

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO,**

**CASE NO. 2004-0485**

Appellee,

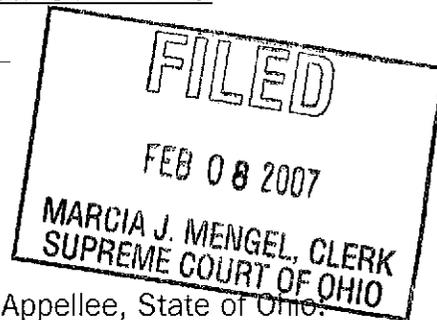
vs.

**DONALD J. KETTERER,**

Appellant.

*A Death Penalty Case on Appeal from the Court of Common Pleas  
of Butler County, Case No. CR2003-03-0309*

**BRIEF IN OPPOSITION OF REOPENING**



Attorneys for Appellee, State of Ohio:

**ROBIN N. PIPER** (0023205)  
**Butler County Prosecuting Attorney**

**DANIEL G. EICHEL** (0008259)  
*[Counsel of Record]*  
**First Assistant Prosecuting Attorney  
and Chief, Appellate Division**

**MICHAEL A. OSTER, JR.** (0076491)  
**Assistant Prosecuting Attorney**  
Government Services Center  
315 High Street, 11<sup>th</sup> Floor  
Hamilton, Ohio 45012-0515  
Telephone: (513) 887-3474  
Fax: (513) 887-3489

Attorneys for Appellant:

**DAVID H. BODIKER** (0016590)  
**Ohio Public Defender**

**RANDALL L. PORTER** (0005835)  
*[Counsel of Record]*  
Assistant State Public Defender  
8 E. Long Street, 11<sup>th</sup> Floor  
Columbus, Ohio 43215  
Telephone: (614) 466-5394  
Fax: (614) 644-0703

OFFICE OF  
PROSECUTING ATTORNEY  
BUTLER COUNTY, OHIO

ROBIN PIPER  
PROSECUTING ATTORNEY

GOVERNMENT SERVICES CENTER  
315 HIGH ST. - 11TH FLOOR  
P.O. BOX 515  
HAMILTON, OHIO 45012

## STATEMENT OF THE CASE

### **I. Procedural Posture:**

Seeing no reason for repetition, the Appellee will herein adopt the Procedural Posture of the Appellant as its own.

### **II. Introduction:**

Now comes Appellee, and in opposition to the Appellant's motion for reopening pursuant to S.Ct. Prac.R. XI, Section 6, filed January 23, 2007, prays that the motion will be denied. An application for reopening "shall be granted only \*\*\* if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." **State v. Allen** (1996), 77 Ohio St.3d 172, 173, 672 N.E.2d 638, 639. As used in this analysis, ineffective assistance of counsel is intended to comprise the two elements set forth in **Strickland v. Washington** (1984), 466 U.S. 668, 104 S.Ct. 205, 80 L.Ed.2d 674. Those two elements are that there was a deficiency in the representation of Appellant, and prejudice resulting from said deficiency. **State v. Reed** (1996), 74 Ohio St.3d 534, 535, 660 N.E.2d 456, 458.

Therefore, to make a legally valid claim of ineffective assistance of appellate counsel, Appellant must prove that his counsel were not only deficient for failing to raise the issues that he now presents, but also that there was a reasonable probability of success had they presented those claims on appeal. **State v. Bradley** (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraphs two and three of the syllabus. Deficient performance means performance falling below an objective standard of reasonable representation. "Prejudice" means a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. **Strickland**, 466 U.S. at 687- 688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674.

See, also, **Williams v. Taylor** (2000), 529 U.S. 362, 390-391, 120 S.Ct. 1495, 146 L.Ed.2d 389; **State v. Bradley** (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraphs two and three of the syllabus.

What is more, to justify reopening his appeal, Appellant "bears the burden of establishing that there was a `genuine issue' as to whether he has a `colorable claim' of ineffective assistance of counsel on appeal." See, **State v. Tenace**, 109 Ohio St.3d 451, 452, 2006-Ohio-2987, citing **State v. Spivey** (1998), 84 Ohio St.3d 24, 25, 701 N.E.2d 696. Guidance from the United States Supreme Court, as interpreted by this Court is found in the following passage:

"Strickland charges us to "appl[y] a heavy measure of deference to counsel's judgments," 466 U.S. at 691, 104 S.Ct. 2052, 80 L.Ed.2d 674, and to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674. Moreover, we must bear in mind that appellate counsel need not raise every possible issue in order to render constitutionally effective assistance. See *Jones v. Barnes* (1983), 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987; *State v. Sanders* (2002), 94 Ohio St.3d 150, 151-152, 761 N.E.2d 18." **State v. Tenace**, 109 Ohio St.3d 451, 452, 2006-Ohio-2987.

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." **Strickland**, 466 U.S. at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674. Because attorney performance is not to be judged by hindsight, courts generally do not find that an attorney performs deficiently by failing to anticipate a future decision or development in the law. See **State v. Smith** (1991), 72 Ohio App.3d 342, 345, 594 N.E.2d 688. Therefore, in the case at bar, Appellant cannot demonstrate that his initial appellate counsel were either deficient or that he suffered a prejudice from their representation that included filing a fifteen issue and

one hundred and forty-seven (147) page merit brief on his behalf.

Before addressing each of Appellant's claims individually, further case law specifically regarding ineffective assistance of appellate counsel must be explored. Failure to raise each and every possible claim, does not constitute ineffective assistance of appellate counsel. "Counsel could have reasonably decided they could not add more issues without "burying good arguments \*\*\* in a verbal mound made up of strong and weak contentions." State v. Campbell (1994), 69 Ohio St.3d 38, 53, 630 N.E.2d 339, 353, quoting Jones v. Barnes (1983), 463 U.S. 745, 753, 103 S.Ct. 3308, 3313, 77 L.Ed.2d 987, 994. Thus, appellate counsel need not raise every possible issue in order to render constitutionally effective assistance. See, Barnes, 463 U.S. at 750-753.

Additionally, the United States Supreme Court has upheld an appellate attorney's discretion to decide which issues he or she believes are the most fruitful arguments. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue, if possible, or at most on a few key issues." Jones v. Barnes (1983), 463 U.S. 745, 77 L.Ed.2d 987, 103 S.Ct. 3308. Additionally, appellate counsel is not required to argue assignments of error which are meritless. Barnes, supra. These principles hold true in Ohio where the Eighth District Court of Appeals has noted that an appellate advocate should not include weaker arguments in their briefs as they might lessen the impact of stronger arguments, and as such, a reviewing court should not "second-guess reasonable professional judgments and impose on an appellate lawyer the duty to raise every "colorable" issue." State v. Jackson, Cuyahoga App. No. 80299, 2002-Ohio-5832, ¶ 6.

## **ARGUMENT**

### **Proposition of Law No. 1:**

#### **A Guilty Plea Waives Any Arguments Pertaining To A Motion To Suppress.**

In Appellant's first proposition for reopening, he argues that he was denied effective assistance of appellate counsel when his counsel failed to argue that he was not able to knowingly, intelligently, and voluntarily consent to having his person and personal items searched because he was intoxicated. The State of Ohio disagrees, based upon the doctrine of waiver.

In his initial merit brief, the Appellant's counsel raised two propositions of error in regard to the motion to suppress and the Appellant being intoxicated. See, State v. Ketterer (2006), 111 Ohio St.3d 70, 2006-Ohio-5283, ¶¶115-116, See, also, Appellant's Merit Brief, p. 60-67, 118-120. [State's Exhibit's #1 & 2] However, this Court flatly rejected both of these propositions stating: "[a]t the outset, we reject propositions V and XII because Ketterer's guilty plea waived his right to contest these issues on appeal." Id., at ¶ 116. Therefore, it is hard, if not impossible, to fathom how a third issue surrounding the motion to suppress would have survived waiver. As such, Ketterer's initial Appellate counsel can not be deemed ineffective for failing to raise an issue that was already waived. See, Barnes, supra (appellate counsel is not required to argue assignments of error which are meritless) Thus, Appellant's first proposition for reopening is without merit.

### **Proposition of Law No. 2:**

#### **A Defect In An Indictment Must Be Raised Prior To Trial, And Is Waived On Appeal.**

In Appellant's second proposition for reopening, he argues that his appellate counsel were ineffective for failing to argue a proposition of law surrounding the language contained

in the indictment against him. However, appellate counsel did attempt to raise this issue in a motion for leave to file supplemental briefing. [State's Exhibit #3] While this motion for supplemental briefing was denied by this Court, the Appellee nonetheless contends that if any such argument would have been raised it would have been without merit and thus initial appellate counsel did not provide ineffective assistance. [State's Exhibit #4]

This Court in **State v. Barton**, 108 Ohio St.3d 402, 414, 2006-Ohio-1324, noted the well settled law that:

Crim.R. 12(C)(2) mandates that "Defenses and objections based on defects in the indictment" must generally be raised "[p]rior to" trial, and we have previously held that "failure to timely object to the allegedly defective indictment constitutes a waiver of the issues involved." *State v. Biros* (1997), 78 Ohio St.3d 426, 436, 678 N.E.2d 891, citing *State v. Joseph* (1995), 73 Ohio St.3d 450, 455, 653 N.E.2d 285. Crim.R. (B)(1) states, "The plea of guilty is a complete admission of the defendant's guilt."

Therefore, any such argument concerning the language used in the initial indictment would have been deemed waived, and appellate counsel is not required to argue assignments of error which are meritless. See, **Barnes**, supra. As such, neither prong of the **Strickland** test can be demonstrated through this second proposition, and it should therefore be denied as being without merit.

**Proposition of Law No. 3:**

**Defense Counsel Withdrew In A Timely Manner From Representing A Potential Witness, And Thus Provided Effective Assistance Of Counsel.**

In his third proposition of law, the Appellant claims that his trial counsel suffered from a conflict of interest because he represented a possible witness in this case. However, based upon the time line of events in this case, the State of Ohio disagrees.

Initially, it must be noted that the Appellant has demonstrated a mistake in time

calculation in his argument addressing this issue. The Appellant claims that his trial counsel, "[a]fter the three judge panel sentenced Appellant to die, Attorney Howard did withdraw from his representation of Mr. Engle because "a conflict of interest has developed whereby he is unable to continue in his representation of the defendant". [Exhibit 15] By that time it was too late to withdraw, at least with respect to Appellant." See, Application For Reopening of Appellant, p. 6. (Emphasis added) [State's Exhibit #5] The reality, is that attorney Howard withdrew on July 2, 2003. [State's Exhibit #6, only relevant docket pages included] Whereas the Judgement of Conviction was filed on February 9, 2004, and the Verdict was filed on February 4, 2004. [State's Exhibits # 7 & 8] Thus, attorney Howard withdrew from the representation of Mr. Engle well over seven months before the three judge panel sentenced the Appellant to death.

Furthermore, it must be noted that attorney Howard's representation of Mr. Engle was not part of the record before the trial court and appellate review is strictly limited to the record. *The Warder, Bushnell & Glessner Co. v. Jacobs* (1898), 58 Ohio St. 77, 50 N.E. 97; *Carran v. Soline Co.* (1928), 7 Ohio Law Abs. 5 and *Republic Steel Corp. V. Sontag* (1935), 21 Ohio Law Abs. 358. Thus, Appellant's initial appellate counsel would not have been able to raise this issue. What is more, because it was not part of the record, the extent of any possibly claimed conflict, if any at all, cannot be known. As a possibility of conflict is insufficient to establish a violation of an Appellant's Sixth Amendment rights, and as no violation occurs where the conflict is irrelevant or merely hypothetical, appellate counsel was effective in the case at bar. See, *Moss v. United States*, 323 F.3d 445, 463-64 (6th Cir. 2003).

Therefore, as the Appellant is incorrect in his time line, and because attorney Howard

withdrew from representing Mr. Engle more than seven months before the Judgement of Conviction and the Verdict, there was no conflict of interest and appellant counsel were not ineffective for failure to raise this issue. The Appellant's third proposition should be denied.

