

In the Supreme Court of Ohio

State of Ohio, :
Appellee, : Case No. 06-1126
-vs- :
Jason Dean, : **This is a death penalty case**
Appellant. :

ON APPEAL FROM THE COURT OF
APPEALS OF CLARK COUNTY, CASE NO. 05-CR-348

MERIT BRIEF OF APPELLANT JASON DEAN

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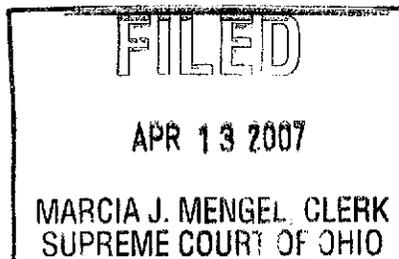


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STATEMENT OF CASE AND FACTS

1. The charges.

On April 10, 2005 Jason Dean approached a car in a Mini-Mart parking lot on Selma Road in Springfield, Ohio. (Vol. 8, T.p. 1575-76; 1680). Yolanda Lyles was in the driver's seat and Andre Piersoll was in the passenger seat. (Id. at 1572-73; 1580). Dean was with Joshua Wade. (Id. at 1577). But Wade did not approach Lyles' car. (Id. at 1577.) Dean had a conversation with Piersoll (Id. at 1575-76; Vol. 9, T.p. 1680), walked away (Vol. 8, T.p. 1577; Vol. 9, T.p. 1680), returned several minutes later (Vol. 8, T.p. 1581; Vol. 9, T.p. 1682), told them to give him the money (Vol. 8, T.p. 1582), and began firing shots into the car (Id. at 1583; Vol. 9, T.p. 1682-84). Bullets grazed Piersoll's face and arm. (Vol. 9, T.p. 1687; 1723; 1728; 1733).

Two days later a car driven by Josh Wade drove down Dibert Avenue in Springfield, Ohio. (Vol. 10, T.p. 2061). Shots were fired from the car as it drove down the street, hitting two homes and a parked car. (Vol. 9, T.p. 1798, 1805). That car then turned around, and additional shots were fired as it came back down the street. (Id. at 1800-02). Crystal Kaboos, an ex-girlfriend of Dean's, testified that she was in the car during this shooting, and that Dean was also with them and also shooting. (Vol. 11, T.p. 2105). However, every other witness to this event saw only one person in the car and only one person shooting. (Vol. 9, T.p. 1803, 1816; Vol. 10, T.p. 2061). Devon Williams specifically identified the driver as Joshua Wade. (Vol. 10, T.p. 2061; Vol. 11, T.p. 2104). Shanta Chilton also testified that the driver was alone. (Vol. 9, T.p. 1816-17.)

The following night, Titus Arnold was shot and killed as he was leaving work. (Vol. 6, T.p. 1103-06). According to testimony, Dean and Wade attempted to rob him, but he ran away.

(Vol. 11, T.p. 2077, 2114-15). As he ran, Wade fatally shot him. (Id.) The State conceded that Wade was the shooter in its opening statement. (Vol. 6, T.p. 1069-70).

Dean was found guilty of the aggravated murder of Arnold and was sentenced to death. The jury found both that this murder was committed as part of a course of conduct involving the purposeful killing of, or attempt to kill, two or more people and that Dean committed the aggravated murder while committing, or attempting to commit, aggravated robbery and did so with prior calculation and design. Dean was also charged with, and found guilty of, two counts of attempted murder stemming from the Selma Road shooting, two counts of aggravated robbery stemming from the Selma Road incident and the Arnold shooting, two counts of improperly discharging a firearm at or into a habitation, four counts of attempted murder stemming from the Dibert Avenue shooting, and four counts of having a weapon under disability.

2. Joshua Wade.

Joshua Wade was a sixteen-year-old friend of Dean's. Dean began spending time with Wade, partying with him, letting him drive his car and wear his clothes. (State's Ex. 372-A). Wade was, according to the State, the person who shot and killed Arnold. (Vol. 6, T.p. 1069-70). He was also the only person identified by the eyewitnesses of that murder. (See Vol. 8, T.p. 1405, 1430.) And, he was the only person identified as having been at the scene of the Dibert Avenue shootings by any witnesses other than Crystal Kaboos, Dean's ex-girlfriend. (Vol. 10, T.p. 2061; Vol. 11, T.p. 2104).

Joshua Wade was charged with the murder of Arnold. (Vol. 15, T.p. 2763-67). He was bound over to be tried as an adult, but was not eligible for the death penalty because he was a minor at the time of the crime. (Id.)

3. Trial.

Dean's attorneys were left to worry about their own fates when the trial court accused them of alleged unethical behavior, when their only concern should have been Dean, whose life was on the line.

Before the start of the trial, the State filed a motion to certify that, under Ohio R. Crim. P. 16(B)(1)(e), it did not have to provide defense counsel with the address of witness Crystal Kaboos because threats had been made against her. (4/24/06 T.p. 5-8). The trial court granted the State's motion. (*Id.* at 8-9).

Subsequently, the defense filed a motion for the trial court to disqualify itself because it had presided over the certification hearing. (Motion to Disqualify, filed May 3, 2006). The trial court denied the motion (Vol. 1, T.p. 18), and accused the trial attorneys of having perpetrated a fraud against it. (Vol. 5, T.p. 756; Vol. 6, T.p. 1162). Throughout the trial there were on-the-record discussions about resolving the matter of defense counsel's unethical behavior after the trial. (Vol. 6, T.p. 1156-65; Vol. 7, T.p. 1323-30; Vol. 8, T.p. 1362-67). Defense counsel tried to withdraw from the case because of the situation (Motion to Withdraw, filed May 15, 2006) and Dean moved the court to allow him to represent himself. (Vol. 6, T.p. 1157; Vol. 7, T.p. 1330; Vol. 8, T.p. 1355). But the trial court rebuffed both of these attempts (Vol. 5, T.p. 966-67; Vol. 8, T.p. 1361), and required the defense to go forward with the constant threat of contempt proceedings following the trial.

Several of Dean's motions—even unopposed motions—were denied by the trial court. The trial court denied Dean's unopposed motion to appear in court without shackles. (*Id.*) The trial court denied counsel's request for five to ten minutes to prepare for the cross-examination of State's witness Terry Smith, even when the State specifically indicated that it had no objection to

this request. (Vol. 11, T.p. 2083). The trial court did not allow a one-day continuance when Dean's brother, called as a witness for the defense, came to court intoxicated. (Vol. 13, T.p. 2538-43). When Dean decided at the last minute that he wished to exercise his right to testify on his own behalf, the trial court denied the defense a continuance to prepare. (Id. at 2553-61). The trial court did not allow a continuance at the sentencing phase when Dean's mother, who was supposed to testify, became ill. (Vol. 14, T.p. 2733-35). And, the trial court admitted evidence at sentencing that the State did not seek to have admitted. (Id. at 2729-31).

There were overtones of racial animus in this case. Dean is Caucasian, while all of the victims were African American. There was also a stark contrast between Dean and Arnold. Arnold was presented as an upstanding and kind young father, youth counselor, and assistant football coach. (Vol. 6, T.p. 1061.) Dean was presented as a racist monster who lead Wade, a troubled youth, into crime. The State was allowed to play recordings of phone calls that Dean had made while being held before trial. The jury also heard, read aloud, excerpts from letters that Dean had written. (Vol. 12, T.p. 2406-50). These letters and phone calls contained almost no information about the crimes. (Id.) But, they did contain a great deal of profanity; they demonstrated a lack of remorse; and the portions admitted highlight Dean's racist and misogynistic views. (Id.)

State's witness Crystal Kaboos was the only witness to put Dean at the scene of the murder and the Dibert Avenue shooting. She was critical to the State's case. Yet the trial court refused to grant a mistrial (Vol. 11, T.p. 2169) when the jury heard her state, from the stand, that she had taken three polygraph examinations (Id. at 2149).

The jury convicted Dean on all counts (Vol. 12, T.p. 2710-18) and recommended that he be sentenced to death. (Vol. 14, T.p. 2823). On June 2, 2006, the trial court accepted the jury's

recommendation and sentenced Dean to death. (6/2/06, T.p. 19). On June 12, 2006, Dean filed a notice of appeal. He is now before this Court on his direct appeal as of right.

As discussed, Dean's attorneys were not able to present the testimony of Dean's mother. (Vol. 14, T.p. 2733-35). Instead, they put Sarah Bennett, Dean's brother's girlfriend, on the stand. (Id. at 2769). Her testimony lasted only four transcript pages. (Id. at 2769-72). This was the only mitigation evidence presented regarding Dean's life. Nothing was presented regarding Dean's diabetes as a mitigating factor even though counsel were aware that Dean was diabetic and that his diabetes was a possible mitigating factor. (Vol. 9, T.p. 1846.)

Proposition of Law No. I

A defendant has a constitutional right to waive counsel and represent himself when the waiver is made knowingly, intelligently and voluntarily. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 10, 16.

Jason Dean was denied his constitutional right to represent himself at his capital trial.

1. Facts.

Dean was appointed two attorneys, John Butz and Richard Mayhall, to represent him in his capital case. (Docket filed 5/2/05, p. 0001; 6/30/2005, T.p. 2). During the pretrial proceedings, the State filed a motion titled "Certification That Disclosure of Witness's Address May Subject Witness to Physical Harm or Coercion" under Ohio R. Crim. P. 16(B)(1)(e) whereby the witness's address did not have to be disclosed to defense counsel. A hearing was held before the trial court on the motion. At this hearing, the State presented information that threats had been made against the witness and the State's fear of the witness' address being given to Dean and his co-defendant. (4/24/06, T.p. 5-8). The trial court granted the State's motion. (4/24/06, T.p. 8-9).

During a pretrial hearing, defense counsel made the trial court aware of the case of State v. Gillard, 40 Ohio St. 3d 226, 533 N.E.2d 272 (1988). (5/4/06, T.p. 20). In Gillard, this Court held that the court that hears the certification motion may not be the same court that conducts the trial. Id. at 229, 533 N.E.2d at 276.

Defense counsel filed a Motion to Disqualify the trial court based on the trial court having presided at the certification hearing. On May 12, 2006, the trial court told the parties that Chief Justice Moyer had denied the affidavit filed by defense counsel that moved for the trial court's recusal. (Vol. 4, T.p. 744). The trial court also stated that based on allegations in the State's response to the motion for disqualification, the trial court had serious concerns about the

defense having perpetrated a fraud on, and manipulating, the court. (Vol. 4, T.p. 745-46). The trial court assured the parties that it would address that issue at a later point in time. Vol. 4, T.p. 746).

On May 15, 2006, defense counsel told the trial court they could not effectively represent Dean until the issue of whether they had committed an ethical violation was determined. (Vol. 5, T.p. 753). Defense counsel stated that Dean had concerns about their representation of him based on the proceedings on May 12, 2006 and that he wanted to fire them. (Vol. 5, T.p. 753-54). Defense counsel stated that they now had a conflict with their client and their ability to represent him was negatively affected. (Vol. 5, T.p. 756). The trial court responded that defense counsel had manipulated the court to preside at the certification hearing — and then after the hearing had told Dean that the judge would be removed from the case because he was not supposed to have heard the certification hearing. Id. Defense counsel then asked the court for leave to file a motion to withdraw. (Vol. 5, T.p. 758).

Dean informed the trial court that he was uncomfortable with his defense counsel continuing to represent him. (Vol. 6, T.p. 1156). Dean stated that he wanted to pursue other legal counsel or represent himself. (Vol. 6, T.p. 1157). Dean and the trial court had a colloquy about this issue and the trial court said that the conflicts with defense counsel and the court would be dealt with later. (Vol. 6, T.p. 1158). Dean stated that his defense counsel's representation of him was being affected because it seemed the court had taken the issue personally and that his attorneys had offended the judge. (Vol. 6, T.p. 1159). The trial court said that Dean's statement was well-articulated and understandable. (Vol. 6, T.p. 1160).

Defense counsel told the trial court they felt that by the court not addressing the potential ethical issue until the case was finished that it created a "chilling effect" and it was all they were

thinking about. (Vol. 6, T.p. 1160, 1165). The trial court responded that it appeared the allegations were supported by certain facts and that the attorneys put themselves in this situation. (Vol. 6, T.p. 1163, 1165).

A couple of days later, Dean reiterated his point and told the court that he believed his defense continued to be compromised. (Vol. 7, T.p. 1272, 1323). Dean told the court that he would like the court to decide the ethical issue now rather than later. Id. The trial court had thought about this issue and the options available but would still wait to address the issue until after the trial. (Vol. 7, T.p. 1330). Dean told the court that if this issue wasn't going to be addressed until after the trial that he wanted to represent himself. Id. Dean stated he was not asserting this right for the purpose of delay. (Vol. 7, T.p. 1337).

The trial court stated that it did not question Dean's intelligence and that he was a well-spoken and articulate individual. (Vol. 7, T.p. 1338). The trial court then had a colloquy with Dean where he said that neither the judge nor defense counsel believed it was a good idea for him to represent himself. Id. The trial court discussed with Dean how the decision to represent himself was not a wise decision; there was a sixteen-count indictment against him; if he were convicted of some of the charges that he could face the death penalty or a life sentence; he had the right to be represented by two attorneys; there would be a trial phase and possibly a penalty phase; and if he waived his right to counsel Dean would be acting as his own attorney and would be responsible for things such as questioning witnesses. (Vol. 7, T.p. 1338-40). The trial court then asked him whether anyone had made promises or threatened him resulting in his wish to represent himself to which Dean replied no. (Vol. 7, T.p. 1340). Last, the trial court asked Dean whether waiving counsel was a voluntary decision and he said it was. Id.

