

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
Appellee, : Case No. 04-0485  
-vs- :  
DONALD KETTERER, :  
Appellant. : **This is a death penalty case.**

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ON APPEAL FROM THE BUTLER COUNTY COURT OF COMMON PLEAS  
HAMILTON, OHIO  
CASE NO. 2003-03-0309

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**APPELLANT KETTERER'S MOTION FOR RECONSIDERATION**

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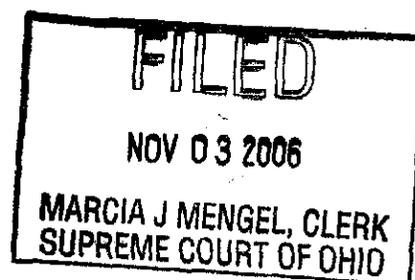
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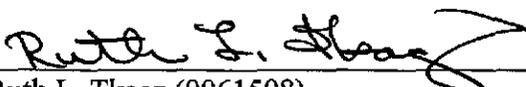
APPELLANT'S MOTION FOR RECONSIDERATION

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Appellant Donald Ketterer requests that this Court reconsider its merits ruling of October 25, 2006, affirming his convictions and death sentence. This request is made under Sup. Ct. Prac. R. XI § 2(A)(4). The reasons for this Motion are set forth in the attached memorandum in support.

Respectfully submitted,

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## MEMORANDUM IN SUPPORT

### PROPOSITION OF LAW NO. 1

When defense counsel advise their client to enter guilty pleas to all counts and specifications in a capital indictment without securing an agreement from the state that a life sentence be imposed, and the defendant is thereafter sentenced to death, counsel renders ineffective assistance and deprives the capital defendant of due process of law. U.S. Const. Amends. VI, VIII, XIV.

This Court characterized Appellant Donald Ketterer's claim of ineffective assistance of counsel for advising him to plead guilty to the entire indictment without securing an agreement for a life sentence as a claim of ineffectiveness "per se." State v. Ketterer, 111 Ohio St. 3d 70, ¶ 80 (2006). Ketterer has made no such argument. Rather, it is the totality of the circumstances surrounding defense counsel's advice that render them ineffective in this case.

Without apparent regard for due process or for their client's life interest, defense counsel encouraged Ketterer to waive his rights and plead guilty to the indictment as charged. The defense attorneys proceeded with a guilty plea knowing that the trial court would bar their request to try the mitigation phase to a jury. (Jury Waiver, Jan. 27, 2004, Morning Session, p. 4) Their initial plan to have Ketterer plead guilty to a three-judge panel and proceed with sentencing before a jury was grounded in a suspect interpretation of Ohio law. The tactical advantage of having a jury seated for the penalty phase that counsel admittedly sought never materialized.

When the reason for the guilty plea became moot, counsel never revised their approach to the case. They simply had Ketterer put his life in the hands of a three-judge panel rather than a twelve-person jury, thereby numerically reducing the chances of receiving a life sentence. With a jury, Ketterer would have had twelve opportunities to convince at least one juror to vote for life instead of death. The value of pleading to a three-judge panel is greatly reduced under death

penalty sentencing schemes such as Ohio's, where one juror may acquit on the death penalty. State v. Brooks, 75 Ohio St. 3d 148, 162, 661 N.E.2d 1030, 1042 (1996).

The particular circumstances in this case illustrate defense counsel's ineffectiveness and the resulting prejudice to Ketterer. The defense attorneys never forged a relationship with Ketterer. (See Merit Brief, Proposition 4.) At a pretrial held on December 9, 2003, Ketterer complained to the court that his attorneys—who had been on the case for nearly ten months at that time—had not been consulting with him: “[B]etween my two lawyers put together, they haven't spent one hour with me over there on my defense.” (Pretrial, Dec. 9, 2003, p. 6) Defense counsel did not disagree with Ketterer's statement.

Because of the lack of an attorney-client relationship in this case, Ketterer had more confidence in inmates who fancied themselves to be jailhouse lawyers than in his own court-appointed attorneys. (See Dr. Hopes's report, Mitigation Exhibit D, p. 13.) The attorneys did not have consistent contact with their client. Then, when counsel came up with the idea to have Ketterer waive his rights and plead guilty, they spoke with him only the night before the trial was to begin. (Jury Waiver/Plea, Jan. 27, 2004, Morning Session, p. 15; Afternoon Session, p. 13) They never developed that essential relationship of trust with the client that the American Bar Association Guidelines advise is so crucial to adequate representation. *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913, 1005 (2003) (Guideline 10.5).