**Proposition of Law No. 4:**

**The Prosecution Provided All Necessary Information, And No Brady Violation Occurred.**

In the forth issue for reopening the Appellant claims that the State failed to disclose favorable evidence to the defense. The State disagrees.

Pursuant to **Brady v. Maryland** (1963), 373 U.S. 83, the State is required to disclose material evidence to defense counsel. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. The possibility that certain undisclosed information might have been helpful to the defense or might have affected the outcome of the trial does not satisfy the requirement that the evidence be material. Moreover, the United States Supreme Court has held that the prosecution's "omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." **United States v. Agurs**, 427 U.S. 97, 112-13, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1975).

Therefore, in the case at bar, as the Appellant plead guilty and there was voluminous evidence proving his guilty, this Court should deny the motion to reopen based on any claimed **Brady** violation. See, **Agurs**, supra.

**Proposition of Law No. 5:**

**The Record Was Adequately Preserved And All Stipulations Were Correctly Made.**

In proposition of law number five, the Appellant argues that his appellate counsel were ineffective for failing to raise the issue that trial defense counsel was ineffective for not preserving grand jury transcripts, and for failing to submit as a supplement to the record the results of defense counsel's DNA testing. As neither one of these items was part of the trial court record, the State disagrees.

It is well settled that a reviewing court may not supplement the record before it with new matter that was not part of the trial court's proceedings. See, **State v. Ishmail** (1978), 54 Ohio St.2d 402, 8 O.O.3d 405, 377 N.E.2d 500, paragraph one of the syllabus. However, the Appellant now argues that because his appellate counsel were not able to supplement the record in this case with these two items, which were not presented to the trial court, that they were somehow ineffective. This argument must fail as it would require an advocate to do more than the law allows in order to be effective.

Furthermore, the Appellant also argues under this proposition that trial defense counsel made stipulations that were inaccurate, and that appellant counsel was ineffective for not including this as a proposition of law for argument. However, in appellant counsel's June 17, 2005, Second Motion to Supplement the Record, pages 3-4, counsel from the State Public Defenders Office noted that both trial defense counsel and the trial court itself concluded that these statements were not inconsistent. [State's Exhibit #9] Thus, it is hard to fathom how an issue would be raised based upon inaccuracies that even the three judge panel did not believe existed. Therefore, proposition of law for reopening five should be denied.

**Proposition of Law No. 6:**  
**Appellate Counsel Properly Argued And Raised All Sentencing Issues.**

In his last proposition of law for reopening, Appellant claims that his initial appellate counsel were ineffective for failing to raise the issue of the future constitutional changes to Ohio's sentencing scheme that were brought about by this Court's decision in **State v. Foster**, 109 Ohio St.3d 1, 2006-Ohio-856. The State disagrees.

Initially, it must be pointed out that appellate counsel filed Appellant's merit brief on October 29, 2004, and his rely brief on March 8, 2005. [State's Exhibits 10 & 11] Thereafter, appellate counsel argued Appellant's case before this Court on February 7, 2006. [State's Exhibit #12] It was not until twenty days after oral argument, and two days short of 16 full months after the merit brief was filed, that the **Foster** decision was released. [State's Exhibit #13] Thus, it is hard to fathom how appellate counsel fell below an objective standard of practice for failing to raise a case that was not yet decided. See, **State v. Smith** (1991), 72 Ohio App.3d 342, 345, (courts generally do not find that an attorney performs deficiently by failing to anticipate a future decision or development in the law)

What is more, after the **Foster** decision was released, appellate counsel did attempt to raise the issue in a motion for supplemental briefing to this Court. [State's Exhibit #14] However, this Court denied the additional briefing. [State's Exhibit #15] It should also be noted that appellate counsel did raise a Sixth Amendment issue pursuant to **Apprendi v. New Jersey** (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, and **Blakely v. Washington** (2004), 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403, on pages 73-76 of their merit brief. [State's Exhibit # 16] Thus, in the case at bar, there is no defective performance in the form of an error so serious that counsel were no longer performing as the

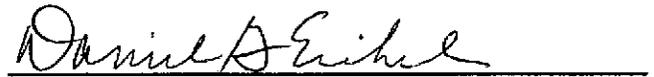
counsel required by the Sixth Amendment. See Strickland, *supra*. As such, reopening as to any Foster issue should be denied.

**CONCLUSION**

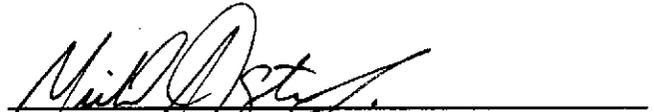
For the foregoing reasons, this Court should deny the motion to reopen.

Respectfully submitted,

**ROBIN N. PIPER** (0023205)  
**Butler County Prosecuting Attorney**



**DANIEL G. EICHEL** (0008259) [*Counsel of Record*]  
**First Assistant Prosecuting Attorney  
and Chief, Appellate Division**



**MICHAEL A. OSTER, JR.** (0076491)  
**Assistant Prosecuting Attorney**  
Government Services Center  
315 High Street, 11<sup>th</sup> Floor  
Hamilton, OH 45012-0515  
Telephone (513) 887-3474  
Fax (513) 887-3489

**PROOF OF SERVICE**

This is to certify that a copy of the foregoing Motion in Opposition, was sent to Randall L. Porter, Assistant State Public Defender, Counsel of Record for Appellant, 8 East Long Street, Columbus, OH 43215-2998, by U.S. ordinary mail this 6<sup>th</sup> day of February, 2007.



**MICHAEL A. OSTER, JR.** (0076491)  
**Assistant Prosecuting Attorney**

**THE STATE OF OHIO, APPELLEE, v. KETTERER, APPELLANT.**

[Cite as *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283.]

*Criminal law — Aggravated murder — Death penalty upheld.*

(No. 2004-0485 — Submitted February 7, 2006 — Decided October 25, 2006.)

APPEAL from the Court of Common Pleas of Butler County,

No. CR 2003-03-0309.

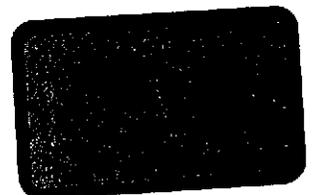
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**MOYER, C.J.**

{¶ 1} In the late afternoon on February 24, 2003, defendant-appellant, 53-year-old Donald Ketterer, beat and stabbed 85-year-old Lawrence Sanders to death in Hamilton, Ohio. Ketterer then stole money and other property and drove Sanders's car away. Ketterer pleaded guilty to burglary, aggravated burglary, aggravated robbery, grand theft of a motor vehicle, and aggravated murder and was sentenced to death.

{¶ 2} According to his confession, Ketterer went to Sanders's home on Shuler Avenue in Hamilton, Ohio on February 24, 2003, to borrow \$200 so he could pay a court fine. Ketterer claimed that Sanders "swore up and down to [him] that he did not have the money" and asked Ketterer to leave. Ketterer felt that Sanders "was being very disrespectful," and he hit Sanders in the head with a skillet three times. Ketterer remembered thinking, "[I]f I just knocked him out, he would know who did it, so I thought I should stab him," which Ketterer did. Ketterer further stated that after Sanders "quit moving," Ketterer took \$60 to \$70 out of Sanders's wallet, searched the house for more money, and found loose and rolled coins. Then he drove away in Sanders's 1995 Pontiac Grand Am.

{¶ 3} Mary Gabbard, a friend of Ketterer's, said that Ketterer was at her East Avenue residence on the evening of February 24, wearing yellow gloves that



demonstrate ineffective assistance of counsel. For the foregoing reasons, we overrule proposition IV.

*Suppression Issues (V, XII)*

{¶ 115} In proposition V, Ketterer argues that the trial court erred “by denying defense counsel’s pretrial motion to suppress Ketterer’s involuntary and coerced statements to the police.” In proposition XII, Ketterer argues that the police failed to honor Ketterer’s rights by not clarifying his comment about counsel before continuing to question him.

{¶ 116} At the outset, we reject propositions V and XII because Ketterer’s guilty plea waived his right to contest these issues on appeal. “[A] defendant who \* \* \* voluntarily, knowingly, and intelligently enters a guilty plea with the assistance of counsel ‘may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.’ ” *Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶ 78, quoting *Tollett v. Henderson* (1973), 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235. In *Fitzpatrick*, we applied this principle to preclude challenges to rulings on various pretrial motions. 102 Ohio St.3d 321, 2004-Ohio-3167, 810 N.E.2d 927, ¶ 79. Accord *Spates*, 64 Ohio St.3d 269, 595 N.E.2d 351, paragraph two of the syllabus (guilty plea waives defendant’s right to challenge deprivation of counsel at preliminary-hearing stage); *Kelley*, 57 Ohio St.3d 127, 566 N.E.2d 658, paragraph two of the syllabus (a plea of guilty “effectively waives all appealable errors” at trial unrelated to the entry of the plea).

*Duplicative Counts and Circumstances (VI)*

{¶ 117} In proposition VI, Ketterer argues that aggravated robbery (Count Two) and aggravated burglary (Count Three), as well as the death specifications charging aggravated murder in the course of aggravated robbery (specification two) and aggravated burglary (specification three) are duplicative

IN THE SUPREME COURT OF OHIO

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Appellant. : **This is a death penalty case.**

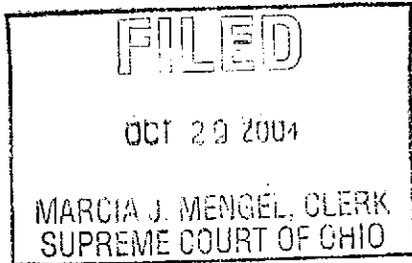
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ON APPEAL FROM THE COURT OF  
COMMON PLEAS OF BUTLER COUNTY  
CASE NO. CR 2003-03-0309

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**MERIT BRIEF OF APPELLANT DONALD KETTERER**

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DAVID H. BODIKER  
Ohio Public Defender

RUTH L. TKACZ (0061508)  
Assistant State Public Defender  
**Counsel of Record**

ROBIN N. PIPER  
Prosecuting Attorney

Butler County Prosecutor's Office  
Government Services Center  
315 High Street, 11th Floor  
Hamilton, Ohio 45011  
(513) 887-3474

TIMOTHY R. PAYNE (0069329)  
Assistant State Public Defender

Office of the Ohio Public Defender  
8 East Long Street, 11th Floor  
Columbus, Ohio 43215  
(614) 466-5394  
Fax: (614) 644-0703

COUNSEL FOR APPELLEE

COUNSEL FOR APPELLANT

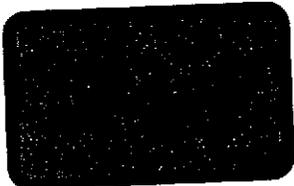
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## PROPOSITION OF LAW NO. 5

The trial court violated Appellant Ketterer's constitutional rights by denying defense counsel's pretrial motion to suppress Ketterer's involuntary and coerced statements to the police. U.S. Const. Amends. V, VIII, XIV; Ohio Const. Art. I, §§ 9 and 16.

### 1. INTRODUCTION.

The trial court's ruling to admit Ketterer's involuntary and coerced confessions to the police violated his constitutional right to due process. See Hill v. Anderson, 300 F.3d 679, 682 (6th Cir. 2002).

Prior to trial, defense counsel filed a motion to suppress evidence and requested an evidentiary hearing. (Motion to Suppress Evidence and Supporting Memorandum, March 27, 2003) The motion sought to suppress, *inter alia*, two written statements taken from Ketterer confessing to the murder of Larry Sanders. The statements, typed by city police detectives and signed by Ketterer, were taken at the Hamilton police station during the early morning hours of February 26, 2003.

