julia R. Bates, Lucas County Prosecuting Attorney, and Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Spiros P. Cocoves and Jeffrey P. Nunnari, Toledo, for appellant.

Opinion

KENNEDY, J.

***1 KENNEDY, J.**

{¶ 1} In 2008, defendant-appellant, Anthony Belton, robbed a gas-station convenience store and murdered Matthew Dugan, the attendant working in the store. Belton entered a no-contest plea to charges of aggravated robbery and aggravated murder with capital specifications, and a three-judge panel sentenced him to death.

{¶ 2} Belton's appeal of right is now before us. For the reasons explained below, we reject each of Belton's propositions of law and affirm his convictions and death sentence.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Pretrial Background

{¶ 3} In August 2008, the state charged Belton with one count of aggravated murder, R.C. 2903.01(B) and (F), and two counts of aggravated robbery, R.C. 2911.01(A). The aggravated-murder charge carried two death specifications, R.C. 2929.04(A)(3) (murder to escape detection) and 2929.04(A)(7) (felony murder). In addition, all three counts carried a firearm specification, R.C. 2941.145.

{¶ 4} The trial was originally scheduled for March 2, 2009. However, the trial court granted several continuances so that the parties would have sufficient time to investigate, complete discovery, and consult experts.

{¶ 5} The trial was also delayed because the trial court devoted significant attention to three constitutional arguments raised by the defense. First, Belton's counsel filed a motion to suppress the statements Belton made to police on August 14, 2008. Second, Belton argued that R.C. 2929.03 and Crim.R. 11(C)(3) are unconstitutional because they do not allow a capital defendant to have a jury determine his or her sentence if the defendant enters a plea of guilty or no contest. [1] Finally, trial counsel sought discovery on a selective-prosecution claim. After briefing and oral argument, the trial court rejected Belton's claims and his discovery request.

{¶ 6} In April 2012, Belton waived his right to a jury and entered a plea of no contest to all charges. The trial court convened a three-judge panel to conduct a plea hearing on April 2, 2012.

B. Evidence Presented at the Plea Hearing

1. The State's Evidence

a. The robbery and murder

{¶ 7} On August 13, 2008, 34–year–old Matthew Dugan was working the night shift at a BP carryout and service station located at the intersection of Secor and Dorr Streets in Toledo. Four store security cameras were operational during Dugan's shift.

{¶ 8} Security recordings show a man entering the carryout at 6:53 a.m. [2] The man, who was wearing a dark hooded jacket and appeared to be African–American, left the store when another customer entered. At 6:55 a.m., the man reentered the store, selected two bottled drinks from the cooler, and brought them to the checkout counter. At that point, another customer entered the store, and the man left again. Dugan helped the other customer, then returned the bottled drinks to the cooler.

{¶ 9} At 7:00 a.m., the man entered the store a third time. He again selected two drinks and walked to the counter. Dugan began to ring up the sale, then turned around to get something from the wall behind the counter. When Dugan turned back around, the man was pointing a handgun at him.

*2 {¶ 10} The recording shows Dugan leap back, raising his hands. Dugan opened the register, removed bills from the drawer, and gave them to the man. Then Dugan retrieved some items from the wall behind the counter for the man. The man gestured toward something else behind Dugan, and Dugan turned around. The man then leaned forward, raised the gun, and fired at the back of Dugan's head. Dugan fell to the floor, and the shooter left the store.

{¶ 11} Recordings indicate that several customers entered and left the carryout after Dugan was shot, apparently without noticing his body behind the counter. Customer Tiffany Greenlee testified that she intended to purchase coffee and a muffin from the carryout that morning, but she could not find an employee to ring up her sale. Greenlee set her items on the counter and left. On her way out, Greenlee looked into the store window and saw a man on the floor behind the counter, lying in a pool of blood. Greenlee called 9–1–1 at 7:40 a.m.

b. Investigation

{¶ 12} Police quickly responded and secured the scene. Police identified the victim as Dugan. The owner of the carryout, Samuel Baiz, informed police that $600 and several prepaid phone cards were missing from the store.

{¶ 13} Detective William Goetz recovered a spent 9 mm shell casing near the cash register and a spent projectile two to three feet from Dugan's body. Police also photographed and collected paper money and coins that were lying on the checkout counter, along with two perspiring drink bottles, a muffin, and a bottled

cappuccino. A printout from the cash register showed that the last transaction that morning was at 7:00 a.m.

{¶ 14} Detective Goetz reviewed the store's security recordings, and Detective Jeffrey Clark coordinated a canvass of the area. Clark testified that during the canvass, an employee at a nearby business gave him the name "Anthony Beltran" as a possible suspect.

{¶ 15} Clark returned to police headquarters, where he ran the name "Anthony Beltran" through a database. According to Clark, his search generated 11 names, including two African–American males. One of the two was Anthony Belton, whose last known address was 934 Cuthbert.

{¶ 16} Clark mentioned Belton's name to Detective Jason Lenhardt. Lenhardt told Clark that he knew Belton and had last seen him around 9:00 p.m. on August 12, 2008. He also informed Clark that Belton had recently moved to 1018 Ranch, which was located one-half mile from the BP. At the plea hearing, Lenhardt testified that on August 12, Belton had a Mohawk and was wearing a black hooded sweatshirt, gray cargo pants, and black sneakers (which matched the clothing worn by the perpetrator in the surveillance video).

{¶ 17} Clark obtained a search warrant for 1018 Ranch and executed the search with Lenhardt, Goetz, and other officers on the evening of August 13. Police found three men at the location: Belton, Dymon Bolton, and Christopher Wilson. Belton and Bolton were inside a 1997 Buick that was parked in front of the house. Lenhardt noted that Belton was still wearing gray cargo pants and black sneakers, but he was wearing a black t-shirt instead of the sweatshirt and his Mohawk had been shaved.

*3 {¶ 18} Detective Schriefer collected fingerprints from the Buick, and at Belton's request, Detective Lenhardt retrieved two pairs of new sneakers (and corresponding receipts) from the car. Lenhardt also seized two black hooded sweatshirts that were on top of a car parked in the driveway of 1018 Ranch.

{¶ 19} Officers took Belton, Bolton, and Wilson into custody and took them to headquarters.

c. Belton's interrogation and arrest

{¶ 20} Detectives Clark and Kermit Quinn interviewed Belton twice on August 14; the first interview began at 12:50 a.m. After executing a written waiver of his *Miranda* rights, *see Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), Belton provided several conflicting accounts of the events of August 13. The state introduced video recordings of Belton's interviews at the plea hearing.

{¶ 21} In response to police questioning, Belton initially denied involvement in the robbery or murder. He told detectives that he had shaved his Mohawk the night before because he lost a bet. Belton said that he had spent the night at his brothers' apartment. Around 9:30 a.m., he went to his own neighborhood to try to sell some drugs because he needed money. Belton noticed that there were a lot of police around, so he stopped by his mother's house, and she told him about the murder. Later, Belton went to Burger King and then the mall, where he bought sneakers.

{¶ 22} After further questioning, Belton admitted some involvement in the robbery. According to Belton, he was driving around with a man named "D," who suggested that Belton rob someone. D gave Belton a gun to use and Belton entered the BP twice. Each time, he picked up two sodas, but then left the store because customers came in and Belton was concerned that he might get caught. But Belton denied entering the store a third time. Instead, he said that D had entered the store, wearing a black hoodie, while Belton and Bolton waited in the car. After Belton heard a pop, he drove down the street to pick up D. D reported that he had shot the clerk in the back. The men went to Belton's brothers' apartment, where they counted and divided the money. Belton's share was $170.

{¶ 23} Finally, Belton admitted that he had shot the clerk. Belton said that he did not mean to kill Dugan, but "the gun went off" when he "went to put the safety on." At this point in the interview, Belton agreed to help Detectives Clark and Quinn find the firearm.

{¶ 24} Officers Lenhardt and Ruben Jurva transported Belton to 1018 Ranch around 3:00 or 4:00 a.m. Officer Jurva located a Hi–Point 9 mm handgun under a log in the yard. The firearm had three live cartridges in the magazine and one in the chamber. The grip on the gun was broken, and police were unable to locate the missing pieces.

{¶ 25} After returning to the station, Detectives Quinn and Clark interviewed Belton a second time, beginning at 5:34 a.m. Before questioning began, Clark reminded Belton of his *Miranda* rights.

*4 {¶ 26} During this interview, Belton admitted that he had owned the gun for about a month but claimed that he did not know it was loaded. With respect to the shooting, Belton insisted that he had only clicked the safety button on the weapon, but he had not pulled the trigger. He said that he regretted everything and that he was sorry he had killed Dugan. Belton also clarified that Wilson was not involved in the robbery. According to Belton, his cousin "TT"—later identified as Tony Bivens—drove him and Bolton to and from the BP. TT also drove Belton and Bolton to the mall later to buy shoes.

{¶ 27} At this point, detectives arrested Belton and searched him. Clark recovered $147 cash and ten Page Plus prepaid phone cards, with a total value of $130. (During the interviews, Belton had admitted to owning a prepaid Page Plus cell phone.) Police also seized Belton's clothing: a black t-shirt, gray pants, and black and gray Adidas tennis shoes.

d. Additional inculpatory statements

{¶ 28} Sergeant Corey Russell testified that Belton made additional inculpatory statements while he was in a holding cell at police headquarters on August 14, 2008. Russell was working at a desk near the cells where Belton, Bolton, and Wilson were being detained. According to Russell, he could easily overhear conversations between the men, who were in separate cells.

{¶ 29} Russell testified that while Bolton was being interviewed elsewhere, Belton made numerous statements to Wilson. According to Russell, Belton told Wilson that Bolton had "given him up." Belton then asserted that Bolton had told the officers "everything said in the car * * * word for word"; he asked Wilson to let everyone know that Bolton "couldn't keep his mouth shut." Ultimately, Russell said, Belton indicated that *he* was responsible and that he did not understand why officers were still holding Wilson.

e. Forensic evidence

{¶ 30} Dr. Diane Scala–Barnett, a Lucas County deputy coroner, performed an autopsy on Dugan's body. Scala–Barnett testified that Dugan died of a single gunshot wound to the back of the head and classified the death as a homicide. Based on stippling around the entrance wound, she opined that the gun had been fired 12 to 24 inches from Dugan's head. Moreover, after being shown the video of the shooting, Scala–Barnett was asked how the shooter had gotten so close to Dugan considering the size of the counter, and she said that the shooter had leaned forward across the counter to fire at close range. Finally, Scala–Barnett noted that the gunshot did not instantly kill Dugan.

{¶ 31} The state introduced evidence showing that the fingerprints lifted from the driver's-side rear door of the Buick were Belton's, but DNA evidence was inconclusive. Finally, the state introduced evidence about the operability of the Hi–Point 9 mm handgun recovered at 1018 Ranch. The president of Hi–Point Firearms, Thomas Deeb, determined that the gun was functional and performed acceptably. The state also submitted ballistics reports from BCI analyst Todd Wharton, who concluded that the recovered Hi–Point 9 mm handgun fired the cartridge found at the crime scene. In one report, Wharton noted that the firearm's "safety lever can easily become disengaged by routine handling" because it was missing part of the right grip plate, hold-open spring, and magazine catch cover/button. Even so, Wharton opined that the gun's trigger could not be pulled while the safety was engaged. Wharton stated that someone would have to exert 5.25 pounds of pressure on the trigger to fire the weapon.

2. Belton's Evidence

*5 {¶ 32} Belton submitted two exhibits in his defense: a curriculum vitae for John Nixon, a firearms expert with Athena Research and Consulting, L.L.C., and Nixon's report.

{¶ 33} Nixon's report described his analysis of the Hi–Point 9 mm handgun and opined that it was in average condition. He noted that "[t]he safety lever was unusually easy to operate," but nevertheless concluded that the

pistol would not fire if the safety was on. Nixon's report also states that the weapon did not fire when he tapped it on his lab bench in a variety of positions, though he noted that "more violent testing may well have resulted in accidental discharge."

{¶ 34} Nixon test-fired the gun 28 times and concluded that it required 3.384 to 5.733 pounds of force to pull the trigger. He did note that on the tenth test, the peak force and distance the trigger moved were significantly less than normal for the pistol. According to Nixon, the "practical effect" of this aberration would be "to surprise the shooter, and possibly result in an unintentional discharge of the pistol."

C. Verdict and Sentencing

{¶ 35} The three-judge panel found Belton guilty of the charged offenses.

{¶ 36} Before sentencing, the trial court merged the two capital specifications, the two aggravated-robbery counts, and the three firearm specifications. The state elected to proceed on the felony-murder specification, R.C. 2929.04(A)(7). After a mitigation hearing, the panel sentenced Belton to death for the aggravated murder, ten years for the aggravated robbery, and three years for the firearm specification, to be served consecutively.

{¶ 37} Belton now appeals, raising 20 propositions of law. We will address Belton's propositions out of order for ease of analysis.

II. ANALYSIS

A. Constitutional Challenges to Ohio's Death–Penalty Laws

1. Repeal of the Death Penalty

[1] {¶ 38} In proposition of law No. 2, Belton contends that his death sentence is unconstitutional because the 2011 amendment to R.C. 2929.11 "effectively repealed Ohio's death penalty." [3]

{¶ 39} R.C. Chapter 2929 addresses penalties and sentencing for criminal offenses. *See State v. Ford,* 128 Ohio St.3d 398, 2011-Ohio-765, 945 N.E.2d 498, ¶ 18. The specific provision at issue here is R.C. 2929.11(A), which articulates the overriding purposes of felony sentencing.

{¶ 40} From the time of its 1996 enactment until September 30, 2011, R.C. 2929.11(A) stated:

> A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

***6** Am.Sub.S.B. No. 2, 146 Ohio Laws, Part IV, 7136, 7457–7458.

{¶ 41} In 2011, the General Assembly enacted Am.Sub.H.B. 86, which modified the second purpose in R.C. 2929.11(A) as follows:

> A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender *using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources.* To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(Emphasis added.)

{¶ 42} According to Belton, R.C. 2929.11, as amended, irreconcilably conflicts with R.C. 2929.03 and 2929.04. R.C. 2929.03 and 2929.04 expressly provide for the death penalty, but Belton says that a death sentence will never satisfy R.C. 2929.11(A)'s requirement that it be the minimum sanction necessary to protect the public and punish an offender *without* imposing additional burdens on government resources. According to Belton, a sentence of life without parole achieves the same goals as a death sentence at a fraction of the cost.

{¶ 43} Belton then urges the court to resolve this conflict in favor of amended R.C. 2929.11 because (1) it was enacted later and (2) it reflects the General Assembly's "manifest intent" to repeal the death penalty. *See* R.C. 1.51 (reconciling conflicts between general and specific statutory provisions) and 1.52 (harmonizing irreconcilable statutes).

[2] {¶ 44} "[W]e have said many times [that] repeals by implication are not favored * * *." *Lucas Cty. Bd. of Commrs. v. Toledo,* 28 Ohio St.2d 214, 217, 277 N.E.2d 193 (1971). This "is understandable * * * since it may properly be assumed that the General Assembly had knowledge of the prior legislation when the subsequent legislation was enacted, and had the General Assembly intended to nullify such prior legislation it would have done so, by means of an express repeal thereof." *Cincinnati v. Thomas Soft Ice Cream, Inc.,* 52 Ohio St.2d 76, 79, 369 N.E.2d 778 (1977). Accordingly, if "two affirmative statutes exist one is not to be construed to repeal the other by implication unless they can be reconciled by *no* mode of interpretation." (Emphasis added.) *In re Hesse,* 93 Ohio St. 230, 234, 112 N.E. 511 (1915); *see also Henrich v. Hoffman,* 148 Ohio St. 23, 26, 72 N.E.2d 458 (1947) (if "two statutes are susceptible to a reasonable construction so that neither will be nullified, it is the duty of the court to so interpret them").

{¶ 45} Here, Belton cannot establish an irreconcilable conflict between R.C. 2929.11 and the statutory provisions governing the death penalty. Belton cites studies documenting the expenses associated with the death penalty and asserts that capital cases are "astronomically more expensive" than comparable noncapital cases. But, as R.C. 2929.11 states, cost is not the only relevant factor in determining a sentence. A court must also consider the minimum penalty necessary to sufficiently punish an offender. And Belton's assertion that the death penalty serves *no* penological function not otherwise served by a sentence of life without parole is, at best, questionable. Indeed, Belton's own brief acknowledges that there is ongoing debate over whether death sentences have more of a deterrent effect on homicides than long-term prison sentences do.

*7 {¶ 46} In some cases then, a sentencing court may determine that the death penalty *is,* in fact, "the minimum sanction[ ]" that will accomplish its purpose of "punish[ing] the offender." R.C. 2929.11(A). And the fact that the General Assembly has not expressly repealed R.C. 2929.03 and 2929.04 indicates its judgment that the death penalty may be appropriate in at least some aggravated-murder cases.

{¶ 47} Belton also asserts that the death penalty violates R.C. 2929.11(A) because "[d]eath does not rehabilitate" and under R.C. 2929.11(A), courts must consider rehabilitation when arriving at a sentence.[4] But R.C. 2929.11(A) states that a sentencing court should consider *four* factors: the need to incapacitate an offender, deterrence, rehabilitation, and restitution. Rehabilitation is only one of these considerations, and it is not dispositive of a court's sentencing determination.

{¶ 48} For these reasons, Belton has not met the heavy burden required to establish that the General Assembly implicitly repealed the death penalty in 2011. And because each of the constitutional and international-law challenges asserted in Belton's second proposition of law is premised on Ohio's repeal of the death penalty, we reject proposition of law No. 2.

2. Pleas and Capital Sentencing

{¶ 49} Under Ohio law, a capital defendant who enters a plea of guilty or no contest waives his right to have a jury determine both his guilt and his sentence. *See* R.C. 2945.06; Crim.R. 11(C)(3). In proposition of law No. 3, Belton asserts several constitutional challenges to this statutory scheme.

a. Pleading guilty or no contest to capital charges

[3] [4] [5] {¶ 50} "A criminal defendant does not have a constitutional right to enter a guilty plea or to have

it accepted by the court." *State ex rel. Bates v. Court of Appeals for the Sixth Appellate Dist.,* 130 Ohio St.3d 326, 2011-Ohio-5456, 958 N.E.2d 162, ¶ 27, citing *Santobello v. New York,* 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); *North Carolina v. Alford,* 400 U.S. 25, 38, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), fn. 11. Likewise, "there is no absolute right to enter a no contest plea." *State v. Jones,* 116 Ohio St.3d 211, 2007-Ohio-6093, 877 N.E.2d 677, fn. 2. "Instead, state law governs the exercise of the ability to plead guilty," *Bates* at ¶ 28, and a defendant may plead no contest only with the consent of the court, *Jones* at fn. 2.

[6] **[7]** {¶ 51} The process for entering a plea of guilty or no contest to charges of aggravated murder and related capital specifications is set forth in R.C. 2945.06 and Crim.R. 11(C)(3). In most cases, a defendant's plea of no contest or guilty to a felony amounts to a waiver of trial, meaning that the state need not present evidence of guilt. *State v. Post,* 32 Ohio St.3d 380, 392, 513 N.E.2d 754 (1987). However, "more stringent procedures" apply when a trial court accepts a plea to capital charges. *State v. Green,* 81 Ohio St.3d 100, 103, 689 N.E.2d 556 (1998). In a capital case, a three-judge panel must examine witnesses, "hear any other evidence properly presented by the prosecution," and "unanimously determine whether the defendant is guilty beyond a reasonable doubt of aggravated murder or of a lesser offense." *Id.* at 104–105, 689 N.E.2d 556. If the three-judge panel determines that the defendant committed aggravated murder and one or more aggravating circumstances, then the panel must proceed to sentencing. *See* Crim.R. 11(C)(3).

***8** {¶ 52} As in all capital cases, the sentencing process is governed by R.C. 2929.03 and 2929.04. The three-judge panel must hear the mitigating evidence presented by the defense and identify any factors that militate against a sentence of death. Then the panel must determine whether the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. R.C. 2929.03(D)(1). After the panel arrives at a sentencing determination, it must issue a written opinion describing both its weighing process and its sentence. R.C. 2929.03(F).

[8] **[9]** {¶ 53} Under this statutory scheme, then, when a capital defendant waives a jury and enters a no-contest plea, a three-judge panel determines both guilt and the appropriate sentence. "R.C. 2945.06 and Crim.R. 11(C)(3) contain no provisions permitting an accused charged with a capital offense to waive a jury, request that a three-judge panel determine guilt upon a plea of guilty, and then have a jury decide the penalty." *Bates,* 130 Ohio St.3d 326, 2011-Ohio-5456, 958 N.E.2d 162, at ¶ 29, citing *State v. Ketterer,* 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 122–125. And trial courts are not at liberty to create a nonstatutory procedure to convene a jury for sentencing purposes. *See State ex rel. Mason v. Griffin,* 104 Ohio St.3d 279, 2004-Ohio-6384, 819 N.E.2d 644, ¶ 17 (granting a writ to prohibit a trial judge from creating a hybrid, nonstatutory procedure).

{¶ 54} In short, Ohio law does not permit a jury to sentence a capital defendant if the defendant has elected to enter a plea of guilty or no contest to capital charges.

b. *Apprendi* and its progeny

[10] {¶ 55} Belton argues that the above statutory scheme violates the Sixth Amendment to the United States Constitution. According to Belton, "even if a capital defendant enters a guilty plea to Aggravated Murder and the accompanying death specifications, he has a right to a jury trial to determine the existence of any mitigating factors and to determine whether the aggravating circumstance or circumstances to which he would plead guilty outweigh those factors by proof beyond a reasonable doubt."

[11] {¶ 56} In support of his constitutional claim, Belton cites two United States Supreme Court decisions: *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). In *Apprendi,* the Supreme Court held that "the Sixth Amendment does not permit a defendant to be 'expose[d] * * * to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.' " (Emphasis and brackets sic.) *State v. Davis,* 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 189, quoting *Apprendi* at 483, 120 S.Ct. 2348. Thus, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* at 490, 120 S.Ct. 2348.

***9** {¶ 57} Two years later, in *Ring,* the Supreme Court applied the *Apprendi* rule to invalidate Arizona's capital-sentencing scheme. Under Arizona's former scheme,

"following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determine[d] the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty." (Brackets sic.) *Ring* at 588, 122 S.Ct. 2428. *Ring* declared this system unconstitutional, because the aggravating factors operated as " 'the functional equivalent of an element of a greater offense.' " *Id.* at 609, 122 S.Ct. 2428, quoting *Apprendi* at 494, fn. 19, 120 S.Ct. 2348. The Supreme Court explained that because the finding of an aggravating circumstance made a defendant eligible to receive the death penalty, the jury must also determine whether the state met its burden of proof as to that element. *Id., overruling Walton v. Arizona,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990).

{¶ 58} More recently, the Supreme Court applied *Apprendi* and *Ring* to invalidate Florida's capital-sentencing scheme in *Hurst v. Florida,* 577 U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). The Florida law at issue in *Hurst* limited the jury's role in capital sentencing to making an advisory recommendation; a trial court was then free to impose a death sentence even if the jury recommended against it. *Id.* at 620. And even when a jury did recommend a death sentence, a trial court was not permitted to follow that recommendation until the *judge* found the existence of an aggravating circumstance. *Id.* at 620, 622. Thus, "Florida [did] not require the jury to make the critical findings necessary to impose the death penalty." *Id.* at 622. Instead, the trial judge in *Hurst* "increased [the defendant's] authorized punishment based on her own factfinding" when she sentenced him to death. *Id.* The Supreme Court held that Florida's capital-sentencing law, like the Arizona law in *Ring,* violated the Sixth Amendment. *Id.*

{¶ 59} Ohio's capital-sentencing scheme is unlike the laws at issue in *Ring* and *Hurst.* In Ohio, a capital case does not proceed to the sentencing phase until *after* the fact-finder has found a defendant guilty of one or more aggravating circumstances. *See* R.C. 2929.03(D); R.C. 2929.04(B) and (C); *State v. Thompson,* 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 147. Because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment. Moreover, in Ohio, if a defendant is tried by a jury, then the judge cannot impose a sentence of death unless the jury has entered a unanimous verdict for a death sentence. R.C. 2929.03(D)(2).

[12] {¶ 60} Federal and state courts have upheld laws similar to Ohio's, explaining that if a defendant has already been found to be death-penalty eligible, then subsequent weighing processes for sentencing purposes do not implicate *Apprendi* and *Ring.* Weighing is *not* a fact-finding process subject to the Sixth Amendment, because "[t]hese determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination." *State v. Gales,* 265 Neb. 598, 628, 658 N.W.2d 604 (2003); *see, e.g., State v. Fry,* 138 N.M. 700, 718, 126 P.3d 516 (2005); *Ortiz v. State,* 869 A.2d 285, 303–305 (Del.2005); *Ritchie v. State,* 809 N.E.2d 258, 268 (Ind.2004). Instead, the weighing process amounts to "a complex moral judgment" about what penalty to impose upon a defendant who is already death-penalty eligible. *United States v. Runyon,* 707 F.3d 475, 515–516 (4th Cir.2013) (citing cases from other federal appeals courts).

***10** {¶ 61} For these reasons, we hold that when a capital defendant in Ohio elects to waive his or her right to have a jury determine guilt, the Sixth Amendment does not guarantee the defendant a jury at the sentencing phase of trial.

c. Additional challenges

{¶ 62} Belton's third proposition of law raises several additional constitutional challenges to Ohio's procedures for sentencing a capital defendant who enters a plea of guilty or no contest.

{¶ 63} First, he claims in his brief that Crim.R. 11(C)(3) is unconstitutional because it " 'needlessly penalizes the assertion of a constitutional right,' " quoting *United States v. Jackson,* 390 U.S. 570, 583, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968). Under Crim.R. 11(C)(3), if a defendant waives a jury trial and enters a guilty plea, a trial court may dismiss capital specifications "in the interests of justice." But there is no analogous rule governing cases that proceed to a jury trial. Belton claims that this different treatment impermissibly burdens capital defendants' exercise of their right to a trial by jury.

{¶ 64} We have previously considered and "rejected similar attacks on Crim.R. 11(C)(3)." *State v. McKnight,* 107 Ohio St.3d 101, 2005-Ohio-6046, 837 N.E.2d 315, ¶ 51, citing *State v. Dickerson,* 45 Ohio St.3d 206, 214, 543 N.E.2d 1250 (1989), and *State v. Buell,* 22 Ohio St.3d 124, 138, 489 N.E.2d 795 (1986). And Belton offers no explanation why the court should now reconsider those holdings.

[13] {¶ 65} Second, Belton argues that Ohio's sentencing procedures for capital defendants who plead guilty violate *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), because they do not permit *a jury* to consider "substantial mitigating evidence, namely acceptance of responsibility through a plea of guilty."

{¶ 66} In *Lockett,* the United States Supreme Court invalidated Ohio's former death-penalty statute because it did "not permit the type of individualized consideration of mitigating factors * * * required by the Eighth and Fourteenth Amendment in capital cases." *Id.* at 606, 98 S.Ct. 2954. But the Supreme Court did not hold, as Belton suggests, that states must permit a jury to consider any possible mitigating evidence at sentencing. Instead, the court indicated that states could not preclude "the sentencer" in a capital case from considering "*as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis sic.) *Id.* at 604, 98 S.Ct. 2954.

[14] {¶ 67} Ohio's present sentencing law is consistent with *Lockett.* Evidence that a capital defendant accepted responsibility by entering a guilty plea is a relevant mitigating factor at sentencing. *Ketterer,* 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, at ¶ 86. *See* R.C. 2929.04(B)(7). Belton is correct that a defendant who pleads guilty will never have an opportunity to present this type of mitigating evidence to a jury. However, the defendant can present that evidence to a three-judge panel. That panel will hear the defendant's mitigating evidence, weigh that evidence against the aggravating circumstances, and make an individualized sentencing determination, as required by R.C. 2929.03.

*11 **[15]** **[16]** {¶ 68} Finally, Belton argues that "the denial of a right to jury sentencing after a plea of guilty violates a capitally charged defendant's rights to present a defense." The U.S. Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense," *California v. Trombetta,* 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), meaning that they have a right to present relevant testimony and other evidence. *See State v. Swann,* 119 Ohio St.3d 552, 2008-Ohio-4837, 895 N.E.2d 821, ¶ 12–13. But a defendant is not deprived of his right to present a defense simply because he does not present his evidence to a jury. *See, e.g., State v. Wesson,* 137 Ohio St.3d 309, 2013-Ohio-4575, 999 N.E.2d 557, ¶ 55–62 (rejecting a defendant's argument that a three-judge panel violated his right to present a complete defense). And Belton does not claim that he was prevented from presenting a full mitigation defense to the three-judge panel.

{¶ 69} For these reasons, proposition of law No. 3 fails.

3. Lethal–Injection Protocol

{¶ 70} In proposition of law No. 4, Belton argues that Ohio's lethal-injection protocol violates the Eighth Amendment's guarantee against cruel and unusual punishment.

[17] {¶ 71} First, Belton questions "the training of the technicians performing the lethal injection procedure, the reliability of any back up procedures in the event of any difficulty, such as an inability to locate a suitable vein for injection, and the efficacy of the single drug protocol." But to support these claims, Belton would have to rely on proof outside the record. Consequently, Belton's arguments are "not appropriately considered on a direct appeal." *State v. Madrigal,* 87 Ohio St.3d 378, 391, 721 N.E.2d 52 (2000) (because proof outside the record was needed to establish ineffective assistance of counsel, the claim was not appropriate on direct appeal).

[18] {¶ 72} Second, Belton claims that Ohio law does not afford any state-court remedy for a protocol challenge, and he says that this alone *proves* that Ohio's lethal-injection protocol—and any other method of execution the state might use—violates multiple constitutional provisions. This argument turns entirely on Belton's reading of this court's decision in *Scott v. Houk,* 127 Ohio St.3d 317, 2010-Ohio-5805, 939 N.E.2d 835.

{¶ 73} *Scott* presented us with a certified question of law from a federal district court: "Is there a post-conviction or

other forum to litigate the issue of whether Ohio's lethal injection protocol is constitutional under *Baze v. Rees,* 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), or under Ohio law?" *Scott* at ¶ 1. In response, we answered: "There is no state postconviction relief or other state-law mode of action to litigate the issue of whether a specific lethal-injection protocol is constitutional under *Baze* * * *, or under Ohio law." *Id.* at ¶ 4.

***12** {¶ 74} In doing so, however, we noted that "review [is] available on this issue through Section 1983, Title 42, U.S.Code, for injunctive relief against appropriate officers or [through] federal habeas corpus petitions." *Id. Scott* also catalogued the established methods by which "an Ohio death-penalty defendant [can] receive state review of his or her case," *id.* at ¶ 2, and affirmed this court's prior holding that "these opportunities for review more than satisfy defendants' 'constitutional rights to due process and fair trials' while also protecting Ohio's 'inherent power to impose finality on its judgments,' " *id.* at ¶ 3, quoting *State v. Steffen,* 70 Ohio St.3d 399, 407, 412, 639 N.E.2d 67 (1994).

{¶ 75} In the wake of *Scott,* federal courts have struggled to define its holding. In Scott's own federal habeas proceedings, the United States Court of Appeals for the Sixth Circuit interpreted this court's decision in *Scott* as an "admission that Scott could not pursue [his lethal-injection] claim in any state forum." *Scott v. Houk,* 760 F.3d 497, 511 (6th Cir.2014), fn. 2. But in other decisions, the United States District Court for the Southern District of Ohio has concluded that *Scott* does not foreclose every possible avenue for raising a protocol challenge in Ohio courts. *See Gapen v. Bobby,* S.D.Ohio No. 3:08–cv–280, 2012 WL 3686303, *4 (Aug. 27, 2012) (report and recommendation by U.S. magistrate) ("*Scott* should not be read as narrowing the scope of any pre-existing Ohio procedures for raising a claim that all lethal injection executions are unconstitutional"), adopted in S.D.Ohio No. 3:08–cv–280, 2012 WL 4057406 (2012); *see also Hill v. Mitchell,* S.D.Ohio No. 1:98–cv–452, 2013 WL 1345831, *117–120 (Mar. 29, 2013), quoting *Scott,* 127 Ohio St.3d 317, 2010-Ohio-5805, 939 N.E.2d 835, ¶ 4 (" 'The Ohio General Assembly has not yet provided an *Ohio-law* cause of action for Ohio courts to process challenges to a lethal-injection protocol * * * ' " [emphasis added]).

{¶ 76} We endorse the latter interpretation of *Scott.* In fact, in 2015, we accepted discretionary jurisdiction over a postconviction matter that squarely presents challenges to Ohio's lethal-injection protocol. *See State v. Broom,* — Ohio St.3d —, 2016-Ohio-1028, — N.E.3d —. Thus, we reject Belton's contention that prisoners have no avenue by which to pursue execution-protocol challenges in any state forum, which is the premise underlying his constitutional argument about *Scott.*

[19] **[20]** {¶ 77} Moreover, even if state-court review for a particular type of Eighth Amendment challenge were unavailable in Ohio, that would not, in itself, prove an Eighth Amendment violation. The Eighth Amendment addresses two aspects of a criminal sentence: (1) it prohibits specific torturous methods of execution, *Gregg v. Georgia,* 428 U.S. 153, 169–170, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and (2) it requires proportionality between the crime and the punishment, *Miller v. Alabama,* — U.S. —, 132 S.Ct. 2455, 2463, 183 L.Ed.2d 407 (2012). A challenge to the adequacy of state-court judicial remedies implicates notions of due process, not the substantive protections of the Eighth Amendment. *See Scott,* 127 Ohio St.3d 317, 2010-Ohio-5805, 939 N.E.2d 835, at ¶ 3.

***13** {¶ 78} We reject proposition of law No. 4.

4. Settled Issues

{¶ 79} Proposition of law Nos. 7, 8, and 13 present three constitutional claims that this court has squarely rejected.

{¶ 80} Belton asserts facial and as-applied constitutional challenges to Ohio's capital-punishment scheme and argues that the death-penalty statutes violate international law and treaties. And he urges the court to reconsider its holdings that (1) Ohio's definition of reasonable doubt is constitutional and (2) residual doubt is not a relevant factor at the mitigation phase. *See State v. Powell,* 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, at ¶ 173, 192. In his brief, Belton explains that he is making "a good faith effort to argue for a change in the law" and also seeking to preserve these issues for federal habeas review.

{¶ 81} We have rejected each of these claims in our prior decisions, and we now summarily reject these propositions of law. *See Thompson,* 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, at ¶ 279–280.

B. Pretrial Issues

1. Pretrial Motions

{¶ 82} In proposition of law No. 5, Belton claims that the trial court undermined his right to a jury trial by denying pretrial motions that sought to protect that right. According to Belton, the denial of seven motions left him with no choice other than to waive a jury and instead proceed before a three-judge panel.

[21] **[22]** {¶ 83} Capital defendants who waive their right to a jury and enter a guilty plea cannot challenge pretrial rulings on appeal; instead, they are limited to attacking the validity of the plea itself. *Tollett v. Henderson,* 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973) (explaining that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process"). However, Ohio permits capital defendants who waive their right to a jury and enter a no-contest plea to challenge pretrial rulings. *See* Crim.R. 12(I) ("The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a motion to suppress evidence").

[23] **[24]** **[25]** {¶ 84} First, Belton challenges the trial court's denial of his motion to prohibit the prosecutor from using peremptory challenges to exclude potential jurors who expressed reservations about the death penalty. A prospective juror may be excused for cause if the juror's views on the death penalty "would prevent or substantially impair the performance of his duties." *State v. Rogers,* 17 Ohio St.3d 174, 478 N.E.2d 984 (1985), paragraph three of the syllabus; *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). However, even when a for-cause challenge is not warranted, the prosecutor may "use peremptories to eliminate jurors based on opposition to the death penalty." *State v. Murphy,* 91 Ohio St.3d 516, 529–530, 747 N.E.2d 765 (2001), citing *State v. Esparza,* 39 Ohio St.3d 8, 13–14, 529 N.E.2d 192 (1988). Accordingly, the trial court did not err by denying Belton's motion.

***14** **[26]** {¶ 85} Second, Belton asked the court to order a jury view of a maximum-security prison or, alternatively, to let him introduce a video showing conditions at such a facility. Belton contends that "a fact finder should be aware of the consequences and conditions associated with life incarceration" when he or she decides whether to impose the death penalty. Belton says the trial court's denial of his motion eliminated "another potentially effective mitigating factor" that might have persuaded one or more jurors to impose a life sentence.

[27] {¶ 86} Belton's argument fails because this is not admissible mitigation evidence. "[M]itigating factors are facts about the defendant's character, background, or record, or the circumstances of the offense, that may call for a penalty less than death." *State v. White,* 85 Ohio St.3d 433, 448, 709 N.E.2d 140 (1999); *see also Lockett,* 438 U.S. at 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (sentencer in a capital case cannot constitutionally be "precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record or any of the circumstances of the offense" [emphasis sic]). But for Eighth Amendment purposes, this definition does not include evidence of potential prison sentences (as an alternative to death), *White* at 448, 709 N.E.2d 140, or evidence about future conditions of confinement. *See State v. Hanna,* 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 678, ¶ 130 (explaining that such evidence is not mitigating, because it does "not relate to appellant, his background or the nature and circumstances of the crime"). Therefore, the evidence Belton wished to present was not relevant to the sentencing evaluation, and the trial court properly denied his motion.

[28] {¶ 87} Next, Belton requested a jury instruction that the defense bears no burden at the mitigation phase. It is true that the prosecutor bears the burden to prove beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors. *State v. Stumpf,* 32 Ohio St.3d 95, 102, 512 N.E.2d 598 (1987). However, the defendant bears the burden to prove the existence of any mitigating factors by a preponderance of the evidence. *Id.* Accordingly, the trial court did not err by denying Belton's motion for a jury instruction that he bore *no* burden at the mitigation phase.

[29] {¶ 88} Belton also requested a jury instruction about mercy as a mitigation factor. According to Belton, the trial court "removed one of the few potentially effective mitigating factors" available to him by denying this motion. But we have long held that mercy is not a mitigating factor. *See State v. O'Neal,* 87 Ohio St.3d 402, 416, 721 N.E.2d 73 (2000); *State v. Lorraine,* 66 Ohio St.3d 414, 418, 613 N.E.2d 212 (1993) ("Mercy * * * is irrelevant

to the duty of the jurors"). The trial court did not err by denying this motion.

[30] [31] [32] {¶ 89} Next, Belton moved for leave to present the final argument at the mitigation phase. "During the sentencing phase of a capital trial the state, having the burden of proving that aggravating circumstances outweigh the mitigating factors, has the right to open and close arguments to the jury." *Rogers,* 17 Ohio St.3d 174, 478 N.E.2d 984, at paragraph six of the syllabus. "[A]ny claim that the trial court erred in following the statutorily mandated order of proceedings must sustain a heavy burden to demonstrate the unfairness and prejudice of following that order." *State v. Bayless,* 48 Ohio St.2d 73, 357 N.E.2d 1035 (1976), paragraph three of the syllabus. Belton has not attempted to meet that burden here, nor can he. Accordingly, the trial court did not err by denying Belton's motion.

***15 [33]** {¶ 90} Belton filed a motion in limine to limit the state's mitigation-phase argument to aggravating circumstances already proved during the guilt phase. Belton is correct that the prosecutor may not rely on aggravating circumstances during the mitigation phase that were not already proved during the first phase of a trial. However, the prosecution's mitigation-phase case is not strictly limited to evidence of those aggravating circumstances. For example, a prosecutor may also rely on evidence "relevant to the nature and circumstances of the aggravating circumstances * * * of which the defendant was found guilty" and "evidence rebutting the existence of any statutorily defined or other mitigating factors first asserted by the defendant." *State v. Gumm,* 73 Ohio St.3d 413, 653 N.E.2d 253 (1995), syllabus. Accordingly, the trial court properly denied Belton's motion.

[34] {¶ 91} Finally, Belton filed a motion in limine to prohibit the prosecutor from referring to the nature and circumstances of the offense as a factor to consider in the mitigation phase unless and until Belton offered it. According to Belton, "Unless and until Defendant utilizes the nature and circumstances of the offense as a mitigating factor, the State may not make reference to them nor may this Court instruct the jurors that the nature and circumstances of the offense may be mitigating factors."

{¶ 92} The trial court denied Belton's motion, noting that there are many ways to permissibly introduce nature-and-circumstances evidence and citing the state's representation that it had no intention to argue that the nature and circumstances of the crime were an aggravating factor. However, the trial court did not analyze whether a prosecutor may state that nature and circumstances are a factor to consider in the mitigation phase if the defense has not offered them as mitigating evidence. [5] As we explained in *State v. DePew,* 38 Ohio St.3d 275, 289, 528 N.E.2d 542 (1988):

> R.C. 2929.04(B) and (C) deal with mitigation and were designed to enable *the defendant* to raise issues in mitigation and to facilitate his presentation thereof. If the defendant chooses to refrain from raising some of or all of the factors available to him, those factors not raised may not be referred to or commented upon by the trial court or the prosecution. When the *purpose* of these sections is understood, it is clear that such comment is appropriate only with regard to those factors actually offered in mitigation by the defendant.

(Emphasis sic.) In light of this body of law, the trial court should have granted Belton's motion in limine to prohibit references to "the nature and circumstances of the offense *as a factor to be considered in mitigation* unless and until offered by defendant." (Emphasis added.)

{¶ 93} In sum, the trial court erred by denying one of the seven pretrial motions Belton cites in support of his claim that the trial court undermined his right to a jury trial. Ultimately, Belton is suggesting that this pretrial ruling rendered his jury waiver involuntary. But Belton executed a written waiver of his right to trial by jury, and such waivers are presumptively knowing, intelligent, and voluntary. *See State v. Bays,* 87 Ohio St.3d 15, 19, 716 N.E.2d 1126 (1999). In this case, we are not persuaded that the trial court's ruling on this single motion in limine is sufficient to overcome that presumption of voluntariness.

***16** {¶ 94} For these reasons, we reject proposition of law No. 5.

2. Prosecutor's File

[35] {¶ 95} In proposition of law No. 6, Belton contends that the trial court erred by denying his motion to have

a copy of the prosecutor's complete file turned over to the court for review to determine whether it contained undisclosed exculpatory or impeachment evidence.

{¶ 96} Belton filed a pretrial motion seeking "an order directing that a complete copy of the prosecutor's file be made and turned over to the court for review and to be sealed for appellate review, if necessary." He argued that turning the file over to the court was a "necessary corollary to" the prosecution's disclosure obligations under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). The trial court denied the motion, explaining that it was not necessary for the court to review the file absent an allegation of noncompliance with discovery under Crim.R. 16.

{¶ 97} The trial court's analysis was correct. "We have consistently rejected the argument that a trial court must 'examine the prosecutor's file to determine the prosecutor's truthfulness or seal the prosecutor's file for purposes of appellate review' on the basis of speculation that the prosecutor *may* have withheld exculpatory evidence." (Emphasis sic.) *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 64, quoting *Hanna,* 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 678, at ¶ 60.

{¶ 98} Belton's sixth proposition of law fails.

C. Plea–Hearing Issues

1. Belton's Confessions

[36] {¶ 99} In proposition of law No. 9, Belton argues that the trial court should have granted his motions to suppress his confession because it was a product of "coercive police misconduct designed to overcome his free will."

[37] {¶ 100} Review of a trial court's ruling on a motion to suppress is "a mixed question of law and fact." *State v. Burnside,* 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. We accept the trial court's factual findings as long as they are supported by competent, credible evidence. *State v. Roberts,* 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 100. However, we review de novo the application of the law to these facts. *Burnside* at ¶ 8.

a. Factual background

{¶ 101} Police arrested Belton around 7:30 or 8:00 p.m. on August 13, 2008, and transported him to police headquarters, where he was placed in a holding cell. Detectives Clark and Quinn first interviewed Belton from 12:50 to 3:02 a.m. on August 14. Clark read Belton the *Miranda* warnings and gave him a written copy of his rights. Belton executed a written *Miranda* waiver, which was witnessed by Clark and Quinn.

{¶ 102} Belton's second interview began around 5:35 a.m. and lasted approximately 30 minutes. Belton was not Mirandized again. However, before the interview began, Clark reminded Belton that the same rights still applied. Belton indicated that he understood.

***17** {¶ 103} Before trial, Belton moved to suppress his confessions. After briefing and a suppression hearing,[6] the trial court denied the motion. The trial court found that (1) under "the totality of the circumstances," Belton was properly Mirandized and knowingly, intelligently, and voluntarily waived his rights as to both interviews, (2) no evidence indicated that Belton was "under the influence of any medications, narcotics or alcohol or illicit drugs" at the time of his statements, and (3) the interrogations and the detectives' statements "were not such to overbear the defendant's will to resist and bring about the confessions."

{¶ 104} At the plea hearing, the state introduced Belton's statements over his continuing objection.

b. Analysis

{¶ 105} Belton now argues that the trial court erred by admitting these statements for a single reason: they were coerced by police. According to Belton, the detectives "essentially promise[d] leniency" and implied that "confessing or not confessing would literally make the difference between life and death."

[38] **[39]** {¶ 106} Before police officers may question a suspect in a custodial setting, the Fifth Amendment requires them to warn the suspect that "he has the right

to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda,* 384 U.S. at 479, 86 S.Ct. 1602, 16 L.Ed.2d 694. The suspect may then "knowingly and intelligently waive these rights and agree to answer questions or make a statement." *Id.* "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver * * *." *North Carolina v. Butler,* 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).

[40] **[41]** {¶ 107} If a defendant later challenges a confession as involuntary, the state must prove a knowing, intelligent, and voluntary waiver by a preponderance of evidence. *See Miranda* at 475, 86 S.Ct. 1602; *Colorado v. Connelly,* 479 U.S. 157, 168–169, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). To determine whether a confession was involuntary, we "consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State v. Edwards,* 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976), paragraph two of the syllabus, *death penalty vacated on other grounds,* 438 U.S. 911, 98 S.Ct. 3147, 57 L.Ed.2d 1155 (1978). However, we will not conclude that a waiver was involuntary "*unless* there is evidence of police coercion, such as physical abuse, threats, or deprivation of food, medical treatment, or sleep." (Emphasis sic.) *Wesson,* 137 Ohio St.3d 309, 2013-Ohio-4575, 999 N.E.2d 557, at ¶ 35; *see State v. Treesh,* 90 Ohio St.3d 460, 472, 739 N.E.2d 749 (2001) ("we need not assess the totality of the circumstances unless we find that the tactics used by the detectives were coercive").

***18** {¶ 108} As an initial matter, other than the fact that Belton was in police custody, nothing about the circumstances of his interrogation was inherently coercive. Belton was 22 years old, had an 11th-grade education, and had prior experience with the criminal-justice system. *See State v. Smith,* 61 Ohio St.3d 284, 288, 574 N.E.2d 510 (1991) (similar facts supported a finding of voluntariness). He was offered beverages before and during his interviews and was permitted to smoke and to use the bathroom. Belton was able to get some sleep in a holding cell during the hours between his arrest and his first interrogation.

{¶ 109} According to Detective Clark, Belton "seemed fully alert," did not have trouble communicating, and responded appropriately to questions. And the interviews themselves were not unduly onerous. The first interview lasted approximately two hours and ten minutes. Then, after a break of two and a half hours, during which Belton accompanied officers to recover the murder weapon, detectives questioned Belton a second time for about 30 minutes. The total time that elapsed between the beginning of the first interview and the conclusion of the second was less than six hours.

{¶ 110} Belton next contends that, in spite of his valid waiver, he was coerced to confess as a result of statements that Detectives Clark and Quinn made during the interviews. Throughout the questioning, the detectives pressed Belton about the veracity of his accounts. At times, they said that perhaps Belton was not a bad person and Dugan's death was an accident. Clark warned Belton that the penalty for aggravated murder is death or life imprisonment and expressed concern about what Belton's grandmother might hear on the news. The detectives also suggested that if Belton confessed, it might be his "saving grace" and that if he cooperated, they would have something to take to the prosecutor and the court might have mercy. In essence, Belton says the officers threatened him with a death sentence and implied that only a confession would save him.

[42] **[43]** **[44]** **[45]** {¶ 111} This court may find coercion when law-enforcement officers "persuad[e] or deceiv[e] the accused, with false promises or information, into relinquishing his rights and responding to questions." *Edwards,* 49 Ohio St.2d at 39, 358 N.E.2d 1051. However, "the presence of promises does not as a matter of law, render a confession involuntary." *Id.* at 41, 358 N.E.2d 1051. Officers may discuss the advantages of telling the truth, advise suspects that cooperation will be considered, or even suggest that a court may be lenient with a truthful defendant. *Id.* And "[a]dmonitions to tell the truth are considered to be neither threats nor promises." *State v. Loza,* 71 Ohio St.3d 61, 67, 641 N.E.2d 1082 (1994); *see also State v. Dixon,* 101 Ohio St.3d 328, 2004-Ohio-1585, 805 N.E.2d 1042, ¶ 29. Finally, it is not unduly coercive for a law-enforcement officer to mention potential punishments. *See State v. Western,* 2d Dist., 2015-Ohio-627, 29 N.E.3d 245, ¶ 38; *compare State v. Robinson,* 9th Dist. Summit No. 16766, 1995 WL 9424, *4 ("While a correct statement of the law may not render

a confession involuntary, a misstatement of the law may cause such a confession to be involuntary").

*19 {¶ 112} Here, contrary to Belton's claims, the detectives did not promise leniency if he confessed or threaten death if he did not. Nor did they claim to have authority to decide how Belton would be charged. Instead, Detective Quinn clearly told Belton, "I ain't making you no promises." He indicated that the prosecutor would decide the appropriate charge, and the judge would decide the sentence.

{¶ 113} Under the circumstances, we hold that the trial court properly denied Belton's motion to suppress, and we reject proposition of law No. 9.

2. Fingerprint Evidence

[46] {¶ 114} In proposition of law No. 10, Belton claims that the trial court erred by admitting the fingerprint evidence collected from the Buick "by an incompetent witness" and admitted during the testimony of an incompetent expert witness. While we are hard pressed to see how this evidence prejudices Belton because the police found him in the Buick, we nevertheless address his proposition of law.

{¶ 115} Over defense objection, Detective Goetz testified as a fingerprint expert at the plea hearing. According to Goetz, Detective Schriefer collected a fingerprint from the driver's side rear door of the Buick while they were executing a search warrant. Goetz and Schriefer later compared the print to Belton's fingerprints and each independently concluded that they were a match. Then, together, they mapped ten points of similarity between the prints. Goetz opined, to a reasonable degree of scientific certainty, that the print on the car was Belton's.

[47] {¶ 116} A trial court's ruling on evidentiary issues, including the admissibility of expert opinions, will not be reversed on appeal absent an abuse of discretion and proof of material prejudice. *See State v. Johnson,* 144 Ohio St.3d 518, 2015-Ohio-4903, 45 N.E.3d 208, ¶ 53; *Terry v. Caputo,* 115 Ohio St.3d 351, 2007-Ohio-5023, 875 N.E.2d 72, ¶ 16 ("Trial courts have broad discretion in determining the admissibility of expert testimony, subject to review for an abuse of discretion").

[48] {¶ 117} To be admissible, expert testimony must satisfy all of the following criteria:

> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information.

Evid.R. 702. "[T]he trial judge has a special obligation to ensure that scientific testimony is not only relevant but reliable." *Davis,* 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, at ¶ 139, citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

{¶ 118} Belton does not dispute that Goetz's testimony satisfies the first requirement. The collection of fingerprints and the comparison of those prints with known samples is a matter beyond the knowledge or experience possessed by a lay person. *See State v. Hartman,* 93 Ohio St.3d 274, 284, 754 N.E.2d 1150 (2001) ("expert testimony was necessary to make fingerprint comparisons").

*20 {¶ 119} As to the second requirement, Belton claims that Goetz was not qualified as an expert. But Goetz has testified as a fingerprint expert more than 20 times in Lucas County. Moreover, Goetz testified that he has collected fingerprints "hundreds of times" and made thousands of fingerprint comparisons over the last 16 years. Goetz completed a 40–hour Federal Bureau of Investigation course on developing latent fingerprints and also studied fingerprint analysis as part of an 80–hour crime-scene course at BCI. Finally, Goetz testified that he has been a member of Ohio Identification Officers since 1996, and he has regularly attended that organization's annual training updates.

{¶ 120} In response to defense questioning, Goetz admitted that he probably had not attended any fingerprint training for three years. He also conceded that only one of his trainings involved either a written or a peer evaluation—the BCI crime-scene training, which he completed in 1996. Goetz indicated that he was not aware of any type of standards for the collection and comparison of fingerprints.

[49] **[50]** {¶ 121} These statements indicate some possible limitations on the breadth of Goetz's expertise, and are relevant in determining the weight and credibility of his testimony. However, the trial court did not abuse its discretion by concluding that Goetz had met Evid.R. 702(B)'s requirement of "specialized knowledge, skill, experience, training, or education" regarding fingerprint evidence. A witness "need not have complete knowledge of the field in question" to qualify as an expert; it is sufficient that the knowledge Goetz possessed about fingerprint analysis would "aid the trier of fact in performing its fact-finding function." *Davis,* 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, at ¶ 148. Indeed, a witness can have expert status without having completed special education or receiving a certification. *Id.* Here, Goetz testified that he had received relevant training in fingerprint analysis and testified to his vast experience with both collecting and analyzing fingerprints and with testifying as a fingerprint expert. Under the circumstances, the trial court reasonably determined that the second prong of Evid.R. 702 was satisfied.

[51] {¶ 122} Finally, to be admissible, Goetz's testimony had to be "based on reliable scientific, technical, or other specialized information." Evid.R. 702(C). In the past, this court has observed that "the reliability of fingerprint evidence is well established." *State v. Foust,* 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, ¶ 93; *see also Davis* at ¶ 140. And numerous federal and state courts have reached the same conclusion, even in the face of recent efforts by defendants to "mount[ ] a frontal assault on the use of fingerprint evidence in litigation." *United States v. Herrera,* 704 F.3d 480, 484 (7th Cir.2013); *see also United States v. John,* 597 F.3d 263, 274 (5th Cir.2010); *People v. Rivas,* 238 Cal.App.4th 967, 975–976, 190 Cal.Rptr.3d 43 (3d Dist.2015). Belton offers no reason why we should now categorically reject fingerprint evidence as a permissible subject of expert testimony.

*21 {¶ 123} For these reasons, the trial court did not err by permitting Goetz to testify as a fingerprint expert, and we reject proposition of law No. 10.

3. Prosecutorial Misconduct

[52] {¶ 124} In proposition of law No. 11, Belton contends that the prosecutor committed misconduct by introducing evidence about the nature and circumstances of the crime that was not necessary to establish guilt at his plea hearing. Because Belton did not raise this objection before the trial court, we review this claim for plain error. *State v. Lang,* 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 154.

[53] {¶ 125} When evaluating a prosecutorial-misconduct claim, the relevant question is whether the prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). To answer that question, we consider two factors: (1) whether the conduct was improper and (2) if so, whether it prejudicially affected the defendant's substantial rights. *State v. Maxwell,* 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 243.

{¶ 126} Belton alleges that the prosecutor acted improperly by introducing Dugan's autopsy report and parts of the coroner's testimony. Specifically, Belton objects to Dr. Scala–Barnett's "graphic testimony * * * about the distance of the gun from the victim, the injuries sustained by the victim, the length of time it took for him to expire and what he must have experienced during that time." He reasons that this evidence was both "overkill" and "unnecessary" given that he had entered a no-contest plea. *See* Crim.R. 11(B)(2) (a no-contest plea "is an admission of the truth of the facts alleged in the indictment"). He further claims that this was an improper attempt by the prosecutor to argue that the nature and circumstances of the crime were aggravating circumstances. *See State v. Kirkland,* 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 94 ("the state may not tell the decisionmaker that the nature and circumstances of the murder itself are the aggravating circumstances").

[54] {¶ 127} As explained above, when a capital defendant enters a plea of guilty or no contest, a panel

of three judges must "hear evidence" and "decid [e] whether the accused is *guilty* of aggravated murder beyond a reasonable doubt" before it can proceed to sentencing. (Emphasis sic.) *Post,* 32 Ohio St.3d at 393, 513 N.E.2d 754. A prosecutor is therefore required to present sufficient evidence at a plea hearing to prove both aggravated murder and the capital specifications. *See Ketterer,* 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, at ¶ 93 (sufficiency challenges are permitted even when a capital defendant pleads guilty).

[55] {¶ 128} Belton suggests that a prosecutor's ability to introduce evidence during a plea hearing is more restricted than it is during the guilt phase of other capital trials. But we apply the same evidentiary rules in both contexts. *See, e.g., id.* at ¶ 127–128. And the prosecutor is not, as Belton implies, limited to offering only "that quantum of evidence necessary to establish a factual basis for the plea so as to allow the fact-finder to make a determination of guilt." Instead, the prosecutor may offer any evidence that is relevant to an element of the charged offense and otherwise admissible. As always, "[t]he admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage,* 31 Ohio St.3d 173, 510 N.E.2d 343 (1987), paragraph two of the syllabus.

***22** {¶ 129} Here, it was not error, let alone plain error, for the prosecutor to introduce or the trial court to admit the evidence Belton identifies. Scala–Barnett's testimony that the fatal gunshot was fired at close range and about the location of the shooter was relevant to establishing Belton's intent to kill. *See Ketterer* at ¶ 128. Her testimony about Dugan's injuries was relevant to proving the facts and circumstances of the offense. *See id.* Finally, contrary to Belton's claims, Scala–Barnett did not speculate about Dugan's mental state in the moments preceding his death. *Cf. State v. Combs,* 62 Ohio St.3d 278, 283, 581 N.E.2d 1071 (1991) (describing comments about murder victims' thoughts as "gross speculation").

{¶ 130} For these reasons, because the prosecutor's conduct was not improper, we reject proposition of law No. 11.

D. Ineffective Assistance of Counsel

{¶ 131} In proposition of law Nos. 1, 12, 16, 17, and 18, Belton argues that trial counsel provided constitutionally ineffective assistance.[7] *See* Sixth and Fourteenth Amendments to the United States Constitution; Ohio Constitution, Article 1, Section 10. For ease of analysis, we address Belton's claims out of order.

[56] **[57]** {¶ 132} To establish ineffective assistance of counsel, Belton must (1) show that counsel's performance "fell below an objective standard of reasonableness," as determined by "prevailing professional norms," *Strickland v. Washington,* 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and (2) demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694, 104 S.Ct. 2052. When performing a *Strickland* analysis, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. 2052.

1. Failing to Argue Entitlement to Sentence Other than Death

{¶ 133} Belton contends that trial counsel were ineffective because they did not argue that he was entitled to a sentence other than death under Ohio law. Belton claims that the General Assembly "effectively repealed Ohio's death penalty" when it amended R.C. 2929.11(A) in 2011. But as explained above, Ohio has not repealed the death penalty. Therefore, we cannot conclude that Belton's trial counsel were ineffective for failing to make this argument.

2. Jury Waiver

[58] {¶ 134} Belton also argues that counsel were ineffective because they advised him to waive a jury trial. The fact that Belton "voluntarily waived his right to a jury does not establish ineffective assistance of counsel." *State v. Hunter,* 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 55. The state's evidence included video recordings of Belton's confession and the shooting itself. The latter depicts Dugan's cooperation during the robbery and Belton's proximity to Dugan when he shot him in the back of the head. Counsel may have reasonably concluded that a three-judge panel was less likely than a jury to be emotionally swayed by this evidence. Hence, it was not objectively unreasonable for counsel to advise Belton to waive a jury trial.

3. Objections During Plea Hearing

***23** **[59]** {¶ 135} Belton raises two ineffective-assistance claims about trial counsel's failure to raise objections during the plea hearing.

{¶ 136} First, he argues generally that trial counsel unjustifiably failed to raise objections and thus failed to preserve issues for appellate review. But Belton does not provide a single citation or identify any example of an issue that counsel failed to preserve. Because he failed to cite any example, Belton cannot satisfy either prong of *Strickland. See State v. Bey,* 85 Ohio St.3d 487, 504, 709 N.E.2d 484 (1999).

{¶ 137} Second, Belton specifically contends that trial counsel should have objected to the coroner's testimony about the nature and circumstances of the crime and Dugan's death. But as we explained above, the coroner's testimony was proper. Accordingly, counsel's performance was not ineffective in this regard.

4. Mitigation Preparation and Presentation

{¶ 138} The remainder of Belton's ineffective-assistance claims pertain to trial counsel's mitigation-phase preparation and performance.

[60] {¶ 139} First, Belton argues that trial counsel abandoned their duty to actively and zealously advocate on his behalf when they waived a mitigation-phase opening statement. *See Evitts v. Lucey,* 469 U.S. 387, 394, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (counsel "must play the role of an active advocate"). But counsel's decision to waive opening or closing statements is generally viewed as a tactical one, even in a capital case. *See State v. Bradley,* 42 Ohio St.3d 136, 144, 538 N.E.2d 373 (1989). Here, the prosecutor had already waived his own opening statement and Belton's counsel decided to follow suit, jumping straight into a presentation of mitigating evidence. Belton cannot overcome the strong presumption that this was a reasonable strategic decision.

[61] {¶ 140} Second, Belton argues that counsel should have had him evaluated by a neuropsychologist because Belton exhibited signs of antisocial-personality disorder. According to Belton, violent offenders who exhibit signs of antisocial-personality disorder "more often than not also exhibit signs of abnormal brain development," a mitigating factor.

{¶ 141} During the mitigation hearing, Dr. Bob Stinson, the defense psychologist, testified that he initially recommended neuroimaging and/or a neuropsychological examination for Belton. Stinson had identified "a number of risk factors and a number of behavioral indicators that [Belton] is experiencing neurological or neuropsychological impairment," including in utero exposure to drugs and possibly infection, a complicated birth, reported head injuries and migraines, drug use, and impulsivity. In light of these indicators, Stinson opined that a neuropsychological evaluation "very well may have shown that there's brain impairment and it may have helped to explain how [Belton] got to his lot in life."

{¶ 142} Trial counsel secured funding for a neuropsychologist to determine whether it was necessary to image Belton's brain. But they did not hire the expert. Accordingly, for the purpose of his evaluation, Stinson "assumed" that Belton did not have a brain impairment. According to Stinson, he would have more strongly urged a neuropsychological evaluation if it had been obvious to him that [Belton] suffered from brain injury.

***24** {¶ 143} Stinson's testimony indicates that a neuropsychological evaluation might have yielded useful mitigation evidence. But even so, Belton cannot establish that trial counsel were deficient for failing to pursue that course. The record indicates that counsel consulted with a neuropsychologist and ultimately decided not to pursue an evaluation. Counsel may have been concerned that the evaluation would yield negative results, thereby damaging Belton's case. Notably, even Stinson did not believe the indicators of potential brain impairment in Belton were sufficiently strong for him to insist on the evaluation.

{¶ 144} Under the circumstances, we presume that counsel's decision was strategic. And in any event, the record does not indicate what results a neuropsychological evaluation or brain scan would have yielded, so Belton cannot establish prejudice under *Strickland.* [8]

[62] **[63]** {¶ 145} Third, Belton argues that trial counsel should have secured a substance-abuse expert to testify about how drugs and alcohol affected his life. A defendant

cannot establish ineffective assistance based on counsel's failure to secure an expert if counsel used "alternative devices" to "fulfill the same functions as the expert assistance sought." *State v. Jenkins,* 15 Ohio St.3d 164, 473 N.E.2d 264 (1984), paragraph four of the syllabus; *see also Foust,* 105 Ohio St.3d 137, 2004-Ohio-7006, 823 N.E.2d 836, at ¶ 103. Here, trial counsel introduced significant evidence of Belton's history of drug and alcohol abuse—and how it may have affected him—through the testimony of Stinson, the defense psychologist. Belton offers no indication of how Stinson's testimony on the subject was inadequate. Because the record contains "no evidence * * * as to what a substance-abuse expert would have said in the penalty phase," Belton cannot "demonstrate[ ] prejudice from missing such testimony." *Ketterer,* 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, at ¶ 111.

[64] {¶ 146} Last, Belton contends that counsel should not have called Matthew Martin, a forensic counselor, as a witness during the mitigation phase. Belton argues that Martin's testimony was a "disaster" because he did not really know Belton, he was unprepared, and his testimony opened the door for the prosecutor to introduce evidence of Belton's altercations in jail.

{¶ 147} Martin testified that he is a forensic counselor on the maximum-security floor of the Lucas County Corrections Center, where Belton had been incarcerated for the last three years. Martin said that Belton was polite and followed the rules. For a time, Belton even held a special position, trustee, for which he was selected due to good behavior.

{¶ 148} Initially, Martin testified that Belton had been in only one physical altercation while on Martin's floor (when another inmate attacked him). However, on cross-examination, the prosecutor inquired about specific fights that occurred between 2008 and 2011. The prosecutor also presented Martin with a jail record from July 23, 2009, which described Belton as "a hard placement [because he] has had issues in each module on the fifth floor." Ultimately, Martin stated that to the best of his knowledge, Belton's fights had occurred soon after his arrest; Martin did not recall Belton's initiating any fights in the last three years.

***25 [65]** {¶ 149} "Generally, counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *Treesh,* 90 Ohio St.3d at 490, 739 N.E.2d 749. Here, Martin's testimony was consistent with the defense's mitigation argument that Belton's behavior in jail improved over time, as he adapted to the environment. And Belton's concern that Martin's testimony opened the door to questions about his jailhouse altercations does not make this strategy objectively unreasonable. *See State v. Nix,* 1st Dist. Hamilton No. C–030696, 2004-Ohio-5502, ¶ 60 ("it clearly cannot be said that defense counsel is constitutionally ineffective whenever he or she inadvertently opens the door to otherwise inadmissible testimony"). In fact, the state would have been able to introduce the same evidence in any event; the defense psychologist had testified about his review of Belton's jail records and even described some of his disciplinary charges. Counsel's performance was not deficient in this regard.

{¶ 150} For all these reasons, Belton's ineffective-assistance claims fail. We reject proposition of law Nos. 1, 12, 16, 17, and 18.

E. Cumulative Error

{¶ 151} In proposition of law No. 20, Belton urges the court to reverse his conviction or, alternatively his sentence, on grounds of cumulative error.

[66] {¶ 152} The cumulative-error doctrine provides that "a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial-court error does not individually constitute cause for reversal." *Powell,* 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, at ¶ 223, citing *State v. DeMarco,* 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus.