Dean then made a statement that he was waiving counsel under duress caused by the trial court postponing dealing with any ethical violation that defense counsel may have committed. (Vol. 7, T.p. 1341). The trial court told Dean that he took issue with his using duress as a reason to represent himself. (Vol. 7, T.p. 1341-42). The trial court said it would try to get in touch with the defense psychologist, Dr. Smalldon, for the purpose of Dr. Smalldon giving the court his opinion on whether Dean was competent to waive counsel. Id. The trial court explained to Dean that he could think about this issue overnight and decide whether waiving counsel was a voluntary decision or was due to feeling pressured. (Vol. 7, T.p. 1342).

The following day Dean told the trial court that he had thought about this issue and he still wanted to represent himself. (Vol. 8, T.p. 1355). Dean retracted the comment he had made about duress. (Vol. 8, T.p. 1355, 1363). He also stated that the only reason he made a comment about duress was for appellate purposes and he did not feel the trial court was biased or prejudiced against him. (Vol. 8, T.p. 1356). Dean said he felt confident to represent himself. Id.

Despite Dean retracting the comment about duress, and assuring the court that he did not believe the court had any bias or prejudice against him, the trial court told Dean that he would not find his waiver of counsel to be voluntary due to his comment. (Vol. 8, T.p. 1361). Dean again retracted his comment about duress and told the court that his constitutional rights were being violated by not being allowed to represent himself. (Vol. 8, T.p. 1363). Dean reiterated that he wanted to defend himself. (Vol. 8, T.p. 1367). Dean further told the jury that he wanted to represent himself but his constitutional right to do so was denied. (Vol. 8, T.p. 1372).

2. Case law supports Dean's right to represent himself.

The seminal case regarding the waiver of counsel is Faretta v. California, 422 U.S. 806 (1975). The Supreme Court held that when the accused knowingly, voluntarily and intelligently elects to represent himself he has a constitutional right to self-representation. Id. at 835.

In State v. Gibson, 45 Ohio St. 2d 366, 345 N.E.2d 399 (1976), this Court held that the defendant had the right to represent himself. Id. at 377, 345 N.E.3d at 406. In Gibson, the defendant had been warned by the trial judge about the severity and possible results of the trial. Id. This Court found that the defendant had knowingly, voluntarily and intelligently chosen to represent himself. Id. It was noted in the decision that the defendant was capable of questioning witnesses and presenting a defense. Id.

In State v. Taylor, 98 Ohio St. 3d 27, 781 N.E.2d 72 (2002), the defendant was charged with aggravated murder with death penalty specifications. Id. at 30, 781 N.E.2d at 76. The defendant told the trial court several times that he wanted to represent himself. Id. A competency hearing was conducted and the defendant was found competent to stand trial. Id. The defendant was warned that representing himself was dangerous and he was questioned about his reasons for wanting to represent himself. Id. at 35, 781 N.E. 2d at 81. The defendant told the trial court that this was probably not a good decision but he felt he was "being forced to do it because this is the only chance that I have got to try to prove things in here that has happened." Id. at 36, 781 N.E.2d at 81. The defendant signed a waiver of counsel form. Id. at 36, 781 N.E.2d at 82. The trial court allowed the defendant to represent himself but also appointed stand-by counsel to assist him if needed. Id. at 41, 781 N.E.2d at 85. The defendant was convicted and ultimately sentenced to death. Id. at 31, 781 N.E.2d at 77-8.

This Court held that the issue is not whether the accused is making a smart decision, but “whether he ‘fully understands and intelligently relinquishes’ his right to counsel”. Id. at 35, 781 N.E.2d 81; (citing to State v. Gibson, 45 Ohio St. 2d 366, 345 N.E.2d 399 (1976)). This Court did not find any error with the defendant’s exercise of his right to represent himself. Id. at 37, 781 N.E.2d at 82.

In State v. Jordan, 101 Ohio St. 3d 216, 804 N.E.2d 1 (2004) the defendant was charged with aggravated murder with death penalty specifications. Id. at 218, 804 N.E.2d at 6. Before trial the defendant stated that he wanted to represent himself and signed a waiver of counsel. Id. The trial court appointed the defendant’s attorneys as standby counsel. Id. An issue of the defendant’s competence was raised by the prosecutor but standby counsel stated that competency was not an issue and the trial court agreed. Id. The defendant was convicted of aggravated murder with death penalty specifications and after waiving the presentation of mitigation evidence was sentenced to death. Id. at 218-19, 804 N.E.2d at 6.

This Court held “[t]o establish an effective waiver of counsel, the trial court must make sufficient inquiry to determine whether a defendant fully understands and intelligently relinquishes that right.” Id. at 221, 804 N.E. 2d at 8 (citing Gibson, syl. para 2; Faretta, 422 U.S. 806). Further, this Court held that “a state may presume that a defendant is competent to be tried and may require him to prove his incompetence by a preponderance of the evidence.” Jordan, 101 Ohio St. 3d at 221, 804 N.E.2d at 8. (citations omitted).

In Dean’s case, the State brought to the trial court’s attention the case of James v. Brigano, 470 F.3d 636 (6th Cir. 2006). In the James case, the defendant sought to fire his counsel and represent himself. Id. at 639. The trial judge did not delve into the reasons for the defendant wanting to fire his attorney nor did the trial judge explain the perils of self-representation. Id.

The trial judge allowed the defendant to represent himself without specifically finding that the waiver was knowing or intelligent. Id. at 643. On appeal, it appeared to the court that the trial judge thought the defendant was trying to delay the trial or “avoid the administration of justice” and the judge used these reasons as support for allowing him to represent himself. Id. The district court and Sixth Circuit granted the defendant habeas relief, finding that the waiver of counsel was not made knowingly and intelligently, with “eyes wide open.” Id. at 644.

3. Dean’s waiver was knowing, intelligent and voluntary.

In Dean’s case, the trial court erred in denying his oral motion to represent himself. The trial court stated that it was going to contact Dr. Smalldon regarding the issue of Dean’s competency to waive counsel (Vol. 7, T.p. 1341-42). However, there is nothing in the record to indicate that Dr. Smalldon was ever contacted about this issue. Further, according to the holding in Jordan, a defendant’s competence may be presumed. Jordan, 101 Ohio St. 3d at 221, 804 N.E.2d at 8. Neither of Dean’s attorneys put anything on the record about him not being competent, thus it can be presumed that he was competent. Id.

The trial court stated several times on the record that Dean was articulate, understandable and that the court appreciated his statements. (Vol. 6, T.p. 1160, Vol. 7, T.p. 1324-25, 1338). The trial court also said that it did not question Dean’s intelligence. (Vol. 7, T.p. 1338). Dean told the court that he was not asserting his right to represent himself to delay the proceedings and would be ready to continue the trial already in progress. (Vol. 7, T.p. 1337). Several times Dean retracted his statement about this decision being under duress. (Vol. 7, T.p. 1355, 1363). The trial court did not explore with Dean his retracting of the duress comment.

The trial court also did not discuss appointing standby counsel to assist Dean in representing himself which has been approved by this Court. Taylor, 98 Ohio St. 3d at 41, 781 N.E.2d at 85; Jordan, 101 Ohio St. 3d at 218, 804 N.E.2d at 6.

4. Conclusion.

Dean's assertion of his right to represent himself and waive counsel was made knowingly, intelligently and voluntarily and should have been granted by the trial court. According to this Court's and the United State's Supreme Court's precedents, Dean's right to self-representation was violated. This Court should reverse and remand this case to the trial court for a proper inquiry into Dean's right to represent himself at a new trial.

Proposition of Law No. II

A trial court errs in denying counsel's motion to withdraw when a ethical conflict exists in violation of the defendant's right to effective assistance of counsel. U.S. Const. amends. VI, VIII, XIV; Ohio Const. art. I, §§ 10, 16.

The trial court erred in denying defense counsels' Motion to Withdraw when a conflict existed that compromised Dean's right to receive effective and zealous representation.

1. Facts.

The relevant events that led to defense counsel seeking to withdraw from representing Dean began with the State filing a motion for certification of a witness under Ohio R. Crim. P. 16(B)(1)(e), and the subsequent certification hearing. At the certification hearing the State sought to be excused from disclosing the address of one of its witnesses, Crystal Kaboos. (4/24/06 T.p. 5-7). The court granted the State's motion. (4/24/06 T.p. 8-9).

Defense counsel filed a motion to recuse the trial judge from hearing the trial. (5/3/06 Motion to Disqualify). The basis for the recusal motion was that the judge had heard the certification hearing, and under State v. Gillard, 40 Ohio St. 3d 226, 229, 533 N.E.2d 272, 276 (1988), should not preside over the trial. (5/3/06 Motion to Disqualify). On May 8, 2006, the trial court informed defense counsel that it had filed a response to the motion to recuse and that this Court had denied the motion for recusal. (Vol. 1, T.p. 18).

The trial court stated on May 12, 2006, that the State had filed a response to the defense motion for recusal as well. (Vol. 4, T.p. 744). The trial court informed defense counsel that the State's response alleged "very serious accusations against defense counsel and appears to be corroborated." (Vol. 4, T.p. 746). The court stated that it, too, had "some very serious concerns about defense counsel and the manner they're operating in the courtroom." Id. The court then declared that it would deal with the concerns and accusations at a later time. Id.

Dean to being concerned about themselves and a potential ethical violation. (Vol. 5, T.p. 756, 1162). A conflict was created between defense counsel effectively and aggressively representing Dean and not wanting to create more problems with the trial court by being assertive. (Vol. 5, T.p. 755). Dean was the party who was most affected by this conflict.

In Holloway v. Arkansas, 435 U.S. 475 (1978), a case was reversed where defense counsel had been forced to represent co-defendants despite counsel's objection. Applicable to Dean's case is the following passage: "The evil [of counsel representing conflicting interests] is in what the advocate finds himself compelled to *refrain* from doing". Id. at 490-91, (emphasis in original). This passage is illustrative of defense counsels' fear of personal repercussions from further upsetting the trial court and thus negatively affecting their ability to zealously represent Dean. (Vol. 5, T.p. 755).

Once defense counsels' loyalty to Dean became compromised, the trial court should have permitted them to withdraw. Defense counsel had their own interest in not being found in contempt for an ethical violation. In the Motion to Withdraw, defense counsel stated "[i]t is impossible, given the state of this case, for Defendant's counsel to continue on and effectively represent the Defendant." (5/15/06 Motion to Withdraw at p.2).

In Cincinnati Bar Association v. Buckley, 94 Ohio St. 3d 333, 763 N.E.2d 116 (2002), this Court sanctioned an attorney for committing ethical violations. In so holding, this Court found that the attorney's "actions were motivated by selfishness, i.e., a desire to protect his own personal interests rather than the interests of his client." Id. at 336, 763 N.E.2d 119. Dean's attorneys told the trial court they felt intimidated and could not effectively represent him until the ethical issue was resolved. (Vol. 5, T.p. 755, Vol. 6, T.p. 1162). Dean was sentenced to death by the trial judge on June 2, 2006, but the trial judge's Entry finding defense counsel guilty of

criminal contempt was not issued until June 13, 2006. (6/13/2006 Entry). Thus, the ethical issue was left unresolved during the entirety of defense counsel's representation of Dean at his capital trial.

The risk to Dean of being represented by counsel with their own divergent interests, in the trial court's decision of whether they committed an ethical violation, was too great. The motion to withdraw should have been granted. The "right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client." Von Moltke v. Gillies, 332 U.S. 708, 725 (1948).

4. Conclusion

The trial court erred in denying defense counsel's motion to withdraw. Defense counsel had a conflict of interest from their continuing representation of Dean — in the face of the trial court informing counsel that it had "legitimate concerns about what may or may not happen to them." (Vol. 8, T.p. 1362). Forcing defense counsel to continue to represent Dean with the threat of being sanctioned violated Dean's constitutional rights to the effective assistance of counsel and a fair trial. (See also Proposition of Law No. I and XIV). This Court should reverse and remand this case for a new trial where Dean is represented by conflict-free counsel.

Proposition of Law No. III

A capital defendant's conviction and death sentence are constitutionally infirm if the trial court is biased against the defendant during the trial proceedings. U.S. Const. amends. V, VI, VIII, XIV; Ohio Const. art. I, §§ 2, 5, 9, 16.

1. Introduction.

Jason Dean was prejudiced by the trial court's bias against him and his attorneys. The trial judge blatantly exhibited its animus toward Dean's defense counsel throughout the duration of the trial. He had a personal grudge against them, and inappropriately took their defense tactics as personal attacks on him. Additionally, the trial court improperly refused to disqualify itself from hearing his trial after holding a certification hearing, handicapped defense counsel by threatening them with contempt proceedings throughout the trial, denied Dean's unopposed motion to appear without restraints, and handicapped the defense by denying several requests for time to present or prepare for important witnesses. Moreover, the trial court should have recused itself from hearing Dean's trial because it held a Crim. R. 16(B)(1)(e) certification hearing.

2. Law.

It is firmly established constitutional law that "a fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136 (1955); see also, Tumey v. Ohio, 273 U.S. 510 (1927); Offutt v. United States, 348 U.S. 11 (1954).

A trial judge is more than a mere moderator. Instead, he or she is the governor of the trial for the purpose of assuring its proper functioning. Quercia v. United States, 289 U.S. 466, 469 (1933). It is the trial court's duty to conduct the trial in an orderly manner with a view to eliciting the truth and to attaining justice between the parties. Glasser v. United States, 315 U.S. 60, 82-83 (1942).

Great care must be exercised by a trial judge to always be calmly judicial, dispassionate, and impartial. The trial court shall avoid all appearances of advocacy. Frantz v. United States, 62 F.2d 737, 739 (6th Cir. 1933). The most basic requirement is one of impartiality in demeanor as well as in actions. United States v. Frazier, 584 F.2d 790, 794 (6th Cir. 1978).

The problem is that potential prejudice lurks behind every intrusion made by a judge into a trial. The reason for this potential prejudice is that a judge's position before a jury is overpowering. United States v. Hoker, 483 F.2d 359, 368 (5th Cir. 1973). The judge's position makes his or her slightest action of great weight with the jury. United States v. Lanham, 416 F.2d 1140, 1144 (5th Cir. 1969).

