

# To Merge- -or Not to Merge That is the Question

By

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## Merger Of Aggravated Murder Counts

- R.C. ( 2941.25 (A) provides that where the same conduct by defendant can be construed as constituting two or more allied offenses of similar import, the indictment may contain counts for all such offenses, but the defendant may be convicted of only one. See, *Newark v. Vazirani* (1990), 48 Ohio St.3d 81, syllabus.
- The trial court erred in sentencing the defendant to death on both aggravated murder counts, however such error is procedural and harmless beyond a reasonable doubt. *State v. Brown* (1988), 38 Ohio St.3d 305, 317-318; *State v. Moore* (1998), 81 Ohio St.3d 22, 39.
- Specifications required for the imposition of the death penalty do not, in and of themselves, constitute separate criminal offenses. Therefore, a specification cannot merge with a substantive offense. *State v. Dennis* (1997), 79 Ohio St.3d 421, 432.
- In *State v. Brown* (1988), 38 Ohio St.3d 305, 317, the court stated, "Case precedent establishes that the state may submit to the jury two crimes that are allied offenses of similar import. However, the law prohibits a conviction of both crimes. *State v. Osborne* (1976), 49 Ohio St.2d 135." A "conviction" includes both the guilt determination and the penalty imposition. Only one penalty of death was given to appellant. Thus, only one conviction actually occurred. See *State v. Henderson* (1979), 58 Ohio St.2d 171, R.C. 2941.25(A). In *State v. Waddy* (1992), 63 Ohio St.3d 424, 447, we rejected the proposition that the prosecution must elect, before the penalty phase, which count shall be submitted to the jury for sentencing. See, also, *State v. Poindexter* (1988), 36 Ohio St.3d 1, 5-6." *State v. Goff* (1998), 82 Ohio St.3d 123, 135.
- Two aggravated murder charges involving the same victim will merge for sentencing purposes. *State v. Lawson* (1992), 64 Ohio St.3d 336,351; *State v. Huertas* (1990), 51 Ohio St.3d 22, 28; *State v. O'Neal* (2000), 87 Ohio St.3d 402, 414-415; *State v. Lynch*, 99 Ohio St.3d 514, 2003-Ohio-2284, at ¶ 132.
- Clearly, since both counts of aggravated murder involved the same victim, the trial court should have merged these counts, *State v. Huertas* (1990), 51 Ohio St.3d 22, 28, 553 N.E.2d 1058, 1066, instead of merely imposing "concurrent" death sentences. *State v. Jones* (2000), 90 Ohio St.3d 403, 419.
- Third, appellant argues that when a defendant is convicted of two counts of aggravated murder for the killing of a single victim, the trial court should require the state to elect to proceed on a single murder count before beginning the penalty phase. However, the court's failure to merge the two counts at sentencing "represents a 'procedural' error that is 'harmless beyond a reasonable doubt.'" *State v. O'Neal* (2000), 87 Ohio St.3d 402, 415, 721 N.E.2d 73, 87, quoting *State v. Moore* (1998), 81 Ohio St.3d 22, 39, 689 N.E.2d 1, 17. Thus, we

find no error here in the jury's consideration of two aggravated murder counts for a single victim. *State v. Woodard* (1993), 68 Ohio St.3d 70, 78-79, 623 N.E.2d 75, 81; *State v. Waddy* (1992), 63 Ohio St.3d 424, 447, 588 N.E.2d 819, 836. Moreover, and in any event, the court of appeals mooted this issue when it upheld the death penalty, after independently reassessing the sentence, solely on the basis of Count One of the indictment and the R.C. 2929.04(A)(7) specification relating to kidnapping. *State v. Twyford*, 94 Ohio St3d 340, 2002-Ohio-894.

### **Merger of Aggravated Murder With Other Counts**

- In establishing whether kidnapping and another offense are committed with a separate animus pursuant to R.C. 2941.25(B), the court has held: “\* \* \* where the restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions. *State v. Logan* (1979) 60 Ohio St. 2d 126.
- Aggravated murder, as defined by R.C. 2903.01(B), is not an ‘allied offense of similar import’ to aggravated burglary, as defined by R.C. 2911.11(A)(1), for purposes of application of R.C. 2941.25(A). *State v. Moss* (1982), 69 Ohio St.2d 515, para. two of the syllabus. See also, *State v. Frazier* (1991), 61 Ohio St.3d 247, 256 (agg. burglary and agg. robbery were separate offenses and separate agg. circumstances); *State v. Barnes* (1986), 25 Ohio St.3d 203, 207.
- The elements of aggravated burglary and aggravated murder do not correspond to such a degree that the commission of one results in the commission of the other. “[I]n order to commit either the crime of aggravated burglary or aggravated murder, the other crime need not be committed. \* \* \* The two offenses are not prerequisites, one for the other. To consummate either offense, the other need not by definition be committed. Aggravated murder and aggravated burglary are never merely incidental to each other \* \* \*.” *State v. Henderson* (1988), 39 Ohio St.3d 24, 28; *State v. Frazier* (1995), 73 Ohio St. 3d 323, 342-343.
- Aggravated burglary is not implicit within kidnapping, nor is kidnapping implicit within aggravated burglary. Unlike robbery or rape, burglary does not inherently require the victim's restraint. *State v. Waddy* (1992), 63 Ohio St.3d 424, 448.
- Aggravated robbery is not an allied offense of similar import to aggravated murder. *State v. Dennis* (1997), 79 Ohio St.3d 421, 432.
- “Appellant also argues that the six aggravated arson counts against him are allied offenses of similar import and should merge into one, because he set only one fire and thus committed only one arson. Under R.C. 2909.02(A)(1), aggravated arson requires that a defendant knowingly set a fire that creates a substantial risk of serious harm or injury to another person. Even though