{¶ 153} Here, Belton cannot point to "multiple instances of harmless error." *State v. Garner,* 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (1995). Nor does he explain how the alleged errors collectively deprived him of a fair trial. Accordingly, proposition of law No. 20 fails.

F. Independent Sentence Evaluation

{¶ 154} In proposition of law No. 19, Belton argues that his death sentence was inappropriate in light of the

mitigating evidence presented. This claim dovetails with our obligation to independently review Belton's death sentence for appropriateness and proportionality. R.C. 2929.05(A).

[67] {¶ 155} In conducting this review, we must determine whether the evidence supports the three-judge panel's finding of aggravating circumstances, whether the aggravating circumstances outweigh the mitigating factors, and whether Belton's death sentence is proportionate to those affirmed in similar cases. *Id.*

1. Aggravating Circumstance

[68] {¶ 156} The three-judge panel found Belton guilty of two aggravating circumstances: committing murder to escape detection, R.C. 2929.04(A)(3), and, as the principal offender, committing murder in the course of an aggravated robbery, R.C. 2929.04(A)(7). The specifications were merged before sentencing, and the prosecutor elected to proceed with the (A)(7) specification.

***26** {¶ 157} The evidence adduced at the plea hearing supports the panel's finding that Belton murdered Dugan in the course of an aggravated robbery and that Belton was the principal offender. Security-camera video from the BP carryout, recorded on the morning of August 13, 2008, shows a single armed individual confront Dugan with a gun, take money and other items, then shoot Dugan at close range. In addition, video recordings show Belton confessing both crimes to police on August 14, 2008. This evidence, coupled with other evidence adduced at the no-contest-plea hearing, indicates that Belton knowingly killed Dugan while committing aggravated robbery and that Belton was the principal offender in the crimes.

2. Mitigating Factors

{¶ 158} We must weigh the above aggravating circumstance against any mitigating evidence about "the nature and circumstances of the offense" and Belton's "history, character, and background." R.C. 29259.04(B). In addition, we must consider the statutory mitigating factors under R.C. 2929.04: (B)(1) (victim inducement), (B)(2) (duress, coercion, or strong provocation), (B)(3) (mental disease or defect), (B)(4) (youth), (B)(5) (lack of significant criminal history), (B)(6) (accomplice only), and (B)(7) (any other relevant factors).

a. Belton's mitigation hearing

{¶ 159} The defense presented testimony from five witnesses at the mitigation phase: Belton's mother, Kim Harold; Belton's great-aunt, Linda Berry; a mitigation specialist, Mark Rooks; a psychologist, Dr. Bob Stinson; and a forensic counselor at the Lucas County Corrections Center, Matthew Martin. Belton also introduced 22 exhibits, including reports of Rooks's interviews with Belton's family members and Belton's educational, medical-history, and employment records. Belton did not testify or present an unsworn statement.

{¶ 160} On rebuttal, the state presented the testimony of Dr. David Connell, a clinical psychologist, and introduced records from the Lucas County Corrections Center.

i. Background and family history

{¶ 161} Belton's mother, Kim Harold, was born to a teenage mother, Sheila Googins, in 1965. As a child, Kim moved frequently, living at times with her mother, her grandmother, and foster parents. When she was five or six, Kim moved in with her mother and stepfather, George Harold, who adopted her. George molested Kim for years, and at some point when Kim was a teenager, she told Sheila that George had molested her. Sheila told Kim she did not believe her, but then Sheila became depressed over the allegation and attempted suicide. Kim moved in with her grandmother after Sheila's suicide attempt. Kim became depressed and began to use marijuana and crack, but she did complete high school and then attended a semester of a nursing program at the University of Toledo.

{¶ 162} At a young age, Kim entered an 11–year relationship with Anthony Belton Sr. They had two sons together when Kim was in her early twenties. Belton was born on November 23, 1985, and Aaron followed on January 5, 1987. Kim used drugs during both pregnancies —marijuana during the first and cocaine during the second. She was also hospitalized for an abdominal contusion during her pregnancy with Belton. Even so, records and family members indicate that Belton's birth was normal and that he was a full-term baby.

*27 {¶ 163} As a young child, Belton saw his father infrequently. The family lived in Toledo, but Belton Sr. was stationed in Japan for four or five years as a member of the United States Marine Corps. When Belton was about four years old, Belton Sr. became frustrated with Kim's continued drug use, and he moved to California. Kim attempted suicide. But soon she began dating Belton Sr.'s nephew, Christopher Belton, and they had a son together. Christopher became like a surrogate father to Belton.

{¶ 164} Kim and her sons moved frequently, living in eight or nine homes while Belton was growing up. Belton attended school regularly, but he began to get into trouble at an early age. According to Belton's great-aunt, Belton knew the difference between right and wrong, but had a tendency not to listen. Kim disciplined him by spanking him or hitting him with a belt.

{¶ 165} Belton witnessed both domestic abuse and drug use in the home. On one occasion, police came to investigate a domestic-violence incident and Belton was maced by the police. Another time, Kim went to the hospital, where she reported that Christopher had assaulted and raped her. Kim smoked marijuana in front of her sons, at times used $100 worth of cocaine in a single day, and left home for days-long crack binges. Yet she rejected offers from Belton Sr. and her mother to take the boys.

{¶ 166} When Belton was around 11 years old, Kim was incarcerated for forgery and petty theft. Kim sent Belton and Aaron to live with Belton Sr. in California. Initially, Belton attended school and earned good grades. He got along well with his father's girlfriend, LaTisha. But after about a year, Belton Sr. and LaTisha broke up, and the family moved.

{¶ 167} When Belton was 13 or 14 years old, Belton Sr. began dating a woman named Michelle. Michelle and her three daughters moved into the house, and she expected Belton to help with the kids. She also tried to act as a surrogate mother to Belton, which he resented. According to Dr. Stinson, "By this time, [Belton] was an angry child who very much resented the abandonments that he had suffered up to this point in life."

{¶ 168} Belton Sr. employed military-style discipline with the boys and frequently grounded Belton or took away privileges. He ordered Belton to do physical exercises such as push-ups as punishment. Belton Sr. also sometimes ordered Belton to box with him so that Belton Sr. could show him that he was stronger and was in charge. At times, he made Belton sit in a hot car all day while he worked.

{¶ 169} Belton attended Gompers High School in San Diego, California, a school that Stinson testified was known for its "crime ridden, gang infested environment." Riots broke out at Gompers several times a year, and when fights broke out, teachers would contain the fighting by closing gates inside the school until a swat team arrived. Belton's attendance at school was spotty. He got into fights, was beaten up a few times, and ultimately joined a gang. Belton began using alcohol and marijuana, but he did not try cocaine or crack, because he had seen what those drugs did to his family members.

*28 {¶ 170} When Belton was 17 or 18 years old, he assaulted a female classmate, and her family threatened charges. Belton Sr. decided to send his sons back to Toledo on a bus.

{¶ 171} Although Belton was glad to return to Toledo, he did not adjust well to the move; his great-aunt testified that he seemed depressed and angry. Initially, Belton enrolled in high school and got a job. But his school attendance was poor, and he was soon kicked out for fighting. Belton began pursuing a GED, but stopped attending classes. And he was fired from his job because he did not want to follow rules. Around this time, Belton began hanging out with his cousins, who used and dealt drugs.

{¶ 172} Belton lived with his mother and his Great–Aunt Sherry, but he left after he got into some disagreements with his great-aunt. Finally, Belton moved into the home of his maternal great-grandmother, Marianne Dodson. Dodson ran a "flop house" for anyone who needed a place to stay. Dodson's guests tended to spend their days smoking marijuana, instead of working or attending school.

{¶ 173} Belton's mother described him as intelligent, fun-loving, and not a bad person. She said that Belton loves to help people. And Belton's great-aunt stated that she has never seen Belton get violent.

ii. Belton's mental health

{¶ 174} Belton's great-aunt, Linda Berry, is a psychiatric nurse. She saw Belton frequently as a child and remembers him as being quiet. At family events, he sat alone rather than playing with other children.

{¶ 175} According to Berry, Belton became severely depressed in 2003 when his uncle, George Harold, died in a motorcycle accident. George had been a father figure and a stabilizing force to Belton. After George's death, Berry said, Belton "wouldn't talk to anybody" and "isolated himself." Berry thinks Belton may have experienced hallucinations and shown other signs of psychosis at the time.

{¶ 176} Berry set up an appointment for Belton to be evaluated at Connecting Point in November 2005. He was diagnosed with dysthymic disorder, which is chronic, low-grade depression.[9] His file was closed in March 2006.

{¶ 177} Dr. Bob Stinson, a forensic psychologist, testified that he had met with Belton, administered the Woodcock–Johnson III achievement test, and interviewed Belton's mother, brother, cousin, and great-aunt. Stinson also reviewed discovery materials, the mitigation specialist's interview notes, and records collected by the mitigation specialist.

{¶ 178} Stinson analyzed Belton's life through the lens of a United States Department of Justice ("DOJ") model that identifies various risk factors that make a person more likely to engage in criminal behavior, as well as various protective factors that reduce the risk of such behavior. According to Stinson, virtually every risk factor identified by the DOJ model applies to Belton, meaning that he was "at high risk for developing a psychological disorder or drug dependence and criminal activity." Stinson testified that these risk factors provide "a context in which to understand how [Belton] developed morally, how he developed in terms of values and what influence[d] his choices that he ultimately made."

***29** {¶ 179} Stinson conceded that Belton made a choice when he committed the crimes. However, he opined that Belton's background may reduce his moral culpability for his crimes. And Stinson testified that Belton has expressed sincere remorse for his actions.

{¶ 180} Stinson diagnosed Belton with an untreated bipolar disorder. In support, he cited Belton's reports of feeling alternately sad, energized, irritable, and suspicious of others. He also noted Belton's personal and family history of depression, his difficulty sleeping, and his report of hearing voices. The state's psychologist, Dr. Connell, disagreed with Stinson's diagnosis. Based on his review of the records, Connell opined that the better diagnosis is antisocial-personality disorder.

{¶ 181} Stinson also diagnosed Belton with drug and alcohol dependence. Belton began using alcohol and marijuana at age 15. Belton told Stinson that by the time he was 17, he was a "minialcoholic." He told Stinson that he drank pints of liquor at a time and sometimes blacked out. At the time of his arrest, Belton was using at least one ounce of marijuana a day. At other times, he used as much as one and a half ounces daily. Stinson explained that individuals with untreated mental illness "oftentimes turn to drugs and alcohol" in an effort to self-medicate.

{¶ 182} Belton's full-scale IQ is 89. However, Stinson noted indications of possible brain damage, such as perinatal risk factors, reported head injuries, reported migraines, and other behavioral indicators. Stinson recommended, but did not insist, that defense counsel secure a neuropsychological or neurological evaluation of Belton. Because this evaluation did not occur, Stinson's conclusions are based on the assumption that Belton does not have brain damage.

iii. Jailhouse behavior

{¶ 183} Matthew Martin, a forensic counselor on the maximum-security floor of the Lucas County Correctional Facility, testified about Belton's behavior in jail since his arrest. Belton had been on Martin's floor for three years, after initial placements on suicide watch and then another floor. According to Martin, Belton is polite and can exercise self-control.

{¶ 184} Martin testified that Belton hardly ever had discipline problems while on his floor. According to Martin, Belton had been selected as a trustee, a privilege reserved for well-behaved inmates. Martin explained that Belton was removed from that position only because a jail captain thought his case was too high profile.

{¶ 185} On rebuttal, the state introduced reports from the jail's disciplinary board dated from 2008 to 2011. The reports document Belton's attack on a special-needs inmate, physical altercations with other inmates, disregard of instructions, and possession of contraband. In July 2009, Belton challenged a shift commander to a fight, stating, "I'm facing the death penalty. I ain't got nothing to lose." Personnel suspected Belton was trying to manipulate his placements in the jail, and one report indicated that Belton may be "a hard placement." Belton also made repeated requests for painkillers, which Dr. Connell described as suspicious, drug-seeking behavior.

***30** {¶ 186} Dr. Stinson testified that Belton's prison record shows his potential to adjust to confinement. He explained that although Belton's record is imperfect, it shows improvement over time. Belton was cited in six disciplinary actions in 2009, three in 2010, and three in 2011. According to Stinson, prison is probably the most stable environment Belton has ever been in and he has responded well to the structure.

b. Weight of mitigating factors

{¶ 187} Based on the above evidence, Belton asked the trial court to assign weight to the following mitigating factors: (1) his history and background, R.C. 2929.04(B), (2) his youth, R.C. 2929.04(B)(4), (3) his lack of significant criminal history, R.C. 2929.04(B)(5), and (4) other factors such as mental-health problems, remorse, acceptance of responsibility, and adaptability to a prison setting, R.C. 2929.04(B)(7). He concedes that there is nothing in the nature and circumstances of the offense that is mitigating.

{¶ 188} Upon our review of the record, we assign weight to the following mitigating factors. First, Belton presented significant evidence of his difficult childhood and upbringing. As a child, Belton moved frequently and had an unstable home life. His family had a history of depression, domestic violence, physical abuse, and drug and alcohol abuse. Belton's mother smoked marijuana in front of him and left home for days at a time to go on crack binges. When she was incarcerated, Belton went to live with his father in California, even though they had not seen each other for years. Belton's father physically abused him. Belton attended a violent, crime-ridden high school, where gangs and riots were common. He eventually joined a gang himself and began using drugs. He did not finish high school, had trouble holding a job, and had difficulty following rules. We assign significant weight to Belton's family history and background.

{¶ 189} Second, Belton was 22 years old when he robbed the BP carryout and murdered Dugan. In the past, we have accorded some weight to the defendant's youth when considering defendants of a similar age. *See, e.g., Thompson,* 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, at ¶ 307 (23–year–old defendant); *State v. Goodwin,* 84 Ohio St.3d 331, 350, 703 N.E.2d 1251 (1999) (according "nominal weight" to defendant's age of 19). *Compare State v. Drummond,* 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 262 (defendant's age of 25 "entitled to little, if any, weight"). Accordingly, we assign Belton's age some weight in mitigation.

{¶ 190} Third, the record does not indicate that Belton has a significant history of serious criminal convictions or delinquency adjudications. Belton's criminal record includes offenses such as loitering, disorderly conduct, giving false information to a police officer, failing to register a dog, and driving without a licensed driver while holding a temporary permit. We afford this factor some weight. *See State v. Neyland,* 139 Ohio St.3d 353, 2014-Ohio-1914, 12 N.E.3d 1112, ¶ 301.

***31** {¶ 191} Fourth, the defense presented evidence that Belton suffered from mental-health problems. R.C. 2929.04(B)(7). Belton was diagnosed with dysthymia in 2005, and he may have been depressed for much longer. In addition, Dr. Stinson diagnosed Belton with bipolar disorder, as well as drug and alcohol dependence. And although the state's expert psychiatrist disagreed with Stinson's diagnosis of bipolar disorder, he opined that Belton suffers from antisocial-personality disorder. This evidence of mental-health problems is entitled to some weight.

{¶ 192} Belton also argues that the record establishes his remorse for the crimes and his acceptance of responsibility. These claims are undermined by Belton's actions in the immediate aftermath of the murder (buying shoes and going to Burger King), his initial lies to police, and his statements to Christopher Wilson while they were in holding cells regarding Bolton's having told the police everything. However, Dr. Stinson and Belton's great-aunt both testified that Belton has repeatedly

expressed remorse to them. And although Belton did not immediately accept responsibility for the crimes, he did help police locate the murder weapon, confess, and (much later) enter a plea of no contest to the charges against him. This factor is entitled to some weight.

{¶ 193} Finally, Belton asserts that he has established his adaptability to prison life. Although Belton was clearly not a model prisoner, there is some evidence that he began to cause fewer disciplinary problems as he spent more time in prison. Dr. Stinson explained that prison is probably the most stable environment Belton has ever lived in and opined that his behavior would only continue to improve. We assign minimal weight to this factor.

{¶ 194} At oral argument, Belton also asked us to consider one additional factor in our reweighing of his sentence: He asserts that the costs associated with a death sentence exceed the costs associated with a sentence of life imprisonment without parole. This "is not a legitimate mitigating factor." *State v. Davis,* 139 Ohio St.3d 122, 2014-Ohio-1615, 9 N.E.3d 1031, ¶ 114 (explaining that such costs are not relevant mitigating evidence because they are not evidence about the defendant's character or record or about the circumstances of the offense).

3. Weighing

[69] {¶ 195} As detailed above, Belton has presented significant mitigating evidence that has substantial weight. That said, Belton shot Dugan at close range, in the back of the head, even though Dugan had cooperated with Belton's demands for money and phone cards. Belton then left Dugan to die and went shoe shopping. Under the circumstances, we conclude that the aggravating circumstance in this case outweighs the mitigating factors beyond a reasonable doubt. *See State v. Elmore,* 111 Ohio St.3d 515, 2006-Ohio-6207, 857 N.E.2d 547, ¶ 167 (compared with the serious aggravating circumstances of committing murder during the course of an aggravated robbery and aggravated burglary, Elmore's mitigating evidence had little significance).

4. Proportionality

***32 [70]** {¶ 196} The death penalty is appropriate and proportionate in this case, when compared to death sentences approved in similar cases. *See, e.g., Murphy,* 91 Ohio St.3d 516, 747 N.E.2d 765 (shooting a robbery victim outside a bar); *Bey,* 85 Ohio St.3d 487, 709 N.E.2d 484 (stabbing a retail employee during a robbery); *State v. Eley,* 77 Ohio St.3d 174, 672 N.E.2d 640 (1996) (shooting a store clerk while robbing a market).

III. CONCLUSION

{¶ 197} We reject each of Belton's propositions and affirm his convictions and sentence of death.

Judgment affirmed.

O'CONNOR, C.J., and PFEIFER, O'DONNELL, LANZINGER, and FRENCH, JJ., concur.

O'NEILL, J., concurs in part and dissents in part for the reasons set forth in his dissenting opinion in *State v. Wogenstahl,* 134 Ohio St.3d 1437, 2013-Ohio-164, 981 N.E.2d 900.

All Citations

--- N.E.3d ----, 2016 WL 1592786, 2016 -Ohio- 1581

Footnotes

1 The trial court held five hearings on this issue, and the parties filed multiple briefs arguing their positions. Later, the court postponed trial to await an appellate court's ruling on the same issue in a different case. Belton also unsuccessfully attempted to file an interlocutory appeal of the trial court's ruling. *See State ex rel. Bates v. Court of Appeals for the Sixth Appellate Dist.,* 130 Ohio St.3d 326, 2011-Ohio-5456, 958 N.E.2d 162.

2 Detective Jeffrey Clark testified that the time stamp on the recording was approximately 50 minutes behind the actual time. This opinion refers to the actual time of events, not the incorrect times indicated by the time stamp.

 © 2016 Thomson Reuters. No claim to original U.S. Government Works.

3 Belton does not—nor could he—make a case that the General Assembly *expressly* repealed the death penalty. The specific statutory provisions governing the death penalty, R.C. 2929.03 and 2929.04, were first enacted in 1972. And although these statutes have been amended multiple times, they have not been repealed.

4 Belton offers this argument as support for his claim that the General Assembly repealed the death penalty when it amended R.C. 2929.11(A) in 2011. But rehabilitation was not added as part of the 2011 amendment. Rehabilitation (and the other three factors mentioned) have all been included in R.C. 2929.11(A) since its initial enactment.

5 However, the trial court did quote a passage from *DePew,* and it granted the defendant's motion to "prohibit the prosecutor from arguing and the court from giving instructions regarding statutory mitigating factors not raised by the defendant."

6 At the hearing, the state introduced complete video recordings of both interviews and presented testimony from Detective Lenhardt, Sergeant Russell, and Detective Clark. Belton's attorney's argued, in part, that Belton had been under the influence when he waived his rights, so much of the suppression-hearing testimony focused on whether Belton was under the influence of drugs or alcohol during questioning, but Belton does not press that claim on appeal.

7 Proposition of law No. 18, part (e), repeats the claims raised in proposition of law Nos. 1, 12, and 16.

8 Because Belton would need evidence outside the record to establish his claims that a neuropsychologist and a substance-abuse expert should have been called to testify, they are not appropriately raised on direct appeal. *See Madrigal,* 87 Ohio St.3d at 390–391, 721 N.E.2d 52 (it is not permissible to rely on evidence outside the record in a direct appeal). Belton could raise them on postconviction review.

9 On rebuttal, the state's psychologist, Dr. Connell, noted that it was inappropriate for Connecting Point to attempt to diagnose Belton at the time, in light of his daily drug use.

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Yellow Flag - Negative Treatment
Habeas Corpus Conditionally Granted by Gumm v. Mitchell, S.D.Ohio, March 29, 2011

73 Ohio St.3d 413
Supreme Court of Ohio.

The STATE of Ohio, Appellee,
v.
GUMM, Appellant.

No. 94–756.
|
Submitted June 7, 1995.
|
Decided Aug. 30, 1995.

Defendant was convicted in the Court of Common Pleas of Hamilton County, of aggravated murder, attempted rape and kidnapping, and sentenced to death. On appeal, the Court of Appeals affirmed, and defendant appealed. The Supreme Court, Moyer, C.J., held that: (1) consideration of nature and circumstances surrounding capital defendant's crime is permissible under Federal Constitution; (2) statute governing imposition of death sentence authorizes jury to consider nature and circumstances of the crime; (3) prosecutor's closing arguments imprecisely described facts surrounding murder as "the aggravating circumstances" in the case, but that argument was not plain error; (4) there was no reversible error in trial court's response to jury question; (5) photographs were admissible; (6) other act evidence did not deny defendant fair trial; (7) defendant was not denied effective assistance of counsel; (8) defendant's waiver of *Miranda* rights was voluntary; (9) appellate court's power of independent review of capital sentences did not violate defendant's right to trial by jury; (10) trial court did not abuse its discretion in refusing to change venue; (11) trial court did not abuse its discretion in refusing to allow defense counsel to defer making opening statement until after state rested its case; and (12) death sentence was appropriate.

Affirmed.

West Headnotes (46)

[1] Sentencing and Punishment
Aggravating circumstances in general

Proof of "aggravating circumstance" is required by Eighth Amendment before convicted murderer may be sentenced to death. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[2] Sentencing and Punishment
Aggravating or mitigating circumstances

Statutes defining felony murder as aggravating circumstance do not violate Eighth Amendment, at least as to defendant who is found to have himself killed, attempted to kill, or intended to kill, or possesses culpable mental state of reckless indifference to human life. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[3] Sentencing and Punishment
Nature and circumstances of offense

During sentencing phase of capital murder case, Eighth Amendment does not preclude consideration of facts and circumstances surrounding the murder. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[4] Sentencing and Punishment
Manner and effect of weighing or considering factors

Once jury finds that defendant falls within legislatively defined category of persons eligible for death penalty, jury is then free to consider myriad of factors to determine whether death is appropriate punishment and may be given unbridled discretion in determining whether death penalty should be imposed. U.S.C.A. Const.Amend. 8.

Cases that cite this headnote

[5] **Sentencing and Punishment**
Factors Related to Offense

Sentencing and Punishment
Arguments and conduct of counsel

Defendant's Eighth Amendment rights were not violated during sentencing phase of capital murder trial when prosecutor argued, and jury was permitted to consider, nature and circumstances of the murder. U.S.C.A. Const.Amend. 8.

1 Cases that cite this headnote

[6] **Sentencing and Punishment**
Factors Related to Offense

Statute governing imposition of death sentence authorizes jury to consider nature and circumstances of the crime. R.C. § 2929.03(D)(1, 2).

Cases that cite this headnote

[7] **Sentencing and Punishment**
Use and effect of report

Sentencing and Punishment
Applicability of rules of evidence in general

Sentencing and Punishment
Admissibility

Sentencing and Punishment
Defendant's mental condition or capacity

Sentencing and Punishment
Arguments and conduct of counsel

Subject to applicable Rules of Evidence, counsel for state and for defendant at penalty stage of capital trial may introduce and comment upon: (1) any evidence raised at trial that is relevant to aggravating circumstances specified in indictment of which defendant was found guilty; (2) any other testimony or evidence relevant to nature and circumstances of aggravating circumstances specified in indictment of which defendant was found guilty; (3) evidence rebutting existence of any statutorily defined or other mitigating factors first asserted by defendant; (4) presentence investigation report, where one is requested by defendant; and (5) mental examination report, where one is requested by defendant. R.C. § 2929.03(D)(1, 2).

19 Cases that cite this headnote

[8] **Sentencing and Punishment**
Arguments and conduct of counsel

At penalty stage of capital trial, state's comment upon defendant's unsworn statement does not, in and of itself, constitute impermissible argument or impermissible introduction of nonstatutory aggravating factors into penalty phase proceedings; to extent that this evidence brings before jury nonstatutory aggravating factors, introduction of that evidence for consideration by jury in penalty phase is specifically authorized by statute. R.C. § 2929.03(D)(1, 2).

12 Cases that cite this headnote

[9] **Sentencing and Punishment**
Instructions

Trial courts in penalty phase of capital proceeding should not instruct jurors that evidence of nature and circumstances of the crime is to be weighed against mitigating factors, but should describe only statutorily defined elements specified in the indictment as being the "aggravating circumstances" a jury is to place on one side of the balance, with mitigating factors placed on the other side. R.C. § 2929.03(D)(1, 2).

26 Cases that cite this headnote

[10] **Sentencing and Punishment**
Arguments and conduct of counsel

Sentencing and Punishment
Instructions

Courts and prosecutors should refrain from advising juries in penalty phase of capital proceeding that aggravating circumstances

placed on one side of balance include "everything that surrounds the crime," or "all the nature and circumstances of this crime" or any comparable phraseology. R.C. § 2929.03(D)(1).

1 Cases that cite this headnote

[11] **Sentencing and Punishment**
Aggravating circumstances in general

In penalty phase of capital proceeding, courts and attorneys should minimize jury confusion by avoiding use of term "aggravating circumstances" to describe two very different legal concepts, i.e., facts sufficient to elevate crime to death-eligible category, and facts relevant to determination as to whether death sentence should be imposed upon death-eligible capital defendant.

4 Cases that cite this headnote

[12] **Criminal Law**
Particular statements, arguments, and comments

Prosecutor's closing arguments in capital proceeding imprecisely described facts surrounding murder as "the aggravating circumstances" in the case, but that argument was not plain error; outcome of jury's sentencing recommendation would not have been different in absence of this argument, particularly as jury was correctly instructed as to what the statutory aggravating circumstances were for weighing purposes.

6 Cases that cite this headnote

[13] **Sentencing and Punishment**
Arguments and conduct of counsel

Prosecutor's comments in sentencing phase of capital proceeding on victim's age, size, physical condition and defendant's motive constituted proper comment on nature and circumstances of statutory aggravating circumstance of felony murder, which jury was required to consider. R.C. §§ 2929.03(D)(1), 2929.04(A)(7).

10 Cases that cite this headnote

[14] **Sentencing and Punishment**
Murder

Although murder is an element of felony-murder aggravating circumstance, it is not, standing alone, an additional aggravating circumstance. R.C. § 2929.04(A)(7).

Cases that cite this headnote

[15] **Criminal Law**
Requisites and sufficiency

Criminal Law
Conduct and Deliberations of Jury

Although trial court's response to jury question contained element of uncertainty as to whether answer meant, "yes, the aggravating circumstances are just the kidnapping and rape" or "yes, the aggravating circumstances include the murder itself," court's response was not reversible error; trial court properly instructed jury to refer to written instructions, which adequately defined both statutory aggravating circumstances at issue as well as process by which jury was to weigh aggravating circumstances against any mitigating factors it found.

6 Cases that cite this headnote

[16] **Sentencing and Punishment**
Harmless and reversible error

Supreme Court's independent review cured any deficiencies of trial court in failing to conform with statutory requirements in its written sentencing opinion. R.C. § 2929.03(F).

4 Cases that cite this headnote

[17] **Criminal Law**
Failure to instruct in general

Any error in trial court's failure in penalty phase to instruct jury that defendant's mental retardation reduced his moral culpability was

waived, where no objection to instructions was proffered at trial.

1 Cases that cite this headnote

[18] **Criminal Law**
Depiction of places;scene of crime
Criminal Law
Depiction of Injuries or Dead Bodies

Photographs exhibiting wound or murder weapon at crime scene that was not readily apparent in any other photograph were relevant and probative in capital case. Rules of Evid., Rules 403, 611(a).

Cases that cite this headnote

[19] **Criminal Law**
Photographs arousing passion or prejudice;gruesomeness

Nonrepetitive photographs in capital cases, even if gruesome, are admissible if probative value of each photograph outweighs danger of material prejudice to accused. Rules of Evid., Rules 403, 611(a).

5 Cases that cite this headnote

[20] **Criminal Law**
Special types of photographs; enlargements, motion and sound pictures, X-rays

Videotape showing defendant "walking through" crime scene with police and describing events surrounding murder was probative and was not gruesome in nature.

Cases that cite this headnote

[21] **Criminal Law**
Special types of photographs; enlargements, motion and sound pictures, X-rays

Two enlarged photographs of victim used by deputy coroner to explain and detail injuries and trauma sustained by victim in lieu of showing projected slides to jury were admissible in capital case.

3 Cases that cite this headnote

[22] **Criminal Law**
Weapons and related objects

Probative value of murder weapons found near murder victim's body clearly outweighed any material prejudice to defendant.

1 Cases that cite this headnote

[23] **Criminal Law**
Evidence calculated to create prejudice against or sympathy for accused

Testimony of one witness that defendant "was hateful," that his personality would change when he drank alcohol and that defendant told her he had once had sexual contact with a horse, and testimony of another witness that defendant started giving her "strange looks" during month before murder and that he had graphically expressed to her his desire to have sex did not deny defendant fair trial in capital murder prosecution. R.C. § 2945.59; Rules of Evid., Rule 404(B).

1 Cases that cite this headnote

[24] **Criminal Law**
Prosecution's right to disclosure
Criminal Law
For prosecution

When defense's mitigation psychologist stated that packet of materials prepared by Court Psychiatric Center helped him form basis of his opinions on defendant, prosecutor could move for production of the packet and refer to materials contained in the packet in his closing argument. Rules of Evid., Rule 703.

1 Cases that cite this headnote

[25] **Costs**
Medical or psychiatric witnesses or assistance

State, having provided funds for defense counsel to obtain mitigation psychologist, was not constitutionally required to provide "mitigation specialist" instead.

5 Cases that cite this headnote

[26] **Criminal Law**
⇦ Necessity for application

Trial court was under no obligation to grant continuance sua sponte to allow defendant to obtain mitigation specialist in lieu of mitigation psychologist.

2 Cases that cite this headnote

[27] **Criminal Law**
⇦ Deficient representation and prejudice in general

Defendant alleging ineffective assistance of counsel must show that counsel's performance was deficient and that deficient performance prejudiced defense so as to deprive defendant of fair trial. U.S.C.A. Const.Amend. 6.

43 Cases that cite this headnote

[28] **Criminal Law**
⇦ Error Waived in Appellate Court

Acts of counsel, not asserted as error in Court of Appeals, were waived. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[29] **Criminal Law**
⇦ Raising issues on appeal;briefs

Appellate counsel was not ineffective for not raising issue of ineffective trial counsel based on failure to object to prosecutorial misconduct during trial. U.S.C.A. Const.Amend. 6.

67 Cases that cite this headnote

[30] **Criminal Law**
⇦ Particular Cases and Issues

Failure to make objections does not constitute ineffective assistance of counsel per se, as that failure may be justified as a tactical decision. U.S.C.A. Const.Amend. 6.

81 Cases that cite this headnote

[31] **Criminal Law**
⇦ Raising issues on appeal;briefs

Appellate counsel need not raise every conceivable issue on appeal.

68 Cases that cite this headnote

[32] **Criminal Law**
⇦ Custodial interrogation in general

Duty to advise suspect of *Miranda* rights does not attach until questioning raises to level of custodial interrogation.

35 Cases that cite this headnote

[33] **Criminal Law**
⇦ Warnings

In judging whether individual has been placed into custody, for purposes of *Miranda*, test is whether, under totality of circumstances, reasonable person would have believed that he was not free to leave.

80 Cases that cite this headnote

[34] **Criminal Law**
⇦ Particular Cases

Defendant's waiver of *Miranda* rights was voluntary; defendant waived his *Miranda* rights several times and signed two waiver of rights forms, and audio and videotape interviews of defendant exhibited no signs of police coercion, threats, mistreatment or physical deprivation.

23 Cases that cite this headnote

[35] **Criminal Law**
⇦ Voluntariness

State carries burden of proving voluntariness of confession by preponderance of evidence.

12 Cases that cite this headnote

[36] **Jury**
Re-examination or other review of questions of fact tried by jury

Appellate court's power of independent review of capital sentences did not violate defendant's right to trial by jury. Const. Art. 1, §§ 5, 10; R.C. § 2929.05.

1 Cases that cite this headnote

[37] **Criminal Law**
Mode of acquiring jurisdiction

Coercing, tricking, inducing or deceiving defendant in returning to Ohio would not necessarily invalidate conviction.

Cases that cite this headnote

[38] **Criminal Law**
Discretion of court

Trial court did not abuse its discretion in refusing to change venue of capital murder trial, where all jurors who were seated were passed for cause by defense counsel.

11 Cases that cite this headnote

[39] **Criminal Law**
Hearing in general

Trial court may in its discretion conduct separate venue hearing prior to jury selection, but is not required to do so.

3 Cases that cite this headnote

[40] **Jury**
Mode of examination

It is not necessary to conduct voir dire of prospective jurors individually and out of hearing of other members of venire.

2 Cases that cite this headnote

[41] **Criminal Law**
Right to open and close

Trial court did not abuse its discretion in refusing to allow defense counsel to defer making opening statement until after state rested its case. R.C. § 2945.10.

1 Cases that cite this headnote

[42] **Sentencing and Punishment**
Instructions

Instruction apprising jury that it was called upon to "recommend" nonbinding sentence of death if it found aggravating circumstances to outweigh mitigating circumstances did not impermissibly reduce jury's sense of responsibility in recommending death.

2 Cases that cite this headnote

[43] **Criminal Law**
Particular Instructions

No plain error was committed in providing jury with verdict form including words "we recommend" sentence of death.

Cases that cite this headnote

[44] **Criminal Law**
Particular Instructions

Failure to object to verdict forms constituted waiver of right to appeal issue.

Cases that cite this headnote

[45] **Sentencing and Punishment**
Low intelligence or mental retardation

Sentencing and Punishment
Physical illness or disability

Defendant's brain dysfunction and mental retardation did not qualify for death penalty mitigating factor of mental disease or defect. R.C. § 2929.04(B)(3).

6 Cases that cite this headnote

[46] Sentencing and Punishment

Killing while committing other offense or in course of criminal conduct

Aggravating circumstances outweighed mitigating factors and supported sentence of death for brutal murder of 10–year-old boy combined with kidnapping and attempted rape. R.C. §§ 2905.01, 2923.02, 2929.04(A)(3, 7).

1 Cases that cite this headnote

****257** *Syllabus by the Court*

Subject to applicable Rules of Evidence, and pursuant to R.C. 2929.03(D)(1) and (2), counsel for the state at the penalty stage of a capital trial may introduce and comment upon (1) any evidence raised at trial that is relevant to the aggravating circumstances specified in the indictment of which the defendant was found guilty, (2) any other testimony or evidence relevant to the nature and circumstances of the aggravating circumstances specified in the indictment of which the defendant was found guilty, (3) evidence rebutting the existence of any statutorily defined or other mitigating factors first asserted by the defendant, (4) the presentence investigation report, where one is requested by the defendant, and (5) the mental examination report, where one is requested by the defendant. Further, counsel for the state may comment upon the defendant's unsworn statement, if any. (R.C. 2929.03[D], construed; *State v. DePew* [1988], 38 Ohio St.3d 275, 528 N.E.2d 542, affirmed and followed.)

Early on the morning of May 12, 1992, the bludgeoned body of ten-year-old Aaron Raines was found by police in the basement of an abandoned building in the lower Price Hill section of Cincinnati. Defendant-appellant, Darryl "Junior" Gumm, was subsequently convicted of the crimes of aggravated murder, attempted rape and kidnapping of Aaron Raines, and sentenced to death.

At 11:00 p.m. on May 11, 1992, Aaron Raines's family reported Aaron as missing to Cincinnati police. An extensive neighborhood search took place, culminating in the discovery of Aaron's body in the basement of an abandoned building adjacent to a neighborhood park where Aaron had previously been playing.

Several weeks later Betty Gumm, a friend of the Raines family and defendant's sister through adoption, learned that her brother Darryl had been in the neighborhood on the day of Aaron's murder. Betty knew that her brother was acquainted with Aaron, and was familiar with the abandoned buildings where Aaron's body was found, having stripped copper out of them many times at night. Betty called the local "Crime Stoppers" number to report her information.

***414** On July 24, 1992, Cincinnati police interviewed appellant at his job site, a tobacco farm in Brooksville, Kentucky. At that time, Gumm told police he hadn't been in Cincinnati since March 1992, and indicated his desire to cooperate with police. On July 27 Cincinnati police returned to Brooksville to talk to Gumm again, and Gumm accompanied them back to Cincinnati, ostensibly to clear himself of any wrongdoing. After extensive questioning ****258** in which he changed his statement several times, Gumm eventually confessed involvement in the murder of Aaron Raines.

Gumm's statement disclosed that he and one Michael Bies, a Kentucky acquaintance, were driven to Cincinnati on May 11 by acquaintances and dropped off around noon. Gumm told police that he and Bies went to a bar to drink beer, and later went to the Price Hill park adjacent to two abandoned buildings, where they encountered Aaron. Gumm and Bies were observed at approximately 7:00 p.m. sitting on a bench in the park in which Aaron last played. Gumm admitted that he lured Aaron into the abandoned buildings for sexual purposes by telling him he would be paid $10 to help strip copper from the buildings. According to Gumm, after the three entered the first building and crossed over a walkway into the second building, Bies asked Aaron to perform oral sex for money. When Aaron refused, Gumm claimed that Bies punched Aaron several times, picked him up and carried him downstairs to the basement. According to Gumm, Bies there hit Aaron several additional times, once on the head with a "two by four." After that, Gumm stated that he and Bies fled the scene. Gumm claims that he himself did not hit Aaron at all, but conceded that he might have stepped on his body as he was attempting to flee from the basement.

When police found Aaron's body at the basement crime scene, they noticed several objects around the body that contained blood and hairs consistent with the victim's. These objects included a chunk of concrete, a pipe, pieces of wood, and twine found wrapped around Aaron's neck.

Amy Martin, M.D., a former deputy coroner of Hamilton County, examined Aaron's body at the crime scene and conducted the post-mortem exam at the coroner's office. Dr. Martin testified that Aaron sustained twenty-one lacerations to the back of his head, representing twenty-one separate blows from an object, and that some of these wounds manifested lines that matched the threading on the pipe found next to the body. Five of Aaron's ribs were broken, which Dr. Martin found unusual for a boy of his age, since such bones are usually flexible. Dr. Martin opined that "something like a kicking or stomping" would be the type of force necessary to break a young boy's ribs. Dr. Martin further testified that the left side of Aaron's face was completely crushed in a manner consistent with a blow from the chunk of concrete found lying next to the body. Several "chevron pattern" bruises consistent with the tread of a Nike gym shoe were found on ***415** several areas of Aaron's body. Gumm had told police that he thought Bies had been wearing L.A. Gear gym shoes, and acknowledged that he had thrown his own shoes away.

Dr. Martin testified that Aaron also sustained a broken jaw, chipped teeth and cut lips, a deep laceration and bone chip on the underside of his jaw, compression wounds and hemorrhages in the eyes probably caused by compression of twine wrapped around his neck, and pattern bruises typical of injuries caused by being struck with a stick or rod.

Dr. Martin found no evidence of any defensive wounds on Aaron's body, and opined that the absence of defensive wounds was consistent with Aaron having been held or restrained while his injuries were being inflicted. Dr. Martin determined that the cause of death was a combination of blunt impacts to the head, chest and abdomen, as well as blunt injury to the neck.

Gumm was indicted by the Hamilton County Grand Jury on one count of aggravated murder with death penalty specifications based on violations of R.C. 2929.04(A)(3) (offense committed to escape detection for attempted rape or kidnapping) and R.C. 2929.04(A)(7) (felony-murder based on underlying felonies of kidnapping and attempted rape). Gumm was also indicted on separate counts of attempted rape (R.C. 2923.02) and kidnapping (R.C. 2905.01). At the conclusion of the guilt phase, the jury found Gumm guilty on all counts and specifications.

At the mitigation phase of the trial Gumm called one witness, his sister Karen Ridenour. He presented no statement himself. The jury found the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt and recommended ****259** that Gumm receive the death penalty. The trial court merged the specifications and imposed the death sentence for the aggravated murder count. The court further imposed consecutive terms of imprisonment upon Gumm's convictions for attempted rape and kidnapping.

Upon appeal, the First District Court of Appeals affirmed the convictions and sentence of death.

Attorneys and Law Firms

Joseph T. Deters, Hamilton County Pros. Atty., and Christian J. Schaefer, Asst. Pros. Atty., for appellee.

H. Fred Hoefle and David J. Boyd, Cincinnati, for appellant.

Opinion

MOYER, Chief Justice.

MOYER, C.J. Appellant has raised twenty-two propositions of law. We have reviewed each and, for the reasons stated below, we find that none justifies reversal of appellant's conviction of the crimes of aggravated murder, kidnapping and attempted rape of ten-year-old Aaron Raines. In addition, we have fulfilled ***416** our responsibilities to independently review the record, weigh the mitigating factors against the aggravating circumstances, and examine the appropriateness and proportionality of a sentence of death in this case. Upon full review of the record we affirm appellant's convictions and death sentence.

I

Allegation of Improper Consideration of "Nature and Circumstances" Evidence

Gumm argues that his death sentence should be reversed based on prosecutorial misconduct. Specifically Gumm complains of the following statements made by prosecutors in the penalty phase closing argument: "What are the aggravating circumstances in this case? All facts and all the circumstances and all the evidence that surrounded that episode back on May the 11th of this year. The age of the victim. How he died. Where he died. Why he died. The motive that was in the minds of the two men that took him into the building. How he was murdered. How he was left. All of these factors should be put on that scale and weighed by you, and on the other side of that scale you should put whatever mitigating factors you heard in the case today."

Later, in rebuttal, the prosecution continued: "And I'm going to speak a little bit about the aggravating circumstances at this point. He was ten years old. He weighed eighty-five pounds, and according to the defendant, he barely came above his waist. We know he was afraid of high places. He was absolutely terrified of the dark. * * *

"And can you think of anything more terrifying for a boy who is afraid of the dark, after all that's happened to him, than to be forcibly taken down into that pitch black basement?

"Just imagine what was going through his mind. How many times did he beg them to stop? How many times did he say a little prayer for help? And down in the basement we know it wasn't quick, and it wasn't easy either.

"How long did it take before he lost consciousness? And when he did, what were his last thoughts? Was he still asking this man to set him free? Or at that point was he begging to just let him die? Those are the aggravating circumstances on this case."

This court is thus once again faced with contentions of error in a capital case based on lower courts having considered, or allowing the jury to consider, or allowing the prosecutor to argue, or including in its sentencing opinion, "nonstatutory aggravating circumstances" in connection with the determination of whether a sentence of death should be imposed. In light of the inclusion of such an argument in nearly every capital case recently presented to this court, we find it ***417** appropriate to review the law, both constitutional and statutory, which governs the resolution of such contentions.

A

Constitutional Considerations

[1] **[2]** Proof of an "aggravating circumstance" is constitutionally required by the Eighth Amendment to the United States Constitution before a convicted murderer ****260** may be sentenced to death. *Tuilaepa v. California* (1994), 512 U.S. 967, ——, 114 S.Ct. 2630, 2634–2635, 129 L.Ed.2d 750, 759. Statutes defining felony-murder as an aggravating circumstance do not violate these Eighth Amendment standards, at least as to a defendant who is found to have himself killed, attempted to kill, or intended to kill, or who possesses a culpable mental state of reckless indifference to human life. *Enmund v. Florida* (1982), 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140; *Tison v. Arizona* (1987), 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127.

In Ohio, a capital defendant is tried and sentenced in a two-stage process. During the first phase (commonly referred to as the "guilt phase") the state must prove the defendant guilty beyond a reasonable doubt of the crime of aggravated murder, and must also prove the defendant guilty of at least one statutorily defined "aggravating circumstance" as set forth in R.C. 2929.04(A)(1) through (8). At the point in time at which the factfinder (either a jury or three-judge panel) finds the defendant guilty of both aggravated murder and an R.C. 2929.04(A) specification, the defendant has become "death-eligible," and a second phase of the proceedings (the "mitigation" or "penalty" or "sentencing" or "selection" phase) begins. R.C. 2929.03(C)(2) and (D)(1).

[3] **[4]** During this latter phase, the Eighth Amendment does not preclude consideration of the facts and circumstances surrounding the murder. To the contrary, the United States Supreme Court has consistently recognized that the determination as to the imposition of a death sentence should hinge on "an *individualized* determination" based on "the character of the individual *and the circumstances of the crime.*" (Emphasis added

in part.) *Zant v. Stephens* (1983), 462 U.S. 862, 879, 103 S.Ct. 2733, 2744, 77 L.Ed.2d 235, 251. See, also, *Woodson v. North Carolina* (1976), 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944, 961 ("consideration of * * * the circumstances of the particular offense [is] a *constitutionally indispensable* part of the process of inflicting the penalty of death." [Emphasis added.]). See, also, *Tuilaepa, supra,* 512 U.S. at ——, 114 S.Ct. at 2637, 129 L.Ed.2d at 762 ("*The circumstances of the crime are a traditional subject for consideration by the sentencer,* and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence" [emphasis added].). As a matter of Eighth Amendment ***418** requirements, " '[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, * * * the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment' [and] may be given 'unbridled discretion in determining whether the death penalty should be imposed * * *.' " *Id.* at ——, 114 S.Ct. at 2639, 129 L.Ed.2d at 764, quoting *California v. Ramos* (1983), 463 U.S. 992, 1008, 103 S.Ct. 3446, 3457, 77 L.Ed.2d 1171, 1185, and *Zant, supra,* 462 U.S. at 875, 103 S.Ct. at 2742, 77 L.Ed.2d at 243.

[5] Pursuant to this precedent, we reject Gumm's contention that he was denied rights guaranteed him by the United States Constitution in that the prosecutor argued and the jury was permitted to consider the nature and circumstances of the murder of Aaron Raines in determining whether to recommend a sentence of death.

B

Statutory Considerations

Our conclusion that consideration of the nature and circumstances surrounding a capital defendant's crime is permissible under the United States Constitution does not conclude our inquiry, in that the imposition of a death sentence in Ohio is further governed by statute.

Our analysis must necessarily begin with the language of the governing statutes. In making the determination whether a death sentence should, in fact, be imposed, "[t]he court, and the trial jury if the offender was tried by a jury, [1] *shall consider * * * any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death,* [2] *shall hear testimony and* ****261** *other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing,* the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and [3] shall hear the statement, if any, of the offender, and *the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender.*" (Emphasis added.) R.C. 2929.03(D)(1). Similarly, R.C. 2929.03(D)(2) requires a trial jury to base its determination as to "whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case" upon "*consideration of the relevant evidence raised at trial,* the testimony, *other evidence,* statement of the offender, arguments of counsel, and, if applicable, [pre-sentence investigation or mental examination] reports submitted pursuant to division (D)(1) of [R.C. 2929.03]." (Emphasis added.)

[6] ***419** These statutes thus expressly require the jury to "consider" both relevant trial evidence as well as "other" evidence relevant to the aggravating circumstances the offender was found guilty of committing. Because findings of guilt are only made as to the specifications contained in the indictment, it is clear that the reference in these provisions to "aggravating circumstances the offender was found guilty of committing" means the R.C. 2929.04(A) specifications set forth in the indictment and at issue in each case. The jury is thus required to "consider" "other evidence" relevant to those specifications, including evidence relevant to the nature and circumstances of those specifications.

Gumm asserts before this court that despite this clear mandate to "consider" all the evidence (including nature and circumstances evidence) in determining whether to recommend a death sentence, the jury must not "weigh" it against the mitigation evidence, or include nature and circumstances evidence in its balancing process unless that evidence has first been relied upon by the defendant, *i.e.,* is favorable to the defendant. Implicit in the argument is the premise that, while the defendant must be allowed to introduce unlimited mitigation evidence on one side of the balancing scale, the state may place on the other side of the

scale the sole fact that the now death-eligible defendant was found guilty of a specification or specifications set forth in R.C. 2929.04(A)(7). Pursuant to this analysis, the state may not present evidence or make argument to augment the bare fact that the defendant was found guilty of a specification, nor may a prosecutor comment upon the actual facts upon which that finding of guilt was based. We reject this approach, finding it to be impracticable and abstract and lacking in common sense.

This court had little problem in its early cases in finding that governing Ohio statutes authorize consideration of "the nature and circumstances of the crime" during the penalty phase. See, *e.g., State v. Jenkins* (1984), 15 Ohio St.3d 164, 174, 15 OBR 311, 320, 473 N.E.2d 264, 277–278 ("The system currently in place in Ohio does *require the sentencing authority to focus on the particular nature of the crime* as well as allow the accused to present a broad range of specified and nonspecified factors in mitigation of the imposition of a death sentence."); *State v. Steffen* (1987), 31 Ohio St.3d 111, 116–117, 31 OBR 273, 278, 509 N.E.2d 383, 390 ("R.C. 2929.04[B] provides that the court, in determining whether death is an appropriate penalty, '*shall consider,* and weigh against the aggravating circumstances proved beyond a reasonable doubt, *the nature and circumstances of the offense* * * *.' * * * Thus, the court is *required* to review this factor."). (Emphasis *sic.*) In *State v. Stumpf* (1987), 32 Ohio St.3d 95, 99, 512 N.E.2d 598, 604, we noted that "[i]n a particular case, the nature and circumstances of the offense may have a mitigating impact, or they may not. *Either way, they must be considered.*" (Emphasis added and citation omitted.) We held in that case, as syllabus law, that "[u]nder R.C. 2929.03(F), a trial court or three-judge panel may ***420** rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors," *id.* at paragraph one of the syllabus, noting that "it would be illogical to require a three-judge panel to consider the ****262** nature and circumstances of the offense in making its decisions whether the aggravating circumstances were sufficient to outweigh the mitigating factors, yet to forbid that panel from relying upon and citing such nature and circumstances as reasons for its decision." *Id.* at 99, 512 N.E.2d at 604. We have noted that it is only by considering the nature and circumstances of the offense, as well as the statutory aggravating circumstances, that it is possible "to prevent a rigid and mechanistic sentencing scheme." *State v. Jester* (1987), 32 Ohio St.3d 147, 153, 512 N.E.2d 962, 969. We have recognized that some crimes are by their very nature so "horrendous" or "harrowing" that it would be difficult to imagine factors that might be mitigating. *State v. Morales* (1987), 32 Ohio St.3d 252, 262, 513 N.E.2d 267, 277; *State v. Steffen, supra,* 31 Ohio St.3d at 128, 31 OBR at 288, 509 N.E.2d at 398.

In paragraph one of the syllabus to *State v. DePew* (1988), 38 Ohio St.3d 275, 528 N.E.2d 542, we established that, pursuant to statute, a prosecutor in the penalty stage of a capital proceeding may introduce " 'any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing * * *.' " We have repeatedly acknowledged the importance of presenting the jury with a wide range of factual information in the sentencing phase. In *State v. Greer* (1988), 39 Ohio St.3d 236, 253, 530 N.E.2d 382, 402, we characterized the contention that the jury is to be carefully fed only that information which reflects positively upon the capital defendant as "ludicrous." We further recognized that, once lawfully inserted into the sentencing considerations, admissible evidence is subject to fair comment by both parties. *Id.* See, also, *State v. Sowell* (1988), 39 Ohio St.3d 322, 329, 530 N.E.2d 1294, 1303; *State v. Benner* (1988), 40 Ohio St.3d 301, 317, 533 N.E.2d 701, 717; *State v. Landrum* (1990), 53 Ohio St.3d 107, 112–113, 559 N.E.2d 710, 719; *State v. Spirko* (1991), 59 Ohio St.3d 1, 13, 570 N.E.2d 229, 245; *State v. Lorraine* (1993), 66 Ohio St.3d 414, 420, 613 N.E.2d 212, 218.

We believe that a large part of the confusion which has developed in this area is semantical in nature in that the term "aggravating circumstances" has been imprecisely employed to refer not only to the eight enumerated *specifications* of aggravating circumstances of R.C. 2929.04(A), but also to any evidentiary factors which tend to increase the likelihood that a death sentence will be imposed. The nature and circumstances of a crime may be "aggravating" in the sense that they are relevant and tend to reinforce the conclusion that a death sentence should be imposed. This does not mean that the facts surrounding a crime can be set forth in the indictment as a specified statutory aggravating circumstance, nor may they ***421** be deemed an "aggravating circumstance" in terms of determining death eligibility. *State v. Johnson* (1986), 24 Ohio St.3d 87, 24 OBR 282, 494 N.E.2d 1061. Thus, the fact that a particular murder was, for instance, particularly cruel or heinous is relevant to the

determination of the appropriateness of actually imposing a death sentence on a death-eligible perpetrator, even though the fact of cruelty or heinousness would not, of itself, be sufficient to bring the crime within the scope of any section of R.C. 2929.04(A), nor could that fact be used to cause the defendant to become death-eligible. *Maynard v. Cartwright* (1988), 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372. Such an analysis is entirely consistent with the vast weight of established precedent of this court in interpreting Ohio's statutes governing capital punishment, as discussed *supra,* and the United States Supreme Court in interpreting the United States Constitution. See *Barclay v. Florida* (1983), 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (sentencer's consideration of fact that murder included element of racial hatred not improper because relevant to statutorily defined aggravating circumstances, although racial hatred did not itself constitute a statutorily defined aggravating circumstance); *Tuilaepa, supra,* at ——, 114 S.Ct. at 2640, 129 L.Ed.2d at 766–767 (Stevens, J., concurring, citing *Zant v. Stephens, supra,* for the proposition that an incorrect characterization of a relevant factor as an aggravating factor does not prejudice a capital defendant, and noting that "references to such potentially ambiguous, but clearly relevant, factors [as the age of the defendant or **263 the circumstances of the crime] actually reduces [*sic*] the risk of arbitrary capital sentencing."). See, generally, Annotation, Validity of Death Penalty, Under Federal Constitution, as Affected by Consideration of Aggravating or Mitigating Circumstances—Supreme Court Cases (1993), 111 L.Ed.2d 947, 956 *et seq.*

[7] [8] We therefore hold, consistent with paragraph one of the syllabus in *DePew, supra,* and the language of R.C. 2929.03(D)(1) and (2), that, subject to applicable Rules of Evidence, counsel for the state and for the defendant at the penalty stage of a capital trial may introduce and comment upon (1) any evidence raised at trial that is relevant to the aggravating circumstances specified in the indictment of which the defendant was found guilty, (2) any other testimony or evidence relevant to the nature and circumstances of the aggravating circumstances specified in the indictment of which the defendant was found guilty, (3) evidence rebutting the existence of any statutorily defined or other mitigating factors first asserted by the defendant, (4) the presentence investigation report, where one is requested by the defendant, and (5) the mental examination report, where one is requested by the defendant. Further, counsel for the state may comment upon the defendant's unsworn statement, if any. Such comment does not, in and of itself, constitute impermissible argument or impermissible introduction of nonstatutory aggravating factors into the penalty phase proceedings. To the extent that this evidence brings before a jury "nonstatutory aggravating *422 factors," the introduction of that evidence for consideration by the jury in the penalty phase is specifically authorized by Ohio statute.

[9] [10] [11] We issue, however, an additional admonition to courts and prosecutors. Our holding in *State v. Davis* (1988), 38 Ohio St.3d 361, 367–373, 528 N.E.2d 925, 931–936, that it is improper to describe nature and circumstances evidence as a statutorily defined aggravating circumstance remains intact. Trial courts should not instruct jurors that "nature and circumstances" evidence is to be "weighed against" mitigating factors, but should continue to describe only the statutorily defined elements specified in the indictment as being the "aggravating circumstances" a jury is to place on one side of the balance, with mitigating factors placed on the other side. Juries may be instructed, and prosecutors may argue, that juries may "consider" the factors set forth in R.C. 2929.03(D)(1) in making their recommendation. Both courts and prosecutors should, however, refrain from advising juries that the aggravating circumstances placed on one side of the balance include "everything that surrounds this crime," or "all the nature and circumstances of this crime" or any comparable phraseology. Both courts and attorneys should do all in their power to minimize jury confusion by avoiding use of the same term ("aggravating circumstances") to describe two very different legal concepts, *i.e.,* facts sufficient to elevate a crime to a death-eligible category, and facts relevant to a determination as to whether a death sentence should be imposed upon a death-eligible capital defendant.

[12] [13] Applying the foregoing principles to the case at bar, we note that the prosecutor's closing arguments did imprecisely describe the facts surrounding Aaron Raines's murder as "the aggravating circumstances" in the case. Had an objection been lodged to this description, it would properly have been sustained. No objection, however, was made to any portion of the state's summation arguments, and the inaccurate description of "nature and circumstances" evidence as "aggravating circumstances" during argument does not constitute plain error. We

find beyond a reasonable doubt that the outcome of the jury's sentencing recommendation would not have been different in the absence of this argument, particularly as the jury was correctly instructed as to what the statutory aggravating circumstances were for weighing purposes. See *State v. Campbell* (1994), 69 Ohio St.3d 38, 41, 630 N.E.2d 339, 345 (The rule of plain error may be invoked only in rare cases where, but for the error, the outcome of the trial clearly would have been otherwise.). Similarly, had objection been made to the prosecutor's invitation to the jury to "imagine" or speculate on aspects of the case not in evidence, *e.g.*, Aaron Raines's ****264** final thoughts, a trial court might well in its discretion have sustained that objection. *State v. Lott* (1990), 51 Ohio St.3d 160, 166, 555 N.E.2d 293, 300 (prosecutors "may not allude to matters not supported by admissible evidence"). However, the prosecutor's comments on Aaron's age, size, physical condition, and the defendant's motive were not ***423** objectionable, as they constituted comment on the nature and circumstances of the statutory aggravating circumstance of felony-murder as set forth in R.C. 2929.04(A)(7), which the jury was mandated by R.C. 2929.03(D)(1) to consider.

II

Response to Jury Question

During its deliberations at the close of the penalty phase, the jury posed the following question to the court: "Are the aggravating circumstances to Count I just the kidnapping and attempted rape, or do they also include the murder itself?" The jury was called into the courtroom and, after reading the question aloud, the trial court responded as follows: "The answer to that is 'Yes.' Let me read you the instructions on that point. And if * * * you're mixed up on something after I get done re-reading it, it's in your instruction booklet under the heading aggravating circumstances." The trial court then reread the jury instructions that discussed the statutory aggravating circumstances of the case. No contemporaneous objection was lodged to this response. After the jury returned to its deliberations, Gumm's counsel lodged an objection to the court's response, claiming that the court had indicated that the aggravated murder was in and of itself one of the aggravating circumstances to be considered in determining penalty.

[14] In this case, with regard to Count I, the jury was called upon to determine whether the defendant was guilty of the death specification of felony-murder, R.C. 2929.04(A)(7), which required proof that Gumm was either "*the principal offender in the commission of the aggravated murder* or, if not the principal offender, [that he] *committed the aggravated murder* with prior calculation and design." (Emphasis added.) We have previously held that proof of guilt of R.C. 2929.04(A)(7) requires proof that the murder was directly "associated with" the identified underlying felony as "a part of one continuous occurrence." *State v. Rojas* (1992), 64 Ohio St.3d 131, 140, 592 N.E.2d 1376, 1385. Although the murder is an *element* of the felony-murder aggravating circumstance defined by R.C. 2929.04(A)(7), it is not, standing alone, an *additional* aggravating circumstance.

[15] We note that the jury question itself was compound in nature and therefore contained a potential for ambiguity. As a result, the trial court's response ("the answer to that is yes") contained an element of uncertainty as to whether that answer meant, "yes, the aggravating circumstances are just the kidnapping and rape" or "yes, the aggravating circumstances include the murder itself." We note that defense counsel's objection to the court's response was not made at a point in time at which the trial court could easily have corrected the ambiguity inherent in its response, and error, if any, might properly be deemed to have ***424** been waived. See *State v. Williams* (1977), 51 Ohio St.2d 112, 5 O.O.3d 98, 364 N.E.2d 1364, paragraph one of the syllabus. If, however, an element of uncertainty remained in the minds of the jurors thereafter, the trial court had quite properly instructed them to refer to the written instructions it had provided them for further clarification. Those instructions adequately defined both the statutory aggravating circumstances at issue as well as the process by which the jury was to weigh the aggravating circumstances against any mitigating factors it found. We do not find reversible error in the trial court's response.

III

Deficiencies of Sentencing Opinion

[16] Gumm contends that the trial court's sentencing opinion improperly emphasized facts tending to show that the murder of Aaron Raines contained an element of prior calculation and design and thereby shows inappropriate

weighing of nonstatutory aggravating factors. This contention is summarily rejected not only on the basis of our **265 discussion herein of nature and circumstances evidence in capital cases, but also on precedent established in, *e.g., State v. Johnston* (1988), 39 Ohio St.3d 48, 57, 529 N.E.2d 898, 908; *State v. Landrum, supra,* 53 Ohio St.3d at 124, 559 N.E.2d at 729. Additionally, this court's independent review cures any deficiencies of the trial court in failing to conform with the requirements of R.C. 2929.03(F) in its written opinion. *State v. Lott, supra,* 51 Ohio St.3d at 171–172, 555 N.E.2d at 305.

IV

Deficient Jury Instructions

[17] Gumm argues that the jury was inadequately instructed in that the court's instructions in the penalty phase failed to instruct the jury that Gumm's mental retardation reduced his moral culpability. Gumm concedes that no objection to the instructions was proffered at the trial court. Error, if any, is thus properly deemed waived. *State v. Adams* (1980), 62 Ohio St.2d 151, 153, 16 O.O.3d 169, 170, 404 N.E.2d 144, 146. See, also, *State v. Hill* (1992), 64 Ohio St.3d 313, 335, 595 N.E.2d 884, 901 (although evidence of mental retardation may be mitigating, death sentence upheld where jury was allowed to consider evidence of low IQ, defendant suffered from no psychoses and could distinguish between right and wrong); *State v. Holloway* (1988), 38 Ohio St.3d 239, 245–246, 527 N.E.2d 831, 838; *State v. Jenkins, supra,* 15 Ohio St.3d at 204–206, 15 OBR at 345–347, 473 N.E.2d at 300–301.

***425** V

Gruesome Photos

[18] Gumm argues that the jury was inflamed by the admission of repetitive, cumulative photographs of the victim and particularly of an enlarged (two feet by three feet) photo of the victim's face which was used by the former deputy coroner during her testimony to explain her autopsy findings as to the extent of Aaron's injuries. Gumm further asserts that he was prejudiced by the admission of the murder weapons.

[19] Under Evid.R. 403 and 611(A), the admission of photographs is left to the sound discretion of the trial court. *State v. Maurer* (1984), 15 Ohio St.3d 239, 264, 15 OBR 379, 401, 473 N.E.2d 768, 791. Nonrepetitive photographs in capital cases, even if gruesome, are admissible if the probative value of each photograph outweighs the danger of material prejudice to an accused. *Id.,* paragraph seven of the syllabus.

[20] In determining the admissibility of the photographs offered into evidence by the prosecution, the trial judge carefully reviewed each photo individually and determined the probative value of each one under the *Maurer* standard. We have reviewed each photograph as well and find that each exhibits a wound or murder weapon at the crime scene that is not readily apparent in any other photograph. Thus, the relevancy and probative value of each admitted photo satisfied *Maurer.* Similarly, a videotape showing the defendant "walking through" the crime scene with police and describing the events surrounding the murder was clearly probative and was not gruesome in nature. The trial court did not abuse its discretion in allowing it to be introduced as evidence.

[21] Two enlarged photographs were used by the deputy coroner to explain and detail the injuries and trauma sustained by the victim in lieu of showing projected slides to the jury. The trial court, in the proper exercise of its discretion, found the photos themselves to be admissible. We do not believe that size alone increases the prejudicial aspect of the photos to such an extent that they become inadmissible.

[22] Last, the probative value of the murder weapons found near the body clearly outweighs any material prejudice to Gumm, and the court did not abuse its discretion in admitting them.

VI

Improper Admission of "Other Acts" Evidence

Gumm contends he was denied due process and the right to a fair trial by the admission of evidence of his prior bad acts. Gumm **266 first challenges the admissibility of testimony elicited from witnesses Phyllis Thacker and Charlotte Baker. ***426** Specifically, Thacker testified that

Gumm "was hateful"; that his personality would change when he drank alcohol; and that Gumm told her that he had once had sexual contact with a horse. Baker testified that Gumm started giving her "strange looks" during the month before the murder and that he had graphically expressed to her his desire to have sex. Gumm asserts that his chance for a fair trial was irretrievably lost after this testimony.

Evid.R. 404(B) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." R.C. 2945.59 states: "In any criminal case in which the defendant's motive or intent * * * or system in doing an act is material, any acts of the defendant which tend to show his motive or intent * * * or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant." In *State v. Flonnory* (1972), 31 Ohio St.2d 124, 126, 60 O.O.2d 95, 96–97, 285 N.E.2d 726, 729, this court noted that R.C. 2945.59 permits the showing of "other acts" when such other acts "tend to show" certain things, *e.g.,* motive and intent, as identified in the statute. "If such other acts do in fact 'tend to show' any of those things they are admissible notwithstanding they may not be 'like' or 'similar' to the crime charged." *Id.*

[23] We note that the prosecution did not revisit these factual disclosures in its summation or emphasize them in any way thereafter. Even assuming, *arguendo,* that the challenged evidence should have been deemed inadmissible, we find on the basis of the record as a whole that Gumm received a fair trial and that it is beyond a reasonable doubt that the jury would have both convicted this defendant and sentenced him to death even in the absence of this evidence. See *DePew, supra,* 38 Ohio St.3d at 287, 528 N.E.2d at 555.