This Court has held that "a criminal trial before a biased judge is fundamentally unfair and denies a defendant due process of law." State v. LaMar, 95 Ohio St. 3d 181, 189, 767 N.E.2d 166, 185 (2002). This Court has further defined judicial bias as "a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts." State ex rel. Pratt v. Weygandt, 164 Ohio St. 463, syl. para. 4, 132 N.E.2d 191 (1956). Moreover, if a criminal defendant demonstrates the presence of a biased trial court, reversal is required and is not subject to harmless-error analysis. State v. Sanders, 92 Ohio St. 3d 245, 278, 750 N.E.2d 90, 127 (2001).

3. Dean's motion to disqualify should have been granted.

Judge Rastatter presided over a certification hearing under Crim. R. 16(B)(1)(e) before the start of Dean's trial. (See Proposition of Law IV.) The purpose of this hearing was to determine whether the State had to disclose witness Crystal Kaboos' address to the defense.

well that this decision would in fact be a trial error. (Id.) Whether this error is harmless is for this Court to decide, not the trial court.

In support of its contention that it did not have to disqualify itself, the trial court noted that it “anticipate[d] overwhelming evidence of the defendant’s guilt at trial which would render a Gillard violation harmless.” (Id.) The trial court stated that it knew that the State had compelling ballistics evidence, numerous incriminating letters written by the defendant, an eyewitness to one of the shootings, and numerous incriminating statements made by the defendant. (Id.) The determination of whether there is overwhelming evidence of guilt that would render a Gillard violation harmless is not for a trial court to make before the evidence has even been presented at trial. It is for an appellate court to make upon reviewing the evidence that was presented to the jury. The trial court’s reasoning was not sound. The rationale behind Gillard is that the fairness of the trial may be jeopardized where the judge has heard prejudicial information about the defendant at a certification hearing. Gillard, 40 Ohio St.3d at 229, 533 N.E.2d at 276.

In the case at bar, not only did the trial court hear such information, but it also prejudged the evidence against Dean, making the Gillard violation even more troublesome. The trial judge made it clear in his entry that he had already determined Dean to be guilty—by overwhelming evidence. This determination by the trial court is clear evidence that he was biased against Dean before the trial even began.

4. The trial court exhibited bias.

4.1 Threats of contempt proceedings caused a chilling effect on counsel’s performance.

After the court denied the defense motion to disqualify itself, Dean’s attorneys filed an affidavit of disqualification with this Court. (Affidavit of Richard Mayhall and John Butz in

Support of Application for Disqualification, filed May 10, 2006). The Chief Justice denied that affidavit. (Supreme Court of Ohio Judgment Entry, filed May 15, 2006). The trial court called counsel in to discuss the denial of the affidavit of disqualification and its concerns about the allegations set forth in the State's response to the affidavit. (Vol. 4, T.p. 744-45). Defense counsel asked that they proceed on the record. (Id. at 745). The State's response was characterized by the trial court as containing "very serious accusations against defense counsel and on its face appears to be corroborated by several facts." (Id. at 746). The State contended in its response that Dean's request for a certification hearing and motion to disqualify was "a precalculated and deliberate attempt to have Judge Rastatter removed from this case." (Motion to Withdraw, filed May 15, 2006, Ex. A). The trial court also indicated to defense counsel that it was concerned that a fraud had been perpetrated upon the court. (Id. at 745). The court went on to state:

In the interest of getting this case back on track, the Court will take that matter up at a later time; but I do assure the parties that that matter will be taken up at a later time. As the Court has indicated, those are very serious allegations; and they will be addressed by this Court, preferably at the conclusion of this case.

(Id. at 746). Ultimately, the trial court was angry with defense counsel because it believed they had sought to have it sit on a certification hearing as a means to disqualify it from sitting on the trial. However, defense counsel were relying on law of which the trial court should also have been aware. Gillard is an Ohio Supreme Court case. Given that the trial court was holding a certification hearing, it should have apprised itself of applicable Supreme Court law.

Shortly thereafter, the following exchange regarding the Gillard issue took place between counsel and the court:

MR. BUTZ: And that's the problem. We can't go on with it hanging out there. We just can't effectively represent our client. Now we have a conflict with our client.

MR. MAYHALL: I mean, I don't understand what rule of—of professional conduct would be implicated by what we did. As I understand it, the allegation is that we had a Supreme Court case that the State didn't; and the issue is was I required to disclose that? I'm not even aware of any rule that said I had to.

THE COURT: I think the allegation, Mr. Mayhall, is that you were aware of that case prior to calling my Bailiff and requesting the hearing and then pretty much manipulating the Court into coming in and presiding over that hearing and then telling your client, either that day or the very next day, that the Judge was going to be removed because he wasn't supposed to sit in on that hearing. And then proceeding to file a motion for me to disqualify myself, and that it appeared to the Court based on my allegations—I'm not saying that you're guilty of them, but it appears from the allegations that you were manipulating the Court and deceiving the Court in an effort to have this Judge removed from the case.

MR. MAYHALL: . . . What I'm saying is—and you have made your position clear, that—that you're not happy about that. What I'm saying is if that constitutes some kind of misconduct, which I don't think it does, then we have to deal with it now because I can't go forward with this hanging over my head.

MR. BUTZ: And just to add, when Mr. Mayhall called and asked that the matter be set, he didn't say it has to be set in front of any particular judge. I mean, we can assume, can we not, that the Court knows the—the Supreme Court law and we didn't ask that it be set in front of any particular judge. . . .

THE COURT: Mr. Mayhall didn't ask for me to be removed from that hearing; and so the State's argument is that he, therefore, waived that right. We're not getting into this now because I told you we'd address that at the conclusion of the case.

MR. BUTZ: I know. That's the problem.

THE COURT: Okay. All right. Well, I'm sorry you guys got yourself into this situation; but we're going to proceed this morning.

MR. BUTZ: Well, I'm going to—I need leave to file a motion to withdraw, which is prepared. Didn't want to do it.

THE COURT: Well, you could have done that. You had all weekend, Mr. Butz.

MR. BUTZ: Didn't want to do it until we had this discussion.

THE COURT: That's not my problem. I'm not going to use court time now to give you time to do that. Return to counsel table.

(Vol. 5, T.p. 756-58). The tension between the court and defense counsel was palpable, and that fact is clear even from the cold record.

Defense counsel then filed a motion to withdraw as counsel for Dean. Counsel argued that given the allegations made by the State and the implication by the court that it had engaged in unethical or contemptuous behavior, it would be impossible to effectively represent Dean and therefore impossible for Dean to receive a fair trial. (Motion to Withdraw, filed May 15, 2006). The court denied this motion on the record on May 15, 2006. (Vol. 5, T.p. 966-67).

The entire trial was tainted by the possibility that defense counsel would be faced with contempt charges after the trial. Defense counsel told the court that "after [its] comments, I was intimidated." (Vol. 5, T.p. 755). Mr. Mayhall further noted that "with this hanging over my head . . . I don't think I'm willing to risk further angering you, and I think that would affect my ability to represent Mr. Dean." (*Id.*) On May 16, 2006, Dean expressed his concerns with the situation to the court. (Vol. 6, T.p. 1156). Dean told the court that he was under the impression that Judge Rastatter had taken the situation personally and that it was impeding his attorneys' ability to properly defend him. (*Id.* at 1159-60). Following up on their client's concern, counsel expressed their own sentiments to the court. Mr. Butz told the court that putting the issue off until the end of trial "continues to have a chilling effect on [his] ability to represent [his] client." (*Id.* at 1162). Mr. Mayhall agreed. (*Id.*)

The following conversation then ensued between the court and defense counsel:

THE COURT: If you guys feel like you have to be on guard now, that for some reason that's a chilling effect on you, then, you know, this Court just doesn't understand that because you should enter any case knowing that you shouldn't engage in unethical behavior. . . .

The trial court's entry demonstrates how personally Judge Rastatter took the actions of Dean's attorneys, and it reveals a personal grudge against them which he allowed to foment through the entire trial.

Butz and Mayhall appealed this contempt finding. On March 9, 2006, the Second District Court of Appeals determined that Butz and Mayhall's actions did not constitute direct contempt, that they therefore should have been afforded an evidentiary hearing, and that the fact-finding should have been referred to another judge because the trial court was "too embroiled in the controversy to act as a neutral and detached fact finder." State v. Dean, Nos. 2006CA61, 2006CA63, 2007 Ohio 1031, 2007 Ohio App. LEXIS 966 (Clark Ct. App. March 9, 2007). The Second District then ordered that Butz and Mayhall be reimbursed the \$2,000 fines. Id.

Upon the reversal of the first contempt finding against Butz and Mayhall, Judge Rastatter immediately issued an entry citing the attorneys for indirect criminal contempt and transferring the matter to the administrative judge for an evidentiary hearing. (3/12/07 Entry). This is a judge with a clear grudge against Dean's attorneys. His attempts to hold them in contempt now that Dean's trial is over only underline the fact that he was harboring this hostility against them from the time of their motion to disqualify throughout Dean's entire capital trial.

6. Dean was prejudiced by the trial court's bias.

It is axiomatic that a court must be impartial in its demeanor and its actions. Frazier, 584 F.2d at 794. In the instant case, the trial court failed in its duties and thus denied Dean a fair trial. The court blatantly demonstrated its dislike and distrust of Dean's attorneys, handicapping their ability to effectively represent Dean. It demonstrated favoritism to the State by ruling against the defense even when the State did not oppose it and by giving it more than what it asked. And the court failed to give the defense even the most minimal latitude it needed to

prepare for witnesses or present witnesses when Dean's life was hanging in the balance. Moreover, the trial court knew that it should not even be hearing this case when it had held the certification hearing.

The concern is heightened here because the evidence against Dean was not overwhelming. There was essentially no credible evidence that Dean was even at the scene of the Dibert Avenue shootings which was the basis for two counts of discharging a firearm at or into an occupied structure and four counts of attempted murder. Those attempted murder charges, in turn, formed part of the basis of the O.R.C. § 2929.04(A)(5) specification. And, there was very little evidence to support the O.R.C. § 2929.04(A)(7) specification that Dean acted with prior calculation and design. Crystal Kaboos was the only witness who established either of these charges. Her credibility was highly questionable. Her story changed several times, and her testimony was contradicted by eyewitnesses. (See Proposition of Law XI). Given the weak evidence against Dean on several of the counts, the trial court's bias became even more prejudicial than it otherwise would have been.

7. The trial court has a history of disregarding the law.

In September of 2006, Judge Rastatter had to be ordered, on mandamus, to follow the Second District Court of Appeal's earlier ruling. In State v. Davis, 166 Ohio App. 3d 468, 851 N.E.2d 515 (2006), the Second District reversed Davis' convictions on three drug offenses and remanded the case to the trial court. In complete disregard of the Second District's mandate, Judge Rastatter issued a journal entry requiring Davis to continue to serve two of the three sentences on convictions the Second District had reversed. Davis then filed a writ of mandamus in the Second District, and the Second District ordered Judge Rastatter to order Davis to be released from prison and to proceed to trial on the charges. State ex rel. Davis v. Rastatter, No.

06CA66, 2006 Ohio 5305, 2006 Ohio App. LEXIS 5301 (Clark Ct. App. Sept. 29, 2006). The Second District noted that Judge Rastatter's actions were "not only contrary to the law of the case . . . [but] also a failure to exercise the discretion we had ordered Respondent to exercise."

Id.

Judge Rastatter has a history of disregarding the law, and treating the courtroom as his own fiefdom. That is exactly what he did in Dean's capital trial.

8. Conclusion.

The trial court's failure to recuse itself from Dean's case and its bias against Dean deprived Dean of his right to a fair trial, effective representation, due process, and a reliable determination of his guilt and punishment in a capital case as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 5, 9, and 16 of the Ohio Constitution. For these reasons, Dean's convictions should be overturned.

Proposition of Law No. IV

It is error for a trial court to: 1) grant the State's motion for certification of a witness under Ohio R. Crim. P. 16(B)(1)(e) when sufficient evidence has not been presented warranting the certification; and 2) preside over the trial after hearing the certification hearing in violation of this Court's decision in State v. Gillard, 40 Ohio St. 3d 226, 533 N.E.2d 272 (1988). U.S. Const. amends. VI, VIII, XIV; Ohio Const. art. I, §§ 10, 16.

Jason Dean's right to a fair trial was violated by trial court error.

1. The trial court erred in granting the State's certification.

The trial court erred in granting the State's Motion to Certify that, under Ohio R. Crim. P. 16(B)(1)(e), the State did not have to provide defense counsel with the address of a witness, Crystal Kaboos. (4/24/06 T.p. 5, 7). The prosecutor stated on the record that the reason for seeking the certification was because Kaboos had been threatened with being shot in the face because she had testified against the co-defendant, Josh Wade. (4/24/06 T.p. 6). Further, the prosecutor declared that threats had been made against the witness to the effect that "people are going to get her if ... she can be found." Id. Based on these representations, the trial court granted the State's motion for certification of the witness. (4/24/06 T.p. 8). The trial court based this finding on not "hav[ing] any reason to believe that the State is abusing that privilege; and, obviously, there's some concern here for this particular witness and her safety." (4/24/06 T.p. 8-9).

In State v. Gillard, 40 Ohio St. 3d 226, 533 N.E.2d 272 (1988), this Court decided the issue of when a certification under Crim. R. 16(B)(1)(e) is proper. In Gillard, the State sought certification of a witness, Webb. Id. at 228, 533 N.E.2d at 275-76. According to Webb, Gillard was at Webb's home in West Virginia and confessed to Webb that he (Gillard) was the shooter in a homicide in Canton, Ohio. Id. at 227, 229, 533 N.E.2d at 274, 276. The State sought to perpetuate Webb's testimony due to Gillard being "a leader of a motorcycle gang, and that his

brothers had engaged, on his behalf and perhaps at his behest, in an organized-crime tactic of intimidating witnesses by threatening the lives of their families.” Id. The court granted the State’s motion to perpetuate Webb’s testimony as provided in Crim R. 16(B)(1)(e). Id. at 228, 533 N.E.2d at 276.

