

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

Pleas

v.

ROLAND DAVIS,

Appellant.

On Appeal from the
Licking County Court of Common

Case No. 2005-1656

THIS IS A DEATH PENALTY
CASE

APPELLANT ROLAND DAVIS' REPLY BRIEF

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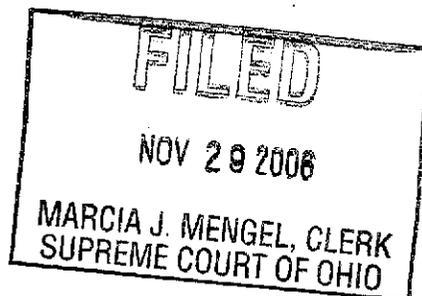


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PROPOSITION OF LAW I

ROLAND DAVIS WAS ENTITLED TO A TRIAL BY A FAIR AND IMPARTIAL JURY FREE FROM BIAS OR PRECONCEIVED OPINIONS ABOUT GUILT OR PUNISHMENT UNDER ART. I, §§ 2, 9, 10 AND 16 OF THE OHIO CONSTITUTION AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. THE JURY SELECTION PROCESS HERE DENIED DAVIS AN OPPORTUNITY TO INSURE THAT A FAIR AND IMPARTIAL JURY WAS SEATED.

- A. Davis Was Denied The “Careful And Searching Voir Dire” Necessary To Develop The Factual Bases For Challenges For Cause And To Exercise Peremptory Challenges Of Jurors Who Were Exposed To Extensive Pretrial Publicity Or Were Biased On Questions Of Guilt, Innocence, Or Sentence.**

In his Merit Brief, Davis demonstrated that this crime and Roland Davis had received a great deal of publicity in the months leading up to the trial, thereby justifying the trial court in granting a change of venue. (Sec. I.A.1) Davis went on to demonstrate that because of this massive publicity, and because the court denied a change of venue, he was at a minimum entitled to a careful and searching voir dire of prospective jurors. (Sec. I.A.2) Davis then demonstrated that he was denied the careful and searching voir dire necessary to uncover hidden biases among the prospective jurors. (Sec. I.A.3) Davis further demonstrated that to the extent that counsel failed to fully and competently prove the extent of the publicity surrounding the crime and Mr. Davis and the necessity of granting a change of

venue and failed to demand or conduct a careful and searching voir dire, counsel's actions denied him the effective assistance of counsel.

Rather than address Davis' claims, the state states the obvious that Davis has the burden of proving prejudice and has the burden of proving that the jury was affected by pretrial publicity. (Appellee's Brief at 3) The state did not address Davis' claims that the court failed to permit -- and counsel failed to conduct -- the careful and searching voir dire necessary to uncover the hidden biases of potential jurors. The state instead assumes that there was a careful and searching voir dire and faults Davis for arguing inconsistent theories and for failing to demonstrate that he was prejudiced by any prejudiced jurors sitting on the jury. (Appellee's Brief at 4) The state simply does not address Davis' claim that the voir dire was inadequate to uncover the biases of the potential jurors. Clearly, without a careful and searching voir dire, it is impossible to discover at trial whether or not the jurors harbored hidden prejudices that would prevent them from fairly judging the case on the evidence presented. That is the error demonstrated in Davis' Merit Brief as well as counsel's failure to more fully develop the record of pre-trial publicity or to conduct a careful and searching voir dire that is necessary to insure the seating of a fair and impartial jury.

The state further argues that Davis' reliance on *Morgan v. Illinois*, 504 U.S. 719 (1992) is misplaced because *Morgan* had to do with a trial court failing to

permit questioning on issues of race in an interracial killing. *Morgan*, as with most Supreme Court cases, cannot be read so narrowly. *Morgan* stands clearly for the proposition that a capitally charged defendant has a right to a meaningful voir dire in which counsel is permitted to – and does – question prospective jurors about biases and prejudices they have that might affect their ability to fairly consider the guilt or innocence of the defendant or to fairly consider all sentencing options. *State v. Jackson*, 107 Ohio St. 3d. 300, 2006-Ohio-5981. Relying on the direct answers of individual jurors that they could be fair and impartial left the assessment of the juror's impartiality in their own hands rendering the entire voir dire procedure meaningless.

Roland Davis was denied the careful and searching voir dire necessary to uncover the biases of the jurors. Davis was likewise denied the effective assistance of counsel by counsel's failure to develop the record of pre-trial publicity and to engage in a meaningful, careful and searching voir dire. The result is that Davis was denied due process and a fair trial by a fair and impartial jury in violation of Art. I, §§ 2, 9, 10, and 16 of the Ohio Constitution as well as the 5th, 6th, 8th, and 16th Amendments. The state failed to address these claims.

B. The Trial Court Applied The Improper Standard In Excusing Prospective Jurors Who Expressed Objections To Capital Punishment But Who Were Not Unequivocally Opposed To Capital Punishment Under All Circumstances And Could Fairly Consider Death As A Sentence.

Roland Davis relies on the arguments presented in his Brief on the Merits in support of Section I.B.¹

C. Trial Counsel Failed To Fully Examine Jurors About Whether Their Opinions on the Death Penalty Would Prevent Them From Following the Court's Instructions And Fairly Considering The Imposition Of The Death Penalty.

In this section, Davis demonstrated that counsel had failed to rehabilitate, or question in any manner, prospective jurors who expressed some reservations about being able to consider the death penalty. The state responded by citing to a series of cases that approve the method of voir dire generally employed in capital cases.

Failing to inquire into the hidden biases of prejudiced jurors falls below the prevailing professional norms for counsel in a capital case. Likewise, failing to question and protect jurors who voice some reservations about the death penalty falls below the prevailing professional norms and is unreasonable because it produces the same result – a jury that is stripped of jurors who do not harbor biases or prejudices that would prevent them from serving. Permitting the state to remove for cause jurors who express some reservations about imposing the death penalty

¹ The prosecutor suggests that counsel for Davis somehow acted unprofessionally by failing to cite all cases either in support or contrary to his position. DR7-106(B) cited by counsel for the state requires disclosure of controlling legal authority “which is not disclosed by opposing counsel.” It is unclear what point counsel for the state is attempting to make referring to the fact that undersigned counsel were also counsel on cases that the state cites as controlling precedent or that undersigned counsel’s proofreading skills are not completely accurate. Counsel breached no ethical obligations in failing to cite every case ever discussing these subjects.

without fully exploring their ability to consider all potential sentences, denied Roland Davis his right to be tried by a jury that was not organized to impose the death sentence – a principle protected under the constitutions of the United States and Ohio since *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

The state replies that the decision of how to conduct voir dire and the extent of questioning – even on the extent of a juror’s biases or feelings about the death penalty – are entirely strategic decisions best left to the trial counsel in the courtroom. The Supreme Court has recognized that there are standards that control the performance of counsel in capital cases. *Wiggins v. Smith*, 529 U.S. 510, 535 (2003). The Supreme Court has for forty years also recognized that it is necessary to inquire into the biases of potential jurors. *Witherspoon v. Illinois, supra; Morgan v. Illinois*, 504 U.S. 719 (1992)

This Court has recognized that preventing defense counsel from informing jurors that a victim was a three year old child and questioning them if they would be able to fully consider a life sentence for someone who killed a three year old was an abuse of discretion denying the defendant a careful and searching voir dire. *State v. Jackson*, 107 Ohio St. 3d 53, 2005-Ohio-5981, ¶ 49-62. Clearly there are constitutional limitations on the “strategic decisions” of counsel during voir dire. Those limitations were breached here by counsel’s failure to question prospective jurors about their ability to consider imposition of the death penalty.