appellant set only one fire, each aggravated arson count recognizes that his action created a risk of harm to a separate person. In *State v. Jones* (1985), 18 Ohio St.3d 116, 117, 18 OBR 148, 480 N.E.2d 408, the court construed this state's aggravated vehicular homicide statute to allow convictions for separate violations "for each person killed as the result of a single instance of [the defendant's] reckless operation of his vehicle." By analogy with *Jones*, appellant's conduct caused six offenses of dissimilar import because six different people were placed at risk. For this reason, appellant's argument fails." *State v. Franklin*, 97 Ohio St.3d 1, 12; 2002-Ohio-5304, at ¶48.

- But see the following: "appellant argues that several counts and specifications in his indictment should have been merged. Appellant was indicted on two counts of aggravated murder for each of the three victims. He now asserts that the trial court should have required the state to elect, during the penalty phase of trial, only one aggravated murder count to be submitted to the jury for each victim. We reject this argument, as this court has consistently held otherwise. See *State v. Goff* (1998), 82 Ohio St.3d 123, 135, 694 N.E.2d 916; *State v. Waddy* (1992), 63 Ohio St.3d 424, 447, 588 N.E.2d 819." *State v. Franklin*, 97 Ohio St.3d 1, 12; 2002-Ohio-5304 at ¶47.

### **Merger Of Aggravating Circumstances**

- In the penalty phase of a capital prosecution, where two or more aggravating circumstances arise from the same act or indivisible course of conduct and are thus duplicative, the duplicative aggravating circumstances will be merged for purposes of sentencing. \* \* \* *State v. Jenkins* (1984), 15 Ohio St.3d 164, para. five of the syllabus.
- Merger is not required when the aggravating circumstances arise from a divisible course of conduct. *State v. Robb* (2000), 88 Ohio St.3d 59, 85, 723 N.E.2d 1019. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971., at ¶ 199.

### **R.C.2929.04(A)(2), "murder for hire" specification into another specification “(2) The offense was committed for hire.”**

- The analysis used to determine whether two aggravating circumstances merge is the same as that used to determine whether two offenses are allied offenses of similar import. \* \* \* *State v. Logan* (1979), 60 Ohio St.2d 126. \* \* \* Thus, the R.C. 2929.02(A)(2) specification merges with the R.C. 2929.04(A)(8) specification only if the elements of the two specifications "correspond to such a degree that commission of one [specification] will result in the commission of the other." \* \* \* Between the two specifications at issue here, no such correspondence exists. The R.C. 2929.04(A)(2) specification requires only that

"the offense was committed for hire." The elements of the R.C. 2929.04(A)(8) specification are that (1) the victim was a witness to an offense; and (2) that the purpose of the killing was to prevent the victim from testifying in a criminal proceeding. These two specifications are by no means "indivisible" even though they happen to apply to the same murder. Indeed, their elements do not overlap. Hired killers do not solely kill witnesses, nor are witnesses killed only by hired killers. Thus, it is not the case that "commission of the one [specification] will result in the commission of the other." *State v. Yarborough*, 95 Ohio St3d 227, 2002-Ohio-2126, at ¶ 124-127

### **R.C.2929.04(A)(3), "escape detection" specification into another specification**

**"(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender."**

- Each aggravated murder count should thus contain only one specification that appellant's acts were part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons. R.C. 2929.04(A)(5). Similarly, specifications pursuant to R.C. 2929.04(A)(3) (escaping detection, apprehension, trial or punishment) and R.C. 2929.04(A)(7) (felony murder) are duplicative of and thus merge with R.C. 2929.04(A)(5), since these aggravating circumstances arise from the same indivisible course of conduct. *State v. Spisak*, (1986) 36 Ohio St3d 80,84.
- Appellant, contends that his death sentence must be vacated since the state presented duplicative aggravating circumstances which, in appellant's view, should have been merged prior to the penalty phase of appellant's trial. In the case at bar, appellant was found guilty of two aggravating specifications, i.e., R.C. 2929.04(A)(3) and (A)(5), \* \* \* In the case at bar, both aggravating circumstances arose from the same act or indivisible course of conduct, i.e., the killing of Peggy Lerch. Thus, the aggravating circumstances are duplicative. However, unlike Jenkins, the case sub judice was tried before a three-judge panel. We assume that the panel did not artificially inflate the aggravating circumstances. See, e.g., *State v. White* (1968), 15 Ohio St.2d 146, 151, 44 O.O.2d 132, 136, 239 N.E.2d 65, 70. As such, we find that the sentencing decision was reliable. *State v. Wickline* (1990) 50 Ohio St.3d 114, 121-122.
- The court of appeals correctly concluded that the specifications based on R.C. 2929.04(A)(3) and (A)(7) arose from an indivisible course of conduct, i.e., Garner's actions in burglarizing and setting fire to the residence at 1969 Knob Court. Having reviewed the record in detail, we reject the state's factual contention that Garner had completed the theft offense and then initiated a second, separate course of conduct in setting the fires. The record instead