Second, Gumm asserts that the state engaged in prosecutorial misconduct in connection with the testimony of defense witness Dr. Henry Leland. Prior to trial Gumm moved the court to provide funds to procure an expert to assist his presentation of mitigation evidence, should he be found guilty. The motion was granted, and Gumm obtained Dr. Leland, a psychologist with expertise in mental retardation. Dr. Leland was called as a defense witness at the guilt phase of Gumm's trial, where he testified that he had interviewed Gumm, reviewed the transcripts of Gumm's statements to police, and reviewed a packet of information supplied to him by Gumm's counsel outlining tests and interviews undertaken and prepared by the Court Psychiatric Center and psychological reports generated while Gumm was a juvenile. In relying on this information and his own testing of ***427** Gumm, Dr. Leland concluded that Gumm demonstrated a mild to borderline level of mental retardation and that Gumm did not have the ability to accurately or consistently describe any series of events.

Thereafter, the prosecutor moved to strike the testimony of defense witness Dr. Henry Leland, unless the packet of materials prepared by the Court Psychiatric Center and relied on by Dr. Leland was admitted into evidence. Gumm argues that admission of the entire packet of materials permitted the prosecution to engage in further misconduct by allowing it to focus on prior bad acts of defendant (past instances of cruelty to animals and an alleged attempt to rape a friend of his sister).

[24] This claim is without merit. Dr. Leland was called as the sole defense witness to show that Gumm's confession to police was not reliable. In response to the prosecutor's question whether the packet of information helped him form the basis of his opinions on Gumm, Dr. Leland stated that the packet "presented the major basis, because when I was able to compare that information with my information, it became clear what the problem was."

****267** Evid.R. 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing." See *State v. Jones* (1984), 9 Ohio St.3d 123, 9 OBR 347, 459 N.E.2d 526, the syllabus of which provides: "Pursuant to Evid.R. 703, facts or data upon which an expert bases an opinion must be those perceived by *him or admitted in evidence at the hearing.*" (Emphasis added.)

While Gumm may have been forced to offer the Court Psychiatric Center packet into evidence to save the testimony of his only witness, the motion by the prosecutor does not constitute prosecutorial misconduct. The Rules of Evidence and relevant precedent support

the propriety of the prosecution's motion in this regard. Because the prosecutor was permitted to comment upon the evidence admitted at trial, as discussed *supra,* at Part I of this opinion, his reference to materials contained in the packet in his closing argument was permissible.

VII

Failure to Provide Mitigation Specialist

[25] In this case the court provided funds for defense counsel to obtain a mitigation psychologist. Gumm now argues, unsuccessfully, that he should instead have been provided with a "mitigation specialist." "An indigent defendant who seeks state-funded expert assistance bears the burden of establishing a reasonable necessity for such assistance, and 'undeveloped assertions that the proposed assistance would be useful to the defense are patently inadequate.' " *State v. Sowell* (1991), 73 Ohio App.3d 672, 681, 598 N.E.2d 136, 142, quoting ***428** *State v. Scott* 1987), 41 Ohio App.3d 313, 315, 535 N.E.2d 379, 382. We do not believe that the state, having provided a mitigation psychologist, was constitutionally required to provide a "mitigation specialist" instead.

[26] Gumm's contention that he was precluded from obtaining a "mitigation specialist" as a result of shortness of time, and therefore forced to select Dr. Leland instead, is foreclosed by the fact that Gumm did not seek a continuance for the purpose of obtaining such a specialist in lieu of Dr. Leland. The trial court was under no obligation to grant a continuance *sua sponte.*

VIII

Effective Assistance of Counsel

[27] **[28]** Reversal of a conviction on the grounds of ineffective assistance requires that defendant show, first, that counsel's performance was deficient, and second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 687. However, each act of counsel with which Gumm finds fault was either not asserted as error in the court of appeals, and thus waived, or may be justified as a strategic decision. Nor has Gumm demonstrated prejudice, *i.e.,* "a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph three of the syllabus.

[29] **[30]** **[31]** Gumm's claim of ineffective assistance of counsel before the court of appeals should also be rejected. Gumm argues that appellate counsel was ineffective for not raising the issue of ineffective trial counsel based on failure to object to prosecutorial misconduct during trial. However, failure to make objections does not constitute ineffective assistance of counsel *per se,* as that failure may be justified as a tactical decision. Furthermore, appellate counsel need not raise every conceivable issue on appeal. See *Campbell, supra,* 69 Ohio St.3d at 53, 630 N.E.2d at 353. Moreover, the process of " 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail * * * is the hallmark of effective appellate advocacy." *Smith v. Murray* (1986), 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434, 441.

IX

Miranda Issues

Gumm contends that the trial court erred in failing to suppress inculpatory statements made to police based on the doctrine of ****268** *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. Gumm argues that all his statements were made in a custodial context, including those made during his ***429** squad car ride back to Cincinnati. Gumm further argues that his statements may not be deemed to have been knowingly, intelligently and voluntarily made in light of the fact that the statements were elicited by seasoned police officers from a youthful, mentally retarded defendant.

[32] **[33]** The duty to advise a suspect of *Miranda* rights does not attach until questioning rises to the level of a "custodial interrogation." *State v. Roe* (1989), 41 Ohio St.3d 18, 21, 535 N.E.2d 1351, 1357. In judging whether an individual has been placed into custody the test is whether, under the totality of the circumstances, a "reasonable person would have believed that he was not free to leave." *United States v. Mendenhall* (1980), 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497, 506 (plurality opinion).

Accord *Florida v. Bostick* (1991), 501 U.S. 429, 439, 111 S.Ct. 2382, 2389, 115 L.Ed.2d 389, 398.

We need not determine whether Gumm's time in the police car was custodial, in that the state did not proffer into evidence any statements Gumm may have made to police during his ride to Cincinnati.

[34] **[35]** While at police headquarters, Gumm waived his *Miranda* rights several times and signed two waiver of rights forms. A review of the audio and videotape interviews of Gumm also include waivers of *Miranda* rights, and exhibit no signs of police coercion, threats, mistreatment or physical deprivation. While the state carries the burden of proving the voluntariness of a confession by a preponderance of the evidence, a low mental aptitude of the interrogee is not enough to show evidence of overreaching. *State v. Hill, supra,* 64 Ohio St.3d at 318, 595 N.E.2d at 890. See, also, Annotation, Mental Subnormality of Accused as Affecting Voluntariness or Admissibility of Confession (1981), 8 A.L.R.4th 16. While Gumm alleges that he can neither read nor write, defense witness Dr. Nancy Schmidtgoessling testified at the motion to suppress hearing that she discovered that Gumm could "actually read fairly decently in terms of the rights forms that we went over together. He recognized most of those words, seemed to know what they meant as well, not just recognizing."

In determining the validity of his waivers we look to the totality of the circumstances. *State v. Smith* (1991), 61 Ohio St.3d 284, 288, 574 N.E.2d 510, 515. Under the governing totality of circumstances test the trial court correctly held Gumm's waiver of *Miranda* rights to be voluntary and his subsequent confession to be admissible.

X

Alleged Violation of Right to Trial by Jury

Gumm contends that an appellate court's power of independent review of capital sentences under R.C. 2929.05 violates the rights of trial by jury accorded an accused under Sections 5 and 10, Article I of the Ohio Constitution.

[36] ***430** The Ohio Constitution states that "[t]he right of a trial by jury shall be inviolate * * *." Section 5, Article I. Section 10, Article I provides that "[i]n any trial, in any court, the party accused shall be allowed * * * a speedy public trial by an impartial jury * * *." However, neither constitutional provision cited by Gumm guarantees the right to be sentenced by a jury, nor was sentencing a jury function at common law. We therefore reject Gumm's contention that he was denied his right to a jury trial as guaranteed by the Ohio Constitution.

XI

Miscellaneous Trial Issues

[37] Gumm contends that his conviction and death sentence should be deemed void based on what he contends was his illegal arrest in Kentucky and transport to Ohio in the absence of proper extradition procedures. The record, however, supports the sole conclusion that Gumm voluntarily returned to Ohio with Cincinnati police officers. Assuming, *arguendo,* that Gumm was coerced, tricked, induced or deceived into returning to Ohio, such a circumstance would not necessarily invalidate a conviction. *Ker v. Illinois* (1886), 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421; ****269** *Frisbie v. Collins* (1952), 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541; *Tomkalski v. Maxwell* (1963), 175 Ohio St. 377, 378–379, 25 O.O.2d 278, 278–279, 194 N.E.2d 845, 846; *State v. Thierbach* (1993), 92 Ohio App.3d 365, 635 N.E.2d 1276. See Annotation, Modern Status of Rule Relating to Jurisdiction of State Court to Try Criminal Defendant Brought Within Jurisdiction Illegally or as Result of Fraud or Mistake (1983), 25 A.L.R.4th 157 (*Ker–Frisbie* rule overwhelmingly recognized with possible exception only in cases of outrageous illegal conduct involving kidnapping, torture, or excessive force).

[38] Gumm argues that the trial court erred in refusing to change the venue of his trial in that pretrial publicity in Hamilton County, including publicity concerning the antecedent trial and conviction of Gumm's accused accomplice, Michael Bies, precluded a fair trial in that county.

[39] **[40]** In reviewing this contention we are guided by established principles that the decision on changing venue rests largely in the discretion of the trial court. *State v.*

Fox (1994), 69 Ohio St.3d 183, 189, 631 N.E.2d 124, 129–130. Absent a clear showing of an abuse of discretion, the trial court's decision controls. "[T]he interests of judicial economy, convenience, and reduction of public expenses necessitate that judges make a good faith effort to seat a jury before granting a change in venue." *Id.* at 189, 631 N.E.2d at 130. Further, in Ohio we recognize that the examination of jurors on their voir dire affords the best test as to whether prejudice exists in the community. *Id.* Although a trial court may in its discretion conduct a separate venue hearing prior to jury selection, it is not required to do so. Nor is it necessary to conduct voir dire of prospective jurors ***431** individually and out of the hearing of other members of the venire. *State v. Mapes* (1985), 19 Ohio St.3d 108, 19 OBR 318, 484 N.E.2d 140, paragraph three of the syllabus; *State v. Brown* (1988), 38 Ohio St.3d 305, 528 N.E.2d 523, paragraph two of the syllabus.

The record reflects that jurors seated in this case affirmed that they would judge the defendant solely on the law and evidence presented at trial, despite having been exposed to pretrial publicity. See *State v. Maurer, supra,* 15 Ohio St.3d at 252, 15 OBR at 390, 473 N.E.2d at 781; *State v. Spirko, supra,* 59 Ohio St.3d at 23, 570 N.E.2d at 253–254. A review of the voir dire proceedings indicates that all jurors who were seated in this case were passed for cause by defense counsel. Gumm has failed to demonstrate that the trial court abused its discretion in refusing to change the venue of his trial.

[41] Gumm contends that the trial court abused its discretion in refusing to allow defense counsel to defer making an opening statement until after the state rested its case. Gumm's argument is defeated by the precedent established in *State v. Bayless* (1976), 48 Ohio St.2d 73, 2 O.O.3d 249, 357 N.E.2d 1035, paragraph three of the syllabus, where this court held that "[a]ny decision to vary the order of proceedings at trial in R.C. 2945.10 is within the sound discretion of the trial court, and any claim that the trial court erred in following the statutorily mandated order of proceedings must sustain a heavy burden to demonstrate the unfairness and prejudice of following that order." Accord *State v. Jenkins, supra,* 15 Ohio St.3d at 215, 15 OBR at 355, 473 N.E.2d at 308; *State v. Grant* (1993), 67 Ohio St.3d 465, 478, 620 N.E.2d 50, 66. Gumm argues that Ohio law provides such limited discovery rights to criminal defendants that fairness demands that a defendant be accorded the right to defer opening statement until after having heard all of the state's evidence. We reject the argument.

[42] **[43]** **[44]** Gumm challenges the trial court's instruction to the jury apprising it that it was called upon to "recommend" a nonbinding sentence of death if it found the aggravating circumstance outweighed the mitigating circumstances. The challenge fails. The argument that such an instruction impermissibly reduces the jury's sense of responsibility in recommending death has been consistently rejected by this court. See, *e.g., State v. Buell* (1986), 22 Ohio St.3d 124, 142–144, 22 OBR 203, 219–220, 489 N.E.2d 795, 811–813; *State v. Steffen, supra,* 31 Ohio St.3d at 114, 31 OBR at 275, 509 N.E.2d at 388; *State v. Grant, supra,* 67 Ohio St.3d at 472, 620 N.E.2d at 61. Similarly, ****270** no plain error was committed in providing the jury with a verdict form including the words "we recommend" a sentence of death. *State v. Carter* (1995), 72 Ohio St.3d 545, 559, 651 N.E.2d 965, 977–978. We note that no objection to the verdict forms appears in the record, and failure to so object constitutes a waiver of the right to appeal the issue. *State v. Thompson* (1988), 46 Ohio App.3d 157, 160, 546 N.E.2d 441, 444.

***432** XII

Constitutionality

Gumm raises seven claims of unconstitutionality in Ohio's death penalty statutes for purposes of preserving issues for federal review. The constitutional arguments he raises have all been rejected by this court in numerous cases. See, *e.g., State v. Sowell, supra,* 39 Ohio St.3d at 336, 530 N.E.2d at 1309. Accordingly, we reject Gumm's constitutional challenges. *State v. Poindexter* (1988), 36 Ohio St.3d 1, 520 N.E.2d 568, syllabus.

XIII

Independent Review and Proportionality Analysis

At the sentencing hearing, Gumm called one witness, his sister Karen Ridenour, who testified that Gumm's alcoholic mother died when he was an infant and that he was raised by her family. Ridenour described Gumm as "very backwards" in school and related an incident where

Gumm was abducted and raped at gunpoint when he was seven years old. Ridenour stated that Gumm could never read or write, and couldn't think for himself. She described several incidents of animal abuse by Gumm after his rape and described those incidents as being "signs that he was calling for help." She testified that her mother and father never attended parenting classes or otherwise tried to resolve Gumm's behavioral problems, and that no one "reached out to help him, period." Gumm was later placed in an orphanage for approximately three years because of his constant truancy. This history and background provide modest mitigating features.

[45] With respect to the relevant statutory mitigating factors of R.C. 2929.04(B) raised by the defense, Gumm's brain dysfunction and mental retardation do not qualify as a mental disease or defect under subsection (3) of the statute. See *State v. Davis* (1992), 63 Ohio St.3d 44, 51, 584 N.E.2d 1192, 1198. Gumm was twenty-six years old at the time of the murder, thus making the factor set forth in subsection (4) inapplicable. However, the factor set forth in subsection (5) is entitled to some weight. While Gumm was placed in an orphanage as a juvenile because of his truancy, he does not have a significant history of prior criminal convictions.

The factor set forth in subsection (6) of R.C. 2929.04(B) is not applicable to Gumm's case despite his allegations that it was not he, but Bies, who brutalized and killed Aaron Raines. Dr. Martin's testimony and several statements made to police by Gumm contradict his claims that he was a mere "participant" in Aaron's murder, and not a "principal offender."

With respect to the mitigating factor described in subsection (7) of R.C. 2929.04(B), Gumm's retardation and brain dysfunction may be entitled to some ***433** weight. However, despite his low IQ, Gumm is able to distinguish right from wrong as noted by Dr. Leland and several court-appointed psychologists who examined him. See *Hill, supra,* 64 Ohio St.3d at 335, 595 N.E.2d at 901.

[46] Upon independent weighing, the merged aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. The totality of evidence and circumstances portrays a heinous and brutal crime that shocks the senses. A small ten-year-old boy who was afraid of the dark and who had problems walking was tricked into going into two abandoned buildings to earn some money and to help a family friend. Once inside, Gumm and Bies told Aaron Raines of their true intentions and Aaron resisted. This clearly constituted kidnapping under R.C. 2905.01. Since Aaron refused to give in to the sexual desires of his abductors, he was then taken down to the basement and brutally murdered. The jury could have found beyond a reasonable doubt that Gumm was a ****271** principal offender in the aggravated murder, since evidence that Aaron lacked defensive wounds supported a finding that two people participated in the actual killing of Aaron Raines. Similarly, the sheer number of blows and weapons used, including evidence of shoe prints on Aaron's chest, which were inconsistent with the shoes worn by Gumm's accomplice, supports the conclusion that Gumm was an active participant in the murder.

Imposition of the death penalty in this case is both appropriate and proportionate when compared with similar capital cases where murder was combined with kidnapping or attempted rape. See, *e.g., State v. Morales, supra,* 32 Ohio St.3d 252, 513 N.E.2d 267 (twelve-year-old victim); *Fox, supra,* 69 Ohio St.3d 183, 631 N.E.2d 124; *State v. Cooey* (1989), 46 Ohio St.3d 20, 544 N.E.2d 895; and *State v. Spirko, supra,* 59 Ohio St.3d 1, 570 N.E.2d 229.

Accordingly, appellant's convictions and sentences are affirmed.

Judgment affirmed.

DOUGLAS, RESNICK, FRANCIS E. SWEENEY, Sr., PFEIFER and COOK, JJ., concur.

WRIGHT, J., concurs in judgment only.

All Citations

73 Ohio St.3d 413, 653 N.E.2d 253, 1995 -Ohio- 24

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Yellow Flag - Negative Treatment
Appeal Reopened by State v. Wogenstahl, Ohio, May 4, 2016

75 Ohio St.3d 344
Supreme Court of Ohio.

The STATE of Ohio, Appellee,
v.
WOGENSTAHL, Appellant.

No. 95–42.
|
Submitted Nov. 15, 1995.
|
Decided March 6, 1996.

Defendant was convicted in the Court of Common Pleas, Hamilton County, of aggravated murder, kidnapping and aggravated burglary, and was sentenced to death. Defendant appealed. The Court of Appeals affirmed, 1994 WL 686898, and defendant again appealed. The Supreme Court, Douglas, J., held that: (1) prosecutor's comments during initial and final penalty phase of closing argument in capital murder case, suggesting that nature and circumstances of offense were "aggravating circumstances" and suggesting that such "aggravation" was to be balanced against evidence presented in mitigation, were not plain error; (2) forensic serologist had proper academic qualifications to render expert opinion in capital murder case concerning HLA DQ Alpha (Haldo Alpha) testing of blood recovered from defendant's vehicle; (3) defendant did not have right to counsel under Ohio Constitution at lineup conducted before he was formally charged; (4) evidence was sufficient to support conviction; (5) evidence of defendant's prior aggravated burglary conviction was admissible to establish prior aggravated felony specifications in connection with burglary and kidnapping charges and to show defendant's scheme, plan or system in perpetrating offense; (6) aggravating circumstances alleged did not merge for purposes of sentencing; and (7) death penalty was not excessive or disproportionate to sentences imposed in other cases.

Affirmed.

West Headnotes (26)

[1] **Criminal Law**
Rendition, form, and entry of judgment
Sentencing and Punishment
Determination and disposition

Supreme Court is not required to address and discuss, in opinion form, each and every proposition of law raised by parties in death penalty appeal.

7 Cases that cite this headnote

[2] **Sentencing and Punishment**
Arguments and conduct of counsel

It is completely improper for prosecutors in penalty phase of capital murder trial to make any comment before jury that nature and circumstances of offense are "aggravating circumstances." R.C. §§ 2929.03(D)(1, 2), 2929.04(B).

19 Cases that cite this headnote

[3] **Sentencing and Punishment**
Arguments and conduct of counsel

It is acceptable for prosecution in penalty phase of capital murder trial to argue that specifications of aggravating circumstances set forth in death penalty statute that defendant was found guilty of committing outweigh evidence in mitigation of death sentence; further, it is acceptable for state to present arguments concerning nature and circumstances of offense. R.C. § 2929.04(A)(1–8).

17 Cases that cite this headnote

[4] **Sentencing and Punishment**
Arguments and conduct of counsel

During penalty phase of capital murder trial, it is improper for state to argue or suggest that nature and circumstances of offense

are "aggravating circumstances." R.C. § 2929.04(A)(1–8), (B).

8 Cases that cite this headnote

[5] **Sentencing and Punishment**
Factors extrinsic to statute or guideline in general

"Aggravating circumstances" against which mitigating evidence is to be weighed during penalty phase of capital murder case are limited to death-eligible statutory aggravating circumstances set forth in death penalty statute. R.C. § 2929.04(A)(1–8).

11 Cases that cite this headnote

[6] **Sentencing and Punishment**
Factors extrinsic to statute or guideline in general

In penalty phase of capital murder trial, any use of term "aggravating circumstances" must be confined to statutory aggravating circumstances set forth in death penalty statute. R.C. § 2929.04(A)(1–8).

2 Cases that cite this headnote

[7] **Criminal Law**
Time for objection

Criminal Law
Sufficiency and Scope of Motion

Defendant's motion for mistrial at conclusion of state's initial closing argument during penalty phase of capital murder case, based upon prosecutor's alleged improper comments, did not preserve for review defendant's claims regarding comments, where defendant did not object at time comments were made.

19 Cases that cite this headnote

[8] **Criminal Law**
Necessity of Objections in General

Plain error does not exist unless it can be said that but for error, outcome of trial would clearly have been otherwise.

37 Cases that cite this headnote

[9] **Criminal Law**
Particular statements, arguments, and comments

Prosecutor's comments during initial and final penalty phase closing argument in capital murder case, suggesting that nature and circumstances of offense were "aggravating circumstances" and suggesting that such "aggravation" was to be balanced against evidence presented in mitigation, were not plain error, in light of statutory aggravating circumstances defendant was found guilty of committing, lack of credible mitigating evidence presented by defendant, and trial court's instruction that only "aggravating circumstances" at issue were three specifications of aggravating circumstances jury had found defendant guilty of committing. R.C. § 2929.04(A, B).

69 Cases that cite this headnote

[10] **Sentencing and Punishment**
Arguments and conduct of counsel

Prosecutors need to exercise abundance of caution during penalty phase of capital murder trial to avoid suggesting or implying that nature and circumstances of offense are "aggravating circumstances." R.C. § 2929.04(A, B).

2 Cases that cite this headnote

[11] **Sentencing and Punishment**
Arguments and conduct of counsel

Prosecutor should refrain from making any vague comments in penalty phase of capital murder trial concerning precisely what aggravating circumstances are in given case; only "aggravating circumstances" at issue in penalty phase of capital trial are statutory specifications of aggravating circumstances

defendant was found guilty of committing. R.C. § 2929.04(A, B).

12 Cases that cite this headnote

[12] **Criminal Law**
Bodily and mental condition

Forensic serologist had proper academic qualifications to render expert opinion in capital murder case concerning HLA DQ Alpha (Haldo Alpha) testing of blood recovered from defendant's vehicle, although serologist had no college degree and was not a medical doctor; serologist had English equivalent of Bachelor of Science degree, had extensive experience in blood analysis and based his opinions on his personal testing of blood samples that had been provided to him. Rules of Evid., Rules 702, 703.

5 Cases that cite this headnote

[13] **Criminal Law**
Bodily tissue or fluids

Expert's testimony that blood recovered from defendant's vehicle was consistent with HLA DQ Alpha (Haldo Alpha) classification of known sample of victim's blood and that Haldo Alpha classification of victim's blood occurred in approximately 5.3% of Caucasian population was probative in capital murder trial to show that source of blood could have come from victim, even though it did not specifically identify source of blood recovered from defendant's vehicle.

Cases that cite this headnote

[14] **Criminal Law**
Bodily tissue or fluids

Evidence that defendant had purchased vehicle approximately one week before victim's murder and that it was impossible to determine age of blood stain recovered from defendant's vehicle went to weight, and not admissibility of evidence that blood stain was consistent with victim's HLA DQ Alpha (Haldo Alpha) classification.

Cases that cite this headnote

[15] **Criminal Law**
Lineup or showup

Defendant did not have right to counsel under Ohio Constitution at lineup conducted before he was formally charged. Const. Art. 1, § 10.

2 Cases that cite this headnote

[16] **Criminal Law**
Manner of exhibition;suggestiveness

Pretrial identification procedure in which witness identified defendant as person he had seen near area where victim's body was found was not unnecessarily suggestive, although witness was unable to identify defendant from photo array shortly after victim's body was discovered, identified defendant's picture but expressed some reservation when shown different photo array almost a year later, and positively identified defendant only when shown single black and white photograph of him.

5 Cases that cite this headnote

[17] **Criminal Law**
Photographs and drawings

Witness' in-court identification of defendant was not product of impermissible police investigatory tactics, where witness had identified defendant from photo array as person she had seen parked outside store in which she was working on night of victim's disappearance and testified that she had focused her attention on defendant because she thought defendant was about to rob her.

2 Cases that cite this headnote

[18] **Criminal Law**
Particular offenses

Criminal Law
Particular offenses and prosecutions

 © 2016 Thomson Reuters. No claim to original U.S. Government Works.

In determining whether evidence was sufficient to establish defendant's identity as perpetrator on appeal in capital murder case, Supreme Court would not evaluate credibility of witnesses and resolve evidentiary conflicts in defendant's favor.

1 Cases that cite this headnote

[19] **Criminal Law**
⇦ Weighing evidence
Criminal Law
⇦ Province of jury or trial court
Weight to be given evidence and credibility of witnesses are issues for jury to determine.

1 Cases that cite this headnote

[20] **Homicide**
⇦ Miscellaneous particular circumstances
Evidence that defendant had been to victim's apartment on night she was abducted, had been seen in area where victim's body was found, and that bloodstains found in defendant's vehicle had same HLA DQ Alpha (Haldo Alpha) classification as that of victim's blood was sufficient to establish defendant's identity as perpetrator in capital murder case.

1 Cases that cite this headnote

[21] **Criminal Law**
⇦ Weighing evidence
Supreme Court generally does not weigh evidence.

Cases that cite this headnote

[22] **Criminal Law**
⇦ Other particular offenses
Criminal Law
⇦ Similar victims
Criminal Law
⇦ Similar means or method;modus operandi
Evidence of defendant's prior aggravated burglary conviction was admissible in capital murder case to establish prior aggravated felony specifications in connection with burglary and kidnapping charges and to show defendant's scheme, plan or system in perpetrating offense; both prior burglary and charged burglary involved persons defendant had been with or visited with day before, involved defendant's utilization of ruse to get occupant out of home so he could commit burglary, and defendant had used same alibi in both cases. R.C. § 2945.59; Rules of Evid., Rule 404(B).

2 Cases that cite this headnote

[23] **Criminal Law**
⇦ Showing bad character or criminal propensity in general
Evidence of other crimes, wrongs or bad acts independent of, and unrelated to, offense for which defendant is on trial is generally inadmissible to show criminal propensity. Rules of Evid., Rule 404(B).

8 Cases that cite this headnote

[24] **Sentencing and Punishment**
⇦ Dual use of evidence or aggravating factor
Aggravating circumstances alleged in capital murder case, that killing occurred during course of kidnapping, that killing occurred during course of aggravated burglary, and that defendant had killed victim for purpose of escaping detection, were not duplicative and did not merge for purposes of sentencing; defendant broke into occupied apartment to kidnap ten-year-old victim, forcibly removed her from apartment to use her for his own sexual gratification, and killed victim when he realized he could not return her to apartment without being identified as perpetrator of burglary or kidnapping offenses. R.C. § 2929.04(A)(3, 7).

3 Cases that cite this headnote

[25] **Sentencing and Punishment**

⇦ Determinations based on multiple factors

Sentencing and Punishment

⇦ Killing while committing other offense or in course of criminal conduct

Aggravating circumstances defendant was found guilty of committing in capital murder case, that killing occurred during course of kidnapping, that killing occurred during course of aggravated burglary, and that defendant had killed victim for purpose of escaping detection, outweighed mitigating evidence; only mitigating evidence presented by defendant was testimony of friends, family and other witnesses indicating that defendant had reformed his life and had changed for the better in months preceding murder and defendant's unsworn statement proclaiming his innocence. R.C. § 2929.04(A)(3, 7).

2 Cases that cite this headnote

[26] **Sentencing and Punishment**

⇦ Killing while committing other offense or in course of criminal conduct

Sentencing and Punishment

⇦ Escape or other obstruction of justice

Sentencing and Punishment

⇦ Age

Death penalty imposed on defendant who kidnapped ten-year-old victim during course of burglary and killed her to escape detection was not excessive or disproportionate to sentences imposed in other cases.

Cases that cite this headnote

Syllabus by the Court

*344 1. In the penalty phase of a capital trial, the "aggravating circumstances" against which the mitigating evidence is to be weighed are limited to the specifications of aggravating circumstances set forth in R.C. 2929.04(A)(1) through (8) that have been alleged in the indictment and proved beyond a reasonable doubt.

*345 2. It is improper for prosecutors in the penalty phase of a capital trial to make any comment before a jury that the nature and circumstances of the offense are "aggravating circumstances."

**314 Peggy Garrett was first introduced to Jeffrey A. Wogenstahl, appellant, in October 1991. During October and November 1991, appellant and Peggy became casual acquaintances. At the time, Peggy resided in a two-bedroom apartment at 301 Harrison Avenue, Harrison, Ohio, with her five children: Eric Horn, age sixteen, Justin Horn, age fifteen, Amber Garrett, age ten, Matthew Garrett, age eight, and Shayna Perkins, age four. During October and November 1991, appellant visited the apartment on several occasions and came to know Peggy's family.

Appellant went to Peggy's apartment on Saturday afternoon, November 23, 1991. He asked Peggy if she had any plans for the evening. Peggy told appellant that she had no plans, and appellant left following a brief conversation. That night, Peggy put her three youngest children (Amber, Matthew and Shayna) to bed for the evening. At approximately 10:30 p.m., she decided to meet a friend, Lynn Williams, at a local bar. Justin was spending the weekend at a friend's house. Peggy left sixteen-year-old Eric in charge of the other children.

Peggy met Lynn Williams at the "Escape" bar sometime between 11:00 p.m. and midnight. From there, the women drove Lynn's car to the Miamitown Lounge, which was also known as "Hornsby's." At Hornsby's, Peggy and Lynn saw appellant at the bar. He was wearing a brown leather jacket and jeans. Appellant joined the women for drinks and conversation. Appellant asked Peggy where Justin was and what Eric and the other children were doing. Peggy told appellant that Justin was away for the weekend, and that Eric was home baby-sitting the children. At some point, the trio went outside to appellant's car to smoke marijuana.

On Sunday morning, at approximately 2:15 a.m., appellant, Peggy and Lynn drove Lynn's car to the Flicker Inn. Later, the women drove appellant back to Hornsby's, where appellant's car was parked. Appellant invited the women to his apartment to smoke marijuana, but Peggy and Lynn told appellant that they were going to the Waffle House restaurant. Peggy and Lynn then separated from appellant and drove directly to the Waffle House. After

the women had arrived at the restaurant, a witness saw a car resembling appellant's dark-brown four-door 1978 Oldsmobile Omega pull into and then out of the restaurant parking lot.

*346 At approximately 3:00 a.m., while the women were at the Waffle House, appellant drove to Peggy's apartment and spoke with Eric. According to Eric, appellant claimed that Peggy needed to see him (Eric) at Troy Beard's house. Beard was Peggy's friend who lived approximately three blocks from the apartment. Eric locked the door to the apartment, leaving the children unattended, **315 and drove with appellant to the vicinity of Beard's residence. Appellant dropped Eric off approximately one block from Beard's apartment. According to Eric, appellant said that he would drive around the block and then pick Eric up to drive him home. When Eric arrived at the residence, Beard told Eric that he (Beard) had not seen Peggy at all that evening. Eric left Beard's apartment and waited for appellant to drive him home. Appellant did not return. Eventually, Eric walked home and found that the door to the apartment was unlocked. He checked on the children and noticed that ten-year-old Amber was missing. However, Eric mistakenly assumed that Amber might have been spending the night at a friend's house. Thus, he mentioned nothing to Peggy when she returned home later that morning.

On the morning of November 24, 1991, Vickie Mozena was working at a United Dairy Farmers store in Harrison, Ohio, near the Ohio–Indiana border. At approximately 3:15 a.m., Mozena saw a car resembling appellant's Oldsmobile drive past the store in the direction of Bright, Indiana. Mozena observed the silhouette of a man driving the vehicle, and what appeared to be a young girl next to him in the passenger's seat. Between 3:45 and 4:00 a.m., Mozena saw the same vehicle parked at a car wash across the street from the United Dairy Farmers store. The vehicle pulled out of the car wash and into the farthest corner of the United Dairy Farmers parking lot. The driver did not exit the vehicle for several minutes, and Mozena thought that she was about to be robbed. However, appellant exited the vehicle, came into the store, and purchased a pack of cigarettes. At that time, Mozena noticed what appeared to be dirt or blood under appellant's fingernails. Later that morning, Mozena once again saw appellant's car parked across the street at the car wash. According to Mozena, there was a man inside the car, presumably cleaning the interior.

Harold Borgman lived on Jamison Road between Harrison, Ohio, and Bright, Indiana. Borgman's home was located in a rural area of West Harrison, Indiana, approximately four miles from Harrison. At 3:13 a.m. on the morning of November 24, 1991, Borgman got out of bed to use the bathroom. Sometime later, he looked out the window and saw a car driving very slowly on Jamison Road toward the direction of Harrison. The driver pulled off to the side of Jamison Road, stopped, and turned off the headlights. Borgman continued to watch for several minutes, and observed two or three vehicles pass the parked car on Jamison Road.

*347 On November 24, at approximately 3:40 a.m., Brian Noel was driving on Jamison Road toward Bright, Indiana. While driving near the location of Borgman's residence, Noel saw a late 1970s-model, dark-colored four-door vehicle parked off to the side of Jamison Road, the vehicle facing the opposite direction. Noel came to a rolling stop alongside the vehicle and observed a man apparently retrieving something from the trunk of the automobile. The man was wearing a dark jacket and blue jeans. Noel later identified appellant as the man he had seen on Jamison Road in the early morning hours of November 24. He also identified appellant's 1978 Oldsmobile as the car that had been pulled off to the side of Jamison Road.

On November 24, at approximately 3:40 a.m., Kathy Roth was driving on Jamison Road toward Bright, Indiana. While driving near the location of Borgman's residence, Roth saw a man wearing a brown leather jacket and blue jeans standing near a parked car off to the side of Jamison Road. As Roth drove past the vehicle, the man turned to face her, dropped his head, and then turned around to face the woods. Roth later identified appellant as the man she had seen on Jamison Road.

Frederick G. Harms was driving on Jamison Road on November 24, at approximately 3:40 a.m. Harms also saw the vehicle parked off to the side of Jamison Road. According to Harms, the vehicle resembled appellant's 1978 Oldsmobile Omega.

On Sunday afternoon, November 24, Peggy Garrett finally realized that Amber was missing. At that time, Eric told Peggy about appellant's 3:00 a.m. visit to the apartment. Peggy and others went to appellant's residence

and knocked on the door for over an hour. When appellant finally answered, Peggy asked him why he had taken Eric to Troy **316 Beard's apartment earlier that morning. Appellant stated that he had been "messing with Eric's head," and claimed to have no knowledge of Amber's whereabouts. On the evening of November 24, 1991, appellant gave a similar statement to Officer Charles Lindsey of the Harrison Police Department.

On Monday, November 25, 1991, police executed a search warrant at appellant's residence. During the search, appellant was questioned concerning his movements on the morning of November 24. Appellant admitted to having visited the Harrison Avenue apartment on November 24 at approximately 3:00 a.m. Appellant told police that he had duped Eric out of the Harrison Avenue apartment as a practical joke. However, appellant stated that he went directly home to bed after having taken Eric to the vicinity of Troy Beard's apartment. Police then requested that appellant accompany them to the Harrison Police Department. Appellant agreed to go to the police station and asked for his leather jacket. Officer Lindsey retrieved the jacket from the bedroom closet. *348 Lindsey noticed that the jacket was soaking wet and that the lining was discolored. According to police, appellant explained that his cat had urinated on the jacket on *Friday* evening, November 22, 1991. Appellant further explained that he had washed the jacket on Friday night. Police were suspicious, since appellant had worn the jacket on Saturday night, November 23, 1991.

Police found several bloodstains in appellant's bathroom. However, it could not be determined whether the blood was human blood. The items seized from appellant's residence included drugs and drug paraphernalia. Police contacted appellant's parole officer, and a parole holder was placed against appellant. On November 25, 1991, police also attempted to search a dumpster near appellant's apartment. However, the dumpster had been emptied earlier that morning. Two witnesses had seen appellant near the dumpster on November 24, at approximately 5:15 a.m.

On the morning of November 27, 1991, appellant made another statement to law enforcement authorities. This time, appellant claimed that he had driven Eric to the vicinity of Troy Beard's apartment on November 24 because Eric had wanted to deliver marijuana to Peggy. Appellant once again asserted that he had proceeded directly home to sleep after dropping Eric off in the vicinity of Beard's residence.

Meanwhile, the search for Amber Garrett continued. On November 27, 1991, Harold Borgman reported to police that he had seen a suspicious vehicle on Jamison Road in the early morning hours of November 24. Borgman led police to the location near his house where he had seen the suspicious vehicle. Sergeant Kenneth J. Greves of the Indiana State Police searched the area and discovered Amber's partially frozen body down a steep embankment off to the side of Jamison Road.

The location where Amber's body was discovered was heavily wooded and overgrown with thorny bushes and vegetation. Amber was wearing a dress and a pair of panties. Her dress had been rolled up from behind and pulled down over her arms. She had been stabbed approximately eleven times, mostly in the chest and neck. Additionally, she had been repeatedly struck in the head with a blunt instrument. The blunt force injuries were consistent with having been caused by an automobile jack handle or some other blunt stick or rod. Superficial wounds on the body indicated that a knife had been held to the base of Amber's neck. The body was covered with postmortem scratches that had apparently been caused by the vegetation in the area. The evidence at the scene indicated that the murder had occurred at a different location and that the killer had carried Amber's body through the dense vegetation.

William L. Dean, a criminalist in the Trace Evidence Section of the Hamilton County Coroner's Laboratory, examined the leather jacket that appellant had *349 been wearing on the morning of Amber's abduction. Thorn tips or "prickles" were removed from small triangular tears in the jacket. Dean also examined a pair of appellant's shoes that were found to contain prickles and other plant material.

**317 Douglas W. Deedrick, a special agent with the Federal Bureau of Investigation, compared the plant material recovered from appellant's jacket and shoes with known samples of vegetation collected from the area where the body was discovered. Deedrick found that the plant material from appellant's clothing was similar to the vegetation collected from the crime scene. Additionally, Dr. Robert D. Webster, a research botanist, concluded that there were no differences between the vegetation

recovered from appellant's clothing and the type of vegetation in the area where the body was discovered.

Police found two car jacks in the trunk of appellant's Oldsmobile, a ratchet jack and a screw or "scissors" jack. The metal handle for the screw jack was missing. There were no identifiable fingerprints anywhere in the vehicle. The car was exceptionally clean, as if it had been thoroughly washed. However, criminalists in the Trace Evidence Section of the Hamilton County Coroner's Laboratory found a very small bloodstain in appellant's Oldsmobile. The specimen was sent to the Serological Research Institute in California for testing. DNA was extracted from the bloodstain and was tested using the HLA DQ (Haldo) Alpha genetic marker system. The HLA DQ Alpha classification of the blood removed from appellant's vehicle was consistent with the HLA DQ Alpha classification of a known sample of Amber's blood. According to Brian Wraxall, a forensic serologist, Amber's HLA DQ Alpha classification occurs in approximately 5.3 percent of the Caucasian population. The blood recovered from appellant's vehicle was not consistent with appellant's blood or blood samples taken from Eric and Justin Horn.

Special Agent Deedrick of the Federal Bureau of Investigation found a single pubic hair inside the crotch area of Amber's panties. Deedrick compared the pubic hair to known samples of pubic hair that had been combed and plucked from appellant's pubic region. According to Deedrick, appellant's pubic hairs exhibited the same microscopic characteristics as the pubic hair recovered from the victim's panties. Deedrick testified to a reasonable degree of scientific certainty that the pubic hair recovered from the victim's underpants had come from appellant. Amber was prepubescent and, thus, the hair could not have come from her. Pubic hair samples taken from Peggy Garrett, Eric Horn and Justin Horn did not match the pubic hair recovered from Amber's panties.

Appellant was indicted by the Hamilton County Grand Jury for the aggravated murder of Amber. Count One of the indictment charged appellant for the purposeful killing of Amber during the commission of an aggravated burglary ***350** and/or kidnapping. This count of the indictment carried three death penalty specifications.[1] Appellant was also indicted, in Counts Two and Three, for kidnapping and aggravated burglary, respectively, with a specification alleging that appellant had a prior (1985) aggravated felony conviction.

Appellant was tried before a jury. Bruce Wheeler was the prosecution's final witness in the guilt/innocence phase of the trial. Wheeler and appellant had been fellow inmates in the same "pod" at the Hamilton County Justice Center. At trial, Wheeler testified that he had spoken with appellant on several occasions concerning appellant's involvement in the killing. According to Wheeler, appellant had said that there was very little evidence against him because he had been "too slick" and had "covered up" the evidence. Further, appellant allegedly admitted to Wheeler that he (appellant) had entered the Garrett apartment with a stolen key and had kidnapped Amber to have sex with her. Wheeler testified that appellant "said he stuck it in her but * * * [did not] ejaculate * * * so there would not be any evidence." Additionally, appellant told Wheeler that he had wanted to return Amber to the apartment because he thought he could get away with having removed her from the residence. However, someone was ****318** at the Garrett residence when appellant attempted to return Amber to her home. Thus, according to Wheeler, appellant said that he decided to have "sex" with Amber once again. Wheeler testified that appellant admitted stabbing Amber in the chest when she refused his further sexual advances. According to Wheeler, appellant admitted killing Amber, dumping the body, cleaning the car, and disposing of the evidence. Appellant also told Wheeler that police had planted Amber's blood in his (appellant's) car because appellant had "cleaned his car too well."

The defense presented several witnesses in the guilt phase of appellant's trial. Appellant testified on his own behalf and, among other things, denied the charges against him.

The jury found appellant guilty of all charges and specifications alleged in the indictment. Following a mitigation hearing, the jury recommended that appellant be sentenced to death for the aggravated murder of Amber Garrett. The trial court accepted the jury's recommendation and imposed the sentence of death. The trial court also sentenced appellant for the kidnapping and aggravated ***351** burglary convictions. On appeal, the court of appeals affirmed the judgment of the trial court and upheld appellant's death sentence.

The cause is now before this court upon an appeal as of right.

Attorneys and Law Firms

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

H. Fred Hoefle and Herbert E. Freeman, Cincinnati, for appellant.

DOUGLAS, Justice.

DOUGLAS, J. Appellant advances thirty-three propositions of law for our consideration. (See Appendix, *infra.*) We have carefully considered each of appellant's propositions of law and have reviewed the death sentence for appropriateness and proportionality. Upon review, and for the reasons that follow, we affirm the judgment of the court of appeals and uphold the sentence of death.

I

[1] We have repeatedly held that this court is not required to address and discuss, in opinion form, each and every proposition of law raised by the parties in a death penalty appeal. See, *e.g., State v. Scudder* (1994), 71 Ohio St.3d 263, 267, 643 N.E.2d 524, 528. We adhere to that position today. Several issues raised by this appellant have been addressed and rejected under similar circumstances in a number of our prior cases. Moreover, a number of appellant's arguments have been waived. Upon a careful review of the record and the governing law, we fail to detect any errors that would undermine our confidence in the outcome of appellant's trial. We are convinced that appellant received a fair trial, a fair and reliable sentencing determination, and competent representation both at trial and on appeal. We address, in opinion form, only those matters that merit some discussion.

II

In his thirteenth proposition of law, appellant contends that the state engaged in "egregious misconduct" during closing arguments in the penalty phase. Specifically, appellant contends, among other things, that the prosecutors had argued to the jury that the nature and circumstances of the offense appellant was found guilty of committing were "aggravating circumstances" the jury was required to consider in recommending the sentence to be imposed for appellant's aggravated murder conviction. Therefore, appellant suggests that the state improperly injected "nonstatutory aggravating circumstances" into the sentencing determination. Similarly, in his sixth proposition of law, appellant contends that the trial ***352** court, in its sentencing opinion, considered the nature and circumstances of the offense as "nonstatutory aggravating circumstances." Before addressing the specific arguments raised in these propositions of law, it is important to recognize the distinctions between two very different concepts embodied in Ohio's death penalty statutes, *i.e.,* "aggravating circumstances" and "nature and circumstances of the offense."

****319** *A*

Aggravating Circumstances v. Nature and Circumstances

[2] Contentions similar to those raised by appellant (that the nature and circumstances of the offense were converted into "nonstatutory aggravating circumstances") arise in nearly every capital case we review. Recently, in *State v. Gumm* (1995), 73 Ohio St.3d 413, 416–423, 653 N.E.2d 253, 259–264, we attempted to clarify the law in this area. However, appellant suggests that *Gumm* misapplied the law and/or that further clarification is required. Thus, we once again review the interplay among R.C. 2929.03(D)(1) and (2) and 2929.04(B) to clarify that it is completely improper for prosecutors in the penalty phase of a capital murder trial to make any comment before a jury that the nature and circumstances of the offense are "aggravating circumstances."

In Ohio, imposition of the death penalty for aggravated murder is precluded unless one or more of the *statutory* aggravating circumstances set forth in R.C. 2929.04(A)(1) through (8) are specified in the indictment and proved beyond a reasonable doubt. See R.C. 2929.04(A). As we explained in *Gumm, supra,* 73 Ohio St.3d at 417, 653 N.E.2d at 260, "[i]n Ohio, a capital defendant is tried and sentenced in a two-stage process. During the first phase (commonly referred to as the 'guilt phase') the state must prove the defendant guilty beyond a reasonable doubt

of the crime of aggravated murder, and must also prove the defendant guilty of at least one statutorily defined 'aggravating circumstance' as set forth in R.C. 2929.04(A)(1) through (8). At the point in time at which the factfinder (either a jury or three-judge panel) finds the defendant guilty of both aggravated murder and an R.C. 2929.04(A) specification, the defendant has become 'death-eligible,' and a second phase of the proceedings (the 'mitigation' or 'penalty' or 'sentencing' or 'selection' phase) begins. R.C. 2929.03(C)(2) and (D)(1)."

R.C. 2929.03(D)(1) provides that in making a determination whether a death sentence should be imposed, "[t]he court, and the trial jury if the offender was tried by a jury, *shall consider * * * any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing* or to any factors in mitigation of the imposition of the sentence of death, *shall hear testimony and other evidence that is relevant to the nature and circumstances of* ***353** *the aggravating circumstances the offender was found guilty of committing,* the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, *and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender.*" (Emphasis added.)

Thus, R.C. 2929.03(D)(1) mandates that in a capital jury trial, the court and the jury "shall consider" any evidence that is relevant to the "aggravating circumstances" the defendant was found guilty of committing. The "aggravating circumstances" referred to in R.C. 2929.03(D)(1) are the statutory aggravating circumstances set forth in R.C. 2929.04(A)(1) through (8). Further, R.C. 2929.03(D)(1) requires that the trial court and jury "hear" testimony and other evidence that is relevant to the *nature and circumstances of the aggravating circumstances the offender was found guilty of committing.* Again, the "aggravating circumstances" referred to in the statute are the R.C. 2929.04(A)(1) through (8) death-eligible aggravating circumstances that were required to have been specified in the indictment. R.C. 2929.03(D)(1) also permits the factfinder to hear the arguments of counsel that are relevant to the penalty that should be imposed on the defendant.

R.C. 2929.03(D)(2) provides, in part:

"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 pursuant to division (D)(1) of this section [pre-sentence investigation and mental examination reports], *the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing* ****320** *are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender.*" (Emphasis added.)

In *Gumm, supra,* 73 Ohio St.3d at 419, 653 N.E.2d at 261, we reviewed the requirements of R.C. 2929.03(D)(1) and (2) and concluded that "[t]hese statutes thus expressly require the jury to 'consider' both relevant trial evidence as well as 'other' evidence relevant to the aggravating circumstances the offender was found guilty of committing. Because findings of guilt are only made as to the specifications contained in the indictment, *it is clear that the reference in these provisions to 'aggravating circumstances the offender was found guilty of committing' means the R.C. 2929.04(A) specifications set forth in the indictment and at issue in each case.* The jury is thus required to 'consider' 'other evidence' relevant to those specifications, including evidence relevant to the nature and ***354** circumstances of those specifications." (Emphasis added.) In *Gumm, supra,* syllabus, we held that:

"Subject to applicable Rules of Evidence, and pursuant to R.C. 2929.03(D)(1) and (2), counsel for the state at the penalty stage of a capital trial may introduce and comment upon (1) any evidence raised at trial that is relevant to the aggravating circumstances specified in the indictment of which the defendant was found guilty, (2) any other testimony or evidence relevant to the nature and circumstances of the aggravating circumstances specified in the indictment of which the defendant was found guilty, (3) evidence rebutting the existence of any statutorily defined or other mitigating factors first asserted by the defendant, (4) the presentence investigation report, where one is requested by the defendant, and (5) the mental examination report, where one is requested by the

defendant. Further, counsel for the state may comment upon the defendant's unsworn statement, if any. (R.C. 2929.03[D], construed; *State v. DePew* [1988], 38 Ohio St.3d 275, 528 N.E.2d 542, affirmed and followed.)"

R.C. 2929.04(B) provides that when one or more of the R.C. 2929.04(A)(1) through (8) specifications of aggravating circumstances contained in the indictment are proved beyond a reasonable doubt, "the court, trial jury, or panel of three judges shall consider, *and weigh against the aggravating circumstances* proved beyond a reasonable doubt, *the nature and circumstances of the offense,* the history, character, and background of the offender, and [all of the factors listed in R.C. 2929.04(B)(1) through (7)]." Therefore, R.C. 2929.04(B) clearly mandates that the nature and circumstances of the offense may only be "weighed" against the R.C. 2929.04(A) specifications of aggravating circumstances the defendant was found guilty of committing. We have recognized this concept in a number of our prior cases.

For example, in *State v. Steffen* (1987), 31 Ohio St.3d 111, 31 OBR 273, 509 N.E.2d 383, we recognized that for purposes of determining whether a capital defendant should be sentenced to death, the nature and circumstances of the offense are *not* to be weighed against the R.C. 2929.04(A) specifications of aggravating circumstances but, rather, are to be reviewed for any possible mitigating value. Specifically, in addressing an argument that the trial court in *Steffen* improperly considered the nature and circumstances of the offense, we stated that:

"R.C. 2929.04(B) provides that the court, in determining whether death is an appropriate penalty, 'shall consider, *and weigh against the aggravating circumstances* proved beyond a reasonable doubt, *the nature and circumstances of the offense* * * *.' * * * Thus, the court is required to review this factor. However, appellant appears to contend that the trial court's remarks on this subject reveal that it viewed the nature and circumstances of the offense herein as aggravating *rather than mitigating as required by R.C. 2929.04(B).* We do not agree. The ***355** statute merely requires that the court consider this factor *in determining the mitigating factors to be weighed against the proven aggravating circumstances.* Obviously, the nature and circumstances of certain offenses ****321** will be such that no mitigating feature can be extracted. By its statement on the gruesome and vicious nature of the murder, the trial court herein was merely justifying its conclusion that no mitigating factors can be gleaned from the nature and circumstances of this particular offense. We find nothing improper in the trial court's remarks." (Emphasis added in part and deleted in part.) *Steffen, supra,* 31 Ohio St.3d at 116–117, 31 OBR at 278, 509 N.E.2d at 390.

Similarly, in *State v. Stumpf* (1987), 32 Ohio St.3d 95, 99, 512 N.E.2d 598, 604, we stated that "R.C. 2929.04(B) requires the jury, trial court, or three-judge panel to 'consider, *and weigh against the aggravating circumstances* proved beyond a reasonable doubt, *the nature and circumstances of the offense* * * *.' * * * In a particular case, the nature and circumstances of the offense may have a mitigating impact, or they may not. * * * Either way, they must be considered." (Emphasis added in part and deleted in part.) See, also, *State v. Davis* (1988), 38 Ohio St.3d 361, 367–373, 528 N.E.2d 925, 931–936.

[3] [4] [5] [6] Obviously, it is perfectly acceptable for the prosecution at the penalty phase of a capital murder trial to argue that the specifications of aggravating circumstances set forth in R.C. 2929.04(A)(1) through (8) that the defendant was found guilty of committing outweigh the evidence in mitigation of the death sentence. Further, it is perfectly acceptable for the state to present arguments concerning the nature and circumstances of the offense. However, in light of the foregoing discussion, it is wholly *improper* for the state to argue or suggest that the nature and circumstances of the offense are "aggravating circumstances." Any such comment or suggestion is improper for at least two reasons. First, Ohio's death penalty scheme clearly provides that the "aggravating circumstances" against which the mitigating evidence is to be weighed are limited to the death-eligible statutory aggravating circumstances set forth in R.C. 2929.04(A)(1) through (8). Second, R.C. 2929.04(B) specifically provides that the court, trial jury, or three-judge panel "*shall consider, and weigh against the aggravating circumstances* proved beyond a reasonable doubt, *the nature and circumstances of the offense* * * *." (Emphasis added.) Thus, in the penalty phase of a capital murder trial, any use of the term "aggravating circumstances" must be confined to the statutory aggravating circumstances set forth in R.C. 2929.04(A)(1) through (8). Recognizing this, in *Gumm, supra,* 73 Ohio St.3d at 422, 653 N.E.2d at 263, we issued a strong admonition that courts and prosecutors should refrain from referring to the

nature and circumstances of the offense as "aggravating circumstances."

At oral argument, appellant criticized our decision in *Gumm,* suggesting that *Gumm* somehow renders Ohio's entire death penalty scheme unconstitutional. ***356** We disagree. However, upon a careful review of *Gumm,* we find certain errors in the body of that decision that seemingly cut across the grain of Ohio's death penalty scheme. In *Gumm, supra,* 73 Ohio St.3d at 420–421, 653 N.E.2d at 262, we stated that:

"We believe that a large part of the confusion which has developed in this area is semantical in nature in that the term 'aggravating circumstances' has been imprecisely employed to refer not only to the eight enumerated specifications of aggravating circumstances of R.C. 2929.04(A), but also to any evidentiary factors which tend to increase the likelihood that a death sentence will be imposed. *The nature and circumstances of a crime may be 'aggravating' in the sense that they are relevant and tend to reinforce the conclusion that a death sentence should be imposed.* This does not mean that the facts surrounding a crime can be set forth in the indictment as a specified statutory aggravating circumstance, nor may they be deemed an 'aggravating circumstance' in terms of determining death-eligibility. *State v. Johnson* (1986), 24 Ohio St.3d 87, 24 OBR 282, 494 N.E.2d 1061. *Thus, the fact that a particular murder was, for instance, particularly cruel or heinous is relevant to the determination of the appropriateness of actually imposing a death sentence on a death-eligible perpetrator,* even though the fact of cruelty or heinousness would not, of itself, be sufficient to bring the crime within the scope of any section of R.C. 2929.04(A), nor could ****322** that fact be used to cause the defendant to become death-eligible." (Emphasis added in part and deleted in part.)

We now recognize that this language in *Gumm* might be construed to suggest that the nature and circumstances of an offense (such as the cruel and heinous manner in which it was committed) can be included on the *aggravation* side of the statutory weighing process. However, as we have pointed out, the nature and circumstances of the offense may only enter into the statutory weighing process on the side of *mitigation.* See R.C. 2929.04(B). Thus, we modify *Gumm* to the extent that that opinion indicates anything to the contrary.

Again and again and again, we hold that in the penalty phase of a capital trial, the "aggravating circumstances" against which the mitigating evidence is to be weighed are limited to the specifications of aggravating circumstances set forth in R.C. 2929.04(A)(1) through (8) that have been alleged in the indictment and proved beyond a reasonable doubt. In this regard, it is improper for prosecutors in the penalty phase of a capital trial to make any comment before a jury that the nature and circumstances of the offense are "aggravating circumstances."

B

Appellant's Contentions

[7] **[8]** In his thirteenth proposition of law, appellant challenges a number of the prosecutor's comments during the initial closing argument in the penalty phase. ***357** However, appellant never objected to the prosecutor's remarks at the time they were made. Therefore, we find that appellant's contentions of error based upon the state's initial closing argument have been waived. [2] Accordingly, our review of appellant's contentions must proceed, if at all, under the plain error analysis of Crim.R. 52(B). Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise. See, *e.g., State v. Wickline* (1990), 50 Ohio St.3d 114, 119–120, 552 N.E.2d 913, 919–920.

[9] In the state's initial closing argument in the penalty phase, the prosecutor discussed the three statutory aggravating circumstances appellant was found guilty of committing. In discussing the R.C. 2929.04(A)(7) kidnapping specification, the prosecutor stated:

"The second aggravating circumstance becomes a lot more serious: the kidnapping of Amber Garrett. What I would like you to consider when you think back about that is what Amber Garrett went through during that kidnapping when she was taken out of her bed. It was a very cold night. All she had on was a little nightie and a pair of underwear. She did not have her glasses, she did not have her shoes.

"At some point in time she woke up and she really did not know where she was. She was in his car and obviously she could not see well or she might have been able to recognize

him at this point. What did she say to him? What went through her mind as she felt that knife pressed against her neck? We know from Dr. Kenny [the coroner] that there was not one or a couple but eleven superficial lacerations. That would hurt. It obviously hurt a lot. This is a 10–year–old girl. *That is the kidnapping. That is the aggravated circumstance.* What went through her mind while all that was going on? That is something to consider." (Emphasis added.)

[10] The prosecutor's comments in this regard could be considered objectionable for two reasons. First, the prosecutor obviously invited the jury to concentrate on what the victim experienced and was thinking in her last moments of life. As we recognized in ****323** *State v. Combs* (1991), 62 Ohio St.3d 278, 283, 581 N.E.2d 1071, 1077, such argument could be considered error to the extent that it invites the jury to speculate on facts not in evidence. Second, we are somewhat troubled by ***358** the prosecutor's statements: "That is the kidnapping. That is the aggravated circumstance." These statements are legally defensible, since the kidnapping was, in fact, the predicate for one of the R.C. 2929.04(A) specifications of aggravating circumstances alleged in the indictment. However, the statements were made in the midst of the prosecutor's description of some of the nature and circumstances of the crime and, thus, could be construed as suggesting that the nature and circumstances of the offense were "aggravating circumstances." In this regard, a much better approach[3] for the closing argument would have been to entirely separate the discussion of the statutory aggravating circumstances appellant was found guilty of committing from the discussion of the nature and circumstances of the crime. For instance, the prosecutor could have first listed the three statutory aggravating circumstances at issue in the case as specified in the indictment. *As a separate portion of the argument to the jury,* the prosecutor could have then set forth a description of all relevant facts and circumstances surrounding the offense—*without referring to any such facts and circumstances as "aggravating."* Again, we emphasize that prosecutors need to exercise an abundance of caution to avoid suggesting or implying that the nature and circumstances of the offense are "aggravating circumstances."

[11] Next, the prosecutor went on to discuss the third statutory (R.C. 2929.04[A][3]) aggravating circumstance, to wit, a killing to escape detection. In this part of the initial closing argument, the prosecutor again invited the jury to speculate concerning the victim's thoughts as she was being stabbed to death: "Think of the savageness of the killing he actually inflicted on her; ten or eleven knife wounds, and she was again alert and aware during this, going into her chest, going into her neck when she was able to fend some of these off. There was a cut in her hand and one of the knife wounds went all the way through her arm. Again, what went through that little girl's mind at that point?" Clearly, the prosecutor should have refrained from encouraging the jury to speculate as to the victim's final thoughts. Additionally, near the conclusion of the prosecutor's initial closing argument, he stated, "[a]nd what, if anything, did she do to deserve this? *Those are the aggravating circumstances,* ladies and gentlemen, that he is guilty of and that you found him guilty of." (Emphasis added.) With respect to these remarks, it is not entirely clear whether the prosecutor was referring to the nature and circumstances of the offense on the one hand or to the three statutory aggravating circumstances that appellant was found guilty of committing on the other hand. In this regard, we note that prosecutors should refrain from making any vague comments in the penalty phase concerning precisely what the aggravating ***359** circumstances are in a given case. Again, the only "aggravating circumstances" at issue in the penalty phase of a capital trial are the R.C. 2929.04(A) specifications of aggravating circumstances the defendant was found guilty of committing.

Additionally, appellant challenges a number of comments made by the prosecutor in the final closing argument in the penalty phase. During the final closing argument, the prosecutor stated, in part:

"Now what were the aggravating circumstances? * * *

" * * * Mr. Piepmeier [the prosecutor who presented the initial closing argument] explained it very eloquently what those aggravating things are. What kind of person would commit the burglary of a friend's house, knows they are not going to be there, and returns to their house to burglarize and kidnap? What kind of person is that? *What kind of aggravating circumstance is that?*

"*What kind of aggravated circumstance is it that a 31–year–old man when he's doing this burglary and right before he gets the* ****324** *baby-sitter out of the house on a cold*

November night with three small children in that apartment? Incredible aggravation.

"*He returns and now knows nobody is there. This is aggravation.* This is balancing on the end of this scale the mitigation and it is a simple balancing test. *He returns and takes a 10–year–old girl, takes a sleeping 10–year–old girl from her warm bed which she is sharing with her little sister and her little brother. Incredible in terms of an aggravating circumstance in this crime.* He takes her sound asleep from her home or half-asleep so quickly on this freezing cold night and he removes her. *There is not time to have shoes put on her, a coat put on her and she is half blind without her glasses, and what kind of aggravation is it?* What kind of person would commit that kind of a crime?

"He throws her in the car. We know from the witnesses and the eyewitnesses that saw this person out on the road, that saw his car on the road which was a very tight time frame. He didn't get what he wanted from Amber and this vicious man, probably within thirty minutes of kidnapping her.

"*What aggravation do we further have? We have these hesitation marks on Amber's neck. I am sure you looked at and saw when you think of her. He stabs her eleven times. This is all on the scale side of aggravation. He stabs this little girl eleven times. The wound to the heart area is incredible in terms of aggravation.*

"*What did the coroner testify to? He ran a knife in her chest, withdrew it partially and then stuck it back in her. That is on the aggravation side against his mitigation. This exhibit that you saw back in the jury room depicts her* ***360*** *struggle in trying to fight him. That is on the aggravation side. That is on the aggravation scale.*

"He wanted to make sure though so he takes a blunt object and probably a jack handle and delivers the shots to the head. She will never talk. For the purpose of escaping detection, just as Mike Piepmeier said in his opening statement. Isn't that incredibly consistent, isn't that incredibly consistent with the cleaning of the car, the cleaning of his clothes, the lies he told the police, the continued lies he told this courtroom and even the lies he told you in this courtroom today?

"*Killing Amber and that aggravation connected with it that you're weighing against his mitigation that was presented today. He was cleaning, he was getting rid of the witness. It is the ultimate cleaning. It was the ultimate selfish act. He made the decision to kill her.*" (Emphasis added.)

Initially, we note that appellant failed to raise an objection to any of the prosecutor's remarks concerning what constituted "aggravation" in this case. Thus, appellant's arguments based upon the prosecutor's remarks have been waived. Accordingly, our discretionary review of appellant's contentions must proceed, if at all, under the plain error analysis of Crim.R. 52(B). See *Wickline, supra,* 50 Ohio St.3d 114, 119–120, 552 N.E.2d 913, 919–920.

We agree with appellant that the prosecutor's final closing argument was riddled with improper comments regarding the nature and circumstances of the offense. Repeatedly, the prosecutor referred to the nature and circumstances of the offense as "aggravation" or "aggravating circumstances." Worse yet, the prosecutor stated that such "aggravation" was to be balanced against the evidence presented in mitigation. Such comments do not conform to Ohio's death penalty scheme for the reason stated in our discussion, *supra.*

However, while many of the prosecutor's comments in the closing arguments (both the initial closing argument and the final closing argument) should not have been made, we nevertheless conclude that the errors did not rise to the level of plain error. We are persuaded that the prosecutor's closing arguments to the jury made no difference in the outcome of the trial, particularly in light of the statutory aggravating circumstances appellant was found guilty of committing and the lack of credible mitigating evidence presented by appellant. Moreover, the trial court properly instructed the jury that the only "aggravating circumstances" at issue in this case were the three specifications of aggravating circumstances the jury had ***325*** found appellant guilty of committing. The instruction was very clear in this regard, and we assume that the jury followed the trial court's instructions.

We have been strongly urged, by some, to reverse appellant's death sentence based upon the prosecution's closing arguments in this case. To do so, it is ***361*** argued, would send a very strong message that any reference to the nature and circumstances of the offense as "aggravating circumstances" is not acceptable *even where, as here, there is no material prejudice to the defendant.* We decline to do so, trusting that our detailed clarification of this issue will

suffice to put prosecutors and trial judges on notice of what is acceptable and what is not.

In his sixth proposition of law, appellant contends that in its sentencing opinion, the trial court considered the nature and circumstances of the offense as "nonstatutory aggravating circumstances." With respect to this issue, the court of appeals stated, in part:

"[T]he thrust of the argument * * * concerns what Wogenstahl portrays as the unlawful conversion of the nature and circumstances of the murder from their rightful role as a mitigating factor to an unauthorized aggravating circumstance.

"Under R.C. 2929.04(B), the nature and circumstances of the offense are specifically to be considered in the sentencing process in that they are to be weighed, along with other delineated factors, 'against the [specified] aggravating circumstances proved beyond a reasonable doubt' in the guilt phase of the proceedings. It is now well accepted that what this permits a trial court to do in a given case is to decide, upon its assessment of the weight of the evidence, that the nature and circumstances of an offense have little, if any, value as a mitigating factor, and to refer to that comparative lack of value as part of the explanation given in the sentencing opinion for why the aggravating circumstances have been found to outweigh the mitigating factors beyond a reasonable doubt. See, *e.g., State v. Combs* (1991), 62 Ohio St.3d 278, 581 N.E.2d 1071 * * *.

"Our reading of the sentencing opinion in this case convinces us that the office assigned to the nature and circumstances of Amber Garrett's murder was precisely the one envisioned by the applicable statute and the case law that the statute has spawned. There was no inappropriate conversion here."

We agree with this assessment of the issue. We are convinced that the trial court did not improperly consider the nature and circumstances of the offense as nonstatutory aggravating circumstances.

Accordingly, for all of the foregoing reasons, we reject appellant's sixth and thirteenth[4] propositions of law.

III

[12] In his twenty-third proposition of law, appellant suggests that forensic serologist Brian Wraxall lacked the proper academic qualifications to render an expert ***362** opinion concerning the HLA DQ Alpha ("Haldo Alpha") testing of the blood recovered from appellant's vehicle. We disagree.