D. The Trial Court Refused to Permit Counsel To Fully Examine Prospective Jurors About Potential Mitigating Evidence, About Whether They Could Consider A Life Sentence For Someone Who Had Killed An Elderly Woman in Her Home Or Whether They Would Automatically Vote For Death Upon A Showing Of Guilt. The Failure to Fully Examine On These Subjects Resulted In Jurors Who Would Automatically Vote For The Death Penalty And Who Would Not Consider Mitigating Evidence.

In Section I.D., Davis demonstrated that the court would not permit the careful and searching voir dire into the specific facts of this case that may have been particularly inflammatory and aggravating, specifically that Davis was charged with killing an 86 year old woman, in her home, facts that the state emphasized repeatedly throughout the trial. This Court in *State v. Jackson*, 107 Ohio St. 3d 53, 2005-Ohio-5981, ¶ 49-62 found that similar limitations placed on counsel about informing jurors of the age of one of the victims and inquiring about the jurors' ability to consider a life sentence in a case involving a young child was an abuse of discretion depriving Jackson of a fair and impartial jury for the penalty phase. The situation is no different here. The victim was an elderly woman killed in her home. Jurors are as likely to be unable to consider a life sentence in this situation as with a young child – yet counsel was prohibited from inquiring about their feelings.

The state did not address this issue. Davis, therefore, relies on the arguments contained in this Brief on the Merits in support of this argument.

E. Comments By The Prosecutor During Voir Dire Misled The Jurors About Their Role In The Determination Of Sentence And Prevented The Jury From Considering Compelling Mitigating Evidence.

In his Brief on the Merits, Davis demonstrated that during voir dire, the prosecutor discussed with prospective jurors what constituted mitigating evidence, told jurors that they were not required to consider mitigating evidence, and that they had to be unanimous to impose a life sentence at the penalty phase. Davis likewise demonstrated that the prosecutor improperly suggested compelling mitigating factors to the prospective jurors; had the jurors commit that they understood that those were mitigating factors that they would consider in determining a sentence; and then in closing argument argued that the absence of those very same mitigating factors weighed in favor of a sentence of death. The actions of the prosecutor had the effect of narrowing the types of mitigating factors the jury could consider, negating the mitigation that Davis did present, and preventing the jury's consideration of proffered mitigating evidence in violation of the 5th, 6th, 8th and 14th Amendments as well as Art. I, §§ 2, 9, 10, and 16 of the Ohio Constitution.²

² The prosecutor again faults counsel for failing to cite to "controlling authority adverse to their client on these issues." Counsel has been unable to locate another instance where a prosecutor used the particular tactic that the prosecutor used in this trial. Therefore counsel has been unable to locate any "controlling authority" on the subject. As zealous advocates are required to do in such a situation, counsel have made their best arguments based on authority that does exist. The

While all verdicts are required to be unanimous, Ohio law is clear that the failure of the jury to unanimously find that the statutory aggravating circumstances outweigh the mitigating factors, results in a life sentence. *State v. Brooks*, 75 Ohio St. 3d 148 (1996); *State v. Springer*, 63 Ohio St. 3d 167 (1992). Repeatedly emphasizing to the jury that its verdicts in the penalty phase must be unanimous is at best misleading and should not be permitted. Emphasizing that all verdicts must be unanimous dilutes the power invested in one juror by the General Assembly to prevent a sentence of death. See, *State v. Brooks, supra*. This is a critical stage of the deliberations in the penalty phase of a capital case. The prosecutor's repeated comments during voir dire were misleading and intended to dilute the power of one juror to prevent a sentence of death. These comments denied Davis due process and a fair and reliable sentencing determination.

During voir dire, the prosecutor discussed specific mitigating factors that clearly did not exist in this case as compelling mitigating factors that the jurors would have to consider in imposing sentence:

[Mr. Oswalt:] Okay. Let me give you that example. How about this situation. How about that one guy is an 18-year old kid who at about five or six was on the street, maybe ten, because his mom's involved in drugs and he's never had supervision. He turned to the only support system he had, which is a street gang, and as a result, for

prosecutor's suggestions throughout his brief that counsel for Davis has somehow misled this court or behaved in an unethical manner are unsupported and wholly improper. All such comments should be stricken from the brief and not considered by this Court.

the bulk of his life up to his 18 years, all he's known is the life of crime.

On the other hand, down here here's a defendant that's had all kinds of opportunities. He's never been without parental support or family support; without jobs or anything like that. Can you see a difference as to why mitigating factors over here might warrant, you know, this guy may be not -- maybe the death penalty isn't appropriate even though he committed the same crime. But this death penalty might be very appropriate. Everybody follow me?

(Tr. at 479-480) This theme was repeated throughout the voir dire by the prosecutor. He had never lived on the streets or been abandoned by his mother. Despite his protestations to the contrary, the prosecutor was aware that Roland Davis was 48 at the time this crime was committed and that he never lived on the street.

During his first closing argument at the penalty phase, the prosecutor returned to this same theme:

Remember the situation I think I gave all of you in the jury selection process when you were in here six at a time, and I asked you to -- I gave you a scenario of these two identical aggravated robberies. The convenient store two blocks this way and another convenient store two blocks that way. And I asked you to presuppose that the crimes were identical, factually identical in all respects. And I asked each and every one of you, well, can you see if they're identical that there might be reasons to impose the death penalty in one case but not the other. And some of you thought about it and came up with -- most of you, I think, came up with that would be a normal human reaction for most people is, well, it's the same crime, same punishment. And then we talked about, well, what if this guy was 18 years old when he committed the offense and from the age of 10 all he ever knew was the life of crime.

This guy over here was 35 and had all the options in the world. *I submit that this Defendant, Roland Davis, is more like this guy over*

here. Not because he didn't have some abusive childhood, witnessing his mother being assaulted, no, but because for 30 years he's been out of that. For 30 years he's not had to deal with that. For 30 years he's had an opportunity to work, to make something of himself. But in 2000 he nonetheless chose the course of action that you've convicted him of.

(Tr. 2239-40) The prosecutor again relied on those same mitigating factors that he had set up as compelling mitigating factors in voir dire and argued that Roland Davis was not like the eighteen year old kid who had lived on the street, and more like the thirty-five year old who had all the opportunities in the world, and therefore Davis was deserving of death.

Ohio Rev. Code § 2929.04(B) enumerates seven specific statutory mitigating factors that the jury must be permitted to consider. The jury must also be permitted to consider any factor in the record or presented by the defendant that it deems to be mitigating. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1981). The prosecutor during voir dire set up one potential mitigating factor for the juror's consideration, and then argued in the penalty phase that the absence of that mitigating factor weighed in favor of imposing the death penalty. This Court has long recognized that it is improper for the prosecutor to comment on the absence of statutory mitigating factors - or the absence of any other mitigating factors - not raised by the defendant as a reason to impose a sentence of death. *State v. Mills*, 62 Ohio St. 3d 357, 373 (1992) The actions of the prosecutor prevented the jury from considering and giving weight to

the wide range of potential mitigating factors and those mitigating factors presented in violation of Art. I, §§ 2, 9, 10, and 16 of the Ohio Constitution and the 5th, 6th, 8th and 14th Amendments.

F. Failure To Excuse Jurors Who Knew Too Much About The Crime, The Victim Or Roland Davis

Roland Davis relies on the arguments contained in his Brief on the Merits in support of this section.