justifies the conclusion that Garner set the fires before exiting the apartment for the final time with the last stolen item, the television. His actions in burglarizing the residence and attempting to cover up his conduct by setting the fires were inextricably intertwined, and thereby constituted one indivisible course of conduct. This conclusion obtains even though Garner may have had multiple motives in setting the fire, i.e., he may have intended both to eliminate possible witnesses as well as to destroy fingerprints or other evidence of his presence. Similarly, the fact that the children did not actually die until some time after Garner left the premises does not require a finding that the specifications were non-duplicative, as the cause of the deaths, i.e., the ignition of the fires, occurred in conjunction of time and place with the burglary and arson. We conclude that the defendant's motion to merge the specifications in this case for purposes of sentencing should have been granted, and the jury should have been instructed accordingly. *State v. Garner* (1995) 74 Ohio St.3d 49, 53-54.

- The state in its cross-appeal contends that the trial court improperly merged the multiple murder specification with the other two death specifications in both aggravated murder counts. Merger of specifications may occur when they are duplications and arise from the same act. However, the specifications for multiple-murder and for felony-murder represent distinct and separate aggravating circumstances. *Williams*, 74 Ohio St.3d at 579, 660 N.E.2d at 734; *State v. Frazier* (1991), 61 Ohio St.3d 247, 256, 574 N.E.2d 483, 490. They "are not duplicative since they did not arise from the same act or indivisible course of conduct." *Id.*, 61 Ohio St.3d at 256, 574 N.E.2d at 490. Therefore, as to both counts, the R.C. 2929.04(A)(3) and (A)(7) specifications are merged, but the R.C. 2929.04(A)(5) specification should not have merged. *State v. Smith* (1997) 80 Ohio St.3d 89, 115-116.
- However, we do find that the R.C. 2929.04(A)(3) and (A)(5) specifications of aggravating circumstances in connection with Count Six arose from the same act or indivisible course of conduct, i.e., the killing of Vargo. Thus, those two aggravating circumstances are duplicative and could have been merged prior to the penalty phase. *State v. Palmer* (1997), 80 Ohio St.3d 543, 574-575.
- Appellant's act of fleeing and his killing of the officer were part of a divisible course of conduct. Therefore, merger of the R.C. 2929.04(A)(3) and (A)(6) death penalty specifications was unnecessary. *State v. Odraye Jones* (2001), 91 Ohio St.3d 335, 346-347.
- Appellant first argues that the R.C. 2929.04(A)(3) specification (escaping detection) should have merged into the aggravated arson felony murder specification for the penalty phase of his trial. The state asserts that appellant would have been entitled to a merger of the escaping detection and felony murder specifications had he so requested, but, in any event, reversal is not required. *State v. Franklin*, 97 Ohio St.3d 1, 12, 2002-Ohio-5304 at ¶ 49.

- At times, we have merged (A)(3) and (A)(7) specifications. See, e.g., *State v. Wiles* (1991), 59 Ohio St.3d 71, 84, 571 N.E.2d 97; *Cooley*, 46 Ohio St.3d at 39, 544 N.E.2d 895; *Jenkins*, 15 Ohio St.3d at 197, 15 OBR 311, 473 N.E.2d 264. In some situations, however, we have found that R.C. 2929.04(A)(3) and (A)(7) specifications can properly be viewed as separate and need not be merged. See, e.g., *State v. Sheppard* (1998), 84 Ohio St.3d 230, 232, 242, 703 N.E.2d 286; *State v. Palmer* (1997), 80 Ohio St.3d 543, 574, 687 N.E.2d 685; *Wogenstahl*, 75 Ohio St.3d at 367, 662 N.E.2d 311. \* \* \* In this case, we conclude that the court of appeals correctly upheld the trial court's decision not to merge the (A)(3) and (A)(7) specifications as to Cora Hartig. The facts show a separate motivation and decision to shoot Mrs. Hartig. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044 at ¶¶81, 82 See also *State v. Ralph Lynch*, 99 Ohio St.3d 514, 2003-Ohio-2284, at ¶ 140.
- The trial court properly merged the (A)(3) aggravating circumstance with the (A)(7) aggravating circumstances prior to sentencing. *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, at ¶330.

