

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Supreme Court Case No. 04-586
Appellee, : Trial Court Case No. 03-CR-358
-vs- :
JOHN DRUMMOND, : **DEATH PENALTY CASE**
Appellant. :

APPELLANT JOHN DRUMMOND'S APPLICATION FOR REOPENING

PAUL J. GAINS
Mahoning County Prosecuting Attorney

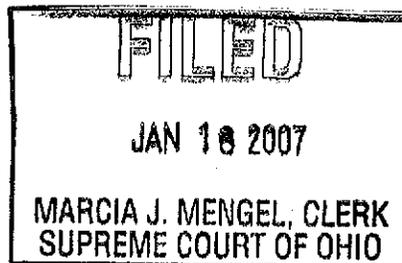
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MEMORANDUM IN SUPPORT

Appellant John Drummond respectfully requests that this Court grant his Application for Reopening under Ohio Sup. Ct. Prac. R. XI, § 6, and State v. Murnahan, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992), because of the denial of effective assistance of counsel during his direct appeal. An application should be granted if a genuine issue exists regarding whether the applicant was denied effective assistance of appellate counsel. Because of the page limitation imposed by this Court's rule, Appellant Drummond is unable to fully brief the issues prior appellate counsel did not raise and requests that this Court grant the application for reopening so that complete and proper briefing on the issues can be presented to this Court.

A. PROCEDURAL HISTORY

John Drummond Jr. was convicted in the Mahoning County Court of Common Pleas of aggravated murder and sentenced to death. The trial court had appointed defense counsel to present Drummond at trial. Attorneys John P. Laczko and Dennis A. DiMartino represented Drummond on his direct appeal to this Court. Drummond filed a timely notice of appeal, and on October 18, 2006, this Court denied his appeal of right. State v. Drummond, 111 Ohio St. 3d 14, 2006-Ohio-5084, 854 N.E.2d 1038.

B. REOPENING IS REQUIRED

After a review of the direct appeal brief that was filed on Drummond's behalf, it appears that his appellate counsel were ineffective for failing to raise and to properly brief meritorious issues that arose during Drummond's capital trial (see Exhibit A attached and incorporated herein). Furthermore, counsel failed to identify and raise the violation of Drummond's Sixth Amendment right to a public trial. It was only after this Court sua sponte ordered the parties to address the issue in a supplemental brief that counsel did so. See Entry, Nov. 4, 2005. Appellate

counsel's failures raise a genuine issue of whether Drummond received his right to effective assistance of appellate counsel on his direct appeal. The lack of effective assistance of appellate counsel prejudiced Drummond.

C. PROPOSITIONS OF LAW

The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees effective assistance of counsel on a criminal appeal as of right. Evitts v. Lucey, 469 U.S. 38 (1985). Appellate counsel must act as an advocate and support the cause of the client to the best of their ability. See, e.g., Anders v. California, 386 U.S. 738 (1967); Penson v. Ohio, 488 U.S. 75 (1988). Failure to present a meritorious issue for review constitutes ineffective assistance of appellate counsel. See, e.g., Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987); Peoples v. Bowen, 791 F.2d 861 (11th Cir. 1986). Furthermore, appellate counsel failed to develop the issues before this Court. Their brief fails to set forth in adequate detail the factual and legal basis for their propositions of law.

Had Drummond's direct appeal counsel properly presented the following meritorious issues to this Court, the outcome of his appeal would have been different:

Proposition of Law No. I: Appellant's Sixth Amendment right to effective assistance of counsel was violated when his defense attorneys failed to devote sufficient time to preparing for trial; failed to maintain the attorney-client relationship; failed to object to prosecutorial misconduct; failed to object when the trial court vouched for a state's witness with inappropriate humor; failed to object when the trial court demeaned the proceedings with inappropriate humor; failed to object to or move to strike speculative answers and a State witness's prejudicial answer regarding remorse; failed to prepare their penalty-phase expert witness; and failed to prepare and present relevant mitigating evidence. U.S. Const. amends. VI, VIII, XIV; Ohio Const. Art. I, §§ 10, 16.

Proposition of Law No. II: The trial court violated Appellant's Sixth and Fourteenth Amendment rights to a fair trial and due process when it admitted prejudicial photographs during the trial; demeaned the proceedings by using inappropriate humor during the trial; improperly vouched for a State witness by using inappropriate humor; failed to grant defense counsel's objection to a prejudicial identification of an audience member; failed to grant defense counsel's objection to improper evidence of the

defendant's alleged lack of remorse; and made rulings that prejudiced the defense. U.S. Const. amends. VI, XIV; Ohio Const. Art. I, §§ 10, 16.

Proposition of Law No. III: A capital defendant is denied substantive and procedural due process rights to a fair trial and a reliable sentence when the prosecutor commits acts of misconduct during the capital trial. U.S. Const. Amends. VI, VIII, XIV; Ohio Const. Art. I, §§ 9, 10, 16.

Proposition of Law No. IV: The cumulative effect of the errors at trial renders a capital defendant's trial unfair and his sentence arbitrary and unreliable. U.S. Const. amends. VI, XIV; Ohio Const. Art. I, §§ 9, 16.

Arguments that appellate counsel should have made on direct appeal include, but are not limited to, the following:

► Defense counsel did not devote sufficient time to meeting with their client and preparing for this capital trial. Counsel's lack of attention to their client and his case prompted Drummond to file pro se motions and to attempt to communicate directly with the trial court. The court instructed Drummond to communicate through his attorneys. (Pretrial, July 2, 2003, p. 19) Drummond, however, continued to file pro se motions. (Pretrial, Oct. 16, 2003, pp. 52-54) Defense counsel ignored Drummond's requests to file certain motions on his behalf. (Pretrial, Dec. 9, 2003, p. 80)

Drummond was so dissatisfied with his attorneys, that he sent a complaint to the Mahoning County Bar Association. (Id. at 66) The trial court did not take Drummond's complaints seriously. (Id. at 74) Counsel's attention was not adequately focused on the case. Lead counsel, James Gentile, returned from a vacation less than two months before the capital trial was scheduled to begin. (Id. at 76) After original co-counsel withdrew from the case because of a conflict of interest, the court appointed new co-counsel less than two months before the trial began. (Id. at 66; Pretrial, Dec. 10, 2003, p. 87)

Defense counsel in a capital case need to develop an adequate attorney-client relationship with the client. The American Bar Association standards for death penalty cases provide:

Trial counsel should *maintain close contact* with the client throughout the preparation of the case, discussing (*inter alia*) the investigation, potential legal issues that exist or develop, and the development of a defense theory.