Ketterer was taken to the police station for questioning at approximately 7:30 p.m. on February 25. (Supp. Hrg., Vol. 1, pp. 44, 70) Ketterer signed the first statement on February 26 at 4:25 a.m. (Id. at 157) That statement presented Ketterer's confession to committing the murder by hitting the victim over the head with a skillet and stabbing him and then further robbing him of money. (See id.; State's Hearing Exhibit 7.) The second statement was taken beginning at 4:45 a.m. and signed by Ketterer at 5:07 a.m. (Id. at 192; State's Hearing Exhibit 8) That statement was shorter and addressed the detectives' questions as to whether Ketterer was involved in another murder (double homicide) that occurred in Hamilton around the same time. The statement set forth that Ketterer knew nothing about the murders occurring on Harmon

Avenue and that he had never heard of a man named Paul Brown. (Id.) The statement, interestingly, also provided that:

I was in Vietnam. I can tell you that when I was in combat that I probably did kill several Vietnamese in battle. And from that time until I killed Larry I have never killed anyone else. (Id.)

The two statements should have been suppressed because they were involuntary and coerced by the police. The statements were involuntary due to Ketterer's deteriorated mental condition. The record amply supports that Ketterer, due to multiple serious mental health deficiencies, was suffering from an exceedingly diminished capacity when he signed the statements.

## 2. KETTERER'S STATEMENTS WERE INVOLUNTARY.

First, the evidence demonstrates that Ketterer, a documented alcoholic who has required past admission into detoxification facilities to become sober, was highly intoxicated on alcohol. Ketterer had been drinking at a bar on February 25 from at least 4:00 p.m. until 7:00 p.m.. In fact, he was so intoxicated that a bartender stated she would not serve him any more alcohol, and a cab had to be called to take him away. When he got up to leave for his cab, Ketterer spilled a bag of goods all over the floor. After the bartender helped him, he spilled the bag again. (Plea Hrg., Vol. 1, pp. 28-40) When the cab came, Ketterer had the driver take him through a drive-thru, where he purchased a pint of whiskey. The cab driver dropped Ketterer off at East Avenue. (Id. at 68)

Soon after being dropped off at or near 706 East Avenue, police apprehended Ketterer. At the suppression hearing, Officer Cifuentes testified that when he first approached Ketterer on February 25, around 7:10 p.m., at the back door of 706 East Avenue, Ketterer had alcohol on his breath. (Supp. Hrg., Vol. 2, p. 359) He further stated that his speech was somewhat slurred and

it was apparent Ketterer had been drinking. Cifuentes acknowledged that he thought Ketterer was in fact intoxicated. (Id. at 359-61) He even had to assure Ketterer he was not being arrested for public intoxication. (Id. at 362) The other officer present, Detective Steve Rogers, also acknowledged that he could smell alcohol on Ketterer's breath. (Id. at 152)

Detective Collins, who interviewed Ketterer at the police station on the evening of the 25th, also acknowledged that he could smell alcohol on Ketterer's breath, and that he seemed slow, slurred his words, and had severe cotton mouth. (Id. at 41)

Additionally, state's witness Donald Williams testified at the suppression hearing about Ketterer's excessive drinking around the time in question. Williams testified about being in contact with Ketterer on February 24 and 25, 2003, and having trouble believing what Ketterer was telling him because "he'd been drinking a lot." (Id. at 293, 296)

Second, at the time of his apprehension by the police, Ketterer was in the midst of a crack-cocaine binge. This fact is also amply supported by the record. Detective Collins testified at the suppression hearing that Ketterer would hang out with crack addict, Mary Gabbard, at 706 East Avenue,<sup>8</sup> where the two of them would drink and smoke crack-cocaine. (Supp. Hrg., Vol. 1, p. 61) Detective Rogers testified that he was informed that on the night of the offense, February 24, 2003, Ketterer showed up at 706 East Avenue with a bag of property and used crack. (Id. at 88-89) Ketterer stayed at East Avenue for quite some time and then left in the early morning hours. (Id.) Subsequent testimony at the suppression hearing indicated that Ketterer showed up two more times at 706 East Avenue the next day (Feb. 25). (Id. at 91, 358-

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<sup>8</sup> 706 East Avenue was an auto body shop, owned by Don Williams, that served as a fencing operation for exchanging, *inter alia*, stolen goods for illicit drugs. (See Supp. Hrg., June 2, 2003, p. 52; see also Plea Hrg., Jan. 28, 2004, p. 194)

59) Detective Rogers also testified that when Ketterer was approached by the police at the back door of 706 East Avenue, Ketterer was talking about crack-cocaine. (Id. at 134)

Detective Cifuentes testified similarly. Cifuentes testified that Ketterer was trading items to Williams at 706 East Avenue in exchange for crack-cocaine. He stated that much was said about this topic when the police first approached Ketterer at the back door. Ketterer had property in a crate and indicated he was getting his crack. (Supp. Hrg., Vol. 2, p. 384)

State's witness Mary Gabbard confirmed that Ketterer frequently smoked crack, and that he was coming to 706 East Avenue around the time of the offense to obtain crack. (Supp. Hrg., Vol. 2, p. 265; Plea Hrg., Vol. 1, pp. 44-45) She testified at the plea hearing that on the night of February 24, 2003, Ketterer came to the address with stolen property that included a couple hundred dollars worth of change. She stated that Ketterer had brought these items to trade for crack. (Plea Hrg., Vol. 1, pp. 44-45)

Based on the record, around the time of the offense and subsequent arrest, Ketterer was continually returning to 706 East Avenue to feed his crack addiction.<sup>9</sup>

Third, on top of his alcoholism and crack cocaine addiction, Ketterer was suffering from a serious mental illness, *i.e.*, bipolar disorder. The Hamilton City Police who took Ketterer's statements were, or should have been, aware of this because in his statement Ketterer mentions his prescription medication (Klonopin) and his concern over having mixed the medication with alcohol. (Supp. Hrg., Vol. 1, p. 165; State's Hearing Exhibit 7) As subsequent testimony on the record reveals, Ketterer's bipolar disorder, mixing with fluctuating psychotic symptoms, is a severe mental illness, and indeed is one of the most severe kinds of mental illness. (Mitigation

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<sup>9</sup> Ketterer himself stated that he was "on a three month nasty run." Pretrial, Dec. 9, 2003, p. 10.

Hrg., Vol. 2, p. 175) Ketterer's bipolar condition, combined with his chronic substance abuse of alcohol and cocaine, caused significant deterioration of his mental capacities.

Fourth, there were numerous other indications that Ketterer had bottomed into a completely debilitated state. Much of the evidence surrounding the offense suggests a perpetrator who had little to no awareness of what he was doing. The victim's car was found wrecked into a garage not far from 706 East Avenue. (See Supp. Hrg., Vol. 1, p. 176.) Silverware and numerous other items taken from the Sanders' home were found strewn about in the snow next to the adjacent alleyway. (Plea Hrg., State's Exhibits (photographs) 47 F, G, and H) At the bar during the afternoon of February 25, Ketterer was so intoxicated he could not keep from spilling his conspicuous bag of stolen property onto the floor. (Plea Hrg., Vol. 1, pp. 31-32) Further, the record indicates that Ketterer had stayed up much, if not all of the night before his arrest, smoking crack cocaine. (Supp. Hrg., Vol. 1, pp. 88-89) He was even observed to have been wearing the same clothes when arrested on February 26 that he was wearing on February 24. (Supp. Hrg., Vol. 1, p. 381)

Fifth, Ketterer's signed statement itself reveals that he had lost touch with reality. Specifically, Ketterer's second statement states that he served in the military in Vietnam. His statement goes on to say that "I probably did kill several people in battle." (Supp. Hrg., Vol. 1, p. 192; State's Hearing Exhibit 8). Ketterer, however, never served in Vietnam, and never engaged in any military combat. (Mitigation Hrg., Vol. 3, p. 249)

### **3. KETTERER'S STATEMENTS WERE THE PRODUCT OF COERCION.**

The record reveals that the Hamilton City Police took advantage of Ketterer's diminished mental condition and eventually, after prolonged questioning, coerced him into signing statements admitting to the crime. The record from the suppression hearing establishes that

Ketterer was brought into the police station on the evening of February 25, 2003, at 7:30 p.m., where he stayed in the same interrogation room in his deteriorated state, being questioned off and on by the police for the next 10 hours. (Supp. Hrg., Vol. 1, pp. 44, 383) Ketterer was interrogated over this period by no less than five different officers: Collins, Rogers, Smith, Cifuentes, and Marcum. During the early part of this interrogation, Detective Collins stopped his questioning because Ketterer refused to sign a card waiving his Miranda rights. Some four hours later, when again being questioned, Ketterer remarked to the police that maybe he needed an attorney. (Supp. Hrg., Vol. 1, p. 108) Detective Rogers testified that in response he told Ketterer that maybe he did need an attorney. (Id.) Rogers acknowledged, however, that he continued to press Ketterer and told him that this was his chance to tell the police about what he knew. (Id.) A signed waiver of Miranda rights was obtained at approximately 12:30 a.m. (Id. at 104)

Detective Rogers' questioning, conducted also with Detective Smith and later Detective Cifuentes, continued for approximately three more hours, from 12:30 a.m. until approximately 3:30 a.m., when the police were finally able to break their suspect. (Id. at 107) Rogers began typing a statement from Ketterer at around 4:00 a.m., which Ketterer signed at 4:25 a.m. (Id. at 107)

Moreover, aside from the sheer length of the interrogation process, the police also coerced Ketterer's statements by the use of scare tactics. The record establishes that Ketterer did not incriminate himself until after Detective Cifuentes appeared and began further interrogation. Cifuentes entered the interrogation room around 2:30 a.m. (Supp. Hrg., Vol. 1, p. 356) Both Detectives Rogers and Cifuentes acknowledge that at some point thereafter, Cifuentes began discussing possible punishments Ketterer was facing, including the death penalty. (Id. at 160, 365) Rogers testified that the difference between death row and a sentence with parole eligibility

was discussed with Ketterer. (Id. at 160) He believed that Cifuentes had read sections to Ketterer from the Ohio Criminal Code and discussed the various penalties for murder and aggravated murder. (Id.) Cifuentes' testimony confirmed that he had discussed with Ketterer the difference between the death penalty and a life sentence with parole eligibility. (Id. at 365) Cifuentes further testified that he informed Ketterer that he was going to be arrested for killing Sanders, but that he needed to know why it happened. He told Ketterer he needed to know his version because it looked like a very cold-blooded murder, and he proceeded to discuss the range of homicides. (Id. at 365-68) The tactic of raising the possibility of the death penalty while also discussing other possible options indicates a coercive police tactic. The police intended to coerce Ketterer into talking by leading him to believe that by doing so, and with the officers' help, his life might be spared.

All of these factors surrounding Ketterer's interrogation establish a coercive process:

- length of time of the interrogation;
- number of detectives involved;
- early morning hours at which the statements were obtained;
- Ketterer's initial refusal to sign the Miranda rights waiver card;
- Ketterer's comment that perhaps he needed an attorney;
- implying that talking might save Ketterer from the death penalty;
- Ketterer's diminished mental state presenting an advantage for the police.

These factors, considered together, lead to the conclusion that Ketterer's two signed statements were produced by undue police coercion.

**4. KETTERER MEETS THE LEGAL STANDARD FOR SUPPRESSION.**

A confession cannot be used if it is involuntary. Hill v. Anderson, 300 F.3d 679, 682 (6th Cir. 2002) (citing United States v. Macklin, 900 F.2d 948, 951 (6th Cir. 1990)). A confession is involuntary only if there is (1) police coercion or overreaching, which (2) overbore the accused's

will, and (3) caused the confession. See Colorado v. Connelly, 479 U.S. 157, 165-66 (1986); United States v. Brown, 66 F.3d 124, 126-27 (6th Cir. 1995).

A suspect's "mental condition is surely relevant to an individual's susceptibility to police coercion." Connelly, 479 U.S. at 165. When a suspect suffers from some mental incapacity, such as intoxication or retardation, and the incapacity is known to interrogating officers, a "lesser quantum of coercion" is necessary to call a confession into question. United States v. Sablotny, 21 F.3d 747, 751 (7th Cir. 1994); see also Nickel v. Hannigan, 97 F.3d 403, 410 (10th Cir. 1996). Further, when assessing whether a confession is involuntary due to intoxication, it is proper for the court to consider the totality of the circumstances. United States v. Newman, 889 F.2d 88, 94 (6th Cir. 1989). See also State v. Edwards, 49 Ohio St. 2d 31, 358 N.E.2d 1051, syllabus, para. 2 (1976).