#### **R.C.2929.04(A)(4), "prisoner in detention facility" specification into another specification**

- (4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, "detention" has the same meaning as in section [2921.01](#) of the Revised Code, except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or mental retardation and developmentally disabled facility unless at the time of the commission of the offense either of the following circumstances apply:**
- (a) The offender was in the facility as a result of being charged with a violation of a section of the Revised Code.**
- (b) The offender was under detention as a result of being convicted of or pleading guilty to a violation of a section of the Revised Code.**
- Also, defendant's status as a prisoner represents a separate death specification, R.C. 2929.04(A)(4), from both the felony-murder death specification in Count I and course-of conduct specifications in Counts I and III. Defendant was an inmate long before he kidnapped guards and committed murders. His inmate status was not implicit in those acts. Thus, the specifications "did not arise from the same act or indivisible course of conduct." *State v. Frazier* (1991), 61

Ohio St.3d 247, 256, 574 N.E.2d 483, 490. See, e.g., *State v. Bradley*, 42 Ohio St.3d at 149, 538 N.E.2d at 385- 386 (inmate status and prior murder conviction treated as separate); *State v. Zuern* (1987), 32 Ohio St.3d 56, 66, 512 N.E.2d 585, 595 (inmate status and victim peace officer status treated as separate). *State v. Robb* (2000), 88 Ohio St.3d 59, 85

### **R.C. 2929.04(A)(5) Course of Conduct Specification**

**“(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.”**

- Each aggravated murder count should thus contain only one specification that appellant's acts were part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons. R.C. 2929.04(A)(5). Similarly, specifications pursuant to R.C. 2929.04(A)(3) (escaping detection, apprehension, trial or punishment) and R.C. 2929.04(A)(7) (felony murder) are duplicative of and thus merge with R.C. 2929.04(A)(5), since these aggravating circumstances arise from the same indivisible course of conduct. *State v. Spisak*, (1986) 36 Ohio St3d 80,84.
- Appellant, contends that his death sentence must be vacated since the state presented duplicative aggravating circumstances which, in appellant's view, should have been merged prior to the penalty phase of appellant's trial. In the case at bar, appellant was found guilty of two aggravating specifications, i.e., R.C. 2929.04(A)(3) and (A)(5), \* \* \* In the case at bar, both aggravating circumstances arose from the same act or indivisible course of conduct, i.e., the killing of Peggy Lerch. Thus, the aggravating circumstances are duplicative. However, unlike Jenkins, the case sub judice was tried before a three-judge panel. We assume that the panel did not artificially inflate the aggravating circumstances. See, e.g., *State v. White* (1968), 15 Ohio St.2d 146, 151, 44 O.O.2d 132, 136, 239 N.E.2d 65, 70. As such, we find that the sentencing decision was reliable. *State v. Wickline* (1990) 50 Ohio St.3d 114, 121-122.
- The jury found appellant guilty of three aggravated murder counts as to each of his four victims. However, the trial court merged the twelve counts into four (one for each victim). Each count carried three death specifications: aggravated burglary, kidnapping, and multiple murder. Before the penalty phase, the trial court merged the felony-murder specifications into the multiple-murder specifications and submitted only the multiple-murder specifications to the jury. Thus, the aggravating circumstance in this case was multiple murder. *State v. Williams* (1997) 79 Ohio St3d 1, 3.