American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.4.2 (1989) (emphasis added). The United States Supreme Court looks to the ABA Guidelines to evaluate the performance of defense counsel in capital cases. See Wiggins v. Smith, 539 U.S. 510 (2003). See also Hamblin v. Mitchell, 354 F.3d 482, 486 (6th Cir. 2003).

In Drummond's case, defense counsel failed to establish the essential attorney-client relationship necessary to ensure effective representation of the client. The attorney-client relationship plays an important role in the outcome of a capital case. See Welsh S. White, Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care, 1993 U. Ill. L. Rev. 323, 337-38 (1993). Courts have reiterated the importance of meeting and consulting with the client. Powell v. Alabama, 287 U.S. 45, 59 (1932) ("a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense."); State v. Smith, 17 Ohio St. 3d 98, 101, 477 N.E.2d 1128, 1131 (1985) (counsel is required to consult with the client on important trial decisions). See also Mitchell v. Mason, 325 F.3d 732, 743-44 (6th Cir. 2003).

The ABA standards require that defense counsel "make every appropriate effort to establish a relationship of trust with the client" American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 10.5

“Relationship With the Client” (2003). The commentary to the Guidelines explains why developing such a relationship is necessary:

Establishing a *relationship of trust with the client is essential* both to overcome the client’s natural resistance to disclosing the often personal and painful facts necessary to present an effective penalty phase defense ... and to ensure that the client will listen to counsel’s advice on important matters such as whether to testify and the advisability of a plea. Client contact must be ongoing. An occasional hurried interview with the client will not reveal to counsel all the facts needed to prepare for trial Similarly, *a client will not - with good reason - trust a lawyer who visits only a few times before trial*, does not send or reply to correspondence in a timely manner, or refuses to take telephone phone calls.

(Id. at 71) (Emphasis added.)

Defense counsel further deprived Drummond of his Sixth Amendment right to effective assistance of counsel at trial when they:

- failed to object to prosecutorial misconduct;
- failed to object when the court, while using inappropriate humor, vouched for a State witness, see trial transcript, p. 2796;
- failed to object when the court demeaned the process and defense counsel with inappropriate humor, see pp. 2542-43, 2796, 2843, 2869, 3007;
- failed to move to strike a State witness’s prejudicial answer regarding remorse, see p. 3198;
- failed to object to and move to strike a State witness’s speculative answer, see p. 3146;
- failed to investigate and prepare persuasive mitigating evidence;
- failed to prepare their penalty-phase expert witness, see p. 3810.

Defense counsel’s representation fell below the standard of conduct required by the United States Supreme Court. Strickland v. Washington, 466 U.S. 668 (1984); Williams v. Taylor, 529 U.S. 362 (2000); Wiggins v. Smith, 539 U.S. 510 (2003). Drummond’s convictions and death sentence should be reversed and his case remanded for a new trial.

► The trial court violated Drummond’s Sixth, Eighth, and Fourteenth Amendment rights to a fair trial, a reliable sentence, and due process when it:

- allowed the State to introduce gruesome/prejudicial photos, see pp. 2490-92, 2511;
- used improper humor, which put defense counsel in a bad light in front of the jury, see pp. 2542-43;

- vouched for a State witness using inappropriate humor, see p. 2796;
- demeaned the process with inappropriate humor, see pp. 2542-43, 2796, 2843, 2869, 3007;
- failed to grant a defense objection to the improper identification of a courtroom spectator, see pp. 3154-55;
- failed to grant a defense objection to the State's improper evidence of lack of remorse, see p. 3198;
- failed to allow defense counsel to make a proper objection during the State's rebuttal closing argument, thus chilling the defense, see p. 3621;
- failed to grant defense motions and objections, see, e.g., pp. 2475-78, 2511, 3154-55, 3198, 3833-35, 3954.

The court's rulings allowed the jurors to consider irrelevant, inflammatory, and prejudicial evidence and arguments, in violation of Drummond's constitutional rights.

► Prosecutorial argument which so infects the trial with unfairness as to make the resulting conviction or sentence a denial of due process rises to the level of a constitutional violation. Darden v. Wainwright, 477 U.S. 168, 181 (1986) (citing Donnelly v. DeChristoforo, 416 U.S. 637 (1974)). Here, the prosecutor's improper arguments made the trial and sentencing determination fundamentally unfair in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

For example, the prosecutors committed prejudicial misconduct at Drummond's trial when they:

- made improper disparaging remarks about the defendant in opening statement, see p. 2437;
- published inflammatory photos to the jury, see pp. 2491-92, 2511;
- asked State witnesses improper leading questions on direct examination, see, e.g., pp. 2525, 2545 et seq., 2568 et seq., 2573, 2593-94, 2620, 2663, 2664, 2784, 2933-34, 2997, 3100, 3275-76, 3287 et seq.;
- elicited victim-impact evidence during the trial phase, see pp. 2527;
- elicited improper testimony on defendant's alleged lack of remorse, see p. 3198;
- mischaracterized witness testimony, see p. 2593;
- asked a State witness to identify a member of the courtroom audience, see pp. 3154-55;
- improperly placed weight on a witness's testimony, see p. 3260;
- elicited hearsay testimony, see p. 3337;

- denigrated defense counsel for making an objection during rebuttal closing argument, see p. 3621;
- at the penalty phase, argued facts not in evidence, see pp. 3761, 3893-94;
- in mitigation closing argument, argued defendant's lack of remorse when the defense did not present remorse as a mitigating factor, see p. 3909.

The prosecutors' improper conduct deprived Drummond of a fair trial. As cited above, the prosecutors led their witnesses. A leading question tells the "witness how to answer or puts into his mouth words to be echoed back." State v. D'Ambrosio, 67 Ohio St. 3d 185, 190, 616 N.E.2d 909, 914 (1993) (quoting Black's Law Dictionary, 888 (6th Ed. 1990)). Generally, leading questions are permitted only on cross-examination. Ohio R. Evid. 611(C). The State's impropriety prejudiced Drummond. The prosecutor should not be able to testify and have the witness simply affirm his statements.