After the certification hearing, the State expanded on the threat to Kaboos. (5/4/06, T.p. 21). The State said that the threat about the witness being shot in the face was either contained in a letter from co-defendant Wade or a letter concerning things Wade had said. (5/4/06, T.p. 21-22). The threats “came from the mouth of Josh Wade” and not Jason Dean. (5/4/06, T.p. 22). Unlike the situation in Gillard, according to the State the threat did not come from Jason Dean or someone acting “on his behalf and perhaps at his behest.” Gillard, 40 Ohio St.3d at 228, 533 N.E.2d at 276; (5/4/06, T.p. 22).

By analogy, this Court in State v. Bays, 87 Ohio St. 3d 15, 716 N.E.2d 1126 (1999) held that the State did not have to disclose the identity of an anonymous caller who provided the detective with information. Id. at 24, 716 N.E.2d at 1138. This Court held that the privilege the State possesses to “withhold from disclosure the identities of those who give information to the police about crimes ... must give way where disclosure of the informant’s identity would be helpful to the accused in making a defense to a criminal charge.” Id. at 24-25, 716 N.E.2d at 1138 (citing to Roviaro v. United States, 353 U.S. 53, 60-61 (1957)).

This Court also held that “[i]n general, courts have compelled disclosure in cases involving an informer who helped to set up the commission of the crime and who was present at its occurrence whenever the informer’s testimony may be helpful to the defense.” Bays, 87 Ohio St. 3d at 25, 716 N.E.2d at 1138 (citations omitted and internal quotation marks omitted). Additionally, this Court held “[i]n contrast, where the informant merely provided information

concerning the offense, the courts have quite consistently held that disclosure is not required.” Id. at 25, 716 N.E.2d at 1139 (citations omitted and internal quotation marks omitted).

This latter scenario is the situation involved in Gillard where the State was allowed to withhold information about the witness, Webb. Webb was solely an informer and did not have personal involvement in the crimes. Gillard, 40 Ohio St. 3d at 228-29, 533 N.E.2d at 275-76.

In the instant case, however, Crystal Kaboos did more than simply provide information about the offenses. In her own testimony she stated that she knew that Dean and co-defendant were going to look for a particular house. (Vol. 11, T.p. 2103). She testified that she rode with Dean and the co-defendant when they were looking for this house on Dibert Avenue — and she was in the backseat of the car when shots were fired from the car. (Vol. 11, T.p. 2104-05). She further testified that Dean and the co-defendant had told her that “they were going to go to the Nite Owl and lure somebody out and rob them.” (Vol. 11, T.p. 2107-08). She then testified that Dean told her that they shot the victim and got \$6 from him. (Vol. 11, T.p. 2114-15). She also testified that Dean told her that he had shot through the windshield of a car at a mini-mart and that Andre Piersoll had been shot. (Vol. 11, T.p. 2117-18). She testified that she was present when Dean got rid of a .25 caliber gun along with another gun. (Vol. 11, T.p. 2125).

Kaboos was more than simply an informant because she had much more of a presence in the crimes. She testified that she was present for the shootings on Dibert Avenue - and that she had knowledge of a plan to commit a crime the night of the homicide - yet she did not try to stop the crime or alert law enforcement until later. (Vol. 11, T.p. 2105, 2108).

According to Crim. R. 16(B)(1)(e), the State is required to demonstrate that pretrial disclosure of a witness’s identification to defense would subject the witness to “physical or substantial economic harm or coercion.” The threat in this case was not made by Dean, but

according to the State it was made by the co-defendant. (5/4/06, T.p. 21-22). Thus, Dean's right to confront the witness was improperly foreclosed.

The trial court erred in granting the State's motion to certify Ms. Kaboos and in not ordering the State to furnish defense counsel with her address for pretrial preparation.

2. Error for trial judge to remain on the case.

This Court stated that when a judge hears information about a defendant threatening a witness, "there is an unnecessary risk that the judge will harbor a bias against that defendant." Gillard, 40 Ohio St. 3d at 229, 533 N.E.2d at 276. This Court held that when "the state seeks to obtain relief from discovery or to perpetuate testimony under *Crim. R. 16(B)(1)(e)*, the judge who disposes of such a motion may not be the same judge who will conduct the trial." Id., (emphasis in original). However, this Court held the error in Gillard for the trial judge to have heard the certification hearing was "harmless in light of the overwhelming evidence of guilt, including an eyewitness account of the murder, Gillard's subsequent flight, his admission to Webb, and his possession of the murder weapon two weeks before the crime." Id. at 229, 533 N.E.2d at 276-77.

In Dean's case, it was not harmless error for the trial judge to be present for the certification hearing, to deny the defense's motion for the judge to recuse himself, and then to preside over the trial. (5/9/06 at T.p. 18). Foremost, the trial judge possessed a bias against Dean (See Proposition of Law No. III).

Additionally, there was not "overwhelming evidence of [Dean's] guilt". Id. at 229, 533 N.E.2d at 276. (See Proposition of Law No. XI). Kari Epperson testified for the State that she was staying at her mother's apartment at 518 West High Street in Springfield, Ohio. (Vol. 8, T.p. 1393). Kari Epperson testified that she was at 518 West High Street and heard squealing tires

outside that caught her attention. (Vol. 8, T.p. 1400). She looked outside and saw a man get out of a car and run down the street. (Vol. 8, T.p. 1401). She then heard two shots fired. (Vol. 8, T.p. 1402-03). After the shots were fired, the man walked back towards the vehicle from which he had exited. (Vol. 8, T.p. 1403). The man looked around him and then ran to the vehicle. (Vol. 8, T.p. 1404). When the man was looking around, she was at the window and got a good look at him and knew that he was Joshua Wade. (Vol. 8, T.p. 1404-05). She saw Wade get into the driver's side of the vehicle and drive away. She did not see anyone else in the car or outside on the street with him. (Vol. 8, T.p. 1407). She knew who Wade was because they are cousins. (Vol. 8, T.p. 1394).

Terri Epperson, Kari Epperson's twin sister, also testified for the state. She testified that she had also been at her birth mother's apartment at 518 West High Street in Springfield, Ohio. (Vol. 8, T.p. 1418-19). She testified that she was going outside to retrieve a diaper bag from her boyfriend's car and before exiting the apartment she looked out the window and noticed a car parking across the street. (Vol. 8, T.p. 1420). She saw a man leave this car and fire two shots. She then saw him look around and then he got into the driver's side of the car. (Vol. 8, T.p. 1429-30). She knew the man who fired the shots was her cousin, Joshua Wade. (Vol. 8, T.p. 1430-31). She did not see anyone else there other than Wade. (Vol. 8, T.p. 1430).

Similarly, there was testimony that a car drove by 609 Dibert Avenue and shots were fired from that car at another car parked on the street as well as into the home itself. (Vol. 9, T.p. 1798, 1805). Shanta Chilton had been at the home at 609 Dibert Avenue when the shots were fired. (Vol. 9, T.p. 1793-94). She testified that she only saw one person, a white boy, firing shots from the car. (Vol. 9, T.p. 1816).

Devon Williams, Sr. was also present at 609 Dibert Avenue when the shooting occurred and it was his car that was struck with bullets. (Vol. 10, T.p. 2038, 2043-44). Williams testified that he “clearly” saw the individual in the car who shot up his car. (Vol. 10, T.p. 2046). Williams only saw one person in the car from where the shots were fired and that person was not Dean. (Vol. 10, T.p. 2061).

The evidence was not overwhelming that Dean committed the homicide of Titus Arnold or that he was the shooter at 609 Dibert Avenue. In fact, there was no question that the co-defendant shot and killed the victim. (Entry, 6/2/06). Additionally, Dean did not flee after the crimes occurred. Thus, it was not harmless for the trial judge to preside over the certification hearing and the trial. Gillard, 40 Ohio St. 3d at 229, 533 N.E.2d at 276.

3. Conclusion.

The trial court erred by granting the State’s motion to certify Crystal Kaboos; thereby withholding her address from disclosure to defense counsel. Further, the trial court should have recused itself from presiding over the trial once it heard the State’s reasons for requesting the certification. This Court should find that it was reversible error for the trial judge to remain on the case once he presided at the certification hearing and that the certification should not have been granted.

Proposition of Law No. V

A trial court errs when a defendant is shackled without a hearing and in violation of his right to the presumption of innocence. U.S. Const. amends. VI, VIII, XIV; Ohio Const. art. I, §§ 10, 16.

The trial court erred in denying Dean's motion without first conducting a hearing. At a hearing on this motion, evidence could have been presented to appear without shackles to demonstrate that Dean would not pose a security risk to the court. Alternatively, less intrusive means for security could have been explored.

1. Facts.

Dean filed a motion with the trial court for him to appear at trial without restraints. (3/7/06 Defendant's Motion to Appear at all Proceedings Without Restraints). The trial court filed an Entry denying Dean's motion with one sentence: "Because the defendant herein has both a documented history of violence and a recent escape attempt, his motion to APPEAR WITHOUT RESTRAINTS OR SHACKLES is OVERRULED." (April 3, 2006 Entry; emphasis in original).

Defense counsel renewed the motion and stated that Dean was transported from the first floor to the third floor of the courthouse in shackles. (Vol. 1, T.p. 3). Counsel said that jurors were in the hallway and may have seen Dean shackled. (Vol. 1, T.p. 3-4). The trial court again overruled the motion. (Vol. 1, T.p. 4).

At the beginning of voir dire, defense counsel made a motion for a mistrial due to prospective jurors seeing Dean wearing shackles. (Vol. 1, T.p. 21). Defense counsel stated that Dean was shackled even though the State did not file a motion requesting that he be shackled. As it was, two armed deputies were present in the courtroom for security. *Id.* Dean is also small in

stature. (5/5/06 T.p. 17). The trial court stated that it was following its prior ruling that Dean would be shackled during the trial. (Vol. 1, T.p. 22).

2. Dean's presumption of innocence was violated.

In Deck v. Missouri, 544 U.S. 622 (2005), the United States Supreme Court ruled on a case involving a defendant being shackled. The Supreme Court stated that the Fifth and Fourteenth Amendments are implicated when physical restraints are employed. Id. at 629. The Court also noted that “[v]isible shackling undermines the presumption of innocence and the related fairness of the factfinding process.” Id. at 630 (citations omitted). Additionally, “[i]t suggests to the jury that the justice system itself sees a ‘need to separate a defendant from the community at large’”. Id. (citations omitted).

To ensure fairness, the trial court should have at least conducted a hearing prior to ordering Dean be shackled during trial. Moreover, if after a hearing the trial court had ordered Dean to be shackled, steps should have been taken to eliminate any risk of the shackles being seen by the jurors. “Due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case.” Deck, 544 U.S. at 632.

As this Court has stated, “no one should be tried while shackled, absent unusual circumstances.” State v. Kidder, 32 Ohio St. 3d 279, 285, 513 N.E.2d 311, 318 (1987). It is within the trial court’s discretion to determine whether a defendant is placed in shackles. State v. Richey, 64 Ohio St. 3d 353, 358, 595 N.E.2d 915, 921 (1992). However, the trial court should have conducted a hearing prior to ordering Dean be shackled and also taken steps to eliminate, or at least minimize, jurors viewing him wearing the shackles.

In State v. Cassano, 96 Ohio St. 3d 94, 772 N.E.2d 81 (2002), the trial court ordered the defendant be shackled during the trial. Id. at 102. However, in Cassano the trial court conducted

a hearing prior to finding that shackles were necessary. Id. at 103, 772 N.E.2d at 93-94. The shackles were also hidden by a skirt around the defense counsel table in the courtroom. Id. Further, Cassano's jurors "knew that [he] was an inmate and a convicted murderer" such that if they had seen Cassano in shackles it would not have been surprising. Id.

3. Dean was denied due process.

In Dean's case, he was shackled without a hearing. The trial court simply issued a written entry denying the motion for him to appear without restraints. (4/3/06 Entry). There is no indication that any effort was made to hide the shackles from the jury's view. Unlike in Cassano, Dean was not charged with a murder committed in a prison, which would have made his appearance in shackles predictable.

4. Conclusion.

By the trial court simply issuing a written one-sentence denial of Dean's motion to appear without restraints, the trial court did not afford Dean his due process rights as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution. The shackling of Dean removed his presumption of innocence before the jury. Deck, 544 U.S. at 630. This Court should reverse Dean's conviction and remand the case to the trial court for a new trial.

Proposition of Law No. VI

The accused's right to a fair trial is violated when the trial court denies reasonable requests by the accused for continuances in a capital case. U.S. Const. amends. V, VI, VIII, XIV; Ohio Const. art. I, §§ 9, 10, 16.

Jason Dean was denied his right to a fair trial when the trial court unreasonably denied four requests by Dean for continuances. The balance of relevant factors for whether a continuance should be granted weighs in favor of Dean's requests for additional time. And Dean's defense was prejudiced by the trial court's refusal to grant him those continuances.

1. Background information.

1.1 No recess before cross-examination of Terry Smith.

Jailhouse informant Terry Smith testified that Dean made incriminating statements to him — and Smith testified that Dean wrote inculpatory letters to another inmate named Jason Mans. (Vol. 11, T.p. 2076-79.) After Smith's direct examination, defense counsel requested information from the prosecutor about Smith. (*Id.* at 2079-80.) The prosecutor replied that the State had previously given defense counsel information regarding the gist of Smith's testimony. (*Id.* at 2082-83.) Defense counsel then asked for a brief recess of about ten minutes to confer with Dean before cross-examining Smith. (*Id.* at 2083.) Although the prosecutor did not object, the trial court denied the defense's request for a brief recess. (*Id.* at 2083.)