G. The Prosecutor And The Trial Court Sought Commitments From The Prospective Jurors That They Impose The Death Penalty.

It is not improper for counsel to inquire of prospective jurors if they can follow the law, follow the judge's instructions, and consider the full range of sentences should the case get to penalty phase deliberations. The prosecutor argues that it is also proper for the prosecutor to emphasize to each of the jurors that the juror would have to consider imposing death and signing a death verdict, while never mentioning that in the proper circumstance they would also be required to consider a life sentence and signing a life verdict. A juror who will not consider mitigation and will not consider signing a life verdict is no more qualified to sit as a juror than a juror who will not consider a death verdict or will not consider signing a death verdict. *Morgan v. Illinois*, 504 U.S. 719 (1992)³

³ Despite the obvious misleading nature of this type of questioning, and the obvious failure of the court, the prosecutor, and defense counsel to employ the same type of questioning to weed out those prospective jurors who could not

It is misleading to cull prospective jurors from the venire by demanding that they commit to signing a death verdict while failing to cull from the same pool jurors who would not or could not consider signing a life verdict in any circumstance. Such imbalance denied Davis due process and a fair and reliable sentencing determination in violation of the 5th, 6th, 8th and 14th Amendments as well as Art. I, §§ 2, 9, 10, and 16 of the Ohio Constitution.

H. Failure To Question Juror About Personal Problems That Would Distract From Performing Duties As A Juror And Failure To Remove That Juror.

In his Brief on the Merits, Davis demonstrated that defense counsel failed to question a prospective juror about the harassment she was getting at work for being on the jury and not being able to get herself off of the jury. Juror Wallace ended up serving as the foreperson of the jury. (Tr. 2315) On at least two separate occasions, Juror Wallace reported harassment and disciplinary actions at work for her failure to remove herself from the jury. Defense counsel failed to question her on either occasion despite being offered the opportunity to do so. (Tr. 826, 1079)

The state argues in response that Davis cannot demonstrate prejudice or that this juror was biased against Davis because of her employer's conduct. (Appellee's Brief at 21). Because counsel failed to ask Juror Wallace any

consider a life sentence, the prosecutor expresses great outrage that his questions were not quoted in their entirety. (Appellee's brief at 20) The portion of the prosecutor's questions that were relevant to the argument were quoted.

questions or inquire into her feelings towards the court system, the state, the defendant, or whether any of these feelings would affect her ability to judge the case on the facts presented in the courtroom, no one knows whether or not she may have become biased by this experience. Counsel's failure to inquire left a potentially biased juror on the jury without examining her ability to put that experience aside. This deprived Davis of a fair trial and a fair and reliable sentencing determination as well as due process.⁴

I. Conclusion

The actions of the trial court, the state, and counsel failed to insure that Roland Davis was tried by a fair and impartial jury. There was no "careful and searching voir dire"; the trial court applied the incorrect standard for evaluating death hesitant jurors; no commitments were required for signing a life verdict; no inquiries were made as to whether strong death penalty jurors could fairly consider mitigation and a sentence of life imprisonment; a potentially biased juror was not questioned about attempts to force her off of the jury and the effect this would have on her deliberations. The result was a jury that was not fair and impartial and that denied Roland Davis a fair trial and due process in violation of the Fifth, Sixth,

⁴ To the extent that this claim relies on evidence *dehors* the record for proof of prejudice, Davis hereby specifically retains the right to raise this claim on post conviction pursuant to Ohio Rev. Code § 2953.21.

Eighth and Fourteenth Amendments, and Article I, Sections 2, 9, 10 and 16 of the
Ohio Constitution.

PROPOSITION OF LAW II

THE ADMISSION OF STATE'S EXHIBITS 12A.1 AND 12A.2, WITHOUT IDENTIFICATION OR AUTHENTICATION VIOLATED ROLAND DAVIS' CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS.

Davis demonstrated in his Brief on the Merits, that the tapes of Roland Davis interview were never authenticated or identified, were never played in open court, but were admitted as evidence, and the jury was encouraged to listen to the tapes behind the closed doors of the jury deliberation room. The state acknowledges that there was no stipulation and no written agreement identifying the tape or stipulating its authenticity or stipulating its admissibility. Nonetheless, the state claims the parties did intend to stipulate and accordingly, there can be no error in the admission of an exhibit that was never identified or authenticated.

The intent of the parties is far from clear from this record. Although both the defense and the prosecution argued about the contents of a taped statement, there was never a discussion of Exhibit 12A other than the state's claim that it was "a normal exhibit". There was no stipulation that Exhibit 12A was the taped interview of Roland Davis. The fact that the parties failed to identify or authenticate this tape cannot be ignored. The state's suggestion that the parties intended to stipulate and therefore, the Court should ignore the requirements of the

Ohio Rules of Evidence requiring the proponent of an exhibit to establish a foundation and authenticity is not supported by the record or the law.

The state relies on *State v. Post*, 32 Ohio St.3d 380, 393 (1987) for the proposition that “agreements, wavers and stipulations made by the accused, or by the accused counsel in his presence, during the course of a criminal trial are binding and enforceable.” *Post* dealt with an on the record statement of facts proffered by the State as the sole evidence presented in support of the existence of the statutory aggravating circumstances. This statement was followed by a certificate of defense counsel which was read and signed in the presence of the defendant stating that the defendant would not contest nor deny the truth of the allegations contained in the prosecuting attorney's explanation of circumstances or statement of facts to the court. *Post* at 393.

In stark contrast to the record in *Post*, the record here clearly demonstrates that there was no agreement regarding identification or authentication relating to Exhibit 12A. Thus, there was no agreement or stipulation to rely on. Instead, the trial court improperly instructed the jury that the tape had been identified as Davis' interview when in fact no person ever identified these tapes and no stipulation was entered into as to the identity of the tapes.

Permitting the admission of damaging tapes that were neither identified, authenticated, stipulated, nor played in open court denied Roland Davis due

process and a fair, open, and public trial in violation of Art. I, §§ 2, 9, 10, and 16 of the Ohio Constitution, as well as the 5th, 6th, 8th, and 14th Amendments.

PROPOSITION OF LAW III

THE ADMISSION OF TAPE RECORDINGS AS EVIDENCE WITHOUT FIRST PRESENTING AND AUTHENTICATING THE TAPE RECORDING IN OPEN COURT IN THE PRESENCE OF THE DEFENDANT DENIED DAVIS HIS CONSTITUTIONAL RIGHT TO BE PRESENT AT A CRITICAL STAGE OF THE TRIAL AND TO A TRIAL IN OPEN COURT IN VIOLATION TO THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND ARTICLE I, § 2, 9, 10 AND 16 OF THE OHIO CONSTITUTION. ADDITIONALLY THE ADMISSION OF A TRANSCRIPT OF THESE UNIDENTIFIED TAPES THAT WERE NEVER PLAYED IN THE COURTROOM VIOLATED DAVIS RIGHTS TO DUE PROCESS, A FAIR TRIAL, THE EFFECTIVE ASSISTANCE OF COUNSEL AND A RELIABLE SENTENCING DETERMINATION.

A. The Admission of The Taped Interview

Although the state agrees that the taped interview, a three and one half hour statement of Roland Davis, was admitted without being played in front of the jury, the state argues that there is no basis for concluding that Davis was not present for a critical stage of the proceedings. The state ignores the fact that the state relied on the tape recorded statement as **substantive evidence**. The state mistakenly relies on cases finding that the conduct of certain procedural matters outside the presence of the defendant and in a closed courtroom did not violate due process or deny the defendant an open and public trial.