By supplying answers for the State's witnesses, the prosecutors violated Drummond's Sixth Amendment right to confrontation. "Although violations of the Rules of Evidence during trial, singularly, may not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial." State v. DeMarco, 31 Ohio St. 3d 191, 196-97, 509 N.E.2d 1256, 1261 (1987).

Defense counsel has a duty to preserve errors for appellate review. Gravley v. Mills, 87 F.3d 779, 785-86 (6th Cir. 1996); Starr v. Lockhart, 23 F.3d 1280, 1286 (8th Cir. 1994). As cited above, counsel attempted to do just that; however, the prosecutor made defense counsel appear as if he were trying to interfere with the progression of the trial. It is misconduct to belittle the defendant's attorney for making objections. See State v. Keenan, 66 Ohio St. 3d 402, 406, 613 N.E.2d 203, 207; McGuire v. State, 677 P.2d 1060, 1063-64 (Nev. 1984).

In analyzing prosecutorial misconduct under the Due Process Clause, the "touchstone" is "the fairness of the trial." State v. Lott, 51 Ohio St. 3d 160, 166, 555 N.E.2d 293, 301 (citing

Smith v. Phillips, 455 U.S. 209, 219 (1982)). While trial counsel failed to object to much of the prosecutors' misconduct here, all the improper conduct is relevant to this Court's due-process inquiry. Keenan, 66 Ohio St. 3d at 410, 613 N.E.2d at 209. See also State v. Fears, 86 Ohio St. 3d 329, 355, 715 N.E.2d 136, 158 (1999) (Moyer, C.J., dissenting). Thus, an objection to the prosecutor's misconduct is only one of many factors in this Court's analysis.

Errors that might not be so prejudicial as to amount to a constitutional violation when considered alone, cumulatively may produce a trial setting that is fundamentally unfair, thereby violating the defendant's constitutional rights. Walker v. Engle, 703 F.2d 959, 963 (6th Cir. 1983) (the "cumulative effect" of misconduct committed by the state constituted denial of fundamental fairness). Cooper v. Sowders, 837 F.2d 284 (6th Cir. 1988) (various trial errors, considered cumulatively, produced a trial setting that was fundamentally unfair). Here, if individual instances of prosecutorial misconduct are not deemed to merit relief, when considered cumulatively the effect of the misconduct establishes that Drummond's constitutional rights were violated. Prosecutorial misconduct in this case was flagrant and prejudicial, resulting in a trial that was fundamentally unfair. See Bates v. Bell, 402 F.3d 635 (6th Cir. 2005).

Appellate counsel failed to properly brief the issues raised in their merit brief. They failed to cite to the record and support their arguments with relevant case law. For example, in Appellant's Proposition of Law No. 8 (prosecutorial misconduct), appellate counsel did not give this Court sufficient notice of the facts underlying the issue. In a trial transcript that revealed many instances of prosecutorial misconduct, appellate counsel devoted barely two pages of their brief to this important violation of Drummond's constitutional rights. They failed to cite to the record. This Court noted that appellate counsel provided "no examples of the misconduct or record references showing when the misconduct occurred." State v. Drummond, 111 Ohio St.

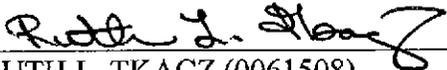
3d, 14, 45, 854 N.E.2d 1038, 1073 (2006). Similarly, appellate counsel failed to properly brief the critical issues of ineffective assistance of counsel and trial court error. Their brief shows that counsel gave only trifling attention to Drummond's appeal.

D. CONCLUSION AND RELIEF REQUESTED

Appellant John Drummond has shown that there is a genuine issue regarding whether he was deprived effective assistance of counsel on appeal. Mr. Drummond requests that his Application for Reopening be granted and that he be afforded an opportunity to file a new appellate brief to establish that prejudicial errors were made at his capital trial and that ineffective assistance of appellate counsel in the prior appellate proceedings prevented these errors from being presented effectively to this Court.

Respectfully submitted,

DAVID H. BODIKER
Ohio Public Defender


RUTH L. TKACZ (0061508)
Assistant State Public Defender
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of APPELLANT'S APPLICATION FOR REOPENING was sent via regular first-class U.S. mail to counsel of record, Rhys Cartwright-Jones, Assistant Prosecuting Attorney, 21 W. Boardman Street, 6th Floor, Youngstown, Ohio 44503, on the 16th day of January, 2007.

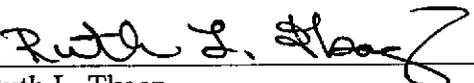

Ruth L. Tkacz
Assistant State Public Defender

EXHIBIT A

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Supreme Court Case No. 04-586
Appellee,	:	Trial Court Case No. 03-CR-358
-vs-	:	
JOHN DRUMMOND,	:	DEATH PENALTY CASE
Appellant.	:	

AFFIDAVIT OF RUTH L. TKACZ

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

I, Ruth L. Tkacz, after being duly sworn, hereby state as follows:

1. I am an attorney licensed to practice law in the state of Ohio since 1993, and I have been an assistant state public defender since 1998. My sole area of practice is capital litigation.
2. I was assigned to work on John Drummond's postconviction case in 2004.
3. I have read the transcript of the proceedings in State v. Drummond, Mahoning County Common Pleas Case No. 03-CR-358.
4. Because of the focus of my practice of law and my attendance at death-penalty seminars, I am aware of the standards of practice involved in the appeal of a case in which the death sentence was imposed.

5. The Due Process Clause of the Fourteenth Amendment guarantees effective assistance of counsel on an appeal as of right. Evitts v. Lucey, 469 U.S. 587 (1985).

6. The initial responsibility of appellate counsel, once the transcript is filed, is to ensure that the entire record has been filed with the Ohio Supreme Court. Appellate counsel has a fundamental duty in every criminal case, and especially in a capital case, to ensure that the entire record is before the reviewing courts on appeal. Ohio Sup. Ct. Prac. R. XIX, § 4(A); R.C. 2929.05; State ex rel. Spirko v. Judges of the Court of Appeals, Third Appellate District, 27 Ohio St. 3d 13, 501 N.E. 2d 625 (1986).

7. After ensuring that the transcript is complete, counsel must then review the record for purposes of issue identification. This review of the record not only includes the transcript, but also the trial motions and exhibits.