In her competency report, Dr. Bobbie Hopes indicated that, although Ketterer was competent to stand trial and his medication controlled the symptoms of his mental illness, “his attorneys should be prepared to make special accommodations for dealing with the symptoms of Mr. Ketterer's current mental condition.” (Mitigation Exhibit D, pp. 14-15)

The timing of counsel's decision to have Ketterer waive his constitutional rights and plead guilty is disconcerting. Defense counsel made the decision before conducting voir dire. They did not avail themselves of an opportunity to "read" the jury pool before making a decision to waive a jury trial.

The unreasonableness of defense counsel's advice is most apparent when considering that their decision to have Ketterer plead guilty was made before fully investigating the case. (See Appellant's Reply Brief, Proposition 1.) Defense counsel filed a motion to have hair found in the victim's hands independently tested.<sup>1</sup> (See Merit Brief, Proposition 4, § 3.) The trial court granted the motion, and even granted funds (a total of \$19,000) to have the DNA testing expedited when counsel failed to set up the testing in a timely manner. (Pretrial, Jan. 20, 2004, pp. 80-83) The specific results, though not in this record, appear to be favorable to Ketterer's defense based on what the prosecutor and defense counsel said on the record. (Mitigation Hrg., Vol. 2, p. 229 )

If counsel knew the results, which were favorable to the defense, and advised Ketterer to plead guilty anyway, thus casting aside favorable forensic evidence, that is unreasonable—particularly because their client had given a statement to the police on February 28, 2003, after his arrest, in which he indicated that others were involved in the crimes. Ketterer had provided details of how Donald Williams and Mary Gabbard played a part in the robbery and homicide, implicating Gabbard as the principal offender.

On the other hand, if defense counsel did not yet have the test results, but went ahead with a plea, that was unreasonable. Under those circumstances, counsel advised their client to plead guilty to a capital indictment without knowing all the facts and investigating all the

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<sup>1</sup> Hairs found in the victim's hands during the autopsy; hair samples retrieved from Ketterer for comparison. See testimony of Detective Steve Rogers, Suppression Hearing, Vol. 1, p. 111; State's Exhibit 9.

evidence. Why ask for independent testing, have the testing expedited at a total cost of \$19,000, and then not wait for the results before deciding on how to proceed? Counsel obviously thought there was something important to discover, otherwise they would not have asked for the testing and, later, for expedited testing.

Defense counsel failed to ask that the trial be continued until after the DNA test results could be obtained. Their original failure occurred when they did not get the testing done in a timely manner after the court had granted their motion for testing. The court was willing to continue the trial date because of the cost of expedited testing. (Pretrial, Jan. 20, 2004, p. 86) The court recognized the importance of the defense having the information before going forward. (Id. at 83)

Defense counsel's advice to Ketterer to waive a jury and plead guilty is made all the more unreasonable by the defense psychologist's expert (competency) report. Dr. Bobbie Hopes evaluated Ketterer and concluded that he "has impaired judgment and reasoning ability." (Mitigation Exhibit D, p. 15) Defense counsel in effect took advantage of Ketterer's impaired mental state. They should have realized that their client could not make a reasoned, sound decision on whether to waive his constitutional rights.<sup>2</sup> He was on psychotropic medication (Mitigation Exhibit D, p. 5). Ketterer was being treated by Dr. Tepe—the jail *psychiatrist*—at the time. (Id.) His attorneys never addressed this point. Ketterer was susceptible to the influence of his attorneys and pressure from the court to work with these particular attorneys. (Pretrial, Dec. 9, 2003, p. 9)

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<sup>2</sup> The standard for competency to stand trial is different from being able to make a knowing, intelligent, voluntary jury waiver and plea. The requirements of Ohio R. Crim. P. 11(C) show that something beyond a determination of competency is required, otherwise a competency evaluation would settle all issues and the court would not need to do anything more. Even with a competency determination, a court must further determine that the defendant is waiving his rights knowingly, intelligently, and voluntarily. Schneekloth v. Bustamonte, 412 U.S. 218 (1973). Competency addresses only whether the defendant understands the nature of the charges against him and whether he can assist his attorneys in his defense.