The presentation of substantive evidence is not the same as a jury instruction conference, *State v. Conway*, 108 Ohio St.3d 214, 222-223, 2006-Ohio-791, or a

jury view, *Snyder v. Massachusetts*, 291 U.S. 97, 107-108 (1934). A jury instruction conference, outside of the presence of the defendant and the jury, is followed by jury instructions given to the jury in the presence of the defendant. A jury view, under Ohio law, is not substantive evidence. *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-791 at ¶19 (jury view is neither evidence nor a crucial stage, (cites omitted)). The three and one-half hour taped interview of Roland Davis by the lead investigating detective in the case was relied on as substantive evidence by the state. It is far different from a jury view or a jury instruction conference held outside of the presence of the jury.

A defendant has both a statutory and constitutional right to be present during critical stages of trial. The presentation of evidence outside the presence of the defendant violates his right to confrontation, his right to a fair trial and his right to due process. The distinction courts have recognized in determining which stages are critical and therefore, which stages require the defendant's presence absent a knowing waiver, is "whenever his presence has a relation, reasonably substantial to the fullness of his opportunity to defend against the charge." *Snyder v. Massachusetts*, 291 U.S. at 105-106. The right to be present during the presentation of evidence is clearly a critical stage of trial. The presentation of evidence is central to the truth finding of a trial. One of the underlying goals of the confrontation clause is that a conviction will not be based on unseen or unknown

evidence. The procedure used here harkens back to the much criticized days of the Star Chamber.

Contrary to the state's claims, the fact that the evidence here was a tape and not a live person does not change the analysis. Although the tape could not be cross-examined, the playing of the tape in the presence of the jury, Roland Davis, the court, counsel and the public during the trial would have assured that the evidence was actually presented and that the tape played was an accurate representation of what occurred. Given the procedure used here, no one knows what evidence the jury actually heard.

Neither Davis, this Court, nor the public have any idea whether the jury listened to the tape, whether the jury listened to the tape in its entirety or whether the tape was audible when/if it was played. Had the tape been played in the courtroom during the trial, Davis and counsel could have made certain the tape was played in its entirety. The record of the trial only contains Sgt. Vanoy's recollection of the interview (in addition to his editorial comments about the meaning of Davis's reactions during the interview). It is critical to our system of justice that the evidence upon which a conviction is based be presented to the jury, in front of the defendant, in open court, and that a record be made of the evidence for later review.

Davis and counsel could have made certain that the tape was audible. Davis and counsel could have made certain that the public and the jury was actually provided the evidence in full. This Court would be able to review the actual evidence presented against Davis rather than relying on Sgt. Vanoy's recollections. These requirements provide the very basis of a full "opportunity to defend against a charge", *Snyder v. Massachusetts, supra*, for due process, and a fair open and public trial, and a fair opportunity for appellate review under Art. I, §§ 2, 9, 10, and 16 of the Ohio Constitution and the 5th, 6th, 8th, and 14th Amendments.

B. The Right To A Public Trial

The State fails to address the public trial argument and as such, Davis will rely on the argument contained in his Brief on the Merits with the following additions.

This Court addressed the Sixth Amendment right to a public trial in two recent cases. In *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, the majority upheld the partial closure of a courtroom at the request of the prosecution during the testimony of certain witnesses. The majority emphasized, among other factors, the presence of media representatives in the courtroom as insuring that witnesses did not change their stories to safeguard the public nature of the trial in upholding the closure. Here, there were no media representatives present when the

taped interview was played (if it was played) since this occurred -- if at all -- behind the closed doors of the jury deliberation room.

The dissent, however, found the closure to be structural error because “key prosecution testimony was presented while the courtroom was closed.” *State v. Drummond*, 2006-Ohio-5084 at ¶271, ¶282.

In a second recent case, a majority of this Court again reiterated the principle that the denial of a public trial is structural error, *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853 at ¶82, and that the right cannot be waived by a defendant’s silence.

The right to a public trial is guaranteed by the Sixth Amendment to the United States Constitution and by Section 10, Article I of the Ohio Constitution. Although Bethel did not object to the closing of the hearing, the right to a public trial under Section 10, Article I of the Ohio Constitution cannot be waived by the defendant's silence. *State v. Hensley* (1906), 75 Ohio St. 255, 266, 79 N.E. 462.

State v. Bethel, supra, 2006-Ohio-4583 at ¶81.

There is nothing in the record before this Court that demonstrates that Davis was advised of his right to be present “at every stage of the trial” or that “every stage” included the right to be present during the presentation of this taped evidence. There is likewise nothing in the record that Davis was informed of his right to an open and public trial or that he made a knowing and intelligent waiver of these rights. Roland Davis is entitled to a new trial where he – and the public are present at all critical states – especially during the presentation of the State’s

evidence, to insure the public's right to hear and examine the evidence, and to insure that a proper record is made of all evidence presented to insure that this Court can review the evidence and provide Davis his right to appellate review. Art. I, §§ 2, 9, 10, and 16 of the Ohio Constitution, the 5th, 6th, 8th, and 14th Amendments.

PROPOSITION OF LAW IV

THE CUMULATIVE AND GRUESOME PHOTOGRAPHS ADMITTED AT TRIAL DEPRIVED ROLAND DAVIS OF DUE PROCESS, A FAIR TRIAL, AND A FAIR AND RELIABLE SENTENCING DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 2, 9, 10 AND 16 OF THE OHIO CONSTITUTION.

Roland Davis relies on the arguments contained in his Brief on the Merits in support of Proposition of Law IV.

PROPOSITION OF LAW V

UNQUALIFIED OPINION TESTIMONY CONCERNING THE TRUTHFULNESS OF A WITNESS OF A DECLARANT USURPS THE FUNCTION OF THE JURY AND DENIED DAVIS DUE PROCESS, A FAIR TRIAL THE RIGHT OF CONFRONTATION, AND THE EFFECTIVE ASSISTANCE OF COUNSEL.

Sgt. Vanoy testified extensively about the investigation of Roland Davis for the murder of Elizabeth Sheeler. Sgt. Vanoy revealed his own thought processes, the apparent thought processes of other members of the Newark Police Department, and most surprisingly the thought processes of Roland Davis during his interviews. The result of this lengthy testimony was that Sgt. Vanoy was able to present his opinions to the jury as to why he and the Newark Police Department believed Roland Davis was guilty of this crime. The testimony of Sgt. Vanoy was improper opinion testimony and invaded the province of the jury on the ultimate question of guilt or innocence.

Sgt. Vanoy was first questioned by the prosecutor whether the police had received information from an out-of-state law enforcement agency in 2004 about Roland Davis as a suspect in this crime. Without ever revealing what this tantalizing bit of information was, Vanoy responded yes, and then continued "since Mr. Davis was a potential suspect. . . ." (Tr. 1320-21) The prosecutor's response was to refer to information not in the record as providing some explanation for this inappropriate question and answer and then relying on this off the record

information to demonstrate that the state was actually assisting Davis to obtain a fair trial by not referring to this. (Appellee's Brief at 41, fn 26) As this relies on information not in the record before this Court, the prosecutor's response should be stricken and not considered by this Court.