- The state in its cross-appeal contends that the trial court improperly merged the multiple murder specification with the other two death specifications in both aggravated murder counts. Merger of specifications may occur when they are duplications and arise from the same act. However, the specifications for multiple-murder and for felony-murder represent distinct and separate aggravating circumstances. *Williams*, 74 Ohio St.3d at 579, 660 N.E.2d at 734; *State v. Frazier* (1991), 61 Ohio St.3d 247, 256, 574 N.E.2d 483, 490. They "are not duplicative since they did not arise from the same act or indivisible course of conduct." *Id.*, 61 Ohio St.3d at 256, 574 N.E.2d at 490. Therefore, as to both counts, the R.C. 2929.04(A)(3) and (A)(7) specifications are merged, but the R.C. 2929.04(A)(5) specification should not have merged. *State v. Smith* (1997) 80 Ohio St.3d 89, 115-116.
- The R.C. 2929.04(A)(5) and (A)(7) specifications are not duplicative, since they did not arise from the same act or indivisible course of conduct. The R.C. 2929.04(A)(7) specification in each count arose from the commission of an aggravated robbery, whereas the R.C. 2929.04(A)(5) multiple murder specification arose from the commission of another killing. Under these circumstances, no merger was required. See, generally, *State v. Frazier* (1991), 61 Ohio St.3d 247, 256, 574 N.E.2d 483, 490. Additionally, on the facts of this case, we find that the R.C. 2929.04(A)(3) specification is clearly not duplicative of both of the specifications with which it was joined in Count Six of the indictment. *State v. Palmer* (1997), 80 Ohio St.3d 543, 574-575.
- However, we do find that the R.C. 2929.04(A)(3) and (A)(5) specifications of aggravating circumstances in connection with Count Six arose from the same act or indivisible course of conduct, i.e., the killing of Vargo. Thus, those two aggravating circumstances are duplicative and could have been merged prior to the penalty phase. *State v. Palmer* (1997), 80 Ohio St.3d 543, 574-575.
- Multiple course of conduct specifications should not be included in an indictment. When there is a course of conduct involving the killing or attempt to kill more than one person, "[e]ach aggravated *murder* count should thus contain only one specification that appellant's acts were part of a course of conduct." *State v. Mitts* (1998), 81 Ohio St.3d 223, 231, citing *State v. Spisak* (1988), 36 Ohio St.3d 80, 84.
- We hold that the trial court correctly declined to merge these separate specifications. The course of conduct, R.C. 2929.04(A)(5), and felony-murder, (A)(7), specifications in Count I are not duplicative and need not be merged. *State v. Smith* (1997), 80 Ohio St.3d 89, 116, 684 N.E.2d 668, 692; *State v. Palmer* (1997), 80 Ohio St.3d 543, 573-574, 687 N.E.2d 685, 710. *State v. Robb* (2000), 88 Ohio St.3d 59, 85
- Also, defendant's status as a prisoner represents a separate death specification, R.C. 2929.04(A)(4), from both the felony-murder death specification in Count I and course-of conduct specifications in Counts I and III. Defendant

was an inmate long before he kidnapped guards and committed murders. His inmate status was not implicit in those acts. Thus, the specifications "did not arise from the same act or indivisible course of conduct." *State v. Frazier* (1991), 61 Ohio St.3d 247, 256, 574 N.E.2d 483, 490. See, e.g., *State v. Bradley*, 42 Ohio St.3d at 149, 538 N.E.2d at 385- 386 (inmate status and prior murder conviction treated as separate); *State v. Zuern* (1987), 32 Ohio St.3d 56, 66, 512 N.E.2d 585, 595 (inmate status and victim peace officer status treated as separate). *State v. Robb* (2000), 88 Ohio St.3d 59, 85

- The jury found defendant guilty of two aggravating circumstances: (1) a course of conduct involving the purposeful killing of two or more persons by the offender, R.C. 2929.04(A)(5); and (2) a murder committed while the principal offender in an aggravated robbery, R.C. 2929.04(A)(7). We merge these aggravating specifications in our independent review for purposes of determining whether they outweigh the mitigating factors beyond a reasonable doubt. *State v. Tibbetts* (2001), 92 Ohio St.3d 146, 172.

- The aggravated arson specification has no such correspondence with the course of conduct specification. The course of conduct specification, R.C. 2929.04(A)(5), imposes punishment for killing multiple victims through a course of conduct. R.C. 2929.04(A)(7) imposes a specification when the offender has effected a killing while committing aggravated arson. Though the arson had the effect of producing multiple murder victims, committing multiple murders does not always involve arson as the course of conduct leading to the deaths. Thus, we fail to see how these specifications can meet the above test, and we decline to impose a merger. *State v. Franklin*, 97 Ohio St.3d 1, 12, 2002-Ohio-5304, at ¶ 49.

- The R.C. 2929.04(A)(5) and (A)(6) specifications are not duplicative, since they did not arise from the same act or indivisible course of conduct. The R.C. 2929.04(A)(6) specification arose from the murder of Officer Leon, whereas the R.C. 2929.04(A)(5) specification arose from the attempted murder of another person. Thus, no merger was required. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971., at ¶ 200.

- Murder while committing a felony, such as aggravated burglary, R.C. 2929.04(A)(7), and during a course of conduct of purposeful killing, R.C. 2929.04(A)(5), as charged in Count 1 and Count 3, are not duplicative. See, e.g., *State v. Smith*, 80 Ohio St.3d at 116, 684 N.E.2d 668; *State v. Williams*, 74 Ohio St.3d at 579, 660 N.E.2d 724. *State v. Stanley Adams*, 103 Ohio St.3d 508, 817 N.E.2d 29, 2004-Ohio-5845, at ¶125

- The course-of-conduct specification, R.C. 2929.04(A)(5), and the felony-murder specification, R.C. 2929.04(A)(7) need not be merged. The R.C. 2929.04(A)(7) specifications arose from the aggravated murder of Jose occurring during the course of rape, kidnapping, burglary, robbery, and arson. In contrast, the course-of-conduct specification arose from the murder of Jose and the

attempted murder of Damaris. Thus, the R.C. 2929.04(A)(5) and (A)(7) specifications did not arise from the same indivisible course of conduct and are not duplicative. See *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 51-52; *State v. Robb* (2000), 88 Ohio St.3d 59, 85, 723 N.E.2d 1019; *State v. Frazier*, 61 Ohio St.3d at 256, 574 N.E.2d 483. *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, at ¶160.