There was no tactical decision by defense counsel that Ketterer's prospects would be better with a three-judge panel than with a twelve-person jury. Defense counsel wanted a jury to determine the sentence—their presentation was geared toward arguing to a jury, not a three-judge panel. See Mitigation Hrg., Vol. 1, p. 103 (re: proportionality evidence: “more helpful for a jury to understand that than a panel of judges”).

This was not a case where defense counsel thought their client's interests would be better served by a three-judge panel. If that had been their thinking, they would not have asked to have the penalty phase presented to a twelve-person jury. In fact, in mitigation closing argument lead counsel admitted that he had never argued a case to a three-judge panel before: “I usually [argue these cases] in front of a jury.” (Mitigation Hrg., Vol. 3, p. 258) He had no track record with a three-judge panel on which to base his decision to proceed that way.

Had defense counsel proceeded with a jury trial, they could have argued to the jurors Ketterer's impaired mental state (setting the stage for mitigation); reasonable doubt as to the principal offender based on Ketterer's police statement naming Mary Gabbard and Donald Williams as participants in the crimes; the lack of credibility of these key state witnesses (Williams is an informant; Gabbard supplied Ketterer with crack—see plea hrg., vol. 1, p. 45); and the forensic hair evidence that gives credence to Ketterer's statement that others were involved.

Defense counsel's decision to have Ketterer plead guilty obtained no tactical advantage for the defense. Ketterer's guilty plea did not stop the prosecutor from introducing prejudicial and inflammatory evidence at the plea hearing. (See Merit Brief, Proposition 7, §§ 2, 3, 4.) The State introduced evidence showing that utensils had been stuck into the victim's face post mortem (plea hrg., Jan. 28, 2004, vol. 1, pp. 98-100); autopsy and crime-scene photographs that

the prosecutor admitted were “gory” and “gruesome” and “extremely inflammatory” (pretrial, June 13, 2003, p. 42; plea hrg., vol. 1, p. 174); and all evidence from the plea hearing was admitted at the mitigation hearing (mitigation hrg., vol. 1, p. 3).

If trial judges are immune to inflammatory evidence, it can also be argued that they are unaffected by mitigating evidence. The power of persuasion must be greater when arguing mitigating factors to a three-judge panel. Judges may be desensitized to mitigating evidence because they have heard it before. See Arizona v. Pandeli, 204 Ariz. 569, 572 (2003) (jurors could have found differently from judge on the mitigating factors).

In mitigation closing argument, the prosecutor mentioned that the panel “has had years of experience, which it can base its decisions on.” (Mitigation Hrg., Vol. 3, p. 240) In closing argument, defense counsel, referring to Ketterer’s crack-cocaine addiction, said, “this court has seen it every day with the people that come before it . . . .” (Id. at 279) It is nothing new for the court. That is the unreasonable risk in taking a capital case to a three-judge panel—mitigation evidence loses its impact.

In its decision denying this proposition of law, this Court found that “[b]y pleading guilty before a three-judge panel, counsel obtained the benefit of substantial mitigation evidence, namely remorse and a plea of guilty.” Ketterer, 111 Ohio St. 3d at ¶ 86. But this Court does not explain how counsel would have been prevented from arguing those mitigating factors to a jury. Counsel could have, in effect, conceded guilt to the jury. The trial court reminded defense counsel of that. (Jury Waiver, Jan. 27, 2004, Morning Session, pp. 14-15) There were significant mitigating factors that jurors could have weighed and given effect. For example:

- Major mental illness—bipolar disorder with psychotic features: depressive, manic, and paranoia components; personality disorder with borderline features; suicide attempts; psychiatric hospitalizations (mitigation hrg., vol. 1, pp. 13-14, 17-18);

- Low cognitive functioning (borderline, IQ 72) (id., vol. 2, p. 169);
- Chronic back pain after bicycle accident (hit by van in 1996), which fueled an addiction to prescription drugs (id., vol. 1, p. 11);
- Substance dependence (alcohol, cocaine, prescription medication) (id., vol. 1, p. 12; vol. 2, p. 180);
- Dysfunctional family—history of mental illness in family (brother diagnosed with bipolar disorder; another brother admitted to Lima State Hospital; uncle and cousin committed suicide); abusive father; brother is an alcoholic who stabbed his wife (see VA records, Defense Mitigation Exhibit A) (id., vol. 1, pp. 10, 85-93; vol. 2, p. 167-68);
- Cooperation with police (plea hrg., vol. 1, pp. 133, 142);
- Favorable jail conduct (mitigation hrg., vol. 2, p. 113);
- Remorse for the death of Lawrence Sanders (id., p. 228);
- Caring for friends, who live in a disadvantaged state on the streets (id., vol. 1, pp. 68, 70, 72, 75; vol. 2, p. 123);
- Military service (honorable discharge) (id., vol. 1, p. 11);
- Donald Williams and Mary Gabbard's participation in the crime or events leading to the crime; Butler County let Williams (an informant) go after a raid on his drug operation (plea hrg., vol. 1, pp. 191-97).