8. For counsel to properly identify issues, they must have a good knowledge of criminal law in general. Most trial issues in capital cases will be decided by criminal law that is applicable to non-capital cases. As a result, appellate counsel must be informed about the recent developments in criminal law when identifying potential issues to raise on appeal. Counsel must remain knowledgeable about recent developments in the law after the merit brief is filed.

9. Since the reintroduction of capital punishment in response to the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), the area of capital litigation has become a recognized specialty in the practice of criminal law. Many substantive and procedural areas unique to capital litigation have been carved out by the United States Supreme Court. As a result, anyone who litigates in the area of capital punishment must be familiar with these issues to raise and preserve them for appellate review.

10. Appellate representation of a death-sentenced client requires recognizing that the case will most likely proceed to the federal courts at least twice: first, on petition for Writ of Certiorari in the United States Supreme Court, and again on petition for Writ of Habeas Corpus filed in a federal district court. Appellate counsel must preserve all issues throughout the state-court proceedings on the assumption that relief is likely to be sought in federal court. The issues that must be preserved are not only issues unique to capital litigation, but also case- and fact-related issues unique to the case that impinge on federal constitutional rights.

11. It is a basic principle of appellate practice that to preserve an issue for federal review, the issue must be exhausted in the state courts. To exhaust an issue, the issue must be presented to the state courts in such a manner that a reasonable jurist would have been alerted to the existence of a violation of the United States Constitution. The better practice to exhaust an issue is to cite directly to the relevant provisions of the United States Constitution in each proposition of law to avoid any exhaustion problems in federal court.

12. It is important that appellate counsel realize that the reversal rate in the state of Ohio is approximately eleven percent on direct appeal and two percent in postconviction. It is my understanding that forty to sixty percent (depending on which of several studies is relied upon) of all habeas corpus petitions are granted. Thus, appellate counsel must realize that in Ohio, a capital case is very likely to reach federal court and, therefore, counsel should prepare the appeal accordingly.

13. Based on the foregoing standards, I reviewed the record and read the trial transcript in John Drummond's case. I have identified issues dealing with ineffective assistance of trial counsel, prosecutorial misconduct, and trial court error that should have been evaluated by appellate counsel and fully presented to the Ohio Supreme Court. These issues are

meritorious and warrant relief. Thus, appellate counsel's failure to present these errors amounts to ineffective assistance of appellate counsel in this case.

14. Appellate counsel raised the issue of ineffective assistance of trial counsel in a mere cursory fashion. Appellate counsel failed to develop the issue with sufficient facts and law. They also failed to cite to several instances of trial counsel's deficient performance. For example, defense counsel failed to object many instances of prosecutorial misconduct (see below) and trial court error (see below).

15. Defense counsel failed to move to strike a witness's improper answer regarding Drummond's alleged lack of remorse. During the prosecutor's direct examination of jailhouse informant, Chauncey Walker, he asked Walker if Drummond expressed remorse over the baby's death. (T.p. 3198) The court overruled defense counsel's objection. (*Id.*) Walker speculated on Drummond's feelings: "He [*sic*] *probably* sorry that he in the situation that he in. I don't know about being sorry about somebody getting hurt in this situation." (*Id.*) (Emphasis added.) Walker had no personal knowledge of how Drummond felt. Defense counsel failed to renew their objection and failed to move to strike the witness's irrelevant, prejudicial answer. The witness's testimony was inadmissible under Ohio R. Evid. 402, 404(A)(1), and 602. The defense did not raise remorse as an issue in the case; therefore, the State should not have raised Drummond's alleged lack of remorse as an issue at trial or at the sentencing phase.

16. Defense counsel failed to provide effective assistance at the penalty phase of Drummond's capital trial. Defense counsel did not conduct a reasonable or thorough mitigation investigation in this case. The mitigation investigation was not timely. Defense counsel failed to begin an investigation immediately after their appointment to this case. Although lead counsel, James Gentile, was appointed to represent Drummond on April 4, 2003 (see trial docket at 4), he

did not file a motion for funds for a mitigation expert until November 7, 2003. Counsel did not file a motion for the appointment of a psychologist until January 2, 2004. (Trial Docket at 55.) The State's case-in-chief began on February 2, 2004. (See Transcript, Vol. 12.)

17. The United States Supreme Court has determined that the American Bar Association's Guidelines provide the standards to be used in evaluating counsel's effectiveness in a capital case. Wiggins v. Smith, 539 U.S. 510, 524 (2003) (citing the 1989 ABA Guidelines). The "standards merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases . . . The 2003 ABA Guidelines do not depart in principle or concept from *Strickland*, *Wiggins*, or [the Sixth Circuit's] previous cases concerning counsel's obligation to investigate mitigation circumstances." Hamblin v. Mitchell, 354 F.3d 482, 487 (6th Cir. 2003).

18. Using the ABA Guidelines to evaluate trial counsel's performance, the record in this case shows that Drummond's attorneys failed to:

- begin an investigation "immediately upon counsel's entry into the case";
- "promptly obtain the investigative resources necessary for both phases, including at minimum the assistance of a professional investigator and a mitigation specialist";
- conduct an "extensive and generally unparalleled investigation into personal and family history";
- "choose experts who are tailored specifically to the needs of the case, rather than relying on an 'all-purpose' expert who may have insufficient knowledge or experience to testify persuasively";
- "be prepared to rebut arguments that improperly minimize the significance of mitigating evidence."

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (rev. ed. 2003), reprinted in 31 Hofstra L. Rev. 913 (2003).

19. The United States Constitution's Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). This right is violated when counsel's performance falls below an objective standard of reasonableness and the client is prejudiced by counsel's breach of duty. Id. at 690, 696. Only after a full investigation can counsel make an informed, tactical decision about which information would be helpful in the client's case. State v. Johnson, 24 Ohio St. 3d 87, 90 (1986).

20. When a capital defendant is deprived of an individualized sentencing assessment because of his attorneys' failure to investigate, the integrity of the proceedings are suspect and prejudice is established. Williams v. Taylor, 529 U.S. 362, 393 fn.17 (2000). Counsel did not meet their obligations under the Sixth Amendment and Strickland. Moreover, counsel's penalty-phase performance failed to meet the standards articulated in Wiggins, Powell v. Collins, 332 F.3d 376 (6th Cir. 2003), and Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995).