- We find that the two R.C. 2929.04(A)(7) and the R.C. 2929.04(A)(5) aggravating circumstances were not duplicative, and they should not have been merged into a single aggravating circumstance, because the jury was obligated to "separately weigh the aggravating circumstances" of each count against the mitigating factors. (Emphasis added.) *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, 785 N.E.2d 439, ¶ 96; see, also, *State v. Keith* (1997), 79 Ohio St.3d 514, 532, 684 N.E.2d 47. *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, at ¶255

#### **R.C. 2929.04(A)(6) Police Officer Victim Specification**

**(6) The victim of the offense was a law enforcement officer, as defined in section 2911.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be a law enforcement officer as so defined, and either the victim, at the time of the commission of the offense, was engaged in the victim's duties, or it was the offender's specific purpose to kill a law enforcement officer as so defined.**

- The R.C. 2929.04(A)(5) and (A)(6) specifications are not duplicative, since they did not arise from the same act or indivisible course of conduct. The R.C. 2929.04(A)(6) specification arose from the murder of Officer Leon, whereas the R.C. 2929.04(A)(5) specification arose from the attempted murder of another person. Thus, no merger was required. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971., at ¶ 200.
- The evidence established that Bryan was properly convicted of the death penalty specifications for aggravated murder, namely murder of a police officer engaged in his duties and murder for the purpose of killing a police officer, both under R.C. 2929.04(A)(6); murder for the purpose of escaping detention, apprehension, trial, or punishment for another offense under R.C. 2929.04(A)(3); and a "course of conduct" in killing or attempting to kill two or more people under R.C. 2929.04(A)(5). The trial court merged the two (A)(6) specifications prior to the jury's death penalty verdict. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971., at ¶ 215.

### **R.C. 2929.04(A)(7) “Felony Murder” Specification**

**“(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.”**

- Each aggravated murder count should thus contain only one specification that appellant's acts were part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons. R.C. 2929.04(A)(5). Similarly, specifications pursuant to R.C. 2929.04(A)(3) (escaping detection, apprehension, trial or punishment) and R.C. 2929.04(A)(7) (felony murder) are duplicative of and thus merge with R.C. 2929.04(A)(5), since these aggravating circumstances arise from the same indivisible course of conduct. *State v. Spisak*, (1986) 36 Ohio St3d 80,84.
- The court of appeals correctly concluded that the specifications based on R.C. 2929.04(A)(3) and (A)(7) arose from an indivisible course of conduct, i.e., Garner's actions in burglarizing and setting fire to the residence at 1969 Knob Court. Having reviewed the record in detail, we reject the state's factual contention that Garner had completed the theft offense and then initiated a second, separate course of conduct in setting the fires. The record instead justifies the conclusion that Garner set the fires before exiting the apartment for the final time with the last stolen item, the television. His actions in burglarizing the residence and attempting to cover up his conduct by setting the fires were inextricably intertwined, and thereby constituted one indivisible course of conduct. This conclusion obtains even though Garner may have had multiple motives in setting the fire, i.e., he may have intended both to eliminate possible witnesses as well as to destroy fingerprints or other evidence of his presence. Similarly, the fact that the children did not actually die until some time after Garner left the premises does not require a finding that the specifications were non-duplicative, as the cause of the deaths, i.e., the ignition of the fires, occurred in conjunction of time and place with the burglary and arson. We conclude that the defendant's motion to merge the specifications in this case for purposes of sentencing should have been granted, and the jury should have been instructed accordingly. *State v. Garner* (1995) 74 Ohio St.3d 49, 53-54, See also *State v. Hughbanks*, 99 Ohio St.3d 365, 2003-Ohio-4121, at ¶ 106.
- The jury found appellant guilty of three aggravated murder counts as to each of his four victims. However, the trial court merged the twelve counts into four (one for each victim). Each count carried three death specifications: aggravated burglary, kidnapping, and multiple murder. Before the penalty phase, the trial court merged the felony-murder specifications into the multiple-murder

specifications and submitted only the multiple-murder specifications to the jury. Thus, the aggravating circumstance in this case was multiple murder. *State v. Williams* (1997) 79 Ohio St3d 1, 3.

- The state in its cross-appeal contends that the trial court improperly merged the multiple murder specification with the other two death specifications in both aggravated murder counts. Merger of specifications may occur when they are duplications and arise from the same act. However, the specifications for multiple-murder and for felony-murder represent distinct and separate aggravating circumstances. *Williams*, 74 Ohio St.3d at 579, 660 N.E.2d at 734; *State v. Frazier* (1991), 61 Ohio St.3d 247, 256, 574 N.E.2d 483, 490. They "are not duplicative since they did not arise from the same act or indivisible course of conduct." *Id.*, 61 Ohio St.3d at 256, 574 N.E.2d at 490. Therefore, as to both counts, the R.C. 2929.04(A)(3) and (A)(7) specifications are merged, but the R.C. 2929.04(A)(5) specification should not have merged. *State v. Smith* (1997) 80 Ohio St.3d 89, 115-116.