Here, the totality of the circumstances weigh in favor of Ketterer, and his confessions should have been suppressed. In short, the combination of the various, underlying circumstances surrounding Ketterer's confessed statements warrant a finding that the statements were not voluntary. Ketterer's statements were a product of his intoxication, deteriorated mental condition, and overriding fatigue combined with the coercive pressure put upon him by the police. His intoxicated condition and mental incapacity were known by the police, and thus a "lesser quantum of coercion" is required to invalidate his confession. See Sablotny, supra. The trial court erred by denying the defense's motion to suppress. The trial court's ruling to admit Ketterer's confession to the police violated his constitutional right to due process, and his conviction should be reversed.

## PROPOSITION OF LAW NO. 12

During a custodial interrogation, when a suspect indicates that he needs an attorney, the police fail to honor his Fifth Amendment right to remain silent when they do not seek clarification of the suspect's request before continuing with the interrogation. U.S. Const. Amends. V, XIV.

Because the United States Supreme Court has held that the police must "scrupulously honor" a suspect's invocation of his Miranda rights, all interrogation should have ceased when Ketterer told Detective Steve Rogers, "Maybe I need an attorney." (Supp. Hrg., Vol. 1, pp. 107-08) The continued questioning that followed violated Ketterer's Fifth Amendment rights.

When a suspect invokes his or her right to remain silent during a custodial interrogation, all questioning must cease. Michigan v. Mosley, 423 U.S. 96 (1975). The police must honor the suspect's exercise of his right to cut off questioning. Id. at 104. Appellant Ketterer recognizes that police are under no constitutional obligation to ask a suspect to clarify ambiguous statements. Davis v. United States, 512 U.S. 452, 462-63 (1994). The test as it is currently applied is whether the suspect has articulated his desire to remain silent "sufficiently clearly that a reasonable police officer in the circumstances would understand the statement." Id. at 459. A reviewing court must make an objective inquiry. Id.

"A suspect need not speak with the discrimination of an Oxford don." Id. at 459 (quoting id. at 476 (Souter, J., concurring in judgment)). The Supreme Court acknowledged, however, that when a suspect makes an ambiguous statement, "[c]larifying questions help protect the rights of a suspect by ensuring that he gets an attorney if he wants one . . . ." Id. at 461. The Court did not adopt a rule requiring the police to follow up with clarifying questions, but Ketterer argues that only by clarifying otherwise ambiguous or inarticulate statements can a suspect's constitutional rights be protected.

The totality of the circumstances in Ketterer's case shows that he could not clearly express his request to stop the interrogation because of his cognitive deficits, mental illness, and substance abuse. Ketterer's cognitive functioning falls in the low to borderline level. (Mitigation Hrg., Vol. 2, p. 169) He has a history of severe mental illness. He was hospitalized in psychiatric facilities thirteen times between 1995 and 2002. (Id. at 171) He has been diagnosed with bipolar disorder mixed, with fluctuating psychotic symptoms. (Id. at 174) Ketterer has been alcohol dependent for over 30 years and has used such drugs as cocaine, barbiturates, and marijuana. (Id. at 180) Ketterer reported that at the time of the offense, he took a large quantity of prescription medication and mixed it with alcohol. (Id. at 212) Ketterer did not have the mental wherewithal to articulately, and with unflinching purpose, invoke his Fifth Amendment rights. Under these circumstances, the detectives should have pursued a clarification of his statement, "Maybe I need an attorney." Instead, a detective merely responded, "Maybe you do." (Supp. Hrg., Vol. 1, p. 108) Although the detective said he offered to talk about it, he never asked Ketterer any follow-up questions before proceeding with the interrogation. (Id.)

When Butler County detectives brought Ketterer in for questioning, it was apparent that he was under the influence of alcohol. (Id. at 41) But the detectives did not give Ketterer a sobriety test. (Id. at 42) According to the evidence presented at the suppression hearing, after Ketterer left Lawrence Sanders's home on February 24, he went to 706 East Avenue and smoked crack with Donald Williams. (Id. at 88) Detectives picked up Ketterer at 7:30 p.m. on February 25, 2003, after he had left intoxicated from a bar. (Id. at 151; Plea Hrg., Vol. 1, p. 40) Ketterer was held at the police station until he was charged with aggravated murder on February 26, 2003, at 5:15 a.m. (Supp. Hrg., Vol. 1, p. 167) When Ketterer told the detective that he might need an

attorney, he had been held at the police station for approximately five hours. (Id. at 104, 107-08)

Multiple detectives were present during the interrogation. (Id. at 108)

When a suspect such as Ketterer is physically tired, under the influence of alcohol, and coming off the influence of crack-cocaine, his judgment is impaired. Dr. Bobbie Hopes concluded that Ketterer has difficulty maintaining focus and has impaired judgment and reasoning ability. (Defense Mitigation Exhibit D, p. 9) Ketterer's drug use, mental illness, and low I.Q. made him especially vulnerable to police interrogation. That being the case, when he voiced a desire to consult with an attorney, it was incumbent upon the police to clarify the statement so that Ketterer's Fifth Amendment rights would be respected and preserved.

Many criminal suspects "will be sufficiently intimidated by the interrogation process or overwhelmed by the uncertainty of their predicament that the ability to speak assertively will abandon them." Davis, 512 U.S. at 469-70 (Souter, J., concurring). By continuing the interrogation without determining whether Ketterer wanted to stop all questioning and contact an attorney, especially when he was under the influence of drugs and alcohol and, thus, less likely to be able to express himself in unequivocal terms, the police violated his right to remain silent.

A rule recognizing that a suspect's ambiguous statements must be clarified by the interrogating law enforcement officers "faces both the real-world reasons why misunderstandings arise between suspect and interrogator and the real-world limitations on the capacity of police and trial courts to apply fine distinctions and intricate rules." Id. at 469.

Ketterer urges this Court to adopt the reasoning in Davis and hold that a capital defendant's Fifth Amendment rights are violated when a suspect makes an ambiguous statement involving his right to remain silent and the police fail to ask him clarifying questions that would help protect the suspect's rights by ensuring that he gets an attorney if he wants one.

IN THE SUPREME COURT OF OHIO

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

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

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APPELLANT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEFING

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ROBIN N. PIPER  
Prosecuting Attorney

DANIEL G. EICHEL  
First Assistant Prosecuting Attorney

MICHAEL A. OSTER, JR.  
Assistant Prosecuting Attorney

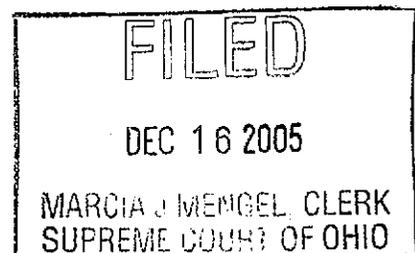
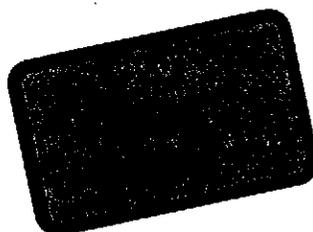
Butler County Prosecutor's Office  
Government Services Center  
315 High Street, 11th Floor  
Hamilton, Ohio 45011  
(513) 887-3474  
COUNSEL FOR APPELLEE

DAVID H. BODIKER  
Ohio Public Defender

RUTH L. TKACZ (0061508)  
Assistant State Public Defender  
Counsel of Record

TIMOTHY R. PAYNE (0069329)  
Assistant State Public Defender

Office of the Ohio Public Defender  
8 East Long Street, 11th Floor  
Columbus, Ohio 43215  
(614) 466-5394  
Fax: (614) 644-0703  
COUNSEL FOR APPELLANT



IN THE SUPREME COURT OF OHIO

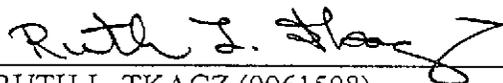
STATE OF OHIO, : Case No. 04-0485  
Appellee, :  
-vs- : Appeal taken from Butler County  
 : Court of Common Pleas  
DONALD KETTERER, : Case No. CR 2003-03-0309  
Appellant. : **This is a death penalty case.**

APPELLANT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEFING

Appellant Donald Ketterer hereby requests leave of this Court to supplement his merit brief, which was filed on October 29, 2004, to include an issue that was not previously discovered, so that this Court has the opportunity to fully consider all issues in this capital case. A memorandum in support is attached.

Respectfully submitted,

DAVID H. BODIKER  
Ohio Public Defender

  
RUTH L. TKACZ (0061508)  
Assistant State Public Defender  
**Counsel of Record**

TIMOTHY R. PAYNE (0069329)  
Assistant State Public Defender

Office of the Ohio Public Defender  
8 E. Long Street, 11<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 466-5394  
COUNSEL FOR APPELLANT

## MEMORANDUM IN SUPPORT

Appellant Donald Ketterer filed a merit brief with this Court on October 29, 2004. The state filed its brief on February 16, 2005. Ketterer filed a reply brief on March 8, 2005. This Court has set oral argument for February 7, 2006.

In preparing for oral argument, direct appeal counsel has discovered an issue not previously brought to this Court's attention. The indictment that charged Ketterer with aggravated robbery as an independent count and as a death specification was faulty. The state's indictment failed to provide notice to Ketterer that the offense of aggravated robbery requires the infliction, or attempted infliction, of "serious" physical harm. O.R.C. § 2911.01(A)(3). Cf. O.R.C. § 2911.02(A)(2). The March 4, 2003 indictment read only that Ketterer "did inflict, attempt to inflict, or threaten to inflict *physical harm* on Lawrence Sanders." (Emphasis added.) Defense counsel failed to move the trial court to dismiss the aggravated robbery charge. Thus, Ketterer pled guilty to a charge of aggravated robbery and a death specification that do not exist under Ohio law. Ketterer requests the opportunity to develop the issue for this Court's review.

For appellate counsel to completely present, and for this Court to accurately determine, the errors that occurred during Ketterer's trial proceedings, counsel must be permitted to raise errors in the Merit Brief arising from the record. Without the ability to raise all relevant issues, counsel cannot provide effective representation to Ketterer on this first appeal as of right. See State v. Buell, 70 Ohio St.3d 1211, 639 N.E.2d 110 (1994); Evitts v. Lucey, 469 U.S. 387 (1985). Simply put, more process is due in a capital case because of the extreme finality of the punishment. See Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

In other cases, this Court has *sua sponte* ordered supplemental briefing, even long after the initial briefs have been filed. See, e.g., State v. Drummond, Case No. 2004-0586; State v.

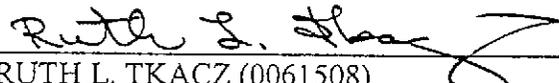
Yarbrough, Case No. 2000-2119. This Court also has granted appellants' motions requesting supplemental briefing. See, e.g., State v. Elmore, Case No. 2004-0041; State v. Barton, Case No. 2003-2036; State v. Jackson, Case No. 2002-1604; State v. Cunningham, Case No. 2002-1377.

If this Court does not allow supplemental briefing, the indictment issue will likely be raised in an Application for Reopening under Ohio Sup. Ct. Prac. R. XI, § 5, and State v. Murnahan, 63 Ohio St. 3d 60 (1992). Thus, it would be efficient for this Court to consider the issue on Ketterer's appeal as of right, rather than in a later case filing.

Accordingly, direct appeal counsel respectfully request leave of this Court to file supplemental briefing. Should this Court grant this motion, Appellant Ketterer would supplement his brief with an additional argument under Proposition of Law No. 4 (ineffective assistance of counsel)—new section no. 6—and by adding new Proposition of Law No. 16 (violation of Ketterer's Fifth and Fourteenth Amendment right to due process).