1.2 No continuance for trial witness.

Defense counsel informed the trial court that Dean's brother, Mark Dean, was supposed to be called as a witness but he had appeared to testify while intoxicated. (Vol. 13, T.p. 2538-39.) Defense counsel represented that Mark was "in no position to testify" because he was drunk. (*Id.* at 2539.) As a result, defense counsel asked Mark to leave the courthouse. (*Id.* at 2540.) Defense counsel requested a recess to enable Jason Dean to telephone Mark Dean to

determine Mark's availability to testify. (Id. at 2541-42.) The prosecutor objected on the ground that Dean could collude with Mark over his testimony. (Id. at 2541-42.)

The trial court denied Dean's request for a recess. (Id. at 2542-43.) The court noted that Mark Dean had been present for some trial testimony and he was thus in a position to tailor his testimony to suit the defense. (Id. at 2542.) The trial court stated it would not delay the trial because Mark was told he would be a witness, but he chose to get drunk on the morning of his testimony. (Id. at 2543.)

1.3 No recess to prepare for Dean's testimony.

After Dean's motion for judgment of acquittal, defense counsel informed the trial court that Dean wanted to testify in his own defense. (Vol. 13, T.p. 2553-54.) Defense counsel had previously advised Dean not to testify. (Id. at 2554-55.) Defense counsel asserted that they needed some time to prepare Dean's testimony — and they would be ineffective if they had to examine Dean without preparing for his testimony. (Id. at 2555, 2557.) The trial court permitted counsel only ten minutes to consult with Dean over this matter. (Id. at 2559-61.) Thereafter, Dean withdrew his request to testify. (Id. at 2561-62.)

1.4 No continuance for mitigation witness.

Defense counsel moved to continue the penalty phase before any witnesses were presented. (Vo. 14, T.p. 2733.) Specifically, counsel pointed out that Dean's mother was too ill to attend that day's proceedings. (Id.)

The trial court denied the continuance. (Id. at 2735.) The court stated that Dean's mother had recurring health problems which made her attendance problematic. (Id. at 2734.) Thus, defense counsel could not assure the court that Dean's mother would be available to testify

any time soon. (Id.) Instead, the trial court said it would give defense counsel “lee way” when examining another mitigation witness. (Id. at 2735.)

2. Balancing test for denial of continuances.

A trial court has discretion whether to grant a continuance. See Ungar v. Sarafite, 376 U.S. 575, 589-90 (1964). Reversible error results from the denial of a continuance, requested by the defense, when the denial deprives the defendant of a fair trial. See Powell v. Collins, 332 F.3d 376, 396 (6th Cir. 2003) (citing Cooper v. Sowders, 837 F.2d 284, 286 (6th Cir. 1988)). Reversible error also results if the denial of a continuance requested by the defense infringes on a specific constitutional right of the defendant. Id. The defendant “must also show that the denial of his request resulted in actual prejudice to his defense.” Id. (citation omitted). “Actual prejudice may be demonstrated by showing that additional time would have made relevant witnesses available or otherwise benefited the defense.” Id. (citation omitted).

A balancing test is used where the defendant claims constitutional error resulting from the denial of a continuance. Id. The reviewing court balances the length of any delay that would follow from a continuance; whether the court, parties, or witnesses would be inconvenienced by the continuance; whether other continuances were granted; the reasons for the request, including whether there was any purpose to delay the trial, whether the defendant was at fault for causing the delay; whether the defense would be prejudiced; and the complexity of the case. Id.

3. Error to deny Dean’s requests for continuances.

The factors set out in Powell balance in Dean’s favor. This was a complex case. The State presented fifty-two witnesses, including witnesses expressing scientific opinions about handwriting analysis and firearms. And the trial court gave considerable flexibility to the State to present its case. Six prosecution witnesses were dismissed and recalled later to complete their

testimonies. (See Vol. 10, T.p. 1978, Vol. 10, T.p. 2020 (Shepherd); Vol. 8, T.p. 1452, Vol. 9, T.p. 1836 (Steinmetz); Vol. 9, T.p. 1637, Vol. 9, T.p. 1753 (Pergram); Vol. 9, T.p. 1646, Vol. 9, T.p. 1761 (Emmel); Vol. 10, T.p. 1876, Vol. 10, T.p. 1919, Vol. 11, T.p. 2191 (Estep).) In basic fairness, the trial court should also have been more flexible in allowing Dean to present his witnesses. (See Proposition of Law No. III.) Moreover, the death penalty was involved, bringing to bear additional procedural and substantive protections to Dean that are afforded under the Ohio statutes, the Eighth Amendment, and the Due Process Clause. See Powell, 332 F.3d at 397 (citation omitted).

The Powell factors also balance in Dean's favor because in each instance when the trial court denied a continuance, one of Dean's specific constitutional rights was implicated. See 332 F.3d at 396. The error resulting from the trial court's denial of a short recess before Terry Smith was cross-examined implicates Dean's Sixth Amendment right to confrontation and effective counsel. (See Proposition of Law No. VII.) The error resulting from the trial court's denial of a continuance when Mark Dean was unavailable to testify implicates Dean's Sixth Amendment right to compulsory process. See Crane v. Kentucky, 476 U.S. 683, 690 (1986). Further, the error resulting from the trial court's denial of a continuance to allow defense counsel to prepare Dean's testimony implicates Dean's Sixth Amendment rights to counsel and compulsory process. (See Proposition of Law No. VII.) And the error resulting from the denial of a continuance in the penalty phase implicates Dean's Eighth Amendment right to present relevant mitigating evidence of his history and background. See Eddings v. Oklahoma, 455 U.S. 104, 113 (1982); Lockett v. Ohio, 438 U.S. 586, 604-05 (1978).

More specifically, a continuance was warranted for Dean's request to consult with his counsel before Smith was cross-examined. It was not Dean's fault that his counsel were not

prepared to cross-examine Smith. But even if this factor weighs against Dean, its weight should be greatly diminished based on counsel's ineffectiveness. (See Proposition of Law No. XIV.) Further, defense counsel requested only ten minutes to speak with Dean. Thus, the length of any delay weighs in Dean's favor. Moreover, Smith was a inmate in the corrections system when he testified. Keeping him in the courtroom for an additional ten minutes would not have inconvenienced this witness.

Smith testified that Dean incriminated himself during their conversations. It was important for counsel to have access to Dean to effectively cross-examine Smith. Dean had first-hand knowledge of any conversations that he may have had with Smith. Accordingly, Dean was prejudiced by the trial court's denial of his request for more time.

The Powell factors also balance in Dean's favor on his claim that his counsel were denied a reasonable amount of time to prepare Dean to testify. The length of the delay weighs in Dean's favor. The trial court could have given counsel an hour or two to meet with Dean to help prepare him to testify. Further, Dean should not be faulted for engaging in dilatory tactics. Dean simply changed his mind because he wanted to be heard by the jury. (See Proposition of Law No. VII.)

Whether Dean's desire to testify was wise is beside the point. The right to testify was personal to Dean, and only he could waive it under the Fifth Amendment. See Johnson v. Zerbst, 304 U.S. 458, 464 (1938). And Dean was competent to make such an important decision. Even assuming that counsel gave Dean good advice when they told him not to testify, it is clear that as a competent defendant Dean had the right to make this type of fundamental choice. See State v. Berry, 80 Ohio St. 3d 371, 385, 686 N.E.2d 1097, 1108 (1997) (capital defendant was competent to waive post-conviction review); State v. Tyler, 50 Ohio St. 3d 24, 38-39, 553 N.E.2d 576, 594 (1990) (capital defendant was competent to waive mitigating evidence).

The Powell factors also balance in Dean's favor on the issue of whether a continuance should have been granted regarding Mark Dean's availability to testify. Although Mark Dean was a defense witness, it was not Jason Dean's fault that Mark was unavailable to testify. There is no evidence suggesting Jason Dean induced Mark to get drunk on the day of Mark's testimony. Nor would the delay have been substantial enough to justify denying this continuance. Mark Dean's disability to be a witness was transient because he was drunk. Within a day, or perhaps a couple of hours, Mark likely would have been sober.

Dean was prejudiced by this error. The record establishes that Mark and Jason Dean bear a strong resemblance to each other. A few witnesses testified as to some confusion in their ability to distinguish Jason from Mark. (Vol. 6, T.p. 1223 (Rhonda Boyd); Vol. 9, T.p. 1699, 1708 (Andre Piersoll).) Accordingly, Mark Dean's testimony could have aided in argument in favor for reasonable doubts based on possible misidentifications of Mark as being Jason.

The trial court also noted that Mark Dean had sat in the courtroom during part of the trial and heard some witnesses' testimony. (Vol. 13, T.p. 2542.) Even if this factor weighs against Dean, it deserves little weight. The State was permitted to seat the lead detective on this case, Doug Estep, at counsel table — even though Estep testified against Dean. (Vol. 1, T.p. 35, Vol. 13, T.p. 2535.) It was not error to let Estep sit at the prosecutor's table. See Ohio Evid. R. 615(B). Nevertheless, Estep's presence at trial could may have given the State the type of tactical edge that underscored the trial court's objection to Mark Dean's presence at trial.

Last, the Powell factors weigh in Dean's favor regarding his claim that a continuance was improperly denied in the penalty phase. Dean requested more time because his mother's illness precluded her attendance. Thus, Dean did not request more time to create delay or out of any improper motive. It is true that more time might not have sufficed to secure the witness'

Proposition of Law No. VII

The accused's right to the effective assistance of counsel is violated when the trial court prohibits the accused from having a reasonable opportunity to confer with his counsel. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 10, 16.

Jason Dean's right to the effective assistance of counsel was violated because the trial court twice refused to give him access to consult with his counsel during a critical stage of the trial. Dean is entitled to a new trial because the prejudice to him is presumed from these constitutional errors. See Perry v. Leeke, 488 U.S. 272, 278-81 (1989).

1. Background information.

1.1 Cross-examination of Terry Smith.

The State presented testimony from jailhouse informant Terry Smith. Smith's testimony was offered to incriminate Dean through statements that Dean purportedly made to Smith about Titus Arnold's murder. (Vol. 11, T.p. 2076-78.) Smith's testimony was also offered to establish a foundation for letters written by Dean to another inmate, Jason Mans. (Id. at 2076-77.) Defense counsel asked for a recess to prepare their cross-examination of Smith, by determining what information the prosecutor had about Smith before he testified. (Id. at 2079-80.) The prosecutor represented that the State had already briefed defense counsel about the gist of Smith's testimony — and that the State's disclosure had been made to defense counsel about twelve days before Smith testified. (Id. at 2082-83.)

Defense counsel then stated that "the only other person who knows anything about these statements would be my client. I would just like five or ten minutes to talk with him." (Id. at 2083.) The prosecutor had "no objection to that." (Id.) However, the trial court denied defense counsel's request to confer with Dean briefly, noting "[t]hat was twelve days ago [when the

State informed defense counsel about Smith's testimony] so we're not going to take trial time to do investigation...." (Id.)

1.2 Dean's request to testify.

After Dean moved for a judgment of acquittal, defense counsel alerted the trial court to Dean's desire to testify on his own behalf. (Vol. 13, T.p. 2553-54.) Defense counsel also related that they had advised Dean not to testify. (Id. at 2554-55.) Moreover, defense counsel made clear that they were not at that time prepared to direct Dean through his testimony. (Id. at 2555, 2557.) A colloquy between Dean and the trial court confirmed that Dean wanted to testify on his own behalf. (Id. at 2556.)

The trial court refused to give defense counsel a recess to prepare Dean to testify, however. (Id. at 2557.) Despite defense counsel's representation that their unprepared direct examination of Dean would be "ineffective," the trial court stated that the case would "proceed." (Id.) The trial court further commented that defense counsel were not ineffective because they advised Dean not to testify. (Id. at 2558.) The trial court then consented to give defense counsel only ten minutes to confer with Dean. (Id. at 2559-61.) Thereafter, defense counsel informed the trial court that Dean would not testify, and the defense rested. (Id. at 2561-62.)

2. Constitutional right of access to defense counsel.

The Sixth Amendment guarantee of the effective assistance of counsel includes the defendant's right of access to his counsel during a critical stage of the trial. See Geders v. United States, 425 U.S. 80, 88 (1976). Indeed, the Supreme Court's "cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance." Id. Thus, in Geders, the Supreme Court found constitutional error when the defendant in a federal criminal trial was denied access

to consult with his counsel by a sequestration order during an overnight recess held between the direct and cross-examination of the defendant. Id. In Geders, the risk of any “coaching” of the defendant by his counsel during the overnight recess was outweighed by the “defendant’s right to consult with his attorney during a long overnight recess....” Id. at 91.

The Supreme Court revisited the issue of a defendant’s access to his counsel within the context of a brief recess in Perry v. Leeke, 488 U.S. 272 (1989). In Perry, a state trial court denied the defendant access to consult with his counsel during a brief fifteen minute recess following the direct and cross-examinations of the defendant. Id. at 274. The Supreme Court distinguished Geders and found no constitutional violation. The Court reasoned that the defendant in Perry had no constitutional right to discuss his testimony with his counsel while his testimony was “in process.” Id. at 281-84. The Court noted that giving a respite to the defendant would make the fact-finding process of the trial less reliable — since consultation with counsel would allow the defendant “an opportunity to regroup and regain a sense of poise and strategy that the unaided witness would not possess.” Id. at 282. “Once the defendant places himself at the very heart of the trial process [by taking the witness stand], it only comports with basic fairness that the story presented on direct is measured for its accuracy and completeness by uninfluenced testimony on cross-examination.” Id. at 283 (citation omitted).

The Supreme Court also made clear in Perry that no showing of prejudice is necessary in a case where the defendant can establish a violation of his right to have access to his counsel. Id. at 278-80. A majority of five justices joined part II of Justice Stevens’s opinion in Perry which held that a violation of the right to counsel in Geders creates a presumption of prejudice to the defendant. See id.

