IN THE OHIO COURT OF APPEALS
FOURTH JUDICIAL DISTRICT
PIKE COUNTY

Case No. 23CA919

THE STATE OF OHIO,
Plaintiff-Appellee,

-vs-

GEORGE W. WAGNER, IV,
Defendant-Appellant.

ON APPEAL FROM THE PIKE COUNTY COURT OF COMMON PLEAS
Case No. 2018 CR 000155

BRIEF OF DEFENDANT-APPELLANT GEORGE W. WAGNER, IV

ORAL ARGUMENT REQUESTED

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Cover, *The Pope and the Capital Juror*, 128 Yale L.J.F. 599 (2018) 27

Cowan, Thompson & Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 Law & Hum. Behav. 53 (1984) 27

Harris, *Testimony for Sale: The Law & Ethics of Snitches & Experts*, 28 Pepp. L. Rev. 1 (2000). 51

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Luginbuhl & Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials*,
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Richard Salgado, *Tribunals Organized to Convict: Searching for a Lesser Evil in the Capital Juror Death-Qualification Process in* United States v. Green,
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INTRODUCTION

Defendant-Appellant George W. Wagner, IV ("George") was denied a fair trial. From beginning to end, Plaintiff-Appellee, the State of Ohio (the "State"), pushed the trial court to err in structuring the proceedings and allow inadmissible evidence, making a conviction more likely than if the law had been followed. First, the State made an inherently coercive deal with George's brother, Jake Wagner ("Jake"), and mother, Angela Wagner ("Angela"), threatening to maintain pursuing the death penalty for them and their family members unless they gave testimony that the State believed to be true. It denied George the benefit of Jake and Angela's bargained-for dismissal of capital specifications until the end of his trial. This gave the State a basis to demand excusal of potential jurors who were unable to sign a death-penalty verdict, even though four of the dismissed jurors were qualified to serve in every other way. Instead, a death-qualified jury was empaneled—a group that was statistically more likely to enter a conviction.

Of the jurors who did serve, two of them had direct personal connections to the victims that Jake and his father, Billy Wagner ("Billy"), shot to death in their sleep. For weeks at the start of trial, the State saturated the minds of jurors with images of faces they had seen before in their daily lives, now gruesomely dead, and the reactions of family members who lost those loved ones. When the State finally got around to admitting evidence related to George, it was largely meant to connect him to his family members through prior crimes and wrongs under the guise of establishing an ongoing scheme to commit crimes together or to show that he and his family owned a significant arsenal of firearms. Jurors were even given some evidence of firearms the State admitted had nothing to do with the case at hand, which had either been withdrawn from evidence or excluded by the trial court. But there was no legitimate purpose for any of this evidence,

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as the manner and cause of death, the murder weapons, and George's association with his family were not in meaningful dispute. Only a small part of the crime scene evidence even had minimal probative value to corroborate Jake's story. Meanwhile, George's efforts to acquire evidence bearing on Jake's credibility were thwarted under the doubtfully applicable work-product doctrine and on likely waived claims of attorney-client privilege.

This was the wrong way to hold a trial, and George needs a new one. Through these strategies, the State acquired a jury that was uniquely susceptible to an emotional reaction to the gruesome images, victim-impact testimony, and character evidence that predominated. Then, during closing arguments, the State accused defense counsel of knowing that George was lying and coaching his testimony. It is impossible to say beyond a reasonable doubt that jurors did not lose their way and convict George because they thought he was just like his criminal family members, he had probably committed the charged crimes because he had acted wrongfully and criminally in the past, he was lying consistent with his character and advice from his lawyers, and an acquittal would dishonor the victims and disappoint their family members, who had already suffered so much. This is particularly true because the actual dispute at trial over George's involvement in the plot to kill was just a credibility battle between the members of the Wagner family; Jake and Angela saying that George was in on it and George taking the stand to deny any involvement in the murder plot. There is a reasonable probability that jurors were swayed by these errors, which demands reversal and a new trial.

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STATEMENT OF THE ASSIGNMENTS OF ERROR

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ASSIGNMENT OF ERROR II: THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO STRIKE SEVERAL JURORS FOR CAUSE.

ASSIGNMENT OF ERROR III: THE TRIAL COURT ERRED, COMMITTED PLAIN ERROR, AND ABUSED ITS DISCRETION BY ADMITTING GRUESOME PHOTOGRAPHS AND VICTIM-IMPACT TESTIMONY FOR DAYS ON END.

ASSIGNMENT OF ERROR IV: THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ADMITTING EVIDENCE OF OTHER ACTS, WRONGS AND CRIMES THROUGHOUT TRIAL, WHICH UNFAIRLY PREJUDICED GEORGE.

ASSIGNMENT OF ERROR V: THE TRIAL COURT ERRED AND DENIED GEORGE THE RIGHT TO DUE PROCESS BY PERMITTING JAKE AND ANGELA TO TESTIFY UNDER THEIR COERCIVE PLEA DEALS.

ASSIGNMENT OF ERROR VI: THE TRIAL COURT ERRED BY QUASHING GEORGE'S SUBPOENAS FOR JAKE'S MEDICAL RECORDS AND INTERVIEW NOTES PREPARED AND HELD BY HIS ATTORNEYS WITHOUT HOLDING AN *IN CAMERA* HEARING.

ASSIGNMENT OF ERROR VII: THE STATE COMMITTED PROSECUTORIAL MISCONDUCT AND RENDERED THE TRIAL UNFAIR DURING CLOSING ARGUMENTS BY ACCUSING DEFENSE COUNSEL OF KNOWING GEORGE LIED AND COACHING HIM TO DO IT.

ASSIGNMENT OF ERROR VIII: THE TRIAL COURT ERRED BY DENYING A REQUEST FOR A JURY INSTRUCTION ON COMPLICITY AFTER THE FACT.

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ASSIGNMENT OF ERROR IX: THE CUMULATIVE IMPACT OF NUMEROUS ERRORS AT TRIAL PREJUDICED GEORGE BY SWAYING THE OUTCOME OF HIS TRIAL.

STATEMENT OF THE ISSUES

1. Was George entitled to have the capital specifications against him dismissed at his repeated request, either as a matter of contract law or under the right to due process guaranteed under the Fourteenth Amendment to the United

States Constitution and Article I, Section 16 of the Ohio Constitution?

2. Did the trial court abuse its discretion by permitting jurors who knew the victims personally or who had participated in the emergency response to the murders to serve on the jury?

3. Did the trial court err and abuse its discretion by permitting the State to elicit emotional responses from relatives of victims and show numerous gruesome photographs over many days, particularly when some of the jurors were already personally familiar with the people who had been killed?

4. Did the trial court err and abuse its discretion by permitting the State to build its case around evidence of weapons owned by George and his family, the ways they allegedly mistreated women other than the victims named in the indictment, and their numerous prior unrelated crimes?

5. Even if admissible, did the risk of undue prejudice from these types of evidence substantially outweigh any probative value after George offered stipulations and did not dispute his inherent association to his family, the mode and manner of the victims' deaths, or who fired the bullets that killed them?

6. When the State conditions dismissal of capital specifications on a defendant's agreement to give truthful testimony, but it reserves the right to determine what is true, is the agreement so unfairly coercive that the testimony acquired must be excluded under due process principles?

7. Was George entitled to enforce his subpoena for Jake's medical information and prior statements to counsel, which could have aided in cross examination on credibility, after Jake had pled guilty and answered questions about the substance of his statements to counsel?

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8. Was George denied a fair trial when the State argued in closing that his attorneys "know he's guilty" and "know he did it," particularly in conjunction with allegations that his testimony had been coached?

9. Was George entitled to have jurors instructed that Ohio law does not permit a conviction for acting as an accomplice

after the fact and that renunciation and abandonment are complete defenses to conspiracy?

STATEMENT OF THE CASE

These proceedings were commenced on November 13, 2018, when a grand jury indicted George. *T.d. 3, p. 1-13; see T.d. 20, p. 1.* He was accused of aggravated murder, R.C. 2903.01(A), with firearm and capital specifications, in Counts One through Eight, asserting he planned to and did kill Kenneth Rhoden ("Kenneth"), Chris Rhoden Sr. ("Chris Sr."), Gary Rhoden ("Gary"), Clarence Franklin Rhoden ("Frankie"), Hannah Hazel Gilley ("Hannah Hazel"), Dana Rhoden ("Dana"), Hanna May Rhoden ("Hanna May"), and Christopher Rhoden, Jr. ("Little Chris"). *T.d. 3, p. 1-7.* Count Nine charged him with conspiring with Jake, Billy, and Angela to commit the aggravated murders and related aggravated burglaries in violation of R.C. 2923.01(A). *Id., p. 7.* He was alleged to have committed aggravated burglary, R.C. 2911.11(A), (A)(2), or (B), by entering four homes to commit the aggravated murders, with firearm specifications, in Counts Ten through Thirteen. *Id., p. 8-10.* He was subjected to related charges for unlawful possession of a dangerous ordnance, R.C. 2923.17(A), with firearm specifications in Count Fourteen; tampering with evidence, R.C. 2921.12(A)(1) or (B), in Counts Fifteen through Seventeen; forgery, R.C. 2913.31(A)(1) or (2), in Count Eighteen; unauthorized use of property, R.C. 2913.04(B), in Count Nineteen; interception of electronic communications, R.C. 2933.52(A)(1), in Count Twenty; obstructing justice, R.C. 2921.32(A)(4) or (5), in Count Twenty-One; and engaging in a pattern of corrupt activity, R.C. 2923.32(A)(1), in Count Twenty-Two. *Id., p. 10-13.*

George pled not guilty to all charges on November 28, 2018, and he was held without bail. *Transcript of Pretrial Hearings ("P.T."), p. 44-51.* Voir dire commenced on

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July 5, 2022, taking place over 23 days, and concluding with selection of 12 jurors and six alternates on August 30, 2022. *Transcript of Jury Selection, Volume 1 ("J.T.Vol."), p. 3; J.T.Vol. 23, p. 7,929, 7,933*. Jurors were sworn on August 31, 2022, before embarking on a two-day jury view. *J.T.Vol. 24, p. 7,975-82; J.T.Vol. 25, p. 7,989*. The evidentiary proceedings began on September 12, 2022. *Transcript of Jury Trial, Volume 1 ("T.Vol."), p. 18-183*. Jurors heard evidence until closing arguments and the trial court's charge were given on November 28 and 29, 2022. *T.Vol. 52, p. 11,659-842; T.Vol. 53, p. 11,852-12,178*. George's Crim.R. 29 motions were denied. *T.Vol. 48, p. 11,421-73*.

Only after the close of evidence, the State agreed to dismiss the capital specifications on George's motion. *T.Vol. 49, p. 11,512-515; T.Vol. 52, p. 11658-59*. After deliberating all day on November 30, 2022, jurors returned guilty verdicts on all remaining counts and specifications. *T.Vol. 54, p. 12,204-21*.

On December 19, 2022, George was sentenced to an aggregate consecutive sentence of "eight consecutive terms of life imprisonment without parole, plus 121 years, 81 years of which are mandatory and shall be served prior to the prison terms imposed for the underlying felonies." *T.Vol. 55, p. 12,327-28*. The Judgment of Entry of Sentence was filed on January 4, 2023. *T.d. 602*. George initiated this appeal by filing his timely Notice of Appeal on January 26, 2023. T.d. 629.

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STATEMENT OF THE FACTS

A. Jake and Hanna May had a child together before breaking up, and Jake grew paranoid about the safety of their daughter.

Jake and Hanna May met in 2010 at the 4-H barn at the Pike County Fair when he was 17 years old and she was 13 years old. *T.Vol. 30, p. 7,051-53*. They eventually started dating with permission from Hanna May's parents, Dana and Chris Sr. *Id., p. 7,053-54*. A

little over three years after meeting, Jake and Hanna May became parents when their daughter, S.W., was born. *Id., p. 7,055-56*. But their relationship did not last long—Hanna May ended it in February 2015. *Id., p. 7,057*. They came to an informal agreement to trade custody back and forth, one week on and one week off. *Id., p. 7,064*.

Many of the women around Jake had been sexually abused or assaulted before, including Hanna May, his mother Angela, George's ex-wife Tabitha Claytor ("Tabby"), and a few cousins. *T.Vol. 30, p. 7,065; T.Vol. 36, p. 8,620-21*. This gave him "a deep fear for [his] own daughter when she was born," and he "solemnly swore" he would protect her. *T.Vol. 30, p. 7,065*. He had visions of a future in which S.W. could suffer the same fate, leading him to become "very protective" of her "innocence." *T.Vol. 33, p. 7,811-13*.

As Hanna May moved on with her romantic life, Jake became concerned that her "choice of men" could place their daughter at risk of being molested too. *T.Vol. 30, p. 7,063*. He heard a story from a cousin of Hanna May that S.W. was locked in a bedroom with her mother and a new boyfriend "for hours" without "answering the door." *Id., p. 7,063-64*. He grew concerned that they "possibly may have been doing inappropriate things with my child in the room with them." *Id., p. 7,064*. S.W. had herself shared a story with Jake that another of Hanna May's boyfriends had "locked her in the bedroom and left her there for hours while she screamed for her mother" and nobody "would come to rescue her." *Id.* S.W. began to show "terror" when it was time for Jake to return her to her mother; "she would scratch and claw, however she could to hold on to my leg and scream, 'Daddy, please don't make me go' with eyes that were filled with tears." *Id.*; *T.Vol. 35, p. 8,337*. Jake spoke with Hanna May and Dana, who both felt S.W. was just "being a brat." *T.Vol. 30, p. 7,065*. Not unreasonably, Hanna May thought Jake was "overreacting." *Id.*

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B. Angela began to suspect that Jake's young daughter was being sexually abused while in Hanna May's custody.