Respectfully submitted,

DAVID H. BODIKER  
Ohio Public Defender

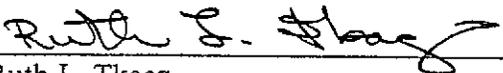
  
RUTH L. TKACZ (0061508)  
Assistant State Public Defender

TIMOTHY R. PAYNE (0069329)  
Assistant State Public Defender

Office of the Ohio Public Defender  
8 East Long Street, 11th Floor  
Columbus, Ohio 43215-2998  
(614) 466-5394  
Fax: (614) 644-0703  
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion for supplemental briefing was forwarded by regular U.S. mail to counsel of record, Daniel G. Eichel, First Assistant Butler County Prosecuting Attorney, 315 High Street, Hamilton, Ohio 45011, on the 16<sup>th</sup> day of December, 2005.

  
\_\_\_\_\_  
Ruth L. Tkacz  
Counsel for Appellant

ON COMPUTER-KMR

The Supreme Court of Ohio

FILED

JAN 25 2006

MARCIA J. MENGEL, CLERK  
SUPREME COURT OF OHIO

103-039

State of Ohio

Case No. 04-485

v.

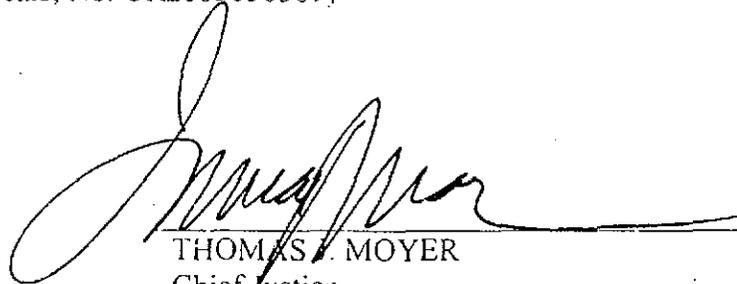
ENTRY

Donald J. Ketterer

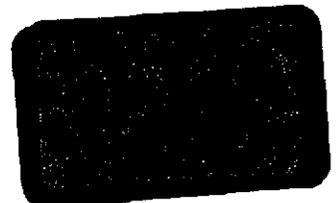
This cause is pending before the Court as an appeal from the Court of Common Pleas for Butler County. Upon consideration of appellant's motion for leave to file a supplemental brief,

IT IS ORDERED by the Court that the motion for leave is denied.

(Butler County Court of Appeals; No. CR2003030309)



THOMAS J. MOYER  
Chief Justice



IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
Appellee, :  
-vs- : Case No. 2004-0485  
DONALD KETTERER, :  
Appellant. : Death Penalty Case

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On Appeal From The Court Of Common Pleas  
Of Butler County, Case No. 2003 CR-03-0309

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**APPLICATION FOR REOPENING  
PURSUANT TO S.CT. PRAC. R. XI, SECTION 6**

---

ROBIN N. PIPER #0023205  
Prosecuting Attorney

DAVID H. BODIKER  
Ohio Public Defender

DANIEL G. EICHEL #0008259  
First Assistant Prosecuting Attorney

RANDALL L. PORTER #0005835  
Assistant State Public Defender  
**Counsel of Record**

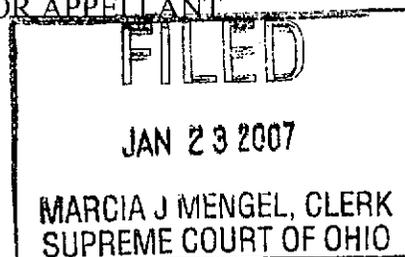
MICHAEL A. OSTER, JR. #0076491  
Assistant Prosecuting Attorney

Office of the Ohio Public Defender  
8 East Long Street, 11th Floor  
Columbus, Ohio 43215  
(614) 466-5394  
Fax: (614) 644-0703  
[porterr@opd.state.oh.us](mailto:porterr@opd.state.oh.us)

Butler County Prosecutor's Office  
Government Services Center  
315 High Street, 11th Floor  
Hamilton, Ohio 45011  
(513) 887-3474

COUNSEL FOR APPELLEE

COUNSEL FOR APPELLANT



place the DNA results into evidence. Attorney Howard could not have cross examined his other client, Tim Engle. That conflict was imputed to co-counsel Chris Pagan. After the three judge panel sentenced Appellant to die, Attorney Howard did withdraw from his representation of Mr. Engle because “a conflict of interest has developed whereby he is unable to continue in his representation of the defendant”. [Exhibit 15]. By that time it was too late to withdraw, at least with respect to Appellant.

#### **PROPOSITION OF LAW NO. IV**

**A PROSECUTOR IS REQUIRED TO DISCLOSE IN A TIMELY MANNER PRIOR TO TRIAL, ALL EXCULPATORY EVIDENCE, INCLUDING EVIDENCE THAT IMPEACHES HIS WITNESSES. Fifth, Sixth, Eighth and Fourteenth Amendments.**

Defense counsel filed five pleadings requesting discovery. The prosecution in all of its initial and supplemental discovery responses, never acknowledged that it possessed any exculpatory information.

Seven of the prosecution’s witnesses had critical information concerning Appellant’s severe drug and alcohol intoxication state at the time of his arrest. [See 4.03.03, Tr. 29-32, 39-42, 293, 358-361.] The prosecution in discovery never provided this information.

The prosecution alleged that Appellant purchased crack cocaine from Mary Gabbard at 706 East Avenue just subsequent to the homicide [04.03.03, Tr. 258-273]. Donald Williams was purchasing the property at 706 East Avenue. [*Id.*, Tr. 260]. Both Gabbard and Williams were charged as a result of the raid on the East Avenue premises. Both Williams and Gabbard testified against Appellant [*Id.* Tr. 242, 297-298]. The prosecutor provided no discovery as to the raid at 706 East Avenue. When defense counsel attempted to broach the issue, the three judge panel repeatedly sustained the prosecutor’s objections. [04.03.03, Tr. 246-247, 251-254].

IN THE COMMON PLEAS COURT  
BUTLER COUNTY, OHIO

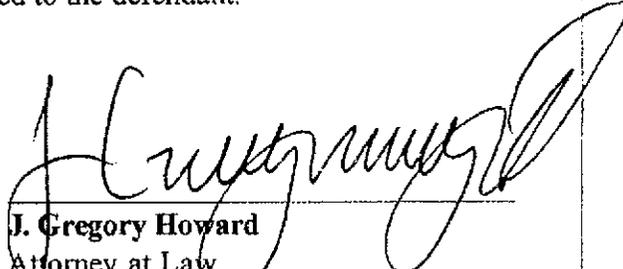
STATE OF OHIO : CASE NO. CR02-11-1895  
Plaintiff :  
vs. : MOTION AND ENTRY TO  
TIM ENGLE : WITHDRAW AS COUNSEL  
Defendant : JUDGE PATER  
: : : : :

Now comes, J. Gregory Howard, counsel of record for the defendant, and hereby move this Court for an order allowing him to withdraw as counsel for the defendant.

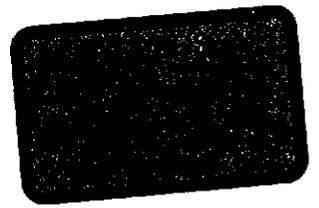
Counsel represents to the Court that based upon information he has received, a conflict of interest has developed whereby he is unable to continue in his representation of the defendant.

Therefore, counsel would respectfully request permission to withdraw.

A copy of said motion has been forwarded to the defendant.

  
J. Gregory Howard  
Attorney at Law  
Supreme Court # 0038510  
723 Dayton Street  
Hamilton, OH 45011  
Tel: 513-868-3663  
Fax: 513-868-9848  
e-mail: jgregoryhoward@cinci.rr.com

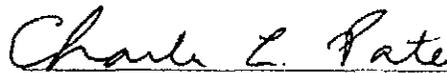
J. GREGORY HOWARD  
ATTORNEY AT LAW  
723 DAYTON STREET  
HAMILTON, OHIO 45011  
(513) 868-3663  
FAX (513) 868-9848



**ENTRY**

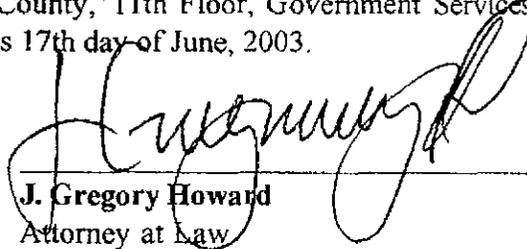
Upon application of counsel and for good cause shown,

**IT IS HEREBY ORDERED THAT** J. Gregory Howard be allowed to withdraw as counsel of record for the defendant and that new counsel be appointed.

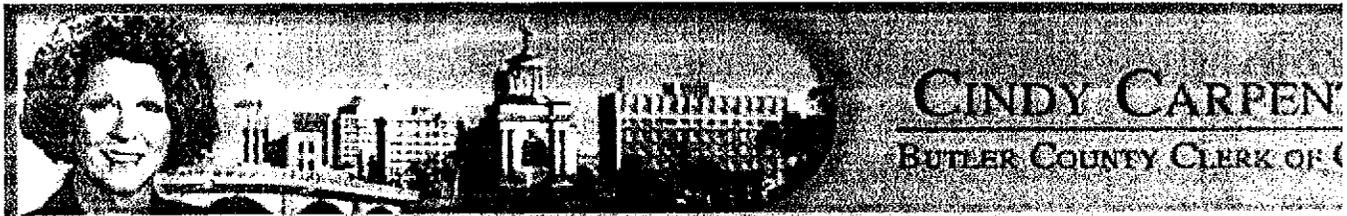
  
PATER, J.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion was served by ordinary U. S. Mail upon the Prosecuting Attorney for Butler County, 11th Floor, Government Services Center, 315 High Street, Hamilton, OH 45011, this 17th day of June, 2003.

  
J. Gregory Howard  
Attorney at Law

J. GREGORY HOWARD  
ATTORNEY AT LAW  
723 DAYTON STREET  
HAMILTON, OHIO 45011  
(513) 868-3663  
FAX (513) 868-9848



## General Inquiry



New Sr

Summary Parties Events **Dockets** Fields Notes Disposition C

## Docket Search

CR 2002 11 1895 STATE OF OHIO VS ENGLE, TIM PATER

Search Criteria

Docket Desc.

Begin Date

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End Date

Ascending

Descending

Search Results First 100 of result set displayed, Please limit search criteria.

Docket Date	Docket Text	Amount	Amount Due	Images
02/07/2005	RC-MMM	0.00	0.00	
01/26/2005	ALL PAPERS SEPARATED AND RETURNED TO SHELF	0.00	0.00	
12/06/2004	MANDATE issued-trial ct. COPIES ISSUED TO ATTORNEY OF RECORD BY REGULAR MAIL	6.00	6.00	<input type="checkbox"/>
07/23/2004	ALL PAPERS SENT TO COURT OF APPEALS	0.00	0.00	
03/04/2004	CHANGE OF PLEA SEPTEMBER 30, 2003 TRANSCRIPT OF PROCEEDING FILED KATHERINE DEPPERMAN	0.00	0.00	
03/02/2004	RC - LK	0.00	0.00	

07/10/2003	PRECIPE FILED SUBPOENA ISSUED.	0.00	0.00	☐
07/09/2003	COURT ADMINISTRATION OFFICE HAS SCHEDULED: The following event: PLEA OR TRIAL SETTING scheduled for 07/08/2003 at 8:30 am has been rescheduled as follows: Event: PLEA OR TRIAL SETTING Date: 07/29/2003 Time: 8:30 am Judge: PATER, CHARLES L Location: General Div Court 2nd floor Super Courtroom	0.00	0.00	☐
07/02/2003	MOTION AND ENTRY TO WITHDRAW AS COUNSEL Attorney: HOWARD, J GREGORY (38510)	4.00	4.00	☐
06/30/2003	PERSONAL SERVICE OF WRIT: UPON: Method : SERVICE BY PROCESS SERVER Issued : 06/04/2003 Service : SUBPOENA BY PROCESS SERVER Served : 06/24/2003 Return : 06/30/2003 On : DIXON, CECILE Signed By : Reason : PROCESS SERVICE Comment : Tracking #: C000012916	0.00	0.00	☐
06/23/2003	PERSONAL SERVICE OF WRIT: UPON: Method : SERVICE BY PROCESS SERVER Issued : 06/04/2003 Service : SUBPOENA BY PROCESS SERVER Served : 06/23/2003 Return : 06/23/2003 On : HENSLEY Detective, FRANK Signed By : Reason : PROCESS SERVICE Comment : Tracking #: C000012911	0.00	0.00	☐
06/23/2003	PERSONAL SERVICE OF WRIT: UPON: Method : SERVICE BY PROCESS SERVER Issued : 06/04/2003 Service : SUBPOENA BY PROCESS SERVER Served : 06/23/2003 Return : 06/23/2003 On : SWARTZEL Detective, DAVE Signed By : Reason : PROCESS SERVICE Comment : Tracking #: C000012910	0.00	0.00	☐
06/23/2003	PERSONAL SERVICE OF WRIT: UPON: Method : SERVICE BY PROCESS SERVER Issued : 06/04/2003 Service : SUBPOENA BY PROCESS SERVER Served : 06/23/2003 Return : 06/23/2003 On : RUSSELL, DEBRA Signed By : Reason : PROCESS SERVICE Comment : Tracking #: C000012915	0.00	0.00	☐

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PRIORITY

STATE OF OHIO

2004 FEB -9 AM 10:02  
BUTLER COUNTY  
CLERK OF COURTS

CASE NO. CR 2003-03-0309

Plaintiff

STATE OF OHIO

vs.