3. Constitutional violation by denial of access to counsel.

Dean's Sixth Amendment right to counsel under Geders was violated by the trial court's refusal to let him confer with his counsel before Smith was cross-examined. The trial court also violated Dean's right to consult with his counsel when counsel needed adequate time to prepare Dean's testimony.

Unlike in Perry, Dean did not seek to confer with his counsel during his own testimony. See 488 U.S. at 281-83. Instead, counsel needed to confer with Dean before a State's witness (Smith) was cross-examined. This situation, unlike in Perry, created no risk of distorting the truth-seeking function of this trial. See id.

Moreover, Dean needed to consult with his counsel in order for them to effectively prepare Dean to testify. (See Vol. 13, T.p. 2555-57.) Again, unlike in Perry, there is no concern here that consultation between Dean and his counsel might distort the truth-seeking function of the proceedings. Counsel did not ask to speak to Dean in a recess during his testimony. Rather, counsel needed some time to meet with Dean to prepare his testimony.

And the trial court's meager concession to give Dean only ten minutes with his counsel was wholly inadequate for counsel to effectively prepare Dean to testify. Up to that time, counsel understood that Dean would not testify. But Dean had a change of heart and he wished to be heard by the jury. Counsel needed adequate time to prepare Dean to present him as a witness, according to his right and desire to testify. The brief recess allotted by the trial court was simply an inadequate amount of time for counsel and Dean to hash out an effective direct examination. Realizing this defect, defense counsel apparently convinced Dean to forego his right to testify during the paltry ten minute recess. Thus, Dean's constitutional right to be a

witness in his own defense was compromised by the trial court's unreasonable restriction on Dean's access to counsel. (See Proposition of Law No. VII.)

Dean need not demonstrate actual prejudice to his defense for this claim. See Perry, 488 U.S. at 278-81. Reversal is required because Dean's right to counsel was violated. Unlike in Perry, there is no compelling and countervailing state interest for the trial court to justify restricting Dean's access to counsel. Under Perry and Geders constitutional error occurred. Dean was denied access to counsel to further his right to a meaningful defense — and the ban on attorney-client communications did not involve a brief recess before or during cross-examination of Dean. See United States v. Sandoval-Mendoza, 472 F.3d 645, 651 (9th Cir. 2006).

Jason Dean's convictions must be reversed and his case remanded for a new trial based on his Sixth Amendment violation.

Proposition of Law No. VIII

The introduction of a defendant's letters and phone calls with no probative value but which are highly prejudicial violates a capital defendant's right to a fair trial, due process, a reliable determination of guilt, and a reliable sentencing determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and of Article I, §§ 9, 10, and 16 of the Ohio Constitution.

The prejudicial impact of the admission of inflammatory letters and recordings of phone calls deprived Dean of a fair trial, due process, a reliable determination of guilt, and a reliable sentencing determination. These letters and recordings had virtually no probative value but were highly prejudicial and therefore should have been excluded by the trial court.

1. Law.

When evidence is "so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." Payne v. Tennessee, 501 U.S. 808, 825 (1991). Moreover, when an individual's life is at stake, the Supreme Court has repeatedly insisted upon higher standards of reliability and fairness. See e.g., Beck v. Alabama, 447 U.S. 625 (1980) (need for heightened reliability); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (the penalty of death is qualitatively different from any other sentence and requires a heightened degree of reliability).

Evidence Rule 401 provides: "Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The admissibility of relevant evidence rests within the sound discretion of the trial court. State v. Drummond, 111 Ohio St. 3d 14, 28, 854 N.E.2d 1038, 1059 (2006).

Evidence Rule 403(A) provides that evidence is not admissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of

misleading the jury. The determination of whether a piece of evidence is inadmissible under this standard is left to the sound discretion of the trial court. State v. Crotts, 104 Ohio St. 3d 432, 437, 820 N.E.2d 302, 308 (2004). All evidence that tends to prove the State's version of the facts necessarily is prejudicial to the defendant. Id. Thus, the Rules of Evidence do not bar all prejudicial evidence, only unfairly prejudicial evidence is excludable. Id.

Evidence is unfairly prejudicial when it may result in an improper basis for the jury's decision. Id. If the evidence "arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish, the evidence may be unfairly prejudicial." Id. In other words, if the evidence appeals to the jury's emotions rather than its intellect, it is usually prejudicial. Id.

Further, a Rule 403 objection requires heightened scrutiny in capital cases. State v. Morales, 32 Ohio St. 3d 252, 257-58, 513 N.E.2d 267, 273 (1987). Whereas exclusion under 403 generally requires that the probative value of the evidence be minimal and the prejudice great, in capital cases, the probative value of each piece of evidence must outweigh any potential danger of prejudice to the defendant. Id. at 258, 513 N.E.2d at 274. If the probative worth of the evidence does not outweigh the danger of prejudice to the defendant, it must be excluded. Id.

On direct appeal, constitutional error is harmless only if the prosecution proves it to be harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 26 (1967). When the record on direct appeal establishes constitutional error, the burden is on the State to prove that the error is harmless beyond a reasonable doubt. Id. "The harmless error standard is even more stringent when applied to errors committed at the penalty phase of a capital trial. 'The question . . . is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" State v. Fears, 86 Ohio St. 3d

329, 354, 715 N.E.2d 136, 158 (1999) (Moyer, C.J., dissenting) (quoting Satterwhite v. Texas, 486 U.S. 249, 258-59 (1988)).

2. Argument.

At Dean's trial, the State introduced highly prejudicial evidence in the form of letters written by Dean to a friend and a girlfriend and telephone calls made to various individuals while in custody before trial.

Defense counsel filed a motion to exclude all of this evidence. (See Defendant's Motion in Limine, filed May 7, 2006). Defense counsel also objected on the record to specific letters and recordings, or portions thereof.¹ This issue is therefore preserved.

Defendant's motion in limine was argued orally before the court. (Vol. 12, T.p. 2378). This led to the redaction of some portions of the letters. Some of these redactions were the result of the trial court's orders and some were the result of agreements between the parties. Despite these redactions, the portions of the letters and recordings admitted were unfairly prejudicial to Dean.

Portions of three phone calls were played for the jury during trial. The first audiotape played was marked State's Exhibit 508 B. (Vol. 12, T.p. 2364). In this conversation with his

¹ Objection to State's exhibit 374-A at Vol. 11, T.p. 2068-73; objection to State's exhibit 436-A at Vol. 12, T.p. 2380-81; objection to State's exhibit 426-A at Vol. 12, T.p. 2383 (see also Defendant's exhibit E); objection to State's exhibit 373-A at Vol. 12, T.p. 2385 (see also Defendant's exhibit E); objection to State's exhibit 433-A at Vol. 12, T.p. 2385 (see also Defendant's exhibit E); objection to State's exhibit 468-A at Vol. 12, T.p. 2392-93 (see also Defendant's exhibit E); objection to State's exhibit 471-A at Vol. 12, T.p. 2393-95 (see also Defendant's exhibit E); objection to State's exhibit 474-A at Vol. 12, T.p. 2395-97 (see also Defendant's exhibit E); objection to State's exhibit 476-A at Vol. 12, T.p. 2397-98 (see also Defendant's exhibit E); objection to State's exhibit 428-A at Vol. 12, T.p. 2384 (see also Defendant's exhibit E); objection to State's exhibit 432-A at Vol. 12, T.p. 2385 (see also Defendant's exhibit E); general objection to letters to Ronda Sions at Vol. 12, T.p. 2421; objection to State's exhibit 372-A at Vol. 12, T.p. 2399 (see also Defendant's Exhibit F); objection to State's exhibit 378-A at Vol. 12, T.p. 2399 (see also Defendant's exhibit F).

mother, Dean refers to the prosecutor as a “motherfucker” twice and uses profanity throughout, saying some form of the word “fuck” seven times in the course of a conversation that was less than three-minutes long. (Id. at 2364-67). He also references the fact that Ronda’s husband hates him. (Id. at 2365-66). This becomes significant in light of the many letters he wrote to Ronda Sions from jail. These letters, read into the record by the prosecutor while Sions was on the stand, reveal that Dean and Sions were involved in a romantic relationship. (Id. at 2431; see also, Id. at 2410-45 (Dean referring to Sions as “baby” throughout letters) and State’s Ex. 431-A (“Why couldn’t we of got [sic] together before all of this shit happened...”). Exhibit 508-B makes it clear that Sions was married during the course of her relationship with Dean.

This recording is not relevant to any of the charges or specifications against Dean. He only discusses the fact that the prosecutors have in their possession the letters he wrote to Ronda Sions. The only argument that could be made that this recording is relevant is that it tends to prove that Dean wrote those letters. However, Ronda Sions identifies those letters as being from Jason Dean. (Id. at 2406-49). Furthermore, a handwriting sample was taken from Dean and compared to the letters. (Id. at 2290). This phone call is cumulative of other identification evidence. Moreover, it does not prove that the specific letters submitted to the jury were in fact written by Dean. It merely establishes that he did write to Ronda Sions. Given that the prosecution had, and used, other means to prove the letters were written by Dean, this recording is of very limited probative value. But, the recording must have gone far in making the jury dislike Dean. Not only was he vulgar, but it also established that he was having an affair with a married woman. The unfair prejudice of this recording greatly outweighs that probative value.

The next audiotape (State’s Exhibit 510 A) played for the jury was Dean talking about how little evidence the State had against him, the charges against him, how many years of

incarceration he was facing, and the fact that Josh Wade was talking to investigators. (Vol. 12, T.p. 2369-73). In this conversation Dean again refers to the prosecutors as “motherfuckers” and he again uses explicit profanity—this time saying “fuck” or a variation of it thirteen times, “bitch” three times, and “shit” or “bullshit” nine times. (Id.)

Significantly, while State’s Exhibits 508 B and 509 C were recorded while Dean was being held at the Clark County Jail, State’s Exhibit 510 A was recorded after Dean was moved to Lebanon Correctional Institution. Defense counsel sought to keep from the jury the fact that Dean had been held at Lebanon. (Vol. 12, T.p. 2309). The State and the court agreed. (Id.). The recording marked State’s Exhibit 509 C begins with a voice stating that the call is “from an inmate at the county jail.” (Id. at 2402-03). But State’s Exhibit 510 A begins with a voice stating that the call is “originating from an Ohio correctional institution,” making it clear to the jury that Dean was, at some point, being held in a state prison prior to his trial. (Id. at 2369). The jury was left to speculate about the discrepancy and why Dean may have been held there.

Again, this recording has only the most attenuated relevance. Dean talks about his co-defendant, Josh Wade, talking to investigators and to Crystal Kaboos about the crime. (Id. at 2370-72). Nowhere in the discussion does he indicate that he was involved in the crime. He indicates that Wade bragged to Kaboos about the murder to make himself look tough. (Id. at 2371-72). And he indicates that an eyewitness has put Wade at the scene, but not him. (Id. 2372). But he does not imply that he was at the scene. He states his belief that he will be found guilty of some charges and that he would be willing to take a deal if offered, but this is not indicative of his guilt. (Id. 2372-73). He is merely recognizing the likelihood of a guilty verdict on some counts. Once again, the danger of unfair prejudice—of the jury seeing Dean as generally arrogant and vulgar—greatly outweighs the probative value of this recording.

The last audiotope played for the jury was a conversation in which Dean says the prosecutor hates him "because we killed a moon cricket." (State's Exhibit 509-C; Tr. 2403). This reference comes up again later in the letters sent from Dean to Ronda Sions and to his friend Jason Mans. (State's exs. 471-A and 474-A; Tr. 2436, 2439). This was the prosecution's attempt to paint Dean as being motivated by racial hatred. (See Proposition of Law No. XV). Although Dean used a slang term for African Americans, he did not indicate that race was a motivation for the crime. Thus the probative value of this recording is minimal at best. Yet the danger of unfair prejudice was high. This evidence of Dean's racism was not relevant as there was no evidence tying his views on African Americans to the crimes for which he was being tried. Dawson v. Delaware, 503 U.S. 159 (1992). Dean also comes across as arrogant and vulgar, announcing himself for the collect call as "Jason mother fucking Dean." (Vol. 12, T.p. 2402).

Some of the admitted portions of Dean's letters to Jason Mans and Ronda Sions also paint him as a vulgar and misogynistic individual. In a letter to Jason Mans dated May 10, 2005, referring to Crystal Kaboos, Dean states, "[a]nd where the bitch talking about she left without me knowing that's a fucking lie. I kicked the bitch out because I found out she was smoking crack! So the bitch tryed [sic] to sink me but realy [sic] saved me when she testified that my dude was the shooter and then my dudes [sic] own cousin same bitch Terry Ebberson [sic] testified against him too." (State's Ex. 373 A). Also in reference to Crystal Kaboos, he said, "[a]ll that shit that bitch that was staying with me is saying about me and my boy telling her about the killing and all that shit ain't [sic] nothing but lies." (Id.) In that same letter, he also referred to Terry Epperson as "the other bitch." (Id.)

Portions of the admitted letters also demonstrate Dean's lack of remorse for the death of Titus Arnold. The following excerpts are indicative of this point:

- "They act like I killed the president." (State's Ex. 372 A.)
- "But I realy [sic] don't give a fuck about dude or his family!" (State's Ex. 374 A.)
- "I'm supposed to care about dude and his family and they are probably praying every night for my death! That's why I say I don't give a fuck about dude or his family. . . . Dude is dead and ain't [sic] nothing gonna [sic] bring him back!" (Id.)
- "It's ridiculous bro you would think I killed the president or something." (State's Ex. 378 A.)
- "When I was down in book in [sic] I was talking to a dude I know Mike Crowley and like I said I'm fucking chained up you seen how they keep me! Anyway this dude walks up to me and says 'that dude you and your boy killed was my cusin [sic].' I looked at him and said I don't give a fuck! So he takes a swing at me and catch's [sic] me in the jaw." (State's Ex. 433 A.)
- "I get so angry some times [sic] and I lose control. *** It's the reason a man I have never layed [sic] eyes on before is in his grave and his children are wondering where their Daddy is and his mother has to cry herself to sleep at night because her son was shot down like an animal for no reason other than he was at the wrong place at the wrong time! And what's so sad and scares me when I think about is the fact that I don't care." (State's Ex. 436 A.)