Around the same time, Angela started to notice that S.W. would come home in a "grouchy mood" after being with Hanna May. *T.Vol. 35, p. 8,346.* She was "not sleeping good" and "didn't want to be alone." *Id.* While he was giving S.W. a bath one night, Jake asked Angela to examine some redness, swelling, and a "bad horrible smell" around the child's "private area." *Id.* At first Angela thought it was from being in diapers and because she "was not the cleanest whenever . . . she came back." *Id.* But Angela came to see that the "redness and stuff would go down" while she stayed with the Wagner family and when "she would come back, it would be there again." *Id.* Then, S.W. began to "try and put things inside of her, pea gravel, dolls, anything." *Id.* Angela was "constantly telling her no, no, no." *Id., p. 8,347.* In November 2015, Angela sought answers from the child:

> I was, like, "Sophia, honey, why do you try to put stuff inside yourself? You're going to make yourself sick. You're going to get infected. Why do you do that?" And she says, "Chris puts stuff in me for bubble gum."

Id., p. 8,347-48. Angela decided there "was some kind of abuse that was going on that needs to be stopped." *Id.* She went to Billy for help. *Id., p. 8,350, 8,361.*

C. Billy and Angela decided to kill Hanna May and several members of her family, and Jake agreed after he came to believe she did not care about the alleged sexual abuse.

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Billy "didn't believe [Angela] at first"; he "did not think that that would be possible" and "didn't want to." *T.Vol. 35, p. 8,362.* She reminded him of the "history of sexual abuse" against Hanna and expressed "it had to be taken care of." *Id.* Neither of them was "raised to believe in the justice system," nor did they "believe in children's services." *Id., p. 8,365-66.* Angela suggested turning in Hanna May's father, Chris Sr., for his marijuana growing operation in the hope that Jake would then acquire "more control" over S.W., but

Billy could not stomach that plan because of how it could impact other "people that deal with drugs in the county." *Id., p. 8,366*. Instead, Billy decided in January of 2016, and Angela agreed, "they would have to be murdered." *Id., p. 8,370, 8,372; T.Vol. 30, p. 7,077.*

Billy initially wanted to kill Chris Sr., Hanna May, and her brothers, Frankie and Little Chris. *T.Vol. 35, p. 8,371*. Angela asked "why can't it just be Hanna," and Billy reflected that the other Rhodens would infer "it was Jake; they'll know and then they'll come and kill Jake." *Id*. She agreed, and Billy started to plan the details. *Id., p. 8,372*. They approached Jake, telling him "the only option" to prevent S.W. from being "harmed" was to "kill Hanna." *T.Vol. 30, p. 7,076-77*. Jake blew up, responding that he "still loved her," he "was not going to let that happen," and he "stomped out the door." *Id., p. 7,076.*

Instead, Jake "confronted Hanna about all of those things." *T.Vol. 30, p. 7,065*.

> I told her abruptly, Hanna, what if your carelessness leads to my daughter being molested, as you was? And she said, I guess we'll just have to deal with it.

Id. That was Jake's "tipping point." *Id., p. 7,078*. He was "very fearful that it was going to happen or had already happened." *Id., p. 7,065-66*. He "felt" he "had no other choice other than to kill Hanna." *Id., p. 7,075*. About a "month or two" after Billy's first approach in January 2016, Jake went to him and "told him we'll have to do it." *Id., p. 7,078-79.*

Jake's initial plan was to "make it look like" Hanna May's then-boyfriend "had done it and then committed suicide afterwards." *T.Vol. 30, p. 7,079*. Billy disliked this idea. *Id., p. 7,080*. If any suspicion at all turned toward Jake, then Chris Sr., his brother Kenneth, and Frankie "would all be bearing down on [Jake] with a sniper up on the hill or some sort." *Id*. Although Billy thought of Chris Sr. as "closer than a brother," he "said you cannot kill Hanna without killing them as well." *Id*. And because Gary, Hannah Hazel,

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Dana, and Little Chris all lived with their primary targets, Billy, Jake, and Angela decided to kill them too if necessary to avoid having witnesses. *Id., p. 7,080-81.*

D. Jake and Angela testified without any direct corroboration that George had been involved in preparing for the murders.

Billy took on the primary role of planning the murders, including "the timing and surrounding events." *T.Vol. 30, p. 7,081.* Jake agreed to "obtain a vehicle that was not our own" to avoid suspicion "and to prep firearms with silencers." *Id.* Billy directed Angela to acquire a "list of stuff" needed to evade detection and prevent any calls to 911, including "a bug detector, a cell phone jammer, and shoes." *T.Vol. 35, p. 8,372, 8, 380-81.*

Billy wanted shoes of a "smaller size" than they normally wore, and Angela picked up two pairs of generic Athletic Works shoes, sizes 10½ and 11, from the Walmart in Waverly, Ohio, on April 7th, 2016. *Id., p. 8,386-89; T.Vol. 12, p. 2,834-85* (identifying the size and make of shoes based upon impressions left at the scene of some of the murders); *T.Vol. 34, p. 7,985-8,031* (same). Angela ordered the other items online, using George's credit card for at least one of those purchases. *T.Vol. 35, p. 8,296, 8,381-86; T.Vol. 45, p. 10,622-24* (George allowed Angela to use his credit card to purchase items for his son without asking, but he did not review the statements and relied on Angela to pay the bill using his cash). She insisted to jurors that she "always asked" before using George's credit card, and she thought he was aware of the plan to kill. *T.Vol. 35, p. 8,296, 8,373-78.*

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The only other thing Angela did to prepare for the murders was to forge backdated "custody documents" for Jake and George so that if "something happened" to them "during the homicides," there would be paperwork electing to have each of their children "stay together and stay on the farm" with Angela. *T.Vol. 35, p. 8,389-94; Exs. CC-295-A, CC-295-B, and CC-295-C.* Angela forged a third copy of this document so that it would

look like Hanna May had elected before their breakup for Jake to take sole custody if she passed away. *T.Vol. 35, p. 8,392-93; Ex. CC-295-A*. She did not realize these papers were stamped with the date they were printed, April 3, 2016. *T.Vol. 35, p. 8,394; T.Vol. 20, p. 4,620-26; T.Vol. 25, p. 6,035-37*. She told jurors that George signed his copy, but she filled the rest of the form before forging her mother's notary stamp. *T.Vol. 35, p. 8,391-97*.

Billy and Angela had also discussed the need for a truck with a gasoline engine for use during the murder plot, as the diesel trucks the Wagners typically drove "are very loud." *T.Vol. 35, p. 8,402*. One day, Billy showed up "at the screen door" and "hollered to George" to "get some money out of the gun cabinet; he'd found a truck they could use." *Id., p. 8,398*. George "didn't want to," but Angela said he "got some money," and went along with his dad to buy an old truck from "Uncle toddy." *Id., p. 8,398-400*. She did not see who drove when they came back, but the truck was parked "on the hill by the new barn," which was "fairly out of sight of passersby." *Id., p. 8,401-02*. Angela did not know what other preparations there might have been, and she reported that "Billy would come down and get Jake and George" a couple times a week in that time. *Id., p. 8,407*. She did not know "who was going to go that night to commit the homicides" or "how they were going to kill people." *Id., p. 8,408*. She was "going to stay at the house with the kids." *Id.*

Jake prepared the murder weapons. *T.Vol. 30, p. 7,082*. He first planned to "use [his own] Ruger 1022," Billy's "Beretta 92," and an "SKS" rifle that had once been George's. *Id.* Everyone in the immediate family had access to the family gun safe where these weapons were kept. *T.Vol. 32, p. 7,640*. And using that access, Jake had "commandeered" the SKS from George in the "decade" it sat in their home, a word that he understood to be "a pirate term where you take something that's not yours." *Id., p. 7,640-41*. "In a sense," the SKS was "as much [Jake's] gun as anybody else's." *Id., p. 7,641*.

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In the "process of trial and error," Jake "destroyed the 1022 and the Beretta was a malfunction that didn't work." *T.Vol. 30, p. 7,082-86*. So, he pivoted to using his Walther Colt 1911 pistol chambered in .22 long rifle and Billy's .40 Glock handgun. *Id.*; *T.Vol. 34, p. 8,164-74* (opining that fired .22 long rifle cartridge casings found at two murder scenes and Jake's home were all fired from Jake's 1911); *T.Vol. 35, p. 8,216-17* (opining that fired .40 cartridge casings found at two other murder scenes were all fired from a Glock 22 recovered with the 1911). He fashioned silencers for the 1911 and SKS out of automotive parts and tools that he purchased. *T.Vol. 30, p. 7,087, 7,091-99*. Jake did not create a silencer for the Glock because it "was a last-minute choice and did not have an extended barrel." *Id., p. 7,108*. Jake test fired it inside of a hunting cabin to confirm it could not be heard from inside the adjacent farmhouse 50 feet away. *Id., p. 7,109*.

Despite Angela's story, Jake admitted at trial that he had purchased the truck from Uncle Toddy himself in the driveway at their home on Peterson Road in Peebles, Ohio. *T.Vol. 30, p. 7,099-100*. Several days before the murders, Billy had him create a "false bedcover" for it "to stack hay or straw or something on top of the vehicle to make it look like the bed was fully loaded with hay." *Id., p. 7,124-25, 7,128*. It was built so that Jake and George could hide in "a compartment underneath" while Billy "drove to Chris's property." *Id*. Jake said that George knowingly helped with the construction. *Id., p. 7,125*.

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Only Jake and Angela's testimony suggested that George assisted in these preparations or had the faintest idea about the murder plot.

E. Jake testified without any direct corroboration that George went along with him and Billy to commit the murders.

In the early afternoon on April 21, 2016, Billy told Jake it was time to commit the murders. *T.Vol. 30, p. 7,128; see T.Vol. 2, p. 414-19* (establishing date). Jake loaded the

back of the truck with the 1911 and SKS, and Billy brought the Glock handgun for himself. *T.Vol. 30, p. 7,129*. Although Angela did not remember it happening, Jake told the jury that he had shown her and George a clip from a Boondock Saints movie before leaving to "psych [himself] into the gumption of doing what [he] was about to do. *Id., p. 7,132-34; T.Vol. 35, p. 8418-19*. Angela testified that George left along with Jake and Billy, and she remained home with the children with instructions to send text messages from Jake and George's cell phones through the evening. *T.Vol. 35, p. 8,414-18, 8,421*. Jake testified that he and George changed into dark clothing, ski masks, gloves, and the Walmart shoes; Jake in a 10½ and George in size 11. *T.Vol. 30, p. 7,129-30, 7,137-39*. Billy wore normal clothes. *Id., p. 7,143-44*. He closed Jake, and allegedly George, in the back of the truck with the guns. *Id., p. 7,146-48*. On the way, Billy stopped to ask Jake whether he "was sure," because "if I wanted to back out, now's the time to say." *T.Vol. 32, p. 7622*. They went on.

1. Billy killed Chris Sr. and Gary at Scene 1.

Jake claimed that when they arrived at Chris Sr.'s house ("Scene 1"), he and George got into position on their stomachs under two different trucks in the front yard as Billy interacted with the occupants in the home. *T.Vol. 30, p. 7,147-50*. Jake had the 1911 and George allegedly held the SKS. *Id*. The plan was for Billy to lure Chris Sr. out to the marijuana growing facility behind his house. *Id., p. 7,150-51*. As they returned to the house, George was supposed to shoot both Chris Sr. and Gary as they crossed in front of the porch. *Id*. George did not pull the trigger, even as Jake claimed to have somehow nudged him from underneath a different truck. *Id., p. 7,153-54*. Billy came outside pretending to look for his cell phone as Chris Sr. called it, but really, he asked the boys why they had not fired. *Id., p. 7,155*. He gave them one more chance and went back inside. *Id*. Jake moved over to the truck that George was sitting and took the SKS. *Id., p. 7,156*.

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While Billy was still inside the house, Chris Sr. came to the door. *T.Vol. 30, p. 7,156*. Jake was supposed to kill him with one clean headshot, but he missed and began to fire wildly with his eyes closed. *Id., p. 7,156-58*. As he fired, he heard gunshots coming from inside the house. *Id., p. 7,157*. Chris Sr. was gone from the doorway when he opened his eyes. *Id., p. 7,157-58*. Jake had hit Chris Sr. a single time in the arm with the SKS. *T.Vol. 7, p. 1711-18; Exs. E and E-257*. Billy followed up with eight more shots from the Glock, two to the chest and six to the head. *Id*. Billy shot Gary three times in the head with the .40 Glock. *T.Vol. 7, p. 1718-22; Exs. F and F-161*. Jake picked up the shell casings from the SKS and purportedly handed it back to George before retrieving the 1911 from the grass. *T.Vol. 30, p. 7,158-59*. Billy came out in a panic. *Id., p. 7,159-61*. He failed to collect all his shell casings, leaving one behind. *T.Vol. 5, p. 1,141-42*.

Jake did not remember what George was doing in those moments. *T.Vol. 30, p. 7,161*. He entered the house and took the keys out of the pocket of the now-deceased Chris Sr. so that he could enter the marijuana grow room to retrieve the recording device for the security system there. *T.Vol. 30, p. 7,161-62, 7,168-70*. Gary's blood was left on the exterior door to that room, and its handle was broken off, but Jake offered no explanation for how he managed that. *T.Vol. 6, p. 1,330-40; Exs. A-108 and A-111*. He returned and placed the recording device in the truck. *T.Vol. 30, p. 7,170*. He went back into Chris Sr.'s home to retrieve the cell phones from the two victims, who had already been dragged into the back bedroom in his absence. *Id., p. 7,170-73*.

From there, Jake and Billy led the alleged trio to each of the remaining crime scenes in an apparent effort to consider their next steps. They walked the short pathway over to Frankie's house ("Scene 2"), where he lived on Chris Sr.'s property with his fiancé, Hannah Hazel, and their children. *T.Vol. 30, p. 7,179-80*. They found Frankie's doors

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locked, the lights off, and the television on. *Id., p. 7,180-82*. Returning to Chris Sr.'s home, they used his keys to take his truck to Dana's house ("Scene 3") to see if she was home. *Id., p. 7,182-84*. She had not returned from her evening job at a nursing home. *Id*. So, they went to check if Kenneth was home ("Scene 4"), and he was. *Id., p. 7,185-86*.

2. Jake killed Frankie and Hannah Hazel at Scene 2.

Returning to Scene 2, Jake began to try unsuccessfully to pry open the door with a knife. *T.Vol. 30, p. 7,186*. Failing at that, he noticed an open back window. *Id., p. 7,187*. As Frankie's dogs barked, Jake boosted himself into the house through the window. *Id.*; *T.Vol. 32, p. 7,651-53*. Billy handed him the 1911 through it. *T.Vol. 30, p. 7,187*. Jake quickly scanned the house and found Frankie's oldest son asleep on the couch. *Id*. Frankie and Hannah Hazel slept in their bedroom. *Id*.