COUNTY OF BUTLER

COURT OF COMMON PLEAS

DONALD J. KETTERER

Oney, P.J.; Sage and Crehan, JJ.

PRIORITY

Defendant

JUDGMENT OF CONVICTION ENTRY

[This is a Final Appealable Order.]

: : : : : : : : : :

This 2<sup>nd</sup> - 4<sup>th</sup> days of February, 2004, came the Prosecuting Attorney into Court and the Defendant personally appearing with his counsel, J. Gregory Howard and Christopher J. Pagan, and the charges, plea of guilty, and findings of the three-judge panel being set forth in the previous Entries of the Court filed January 30, 2004, and February 4, 2004, which are expressly included herein by reference. Wherefore, the Defendant being informed that he stands convicted of **AGGRAVATED MURDER** contrary to R.C. 2903.01(B) with **Specification 1 to Count One** pursuant to R.C. 2929.04(A)(3), **Specification 2 to Count One** pursuant to R.C. 2929.04(A)(7), and **Specification 3 to Count One** pursuant to R.C. 2929.04(A)(7), as charged in Count One of the Indictment; **AGGRAVATED ROBBERY** contrary to R.C. 2911.01(A)(3), a felony of the first degree as charged in Count Two of the Indictment; **AGGRAVATED BURGLARY** contrary to R.C. 2911.11(A)(1), a felony of the first degree as charged in Count Three of the Indictment, **GRAND THEFT OF A MOTOR VEHICLE**, a felony of the fourth degree contrary to R.C. 2913.02(A)(1) as charged in Count Four of the Indictment, and **BURGLARY** contrary to R.C. 2911.12(A)(3), a felony of the third degree as charged in Count Five of the Indictment, and after having heard all the facts adduced by both parties, the panel of three judges having engaged in a determination of sentence for Count One pursuant to the requirements of R.C. 2929.03(D)(1)-(3) and having unanimously found that the aggravating circumstances the Defendant was found guilty of committing outweigh the mitigating factors presented by proof beyond a reasonable doubt, the Court afforded counsel an opportunity to speak on behalf of the Defendant, and the Court addressed the defendant personally and asked if he wished to make a statement in his own behalf or present any information in mitigation of punishment, and nothing being shown as to why sentence should not now be pronounced,

It is **ORDERED** as to **Count One** that the Defendant shall suffer death, which sentence is imposed pursuant to R.C. 2929.02(A) and 2929.03-.04. Pursuant to R.C. 2949-21-.22, a Writ for the execution of the death penalty shall be issued, directed to the Sheriff, requiring that the Defendant be conveyed to the custody of the **Ohio Department of Rehabilitation and Correction** and

OFFICE OF  
PROSECUTING ATTORNEY  
BUTLER COUNTY, OHIO  
ROBIN PIPER  
PROSECUTING ATTORNEY  
GOVERNMENT SERVICES CENTER  
318 HIGH ST., 15TH FLOOR  
P.O. BOX 318  
MARIETTA, OHIO 45752



that the Defendant be assigned to the appropriate correctional institution and kept until the execution of his sentence. This death sentence shall be executed by lethal injection in accordance with the provisions of R.C. 2949.22, within the walls of the state correctional institution designated by the Director of the Rehabilitation and Correction as the location for executions, and within an enclosure to be prepared for such purpose that shall exclude public view, under the direction of the Warden of such institution or, in his absence, a deputy warden, on the 24<sup>th</sup> day of June, 2004, or date otherwise designated by a court in the course of any appellate or postconviction proceedings.

It is **FURTHER ORDERED** as to Count Two that the Defendant be sentenced to be imprisoned for a **stated prison term of nine (9) years** and pay a fine of two thousand (\$2,000.00) dollars.

It is **FURTHER ORDERED** as to Count Three that the Defendant be sentenced to be imprisoned for a **stated prison term of nine (9) years**, which term of imprisonment shall be served **consecutively** with the term of imprisonment heretofore imposed as to Count Two, and pay a fine of two thousand (\$2,000.00) dollars.

It is **FURTHER ORDERED** as to Count Four that the Defendant be sentenced to be imprisoned for a **stated prison term of seventeen (17) months**, which term of imprisonment shall be served **concurrently** with the terms of imprisonment heretofore imposed as to Counts Two and Three. The Court has considered the factors under R.C. 2929.13(B) and finds the following:

- physical harm to a person;
- attempt or threat with a weapon;
- previous prison term served.

For reasons stated on the record, and after consideration of the factors under R.C. 2929.12, the Court also finds that prison is consistent with the purposes of R.C. 2929.11 and that the defendant is not amenable to an available community control sanction.

It is **FURTHER ORDERED** as to Count Five that the Defendant be sentenced to be imprisoned for a **stated prison term of four (4) years**, which term of imprisonment shall be served **consecutively** with the terms of imprisonment heretofore imposed as to Counts Two and Three, and pay a fine of one thousand (\$1,000.00) dollars.

With regard to sentences imposed herein as to Counts Two, Three and Five, pursuant to Revised Code Section 2929.14(E), the Court finds for the reasons stated on the record that:

- Consecutive sentences are necessary to protect the public from future crime or to punish the defendant and not disproportionate to the seriousness of the defendant's conduct and the danger the defendant poses to the public.

OFFICE OF  
PROSECUTING ATTORNEY  
BUTLER COUNTY, OHIO  
  
ROBIN PIPER  
PROSECUTING ATTORNEY  
  
GOVERNMENT SERVICES CENTER  
116 HIGH ST., 11TH FLOOR  
P.O. BOX 818  
HAMILTON, OHIO 45012

The Court also finds that:

- The harm caused by the defendant was so great or unusual that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the defendant's conduct.
- The defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the defendant.

Therefore, the sentences as to Counts Two, Three and Five are to be served consecutively.

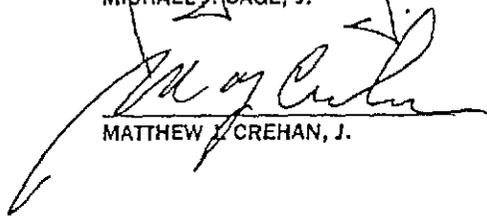
Defendant is hereby further advised of all of his rights pursuant to Criminal Rule 32, including his right to appeal the judgment, his right to appointed counsel at no cost, his right to have court documents provided to him at no cost, and his right to have a notice of appeal filed on his behalf.

Defendant is therefore **ORDERED** conveyed to the custody of the **Ohio Department of Rehabilitation and Correction**. Credit for 347 days is granted as of this date of sentencing along with future custody days in the Butler County Jail while Defendant awaits transportation to the appropriate state institution, to be certified by the Sheriff. Defendant is **ORDERED** to pay all costs of prosecution.

ENTER

  
PATRICIA ONEY, P.J.

  
MICHAEL J. SAGE, J.

  
MATTHEW J. CREHAN, J.

Approved as to Form:

ROBIN N. PIPER (0023205)  
PROSECUTING ATTORNEY  
BUTLER COUNTY, OHIO  
CDH/DGE/mml  
2/06/2004

IN THE COMMON PLEAS COURT, BUTLER COUNTY, OHIO

STATE OF OHIO  
Plaintiff

CASE NO. CR2003-03-0309

FILED BUTLER CO.  
COMMON PLEAS COURT

VERDICT

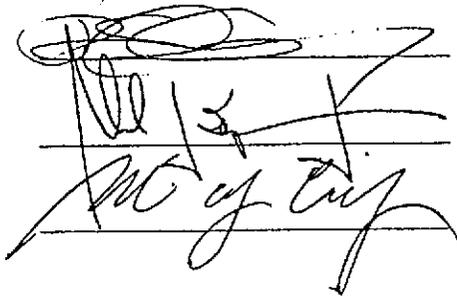
vs

FEB 04 2004

Defendant  
Donald Ketterer

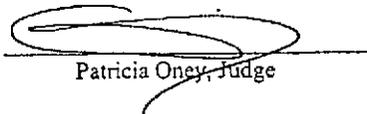
CINDY CARPENTER  
CLERK OF COURTS

We, the panel of Judges having been empaneled to hear this cause find the aggravating circumstances that the defendant was found guilty of committing, outweighs the mitigating factors presented in this case by proof beyond a reasonable doubt and hereby sentences Donald Ketterer to death.

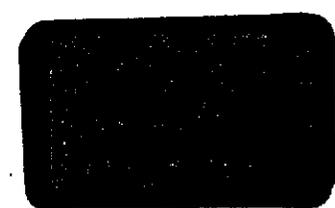


FILED  
FEB 4 2004  
CLERK OF COURTS

ENTER



Patricia Oney, Judge



IN THE SUPREME COURT OF OHIO

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

---

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

---

APPELLANT'S SECOND MOTION TO  
SUPPLEMENT THE RECORD ON APPEAL  
UNDER S. CT. PRAC. R. XIX, § 3(D)

---

ROBIN N. PIPER  
Prosecuting Attorney

DANIEL G. EICHEL  
First Assistant Prosecuting Attorney

MICHAEL A. OSTER, JR.  
Assistant Prosecuting Attorney

Butler County Prosecutor's Office  
Government Services Center  
315 High Street, 11th Floor  
Hamilton, Ohio 45011  
(513) 887-3474  
COUNSEL FOR APPELLEE

DAVID H. BODIKER  
Ohio Public Defender

RUTH L. TKACZ (0061508)  
Assistant State Public Defender  
**Counsel of Record**

TIMOTHY R. PAYNE (0069329)  
Assistant State Public Defender

Office of the Ohio Public Defender  
8 East Long Street, 11th Floor  
Columbus, Ohio 43215  
(614) 466-5394  
Fax: (614) 644-0703  
COUNSEL FOR APPELLANT

FILED

JUN 17 2005

MARCIA J. MENGEL, CLERK  
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

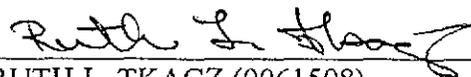
STATE OF OHIO, : Case No. 04-0485  
Appellee, :  
-vs- : Appeal taken from Butler County  
DONALD KETTERER, : Court of Common Pleas  
Appellant. : Case No. CR 2003-03-0309  
: This is a death penalty case.

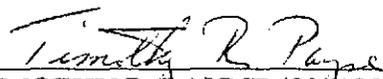
MOTION TO SUPPLEMENT THE RECORD

Appellant Donald Ketterer hereby moves this Court to order the Clerk of the Butler County Court of Common Pleas to locate, certify, and transmit the witness statements provided to defense counsel under Ohio R. Crim. P. 16(B)(1)(f) & (g) and the transcript of the grand jury proceedings prepared in this case to this Court. Ohio Rev. Code Ann. § 2929.05 mandates appellate review of the entire record in the direct appeal. Supplementation of the record is therefore necessary to comply with this statutory mandate. Also, appellate counsel cannot fulfill their role as zealous advocates for Mr. Ketterer without the benefit of a complete record. A memorandum is attached.