Excerpts of letters were also admitted to show Dean as a racist:

- "This monkey comes up to [me and] he is handcuffed right[.] [H]e looks at me and say [sic] are you the dude that killed old boy Titus Arnold. I said what if I am. He says man that was my cousin. I'm like I don't give a fuck. Old boy sucker punches [me] with the handcuffs." (State's Ex. 373 A.)
- "Moon cricket!!" (State's Ex. 471 A.)
- "But the fucking moon cricket working I done had words with him I don't know how many times." (State's Ex. 474 A.)
- "They been [sic] on time the last few days with your mail!! I guess that new mail man be [sic] handlin [sic] his business. He got [sic] to be a white guy!!" (State's Ex. 476 A.)

While these excerpts do show Dean as a racist, they indicate no racist motivation for the crimes.

See Dawson, 503 U.S. 159. Dean's racist attitude was irrelevant. It was just another way for the

State to portray him as a bad guy and to make the jury dislike him. This would have been particularly effective given the juxtaposition of Dean's character against Titus Arnold's character. Arnold was a youth counselor and a father of three. The State offered evidence that Arnold would try to get home early from work to see his children and fiancée. (Vol. 6, T.p. 1097-98). There was also testimony that Arnold would sometimes treat the kids at Visions for Youth to a snacks. (Id. at 1112).

Other portions from the letters painted Dean as a dangerous individual with an unabashed disregard for the law and societal norms:

- "I kinda [sic] took him (Josh) under my wing. Let him drive my car. We drink and smoke and party all day every day together."² (State's Ex. 372 A.)
- "I have lived my life the way I wanted. I have always done what I wanted to do when I wanted to do it and fuck what anybody had to say about it!" (State's Ex. 374 A.)
- "Life's a motherfucker isn't it bro!! This is what happens when you live life in the streets and make your own rules and laws. You lose everything every time!" (State's Ex. 378 A.)
- "I got caught up living the fast life doing what comes natural [sic] to a beast like me. Doing what I wanted when I wanted and how I wanted." (State's Ex. 426 A.)
- "If I could just get my hands on that motherfucker I would crush him. If I could get my hands on him there would be another mother mourning the loss of her child!" (State's Ex. 468 A.)
- "Because at that point if I wanted something I took it and damn the consequences. But that kind of thinking has had me know where [sic] but where I am right now locked in a concrete and steel cage." (State's Ex. 474 A.)
- "I will take some money some jewlery [sic] some dope. I will take your car and everything you own. But I would never take no pussy!!" (State's Ex. 471 A.)

Most of the letters admitted contained only marginally probative information, or no probative information at all. Throughout the letters, Dean makes generalizations about why he is

² Defendant did not object to this passage.

in jail and on trial. He talks about living a fast life (State's Ex. 426 A), doing "crazy shit" (State's Ex. 431 A), making mistakes (State's Ex. 462 A), living life in the streets (State's Ex. 378 A), and about not caring about the consequences of his actions (State's Ex. 474 A). He also talks about wishing Wade would stop talking about the crimes (State's Ex. 435 A) and about having blood on his hands (State's Ex. 471 A). Never, in any of the letters does he admit to the crimes or give any details about them. This sort of general statements do little to prove the State's case against Dean. What they do is portray Dean as cold-blooded, racist, misogynistic, and generally unfit to be in society. The State played upon the jury's emotions, impressing upon them just how bad Dean was. And, inevitably, that lead to a comparison to how good the victim was.

Ohio R. Evid. 404(B) provides that other acts are not admissible "to prove the character of a person in order to show that he acted in conformity therewith." Accordingly, courts "must be careful when considering evidence as proof of identity to recognize the distinction between evidence which shows that a defendant is the *type* of person who might commit a particular crime and evidence which shows that a defendant *is the* person who committed a particular crime." State v. Lowe, 69 Ohio St. 3d 527, 530, 634 N.E.2d 616, 619 (1994) (emphasis in original). Moreover, "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion" except in certain circumstances that do not apply in this case. Ohio R. Evid. 404(A). The evidence presented in these letters and recordings paints Dean as having bad character and is not relevant to the crimes for which he was tried. Accordingly, the evidence was not admissible under Evid. R. 404(A) or (B). This evidence was an attempt by the State to paint Dean as the type of person who would commit these kinds of crimes and as a person of bad character.

Exacerbating this problem, the State read most of the admitted letters to Ronda Sions into the record during its questioning of Sions. (Vol. 12, T.p. 2406-50). This only added to the prejudicial effect the letters had on the jury. Even the trial court recognized that “obviously, that has probably a greater impact on the jury than if they just sent paper back.” (Id. at 2400-01). That greater impact made the letters even more prejudicial than they otherwise would have been. As the trial court recognized, hearing Dean’s words read aloud would increase their effect on the juror’s emotions. This evidence was designed to, and did, appeal to the jury’s emotions, not its intellect. See Crotts, 104 Ohio St. 3d at 437, 820 N.E.2d at 308. It undoubtedly served to provoke the jury into wanting to punish Dean.

The prejudice produced by these letters and recordings was substantial. Dean came across as callous, vulgar, and unremorseful. The evidence helped the State obtain convictions on all charges by playing upon the passions and prejudices of the jury. There was a very real danger that this evidence inflamed the jurors’ emotions and thus prejudiced Dean. The unfair prejudice generated by the letters and recordings substantially outweighed whatever minimal probative value the evidence possessed.

The prejudice caused to Dean by this evidence is of particular concern because the evidence against him was not overwhelming. There was essentially no credible evidence that Dean was even at the scene of the Dibert Avenue shootings which was the basis for two counts of discharging a firearm at or into an occupied structure and four counts of attempted murder. Those attempted murder charges, in turn, formed part of the basis of the O.R.C. § 2929.04(A)(5) specification. And, there was very little evidence to support the O.R.C. § 2929.04(A)(7) specification that Dean acted with prior calculation and design. Crystal Kaboos was the only witness who offered testimony that could establish either of these charges. Her credibility was

highly questionable. Her story changed several times, and her testimony was contradicted by eyewitnesses. (See Proposition of Law No. XI). Given the weak evidence against Dean, the letters and phone calls, which played on the jury's emotions, became even more prejudicial than they otherwise would have been.

Dean was further prejudiced by the introduction of these items in the sentencing phase. The trial court failed to make any distinction between exhibits admitted at trial and exhibits admitted in the penalty phase, with the exception of the autopsy photos. (Vol. 14, T.p. 2730-32). As a result, the letters and recordings were admitted during the sentencing phase, over the defense's objection. (Id.) This evidence must have roused hatred in the jury. The effect would have been to make the jury not only dislike Dean, but also see him as unfit to be in society and to fear him. These feelings would have been exacerbated by the juxtaposition of Dean against Arnold. The prejudicial impact of this evidence violated the Eighth and Fourteenth Amendment guarantees "that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). See also State v. Thompson, 33 Ohio St. 3d 1, 514 N.E.2d 407 (1987). (See Proposition of Law XVII.)

The prejudicial impact of the jury's exposure to this inflammatory evidence deprived Dean of his right to a fair trial, due process, and a reliable determination of his guilt and punishment in a capital case as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 10 and 16 of the Ohio Constitution. For these reasons, Dean's convictions should be overturned, or, at a minimum, his death sentence vacated.

Proposition of Law No. IX

A trial court errs when it 1) fails to grant a mistrial after prejudicial testimony about a polygraph examination is given and 2) gives an improper curative instruction in violation of the defendant's right to due process and a fair trial. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 10, 16.

Jason Dean's constitutional rights were violated by the prejudicial testimony of a State's witness which the trial court failed to rectify.

1. Facts.

During the State's presentation of evidence at the guilt phase, witness Crystal Kaboos testified. (Vol. 11, T.p. 2091). She testified that Dean made incriminating statements to her about his involvement in the different crimes. (Vol. 11, T.p. 2105-07, 2113-14). During cross-examination when she was questioned about inconsistent statements she made, she stated: "No. But I've taken three polygraph tests to prove that I was telling the truth." (Vol. 11, T.p. 2149).

At this point defense counsel approached the bench and moved for a mistrial. (Vol. 11, T.p. 2152). The defense stated that the witness had been instructed not to mention the polygraph tests. (Vol. 11, T.p. 2151). Kaboos' testimony was not responsive to the question asked of her and occurred when she was questioned about her inconsistent statements to the Grand Jury and police. (Vol. 11, T.p. 2148-49).

With respect to State's witness Kaboos's importance, the trial court stated that "certainly a lot of things hinge on her testimony ... [she is] a significant witness who had information about all three incidents for which the defendant has been charged with crimes, the April 10 incident, the April 12, and the April 13." (Vol. 11, T.p. 2166). The trial court further acknowledged that:

[He didn't] know if a curative instruction [could] solve the problem. I share [the defense] concern that when [the jurors] are back in the jury room deliberating and they're going over Crystal Kaboos' testimony and going over what she said on direct examination and what she said on cross-examination and, perhaps, some inconsistencies, that they may tend to fall back on the information they

received that she passed a polygraph exam. And that could be enough to sway the jury or to convince the jury to believe her testimony; whereas, if they didn't have that information, perhaps they would choose to disbelieve some portions of her testimony.

(Vol. 11, T.p. 2167).

2. Standard of review.

The standard of review on a motion for mistrial is an abuse of discretion. State v. Hancock, 108 Ohio St. 3d 57, 840 N.E.2d 1032 (2006). In Hancock's capital case, the trial judge declared a mistrial upon discovery that certain trial exhibits, excluded during the sentencing phase, had in fact been sent to the jury for sentencing deliberations. Id. at 61, 840 N.E.2d at 1042. The court of appeals reversed the trial judge's ruling. Id. at 62, 840 N.E.2d at 1042. On later appeal, this Court reversed the court of appeals and found that the trial judge had not abused its discretion in granting a mistrial. Id. at 62, 78, 840 N.E.2d at 1042, 1055. In so holding, this Court stated "[t]he term [abuse of discretion] has been defined as 'a view or action that no conscientious judge, acting intelligently, could honestly have taken.'" Id. at 77, 840 N.E.2d at 1055; (citations omitted). Additionally, in State v. Franklin, 62 Ohio St. 3d 118, 127, 580 N.E.2d 1, 9 (1991) this Court held that "mistrials need be declared only when the ends of justice so require and a fair trial is no longer possible." (citations omitted).

3. Dean's constitutional right to a fair trial was violated.

It was an abuse of discretion for the trial court to deny defense counsels' motion for a mistrial. The importance of Kaboos' testimony to both the guilt and sentencing phases cannot be understated or cured with an instruction. The trial court instructed the jury to consider "the quality of the evidence regarding the aggravating circumstances". (Vol. 14, T.p. 2811). Kaboos' testimony was directly on point for the aggravating circumstances. As one example, Kaboos testified that Dean told her that he and his co-defendant robbed the victim of \$6. (Vol. 11, T.p.

2115). This testimony established the aggravating circumstance of aggravated robbery that the jury weighed against the mitigating factors. (Vol. 14, T.p. 2808-12).

In denying the motion for mistrial, the trial court first reasoned that State v. Holt, 17 Ohio St. 2d 81, 246 N.E.2d 365 (1969) supported its decision. (Vol. 11, T.p. 2169). The trial court stated that a mistrial was warranted in Holt because the testimony was that the defendant had failed a polygraph test. (Vol. 11, T.p. 2169).

Kaboos' testimony had the same effect as the testimony in Holt that warranted a mistrial. Kaboos' testified that Dean told her he committed the crimes. Yet he had pled not guilty and even as late as his unsworn statement he maintained his innocence. (Vol. 14, T.p. 2783). Kaboos' testimony was buttressed by her statement about taking three polygraph tests to prove that she was telling the truth. By implication the meaning was that Dean lied about being innocent.

The trial court explained that Kaboos' statement did not mean that she passed the polygraph tests, just that she had taken them. (Vol. 11, T.p. 2169-71). This is illogical because a witness is not going to mention taking a polygraph test if the person failed it because then all credibility would be lost and a failing result would not "prove [she] was telling the truth." (Vol. 11, T.p. 2149).

Despite defense counsel's objection, the trial court gave a curative instruction to the jury. (Vol. 11, T.p. 2173-75, 2179-80). In this curative instruction the trial court stated that polygraph examinations are not admissible, that Kaboos' statement didn't indicate whether she passed the polygraph, and that the jury was to disregard her statement. (Vol. 11, T.p. 2179-80).

In In re D.S., 111 Ohio St. 3d 361, 856 N.E.2d 921 (2006) this Court addressed the subject of polygraph examinations. In citing to State v. Souel, 53 Ohio St. 2d 123, 372 N.E.2d

1318 (1978), this Court noted that “[w]e have not adopted the unrestrained use of polygraph results at trial, and polygraphs themselves remain controversial. Only if there is a stipulation between the parties do we allow the admission of polygraph results at trial, and then for corroboration or an impeachment only.” In re D.S., 111 Ohio St. 3d at 364, 856 N.E.2d at 924.

The curative instruction in Dean’s case involved a very serious situation. The testimony was unlike the testimony in State v. Garner, 74 Ohio St. 3d 49, 59, 656 N.E.2d 623, 634 (1995) where the subject of a motion for mistrial was a “reference to the defendant’s prior arrests [which] was fleeting.” This testimony was deemed not to be an abuse of discretion for the trial judge to deny the motion for mistrial and a curative instruction was appropriate. Id.