Jake let his father in through the back door and lost track of George. *T.Vol. 30, p. 7,187-89*. Using the 1911, Jake shot Frankie in the head as he slept, and he then shot Hannah Hazel five times in the head as she stirred awake. *Id., p. 7,189; T.Vol. 8, p. 2102-04; Exs. G and G-95*. He did not initially notice that their child, R.R., was sleeping between them. *T.Vol. 30, p. 7,189-90*. Although Frankie died of only three gunshot wounds, Jake volunteered at trial that Billy "shot Frankie a couple more times" after Jake handed him the 1911 to scan the floor for fired shell casings. *T.Vol. 32, p. 7,666; T.Vol. 8, p. 2105-07; Exs. H and H-105*. Partly because the room was messy, but also because he did not believe that forensic science could link a .22 long rifle rimfire cartridge to the gun that fired it, they left without collecting five fired casings and locked the door behind them without waking Frankie's older son. *T.Vol. 30, p. 7,190, 7,194-95; T.Vol. 8, p. 1,955*.

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3. Jake killed Dana, Hanna May, and Little Chris at Scene 3.

Jake and Billy took Chris Sr.'s truck back to Scene 3, with George allegedly riding along. *T.Vol. 30, p. 7,195-96.* Jake entered the unlocked front door and snuck through the house to find Hanna May asleep and Dana awake, using her cellphone. *Id., p. 7,202-03.* He was frozen until Hanna May's days-old baby, K.R., emitted a "slight cry." *Id.* In a manner evoking a scene from a spaghetti western, Jake described himself striding back and forth between their rooms, shooting Dana as she gasped in surprise, then Hanna May as she turned to look right at him, then Dana again, and then Hanna May again. *Id., p. 7,203-04, 7,211.* Dana suffered five gunshot wounds to her head from the front and side consistent with Jake's story, but Hanna May had been shot twice to the back of her head. *T.Vol. 10, p. 2,486-88; Exs. I and I-129; Exs. J and J-95.* This was "inconsistent" with Hanna May "looking at the person who shot her." *T.Vol. 10, p. 2,486.* Jake did not know what Billy and George were doing at this point, but he believed they entered the home carrying the Glock and SKS respectively. *T.Vol. 30, p. 7,205-06.*

Jake went to Little Chris' bedroom next, where he shot the young man four times in the head from the left side of his bed. *T.Vol. 30, p. 7,213-14; T.Vol. 10, p. 2,485, 2,489; Exs. K and K-89.* He took all three victims' phones away from Scene 3, and he searched for all the .22 long rifle shell casings he could find, ultimately leaving one behind. *T.Vol. 30, p. 7,213-15, 7,217; T.Vol. 10, p. 2,363-66; Exs. C-388 and C-430.*

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4. Billy killed Kenneth at Scene 4.

From there, Jake explained that they returned to Scene 1 in Chris Sr.'s truck so that George could collect the pickup Jake bought for the murder plot. *T.Vol. 30, p. 7,228.* Jake led the way back to Scene 4, but George pulled off of the road about a mile away from Kenneth's house. *Id.* When the other two arrived, Billy went to the front door of Kenneth's

trailer and pounded on it, receiving no answer. *Id.* Billy walked in, and Jake claimed to have seen "a muzzle flash" from Billy's Glock despite that his headlights were still on and pointed "right up to the front of Kenneth's camper." *Id.* Kenneth was killed with a single gunshot to his right eye from closer than three feet away, and Billy left the fired .40 shell casing there. *T.Vol. 11, p. 2,575-77, 2,618, 2,633-34; Exs. L and L-62.* Billy and Jake looked around for security cameras, took a trail camera that was perched in a tree, and departed back to where George allegedly waited. *T.Vol. 30, p. 7,229.* Jake dropped off Chris Sr.'s truck, left the keys in it, and Billy drove them home. *Id., p. 7,236.*

Other than Jake's testimony, none of the physical evidence linked George to any of the murder scenes. Jake alone testified that George came along, wore the size 11 Walmart shoes, and carried the SKS that had been used in the killings. Indeed, Jake admitted that George "didn't like the idea whatsoever," "did not want any part of it at all," had never "agreed to do it," and had not fired a weapon at anyone. *T.Vol. 32, p. 7,602-04.* When Jake pled guilty, he told the State during a proffer that George only went along to protect him from Billy, who George thought might be setting Jake up. *Id., p. 7,604-05.*

F. Jake attempted to destroy and hide the remaining evidence and claimed without any direct corroboration that George assisted.

Once he arrived home around 4:30 a.m. on April 22, 2016, Jake set out to destroy any physical evidence of the crimes. *T.Vol. 31, p. 7,251.* He burned everything he could to ash, including all the clothing worn during the murder spree, the floor mats from the truck, the shell casings and cell phones taken from the victims, the security devices collected, and the Walmart shoes. *Id., p. 7,251-53, 7,259-60, 7,263-64.* He used a torch to try to melt the guns, but he turned to cutting them into smaller pieces with a portable grinder after running out of fuel. *Id., p. 7,251-52, 7,260-61.* He claimed George helped

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him take the false bed out of the truck, but Jake dismantled it himself later on. *Id., p. 7,253-54.* And he asserted that George helped him dig a hole in a barn on the property to temporarily store the partly disassembled murder weapons. *Id., p. 7,255-57.* Billy drove the truck to Athens early that morning, where he gave it to his niece, Katy, as a present. *Id., p. 7,263; T.Vol. 34, p. 8,060-66* (Katy transferred the truck title into her own name that afternoon); *T.Vol. 37, p. 8,892-98* (Katy describing the interaction with Billy).

After Jake completed this work, he and George left the house to complete a chore for Angela. *T.Vol. 31, p. 7,270.* They forgot some tools, and as they returned to the house to get them, Angela called and asked them to come home as soon as possible. *Id., p. 7,271.* By the time they got back, news broadcasts were already reporting some of the deaths. *Id., p. 7,275-76.* Jake walked outside to take a call from a friend, who had heard the news, and he pretended to be shocked and mournful. *Id., p. 7,274, 7,277-78.*

Billy had told Angela that she was "supposed to act like we were hearing it for the first time." *T.Vol. 35, p. 8,431.* She told jurors that Billy instructed her and her sons before and after the murders to take extreme precautions to prevent being overheard by anyone talking about it, including by writing notes and destroying them on the stove, running water or the dryer while speaking in their homes, talking outside, or turning the radio on when speaking in cars. *Id., p. 8,432.* He was generally suspicious that the authorities could listen in on conversations through electronic devices. *Id., p. 8,376.* Angela asked Billy a single question about the killings that day in a hushed tone: "Why so many? And he had told me because they were there." *Id., p. 8,427.*

Jake never talked about the killings with his family ever again due to the "immense guilt" he felt, choosing instead to "erase the memory completely" and rejecting offers from

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his parents to talk. *T.Vol. 31, p. 7,284-85.* "I told them no, I got it. I'm bottling it up, and don't mention it." *Id.*

At "a later date," Billy directed Jake to place the partly destroyed murder weapons in buckets full of concrete so that they could "dispose of them in the lake that's on my grandmother's property," the Flying W Farm. *T.Vol. 31, p. 7,287-88, 7,344.* The plan was to use the concrete buckets as "weights for a floating geese house," which was "kind of like a chicken coop that floats for the wild geese to nest in." *Id., p. 7,288.* There was no dispute that George helped build the goose house. *Id., p. 7,288-89; T.Vol. 45, p. 10,685-89.* But George told the jury it was built in early February 2016, months before the homicides, and steel bars were used as anchors. *T.Vol. 45, p. 10,685-89.* George denied ever seeing the concrete buckets recovered after Jake pled guilty. *Id., p. 10,690-91.*

G. The State's investigators trace forensic evidence at the scenes of the crimes back to Jake and Angela.

The State's investigators wanted to interview Billy about the murders due to his closeness with Chris Sr. and some of the tips that had come in. *T.Vol. 18, p. 3,933-35.* They grew suspicious of him when he said during an interview that he had angrily broken the phone he was using at the time Chris Sr. was killed because he "kept frickin' calling Chris." *Id., p. 4,173-74.* The authorities knew from cell phone records that Chris Sr.'s last outgoing phone calls on the evening of April 21, 2016, were made to Billy, who never returned those calls in the days after the homicides. *Id., p. 4,136-42, 4,157.* The authorities also grew suspicious of Jake after his answers to questions about his relationship with Hanna May did not track with their Facebook communications, which had been acquired through a warrant, and discussions with her friends and family. *Id., p. 4,150-51, 4,158-60.* During two follow-up discussions with Jake at the house on Peterson Road in April and May of

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2017, investigators learned that the Wagners were selling their farm and considering moving to Alaska. *Id., p. 4,160-66*. Jake was also planning to switch cell phone carriers. *Id*. They also noticed fired .40 caliber cartridge casings on the property. *Id., p. 4,164-65.*

Investigators contacted Billy on May 4, 2017, who confirmed the plan to move to Alaska. *T.Vol. 18, p. 4,167-68*. Worried they would lose a chance to examine Jake and Billy's cell phones in the transition, warrants for both devices were acquired. *Id., p. 4,169*. They did an expedited review of the information acquired before the new owner of the Peterson Road Farm took possession, and using all of the information they had acquired already, the State acquired warrants to search that location on May 10 and 12, 2017. *Id., p. 4,188-92*. Several .22 long rifle cartridges recovered during these searches were linked by common firing pin impressions to the shell casings found at Scenes 2 and 3, and ultimately to the weapon that Jake had cut up and encased in concrete. *T.Vol. 19, p. 4,335-37, 4,348-51, 4,390-95, 4,399-401; T.Vol. 34, p. 8,164-74*. Jake had purchased it at a gun show in Columbus on January 31, 2015. *T.Vol. 46, p. 11,155-56; Ex. MMMM-3*.

Billy, Angela, Jake, S.W., George, and his son, B.W., all left for a brief vacation to Alaska by May 12, 2017, to scope out work and housing, leaving their belongings in trucks and trailers at a friend's property on Route 41. *T.Vol. 18, p. 4,191; T.Vol. 33, p. 7,780, 7,786-87*. The authorities acquired another warrant to search the property they left there. *T.Vol. 20, p. 4,496-97*. They found the three custody documents that Angela had forged, which had been very obviously backdated. *T.Vol. 20, p. 4,620-26; Exs. CC-295-A, CC-295-B, and CC-295-C*. And they found a receipt from the Waverly Walmart dated April 7, 2016, which reflected the purchase of two pairs of shoes consistent with shoeprints left at Scenes 1 and 3. *T.Vol. 20, p. 4,657-60, 4,727-30; Exs. CC-63 and CC-265; T.Vol. 12, p. 2,834-85*; *T.Vol. 34, p. 7,985-8,031*. Using this receipt, the State was able to acquire video

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from the Waverly Walmart of Angela purchasing the two pairs of shoes that day. *T.Vol. 20, p. 4,694-98; Exs. JJ-1 through JJ-4.*

With this evidence, investigators asked the Border Patrol to stop Billy, Angela, Jake, George, and their children as they re-entered the country on their drive back from the Alaska vacation at the Montana border. *T.Vol. 22, p. 5,184, 5,199-203.* During Angela's interview, she admitted to purchasing the shoes at Walmart, but she claimed she "threw them away" because "they are an old man's shoe, so they wouldn't wear them." *T.Vol. 23, p. 5,431-34.* She did not identify who "they" were that disliked the shoes. *Id.*

As they were interviewed in Montana, listening devices were installed in Angela's SUV. *T.Vol. 22, p. 5,253.* With still more warrants, wiretapping was performed on their cell phones in 2017 and 2018, and recording devices were placed in a semi-truck that George and Jake got a job driving during 2018. *T.Vol. 25, p. 5,895-913; T.Vol. 41, p. 9,466-77.* In July 2018, foot tracings, measurements, and impressions and palm and fingerprints were acquired from Billy, Jake, and George. *T.Vol. 26, p. 6,181-6,194.* A handwriting sample was acquired from Angela at the same time. *Id., p. 6,208-14.* Billy, Angela, Jake, and George were arrested on November 13, 2018. *T.Vol. 30, p. 7,028.*

H. Jake enters a guilty plea and leads the State to the murder weapons and the truck.

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Jake agreed with the State to enter a guilty plea and admit his involvement in the murder plot in April 2021. *T.Vol. 32, p. 7,573-86; TTT-1* (accepted guilty plea); *Ex. TTT-2* (executed plea agreement). The information he gave State investigators led them to the murder weapons and silencers found in concrete blocks in the lake at the Flying W and the truck that Billy gave to Katy on April 22, 2016. *T.Vol. 34, p. 8,053-66.* After Jake pled guilty, Angela took a plea agreement. *T.Vol. 36, p. 8,590-94; Exs. YYY-2 and YYY-4*

I. George denied involvement—he knew that his family was being investigated after the murders, assumed he was being surveilled, and believed it to be harassment.

Only co-defendant testimony linked George to any preparation or murder scenes. Jake alone said George wore the size 11 Walmart shoes, carried the SKS that night, helped dig a hole where weapons were hidden, and helped build the goose box *after* the murders, rather than before. *E.g., T.Vol. 30, p. 7,129-30, 7,137-39, 7,147-50, 7,287-89*. Angela described conversations with George about the conspiracy, including one where she claimed he referenced a shoeprint he had purportedly left at Scene 1. *E.g., T.Vol. 35, p. 8,377-78, 8,467-68, 8,579-82*.