With respect to Wraxall's qualifications, appellant established at trial that Wraxall had no college degree and was not a medical doctor. However, "[u]nder Evid.R. 702, an expert may be qualified by *knowledge, skill, experience, training, or education* to give an opinion which will assist the jury to understand the evidence and determine a fact at issue." (Emphasis added.) *State v. Beuke* (1988), 38 Ohio St.3d 29, 43, 526 N.E.2d 274, 289. Here, the record reflects that Wraxall was educated in England where he achieved a Higher National Certificate in Applied Biology. Wraxall testified that his education in England is approximately equivalent to the Bachelor of Science degree in the United States. He has studied microbiology at a United States university and has attended numerous symposiums in the field of criminalistics. He has published several papers in the field of bloodstain analysis. From 1963 through 1977, Wraxall worked for the Metropolitan Police Forensic Science Laboratory in London. He began working for the Serological ****326** Research Institute in 1978, and has over fourteen years of laboratory experience. Additionally, Wraxall has testified as an expert in twenty states, including Ohio.

Although Wraxall lacks a college degree and is not a medical doctor, we find that the trial court did not abuse its discretion in allowing him to testify as an expert based upon his extensive background and experience in blood analysis. Further, Wraxall's expert opinions were based on his personal testing of the blood samples that had been provided to him and, thus, the requirements of Evid.R. 703 have been satisfied.

[13] Next, appellant contends that Wraxall's testimony should have been stricken because Wraxall never offered an expert opinion that the blood recovered from appellant's vehicle was, in fact, Amber's blood. We find that appellant's arguments demonstrate a complete lack of understanding of the purposes of Wraxall's testimony. Wraxall testified to a reasonable degree of scientific

certainty that the blood recovered from appellant's vehicle was consistent with the Haldo Alpha classification of a known sample of Amber's blood. He also testified to a reasonable degree of scientific certainty that the Haldo Alpha classification of Amber's blood occurs in approximately 5.3 percent of the Caucasian population. The prosecution did not offer Wraxall's testimony to establish specific identification of the source of the blood recovered from appellant's vehicle. The Haldo Alpha test was incapable of establishing specific identification. Rather, Wraxall's testimony was probative that the source of blood could have come from the victim, and was much more probative than the typical ABO blood grouping evidence that is routinely considered in criminal trials. The testimony excluded approximately ninety-five percent of the Caucasian population as potential ***363** sources of the bloodstain recovered from appellant's vehicle. Accordingly, we find no error in the admission of Wraxall's testimony.

[14] Furthermore, appellant points to the fact that the evidence at trial established that appellant had purchased the 1978 Oldsmobile on November 18, 1991, *i.e.*, approximately a week before Amber's murder. On cross-examination, Wraxall conceded that it was impossible to determine the age of the bloodstain recovered from appellant's vehicle. In this regard, appellant contends that the trial court should have excluded the bloodstain evidence, since the age of the bloodstain could not be determined. However, we find that the question concerning the age of the bloodstain goes to the weight, and not to the admissibility, of the bloodstain evidence. In any event, appellant's arguments in this regard have been waived.

Accordingly, we reject appellant's twenty-third proposition of law.

IV

In his twenty-fourth proposition of law, appellant challenges the trial court's refusal to suppress the testimony of two witnesses who identified appellant as the man they had seen on Jamison Road in the early morning hours of November 24, 1991. Appellant contends that the trial court erred by refusing to suppress the identification testimony of Brian Noel and Kathy Roth. We disagree.

[15] Noel initially identified appellant on Thursday, November 28, 1991, at a lineup conducted at the Hamilton County Justice Center. At that time, appellant had not been charged with a crime and, thus, was not represented by counsel. Appellant concedes that he had no Sixth Amendment right to counsel at the lineup because he had not been formally charged with a crime. See *Kirby v. Illinois* (1972), 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411. Nevertheless, appellant invites us to find that he had a right to counsel under Section 10, Article I of the Ohio Constitution. However, appellant has presented us with no compelling reasons why Ohio constitutional law should differ from the federal law on this issue. Moreover, a videotape of the lineup reveals that it was conducted in an appropriate manner. At trial, Noel positively identified appellant as the man he had seen on Jamison Road on the night in question. The trial court did not err in refusing to suppress Noel's identification testimony.

****327** **[16]** Likewise, appellant has failed to demonstrate any impropriety by the state with respect to Roth's identification of appellant. In *State v. Brown* (1988), 38 Ohio St.3d 305, 310, 528 N.E.2d 523, 532, we held that "[w]here a witness has been confronted by a suspect before trial, that witness' identification of the suspect will be suppressed if the confrontation procedure was unnecessarily suggestive of the suspect's guilt and the identification was unreliable under the totality of the circumstances. *Manson v. Brathwaite* (1977), 432 U.S. 98 [97 S.Ct. 2243, 53 L.Ed.2d 140]."

***364** Police showed Roth a photo array composed of six photographs shortly after Amber's body was discovered. Roth was unable to positively identify appellant. Almost a year later, a prosecutor showed Roth a different photo array. At that time, Roth identified appellant's picture, but expressed some reservations, since appellant's face and hair as depicted in the photograph appeared "fuller" than when she had seen him on Jamison Road. Roth was then shown a single black-and-white photograph of appellant, which she positively identified. At trial, Roth expressed no reservations in identifying appellant as the man she had seen on Jamison Road. Appellant suggests that the state acted improperly in obtaining Roth's identification of appellant. However, the record does not support appellant's contentions in this regard.

[17] Appellant also apparently suggests that Vickie Mozena's identification of appellant was "sufficiently

uncertain" and resulted from overly suggestive police practices. However, a review of Mozena's testimony reveals that appellant's argument is completely unfounded. Mozena was shown a photo array shortly after the murder and, without hesitation, identified appellant as the man she had seen at the United Dairy Farmers store on the night of Amber's disappearance. Mozena testified at trial that she thought appellant was about to rob her when he entered the United Dairy Farmers store. Thus, Mozena had good reason to focus her attention on appellant and to remember him. Moreover, Mozena sold appellant a pack of cigarettes and had seen him in the store on at least one other occasion. At trial, Mozena expressed no doubt whatsoever that the man she had seen on the morning of November 24, 1991 was, in fact, appellant. There is no evidence to suggest that Mozena's identification of appellant was the product of impermissible police investigatory tactics.

Accordingly, appellant's twenty-fourth proposition of law is not well taken.

V

[18] **[19]** **[20]** In his twenty-fifth proposition of law, appellant contends that the evidence is insufficient to establish his identity as the perpetrator of the crimes. We disagree. In reviewing the sufficiency of the evidence, "the relevant question is whether, after 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 beyond a reasonable doubt." (Emphasis *sic.*) *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573. The weight to be given the evidence and the credibility of the witnesses are issues for the jury to determine. See *State v. DeHass* (1967), 10 Ohio St.2d 230, 39 O.O.2d 366, 227 N.E.2d 212, paragraph one of the syllabus. Upon a thorough review of the record, we are absolutely convinced that the evidence in this case was more than sufficient to prove appellant's guilt beyond a reasonable doubt. In this proposition, ***365** appellant essentially requests that we evaluate the credibility of witnesses and resolve evidentiary conflicts in his favor. This we refuse to do. See, generally, *State v. Hawkins* (1993), 66 Ohio St.3d 339, 344, 612 N.E.2d 1227, 1231.

[21] In his twenty-sixth proposition of law, appellant urges that his convictions are against the manifest weight of the evidence. However, appellant readily concedes that this court does not, generally, weigh the evidence. See *State v. Cooey* (1989), 46 Ohio St.3d 20, 26, 544 N.E.2d 895, 905–906. Therefore, having found that the evidence of appellant's guilt is legally sufficient to sustain his convictions, we reject appellant's arguments concerning the manifest weight of the evidence. Furthermore, we note, in passing, that the direct and circumstantial evidence in this ****328** case overwhelmingly establishes appellant's guilt of all charges and specifications.

Accordingly, we reject appellant's twenty-fifth and twenty-sixth propositions of law.

VI

[22] Appellant had a prior (1985) aggravated burglary conviction. At trial, the state informed the court of its intention to call Officer Kent Miller to testify concerning the circumstances of appellant's prior conviction. The prosecutor stated that Miller's testimony would be used to establish the prior aggravated felony specifications in connection with Counts Two and Three of the indictment. Moreover, the prosecutor stated that "[i]n addition, Judge, we won't offer his [Miller's] testimony only for that purpose. We are also going to [R.C.] 2945.59[A] * * *, Evidence Rule 404[B], what is [oftentimes] referred to as same or similar offenses. We think that it is relevant to prove defendant's scheme, plan or system in perpetrating a particular offense, particularly this [1989] aggravated burglary." The prosecutor explained to the trial judge that the prior burglary and the burglary in this case both "involved people he [appellant] had been with or visited with the day before, and in both offenses he utilized some rouse [*sic*, ruse] to get the occupant out of the home so he could commit the burglary. In either [*sic*] cases there was a sign of force and, finally, he used an alibi when he was confronted that he had gone straight home and gone to bed and didn't know anything about the burglary." The trial court ruled in favor of allowing Miller's testimony pursuant to R.C. 2945.59 and Evid.R. 404(B), and to establish the prior aggravated felony specifications in Counts Two and Three of the indictment.

In his twenty-first proposition of law, appellant contends that the trial court committed reversible error in allowing

Miller to testify concerning appellant's 1985 aggravated burglary conviction. We disagree.

R.C. 2945.59 provides that:

*366 "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his 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 may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

Evid.R. 404(B) provides:

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

[23] Evidence of other crimes, wrongs or bad acts independent of, and unrelated to, the offenses for which a defendant is on trial is generally inadmissible to show criminal propensity. See *State v. Woodard* (1993), 68 Ohio St.3d 70, 73, 623 N.E.2d 75, 78, and *Wickline, supra,* 50 Ohio St.3d 114, 120, 552 N.E.2d 913, 920. However, the evidence of appellant's 1985 aggravated burglary conviction was not used for an impermissible purpose. We agree with the court of appeals' determination that there are "striking" similarities between appellant's 1985 conviction and the aggravated burglary in the case at bar. The similarities tended to establish a number of the items enumerated in R.C. 2945.59 and Evid.R. 404(B). Thus, the evidence of appellant's prior conviction was admissible for that limited purpose. See *State v. Broom* (1988), 40 Ohio St.3d 277, 533 N.E.2d 682, paragraph one of the syllabus.

Appellant protests that the prior offense was "dissimilar" to the aggravated burglary committed in this case. However, as we recognized in *State v. Jamison* (1990), 49 Ohio St.3d 182, 552 N.E.2d 180, syllabus, "[o]ther acts forming a unique, identifiable plan of criminal activity are admissible to establish identity under Evid.R. 404(B). * * * Although the standard for admissibility is strict, the other acts need not be the same as or similar to the crime charged." **329 Moreover, we note that Miller's testimony concerning the prior aggravated burglary conviction was clearly admissible because the prosecution bore the burden of establishing the prior aggravated felony specification in connection with Counts Two and Three of the indictment.

Accordingly, appellant's twenty-first proposition of law is not well taken.

VII

[24] Appellant was found guilty of three death penalty specifications in connection with the aggravated murder. The first specification alleged that the killing occurred during the course of a kidnapping (R.C. 2929.04 [A] [7]). The second specification alleged that the killing *367 occurred during the course of an aggravated burglary (R.C. 2929.04[A][7]). The third alleged that appellant killed Amber for the purpose of escaping detection, apprehension, trial, or punishment for having committed the aggravated burglary and/or kidnapping (R.C. 2929.04[A] [3]).

In his first proposition of law, appellant contends that the trial court should have merged the three aggravating circumstances prior to the penalty phase since, according to appellant, the three aggravating circumstances were duplicative. We disagree.

In *State v. Jenkins* (1984), 15 Ohio St.3d 164, 15 OBR 311, 473 N.E.2d 264, paragraph five of the syllabus, this court held that:

"In the penalty phase of a capital prosecution, where two or more aggravating circumstances arise from the same act or indivisible course of conduct and are thus duplicative, the duplicative aggravating circumstances will be merged for purposes of sentencing. Should this merging of aggravating circumstances take place upon appellate review of a death sentence, resentencing is not automatically required where the reviewing court independently determines that the remaining aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt and that the jury's consideration

of duplicative aggravating circumstances in the penalty phase did not affect the verdict."

Here, the three aggravating circumstances appellant was found guilty of committing were not duplicative. The evidence at trial, if accepted, established that appellant broke into an occupied structure to kidnap ten-year-old Amber Garrett. He forcibly removed Amber from the apartment to use her for his own sexual gratification. Appellant physically restrained Amber and bound her arms in the clothing she was wearing. A knife was held to Amber's neck. She was transported in appellant's vehicle across the Ohio–Indiana border. At some point, appellant killed Amber when he realized that he could not return her to the apartment without being identified as the perpetrator of the aggravated burglary and/or kidnapping offenses.

In *State v. Waddy* (1992), 63 Ohio St.3d 424, 448, 588 N.E.2d 819, 837, we recognized that aggravated burglary is not implicit within kidnapping, and that kidnapping is not implicit within aggravated burglary. In *Waddy,* we held that although Waddy had been convicted of two R.C. 2929.04(A)(7) death penalty specifications (*i.e.,* aggravated burglary and kidnapping), the specifications were not duplicative. *Id.* We reach the same conclusion here. Further, the R.C. 2929.04(A)(3) aggravating circumstance in the case at bar can clearly be viewed as independent of the two R.C. 2929.04(A)(7) aggravating circumstances appellant was found guilty of committing. The aggravating circumstances appellant was found guilty of committing did not arise out of the same act or indivisible course ***368** of conduct. Therefore, merger was not required. Moreover, given the dearth of mitigating evidence in this case, we are convinced beyond a reasonable doubt that the jury would have reached the same verdict in the penalty phase even if the three aggravating circumstances had been merged.

Accordingly, we reject appellant's first proposition of law. Similarly, we reject the arguments in support of appellant's second, third, and fourth propositions of law which assume that the aggravating circumstances appellant was found guilty of committing should have been merged at trial and on appeal.

VIII

[25] Having considered each of appellant's propositions of law, we must now independently ****330** review the death sentence for appropriateness (also raised in appellant's twenty-seventh proposition of law) and proportionality. Again, we find that the three specifications of aggravating circumstances appellant was found guilty of committing are clearly shown on the record before us.

In mitigation, appellant presented the testimony of friends, family and others. The witnesses were aware of appellant's criminal history, and testified that appellant had reformed his life and had changed for the better in the months preceding the murder. In an unsworn statement, appellant proclaimed his innocence, challenged the state's evidence, and expressed sympathy to Amber's family. Defense counsel urged the jury to consider, as mitigating, that Amber Garrett died quickly and that she was neither raped nor tortured. Moreover, defense counsel urged the jury to spare appellant's life and suggested that the real killer was yet to be identified.

The trial court and court of appeals apparently found no credible mitigating evidence and, upon a review of the record, neither do we. Accordingly, we find that the aggravating circumstances appellant was found guilty of committing outweigh the evidence presented in mitigation beyond a reasonable doubt.

[26] As our final task, we have undertaken a comparison of the death sentence in this case to those cases in which we have previously imposed the death penalty. We have previously imposed the death sentence in cases involving murder during the course of a kidnapping (see, *e.g., Scudder, supra,* 71 Ohio St.3d 263, 643 N.E.2d 524), murder during the course of an aggravated burglary (see, *e.g., State v. Bonnell* [1991], 61 Ohio St.3d 179, 573 N.E.2d 1082), and murder to escape detection (see, *e.g., State v. Burke* [1995], 73 Ohio St.3d 399, 653 N.E.2d 242). Appellant's death sentence is neither excessive nor disproportionate.

Accordingly, we affirm the judgment of the court of appeals.

Judgment affirmed.

MOYER, C.J., and WRIGHT, RESNICK, FRANCIS E. SWEENEY, Sr., PFEIFER and COOK, JJ., concur.

*369 APPENDIX

"Proposition of Law No. 1: Specifications under R.C. 2929.04(A)(3) and (A)(7) are duplicative, and must be merged prior to the weighing by the sentencing jury, the trial judge, and an appellate court considering the appropriate sentence in a capital case. The failure to merge such specifications constitutes a violation of the rights of the accused under the United States Constitution and the Ohio Constitution as well where the death sentence is imposed thereafter.

"Proposition of Law No. 2: The power conferred by R.C. 2929.05 upon appellate courts to review aggravating and mitigating factors, and to determine the appropriateness of a given death sentence, is subordinate to the right of the accused to trial by jury under Art. I. §§ 5 and 10 of the Ohio Constitution.

"Proposition of Law No. 3: Unless it can fairly be held beyond a reasonable doubt that penalty phase error in a capital trial had no effect upon the jury's sentencing verdict, appellate courts are rendered powerless by the right to trial by jury set forth in the Ohio Constitution, Art. I. §§ 5 and 10, from purporting to 'cure' the error and to affirm the death sentence; any such affirmance violates the right of the accused to trial by jury, and the death sentence must be vacated and set aside.

"Proposition of Law No. 4: The affirmance of a death sentence by an appellate court which has reweighed the aggravating and mitigating factors without merging specifications required to be merged, where the jury which recommended the death sentence upon unmerged specifications, and the trial judge also did not merge the specifications in determining the sentence, constitutes a violation of the right of the accused under the Eighth Amendment to have the death sentence imposed only after the proper procedures have been followed under the state scheme for imposing the death sentence, and also constitutes a violation of the right to due process of law in that such appellate reweighing abrogates **331 the liberty interest created by state law, which requires jury participation in the capital sentencing process.

"Proposition of Law No. 5: Where a trial court, in its opinion justifying a death sentence, incorporates verbatim therein *as the trial court's own conclusions* negative statements about the accused made in the prosecutor's opening statement five weeks prior to the sentencing proceedings, and also incorporates practically verbatim from similar opinions of other judges, and of the same judge, in prior capital cases, conclusions purportedly resulting from the sentencing process in the case at bar, then the offender has been denied his Eighth Amendment right to individualized and independent consideration by the trial court of the appropriate sentence in his case, and his Fourteenth Amendment right to due process of law.

*370 "Proposition of Law No. 6: Where, in a capital case, the sentencing court considers and weighs invalid or improper aggravating factors in imposing the death sentence, that sentence offends the Eighth Amendment to the Constitution of the United States, and the right to due process under the Fourteenth Amendment, and their counterparts in the Ohio Constitution, and must be reversed.

"Proposition of Law No. 7: The defendant in a capital case is entitled to 12 peremptory jury challenges, and the restriction of the defense to 6 peremptory challenges violates Ohio law and the rights of the accused to a fair and impartial jury under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, and under Art. I. §§ 5 and 9 of the Ohio Constitution.

"Proposition of Law No. 8: The denial of the right of the accused to jury instructions as to the mitigating factors of residual doubt and mercy violates the right of the accused to consideration by the sentencer in a capital prosecution of all relevant mitigating factors, in violation of his rights under the Eighth Amendment to the Constitution of the United States, to due process under the Fourteenth Amendment, and to his rights under the Ohio Constitution, Art. I. §§ 9 and 16.

"Proposition of Law No. 9: The application against the accused by an intermediate appellate court of a change in the law occurring between the imposition of a death sentence and the decision of the appellate court to affirm, which change deprives the accused of the benefit of mitigating factors to which he was entitled when his case was tried, violates his protection against *ex post facto* laws, in violation of Art. I. § 10 of the United States

Constitution, and Art. II. § 28 of the Ohio Constitution, as well as R.C. 1.48.

"Proposition of Law No. 10: The trial court committed error prejudicial to appellant's Eighth Amendment and due process rights in permitting the prosecution to argue that the jury's death verdict was only a recommendation, and also in instructing the jury, and providing verdict forms to the effect that the jury's verdict was only a recommendation, and was not binding upon the trial court.

"Proposition of Law No. 11: The denial of defense requests for funds to retain the services of an investigator, and for a mitigation specialist, denied appellant the right to the equal protection of the laws, secured to him by the Fourteenth Amendment to the U.S. Constitution, and rendered his death sentence constitutionally infirm under the Eighth Amendment, as well as violating his right to due process of law under the U.S. and Ohio Constitutions.

"Proposition of Law No. 12: Where the prosecution, at the penalty phase of a capital prosecution, is permitted, over objection and motions for mistrial, to adduce evidence of a single incident of a prior 'bad act' occurring ten years prior to the offense at bar, and the nature of such act, and even its existence, was not shown to have occurred; the accused was not indicted for a specification based upon such incident; and no conviction resulted from such incident, then the imposition of the death sentence was the result of unconstitutional weighing and consideration of a nonstatutory aggravating factor, the right of the accused under the Eighth and Fourteenth Amendments has been violated, and reversal of the death sentence is required.

"Proposition of Law No. 13: Egregious misconduct by the prosecutor in the penalty **332 phase of capital proceedings requires reversal of the death sentence, and where the prosecutor, in the guise of rebuttal, offers grossly prejudicial and inadmissible evidence of a nonstatutory aggravating factor, and his final argument for death argues nonstatutory aggravating factors, misstates the evidence, contains inflammatory remarks and invective against the accused and his counsel, a death sentence based on a jury verdict following such arguments violates due process and the Eighth Amendment of the United States Constitution, and their counterparts in the Ohio Constitution.

"Proposition of Law No. 14: It is error for the trial court in a capital prosecution to refuse a defense request to submit a questionnaire promulgated by defense counsel to prospective jurors prior to voir dire, in violation of the rights of the accused under the Eighth and Fourteenth Amendments to the Constitution of the United States, and Art. I. §§ 9 and 16 of the Ohio Constitution.

"Proposition of Law No. 15: It is error for the trial court in a capital prosecution to refuse a defense request to conduct individual, sequestered voir dire, in violation of the rights of the accused under the Eighth and Fourteenth Amendments to the Constitution of the United States, and Art. I. §§ 9 and 16 of the Ohio Constitution.

"Proposition of Law No. 16: It is error for the trial court in a capital prosecution to refuse a defense request to argue first and last to the jury at the penalty phase of the prosecution, in violation of the rights of the accused under the Eighth and Fourteenth Amendments to the Constitution of the United States, and Art. I. §§ 9 and 16 of the Ohio Constitution.

"Proposition of Law No. 17: It is error for the trial court in a capital prosecution to refuse a defense request for separate juries for the guilt and, if necessary, the penalty phases of the prosecution, in violation of the rights of the accused under the Eighth and Fourteenth Amendments to the Constitution of the United States, and Art. I. §§ 9 and 16 of the Ohio Constitution[.]

"Proposition of Law No. 18: The Ohio death penalty statutes are unconstitutional, violating the Eighth and Fourteenth Amendment proscription of cruel and unusual punishments, the Fourteenth Amendment guarantees to due process of *372 law and to the equal protection of the laws, and also violating the concomitant provisions of the Ohio Constitution.

"Proposition of Law No. 19: A conviction and death sentence for aggravated murder must be reversed as violations of the fundamental fairness required by the Due Process Clause of the Fourteenth Amendment, and the Sixth Amendment of the right to trial before a fair and impartial jury, as well as their counterparts in the Ohio Constitution, as well as the Eighth Amendment prohibition against cruel and unusual punishment, where the conviction and death sentence were obtained through use of repetitive, cumulative, photographs of the corpse

of the deceased, the net prejudicial effect of which far outweighed their probative value.

"Proposition of Law No. 20: Unless and until the accused puts his character in issue, it is improper, prejudicial error to permit the state to present evidence in its case in chief purporting to demonstrate that the accused is a bad person, in violation of the right of the accused to due process of law and to a fair and impartial jury, under the Sixth and Fourteenth Amendments, respectively, to the Constitution of the United States, and, where a death sentence is the result of the proceedings, in violation of the Eighth Amendment as well; similar rights protected by the Ohio Constitution were similarly violated.

"Proposition of Law No. 21: It is prejudicial error, and a violation of the right of the accused to due process of law, secured by the Fourteenth Amendment to the Constitution of the United States, to admit evidence of a prior offense which is temporally remote, and not at all similar to the offense in the case at bar, under the purported 'same and similar act' exception to the general rule that evidence of prior criminal conduct is not admissible to prove an element of the subsequent offense then being tried.

"Proposition of Law No. 22: A death sentence must be reversed as contrary to the **333 Revised Code, as well as the Eighth Amendment, where the trial court fails to instruct the jury that the aggravating circumstance under R.C. 2929.04(A)(7) contains two mutually exclusive alternatives, and thus permits conviction of the aggravating circumstance upon less than a unanimous vote of the jury; such an error is also an independent violation of the right of the accused to due process of law; similar rights secured by the Ohio Constitutional [*sic*] are also violated thereby.

"Proposition of Law No. 23: Admission of an expert opinion with respect to a Haldo–Alpha blood test insufficient to establish to a reasonable scientific certainty that blood found in the defendant's auto was that of the deceased victim, where the expert possesses insufficient expertise, and where the defendant owned to [*sic*, the] auto for but three days prior to the offense, and where the blood *373 removed from the defendant's auto could have been there as long as ten years, is prejudicial error, and a denial of due process.

"Proposition of Law No. 24: Where the identification of the accused by a witness is the result of overly suggestive police investigative tactics, the refusal of the trial court to suppress the witness' identification testimony violates the right of the accused to due process of law, requiring reversal.

"Proposition of Law No. 25: Where the state fails to prove beyond a reasonable doubt that the accused is the perpetrator of the crimes with which he has been charged, convictions for aggravated murder, aggravated burglary and kidnapping, and the capital specifications attendant thereto, must be reversed as contrary to the right of the accused to due process of law under the Ohio and federal Constitutions.

"Proposition of Law No. 26: Convictions for aggravated murder which are contrary to the manifest weight of the evidence must be reversed, as contrary to the right of the accused to due process of law under the Ohio and federal Constitutions.

"Proposition of Law No. 27: The aggravating circumstances appellant was found guilty of violating do not outweigh the mitigating factors, and hence the death sentence imposed upon appellant violates his rights under the Eighth and Fourteenth Amendments to the United States Constitution, and violate Ohio law as well.

"Proposition of Law No. 28: Where convictions of capital murder and related offenses is [*sic*] tainted by prejudicial prosecutorial misconduct which deprives the accused of a fair trial, those convictions violate the fundamental fairness required by due process, and the conviction must be reversed as violative of the Ohio and federal Constitutions.

"Proposition of Law No. 29: A death sentence following a verdict of a jury from which one or more venirepersons were improperly excused because of their views with respect to capital punishment violates the right of the accused to a fair and impartial jury under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and their counterparts under the Ohio Constitution.

"Proposition of Law No. 30: Where one on trial for a capital crime is denied the effective assistance of counsel, in violation of his right thereto under the Sixth, Eighth

and Fourteenth Amendments to the Constitution of the United States, and under the Ohio Constitution, Art. I. § 10, his conviction and sentence must be reversed.

"Proposition of Law No. 31: Where appellate counsel fail to raise on appeal the issue of ineffectiveness of trial counsel in failing to object to prejudicial prosecutorial misconduct in argument, the accused has been denied the effective assistance ***374** of appellate counsel secured to him by the Sixth and Fourteenth Amendments to the Constitution of the United States, and by Art. I. § 10 of the Ohio Constitution.

"Proposition of Law No. 32: Where, during a criminal trial, there are multiple instances of error, and the cumulative effect of such errors deprives the accused of a fair trial and undermines the reliability of the conviction and the sentence of death imposed upon a jury verdict, the rights of the accused to due process and to be free from cruel and unusual punishment, under the Fourteenth and Eighth Amendments, respectively, of the United States Constitution, and their corollaries ****334** in the Ohio Constitution, have been violated, requiring reversal.

"Proposition of Law No. 33: To comport with due process under the United States and Ohio Constitutions, and the Ohio capital statutes, for purposes of proportionality review, death sentences must be compared with all other cases within the jurisdiction in which the death sentence was imposed, as well as those capital cases in which it was not imposed."

All Citations

75 Ohio St.3d 344, 662 N.E.2d 311, 1996 -Ohio- 219

Footnotes

1 The first death specification alleged that appellant had purposefully killed Amber during the course of a kidnapping (R.C. 2929.04[A][7]), the second alleged that the killing occurred during the course of an aggravated burglary (R.C. 2929.04[A][7]), and the third alleged that appellant had killed Amber for the purpose of escaping detection, apprehension, trial, or punishment for having committed the aggravated burglary and/or kidnapping (R.C. 2929.04[A][3]).

2 We recognize that appellant moved for a mistrial at the conclusion of the state's initial closing argument based upon the prosecutor's alleged improper comments. The motion was denied. In this regard, appellant claims that he did "object" to the prosecutor's comments. However, "[i]mproper remarks of counsel during argument, unless so flagrantly improper as to prevent a fair trial, should be at once objected to and exception taken; otherwise error cannot be predicated upon the remarks alleged to have been improper." *State v. DeNicola* (1955), 163 Ohio St. 140, 56 O.O. 185, 126 N.E.2d 62, paragraph three of the syllabus. See, also, *State v. Johnson* (1989), 46 Ohio St.3d 96, 102, 545 N.E.2d 636, 642.

3 We recognize, of course, that we have the advantage of "Monday morning quarterbacking," whereas the prosecutor was required to make his decisions and comments during the "heat of the battle." We further recognize that our job, in this regard, is much easier than was his.

4 With respect to the host of additional arguments appellant has raised in his thirteenth proposition of law, we find no prejudicial errors requiring reversal of the death sentence.

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Baldwin's Ohio Revised Code Annotated
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2929. Penalties and Sentencing (Refs & Annos)
Penalties for Murder

R.C. § 2929.03

2929.03 Imposing sentence for a capital offense; procedures; proof of relevant factors; alternative sentences

Effective: January 1, 2008
Currentness

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose sentence on the offender as follows:

(1) Except as provided in division (A)(2) of this section, the trial court shall impose one of the following sentences on the offender:

(a) Life imprisonment without parole;

(b) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;

(c) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(d) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(e) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (A)(1)(a) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be served pursuant to that section.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated

 © 2016 Thomson Reuters. No claim to original U.S. Government Works.

murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard. The instruction to the jury shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but the instruction shall not mention the penalty that may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 of the Revised Code, the trial court shall impose sentence on the offender as follows:

(a) Except as provided in division (C)(1)(b) of this section, the trial court shall impose one of the following sentences on the offender:

(i) Life imprisonment without parole;

(ii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;

(iii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iv) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(v) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (C)(1)(a)(i) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(2)(a) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be one of the following:

(i) Except as provided in division (C)(2)(a)(ii) or (iii) of this section, the penalty to be imposed on the offender shall be death, life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(ii) Except as provided in division (C)(2)(a)(iii) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of death or life imprisonment without parole on the offender pursuant to division (C)(2)(a)(i) of this section, the penalty to be imposed on the offender shall be an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section.

(iii) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the penalty to be imposed on the offender shall be death or life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(b) A penalty imposed pursuant to division (C)(2)(a)(i), (ii), or (iii) of this section shall be determined pursuant to divisions (D) and (E) of this section and shall be determined by one of the following:

(i) By the panel of three judges that tried the offender upon the offender's waiver of the right to trial by jury;

(ii) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or

to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. 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.

(2) 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 pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to one of the following:

(a) Except as provided in division (D)(2)(b) or (c) of this section, to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(b) Except as provided in division (D)(2)(c) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the jury does not recommend a sentence of life imprisonment without parole pursuant to division (D)(2)(a) of this section, to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section.

(c) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, to life imprisonment without parole.

If the trial jury recommends that the offender be sentenced to life 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, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code, the court shall impose the sentence recommended by the jury upon the offender. If the sentence is an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment imposed as described in division (D)(2)(b) of this section or a sentence of life imprisonment without parole imposed under division (D)(2) (c) of this section, the sentence shall be served pursuant to section 2971.03 of the Revised Code. If the trial jury recommends that

 © 2016 Thomson Reuters. No claim to original U.S. Government Works.

the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

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

(a) Except as provided in division (D)(3)(b) of this section, one of the following:

(i) Life imprisonment without parole;

(ii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(iv) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (D)(3)(a)(i) of this section, the court or panel shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Except as provided in division (E)(2) of this section, one of the following:

(a) Life imprisonment without parole;

(b) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(c) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(d) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (E)(2)(a) of this section, the court or panel shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. For cases in which a sentence of death is imposed for an offense committed before January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. For cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G)(1) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed before January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

(2) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed on or after January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the supreme court.

CREDIT(S)

(2007 S 10, eff. 1-1-08; 2004 H 184, eff. 3-23-05; 1996 H 180, eff. 1-1-97; 1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96; 1995 S 4, eff. 9-21-95; 1981 S 1, eff. 10-19-81; 1972 H 511)

LEGISLATIVE SERVICE COMMISSION

1973:

This section specifies the procedure to be followed in determining whether the sentence for aggravated murder is to be life imprisonment or death.

The death penalty is precluded unless the indictment contains a specification of one or more of the aggravating circumstances listed in section 2929.04. In the absence of such specifications, life imprisonment must be imposed. If the indictment specifies an aggravating circumstance, it must be proved beyond a reasonable doubt, and the jury must return separate verdicts on the charge and specification. If the verdict is guilty of the charge but not guilty of the specification, the penalty is life imprisonment.

If the verdict is guilty of both the charge and the specification, the jury is discharged and the trial begins a second phase designed to determine the presence or absence of one or more mitigating circumstances. If one of the three mitigating factors listed in section 2929.04 is established by a preponderance of the evidence, the penalty is life imprisonment. If none of such factors is established, the penalty is death. The procedure is essentially the same in the first phase of an aggravated murder trial whether the case is tried by a jury or by a three-judge panel on a waiver of a jury. The burden of proof still rests on the state, the same rules of evidence apply, the specification must be proved beyond a reasonable doubt, and the panel's verdict must be unanimous.

With respect to the mitigation phase of the trial, the procedure is somewhat different depending on whether the case is tried by a jury or a three-judge panel. A jury tries only the charge and specification, and the judge in a jury trial determines mitigation. If a jury is waived, the same three-judge panel tries not only the charge and specification, but also determines the presence or absence of mitigation. Also, the statute expressly provides that the panel's finding that no mitigating circumstance is established must be unanimous, or the death penalty is precluded. In other respects, the procedure for determining mitigation is similar whether the trial judge or a three-judge panel tries the issue. Mitigation must be established by a preponderance of the evidence, and the rules of evidence also apply in this phase of the trial (the requirement for a pre-sentence investigation and report, the requirement for a psychiatric examination and report, and the provision for an unsworn statement by the defendant, represent partial exceptions to the rules of evidence).

Notes of Decisions (757)

R.C. § 2929.03, OH ST § 2929.03
Current through File 84 of the 131st General Assembly (2015-2016).

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Baldwin's Ohio Revised Code Annotated
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2929. Penalties and Sentencing (Refs & Annos)
Penalties for Murder

R.C. § 2929.04

2929.04 Criteria for imposing death or imprisonment for a capital offense

Currentness

(A) Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or a person in line of succession to the presidency, the governor or lieutenant governor of this state, the president-elect or vice president-elect of the United States, the governor-elect or lieutenant governor-elect of this state, or a candidate for any of the offices described in this division. For purposes of this division, a person is a candidate if the person has been nominated for election according to law, if the person has filed a petition or petitions according to law to have the person's name placed on the ballot in a primary or general election, or if the person campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, "detention" has the same meaning as in section 2921.01 of the Revised Code, except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or mental retardation and developmentally disabled facility unless at the time of the commission of the offense either of the following circumstances apply:

(a) The offender was in the facility as a result of being charged with a violation of a section of the Revised Code.

(b) The offender was under detention as a result of being convicted of or pleading guilty to a violation of a section of the Revised Code.

 © 2016 Thomson Reuters. No claim to original U.S. Government Works.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or 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 the offender.

(6) The victim of the offense was a law enforcement officer, as defined in section 2911.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be a law enforcement officer as so defined, and either the victim, at the time of the commission of the offense, was engaged in the victim's duties, or it was the offender's specific purpose to kill a law enforcement officer as so defined.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim's testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding.

(9) The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.

(10) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism.

(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 or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

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

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;

(4) The youth of the offender;

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

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

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

(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, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

CREDIT(S)

(2002 S 184, eff. 5-15-02; 1998 S 193, eff. 12-29-98; 1997 H 151, eff. 9-16-97; 1997 S 32, eff. 8-6-97; 1981 S 1, eff. 10-19-81; 1972 H 511)

LEGISLATIVE SERVICE COMMISSION

1973:

This section provides that the death penalty for aggravated murder is precluded unless one of seven listed aggravating circumstances is specified in the indictment and proved beyond a reasonable doubt. The seven aggravating circumstances deal with: (1) assassination of the President, Vice President, Governor, Lieutenant Governor, or a person who has been elected to or is a candidate for any such office; (2) murder for hire; (3) murder to escape accountability for another crime; (4) murder by a prisoner; (5) repeat murder or mass murder; (6) killing a law enforcement officer; and (7) felony murder.

The section also provides that even if one or more aggravating circumstances is proved beyond a reasonable doubt, the death penalty for aggravated murder is still precluded if the trial court finds that any of three mitigating circumstances is established by a preponderance of the evidence. The mitigating circumstances are: (1) the victim of the offense induced or facilitated it; (2) the offender acted under duress, coercion, or strong provocation; and (3) although the defense of insanity could not be or was not established, the offense was chiefly the product of the offender's mental deficiency or psychosis (psychosis is mental illness, as distinguished from a behavioral disorder. Primarily psychopaths have a behavioral disorder).

Notes of Decisions (1558)

R.C. § 2929.04, OH ST § 2929.04
Current through File 84 of the 131st General Assembly (2015-2016).

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

719 F.3d 511
United States Court of Appeals,
Sixth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Marvin Charles GABRION,
II, Defendant–Appellant.

Nos. 02–1386, 02–1461, 02–1570.
|
Argued: June 6, 2012.
|
Decided and Filed: May 28, 2013.

Synopsis

Background: Defendant was convicted in the United States District Court for the Western District of Michigan, Robert Holmes Bell, J., 2006 WL 2473978, of first degree capital murder within special maritime and territorial jurisdiction of United States. Court imposed sentence of death. Defendant appealed. The Court of Appeals, 517 F.3d 839, affirmed. Parties then filed supplemental briefs and, after a second oral argument, Court was prepared to decide other issues on the merits. The Court of Appeals, 648 F.3d 307, affirmed. The Court granted government's petition to rehear the case en banc.

Holdings: The Court of Appeals, Kethledge, Circuit Judge, held that:

[1] murder's location in state that lacked death penalty could not count as mitigating factor in sentencing phase of capital trial as that term was used under Eighth Amendment;

[2] murder's location in state that lacked death penalty could not count as mitigating factor in sentencing phase of capital trial as that term was used under Federal Death Penalty Act;

[3] exclusion of defendant's argument from sentencing phase of his trial, claiming that there was residual-doubt about whether victim had been murdered within National Forest, was harmless beyond reasonable doubt;

[4] defendant's right to impartial jury drawn from venire that had not been tilted in favor of capital punishment by selective prosecutorial challenges for cause had not been violated by excluding generally anti-death penalty venirepersons;

[5] requirement for jury to weigh mitigating and aggravating factors when considering whether defendant should be sentenced to death did not have to be based on reasonable doubt standard;

[6] new determination of defendant's competency for purposes of his appeal was not warranted; and

[7] district court did not abuse its discretion by excluding defendant from penalty phase for partial day during testimony of 24 witnesses after he punched his attorney in the face in presence of jury.

Affirmed.

Clay, Circuit Judge, filed opinion concurring only in the judgment, in which Cole, Circuit Judge, joined.

Karen Nelson Moore, Circuit Judge, filed dissenting opinion, in which Martin, White, and Stranch, Circuit Judges, joined.

West Headnotes (22)

[1] Sentencing and Punishment
Other matters related to offense

Murder's location in state that lacked death penalty could not count as mitigating factor in sentencing phase of federal capital trial as that term was used under Eighth Amendment, since it did not have anything to do with reasoned moral response to defendant's background, character, and crime. U.S.C.A. Const.Amend. 8; 18 U.S.C.A. § 1111(b).

2 Cases that cite this headnote

[2] Sentencing and Punishment
Mitigating circumstances in general

In a death penalty case, the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence.

Cases that cite this headnote

[3] **Sentencing and Punishment**
Factors Related to Offender

A capital defendant's punishment must be tailored to his personal responsibility and moral guilt.

Cases that cite this headnote

[4] **Sentencing and Punishment**
Evidence in mitigation in general

To the extent relevant to the capital defendant's culpability, mitigation evidence includes evidence about the defendant's background and the circumstances of his crime.

3 Cases that cite this headnote

[5] **Sentencing and Punishment**
Offender's character in general

Sentencing and Punishment
Other matters related to offender

In addition to evidence concerning the capital defendant's culpability, evidence of the defendant's character can be mitigating, including evidence that the defendant would be a well-behaved prisoner if not executed, evidence of the defendant's military service, and evidence of the defendant's religious conversion while in prison.

1 Cases that cite this headnote

[6] **Sentencing and Punishment**
Evidence in mitigation in general

Mitigation evidence is evidence relevant to a reasoned moral response to the capital defendant's background, character, and crime.

4 Cases that cite this headnote

[7] **Sentencing and Punishment**
Other matters related to offense

Murder's location in state that lacked death penalty could not count as mitigating factor in sentencing phase of capital trial as that term was used under Federal Death Penalty Act, since it did not fall within any of statutory mitigation factors or have anything to do with reasoned moral response to defendant's background, character, and crime. 18 U.S.C.A. §§ 1111(b), 3592(a).

3 Cases that cite this headnote

[8] **Sentencing and Punishment**
Sentence or disposition of co-participant or codefendant

Under the Federal Death Penalty Act, the mitigation factor that asks whether "[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death" does not measure the defendant's culpability itself, but instead considers, as a moral data point, whether that same level of culpability, for another participant in the same criminal event, was thought to warrant a sentence of death; hence the factor addresses whether the defendant's culpability warrants death. 18 U.S.C.A. § 3592(a)(4).

3 Cases that cite this headnote

[9] **Sentencing and Punishment**
Harmless and reversible error

Exclusion of capital defendant's argument from sentencing phase of his trial, claiming that there was residual doubt about whether victim had been murdered within National Forest, was harmless beyond reasonable doubt, since supposed doubt concerned only technical jurisdictional issue, record contained evidence concerning murder's location, and government's case for aggravation was overwhelming. 18 U.S.C.A. §§ 1111(b), 3595(c)(2)(C).

Cases that cite this headnote

[10] **Jury**
Punishment prescribed for offense

Defendant's right to impartial jury drawn from venire that had not been tilted in favor of capital punishment by selective prosecutorial challenges for cause had not been violated by excluding generally anti-death penalty venireperson, where court explored apparent contradiction between answers regarding his ability to follow court's instructions, but he resisted rehabilitation. U.S.C.A. Const.Amends. 6, 14.

Cases that cite this headnote

[11] **Constitutional Law**
Fair and impartial jury

Jury
Competence for Trial of Cause

The Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury. U.S.C.A. Const.Amends. 6, 14.

Cases that cite this headnote

[12] **Jury**
Punishment prescribed for offense

A court may exclude a juror for cause based upon his views on capital punishment if the juror's views, either in favor of the death penalty or against, would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

1 Cases that cite this headnote

[13] **Criminal Law**
Summoning, impaneling, or selection of jury

A district court's application of the standard for excluding a juror for cause based upon his views on capital punishment is reviewed with considerable deference; deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors.

1 Cases that cite this headnote

[14] **Criminal Law**
Jury selection

When reviewing a district court's decision whether to exclude a particular juror for cause based upon his views on capital punishment, the question is not whether the reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record.

Cases that cite this headnote

[15] **Jury**
Punishment prescribed for offense

Defendant's right to impartial jury drawn from venire that had not been tilted in favor of capital punishment by selective prosecutorial challenges for cause had not been violated by excluding generally anti-death penalty venireperson, where venireperson "equivocated" as to whether he could consider the death penalty. U.S.C.A. Const.Amends. 6, 14.

1 Cases that cite this headnote

[16] **Jury**
Punishment prescribed for offense

Defendant's right to impartial jury drawn from venire that had not been tilted in favor of capital punishment by selective prosecutorial challenges for cause had not been violated by excluding generally anti-death penalty venireperson, where venireperson thought that life in prison was more egregious than death, he likely could not follow court's instructions regarding capital punishment, and defendant may have been prejudiced by him. U.S.C.A. Const.Amends. 6, 14.

 © 2016 Thomson Reuters. No claim to original U.S. Government Works.

Cases that cite this headnote

[17] **Jury**

Punishment prescribed for offense

Defendant's right to impartial jury drawn from venire that had not been tilted in favor of capital punishment by selective prosecutorial challenges for cause had not been violated by excluding generally anti-death penalty venireperson, where venireperson had been contacted by government, acquaintance had filled his ear with things about defendant's youth, and he "winc[ed] and bob [bed] and weave[d] a little bit" when he said that could consider death penalty after being very artfully led though series of questions. U.S.C.A. Const.Amends. 6, 14.

Cases that cite this headnote

[18] **Sentencing and Punishment**

Manner and effect of weighing or considering factors

Sentencing and Punishment

Degree of proof

Requirement for jury to weigh mitigating and aggravating factors when considering whether defendant should be sentenced to death did not have to be based on reasonable doubt standard, since defendant already was "death eligible" once jury found beyond reasonable doubt that he had intentionally killed victim and that two statutory aggravating factors were present; at that point jury did not need to find any additional facts in order to recommend that defendant be sentenced to death, but only had to make moral judgment. 18 U.S.C.A. §§ 3591(a)(2)(A), 3592, 3593(e).

7 Cases that cite this headnote

[19] **Jury**

Sentencing Matters

Sentencing and Punishment

Factors enhancing sentence

Apprendi, which requires that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt, does not apply to every "determination" that increases a defendant's maximum sentence; instead it applies only to findings of "fact" that have that effect.

5 Cases that cite this headnote

[20] **Criminal Law**

Successive proceedings in general

New determination of capital defendant's competency for purposes of his appeal was not warranted, since district court was correct to find that defendant was competent to stand trial and, in substance, it simply was rehash of his argument in district court that he was incompetent.

1 Cases that cite this headnote

[21] **Sentencing and Punishment**

Voluntary absence and waiver

District court did not abuse its discretion by excluding defendant from penalty phase of capital murder trial for partial day during testimony of 24 witnesses after he punched his attorney in the face in presence of jury, where defendant had been verbally disruptive throughout almost entire trial and had been warned by court and he continued to be very unruly in cell block after being removed.

1 Cases that cite this headnote

[22] **Criminal Law**

Presence of Accused

Ordinarily, a district court is required to warn a disruptive defendant before removing him from the courtroom. U.S.C.A. Const.Amend. 6; Fed.Rules Cr.Proc.Rule 43, 18 U.S.C.A.

Cases that cite this headnote

Attorneys and Law Firms

***514 ARGUED:** Barry J. Fisher, Office of the Federal Public Defender, Albany, New York, for Appellant. Timothy P. VerHey, United States Attorney's Office, Grand Rapids, Michigan, for Appellee. **ON BRIEF:** Kevin McNally, Margaret O'Donnell, McNally & O'Donnell, Frankfort, Kentucky, Judy Clarke, Clarke & Rice, San Diego, California, for Appellant. Joseph C. Wyderko, United States Department of Justice, Washington, D.C., Donald A. Davis, Jennifer L. McManus, Timothy P. VerHey, United States Attorney's Office, Grand Rapids, Michigan, for Appellee.

Before: BATCHELDER, Chief Judge; MARTIN, BOGGS, MOORE, COLE, CLAY, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, GRIFFIN, KETHLEDGE, WHITE, STRANCH, and DONALD, Circuit Judges.

KETHLEDGE, J., delivered the opinion of the court, in which BATCHELDER, C.J., and BOGGS, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, ***515** GRIFFIN, and DONALD, JJ., joined. CLAY, J. (pp. 535–37), delivered a separate opinion concurring in the judgment only, in which COLE, J., joined. MOORE, J. (pp. 537–55), delivered a separate dissenting opinion, in which MARTIN, WHITE, and STRANCH, JJ., joined.

OPINION

KETHLEDGE, Circuit Judge.

Marvin Gabrion was scheduled to be tried in Michigan state court for a rape charge on June 5, 1997. But that trial never happened. Two days before the trial was set to begin, Gabrion abducted Rachel Timmerman—the 19–year–old woman he allegedly raped—and took her to a remote location in the Manistee National Forest, bound and gagged her and weighed her down with concrete blocks, put her in an old metal boat, and then threw her overboard, alive, into a shallow, weedy lake, where she drowned. Gabrion also abducted and killed Timmerman's infant daughter.

Timmerman's murder was a federal offense because it occurred in a National Forest. *See* 18 U.S.C. § 1111(b). A federal jury later convicted Gabrion of murder and recommended that he be sentenced to death. The district court sentenced him accordingly. Gabrion now challenges his conviction and sentence on numerous grounds. We reject all of his arguments, and affirm.

I.

A.

On the morning of August 7, 1996, Rachel Timmerman arrived at her mother's trailer home in Newaygo County, Michigan, hysterical and bleeding from a laceration on her nose. She said that a man named Marvin Gabrion had raped her the night before. Timmerman was then 19 years old and had given birth to a baby girl, Shannon Verhage, just six weeks earlier. Rachel told her mother that she was afraid to press charges because Gabrion had said that, if she did, he would kill both her and her baby. But that afternoon Rachel reported the rape to the Newaygo County Sheriff. Two months later, the county prosecutor charged Gabrion with the rape. For the next three months, however, the police were unable to find him.

On January 20, 1997, the Sheriff's deputies found and arrested Gabrion. They gave him an arrest warrant that named three witnesses for the rape charge: Timmerman herself; Wayne Davis, an associate of Gabrion's who had been with him the night of the rape; and Gabrion's teenaged nephew, Mikey Gabrion. Marvin Gabrion was jailed after his arrest, but was released after a friend (to whom Gabrion said he was jailed for DUI) posted bond for him on February 3, 1997.

Timmerman herself was in jail for a minor drug charge when Gabrion was released, but another witness, Davis, was free for the time being. Within days of Gabrion's release, Gabrion made his way to Davis's residence in White Cloud, Michigan. Davis himself was set to report to jail on February 13 for a 90–day term resulting from a DUI charge. His friend Darlene Lazo had agreed to drive Davis to jail that morning. The afternoon before Davis was scheduled to report, Lazo encountered Gabrion at Davis's home, working on a car. When Lazo arrived the next morning to give Davis a ride to jail, he was missing. Left behind, on a kitchen chair, was an army jacket that Davis always wore. His personal effects in the house likewise seemed untouched, except that his stereo equipment was missing. Davis was never seen alive

again. A few weeks after *516 Davis's disappearance, Gabrion tried to sell Davis's stereo equipment at a local consignment shop, with the serial numbers ground off.

On May 5 Timmerman was released from jail. Twice that month she encountered Gabrion and called the Sheriff's office in a panic afterwards, saying that she thought he would kill her. Meanwhile, a young friend of Gabrion's, John Weeks, repeatedly called Timmerman to ask her on a date. Rachel did not know that Weeks was calling at Gabrion's direction. Finally, on June 3—two days before Gabrion's rape trial was set to begin—Rachel told her father that a boy had invited her to dinner that night, and that she would be home in a couple of hours. She said she was bringing her baby along because the boy had specifically asked her to. Rachel's father never saw either of them alive again.

The day after Timmerman's disappearance, several other people saw her with Gabrion and another man in the vicinity of Oxford Lake, which lies partly in the Manistee National Forest. In early June—almost certainly on June 4—Bonnie Robinson was driving away from her farm in the vicinity of Oxford Lake. As she approached a one-lane bridge, she encountered an old pickup truck driving fast the other way, towards the lake. Inside the truck were two men with a large blond woman (a description matching Rachel) sitting between them. The driver "seemed to be very angry about something." A metal boat was sticking out of the truck's bed.

Kathy Kirk similarly testified that she and her mother had parked at Oxford Lake, near the mud ramp, when an old pickup truck with a boat sticking out the back pulled up alongside them. Gabrion was driving and a young blond woman (whose photo Kirk later saw on the news) was sitting between him and another man (who was almost certainly Weeks). Twice the blond woman looked up at Kirk, and then looked down again. Soon Kirk and her mother drove off.

Finally, again on June 4, Pearl and Bob Hall were driving along a narrow two-track road towards Oxford Lake. As they got near the lake, an old pickup truck with a boat sticking out came fast the other way. This time Gabrion was driving alone, looking "like he was really mad. He was just glaring." Hall had to pull off into the bushes to avoid a collision. As Gabrion drove past, "it sounded like there was stuff in the boat to make it rattle." When the Halls got down to the lake, they saw marks in the mud ramp where someone had recently dragged out a boat.

One evening later that same week, Gabrion and John Weeks approached several campers at a nearby campground. Gabrion introduced himself as Lance (an alias he frequently used) and asked whether he could store his boat at the other campers' site, explaining that his own site was too crowded to keep it there. They agreed. One of the campers, Dan Basset, said that Gabrion was "skittish, nervous, didn't talk much." Basset also said that Gabrion "always wore gloves [,]" even though it was warm out. Basset later came upon Gabrion's campsite while looking for firewood. Gabrion was standing by the fire, with gloves on. The campsite was nowhere near the area where Gabrion had said it was, and had plenty of room to store a boat.

Around 3:30 a.m. on June 6—two days after Gabrion was seen with Timmerman near Oxford Lake—one of Gabrion's neighbors in town, Trevor Zylstra, awoke to the sound of "a very loud bang[.]" Zylstra looked out the window and saw Gabrion dragging a metal boat on his gravel driveway. Once Gabrion got the boat to the side of the garage, Zylstra saw him *517 remove two life vests, three concrete blocks, and a length of chain. Then Gabrion pulled the boat into the garage and ground off the boat's registration numbers.

Almost a month later—on July 5, 1997—Douglas Sortor and his son-in-law Nathan prepared to launch a small fishing boat at the same ramp that Gabrion had visited. They saw an object floating about 100 yards offshore. They looked at the object through binoculars and thought it appeared to be a human torso. They decided to investigate. The weeds between the ramp and the object were too thick to row through, so Sortor rowed to the South and then circled back towards the object. As they came close, they saw feet protruding from the water. Sortor said they hoped it was "a dummy" of some kind. Then the odor hit them and they realized the object was a human body. It was Rachel's. The body was face-up with a concrete block attached to the front, near the waist. The body was fully clothed. Rachel's left leg and waist were tightly bound with a shiny metal chain and two padlocks. A second concrete block was also attached to the body through the chain. Rachel's wrists were handcuffed tightly behind her back. Her eyes and mouth were bound with duct tape; her nose had been left uncovered. The water

in that area was about 3 feet deep, with 82 feet of soft muck beneath. About one-third of the body was covered in muck. The body had surfaced as a result of bacterial gassing.

Gabrion's whereabouts at that time were unknown, but the police promptly began investigating him as a suspect. They executed a search warrant at his residence and found two keys that matched the padlocks on Rachel's body. They also found concrete blocks that were stained with the same tar and paint materials as the blocks attached to Rachel's body. Gabrion's nephew, Mikey, led Sheriff's deputies to a campsite that his uncle frequently used. The site was north of Oxford Lake, down a two-track in a dense, remote area. Gabrion's tent was still pitched there. Scattered about they found bolt cutters, another length of shiny chain, duct tape, a woman's hair clip, and silicone nipples for a baby bottle.

Meanwhile, the FBI in upstate New York were already investigating Gabrion in connection with the theft of social-security benefits belonging to a mentally disabled man from Grand Rapids, Michigan, named Robert Allen. Allen had disappeared in 1995 and was never seen again. Shortly after his disappearance a man who identified himself as Allen—but whom a post-office employee later identified as Gabrion—opened a post office box in Sherman, New York and directed that Allen's benefit check be sent there each month. Gabrion also signed over one of Allen's checks as payment for rent in early 1996. In October 1997, the Detroit FBI got word that Gabrion was headed to Sherman to collect Allen's check for that month. An FBI SWAT team staked out the Sherman post office on October 14. When Gabrion arrived, the agents arrested him. He was carrying a Virginia driver's license in the name of Ronald Lee Strevels at the time.

The body of Timmerman's 11–month old daughter, Shannon Verhage, has never been found. But it is virtually undisputed that Gabrion killed her. While awaiting trial for Rachel's murder, Gabrion gave another prisoner a map of Oxford Lake, on which he had written, "body of 3, 1 found." While incarcerated, Gabrion also told two inmates that he "killed the baby because there was nowhere else to put it."

B.

The government indicted Gabrion for violating 18 U.S.C. § 1111, which prohibits murder "[w]ithin the special maritime and ***518** territorial jurisdiction of the United States[.]" The government also notified Gabrion that it would seek the death penalty.

Gabrion went to trial on February 25, 2002. On March 5, the jury found him guilty of first-degree murder. The trial then entered the penalty phase. (That is the phase during which the government and defendant submit evidence as to circumstances of the offense or aspects of the defendant's background that "aggravate" for or "mitigate" against the death penalty.)

A total of 58 witnesses testified in support of the government's allegations during the penalty phase of the trial. Some of the testimony concerned the depraved manner of the murder itself—including the terror that Timmerman must have felt as Gabrion rowed her 100 yards out onto the water, the boat rocking as she lay inside it, blinded, bound, gagged, and weighed down with concrete blocks. Other testimony concerned the likelihood that Gabrion killed Timmerman's baby, Shannon Verhage. Still other testimony concerned Gabrion's character and future dangerousness. Some of that testimony pointed to Gabrion's likely role in the disappearance (and presumably murder) of three other people. One was Wayne Davis, the only witness to Timmerman's rape (other than Gabrion's nephew and Timmerman herself), who was last seen with Gabrion before Davis disappeared, and whose stereo equipment Gabrion tried to sell several weeks later. Another was John Weeks, who was likely the only witness to Timmerman's murder, and who himself disappeared about 18 days later —never to be seen again—after telling his girlfriend that he was going on a "dope run" to Texas with Gabrion. (Gabrion later told Weeks's girlfriend that he had dropped off Weeks with some friends in Arizona.) The third was Robert Allen, the mentally disabled man who crossed Gabrion's path in Grand Rapids and then vanished in 1995, just before Gabrion assumed his identity and began stealing his disability checks.

Numerous other witnesses testified to Gabrion's propensity for violence. Two witnesses described how each of their homes had been set afire shortly after a disagreement with Gabrion. Another witness described how Gabrion began shooting a bolt-action rifle towards his house after he told Gabrion to leave a party there.

(The investigating police officer found Gabrion passed out in a trailer with the rifle hanging above him on the wall and spent casings on the hood of his pickup truck outside.) Another witness described how Gabrion trained a rifle on her and her two-year old child as she walked to her car one day, and then climbed into his car and followed them for miles. Another woman testified as to how Gabrion sexually assaulted her in her home. Another witness testified that Gabrion beat and kicked him, punched his wife in the face, and then punched his teenaged son, after the witness interrupted a card game to retrieve heart medicine for the witness's uncle. Another witness testified that Gabrion said he could "snipe" everyone in the neighborhood from his second-story window. One night this same witness heard a gunshot, looked out the window and saw a red muzzle flash from Gabrion's window just before the crack of a second shot. This witness found a bullet embedded in his home afterwards.

Other testimony showed that Gabrion had been a busy inmate while awaiting trial. He carved a fake gun from soap, painted it black, and planned to use it in an escape attempt. In separate phone calls, he impersonated a state senator and court officials in an attempt to transfer to another jail. He obtained hypodermic needles, ***519** razor blades, and a claw made from a metal shower ring, among other contraband. Gabrion also placed dozens of calls to Shannon Verhage's paternal grandmother, accusing her of killing Rachel and Shannon. And Gabrion wrote numerous letters to Rachel's father, saying he knew where the baby was and asking for a photo of her. In desperation, apparently, Rachel's father eventually sent him one, which Gabrion then used for sexual gratification.

After the prosecution finished with its proofs, Gabrion offered mitigation evidence. Dr. Douglas Sharre asserted that Gabrion had been in "multiple motor vehicle accidents" that allegedly damaged Gabrion's brain. Dr. Newton Jackson testified that Gabrion had been subject to "negative influences" as a child, including violence and alcohol abuse by his parents. Dr. Jackson also testified that Gabrion displayed "some histrionic personality features where there is exaggeration and the desire to be the center of attention." (Gabrion testified three times at trial.) Dr. Jackson said "[t]here's also antisocial features where he has a history of arrests and heedless disregard for his own safety and that of others, a lack of empathy for others." Dr. Jackson said that Gabrion also displayed narcissistic features, and that his relationships with other people largely took "the form of using other people to satisfy his own desires." But Dr. Jackson said that "I don't view Mr. Gabrion as mentally ill" and that Gabrion was engaged in "some malingering[,]" *i.e.*, faking his symptoms.

The government presented evidence in rebuttal. It first called the driver in one of Gabrion's alleged car accidents, who testified that Gabrion had faked his injuries. A neurologist testified that he had reviewed Gabrion's medical records and found no evidence of any brain injury. A clinical neuropsychologist, Dr. Thomas Ryan, offered the same conclusion. Dr. Ryan also tested Gabrion and believed that Gabrion was faking his impairments. He explained the results of one test as follows:

> *A:* [O]n one particular malingering test, which is what we call a forced choice measure, meaning that the person is forced to choose between one of two items, Mr. Gabrion was shown a series of 50 common objects. As soon as that was through, I then showed him another plate of cards, one of which was the item he had just seen, one was one he had never seen. So basically he was forced to choose which one he had just seen. Now, blindly guessing would give you a score of approximately 25 out of 50.
>
> ...
>
> *A:* And there were three trials with the same exact figures on each trial. That is called the test of memory malingering. On trial one he got a score of 32, and the authors of that test suggest that anything below a score of 45 indicates malingering, particularly on trial two, because this person who developed the test developed it on individuals with very severe injuries, people who have had aneurysms burst, people who've had severe brain injuries, people who have been in coma for three months. So brain-injured individuals generally get a score of about 44 or 45.
>
> *Q:* Are you saying you gave this test three times?
>
> *A:* No—yes, I administered—there's three administrations.
>
> *Q:* What did he get for each test?
>
> *A:* On trial one he got a score of 32.

Q: What about trial two?

***520** *A:* On trial two he got a score of 26, so he did worse.

Q: How about trial three?

A: Now, again, these are the same stimulus items, so on trial two he got worse. He performed more poorly. And then on the retention trial he got a score of 21. So this indicates to me that he knew the right answer, but was intentionally giving me the wrong answer.

Q: Is that also true—I'm not going to go into the next test, but is that also true of the other tests that you gave him?

A: Yes.

Dr. Gregory Saathoff, a clinical psychologist, likewise testified that Gabrion was malingering. He also said that Gabrion displayed anger towards women.

The jury returned its penalty verdict on March 16, 2002. They found unanimously that the government had proved two statutory aggravating factors beyond a reasonable doubt: first, that Gabrion committed the murder in an especially heinous, cruel, and depraved manner; and second, that he committed the murder after substantial planning and premeditation. In addition, the jury unanimously found four nonstatutory aggravating factors beyond a reasonable doubt: that Gabrion presented a future danger, that Timmerman's death caused a loss to her family and society, that Gabrion caused the death or disappearance of Shannon Verhage, and that Gabrion obstructed justice by murdering Rachel. One or more jurors also found the following mitigating factors by a preponderance of the evidence: that Gabrion had an impoverished and abusive childhood, that he had a lack of parental guidance, that his upbringing contributed to his criminal conduct, that he did not have a record of disciplinary infractions in school, that he engaged in substance abuse, that he had personality disorders, and that the loss of Gabrion's life would be significant to his family. The jury also found that the aggravating factors sufficiently outweighed the mitigating ones to justify a sentence of death. The district court sentenced Gabrion accordingly. *See generally* 18 U.S.C. § 3593(a).

Gabrion appealed. Among other challenges, Gabrion argued (and here we mean that literally—for Gabrion came up with the argument himself) that the federal government lacked jurisdiction over Timmerman's murder. A divided panel of this court rejected this argument in a separate opinion. *See* 517 F.3d 839. Thereafter, the panel addressed Gabrion's remaining claims and unanimously rejected 20 of them. Over a dissent, however, two members of the panel vacated Gabrion's death sentence on two grounds. *See* 648 F.3d 307. We granted the government's petition to vacate the latter decision and rehear the case en banc.

II.

We begin with the three issues that were the focus of briefing and argument during our rehearing en banc.

A.

[1] Gabrion argues that the murder's location in Michigan—a State that lacks the death penalty—should have counted as a mitigating factor as that term is used under both the Eighth Amendment and the Federal Death Penalty Act. The district court disagreed, and excluded from the penalty phase of Gabrion's trial any evidence or argument to the effect that the murder's location in Michigan was somehow mitigating.

1.

[2] We consider the Eighth Amendment question first. Gabrion's briefs are ***521** not clear as to why the murder's location in a non-death penalty state is mitigating, other than to say that it would be "arbitrary" to execute him based upon the "geographic happenstance" that he murdered Rachel Timmerman in a National Forest. Gabrion Br. at 119–20. But it is clear that the murder's location in Michigan is unlike any fact that the Supreme Court has ever recognized as mitigating. It is true, of course, that "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." *Buchanan v. Angelone,* 522 U.S. 269, 276, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998). But the question is what counts as "constitutionally relevant mitigating evidence." *Id.*

[3] A capital defendant's "punishment must be tailored to his personal responsibility and moral guilt." *Enmund v. Florida,* 458 U.S. 782, 801, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). Accordingly, the two seminal cases that require the admission of mitigation evidence—*Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and *Eddings v. Oklahoma,* 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)—are based upon "the principle that punishment should be directly related to the personal culpability of the criminal defendant." *Penry v. Lynaugh,* 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *overruled on other grounds by Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

[4] It comes as no surprise, therefore, that most of the evidence the Supreme Court has deemed mitigating was evidence relevant to the defendant's personal culpability for his crime. That evidence includes, for example, evidence that the defendant was intoxicated at the time of his crime, *Parker v. Dugger,* 498 U.S. 308, 314, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991); evidence that the defendant drove the getaway vehicle but did not participate in the murders themselves, *Enmund,* 458 U.S. at 786, 801, 102 S.Ct. 3368; evidence of the defendant's "youth" and abusive "family history[,]" *Eddings,* 455 U.S. at 115, 102 S.Ct. 869; evidence of the defendant's low IQ, *Smith v. Texas,* 543 U.S. 37, 44, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004); evidence that the defendant suffered from depression, *Brewer v. Quarterman,* 550 U.S. 286, 289, 127 S.Ct. 1706, 167 L.Ed.2d 622 (2007); evidence that the defendant suffered from borderline personality disorder, *Bobby v. Van Hook,* 558 U.S. 4, 10–11, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009); evidence that the defendant was "shuttled from foster home to foster home[,]" *Wiggins v. Smith,* 539 U.S. 510, 525, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); and evidence that the defendant was sexually abused as a child, *id.* at 528, 123 S.Ct. 2527. The admission of much of this evidence reflects "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.' " *Penry,* 492 U.S. at 319, 109 S.Ct. 2934 (quoting *California v. Brown,* 479 U.S. 538, 545, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring)). Thus, to the extent relevant to the defendant's culpability, mitigation evidence includes evidence about the defendant's background and the circumstances of his crime. *See Penry,* 492 U.S. at 327–28, 109 S.Ct. 2934.