Respectfully submitted,

DAVID H. BODIKER  
Ohio Public Defender

  
RUTH L. TKACZ (0061508)  
Assistant State Public Defender

  
TIMOTHY R. PAYNE (0069329)  
Assistant State Public Defender

COUNSEL FOR APPELLANT

## MEMORANDUM IN SUPPORT

Appellant Donald Ketterer pled guilty to aggravated murder and was sentenced to death by a three-judge panel of the Butler County Court of Common Pleas. He is currently before this Court on an appeal as of right. Under Article I, § 16, of the Ohio Constitution, he is entitled to a “complete, full, and unabridged transcript of all proceedings against him so that he may prosecute an effective appeal.” State ex. rel. Spirko v. Court of Appeals, Third Appellate Dist., 27 Ohio St. 3d 13, 18, 501 N.E.2d 625, 629 (1986). The record before this Court is not complete.

### **WITNESS STATEMENTS**

At the hearing on Donald Ketterer’s guilty plea, the state presented testimony from Mary Gabbard. On direct examination, Gabbard testified that Ketterer showed up at Donald Williams’s auto repair shop on East Avenue (where Gabbard had been staying) the day before his arrest with items he wanted to trade for crack-cocaine. (Jan. 28, 2004 Plea Hrg., Vol. 1, pp. 44-45) She said that Ketterer wore bloody gloves, which Ketterer attributed to a fight he had with a “Mexican” who tried to steal his bike. (Id. at 47-48) Gabbard’s testimony linked Ketterer to personal property taken from the victim, Lawrence Sanders’s, residence and, thus, to the homicide.

The police took a pretrial statement from Gabbard. Upon motion of defense counsel under Ohio R. Crim. P. 16(B)(1)(f) & (g), the state provided a sealed copy of witness statements to the trial court. (Jan. 20, 2004 Pretrial, pp. 73-74) After Gabbard’s direct testimony at the plea hearing, the court, along with defense counsel, reviewed a copy of her pretrial statement. The court and defense counsel concluded that the statement was not inconsistent with Gabbard’s

testimony; therefore, defense counsel did not use the statement in cross-examination. (Jan. 28, 2004 Plea Hrg., Vol. 1, p. 51)

All parties at the plea hearing, as well as the three-judge panel, had access to Gabbard's police statement. The court's and defense counsel's conclusion that the statement did not contain conflicting information is subject to review by appellate counsel and this Court. Gabbard's statement is particularly important, because Ketterer told police that he did not act alone; that others were involved in the death of Mr. Sanders. (Supp. Hrg., April 3, 2003, Vol. 1, p. 73)

Moreover, on February 28, 2003, Ketterer told police that Donald Williams drove Ketterer and "Mary Gadd"<sup>1</sup> [*sic*] to Mr. Sanders's residence, where Ketterer and Gabbard ("Gadd") proceeded to look through the residence for items to take. Ketterer hit Sanders with a skillet. Ketterer went to the garage to get Mr. Sanders's car, leaving Gabbard with Sanders, who, according to Ketterer, was still breathing. Ketterer and Gabbard returned to East Avenue. Later, Mr. Sanders was found dead. (State's Answer to Defendant's Request for Discovery, filed March 12, 2003)

Hairs found in Mr. Sanders's hands were tested. There is a discussion on the record by counsel regarding a possible stipulation to the testing results. (Mitigation Hrg., Vol. 2, pp. 229-30 ) The comments imply that the test results were favorable to Ketterer—*i.e.*, the hairs found in Sanders's hands were not Ketterer's hairs. (*Id.*) The hair evidence suggests that someone else may have been involved in the murder of Lawrence Sanders.

---

<sup>1</sup> Appellant Ketterer's oral statement was transcribed by either Butler County law enforcement or the prosecutor and was provided to defense counsel in pretrial discovery as required under Ohio R. Crim. P. 16(B)(1)(a). The February 28, 2003 statement identifies "Mary Gadd" as an accomplice in the robbery, and presumably the aggravated murder, of Lawrence Sanders. Appellant believes that "Gadd" is Gabbard.

A staff member of the Office of the Ohio Public Defender has examined the record before this Court. The pretrial witness statements are not before this Court. Ketterer requests that all statements of Mary Gabbard reviewed by defense counsel at the plea hearing be made part of the record of this case on appeal. Further, Ketterer requests that all pretrial statements of Donald Williams, who testified at the hearing on the defense's motion to suppress, be made part of the record before this Court.<sup>2</sup> Williams's statement(s) are equally important because he implicated Ketterer in the crime. At the suppression hearing, Williams said that Ketterer told him that he had robbed and killed someone. (Supp. Hrg., Vol. 1, pp. 292, 296-97) Williams's own possible involvement in the crimes puts his statements at issue.

At the hearing on Ketterer's guilty plea, the state also called Lisa Lawson, a bartender who said that she saw Ketterer at a bar on February 25, 2003, where he dropped a bag of coins on the floor. (Jan. 28, 2004 Plea Hrg., Vol. 1, pp. 29-32) After direct examination, defense counsel reviewed Lawson's pretrial statement and concluded that it showed no inconsistencies with her testimony. (Id. at 37) The state later called Charles Farthing as a witness, a cab driver who picked up Ketterer at the bar and drove him to East Avenue. (Id. at 65-68) Defense counsel noted that Farthing's pretrial statement was consistent with his testimony. Counsel did not cross-examine the witness. (Id. at 69) Appellant Ketterer requests that all pretrial witness statements be made part of the record of this appeal.

---

<sup>2</sup> A statement from Donald Williams as recounted by Detective Steve Rogers in his Affidavit for Search Warrant was provided to defense counsel and used at the hearing on the defense's motion to suppress; the Affidavit is in the record. (See Defendant's Suppression Hearing Exhibit B.) Appellant does not know if that statement was the only statement obtained from Williams. If there are additional statements, Appellant asks that they be made part of the record.

## GRAND JURY TRANSCRIPT

On April 14, 2003, defense counsel filed a motion with the trial court asking for a copy of the transcript of the grand jury proceedings in Ketterer's case. Counsel also asked that the transcript be prepared, "sealed and held by the court" pending the court's ruling on their motion for access to the transcript. (Pretrial, June 13, 2003, p. 44) The court granted defense counsel's motion to transcribe the grand jury proceedings prior to trial. The court placed the grand jury transcript "under seal" to be held by the trial judge in her office. (Id. at 45) Subsequently, the court denied counsel's motion to be provided with a copy of the transcript. (Entry filed Sept. 18, 2003.)

If Mary Gabbard and Donald Williams testified before the grand jury,<sup>3</sup> their testimony could shed light on their veracity and whether they were involved in the robbery and aggravated murder of Lawrence Sanders, as Ketterer's February 28, 2003 oral statement indicates. This information is important because it affects defense counsel's decision to have Ketterer plead guilty rather than exercise his constitutional right to a jury trial. It could raise reasonable doubt as to Ketterer's role in Mr. Sanders's death. Furthermore, lack of consistency among Williams's and Gabbard's police statements, grand jury testimony, and respective suppression hearing and plea hearing testimony is a basis for impeaching the witnesses.

The grand jury transcript is not before this Court. It should be made part of the record for appellate review.

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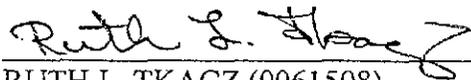
<sup>3</sup> In an entry filed Sept. 18, 2003 (amending an entry of Aug. 26, 2003), the trial court denied defense counsel's motion to disclose the names of the grand jury witnesses.

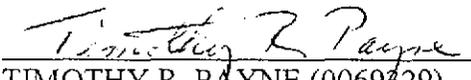
**CONCLUSION**

WHEREFORE, Appellant Donald Ketterer requests that this Court order the Clerk of the Butler County Court of Common Pleas to locate and transmit to this Court the transcripts of all the grand jury proceedings and all pretrial witness statements, including the statements of Mary Gabbard and Donald Williams. If needed, this Court should order the trial court or the Butler County Prosecuting Attorney to provide the sealed grand jury transcript and witness statements to the common pleas court clerk for transmittal to this Court.

Respectfully submitted,

DAVID H. BODIKER  
Ohio Public Defender

  
RUTH L. TKACZ (0061508)  
Assistant State Public Defender  
**Counsel of Record**

  
TIMOTHY R. PAYNE (0069329)  
Assistant State Public Defender

Office of the Ohio Public Defender  
8 East Long Street, 11th Floor  
Columbus, Ohio 43215-2998  
(614) 466-5394  
Fax: (614) 644-0703  
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing SECOND MOTION TO SUPPLEMENT THE RECORD was forwarded by regular U.S. mail to counsel to record, Daniel G. Eichel, First Assistant Butler County Prosecuting Attorney, 315 High Street, Hamilton, Ohio 45011, on the 17<sup>th</sup> day of June, 2005.



Ruth L. Tkacz  
Counsel for Appellant

IN THE SUPREME COURT OF OHIO

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

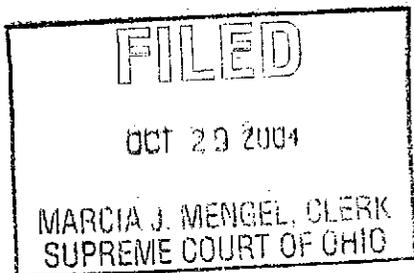
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ON APPEAL FROM THE COURT OF  
COMMON PLEAS OF BUTLER COUNTY  
CASE NO. CR 2003-03-0309

---

**MERIT BRIEF OF APPELLANT DONALD KETTERER**

---



DAVID H. BODIKER  
Ohio Public Defender

RUTH L. TKACZ (0061508)  
Assistant State Public Defender  
**Counsel of Record**

ROBIN N. PIPER  
Prosecuting Attorney

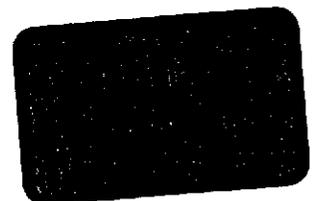
TIMOTHY R. PAYNE (0069329)  
Assistant State Public Defender

Butler County Prosecutor's Office  
Government Services Center  
315 High Street, 11th Floor  
Hamilton, Ohio 45011  
(513) 887-3474

Office of the Ohio Public Defender  
8 East Long Street, 11th Floor  
Columbus, Ohio 43215  
(614) 466-5394  
Fax: (614) 644-0703

COUNSEL FOR APPELLEE

COUNSEL FOR APPELLANT



IN THE SUPREME COURT OF OHIO

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

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

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REPLY BRIEF OF APPELLANT DONALD KETTERER

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ROBIN N. PIPER  
Prosecuting Attorney

DANIEL G. EICHEL  
First Assistant Prosecuting Attorney

MICHAEL A. OSTER, JR.  
Assistant Prosecuting Attorney

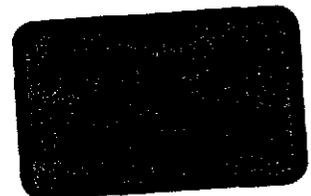
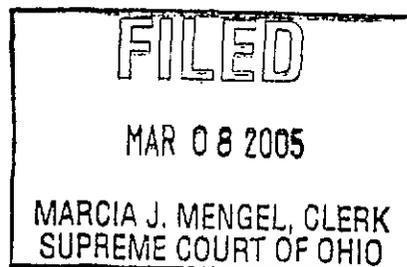
Butler County Prosecutor's Office  
Government Services Center  
315 High Street, 11th Floor  
Hamilton, Ohio 45011  
(513) 887-3474  
COUNSEL FOR APPELLEE

DAVID H. BODIKER  
Ohio Public Defender

RUTH L. TKACZ (0061508)  
Assistant State Public Defender  
Counsel of Record

TIMOTHY R. PAYNE (0069329)  
Assistant State Public Defender

Office of the Ohio Public Defender  
8 East Long Street, 11th Floor  
Columbus, Ohio 43215  
(614) 466-5394  
Fax: (614) 644-0703  
COUNSEL FOR APPELLANT



# The Supreme Court of Ohio

November 15, 2005

State of Ohio

v.