- The R.C. 2929.04(A)(5) and (A)(7) specifications are not duplicative, since they did not arise from the same act or indivisible course of conduct. The R.C. 2929.04(A)(7) specification in each count arose from the commission of an aggravated robbery, whereas the R.C. 2929.04(A)(5) multiple murder specification arose from the commission of another killing. Under these circumstances, no merger was required. See, generally, *State v. Frazier* (1991), 61 Ohio St.3d 247, 256, 574 N.E.2d 483, 490. Additionally, on the facts of this case, we find that the R.C. 2929.04(A)(3) specification is clearly not duplicative of both of the specifications with which it was joined in Count Six of the indictment. *State v. Palmer* (1997), 80 Ohio St.3d 543, 574-575.

- The offenses of kidnapping and aggravated robbery were committed with no separate animus, as there is no showing of a prolonged restraint, significant asportation, or secret confinement of the victims. Therefore, the kidnapping specification merges with the aggravated robbery specification. *State v. Fears* (1999) 86 Ohio St.3d 329, 344.

- The aggravated burglary does not merge with the aggravated robbery. As soon as appellant entered the apartment by force armed with a deadly weapon with the intent to commit a theft, the aggravated burglary was completed. R.C. 2911.11; *State v. Frazier* (1979), 58 Ohio St.2d 253, 256, 12 O.O.3d 263, 265, 389 N.E.2d 1118, 1120. Nor does the aggravated burglary merge with the kidnapping in this case. *State v. Waddy* (1992), 63 Ohio St.3d 424, 448, 588 N.E.2d 819, 837. *State v. Fears* (1999) 86 Ohio St.3d 329, 344.

- We hold that the trial court correctly declined to merge these separate specifications. The course of conduct, R.C. 2929.04(A)(5), and felony-murder, (A)(7), specifications in Count I are not duplicative and need not be merged. *State v. Smith* (1997), 80 Ohio St.3d 89, 116, 684 N.E.2d 668, 692; *State v.*

*Palmer* (1997), 80 Ohio St.3d 543, 573-574, 687 N.E.2d 685, 710. *State v. Robb* (2000), 88 Ohio St.3d 59, 85

- Also, defendant's status as a prisoner represents a separate death specification, R.C. 2929.04(A)(4), from both the felony-murder death specification in Count I and course-of conduct specifications in Counts I and III. Defendant was an inmate long before he kidnapped guards and committed murders. His inmate status was not implicit in those acts. Thus, the specifications "did not arise from the same act or indivisible course of conduct." *State v. Frazier* (1991), 61 Ohio St.3d 247, 256, 574 N.E.2d 483, 490. See, e.g., *State v. Bradley*, 42 Ohio St.3d at 149, 538 N.E.2d at 385- 386 (inmate status and prior murder conviction treated as separate); *State v. Zuern* (1987), 32 Ohio St.3d 56, 66, 512 N.E.2d 585, 595 (inmate status and victim peace officer status treated as separate). *State v. Robb* (2000), 88 Ohio St.3d 59, 85

- The jury found defendant guilty of two aggravating circumstances: (1) a course of conduct involving the purposeful killing of two or more persons by the offender, R.C. 2929.04(A)(5); and (2) a murder committed while the principal offender in an aggravated robbery, R.C. 2929.04(A)(7). We merge these aggravating specifications in our independent review for purposes of determining whether they outweigh the mitigating factors beyond a reasonable doubt. *State v. Tibbetts* (2001), 92 Ohio St.3d 146, 172.

- The aggravated arson specification has no such correspondence with the course of conduct specification. The course of conduct specification, R.C. 2929.04(A)(5), imposes punishment for killing multiple victims through a course of conduct. R.C. 2929.04(A)(7) imposes a specification when the offender has effected a killing while committing aggravated arson. Though the arson had the effect of producing multiple murder victims, committing multiple murders does not always involve arson as the course of conduct leading to the deaths. Thus, we fail to see how these specifications can meet the above test, and we decline to impose a merger. *State v. Franklin*, 97 Ohio St.3d 1, 12, 2002-Ohio-5304, at ¶ 49.

- At times, we have merged (A)(3) and (A)(7) specifications. See, e.g., *State v. Wiles* (1991), 59 Ohio St.3d 71, 84, 571 N.E.2d 97; *Cooey*, 46 Ohio St.3d at 39, 544 N.E.2d 895; *Jenkins*, 15 Ohio St.3d at 197, 15 OBR 311, 473 N.E.2d 264. In some situations, however, we have found that R.C. 2929.04(A)(3) and (A)(7) specifications can properly be viewed as separate and need not be merged. See, e.g., *State v. Sheppard* (1998), 84 Ohio St.3d 230, 232, 242, 703 N.E.2d 286; *State v. Palmer* (1997), 80 Ohio St.3d 543, 574, 687 N.E.2d 685; *Wogenstahl*, 75 Ohio St.3d at 367, 662 N.E.2d 311. \* \* \* In this case, we conclude that the court of appeals correctly upheld the trial court's decision not to merge the (A)(3) and (A)(7) specifications as to Cora Hartig. The facts show a separate motivation and decision to shoot Mrs. Hartig. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044 at ¶¶81, 82