George took the witness stand and vehemently denied knowledge of or involvement in the homicides. *T.Vol. 45, p. 10,711-13*. He insisted he would have tried to stop Billy, Jake, and Angela if he had known what was coming. *Id*. According to George, he went to bed at 10:00 p.m. on April 21, 2016, slept through the night without hearing any loud diesel trucks coming or going, and woke up to Jake rushing him out the door without coffee to deal with Angela's morning chore. *T.Vol. 45, p. 10,715-17.*

Because they had a fight, George was not even talking to his father during the first few months that Billy would have been planning the murders. *Id., p. 10,566-70*. He was a passenger in the car when Angela bought the shoes from Walmart, but he did not know she was buying them, never saw them, and knew nothing about them. *Id., p. 10,822-25*. He signed the document electing for Angela to take custody of his son if something happened to him before the rest of it was filled out, and he did it while he was in a rush to leave his house. *T.Vol. 46, p. 10,934-35*. He had already created a similar document; he just thought his mother was offering him a form "that was more legitimate looking than my handwritten one." *Id*. He had known of Uncle Toddy's truck and lent the money to

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buy it, but he only saw it once in early 2016 and did not know it had anything to do with the murders until Jake gave his proffer. *Id., p. 10,804-809.* He denied helping to build the false bed for it. *T.Vol. 45, p. 10,814-15.*

While George had bought and sold more SKS rifles than he could remember, he knew the one recovered from the concrete buckets belonged to Jake because of the wood stock on it. *T.Vol. 45, p. 10,832-33.* George had an SKS with a black synthetic stock, but he had sold it to his friend, Ben McCann, in the middle of 2015. *Id.; T.Vol. 46, p. 11,033-36.* George did not remember the particular 1911 pistol Jake used in the murders independently from the other 1911 pistols Jake had owned. *T.Vol. 46, p. 11,036-38.*

When he was interviewed at the Montana Border, George agreed to the investigator's request to "spy on" Jake. *T.Vol. 45, p. 10,742-43.* He agreed even though he "was emotionally distraught that they would accuse [his] family" of the heinous crimes. *Id., p. 10,740.* When he finally asked his brother whether he was involved, Jake "swore up and down he didn't know who did it and they didn't have nothing to do with it." *Id., p. 10,743.* Given the robust churn of the rumor mill on social media, George felt "like everybody was against [his] family," and he got "irritated when people are messing with [his] family." *T.Vol. 46, p. 10,951-52.* He believed his brother's denials until Jake and Angela pled guilty, leaving him "heartbroken" and "betrayed." *Id., p. 10,810-14.*

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ARGUMENT

ASSIGNMENT OF ERROR I: THE TRIAL COURT ERRED AND DENIED GEORGE THE RIGHT TO DUE PROCESS BY REJECTING REQUESTS TO DISMISS THE CAPITAL SPECIFICATIONS AGAINST HIM BEFORE TRIAL.

Whether as a matter of contract law or fundamental fairness, George was entitled to a trial without the specter of the death penalty hanging over him. His brother entered

into a plea deal requiring dismissal of all death specifications in the case without delay. Waiting until after the close of evidence to dismiss them was not justified. *T.Vol. 49, p. 11,512-15*. This Court should reverse and remand for new proceedings without all the trappings of a death penalty case, as George requested before, during, and after trial. *T.d. 293, 330, 401, 588*; *P.T., p. 657-64; T.Vol. 33, p. 7,973; T.Vol. 55, p. 12,231-36*.

A. Jake and Angela's plea agreements did not provide for delayed dismissal of death specifications, and George was a third-party beneficiary entitled to immediate performance.

Before this Court reaches the constitutional question, it should consider whether George was entitled to have the death specifications dismissed from his indictment long before trial under basic contract principles. After-all, plea deals like the ones entered by Jake and Angela "are contracts between the state and criminal defendants and are subject to contract-law principles." *State v. Adkins*, 2005-Ohio-2577, ¶ 7 (4th Dist.). A court *must* remedy a breach of a plea agreement by the State, and it may order specific performance if appropriate. *State v. James*, 2013-Ohio-5322, ¶ 15 (4th Dist.).

The State agreed with Jake that "in consideration of [his] agreement to provide truthful testimony in the trials of each of his co-Defendants," specifically including George, it would "dismiss the 'death penalty' Specifications" in "Counts One through Eight of their indictments." *TTT-2, p. 4, ¶ 9*. If Jake did not comply with his agreement, the State was authorized to "reinstate the original charges with all of the original specifications against them." *TTT-2, p. 5, ¶ 11*. When the trial court accepted this agreement and journalized Jake's guilty pleas, it was further ordered:

> Upon acceptance of the Defendant's plea of **GUILTY** to the above outlined offenses and specifications, the State moves to dismiss Specifications Four, Five, and Six from Counts One through Eight, respectively.

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TTT-1, p. 4. This entry incorporated the earlier agreement, and it again reflected that the State agreed to dismiss the death specifications against George. *Id.*

While the State steadfastly opposed the dismissal of death specifications until the very end of trial, that is not what Jake's plea agreement provided for. *E.g., T.Vol. 33, p. 7,973*. The agreement to dismiss the death penalty specifications was to be performed immediately "[u]pon acceptance" by the trial court, which is why Jake's own specifications were dismissed right away. *TTT-1, p. 4*. There is no text in the plea agreement or entry contemplating that George would not also be relieved of the potential penalty of death right away or setting some later time for performance. Indeed, the State agreed to dismiss the death penalty for Jake's co-defendants in return for his "agreement to provide truthful testimony," not after delivery of the testimony. *TTT-2, p. 4, ¶ 9*. Further bolstering this meaning, there is no purpose for a term permitting reinstatement of death specifications against George if Jake were to later breach the plea deal unless the parties contemplated immediate performance. *TTT-2, p. 5, ¶ 11*. This Court must enforce Jake's agreement with the State based upon *all* of its terms without rendering any "meaningless, unnecessary, or superfluous." *Fifth Third Mtge. Co. v. Rankin*, 2011-Ohio-2757, ¶ 17, 24 (4th Dist.). Delayed dismissal at least rendered the reinstatement term superfluous.

Even if the clear text did not say that George's death specifications should have been dismissed after Jake's plea was accepted, "the law implies that performance is to take place within a reasonable time" in the absence of a provision specifying the time. *Stewart v. Herron*, 77 Ohio St. 130, 147 (1907). George should not have waited for far more than a year from the April 22, 2021, acceptance of Jake's plea until the November 22, 2022, dismissal. TTT-1, p. 5; *T.Vol. 49, p. 11,512-15*. That was unreasonable.

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The State confirmed with Jake that he entered the plea deal because he wanted his family members "to be able to go to trial without the fear of death." *T.Vol. 33, p. 7,969*. George is a named third-party beneficiary of Jake's plea deal, and it was explicitly entered "with the intent to benefit" him. *Peters v. Malone*, 2004-Ohio-3327, ¶ 12 (4th Dist.). He was and is entitled to enforce it. *Id*. Since George cannot very well elect to withdraw Jake's plea to rescind the deal, the only appropriate remedy is specific enforcement. *James*, 2013-Ohio-5322, at ¶ 15 (4th Dist.). This Court should reverse and remand with instructions to hold a new trial proceeding without any pending death specifications.

B. Forcing George to trial before a death-qualified jury was fundamentally unfair in light of the reasonable expectation that death specifications would be dismissed.

Alternatively, the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution required pretrial dismissal of the death penalty given that nobody reasonably anticipated a death-qualified jury would be necessary. Early in jury selection, as the State opposed George's request for additional peremptory challenges on account of the death specifications against him, it had already admitted the "significant chance that we would not make it to a mitigation phase as far as procedurally" given "the path that this case has taken." *J.T.Vol. 9, p. 2,375*. Precisely because a full capital proceeding was unnecessary in light of Jake's plea deal, it should not have been allowed as a matter of procedural due process.

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This Court has expressed that "[p]rocedural due process is not a technical concept but, rather, concerns fundamental fairness." *Brisker v. Ohio Dept. of Ins.*, 2021-Ohio-3141, ¶ 40 (4th Dist.). "What process is due depends on considerations of fundamental fairness in a particular situation." *In re D.S.*, 2016-Ohio-1027, ¶ 28. The analysis requires courts to balance enumerated factors affecting "the governmental and private interests":

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 334-335 (1976); *In re Adoption of H.N.R.*, 2015-Ohio-5476, ¶ 24.

It is an apparent question of first impression whether the State can pursue death penalty specifications through the close of evidence in a trial when it knows that it will be required to dismiss them under a plea deal before jurors deliberate. So, it first makes sense to express that this procedure was fundamentally unfair on its face without getting into the balancing factors. A death penalty trial unlocks the enormous power of the State to bear down on a criminal defendant with every resource available. The process of qualifying jurors to sit on a death penalty case placed George at an immediate disadvantage, as death-qualified juries are more likely to convict than juries that include those who would not return such a verdict. Carmody, *Death Prone Jurors: The Disintegration of the* Witherspoon *Rule in Texas*, 9 St.Mary's L.J. 288, 288 fn.1 (1977); Cover, *The Pope and the Capital Juror*, 128 Yale L.J.F. 599, 601-602 (2018); Cowan, Thompson & Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 Law & Hum. Behav. 53, 68 (1984); Luginbuhl & Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials*, 12 Law & Hum. Behav. 263, 275-276 (1988); Richard Salgado, *Tribunals Organized to Convict: Searching for a Lesser Evil in the Capital Juror Death-Qualification Process in* United States v. Green, 2005 B.Y.U.L.Rev. 519, 530-533 (2005).

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Four jurors who could have otherwise served, A-93, A-247, B-199, and B-214, were excluded purely because of their views on the death penalty. *J.T.Vol. 13, p. 4,036-49; J.T.Vol. 15, p. 4,709-29; J.T.Vol. 17, p. 5,815-40; J.T.Vol. 18, p. 5,847-72*. This had a real impact upon the jury pool, as any of these jurors could have been selected if they had remained in it instead of some other person who did end up serving on the jury. *J.T.Vol. 18, p. 5,873-74* (objecting to the exclusion of these jurors on that basis).

The three-factor test under *Mathews* confirms that due process required dismissal of the death specifications against George before trial proceedings began. *See Mathews*, 424 U.S. at 334-335. His protected interests were liberty *and life*, at least during jury selection and trial before the State complied with its plea deal. That called down the greatest protections due process can provide. The risk of erroneous deprivation of his liberty was greatly heightened, given the increased likelihood that a death-qualified jury would convict him, a concern that would have been obviated by holding a normal trial. And removing the death penalty would have relieved enormous "fiscal and administrative burdens" from the State, as it would not have had to summon hundreds of jurors and tried the case for months. Dragging George through the process needlessly violated his state and federal due process rights. This Court should reverse and remand for a new trial without any pending death-penalty specifications.

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ASSIGNMENT OF ERROR II: THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO STRIKE SEVERAL JURORS FOR CAUSE.

At least three of the empaneled jurors, A-194, A-243, and A-271, should have been excluded for cause given their familiarity with the victims on April 22, 2016, and the equivocal answers they gave. But they were empaneled nonetheless. *J.T. Vol. 23, p. 7,933*. This Court should reverse and remand for a new trial before a fair jury.

A. Standard of review for juror challenges for cause.

The "right of trial by jury guaranteed by the Constitution carries with it by necessary implication the right that the jury be composed of unbiased and unprejudiced persons." *Klem v. Consol. Rail Corp.*, 2010-Ohio-3330, ¶ 94 (6th Dist.); *Lingafelter v. Moore*, 95 Ohio St. 384 (1917), paragraph one of the syllabus. Thus, a "juror in a criminal case may be challenged" for a number of enumerated "causes," including that he or she "is unsuitable for any other cause to serve as a juror." *R.C. 2945.25(O)*. It is proper to exclude a potential juror who has "expressed uncertainty as to whether she would be able to fairly and impartially determine the facts" or who has "a generalized bias" and an "unwillingness" to set that bias aside. *State v. Williams*, 2021-Ohio-256, ¶ 39-40 (3d Dist.); *Jenkins v. Grawe*, 2019-Ohio-2013, ¶ 34, 36 (10th Dist.); *Lingafelter* at 390.

The trial court should excuse a challenged juror "if the court has <u>any doubt</u> as to the juror's being entirely unbiased." (Emphasis added.) *Westfall v. Aultman Hosp.*, 2017-Ohio-1250, ¶ 54 (5th Dist.); *Lingafelter*, 95 Ohio St. 384, at paragraph two of the syllabus; *Klem* at ¶ 154. This Court reviews an order denying a challenge for cause on the basis of a juror's ability to be fair, impartial, and unbiased for an abuse of discretion. *Berk v. Matthews*, 53 Ohio St.3d 161, 168-169 (1990); *Hall v. Banc One Mgt. Corp.*, 2007-Ohio-4640, ¶ 1, 29-34, 38. The focus of the inquiry is on a juror's assessment of his or her own ability to "render a fair and impartial verdict." *Maddex v. Columber*, 114 Ohio St. 178, 185 (1926); *State v. Bedford*, 39 Ohio St.3d 122, 127 (1988).

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In order to preserve error with regard to a ruling on a challenged juror, all peremptory challenges must be exhausted. *State v. Getsy*, 84 Ohio St.3d 180, 191 (1998); *Hoy v. OhioHealth Corp.*, 2019-Ohio-4693, ¶ 3 (10th Dist.). In this instance, George utilized all six of the peremptory challenges given to him. *J.T.Vol. 22, p. 7,621, 7,643;*

J.T.Vol. 23, p. 7,667, 7,691, 7,730, 7,749. This Court should rule that the trial court erred and abused its discretion in denying the following for-cause challenges.

B. Juror A-194 knew Chris Sr. and Dana before they were killed, and he equivocated on whether it would impact his deliberations.

In addition to being "in favor of the death penalty in every case where a murder has been committed," Juror A-194 attended school with Chris Sr. and Dana and went to church with Dana growing up. *J.T.Vol. 10, p. 2,499, 2,516; Questionnaire A-194, p. 13*. He would speak to them if he saw them around. *J.T.Vol. 10, p. 2,516, 2,521*. When asked whether he could presume that George was not guilty of their murders, he answered that he "would like to think so, yes." *Id., p. 2,517*. The State asked if he could decide solely on the testimony and evidence, this gentleman answered: "I would like to say yes, but, there again, you've got your opinion." *Id., p. 2,512-13*. When asked to confirm that his already-held opinions would persist, he answered: "Right. Right. Absolutely. Absolutely." *Id., p. 2,513*. He could not answer in advance whether seeing Chris Sr. and Dana dead in photographs would have an undue impact: "I would like to think that it wouldn't affect my judgment, but until I actually seen it, you know." *Id., p. 2,524-26*. He could not answer a "hypothetical question." *Id., p. 2,527-28*. With another chance to question him, the State got him to agree he would not find George guilty based solely upon gruesome pictures of Chris Sr. and Dana if he otherwise "thought the State hadn't proved its case." *Id., p. 2,534*. But he did not deny the shock of such photos would weigh in his analysis. *Id*.