21. Mitigation is the phase of the trial where defense counsel must present evidence of their client's character, history, and background. See Wiggins v. Smith, 539 U.S. 510 (2003); Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995). Counsel had a duty to mitigate the offenses for which Drummond had been convicted. The issue of gangs and their culture was a major theme in the State's case. (T.p. 3129, et. seq.) Counsel could not simply ignore it. In fact, defense counsel brought up the subject during Dr. John Fabian's mitigation testimony. (T.p. 3820) Counsel intended to elicit testimony about gangs and their influence on Drummond's life, but they had the wrong expert to address the matter—a psychologist who was not qualified to testify about gangs. There was no strategy on defense counsel's part during the mitigation hearing to stay away from the topic. They failed, however, to investigate, prepare, and present the relevant evidence with a qualified expert.

22. Drummond's attorneys failed to properly prepare their expert witness. As a result, the jurors did not have relevant, compelling mitigating evidence to weigh and give effect. When a lawyer receives incompetent assistance from an expert, the lawyer's ability to render adequate, effective representation to the capital client is compromised. There is a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981) (quoting United States v. Fessel, 531 F.2d 1275, 1279 (5th Cir. 1976)). Defense attorneys must adequately prepare their witnesses and ensure that experts understand their function within the capital-trial context. Here, the manner and type of evidence presented undermined the purpose of mitigation. Dr. Fabian testified that he "didn't have a lot of time to do this evaluation." (T.p. 3810) He was not prepared to testify. While on the witness stand, Dr. Fabian had to familiarize himself with Drummond's jail records, stating, "It has been a little while." (T.p. 3832) He was confused over who he worked for, the defendant or the court. (T.p. 3838)

23. Dr. Fabian's testimony became prejudicial when he told the jurors that Drummond made a "choice" to run the streets. (T.p. 3825) Drummond's so-called "choice" was not placed into a context that would have led the jurors to understand and appreciate the pressure to conform to the streets and the lack of emotional support from his family. Dr. Fabian also failed to address what would have been an important and unique mitigating factor for the jurors to consider: the amputation of Drummond's leg when he was just sixteen years old. In his mitigation-phase testimony, Dr. Fabian mentioned Drummond's leg amputation only in passing. (T.p. 3822, 3826) He made no specific reference to Drummond's medical records. Dr. Fabian rendered counsel ineffective. Drummond was prejudiced by his attorneys' ineffectiveness. Defense counsel's deficient performance in preparing and presenting their expert witness

undermines confidence in the outcome of Drummond's capital trial. As a result of trial counsel's ineffectiveness, Drummond's rights guaranteed by the United States Constitution's Sixth, Eighth, and Fourteenth Amendments were violated.

24. Trial court error deprived Drummond of a fair trial and due process under the Sixth and Fourteenth Amendments. The court made improper and prejudicial rulings against the defense. For example, the judge denied Drummond's request for new counsel after a breakdown occurred in the attorney-client relationship (T.p. 82); the judge denied defense counsel's motion in limine to prevent the State from admitting evidence of other bad acts (T.p. 2475-78); the judge denied defense counsel's motion for change a venue—a motion all the more relevant because co-defendant Wayne Gilliam's case was tried in the same jurisdiction, adding to the publicity (T.p. 2478); the judge denied defense counsel's objection to publishing to the jury photos of the dead baby (T.p. 2511); the judge did not record sidebars, resulting in an incomplete record; the judge rarely ruled on defense objections, instead "noting" the objections for the record with the presumptive outcome being that the defense objections were overruled and the prosecutors' improper conduct or motions sustained; the judge made inappropriate, sarcastic comments that diminished the seriousness of the death-penalty proceedings (see, e.g., T.p. 2796, 2843, 2869); the judge overruled defense counsel's objection to the irrelevant and prejudicial testimony of Sgt. Michael Lambert when he identified one of the courtroom spectators as being pictured in an alleged gang photo seized from Drummond's sister's residence (T.p. 3154-55); the judge denied defense counsel's objection to the prosecutor's irrelevant and prejudicial question posed to jailhouse snitch, Chauncey Walker, as to whether Drummond expressed sorrow over the baby's death (T.p. 3198); the judge impermissibly limited the mitigation testimony of Dr. John Fabian in violation of the holding in Lockett v. Ohio, 438 U.S. 586 (1978), (T.p. 3833-35); and the judge

impermissibly considered Drummond's alleged lack of remorse as an aggravating circumstance (T.p. 3954); the judge knew two of the seated jurors, Phillips and Frost-Kim (T.p. 1404, 1760)

25. The trial court injected inappropriate humor into the trial, which demeaned the proceedings and, in effect, vouched for a State witness. During the trial, the judge made light of the proceedings with sarcasm and jocularly that is not befitting a capital trial where the defendant's life is at stake. After a luncheon recess, the judge remarked to the jurors that she heard that they tried to shove lead defense counsel down the sidewalk. (T.p. 2542-43) Although said in jest, the judge's comment poked fun at defense counsel and implied that counsel representing the defendant was somehow repugnant or worthy of ridicule, or, at the very least, not to be taken seriously. After BCI agent Ed Carlini testified, the judge sarcastically thanked him for his "riveting" testimony, and followed up by saying, "not that we don't love you" (T.p. 2796) The judge's playful remark could be interpreted as an endorsement of the witness. Defense counsel failed to object and to ask for a sidebar to discuss the judge's behavior.

26. After Officer Anthony Marzullo's direct testimony, the judge again described the testimony as "riveting." (T.p. 2843) Officer Marzullo testified that the baby swing had blood and "brain matter" on it, and that pieces of plastic had been recovered from the baby's head. (T.p. 2802, 2841) After cross-examination, in response to defense counsel's request for a moment to check his notes and his side-comment that trials are not as portrayed on television, the judge referred to Drummond's proceedings as the "Twilight Zone." (T.p. 2869) During the direct testimony of jailhouse informant, Nathaniel Morris, the witness was asked about contacting the police task force. The judge interrupted with her own commentary, "They don't return my calls and he gets - -." (T.p. 3007) It appeared that the judge was not taking the trial seriously. Her comments were made in front of the jurors. Defense counsel failed to object.