Case No. 04-0485

Donald J. Ketterer

## NOTICE OF HEARING

TO: Daniel G. Eichel

Ruth L. Tkacz

The Supreme Court of Ohio will hold a hearing on the merits in this case on Tuesday, the 7<sup>th</sup> day of February, 2006. Time allowed for oral argument will be 30 minutes per side.

Attorneys who argue before the Court must comply with the provisions of Rule IX of the Rules of Practice of the Supreme Court of Ohio and the instructions that follow. Pursuant to Rule IX, Section 3, counsel for either or both parties may waive oral argument and submit the case upon briefs. The Clerk must be notified in writing of the waiver at least ten days before the date scheduled for the oral argument.

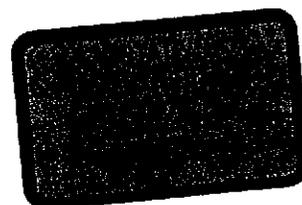
Court convenes promptly at 9 a.m. Counsel in all cases are expected to be present when court convenes. Counsel must register with the deputy clerk **prior to 8:45 a.m.** at the information desk outside the Courtroom on the first floor of the Ohio Judicial Center.

For more information on protocol for presenting oral argument before the Supreme Court of Ohio, counsel may refer to the "Guide for Counsel Presenting Oral Argument" located at [www.sconet.state.oh.us/Clerk\\_of\\_Court](http://www.sconet.state.oh.us/Clerk_of_Court).

*Note: Assignments in the Supreme Court take precedence over other assignments.*

MARCIA J. MENGEL CLERK

*Amy Heinstack* DEPUTY CLERK





THE STATE OF OHIO, APPELLEE, v. FOSTER, APPELLANT.  
THE STATE OF OHIO, APPELLANT, v. QUINONES, APPELLEE.  
THE STATE OF OHIO, APPELLEE, v. ADAMS, APPELLANT.  
THE STATE OF OHIO, APPELLEE, v. HORN, APPELLANT.  
[Cite as *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.]

*Criminal law — Felonies — Sentencing — Sentencing statutes are unconstitutional to extent that judicial fact-finding is required before imposition of sentence greater than maximum authorized by jury verdict or by defendant's admissions, before imposition of consecutive sentences, or before imposition of penalty enhancements for major drug offenders and repeat violent offenders — Offending statutes severed.*

(Nos. 2004-1568 and 2004-1771 — Submitted July 26, 2005;

No. 2005-0735 — Submitted August 10, 2005; and

No. 2005-2156 — Submitted February 10, 2006 —

Decided February 27, 2006.)

APPEAL from the Court of Appeals for Licking County,  
No. 03CA95, 2004-Ohio 4209.

APPEAL from the Court of Appeals for Cuyahoga County,  
No. 83720, 2004-Ohio-4485.

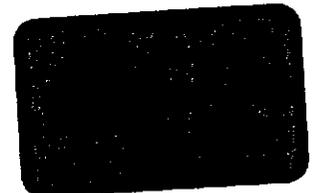
APPEAL from the Court of Appeals for Lake County,  
No. 2003-L-110, 2005-Ohio-1107.

APPEAL from the Court of Appeals for Ottawa County,  
No. OT-03-016, 2005-Ohio-5257.

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SYLLABUS OF THE COURT

1. Because R.C. 2929.14(B) and (C) and 2929.19(B)(2) require judicial fact-finding before imposition of a sentence greater than the maximum term



IN THE SUPREME COURT OF OHIO

ORIGINAL

ON COMPUTER - TAM

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

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

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**APPELLANT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEFING TO  
ADDRESS SENTENCING ISSUES ARISING FROM STATE V. FOSTER**

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ROBIN N. PIPER  
Prosecuting Attorney

DANIEL G. EICHEL  
First Assistant Prosecuting Attorney

MICHAEL A. OSTER, JR.  
Assistant Prosecuting Attorney

Butler County Prosecutor's Office  
Government Services Center  
315 High Street, 11th Floor  
Hamilton, Ohio 45011  
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8 East Long Street, 11th Floor  
Columbus, Ohio 43215  
(614) 466-5394  
Fax: (614) 644-0703  
COUNSEL FOR APPELLANT



# The Supreme Court of Ohio

FILED

JUN 07 2006

MARCIA J. MENGEL, CLERK  
SUPREME COURT OF OHIO

State of Ohio

Case No. 04-485

v.

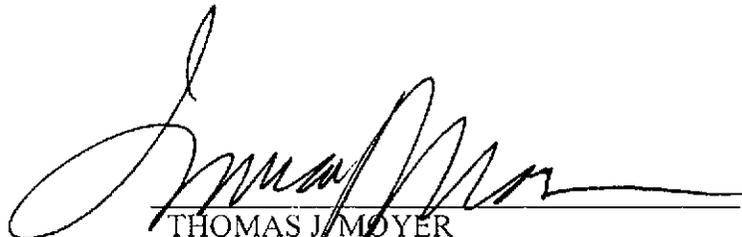
ENTRY

Donald J. Ketterer

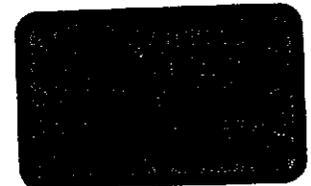
This cause is pending before the Court as a death penalty appeal from the Court of Common Pleas for Butler County. Upon consideration of appellant's motion for leave to file supplemental briefing to address sentencing issues,

IT IS ORDERED by the Court that the motion is denied.

(Butler County Court of Common Pleas; No. CR2003030309)



THOMAS J. MOYER  
Chief Justice



PROPOSITION OF LAW NO. 7

A trial court violates a capital defendant's rights to due process and a fair and reliable determination of guilt and punishment when, after the defendant enters a guilty plea, the court does not permit the penalty phase to be presented to a jury; admits gruesome crime-scene and autopsy photographs at the plea and sentencing hearings; fails to hold a hearing on the defendant's request for new counsel; fails to grant defendant's request for new counsel; denies the release to the defense of grand jury transcripts relating to a key witness for the state; does not limit the state's evidence in a plea hearing to the aggravated murder and aggravating circumstances; limits the mitigation evidence the defense intends to present; and fails to keep a complete record of all court proceedings. U.S. Const. Amends. VI, VIII, XIV.

1. **THE TRIAL COURT ERRED BY DENYING THE DEFENSE'S MOTION TO HAVE A JURY IMPANELED TO CONSIDER THE MITIGATION EVIDENCE AND MAKE A RECOMMENDATION ON SENTENCE AFTER KETTERER PLED GUILTY TO A THREE-JUDGE PANEL.**

When defense counsel advised Ketterer to plead guilty to the whole indictment without an agreement that a life sentence be imposed, they did so with the intention of taking the sentencing determination to a jury. (Jury Waiver, Jan. 27, 2004, Morning Session, p. 4) But the trial court overruled the defense motion. (Id. at 8-9) See O.R.C. § 2945.06; Ohio R. Crim. P. 11(C)(3).

Ohio Revised Code § 2945.06 and Ohio R. Crim. P. 11(C)(3), as applied in this case, deprived Ketterer of his constitutional right to a trial by jury at the sentencing phase of his capital trial proceedings. The statute does not provide for a jury to determine whether the evidence of aggravating circumstances versus mitigating factors warrants a sentence of death. As such it does not comport with the spirit of Ring v. Arizona, 536 U.S. 584 (2002).

Ketterer had a right to a jury trial under the Sixth and Fourteenth Amendments. The court violated that right when it denied Ketterer a jury determination on the issue of sentencing. Apprendi v. New Jersey, 530 U.S. 466 (2000), holds that the Sixth and Fourteenth Amendments require a jury to find, beyond a reasonable doubt, any fact that "would expose the defendant to a

greater punishment than that authorized by the jury's verdict." Id. at 494. The trial court did not afford Ketterer the right to have a jury make the factual findings of whether the aggravating circumstances outweighed the mitigating factors, and, thus, whether death should be imposed.

After Ketterer pleaded guilty and the three-judge panel made a finding of guilty based on the state's evidence, the maximum penalty Ketterer could receive for aggravated murder was a life sentence. A further determination of the weight to be given the aggravating circumstances and any mitigating factors could increase the penalty to death. This factual finding for a sentencing enhancement should be made by a jury.

"[T]he relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Id. When the required finding is whether mitigating factors exist and whether the aggravating circumstances outweigh those mitigating factors so that death is imposed, the answer must be yes—the defendant is exposed to a punishment greater than that allowed by a guilty verdict.

The United States Supreme Court has held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Blakely v. Washington, \_\_\_\_ U.S. \_\_\_\_, 124 S. Ct. 2531, 2536 (2004) (quoting Apprendi, 530 U.S. at 490). In Blakely, the relevant issue was whether a defendant who pleads guilty to kidnapping could have his sentence increased by the judge based on a statutory sentencing enhancement that departs from the standard range. The Court held that because a jury did not make the factual finding necessary to increase the sentence, the trial court had violated the defendant's Sixth Amendment right to trial by jury. Ketterer asserts that the same reasoning should apply to a capital case where a defendant, such as Ketterer, pleads guilty

to the indictment. But see Proffitt v. Florida, 428 U.S. 242, 252 (1976) (plurality opinion) (“it has never [been] suggested that jury sentencing is constitutionally required”).

There is no substantive difference between a defendant pleading guilty to a non-capital offense that requires a jury to determine whether facts exist to enhance the punishment and a capital defendant who pleads guilty but reserves the right to have a jury determine whether mitigating factors exist and whether those factors offset the aggravating circumstances. In Ring, the Court held “[c]apital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.” Ring, 536 U.S. at 539. Ring posed the question whether the trial court, rather than a jury, could make the finding of the existence of an aggravating circumstance, which rendered a capital defendant eligible for the death penalty. Ring’s answer was an unequivocal no. If death-penalty eligibility is based on a factual determination, a jury must find the fact. Id. at 602.

At Ketterer’s plea hearing, the three-judge panel found that the state had presented sufficient evidence to permit the court to make a finding of guilty and accept Ketterer’s guilty plea. The panel then had to hear evidence on the existence of mitigating factors presented by the defense and decide if the aggravating circumstances outweighed those mitigating factors. Only if the panel determined that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt could the court impose death. O.R.C. § 2929.03(D), 2929.04(B) & (C). Thus, identifying mitigating factors and weighing the factual determinations creates a system of sentencing enhancement that requires a jury’s findings.

The petitioner in Ring did not raise a claim concerning mitigating factors or whether the Sixth Amendment requires a jury to determine whether to impose the death penalty. Ring, 536 U.S. at 597. But the logic of Ring should apply to the weighing process in a capital sentencing

hearing. In Arizona v. Pandeli, 65 P.3d 950, 953 (2003), the Arizona Supreme Court found that the right recognized in Ring extended to the jury's weighing aggravating circumstances and mitigating factors. Similarly, in Arizona v. Jones, 72 P.3d 1264, 1270 (2003), the court held that a jury is entitled to make findings on mitigating factors. The court reasoned that a jury faced with the same evidence of mitigating factors could have come to a conclusion different from the court about the sentence to be imposed. Id.

In Ketterer's case, had a jury been impaneled to hear mitigating evidence and then to determine whether the aggravating circumstances outweighed the mitigating factors, there is a reasonable probability that the outcome would have been different. See Proposition of Law No. 11, incorporated herein by reference. Ketterer presented uncontradicted evidence at the sentencing hearing that he suffers from a mental disease or defect under O.R.C. § 2929.04(B)(3). Ketterer's bipolar disorder, his substance abuse, his low cognitive functioning, his abusive childhood, and his expression of remorse are all entitled to weight and could have persuaded jurors to vote for a life sentence instead of death. When the trial court took away a jury determination of mitigating factors, it deprived Ketterer of his rights to a jury trial and due process under the Sixth and Fourteenth Amendments. This case should be remanded for a new sentencing hearing before a constitutionally impaneled jury.