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The trial court abused its discretion by overruling George's request to excuse Juror A-194 for a number of reasons, including because "he knows two of the victims," the strong views on the death penalty that he expressed in court and on his long-form questionnaire, and his hesitance to give "the presumption of innocence." *J.T.Vol. 10, p.*

2,547-48; Questionnaire A-194, p. 7, 15-18 (answering that criminal defendants "should testify," offering the most extreme views in favor of the death penalty available on the questionnaire, and denying he would "consider" or "respect" the views of other jurors on the death penalty). There was no way to remove all doubt about his capacity to be fair given his equivocal answers. George was correct, this gentleman tried "to please the person who's asking him the question," and "his first answer" was "more indicative of his attitude than anything else, along with the answers on the questionnaire." *Id., p. 2,547-48*. That is especially true given his expressed inability to answer the hypothetical questions that are necessary in a searching *voir dire*. In this way, Juror A-194 was much like those individuals who had "been back and forth a little bit with respect to the answers" they gave about their capacity to fairly consider the death penalty, which consistently led the trial court to remove for cause. *E.g., J.T.Vol. 15, p. 4,727-29*.

At the very least, asking whether he would convict based *solely* upon the "terrible" pictures of Chris Sr. and Dana failed to rehabilitate him. *Id., p. 2,534*. The "inflammatory nature" of gruesome photographs can create "a danger of prejudicial impact" on the jury's deliberations. *State v. Morales*, 32 Ohio St.3d 252, 257 (1987). Juror A-194 did not confirm that he would be able to consider violent pictures of victims he knew from childhood without allowing emotion to impact his conclusions, and he denied he was even able to answer a hypothetical along those lines. He should have been excluded.

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C. Juror A-243 knew Hanna May, Frankie, and Little Chris from her time working at their school, and she admitted that photos of their death could sway her.

Juror A-243 knew Hanna May from her time working at a school as an interpreter for another child in the same set of classes. *J.T.Vol. 11, p. 3,055-56, 3,071; Questionnaire A-243, p. 11, 13*. She saw Hanna May "pretty much every day." *J.T.Vol. 11, p. 3,056, 3,071*.

She had also been a substitute teacher for Frankie and Little Chris. *Id., p. 3,072*. More recently, this juror had attended a fundraiser "collecting money for the funerals." *Id., p. 3,062*. She denied that she could answer how she would react to gruesome photos:

> I cannot tell you how I'm going to react when I see pictures. I don't have any idea what I'm going to do. I don't know if I'm going to cry. I don't know if I'm going to be trying to keep my peace.

Id., p. 3,073. She volunteered that she was a "sensitive person" when asked if the violent photographs of the children she met at school would affect her during deliberations: "I wouldn't be human if I didn't act that way." *Id., p. 3,074*. And when George asked her whether she would be "more sensitive about seeing photos of children that [she] knew," she also denied she could "answer that" before seeing them. *Id*. When she was certain of things, she gave definite answers. For example, she was familiar with the Pike County Prosecutor, who had handled "a case in which [she] and [her] husband were the victims." *Id., p. 3,060*. She gave a clear "[y]es," she could put that positive experience "aside and judge this case fairly on the merits of this case." *Id., p. 3,061*.

George asked to excuse Juror A-243 for cause because of her answers about "the photographs of the children that she's familiar with from school." *J.T.Vol. 11, p. 3,098*.

> The answer that we needed to hear was, no, it would not have an effect. I'm concerned that it is possible that it could have an effect. She had the opportunity to say, no, it wouldn't, but she said, possibly.

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Id. For the same reasons that Juror A-194 should have been excused, the trial court abused its discretion by denying the for-cause challenge to Juror A-243. She did not answer definitely that she would be able to set aside any emotional response to photographs of the violently murdered individuals who she had known as young schoolchildren and render a verdict dispassionately, leaving substantial doubt about her

capacity to serve fairly as a juror.

D. Juror A-271 worked as a dispatcher for the ambulance company that received the initial emergency call on April 22, 2016, and she spent that day arranging the transport of the victims' infant children.

Juror A-271 worked as an ambulance dispatcher, and she had worked on the response to the killings as the authorities discovered them on April 22, 2016. *J.T.Vol. 13, p. 3,818-20, 3,832-36; Questionnaire A-271, p. 11.* The "whole case" was "very close to home" for her. *Questionnaire A-271, p. 11.* She even "got the original call" to send out an ambulance. *J.T.Vol. 13, p. 3,818.* She lived that day hearing there was "a lot of blood" and "trying to get the kids out" of the scenes and over to a hospital. *Id., p. 3,819, 3,835.*

George asked the trial court to excuse Juror A-271 for cause because of her "personal involvement" in the case. *J.T.Vol. 13, p. 3,849.* There were "plenty of jurors available who don't have the intimate knowledge and emotional connection that she has to dispatching units to the crime scenes" and had not heard "information from people that were at the crime scenes." *Id., p. 3,850.* The trial court abused its discretion in denying this for-cause challenge given the significant emphasis during *voir dire* on the gruesome photos that would be shown during trial. The risk of a prejudicial emotional response to the evidence at trial was too high for the court to accept her promise to "disregard" what she already knew—she had followed the movements of the infants found in bed with their dead parents all day on April 22, 2016. *Id., p. 3,820.*

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ASSIGNMENT OF ERROR III: THE TRIAL COURT ERRED, COMMITTED PLAIN ERROR, AND ABUSED ITS DISCRETION BY ADMITTING GRUESOME PHOTOGRAPHS AND VICTIM-IMPACT TESTIMONY FOR DAYS ON END.

After choosing a jury partly made up of individuals who had known some of the victims personally or heard about the emergency response on April 22, 2016, the State's

strategy played directly to their closeness to the case. Not only did the jury see a great volume of gruesome photograph from the crime scenes and autopsies over the first two weeks of testimony, they heard directly from surviving victims about their emotional reaction and the moral impact the murders made on their lives. Each step along the way, other less prejudicial evidence would have served as a fine alternative. And in any case, George did not dispute any of the facts about the crime scenes or the emergency response on April 22, 2016. George deserves a trial without such a shocking and emotional presentation, which likely played a significant role in the jury's deliberations.

A. Standards of review for rulings admitting or excluding evidence.

"Balancing the risks and benefits of the evidence" under Evid.R. 403(A) "necessarily involves an exercise of judgment" and "should be reviewed for an abuse of discretion." *State v. Hartman*, 2020-Ohio-4440, ¶ 29. A court reviews a preserved error in admission of evidence for whether it had a "prejudicial effect upon the jurors." *State v. Fluellen*, 88 Ohio App.3d 18, 23 (4th Dist. 1993); *Id.* at 27 (Harsha, P.J., concurring) (explaining that reviewing courts must look for "a reasonable possibility" that inadmissible evidence "may have contributed to appellant's conviction."); *see Chapman v. California*, 386 U.S. 18, 25-26 (1967); *Harrington v. California*, 395 U.S. 250, 254 (1969); *see State v. Morris*, 2014-Ohio-5052, ¶ 22-25. The State therefore carries the burden to show that preserved errors were "harmless beyond a reasonable doubt." *State v. Rahman*, 23 Ohio St.3d 146, 150-151 (1986).

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All that is required to preserve error and prevent it from being "forfeited" is to " 'call' " it " 'to the trial court's attention at a time when such error could have been avoided or corrected.' " *State v. Quarterman*, 2014-Ohio-4034, ¶ 15, quoting *State v. Awan*, 22 Ohio St.3d 120, 122 (1986); *State v. Rogers*, 2015-Ohio-2459, ¶ 21. Notwithstanding

forfeiture, Crim.R. 52(B) affords a court of appeals the discretion "to notice plain error" in " 'exceptional circumstances to avoid a miscarriage of justice.' " *State v. Long*, 53 Ohio St.2d 91, 94-95 (1978), quoting *United States v. Rudinsky*, 439 F.2d 1074, 1076 (6th Cir. 1971); *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). A "plain error" is a "deviation from a legal rule" representing "an 'obvious' defect in the trial proceedings." *Barnes* at 27, quoting *State v. Sanders*, 92 Ohio St.3d 245, 257 (2001). Even obvious errors must have affected "substantial rights" to warrant reversal under Crim.R. 52(B), which requires demonstration of " 'a reasonable *probability* that the error resulted in prejudice—the same deferential standard for reviewing ineffective assistance of counsel claims.' " (Emphasis sic.) *State v. Thomas*, 2017-Ohio-8011, ¶ 33, quoting *Rogers* at ¶ 22; *see also United States v. Dominguez Benitez*, 542 U.S. 74, 81-83 (2004). This bar is not so high as to demand that the outcome clearly must have been different. *Dominguez Benitez* at 81.

B. The rule against admitting unfairly prejudicial evidence, even if relevant.

At trial, "[a]ll relevant evidence is admissible." *Evid.R. 402*. Under Evid.R. 401, evidence is relevant if it has "any tendency" to make a fact "of consequence" any more or less probable than it would be absent the evidence. *Evid.R. 401*. A court should exclude testimony that does not tend to make a fact of consequence more or less probable. *Village of Oakwood v. Makar*, 11 Ohio App.3d 46, 50 (8th Dist. 1983); *State v. Miniard*, 2004-Ohio-5352, ¶ 28 (4th Dist.).

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Even if relevant, a court must still assess whether the "probative value" of evidence "is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." *Evid.R. 403(A)*; *Hartman*, 2020-Ohio-4440, at ¶ 29; *Mowery v. Columbus*, 2006-Ohio-1153, ¶ 64 (10th Dist.). Under Evid.R. 403(A), "[a]s the importance of the factual dispute for which the evidence is offered to the resolution of the

case increases, the probative value of the evidence also increases and the risk of *unfair* prejudice decreases." (Emphasis added.) *Hartman*, at ¶ 31.

Under Evid.R. 403(A), a court should not view evidence of other wrongful acts "as an island," using "its own probative value and unfairly prejudicial risk" as the "sole reference points in deciding whether the danger substantially outweighs the value and whether the evidence ought to be excluded." *Old Chief v. United States*, 519 U.S. 172, 182 (1997) (interpreting Fed. R. Evid. 403). Rather, the " 'probative value' of an item of evidence, as distinct from its Rule 401 'relevance,' may be calculated by comparing evidentiary alternatives." *Id.* at 184. It is thus vital to ask whether one may "prove the same fact through less prejudicial means and whether the other-acts evidence is probative of an essential element of the crime or an intermediate fact in the case." *Hartman* at ¶ 32.

C. The State built the structure of its case around the most gruesome evidence.

George consistently opposed the State's effort to present an enormous volume of gruesome photographic and physical evidence showing the victims as they were found dead and during their autopsies. *Evid.R. 403(A)*. The trial court admitted numerous duplicative bloody photos of the victims shown at the four crime scenes over George's objection. *Exs. A-483, A-484, B-60, B-159, B-160, B-161, B-162, B-164, B-167, B-168, B-260, B-261, B-262, B-267, B-268, B-272, B-273, B-274, B-275, B-287, C-141, C-311, C-312, C-328, C-338, C-344, C-348, C-352, C-355, C-356, C-358, D-236; T.Vol. 44, p. 9,961-65, 10,007-09, 10,021-30, 10,062-63, 10,074-83, 10,147-49*. Jurors were also provided with duplicative and often close-up photographs from each victim's autopsy, which were spine-chilling. *Exs. E-37, E-40, E-95, E-115, E-116, E-120, E-124, E-127, E-130, E-143, E-144, E-152, E-190, E-194, E-198, F-24, F-82, F-83, F-97, F-99, F-102, F-105, F-121, F-123, G-28, G-32, G-34, G-35, G-38, G-39, G-42, G-43, G-69, G-88, H-2, H-3, H-29, H-37, H-59, I-3,*

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I-54, I-70, I-71, I-74, I-75, I-80, I-83, I-85, I-86, I-87, I-90, I-92, J-24, J-30, J-57, K-2, K-31, K-35, K-40, K-47, L-2, L-19, L-30, L-32; T.Vol. 44, p. 10,164-74, 10,184-88, 10,194-99, 10,204-07, 10,211-18, 10,222-23, 10,226-28, 10,231-35. Although most of it had been shown in already-admitted photographs, jurors were also given ghastly physical evidence over objection. The bloody clothing worn by several victims, bloody bedding, and each of the bloody diapers worn by and removed from R.R. and K.R. were admitted. *Exs. B-310, C-408, C-409, C-410, C-411, C-416, C-417, C-418, C-419, C-437, G-96, G-97, H-106, I-130, I-131, J-96, J-97, J-98; T.Vol. 44, p. 10,036-40, 10,088-90, 10,201-02, 10,208-09, 10,219-20, 10224-25.* At some point, the State's insistence that it did not "want to just show blood" lost any possible meaning it might have had. *T.Vol. 44, p. 10,082.*

The problematically gruesome evidence is too voluminous to analyze each objectionable exhibit in detail, and a few examples are therefore warranted to demonstrate how the trial court's abused its discretion as to each of them. For one great example, the State explained that it wanted to show jurors the "blood patterns" left in Little Chris' bed after his body was removed. *T.Vol. 44, p. 10,081; Exs. C-352, C-355.* Not a single witness had testified about the pattern of blood left in his bed or explained what meaning could be gleaned from it. Like all of the other unnecessarily violent and visceral evidence admitted over objection, there was no meaningful dispute about any facts that it could prove either. George was not "not disputing who was in the bed, whose blood it is, anything like that." *T.Vol. 44, p. 10,081.* The only apparent purpose was to inflame the emotions of the jury. *Id.*

This echoed George's numerous objections throughout trial that he was not disputing any facts about the crime scenes, the forensic evidence found there, or the manner and cause of any deaths, none of which connected him to any crime

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independently of the testimony of Jake and Angela. *T.Vol. 3, p. 619-23; T.Vol. 4, p. 713-715* (court accepting a continuing objection); *T.Vol. 8, p. 1,805, 1,928-29, 1,950-51, 1,979-83* (overruling a motion for mistrial on account of the repeatedly shown gruesome evidence)*; T.d. 525* (motion for mistrial renewed in writing); *T.Vol. 9, p. 2,120-30, 2,140-50* (conference in chambers, oral argument on the mistrial motion, and another request for continuing objection). George's offers to stipulate to the facts at the scene of the crime were often accepted by the State, but never when it would take any of the shockingly bloody or gruesome materials out of view for jurors. *E.g., T.Vol. 2, p. 308-09; T.Vol. 4, p. 774, 787; T.Vol. 7, p. 1,587-88, 1,682-83; T.Vol. 8, p. 1917-18, 1,920-22* (asking for another continuing objection), *1,928-29*; *T.Vol. 10, p. 2,411-13*.