27. Drummond had a constitutional right to a fair trial presided over by a fair and impartial judge. In re Murchison, 349 U.S. 133 (1955). The trial judge's behavior, however, denied Drummond his Sixth Amendment right. "Within the purview of a fair trial, the judge himself is on trial, and must be always aware of that fact." United States v. Brown, 539 F.2d 467, 469 (5th Cir. 1976). The judge's rulings stacked the record against Drummond (see, e.g., T.p. 2475-78, 2511, 3154-55, 3198, 3833-35, 3954), and her remarks diminished the seriousness of his trial, as if to say that Drummond was irrelevant (T.p. 2976, 2843, 2869).

28. Defense counsel failed to move for all sidebars to be placed on the record. The trial court also failed to record sidebars sua sponte. After one of the off-the-record sidebars, the judge commented that the sidebar was an "all-time record for a sidebar. I think I'll just stand over there." (T.p. 3131) Rather than recognizing the importance of recording sidebars in a capital case, the judge made jokes.

29. The trial court erred by overruling defense counsel's objection to a State witness's improper identification of a courtroom spectator. (T.p. 3154-55) While testifying about a "gang book" found in Drummond's sister's residence, Detective Lambert said that a man sitting in the courtroom was pictured in some of the photographs in the book. The prosecutor's question and the detective's answer injected irrelevant and prejudicial evidence into the trial. The improper testimony would only lead the jurors to be fearful of alleged gang members in the courtroom—a fear that the court had acknowledged when it closed the courtroom, thus denying Drummond a public trial. (T.p. 2968)

30. The trial court erred by overruling defense counsel's objection to impermissible evidence of Drummond's alleged lack of remorse. (T.p. 3198) See ¶ 15 above.

31. The trial court erred by admitting inflammatory, prejudicial photographs over defense counsel's objection. (T.p. 2490-92) Crime-scene photos were passed to every juror for their review. The pictures showed blood on the baby swing, "brain matter," and the dead infant. (T.p. 2490-92, 2511) Autopsy photos were also shown to the jurors. (T.p. 3399) The standard used to determine whether gruesome photographic evidence is admissible in a capital case is stricter than the standard used in non-capital cases under Evidence Rule 403. State v. Morales, 32 Ohio St. 3d 252, 258, 513 N.E.2d 267, 274 (1988).

32. In capital cases, the burden shifts to the proponent of the evidence to demonstrate that the probative value of "each photograph" outweighs the "danger of prejudice" to the defendant. Morales, 32 Ohio St. 3d at 258, 513 N.E.2d at 274. In addition to meeting that burden, the proponent of the gruesome photographs must also establish that the pictures are neither repetitive nor cumulative. Id. at 259, 513 N.E.2d at 274. See also State v. DePew, 38 Ohio St. 3d 275, 281, 528 N.E.2d 542, 551 (1988); State v. Maurer, 15 Ohio St. 3d 239, 473 N.E.2d 768, syllabus, para. 7 (1984). A photograph is gruesome when it depicts the actual body parts of the victim. State v. DePew, 38 Ohio St. 3d 275, 281, 528 N.E.2d 542, 550 (1988). As the standard in Maurer and Morales is designed to protect the capital defendant from the "danger of prejudice," the defendant need not establish actual prejudice. See Morales, 32 Ohio St. 3d at 258, 513 N.E.2d at 274 (emphasis added). Thus, the Maurer and Morales standard is in concert with capital jurisprudence from the United States Supreme Court that strives to make the trial phase in a capital case as reliable as possible. See Beck v. Alabama, 447 U.S. 625, 630 (1980).

33. Nevertheless, the admission of gruesome photographs may be harmless error at the trial phase when the evidence of guilt is overwhelming on each element of the offense. See State v. Thompson, 33 Ohio St. 3d 1, 15, 514 N.E.2d 407, 420 (1987). See also In re Winship,

397 U.S. 358 (1970). In Drummond's case, however, the State presented only circumstantial evidence to prove guilt. And the defense presented witnesses who undermined the State's witnesses and who implicated others in the shooting, making evidence of guilt less than overwhelming. (T.p. 3419, 3448, 3449, 3451, 3482, 3525) Even when the admission of gruesome photographs is harmless at trial, the use of improper photographs by the prosecution may have a prejudicial "carry over" effect on the trier of fact's penalty-phase deliberations. See State v. Thompson, 33 Ohio St. 3d 1, 15, 514 N.E.2d 407, 421 (1987).

34. The trial court erred by failing to allow defense counsel to make a proper objection during the State's rebuttal closing argument, thus chilling the defense. (T.p. 3621) Defense counsel has a duty to preserve errors for appellate review. Gravley v. Mills, 87 F.3d 779, 785-86 (6th Cir. 1996); Starr v. Lockhart, 23 F.3d 1280, 1286 (8th Cir. 1994). See also American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 10.8, "The Duty to Assert Legal Claims," Commentary (2003) ("One of the most fundamental duties of an attorney defending a capital client at trial" is to preserve all conceivable errors for appellate review.) During the State's trial-phase closing argument, the prosecutor made an improper argument about defense witness, William Harris, referring to facts not in evidence. (T.p. 3621) In front of the jury, the prosecutor berated defense counsel for making an objection. (Id.) Defense counsel attempted to object again, but the trial court told counsel, "It's closing" and overruled the objection. The judge told defense counsel he could make his record "later." (Id.) Defense counsel has a duty to make timely objections. Ohio's contemporaneous objection rule requires counsel to object at a time when the error could have been avoided or corrected. See State v. Glaros, 170 Ohio St. 471, 475, 166 N.E.2d 379, 382 (1960). See also State v. Mason, 82 Ohio St. 3d 144, 162, 694 N.E.2d 932, 951 (1998). In

effect, the trial court told defense counsel to stifle their advocacy on behalf of Drummond. The court saw no point in defense counsel making timely objections, because it apparently already had determined that defense objections would be overruled. This approach bespeaks the trial court's bias against Drummond. The trial court's ruling and its silencing of defense counsel violated Drummond's Sixth and Fourteenth Amendment rights to effective assistance of counsel, a fair trial, and due process.

35. Prosecutorial misconduct at Drummond's trial was so flagrant and prejudicial it resulted in a trial that was fundamentally unfair. See Bates v. Bell, 402 F.3d 635 (6th Cir. 2005). The prosecutors led their witnesses during direct examination; made improper, inflammatory remarks during opening and closing argument; elicited prejudicial testimony from State witnesses; mischaracterized testimony; elicited improper hearsay testimony; inflamed the jurors by publishing prejudicial photos (T.p. 2491-92, 2511); berated defense counsel for making a proper objection; argued facts not in evidence at the penalty phase; and improperly raised alleged lack of remorse when defense counsel did not offer remorse as a mitigating factor.