[5] [6] In addition to evidence concerning the defendant's culpability, evidence of the defendant's character can be mitigating. That evidence includes evidence that the defendant would be a well-behaved prisoner if not executed, *Skipper v. South Carolina,* 476 U.S. 1, 4–5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); evidence of the defendant's ***522** military service, *Porter v. McCollum,* 558 U.S. 30, 39–40, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009); and evidence of the defendant's religious conversion while in prison, *Wong v. Belmontes,* 558 U.S. 15, 20–21, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009). Viewed as a whole, therefore, mitigation evidence encompasses both culpability and character, all to the extent relevant to the defendant's "personal responsibility and moral guilt." *Enmund,* 458 U.S. at 801, 102 S.Ct. 3368. In summary: mitigation evidence is evidence relevant to "a reasoned moral response to the defendant's background, character, and crime." *Penry,* 492 U.S. at 319, 109 S.Ct. 2934 (emphasis omitted); *see also United States v. Johnson,* 223 F.3d 665, 675 (7th Cir.2000) ("A mitigating factor is a factor arguing against sentencing *this* defendant to death; it is not an argument against the death penalty in general") (emphasis in original).

That Michigan lacks a death penalty has nothing to do with these things. It has nothing to do with Gabrion's background or character. It has nothing to do with the reasons why he chose to kill Rachel Timmerman. It has nothing to do with the utter depravity of the manner in which he killed her. And above all it has nothing to do with his culpability for that offense or with any other consideration the Supreme Court has ever flagged as mitigating. Gabrion does not even argue the contrary.

Gabrion does assert that "[t]he simple fact that 227 feet was the difference between a life sentence and a potential death sentence may have been viewed as mitigating by one or more jurors." Gabrion Br. at 120. But mitigation under the Eighth Amendment is not a matter of geographic coordinates. That Gabrion would not have been subject to the death penalty if only he had rowed his boat 228 feet to the north, beyond the boundary of the Manistee National Forest, before throwing Rachel Timmerman overboard, is not mitigating—for the same reasons that Michigan's lack of a death penalty is not mitigating. (See the preceding paragraph.) Nor does the boundary's proximity become

mitigating based on Gabrion's speculation about what a single juror might have thought about it. Mitigation evidence, as shown above, is not an empty concept to be filled by whatever a lawyer or court thinks might persuade a single juror in a particular case. It is true that the Supreme Court has said that mitigation evidence includes evidence that "the sentencer could reasonably find ... warrants a sentence less than death." *Tennard v. Dretke,* 542 U.S. 274, 285, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004) (quotation marks omitted). But the key word there is "reasonably"; and read in the context of the rest of the Supreme Court's mitigation-evidence caselaw, and *Penry* in particular, that passage simply refers to evidence relevant to "a reasoned moral response to the defendant's background, character, and crime." *Penry,* 492 U.S. at 319, 109 S.Ct. 2934. Otherwise, for example, the Eighth Amendment would compel admission of evidence regarding the positions of the planets and moons at the time of the defendant's offense—so long as he can show that at least one juror is a firm believer in astrology. To read the *Tennard* passage (and others like it) in the manner that Gabrion suggests would be to transform mitigation from a moral concept to a predictive one, and make a caricature of the law. We decline the suggestion.

The dissent is mistaken, therefore, when it suggests that mitigation, for purposes of the Eighth Amendment, is not a moral concept. Of course it is, as the plain terms of the Supreme Court's precedents make clear. *See, e.g., Penry,* 492 U.S. at 319, 109 S.Ct. 2934; ***523** *Enmund,* 458 U.S. at 801, 102 S.Ct. 3368. But that does not mean (as the dissent seems to fear) that judges must act as moral filters in determining whether evidence is mitigating for purposes of the Eighth Amendment. The Supreme Court has spared us that task, by itself identifying certain categories of evidence—broadly stated, culpability and character—that are morally significant and thus mitigating under the Eighth Amendment. Our task, therefore, is not ourselves to determine the moral significance of a particular fact, but rather to determine whether the fact falls within one of the morally significant bins that the Supreme Court has already identified. The geographic coordinates of Rachel Timmerman's murder fail that test.

The dissent's response is that the location of Timmerman's murder is a "circumstance of the offense." That is true enough—so was the moonphase that day—but the dissent is mistaken to read those words in complete isolation from the Supreme Court's statements as to *why* circumstances of the offense can be mitigating. On this point the Court has been reasonably clear: "it is *precisely because* the punishment should be directly related to the *personal culpability of the defendant* that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense." *Penry,* 492 U.S. at 327–28, 109 S.Ct. 2934 (emphasis added). And even in *Tennard*—upon which the dissent mistakenly relies here—the Court said that mitigation evidence does not include evidence of "the circumstances of the crime [that] is unlikely to have any tendency to mitigate *the defendant's culpability.*" 542 U.S. at 286, 124 S.Ct. 2562 (emphasis added).

The dissent's reliance on *Tennard* is misplaced for another reason. There, Tennard sought to admit evidence of his low IQ, which is a type of evidence that the Supreme Court has identified as mitigating. *See Smith v. Texas,* 543 U.S. 37, 44, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004). The definition of mitigating, therefore, was not the issue in *Tennard.* The issue, rather, was the definition of *relevance:* the Fifth Circuit had upheld the exclusion of Tennard's evidence on grounds that it did not have a strong tendency (as opposed to any tendency, which is the usual relevance standard) to mitigate Tennard's culpability for his crime. The Supreme Court reversed, stating that the Fifth Circuit's test "is inconsistent with the standard we have adopted for relevance in the capital sentencing context." 542 U.S. at 287, 124 S.Ct. 2562. So the Court reiterated that standard: "the 'meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding' than in any other context[.]" *Id.* at 284, 124 S.Ct. 2562 (quoting *McKoy v. North Carolina,* 494 U.S. 433, 440–41, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990)). That means the Eighth Amendment requires admission of evidence with "any tendency," not some stronger tendency, "to mitigate the defendant's culpability." 494 U.S. at 286, 110 S.Ct. 1056. And here—unlike Tennard's low IQ—Gabrion's decision to throw Rachel Timmerman overboard where he did, rather than 228 feet to the north, had no tendency to mitigate his culpability for that crime.

That Michigan lacks a death penalty is irrelevant to a reasoned moral response to Gabrion's background, character, and crime. Evidence concerning that fact—or any corollary ones—is not mitigation evidence under the Eighth Amendment. *Accord United States v. Higgs,* 353 F.3d 281, 328 (4th Cir.2003) (federal defendant's

ineligibility for death penalty under Maryland law was not mitigating).

*524 2.

[7] [8] The same conclusion holds under the Federal Death Penalty Act. The Act lists seven types of mitigating factors, plus a catch-all, that the jury "shall consider" in determining whether to recommend a death sentence. *See* 18 U.S.C. § 3592(a). Five of the factors measure the defendant's culpability, to wit: "[i]mpaired capacity[,]" § 3592(a)(1); "unusual and substantial duress," § 3592(a)(2); "the defendant's participation was relatively minor," § 3592(a)(3); "[t]he defendant committed the offense under severe mental or emotional disturbance[,]" § 3592(a)(6); and "[t]he victim consented to the criminal conduct that resulted in the victim's death [,]" § 3592(a)(7). Another factor asks whether "[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death." *Id.* § 3592(a)(4). This factor does not measure the defendant's culpability itself, but instead considers —as a moral data point—whether that same level of culpability, for another participant in the same criminal event, was thought to warrant a sentence of death. Hence this factor likewise addresses whether the defendant's culpability warrants death. Another factor concerns the defendant's background: "The defendant did not have a significant prior history of other criminal conduct." *Id.* § 3592(a)(5). The remaining factor is the catch-all: rather than describe a specific type of mitigation evidence, as the other factors do, this factor simply tracks the Supreme Court's definition of mitigation evidence. *See id.* § 3592(a)(8) (requiring consideration of "[o]ther factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence").

That Michigan lacks a death penalty does not fall within any of these statutory mitigation factors. *See Johnson,* 223 F.3d at 675 (§ 3592(a) includes "only factors specific to the defendant"). Gabrion again does not even dispute the point. But he does contend that the statute's enumeration of mitigating factors is not exclusive. *See* § 3592(a) (stating that the term "mitigating factors ... includ[es]" the enumerated factors). That is true enough; the statute does not purport to catalogue every conceivable circumstance that might diminish a defendant's culpability or otherwise mitigate against a sentence of death. But neither do we have any reason to think that the term "mitigating factors," as used in the statute, encompasses facts having nothing to do with "a reasoned moral response to the defendant's background, character, and crime." *Penry,* 492 U.S. at 319, 109 S.Ct. 2934 (emphasis omitted). Every indication in the statute is to the contrary: all of the examples of mitigating evidence listed in § 3592(a) concern the defendant's background, culpability, or crime. The same is true for all 16 examples of aggravating factors set forth in § 3592(c). That Michigan lacks a death penalty is different in kind from any factor recognized as relevant to sentencing under § 3592(a) or (c).

Whatever the precise contours of the term "mitigating factor" as used in § 3592(a), the murder's location in Michigan falls beyond them. That one defendant commits a murder on federal land in Michigan is not a mitigating factor—any more than another defendant's commission of a murder on federal land in Ohio (a death-penalty state) is an aggravating one. Gabrion's statutory argument, like his constitutional one, is meritless.

3.

[9] Gabrion also makes what is known as a "residual doubt" argument. An element of Gabrion's offense in this case was *525 that he murdered Rachel Timmerman within a National Forest. *See* 18 U.S.C. § 1111(b). Whether Gabrion killed Timmerman inside the Forest (as opposed to killing her outside the Forest and then moving her body inside) was an issue extensively litigated during the guilt phase of Gabrion's trial. The jury eventually found beyond a reasonable doubt that Gabrion killed Timmerman inside the Forest. Gabrion now says that, under the Eighth Amendment and the Federal Death Penalty Act, he was entitled to argue to the jury during the penalty phase of his trial that they should consider—as a putative mitigating factor—any "residual doubt" about a fact they had already found beyond a reasonable doubt, *i.e.,* that he killed Timmerman inside the Forest.

A plurality of the Supreme Court has said that it is "quite doubtful" that there exists any constitutional right to argue "residual doubt" as a mitigating factor. *Oregon v. Guzek,* 546 U.S. 517, 525, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006) (internal quotation marks omitted). Two other justices have rejected the right's existence altogether. *See id.* at 528–30, 126 S.Ct. 1226

(Scalia, J., concurring). We are likewise doubtful that a (by-definition) unreasonable doubt regarding an issue litigated during the guilt phase of the trial can be part of "a reasoned *moral* response to the defendant's background, character, and crime." *Penry,* 492 U.S. at 319, 109 S.Ct. 2934 (emphasis in original).

But we need not decide that issue here. Under the Federal Death Penalty Act, "[t]he court of appeals shall not reverse or vacate a sentence of death on account of any error which can be harmless ... where the Government establishes beyond a reasonable doubt that the error was harmless." 18 U.S.C. § 3595(c)(2)(C). We can make such a determination here, because—unlike in *Davis v. Coyle,* 475 F.3d 761, 774–75 (6th Cir.2007)—the record contains evidence concerning the factor (*i.e.,* the murder's location) that Gabrion says was improperly excluded from the sentencing phase of his trial.

On this record, the exclusion of Gabrion's residual-doubt argument was so palpably harmless as to render an opinion on the merits of the exclusion nearly advisory. The government's case for aggravation was overwhelming: Gabrion killed Timmerman in an undisputedly horrific manner, killed her infant daughter, likely killed three other people who either witnessed his crimes or whose death was otherwise useful to him, and terrorized countless people who crossed his path. And unlike most residual-doubt cases—where the doubt concerns whether the defendant *actually committed the murder*—here the supposed doubt concerns only a technical jurisdictional issue that, though significant legally, is much less so morally. The exclusion of Gabrion's residual-doubt argument was harmless beyond a reasonable doubt.

B.

[10] Gabrion next claims that the district court was biased in favor of pro-death penalty jurors during the process of selecting his jury (*i.e.,* voir dire). During that process, the court interviewed 101 potential jurors (*i.e.,* venirepersons). Those interviews generally followed the same template: the court first spoke to the potential juror, explaining that Gabrion was presumed innocent, that the government bore the burden of proving Gabrion's guilt, and that, if the jury found that the government had not carried its burden, the case was over. Then the court would explain to the potential juror that, if the jury found Gabrion guilty beyond a reasonable doubt, the case would proceed to the sentencing phase, which for practical purposes would ***526** be like a new trial. That Gabrion would have been found guilty of premeditated murder was not a sufficient basis for the jury to recommend a death sentence. Instead, the court would explain, the government bore the burden of proving beyond a reasonable doubt any aggravating factors that the government thought favored a death sentence. The court would further explain that Gabrion was entitled to prove, merely by a preponderance of the evidence, any mitigating factors he thought applicable. The jurors would then weigh the aggravating factors against the mitigating ones, and could recommend death only if they found unanimously that the aggravators outweighed the mitigators. At that point in the voir dire, the court would typically ask the venireperson whether she could follow those instructions. Then the prosecution and defense lawyers would each have a turn questioning the potential juror. The court frequently asked its own follow-up questions after the lawyers were done. Once all the questioning was done, the court might excuse the juror on its own initiative, or either side could move to excuse the juror for cause. If a lawyer so moved, the court would hear argument from each side and then sustain or overrule the objection to the juror, explaining the reason for its decision as it did so.

In total, the court excused 25 potential jurors on its own initiative, mostly for reasons of personal hardship. Neither party objected to any of those exclusions. Gabrion challenged a total of 16 jurors for cause, of whom the court excused 11. The government challenged a total of 14 jurors for cause, of whom the court again excused 11. Eventually the venire pool was narrowed to 56 potential jurors. Each side was then permitted to strike 20 potential jurors peremptorily. Gabrion used all 20 of his strikes, removing the five venirepersons he had unsuccessfully challenged for cause, plus 15 other jurors. The government struck 18 potential jurors, including the ones it had unsuccessfully challenged for cause. Neither party objected to any of the 12 jurors who actually sat on Gabrion's jury.

But Gabrion says the process was unfair nonetheless. Specifically, he claims that the district court improperly excluded four generally anti-death penalty venirepersons (Abrahams, Donahey, Hemmeke, and Groves) whom the government challenged for cause. Gabrion also claims that the court's jury-selection process was generally

"lopsided" in favor of jurors who supported the death penalty. We consider these claims in turn.

1.

[11] "It is well settled that the Sixth and Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury." *Ross v. Oklahoma,* 487 U.S. 81, 85, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). Gabrion cannot plausibly argue that this right was violated here, since he did not object to a single one of the jurors who sat in his case. But Gabrion does say that a related right was violated, namely, his right to an impartial jury "drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause." *Uttecht v. Brown,* 551 U.S. 1, 9, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007). Gabrion says his venire was tilted this way because of the district court's exclusion of the four venirepersons recited above.

[12] A capital defendant's right to an impartial jury is "balance[d]" against the government's "strong interest in having jurors who are able to apply capital punishment within the framework [the] law prescribes." *Id.* The Supreme Court strikes that balance with the following ***527** standard: The court may exclude a juror for cause based upon his views on capital punishment if "the juror's views[,]" either in favor of the death penalty or against, "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) (internal quotation marks omitted).

[13] **[14]** We review the district court's application of that standard with considerable deference. "Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." *Uttecht,* 551 U.S. at 9, 127 S.Ct. 2218. (In contrast, the transcript we review captures only the *dire* part of *voir dire.*) In many instances, the court's decision whether to exclude a juror also depends on its assessment of the juror's credibility, which lies "peculiarly within a trial judge's province." *Witt,* 469 U.S. at 428, 105 S.Ct. 844. We are also mindful of "the expertise developed by trial judges" with respect to the jury-selection process in general. *United States v. Purkey,* 428 F.3d 738, 750 (8th Cir.2005) (internal quotation marks omitted). Accordingly, in reviewing the district court's decision whether to exclude a particular juror, "the question is not whether [we] might disagree with the trial court's findings, but whether those findings are fairly supported by the record." *Witt,* 469 U.S. at 434, 105 S.Ct. 844; *see also Bowling v. Parker,* 344 F.3d 487, 519 (6th Cir.2003) (same).

We begin with the exclusion of venireman Abrahams. After the district court explained to him the weighing process involved in the sentencing phase of the trial, and asked whether he could follow "the instructions of this Court" in that process, Abrahams replied that "I'm more unsure of if [sic] I could outweigh the sentence of life imprisonment over death or vice versa." The prosecutor then asked Abrahams whether his "moral values" would "interefere with your determination of what an appropriate sentence would be[.]" Abrahams replied that "I believe that it's a possibility," adding that "it's just on my mind and it could be something that sidetracks my judgment." In response to questioning by Gabrion's counsel, however, Abrahams said, "[a]t this point, yes, I do believe that I could" consider whether a death sentence would be appropriate.

The court explored the apparent contradiction between these answers, saying, "I'm sorry, I heard two different things. I want to see if I can get this straight." The court then asked Abrahams a leading question in *favor* of finding him qualified:

> *Q:* And could you then impose either sentence if you felt the government had prevailed beyond a reasonable doubt with aggravating circumstances?

But Abrahams's answer cut in favor of exclusion:

> *A:* It's—I'm not sure. That's what I'm trying to express, that I don't know for sure that I could go through the whole trial and, for instance, them prove him guilty and then go through the second part of the trial for sentencing, that I could say life imprisonment or death. I honestly don't know. That's the point that I was trying to get across. Very unsure of what I could say yes or no to, either way.

The court then excused Abrahams for cause, reasoning:

> [N]ormally I would say if he says I'll consider both of them, that's normally ***528** all right. But if it's preceded with I don't know if I could do it and then I ask him, Could you, and he says, I don't know, I think it's grounds for excusal. It's a close question, but I think it's grounds for excusal because of his hesitancy and the honesty with which he's approached it.

Thus, the court itself sought to rehabilitate Abrahams after he gave conflicting answers regarding his ability to follow the court's instructions. But Abrahams resisted the rehabilitation. The court was within its discretion to exclude him.

Venireman Donahey likewise resisted efforts at his rehabilitation. Donahey stated on his jury questionnaire that "I think the death penalty is wrong [,]" but then told the court that he "would follow what the law would tell me to do on that." In response to an open-ended question by the prosecutor, however, Donahey said: "And to take life because they took someone else's life, you know, somewhere down inside me, it just doesn't seem right[.]" He added, in response to a leading question from the prosecutor, that his views about the death penalty "might" interfere with his "ability to make a judgment as to sentencing[.]" Gabrion's counsel then sought to rehabilitate Donahey with a long explanation of the sentencing process, after which came the following exchange:

> *Q:* Now, given this, would you be able to consider all of these factors in making a determination of sentence, aggravating factors, mitigating factors, bring your own values, and consider the imposition of one of these two sentences?
>
> *A:* I believe it would be very difficult. I would hope that I could, you know. But until I'm actually in that position, it's very difficult to say.
>
> *Q:* Well, we understand it's difficult. We understand it's —
>
> *A:* Well, you want a yes or no question to something—
>
> *Q:* No, no. Can you consider it is the question.
>
> *A:* Yes, I could consider it.
>
> *Q:* I have no further questions at the moment.

The district court excused Donahey for cause, explaining:

> *Q:* Well, he said he didn't know [whether he could consider the death penalty], he didn't know to one of the questions he asked, and I think he should be excused. Number one, he indicates he has a strong moral view against the death penalty; and number two, when asked, he equivocated on whether or not he could in fact consider it. He would try hard, but he was unable to say that he would be able to do it. So I think he needs to be—he should be excused for that reason in this matter.

[15] Donahey's exclusion presents a closer question than Abrahams's did. The first reason cited by the court—that "he indicates he has a strong moral view against the death penalty"—is not a ground for exclusion. *Witt,* 469 U.S. at 424, 105 S.Ct. 844. But the court did not rely on that reason alone, finding that Donahey "equivocated" as to whether he could consider the death penalty. That finding is plainly correct. The court's final reason—that Donahey "was unable to say that he would be able to" consider the death penalty—is at least nominally refuted by Donahey's answer that he "could consider it." But that answer came in response to a leading question, after Gabrion's counsel had pressed him on the point; and the answer came on the heels of another equivocation—that it "would be very difficult" to consider a death sentence. Donahey's statements, viewed as a ***529** whole, were ambiguous; and "when there is ambiguity in the prospective juror's statements, the trial court, aided as it undoubtedly is by its assessment of the venireman's demeanor, is entitled to resolve it in favor of the" government. *Uttecht,* 551 U.S. at 7, 127 S.Ct. 2218 (internal quotation marks and alterations omitted). The court was within its discretion to exclude Donahey.

[16] Venireman Hemmeke expressed stronger opposition to the death penalty than Donahey did, checking a box on the juror questionnaire that said, "I could never, regardless of the facts and circumstances, return a verdict which imposed the death penalty." But his answers as a whole were incoherent. The court began the questioning as follows:

Q: Okay. What did you mean by that [response on the questionnaire]?

A: I feel that if he is guilty, that it's more punishing to have him stay in jail in a—cooped up in a little cell than what it would be to be put to death.

Q: Oh. You think, then, that it's more cruel—

A: To keep them—

Q: —to sentence to life in prison than it is to take life?

A: Yes.

Q: That's why you would have difficulty imposing death?

A: Yes.

The court then asked Hemmeke whether he could follow the court's instructions "on aggravating and mitigating circumstances and weighing those circumstances [.]" Hemmeke responded:

A: I—hearing what they might say, I might change it. But I'm pretty set in the no death penalty.

Q: Wait a minute. No death penalty because that's lenient and life in prison is worse, right?

A: Yeah, yeah.

In response to questioning by the prosecutor, however, Hemmeke said: "If the facts are there, everything fits together, and it was a very gruesome, ugly murder, then I would maybe do it, maybe go with the death sentence." Hemmeke also said—in response to a leading question from defense counsel—that "yeah [,]" he could consider a death sentence.

The court struck Hemmeke for cause, saying "I'm terribly upset by this man's fuzzy thinking in which he thinks somehow that life in prison is more egregious than death[.]" The court added that "I'm not satisfied that this gentleman's thought process can hang together for purposes of making the decision it needs to"; that "[m]y reason for excusing him is really I don't think he can follow instructions"; and that "I ultimately think that the defendant may be prejudiced by him." We have no basis to second-guess any of these findings.

[17] That leaves the exclusion of venireman Groves, who was the "water resources director" for a local employer. The prosecution had actually contacted Groves about Gabrion's case well before voir dire, asking him about the meaning of the term "navigable waters" under Michigan law. Groves said during voir dire that he could set that contact aside if necessary, but that he also had "a co-worker whose wife apparently went to school with [Gabrion], and I've been told things about [Gabrion]." Groves described those things as "very unflattering[.]" When asked by the court whether he would "be able to set that aside in this case[,]" Groves answered, "I'd like to think I could." Groves also said that "I think I would reserve the death penalty for an individual like Osama ***530** bin Laden where we have someone that's a mass murderer type." When later asked by defense counsel whether he could follow the court's instructions in a sentencing phase, Groves answered: "I suppose I could, yes."

The court excluded Groves for three reasons: "The first is he was apparently contacted by the government ... and I think that just raises a specter here that I think is inappropriate." Even more troubling for the court, however, was a second reason:

> I think this is really potentially very damning of Mr. Gabrion, he apparently talks to somebody he works with whose wife apparently went to school with Mr. Gabrion and she fills his ear with things about Mr. Gabrion. And I say, can you disregard that? And he looks at me and he says, Yeah, I think I can. I'm not convinced he's very sincere.

Third, the court said that "when very artfully led though a serious of questions, he says, yeah, I could consider" the death penalty, but that Groves "winc[ed] and bob[bed] and weave[d] a little bit" when he said that. Each of these reasons was sufficient for Groves's exclusion.

2.

Gabrion is unclear about the constitutional basis for his claim that the district court's jury-selection process was generally "lopsided" in favor of pro-death penalty

jurors. He says in passing that this claim is based upon the Equal Protection and Due Process clauses, but does not develop that argument enough for us to consider it here. Nor is it clear from the caselaw that the Sixth Amendment supports a jury-selection claim that is not based on either the exclusion of a particular anti-death penalty juror or the inclusion (on the actual petit jury) of an "automatic death penalty" juror. *See Morgan v. Illinois,* 504 U.S. 719, 728, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). But we will assume without deciding that Gabrion can show a violation of the Sixth Amendment if he simply demonstrates that his jury selection process favored pro-death penalty jurors generally.

The factual basis for Gabrion's claim, such as it is, is twofold. First, he says that "the trial court attempted to rehabilitate potential defense cause excusals [*i.e.,* pro-death penalty jurors], but did not take the same approach to potential government cause excusals [*i.e.,* anti-death penalty ones]." Gabrion Suppl. Br. at 14. The record belies that assertion. Take the example of venireperson Branch, who stated on his questionnaire that he was "really against the death penalty." In response to another question—whether there was "anything about this case that would prevent" him from following his oath if selected as a juror—Branch responded, yes: "The death penalty." But the district court did not leave matters there and excuse Branch for cause. Instead, the court explained the trial process to Branch at length and then asked whether, as a part of that process, Branch could consider the death penalty. Branch said that he could. But Branch then backtracked in response to the prosecutor's questions, saying that he was "not certain" whether he could consider the death penalty. So the court rehabilitated him again:

> *Q:* ... I want to make sure that you're on the page here. The predicate here was if the facts warranted it, in other words, if the facts were such that would warrant that, could you? And I heard you say I might not. What did you mean by that?
>
> ...
>
> *A:* It's hard to say without me being a juror or in the circumstances where I have to decide. I might say it's a possibility of a yes or a no.
>
> ***531** *Q:* Right. And that's based—I want to make sure—that's *based upon the facts,* not on what your philosophy is?
>
> *A:* Religion or nothing, no, just the facts.
>
> *Q:* Okay. Thank you, sir. Thank you.

The government then moved to excuse Branch for cause. The court refused, explaining: "this witness says it depends on the facts, and I think that's sufficient. I'm troubled by the fact that he previously stated, No way. But he obviously has done some thinking about this, and I think he's appropriate."

Likewise, there were two other anti-death penalty veniremen—Wing and Fix—who at first equivocated regarding their ability to consider the death penalty, but then gave rehabilitative answers to follow-up questions from the court. Indeed, Gabrion's counsel cited Fix's "response to your [*i.e.,* the district court's] question" in opposing the government's motion to excuse Fix for cause. The court "agree[d]" with Gabrion's counsel on that point, and overruled the government's objections to both Fix and Wing. Moreover, as noted above, the court asked venireman Abrahams a leading question in favor of rehabilitation, but Abrahams declined to follow the court's lead. Thus, Gabrion's assertion that the court rehabilitated only pro-death penalty venirepersons is simply false.

Gabrion also says the district court was biased because it excluded four generally anti-death penalty venirepersons (Abrahams, Donahey, Hemmeke, and Groves, already discussed above) while retaining three generally pro-death penalty ones (Harrington, Wehler, and Erickson) whom Gabrion challenged for cause (and later struck peremptorily). It is true, of course, that the court excluded the one set of venirepersons while retaining the other. But the argument's premise is wrong. Jurors are not commodities. They are individuals, whose answers during voir dire differ in various ways, some subtle and some not. Here, the district court took account of those differences and excluded Abrahams, Donahey, Hemmeke, and Groves for the reasons already mentioned. And it retained pro-death penalty jurors Harrington, Wehler, and Erickson on grounds similar to the grounds on which it retained anti-death penalty jurors Branch, Fix, and Wing—namely, that on balance each of them credibly stated that he could follow the court's instructions in choosing a sentence in the case. *See, e.g.,* 2 Jury Trial Tr. at 335 (stating that Branch "is, in my opinion, a flip of the Wehler guy"); *Id.* at. 536 (stating that Harrington "is

not unlike this morning's Mr. [ ] Branch who said he could never impose the death penalty ... and come to find out, he said he could be fair").

The district court did a commendable job, not an unconstitutional one, of selecting a jury in this case. Gabrion's arguments to the contrary are meritless.

C.

[18] Gabrion next argues that the district court gave the jury erroneous instructions with regard to the findings necessary to its recommendation that the court sentence Gabrion to death. In order for Gabrion to be eligible for the death penalty, the jury had to find two things beyond a reasonable doubt: first, that Gabrion killed Rachel Timmerman "intentionally[,]" 18 U.S.C. § 3591(a)(2)(A); and second, that the government proved "at least one of the statutory aggravating factors set forth at § 3592." *Jones v. United States,* 527 U.S. 373, 376–77, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999). "Once [Gabrion] became death eligible, the jury had to decide whether he should receive a death sentence." ***532** *Id.* at 377, 119 S.Ct. 2090. Specifically, the jury was required to

> consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death.... Based upon this consideration, the jury by unanimous vote ... shall recommend whether the defendant should be sentenced to death[.]

18 U.S.C. § 3593(e). If the jury recommends death, the district court is required to impose that sentence. *See* 18 U.S.C. § 3591(a)(2).

Here, the jury found beyond a reasonable doubt that Gabrion killed Timmerman intentionally and that two statutory aggravating factors were present. The jury also determined, unanimously, that the government's aggravating factors sufficiently outweighed the mitigating ones to justify a sentence of death. But Gabrion argues that the jury was required to make the latter determination —*i.e.,* the "outweighs" one—beyond a reasonable doubt. The district court did not instruct the jury to that effect, so Gabrion says we must vacate his sentence.

As support for his argument, Gabrion cites the Supreme Court's holding in *Apprendi v. New Jersey,* 530 U.S. 466, 489, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). There, the Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S.Ct. 2348. Gabrion says that the jury's "outweighs" determination is a "fact" that increases his maximum sentence from life to death, and thus must be proved beyond a reasonable doubt.

[19] The problem with this argument is that *Apprendi* does not apply to every "determination" that increases a defendant's maximum sentence. Instead it applies only to findings of "fact" that have that effect. *Id.* In *Apprendi* itself, for example, the Court held that a jury was required to find beyond a reasonable doubt that the "defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race[.]" *Id.* at 468–69, 120 S.Ct. 2348. In *Blakely v. Washington,* 542 U.S. 296, 300, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the same was true about a finding that the defendant acted with "deliberate cruelty [.]" In *United States v. Booker,* 543 U.S. 220, 233, 235, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), the same was true about a finding that the defendant possessed more than 500 grams of crack. Even in *United States v. Gaudin,* 515 U.S. 506, 509, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)—a case often cited as the high-water mark for what counts as a "fact" for purposes of *Apprendi*—the necessary finding was simply that the defendant's statement was likely to have a particular effect on its recipient.

These sorts of findings—that a particular statement might influence its recipient, or that the defendant acted with a particular state of mind, or possessed a particular quantity of drugs, or was himself the triggerman, rather than just an accomplice—are different in kind from the "outweighs" determination required by § 3593(e). *Apprendi* findings are binary—whether a particular fact existed or not. Section 3593(e), in contrast, requires the jury to "consider" whether one type of "factor" "sufficiently outweigh[s]" another so as to "justify" a particular sentence. Those terms—consider, justify, outweigh—reflect a process of assigning weights to competing interests, and then determining, based upon some criterion, which of those interests predominates.

The result is one of *533 judgment, of shades of gray; like saying that Beethoven was a better composer than Brahms. Here, the judgment is moral—for the root of "justify" is "just." What § 3593(e) requires, therefore, is not a finding of fact, but a moral judgment.

In that respect § 3593(e) is no different from 18 U.S.C. § 3553, which likewise requires the decisionmaker to "consider" various "factors" and then determine—as a prerequisite to imposing a particular sentence—that the sentence is "sufficient, but not greater than necessary" to comply with the purposes set forth in § 3553(a)(2). That determination is just as necessary to the selection of a sentence under § 3553(a) as the "outweighs" determination is to the selection of a sentence under § 3593(e). The two determinations are therefore indistinguishable for purposes of *Apprendi*; and yet no one contends that a jury must find beyond a reasonable doubt that a particular sentence is "sufficient, but not greater than necessary" under § 3553(a)(2).

What § 3593(e) requires, in summary, is not a finding of fact in support of a particular sentence. What § 3593(e) requires is a determination of *the sentence itself,* within a range for which the defendant is already eligible. That makes this case different from any in which the Supreme Court has applied *Apprendi.* Here, Gabrion was already "death eligible" once the jury found beyond a reasonable doubt that he intentionally killed Rachel Timmerman and that two statutory aggravating factors were present. *Jones,* 527 U.S. at 377, 119 S.Ct. 2090. At that point the jury did not need to find any additional facts in order to recommend that Gabrion be sentenced to death. It only needed to decide, pursuant to the weighing of factors described in the statute, that such a sentence was "just[ ]." 18 U.S.C. §§ 3591(a), 3593(e). And in making that moral judgment, the jury did not need to be instructed as if it were making a finding of fact.

Every circuit to have addressed the argument that Gabrion makes here—six circuits so far—has rejected it. *See United States v. Runyon,* 707 F.3d 475, 516 (4th Cir.2013); *United States v. Fields,* 516 F.3d 923, 950 (10th Cir.2008); *United States v. Mitchell,* 502 F.3d 931, 993–94 (9th Cir.2007); *United States v. Sampson,* 486 F.3d 13, 31 (1st Cir.2007); *United States v. Fields,* 483 F.3d 313, 345–46 (5th Cir.2007); *Purkey,* 428 F.3d at 749. Today we become the seventh. Gabrion's argument is meritless.

III.

A.

Gabrion also presents three arguments that he says the original panel in his appeal overlooked.

1.

[20] Gabrion's first such argument is that we should order a determination of his competency for purposes of his appeal. By way of background, the district court appointed no fewer than three mental-health experts to examine Gabrion, each of whom concluded that he was both competent and malingering. (To malinger is to manipulate; and persons with Histrionic or Antisocial personalities tend to be highly manipulative. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (DSM–IV–TR), 713 (4th ed. 2000); *see also id.* at 702 (Antisocials "may repeatedly lie, use an alias, con others, or malinger").) We agree with the original panel that the district court was correct to find that Gabrion was competent to stand trial. *See* 648 F.3d at 318–20. And Gabrion's argument that we should order a new determination of his competency for purposes of his appeal *534 is, in substance, simply a rehash of his argument that he was incompetent in the district court. Overlooked or not, this argument is meritless.

2.

[21] Gabrion says the original panel also overlooked his argument that the district court should not have excluded him from the courtroom during a portion of the trial's penalty phase. The exclusion in question occurred after Gabrion punched his lawyer in the face in the presence of the jury. The district court sent Gabrion upstairs to the courthouse lockup, where for the remainder of that afternoon he watched the trial on closed-circuit television. The next morning the U.S. Marshal reported that Gabrion had been "very unruly in the cell block throughout the afternoon, banging on the cell, yelling, that sort of behavior all afternoon[.]" Gabrion's counsel reported the

same thing. The court left Gabrion upstairs for a total of 24 witnesses.

[22] The Confrontation Clause and Federal Rule of Criminal Procedure 43 ordinarily require a district court to warn a disruptive defendant before removing him from the courtroom. *See Gray v. Moore,* 520 F.3d 616, 624 (6th Cir.2008); Fed.R.Crim.P. 43(c)(1)(C). Here, Gabrion got plenty of warning. For example, Gabrion repeatedly interrupted the court during a hearing three days before trial. The court warned him: "Mr. Gabrion, I will remove you and I will penalize you if you continue to interrupt me or anyone else during this trial very specifically. I mean that. Do you understand that?" The court later added, "I'm giving you fair warning and I want you to hear me very clearly. I will not tolerate interruptions or noise during the trial." So lack of warning is not an issue here.

Gabrion contends, however, that the court should have returned Gabrion to the courtroom sooner than the court actually did. Specifically, Gabrion suggests that the court should have put him in shackles and returned him to the courtroom almost immediately after the punch, albeit with a stern warning, apparently, that additional outbursts would lead to his removal. The argument defies common sense. Setting aside the whole question whether Gabrion could have been physically restrained, the court had every reason to think that Gabrion would continue to be *verbally* disruptive if he were promptly to return. And Gabrion admits that a district court can exclude a defendant who is verbally disruptive. *See* Gabrion Pet'n for Reh'g at 3.

Gabrion was verbally disruptive throughout almost the entire trial. To cite one of dozens of examples, during the prosecution's opening statement during the penalty phase, Gabrion interjected for all to hear: "Why do you just let him stand up there and lie like that and never do anything about it? It's bullshit.... Fucking liar asshole." The court had no reason to think Gabrion would behave any better just after punching his counsel and carrying on upstairs all afternoon. The district court did not abuse its discretion by excluding Gabrion for the period it did. *See Illinois v. Allen,* 397 U.S. 337, 343, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) ("trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case").

3.

Finally, Gabrion says the original panel overlooked his argument that Dr. Saathoff's testimony in rebuttal violated Gabrion's Fifth and Sixth Amendment rights to the extent that Dr. Saathoff testified about Gabrion's contempt for women. We ***535** do not think the panel overlooked this argument. Gabrion concedes that Dr. Saathoff could testify about subjects raised by Gabrion's experts in mitigation. *See* Gabrion 2009 Suppl. Br. at 38–39. But Gabrion asserts that Dr. Saathoff's testimony about Gabrion's misogyny exceeded the scope of his experts' testimony in mitigation, thereby allegedly violating Gabrion's rights under the Fifth and Sixth Amendments.

The original panel correctly determined that the factual premise of this argument is incorrect: "Dr. Saathoff's testimony as a whole was a fair rebuttal of Gabrion's mitigation evidence and did not unfairly prejudice Gabrion." 648 F.3d at 341. For example, Dr. Jackson —one of Gabrion's experts—testified at length about "Gabrion's psychological makeup[,]" an open-ended subject of which Gabrion's misogyny was certainly a part. Gabrion's mitigation evidence also downplayed the extent of his future dangerousness to women. *See Id.* Thus, whatever the contours of the Fifth and Sixth Amendment rights that Gabrion asserts here, Dr. Saathoff's testimony did not violate them—for reasons already stated in the original panel opinion.

B.

Gabrion also presents more than a dozen other arguments that the original panel unanimously rejected. *See, e.g.,* Gabrion Br. at 78 (the district court abused its discretion "by removing a juror who was allegedly sleeping"). We have reviewed those arguments, but do not think it worthwhile to address them again here. It is enough for our purposes to state that we reject all of Gabrion's remaining arguments.

* * *

After 11 days of testimony and two days of careful deliberation, the 12 jurors who sat on this case decided unanimously that Marvin Gabrion deserved a sentence of

death for what he did to Rachel Timmerman. We have no basis to set aside that moral judgment. The district court's judgment is affirmed.

CLAY, Circuit Judge, concurring only in the judgment. Both the majority and the dissent offer wide-ranging opinions that delve into the minute detail of the important issues implicated by this case. It is the breadth of those opinions, however, that prevents me from fully embracing either opinion's analysis. Therefore, I concur only in the judgment of the majority.

The central concern throughout the appeal of this case has had to do with the location of Rachel Timmerman's murder, just 227 feet inside the boundaries of the Manistee National Forest in western Michigan. During the penalty phase of his trial, Defendant sought to raise two arguments with respect to the location of the murder. First, he sought to argue that because the murder occurred on federal property in Michigan, a non-death penalty state, the jury should be able to consider as a mitigation factor that had the murder occurred on non-federal property in Michigan, he would not be eligible to receive the death penalty. Second, Defendant contends that he should have been able to make a so-called residual doubt argument that despite the jury's finding beyond a reasonable doubt at trial that the murder was committed on federal property, it may actually not have been committed on federal property. The issue for us as an appellate court is to decide whether the district court erred in excluding such arguments from the penalty phase.

Any attempts to recast the issue more broadly would seem to be inappropriate ***536** and ill-conceived. Specifically, I am sympathetic to the dissent's suggestion that the majority has altered the standard for what constitutes relevant mitigating evidence. *See* Dissent at 538. While I do not see the majority's alteration as the "transform[ation]" that the dissent does, *id.*, I do not think that the majority's references to the jury's moral judgment are necessary to resolve this case. *See* Maj. Op. at 521–23. To be sure, morality and the jury's "moral response" are part of death penalty deliberations, *Penry v. Lynaugh,* 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *overruled on other grounds by Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), but, as demonstrated below, I think this case can be more narrowly resolved by deciding whether either of Defendant's arguments fit into the categories of "culpability and character" that the Supreme Court has identified to be relevantly considered by a jury in imposing the death penalty. *See* Maj. Op. at 522.

As to Michigan's status as a non-death penalty state, such an argument seeks to inject extraneous factors into the jury's consideration of Defendant's sentence. While the jury, especially in capital cases, is entitled to "take [ ] a wide range of factors into account," *Lockett v. Ohio,* 438 U.S. 586, 602, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), jurors must be guided in their "individualized assessment of the appropriateness of the death penalty" to a given defendant, *Penry,* 492 U.S. at 319, 109 S.Ct. 2934; *see also Gregg v. Georgia,* 428 U.S. 153, 192–93, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) ("The idea that a jury should be given guidance in its decisionmaking is also hardly a novel proposition."). An argument about Michigan's decision, as a state, not to impose the death penalty has nothing to do with a federal jury's determination of the appropriateness of applying the federal death penalty statute with respect to Defendant. The district court's refusal to allow such an argument during the penalty phase of the trial does not appear to constitute error.

With respect to the residual doubt argument, it must first be stated that the same jury had already found beyond a reasonable doubt that Defendant murdered Timmerman on federal property when it found Defendant guilty during the guilt phase of the trial. This finding, as demonstrated by the concurrence in *Gabrion I,* was well-supported by the evidence. *United States v. Gabrion,* 517 F.3d 839, 857–76 (6th Cir.2008) (Moore, J., concurring in the judgment). This case does not require us to answer the question whether it would have been error had the district court allowed a residual doubt argument on the issue of the location of the murder to be presented during the penalty phase of the trial; and I decline to address that issue. We need only decide whether the district court's refusal to allow such an argument was error under the circumstances of this case. In this case, the issue of the location of Timmerman's murder had already been decided definitively and unassailably by the same jury. Notwithstanding the wide berth that the Supreme Court has traditionally given defendants seeking to introduce mitigation evidence during the penalty phase of a death penalty trial, *see, e.g., Tennard v. Dretke,* 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004); *Lockett,* 438 U.S. 586, 98 S.Ct. 2954, the district court was within its discretion

under the facts of this case not to permit re-argument on this point during the penalty-phase, *cf. Oregon v. Guzek,* 546 U.S. 517, 526, 126 S.Ct. 1226; 163 L.Ed.2d 1112 (2006); *Lockhart v. McCree,* 476 U.S. 162, 205, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) (Marshall, J., dissenting).

In sum, Defendant has come forward with no assignments of error, including his ***537** arguments with respect to the *voir dire,* which suggest that the district court's handling of this case was improper so as to mandate reversal. Therefore, I concur in the judgment that Defendant's conviction and sentence be affirmed, but not in the majority opinion or its analysis.

KAREN NELSON MOORE, Circuit Judge, dissenting. During the guilt phase of Marvin Gabrion's trial, the jury was required to make a determination on an extremely complicated and hotly contested element of the offense—whether Gabrion committed the murder in the Manistee National Forest or in the State of Michigan. Their answer not only resolved an interesting academic issue of federal jurisdiction, but also exposed Gabrion to a sentence of death. Given the direct connection between this determination and the resultant penalty phase, Gabrion sought to introduce as mitigation both a residual-doubt argument and evidence of the location of the crime. The district court denied this request, and the penalty phase proceeded with no mention of this circumstance of the offense. At the end of the penalty phase, Gabrion sought to have the jury instructed in accordance with *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)—that in order to sentence Gabrion to death, the jury would have to find beyond a reasonable doubt that the aggravators outweighed the mitigators. The district court denied this request as well.

The majority concludes that neither of these determinations constituted errors. Because I believe that the district court erred in making each of these determinations, as well as in excluding certain jurors during voir dire, and that Gabrion's constitutional rights were violated as a result, I cannot agree. I would vacate Gabrion's sentence and remand for a new penalty hearing. I therefore respectfully dissent.

I. PENALTY–PHASE ERRORS

A. Michigan's Lack of a Death Penalty as Mitigating Evidence

Gabrion articulates three theories in support of his contention that the district court erred by precluding him from presenting evidence of the location of the crime during the penalty phase of his trial, one arising under the Eighth Amendment and two based on the Federal Death Penalty Act ("FDPA"). Although I believe that each of these theories requires admission of this evidence, I am most troubled by the majority's decision to eviscerate the decades-old relevance standard established by the Supreme Court in order to achieve the majority's desired result.

Replacing constitutionality with morality as the benchmark of relevance narrows the scope of evidence that a defendant may present as mitigation during the penalty phase of his trial. Given the importance of this constitutional right, I cannot support transforming the standard in such a way that precludes a defendant from presenting constitutionally relevant evidence simply because a panel of judges cannot see its moral relevance. Whatever the majority thinks of Gabrion's moral culpability or the horrific nature of the crimes he committed, these opinions cannot displace the constitutional relevance of the evidence Gabrion seeks to present. I would allow Gabrion to present evidence of the location of the crime—an element of the offense—based on the constitutional standard employed by the Supreme Court, and alternatively, under the FDPA.

1. Eighth Amendment

A defendant has an Eighth Amendment right to present all evidence at the penalty ***538** phase of a capital trial that is relevant to "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The Supreme Court has made clear that this is an expansive right:

> When we addressed directly the relevance standard applicable to mitigating evidence in capital cases ..., we spoke in the most expansive terms. We established that the meaning of relevance is

> no different in the context of mitigating evidence introduced in a capital sentencing proceeding than in any other context, and thus the general evidentiary standard—any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence—applies.

Tennard v. Dretke, 542 U.S. 274, 284, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004) (internal quotation marks omitted).

Rather than apply the Supreme Court's conception of relevance, the majority fashions its own standard —"mitigation evidence encompasses both culpability and character, all to the extent relevant to the defendant's personal responsibility and moral guilt."[1] Maj. Op. at 522 (internal quotation marks omitted). However, this standard addresses only a part of what would be admissible under the relevance standard outlined by the Supreme Court. Critically, this new standard allows the majority to avoid engaging in any analysis concerning whether the evidence Gabrion seeks to present is a circumstance of the offense, a consideration included expressly in the Supreme Court's relevance standard. *See Gregg v. Georgia,* 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) ("We have long recognized that for the determination of sentences, justice generally requires that there be taken into account the circumstances of the offense together with the character and propensities of the offender.") (internal quotation marks and alterations omitted). That the evidence at issue here was an element of the offense only underscores the consequences of the majority's decision to transform the standard. Under the Supreme Court's standard, evidence related to an element of the offense is unequivocally relevant, yet under the novel standard employed by the majority, a court may skirt the inquiry most relevant to its admission.

Additionally, the Supreme Court has indicated that evidence may "ha[ve] nothing to do with his culpability for [the] offense," yet be admissible nonetheless. Maj. Op. at 522. As explained by Justice Stevens, "a jury must be allowed to give weight to any aspect of a defendant's character or history that may provide a basis for a sentence other than death, even if such evidence does not tend to reduce the defendant's culpability for his crime." *Wong v. Belmontes,* 558 U.S. 15, 28, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009) (Stevens, J., concurring) (internal quotation marks omitted); *see also Brewer v. Quarterman,* 550 U.S. 286, 289, 127 S.Ct. 1706, 167 L.Ed.2d 622 (2007) (acknowledging that mitigation includes more than that which addresses culpability: "we have long recognized that a sentencing jury must be able to give a reasoned moral response to a defendant's mitigating evidence-particularly that evidence which tends to diminish his culpability") (internal quotation marks omitted). The fact that "most of the evidence the Supreme Court has deemed mitigating was evidence relevant to the defendant's ***539** personal culpability for his crime" does not eliminate the broad constitutional protections for those defendants who wish to present evidence unrelated to their moral culpability. Maj. Op. at 521.

Notably, the majority opinion is devoid of any examples of the Supreme Court having excluded mitigation evidence on the basis that it did not meet the constitutional minimum, let alone any evidence similar to that which Gabrion seeks to introduce.[2] Instead, the cases cited by the majority reflect the inclusive nature of the Eighth Amendment standard. A review of post-*Furman* cases that consider mitigation evidence reveals that the Supreme Court consistently employs iterations of the expansive relevance standard. *See, e.g., Abdul–Kabir v. Quarterman,* 550 U.S. 233, 248, 127 S.Ct. 1654, 167 L.Ed.2d 585 (2007) ("In those cases, we emphasized the severity of imposing a death sentence and that the sentencer in capital cases must be permitted to consider *any* relevant mitigating factor.") (internal quotation marks omitted); *Tennard,* 542 U.S. at 285, 124 S.Ct. 2562 (explaining that a jurisdiction "cannot bar the consideration of evidence if the sentencer could reasonably find that it warrants a sentence less than death") (internal quotation marks and alteration omitted); *Payne v. Tennessee,* 501 U.S. 808, 822, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) ("[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances."); *Lockett,* 438 U.S. at 604, 98 S.Ct. 2954 ("[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.") (internal footnote omitted).[3]

***540** The Supreme Court has continued to apply such an expansive standard with good reason. Without an opportunity to present mitigation evidence—the means by which the jury considers the individual defendant and the circumstances of his offense—the death penalty would be unconstitutional. *Woodson v. North Carolina,* 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) ("[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a *constitutionally indispensable* part of the process of inflicting the penalty of death.") (citation omitted) (emphasis added); *see also Kansas v. Marsh,* 548 U.S. 163, 171, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006) ("This Court noted that, as a requirement of individualized sentencing, a jury must have the opportunity to consider all evidence relevant to mitigation."). [4]

Under the correct standard, the evidence that Gabrion sought to introduce is unquestionably relevant. When the location of the crime is what makes a defendant eligible for the death penalty in the first place, the location becomes a "circumstance of the offense" that could justify a sentence less than death. Indeed, in this case, the location of the body was an *element* of the offense. [5] A juror may have ***541** been less inclined to impose the death penalty for a crime committed in Michigan if he knew that the United States's ability to prosecute the crime and impose a sentence of death was determined by a distance roughly the length of a hockey rink. Certainly, not every juror would be softened by the knowledge that Michigan is a non-death-penalty state and that Gabrion was eligible for the death penalty only because his crime was committed on federal lands within Michigan—a conclusion that itself was extremely complicated and hotly contested. But the fact that some jurors reasonably may be inclined not to impose the death penalty as a result of such information makes the excluded information mitigating.

Moreover, the Supreme Court has rebuked attempts by the courts to narrow the scope of mitigating evidence, making clear that it is not a judge's role to weigh in on the moral relevance of evidence. In *Tennard,* for example, the Supreme Court rejected the Fifth Circuit's constitutional-relevance screening test and its nexus requirement, reasoning that these additional hurdles have "no basis in our precedents and, indeed, [are] inconsistent with the standard we have adopted for relevance in the capital sentencing context." 542 U.S. at 287, 124 S.Ct. 2562. The Court further identified the role of a federal appellate court regarding mitigation evidence: "to say that only those features and circumstances that a panel of federal appellate judges deems to be severe ... could have such a tendency is incorrect. Rather, the question is simply whether the evidence is of such a character that it might serve as a basis for a sentence less than death." *Id.* (internal quotation marks omitted).

Accordingly, we are not charged with excluding evidence that is not *morally* relevant. Rather, we must uphold a defendant's right to present evidence that is *constitutionally* relevant. That the majority considers Gabrion's evidence morally unpersuasive is of no matter. Courts determine whether evidence is constitutionally relevant, much of which addresses moral culpability, and that evidence is relied upon by the jury to make a reasoned moral judgment. If evidence meets the low constitutional bar established by Supreme Court —which it unequivocally does here—then it must be allowed in. The majority deprives Gabrion of his Eighth Amendment right to present constitutionally relevant mitigation evidence.

2. Federal Death Penalty Act

Gabrion's constitutional right to present mitigation evidence is distinct from his statutory right to present mitigation evidence under the FDPA. Under § 3592(a), "the finder of fact shall consider any mitigating factor," including a list of seven specific factors and an eighth category requiring consideration of "[o]ther factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence." 18 U.S.C. § 3592(a). The parties debate whether these eight categories are exhaustive, how broadly to read this eighth category if they are, and most importantly, whether the information ***542** about Michigan qualifies under any of these readings. The majority ultimately concludes that it does not, relying on the unfounded assumption that Congress limited the protections in § 3592(a) to the constitutional minimum. Because I believe the FDPA allows a defendant to introduce evidence beyond the constitutional minimum, I cannot agree.

As an initial matter, I remain confounded as to how evidence relating to an element of the offense does not qualify as a "circumstance of the offense" under § 3592(a)(8). The majority once again refuses to engage in this analysis, choosing instead to rely upon unsupported assertions, namely that § 3592(a) is based in the same moral principles as the majority's novel relevance standard. Even assuming, though, that an element of the offense is somehow outside the scope of § 3592(a)(8), the expansive nature of § 3592(a) as a whole requires permitting Gabrion to present this evidence. By its own language, the § 3592(a) list is non-exhaustive and merely illustrative. The first indication of § 3592(a)'s expansive nature is reflected in the initial preface, where Congress stated that the jury "shall consider *any* mitigating factor." *Id.* (emphasis added). Congress subsequently used the open-ended word "including" when listing the enumerated examples of mitigating factors. *Id.* The majority does not account for this open-ended language in any meaningful way, focusing instead on reiterating its constitutional argument by pointing to the similarities between the language of the eighth factor and the constitutional standard set forth by the Supreme Court.

The government's only argument in response is that the existence of the eighth category would be "superfluous" if the words "any mitigating factor" are given broader meaning, but the government fails to explain how this list is any different from other illustrative lists. As explained by the Fifth Circuit when rejecting a similar argument relating to aggravating factors under the FDPA, " '[i]t is "a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." ' " *United States v. Robinson,* 367 F.3d 278, 293 (5th Cir.2004) (quoting *TRW, Inc. v. Andrews,* 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001)). The merits panel correctly concluded that purely as a matter of statutory interpretation, defense counsel is entitled to argue any point that "could conceivably make a juror question the appropriateness in the case of imposing a sentence of death." *United States v. Gabrion,* 648 F.3d 307, 326 (6th Cir.2011), *reh'g en banc granted, op. vacated* (6th Cir. Nov. 17, 2011). The government does not even try to argue that this evidence could not even "conceivably" bear on a juror's decision of whether death was justified under this standard.

Perhaps the strongest evidence in support of an expansive reading of § 3592(a) is found in the interpretations of other FDPA provisions. Specifically, our sister circuits have consistently interpreted §§ 3592(b), (c), and (d) and 3593(a), the aggravating-factor provisions, as expansive. These interpretations are instructive, as the aggravating-factor provisions employ the same terms that are at issue in the mitigating-factor provision. Each provision relating to non-statutory aggravating factors in § 3592 states as follows: "The jury, or if there is no jury, the court, may consider whether *any* other aggravating factor for which notice has been given exists." § 3592(b), (c), and (d) (emphasis added). Additionally, § 3593(a) prescribes that "[t]he factors for which notice is provided ***543** under this subsection *may include* factors concerning the effect of the offense on the victim and the victim's family ... and *any* other relevant information." *Id.* § 3593(a) (emphasis added).

Certain circuits base their interpretations on the plain language of the terms at issue. For example, the Fourth Circuit has explained that "the text of [§ 3593(a)] is illustrative rather than exhaustive, identifying some kinds of aggravating factors and evidence that the prosecution's notice to the defendant '*may* include' and concluding with a catchall permitting the prosecution to present 'any other relevant information.' " *United States v. Runyon,* 707 F.3d 475, 501 (4th Cir.2013) (quoting § 3592(c)). Given this language, the court determined that Runyon, in arguing for a more restrictive interpretation, was "creating restrictions ... out of whole cloth." *Id.* Likewise, the First Circuit indicated that "[t]he FDPA broadly provides that the government may present any information relevant to an aggravating factor for which notice has been provided." *United States v. Sampson,* 486 F.3d 13, 44 (1st Cir.2007) (internal quotation marks and alteration omitted). Finally, the Tenth Circuit explained that "the use of the phrases 'may include' and 'any other relevant information' clearly suggests that Congress intended to permit the admission of any other relevant evidence, including, as authorized by *Payne,* evidence giving the jury a glimpse of the victim's personality and the life he led." *United States v. Barrett,* 496 F.3d 1079, 1099 (10th Cir.2007).

Even more notable, though, are the circuits that have expressly compared the terms found in the mitigation provision with those in the non-statutory-aggravators

provision in order to establish the FDPA's expansiveness. For example, the Fifth Circuit asserted that the breadth of the non-statutory-aggravators provision is supported by that of the mitigation provision: "The statute provides that the jury may consider such determinations in reaching its decision to recommend death, just as it permits the jury to consider any mitigating factors not specified in the statute." *Robinson,* 367 F.3d at 293. In support of this assertion, the court compared the language in § 3592(a)—" 'the finder of fact shall consider any mitigating factor, including the following' eight specified factors"—with the language in § 3592(c)—" 'the jury ... may consider whether any other aggravating factor for which notice has been given exists.' " *Id.* at 293 n. 23 (quoting § 3592(a), (c)).

Additionally, the Second Circuit referred expressly to § 3592(c) in interpreting § 3593(a), the provision allowing victim-impact statements to be presented as a non-statutory aggravating factor, as expansive:

> We read [§ 3593(a)] as language of inclusion, not exclusion. It speaks to what "may be included." ... *see also* 18 U.S.C. § 3592(c) ("The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists."). The final phrase ("and any other relevant information"), though ambiguous, is read most naturally as a catch-all for what may be deemed "relevant" by the court.

United States v. Whitten, 610 F.3d 168, 188 (2d Cir.2010) (internal citations and alterations omitted). In a different case, the Second Circuit again touched on the expansiveness of both aggravating and mitigating factors: "the Supreme Court has also made clear that in order to achieve such 'heightened reliability[ ]' [in imposing the death sentence,] *more* evidence, not less, should be admitted on the presence or absence of aggravating and ***544** mitigating factors." *United States v. Fell,* 360 F.3d 135, 143 (2d Cir.2004) (citing *Gregg,* 428 U.S. at 203–04, 96 S.Ct. 2909).

Against this backdrop, § 3592(a) must be read as inclusive. I therefore cannot agree with the majority's interpretation of this provision, or with its refusal to address the "circumstance of the offense" language in § 3592(a)(8). For these reasons, I believe the district court erred in denying Gabrion's request to admit evidence relating to the location of the offense.

3. Residual Doubt

Even assuming there is no constitutional right to present a residual-doubt argument, Gabrion should have been allowed to raise this argument under the FDPA. It cannot be disputed that the FDPA allows a defendant to proffer evidence of certain types of residual doubt. For example, a defendant may present evidence that he "was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge." 18 U.S.C. § 3592(a)(2). Similarly, the FDPA permits evidence that "[t]he defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge," and that "the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge." *Id.* § 3592(a)(1), (3). The FDPA also allows the defendant to present evidence that "[t]he defendant committed the offense under severe mental or emotional disturbance." *Id.* § 3592(a)(6).

Each of these subsections thus allows a reevaluation by the jury during the penalty phase of the same evidence presented during the guilt phase. And, given that the penalty phase is under way, this is undoubtedly evidence that the jury found unpersuasive concerning one of the elements of the offense during the guilt phase. *Cf. Oregon v. Guzek,* 546 U.S. 517, 523, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006) (explaining that a capital defendant did not have a constitutional right to present new alibi evidence at a resentencing for a prior conviction, but "to the extent it is evidence he introduced at [the time of the original trial], he is free to introduce it now, albeit in transcript form").

The majority's conclusion that Gabrion is barred from presenting evidence of the location of the offense—first because it "was an issue extensively litigated during the guilt phase of Gabrion's trial" and second because the jury had already "found beyond a reasonable doubt that Gabrion killed Timmerman inside the Forest"—therefore cannot be extended to the FDPA, as the principle that *all* relitigation is precluded under the FDPA would not comport with the plain language of the statute. Maj. Op. at 524–25. The FDPA expressly permits relitigation of elements of an offense, and I cannot see any logic in an arbitrary determination that evidence concerning the

location of the offense is one that must be precluded. The district court should have allowed Gabrion to present residual-doubt evidence under the FDPA.

Finally, even if the FDPA does not require the court to instruct the jury on this evidence, Gabrion's counsel should not have been forbidden from presenting this argument in closing arguments, an issue left unaddressed by the majority.[6] *Lockhart* ***545** *v. McCree,* 476 U.S. 162, 181, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) ("Such residual doubt has been recognized as an extremely effective argument for defendants in capital cases.") (internal quotation marks omitted); *Moore v. Mitchell,* 708 F.3d 760, 788 (6th Cir.2013) (recognizing residual doubt as a mitigation theory); *Webb v. Mitchell,* 586 F.3d 383, 394–95 (6th Cir.2009) (discussing residual-doubt theory raised at mitigation), *cert. denied,* 559 U.S. 1076, 130 S.Ct. 2110, 176 L.Ed.2d 738 (2010); *Hawkins v. Coyle,* 547 F.3d 540, 548 (6th Cir.2008) (noting that arguing residual doubt at mitigation was a "strategy endorsed" by the Supreme Court and the Ohio Supreme Court at the time of defendant's trial in 1989), *cert. denied,* 558 U.S. 1013, 130 S.Ct. 553, 175 L.Ed.2d 385 (2009); *Scott v. Mitchell,* 209 F.3d 854, 881–82 (6th Cir.2000) (decision by counsel to pursue residual-doubt theory at mitigation not "objectively unreasonable"), *cert. denied,* 531 U.S. 1021, 121 S.Ct. 588, 148 L.Ed.2d 503 (2000). If such theories are deemed positions pursued by reasonable counsel, it is difficult to call them now wholly irrelevant to mitigation.

B. Balancing Factors "Beyond a Reasonable Doubt"

The only relevant question on this issue is whether the jury must determine that the aggravating factors substantially outweigh the mitigating factors in order for Gabrion to be sentenced to death. Because I believe that the answer to that question is "yes," that determination must be made beyond a reasonable doubt.

1. *Apprendi* and the FDPA

Under *Apprendi,* "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S.Ct. 2348. The Supreme Court made clear in *Apprendi* that the state's use of the term "sentence enhancement" had no bearing on the inquiry. *Id.* at 476, 120 S.Ct. 2348. When "a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others," those circumstances that lead to the increase in the authorized penalty must be submitted to a jury and proven beyond a reasonable doubt. *Id.* at 484, 120 S.Ct. 2348.

The rule is no different in death-penalty cases. "The dispositive question ... is one not of form, but of effect." *Ring v. Arizona,* 536 U.S. 584, 602, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (internal quotation marks omitted). If a finding leads to "an increase in a defendant's authorized punishment," that finding must be found by a jury beyond a reasonable doubt—"no matter how the State labels it." *Id.* For example, because Arizona's enumerated aggravating factors are necessary for the imposition of the death penalty, they "operate as 'the functional equivalent of an element of a greater offense,' [and] the Sixth Amendment requires that they be found by a jury." *Id.* at 609, 122 S.Ct. 2428 (quoting *Apprendi,* 530 U.S. at 494 n. 19, 120 S.Ct. 2348) (internal citation omitted).

Two years after *Ring,* the Supreme Court—for a third time—rejected a state's attempt to find a linguistic loophole. In *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the state argued that the "statutory maximum" for the crime in question was ten years, and technically under the statute it ***546** was. *Id.* at 303, 124 S.Ct. 2531. But the Supreme Court ignored the state's labels—because the statute permitted the ten-year maximum only if there were sufficient reasons to justify the "exceptional sentence," the true maximum for the defendant for *Apprendi* purposes was not ten years. *Id.* at 304–05, 124 S.Ct. 2531. "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence." *Id.* at 305, 124 S.Ct. 2531. The first question is therefore not a constitutional question but simply a statutory one: What does the FDPA require in order to sentence someone to death?

Although it is true that the FDPA forbids the imposition of the death penalty unless at least one aggravating factor listed in § 3592 is unanimously found to exist beyond a reasonable doubt, the death penalty is authorized only if the jury (under the statute) then decides that "all the aggravating factor or factors found to exist

sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death." 18 U.S.C. § 3593(e).[7] Before this determination is made, a sentence of death is simply not an option. Even when there are no mitigating factors, the death penalty is still not authorized (again, under the statute) unless the jury finds that "the aggravating factor or factors alone are sufficient to justify a sentence of death." *Id.* Under the plain terms of the FDPA, the district court could not impose the death penalty solely on the grounds that the jury found an aggravating factor and the requisite intent. *Blakely,* 542 U.S. at 305, 124 S.Ct. 2531. The statutorily authorized sentence increases to death only after the jury determines that the aggravating factors sufficiently outweigh the mitigating factors to justify the sentence of death, and not a moment before.

The language of § 3591 further supports this interpretation. According to its terms, a defendant found guilty of an underlying offense "shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified." 18 U.S.C. § 3591(a). Section 3591 thus instructs us in two meaningful ways. First, § 3591 directs us to § 3593 as a whole rather than to any specific subsection. Second, § 3591 provides that a court cannot sentence a defendant to death until the jury determines that death is justified—i.e., after the jury weighs the aggravators and any mitigators pursuant to § 3593(e).

This makes the balancing of factors a "fact" for sentencing purposes under the FDPA. We were clearly instructed in *Blakely* that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." 542 U.S. at 303–04, 124 S.Ct. 2531. Here, without the balancing, the maximum sentence the judge can impose under the statute is life in prison. Because the death penalty could not be imposed by a judge under the FDPA but for the balancing by the jury—and the majority does not offer a colorable argument otherwise—whether the court ***547** calls the jury's balancing a "finding of fact," a "mixed question of law and fact," or "Mary–Jane" is irrelevant. "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority." *Id.* at 304, 124 S.Ct. 2531 (internal quotation marks and citation omitted).