The state further attempts to distinguish this Court's controlling authority by suggesting that Sgt. Vanoy was actually giving factual testimony rather than opinion testimony when he stated that Davis was being deceptive or lying. The prosecutor's arguments are disingenuous. Sgt. Vanoy repeatedly gave his opinion that Davis was deceptive or lying. These were not factual observations but clear expressions of his opinion:

"Just very non-committal, very wishy washy about it." (Tr. 1333)

"He had a lot of qualifying statements throughout our contact with him. . . . So he made a lot of qualifying statements and he didn't commit to a whole lot" (Tr. 1337)

"Again, this came at the very end, towards the very end of the interview. And again, I -- ..., as best as I can recall it was just kind of like a -- just a light bulb went off . . . I mean, it was just -- it was a 360. . . . You know, we had someone who was being *very deceptive* to us. . . ." (Tr. 1348-50)

Sgt. Vanoy's running commentary about the meaning of Davis' responses and the truthfulness of those responses, permitted Sgt. Vanoy to express his opinion that Davis was lying, ("You know, we had someone who was being very deceptive to us"), and why and how he got to that belief that Davis was lying,

usurping the role of the jury to determine the truthfulness of a defendant's statement. This was particularly improper since the taped interview was never played in open court. (See Propositions of Law II and III)

The truthfulness of a witness' testimony or statement is exclusively within the province of the jury. It is never properly the subject of opinion testimony. See, *State v. Boston*, 46 Ohio St.3d 108 (1989), *State v. Eastham*, 39 Ohio St.3d 307, 312 (1988) (Brown, J., concurring stated that such an opinion '* * * acted as a litmus test of the key issue in the case and infringed upon the role of the fact finder, who is charged with making determinations of veracity and credibility. * * * In our system of justice it is the fact finder, not the so-called expert or lay witnesses, who bears the burden of assessing the credibility and veracity of witnesses.' ") The prosecutor's attempt to classify these as factual statements that Davis was deceitful or lying are unfounded. These were opinion statements by Sgt. Vanoy that he was not qualified to give and that invaded the province of the jury.⁵

The state further argues that the best evidence rule does not require that the tape be played but fully permits a party to the interview to relate what was said in the interview. If the best evidence rule means anything it means that a tape

⁵ The state relies on the unreported case of *State v. Adrian*, (2d District CA), 2006 WL 2335599, as permitting this type of questioning. *Adrian* is pending in this Court on a Memorandum in Support of Jurisdiction filed by Adrian and a cross-appeal filed by the state.

recording of an interview will provide the jury a more realistic and straightforward picture of what actually transpired at the interview than the police officer's recollection - especially where interspersed with the officer's commentary and opinion. Here the tape recording of the interview was neither played for the jury in open court nor authenticated by the proponent of the exhibit. It was relied on by the state as substantive evidence. If heard at all by the jury it was heard behind the closed doors of the jury deliberation room.

The practice employed here of neither authenticating nor playing the tape in open court but relying on Sgt. Vanoy's heavily editorialized presentation of his recollection of the interview represents a disturbing trend of permitting the state to prove cases based on the recollection and opinion of police officers rather than actual evidence demonstrating what occurred. If the constitutional guarantees of due process and fundamentally fair trials (especially in capital cases) mean anything, they mean that persons can only be convicted upon the presentation of real evidence in open court, not on the presentation of law enforcement officers that they believe the defendant is lying or that he is guilty. Art. I, §§ 2, 9, 10, and 16 of the Ohio Constitution, and the 5th, 6th, 8th, and 14th Amendments to the United States Constitution.

There was no reason for Sgt. Vanoy to testify as to the contents of Davis' interrogation. The tape was available as was a transcript of the tape. Both the tape

and the transcript were provided to the jury (along with a tape player) during their deliberations at both phases of the trial. There was no reason for Sgt. Vanoy to be permitted to give his opinion about the veracity of Davis' statements or about Davis' reactions to questions. See also, Discussion of Evid. R. 702 and the gate-keeping role of the trial court in admitting only reliable testimony that will assist the trier of fact in this Court's recent opinion in *Valentine v. Conrad*, 110 Ohio St. 3d 42, 2006-Ohio-3561. See also, discussion at Proposition of Law VI of this Reply Brief.

Roland Davis was denied due process and a fair trial by the testimony of Sgt. Vanoy in violation of Art. I, §§ 2, 9, 10, and 16 of the Ohio Constitution and the 5th, 6th, 8th, and 14th Amendments.

PROPOSITION OF LAW VI

BEFORE PRESENTING “EXPERT” TESTIMONY, THE STATE MUST ESTABLISH THE SCIENTIFIC OR OTHER BASIS FOR THE TESTIMONY AND ESTABLISH THAT THE “EXPERT” HAS THE QUALIFICATIONS AND TRAINING TO RENDER AN OPINION. *DAUBERT v. MERRILL DOW PHARMACEUTICALS, INC.* 509 U.S. 579 (1993). THE PRESENTATION OF “EXPERT” TESTIMONY WITHOUT FIRST ESTABLISHING EITHER THE SCIENTIFIC BASIS OR THE QUALIFICATIONS OF THE “EXPERT” DEPRIVED DAVIS OF DUE PROCESS AND A FAIR TRIAL

Det. Elliget was permitted to testify on a wide range of subjects. His expertise was not demonstrated for any of these subjects. Trial courts have a gate-keeping responsibility to insure that expert testimony presented to a jury comports with the requirements of Ohio R. Evid. 702, that it is reliable, and that there is a valid connection between the area of expertise and the conclusions stated by the expert. *Valentine v. Conrad*, 110 Ohio St. 3d 42, 2006-Ohio-3561; *Daubert v. Merrill Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993); *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999).

Ohio R. Evid. 702 states: “A witness may testify as an expert if all of the following apply:

- (A) The witness’ testimony either relates to matter beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons.;
- (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent the testimony reports the result of a procedure, test, or experiment; the testimony is reliable only if all of the following apply:

- (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts of principles;
- (2) The design of the procedure, test or experiment, reliably, implements the theory;
- (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

See, *Valentine v. Conrad, supra*.

None of the requirements of Ohio R. Evid. 702 were met here, based entirely -- according to the prosecutor -- on defense counsel's blanket stipulation to Det. Elliget's "qualifications." However, as this Court has recently observed:

[t]he qualification and reliability requirements of Evid. R. 702 are distinct. Because even a qualified expert is capable of rendering scientifically unreliable testimony, it is imperative for a trial court, as gatekeeper, to examine the principles and methodology that underlie the expert's opinion. [(citing *Daubert, supra*, and *Gen'l Elec. Co. v. Joiner* (1997), 522 U.S. 1356, 142)] It is that determination that ensures that testimony will be helpful to the trier of fact.

Valentine v. Conrad, 2006-Ohio-3561, ¶ 17. It is this complete failure to qualify Det. Elliget to testify on the specific areas he testified about and the complete failure of the trial court to "examine the principles and methodology that underlie [Det. Elliget's] opinion" that rendered all of his testimony unreliable and inadmissible.

Roland Davis was thus denied due process and a fair trial by the admission of the unreliable and untested "expert" testimony of Det. Elliget in violation of Art. I, §§ 2, 9, 10, and 16 of the Ohio Constitution and the 5th, 6th, 8th, and 14th Amendments.

PROPOSITION OF LAW VII

REPORTS PREPARED BY AN EXPERT WITNESS AND RELIED ON BY THAT WITNESS DURING HER TESTIMONY AND SUBJECT TO CROSS-EXAMINATION ARE ADMISSIBLE AS EXHIBITS WHEN REQUESTED BY THE PARTY OPPONENT. THE TRIAL COURT'S EXCLUSION OF SUCH REPORTS OF THE STATE'S DNA EXPERT DENIED ROLAND DAVIS HIS RIGHT TO A FAIR TRIAL, DUE PROCESS AND A RELIABLE SENTENCING DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I §§ 2, 9, 10 AND 16 OF THE OHIO CONSTITUTION.