36. In Proposition of Law No. 4 in their merit brief, appellate counsel indicated that the issue of the prosecutors' improper leading questions would be "explored at length further in this Brief." (Appellant's Merit Brief, p. 26) But appellate counsel did not explore the issue at length. Counsel barely explored the issue at all. They raised the issue in Proposition of Law No. 6, but devoted only a mere two short paragraphs to it. (Appellant's Merit Brief, pp. 34-35) Counsel failed to cite to the record or develop in any meaningful way the prosecutors' improper use of leading questions on direct examination and prosecutorial misconduct overall. This Court noted that appellate counsel failed to cite to specific instances of the improper leading questions. State v. Drummond, 111 Ohio St. 3d 14, 35, 854 N.E.2d 1038, 1065 (2006).

37. The prosecutor asked improper leading questions to more than State witnesses Rozenblad, Walker, and Morris. (See Appellant's Merit Brief, p. 35.) The record is replete with leading questions. This affidavit will not recount all instances of the improper leading questions here, but provides significant examples:

- Jiyen Dent, Sr.
Q: Did you tell [Latoya] to stay in the kitchen?
A: Yes. (T.p. 2525)

- Rebecca Perez
Q: Did you hear a lot of shots?
A: At first it was just a few, and then as I was going towards the house, it was more than just a few. It was more shots. (T.p. 2570)

Q: Did one set of shots sound closer to you than the other?
A: Yes. (T.p. 2570)

Q: And where did you used to live?
A: 74 Rutledge.
Q: And that's the house where the shooting had taken place?
A: Yes. (T.p. 2573)

Q: Were you startled that night?
A: Yes. (T.p. 2593)

Q: Frightened?
A: Yes. (T.p. 2594)

- Wanda Greer, re: house painted with "LKC"
Q: That's the Lincoln Knoll's Crips?
A: Uh-huh. (T.p. 2620)

Q: Was that around the time all these people were hanging around in front of your driveway?
A: Yes, it was. (T.p. 2621)

- William Greer, re: Drummond carrying a gun
Q: Does it look like an assault rifle?
A: From where I was standing I couldn't really tell you what type of gun, just a long gun.
Q: A large rifle type gun?
A: Yeah. (T.p. 2664)

- Ed Carlini (BCI), re: recovering bullets, tracing bullet trajectory
 - Q: And is that where the string's pointing that's extended off the probe to give you the angle of the trajectory?
 - A: Yes, it is.
 - Q: But that's as far as you went; is it not?
 - A: Exactly, yes.
 - Q: Had Officer Marzullo told you that shell casings had already been found?
 - A: Yes. (T.p. 2781-82)

- Q: From using the probe on those bullet holes would give you an indication of the direction of fire - -
- A: Yes.
- Q: - - into that house?
- A: Yes." (T.p. 2784)

- Q: And, let's see, the other shots at 74 Rutledge, did they come basically from the south and west, the southwest, into that house?
- A: Correct. (T.p. 2784)

- Yaraldean Thomas
 - Q: Let's talk about the gun you saw Mr. Drummond get out of the car and walk around with. What kind of a gun was that?
 - A: Like a rifle, big rifle.
 - Q: Like an assault rifle?
 - A: Yeah. (T.p. 3100)

- Leonard Schroeder
 - Q: Didn't you talk to the police?
 - A: Yes.
 - Q: Detective Sergeant Rodway?
 - A: Yes. I don't know who it was (T.p. 3272)

- Q: And you told them about Mr. Drummond and Mr. Gilliam coming to your after you heard the shots?
- A: Yes. (T.p. 3273)

- Q: Didn't they tell you - - and what you told the police - - was some fools are shooting over there?
- Mr. Gentile: Objection.
- A: They was still saying they didn't know who it was.
- Q: Huh?
- A: They was still saying they didn't know who it was.
- Q: You didn't say they didn't know who it was. You said some fools are shooting over there?
- A: Yeah. (T.p. 3274)

38. See also pp. 3275-77. The prosecutor “testified” to what Leonard Schroeder had said at Wayne Gilliam’s trial. The prosecutor led the witness until he received the answers he wanted.

39. This Court found that no improper leading questions were asked of James Rozenblad. Drummond, 111 Ohio St. 3d at 37, 854 N.E.2d 1066. Appellate counsel failed to identify specific instances of when the prosecutor asked Rozenblad improper leading questions.

For example:

Q: Who’s the fellow in the brown and tan jacket there looking at you?

A: In the what?

Q: It looks like a Cleveland Browns jacket.

A: He’s a friend of mine.

Q: **Michael Peace?**

A: Yeah. (T.p. 2933-34) (Emphasis added.)

Q: Now is he related to Brett Schroeder?

A: Yes.

Q: **Brother?**

A: Yes.” (T.p. 2943) (Emphasis added.)

Q: What happened to Karl Green?

A: He’s deceased.

Q: **He was killed by Casimiro Ellis**; is that right?

A: Yes.

Mr. Yarwood: Objection, Your Honor.

Mr. Franken: I can clear that up.

Q: Were you with Karl when he was killed?

A: Yes.

Q: **It was up [sic] the Mystic Lounge?**

A: Yes. (T.p. 2938) (Emphasis added.)

Q: And was someone convicted for it?

A: Yes.

Q: **Was it Casimiro Ellis?**

A: Yes. (T.p. 2939) (Emphasis added.)

40. When the witness failed to identify the prosecutor in the Ellis case, lead prosecutor, Timothy Franken, supplied the jurors with the answer by jokingly saying, “I get no recognition.” (T.p. 2939)

41. Re: identifying pictures in book of photos:

Q: Is that Andre Bryant?

A: Yes.

Q: Drummond, John Drummond?

A: Yes. (T.p. 2943)

Q: Remember we spoke about the house?

A: Yes.

Q: Where the south side guy lived?

A: Yes.

Q: Handing you what’s marked at State’s Exhibit 126, would you look at that please? Does that look like the house?

A: Yes. (T.p. 2950)

42. By supplying answers for the State’s witnesses, the prosecutors violated Drummond’s Sixth and Fourteenth Amendment rights to confrontation, due process, and a fair trial.