At the very heart of *Apprendi* was a rejection of labels as a means of analyzing constitutional rights. 530 U.S. at 476, 120 S.Ct. 2348 ("Merely using the label 'sentence enhancement' to describe [one of the procedural safeguards] surely does not provide a principled basis for treating them differently."). Because the clear language of the FDPA requires the jury to conduct this balancing before a defendant can be sentenced to death, the merits panel correctly held that "a jury's finding that the aggravating factors outweigh the mitigating factors is an element of the death penalty and must be found beyond a reasonable doubt, the same standard constitutionally required for all other findings of fact and mixed questions of law and fact." *Gabrion,* 648 F.3d at 325.

2. "Death–Eligibility"

Rather than adhere to the Supreme Court's directive to look beyond labels, the majority throws yet another label into the mix. Specifically, the majority contends that a defendant becomes "death-eligible" the moment that the jury finds a statutory aggravating factor beyond a reasonable doubt. Maj. Op. at 532, 533–34. Once "death-eligibility" attaches, the majority reasons, the jury need not make any additional findings of fact in order for the defendant to receive a sentence of death. Because this argument relies on unsupported assumptions and logical leaps, I cannot agree.

As an initial matter, I find the majority's analysis as to when "death-eligibility" would attach to be unsatisfactory. In my view, choosing a point at which a defendant becomes so-called "death-eligible" under the FDPA other than at the completion of a § 3593 hearing is nothing short of arbitrary. The majority's brief analysis makes no effort to explain why a defendant would become "death-eligible" upon the jury's finding an aggravating factor. Instead, the majority cites *Jones v. United States,* 527 U.S. 373, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999), a pre-*Apprendi* case that does not squarely address the issue, which in turn cites § 3593(e) for a general proposition.[8] *Id.* at 376–77, 119 S.Ct. 2090. But § 3593(e) does not include the term "death-eligible," nor does it prescribe that "a death sentence may not legally be imposed unless at least one aggravating factor is found to exist beyond a reasonable doubt," as did the Arizona scheme in *Ring.*

Ring, 536 U.S. at 597, 122 S.Ct. 2428 (internal quotation marks and alteration omitted). Under the FDPA, finding an aggravating factor beyond a reasonable doubt is one of many prerequisites to imposing the death penalty; it is not the point of no return.

I must also note that contrary to the majority's suggestion, "death-eligibility" is not the cornerstone of *Apprendi.* Rather, ***548** "death-eligibility" is an ambiguous term, used in a variety of ways depending on the jurisdiction. The majority makes no attempt to define this term or explain its importance. This is troubling, given that federal courts typically use this term as it relates to the FDPA to describe whether a defendant could ever receive a sentence of death based on his purported conduct, often at the indictment stage. *See, e.g., United States v. Parks,* 700 F.3d 775, 778 (6th Cir.2012) ("In enacting the FDPA, Congress increased the number of death-eligible offenses *in toto.*"); *United States v. Lawrence,* 555 F.3d 254, 264 (6th Cir.2009) ("Third, if the jury finds both a death-eligible offense and one or more of the statutory aggravating factors, the jury considers whether the statutory aggravating factor or factors found to exist, together with any non-statutory aggravating factors found to exist upon proof beyond a reasonable doubt, sufficiently outweigh the mitigating factor or factors found to exist, so as to justify a sentence of death."). Moreover, there is nothing to support the theory that a jury ceases to find facts once "death-eligibility" attaches. The majority's application of an undefined placeholder avoids engaging in a meaningful *Apprendi* analysis and raises more questions than it answers.

3. Weighing Evidence

Additionally, I cannot agree with the majority's contention that weighing aggravators and mitigators is qualitatively different than finding facts for the purposes of *Apprendi.* Because the jury must *weigh* the aggravating factors against the mitigating factors under § 3593(e), the majority surmises, this determination cannot constitute a finding of fact. Maj. Op. at 532–33. According to the majority, the type of decision that has been deemed a finding of fact under *Apprendi,* such as whether a defendant was the triggerman, is binary, thus requiring only a response to a simple yes-or-no question.

This reasoning, however, misapprehends the function of the jury. Asking a jury to weigh evidence, in this case evidence that aggravates against evidence that mitigates, is not unique to the penalty phase of a capital trial. Rather, it is the sole task of a jury at every stage of every proceeding. Indeed, juries are frequently tasked with reaching subjective conclusions of great import beyond a reasonable doubt. *See United States v. Gaudin,* 515 U.S. 506, 514–15, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) (holding jury's responsibility often includes applying law to facts when drawing ultimate conclusions such as guilt, but that such conclusions must still be reached beyond a reasonable doubt).

When a jury determines whether a homicide was committed in self-defense, for example, it weighs the evidence presented at trial. Imagine a trial where the government presents testimony from eyewitnesses who describe a confrontation between the defendant and the victim. All agree that the defendant shot the victim, and all give the same general account of the victim's actions preceding the shooting. The defendant takes the stand and testifies that he thought the victim was about to shoot him and therefore shot the victim first, in self-defense. During deliberations, the jury's focus would not be on the type of binary yes-or-no fact finding contemplated by the majority. Rather, the jury would be required to engage in a balancing of the objective facts with personal and moral judgment to determine if it was reasonable for the defendant to think that the force he used was necessary to defend himself against an immediate threat. *See* Sixth Circuit Criminal Pattern Jury Instructions § 6.06 (2009). Jurors must deliberate on similar issues when considering a coercion/duress defense. ***549** *See id.* § 6.05 (2009). These judgments are not binary yes-or-no decisions that depend on which version of the facts a jury believes. Rather, they entail value-laden balancing of the sort involved when a jury is asked to recommend life or death. *See Brown v. Sanders,* 546 U.S. 212, 216–17, 126 S.Ct. 884, 163 L.Ed.2d 723 (2006) ("[W]e have held that in *all* capital cases the sentencer must be allowed to weigh the facts and circumstances that arguably justify a death sentence against the defendant's mitigating evidence."). "While the question of innocence or guilt of the offense is essentially a question of fact, the choice between life imprisonment and capital punishment is both a question of underlying fact and a matter of reasoned moral judgment." *Sawyer v. Whitley,* 505 U.S. 333, 370, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992) (Stevens, J., concurring).

Moreover, the comparison is not altered, as the majority suggests, by the formal nature of the penalty phase, in which the jury weighs only those facts that it has already specifically found as a special finding. Rather, the formality of the penalty phase serves as a safeguard against determinations made arbitrarily or for an impermissible reason, thus ensuring the constitutionality of the ultimate decision. *Woodson,* 428 U.S. at 305, 96 S.Ct. 2978 ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long.... Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."); *see also Franklin v. Lynaugh,* 487 U.S. 164, 179, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) ("Given the awesome power that a sentencing jury must exercise in a capital case, it may be advisable for a State to provide the jury with some framework for discharging these responsibilities."); *Lockett,* 438 U.S. at 604, 98 S.Ct. 2954 ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."); *Gregg,* 428 U.S. at 192–93, 96 S.Ct. 2909 ("The idea that a jury should be given guidance in its decisionmaking is also hardly a novel proposition.").

As explained in *Gregg,* "[w]here the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner." 428 U.S. at 195, 96 S.Ct. 2909. Without such safeguards, "[a] system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." *Id.* at 195 n. 46, 96 S.Ct. 2909. Much like the requirement that a jury make an individualized determination, the formal nature of the penalty phase under the FDPA preserves the constitutionality of the death penalty.

As with any decision that requires weighing factors—even factors that each objectively exist beyond a reasonable doubt—the proper weight itself can be difficult to decide. Is it really so surprising that some would weigh factors and answer "absolutely" and others would say "I think so?" And when the decision on the line is whether to take the life of another human, is it really too much to ask that the jury's answer be "yes, beyond a reasonable doubt," and not just "yes, I'm pretty sure?" *See Ring,* 536 U.S. at 589, 122 S.Ct. 2428 ("Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.").

***550 4. Sentencing Under 18 U.S.C. § 3553(a)**

The majority also compares § 3593(e) with § 3553(a), implying that today's decision may have an impact on sentencing under § 3553(a). As an initial matter, our ruling today cannot be incorrect merely because it may reveal potential problems with how courts have interpreted § 3553(a) to date. Our duty is to decide the case and controversy before us, not future cases or controversies that have not been presented to us. But more importantly, today's analysis is not likely to impact how courts apply § 3553(a) during noncapital sentencing, as § 3553(a) is distinguishable from § 3593(e) for purposes of *Apprendi.* The parsimony provision instructs the judge to impose a sentence no "greater than necessary" to achieve the remaining sentencing objectives listed in the statute. Unlike the weighing in § 3593(e), such a finding does not increase the statutory maximum; indeed, in many ways § 3553(a) is Congress restating the principle that the statutory maximum is the "maximum [the court] may impose *without* any additional findings." *Blakely,* 542 U.S. at 303–04, 124 S.Ct. 2531.

Furthermore, even if we could call it a factfinding, "[j]udicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments." *Harris v. United States,* 536 U.S. 545, 558, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002). "[N]othing in [our] history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute." *Apprendi,* 530 U.S. at 481, 120 S.Ct. 2348. The parsimony provision does not expand or contract the range prescribed by statute, but merely codifies these principles to reflect Congress's position on the extent of discretion federal district judges should have when imposing sentences within the permissible range. Given these critical distinctions, I cannot agree with the majority's conclusion that § 3553(a) and § 3593(e) are indistinguishable for the purposes of *Apprendi.*

II. VOIR DIRE

Gabrion argues that his Sixth and Fourteenth Amendment rights to an impartial jury were violated by the district court's biased exclusions of jurors for cause. Specifically, Gabrion outlines three ways in which these rights were violated: (1) the district court erred by excluding four jurors who leaned against the death penalty, (2) the district court erred by not having excluded three jurors who leaned in favor of the death penalty, and (3) the district court's exclusion and inclusion of these jurors resulted in a venire tilted toward capital punishment. The majority deems each of these arguments meritless in light of the broad discretion afforded to the district court when selecting a jury. Because I believe that the district court improperly excluded two jurors, which resulted in a venire tilted in favor of capital punishment, I cannot agree.

A. Exclusion of Anti–Death–Penalty Jurors

Gabrion argues that his death sentence is unconstitutional based on the exclusion of four death-qualified jurors who were improperly excluded from the venire: Abrahams, Donahey, Hemmeke, and Groves. The majority rejects this argument, highlighting the discretion a district court holds in selecting a jury. The voir-dire transcript demonstrates, however, that both Abrahams and Donahey each clearly stated multiple times that despite ***551** their personal misgivings about the death penalty, they would be able to follow the instructions of the district court and follow their oaths. This is all the law requires.

The government faces a significant burden when it wishes to remove a juror for cause, for its "power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." *Gray v. Mississippi,* 481 U.S. 648, 658, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987). When the government seeks to exclude a juror for bias, it "must demonstrate, through questioning, that the potential juror lacks impartiality. It is then the trial judge's duty to determine whether the challenge is proper." *Morgan v. Illinois,* 504 U.S. 719, 733, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) (internal quotation marks and emphasis omitted). Quite simply, I do not believe the government established a lack of impartiality here.

When a juror is excluded improperly for cause on the basis that she opposes the death penalty, the sentence of death is rendered unconstitutional. *Adams v. Texas,* 448 U.S. 38, 51, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980) ("Accordingly, the Constitution disentitles the State to execute a sentence of death imposed by a jury from which such prospective jurors have been excluded."). Because I believe that the district court erred in excluding Abrahams and Donahey, both of whom stated clearly that they could put their personal beliefs to the side in order to follow the instructions of the court, I would vacate Gabrion's sentence.

1. Abrahams

The district court explained its reasoning for excluding Abrahams as follows: "Well, I think there are two issues here. He can consider both.... Would he—not would he, could he impose either one? And when it says could he impose either one, on the government's question and on my question he said I don't know. Now he says he'll consider it." 2 Jury Trial 562:19–24. The district court then reasoned that although "normally I would say if he says I'll consider both of them, that's normally all right. But if it's preceded with I don't know if I could do it and then I ask him, Could you, and he says I don't know, I think it's grounds for excusal." *Id.* at 563:2–6. The district court coined this a "close question," but ultimately determined "it's grounds for excusal because of his hesitancy and the honesty with which he's approached it." *Id.* at 563:6–8.

As an initial matter, "[i]t is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *Lockhart v. McCree,* 476 U.S. 162, 176, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). "[I]t cannot be assumed that a juror who describes himself as having conscientious or religious scruples against the infliction of the death penalty or against its infliction in a proper case thereby affirms that he could never vote in favor of it or that he would not consider doing so in the case before him." *Witherspoon v. Illinois,* 391 U.S. 510, 515 n. 9, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)

(internal quotation marks and citation omitted); *see also id.* at 529, 88 S.Ct. 1770 (Douglas, J., concurring) ("Those with scruples against capital punishment can try the case according to the law and the evidence, because the law does not contain the inexorable command of an ***552** eye for an eye.") (internal quotation marks omitted).

Taken in context, Abrahams's hesitancy clearly relates to how he would weigh the aggravators and mitigators in order to reach an ultimate decision, not to whether he would be able to engage in such a task. And it is clear that the former does not reflect the sort of partiality that requires excusal for cause. Abrahams's hesitancy is first seen during the initial line of questioning:

> THE COURT: Could you do that if the instructions of this Court and the law dictated that?
>
> JUROR ABRAHAMS: Um, I believe on my questionnaire that I said that I would be fair in a judgment of the death sentence. But in the past couple of weeks I'm not really unclear, but I'm more unsure of if I could outweigh the sentence of life imprisonment over death or vice versa. It's just something that I've never had to deal with or—excuse me, so it's—
>
> THE COURT: Right. That can be appreciated. I think the inquiry at this point is if you made up your mind or if you would follow the facts and follow the law—
>
> JUROR ABRAHAMS: Yes.
>
> THE COURT: —and be able to fairly, impartially impose either one of them if the evidence and the law dictated that.
>
> JUROR ABRAHAMS: Yes, sir.

2 Jury Trial 554:3–19. Gabrion's attorney then asked Abrahams similar questions:

> MR. STEBBINS: ... Now, do you think you can consider these options at that point, listen to this evidence and fairly consider whether the death sentence is appropriate or a life sentence is appropriate?
>
> JUROR ABRAHAMS: At this point, yes, I do believe that I could.
>
> MR. STEBBINS: You could consider that?
>
> JUROR ABRAHAMS: I could consider it, yes.
>
> MR. STEBBINS: And you don't think anything in your thoughts you've had, these concerns you've had over the last couple of weeks will prevent you from making that determination?
>
> JUROR ABRAHAMS: I don't think it would prevent me, no, sir. It's just a consideration that I wish to be heard. That's all I had.

Id. at 560:6–20. When the district court reconvened its questioning, Abrahams did not waffle as to his ability to impose a death sentence, as described by the majority. Rather, Abrahams stated clearly for a third time that imposing the death sentence is something he "could seriously consider if the facts and circumstances were such that it was open for consideration." *Id.* at 561:6–9. Abrahams then repeated his earlier hesitancy as to which he would choose:

> That's what I'm trying to express, that I don't know for sure that I could go through the whole trial and, for instance, them prove him guilty and then go through the second part of the trial for sentencing, that I could say life imprisonment or death. I honestly don't know. That's the point that I was trying to get across. Very unsure of what I could say yes or no to, either way.

Id. at 561:15–22.[9] Here, Abrahams is not stating that a personal viewpoint would ***553** preclude him from finding that death is justified. Rather, he is expressing that he has no preconceived notion of how he would react to this unique process, and "neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty." *Adams,* 448 U.S. at 50, 100 S.Ct. 2521.

Concerning the statements to which the majority directs us—Abrahams's admission that his moral values would be on his mind while deliberating as to life or death —the Supreme Court has stated that the government cannot "exclude jurors whose only fault was to take their

responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected." *Id.* at 50–51, 100 S.Ct. 2521. If a juror states consistently that he would be able to apply the law to the facts notwithstanding his moral beliefs, he cannot be excluded for cause. Abrahams did not resist rehabilitation, as suggested by the majority; he simply continued to express hesitancy as to the great responsibility he would be undertaking as a juror, which has never been sufficient to require exclusion. The majority's stated reasons for upholding the district court's exclusion of Abrahams are thus contrary to binding authority and the plain language of the voir-dire transcript.

2. Donahey

The majority employs a similar approach with respect to Donahey, claiming that he equivocated and rendered ambiguous answers. However, I cannot agree. Donahey opposed the imposition of the death penalty on a personal level, yet was adamant in stating that he would temporarily yield these beliefs to fulfill his duty as a juror. When initially questioned by the court as to his moral views regarding the death penalty, Donahey responded as follows:

> THE COURT: No, I understand. And so the question comes down to whether you could impose it or whether you would find yourself unable to.
>
> JUROR DONAHEY: Okay. So I interpreted that as whether—I mean, if it was up to me.
>
> THE COURT: Oh, okay.
>
> JUROR DONAHEY: You know what I'm saying? That's the way I interpreted it. So you're saying that if all the factors came out in the mitigating, because the law says it's a possibility, could somebody find it. And I suppose, as personally distasteful as it would be, I would have to go with it.
>
> THE COURT: Which means?
>
> JUROR DONAHEY: I would follow what the law would tell me to do on that.

1 Jury Trial 93:18–94:7. Donahey thus falls squarely within the category of jurors described in *Lockhart* as being death-qualified—those who personally oppose the death penalty yet affirm their ability to put their views to the side in order to adhere to their oath as a juror. 476 U.S. at 176, 106 S.Ct. 1758.

The majority insists, however, that Donahey equivocated, pointing to a statement where he describes his *personal* views on the death penalty, as is made evident when placed in context:

> MR. DAVIS: In answering the question that was put to you by the questionnaire, you said that the death penalty was morally wrong.
>
> ***554** JUROR DONAHEY: Um-hum.
>
> MR. DAVIS: Could you explain that?
>
> JUROR DONAHEY: Well, as I expressed, if we're trying to have a society that says, you know, killing is wrong, yet we invoke that as a punishment, there seems to be something contradictory there. I mean, our laws and stuff are reflective of our morals, and then there's a contradiction there. And then particularly in the recent past there seems to be with now DNA testing more and more verdicts that have been overturned. People that have been sentenced to die were cleared eventually. And to take life because they took someone else's life, you know, somewhere down inside me, it just doesn't seem right, you know.
>
> So maybe when I say morally, maybe I could have expressed it a little better. But I wasn't looking at—you know, I was filling something out, you know, basically to get it done with and not writing some kind of, you know, paper on it, you know.

1 Jury Trial 94:16–95:11. [10] Later in the same colloquy, Donahey responded to a question that his views on the death penalty might interfere with his ability to make a judgment. *Id.* at 95:16–20. Donahey expanded on this answer in response to a question by Gabrion's attorney, stating that the decision "would be very difficult" but that he "could consider" the death penalty. *Id.* at 98:24–99:8.

The majority and the district court both contend that Donahey equivocated as to whether he could consider imposing a sentence of death. *Id.* at 100:21–24. My review of the voir-dire testimony, however, reveals no evidence of this purported equivocation. Donahey expressed that he personally opposed the death penalty, but stated that as a juror he would follow the instructions of the court,

"as personally distasteful as it would be." *Id.* at 94:2–3.[11] Moreover, as evidenced by the above-quoted testimony, the district court's statement that Donahey "was unable to say that he would be able to" consider the death penalty is plainly incorrect. *Id.* at 101:1–2.

Additionally, I find it contradictory for the majority to disregard Donahey's statement that he would be able to consider imposing the death sentence because "that answer came in response to a leading question," yet rely heavily on "a leading question from the prosecutor, that his views about the death penalty 'might' interfere with his 'ability to make a judgment as to sentencing.' " Maj. Op. at 528. Finally, I am unclear as to why any purported ***555** ambiguity in Donahey's testimony should play a role in the analysis, given that this was not a reason proffered by the district court for excluding Donahey. The majority does not explain why this should be considered by this court, nor does it explain how Donahey's testimony was in fact ambiguous. Ultimately, Donahey was improperly excluded by the district court as a result of his personal opposition to the death penalty.

3. Groves

Although I agree with the majority that the first two reasons given by the district court were sufficient to exclude Groves, I do not agree with the district court's insinuation that Groves could have been excluded based on his view that the death penalty should be reserved for extreme cases, such as those involving mass murders. 2 Jury Trial 385:1–2. The Supreme Court has stated expressly that jurors "cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment." *Witherspoon,* 391 U.S. at 522 n. 21, 88 S.Ct. 1770; *see also Gregg,* 428 U.S. at 182, 96 S.Ct. 2909 ("Rather, the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases."). This is because "a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him." *Id.*

B. Venire Tilted in Favor of Capital Punishment

Contrary to the majority's assertion, Gabrion has identified a constitutional basis for his claim that the jury-selection process was lopsided: "a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause." *Uttecht v. Brown,* 551 U.S. 1, 9, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007). Because the district court improperly excluded jurors based on their personal beliefs on the death penalty, I believe the venire in Gabrion's case was tilted in favor of capital punishment. I would vacate Gabrion's death sentence on this ground for the reasons stated above.

III. CONCLUSION

For all of these reasons, I respectfully dissent. I would vacate Gabrion's sentence of death and remand for a new penalty hearing.

All Citations

719 F.3d 511

Footnotes

1 The majority references the correct standard at one point in its opinion, yet bases its analysis wholly on the moral-culpability and character-of-the-defendant factors.

2 The Seventh Circuit's opinion in *United States v. Johnson,* 223 F.3d 665 (7th Cir.2000), is not instructive. Gabrion did not seek to introduce evidence that the death penalty is immoral. He sought to introduce evidence relating to an element of the offense of which he was convicted. In other words, Gabrion sought to proffer evidence supporting an argument "against sentencing *this* defendant to death." *Id.* at 675. Additionally, insofar as the majority assumes Gabrion's evidence can be presented only in generalities, the Supreme Court has explained that although "[i]t might seem, then, that [certain types of evidence] apply to every eligible defendant[,] ... that cannot be correct." *Jones v. United States,* 527 U.S. 373, 401, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999). As applied to the context of victim-impact statements, the Supreme Court stated that "[e]ven though the *concepts* of victim impact and victim vulnerability may well be relevant in every case,

evidence of victim vulnerability and victim impact in a particular case is inherently individualized." *Id.* The same is true of the evidence Gabrion sought to present relating to the location of the offense.

3 The majority's citations to cases that discuss the moral culpability of the defendant are unpersuasive. As an initial matter, it is unsurprising that the Supreme Court has made statements regarding the significance of moral culpability in mitigation; it is, after all, one of the categories that the Supreme Court itself has outlined. What the majority here continues to disregard, however, is that "circumstances of the offense" is also a category incorporated by the Supreme Court. In fact, *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), a case cited by the majority, expressly includes this category: "[T]he Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense." *Id.* at 317, 109 S.Ct. 2934 (internal quotation marks omitted).

Moreover, I must point out that the majority's reliance on *Tennard* and *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), for the proposition that mitigation is only a moral concept is misplaced. In *Enmund,* the Supreme Court discussed the personal culpability of the defendant in the context of the imposition of the death penalty on a non-triggerman, not as a general matter. 458 U.S. at 797–801, 102 S.Ct. 3368. With respect to *Tennard,* the majority omits the surrounding text of the sentence that it quotes. When read in context, the paragraph clearly establishes the inclusive nature of the mitigation standard. It does not prohibit admission of the circumstances of the crime, as the majority's selective quotation insinuates. The entirety of the cited paragraph states as follows:

> We have never denied that gravity has a place in the relevance analysis, insofar as evidence of *a trivial feature* of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability. However, to say that only those features and circumstances that a panel of federal appellate judges deems to be severe (let alone uniquely severe) could have such a tendency is incorrect. Rather, the question is simply whether the evidence is of such a character that it might serve as a basis for a sentence less than death.

Tennard, 542 U.S. at 286–87, 124 S.Ct. 2562 (internal quotation marks and citations omitted) (emphasis added).

4 The result of the majority's analysis is to exclude from the penalty phase evidence that was presented during the guilt phase. However, the bifurcated nature of a capital trial was not established in order to restrict the jury's consideration of evidence related to the circumstances of the offense. Rather, it was created in order to enable the jury to consider more information about the defendant than that which would be admissible when determining the question of guilt: "When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman.*" *Gregg,* 428 U.S. at 191–92, 96 S.Ct. 2909.

5 The majority's comparison of an element of the offense to the "moonphase that day" underscores its unwillingness to engage in a meaningful analysis of the third category the Supreme Court has outlined as mitigation—circumstances of the offense. The majority's comparison of the location of the body to the moonphase that day is apt in one respect, however. During the guilt phase, the jury, too, was likely to have regarded the disputes over where Timmerman died and whether she was asphyxiated or drowned as no more relevant to the question of Gabrion's guilt than the moonphase that day. Jurors convinced beyond a reasonable doubt that a defendant has murdered in cold blood are highly unlikely to then find the defendant not guilty based on doubts as to the location of the murder or the manner of death. In the face of overwhelming evidence that Gabrion murdered Timmerman, the jurors likely spent little time focusing on the seemingly irrelevant question whether the murder took place on federal lands or the degree to which they were convinced of that morally irrelevant fact. But, having rendered a guilty verdict, and then turning to the question whether Gabrion should receive the death penalty, some jurors might have viewed the morally irrelevant issue of the location of the murder as having new significance, far more relevant than the moonphase that day, had they been informed that the location was the single factor that made the murder a federal crime, thereby exposing Gabrion to the death penalty, which would not have been an option had the murder been committed 227 feet to the north.

6 I agree with Gabrion that the government's suggestion that Gabrion's counsel could have made this argument anyway is absurd in light of the district court's ruling specifically prohibiting this testimony. *See* Supplemental Appellee Br. on Reh'g at 21–22; Supplemental Reply Br. on Reh'g at 12.

7 Everyone agrees that § 3593(e) itself states no burden of persuasion on this issue. Some state statutes, however, do explicitly provide that the jury must find that the aggravators must outweigh the mitigators beyond a reasonable doubt. *Gabrion,* 648 F.3d at 326 (6th Cir.2011).

8 The six circuit courts to have addressed this issue thus far mirror the majority's approach and are also lacking in any statutory analysis. *See Runyon,* 707 F.3d at 516; *United States v. Fields,* 516 F.3d 923, 950 (10th Cir.2008); *United States v. Mitchell,* 502 F.3d 931, 993–94 (9th Cir.2007), *cert. denied,* 553 U.S. 1094, 128 S.Ct. 2902, 171 L.Ed.2d 843

(2008); *United States v. Sampson,* 486 F.3d 13, 32 (1st Cir.2007); *United States v. Fields,* 483 F.3d 313, 345–46 (5th Cir.2007), *cert. denied,* 552 U.S. 1144, 128 S.Ct. 1065, 169 L.Ed.2d 814 (2008); *United States v. Purkey,* 428 F.3d 738, 750 (8th Cir.2005).

9 It is important to note that unlike with juror Groves, whose exclusion Gabrion also challenges, the district court did not make note of any nonverbal indications that Abrahams would be unable to consider imposing a sentence of death. When giving his reasoning regarding Groves, the district court stated "I think in the context of his saying, Yes, I could consider it, and he winces and bobs and weaves a little bit when he does that, I think he's really not qualified." 2 Jury Trial 385:4–7.

10 It is clear from the transcript that Donahey was confused by the wording of this question on the questionnaire. In both passages, Donahey explains his initial confusion when he filled out the questionnaire, as he thought it was asking about his personal beliefs. Once the judge clarified that the critical issue is whether he could follow his oath despite those beliefs, Donahey stated clearly that he would be able to follow instructions and place his personal beliefs aside. The selective quotations cited by the majority do not reflect this dynamic of Donahey's voir dire.

11 Comparing Donahey's statements with those made by Hemmeke, another juror whose exclusion Gabrion challenges, is instructive. Unlike Donahey, Hemmeke responded on his questionnaire that he "could never, regardless of the facts and circumstances, return a verdict which imposed the death penalty." 2 Jury Trial 509:24–510:1. Further contrary to Donahey, Hemmeke answered the district court's initial inquiry as to whether he could consider imposing a sentence of death by stating, "I'm pretty set in the no death penalty." *Id.* at 511:1. These kinds of statements, that go to one's ability to consider imposing the death penalty, differ vastly from those made by Donahey, who established that although he personally opposed capital punishment, he would put those views aside for the purposes of deliberations.

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds People v. LaValle, N.Y., June 24, 2004

119 S.Ct. 2090
Supreme Court of the United States

Louis JONES, Petitioner,
v.
UNITED STATES.

No. 97–9361.
|
Argued Feb. 22, 1999.
|
Decided June 21, 1999.
|
Rehearing Denied Aug. 23, 1999.
See 527 U.S. 1058, 120 S.Ct. 22.

Defendant was convicted in the United States District Court for the Northern District of Texas, Sam R. Cummings, J., of kidnapping with death resulting, and was sentenced to death. Defendant appealed, and the Court of Appeals for the Fifth Circuit affirmed, 132 F.3d 232. Certiorari was granted, and the Supreme Court, Justice Thomas, held that: (1) under Federal Death Penalty Act, jury's failure to reach unanimous verdict recommending either death sentence, or life imprisonment without possibility of release, does not create "good cause" for discharge of jury, as will require court to impanel a second jury; (2) Eighth Amendment did not require that jury be instructed as to consequences of their failure to agree on verdict; (3) instructions to which defendant failed to raise timely objection would be reviewed for plain error; (4) instructions did not impermissibly lead jurors to believe that defendant would receive lesser sentence if they did not unanimously recommend death or life without release; and (5) any error in allowing jury to consider allegedly vague, overbroad, and duplicative nonstatutory aggravating factors was harmless.

Affirmed.

Justice Ginsburg dissented and filed an opinion in which Justice Stevens and Justice Souter joined, and in which Justice Breyer joined in part.

West Headnotes (36)

[1] **Criminal Law**
Assent of required number of jurors
Sentencing and Punishment
Necessity for new jury

Failure of jury which sits during guilt phase of capital trial under Federal Death Penalty Act to reach unanimous verdict recommending either death sentence, or life imprisonment without possibility of release, does not create "good cause" for discharge of jury, as will require court to impanel a second jury and hold a second sentencing hearing; while "good cause" encompasses events such as juror disqualification, it cannot be read so expansively as to include a jury's deadlock. 18 U.S.C.A. § 3593(b)(2)(C).

16 Cases that cite this headnote

[2] **Criminal Law**
Assent of required number of jurors
Sentencing and Punishment
Unanimity

Under Federal Death Penalty Act, whenever jury reaches a result other than a unanimous verdict recommending a death sentence, or life imprisonment without the possibility of release, during sentencing hearing, duty of sentencing falls upon district court. 18 U.S.C.A. §§ 3593(b)(2)(C), (e), 3594.

9 Cases that cite this headnote

[3] **Criminal Law**
Matters of law in general
Sentencing and Punishment
Instructions

Eighth Amendment prohibition of cruel and unusual punishment does not require that jury be instructed as to consequences of their failure to agree on verdict in capital trial. U.S.C.A. Const.Amend. 8.

30 Cases that cite this headnote

[4] **Sentencing and Punishment**
Avoidance of arbitrariness or capriciousness

Eighth Amendment prohibition of cruel and unusual punishment requires that a sentence of death not be imposed arbitrarily. U.S.C.A. Const.Amend. 8.

6 Cases that cite this headnote

[5] **Sentencing and Punishment**
Individualized determination

Sentencing and Punishment
Narrowing class of eligible offenders

In order for a capital sentencing scheme to pass constitutional muster under Eighth Amendment, it must perform a narrowing function with respect to the class of persons eligible for the death penalty, and must also ensure that capital sentencing decisions rest upon an individualized inquiry. U.S.C.A. Const.Amend. 8.

16 Cases that cite this headnote

[6] **Sentencing and Punishment**
Evidence in mitigation in general

In order to satisfy Eighth Amendment requirement that capital sentencing decisions rest upon an individualized inquiry, scheme governing "selection phase," in which jury decides whether death-eligible defendant will receive death penalty, must allow a broad inquiry into all constitutionally relevant mitigating evidence. U.S.C.A. Const.Amend. 8.

26 Cases that cite this headnote

[7] **Sentencing and Punishment**
Matters Related to Jury

Eighth Amendment prohibits jury from being affirmatively misled regarding its role in capital sentencing process. U.S.C.A. Const.Amend. 8.

10 Cases that cite this headnote

[8] **Criminal Law**
Matters of law in general

Sentencing and Punishment
Instructions

Failure to instruct jury as to consequences of deadlock during sentencing hearing held pursuant to Federal Death Penalty Act did not affirmatively mislead jury regarding its role in sentencing process, as would violate Eighth Amendment's prohibition on cruel and unusual punishment. U.S.C.A. Const.Amend. 8; 18 U.S.C.A. § 3593.

54 Cases that cite this headnote

[9] **Sentencing and Punishment**
Instructions

Eighth Amendment prohibition of cruel and unusual punishment does not require a jury be instructed as to the consequences of a breakdown in the deliberative process. U.S.C.A. Const.Amend. 8.

11 Cases that cite this headnote

[10] **Criminal Law**
Assent of required number of jurors

The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.

7 Cases that cite this headnote

[11] **Sentencing and Punishment**
Matters Related to Jury

In a capital sentencing proceeding, Government has a strong interest in having the jury express the conscience of the community on the ultimate question of life or death.

17 Cases that cite this headnote

[12] **Criminal Law**
Matters of law in general

No requirement exists that instruction on the consequences of jury deadlock be given in every capital case under Federal Death Penalty Act. 18 U.S.C.A. §3593.

13 Cases that cite this headnote

[13] **Criminal Law**
Time for, and form of, objection

Criminal Law
Necessity of specific objection

A party generally may not assign error to a jury instruction if he fails to object before the jury retires, or to state distinctly the matter to which he objects and the grounds of the objection. Fed.Rules Cr.Proc.Rule 30, 18 U.S.C.A.

6 Cases that cite this headnote

[14] **Criminal Law**
Time for, and form of, objection

Criminal Law
Necessity of specific objection

Timeliness and specificity requirements for preservation of alleged error in jury instructions in proceeding under Federal Death Penalty Act apply during sentencing phase as well as trial. 18 U.S.C.A. § 3595(c)(2)(C); Fed.Rules Cr.Proc.Rules 1, 54(a), 18 U.S.C.A.

8 Cases that cite this headnote

[15] **Criminal Law**
Time for, and form of, objection

Criminal Law
Necessity of specific objection

Timeliness and specificity requirements for preservation of objections to jury instructions enable a trial court to correct any instructional mistakes before the jury retires, and in that way help to avoid the burdens of an unnecessary retrial. Fed.Rules Cr.Proc.Rule 30, 18 U.S.C.A.

9 Cases that cite this headnote

[16] **Criminal Law**
Time for, and form of, objection

Criminal Law
Sufficiency and Scope of Motion

While an objection in a directed verdict motion before the jury retires can preserve a claim of error in jury instructions, objections raised after the jury has completed its deliberations do not. Fed.Rules Cr.Proc.Rule 30, 18 U.S.C.A.

7 Cases that cite this headnote

[17] **Criminal Law**
Plain or fundamental error

Provision of Federal Death Penalty Act under which appellate court shall remand a case if it finds that death sentence was imposed under influence of passion, prejudice, or any other arbitrary factor does not create exception to rule under which unpreserved objections to jury instructions may be reviewed only for plain error. 18 U.S.C.A. § 3595(c)(2)(A); Fed.Rules Cr.Proc.Rules 30, 52(b), 18 U.S.C.A.

94 Cases that cite this headnote

[18] **Criminal Law**
Time for, and form of, objection

Objections to jury instructions which defendant failed to raise before jury retired in proceeding under Federal Death Penalty Act would be reviewed only for plain error. 18 U.S.C.A. § 3595; Fed.Rules Cr.Proc.Rules 30, 52(b), 18 U.S.C.A.

17 Cases that cite this headnote

[19] **Statutes**
Context

Statutory language must be read in context, and a phrase gathers meaning from the words around it.

21 Cases that cite this headnote

[20] **Sentencing and Punishment**
Presentation and reservation in lower court of grounds of review

In enacting Federal Death Penalty Act, Congress sought to impose a timely objection requirement at sentencing, and did not intend to equate with legal error the phrase "arbitrary factor," as used in provision under which appellate court shall remand a case if it finds that death sentence was imposed under influence of passion, prejudice, or any other arbitrary factor, with legal error. 18 U.S.C.A. § 3595(c)(2)(A).

7 Cases that cite this headnote

[21] **Criminal Law**
Necessity of Objections in General

Under plain error standard of review, relief is not warranted unless there has been (1) error (2) that is plain, and (3) affects substantial rights. Fed.Rules Cr.Proc.Rule 52(b), 28 U.S.C.A.

47 Cases that cite this headnote

[22] **Criminal Law**
Necessity of Objections in General

Appellate review under plain error doctrine is circumscribed, and court will exercise its power under rule governing plain error review sparingly. Fed.Rules Cr.Proc.Rule 52(b), 28 U.S.C.A.

22 Cases that cite this headnote

[23] **Criminal Law**
Necessity of Objections in General

Appellate court should exercise its discretion to correct plain error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. Fed.Rules Cr.Proc.Rule 52(b), 28 U.S.C.A.

56 Cases that cite this headnote

[24] **Criminal Law**
Instructions in general

Proper standard for reviewing claim that instruction caused impermissible jury confusion is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates Federal Constitution.

35 Cases that cite this headnote

[25] **Criminal Law**
Construction and Effect of Charge as a Whole

Instruction in proceeding under Federal Death Penalty Act that if jurors recommended imposition of lesser sentence than death sentence, or sentence of life imprisonment without release, court would be required to impose a sentence authorized by law, did not impermissibly lead jurors to believe that defendant would receive lesser sentence if jury failed to unanimously recommend sentence of death or life imprisonment without release, when read alongside unambiguous charge that any sentencing recommendation be unanimous, and other instructions explicitly identifying when jury need not be unanimous. 18 U.S.C.A. § 3591 et seq.

12 Cases that cite this headnote

[26] **Criminal Law**
Construction and Effect of Charge as a Whole

Jury instructions must be evaluated not in isolation, but in the context of the entire charge.

70 Cases that cite this headnote

[27] **Criminal Law**

Error in Instructions Cured by Withdrawal or Giving Other Instructions

Instructions that might be ambiguous in the abstract can be cured when read in conjunction with other instructions.

14 Cases that cite this headnote

[28] **Criminal Law**

Construction and Effect of Charge as a Whole

Ambiguity and confusion allegedly created in proceeding under Federal Death Penalty Act by fact that decision form for lesser sentence recommendation did not contain phrase "by unanimous vote," while decision forms for recommendations of death sentence and life imprisonment without possibility of release did require unanimity, was cured when considered in light of entire jury instruction, which explicitly stated that jury had to be unanimous, and exhorted it to discuss punishment and reach agreement. 18 U.S.C.A. § 3591 et seq.

70 Cases that cite this headnote

[29] **Criminal Law**

Form of verdict

Fact that decision form for lesser sentence recommendation in proceeding under Federal Death Penalty Act required only jury foreperson's signature, unlike forms for recommendations of death sentence and life imprisonment without possibility of release, did not create reasonable likelihood of confusion over effect of juror nonunanimity, where lesser sentence form used phrase "We the jury recommend," like other forms, and thus signaled that form represented jury's recommendation, and foreperson alone signed verdict forms to indicate jury's agreement. 18 U.S.C.A. § 3591 et seq.

1 Cases that cite this headnote

[30] **Federal Courts**

Presentation of Questions Below or on Review;Record;Waiver

Supreme Court would decline to review ruling by Court of Appeals that affidavits prepared after jury had returned its sentencing recommendation in capital murder case could not be relied upon to undermine recommendation, where issue was not raised in any of questions presented by petitioner, or fairly included with them. U.S.Sup.Ct.Rule, 14.1(a), 28 U.S.C.A.

3 Cases that cite this headnote

[31] **Criminal Law**

Particular Instructions

Any error in trial court's instructions regarding jury unanimity in proceeding under Federal Death Penalty Act, which allegedly led jury to erroneous belief that it did not have to unanimously recommend lesser sentence if it declined to recommend sentence of death or life imprisonment without release, did not affect defendant's substantial rights, and thus could not provide basis for relief under plain error standard of review, where any confusion was allayed by court's admonition that jury should not concern itself with effect of such a recommendation, and nothing indicated that any confusion worked to defendant's detriment. 18 U.S.C.A. § 3591 et seq.; Fed.Rules Cr.Proc.Rule 52(b), 18 U.S.C.A.

53 Cases that cite this headnote

[32] **Criminal Law**

Custody and conduct of jury

Jurors are presumed to have followed instructions.

26 Cases that cite this headnote

[33] **Criminal Law**

Necessity of Objections in General

Where it is uncertain whether effect of alleged error actually worked to detriment of defendant, defendant cannot meet burden of showing that the error actually affected

his substantial rights, as required to obtain relief under plain error standard. Fed.Rules Cr.Proc.Rule 52(b), 28 U.S.C.A.

61 Cases that cite this headnote

[34] **Sentencing and Punishment**
⇦ Dual use of evidence or aggravating factor
Sentencing and Punishment
⇦ Vulnerability
Sentencing and Punishment
⇦ Victim's family status

Nonstatutory aggravating factors setting forth victim impact evidence, and victim vulnerability evidence, which were considered and found by jury in prosecution under Federal Death Penalty Act, were not impermissibly vague, overbroad, and duplicative, as would violate Eighth Amendment's prohibition on cruel and unusual punishment. (Per Justice Thomas, with three Justices concurring.) U.S.C.A. Const.Amend. 8; 18 U.S.C.A. § 3591 et seq.

72 Cases that cite this headnote

[35] **Sentencing and Punishment**
⇦ Harmless and reversible error

Any error in allowing jury to consider allegedly vague, overbroad, and duplicative nonstatutory aggravating factors of victim impact evidence, and victim vulnerability evidence, during sentencing hearing in proceeding under Federal Death Penalty Act was harmless; had factors been clearly defined, jury surely would have reached the same recommendation, and Government's argument to jury cured nonstatutory factors of any infirmity as written. U.S.C.A. Const.Amend. 8; 18 U.S.C.A. § 3591 et seq.

79 Cases that cite this headnote

[36] **Sentencing and Punishment**
⇦ Harmless and reversible error

Harmless error review of a death sentence imposed after invalid aggravating factor was considered may be performed in at least two different ways: appellate court may choose to consider whether, absent an invalid factor, the jury would have reached the same verdict, or it may choose instead to consider whether the result would have been the same had the invalid aggravating factor been precisely defined.

44 Cases that cite this headnote

****2094 *373** *Syllabus* *

Petitioner was sentenced to death for the crime of kidnaping resulting in the victim's death. Petitioner's sentence was imposed pursuant to the Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 *et seq.* At the sentencing hearing, the District Court instructed the jury and provided it with four decision forms on which to record its sentencing recommendation. The court refused petitioner's request to instruct the jury as to the consequences of jury deadlock. The jury unanimously recommended that petitioner be sentenced to death. The District Court imposed sentence in accordance with the jury's recommendation, and the Fifth Circuit affirmed.

Held: The judgment is affirmed.

132 F.3d 232, affirmed.

Justice THOMAS delivered the opinion of the Court with respect to Parts I, II, and III–B, concluding:

1. The Eighth Amendment does not require that a jury be instructed as to the consequences of their failure to agree. Pp. 2097–2100.

(a) As petitioner argues, the Federal Death Penalty Act requires judge sentencing when the jury, after retiring for deliberations, reports itself as unable to reach a unanimous verdict. In such a case, the sentencing duty falls upon the District Court pursuant to 18 U.S.C. § 3594. Pp. 2097–2098.

(b) The Eighth Amendment, however, does not require that a jury be instructed as to the consequences of a breakdown in the deliberative process. Such an instruction

has no bearing on the jury's role in the sentencing process. Moreover, the jury system's very object is to secure unanimity, and the Government has a strong interest in having the jury express the conscience of the community on the ultimate life or death question. A charge of the sort petitioner suggests might well undermine this strong governmental interest. In addition, Congress chose not to require such an instruction be given. The Court declines to invoke its supervisory powers over the federal courts and require that such an instruction be given in every capital case in these circumstances. Pp. 2098–2100.

**2095 2. There is no reasonable likelihood that the jury was led to believe that petitioner would receive a court-imposed sentence less than life *374 imprisonment in the event they could not recommend unanimously a sentence of death or life imprisonment without the possibility of release. Pp. 2100–2105.

(a) Petitioner claims that the instruction pertaining to the jury's sentencing recommendation, in combination with the Decision Forms, led to confusion warranting reversal of his sentence under the Due Process Clause, the Eighth Amendment, and the Act. Because petitioner did not voice the objections that he now raises before the jury retired, see Fed. Rule Crim. Proc. 30, his claim of error is subject to a limited appellate review for plain error, *e.g., Johnson v. United States,* 520 U.S. 461, 465–466, 117 S.Ct. 1544, 137 L.Ed.2d 718. Pp. 2100–2102.

(b) Under that review, relief is not warranted unless there has been (1) error, (2) that is plain, and (3) affects substantial rights. Petitioner's argument falls short of satisfying even the first requirement, for no error occurred. The proper standard for reviewing claims that allegedly ambiguous instructions caused jury confusion is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution. There is no such likelihood here. The District Court gave no explicit instructions on the consequences of nonunanimity; and the passages that petitioner argues led to jury confusion, when viewed in the context of the entire instructions, lack any ambiguity. Nor did the Decision Forms or their accompanying instructions create a reasonable likelihood of confusion over the effect of nonunanimity. The District Court's explicit instruction that the jury had to be unanimous and its exhortation to the jury to discuss the punishment and to attempt to reach agreement make it doubtful that the jury thought it was compelled to recommend a lesser sentence in the event of a disagreement. Even assuming, *arguendo,* that a plain error occurred, petitioner cannot show that it affected his substantial rights. The District Court admonished the jury not to concern itself with the effect of a lesser sentence recommendation. Moreover, assuming that the jurors were confused over the consequences of deadlock, petitioner cannot show the confusion necessarily worked to his detriment. It is just as likely that the jurors, loathe to recommend a lesser sentence, would have compromised on a life imprisonment sentence as on a death sentence. Cf. *Romano v. Oklahoma,* 512 U.S. 1, 14, 114 S.Ct. 2004, 129 L.Ed.2d 1. Pp. 2102–2105.

3. Assuming, *arguendo,* that the District Court erred in allowing the jury to consider nonstatutory aggravating factors that were vague, overbroad, or duplicative in violation of the Eighth Amendment, such error was harmless beyond a reasonable doubt. An appellate court may conduct harmless-error review by considering either whether absent an invalid factor, the jury would have reached the same verdict or whether the result would have been the same had the invalid aggravating *375 factor been precisely defined. See *Clemons v. Mississippi,* 494 U.S. 738, 753–754, 110 S.Ct. 1441, 108 L.Ed.2d 725. The Fifth Circuit performed the first sort of analysis, and its explanation appears sufficient. Even if its analysis was too perfunctory, it is plain, under the alternative mode of harmless-error analysis, that the error indeed was harmless. Had the nonstatutory aggravating factors been precisely defined in writing, the jury would have reached the same recommendation as it did. The Government's argument to the jury cured the factors of any infirmity as written. Pp. 2108–2110.

THOMAS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–B, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined, and an opinion with respect to Part III–A, in which REHNQUIST, C. J., and O'CONNOR and KENNEDY, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which STEVENS and SOUTER, JJ., joined, and in which BREYER, J., joined as to Parts I, II, III, and V, *post,* p. 2110.

Attorneys and Law Firms

Timothy Crooks, Fort Worth, TX, for petitioner.

**2096 Michael R. Dreeben, Washington, DC, for respondent.

Opinion

Justice THOMAS delivered the opinion of the Court, except as to Part III–A. †

Petitioner was sentenced to death for committing a kidnaping resulting in death to the victim. His sentence was imposed under the Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 *et seq.* (1994 ed. and Supp. III). We are presented with three questions: whether petitioner was entitled to an instruction as to the effect of jury deadlock; whether there is a reasonable likelihood that the jury was led to believe that petitioner would receive a court-imposed sentence *376 less than life imprisonment in the event that they could not reach a unanimous sentence recommendation; and whether the submission to the jury of two allegedly duplicative, vague, and overbroad nonstatutory aggravating factors was harmless error. We answer "no" to the first two questions. As for the third, we are of the view that there was no error in allowing the jury to consider the challenged factors. Assuming error, *arguendo,* we think it clear that such error was harmless.

I

Petitioner Louis Jones, Jr., kidnaped Private Tracie Joy McBride at gunpoint from the Goodfellow Air Force Base in San Angelo, Texas. He brought her to his house and sexually assaulted her. Soon thereafter, petitioner drove Private McBride to a bridge just outside of San Angelo, where he repeatedly struck her in the head with a tire iron until she died. Petitioner administered blows of such severe force that, when the victim's body was found, the medical examiners observed that large pieces of her skull had been driven into her cranial cavity or were missing.

The Government charged petitioner with, *inter alia,* kidnaping with death resulting to the victim, in violation of 18 U.S.C. § 1201(a)(2), an offense punishable by life imprisonment or death. Exercising its discretion under the Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 *et seq.*, the Government decided to seek the latter sentencing option. Petitioner was tried in the District Court for the Northern District of Texas and found guilty by the jury.

The District Court then conducted a separate sentencing hearing pursuant to § 3593. As an initial matter, the sentencing jury was required to find that petitioner had the requisite intent, see § 3591(a)(2); it concluded that petitioner intentionally killed his victim and intentionally inflicted serious bodily injury resulting in her death. Even on a finding of intent, however, a defendant is not death eligible unless the sentencing jury also finds that the Government *377 has proved beyond a reasonable doubt at least one of the statutory aggravating factors set forth at § 3592. See § 3593(e). Because petitioner was charged with committing a homicide, the Government had to prove 1 of the 16 statutory aggravating factors set forth at 18 U.S.C. § 3592(c) (1994 ed. and Supp. III) (different statutory aggravating factors for other crimes punishable by death are set forth at §§ 3592(b), (d)). The jury unanimously found that two such factors had been proved beyond a reasonable doubt—it agreed that petitioner caused the death of his victim during the commission of another crime, see § 3592(c)(1), and that he committed the offense in an especially heinous, cruel, and depraved manner, see § 3592(c)(6). [1]

**2097 Once petitioner became death eligible, the jury had to decide whether he should receive a death sentence. In making the selection decision, the Act requires that the sentencing jury consider all of the aggravating and mitigating factors and determine whether the former outweigh the latter (or, if there are no mitigating factors, whether the aggravating factors alone are sufficient to warrant a death sentence). §§ 3591(a), 3592, 3593(e). The Act, however, requires more exacting proof of aggravating factors than mitigating ones—although a jury must unanimously agree that the Government established the existence of an aggravating factor beyond a reasonable doubt, § 3593(c), the jury may consider a mitigating factor in its weighing process so long as one juror finds that the defendant established its existence by preponderance of the evidence, §§ 3593(c), (d). In addition to the *378 two statutory aggravators that established petitioner's death eligibility, the jury also unanimously found two aggravators of the nonstatutory variety [2] had been proved: One set forth victim impact evidence and the other victim vulnerability evidence. [3] As for mitigating

factors, at least one juror found 10 of the 11 that petitioner proposed and seven jurors wrote in a factor petitioner had not raised on the Special Findings Form. [4]

*379 After weighing the aggravating and mitigating factors, the jury unanimously recommended that petitioner be sentenced to death. App. 57–58. The District Court imposed sentence in accordance with the jury's recommendation pursuant to § 3594. The United States Court of Appeals for the Fifth Circuit affirmed the sentence. 132 F.3d 232 (1998). We granted certiorari, 525 U.S. 809, 119 S.Ct. 39, 142 L.Ed.2d 31 (1998), and now affirm.

II

A

We first decide the question whether petitioner was entitled to an instruction as to the consequences of jury deadlock. Petitioner requested, in relevant part, the following instruction:

> "In the event, after due deliberation and reflection, the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I **2098 will impose a sentence of life imprisonment without possibility of release....
>
> "In the event you are unable to agree on [a sentence of] Life Without Possibility of Release or Death, but you are unanimous that the sentence should not be less than Life Without Possibility of Release, you should report that vote to the Court and the Court will sentence the defendant to Life Without the Possibility of Release." App. 14–15.

*380 In petitioner's view, the Eighth Amendment requires that the jurors be instructed as to the effect of their inability to agree. He alternatively argues that we should invoke our supervisory power over the federal courts and require that such an instruction be given.

[1] Before we turn to petitioner's Eighth Amendment argument, a question of statutory interpretation calls for our attention. The Fifth Circuit held that the District Court did not err in refusing petitioner's requested instruction because it was not substantively correct. See 132 F.3d, at 242–243. According to the Court of Appeals, § 3593(b)(2)(C), which provides that a new jury shall be impaneled for a new sentencing hearing if the guilt phase jury is discharged for "good cause," requires the District Court to impanel a second jury and hold a second sentencing hearing in the event of jury deadlock. *Id.,* at 243. The Government interprets the statute the same way (although its reading is more nuanced) and urges that the judgment below be affirmed on this ground.

[2] Petitioner, however, reads the Act differently. In his view, whenever the jury reaches a result other than a unanimous verdict recommending a death sentence or life imprisonment without the possibility of release, the duty of sentencing falls upon the district court pursuant to § 3594, which reads:

> "Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. Otherwise, the court shall impose any lesser sentence that is authorized by law. Notwithstanding any other law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release."

*381 Petitioner's argument is based on his construction of the term "[o]therwise." He argues that this term means that when the jury, after retiring for deliberations, reports itself as unable to reach a unanimous verdict, the sentencing determination passes to the court.

[3] As the dissent also concludes, *post,* at 2116, petitioner's view of the statute is the better one. The phrase "good cause" in § 3593(b)(2)(C) plainly encompasses events such as juror disqualification, but cannot be read so expansively as to include the jury's failure to reach a unanimous decision. Nevertheless, the Eighth Amendment does not require that the jurors be instructed as to the consequences of their failure to agree.

[4] [5] [6] To be sure, we have said that the Eighth Amendment requires that a sentence of death not be imposed arbitrarily. See, *e.g., Buchanan v. Angelone,*

522 U.S. 269, 275, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998). In order for a capital sentencing scheme to pass constitutional muster, it must perform a narrowing function with respect to the class of persons eligible for the death penalty and must also ensure that capital sentencing decisions rest upon an individualized inquiry. *Ibid.* The instruction that petitioner requested has no bearing on what we have called the "eligibility phase" of the capital sentencing process. As for what we have called the "selection phase," our cases have held that in order to satisfy the requirement that capital sentencing decisions rest upon an individualized inquiry, a scheme must allow a "broad inquiry" into all "constitutionally relevant mitigating evidence." *Id.*, at 276, 118 S.Ct. 757. Petitioner does not argue, nor could he, that the District Court's failure to give the requested instruction prevented the jury from considering such evidence.

[7] [8] [9] [10] [11] In theory, the District Court's failure to instruct the jury as to the consequences of deadlock could give rise to an Eighth Amendment problem of a different ****2099** sort: We also have held that a jury cannot be "affirmatively misled regarding its ***382** role in the sentencing process." *Romano v. Oklahoma,* 512 U.S. 1, 9, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994). In no way, however, was the jury affirmatively misled by the District Court's refusal to give petitioner's proposed instruction. The truth of the matter is that the proposed instruction has no bearing on the jury's role in the sentencing process. Rather, it speaks to what happens in the event that the jury is unable to fulfill its role—when deliberations break down and the jury is unable to produce a unanimous sentence recommendation. Petitioner's argument, although less than clear, appears to be that a death sentence is arbitrary within the meaning of the Eighth Amendment if the jury is not given any bit of information that might possibly influence an individual juror's voting behavior. That contention has no merit. We have never suggested, for example, that the Eighth Amendment requires a jury be instructed as to the consequences of a breakdown in the deliberative process. On the contrary, we have long been of the view that "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." *Allen v. United States,* 164 U.S. 492, 501, 17 S.Ct. 154, 41 L.Ed. 528 (1896).[5] We further have recognized that in a capital sentencing proceeding, the Government has "a strong interest in having the jury express the conscience of the community on the ultimate question of life or death." *Lowenfield v. Phelps,* 484 U.S. 231, 238, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) (citation and internal quotation marks omitted). We are of the view that a charge to the jury of the sort proposed by petitioner might well have the effect of undermining this strong governmental interest.[6]

[12] ***383** We similarly decline to exercise our supervisory powers to require that an instruction on the consequences of deadlock be given in every capital case. In drafting the Act, Congress chose not to require such an instruction. Cf. § 3593(f) (district court "shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be"). Petitioner does point us to a decision from the New Jersey Supreme Court requiring, in an exercise of that court's supervisory authority, that the jury be informed of the sentencing consequences of nonunanimity. See *New Jersey v. Ramseur,* 106 N.J. 123, 304–315, 524 A.2d 188, 280–286 (1987). Of course, New Jersey's practice has no more relevance to our decision than the power to persuade. Several other States have declined to require a similar instruction. See, *e.g., North Carolina v. McCarver,* 341 N.C. 364, 394, 462 S.E.2d 25, 42 (1995); *Brogie v. Oklahoma,* 695 P.2d 538, 547 (Okla.Crim.App.1985); *Calhoun v. Maryland,* 297 Md. 563, 593–595, 468 A.2d 45, 58–60 (1983); *Coulter v. Alabama,* 438 So.2d 336, 346 (Ala.Crim.App.1982); *Justus v. Virginia,* 220 Va. 971, 979, 266 S.E.2d 87, 92–93 (1980). We find the reasoning of the Virginia Supreme Court in *Justus* far more persuasive than that of the New Jersey Supreme Court, especially in light of the strong governmental interest that we have recognized in having the jury render a unanimous sentence recommendation:

> ****2100** ***384** "The court properly refused an instruction offered by the defendant which would have told the jury that if it could not reach agreement as to the appropriate punishment, the court would dismiss it and impose a life sentence. While this was a correct statement of law it concerned a procedural matter and was not one which should have been the subject of an instruction. It would have been an open invitation for

the jury to avoid its responsibility and to disagree." *Id.*, at 979, 266 S.E.2d, at 92.

In light of the legitimate reasons for not instructing the jury as to the consequences of deadlock, and in light of congressional silence, we will not exercise our supervisory powers to require that an instruction of the sort petitioner sought be given in every case. Cf. *Shannon v. United States,* 512 U.S. 573, 587, 114 S.Ct. 2419, 129 L.Ed.2d 459 (1994).

B

Petitioner further argues that the jury was led to believe that if it could not reach a unanimous sentence recommendation he would receive a judge-imposed sentence less severe than life imprisonment, and his proposed instruction as to the consequences of deadlock was necessary to correct the jury's erroneous impression. Moreover, he contends that the alleged confusion independently warrants reversal of his sentence under the Due Process Clause, the Eighth Amendment, and the Act itself. He grounds his due process claim in the assertion that sentences may not be based on materially untrue assumptions, his Eighth Amendment claim in his contention that the jury is entitled to accurate sentencing information, and his statutory claim in an argument that jury confusion over the available sentencing options constitutes an "arbitrary factor" under § 3595(c)(2)(A).

To put petitioner's claim in the proper context, we must briefly review the jury instructions and sentencing procedures ***385** used at trial. After instructing the jury on the aggravating and mitigating factors and explaining the process of weighing those factors, the District Court gave the following instructions pertaining to the jury's sentencing recommendation:

"Based upon this consideration, you the jury, by unanimous vote, shall recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without the possibility of release, or sentenced to some other lesser sentence.

"If you unanimously conclude that the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of any mitigating factors, that the aggravating factors are themselves sufficient to justify a sentence of death, you may recommend a sentence of death. Keep in mind, however, that regardless of your findings with respect to aggravating and mitigating factors, you are never required to recommend a death sentence.

"If you recommend the imposition of a death sentence, the court is required to impose that sentence. If you recommend a sentence of life without the possibility of release, the court is required to impose that sentence. If you recommend that some other lesser sentence be imposed, the court is required to impose a sentence that is authorized by the law. In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release. That is a matter for the court to decide in the event you conclude that a sentence of death or life without the possibility of release should not be recommended." App. 43–44.

***386** The District Court also provided the jury with four decision forms on which to record its recommendation.[7] In its instructions ****2101** explaining those forms, the District Court told the jury that its choice of form depended on its recommendation:

"The forms are self-explanatory: Decision Form A should be used if you determine that a sentence of death should not be imposed because the government failed to prove beyond a reasonable doubt the existence of the required intent on the part of the defendant or a required aggravating factor. Decision Form B should be used if you unanimously recommend that a sentence of death should be imposed. Decision Form C or Decision Form D should be used if you determine that a sentence of death should not be imposed because: (1) you do not unanimously find that the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors found to exist; (2) you do not unanimously find that the aggravating factor or factors found to exist are ***387** themselves sufficient to justify a sentence of death where no mitigating factor has been found to exist; or (3) regardless of your findings with respect to aggravating and mitigating factors you are not unanimous in recommending that a sentence of death should be imposed. Decision Form C should be used if you unanimously recommend that a sentence of imprisonment for life without the possibility of release should be imposed.

"Decision Form D should be used if you recommend that some other lesser sentence should be imposed." *Id.*, at 47–48.

[13] **[14]** **[15]** **[16]** Petitioner maintains that the instructions in combination with the decision forms led the jury to believe that if it failed to recommend unanimously a sentence of death or life imprisonment without the possibility of release, then it would be required to use Decision Form D and the court would impose a sentence less than life imprisonment.[8] The scope of our review is shaped by whether petitioner properly raised and preserved an objection to the instructions at trial. A party generally may not assign error to a jury instruction if he fails to object before the jury retires or to "stat[e] distinctly the matter to which that party objects and the grounds of the objection." Fed. Rule Crim. Proc. 30. These timeliness and specificity requirements apply during the sentencing phase as well as the trial. See 18 U.S.C. § 3595(c)(2)(C); see also Fed. Rules Crim. Proc. 1, 54(a). They enable a trial court to correct any instructional mistakes ***388** before the jury retires and in that way help to avoid the burdens of an unnecessary retrial. While an objection in a directed verdict motion before the jury retires can preserve a claim of error, *Leary v. United States,* 395 U.S. 6, 32, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), objections raised after the jury has completed its deliberations do not. See *Singer v. United States,* 380 U.S. 24, 38, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965); *Lopez v. United States,* 373 U.S. 427, 436, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963); cf. *United States v. Socony–Vacuum Oil Co.,* 310 U.S. 150, 238–239, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). Nor does a request for an instruction before the jury retires preserve an objection to the instruction actually given by the court. Otherwise, district judges would have to speculate on what sorts of objections might be implied through a request for an instruction and issue rulings on "implied" objections that a defendant never intends to raise. ****2102** Such a rule would contradict Rule 30's mandate that a party state distinctly his grounds for objection.

[17] **[18]** Petitioner did not voice the objections to the instructions and decision forms that he now raises before the jury retired. See App. 16–33. While Rule 30 could be read literally to bar any review of petitioner's claim of error, our decisions instead have held that an appellate court may conduct a limited review for plain error. Fed. Rule Crim. Proc. 52(b); *Johnson v. United States,* 520 U.S. 461, 465–466, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997); *United States v. Olano,* 507 U.S. 725, 731–732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *Lopez, supra,* at 436–437, 83 S.Ct. 1381; *Namet v. United States,* 373 U.S. 179, 190–191, 83 S.Ct. 1151, 10 L.Ed.2d 278 (1963). Petitioner, however, contends that the Federal Death Penalty Act creates an exception. He relies on language in the Act providing that an appellate court shall remand a case where it finds that "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." § 3595(c)(2)(A). According to petitioner, the alleged jury confusion over the available sentencing options is an arbitrary factor and thus warrants resentencing even if he did not properly preserve the objection.

[19] **[20]** This argument rests on an untenable reading of the Act. The statute does not explicitly announce an exception to ***389** plain-error review, and a congressional intent to create such an exception cannot be inferred from the overall scheme. Statutory language must be read in context and a phrase "gathers meaning from the words around it." *Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961); see also *Gustafson v. Alloyd Co.,* 513 U.S. 561, 575, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995). Here, the same subsection that petitioner relies upon further provides that reversal is warranted where "the proceedings involved any other legal error requiring reversal of the sentence that was properly preserved for appeal under the rules of criminal procedure." § 3595(c)(2)(C). This language makes clear that Congress sought to impose a timely objection requirement at sentencing and did not intend to equate the phrase "arbitrary factor" with legal error. Petitioner's broad interpretation of § 3595(c)(2)(A) would drain § 3595(c)(2)(C) of any independent meaning.

[21] **[22]** **[23]** We review the instructions, then, for plain error. Under that review, relief is not warranted unless there has been (1) error, (2) that is plain, and (3) affects substantial rights. *Johnson, supra,* at 467, 117 S.Ct. 1544; *Olano, supra,* at 732, 113 S.Ct. 1770. Appellate review under the plain-error doctrine, of course, is circumscribed and we exercise our power under Rule 52(b) sparingly. See *United States v. Young,* 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985); *United States v. Frady,* 456 U.S. 152, 163, and n. 14, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982); cf. *Henderson v. Kibbe,* 431 U.S. 145, 154, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977) ("It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made

in the trial court"). An appellate court should exercise its discretion to correct plain error only if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Olano, supra,* at 732, 113 S.Ct. 1770 (internal quotation marks omitted); *Young, supra,* at 15, 105 S.Ct. 1038; *United States v. Atkinson,* 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555 (1936).

[24] **[25]** Petitioner's argument—which depends on the premise that the instructions and decision forms led the jury to believe that it did not have to recommend unanimously a lesser ***390** sentence—falls short of satisfying even the first requirement of the plain-error doctrine, for we cannot see that any error occurred. We have considered similar claims that allegedly ambiguous instructions caused jury confusion. See, *e.g., Victor v. Nebraska,* 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994); *Estelle v. McGuire,* 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Boyde v. California,* 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). The proper standard for reviewing such claims is " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates ****2103** the Constitution." *Estelle, supra,* at 72, 112 S.Ct. 475 (quoting *Boyde, supra,* at 380, 110 S.Ct. 1190); see also *Victor, supra,* at 6, 114 S.Ct. 1239 (applying reasonable likelihood standard to direct review of state criminal conviction). [9]

There is no reasonable likelihood that the jury applied the instructions incorrectly. The District Court did not expressly inform the jury that it would impose a lesser sentence in case of deadlock. It simply told the jury that, if it recommended a lesser sentence, the court would impose a sentence "authorized by the law." App. 44. Nor did the District Court expressly require the jury to select Decision Form D if it could not reach agreement. Instead, it exhorted the jury "to discuss the issue of punishment with one ***391** another in an effort to reach agreement, if you can do so." *Id.,* at 46.