The state claims that the business record exception to the hearsay rule was not specifically argued to the trial court and accordingly was waived on appeal. The failure to present this argument to the attention of the trial court was raised as an example of the denial of the effective assistance of trial counsel in footnote 33 of Davis' Merit Brief. In addition, it was the state, not the defense, who objected on the grounds of hearsay to the admission of the report. Contrary to the state's claims, the trial court did not clearly explain why it refused admission of the report. It is not clear that the trial court ever found the report inadmissible because it was "hearsay": "[T]he jury heard everything that she testified to and I'll argue it that way, *which isn't hearsay* as the report could be. I'll sustain the objection on that basis." (Tr. at 1798, emphasis supplied) The state interprets this somewhat cryptic statement to mean that the trial court found the report to be cumulative.

Additionally, the state argues that admission of this report would have

placed undue emphasis on a single witness because no other expert witness was presented. This rather disingenuous twist ignores the fact that Meghan Clement was the *state's* expert. The state now argues that permitting the report of the state's expert to be admitted at the request of the defense would have put undue influence on the state's expert's testimony. Such an argument defies logic. There is no rule that prohibits the admission of the state's expert's report at the request of the defendant because it may place undue influence on the state's expert.

Moreover, this argument ignores the actual testimony and the cross-examination of state's witness Meaghan Clement. The defense was able to question her about problems revealed in this report including that there were additional alleles that appeared in these samples, that these additional alleles were all consistent with Sheeler's DNA profile, that there was additional activity in several of the loci that could be a different allele – not attributable to Davis. (Tr. at 1744-45) Moreover, Sheeler's blood had degraded to a point where no alleles could be determined for at least four of the loci. (Tr. at 1746) Clement also acknowledged that in certain loci, there was not a clear indication of major profile versus minor profile so those loci were not included in the statistical estimate. (Tr. at 1749) While the report supported, to some extent, the state's theory, it also revealed discrepancies in that theory that a jury may well have been troubled by. Thus to claim that the admission of the report would somehow put undue emphasis

on the state's expert witness, ignores the fact that the net effect of Clement's testimony was much more balanced and less compelling than the state wants to acknowledge.

The state also claims that it is within the trial court's discretion to exclude "needlessly cumulative" evidence suggesting the report was needlessly cumulative because the jury heard the testimony. Such claim ignores the complexity of the testimony. Clement testified about fourteen different alleles, with titles that included D3S1358, vWA, FGA, D8S1179, D21S11, D18S51, D5S818, D13S317, D7S820, D16S539, THO1, TPOX, CSF, and Amelogenin -- across four different locations. Clement did not repeat each allele, where it was found, and what part of the matter matched Sheeler, Davis, or neither of them during her testimony, but referred to her report which was used as an exhibit by both the State and the defense during her direct and cross examination.

This was complicated, lengthy and specific testimony. It is impossible to remember this information in the context that it was presented. The report summarized the findings and presented a chart that allowed an easier understanding of which alleles were found where and who they matched or shared characteristics with. The report was in no way needlessly cumulative. A fairer characterization of the report would be that it was essential to an understanding of Clement's entire testimony. The state's argument to the contrary supports this very

claim. The state opposes admission of the report because it casts doubt on the state's theory. Such reasoning cannot logically support its exclusion.

Finally the state argues that forensic reports that are prepared in anticipation of a specific case cannot meet the business record exception to the hearsay rule. The state claims that when a document is prepared in anticipation of specific litigation, the underlying rationale of the business record exception, i.e., trustworthiness, is lacking, (Appellee's Brief at 54) citing *State v. Lane*, 108 Ohio App.3d 477 (1995). The court in *State v. Lane* disagreed with the Eighth District's appellate court finding in *State v. Fontenette* (Sept. 19, 1991), Cuyahoga App. No. 59014. The *Lane* court held that when a document is prepared in anticipation of specific litigation, the underlying rationale of trustworthiness is, arguably supplanted by a natural motivation to color the facts in favor of the party requesting that the document be generated. *State v. Lane, supra* at 489. This rationale is inapplicable under the circumstances here because it is the defense that requested the admission of the report of the state's expert not the state. Thus, either there is no bias or the defense recognized that the essential information contained in the report was more probative than any alleged bias.

The state's argument that the defense only sought admission of one page of the report is incorrect. The defense sought admission of the entire report identifying it as Defense Exhibit L. (Tr. at 1795) When, during deliberations, the

jury asked for the chart used by the defense in closing, the defense identified that as a portion of Defendant's Exhibit L. (Tr. at 1970) Clearly the defense sought admission of the entire report and the court should have admitted the entire report.

Exclusion of this exhibit denied Davis the opportunity to fully confront the State's expert. While Davis was able to cross-examine Clement, the jury was prevented from examining the critical document that formed the basis of Clement's opinion and the basis for cross-examination.⁶

For all of these reasons, as well as those set forth in Davis Merit Brief, the court's exclusion of Defense Exhibit L denied Davis his right to confront witnesses, and to due process, a fair trial, and a fair and reliable sentencing determination as well as the effective assistance of counsel in violation of the 5th, 6th, 8th and 14th Amendments and Art. I §§ 2, 9, 10, and 16 of the Ohio Constitution.

⁶ To the extent that counsel did not fully object to the exclusion of Clement's report as an exhibit, or in response to the jury's request, counsel's performance fell far below the prevailing professional norms and was therefore unreasonable, denying Davis the effective assistance of counsel under the 5th, 6th, 8th and 14th Amendments, and Art. I, §§ 2, 9, 10 and 16 of the Ohio Constitution.

PROPOSITION OF LAW VIII

ROLAND DAVIS WAS DEPRIVED OF A FAIR AND RELIABLE DETERMINATION OF HIS GUILT OF INNOCENCE IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND SECTIONS 2, 9, 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION, BY THE TRIAL COURT'S ERRONEOUS JURY INSTRUCTIONS AT THE PENALTY PHASE.

Roland Davis relies on the argument contained in his Brief on the Merits in support of Proposition of Law VIII.

PROPOSITION OF LAW IX

DAVIS WAS DENIED HIS RIGHT TO A FAIR TRIAL, DUE PROCESS OF LAW AND A FAIR AND RELIABLE SENTENCING DETERMINATION BECAUSE THE STATE OFFERED INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION ON THE AGGRAVATING CIRCUMSTANCE OF KIDNAPPING OR THE CHARGE OF KIDNAPPING.

Roland Davis relies on the argument contained in his Brief on the Merits in support of Proposition of Law IX.

PROPOSITION OF LAW X

THE FAILURE TO MERGE THE KIDNAPPING AND AGGRAVATED ROBBERY SPECIFICATIONS OF STATUTORY AGGRAVATING CIRCUMSTANCES RESULTED IN THE JURY WEIGHING DUPLICATIVE AND CUMULATIVE AGGRAVATING CIRCUMSTANCES THEREBY DENYING DAVIS DUE PROCESS AND A FAIR AND RELIABLE SENTENCING PHASE AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 2, 9, 10 AND 16 OF THE OHIO CONSTITUTION.

Roland Davis relies on the argument contained in his Brief on the Merits in support of Proposition of Law X.

PROPOSITION OF LAW XI

JURY INSTRUCTIONS AT THE PENALTY PHASE MUST CONVEY TO THE JURY ADEQUATE INFORMATION TO PROPERLY GUIDE THE JURY'S EXERCISE OF ITS DISCRETION. THE INSTRUCTIONS HERE FAILED TO PROVIDE THE MANDATED GUIDANCE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AS WELL AS ARTICLE I, §§ 2, 9, 10 AND 16 OF THE OHIO CONSTITUTION.