43. It is misconduct to belittle the defendant’s attorney for making objections. See State v. Keenan, 66 Ohio St. 3d 402, 406, 613 N.E.2d 203, 207 (1993); McGuire v. State, 677 P.2d 1060, 1063-64 (Nev. 1984). In front of the jury, the prosecutor criticized defense counsel for making a proper objection during closing argument. After the court overruled defense counsel’s objection to the prosecutor’s references to facts not in evidence and the mischaracterization of William Harris’s testimony, the prosecutor said, “*Before we were so rudely interrupted*, he’s done that stunt before.” (T.p. 3621) (Emphasis added.) The prosecutor portrayed defense counsel as having bad manners and inappropriately disrupting the proceedings. Counsel, however, was advocating for his client and attempting to preserve a record of the prosecutor’s misconduct. See ¶ 34 above.

44. The prosecutor made disparaging remarks in his trial-phase opening statement. He referred to Drummond as a “coward.” (T.p. 2437) The prosecutor’s remark was inflammatory and improper.

45. The prosecutor elicited improper victim-impact evidence during the direct examination of Jiyen Dent Sr., the baby’s father. She commented that “911 had you on hold for quite some time,” and then she asked Mr. Dent, “How difficult was that?” Dent answered, “Very difficult.” (T.p. 2527) Victim-impact evidence may be relevant to the jury’s sentencing decision. Payne v. Tennessee, 501 U.S. 808, 827 (1991). But it must be excluded from the trial phase because it inflames the jury with evidence collateral to the charged offenses. State v. White, 15 Ohio St. 2d 146, 151, 239 N.E.2d 65, 70 (1968). Later, when referring to defense counsel’s cross-examination of the witness, the prosecutor asked Mr. Dent whether “any of those questions that you were asked gives anyone permission to kill your son?” (T.p. 2541) The court sustained defense counsel’s objection, but the inflammatory inference was planted in the jurors’ minds.

46. The prosecutor mischaracterized the testimony of James Rozenblad. Rozenblad had testified to “some guys” from the south side who Drummond and others were allegedly talking about. (T.p. 2897) The prosecutor then asked Rozenblad about the “guy” from the south side, implying that there was only one and that one person would be Jiyen Dent Sr. (Id.) Rozenblad’s original answer diluted the notion that Dent was specifically targeted in an alleged gang retaliation killing. The prosecutor made sure to conform the testimony to the State’s theory of the case.

47. The prosecutor improperly asked Detective Lambert to identify a member of the courtroom audience in a effort to instill fear in the jurors and prejudice Drummond. (T.p. 3154-55) See ¶ 29 above.

48. The prosecutor injected alleged lack of remorse into the case. By doing so, he tempted the jurors to decide the case not from “law and reason, but [from] passion and bias.” State v. Fautenberry, 72 Ohio St. 3d 435, 438, 650 N.E.2d 878, 882 (1995). The prosecutor asked jailhouse informant, Chauncey Walker, if Drummond had expressed sorrow over the baby’s death. (T.p. 3198) The witness could only speculate on Drummond’s feelings. (Id.) The question impermissibly raised alleged lack of remorse as an issue in the case. During the sentencing phase, the prosecutor argued that Drummond had no remorse; however, defense counsel had not raised remorse as a mitigating factor. (T.p. 3909)

49. The prosecutor improperly vouched for a witness. On redirect examination, the prosecutor asked Detective Kelly whether the Youngstown Police could have broken the case without the help of jailhouse informant, Chauncey Walker. (T.p. 3260) Detective Kelly answered, “No.” (Id.) Thus, the prosecutor placed great importance on Walker as a witness for the State and elevated his status in the minds of the jurors. That the police relied heavily on Walker implies that Walker is a credible witness. An attorney may not express an opinion on the credibility of a witness. State v. Williams, 79 Ohio St. 3d 1, 12, 679 N.E.2d 646, 657 (1997) (citing State v. Thayer, 124 Ohio St. 1, 176 N.E. 656 (1931)); State v. Smith, 14 Ohio St. 3d 13, 14, 470 N.E.2d 883, 885 (1984)). This is especially important when the prosecutor vouches for a witness, because “the prosecutor’s opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government’s judgment rather than its own view of the evidence.” United States v. Young, 470 U.S. 1, 18-19 (1985) (citing Berger v. United States,

295 U.S. 78, 88-89 (1935)). Similarly, soliciting an opinion from law enforcement on the importance of a witness improperly influences the jurors' determination of such matters. The jury must be the sole judge of a witness's credibility. State v. DeHass, 10 Ohio St. 2d 230, 231, 227 N.E.2d 212, 213 (1967). The prosecutor's misconduct denied Drummond a fair trial and due process.

50. In penalty-phase closing argument, the prosecutor told the jurors, "The mother [of Drummond's children] had to take him to court to even establish paternity. She had to get an order for child support. He doesn't pay." (T.p. 3893-94) Defense counsel failed to object to the State's closing argument, in which the prosecutor argued facts not in evidence. The prosecutor's comments were improper because there was no evidence presented that Drummond did not pay child support. The prosecutor asked Drummond's mother on cross-examination about this matter, and Cynthia Drummond responded that she did not know. (T.p. 3761) Interestingly, when he had the opportunity to elicit testimony on the subject from the children's mother, the prosecutor declined to cross-examine the mother of Drummond's children (a twin boy and girl), Shalese DeMarco. Prosecutorial misconduct deprived Drummond of a fair mitigation hearing and a reliable sentence under the Sixth, Eighth, and Fourteenth Amendments.

51. Appellate counsel failed to raise these issues in this affidavit and failed to sufficiently develop the propositions of law raised in their merit brief. Based on my evaluation of the record and understanding of the law, I believe the issues raised in Appellant Drummond's Application for Reopening are meritorious. Also, had appellate counsel raised these issues, each error would have been properly preserved for federal-court review.

52. Therefore, John Drummond was detrimentally affected by the deficient performance of his former appellate counsel.

Further affiant sayeth naught.

Ruth L. Tkacz
RUTH L. TKACZ
Counsel for Appellant Drummond

Sworn to and subscribed before me on this 11th day of January, 2007.

Joan E. Hayes
Notary Public



JOAN E. HAYES
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES *May 29, 2008*