The body that would not only hear evidence for the guilty plea, but also determine Ketterer's punishment, was a panel composed of judges who could be jaded from experience on the bench, who likely have heard similar arguments in other cases, and who may have concerns about political fallout from their decision. The Sixth Circuit has recognized the pressure elected judges are under. See Depew v. Anderson, 311 F.3d 742, 752-53 (6th Cir. 2002). Jury sentencing in capital cases is recognized as a valued right by the United States Supreme Court. Woodson v. North Carolina, 428 U.S. 280, 288 (1976). The value of jury sentencing should outweigh the value of a guilty plea.

This Court stated that “nothing in the record supports Ketterer’s claim that his counsel instructed him to plead guilty.” Ketterer, 111 Ohio St. 3d at ¶ 82. But the record in fact reflects that it was defense counsel’s decision to proceed with a guilty plea. At a pretrial hearing, lead counsel told the trial court, “It’s *our* intention to enter our guilty plea to a three-judge panel, and we have discussed that with Mr. Ketterer.” (Jury Waiver, Jan. 27, 2004, Morning Session, p. 15) (Emphasis added.) Moreover, counsel said they filed motion to plead guilty to the indictment “in whole” and that Ketterer gave his “permission” to proceed in that way. (Id. at 4) The court then asked Ketterer if he had received “advice” from his attorneys on how to proceed. He answered yes. (Id. at 16) Thus, the idea to plead guilty originated with defense counsel, not Ketterer.

This Court cited to State v. Bird, 81 Ohio St. 3d 582, 585, 692 N.E.2d 1013 (1998), as support for its holding that defense counsel’s tactical decisions receive deference. Ketterer, 111 Ohio St. 3d at ¶ 85. Bird, however, is not a capital case. In Bird, the defendant was charged with felonious assault; his life was not at stake. In a capital case, more is required of defense counsel. “[D]eath penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases.” ABA Guidelines, 31 Hofstra L. Rev. at 923. Therefore, scrutiny of defense’s counsel’s decisions should be all the more exacting.

Ketterer succumbed to his attorneys’ unreasonable advice. Had counsel not advised Ketterer to plead guilty to the entire capital indictment, the record shows that there is a reasonable probability he would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Ketterer did not initiate the decision to plead guilty. The defense psychologist’s report indicates that Ketterer wanted to go to trial: he believed that hairs found at the scene could exonerate him; he “is motivated toward defending himself.” (See Mitigation Exhibit D, p. 13.)

Ketterer expressed to Dr. Hopes, during her evaluation of him, his desire to pursue a defense and to investigate the potentially exculpatory hair evidence. He also motioned the trial court *pro se* for a NGRI plea. (Pretrial, Jan. 5, 2004) This Court even acknowledged that Ketterer was “fixated on pleading not guilty by reason of insanity and complained that his lawyers did not spend time with him or follow his advice on how to proceed.” Ketterer, 111 Ohio St. 3d at ¶ 102.

Having talked with Ketterer about waiving his rights and pleading guilty just the night before he waived his rights in court (Jury Waiver/Plea, Jan. 27, 2004, Morning Session, p. 15; Afternoon Session, p. 13), there was not sufficient time for Ketterer to digest his attorneys’ advice and evaluate the consequences of waiving his rights. He was confused, as evidenced by Dr. Hopes’s report. In the wake of his attorneys’ haste, Ketterer deferred to the so-called legal professionals and followed their advice to plead guilty.

Defense counsel’s unreasonable judgment deprived Ketterer of his constitutional right to effective assistance of counsel and to a fair trial under the Sixth and Fourteenth Amendments. This Court should vacate its opinion and remand Ketterer’s case for a new trial because his right to effective assistance of counsel was violated under the particular circumstances of this case.