Roland Davis relies on the argument contained in his Brief on the Merits in support of Proposition of Law XI.

PROPOSITION OF LAW XII

THE PROSECUTOR HAS AN OBLIGATION TO SEEK JUSTICE AND TO REFRAIN FROM UNFAIRLY SEEKING A CONVICTION OR SENTENCE OF DEATH BASED ON IMPROPER EVIDENCE, IMPROPER ARGUMENT AND OTHER MISCONDUCT UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, §§ 2, 9, 10, AND 16 OF THE OHIO CONSTITUTION.

A. The Prosecutors Improperly and Repeatedly Vouched for and Stated Expressions Of Personal Belief.

The state suggests that the prosecutor's statements asking "do these people appear to you to be people that would come in here and identify the person as a murderer unless they were certain?" was merely a comment designed to get the jurors thinking about the type of witnesses these people were. This comment immediately followed a more egregious comment -- claiming these people were "absolutely, positively certain" -- that the defense successfully objected to. In response, the prosecutor did the same thing -- suggesting that he somehow knew these witnesses and they were to be believed but couched it in the form of a question. Ignoring the court's order sustaining counsel's objection while repeating the same message couched in the form of a question did not sanitize the improper comment.

Next the state suggests that the following was merely a comment on the level of expertise of its witnesses:

“I’m not the expert, these folks are. And as long as DNA has been around and as many cases these folks have done – that is, these folks being officer, Detective Elliget, Dr. Tejwani, Meghan Clement, and their degrees and stuff, they know these things more than we can hope to know, if we hope to know it at all.

...

The likelihood of Randy Davis being a suspect is – or being involved in this on this evidence is zero, unless you believe the combined total experience of two DNA experts of about – if I added correctly, about 37 years, don’t know what they are talking about.”

Tr. at 1918.

This line of argument went far beyond a comment on expertise. It suggested that the jury should not question anything any expert that testified on behalf of the state testified about because all the experts together knew far more than the jurors could ever know and the DNA experts together could not be wrong. This is vouching. It is improper. It encouraged the jury to ignore the evidence and merely trust the state’s experts.

B. Comment on Missing Witness

The state argued that the prosecutor’s comments about the absence of defense experts (the court actually sustained the objection) was merely an attempt to show that the state’s experts engaged in some type of “peer review” offered by the defense. This argument is absurd. The state went out of its way to argue that the defense had no expert witnesses, that the state’s experts with all of their knowledge and expertise (see above) should be believed, and that anything that

caused the jury to doubt the experts' conclusions should not be admissible. (See, Proposition of Law No. 7) This tactic was aimed at convincing the jury to substitute the experts' opinions for their own. It was improper. It was also not an isolated event -- the state repeatedly employed this tactic throughout the trial.

C. Victim Impact Evidence

The state creates fictional reasons to justify the repeated presentation of victim impact evidence. For example, the state argues that the prosecutor's repeated references to the fact that the victim was an 86 year old woman was necessary to explain why an assailant would not have any visible injuries. Davis never claimed that the absence of visible injuries on Davis indicated his innocence. Davis was not arrested for this crime until several years after it occurred. Moreover, repeating the victim's age more than thirteen times during the course of the trial was unnecessary to establish that the perpetrator would not have visible injuries, and served to inflame the passions of the jury against Davis.

The victim's age and photograph were repeatedly displayed to the jury served to create a non-statutory aggravating circumstance based on the advanced age of the victim. (See, Appellee's Brief at 80 virtually admitting this point) For these reasons as well as those set forth in Davis's initial brief, this Court should find the repeated introduction of victim impact evidence cannot be condoned and

that it denied Davis due process, a fair trial and a fair and reliable sentencing determination.

E. Denigration of Defense counsel

The state suggests that because the prosecutor told the jurors in opening statement that he did not expect defense counsel to do anything “sneaky” during the course of trial, that he could not have denigrated defense counsel in closing. While the prosecutor’s statement in opening is in and of itself objectionable, the state’s related claim is ludicrous. The prosecutor’s “colorful” argument went beyond merely pointing out that two DNA experts testified in a manner that helped the state. (See, Appellee’s Brief at 82)

Instead, the argument ridiculed the defense theory on a point that the jury was clearly focused on during deliberations and had a right to be focused on given the problems with Clement’s analysis. (See discussion at Proposition of Law VII) Clement’s report established that there was not an exact match between Davis’s profile and either of the samples submitted. This evidence, as well as the testimony relating to the shared DNA between paternal relatives, created a reasonable doubt about the statistics used by the state’s experts to suggest that there was only a 1 in 37 quadrillion or 1 in 6 billion chance of this DNA belonging to someone other than Davis. The prosecution’s improper argument ridiculing the defense theory was not only prejudicial but infringed on his right to effective

counsel and his right to a fair trial under the 5th, 6th, 8th and 14th Amendments, as well as Art. I, § 2, 9, 10 and 16 of the Ohio Constitution. *See, State v. Keenan*, 66 Ohio St.3d 402, 406 (1993).

Conclusion

A review of the record reveals a consistent pattern of improper argument, improper comments and improper questions by the prosecutor. For these reasons, as well as the reasons set forth in Davis' Merit Brief, this Court should find that the prosecutor here, overstepped proper boundaries and repeatedly committed misconduct that prejudiced Roland Davis thereby violating his rights under the 5th, 6th, 8th, and 14th Amendments as well as Article I, §§ 2, 9, 10, and 16 of the Ohio Constitution.

PROPOSITION OF LAW XIII

THE REPRESENTATION PROVIDED TO ROLAND DAVIS FELL FAR BELOW THE PREVAILING NORMS FOR COUNSEL IN A CAPITAL CASE, WAS UNREASONABLE, AND AFFECTED THE OUTCOME IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AS WELL AS ART. I, § 2, 9, 10, AND 16 OF THE OHIO CONSTITUTION.

Davis demonstrated in his Merit Brief that trial counsel's performance fell far below the prevailing professional norms, and deprived Davis of the effective assistance of counsel.

A. Pre-Trial

1. Expert And Investigative Assistance.

Davis relies on the arguments contained in his Merit Brief in support of this section.

2. Restraints On Davis During Trial

The state argues *Deck v. Missouri*, 544 U.S. 622 (2005) is incorrectly cited for the proposition that it is prejudicial *per se* to have restraints on the accused, absent a demonstration that such restraints are necessary. The state argues that *Deck* only applies to visible restraints. The state ignores the fact that there was never a hearing to justify placing any restraints on Davis-visible or not visible.⁷

⁷ The record does not reflect whether the restraints used were visible to the jury. However, the record does reflect that restraints were ordered in the absence of any

The state failed to make any showing of a need for such heightened security. It is the state's burden to establish the need for restraints. The prejudice arising from the use of restraints is set forth in Davis' Merit Brief and will not be repeated here. Trial counsel's failure to object or require the state to establish some reason for the restraints throughout Davis' trial fell below prevailing professional norms for capital counsel in 2005, and was therefore unreasonable.

3. Litigating Admissibility of DNA By Stipulation

The state suggests that counsel's failure to litigate the DNA motion was reasonable because Davis obtained free discovery without revealing anything of his own case. (Appellee's Brief at 97). The state's argument makes little sense and more importantly, fails to address the fact that counsel failed to litigate a meritorious motion except by stipulation. Under Ohio R. Crim. P. 16, Roland Davis was entitled to the underlying information and test results including the validation studies, the test kits and the personnel involved in collecting and preserving the DNA samples. Counsel did not have to file a sham motion in an attempt to obtain this information. The fact that this information was obtained as a result of the stipulation does not excuse in any manner counsel's failure to prepare for and zealously litigate the motion.

evidence offered by the state justifying restraints or any findings by the Court as to why restraints were necessary.