- Finally, the R.C. 2929.04(A)(9) specification represents a separate death specification from both the R.C. 2929.04(A)(3) and (A)(7) specifications. The fact that the victim was a child under 13 years of age is not implicit in felony murder or murder to escape detection. Thus, the specifications did not arise from the same act or indivisible course of conduct. *State v. Lynch*, 99 Ohio St.3d 514, 2003-Ohio-2284, at ¶ 141.
- Murder while committing a felony, such as aggravated burglary, R.C. 2929.04(A)(7), and during a course of conduct of purposeful killing, R.C. 2929.04(A)(5), as charged in Count 1 and Count 3, are not duplicative. See, e.g., *State v. Smith*, 80 Ohio St.3d at 116, 684 N.E.2d 668; *State v. Williams*, 74 Ohio St.3d at 579, 660 N.E.2d 724. *State v. Stanley Adams*, 103 Ohio St.3d 508, 817 N.E.2d 29, 2004-Ohio-5845, at ¶125
- The course-of-conduct specification, R.C. 2929.04(A)(5), and the felony-murder specification, R.C. 2929.04(A)(7) need not be merged. The R.C. 2929.04(A)(7) specifications arose from the aggravated murder of Jose occurring during the course of rape, kidnapping, burglary, robbery, and arson. In contrast, the course-of-conduct specification arose from the murder of Jose and the attempted murder of Damaris. Thus, the R.C. 2929.04(A)(5) and (A)(7) specifications did not arise from the same indivisible course of conduct and are not duplicative. See *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 51-52; *State v. Robb* (2000), 88 Ohio St.3d 59, 85, 723 N.E.2d 1019; *State v. Frazier*, 61 Ohio St.3d at 256, 574 N.E.2d 483. *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, at ¶160.
- We find that the two R.C. 2929.04(A)(7) and the R.C. 2929.04(A)(5) aggravating circumstances were not duplicative, and they should not have been merged into a single aggravating circumstance, because the jury was obligated to "separately weigh the aggravating circumstances" of each count against the mitigating factors. (Emphasis added.) *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, 785 N.E.2d 439, ¶ 96; see, also, *State v. Keith* (1997), 79 Ohio St.3d 514, 532, 684 N.E.2d 47. *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, at ¶255
- The trial court erred by merging the two separate (A)(7) aggravating circumstances into a single aggravating circumstance. *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, at ¶330.

#### **R.C. 2929.04(A)(8) "Witness Victim" Specification**

**“(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim's testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the**

**commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding. “**

- The analysis used to determine whether two aggravating circumstances merge is the same as that used to determine whether two offenses are allied offenses of similar import. \* \* \* *State v. Logan* (1979), 60 Ohio St.2d 126. \* \* \* Thus, the R.C. 2929.02(A)(2) specification merges with the R.C. 2929.04(A)(8) specification only if the elements of the two specifications "correspond to such a degree that commission of one [specification] will result in the commission of the other." \* \* \* Between the two specifications at issue here, no such correspondence exists. The R.C. 2929.04(A)(2) specification requires only that "the offense was committed for hire." The elements of the R.C. 2929.04(A)(8) specification are that (1) the victim was a witness to an offense; and (2) that the purpose of the killing was to prevent the victim from testifying in a criminal proceeding. These two specifications are by no means "indivisible" even though they happen to apply to the same murder. Indeed, their elements do not overlap. Hired killers do not solely kill witnesses, nor are witnesses killed only by hired killers. Thus, it is not the case that "commission of the one [specification] will result in the commission of the other." *State v. Yarborough*, 95 Ohio St3d 227, 2002-Ohio-2126, at ¶ 124-127

#### **R.C. 2929.04(A)(9) “Child under 13” Specification**

**“(9) The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.”**

- Finally, the R.C. 2929.04(A)(9) specification represents a separate death specification from both the R.C. 2929.04(A)(3) and (A)(7) specifications. The fact that the victim was a child under 13 years of age is not implicit in felony murder or murder to escape detection. Thus, the specifications did not arise from the same act or indivisible course of conduct. *State v. Ralph Lynch*, 99 Ohio St.3d 514, 2003-Ohio-2284, at ¶ 141
- Murder of a person specifically protected because of status, such as a child, is not duplicative of other death specifications. See *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 199-200 ("course of conduct,"

[A][5], and murder of police officer, [A][6], are not duplicative); *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185, at ¶ 141 (death of a child, [A][9] is not duplicative of [A][3] or [A][7] ). *State v. Stanley Adams*, 103 Ohio St.3d 508, 817 N.E.2d 29, 2004-Ohio-5845, at ¶126