**PROPOSITION OF LAW NO. 2**

A jury waiver and guilty plea are not made knowingly, intelligently, and voluntarily when the capital defendant is not adequately informed of his rights and the applicable law, and when he suffers from mental illness and is medicated at the time he waives his rights. Thus, a trial court errs by accepting a plea without first determining whether the capital defendant is competent to relinquish his constitutional rights. U.S. Const. Amends. VI, VIII, XIV.

This Court denied this claim, finding that Ketterer was competent to waive a jury trial and plead guilty. The Court quoted from the transcript in which the trial judge asked Ketterer leading questions to which he merely responded, “Yes, ma’am.” Ketterer, 111 Ohio St. 3d at ¶¶ 15-60. Ketterer, having been influenced by his attorneys to plead guilty, was unlikely to respond any other way.

Ketterer was vulnerable to his attorneys’ advice to waive a jury and plead guilty. He could not waive his constitutional rights and plead guilty knowingly, voluntarily, and intelligently as the standard requires. The record shows that Ketterer was unable to understand the lethal ramifications of a jury waiver and guilty plea.

Factors Affecting Jury Waiver

Pretrial, Dec. 9, 2003, pp. 5-14	<ul style="list-style-type: none"><li>• Erratic and misinformed: During discussion of juror questionnaire, Ketterer complains about wanting to enter a NGRI plea; lack of contact with his attorneys; Ketterer “goes blank” sometimes; he does not understand what is going on, only “bits and pieces”; worst scenario according to Ketterer—he was looking at 30 years to life; he felt threatened by his attorney; bipolar disorder and drug/alcohol relapse; he does not read well; Ketterer tells lead counsel he is “fired.”</li><li>• Court asks Ketterer to sit down; no hearing on his request for new a attorney.</li></ul>
Defense Mitigation Exhibit D (former Competency Exhibit A), p. 3	<ul style="list-style-type: none"><li>• Ketterer dropped out of school early in the 11th grade.</li><li>• Psychologist interviewed Ketterer on Jan. 11,</li></ul>

	2004, noting deficiencies; waiver and plea occurred just two weeks later, on Jan. 27, 2004.
Exhibit D, p. 4  Mitigation Hrg., Vol. 2, testimony of Dr. Smalldon, p. 179	<ul style="list-style-type: none"> <li>• Ketterer began drinking at age 13 or 14.</li> <li>• History of using marijuana, speed, cocaine, and prescription medication.</li> <li>• A 1997 report indicates that Ketterer was diagnosed with Depressive Disorder and Polysubstance Abuse, chronic.</li> <li>• Ketterer was treated at various VA hospitals for alcohol and drug abuse.</li> <li>• Ketterer suffered a back injury in 1996 when he was hit by a van; he suffers from chronic pain.</li> </ul>
Exhibit D, p. 5  Mitigation Hearing, Vol. 2, p. 171  Exhibit D, p. 5	<ul style="list-style-type: none"> <li>• While held in the Butler County jail, Ketterer was taking psychotropic medication.</li> <li>• Ketterer has a “well established” history of depression and anxiety; treatment dates back to 1991.</li> <li>• Ketterer was admitted to psychiatric hospitals 13 times between 1995 and 2002.</li> <li>• Suicide attempts; in Nov. 2002, Ketterer overdosed on a month’s worth of medication and sleeping pills.</li> <li>• Diagnosed with Bipolar Disorder; Major Depressive Disorder in 1998.</li> <li>• Prescribed Lithium and Klonopin (for severe depressive disorders).</li> </ul>
Exhibit D, p. 7	<ul style="list-style-type: none"> <li>• At the jail, Ketterer’s concentration was impaired.</li> <li>• Jail psychiatrist, Dr. Tepe, had recently increased medication for Ketterer’s sleep difficulty.</li> <li>• Hospital reports indicate auditory hallucinations.</li> <li>• “I’ve heard voices in my head for years.” Ketterer hears his deceased father’s voice.</li> </ul>
Exhibit D, p. 9	<ul style="list-style-type: none"> <li>• Ketterer does better with highly structured questions, rather than open-ended questions.</li> <li>• Impaired judgment and reasoning ability.</li> <li>• Jumps to incorrect conclusions and makes poor decisions.</li> <li>• Functions in the low-average range, but judgment, reasoning, and concentration are</li> </ul>