Notwithstanding the absence of an explicit instruction on the consequences of nonunanimity, petitioner identifies several passages which, he believes, support the inference that the jury was confused on this point. He trains on that portion of the instructions telling the jurors that the court would decide the sentence if they did not recommend a sentence of death or life without the possibility of release. Petitioner argues that this statement, coupled with two earlier references to a "lesser sentence" option, caused the jurors to infer that the District Court would impose a lesser sentence if they could not unanimously agree on a sentence of death or life without the possibility of release. He maintains that this inference is strengthened by a later instruction: "In order to bring back a verdict recommending the punishment of death or life without the possibility of release, all twelve of you must unanimously vote in favor of such specific penalty." *Id.,* at 45. According to petitioner, the failure to mention the "lesser sentence" option in this statement strongly implied that, in contradistinction to the first two options, the "lesser sentence" option did not require jury unanimity.

[26] **[27]** Petitioner parses these passages too finely. Our decisions repeatedly have cautioned that instructions must be evaluated not in isolation but in the context of the entire charge. See, *e.g., Bryan v. United States,* 524 U.S. 184, 199, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998); *United States v. Park,* 421 U.S. 658, 674, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975); *Cupp v. Naughten,* 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973); *Boyd v. United States,* 271 U.S. 104, 107, 46 S.Ct. 442, 70 L.Ed. 857 (1926). We agree with the Fifth Circuit that when these passages are viewed in the context of the entire instructions, they lack ambiguity and cannot be given the reading that petitioner advances. See 132 F.3d, at 244. We previously have held that instructions that might be ambiguous in the abstract can be cured when read in conjunction with other instructions. *Bryan, supra,* at 199, 118 S.Ct. 1939; *Victor,* ***392** *supra,* at 14–15, 114 S.Ct. 1239; *Estelle, supra,* at 74–75, 112 S.Ct. 475. Petitioner's claim is far weaker than those we evaluated in *Bryan, Victor,* and *Estelle* because the jury in this case received an explicit instruction that it had to be unanimous. Just prior to its admonition that the jury should not concern itself with the ultimate sentence if it does not recommend death or life without the possibility of release, the trial court expressly instructed the jury in unambiguous language that any sentencing recommendation had to be by a unanimous vote. Specifically, it stated that "you the jury, by unanimous vote, ****2104** shall recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without the possibility of release, or sentenced to some other lesser sentence." App. 43. Other instructions, by contrast, specified when the jury did not have to act unanimously. For example, the District Court explicitly told the jury that its findings on the mitigating circumstances, unlike those on the aggravating circumstances, did not have to be

unanimous.[10] To be sure, the District Court could have used the phrase "unanimously" more frequently. But when read alongside an unambiguous charge that any sentencing recommendation be unanimous and other instructions explicitly identifying when the jury need not be unanimous, the passages identified by petitioner do not create a reasonable likelihood that the jury believed that deadlock would cause the District Court to impose a lesser sentence.

[28] *393 Petitioner also relies on alleged ambiguities in the decision forms and the explanatory instructions. He stresses the fact that Decision Form D (lesser sentence recommendation), unlike Decision Forms B (death sentence) and C (life without the possibility of release), did not contain the phrase "by unanimous vote" and required only the foreperson's signature. These features of Decision Form D, according to petitioner, led the jury to conclude that nonunanimity would result in a lesser sentence. According to petitioner, the instructions accompanying Decision Form D, unlike those respecting Decision Forms B and C, did not mention unanimity, thereby increasing the likelihood of confusion.

With respect to this aspect of petitioner's argument, we agree with the Fifth Circuit that "[a]lthough the verdict forms standing alone could have persuaded a jury to conclude that unanimity was not required for the lesser sentence option, any confusion created by the verdict forms was clarified when considered in light of the entire jury instruction." 132 F.3d, at 245. The District Court's explicit instruction that the jury had to be unanimous and its exhortation to the jury to discuss the punishment and attempt to reach agreement, App. 46, make it doubtful that the jury thought it was compelled to employ Decision Form D in the event of disagreement.

[29] **[30]** Petitioner also places too much weight on the fact that Decision Form D required only the foreperson's signature. Although it only contained a space for the foreperson's signature, Form D, like the others, used the phrase "We the jury recommend ...," thereby signaling that Form D represented the jury's recommendation. *Id.*, at 59. Moreover, elsewhere, the jury foreperson alone signed the jury forms to indicate the jury's unanimous agreement. Specifically, only the jury foreperson signed the special findings form on which the jury was required to indicate its unanimous agreement that an aggravating factor had been proved beyond a reasonable doubt. *Id.*, at 51–53. In these circumstances, we do *394 not think that the decision forms or accompanying instructions created a reasonable likelihood of confusion over the effect of nonunanimity.[11]

2105 **[31] **[32]** Even assuming, *arguendo,* that an error occurred (and that it was plain), petitioner cannot show that it affected his substantial rights. Any confusion among the jurors over the effect of a lesser sentence recommendation was allayed by the District Court's admonition that the jury should not concern itself with the effect of such a recommendation. See *supra,* at 2103 (quoting App. 44). The jurors are presumed to have followed these instructions. See *Shannon,* 512 U.S., at 585, 114 S.Ct. 2419; *Richardson v. Marsh,* 481 U.S. 200, 206, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). Even if the jurors had some lingering doubts about the effect of deadlock, therefore, the instructions made clear that they should set aside their concerns and either report that they were unable to reach agreement or recommend a lesser sentence if they believed that this was the only option.

[33] Moreover, even assuming that the jurors were confused over the consequences of deadlock, petitioner cannot show the confusion necessarily worked to his detriment. It is just as likely that the jurors, loath to recommend a lesser sentence, would have compromised on a sentence of life imprisonment as on a death sentence. Where the effect of an allegederror *395 is so uncertain, a defendant cannot meet his burden of showing that the error actually affected his substantial rights. Cf. *Romano,* 512 U.S., at 14, 114 S.Ct. 2004. In *Romano,* we considered a similar argument, namely, that jurors had disregarded a trial judge's instructions and given undue weight to certain evidence. In rejecting that argument, we noted that, even assuming that the jury disregarded the trial judge's instructions, "[i]t seems equally plausible that the evidence could have made the jurors more inclined to impose a death sentence, or it could have made them less inclined to do so." *Ibid.* Any speculation on the effect of a lesser sentence recommendation, like the evidence in *Romano,* would have had such an indeterminate effect on the outcome of the proceeding that we cannot conclude that any alleged error in the District Court's instructions affected petitioner's substantial rights. See *Park,* 421 U.S., at 676, 95 S.Ct. 1903; *Lopez,* 373 U.S., at 436–437, 83 S.Ct. 1381.

III

A

[34] Apart from the claimed instructional error, petitioner argues that the nonstatutory aggravating factors found and considered by the jury, see n. 2, *supra,* were vague, overbroad, and duplicative in violation of the Eighth Amendment, and that the District Court's error in allowing the jury to consider them was not harmless beyond a reasonable doubt.

The Eighth Amendment, as the Court of Appeals correctly recognized, see 132 F.3d, at 250, permits capital sentencing juries to consider evidence relating to the victim's personal characteristics and the emotional impact of the murder on the victim's family in deciding whether an eligible defendant should receive a death sentence. See *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) ("A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. ***396** There is no reason to treat such evidence differently than other relevant evidence is treated"). Petitioner does not dispute that, as a general matter, such evidence is appropriate for the sentencing jury's consideration. See Reply Brief for Petitioner 15. His objection is that the two nonstatutory aggravating factors were duplicative, vague, and overbroad so as to render their use in this case unconstitutional, a point with which the Fifth Circuit agreed, 132 F.3d, at 250–251, although it ultimately ruled in the Government's favor on the ground that the alleged error was harmless beyond a reasonable doubt, *id.,* at 251–252.

The Government here renews its argument that the nonstatutory aggravators in this case were constitutionally valid. At oral argument, however, it was suggested that this ****2106** case comes to us on the assumption that the nonstatutory aggravating factors were invalid because the Government did not cross-appeal on the question. Tr. of Oral Arg. 25. As the prevailing party, the Government is entitled to defend the judgment on any ground that it properly raised below. See, *e.g., El Paso Natural Gas Co. v. Neztsosie,* 526 U.S. 473, 479, 119 S.Ct. 1430, 1434–1435, 143 L.Ed.2d 635 (1999); *Northwest Airlines, Inc. v. County of Kent,* 510 U.S. 355, 364, 114 S.Ct. 855, 127 L.Ed.2d 183 (1994) ("A prevailing party need not cross-petition to defend a judgment on any ground properly raised below, so long as that party seeks to preserve, and not to change, the judgment"). It further was suggested that because we granted certiorari on the Government's rephrasing of petitioner's questions and because the third question —"whether the court of appeals correctly held that the submission of invalid nonstatutory aggravating factors was harmless beyond a reasonable doubt"—presumes error, we must assume the nonstatutory aggravating factors were erroneous. Tr. of Oral Arg. 25–27. We are not convinced that the reformulated question presumes error. The question whether the nonstatutory aggravating factors were constitutional is fairly included within the third question presented ***397** we might answer "no" to the question "[w]hether the Court of Appeals correctly held that the submission of invalid nonstatutory aggravating factors was harmless beyond a reasonable doubt," 525 U.S. 809, 119 S.Ct. 39, 142 L.Ed.2d 31 (1998), by explaining that the Fifth Circuit was incorrect in holding that there was error. Without a doubt, the Government would have done better to call our attention to the fact that it planned to argue that the nonstatutory aggravating factors were valid at the petitioning stage. But it did not affirmatively concede that the nonstatutory aggravators were invalid, see Brief in Opposition 18–22, and absent such a concession, we think that the Government's argument is properly presented. [12]

***398** 1

We first address petitioner's contention that the two nonstatutory aggravating factors were impermissibly duplicative. The Fifth Circuit reasoned that "[t]he plain meaning of the term 'personal characteristics,' used in [nonstatutory aggravator] 3(C), necessarily includes 'young age, slight stature, background, and unfamiliarity,' which the jury was asked to consider in 3(B)." 132 F.3d, at 250. The problem, the court thought, was that this duplication led to "double counting" of aggravating factors. Following a Tenth Circuit decision, *United States v. McCullah,* 76 F.3d 1087, 1111 (1996), the Fifth Circuit was of the view that in a weighing scheme, "double counting" has a tendency to skew the process so as to give rise to the risk of an arbitrary, and thus unconstitutional, death sentence. 132 F.3d, at 251. In the Fifth Circuit's words, there ****2107** may be a thumb on the scale in favor

of death "[i]f the jury has been asked to weigh the same aggravating factor twice." *Ibid.*

We have never before held that aggravating factors could be duplicative so as to render them constitutionally invalid, nor have we passed on the "double counting" theory that the Tenth Circuit advanced in *McCullah*[13] and the Fifth Circuit appears to have followed here. What we have said is that the weighing process may be impermissibly skewed if the sentencing jury considers an invalid factor. See *Stringer v. Black,* 503 U.S. 222, 232, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992). Petitioner's argument (and the reasoning of the Fifth and Tenth Circuits) would have us reach a quite different proposition—that if two aggravating factors are "duplicative," then the weighing process necessarily is skewed, and the factors are therefore invalid.

Even accepting, for the sake of argument, petitioner's "double counting" theory, there are nevertheless several ***399** problems with the Fifth Circuit's application of the theory in this case. The phrase "personal characteristics" as used in factor 3(C) does not obviously include the specific personal characteristics listed in 3(B) —"young age, her slight stature, her background, and her unfamiliarity with San Angelo"—especially in light of the fact that 3(C) went on to refer to the impact of the crime on the victim's family. In the context of considering the effect of the crime on the victim's family, it would be more natural to understand "personal characteristics" to refer to those aspects of the victim's character and personality that her family would miss the most. More important, to the extent that there was any ambiguity arising from how the factors were drafted, the Government's argument to the jury made clear that 3(B) and 3(C) went to entirely different areas of aggravation—the former clearly went to victim vulnerability while the latter captured the victim's individual uniqueness and the effect of the crime on her family. See, *e.g.,* 25 Record 2733–2734 ("[Y]ou can consider [the victim's] young age, her slight stature, her background, her unfamiliarity with the San Angelo area.... She is barely five feet tall [and] weighs approximately 100 pounds. [She is] the ideal victim"); *id.,* at 2734 ("[Y]ou can consider [the victim's] personal characteristics and the effects of the instant offense on her family.... You heard about this young woman, you heard about her from her mother, you heard about her from her friends that knew her. She was special, she was unique, she was loving, she was caring, she had a lot to offer this world"). As such, even if the phrase "personal characteristics" as used in factor 3(C) *was* understood to include the specific personal characteristics listed in 3(B), the factors as a whole were not duplicative—at best, certain evidence was relevant to two different aggravating factors. Moreover, any risk that the weighing process would be skewed was eliminated by the District Court's instruction that the jury "should not simply count the number of aggravating and mitigating factors and reach a decision ***400** based on which number is greater [but rather] should consider the weight and value of each factor." App. 45.

2

We also are of the view that the Fifth Circuit incorrectly concluded that factors 3(B) and 3(C) were unconstitutionally vague. In that court's view, the nonstatutory aggravating factors challenged here "fail[ed] to guide the jury's discretion, or [to] distinguish this murder from any other murder." 132 F.3d, at 251. The Court of Appeals, relying on our decision in *Maynard v. Cartwright,* 486 U.S. 356, 361–362, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), also was of the opinion that "[t]he use of the terms 'background,' 'personal characteristics,' and 'unfamiliarity' without further definition or instruction left the jury with ... open-ended discretion." 132 F.3d, at 251 (internal quotation marks omitted).

Ensuring that a sentence of death is not so infected with bias or caprice is our "controlling ****2108** objective when we examine eligibility and selection factors for vagueness." *Tuilaepa v. California,* 512 U.S. 967, 973, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). Our vagueness review, however, is "quite deferential." *Ibid.* As long as an aggravating factor has a core meaning that criminal juries should be capable of understanding, it will pass constitutional muster. *Ibid.* Assessed under this deferential standard, the factors challenged here surely are not vague. The jury should have had no difficulty understanding that factor 3(B) was designed to ask it to consider whether the victim was especially vulnerable to petitioner's attack. Nor should it have had difficulty comprehending that factor 3(C) asked it to consider the victim's personal traits and the effect of the crime on her family.[14] Even if the factors as written ***401** were somewhat vague, the Fifth Circuit was wrong to conclude that the factors were not given further definition, see 132 F.3d, at 251; as we have

explained, the Government's argument made absolutely clear what each nonstatutory factor meant. [15]

3

Finally, we turn to petitioner's contention that the challenged nonstatutory factors were overbroad. An aggravating factor can be overbroad if the sentencing jury "fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty." *Arave v. Creech,* 507 U.S. 463, 474, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993). We have not, however, specifically considered what it means for a factor to be overbroad when it is important only for selection purposes and especially when it sets forth victim vulnerability or victim impact evidence. Of course, every murder will have an impact on the victim's family and friends and victims are often chosen because of their vulnerability. It might seem, then, that the factors 3(B) and 3(C) apply to every eligible defendant and thus fall within the Eighth Amendment's proscription against overbroad factors. But that cannot be correct; if it were, we would not have decided *Payne* as we did. Even though the *concepts* of victim impact and victim vulnerability may well be relevant in every case, *evidence* of victim vulnerability and victim impact in a particular case is inherently individualized. And such evidence is surely relevant to the selection phase decision, given that the sentencer ***402** should consider all of the circumstances of the crime in deciding whether to impose the death penalty. See *Tuilaepa,* 512 U.S., at 976, 114 S.Ct. 2630.

What is of common importance at the eligibility and selection stages is that "the process is neutral and principled so as to guard against bias or caprice in the sentencing decision." *Id.,* at 973, 114 S.Ct. 2630. So long as victim vulnerability and victim impact factors are used to direct the jury to the individual circumstances of the case, we do not think that principle will be disturbed. Because factors 3(B) and 3(C) directed the jury to the evidence specific to this case, we do not think that they were overbroad in a way that offended the Constitution.

B

[35] The error in this case, if any, rests in loose drafting of the nonstatutory aggravating factors; as we have made clear, victim vulnerability and victim impact evidence are appropriate subjects for the capital sentencer's ****2109** consideration. Assuming that use of these loosely drafted factors was indeed error, we conclude that the error was harmless.

[36] Harmless-error review of a death sentence may be performed in at least two different ways. An appellate court may choose to consider whether absent an invalid factor, the jury would have reached the same verdict or it may choose instead to consider whether the result would have been the same had the invalid aggravating factor been precisely defined. See *Clemons v. Mississippi,* 494 U.S. 738, 753–754, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). The Fifth Circuit chose to perform the first sort of analysis, and ultimately concluded that the jury would have returned a recommendation of death even had it not considered the two supposedly invalid nonstatutory aggravating factors:

> "After removing the offensive non-statutory aggravating factors from the balance, we are left with two ***403** statutory aggravating factors and eleven mitigating factors to consider when deciding whether, beyond a reasonable doubt, the death sentence would have been imposed had the invalid aggravating factors never been submitted to the jury. At the sentencing hearing, the government placed great emphasis on the two statutory aggravating factors found unanimously by the jury—Jones caused the death of the victim during the commission of the offense of kidnapping; and the offense was committed in an especially heinous, cruel, and depraved manner in that it involved torture or serious physical abuse of the victim. Under part two of the Special Findings Form, if the jury had failed to find that the government proved at least one of the statutory aggravating factors beyond a reasonable doubt, then the deliberations would have ceased leaving the jury powerless to recommend the death penalty. Therefore, the ability of the jury to recommend the death penalty hinged on a finding of a least one statutory aggravating factor. Conversely, jury findings regarding the non-statutory aggravating factors were not required before the jury could recommend the death penalty. After removing the two non-statutory aggravating factors from the mix, we conclude that the two remaining statutory aggravating factors unanimously found by the jury support the sentence of death, even after considering the eleven mitigating factors found by one or more jurors. Consequently, the error was harmless

because the death sentence would have been imposed beyond a reasonable doubt had the invalid aggravating factors never been submitted to the jury." 132 F.3d, at 252.

Petitioner claims that the court's analysis was so perfunctory as to be infirm. His argument is largely based on the following passage from *Clemons:* "*Under these circumstances,* it would require a detailed explanation based on the record for ***404** us possibly to agree that the error in giving the invalid 'especially heinous' instruction was harmless." 494 U.S., at 753–754, 110 S.Ct. 1441 (emphasis added). *Clemons,* however, involved quite different facts. There, an "especially heinous" aggravating factor was determined to be unconstitutionally vague. The only remaining aggravating factor was that the murder was committed during a robbery for pecuniary gain. The State had repeatedly emphasized the invalid factor and said little about the valid aggravator. See *id.,* at 753, 110 S.Ct. 1441. Despite this, all that the Mississippi Supreme Court said was: " 'We likewise are of the opinion beyond a reasonable doubt that the jury's verdict would have been the same with or without the "especially heinous, atrocious or cruel" aggravating circumstance.' " *Ibid.* (quoting *Clemons v. State,* 535 So.2d 1354, 1364 (Miss.1988)). We quite understandably required a "detailed explanation based on the record" in those circumstances.

The same "detailed explanation ... on the record" that we required in *Clemons* may not have been necessary in this case. Cf. *Sochor v. Florida,* 504 U.S. 527, 540, 112 S.Ct. 2114, 119 L.Ed.2d 326 (1992) (there is no federal requirement that state courts adopt "a particular formulaic indication" before their review for harmless error will pass scrutiny). But even if the Fifth Circuit's harmless-error analysis was too perfunctory, we think it plain, under the alternative mode of harmless-error analysis, that the error indeed was harmless beyond a reasonable doubt. See ****2110** § 3595(c)(2) (federal death sentences are not to be set aside on the basis of errors that are harmless beyond a reasonable doubt). Had factors 3(B) and 3(C) been precisely defined in writing, the jury surely would have reached the same recommendation as it did. The Government's argument to the jury, see, *e.g.,* 25 Record 2733–2734, cured the nonstatutory factors of any infirmity as written. We are satisfied that the jury in this case actually understood what each factor was designed to put before it, and therefore have ***405** no doubt that the jury would have reached the same conclusion had the aggravators been precisely defined in writing.

* * *

For the foregoing reasons, the judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice GINSBURG, with whom Justice STEVENS and Justice SOUTER join, and with whom Justice BREYER joins as to Parts I, II, III, and V, dissenting.

The Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. §§ 3591–3598 (1994 ed. and Supp. III), establishes a complex regime applicable when the Government seeks the ultimate penalty for a defendant found guilty of an offense potentially punishable by death. This case is pathmarking, for it is the first application of the FDPA. Two questions, as I comprehend petitioner's core objections, warrant prime attention.

First, when Congress specifies only two sentencing options for an offense, death or life without possibility of release, must the jury be told exactly that? Or, can a death decision stand despite misleading trial court "lesser sentence" instructions, specifically, instructions open to the construction that lack of a unanimous jury vote for either life or death would allow the judge to impose a sentence less severe than life in prison? Second, when the jury is unable to agree on a unanimous recommendation in a case in which death or life without possibility of release are the only sentencing options, must the judge then impose the life sentence? Or, is the judge required or permitted to impanel a second jury to make the life or death decision?

The Court of Appeals for the Fifth Circuit confronted these two questions and resolved both for the prosecution. The Fifth Circuit also tolerated the trial court's submission of two nonstatutory aggravating factors to the jury, although ***406** the appeals court found those factors duplicative and vague.[1] The lower courts' disposition for death, despite the flawed trial proceedings, and this Court's tolerance of the flaws, disregard a most basic guide: "[A]ccurate sentencing information is an

indispensable prerequisite to a [jury's] determination of whether a defendant shall live or die." *Gregg v. Georgia,* 428 U.S. 153, 190, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.). That "indispensable prerequisite" was not satisfied in this case. I would reverse and remand so that the life or death decision may be made by an accurately informed trier.

I

After authorizing the federal death penalty for a small category of cases in 1988,[2] Congress **2111 enacted comprehensive death penalty legislation in 1994. See FDPA, 108 Stat. *407 1959.[3] Applicable to over 40 existing and newly declared death-eligible offenses, see 18 U.S.C. § 3591; §§ 60005–60024, 108 Stat. 1970–1982,[4] the FDPA prescribes penalty-phase procedures; principally, it provides for a separate sentencing hearing whenever the Government seeks the death penalty for defendants found guilty of a covered offense. See 18 U.S.C. § 3593.[5]

In death-eligible homicide cases, the Act instructs, the jury must respond sequentially to three inquiries; imposition of the death penalty requires unanimity on each of the three. First, the jury determines whether there was a killing or death resulting from the defendant's intentional engagement in life-threatening activity. See 18 U.S.C. § 3591(a)(2).[6] *408 Second, the jury decides which, if any, of the Government-proposed aggravating factors, statutory and nonstatutory, were proved beyond a reasonable doubt. See § 3593(d).[7] Third, if the jury finds at least one of the statutory aggravators proposed by the Government, the jury then determines whether the aggravating factors "sufficiently outweigh" the mitigating factors to warrant a death sentence, or, absent mitigating factors, whether the aggravators alone warrant that sentence. § 3593(e). The mitigating factors, seven statutory and any others tending against the death sentence, are individually determined by each juror; unlike aggravating factors, on which the jury must unanimously agree under a "beyond a reasonable doubt" standard, a mitigating factor may be considered in the jury's weighing process if any one juror finds the factor proved by a "preponderance of the evidence." See §§ 3592(a), (c), 3593(d). The weighing is not numeric; the perceived significance, not the number, of aggravating and mitigating factors determines the decision.[8]

II

Louis Jones, Jr.'s crime was atrocious; its commission followed Jones's precipitous decline **2112 in fortune and self-governance on termination of his 22–year Army career. On February 18, 1995, Jones forcibly abducted Private Tracie *409 Joy McBride at gunpoint from the Goodfellow Air Force Base in San Angelo, Texas. In the course of the abduction, Jones struck Private Michael Alan Peacock with a handgun, leaving him unconscious. Thereafter, Jones sexually assaulted and killed McBride, leaving her body under a bridge located 20 miles outside of San Angelo. See 132 F.3d 232, 237 (C.A.5 1998).

In the fall of 1995, Jones was tried before a jury and convicted of kidnaping with death resulting, in violation of 18 U.S.C. § 1201(a)(2). See 132 F.3d, at 237–238. A separate sentencing hearing followed to determine whether Jones would be punished by death. See *id.,* at 238.

At the close of the sentencing hearing, Jones submitted proposed jury instructions. Jones's instruction no. 4 would have advised the jury that it must sentence Jones to life without possibility of release rather than death "[i]f ... any one of you is not persuaded that justice demands Mr. Jones's execution." App. 13.[9] Jones's instruction no. 5 would have advised that, if "the jury is unable to agree on a unanimous decision as to the sentence to be imposed," the jury should so inform the judge, who would then "impose a sentence of life imprisonment without possibility of release." *Id.,* at 14.[10] Proposed instructions nos. 4 and 5, although inartfully *410 drawn, unquestionably sought to convey this core information: If the jurors did not agree on death, then the only sentencing option, for jury or judge, would be life without possibility of release. Jones also objected, on vagueness grounds, to two of the three nonstatutory aggravators proposed by the Government. See *id.,* at 21–22, 28.

The District Court rejected Jones's proposed instructions nos. 4 and 5 and refused to strike or modify the nonstatutory aggravators to which Jones had objected. See *id.,* at 33. The trial court instructed the jury that it could recommend death, life without possibility of release,

or a lesser sentence, in which event the court would decide what the lesser sentence would be. See *id.*, at 44.

The jury apparently found the case close. It rejected three of the seven aggravators the Government urged. See 132 F.3d, at 238. [11] And one or more jurors found each of the specific mitigating factors submitted by Jones. See ***411** *ibid.* [12] The jury deliberated ****2113** for a day and a half before returning a verdict recommending death.

Jones moved for a new trial on the ground, supported by postsentence juror statements, that the court's instructions had misled the jurors. Specifically, Jones urged that the charge led jurors to believe that a deadlock would result in a court-imposed lesser sentence; to avoid such an outcome, Jones asserted, jurors who favored life without possibility of release changed their votes to approve the death verdict. See App. 60–68, 75–80. The vote change, Jones maintained, was not hypothetical; it was backed up by juror statements. See *id.*, at 68, 79. The District Court denied the new trial motion. *Id.*, at 74, 81.

The Court of Appeals for the Fifth Circuit affirmed the death sentence. The appeals court ruled first that the District Court correctly refused to instruct that a jury deadlock would yield a court-imposed sentence of life imprisonment without possibility of release. 132 F.3d, at 242–243. Jury deadlock under the FDPA, the Fifth Circuit stated, would not occasion an automatic life sentence; instead, that court declared, deadlock would necessitate a second sentencing hearing before a newly impaneled jury. *Id.*, at 243. The Court of Appeals further observed that, "[a]lthough the use of instructions to inform the jury of the consequences of a hung jury ha[s] been affirmed, federal courts have never been affirmatively required to give such instructions." *Id.*, at 245.

Next, the appeals court determined that the instructions, read in their entirety, "could not have led a reasonable jury to conclude that non-unanimity would result in the imposition ***412** of a lesser sentence." *Id.*, at 244. Jones could not rely on juror statements, the Fifth Circuit held, to show that the jury, in fact, was so misled when it sentenced him to death. See *id.*, at 245–246 (although Federal Rule of Evidence 606(b) is not applicable to FDPA penalty-phase proceedings, see 18 U.S.C. § 3593(c), "[t]he reasons for not allowing jurors to undermine verdicts in [trial proceedings] ... apply with equal force to sentencing hearings").

Nor, in the Court of Appeals' view, did the District Court err *plainly* by conveying to the jury the misinformation that three sentencing options were available—death, life imprisonment without release, or some other lesser sentence. See 132 F.3d, at 246–248. Noting that the FDPA takes account of all three possibilities, see 18 U.S.C. § 3593(e), while the kidnaping statute authorizes only two sentences, death or life imprisonment, see § 1201(a), the Fifth Circuit acknowledged that the District Court had erred in giving the jury a lesser sentence option: "[T]he substantive [kidnaping] statute takes precedence over the death penalty sentencing provisions" and limits the options to death or life imprisonment without release. 132 F.3d, at 248. The appeals court nevertheless concluded that the District Court's error was not "plain" because the FDPA was new and no prior opinion had addressed the question; hence, no "clearly established law" was in place at the time of Jones's sentencing hearing. *Ibid.*

The Fifth Circuit also considered Jones's challenge to the nonstatutory aggravators presented to the jury at the Government's request. The court held that the two found by the jury—the victim's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas," and her "personal characteristics and the effect of the ... offense on [her] family"—were "duplicative" of each other, and also impermissibly "vague and overbroad." *Id.*, at 250–251. The court declined to upset the death verdict, however, because it believed "the death sentence would have been imposed beyond a reasonable doubt had the invalid aggravating ***413** factors never been submitted to the jury." *Id.*, at 252.

III

The governing law gave Jones's jury at the sentencing phase a life (without release) or death choice. The District Court, however, introduced, erroneously, a third prospect, ****2114** "some other lesser sentence." App. 44. [13] Moreover, the court told the jury "not to be concerned" with what that lesser sentence might be, for "[t]hat [was] a matter for the court to decide." *Ibid.* The jury's choice was clouded by that misinformation. I set out below my reasons for concluding that the misinformation rendered the jury's death verdict unreliable.

A

The District Court instructed the jury:

> "[Y]ou the jury, by unanimous vote, shall recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without the possibility of release, or sentenced to some other lesser sentence.
>
> . . . . .
>
> "... If you recommend that some other lesser sentence be imposed, the court is required to impose a sentence that is authorized by the law. In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release. That is a matter for the court to decide in the event you conclude that a sentence of death ***414** or life without the possibility of release should not be recommended.
>
> . . . . .
>
> "In order to bring back a verdict recommending the punishment of death or life without the possibility of release, all twelve of you must unanimously vote in favor of such specific penalty." App. 43–45.

Those instructions misinformed the jury in two intertwined respects: First, they wrongly identified a "lesser sentence" option; [14] second, the instructions were open to the reading that, absent juror unanimity on death or life without release, the District Court could impose a lesser sentence.

The Fifth Circuit, and the United States in its submission to this Court, acknowledged the charge error. See 132 F.3d, at 248; *ante,* at 2101, n. 8. Section 1201, which defines the crime, governs. It calls for death or life imprisonment, nothing less, and neither parole nor good-time credits could reduce the life sentence. See Brief for United States 13–14, n. 2 ("[W]e agree with petitioner that the only sentences that could have been imposed are death and life without release (because the kidnapping statute, 18 U.S.C. [§] 1201, authorizes only death and life imprisonment, and neither parole nor good-time credits could reduce the life sentence)."). The third option listed in the FDPA provision, "some other lesser sentence," § 3593(e), is available only when the substantive statute does not confine the sentence to life or death. The Fifth Circuit found the error "not so obvious, clear, readily apparent, or conspicuous." 132 F.3d, at 248. I disagree ***415** and would rank the District Court's misconstruction "plain error," [15] because the FDPA unquestionably is a procedural statute that does not alter substantive ****2115** prescriptions. [16] No serious doubt should have existed on that score. [17]

The flawed charge did not simply include a nonexistent option. It could have been understood to convey that, absent juror unanimity, some "lesser sentence" might be imposed by the court. That message came from instructions that the jury must be unanimous to "bring back a verdict recommending the punishment of death or life without the possibility of release," App. 45, that "some other lesser sentence" was possible, *id.,* at 44, and that the jury should not "be concerned with the ... sentence the defendant might receive in the event [it] determine[d] not to recommend a death sentence or a sentence of life without the possibility of release," *ibid.* Jones's proposed instructions—that he ***416** would be sentenced to life without possibility of release if the jury did not agree on death, see *supra,* at 2112, and nn. 9, 10—should have made it apparent that he sought to close the door the flawed charge left open. [18]

There is, at least, a reasonable likelihood that the flawed charge tainted the jury deliberations. See *Boyde v. California,* 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) (where "[t]he claim is that the instruction is ... subject to an erroneous interpretation," the "proper inquiry ... is whether there is a reasonable likelihood that the jury has applied the challenged instruction" erroneously). As recently noted, a jury may be swayed toward death if it believes the defendant otherwise may serve less than life in prison. See *Simmons v. South Carolina,* 512 U.S. 154, 163, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (plurality opinion) ("[I]t is entirely reasonable for a sentencing jury to view a defendant who is eligible

for parole as a greater threat to society than a defendant who is not."). Jurors may have been persuaded to switch from life to death to ward off what no juror wanted, *i.e.*, any chance of a lesser sentence by the judge. [19]

*417 The Court, in common with the Fifth Circuit and the Solicitor General, insists it was just as likely that jurors not supporting death could have persuaded death-prone jurors to give way and vote for a life sentence. See *ante,* at 2105; 132 F.3d, at 246; Brief for United States 22. I would demur (say so what) to that position. It should suffice that the potential to confuse existed, *i.e.*, that the instructions could have tilted the jury toward **2116 death. The instructions "introduce[d] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Beck v. Alabama,* 447 U.S. 625, 643, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). "Capital sentencing should not be ... a game of 'chicken,' in which life or death turns on the ... happenstance of whether the particular 'life' jurors or 'death' jurors in each case will be the first to give in, in order to avoid a perceived third sentencing outcome unacceptable to either set of jurors." Reply Brief 7–8, n. 11.

B

The Fifth Circuit held that the District Court was not obliged to tell the jury that Jones's default penalty was life without possibility of release in part because the appeals court viewed that instruction as "substantively [in]correct." 132 F.3d, at 242. [20] As the Fifth Circuit comprehended the law, if the jury deadlocked, "a second sentencing hearing *418 would have to be held in front of a second jury impaneled for that purpose." *Id.,* at 243. [21] But the FDPA, it seems to me clear, does not provide for a second shot at death. The dispositive provision, as I read the Act, is § 3594, which first states that the court shall sentence the defendant to death or life imprisonment without possibility of release if the jury so recommends, and then continues:

> "Otherwise, the court shall impose any lesser sentence that is authorized by law. Notwithstanding any other law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release." 18 U.S.C. § 3594.

The "[o]therwise" clause, requiring judge sentencing, becomes operative when a jury fails to make a unanimous recommendation at the close of deliberations. The Fifth Circuit's attention was deflected from the § 3594 path by § 3593(b)(2)(C), which provides for a sentencing hearing "before a jury impaneled for the purpose of the hearing if ... the jury that determined the defendant's guilt was discharged for good cause." Discharge for "good cause" under § 3593(b)(2)(C), however, is most reasonably read to cover guilt-phase (and, by extension, penalty-phase) juror disqualification due to, *e.g.*, exposure to prejudicial extrinsic information or illness. The provision should not be read expansively to encompass failure to reach a unanimous life or death decision.

The Government refers to a "background rule" allowing retrial if the jury is unable to reach a verdict, and urges that *419 the FDPA should be read in light of that rule. Brief for United States 29. But retrial is not the prevailing rule for capital penalty-phase proceedings. As the Government's own survey of state laws shows, in life or death cases, most States require judge sentencing once a jury has deadlocked. See *id.,* at 32; App. to Brief for United States 1a–6a (identifying 25 States in which the court imposes sentence upon deadlock and three States in which a new sentencing hearing is possible); see also Acker & Lanier, Law, Discretion, and the Capital Jury: Death Penalty Statutes and Proposals for Reform, 32 Crim. L. Bull. 134, 169 (1996) ("In twenty-five of the twenty-nine states in which capital juries have final sentencing authority, ... a deadlocked sentencing jury is transformed into a 'lifelocked' jury. That is, the jury's inability to produce a unanimous penalty-phase verdict results in the defendant's being sentenced to life imprisonment **2117 or life imprisonment without parole." (footnotes omitted)).

Furthermore, at the time Congress adopted the FDPA, identical language in the predecessor Anti–Drug Abuse and Death Penalty Act of 1988 had been construed to mandate court sentencing upon jury deadlock. See *United States v. Chandler,* 996 F.2d 1073, 1086 (C.A.11 1993) ("If the jury does not [recommend death], the district court sentences the defendant."); *United States v. Pitera,* 795 F.Supp. 546, 552 (E.D.N.Y.1992) ("Absent a recommendation of death, the court must sentence a defendant."). [22] The House Report suggests that Congress understood and approved that construction. See H.R.Rep. No. 103–467, p. 9 (1994) ("If the jury is not

*420 unanimous, the judge shall impose the sentence pursuant to Section 3594.").

IV

Piled on the key instructional error, the trial court presented the jury with duplicative, vague nonstatutory aggravating factors. The court told the jury to consider as aggravators, if established beyond a reasonable doubt, factors 3(B)—the victim's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas"—and 3(C)—the victim's "personal characteristics and the effect of the instant offense on [her] family." 132 F.3d, at 250. [23] The jury found both. See *ibid.*

The District Court did not clarify the meaning of the terms "background" and "personal characteristics." See *id.*, at 251. Notably, the term "personal characteristics" in aggravator 3(C) necessarily included "young age," "slight stature," "background," and "unfamiliarity," factors the jury was told to consider in aggravator 3(B). I would not attribute to the Court genuine disagreement with that proposition. But see *ante,* at 2106–2107. Double counting of aggravators "creates the risk of an arbitrary death sentence." 132 F.3d, at 251; see also *United States v. McCullah,* 76 F.3d 1087, 1111 (C.A.10 1996) ("Such double counting of aggravating factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily."). The Fifth Circuit considered the District Court's lapse inconsequential, concluding that "the two remaining statutory aggravating factors ... support the sentence of death, even after considering the eleven mitigating factors." 132 F.3d, at 252. [24]

**2118 *421 Appellate courts should hesitate to assert confidence that "elimination of improperly considered aggravating circumstances could not possibly affect the balance." *Barclay v. Florida,* 463 U.S. 939, 958, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). Adding the overlapping aggravators to the more disturbing misinformation conveyed in the charge, I see no basis for concluding " 'it would have made no difference if the thumb had been removed from death's side of the scale.' " 132 F.3d, at 251 (quoting *Stringer v. Black,* 503 U.S. 222, 232, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992)).

V

The Fifth Circuit's tolerance of error in this case, and this Court's refusal to face up to it, cannot be reconciled with the recognition in *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion), that "death is qualitatively different." If the jury's weighing process is infected by the trial court's misperceptions of the law, the legitimacy of an ensuing *422 death sentence should not hinge on defense counsel's shortfalls or the reviewing court's speculation about the decision the jury would have made absent the infection. I would vacate the jury's sentencing decision and remand the case for a new sentencing hearing, one that would proceed with the accuracy that superintendents of the FDPA should demand.

All Citations

527 U.S. 373, 119 S.Ct. 2090, 144 L.Ed.2d 370, 67 USLW 3682, 67 USLW 4508, 99 Cal. Daily Op. Serv. 4802, 1999 Daily Journal D.A.R. 6193, 1999 CJ C.A.R. 3725, 12 Fla. L. Weekly Fed. S 403

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

† Justice SCALIA joins all but Part III–A of the opinion.

1 As phrased on the Special Findings Form returned by the jury, the statutory aggravating factors read:

> "2(A). The defendant LOUIS JONES caused the death of Tracie Joy McBride, or injury resulting in the death of Tracie Joy McBride, which occurred during the commission of the offense of Kidnapping."
>
> "2(C). The defendant LOUIS JONES committed the offense in an especially heinous, cruel, and depraved manner in that it involved torture or serious physical abuse to Tracie Joy McBride." App. 51–52.

2 The term "nonstatutory aggravating factor" is used to refer to any aggravating factor that is not specifically described in 18 U.S.C. § 3592. Section 3592(c) provides that the jury may consider "whether any other aggravating factor for which notice has been given exists." Pursuant to § 3593(a), when the Government decides to seek the death penalty, it must provide notice of the aggravating factors that it proposes to prove as justifying a sentence of death.

3 As phrased on the Special Findings Form, the nonstatutory aggravating factors read:

"3(B). Tracie Joy McBride's young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas.

"3(C). Tracie Joy McBride's personal characteristics and the effect of the instant offense on Tracie Joy McBride's family constitute an aggravating factor of the offense." App. 53.

4 The mitigating factors that the jury found as set forth on the Special Findings Form (along with the number of jurors that found for each factor in brackets) are as follows:

"1. That the defendant Louis Jones did not have a significant prior criminal record." [6]

"2. That the defendant Louis Jones' capacity to appreciate the wrongfulness of the defendant's conduct or to conform to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge." [2]

"3. That the defendant Louis Jones committed the offense under severe mental or emotional disturbance." [1]

"4. That the defendant Louis Jones was subjected to physical, sexual, and emotional abuse as a child (and was deprived of sufficient parental protection that he needed)." [4]

"5. That the defendant Louis Jones served his country well in Desert Storm, Grenada, and for 22 years in the United States Army." [8]

"6. That the defendant Louis Jones is likely to be a well-behaved inmate." [3]

"7. That the defendant Louis Jones is remorseful for the crime he committed." [4]

"8. That the defendant Louis Jones' daughter will be harmed by the emotional trauma of her father's execution." [9]

"9. That the defendant Louis Jones was under unusual and substantial internally generated duress and stress at the time of the offense." [3]

"10. That the defendant Louis Jones suffered from numerous neurological or psychological disorders at the time of the offense." [1] *Id.,* at 54–56.

Seven jurors added petitioner's ex-wife as a mitigating factor without further elaboration. *Id.,* at 56.

5 We have thus approved of the use of a supplemental charge to encourage a jury reporting itself as deadlocked to engage in further deliberations, see *Allen v. United States,* 164 U.S., at 501, 17 S.Ct. 154, even capital sentencing juries, see *Lowenfield v. Phelps,* 484 U.S. 231, 237–241, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988).

6 It is not insignificant that the Courts of Appeals to have addressed this question, as far as we are aware, are uniform in rejecting the argument that the Constitution requires an instruction as to the consequences of a jury's inability to agree. See, *e.g., Coe v. Bell,* 161 F.3d 320, 339–340 (C.A.6 1998); *Green v. French,* 143 F.3d 865, 890 (C.A.4 1998); *United States v. Chandler,* 996 F.2d 1073, 1088–1089 (C.A.11 1993); *Evans v. Thompson,* 881 F.2d 117, 123–124 (C.A.4 1989). Indeed, the Fifth Circuit, in the alternative, reached the same conclusion in this very case. See 132 F.3d 232, 245 (1998).

7 The decision forms read as follows:

"*DECISION FORM A*

"We the jury have determined that a sentence of death should not be imposed because the government has failed to prove beyond a reasonable doubt the existence of the required intent on the part of the defendant or a required aggravating factor."

"*DECISION FORM B*

"Based upon consideration of whether the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of any mitigating factors, whether the aggravating factor or factors are themselves sufficient to justify a sentence of death, we recommend, by unanimous vote, that a sentence of death be imposed."

"*DECISION FORM C*

"We the jury recommend, by unanimous verdict, a sentence of life imprisonment without the possibility of release."

"*DECISION FORM D*

"We the jury recommend some other lesser sentence." App. 57–59.

8 Petitioner does not argue that the District Court's instructions on the lesser sentence option, standing alone, constituted reversible error although the parties agree that, after the jury found petitioner guilty of kidnaping resulting in death, the only possible sentences were death and a life sentence. See Brief for Petitioner 18–19; Brief for United States 13, n.

2; see also 18 U.S.C. § 1201. Petitioner made such an argument below; the Fifth Circuit, however, concluded that the instructions as to the lesser sentence option did not rise to the level of plain error. 132 F.3d, at 246–248.

9 Petitioner concedes that the *Boyde* standard applies to the extent that he is advancing a constitutional claim, but relying on our prior decision in *Andres v. United States,* 333 U.S. 740, 752, 68 S.Ct. 880, 92 L.Ed. 1055 (1948), he contends that a more lenient standard applies to the extent that he seeks relief under the statute directly. Our decisions in *Boyde* and *Estelle,* however, foreclose that reading of *Andres.* In *Boyde* we noted that our prior decisions, including *Andres,* had been "less than clear" in articulating a single workable standard for evaluating claims that an instruction prevented the jury's consideration of constitutionally relevant evidence. 494 U.S., at 378, 110 S.Ct. 1190. In order to supply "a single formulation for this Court and other courts to employ in deciding this kind of federal question," we announced the "reasonable likelihood" standard. *Id.,* at 379, 110 S.Ct. 1190. We made this same point later in *Estelle,* noting that "[i]n *Boyde* ... we made it a point to settle on a single standard of review for jury instructions—the 'reasonable likelihood' standard—after considering the many different phrasings that had previously been used by this Court." 502 U.S., at 72–73, n. 4, 112 S.Ct. 475.

10 The relevant portion of the instruction read: "You will also recall that I previously told you that all twelve of you had to unanimously agree that a particular aggravating circumstance was proved beyond a reasonable doubt before you consider it. Quite the opposite is true with regard to mitigating factors. A finding with respect to a mitigating factor may be made by any one or more of the members of the jury, and any member who finds by a preponderance of the evidence the existence of a mitigating factor may consider such factor established for his or her weighing of aggravating and mitigating factors regardless of the number of other jurors who agree that such mitigating factor has been established." App. 43.

11 Petitioner also urges us to take cognizance of two affidavits prepared after the jury had returned its sentencing recommendation. One affidavit, attached to petitioner's new trial motion, was executed by an investigator for the federal public defender after a juror had contacted the public defender's office. *Id.,* at 66–68, 112 S.Ct. 475. The other affidavit, attached to petitioner's motion to reconsider the District Court's order denying his motion for a new trial, was executed by one of the jurors. *Id.,* at 78–80, 112 S.Ct. 475. The Fifth Circuit ruled that petitioner could not rely on these affidavits to undermine the jury's sentencing recommendation. 132 F.3d, at 245–246. Petitioner did not raise this independent determination in any of his questions presented, and we do not believe that the issue is fairly included within them. We therefore decline review of this ruling by the Fifth Circuit. See this Court's Rule 14.1(a); *Berkemer v. McCarty,* 468 U.S. 420, 443, n. 38, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

12 The dissent would treat this aspect of the Government's argument as waived. *Post,* at 2117, n. 24. As Justice GINSBURG explained, for a unanimous Court, in *Caterpillar Inc. v. Lewis,* 519 U.S. 61, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996): "Under this Court's Rule 15.2, a nonjurisdictional argument not raised in a respondent's brief in opposition to a petition for a writ of certiorari '*may* be deemed waived.' " *Id.,* at 75, n. 13, 117 S.Ct. 467 (emphasis added). But we have not done so when the issue not raised in the brief in opposition was "predicate to an intelligent resolution of the question presented." *Ohio v. Robinette,* 519 U.S. 33, 38, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996) (internal quotation marks omitted); see also *Caterpillar,* 519 U.S., at 75, n. 13, 117 S.Ct. 467. In those instances, we have treated the issue not raised in opposition as fairly included within the question presented. This is certainly such a case. Assessing the error (including whether there was error at all) is essential to an intelligent resolution of whether any such error was harmless. Moreover, here, as in *Caterpillar,* "[t]he parties addressed the issue in their briefs and at oral argument." *Ibid.* By contrast, in the cases that the dissent looks to for support for its position, there were good reasons to decline to exercise our discretion. In *Roberts v. Galen of Va., Inc.,* 525 U.S. 249, 253–254, 119 S.Ct. 685, 142 L.Ed.2d 648 (1999) *(per curiam),* the "claims [we declined to consider did] not appear to have been sufficiently developed below for us to assess them," and in *South Central Bell Telephone Co. v. Alabama,* 526 U.S. 160, 171, 119 S.Ct. 1180, 143 L.Ed.2d 258 (1999), the argument respondent raised for the first time in its merits brief was "so far-reaching an argument" that "[w]e would normally expect notice [of it]," especially when, unlike this case, the respondent's argument did not appear to have been raised or considered below.

13 The Tenth Circuit, in a decision subsequent to *McCullah,* has emphasized that factors do not impermissibly overlap unless one "necessarily subsumes" the other. *Cooks v. Ward,* 165 F.3d 1283, 1289 (1998).

14 Petitioner argues that the term "personal characteristics" was so vague that the jury may have thought it could consider the victim's race and the petitioner's race under factor 3(C). In light of the remainder of the factor and the Government's argument with respect to the factor, we fail to see that possibility. In any event, in accordance with the Death Penalty Act's explicit command in § 3593(f), the District Court instructed the jury not to consider race at all in reaching its decision. App. 47. Jurors are presumed to have followed their instructions. See *Richardson v. Marsh,* 481 U.S. 200, 206, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987).

15 We reiterate the point we made in *Tuilaepa v. California,* 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994)—we have held only a few, quite similar factors vague, see, *e.g., Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) (whether murder was "especially heinous, atrocious, or cruel"), while upholding numerous other factors against vagueness challenges, see 512 U.S., at 974, 114 S.Ct. 2630 (collecting cases).

1 The Court granted certiorari on three questions as phrased by the United States:

" '1. Whether petitioner was entitled to a jury instruction that the jury's failure to agree on a sentencing recommendation automatically would result in a court-imposed sentence of life imprisonment without possibility of release. 2. Whether there is a reasonable likelihood that the jury instructions led the jury to believe that deadlock on the penalty recommendation would automatically result in a court-imposed sentence less severe than life imprisonment. 3. Whether the Court of Appeals correctly held that the submission of invalid nonstatutory aggravating factors was harmless beyond a reasonable doubt.' " 525 U.S. 809, 119 S.Ct. 39, 142 L.Ed.2d 31 (1998); see also Brief for United States I.

I think it fair and " 'principled,' " *ante,* at 2108, to read the indigent petitioner's arguments on the questions presented with the willingness to overlook "loose drafting" that the Court consistently shows in evaluating the Government's case. See, *e.g., ante,* at 2104, 2108; see also *ante,* at 2105–2108 (adopting Government's merits brief arguments although those arguments were not mentioned in the Brief in Opposition).

2 The predecessor Anti–Drug Abuse Act of 1988 authorized the death penalty for murder resulting from certain drug-related offenses. See 21 U.S.C. § 848(e). The FDPA states that its procedures apply to "any [federal] offense for which a sentence of death is provided," 18 U.S.C. § 3591(a)(2), but does not repeal the 1988 Act, which differs in some respects. See, *e.g.,* 21 U.S.C. §§ 848(q)(4)-(9) (mandatory appointment of habeas counsel and provision of investigative and expert services).

3 Congress enacted three statutes authorizing the death penalty between 1972 and 1988: Antihijacking Act of 1974, § 105, 88 Stat. 411–413, repealed by FDPA, § 6002, 108 Stat. 1970 (air piracy); Criminal Law and Procedure Technical Amendments Act of 1986, § 61, 100 Stat. 3614 (witness killing); Department of Defense Authorization Act, 1986, § 534, 99 Stat. 634–635 (amending the Uniform Military Justice Act to establish weighing procedures for courts-martial considering the death penalty for espionage). Earlier federal statutes authorizing the death penalty remained on the books, but were not invoked following this Court's decision in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) *(per curiam),* which led to a hiatus in death penalty adjudications. See Little, The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role, 26 Ford. Urb. L.J. 347, 349, n. 5, 372–380 (1999).

4 See *id.,* at 391, and n. 242 (estimating that the FDPA applies to at least 44 offenses).

5 The sentencing hearing is before a jury unless the defendant, with the approval of the Government, moves for a hearing before the court. See 18 U.S.C. § 3593(b).

6 Section 3591(a)(2) allows the death penalty for a defendant found guilty of a death-eligible homicide "if the defendant, as determined beyond a reasonable doubt at the [sentencing] hearing":

"(A) intentionally killed the victim;

"(B) intentionally inflicted serious bodily injury that resulted in the death of the victim;

"(C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or

"(D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act."

7 The FDPA lists 16 aggravating factors for homicide and allows the jury to "consider whether any other aggravating factor for which notice has been given [by the Government] exists." 18 U.S.C. § 3592(c). Nonstatutory aggravators "may include factors concerning the effect of the offense on the victim and the victim's family." § 3593(a).

8 See Little, *supra,* at 397 ("[Weighing] requires qualitative, not quantitative, evaluation." (internal quotation marks omitted)).

9 Jones's instruction no. 4 read in relevant part:

"If, after fair and impartial consideration of all the evidence in this case, any one of you is not persuaded that justice demands Mr. Jones's execution, then the jury must return a decision against capital punishment and must fix Mr. Jones'[s] punishment at life in prison without any possibility of release." App. 13.

10 Jones's instruction no. 5 read in relevant part:

"[I]f any of you—even a single juror—is not persuaded beyond a reasonable doubt that Mr. Jones'[s] execution is required in this case, then the entire jury must render a decision against his death. In that event, the jury must fix his punishment at life in prison without any possibility of release.

"Again, unless all twelve members of the jury determine that Mr. Jones should receive the death penalty, I will impose a sentence of life imprisonment without possibility of release. In the event, after due deliberation and reflection, the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I will impose a sentence of life imprisonment without possibility of release ....

"In the event you are unable to agree on Life Without Possibility of Release or Death, but you are unanimous that the sentence should not be less than Life Without Possibility of Release, you should report that vote to the Court and the Court will sentence the defendant to Life Without the Possibility of Release." App. 14–15.

In "Defendant's Objections to the Court's Charge," Jones "particularly direct[ed] the court's attention" to his proposed instruction no. 5. *Id.,* at 25, 30.

11 The jury rejected the following aggravators: (1) the crime involved substantial planning and premeditation, see 18 U.S.C. § 3592(c)(9); (2) the crime created a grave risk to a person other than the victim, see § 3592(c)(5); and (3) Jones posed a future danger to the lives and safety of other persons. It found as aggravators: (1) Jones killed the victim during the commission of kidnaping, see § 3592(c)(1); (2) the crime was especially heinous, cruel, and depraved, see § 3592(c)6; (3) the victim's young age, slight stature, background, and unfamiliarity with San Angelo, Texas; and (4) the victim's personal characteristics and the effect of the offense on her family. See 132 F.3d, at 238, and nn. 1, 2.

12 One or more jurors found each of Jones's ten specific mitigating factors. None found the eleventh, a catchall stating that "other factors in the defendant's background or character militate against the death penalty," see 18 U.S.C. § 3592(a)(8), but seven found the existence of an additional mitigating factor not submitted by Jones. See 132 F.3d, at 238–239, n. 3.

13 The problem was not, as the Court describes it, a failure to give the jury "[a] bit of information that might possibly influence an individual juror's voting behavior," *ante,* at 2099; rather, the jury was " 'affirmatively misled,' " cf. *ante,* at 2099, by the repeated misinformation the charge and decision forms conveyed.

14 The verdict forms compounded the error by allowing the jurors to return as their decision the statement: "We the jury recommend some other lesser sentence." App. 59.

Jones does not press the District Court's identification of a lesser sentence option as an independent ground for reversal. That error, however, is an essential component of his argument that the misinformation conveyed by the District Court led the jury to believe that deadlock could result in a less-than-life sentence.

15 Justice BREYER does not believe that the District Court's submission of the (unobjected-to) jury instructions amounted to "plain error." In his view, the judge's (objected-to) failure to submit the defense's proposed instruction no. 5 amounted to an "abuse of discretion," for that proposed instruction was legally correct, the judge's failure to give it likely rested upon an erroneous view of the law, and it would have corrected the false impression created by the remaining instructions. See *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990); App. 74 (order denying defendant's motion for new trial); cf. 132 F.3d, at 242.

16 The Fifth Circuit noted that Jones's counsel proposed language referring to a "lesser sentence," but reviewed for "plain error," rather than discounting the error as "invited," because the District Court did not use defense counsel's requested language. 132 F.3d, at 246, n. 10. Although Jones's counsel did propose "lesser sentence" language, see, *e.g.,* App. 26, Jones's proposed instructions nos. 4 and 5 made one thing clear—his view that the jury and judge were required to impose life without possibility of release if the jury did not agree to death. See *supra,* at 2112, nn. 9, 10.

17 The Court, in a footnote, appears to recognize what should be beyond genuine debate: For Jones, "the only possible sentences were death and a life sentence." *Ante,* at 2101, n. 8. In face of the District Court's lesser sentence instructions, four times given to the jury, it is difficult to comprehend why this Court "cannot see that any error occurred." See *ante,* at 2102.

18 It is the general rule, as the Government observes, and the Court repeats, that " '[a] party who has requested an instruction that has not been given is not relieved of the requirement that he state distinctly his objection to the instruction that is given.' " Brief for United States 24 (quoting 2 C. Wright, Federal Practice and Procedure § 484, p. 702 (2d ed.1982)); see also *ante,* at 2101. It is also true, however, that "the requirement of objections should not be employed woodenly, but should be applied where its application will serve the ends for which it was designed, rather than being made into a trap for the unwary." 2 Wright, *supra,* § 484, at 699–701. Here, Jones's proposed instruction that his default sentence was life without possibility of release apprised the District Court and the Government of his essential position.

19 While precedent supports the Fifth Circuit's affirmation that statements attesting to the juror's understanding of the instructions are inadmissible, see 132 F.3d, at 245–246, the statements Jones submitted do assert that apprehension of a lesser sentence the judge might impose in fact caused jurors to vote for a death sentence, see App. 68, 79. On a matter so grave, I would not discount those statements altogether. Cf. *Jorgensen v. York Ice Machinery Corp.,* 160 F.2d 432, 435 (C.A.2 1947) (L. Hand, J.) (while many defects in jury deliberation do not require reversal, "this has ... nothing

to do with what evidence shall be competent to prove the facts when the facts do require the verdict to be set aside, as concededly some facts do").

20 Misinformation, not the District Court's failure to repeat the unanimity requirement each time it mentioned the jury's sentencing options, or to advise on the consequences of a deadlocked jury, is the harmful error at the heart of Jones's case. I therefore see no cause to dispute that "the Eighth Amendment does not require that the jury be instructed as to the consequences of their failure to agree." *Ante,* at 2098. In my judgment, however, the court was obliged, in this life or death case, to make clear to the jury that Jones's minimum sentence was life without possibility of release.

21 At oral argument, counsel for the United States maintained that it would be up to the prosecutor, when a jury is deadlocked, to request a new panel or to allow the judge to decide on the sentence. See Tr. of Oral Arg. 41. But this could be done only once, the Government maintained: In the event of a second deadlock, it would be the court's obligation to impose the sentence. See *id.,* at 46.

22 Like the FDPA, the Anti–Drug Abuse Act provides for a new sentencing jury if the guilt-phase jury "has been discharged for good cause," 21 U.S.C. § 848(i)(1)(B)(iii), and states, immediately after providing for the death sentence upon jury recommendation, that "[o]therwise the court shall impose a sentence, other than death, authorized by law," § 848(*l*). Under the Anti–Drug Abuse Act, unlike the FDPA, the only binding recommendation the jury can make is for death.

23 Counsel specifically objected to these factors. See App. 21–22, 28.

24 The Government now argues, contrary to the Fifth Circuit's conclusion, that aggravating factors 3(B) and 3(C) are not duplicative, vague, or overbroad. See Brief for United States 40–45. The Court granted certiorari on the Government's reformulated questions, which presumed the incorrectness of the aggravators. See *supra,* at 2110, n. 1. In its brief in opposition, the Government did not challenge the Fifth Circuit's determination of error, but focused solely on whether the error was harmless. Justic Thomas, writing for a plurality, nevertheless addresses the Government's newly raised argument. See *ante,* at 2105–2108. I would hold the Government to a tighter rein and dismiss the tardy argument as waived. See *Roberts v. Galen of Va., Inc.,* 525 U.S. 249, 253, 119 S.Ct. 685, 142 L.Ed.2d 648 (1999) *(per curiam); South Central Bell Telephone Co. v. Alabama,* 526 U.S. 160, 119 S.Ct. 1180, 143 L.Ed.2d 258 (1999); cf. this Court's Rule 15.2.

It is evident that the issue held back by the Government was not "predicate to an intelligent resolution of the question presented." *Ohio v. Robinette,* 519 U.S. 33, 38, 117 S.Ct. 417, 136 L.Ed.2d 347 (1996) (internal quotation marks omitted). But see *ante,* at 2106, n. 12. Justice Thomas treats the two issues as separate and independent. He maintains first that there was no error. Writing for the Court, he then proceeds to assume there was error and concludes that any error was harmless. Either holding would do to support the Court's disposition. See, *e.g., United States v. Hasting,* 461 U.S. 499, 506, n. 4, 510–512, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983) (holding presumed error harmless rather than deciding whether there was, in fact, error; Court explains "[t]he question on which review was granted assumed that there was error and the question to be resolved was whether harmless-error analysis should have applied"); *id.,* at 512–513, 103 S.Ct. 1974 (STEVENS, J., concurring) (Court should decide case on the ground that there was no error, without reaching harmless-error question).

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

707 F.Supp.2d 621
United States District Court,
W.D. North Carolina,
Charlotte Division.

UNITED STATES of America
v.
Alejandro Enrique Ramirez UMANA,
a/k/a "Wizard", "Lobo", Defendant.

No. 3:08CR134–RJC.
|
April 19, 2010.

Synopsis
Background: Defendant charged in superseding indictment with multiple federal offenses arising out of alleged gang affiliation, including murder in aid of racketeering, moved to strike non-statutory aggravating factors from government's notice of intent to seek death penalty.

Holdings: The District Court, Robert J. Conrad, Jr., Chief Judge, held that:

[1] rule of lenity did not compel court to construe Federal Death Penalty Act (FDPA) to prohibit jury's consideration of non-statutory aggravating factors when determining defendant's eligibility for death penalty;

[2] jury's consideration of defendant's uncharged acts of violence as non-statutory aggravating factors would not violate defendant's Fifth, Sixth, and Eighth Amendment rights;

[3] FDPA's listing of six categories of prior conviction as statutory aggravating factors did not preclude jury's consideration of allegations of uncharged criminal conduct as non-statutory aggravating factors;

[4] doubts regarding accuracy of predictions of defendant's future dangerousness did not render jury's inquiry into future dangerousness unreliable within meaning of Eighth Amendment;

[5] sub-factor of defendant's low rehabilitative potential was relevant to consideration of aggravating factor of future dangerousness;

[6] jury could consider non-statutory aggravating capital sentencing factor "Gang Motivated Killing" which duplicated element of charged offense of murder in aid of racketeering without violating Eighth Amendment;

[7] aggravating factors "Gang Motivated Killing" and "Future Dangerousness" were not duplicative as would arbitrarily skew sentencing for gang-related murders in favor of death penalty in violation of Eighth Amendment; and

[8] aggravating factors "Callous Disregard" and "Future Dangerousness" were duplicative.

Motion granted in part and denied in part.

West Headnotes (37)

[1] Sentencing and Punishment
Proceedings

The Federal Death Penalty Act (FDPA) directs that sentencing in a federal capital case be performed in two discrete phases; the first phase, eligibility, requires the jury to determine whether the defendant qualifies for the death penalty, while the second phase, selection, requires a decision as to whether a particular defendant should in fact receive that sentence. 18 U.S.C.A. § 3593(b).

Cases that cite this headnote

[2] Sentencing and Punishment
Avoidance of arbitrariness or capriciousness
Sentencing and Punishment
Objective standards

The sentencing process in a federal capital case must be neutral and principled so as to guard against bias or caprice in the sentencing decision. 18 U.S.C.A. § 3591 et seq.

 © 2016 Thomson Reuters. No claim to original U.S. Government Works.

Cases that cite this headnote

[3] **Constitutional Law**
⇦ Capital Punishment;Death Penalty
Jury
⇦ Death penalty
Sentencing and Punishment
⇦ Provision authorizing death penalty

The Fifth, Sixth, and Eighth Amendments of the Constitution require that a capital sentencing scheme suitably direct and limit a sentencing jury's discretion so as to minimize the risk of wholly arbitrary and capricious action. U.S.C.A. Const.Amends. 5, 6, 8.

Cases that cite this headnote

[4] **Constitutional Law**
⇦ Matters Considered
Jury
⇦ Death penalty
Sentencing and Punishment
⇦ Narrowing class of eligible offenders
Sentencing and Punishment
⇦ Aggravating circumstances in general

Pursuant to the protections afforded by the Fifth, Sixth, and Eighth Amendments, a court may not permit the jury, when determining defendant's eligibility for death penalty, to consider aggravating factors that are impermissibly vague, overbroad, or otherwise fail to genuinely narrow the class of persons eligible for the death penalty. U.S.C.A. Const.Amends. 5, 6, 8; 18 U.S.C.A. § 3591 et seq.

Cases that cite this headnote

[5] **Sentencing and Punishment**
⇦ Aggravating circumstances in general

The aggravating factors put before a sentencing jury determining the defendant's eligibility for death penalty must permit jury to make a principled distinction between those who deserve the death penalty and those who do not. U.S.C.A. Const.Amends. 5, 6, 8; 18 U.S.C.A. § 3591 et seq.

Cases that cite this headnote

[6] **Criminal Law**
⇦ Liberal or strict construction;rule of lenity

The "lenity rule" requires a court to resolve any ambiguity in a criminal statute in favor of the defendant.

Cases that cite this headnote

[7] **Sentencing and Punishment**
⇦ Aggravating or mitigating circumstances
Sentencing and Punishment
⇦ Aggravating circumstances in general

Rule of lenity did not compel court to construe Federal Death Penalty Act (FDPA) to prohibit jury's consideration of non-statutory aggravating factors when determining defendant's eligibility for death penalty for gang-related murders because FDPA, when read as a whole, was not vague with respect to whether non-statutory factors were proper to consider; FDPA contained explicit catch-all provisions authorizing the jury to consider both statutory aggravating factors and "any other aggravating factor for which notice has been given," and contrary construction of FDPA would render several of its other provisions essentially meaningless. 18 U.S.C.A. §§ 3591(a), 3592(c), 3593(d).

Cases that cite this headnote

[8] **Statutes**
⇦ Superfluousness

To the extent possible, a statute should be read so that no part is rendered superfluous or inoperable.

Cases that cite this headnote

[9] **Sentencing and Punishment**
⇦ Aggravating circumstances in general

The Federal Death Penalty Act (FDPA) generally authorizes a jury in a federal capital case to consider any non-statutory aggravating factor for which notice has been provided. 18 U.S.C.A. §§ 3591(a), 3592(c), 3593(d).