Ultimately, the blood and gore were the point of the first two weeks of the State's case in chief. Another good example showing that to be true are the photos that were taken of the bloody baby, R.R., which were shown during trial and admitted over objection. *Exs. Q-1, Q-2, Q-3, and Q-4; T.Vol. 44, p. 10,242-43; T.Vol. 2, p. 244-45; T.Vol. 3, p. 695-96.* This child's great aunt found it still alive at Scene 2 between its parents in a pool of their blood. *T.Vol. 2, p. 225-27.* On the first day of trial, jurors saw disturbing pictures of the blood that was still covering R.R. on arrival at the hospital. *Id., p. 245-46.* The State then led its crime-scene investigator to identify a single droplet of blood in two photographs of the hallway at Scene 2, which "would be consistent with blood falling from the child as they carried it out." *T.Vol. 8, p. 1,907-10; Exs. B-193, B-194.* The State even showed Jurors three photographs of a blood-smeared table in the front yard where R.R.'s blood-soaked diaper had been changed, although swabs of the blood from the diaper were never sent to any lab for testing to establish any fact that mattered. *T.Vol. 8, p. 1,827-32; Exs. B-59, B-60, B-181.* The diaper itself was collected as evidence and admitted for jurors to consider

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during and at the end of trial, despite another rejected offer to stipulate to any fact it could prove. *T.Vol. 4, p. 729; T.Vol. 7, p. 1,748-52.*

None of this evidence was probative of anything that mattered at trial. Proving that to be true, the State only had one witness who was familiar with the events at the scenes of the murders, Jake. When he testified, the State only showed him a few photos from each scene, and none of the especially gruesome ones. *T.Vol. 30, p. 7,176-77, 7,196-202, 7,224; T.Vol. 32, p. 7,562-63; Exs. A-55, A-169, A-246, A-544, B-24, B-25, B-27, B-28, B-188, C-436.* Had any of the photographic details about the nuances of the murders mattered to implicate George, the State would have asked Jake about them. As for the autopsy photographs, George was able to acquire all relevant information from the coroner on cross-examination utilizing written diagrams she had created in the process, thus completely diminishing any unique probative value her photographs offered. *T.Vol. 7, p. 1,703-28; T.Vol. 8, p. 2,102-07; T.Vol. 10, p. 2,484-89; T.Vol. 11, p. 2,633-44.*

The trial court abused its discretion by permitting the State to overload the jurors, some of whom knew the victims, with bloody and violent pictures of their deaths and autopsies and related blood-soaked items, particularly during the first weeks of trial. The "probative value of the photographs" admitted over objection did not "outweigh their prejudicial impact." *State v. Thompson*, 33 Ohio St.3d 1, 9 (1987). Quite the opposite, unfair prejudice was the point, and George needs a new trial as a remedy. *Evid.R. 403(A).*

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D. The State relied upon and focused on significant victim-impact evidence.

The other prominent category of unduly prejudicial evidence admitted at trial was testimony showing the impact the killings had on the victims' family members. *Evid.R. 403(A).* "Victim-impact evidence includes evidence relating to the victim's personal characteristics and the impact that the crimes had on the victim's family." *State v.*

Graham, 2020-Ohio-6700, ¶ 113. It is only admissible during "the sentencing phase of the death-penalty proceedings" or if "relevant to the facts attendant to the offense." *Id.* Such evidence " 'tends to inflame the passions of the jury and risk conviction on facts unrelated to actual guilt,' " and this Court has generally reviewed whether the testimony was so emotional that it "affected the outcome of the case." *State v. Ruggles*, 2023-Ohio-54, ¶ 36, 39 (4th Dist.), quoting *State v. Wade*, 2008-Ohio-4870, ¶ 17 (8th Dist.).

The State put on a remarkably emotional presentation for the jury, which was neither necessary nor probative in light of the other evidence available. *Evid.R. 403(A)*. Prominently, the State offered dispassionate testimony about each crime scene from consummately professional law enforcement officers and first responders, who described each location in detail as it was on April 22, 2016, and immediately thereafter. *T.Vol. 2, p. 390-411* (Sheriff's Deputy Jonathan Chandler at Scenes 2 and 3)*; Id., p. 412-37* (Paramedic Justin Waring at Scene 2); *T.Vol. 3, p. 466-537* (Sheriff's Lieutenant Adam Ball at Scenes 1 and 3); *Id., p. 540-61* (Sheriff's Deputy Morgan Music at Scene 1); *Id., p. 563-92* (Sheriff Tracy Evans at Scenes 1 and 3); *Id., p. 593-623* (Emergency Management Director Timothy Dickerson at Scene 3); *Id., p. 625-75* (Patrol Officer Gary Mosely at Scenes 2 and 3); *Id., p. 678-701* (Paramedic Miranda Cable at Scenes 1, 2, and 3); *T.Vol. 4, p. 720-43* (Paramedic Darryl Hart at Scene 3); *Id., p. 904-20* (Sheriff's Deputy Beau Romine at Scene 4); *T.Vol. 5, p. 938-1,209* (BCI Investigator Shane Hanshaw at Scene 1); *T.Vol. 6, p. 1,224-1,406* (BCI Investigator Shane Hanshaw at Scene 1 continued); *Id., p. 1,407-504* (BCI Investigator Todd Fortner at Scene 1); *T.Vol. 7, p. 1,744-87* (BCI Investigator Todd Fortner at Scene 2); *T.Vol. 8, p. 1,809-2,026* (BCI Investigator Todd Fortner at Scene 2 continued); *T.Vol. 9, p. 2,152-2,280* (BCI Investigator Brian White at Scene 3); *T.Vol. 10, p. 2,309-400* (BCI Investigator Brian White at Scene 3 continued);

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T.Vol. 11, p. 2,507-605 (BCI Investigator George Staley at Scene 4). So, there was no reason for the State to put witnesses related to the victims on the stand to testify about discovering the murders. Yet that is exactly what the State did, leading the trial court to point out that "we don't see a lot of cases where this many family members are anticipated as witnesses other than in domestic cases." *T.Vol. 15, p. 3,240.*

Dana's sister, Bobby Jo Manley, had found Chris Sr. and Gary inside Scene 1, and she was so upset after she exited that she needed her friend Emmy Morgan to physically hold her. *T.Vol. 2, p. 222, 252-53.* In the middle of the proper testimony offered by Paramedic Darryl Hart, who had known Dana, the State for some reason started asking him about what kind of person she had been: "Oh, she's a hardworking individual." *T.Vol. 4, p. 735.* Leading Kenneth's cousin, Donald Stone, the State elicited that the Rhoden family were "close-knit," "helpful people," who would "look out for one another." *Id., p. 779-80.* This drew an emotional response from Mr. Stone, who had to be asked: "Do you need a minute to collect yourself or are you okay to go forward?" *Id.* Outside the presence of jurors, George's counsel noted of Mr. Stone:

> MR. PARKER: Judge, I just want to put on the record that the last witness was crying and very emotional while identifying the photographs of the victim, even though we offered to stipulate to them.
>
> THE COURT: I think he was crying before he even identified photographs.
>
> MR. PARKER: But especially so when he saw the photographs.
>
> THE COURT: Well, I don't necessarily find it especially so.

Id., p. 787. Whether or not it was caused by images of Kenneth dead, he cried for the jury.

Similarly, Kenneth's son Luke was asked to agree that this victim was "involved"

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in his children's lives, supportive of their endeavors, and even recently helpful in paying for Luke's tuition for trucking school. *T.Vol. 4, p. 791*. Kenneth cut Luke a check for that the day he was killed. *Id*. Luke said he would "routinely help people out." *Id, p. 855*. Luke and the friends who went with him to find his father's body on April 22, 2016, were understandably in "shock, very emotional, angry." *Id., p. 914*. Kenneth's daughter Kendra Rhoden told how Kenneth was also "trying to support [her] through a nursing career" so she "wouldn't have to take out loans." *T.Vol. 15, p. 3,291*. Kendra offered that she had driven over to Scene 1 after hearing the news, where she found out Hanna May had also been killed, "cried," and "tried to push past the sheriffs there." *Id., p. 3,319*. Later, Kendra found out her father had been killed and "dropped to the ground" crying. *Id., p. 3,322*.

During the third week of trial, and after the relevant evidence relating to the crime scenes had been covered exhaustively, Dana's sister-in-law, April Manley, got on the stand for the apparent purpose of describing how heartbreaking April 22, 2016, had been for her family. April described the various family connections and explained that her husband, James Manley, and Dana had "an unbreakable bond." *T.Vol. 15, p. 3,186*. James "was an emotional wreck" after finding Dana dead and hearing K.R. crying:

> He said he heard [K.R.] crying and he wouldn't walk back there, that he knew what kind of mom Hanna was and she wouldn't be letting [K.R.] cry like that.

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Id., p. 3,189. April had been present for K.R.'s birth days before the murders. *Id., p. 3,183, 3,199*. When K.R. was brought out of Dana's house, April asked to hold the child for a moment, but the EMT denied that request until any evidence could be collected. *Id., p. 3,193*. April went along in the ambulance, she was only permitted to hold K.R. for a brief period, and she was eventually asked to leave. *Id., p. 3,193-94*. Jake had appeared in the parking lot by then. *Id*. He was "emotionless." *Id*. The State's final question for her:

> Q. Okay. And can you tell us -- did you also share with BCI why it bothers you so much that Jake hugged you that day?
>
> A. Because I often wonder if he still had my baby's blood on him when he touched me.

Id., p. 3,236.

Hanna May's boyfriend, Cory Holdren, offered substantial testimony about how wonderful their relationship had been before she was killed, how great a mother she was, and his plans to be a father to K.R. *T.Vol. 15, p. 3,353-59.* Their last text messages conveyed their love for each other. *Id., p. 3,364.* He heard from Kendra Rhoden on the morning of April 22, 2016, that something had happened, and he rushed over to Hanna May's house. *Id., p. 3,365.* When he arrived only to find she had been killed, he "froze" and then "sat down in the grass" until the authorities pushed the growing group further back from the scene. *Id., p. 3,366.* He described Hanna May as a "hard worker" just like Dana and thought she "was going to be a great mom." *Id., p. 3,366-67.* Samantha Staley, who previously dated Frankie and knew Hanna May shared her emotional reaction:

> I had lost control of my emotions. I had called my husband at work and told him he needed to come home ASAP, something bad has happened. Even though Frankie and I had broken up, he was the first boy that I actually loved. So it was just a lot of trauma at one time.

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Id., p. 3,601.

Other evidence without any real relevance was also admitted for the apparent purpose of pulling on the heartstrings of jurors. They saw a photo of a chalk drawing on the wall inside of Dana's garage conveying a heartbreaking message, "Dana loves Chris" and "we love you," which the State asked to admit because it also proved the distance of her garage from her house; an irrelevant fact. *Ex. C-93; T.Vol. 44, p. 10,057-58.* The State

showed jurors the bloody diaper taken from Hanna May's newborn too, and it was admitted into evidence over objection. *T.Vol. 10, p. 2,378, 2,389-90, 2,398-99; T.Vol. 44, p. 10,088-90; C-437.* The State even asked for a break in the middle of testimony to run to the evidence room to retrieve K.R.'s bloody diaper. *T.Vol. 10, p. 2,378, 2,389-90.* None of this was needed, and it undermined the fairness of the trial. *Evid.R. 403(A).*

E. The quite probable impact on jurors from the unfairly prejudicial evidence.

The State will likely argue that George did not object each and every time jurors saw an exhibit that he now argued was erroneously admitted. But from the very beginning, George objected that it would be "prejudicial to project photographs of the deceased victims" on the "TV screens" that had been made available in court. *T.Vol. 2, p. 195-96.* He objected to references to and admission of victim impact evidence before the State offered opening statements. *T.Vol. 1, p. 24.* These objections continued as noted above, and it is not worth parsing which exhibits had a specific objection and at what time. The trial court was apprised of these issues at various points during trial with plenty of time to address them, and that is all that is required to preserve error. *Quarterman*, 2014-Ohio-4034, at ¶ 15; *Rogers*, 2015-Ohio-2459, at ¶ 21. Alternatively, if this Court somehow finds that any error in the admission of any particular testimony or exhibit raised by this assignment of error has been forfeited, George asks this Court to notice plain error. The problems with gruesome evidence and victim-impact testimony were obvious and heavily litigated throughout trial as numerous objections were raised. There is a great probability that the jurors, including those who knew Chris Sr., Dana, Frankie, Hanna May, and Little Chris, were unfairly swayed during deliberations. This was a manifest injustice.

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ASSIGNMENT OF ERROR IV: THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ADMITTING EVIDENCE OF OTHER ACTS, WRONGS AND CRIMES THROUGHOUT TRIAL, WHICH UNFAIRLY PREJUDICED GEORGE.