Mitigation Hearing, Vol. 2, pp. 169-70	<p>below his verbal intelligence.</p> <ul style="list-style-type: none"> <li>• Full-scale IQ of 72.</li> </ul>
Jury Waiver, Jan. 27, 2004, Morning Session, pp. 12, 16	<ul style="list-style-type: none"> <li>• Ketterer signed jury waiver before court engaged in any Q &amp; A with him; waiver states that Ketterer has satisfied the court that he understands that he has a right to a jury trial.</li> <li>• How can Ketterer know whether he has satisfied the court, when he has not yet discussed it with the court?</li> <li>• Ketterer signed the waiver without regard to what it stated.</li> </ul>
Exhibit D, p. 10	<ul style="list-style-type: none"> <li>• Ketterer does not know the difference between murder and aggravated murder.</li> <li>• Believes that someone who has a mental illness cannot be sentenced to death; believes the most he could get is 45 years to life.</li> </ul>

This Court held that the trial court conducted “an adequate inquiry into Ketterer’s medication and determined that it did not affect Ketterer’s understanding of the proceedings or his decision-making ability.” Ketterer, 111 Ohio St. 3d at ¶ 71. But the trial court never determined which medication Ketterer was taking. (Jury Waiver, Jan. 27, 2004, Morning Session, pp. 21-23) Thus, how could the court know that it did not affect Ketterer’s cognition? The court chose simply to rely on Ketterer for his assurance.

This Court further noted that defense counsel did not challenge Ketterer’s ability to waive a jury and enter guilty pleas. Ketterer, 111 Ohio St. 3d at ¶ 72. Because the decision to waive a jury trial and plead guilty to the indictment was defense counsel’s idea, it is unlikely that they would have made such a challenge. The relationship between counsel and Ketterer was strained at best. (See Merit Brief, Proposition 4, § 1.)

Ketterer did not make a knowing, voluntary, and intelligent waiver of his right to a jury trial under the Sixth Amendment. This Court should vacate its opinion and remand Ketterer’s case for a new trial.

## PROPOSITION OF LAW NO. 11

Appellant Donald Ketterer's death sentence must be vacated by this Court as inappropriate because the evidence in mitigation was not outweighed by the aggravating circumstances. U.S. Const. Amends. VIII, XIV.

In its independent sentence evaluation, this Court found that the aggravating circumstances outweighed the mitigating factors. Ketterer, 111 Ohio St. 3d at ¶ 204. The wealth of mitigating evidence in this case, however, supports a reversal of Ketterer's death sentence.

Under Proposition of Law No. 1 above, Ketterer lists the significant mitigating factors in his case. The most compelling of these is his severe mental illness. (See Merit Brief, Proposition 13.)

Ketterer's character, history, and background militates against imposing death. This Court has placed great weight on a defendant's troubled upbringing and dysfunctional family. State v. Tenace, 109 Ohio St. 3d 255, 847 N.E.2d 386 (2006). Ketterer's upbringing was indeed troubled and abusive. His father, who had mental problems and a drinking problem, beat him and whipped him with a razor strap. (Mitigation Hrg. Vol. 1, pp. 10, 91-93) Ketterer continued to hear his father's voice after his father had died. (Id. at 10)

Mental illness extends throughout Ketterer's family. A cousin and an uncle committed suicide, and Ketterer's brothers have mental illness. (Id. at 88-89) Ketterer's younger brother, Thomas, takes medication for depression, anxiety disorder, and bipolar disorder. (Id. at 86-87) Another brother, George, has had psychiatric hospitalizations. (Id. at 88)

Like defendant Tenace, Ketterer is substance dependent. According to Dr. Hopes, Ketterer's life has been a battle with chemical dependency—"fighting the use of drugs and alcohol, doing well for maybe several months, and even up to three or four years, and then some event is traumatic to him, and he relapses and goes back to doing it . . . ." (Mitigation Hrg., Vol.

1, p. 12) He has been alcohol dependent for over 30 years and also has used cocaine. He smoked crack-cocaine the day before his arrest. (Suppression Hrg., Vol. 1, p. 88)

Ketterer suffered from a mental disease or defect under O.R.C. 2929.04(B)(3) at the time of the crime. (Mitigation Hrg., Vol. 1, p. 17; Vol. 2, p. 178) He also has cognitive deficits. (Id. at Vol. 1, p. 169; Vol. 2, p. 10) “[V]iewed cumulatively,” Ketterer’s mitigating factors weigh in favor of a life sentence. Tenace, 109 Ohio St. 3d at 273, 847 N.E.2d at 403. Given this Court’s precedent in Tenace and State v. Claytor, 61 Ohio St. 3d 234, 244-46, 574 N.E.2d 472, 481-82 (1991) (death sentence vacated after independent review based on (B)(3) mitigation), this Court should vacate Ketterer’s death sentence.