Cases that cite this headnote

[10] **Constitutional Law**
⇦ Evidence and witnesses
Sentencing and Punishment
⇦ Unadjudicated conduct
Sentencing and Punishment
⇦ Instructions

Non-statutory aggravating factors alleging uncharged criminal conduct may be put before sentencing jury determining defendant's eligibility for death penalty without violating the Fifth, Sixth, and Eighth Amendments so long as the jury is properly instructed that it must find such conduct unanimously and beyond a reasonable doubt. U.S.C.A. Const.Amends. 5, 6, 8; 18 U.S.C.A. §§ 3591(a), 3592(c), 3593(d).

1 Cases that cite this headnote

[11] **Constitutional Law**
⇦ Evidence and witnesses
Jury
⇦ Death penalty
Sentencing and Punishment
⇦ Unadjudicated conduct
Sentencing and Punishment
⇦ Instructions

Jury's consideration of defendant's uncharged acts of violence as non-statutory aggravating factors when determining defendant's eligibility for death penalty for gang-related murders would not violate defendant's Fifth, Sixth, and Eighth Amendment rights as would require acts to be stricken from government's notice of intent to seek death penalty, given that government attributed uncharged acts, including participation in several murders, to defendant himself rather than his gang, provided that jury was properly instructed that it must find such conduct unanimously and beyond reasonable doubt. U.S.C.A. Const.Amends. 5, 6, 8; 18 U.S.C.A. §§ 3591(a), 3592(c), 3593(d).

1 Cases that cite this headnote

[12] **Sentencing and Punishment**
⇦ Unadjudicated conduct

Federal Death Penalty Act's (FDPA) listing of six categories of prior conviction as statutory aggravating factors that jury could consider when determining eligibility for death penalty did not preclude jury's consideration of allegations of uncharged criminal conduct as non-statutory aggravating factors at sentencing for gang-related murders; a number of FDPA's provisions specifically allowed jury to consider and return findings not only for statutory aggravating factors but "any other aggravating factor for which notice has been given," and applying literal interpretation to limit jury's consideration to enumerated categories of prior conviction would thwart these open-ended provisions. 18 U.S.C.A. §§ 3592(c), 3593(d).

Cases that cite this headnote

[13] **Statutes**
⇦ Express mention and implied exclusion; expressio unius est exclusio alterius

The maxim of statutory construction "expressio unius est exclusio alterius" means that the express designation of one thing may properly be construed to mean the exclusion of another.

Cases that cite this headnote

[14] **Statutes**
⇦ Express mention and implied exclusion; expressio unius est exclusio alterius

The maxim of statutory construction expressio unius est exclusio alterius requires great caution in its application, and should

not be applied if it creates contradiction within a statute.

Cases that cite this headnote

[15] **Sentencing and Punishment**
⇦ Unadjudicated conduct

By listing six categories of prior conviction as statutory aggravating factors jury may consider when determining eligibility for death penalty, Congress did not intend for the Federal Death Penalty Act (FDPA) to preclude allegations of uncharged criminal conduct as non-statutory aggravating factors. 18 U.S.C.A. §§ 3592(c), 3593(d).

1 Cases that cite this headnote

[16] **Sentencing and Punishment**
⇦ Procedure

Sentencing and Punishment
⇦ Applicability of rules of evidence in general

Although the Federal Rules of Evidence do not apply at capital sentencing hearing, the Federal Death Penalty Act (FDPA) provides a capital defendant with constitutionally sufficient evidentiary protection. 18 U.S.C.A. § 3593(c).

1 Cases that cite this headnote

[17] **Sentencing and Punishment**
⇦ Unadjudicated conduct

Evidence of uncharged acts of violence is not per se inadmissible at capital sentencing for jury's consideration as non-statutory aggravating factor when determining eligibility for death penalty. 18 U.S.C.A. § 3593(c).

Cases that cite this headnote

[18] **Criminal Law**
⇦ Nature or stage of proceeding

Confrontation Clause bars out-of-court testimonial statements by witnesses only at eligibility phase of capital sentencing proceedings during which jury determines whether the defendant qualifies for the death penalty, not at selection phase when jury determines whether defendant should in fact receive death sentence. U.S.C.A. Const.Amend. 6; 18 U.S.C.A. § 3593(b, c).

1 Cases that cite this headnote

[19] **Sentencing and Punishment**
⇦ Other offenses, charges, or misconduct

Heightened reliability concerns related to capital sentencing require a threshold determination that evidence of unadjudicated conduct is reliable prior to its admission jury's consideration when determining defendant's eligibility for death penalty. 18 U.S.C.A. § 3593(c).

Cases that cite this headnote

[20] **Sentencing and Punishment**
⇦ Dangerousness

Doubts regarding accuracy of predictions of defendant's future dangerousness did not render inquiry into future dangerousness unreliable within meaning of Eighth Amendment as would preclude capital sentencing jury from considering future dangerousness as non-statutory aggravating factor when determining whether to apply death penalty for gang-related murders; while determination of future dangerousness was difficult, that did not mean it could not be made, and what was essential was that jury have all possible relevant information when making determination. U.S.C.A. Const.Amend. 8; 18 U.S.C.A. §§ 3592(c), 3593(c).

5 Cases that cite this headnote

[21] **Sentencing and Punishment**
⇦ Defendant's character and conduct

Sentencing and Punishment
⇦ Expert evidence

During sentencing in federal capital case, in addition to lay testimony, the government may also offer expert opinion testimony concerning the defendant's future dangerousness as an aggravating factor weighing in favor of death penalty. 18 U.S.C.A. §§ 3592(c), 3593(c).

1 Cases that cite this headnote

[22] **Sentencing and Punishment**
Dangerousness
Sentencing and Punishment
Notice of sentencing factors
Sentencing and Punishment
Burden of proof

Government's allegation in notice of intent to seek death penalty that defendant was "likely" to commit future acts of violent did not improperly suggest that government's burden of proof was less than required by due process and the Federal Death Penalty Act (FDPA) as would preclude jury's consideration of future dangerousness as non-statutory aggravating factor when determining whether to apply death penalty for gang-related murders; use of "likely" was necessary because no-one could predict future events with absolute certainty, and government still retained its required burden of proving beyond reasonable doubt that the defendant posed danger to lives and safety of others. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. §§ 3592(c), 3593(c).

4 Cases that cite this headnote

[23] **Sentencing and Punishment**
Dangerousness
Sentencing and Punishment
Notice of sentencing factors

Government could allege specific sub-factors in support of allegation of defendant's future dangerousness for capital sentencing jury's consideration as non-statutory aggravating factor without misleading the jury from its core inquiry of whether the defendant was likely to commit acts of violence in the future as would weigh in favor of death penalty for gang-related murders; to the contrary, sub-factors clarified the factor's common-sense core of meaning and focused the jury on the government's proffered evidence. 18 U.S.C.A. §§ 3592(c), 3593(c).

1 Cases that cite this headnote

[24] **Sentencing and Punishment**
Dangerousness

Capital sentencing jury was not required to find presence of all sub-factors alleged by government to find presence of future dangerousness as non-statutory aggravating factor weighing in favor of death penalty for gang-related murders; sub-factors were alleged as evidence, not elements, of future dangerousness factor. 18 U.S.C.A. §§ 3592(c), 3593(c).

1 Cases that cite this headnote

[25] **Sentencing and Punishment**
Dangerousness
Sentencing and Punishment
Notice of sentencing factors

Duplicative sub-factors alleged by government in support of allegation of defendant's future dangerousness were not unconstitutional as would preclude sub-factors' consideration by capital sentencing jury in determining whether to apply death penalty for gang-related murders, because each sub-factor fell under umbrella of single non-statutory aggravating factor of future dangerousness. 18 U.S.C.A. §§ 3592(c), 3593(c).

Cases that cite this headnote

[26] **Sentencing and Punishment**
Remorse and actual or potential rehabilitation
Sentencing and Punishment
Dangerousness

Sub-factor of defendant's low rehabilitative potential was relevant to capital sentencing jury's consideration of non-statutory

aggravating factor of future dangerousness in determining whether to apply death penalty for gang-related murders, although capital offenses carried life sentence as only alternative to death penalty; case was not one where criminal behavior alleged by government would be wholly prevented by defendant's incarceration, rather, government alleged that defendant's low potential for rehabilitation increased likelihood he would commit acts of violence against other prisoners and correctional officers throughout his incarceration. 18 U.S.C.A. §§ 3592(c), 3593(c).

Cases that cite this headnote

[27] **Sentencing and Punishment**
Remorse and actual or potential rehabilitation
Sentencing and Punishment
Declarations and confessions

There is nothing per se unconstitutional about considering a defendant's lack of remorse as a characteristic that favors imposition of the death penalty, but the Fifth Amendment limits proof of lack of remorse to affirmative words or conduct expressed by the defendant. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. §§ 3592(c), 3593(c).

1 Cases that cite this headnote

[28] **Sentencing and Punishment**
Remorse and actual or potential rehabilitation
Sentencing and Punishment
Dangerousness
Sentencing and Punishment
Declarations and confessions

Government intended to offer only affirmative statements made by defendant to others, rather than defendant's mere silence, to prove lack of remorse as sub-factor supporting allegation of non-statutory aggravating factor of future dangerousness for capital sentencing jury's consideration in determining whether to apply death penalty for gang-related murders, and sub-factor thus did not violate defendant's Fifth Amendment right to silence. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. §§ 3592(c), 3593(c).

1 Cases that cite this headnote

[29] **Sentencing and Punishment**
Dual use of evidence or aggravating factor
Sentencing and Punishment
Motive

Capital sentencing jury could consider non-statutory aggravating capital sentencing factor "Gang Motivated Killing" which duplicated element of charged offense of murder in aid of racketeering without violating Eighth Amendment; guilty verdict would genuinely narrow class of death-eligible persons from those who simply committed murder to those who committed murder for purpose of maintaining or elevating position in racketeering organization, and there was nothing unconstitutional about jury performing this narrowing during guilt phase of trial followed by government re-alleging same circumstance as aggravating factor at sentencing. U.S.C.A. Const.Amend. 8; 18 U.S.C.A. §§ 1959(a)(1), 3592(c), 3593(c).

Cases that cite this headnote

[30] **Sentencing and Punishment**
Dual use of evidence or aggravating factor
Sentencing and Punishment
Motive
Sentencing and Punishment
Dangerousness

Non-statutory aggravating capital sentencing factors "Gang Motivated Killing" and "Future Dangerousness" were not duplicative as would arbitrarily skew sentencing for gang-related murders in favor of death penalty in violation of Eighth Amendment; Gang Motivated Killing concerned defendant's motive for committing a specific act of violence in the past, while Future

Dangerousness concerned his propensity for violence in the future. U.S.C.A. Const.Amend. 8; 18 U.S.C.A. §§ 3592(c), 3593(c).

Cases that cite this headnote

[31] **Sentencing and Punishment**
⇦ Aggravating circumstances in general

An aggravating capital sentencing factor is not unconstitutionally vague if it possesses some common-sense core of meaning that criminal juries should be capable of understanding. 18 U.S.C.A. §§ 3592(c), 3593(c).

Cases that cite this headnote

[32] **Sentencing and Punishment**
⇦ Aggravating circumstances in general

A relevant aggravating capital sentencing factor is one that assists the jury in distinguishing those who deserve capital punishment from those who do not. 18 U.S.C.A. §§ 3592(c), 3593(c).

Cases that cite this headnote

[33] **Sentencing and Punishment**
⇦ Aggravating circumstances in general

If an aggravating capital sentencing factor bears only a tangential relationship to whether the defendant deserves the death penalty, it should be excluded from the sentencing jury's consideration. 18 U.S.C.A. §§ 3592(c), 3593(c).

Cases that cite this headnote

[34] **Sentencing and Punishment**
⇦ Dual use of evidence or aggravating factor

Aggravating capital sentencing factors are not duplicative unless they substantially overlap, or the elements of one necessarily include the elements of another. 18 U.S.C.A. §§ 3592(c), 3593(c).

Cases that cite this headnote

[35] **Sentencing and Punishment**
⇦ Extreme or reckless indifference

Non-statutory aggravating capital sentencing factor "Callous Disregard" was not unconstitutionally vague as would preclude sentencing jury from considering factor in determining whether to apply death penalty for gang-related murders; factor possessed common-sense core of meaning sufficient to overcome any vagueness concerns because government would have to show that defendant, through his words and actions, failed to appreciate the gravity of killing two human beings. 18 U.S.C.A. §§ 3592(c), 3593(c).

Cases that cite this headnote

[36] **Sentencing and Punishment**
⇦ Extreme or reckless indifference

Non-statutory aggravating capital sentencing factor "Callous Disregard" was relevant to determining whether defendant deserved death penalty for gang-related murders; whether defendant appreciated gravity of his actions related to his individual character and provided one legitimate basis to distinguish whether death penalty was justified in this particular case. 18 U.S.C.A. §§ 3592(c), 3593(c).

Cases that cite this headnote

[37] **Sentencing and Punishment**
⇦ Dual use of evidence or aggravating factor

Non-statutory aggravating capital sentencing factor "Callous Disregard" was duplicative of "Future Dangerousness" factor and would thus be stricken from government's notice of intent to seek death penalty for gang-related murders; concept of callous disregard was similar to lack of remorse which government alleged as sub-factor of Future Dangerousness, and jury could

interpret government's notice as suggesting that a finding of lack of remorse automatically required finding of both Future Dangerousness and Callous Disregard. 18 U.S.C.A. §§ 3592(c), 3593(c).

5 Cases that cite this headnote

Attorneys and Law Firms

*627 John David Bryson, Wyatt Early Harris & Wheeler, LLP, High Point, NC, Mark Patrick Foster, Jr., Law Offices of Mark Foster, PC, Charlotte, NC, for Defendant.

ORDER

ROBERT J. CONRAD, JR., Chief Judge.

THIS MATTER is before the Court on the "Defendant's Motion to Strike Non-statutory Aggravating Factor and to Exclude Evidence of Unadjudicated Criminal Acts During Penalty Phase of Trial" (Doc. No. 483) filed April 24, 2009; the "Defendant's Motion to Strike Non–Statutory Aggravating Factors from Notice of Intent to Seek the Death Penalty" (Doc. No. 488) filed April 24, 2009; the government's Consolidated Response (Doc. No. 503) filed May 8, 2009; the defendant's "Motion to Strike the Non–Statutory Aggravating Factor of Future Dangerousness from the Notice of Intent to Seek the Death Penalty" (Doc. No. 968) filed April 6, 2010; and the government's Response (Doc. No. 991) filed April 13, 2010. For the reasons stated below, the Court **GRANTS IN PART** and **DENIES IN PART** the defendant's motion to strike non-statutory aggravating factors (Doc. No. 488) and **DENIES** the defendant's remaining motions (Doc. Nos. 483 & 968).

I. BACKGROUND

The defendant is charged in a Superseding Indictment with multiple federal offenses arising out of his alleged affiliation with La Mara Salvatrucha, also known as the MS–13 gang (hereafter "MS–13"). Count 1 of the Indictment charges the defendant with a RICO conspiracy, in violation of 18 U.S.C. § 1962(d). As an overt act in furtherance of this conspiracy, the Indictment alleges that on December 8, 2007, the defendant murdered two individuals, Ruben Garcia Salinas and Manuel Garcia Salinas, in a restaurant in Greensboro, North Carolina. These murders are also charged separately in Counts 22 and 24 of the Indictment as murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(1), and in Counts 23 and 25 as use of a firearm during and in relation to a crime of violence resulting in death, in violation of 18 U.S.C. § 924(j). In the event the defendant is found guilty of Counts 22, 23, 24, or 25, the government has filed a Notice of Intention to Seek the Death Penalty (Doc. No. 275), as required by the Federal Death Penalty Act ("FDPA"), 18 U.S.C. § 3591 *et seq.* In its Notice, the government lists several aggravating factors it contends justify a sentence of death. Several of these are enumerated aggravating factors listed in § 3592(c) (the "statutory aggravating factors"). The government has also given notice of its intent to prove additional aggravating factors which are not enumerated *628 in § 3592(c) (the "non-statutory aggravating factors"), including the following:

1. Gang Motivated Killing.

The defendant killed Ruben Garcia Salinas to protect and maintain the name and reputation of the criminal enterprise MS–13, and to advance his position and reputation within the criminal enterprise.

* * *

3. Callous Disregard for the Severity of the Offense.

Defendant has demonstrated a callous disregard for the severity of the offense, as evidenced by his words and actions following the murder of Ruben Garcia Salinas.

4. Participation in Additional Uncharged Murders and Other Acts of Violence.

Apart from the offenses charged in the First Superseding Bill of Indictment, defendant has been involved in other serious acts of violence, which are not reflected in his criminal record. Including but not limited to:

a. On or about July 27, 2005, in Los Angeles, California, defendant knowingly, intentionally, and unlawfully killed Jose Herrera and Gustavo Porras.

b. On or about September 28, 2005, in Los Angeles, California, defendant knowingly, intentionally, and

unlawfully participated and aided and abetted the killing of Andy Abarca.

5. Future Dangerousness.

Defendant is likely to commit criminal acts of violence in the future which would constitute a continuing and serious threat to the lives and safety of others, as evidenced by at least one or more of the following:

a. Continuing Pattern of Violence.

Defendant has engaged in a continuing pattern of violence, attempted violence, and threatened violence, including but not limited to the crimes alleged against defendant in the First Superseding Bill of Indictment.

b. Low Rehabilitative Potential.

Defendant poses a future danger to the lives and safety of other persons as demonstrated by his lack of rehabilitation after prior incarceration, his pattern of criminal conduct, and, his allegiance to and membership in MS–13.

c. Lack of Remorse.

Defendant has never expressed any remorse for killing Rubin Garcia Salinas as indicated by defendant's statements to fellow gang-members during the course of and following the offenses alleged in the First Superseding Bill of Indictment.

d. Gang Membership.

Defendant has demonstrated an allegiance to and active membership in MS–13, a violent criminal enterprise.

(Doc. No. 275 at 4–5).[1] On April 24, 2009, the defendant filed two motions to strike non-statutory aggravating factors from the government's Notice. (Doc. Nos. 483 & 488). Therein the defendant moves to strike all his non-statutory aggravating factors as unauthorized by the FDPA. The defendant also moves to strike on various other grounds the aggravating factors Uncharged Murders and Other Violent Conduct, Gang Motivated Killing, and Callous Disregard for the Severity of the Offense. Later, on April 6, 2010, the defendant filed a third motion to strike the non-statutory ***629** aggravating factor Future Dangerousness. (Doc. No. 968).

II. LEGAL FRAMEWORK

A. Capital Sentencing

[1] **[2]** The FDPA directs that sentencing in a federal capital case be performed in two discrete phases. The first phase, "eligibility," requires the jury to determine whether the defendant qualifies for the death penalty, while the second phase, "selection," requires a decision as to whether a particular defendant "should in fact receive that sentence." *Tuilaepa v. California,* 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). Both the eligibility and selection phases are conducted in a special sentencing hearing mandated by the FDPA. 18 U.S.C. § 3593(b). At this hearing, "information may be presented as to any matter relevant to the sentence, ... regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. § 3593(c). However, the process must be "neutral and principled so as to guard against bias or caprice in the sentencing decision." *Tuilaepa,* 512 U.S. at 973, 114 S.Ct. 2630 (citing *Gregg v. Georgia,* 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)).

To be eligible for the death penalty in a homicide case, the jury first must find that the defendant acted intentionally in killing another person. 18 U.S.C. § 3591(a)(2). Next, it must find beyond a reasonable doubt the presence of at least one statutory aggravating factor alleged in the government's Notice. 18 U.S.C. 3593(e)(2). If these findings are made, the defendant is eligible for the death penalty, and the jury proceeds to the selection phase. During this phase, the jury may consider the presence of any statutory or non-statutory aggravating factor for which the government has given notice. 18 U.S.C. § 3592(c). Each juror then weighs aggravating factors, found unanimously beyond a reasonable doubt, against mitigating factors, found by that juror by a preponderance of evidence. 18 U.S.C. § 3593(d). The jury may recommend the death penalty if it unanimously concludes that "all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist ..., or, in the absence of a mitigating factor, ... the aggravating factor or factors alone are sufficient to justify a sentence of death." 18 U.S.C. § 3593(e).

B. Constitutional Protections

[3] **[4]** **[5]** The Fifth, Sixth, and Eighth Amendments of the Constitution require that a capital sentencing scheme " 'suitably direct[ ] and limit [ ]' " a sentencing jury's discretion " 'so as to minimize the risk of wholly arbitrary and capricious action.' " *Lewis v. Jeffers,* 497 U.S. 764, 774, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990) (quoting *Gregg v. Georgia,* 428 U.S. 153, 189, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)). Pursuant to these protections, the Court will not permit the jury to consider aggravating factors that are impermissibly vague, overbroad, or otherwise fail to " 'genuinely narrow the class of persons eligible for the death penalty.' " *Arave v. Creech,* 507 U.S. 463, 474, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993) (quoting *Zant v. Stephens,* 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)); *accord Maynard v. Cartwright,* 486 U.S. 356, 364, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) (invalidating an aggravating factor that "an ordinary person could honestly believe" applied to every eligible defendant). In sum, the Court must ensure that aggravating factors put before a sentencing jury permit it "to make a principled distinction between ***630** those who deserve the death penalty and those who do not." *Jeffers,* 497 U.S. at 776, 110 S.Ct. 3092.

III. DISCUSSION

A. FDPA Authorization of Non–Statutory Aggravating Factors

[6] **[7]** At the outset, the defendant challenges the government's right to present evidence[2] of any non-statutory aggravating factor during the selection phase of his sentencing. Section 3591(a) of the FDPA directs the jury to "consider[ ] ... the factors set forth in section 3592" when deciding whether to impose the death penalty. The defendant argues that because § 3591(a) references only the factors "set forth" in § 3592, it authorizes the jury to consider only the statutory aggravating factors explicitly listed in that section. Thus, the FDPA is vague as to whether non-statutory aggravating factors are ever proper to consider. In light of this vagueness, the defendant argues that the rule of lenity[3] should compel the Court to construe the FDPA to limit the government's Notice and subsequent proof to the statutory aggravating factors enumerated in § 3592(c)(1)-(16).

[8] **[9]** The defendant's argument fails because the FDPA is not vague in this regard. Section 3592(c) contains an explicit "catch-all" provision authorizing the jury to consider "any other aggravating factor for which notice has been given...." Moreover, section 3593(d) contains identical language instructing the jury to consider the presence of both statutory aggravating factors "and any other aggravating factor for which notice has been provided," i.e., any non-statutory aggravating factor alleged in the government's Notice. Reading the FDPA as a whole, it is clear that the "set forth" language in § 3591(a) authorizes the consideration of both statutory and non-statutory aggravating factors. Moreover, any contrary construction of the FDPA would render several of its other provisions essentially meaningless. To the extent possible, a statute should be read so that no part is rendered superfluous or inoperable. *Shipbuilders Council of America v. U.S. Coast Guard,* 578 F.3d 234, 244 (4th Cir.2009); *Zheng v. Holder,* 562 F.3d 647, 654 (4th Cir.2009). Other courts have considered the arguments raised by the defendant and reached the same conclusion. *See United States v. Le,* 327 F.Supp.2d 601, 614 (E.D.Va.2004); *United States v. Nguyen,* 928 F.Supp. 1525, 1536 (D.Kan.1996). Thus, the Court finds that the FDPA generally authorizes a jury to consider any non-statutory aggravating factor for which notice has been provided.

B. Uncharged Murders and Other Violent Conduct

The defendant lodges several objections to the non-statutory aggravating factor "Uncharged Murders and Other Violent Conduct," which alleges the defendant's participation in additional uncharged murders and other acts of violence. First, the defendant makes a constitutional challenge ***631** under the Fifth, Sixth, and Eighth Amendments to the use of uncharged criminal conduct as an aggravating factor. Next, the defendant argues that because the FDPA includes certain types of prior convictions as statutory aggravating factors, Congress intended to exclude unadjudicated criminal conduct from consideration. Finally, as an additional ground to his motion to strike, the defendant claims evidence of uncharged acts should be excluded from his sentencing hearing because the probative value of such evidence is outweighed by its likelihood to confuse or mislead the jury.

1. Constitutionality

In support of his constitutional challenge under the Fifth, Sixth, and Eighth Amendments, the defendant makes two separate arguments: (1) that it is unconstitutional to try uncharged conduct under the relaxed evidentiary standard mandated by the FDPA; and (2) having already convicted the defendant of capital offenses, the jury will be unable to remain impartial when determining whether he committed the uncharged conduct.

[10] Despite these concerns, the established law in the Fourth Circuit is that non-statutory aggravating factors alleging uncharged criminal conduct do not violate the Constitution so long as the jury is properly instructed that it must find such conduct unanimously and beyond a reasonable doubt. *See United States v. Higgs,* 353 F.3d 281, 323 (4th Cir.2003); *see also United States v. Cisneros,* 363 F.Supp.2d 827, 838–39 (E.D.Va.2005) (citing *Higgs,* denying a motion to strike aggravating factors alleging uncharged criminal conduct); *United States v. Beckford,* 964 F.Supp. 993, 1002–03 (E.D.Va.1997) (holding that due process does not require a defendant's sentencing hearing to be governed by the Federal Rules of Evidence, even when allegations of unadjudicated conduct are present).

[11] Here, the defendant is alleged to have committed, or aided and abetted in the commission of, uncharged acts of violence including participation in the murder of several individuals. Critically, the government's allegations attribute these crimes to the defendant himself, not MS–13. *Cf. United States v. Rivera,* 405 F.Supp.2d 662, 670–71 (E.D.Va.2005); *United States v. Grande,* 353 F.Supp.2d 623, 638 (E.D.Va.2005) (related cases, both striking non-statutory aggravating factors attempting to impute to the defendants acts of violence committed by their affiliated gang). Thus, the government's non-statutory aggravating factor alleging uncharged criminal conduct does not violate the defendant's Fifth, Sixth, and Eighth Amendment rights.

2. FDPA Authorization

[12] **[13]** **[14]** Next, the defendant argues that in enacting statutory aggravating factors related to six categories of prior conviction,[4] Congress intended for the FDPA to exclude all uncharged criminal conduct from the jury's consideration. This proposition is based upon the maxim of statutory construction *expressio unius est exclusio alterius,* meaning "that the express designation of one thing may properly be construed to mean the exclusion of another." *Volvo Trademark Holding Aktiebolaget v. Clark Mach. Co.,* 510 F.3d 474, 483 (4th Cir.2007) (quoting *Volvo Trademark Holding Aktiebolaget v. AIS Constr. Equip.* ***632** *Corp.,* 416 F.Supp.2d 404, 411 (W.D.N.C.2006)). "The maxim requires great caution in its application, and in all cases is applicable only under certain conditions." STATUTES AND STATUTORY CONSTRUCTION § 47:25 (Norman J. Singer & J.D. Shambie Singer eds., 7th ed. 2007) (quotations omitted). One such limitation of the maxim is that it should not be applied if it creates "contradiction" within a statute. *Id.*; *see also U.S. Dept. of Labor v. Bethlehem Mines Corp.,* 669 F.2d 187, 197 (4th Cir.1982) ("The maxim is to be applied with great caution and is recognized as unreliable.").

[15] Here, the defendant's preferred construction of the FDPA would contradict a number of its provisions. Section 3592(c) itself specifically allows the sentencing jury to consider not only statutory aggravating factors but "any other aggravating factor for which notice has been given." Similarly, the jury is instructed to return findings for any statutory aggravating factor "and any other aggravating factor for which notice has been provided...." 18 U.S.C. § 3593(d). These open-ended provisions would be thwarted by applying a literal interpretation to the categories of prior conviction enumerated as statutory aggravating factors. Noting this, the Fourth Circuit has rejected the defendant's line of reasoning. *See Higgs,* 353 F.3d at 322–23. Thus, the Court concludes that by listing six categories of prior conviction as statutory aggravating factors, Congress did not intend for the FDPA to preclude allegations of uncharged criminal conduct in non-statutory aggravating factors.

3. Admissibility of Evidence

Finally, the defendant argues that any evidence of uncharged violent acts is inadmissible at his sentencing hearing under 18 U.S.C. § 3593(c), which directs the Court to exclude evidence "if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." The defendant claims that because the Federal Rules of Evidence are inapplicable to a capital sentencing hearing, any evidence of uncharged criminal acts admitted at his sentencing hearing would lack sufficient indicia of reliability. The

defendant concludes that complete exclusion is necessary under § 3593(c) because the probative value of such evidence would be limited, while the risk of unfair prejudice, confusion of the issues, and misleading the jury would be high.

[16] **[17]** Although the Federal Rules of Evidence do not apply, "the FDPA provides a capital defendant with constitutionally sufficient evidentiary protection." *United States v. Fulks,* 454 F.3d 410, 438 (4th Cir.2006); *accord United States v. Lee,* 374 F.3d 637, 648 (8th Cir.2004); *United States v. Fell,* 360 F.3d 135, 145–46 (2d Cir.2004) (reaching the same conclusion). Thus, the mere fact that the Rules are inapplicable is no reason to categorically exclude evidence. Without ruling on any specific evidence the government might seek to admit at the defendant's sentencing hearing, the Court declines to hold that all evidence of uncharged acts of violence is *per se* inadmissible. The Court therefore denies the defendant's motion to strike the non-statutory aggravating factor Participation in Additional Uncharged Murders and Other Acts of Violence.

In this manner, the Court defers making an admissibility determination of specific evidence of unadjudicated criminal conduct until after its review of said evidence. Should the defendant's trial proceed to the penalty phase, the Court will bifurcate eligibility and selection phases into two discrete proceedings. Both the government and the defendant have argued to the ***633** Court whether the Confrontation Clause and *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), should apply to the selection phase of the defendant's sentencing hearing. If *Crawford* does apply, its prohibition against the admission of testimonial statements from unavailable witnesses not subject to a prior opportunity for cross-examination would operate to bar certain statements proffered by the government as evidence of the defendant's unadjudicated criminal acts.

[18] Although the Fourth Circuit has noted pre-*Crawford* that "it is far from clear that the Confrontation Clause applies to a capital sentencing proceeding," *Higgs,* 353 F.3d at 324, the applicability of *Crawford* to a capital sentencing proceeding is unsettled in this jurisdiction. *See United States v. Jordan,* 357 F.Supp.2d 889, 901 (E.D.Va.2005) (noting that *Higgs* is "of limited value in a post-*Crawford* analysis"). Absent guidance from the Supreme Court or the Fourth Circuit, the district courts are left to determine this issue. After review, the Court agrees with the districts courts in this jurisdiction that have determined *Crawford* only applies to the eligibility phase of capital sentencing proceedings. *See United States v. Bodkins,* No. 4:04cr70083, 2005 WL 1118158, at *4–5 (W.D.Va. May 11, 2005); *Jordan,* 357 F.Supp.2d at 903–04. Thus, testimonial hearsay evidence offered during the eligibility phase would have to meet the requirements of *Crawford* before it could be presented to the jury. *Crawford* would not, however, operate to bar similar hearsay testimony offered during the selection phase.

[19] Nevertheless, regardless of *Crawford,* courts recognize that heightened reliability concerns related to capital sentencing require a threshold determination that evidence of unadjudicated conduct is reliable prior to its admission. *See Jordan,* 357 F.Supp.2d at 904; *United States v. Cisneros,* 363 F.Supp.2d 827, 838–39 (E.D.Va.2005); *United States v. Breeden,* No. 3:03cr13, 2004 WL 1920981, at *4 (W.D.Va. Aug. 27, 2004); *United States v. Foster,* No. CRIM. CCB–02–410, 2004 WL 903921, at *1 (D.Md. Apr. 9, 2004); *Beckford,* 964 F.Supp. at 1000. Therefore, should the defendant's trial proceed to the penalty phase, the government shall present to the Court and to the defendant information it intends to introduce as unadjudicated conduct for a determination of reliability. Only if the government satisfies that threshold determination will such evidence be presented to the jury. *See Beckford,* 964 F.Supp. at 1000.

C. Future Dangerousness

The defendant moves to strike the non-statutory aggravating factor "Future Dangerousness" in its entirety on the grounds that any inquiry into his future dangerousness is unreliable within the meaning of the Eighth Amendment, and that by alleging that the defendant "is likely" to commit criminal acts of violence in the future, the government improperly suggests its burden of proof is less than proof beyond a reasonable doubt.

1. Constitutionality of Future Dangerousness

[20] It has long been held that a sentencing court may evaluate and consider a defendant's propensity to commit acts of violence in the future as an aggravating factor weighing in favor of the death penalty. *See Jurek v. Texas,*

428 U.S. 262, 274–76, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). In *Jurek,* the Supreme Court noted that:

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does ***634** not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a [capital sentencing jury] jury must perform in answering the ... question [of future dangerousness] is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.

Id. at 274–75, 96 S.Ct. 2950. *See also Simmons v. South Carolina,* 512 U.S. 154, 162, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) (reaffirming the central holding of *Jurek*).

[21] In addition to lay testimony, the government may also offer expert opinion testimony concerning the defendant's future dangerousness. *See Barefoot v. Estelle,* 463 U.S. 880, 897–99, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), *superseded in part by statute,* Pub.L. No. 104–132, § 102 (1996) (28 U.S.C. § 2253(c)), *as recognized in Slack v. McDaniel,* 529 U.S. 473, 480–81, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). In *Estelle,* the petitioner argued that scientific experts were categorically unable to render predictions about a defendant's future dangerousness with any degree of reliability. 463 U.S. at 896, 103 S.Ct. 3383. Although the Court recognized a disagreement among penological experts about the accuracy of these predictions, it was "not persuaded that such testimony is almost entirely unreliable and that the factfinder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings." *Id.* at 899, 103 S.Ct. 3383. Applying these precedents, the Fourth Circuit has consistently upheld consideration of future dangerousness as an aggravating factor. *E.g., Eaton v. Angelone,* 139 F.3d 990, 998 (4th Cir.1998); *Bunch v. Thompson,* 949 F.2d 1354, 1367–68 (4th Cir.1991); *Woomer v. Aiken,* 856 F.2d 677, 680 (4th Cir.1988) (all denying habeas relief, upholding state capital sentencing schemes that consider a defendant's future dangerousness).

In citing to studies that suggest predictions of future dangerousness are often wrong, or that subsequent advancements in federal corrections facilities have reduced prisoner violence, the defendant argues that the Court should conclude that *Jurek* and *Barefoot* are no longer controlling law. These are not legitimate grounds for a district court to question the continuing validity of otherwise mandatory precedent. Moreover, few of the reliability concerns raised by the defendant in the instant motion are new considerations. In *Barefoot,* the Supreme Court explicitly recognized that some studies indicated that predictions of future dangerousness were often wrong. 463 U.S. at 899 n. 7, 103 S.Ct. 3383. However, this did not render consideration of future dangerousness unconstitutional, because "[a]ll of these professional doubts about the usefulness of psychiatric predictions can be called to the attention of the jury." *Id.* Thus, the Court denies the defendant's motion to strike Future Dangerousness on the ground that it is unreliable within the meaning of the ***635** Eighth Amendment. [5]

2. "Is Likely" Phrasing

[22] The defendant next argues that by alleging that he "is likely" to commit acts of violence in the future, the factor improperly suggests that the government's burden of proof is less than is required by due process and the FDPA. This argument is plainly without merit. The term "is likely" is necessary phrasing because, of course, one cannot predict future events with absolute certainty. The government still retains its required burden of proof, i.e., it

must prove beyond a reasonable doubt that the defendant poses a danger to the lives and safety of others. It is no surprise, then, that the Fourth Circuit has noted that "[f]uture dangerousness is best defined as evidence that a defendant is 'likely to commit criminal acts of violence in the future that would be a threat to the lives and safety of others.' " *United States v. Basham,* 561 F.3d 302, 331 (4th Cir.2009) (quoting *United States v. Bernard,* 299 F.3d 467, 482 (5th Cir.2002)). Thus, the government's phrasing of this aggravating factor does not imply a lesser burden of proof than the defendant's right to due process requires.

3. Sub-factors

As an alternative to striking the factor in its entirety, the defendant challenges the government's allegation of four specific sub-factors supporting a finding of future dangerousness: (1) "Continuing Pattern of Violence"; (2) "Low Rehabilitative Potential"; (3) "Lack of Remorse"; and (4) "Gang Membership." (Doc. No. 275 at 4–5). The defendant first argues that alleging specific sub-factors under the heading Future Dangerousness will mislead the jury. The defendant also argues that an allegation of his low rehabilitative potential is irrelevant where the defendant's only alternative to the death penalty is life in prison without the possibility of parole, [6] and that his lack of remorse is alleged in such a way that violates his Fifth Amendment right to silence.

[23] **[24]** **[25]** As an initial matter, the government may allege specific sub-factors under Future Dangerousness without misleading the jury from its core inquiry of whether the defendant is likely to commit acts of violence in the future. To the contrary, these sub-factors clarify the factor's "common-sense core of meaning," *Jurek,* 428 U.S. at 279, 96 S.Ct. 2950 (White, J., concurring in judgment), and focus the jury on the government's proffered evidence. For this reason, Future Dangerousness is often alleged with multiple sub-factors, including Low Rehabilitative Potential and Lack of Remorse. *See United States v. Bin Laden,* 126 F.Supp.2d 290, 303–04 (S.D.N.Y.2001) (collecting cases). Moreover, because these sub-factors are alleged as evidence—not elements—of future dangerousness, the jury need not separately find the presence of all four sub-factors to find the presence of future dangerousness. Thus, the government may generally allege specific sub-factors in support of an allegation of the defendant's future dangerousness. [7]

***636** **[26]** Next, because certain of his capital offenses carry a life sentence as the only alternative to the death penalty, the defendant challenges the relevance of the sub-factor Low Rehabilitative Potential. The defendant reasons that the issue before the jury is not whether he can be rehabilitated, but whether he would pose a continuing danger to others in federal prison.

This argument ignores the fact that although future dangerousness is the jury's overall inquiry, the defendant's potential for rehabilitation is directly relevant to his future dangerousness. *See United States v. Gooch,* No. 04–128–23, 2006 WL 3780781, at *29 (D.D.C. Dec. 20, 2006) ("[The defendant's] alleged low rehabilitative potential is relevant ... as it bears on his future dangerousness in prison."). This case is not one where the criminal behavior alleged by the government would be wholly prevented by the defendant's incarceration. *See United States v. Taveras,* 424 F.Supp.2d 446, 463–64 (E.D.N.Y.2006) (excluding evidence of sexual abuse against minors to prove a defendant's future dangerousness, when it was highly unlikely the defendant would ever be released from prison). Rather, the government alleges by this sub-factor that the defendant's low potential for rehabilitation increases the likelihood that he will commit acts of violence against other prisoners and correctional officers throughout his incarceration. For these reasons, Low Rehabilitative Potential is a relevant sub-factor of Future Dangerousness.

[27] Finally, the defendant raises a Fifth Amendment challenge to the sub-factor Lack of Remorse, which alleges that he "has never expressed any remorse for [the murders] as indicated by defendant's statements to fellow gang-members during the course of and following the offenses...." (Doc. No. 275 at 5). There is nothing *per se* unconstitutional about considering a defendant's lack of remorse as a characteristic that favors imposition of the death penalty. *See Zant,* 462 U.S. at 885 n. 22, 103 S.Ct. 2733 (noting that lack of remorse is an appropriate aggravating factor); *see also United States v. Cooper,* 91 F.Supp.2d 90, 112–13 (D.D.C.2000); *Nguyen,* 928 F.Supp. at 1541 (both citing *Zant*). However, the Fifth Amendment limits proof of lack of remorse to "affirmative words or conduct" expressed by the defendant. *United States v. Caro,* 597 F.3d 608, 627 (4th

Cir.2010) (citing *United States v. Basham,* 561 F.3d 302, 334 (4th Cir.2009), and *Emmett v. Kelly,* 474 F.3d 154, 170 (4th Cir.2007)).

[28] Given this restriction, the Court finds the government's allegation that the defendant "has never expressed any remorse" somewhat troubling. However, upon reading the sub-factor in its entirety, it seems clear that the government intends to offer only affirmative statements made by the defendant to others to prove his lack of remorse. Moreover, if necessary, the Court will offer an instruction to the jury that the defendant's mere silence may never be considered as proof of lack of remorse. *See Caro,* 597 F.3d at 630–31 (approving of a similar instruction). Thus, although the Fifth Amendment places restrictions on admissible evidence concerning the defendant's lack of remorse, it does not require the Court to strike this sub-factor from the government's Notice. The Court therefore denies the defendant's motion ***637** to strike Future Dangerousness and certain of its sub-factors.

D. Gang Motivated Killing

[29] The defendant moves to strike the non-statutory aggravating factor "Gang Motivated Killing" from the government's Notice as duplicative of both the criminal conduct alleged in Counts 22 and 24 of his Superseding Indictment and the non-statutory aggravating factor Future Dangerousness.[8] The defendant asserts that the duplicative nature of this aggravating factor violates the Eighth Amendment in the sense that it fails to narrow the class of persons eligible for the death penalty from those guilty of the underlying capital offense, which in the defendant's case is a violation of 18 U.S.C. § 1959(a)(1).

In *Lowenfield v. Phelps,* 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), the United States Supreme Court upheld a state capital sentencing scheme that required a jury to consider certain circumstances as both statutory elements of first-degree murder *and* aggravating factors. *Id.* at 241–43, 108 S.Ct. 546. Because each circumstance elevated the offense beyond a common-law murder, thereby "genuinely narrowing the class of death-eligible persons," there was nothing unconstitutional about the jury performing this narrowing function at the guilt phase of the trial. *Id.* at 244–45, 108 S.Ct. 546. Thus, "the fact that the aggravating circumstance duplicated one of the elements of the crime [did] not make the [the] sentence constitutionally infirm." *Id.* at 246, 108 S.Ct. 546. Federal courts, including the Fourth Circuit, have uniformly applied the *Lowenfield* holding to aggravating factors that duplicate elements of federal homicide statutes. *See Higgs,* 353 F.3d at 315–16 (upholding an aggravating factor that duplicated an element of 18 U.S.C. § 1111(a), causing death during the commission of a kidnapping); *see also Deputy v. Taylor,* 19 F.3d 1485, 1502 (3rd Cir.1994) ("Following ... *Lowenfield,* federal courts of appeals have consistently held that a sentencing jury can consider an element of the capital offense as an aggravating circumstance even if it is duplicitous.").

It is less clear, however, whether the same circumstance alleged as two separate non-statutory aggravating factors would comply with the Constitution. The Supreme Court has expressly declined to rule on this issue. *See Jones v. United States,* 527 U.S. 373, 398, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999) (declining to decide whether "aggravating factors could be duplicative so as to render them constitutionally invalid"). Prior to the *Jones* decision, the Fourth Circuit held that permitting a jury to make "cumulative findings" during the penalty phase of trial creates a "clear risk of skewing the weighing process in favor of the death penalty and thereby causing it to be imposed arbitrarily, hence unconstitutionally." *United States v. Tipton,* 90 F.3d 861, 899 (4th Cir.1996) (citing *Stringer v. Black,* 503 U.S. 222, 230–32, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992)). Although *Tipton* concerned a jury's cumulative finding of several death-eligible *mens rea* identical to those set forth in 18 U.S.C. § 3591(a)(2)(A)-(D), several district courts within the Fourth Circuit have concluded that *Tipton* also prohibits duplicative aggravating factors. *See, e.g., Rivera,* 405 F.Supp.2d at 668; *Grande,* 353 F.Supp.2d at 631; *United States v. Regan,* 228 F.Supp.2d 742, 750–51 (E.D.Va.2002); ***638** *United States v. Johnson,* 136 F.Supp.2d 553, 559 (W.D.Va.2001). These courts have held that aggravating factors are impermissibly duplicative if they "necessarily subsume[ ]" each other. *Regan,* 228 F.Supp.2d at 750 (quoting *United States v. McCullah,* 76 F.3d 1087, 1111 (10th Cir.1996)). This occurs "when the factors in question substantially overlap, or the factor's elements necessarily include elements of another factor." *Id.*

As it relates to Counts 22 and 24 of his Indictment, the defendant's argument is foreclosed by *Lowenfield* and *Higgs.* In order to convict the defendant on Counts 22 and 24, the government will have to prove not only that

he murdered Ruben and Manuel Salinas, but that he did so for the purpose of maintaining or increasing position in MS–13. 18 U.S.C. § 1959(a); (Doc. No. 623: Third Superseding Indictment ¶ 49 & 54). Thus, a guilty verdict on Count 22 or 24 "genuinely narrow[s] the class of death-eligible persons" from those who simply commit murder to those who commit murder for the purpose of maintaining or elevating position in a racketeering organization. *Lowenfield,* 484 U.S. at 244, 108 S.Ct. 546. Such a finding during the guilt phase of the trial would not prevent the government from properly re-alleging the same circumstance as an aggravating factor.

[30] Moreover, Gang Motivated Killing is not duplicative of Future Dangerousness. Each aggravating factor relates to a different characteristic of the defendant: Gang Motivated Killing concerns the defendant's motive for committing a specific act of violence in the past, while Future Dangerousness concerns his propensity for violence in the future. The only overlap is found in the sub-factor Gang Membership, which alleges as evidence of the defendant's future dangerousness that he "has demonstrated an allegiance to and active membership in MS–13, a violent criminal enterprise." (Doc. No. 275 at 5). Although the defendant's allegiance to MS–13 is certainly relevant to both factors, this single commonality does not create a substantial overlap between Gang Motivated Killing and Future Dangerousness, nor does it subsume the elements of one factor into the other. *Regan,* 228 F.Supp.2d at 751. Thus, these aggravating factors are sufficiently distinguishable such that a finding of both would not impermissibly or arbitrarily skew the jury's weighing process in favor of the death penalty.

E. Callous Disregard for the Severity of the Offense

Finally, the defendant moves to strike the non-statutory aggravating factor "Callous Disregard for the Severity of the Offense" (hereafter "Callous Disregard") on the ground that it is unconstitutionally vague, irrelevant, and duplicative of the non-statutory aggravating factor future dangerousness.[9]

[31] **[32]** **[33]** **[34]** A factor is not unconstitutionally vague if it possesses "some 'common-sense core of meaning ... that criminal juries should be capable of understanding....' " *Tuilaepa,* 512 U.S. at 973, 114 S.Ct. 2630 (1994) (quoting *Jurek v. Texas,* 428 U.S. 262, 279, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (White, J., concurring in judgment)). However, "the proper degree of definition" required to withstand a vagueness challenge falls well short of "mathematical precision." *Id.* (quoting ***639** *Walton v. Arizona,* 497 U.S. 639, 655, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990)). Moreover, a relevant aggravating factor is one that assists the jury "in distinguishing 'those who deserve capital punishment from those who do not....' " *United States v. McVeigh,* 944 F.Supp. 1478, 1488 (D.Colo.1996) (quoting *Creech,* 507 U.S. at 474, 113 S.Ct. 1534); *accord Johnson,* 136 F.Supp.2d at 558 ("[T]he aggravating factor must be sufficiently relevant to the question of who should live and who should die.") (internal quotations omitted). Courts have often emphasized that relevant evidence is "particularized to the individual defendant." *United States v. Chong,* 98 F.Supp.2d 1110, 1116 (D.Hawai'i 1999) (citing *United States v. Frank,* 8 F.Supp.2d 253, 279 (S.D.N.Y.1998)). If the aggravating factor bears only a "tangential relationship" to whether the defendant deserves the death penalty, it should be excluded. *Rivera,* 405 F.Supp.2d at 668. Finally, aggravating factors are not duplicative unless they substantially overlap, or the elements of one necessarily include the elements of another. *Regan,* 228 F.Supp.2d at 751.

[35] **[36]** Callous Disregard is neither unconstitutionally vague nor irrelevant. As is noted *supra,* general constitutional challenges to Lack of Remorse, a similar factor, have failed. *See Cooper,* 91 F.Supp.2d at 112–13; *Nguyen,* 928 F.Supp. at 1541 (both citing *Zant,* 462 U.S. at 885 n. 22, 103 S.Ct. 2733) In order to prove his callous disregard for the severity of these offenses, the government will have to show that the defendant, through his words and actions, failed to appreciate the gravity of killing two human beings. This has a "common-sense core of meaning" sufficient to overcome any vagueness concerns. *Jurek,* 428 U.S. at 279, 96 S.Ct. 2950 (White, J., concurring). Moreover, the factor is also relevant, because whether the defendant appreciated the gravity of his actions relates to his individual character and provides one legitimate basis to distinguish whether the death penalty is justified in this particular case. *Creech,* 507 U.S. at 474, 113 S.Ct. 1534. Thus, Callous Disregard is sufficient to overcome vagueness and relevance challenges.

[37] Greater concerns are raised by the defendant's claim that Callous Disregard is duplicative of Future Dangerousness. Both the government and the Court have likened the concept of callous disregard for the

severity of the offense to a lack of remorse, which the government also alleges in its Notice as a sub-factor of Future Dangerousness. (Doc. No. 275 at 5). As a starting point, the Court recognizes the difference between alleging lack of remorse in its own right and alleging of lack of remorse as it relates to the defendant's future dangerousness. Moreover, Lack of Remorse is alleged as only one of four sub-factors of Future Dangerousness, each of which is meant to explain rather than supplant that aggravating factor. But despite these distinctions, a possibility exists that the jury could interpret the government's Notice as suggesting that a finding of Lack of Remorse automatically results in a finding of both Future Dangerousness and Callous Disregard. In this sense, the jury could perceive that the elements of Callous Disregard necessarily subsume the elements of Future Dangerousness. *Regan,* 228 F.Supp.2d at 750. To eliminate this risk, the Court grants the defendant's motion to strike Callous Disregard from the government's Notice. No part of the Court's ruling on this matter shall prevent the government from arguing the defendant's lack of remorse as proof of his future dangerousness.

IV. CONCLUSION

IT IS, THEREFORE, ORDERED that:

***640** 1. The "Defendant's Motion to Strike Non–Statutory Aggravating Factors and Exclude Evidence of Unadjudicated Criminal Acts During Penalty Phase of Trial" (Doc. No. 483) is **DENIED;**

2. The defendant's "Motion to Strike the Non–Statutory Aggravating Factor of Future Dangerousness from the Notice of Intent to Seek the Death Penalty" (Doc. No. 968) is **DENIED;**

3. The "Defendant's Motion to Strike Non–Statutory Aggravating Factors from Notice of Intent to Seek the Death Penalty" (Doc. No. 488) is **GRANTED IN PART** and **DENIED IN PART;** that is, **GRANTED** such that the Court **STRIKES** the non-statutory aggravating factor "Callous Disregard for the Severity of the Offense" from the government's Notice of Intention to Seek the Death Penalty (Doc. No. 275), and **DENIED** in all other respects; and

4. Should the defendant's trial proceed to the penalty phase, the government shall present to the Court and to the defendant information it intends to introduce as unadjudicated conduct for a determination of reliability. Only if the government satisfies that threshold determination will such evidence be presented to the jury.

All Citations

707 F.Supp.2d 621

Footnotes

1 Each aggravating factor is also re-alleged with respect to the other murder victim, Manuel Garcia Salinas. (Doc. No. 275 at 5–8).

2 The FDPA conspicuously uses the term "information" rather that "evidence," perhaps because the Federal Rules of Evidence are explicitly rendered inapplicable to capital sentencing proceedings. 18 U.S.C. § 3593(c). However, because the parties have often used the term "evidence" in their briefing of these issues, the Court will use that term throughout this Order.

3 The rule of lenity requires a court to resolve any ambiguity in a criminal statute in favor of the defendant. *United States v. Munn,* 595 F.3d 183, 194 (4th Cir.2010) (citing *United States v. Santos,* 553 U.S. 507, 128 S.Ct. 2020, 2025, 170 L.Ed.2d 912 (2008)).

4 *See* 18 U.S.C. § 3592(c)(2) (violent felony involving firearm); (c)(3) (offense for which death or life imprisonment was authorized); (c)(4) (two violent felony offenses); (c)(10) (two felony drug offenses); (c)(12) (serious federal drug offense); (c)(15) (sexual assault or child molestation).

5 For the same reasons, the Court denies the defendant's motion for an order requiring the government to produce empirical evidence establishing the reliability of the sub-factors Low Rehabilitative Potential and Lack of Remorse as a condition to presenting evidence of these sub-factors.

6 The Court notes that although this is true for Counts 22 and 24, *see* 18 U.S.C. § 1959(a)(1), Counts 23 and 25 do not necessarily carry a minimum life sentence. *See* 18 U.S.C. § 924(j)(1) (authorizing punishment "by death or by imprisonment for any term of years or for life").

7 To the extent the defendant suggests that certain of these sub-factors are unconstitutionally duplicative of each other, duplicative sub-factors are not unconstitutional, because each sub-factor falls under the umbrella of a single non-statutory aggravating factor: future dangerousness. *United States v. Mayhew,* 380 F.Supp.2d 936, 950–51 (S.D.Ohio 2005); *United States v. Taylor,* 316 F.Supp.2d 730, 742–43 (N.D.Ind.2004); *United States v. Davis,* No. CR.A. 01–282, 2003 WL 1873088, at *10 (E.D.La. Apr. 10, 2003).

8 In his motion, the defendant fails to specify which non-statutory aggravating factor is supposedly duplicative of Gang Motivated Killing, but the government addresses Future Dangerousness in its response. Absent a reply from the defendant, the Court assumes that this is the aggravating factor at issue.

9 In his motion, the defendant again fails to specify which non-statutory aggravating factor is supposedly duplicative of Callous Disregard, and the government does not identify one in its response. After a review of the government's Notice, it seems likely that the defendant is again referring to Future Dangerousness.

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted **Negative Treatment Reconsidered by** U.S. v. Fell, 2nd Cir.(Vt.), Feb. 03, 2004

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 228. Death Sentence (Refs & Annos)

18 U.S.C.A. § 3591

§ 3591. Sentence of death

Currentness

(a) A defendant who has been found guilty of--

(1) an offense described in section 794 or section 2381; or

(2) any other offense for which a sentence of death is provided, if the defendant, as determined beyond a reasonable doubt at the hearing under section 3593--

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury that resulted in the death of the victim;

(C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or

(D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act,

shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense.

(b) A defendant who has been found guilty of--

(1) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing criminal enterprise offense under the conditions described in subsection (b) of that section which

involved not less than twice the quantity of controlled substance described in subsection (b)(2)(A) or twice the gross receipts described in subsection (b)(2)(B); or

(2) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing criminal enterprise offense under that section, where the defendant is a principal administrator, organizer, or leader of such an enterprise, and the defendant, in order to obstruct the investigation or prosecution of the enterprise or an offense involved in the enterprise, attempts to kill or knowingly directs, advises, authorizes, or assists another to attempt to kill any public officer, juror, witness, or members of the family or household of such a person,

shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense.

CREDIT(S)

(Added Pub.L. 103-322, Title VI, § 60002(a), Sept. 13, 1994, 108 Stat. 1959.)

Notes of Decisions (20)

18 U.S.C.A. § 3591, 18 USCA § 3591
Current through P.L. 114-165.

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted **Prior Version Held Unconstitutional as Applied by** U.S. v. Higgs, 4th Cir.(Md.), Dec. 22, 2003

KeyCite Yellow Flag - Negative Treatment Proposed Legislation

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 228. Death Sentence (Refs & Annos)

18 U.S.C.A. § 3592

§ 3592. Mitigating and aggravating factors to be considered in determining whether a sentence of death is justified

Effective: July 27, 2006
Currentness

(a) Mitigating factors.--In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor, including the following:

(1) Impaired capacity.--The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.

(2) Duress.--The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

(3) Minor participation.--The defendant is punishable as a principal in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

(4) Equally culpable defendants.--Another defendant or defendants, equally culpable in the crime, will not be punished by death.

(5) No prior criminal record.--The defendant did not have a significant prior history of other criminal conduct.

(6) Disturbance.--The defendant committed the offense under severe mental or emotional disturbance.

(7) Victim's consent.--The victim consented to the criminal conduct that resulted in the victim's death.

(8) Other factors.--Other factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence.

(b) Aggravating factors for espionage and treason.--In determining whether a sentence of death is justified for an offense described in section 3591(a)(1), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

(1) Prior espionage or treason offense.--The defendant has previously been convicted of another offense involving espionage or treason for which a sentence of either life imprisonment or death was authorized by law.

(2) Grave risk to national security.--In the commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security.

(3) Grave risk of death.--In the commission of the offense the defendant knowingly created a grave risk of death to another person.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists.

(c) Aggravating factors for homicide.--In determining whether a sentence of death is justified for an offense described in section 3591(a)(2), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

(1) Death during commission of another crime.--The death, or injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission of, an offense under section 32 (destruction of aircraft or aircraft facilities), section 33 (destruction of motor vehicles or motor vehicle facilities), section 37 (violence at international airports), section 351 (violence against Members of Congress, Cabinet officers, or Supreme Court Justices), an offense under section 751 (prisoners in custody of institution or officer), section 794 (gathering or delivering defense information to aid foreign government), section 844(d) (transportation of explosives in interstate commerce for certain purposes), section 844(f) (destruction of Government property by explosives), section 1118 (prisoners serving life term), section 1201 (kidnapping), section 844(i) (destruction of property affecting interstate commerce by explosives), section 1116 (killing or attempted killing of diplomats), section 1203 (hostage taking), section 1992 (wrecking trains), section 2245 (offenses resulting in death), section 2280 (maritime violence), section 2281 (maritime platform violence), section 2332 (terrorist acts abroad against United States nationals), section 2332a (use of weapons of mass destruction), or section 2381 (treason) of this title, or section 46502 of title 49, United States Code (aircraft piracy).

(2) Previous conviction of violent felony involving firearm.--For any offense, other than an offense for which a sentence of death is sought on the basis of section 924(c), the defendant has previously been convicted of a Federal or State offense punishable by a term of imprisonment of more than 1 year, involving the use or attempted or threatened use of a firearm (as defined in section 921) against another person.

(3) Previous conviction of offense for which a sentence of death or life imprisonment was authorized.--The defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute.

(4) Previous conviction of other serious offenses.--The defendant has previously been convicted of 2 or more Federal or State offenses, punishable by a term of imprisonment of more than 1 year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person.

(5) Grave risk of death to additional persons.--The defendant, in the commission of the offense, or in escaping apprehension for the violation of the offense, knowingly created a grave risk of death to 1 or more persons in addition to the victim of the offense.

(6) Heinous, cruel, or depraved manner of committing offense.--The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

(7) Procurement of offense by payment.--The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

(8) Pecuniary gain.--The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

(9) Substantial planning and premeditation.--The defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism.

(10) Conviction for two felony drug offenses.--The defendant has previously been convicted of 2 or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance.

(11) Vulnerability of victim.--The victim was particularly vulnerable due to old age, youth, or infirmity.

(12) Conviction for serious Federal drug offenses.--The defendant had previously been convicted of violating title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 for which a sentence of 5 or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise.

(13) Continuing criminal enterprise involving drug sales to minors.--The defendant committed the offense in the course of engaging in a continuing criminal enterprise in violation of section 408(c) of the Controlled Substances Act (21 U.S.C. 848(c)), and that violation involved the distribution of drugs to persons under the age of 21 in violation of section 418 of that Act (21 U.S.C. 859).

(14) High public officials.--The defendant committed the offense against--

(A) the President of the United States, the President-elect, the Vice President, the Vice President-elect, the Vice President-designate, or, if there is no Vice President, the officer next in order of succession to the office of the

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted **Negative Treatment Reconsidered by** U.S. v. Quinones, 2nd Cir.(N.Y.), Dec. 10, 2002

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 228. Death Sentence (Refs & Annos)

18 U.S.C.A. § 3593

§ 3593. Special hearing to determine whether a sentence of death is justified

Effective: November 2, 2002
Currentness

(a) Notice by the government.--If, in a case involving an offense described in section 3591, the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, the attorney shall, a reasonable time before the trial or before acceptance by the court of a plea of guilty, sign and file with the court, and serve on the defendant, a notice--

(1) stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter and that the government will seek the sentence of death; and

(2) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.

The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family, and may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information. The court may permit the attorney for the government to amend the notice upon a showing of good cause.

(b) Hearing before a court or jury.--If the attorney for the government has filed a notice as required under subsection (a) and the defendant is found guilty of or pleads guilty to an offense described in section 3591, the judge who presided at the trial or before whom the guilty plea was entered, or another judge if that judge is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted--

(1) before the jury that determined the defendant's guilt;

(2) before a jury impaneled for the purpose of the hearing if--

(A) the defendant was convicted upon a plea of guilty;

(B) the defendant was convicted after a trial before the court sitting without a jury;

(C) the jury that determined the defendant's guilt was discharged for good cause; or

(D) after initial imposition of a sentence under this section, reconsideration of the sentence under this section is necessary; or

(3) before the court alone, upon the motion of the defendant and with the approval of the attorney for the government.

A jury impaneled pursuant to paragraph (2) shall consist of 12 members, unless, at any time before the conclusion of the hearing, the parties stipulate, with the approval of the court, that it shall consist of a lesser number.

(c) Proof of mitigating and aggravating factors.--Notwithstanding rule 32 of the Federal Rules of Criminal Procedure, when a defendant is found guilty or pleads guilty to an offense under section 3591, no presentence report shall be prepared. At the sentencing hearing, information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered under section 3592. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial judge's discretion. The defendant may present any information relevant to a mitigating factor. The government may present any information relevant to an aggravating factor for which notice has been provided under subsection (a). Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. For the purposes of the preceding sentence, the fact that a victim, as defined in section 3510, attended or observed the trial shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury. The government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in the case of imposing a sentence of death. The government shall open the argument. The defendant shall be permitted to reply. The government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the government, and is not satisfied unless the existence of such a factor is established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence of such a factor is established by a preponderance of the information.

(d) Return of special findings.--The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factor or factors set forth in section 3592 found to exist and any other aggravating factor for which notice has been provided under subsection (a) found to exist. A finding with respect to a mitigating factor may be made by 1 or more members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such factor established for purposes of this section regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law.

(e) Return of a finding concerning a sentence of death.--If, in the case of--

(1) an offense described in section 3591(a)(1), an aggravating factor required to be considered under section 3592(b) is found to exist;

(2) an offense described in section 3591(a)(2), an aggravating factor required to be considered under section 3592(c) is found to exist; or

(3) an offense described in section 3591(b), an aggravating factor required to be considered under section 3592(d) is found to exist,

the jury, or if there is no jury, the court, shall consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.

(f) Special precaution to ensure against discrimination.--In a hearing held before a jury, the court, prior to the return of a finding under subsection (e), shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be. The jury, upon return of a finding under subsection (e), shall also return to the court a certificate, signed by each juror, that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be.

CREDIT(S)

(Added Pub.L. 103-322, Title VI, § 60002(a), Sept. 13, 1994, 108 Stat. 1964; amended Pub.L. 105-6, § 2(c), Mar. 19, 1997, 111 Stat. 12; Pub.L. 107-273, Div. B, Title IV, § 4002(e)(8), Nov. 2, 2002, 116 Stat. 1810.)

Notes of Decisions (172)

18 U.S.C.A. § 3593, 18 USCA § 3593
Current through P.L. 114-165.

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

President of the United States, or any person who is acting as President under the Constitution and laws of the United States;

(B) a chief of state, head of government, or the political equivalent, of a foreign nation;

(C) a foreign official listed in section 1116(b)(3)(A), if the official is in the United States on official business; or

(D) a Federal public servant who is a judge, a law enforcement officer, or an employee of a United States penal or correctional institution--

(i) while he or she is engaged in the performance of his or her official duties;

(ii) because of the performance of his or her official duties; or

(iii) because of his or her status as a public servant.

For purposes of this subparagraph, a "law enforcement officer" is a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, or prosecution or adjudication of an offense, and includes those engaged in corrections, parole, or probation functions.

(15) Prior conviction of sexual assault or child molestation.--In the case of an offense under chapter 109A (sexual abuse) or chapter 110 (sexual abuse of children), the defendant has previously been convicted of a crime of sexual assault or crime of child molestation.

(16) Multiple killings or attempted killings.--The defendant intentionally killed or attempted to kill more than one person in a single criminal episode.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists.

(d) Aggravating factors for drug offense death penalty.--In determining whether a sentence of death is justified for an offense described in section 3591(b), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

(1) Previous conviction of offense for which a sentence of death or life imprisonment was authorized.--The defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or death was authorized by statute.

(2) Previous conviction of other serious offenses.--The defendant has previously been convicted of two or more Federal or State offenses, each punishable by a term of imprisonment of more than one year, committed on different occasions, involving the importation, manufacture, or distribution of a controlled substance (as defined in section 102 of the

Controlled Substances Act (21 U.S.C. 802)) or the infliction of, or attempted infliction of, serious bodily injury or death upon another person.

(3) Previous serious drug felony conviction.--The defendant has previously been convicted of another Federal or State offense involving the manufacture, distribution, importation, or possession of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) for which a sentence of five or more years of imprisonment was authorized by statute.

(4) Use of firearm.--In committing the offense, or in furtherance of a continuing criminal enterprise of which the offense was a part, the defendant used a firearm or knowingly directed, advised, authorized, or assisted another to use a firearm to threaten, intimidate, assault, or injure a person.

(5) Distribution to persons under 21.--The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 418 of the Controlled Substances Act (21 U.S.C. 859) which was committed directly by the defendant.

(6) Distribution near schools.--The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 419 of the Controlled Substances Act (21 U.S.C. 860) which was committed directly by the defendant.

(7) Using minors in trafficking.--The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 420 of the Controlled Substances Act (21 U.S.C. 861) which was committed directly by the defendant.

(8) Lethal adulterant.--The offense involved the importation, manufacture, or distribution of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), mixed with a potentially lethal adulterant, and the defendant was aware of the presence of the adulterant.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists.

CREDIT(S)

(Added Pub.L. 103-322, Title VI, § 60002(a), Sept. 13, 1994, 108 Stat. 1960; amended Pub.L. 103-322, Title XXXIII, § 330021(1), Sept. 13, 1994, 108 Stat. 1960, 2150; Pub.L. 104-132, Title VII, § 728, Apr. 24, 1996, 110 Stat. 1302; Pub.L. 104-294, Title VI, §§ 601(b)(7), 604(b)(35), Oct. 11, 1996, 110 Stat. 3499, 3508; Pub.L. 107-273, Div. B, Title IV, § 4002(e)(2), Nov. 2, 2002, 116 Stat. 1810; Pub.L. 109-248, Title II, § 206(a)(4), July 27, 2006, 120 Stat. 614.)

Notes of Decisions (136)

18 U.S.C.A. § 3592, 18 USCA § 3592
Current through P.L. 114-165.

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.