A. The rule against admitting evidence of other crimes, wrongs, or acts.

The Ohio Rules of Evidence also exclude "[e]vidence of any other crime, wrong, or act . . . to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." *Evid.R. 404(B); State v. Worley*, 2021-Ohio-2207, ¶ 118. The rule is simple: "evidence of other acts is admissible when the evidence is probative of a separate, nonpropensity-based issue." *Hartman*, 2020-Ohio-4440, at ¶ 22. This rule is typically utilized when a proponent of evidence seeks to establish the identity of an offender by tying together similar specific instances of criminal or other bad conduct. *E.g., State v. Curry*, 43 Ohio St.2d 66 (1975) (applying the statutory predecessor to Evid.R. 404(B)); *State v. Roberts*, 2007-Ohio-856, ¶ 5-6 (1st Dist.). But to "justify the admission of other-acts evidence for a nonpropensity purpose, the evidence must pertain to a ' "material" issue that is actually in dispute.' " *Worley*, at ¶ 118, quoting *Hartman*, at ¶ 27. Courts must closely "scrutinize the proponent's logic to determine exactly how the evidence connects to a proper purpose[.]" *Hartman* at ¶ 23. Moreover, a trial court is required to engage in a "robust" analysis of whether 404(B) evidence is admissible under Evid.R. 403(A), focusing on "the importance of the factual dispute for which the evidence is offered." *Id.* at ¶ 29-31.

"The admissibility of other-acts evidence pursuant to Evid.R. 404(B) is a question of law," which is reviewed *de novo*. *Hartman* at ¶ 22.

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B. **The State went overboard with evidence of weaponry unrelated to the murders, it did not add much to the dispute over George's credibility, and the trial court's cautionary instruction would only have confused the jury.**

Throughout trial, George objected to physical, photographic, and documentary evidence of guns that had nothing to do with the crimes charged in the indictment, including sixteen actual guns, and dozens if not hundreds of shell casings that were admitted. *Exs. DD-598, DD-600, DD-606, DD-612, DD-614, DD-616, DD-618, DD-620, DD-622, DD-624, DD-626, DD-630, DD-634, DD-636, DD-638, DD-640; T.Vol. 19, p. 4,313-405, 4,436, 4,445-48; T.Vol. 20, p. 4,545-49, 4,551-52; T.Vol. 21, p. 4,779-80, 4,829-37, 4,855-927; T.Vol. 44, p. 10,270-92, 10,324-25, 10,368-69; T.Vol. 45, p. 10,427-468*. None of these were used to kill anyone. The State claimed a need to demonstrate which guns were available for Jake to modify with a silencer, and it wanted to call into doubt a single statement George made on a wiretap recording—that a gun list found on Jake's phone was a wish list rather than an actual list of guns owned by his relatives. *E.g., T.Vol. 17, p. 3,688-99; T.Vol. 21, p. 4,749-69*. These purposes were not important enough to justify the enormous arsenal provided to jurors. *Evid.R. 403(A) and 404(B)*.

Even if there were probative value to such evidence, this Court should still reverse and remand for a new trial because evidence of unrelated weapons that had been withdrawn or ordered excluded, including five guns, went to the jury[1]. *Ex. DD-439* (excluded picture of irrelevant guns); *Exs. DD-424, DD-446, DD-450, DD-451, DD-472, DD-478, DD-483, DD-498* (withdrawn pictures of irrelevant guns); *DD-632* (withdrawn Browning rifle); *DD-602* (Walther Smith & Wesson pistol not offered); *DD-608*

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[1] Undersigned counsel observed and photographed these exhibits on February 1 and 2, 2024, in the presence of opposing counsel. They are being kept in the location reserved for admitted exhibits alongside the other admitted weapons and photographs rather than the location for exhibits that were marked but not admitted.

(Winchester Model 255 rifle not offered); *DD-610* (Savage Model 93 rifle not offered); *DD-628* (Springfield 1903 rifle not offered); *T.Vol. 45, p. 10,441-53, 10,465*. Giving unadmitted evidence to jurors is reversible error if prejudicial. *State v. Westwood*, 2002-Ohio-2445, ¶ 22-37 (4th Dist.); *State v. Patterson*, 2010-Ohio-2012, ¶ 71-72 (2d Dist.).

The Ohio Supreme Court has noted the consensus of authorities that "have recognized the introduction of other weapons evidence—i.e., irrelevant evidence of weapons unrelated to the charges—as error." *Thomas*, 2017-Ohio-8011, ¶ 36. Such evidence is "presumptively harmful error because of the danger the jury will consider the accused's bad character or propensity to crime as evidence of guilt" *Id.* at ¶ 42. In *Thomas*, just as in this case, the evidence of the defendant's involvement in a charged crime was "circumstantial," without "corroborating, probative, scientific, or forensic evidence to connect" him to it. *Id.* at ¶ 46. Nothing about this case meaningfully distinguishes it from *Thomas*, except that error has been preserved and the State bears the burden to prove it harmless beyond a reasonable doubt. And while the State has identified one or two reasons why the gun list could be slightly probative, the weighing process required by Evid.R. 403(A) still renders the Wagner gun cache inadmissible. *Hartman*, 2020-Ohio-4440, at ¶ 29-31. The unfair prejudice from this evidence far outweighs its utility given the other evidence the State could use to challenge George's credibility.

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The State will likely argue that there was no prejudice to the jury's deliberations because a cautionary instruction was given. *See T.Vol. 21, p. 4,856-57*. But this Court has observed that the "presumption" such an instruction will be followed "can be rebutted by showing that the evidence could not have been ignored and that serious prejudice likely occurred." *Westwood*, 2002-Ohio-2445, at ¶ 42 (4th Dist.). There are "some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the

consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton v. United States*, 391 U.S. 123, 135, (1968). This is just such a context. The trial court advised jurors not to make a propensity inference based upon "evidence concerning guns allegedly recovered at the Flying W Farms," but it did not offer such an instruction as to the numerous irrelevant shell casings collected from there or the home at Peterson Road. *T.Vol. 21, p. 4,856-57.* Nor did it instruct jurors what kind of inferences they *could* make using this evidence. With jurors awash in a sea of other information for months, the practical limitations of a single instruction given on the 20th day of a trial twice that long could not be clearer.

C. The State's theory of an ongoing criminal conspiracy to manipulate and control women was an obvious propensity and character theme.

The State's trial presentation was rife with other evidence of George's morally questionable conduct and prior crimes. Although she had no knowledge about the Rhoden murders, George's ex-wife Tabitha Claytor was permitted to describe her relationship and divorce from him, numerous crimes committed by him and his family, and instances in which she portrayed him or his family as doing her wrong. *T.Vol. 16, p. 3,644-79; T.Vol. 17, p. 3,703-54, 3,782-88, 3,790-91, 3,798.* Jake and Angela implicated George in a wide variety of criminal acts and other moral wrongs, some relating to Tabitha, that had nothing to do with the murders. *T.Vol. 30, p. 7,030-49; T.Vol. 31, p. 7,346-73; T.Vol. 35, p. 8,277-93, 8,299-305, 8,352-56.* The weeks-long trial was chock full of additional examples of other-acts evidence too-plentiful to enumerate. That is because the State wanted to use George's custody battle with Tabitha and prior crimes committed alongside his family as evidence of a "common scheme or plan" proving he was in on the plot to take S.W. away from Hanna May. *E.g., T.Vol. 28, p. 6,722-23; T.Vol. 29, p. 6,883-84.*

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> The entire theory of the State's case is this family functions as a unit, commits crimes as a unit, in particular threatens the females that come into their midst as a unit, and that's exactly what we have here.

T.Vol. 15, p. 3,420. The State's plan was therefore to thwart Evid.R. 404(B), as this was nothing more than a character and propensity theme extrapolated to the family group.

The State's efforts went off the rails because "identity was not an issue," there were no "signature, fingerprint-like characteristics" common to both the Rhoden killings and prior conduct George engaged in, and the earlier crimes were not "part of the same grand design by the defendant." *Hartman*, 2020-Ohio-4440, at ¶ 37, 39, 46. Everyone knew who George was, so they did not need to identify him through his unique conduct. Jake and Angela weakly implicated him in the charged crimes independently from his prior bad acts and crimes. And unlike Jake, George did not kill his former romantic partner. With these differences, proof George did wrong in the past was "no different than proof that the accused has a propensity for committing that type of crime." *Hartman* at ¶ 46.

While the State will point to cautionary instructions on this issue too, there is little reason to believe jurors would have understood them when evaluating other-acts evidence. Permitting jurors to consider "motive, identity, or common plan or scheme" made no sense in this case, and jurors were not told how those factors were any different than the prohibited "purpose of proving the character of the defendant or any member of the defendant's family in order to show that the defendant or another family member of his acted in conformity with that character." *T.Vol. 15, p. 3,434*.

Weeks after this instruction, jurors would have been focused on the State's closing argument, which postured that that George and his family had a way of treating women and were "willing to result to crimes if the women don't cooperate." *T.Vol. 52, p. 11,703*.

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The State asked jurors to consider "how controlling they were as a group, especially the subset of three that lived on Peterson Road in regard to their girlfriends, wives, mother of their children, and how obsessed they were about gaining custody of their children." *Id., p. 11,732*. The character strategy was explicit:

> These issues with the women and children in their lives should never have led to such a drastic result, but it did. And, again, I think you got a glimpse when both Jake and Angela testified, somewhat more, I think, with Angela, but how their minds worked when dealing with the women who gave them children and especially when they lost control of those women. (Emphasis added.)

Id., p. 11,676-77. The State's case was about who George and his family were the whole time. This Court should reject this duplicitous use of 404(B) evidence by reversing and remanding with instructions to focus the trial proceedings on probative evidence that does not call so strongly for a conviction based on propensity and character.

ASSIGNMENT OF ERROR V: THE TRIAL COURT ERRED AND DENIED GEORGE THE RIGHT TO DUE PROCESS BY PERMITTING JAKE AND ANGELA TO TESTIFY UNDER THEIR COERCIVE PLEA DEALS.

"It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained." *Rochin v. California*, 342 U.S. 165, 172 (1952). The Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution prohibit the government from coercing evidence from witnesses because such statements "offend the community's sense of fair play and decency." *Rochin* at 173. Under the clause in Jake and Angela's plea deals giving the State sole and complete authority to "determine" whether their testimony was true, they were not free to tell their own truth. *TTT-2, p. 5, ¶ 11; YYY-2, p. 5, ¶ 11*. They were coerced into providing the State's truth, whatever they thought

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that was. *Id.* When a plea agreement "drafted in such a manner that the prosecution seemingly had unilateral authority to determine when and if Appellant's cooperation was sufficient," it is an illusory inducement that "does not comport with due process." *State v. Johnson*, 2023-Ohio-2282, ¶ 53-54 (7th Dist.).

Jake and Angela's deals also required them to maintain their "value as a witness" against George. *TTT-2, p. 5, ¶ 11; YYY-2, p. 5, ¶ 11.* With that advisement, it would not have been hard for them to figure out on their own how to steer their testimony away from reality and toward a conviction. The "value" of a State witness is to acquire a conviction, and making an agreement to testify contingent on maintaining that value is "nothing more than an invitation to perjury having no place in our constitutional system of justice." *United States v. Waterman,* 732 F.2d 1527, 1531 (8th Cir. 1984). The "truth-finding function of the jury" is an inherent feature of the "the fair procedures guaranteed" by the right to due process, and Jake and Angela's plea agreements are inexorably at odds with truth-seeking insofar as they allow one of the parties in an adversarial proceeding to weild complete control over it. *See Id.* at 1528. If the truth undercut their value, that is an incentive to lie.

Jake and Angela's plea agreements also threatened to reinstate the death penalty for Jake, George, Billy, and Angela if the State concluded for itself that any of their testimony to be false. *TTT-2, p. 5, ¶ 11; YYY-2, p. 5, ¶ 11.* As George explained to the trial court, the plea deals are therefore similar to the ancient common-law practice of approvement. Harris, *Testimony for Sale: The Law & Ethics of Snitches & Experts*, 28 Pepp. L. Rev. 1, 13 (2000). A defendant would be offered an opportunity to implicate an accomplice for not only his crime, but for all other bad acts by the accomplice. *Id.* If the defendant succeeded at convicting a co-defendant, he would be pardoned; if he was

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unsuccessful, he would be put to death. *Id.* at 13-14. This practice was "too conducive to perjury" for the law to tolerate in "the 17th century." *Id.* Jake and Angela's deals are actually far worse insofar as it is the State deciding whether to let them off of the death penalty rather than jurors, and that is all the more reason their testimony should not have been permitted.

This Court should reverse and remand with instructions to provide a fair trial, particularly excluding the testimony of Jake and Angela.

ASSIGNMENT OF ERROR VI: THE TRIAL COURT ERRED BY QUASHING GEORGE'S SUBPOENAS FOR JAKE'S MEDICAL RECORDS AND INTERVIEW NOTES PREPARED AND HELD BY HIS ATTORNEYS WITHOUT HOLDING AN *IN CAMERA* HEARING.

A. Standard of review for an order quashing a subpoena.

A trial court's decision on a motion to quash a subpoena is reviewed for an abuse of discretion. *State v. Baker*, 2010-Ohio-1289, ¶ 15 (12th Dist.). But discretion only goes so far, as the United States Supreme Court has recognized that "[t]he right to the production of all evidence at a criminal trial . . . has constitutional dimensions." *United States v. Nixon*, 418 U.S. 683, 711 (1974). Specifically, the Fifth and Sixth Amendments to the United States Constitution guarantee compulsory process as to subpoenas in criminal matters: "It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced." *Id.*

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For those reasons, the "trial court must hold an evidentiary hearing" before deciding whether a subpoena should be quashed. *State v. Widmer*, 2012-Ohio-4342, ¶ 129 (12th Dist.); *In re Subpoena Duces Tecum Served Upon Atty. Potts*, 2003-Ohio-5234, ¶ 16. To quash a subpoena in a criminal matter, the movant must demonstrate that "compliance would be unreasonable or oppressive." *Crim.R. 17(C)*; *Potts* at ¶ 12. And the

party seeking production is merely required to demonstrate that the desired evidence would be relevant. *See Potts* at ¶ 16; *State v. Brown*, 64 Ohio St.3d 649, 652 (1992).

If a trial court fails to hold a hearing and elicit evidence from the subpoena's proponent about the relevancy of the materials to be produced, the trial court errs in granting the motion to quash. *E.g., Baker*, 2010-Ohio-1289, at ¶ 23 (12th Dist.) (vacating conviction and remanding for evidentiary hearing).