### PROPOSITION LAW NO. 13

The execution of a severely mentally ill person is cruel and unusual punishment.  
U.S. Const. Amends. VIII, XIV; Ohio Const. Art. I, § 9.

Donald Ketterer suffers from a severe, longstanding mental illness. (Mitigation Hrg., Vol. 1, pp. 13-14, 17; Vol. 2, pp. 171, 174, 178, 179) He was hospitalized at least thirteen times between 1995 and 2002 for psychiatric problems. (Mitigation Hrg., Vol. 2, p. 171) He has been diagnosed with bipolar disorder mixed, with fluctuating psychotic symptoms. (Id. at 174) The defense's expert witness, Dr. Jeffrey Smalldon, testified that bipolar disorder is "one of the most severe kinds of mental illness." (Id. at 175) Records from VA hospitals confirm Ketterer's mental problems. (See Defense Mitigation Exhibit A.)

Evolving standards of decency mandate that persons who are mentally ill should not be subject to the death penalty. Under the Eighth Amendment, executing a person who is mentally ill is cruel and unusual punishment. The concurring opinion in this case recognizes this. Moreover, the death penalty does not achieve its goal in such cases. "Deterrence is of little value as a rationale for executing offenders with severe mental illness when they have diminished impulse control and planning abilities." Ketterer, 111 Ohio St. 3d at ¶ 231 (Stratton, J., concurring).

This Court relied on its decision in State v. Hancock, 108 Ohio St. 3d 57, 840 N.E.2d 1032 (2006), to reject this proposition of law. The Court found that Appellant Hancock "cites no evidence that the execution of such offenders is inconsistent with 'evolving standards of decency.'" Hancock, 108 Ohio St. 3d at 82, 840 N.E.2d at 1059 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). The concurring opinion in Ketterer's case provides the evidence to support making severely mentally ill defendants ineligible for the death penalty. Ketterer, 111 Ohio St. 3d at ¶¶ 231-244 (Stratton, J., concurring).

In Ketterer's case, he "lacked substantial capacity at the time or around the time this offense was committed to conform his conduct to the requirements of the law." (Mitigation Hrg., Vol. 2, p. 178) A couple of months prior to the offense, Ketterer had been hospitalized for a drug overdose. He took his entire supply of medication (Elavil and Clonapin) all at once and washed it down with a bottle of whiskey. (Id., Vol. 1, pp. 15, 35) He then went off his medication for about a month. (Id. at 16) Ketterer never got back "to an appropriate medication regimen." (Id.)

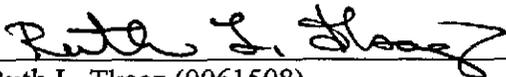
Ketterer's mental illness reduces his moral culpability for the crime of capital murder. Under the state and federal constitutions, this Court has authority to hold that the death penalty is unconstitutional as applied to those who are mentally ill. This Court should adopt the concurring opinion's conclusion that mentally ill defendants should be excluded from the penalty of death and vacate Ketterer's death sentence.

### Conclusion

For each of the foregoing reasons, this Court must vacate its opinion, reverse Donald Ketterer's convictions, and remand this case for a new trial. Alternatively, Ketterer's death sentence must be vacated and his case remanded for a new penalty-phase hearing before a twelve-person jury.

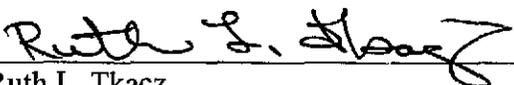
Respectfully submitted,

David H. Bodiker  
Ohio Public Defender

  
Ruth L. Tkacz (0061508)  
Assistant State Public Defender  
Counsel of Record

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Motion for Reconsideration was forwarded by regular first-class U.S. mail to counsel of record, Daniel G. Eichel, First Assistant Butler County Prosecuting Attorney, 315 High Street, Hamilton, Ohio 45011, on the 3<sup>rd</sup> day of November, 2006.

  
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