Strickland v. Washington, 466 U.S. 668 (1984) cautions reviewing courts not to accept *post-hoc* rationalizations for counsel's conduct. Yet this is exactly what the state is offering. Counsel has certain obligations in a criminal case. Those obligations are even greater in a capital case. One of those obligations is to test the state's case at every opportunity. Counsel completely failed to do so here.

B. Trial Phase.

1. Counsel's Stipulations

The state's post-hoc view of trial counsel's numerous stipulations was that trial counsel could avoid being seen as an "obstructionist". (Appellee's Brief at 99). There is a difference between being an "obstructionist" and being an advocate. Counsel's numerous stipulations relieved the state of its burden of proof and encouraged a view that defense counsel was merely going through the fewest number of motions and objections possible to get through the trial. Counsel has an obligation to test the state's case. Here counsel completely abdicated that obligation.

2. Admission of Unidentified Tape Never Played in Courtroom

Contrary to the state's claim, this is not merely a rehashing of Proposition of Law Nos. II and III. This argument raises a separate constitutional claim that Davis was denied the effective assistance of counsel when substantive evidence relied on by the state to establish his guilt was presented outside the presence of his

counsel. As set forth in the initial brief, the complete denial of counsel at a critical stage of trial gives rise to a presumption of prejudice. *United States v. Cronin*, 466 U.S. 648 (1984). Davis was denied counsel when the state presented and counsel acquiesced in the presentation of substantive evidence outside of the presence of counsel, the defendant, and the public. Davis was convicted based on unseen and unheard evidence without the assistance of counsel. Counsel's performance in permitting substantive testimony to be submitted to the jury without the presence of counsel, the defendant, or the public fell below the prevailing professional norms for counsel representing indigent capital defendants.

Because the State fails to address the remaining portions of Davis's ineffective assistance of counsel claim, Davis relies on the arguments presented in his Merit Brief in support of those claims.

C. Penalty Phase.

To the extent that Davis' claim that the failure to present a forensic psychologist at the penalty phase is dependent upon evidence *dehors* the record and is therefore not subject to proof in this appeal, Davis reserves the right to litigate this claim with evidence *dehors* the record in his Petition for Post-Conviction Relief pursuant to Ohio Rev. Code, § 2953.21, *et seq.* To the extent it can be demonstrated based on the record before this Court, it is clear that Davis was deprived of the effective assistance of counsel.

In addition, the remaining claims in this Proposition of Law are capable of resolution based on the record before this Court. Because the Ohio procedural rule is clear--if appellant is represented by new counsel on appeal and the issue is capable of being resolved on the record, ineffective assistance of counsel claims must be raised on direct appeal, these claims must be addressed. See, *State v. Lentz*, 70 Ohio St. 3d 527, 530 (1994)

The state's post trial rationalizations for defense counsel's stipulations of records are pure speculation. There is no adequate substitute for the compelling impact to be gained by explaining the devastating effects on a child of being placed in an orphanage and abandoned by parents and grandparents. This compelling story was completely lost by counsel's stipulation of the extensive children's home records here. This was a capital sentencing proceeding where the emotional impact of a person's devastating childhood may be most compelling. See, *State v. Tenace*, 109 Ohio St. 3d 255, 2006-Ohio-2417, ¶¶ 69-104, 107. The failure to present an explanation of these records was a failure to present a compelling story of Davis' background.

The state's suggestion that these records may not have been able to be authenticated is irrelevant. The point is that these records should not have been the only evidence of this significant and tragic childhood trauma. Counsel has a duty to humanize a capitally convicted defendant. *State v. Tenace, supra*. Presenting

live testimony and explaining the effect of such trauma on a child is one of the obligations recognized by the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) as well as case law. See, i.e., *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003). This claim is apparent on the record. There was significant compelling mitigating evidence that was never explained to the jury. Counsel completely failed to properly present this evidence and argue its effect in closing argument. Counsel fell below the prevailing professional norms of capital counsel.

For the foregoing reasons, as well as those set forth in Davis' Merit Brief, this Court should find that Roland Davis was denied his right to the effective assistance of counsel in violation of 5th, 6th, 8th, and 14th Amendments as well as Article I, §§ 2, 9, 10, and 16 of the Ohio Constitution.

PROPOSITION OF LAW XIV

ROLAND DAVIS WAS CONVICTED AND SENTENCED TO DEATH IN A TRIAL CONDUCTED IN AN EMOTIONAL ATMOSPHERE WHERE THE PROSECUTOR EXPLOITED THE EMOTIONAL IMPACT OF EVIDENCE ABOUT THE VICTIM IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AS WELL AS ARTICLE 1, SECTIONS 2, 9, 10 AND 16 OF THE OHIO CONSTITUTION.

Roland Davis relies on the arguments contained in his Merit Brief in support of Proposition of Law XIV.

PROPOSITION OF LAW XV

THE DEATH SENTENCE IMPOSED ON ROLAND DAVIS IS DISPROPORTIONATE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Roland Davis relies on the arguments contained in his Merit Brief in support of Proposition of Law XV.

PROPOSITION OF LAW XVI

THE OHIO SENTENCING REVIEW PROCESS AS IMPLEMENTED BY THE TRIAL COURT DENIED ROLAND DAVIS AN ADEQUATE SAFEGUARD AGAINST THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY. THE DEATH PENALTY IN THIS CASE IS INAPPROPRIATE UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AS WELL AS ARTICLE I, §§ 2, 9, 10, AND 16 OF THE OHIO CONSTITUTION.

Roland Davis relies on the arguments contained in his Merit Brief in support of Proposition of Law XVI.

PROPOSITION OF LAW NO. XVII

OHIO'S DEATH PENALTY LAW IS UNCONSTITUTIONAL. OHIO REV. CODE ANN. §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, 2929.05, AND 2929.06 ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED TO ROLAND DAVIS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ART. I, §§ 2, 9, 10, 16 OF THE OHIO CONSTITUTION. FURTHER, OHIO'S DEATH PENALTY STATUTE VIOLATES THE UNITED STATES' OBLIGATIONS UNDER INTERNATIONAL LAW.

Roland Davis relies on the arguments contained in his Merit Brief in support of Proposition of Law XVII.

PROPOSITION OF LAW XVIII

A TRIAL COURT MAY NOT SENTENCE A DEFENDANT TO MAXIMUM AND CONSECUTIVE SENTENCES BASED ON FACTS NOT FOUND BY THE JURY OR ADMITTED BY DEFENDANT. THIS VIOLATED DAVIS' CONSTITUTIONAL RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §10 AND 16 OF THE OHIO CONSTITUTION.

Roland Davis relies on the arguments contained in his Merit Brief in support of Proposition of Law XVIII.

CONCLUSION

For all of the reasons stated herein and in Davis' Merit Brief, this Court should reverse the conviction and sentences imposed on Roland Davis and remand this case to the trial court for a new trial and/or a capital and non-capital sentencing procedures that comply with the dictates of the Ohio Statutes, the 5th, 6th, 8th and 14th Amendments, and Art. I, §§ 2, 9, 10, and 16 of the Ohio Constitution.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing BRIEF ON THE MERITS was delivered by regular U.S. Mail to Robert Becker Prosecuting Attorney, and Kenneth Oswald Assistant Prosecuting Attorney, County Administration Building, 20 S. Second St., 4th Floor, Newark, OH 43055 this 28th day of November, 2006.



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