B. The attorney-client privilege and work-product doctrine.

A party asserting a privilege against disclosure bears the burden of proof. *Perfection Corp. v. Travelers Cas. & Sur.*, 2003-Ohio-2750, ¶ 12 (8th Dist.); *Svoboda v. Clear Channel Comms., Inc.*, 2004-Ohio-894, ¶ 19 (6th Dist.). This test is not easily satisfied because statutory privileges that have been enacted in derogation of the common law and are strictly construed. *Weis v. Weis*, 147 Ohio St. 416 (1947), paragraph four of the syllabus; *State v. Garrett*, 8 Ohio App.3d 244, 246, (10th Dist. 1983). The United States Supreme Court has routinely recognized that "statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth." *Pierce Cty., Washington v. Guillen*, 537 U.S. 129, 144 (2003); *Belichick v. Belichick*, 37 Ohio App.2d 95, 96-97 (7th Dist. 1973).

With respect to the attorney-client privilege, the protections that have been afforded both under Ohio common law and R.C. 2317.02(A) apply only to confidential communications. *State ex rel. Thomas v. Ohio State Univ.*, 71 Ohio St.3d 245, 249-250 (1994); *Rubel v. Lowe's Home Ctrs., Inc.*, 580 F.Supp.2d 626, 629 (N.D. Ohio 2008). Where there is no intent to maintain confidentiality, disclosure is not precluded. *Mid-Am. Natl. Bank & Trust Co. v. Cincinnati Ins. Co.*, 74 Ohio App.3d 481, 488-489 (6th Dist.

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1991). A client who publishes her attorney's advice has no right to expect it will remain privileged. *State v. Houck*, 2010-Ohio-743, ¶ 37-38 (2d Dist.).

The attorney work-product doctrine originally provided the limited protections from disclosure set forth in Civ.R. 26(B)(3), which have now been incorporated into Crim.R. 16(J)(1). Under the civil rule, a party may obtain documents prepared "in anticipation of litigation or for trial" by "another . . . party's representative" by making "a showing of good cause." *Civ.R. 26(B)(3)*. The work product doctrine exists primarily to protect strategic planning during litigation and prevent one party from "piggybacking" on the opponent's trial preparation. *Dennis v. State Farm Ins. Co.,* 143 Ohio App.3d 196, 200-201 (7th Dist. 2001); *United States v. Beiersdorf-Jobst, Inc.*, 980 F.Supp. 257, 262 (N.D.Ohio 1997). Once a case concludes, however, the work product privilege serves no purpose. *See In re Grand Jury Proceedings*, 73 F.R.D. 647, 653 (M.D.Fla.1977).

The attorney-client privilege and the work product protection are distinct. *Burnham v. Cleveland Clinic*, 2016-Ohio-8000, ¶ 16. The attorney-client privilege is preserved in both the common law and R.C. 2317.02(A)(1). *Id.* at ¶ 16-18. In contrast to the strong protections afforded to attorney-client communications, the work product doctrine "allows the protection to be removed by an opposing party's demonstration of a need for the materials." *Id.* at ¶ 18, citing *Jackson v. Greger*, 2006-Ohio-4968; *see Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 2010-Ohio-4469, ¶ 59-60.

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In the absence of evidence establishing that materials are covered by attorney-client privilege or the work-product doctrine, an *in camera* review is necessary to determine whether materials are privileged. *Smith v. Technology House, Ltd.*, 2019-Ohio-2670, ¶ 37 (11th Dist.); *see Cousino v. Mercy St. Vincent Med. Ctr.*, 2018-Ohio-1550, at ¶ 16, 41-45 (6th Dist.); *Bell v. Mt. Sinai Med. Ctr.*, 67 Ohio St.3d 60 (1993); *Shaw v.*

Toyotomi Am., Inc., 1996 WL 546873, *2 (3d Dist. Sept. 26, 1996); *Corbis Corp. v. Starr*, 719 F.Supp.2d 843, 846 (N.D. Ohio 2010).

C. The trial court was required to hold a hearing or examine the materials George demanded from the State and Jake's lawyers before rejecting his requests and subpoenas for them.

The trial court erred as a matter of law by denying George's efforts to acquire evidence of Jake's statements to his physicians and his attorneys without at least holding a hearing or *in camera* review of those materials. Without knowing what responsive materials even existed, there could be no lawful order cloaking those materials in the secrecy of attorney-client privilege or the work-product doctrine.

After Jake pled guilty, George issued subpoenas to Jake's attorneys seeking any medical records or mental health records that they might possess. *T.d. 255, p. 5-6*. Jake moved to quash these subpoenas on the basis of work-product privilege, claiming any such records were prepared in anticipation of litigation. *Id., p. 3*. George opposed that motion, explaining that such records are relevant to impeach Jake's credibility and asking the court to mandate a privilege log or engage in an *in camera* review to determine whether the work-product protection would apply. *T.d. 257, p. 2-3, 9-10*. The trial court quashed the subpoenas without any hearing or mandating a privilege log. *T.d. 257, p. 1*.

Then, at the State's request, Jake also vouched for the truthfulness of his original confession to his own attorneys, which occurred before his plea deal. *Id., p. 7,547*. George understandably issued subpoenas to Jake's lawyers again, this time asking for the notes of any conversations with Jake regarding his confession. *T.Vol. 33, p. 7,695-97*. He asserted that Jake had waived any attorney-client privilege over that communication by discussing it in front of the jury in response to the State's questions. *Id., p. 7,695-96*. The trial court quashed the subpoena and denied George's request to have the attorney notes

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placed under seal for appellate purposes. *Id., p. 7,851-53.*

Simply put, the trial court could not have extended the attorney-client privilege and work-product protections to these materials without seeing them. Nor could it have ruled on the fact dependent question of waiver, which turns on the "subject" of the allegedly privileged information. *Riley v. Rogers*, 8 Ohio Law Abs. 482, 482 (4th Dist. 1930). An *in camera* review is also required where, as here, the proponent of the privilege fails to offer any evidence of what the materials are. *Smith*, 2019-Ohio-2670, at ¶ 37 (11th Dist.); *see Cousino*, 2018-Ohio-1550, at ¶ 16, 41-45; *Shaw*, 1996 WL 546873, at *2 (3d Dist.); *Corbis Corp.*, 719 F.Supp.2d at 846. Some sort of evidentiary hearing was required. *Widmer*, 2012-Ohio-4342, at ¶ 129 (12th Dist.); *Potts*, 2003-Ohio-5234, at ¶ 16. Moreover, it is fairly apparent that the work-product doctrine should no longer protect Jake's medical records and mental health records after he has pled guilty and been relieved of the risk of execution. *See In re Grand Jury Proceedings*, 73 F.R.D. at 653. The litigation for which his mitigation presentation would have been prepared will now never happen. And in any case, the classic exception to the work-product protection is "a showing of good cause" and need for disclosure. *Civ.R. 26(B)(3); Burnham*, 2016-Ohio-8000, at ¶ 18. George's defense is a good cause, and he needed every possible evidence that could help him undermine his accusers. So, while the trial court at least erred by failing to engage in an *in camera* review of these materials, the basis for shielding at least some of those materials is implausible on its face. This Court should reverse and remand for proceedings in which George is completely afforded his right to compulsory process.

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ASSIGNMENT OF ERROR VII: THE STATE COMMITTED PROSECUTORIAL MISCONDUCT AND RENDERED THE TRIAL UNFAIR DURING CLOSING ARGUMENTS BY ACCUSING DEFENSE COUNSEL OF KNOWING GEORGE LIED AND COACHING HIM TO DO IT.

At the penultimate moment in trial, the State crossed the line by arguing that George was lying with the help of his attorneys. It argued that defense counsel made an "intentional misstatement" because "they know he's guilty. They know he did it." *T.Vol. 53, p. 11,977*. In response to George's objection, the trial court did not instruct jurors to disregard this unfair attack. *Id.* It told jurors this was just "argument," and directed the jury to "rely upon its collective memories" of the evidence. *Id., p. 11,978-79*. This did nothing to address the problem. *Id.* Not long after that, the State argued that George could not be believed because he gave "obvious clues that he had practiced his answers, that he'd been coached on his answers." *Id., p. 11,992*. The obvious implication was that George's attorneys had coached him, knowing full well he planned to lie.

"The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant." *State v. Smith*, 14 Ohio St.3d 13, 14 (1984). The Supreme Court of Ohio has explained that "disparaging defense counsel" is improper. *State v. Keenan*, 66 Ohio St.3d 402, 406 (1993). Without a doubt, arguing "that defense counsel had suborned perjury by manufacturing, conceiving and fashioning lies to be presented in court" is across the line. *Smith,* 14 Ohio St.3d at 14. And when such accusations have been made in the past, a trial court's instruction that "arguments of counsel are not to be considered as evidence was insufficient to correct the error." *Id.* at 15. This Court should remedy these improper remarks by ordering a new trial for George.

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ASSIGNMENT OF ERROR VIII: THE TRIAL COURT ERRED BY DENYING A REQUEST FOR A JURY INSTRUCTION ON COMPLICITY AFTER THE FACT.

George asked the trial court to instruct jurors that the law in Ohio does not prohibit accessory after the fact. *T.d. 570, p. 3*. The trial court erroneously denied this request. *T.d. 577, p. 2*. This Court should reverse and remand for a new trial with a fully instructed jury.

The United States Supreme Court explained, "[i]t is obvious that . . . the influence of the trial judge on the jury is necessarily and properly of great weight" *Starr v. United States*, 153 U.S. 614, 626 (1894); *accord State v. Griffin*, 2014-Ohio-4767, ¶ 5. Jurors may defer to the judge's "lightest word or intimation." *Id.* A "properly instructed jury is a fundamental component of a fair trial." *Duckworth v. Lutheran Med. Ctr.*, 1995 WL 33070, *3 (8th Dist. Jan. 25, 1995). Ohio law gives great weight to jury instructions that have been requested by a party. *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 591 (1991). The rule is clear: "[I]f requested instructions are correct and pertinent, they must be included, at least in substance." *State v. Barron*, 170 Ohio St. 267, 270 (1960).

Accordingly, " 'it is prejudicial error in a criminal case to refuse to administer a requested charge which is pertinent to the case, states the law correctly, and is not covered by the general charge.' " *State v. Group*, 2002-Ohio-7247, ¶ 108, quoting *State v. Scott*, 26 Ohio St.3d 92, 101 (1986); *State v. Comen*, 50 Ohio St.3d 206, 210 (1990). Error in the failure to give a requested instruction is preserved "where the record affirmatively shows that a trial court has been fully apprised of the correct law governing a material issue in dispute, and the requesting party has been unsuccessful in obtaining the inclusion of that law in the trial court's charge to the jury." *State v. Wolons*, 44 Ohio St.3d 64, 67 (1989). This Court should review the record for whether a party claiming error due to the denial of a requested instruction "has introduced sufficient evidence to warrant a jury

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instruction." *Parma v. Treanor*, 2018-Ohio-3166, ¶ 19 (8th Dist.); *Daniels v. Northcoast Anesthesia Providers, Inc.*, 2018-Ohio-3562, ¶ 44 (8th Dist.).

Being "an accessory after the fact" is "not a crime recognized in Ohio." *State v. Starr*, 24 Ohio App.2d 56, 58 (1st Dist. 1970). Helping a murderer after the fact, whether by "fabricating an alibi" or "helping [them] to dispose of the murder weapon," is not punishable on an accomplice theory. *State v. Woods*, 48 Ohio App.3d 1, 7 (1st Dist. 1988). Consequently, jurors needed to know that George was not an accomplice to the Rhoden murders if he had strictly helped with the coverup. They were "entitled to believe all, or some, or none of the testimony" admitted at trial. *Malone v. Cline*, 1982 WL 5402, *2 (5th Dist. Mar. 1, 1982). Jurors may have reached a common-sense view that George was not originally involved in the murder plot but decided to assist his family in avoiding responsibility once he found out what they had already done. That would have justified an acquittal for murder, and it was improper to deny jurors an instruction to that effect.

ASSIGNMENT OF ERROR IX: THE CUMULATIVE IMPACT OF NUMEROUS ERRORS AT TRIAL PREJUDICED GEORGE BY SWAYING THE OUTCOME OF HIS TRIAL.

Finally, if this Court concludes that each of the foregoing assigned errors had no independent impact on the jury's verdict, then it should consider whether the cumulative effect of all the errors at trial did, even those that did not fit within the page limits of this brief. A "conviction will be reversed if the cumulative effect of all the errors in a trial deprive a defendant of the constitutional right to a fair trial, even though each alleged instance of error may not individually constitute cause for reversal." *State v. Platt*, 2024-Ohio-1330, ¶ 103 (4th Dist.). Where "the evidence of guilt was not overwhelming" and several errors occurred below, thus rendering a trial unfair, a reversal on that basis is

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warranted. *State v. Leach*, 2002-Ohio-6654, ¶ 58 (1st Dist.); *Daniels v. Northcoast Anesthesia Providers, Inc.*, 2018-Ohio-3562, ¶ 67 (8th Dist.).

Here, it is not enough to assess the independent prejudicial impact of the various errors below. The problems with George's trial conjoined to contort the entire mechanism of justice. The assigned errors flowed together, changing the kind of jury that could be empaneled to decide the case, allowing the State to appeal particularly to their heartstrings using a great deal of information that had no business being admitted, unduly influencing the testimony of key witnesses for the State, Jake and Angela, and denying George information he would have needed to fully call Jake's story into question. Then, after jurors sat for weeks through an interminable trial, the State gave them an easy way out by accusing George's attorneys of knowing he would lie on the stand and coaching him. These are not the only problems with the trial that combined to make it unfair. Concurrently with this filing, George has asked this Court to permit him to submit a supplemental brief asserting other assignments of error that were omitted from this brief purely due to the page limit, not because they lack merit in any way. Those issues also belong in the cumulative error calculus, and this Court should consider them.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the lower court's judgment and remand for a new trial with clear instructions premised on the ruling.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on June 10, 2024, the foregoing **Brief** was served by email upon:

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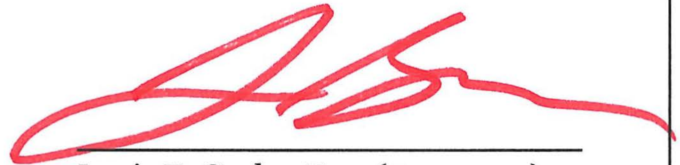

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