The only remedy in Dean’s case was for a mistrial to be declared. In contrast to the situation in Garner, the testimony by Kaboos was not a “fleeting reference” and the curative instruction did not solve the problem.

To emphasize the importance of Kaboos’ testimony, during the guilt phase deliberations the jury sent a question to the trial court. (Vol. 13, T.p. 2707). The question was “[d]id Crystal Kaboos say, quote, they were going out to rob and kill drug dealers....” Id. This was the only question the jurors had during deliberations. In response, the trial court, with the agreement of defense counsel, had Kaboos’ testimony transcribed and given to the jury. Id. The jurors then had a transcript of Kaboos’ testimony, which included her statement about taking polygraph tests, before them when deciding on a verdict, further prejudicing Dean.

4. Trial court invaded the province of the jury.

As part of the curative instruction, the court told the jurors “I would note for your observation that although she said she took three polygraph exams to prove that she was telling

the truth, she never indicated one way or the other what the results were.” (Vol. 11, T.p. 2180). The trial court’s curative instruction to the jury contained improper speculation.

The trial court not only repeated Kaboos’ testimony, but also gave the jurors its own interpretation of the meaning of the testimony — and then told the jury to disregard the testimony. (Vol. 11, T.p. 2180). The trial court erred because it should have simply instructed the jury to disregard the testimony without editorializing. It was improper for the judge to assume the role of fact-finder and telling the jury what Kaboos’ testimony meant. See Barker v. Yukins, 199 F.3d 867, 874-75 (6th Cir. 1999) (credibility determinations rest exclusively with jury).

Dean had a Sixth Amendment right to have his jury be the factfinders and not the court. Duncan v. Louisiana, 391 U.S. 145 (1968). The trial court usurped the role of the jurors which is for them to judge and assign meaning to the testimony. The trial court’s curative instruction amounted to an instruction to the jury as to the meaning of Kaboos’ testimony which was wholly improper.

5. Conclusion.

The trial court erred in denying a mistrial. State’s witness, Crystal Kaboos, was utterly crucial to the State’s case against Dean. In this case, the “ends of justice” required the trial court to declare a mistrial. The curative instruction given by the judge was illogical and did not cure the prejudicial error. This Court should vacate Dean’s conviction and remand the case for a new trial.

Proposition of Law No. X

The right of the accused to a fair trial, to a fair and impartial jury, and to due process are violated when pretrial publicity is so pervasive that prejudice to the accused must be presumed and when the voir dire of the prospective jurors reinforces the prejudice caused by adverse publicity. U.S. Const. amends. VI, XIV, Ohio Const. art. I, §§ 5, 16.

The trial court violated Jason Dean's right to a trial by a fair and impartial jury when it denied Dean's motion for a change of venue, filed on March 7, 2006. The record reveals that the prospective jurors in this case were exposed to extensive pretrial publicity. Further, the nature and extent of pretrial publicity over this case in Clark County was so heavy that several jurors were not able to follow the trial court's instructions not to discuss the case. Under these circumstances, prejudice is presumed from pretrial publicity.

1. Individual voir dire examination reveals extensive exposure to case.

The trial court permitted individual sequestered voir dire on the issue of whether the prospective jurors were exposed to pretrial publicity. (Vol. 1, T.p. 32.) Several prospective jurors were exposed to pretrial publicity about this case. (See Vol. 1, T.p. 108, 133, 180-82, 223, 260-61, 268-69, 317, 335-36; Vol. 2, T.p. 369-70, 416, 426, 454, 471, 495-96, 594; Vol. 3, T.p. 653-54, 690.) Indeed, during voir dire the prosecuting attorney remarked that this case had drawn considerable media attention. (Vol. 1, T.p. 169-70.) Moreover, four of the jurors empanelled for service stated at voir dire and on their questionnaires that they were exposed to pretrial publicity: Chase (Vol. 1, T.p. 108); Myers (Vol. 2, T.p. 369-70); Massie (Vol. 2, T.p. 416); and Edgington (Vol. 2, T.p. 426.).

The prospective jurors often times knew of this case through exposure to newspaper articles and headlines. (See e.g. Vol. 1, T.p. 108, 133, 180-82, 223, 260-61, 268-69, 317, 335-36; Vol. 2, T.p. 416, 426, 454, 471.) Several other prospective jurors had seen television news

coverage about this case. (See e.g. Vol. 1, T.p. 268-69; Vol. 2, T.p. 369-70, 544.) Still other prospective jurors knew of this case from discussions with family, friends or co-workers. (See e.g. Vol. 1, T.p. 133, 223.)

Significantly, several jurors knew details about the facts of the case as the result of publicity. (See e.g. Vol. 1, T.p. 180-82, 317; Vol. 2, T.p. 426, 495-96, 544; Vol. 3, T.p. 690.) For instance, prospective jurors were aware that Titus Arnold had worked as a youth counselor, that he had been shot in the back coming home from work, and that a vigil was held for him. (See e.g. Vol. 2, T.p. 426, 495-96; Vol. 3, T.p. 690.)

2. Jurors were not able to follow the trial court's orders.

The trial court instructed the prospective jurors not to discuss the case with anyone before individual voir dire was conducted. (Vol. 1, T.p. 32.) The trial court also admonished the prospective jurors to avoid any media exposure or other types of exposure to this case during the proceedings. (Id.)

However, the extent and nature of the pretrial publicity in this case caused several prospective jurors to ignore the trial court admonitions to avoid media exposure or discussions about the case. The failure of several prospective jurors to follow the trial court's admonitions was the result of heavy local publicity arising from Dean's motion to disqualify the trial court. (See Proposition of Law No. IV.) Defense counsel noted that "bold headlines" had appeared in the local Springfield paper — along with several news reports about this unique development in a capital murder trial. (Vol. 5, T.p. 765.)

Six prospective jurors indicated that they had been exposed to this publicity after they were admonished otherwise by the trial court. (Id. at 768.) The subsequent voir dire of those six jurors (Ramey, Smith, Kline, Chase, Kerr, and Patsiavos) reveals that they had been exposed to

Dean's attempt to disqualify the judge through the media or through discussions with co-workers, family, or friends. (Vol. 5, T.p. 769-70, 775, 776-77, 782-83, 785-86, 788.) Additional details about the offense were also revealed to some jurors beyond what was stated in individual or general voir dire. (Id. at 769-70, 776-77.) Based on this event, defense counsel moved to excuse juror Kline for cause based on his inability or unwillingness to follow the court's instructions. (Id. at 792.) Jurors Chase and Kerr were empanelled for Dean's trial.

3. Publicity revealed at general voir dire.

Following individual sequestered voir dire, prospective jurors were questioned — twelve at a time — in the jury box. During general voir dire it became further apparent that the venire was exposed to extensive pretrial publicity.

Prospective juror McCullum admitted that she had ignored the trial court's admonitions because she had followed this case in the papers. (Vol. 5, T.p. 865-67.) McCullum also knew some detailed information about this case. McCullum knew of Dean's prior record and that the victim had been shot in the back of the head. (Id.) Again, defense counsel moved to challenge McCullum for cause due to her failure to follow the trial court's admonitions. (Id. at 870-74.)

Prospective juror Skinner admitted to hearing about this case at work and by discussion with his family. (Vol. 5, T.p. 837-38.) Skinner heard that the victim had been robbed of a small amount of money. (Id. at 842.) He also knew — as did prospective juror Bailey — that Dean wanted a new judge. (Vol. 5, T.p. 837, 856-57.)

Prospective juror Quick learned about this case through the media exposure and from contact with people she knew. (Vol. 5, T.p. 878-79.) Quick also had discussed the case with her husband and friends. Quick's husband told her that Dean "did it." (Id. at 881.) Quick had also heard of Dean's prior criminal record. (Id. at 880.)

Prospective juror Pauling also heard that Dean wanted the trial court disqualified. (Vol. 5, T.p. 899-901.) And juror Edgington (who was empanelled) had a phone conversation with her mother — after she was admonished by the court not to — in which she heard that Dean wanted to remove the trial court from his case. (Vol. 5, T.p. 915.)

4. Prejudice presumed from pretrial publicity.

In Irvin v. Dowd, the United States Supreme Court held that the defendant's right to an impartial jury was denied by a presumption of prejudice arising from extensive pretrial publicity. 366 U.S. 717, 725-28 (1961). The Court found a presumption of prejudice despite the sincerity of the jurors who stated that they could be "fair and impartial" to the defendant. Id. at 728. In Irvin, the viewpoint of the community was revealed by the media's pretrial coverage. Id. at 725. The media painted Irvin as a person of especially bad character, due to his prior criminal record and status as parole violator. Id. Further accounts noted that Irvin confessed and offered to plead guilty to avoid the death penalty. Id. at 725-26. The Court found that the "force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people of Gibson County." Id. at 726. See also, Sheppard v. Maxwell, 384 U.S. 333, 352-53 (1966) (presumed prejudice from pretrial publicity on totality of circumstances); Rideau v. Louisiana, 373 U.S. 723, 725-27 (1963).

As in Irvin, prejudice from the weight of adverse, pretrial publicity in this case must be presumed. The voir dire record establishes that the prospective jurors were exposed to publicity about this case. These details included the shocking death of a popular youth counselor and information of Dean's prior criminal record. Moreover, prejudice should be presumed because several prospective jurors (including jurors actually empanelled) were unable or unwilling to

follow the trial court's admonitions not to discuss this case. (See Vol. 1, T.p. 82-83; Vol. 5, T.p. 785-86, 915.)

5. Conclusion.

Jason Dean could not get a fair and impartial jury in Clark County as a result of overwhelming pretrial publicity. The media accounts of his case ensured that his guilt was presumed there. Dean's convictions must be reversed. He must be retried after a change of venue. The right to a fair and impartial jury is fundamental. The denial of that right is a structural error that is never harmless. See Arizona v. Fulminante, 499 U.S. 279, 290 (1991).

Proposition of Law No. XI

When the State fails to introduce sufficient evidence of particular charges, a resulting conviction deprives a capital defendant of substantive and procedural due process. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 9, 16.

1. Introduction.

The State failed to produce evidence demonstrating that Jason Dean engaged in “a course of conduct involving the . . . attempt to kill two or more persons” (O.R.C. § 2929.04(A)(5)) or that he murdered Titus Arnold with prior calculation and design (O.R.C. § 2929.04(A)(7)). The State also failed to produce evidence sufficient to demonstrate that Jason Dean was at the scene of the shooting on Dibert Avenue which constituted the basis for Counts 5-10 (two counts of discharging a firearm at or into an occupied structure and four counts of attempted murder).

The State’s case was insufficient as to those charges. Resultantly, Dean’s convictions for discharging a firearm into an occupied structure and attempted murder, as well as his death sentence, violate his rights to substantive and procedural due process. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 9, 16.

2. Facts.

2.1 Discharging a firearm into an occupied structure and attempted murder.

The State presented a great deal of evidence regarding the shooting on Dibert Avenue on April 12, 2005, including many photographs, the testimony of police officers who responded to the scene, the testimony of police officers who investigated the crime, and the testimony of the victims. However, the State presented virtually no evidence that Dean was actually at the scene of that crime.

2.2 Prior calculation and design element of the O.R.C. § 2929.04(A)(7) specification.

Dean was charged with an O.R.C. § 2929.04(A)(7) death penalty specification. Dean was not charged with having been the principal offender, but rather as having murdered Titus Arnold with prior calculation and design.

The State presented the testimony of several eyewitnesses to the shooting of Titus Arnold. Yet the only testimony that could establish that Dean acted with prior calculation and design was Crystal Kaboos, who did not witness the events and whose testimony was not credible.

3. Law.

3.1 Sufficiency of the evidence.

The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). See also State v. Adams, 62 Ohio St. 2d 151, 404 N.E.2d 144 (1980); State v. Miclau, 167 Ohio St. 38, 146 N.E.2d 293 (1957); O.R.C. § 2901.05(A). The test for determining whether the trial evidence was sufficient to establish guilt beyond a reasonable doubt is whether there was “substantial evidence upon which a jury could have reasonably concluded that all the elements of an offense have been proven beyond a reasonable doubt.” State v. Eley, 56 Ohio St. 2d 169 syl., 383 N.E.2d 132 (1978). In examining claims based upon insufficient evidence a reviewing court must ask whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 316 (1979). See also State v. Adams, 62 Ohio St.2d 151, 153, 404 N.E.2d 144, 146; Miclau, 167

Ohio St. at 41. A conviction based upon insufficient evidence violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Jackson, 443 U.S. at 316.

3.2 Manifest weight of the evidence.

In assessing the manifest weight of the evidence, this Court must examine the entire record and determine whether the evidence produced attains the high degree of probative force and certainty required for a criminal conviction.

This inquiry is separate from the examination for sufficiency of the evidence. This review must be directed toward a determination of whether there is substantial evidence upon which a jury could reasonably conclude that all of the elements have been proved beyond a reasonable doubt. State v. Eley, 56 Ohio St.2d 169, 172, 383 N.E.2d 132, 134 (1978); Glasser v. United States, 315 U.S. 60, 80 (1942). Substantial evidence is more than a mere scintilla. See United States v. Orrico, 599 F.2d 113, 117 (6th Cir. 1979). It is evidence affording a substantial basis of fact from which the fact at issue can be reasonably inferred. Id.

4. Argument.

4.1 Insufficient evidence to prove Dibert Avenue counts.

Dean was charged with two counts of knowingly “discharg[ing] a firearm at or into an occupied structure that is a permanent or temporary habitation of any individual” under O.R.C. § 2923.161(A)(1). Both of these incidents allegedly occurred on April 12, 2005 on Dibert Avenue in Springfield. Dean was also charged with four counts of attempted murder regarding the four individuals at 609 Dibert Avenue when the shooting occurred.

The State presented no evidence demonstrating that Dean was at the scene of this crime. Shanta Chilton testified that after hearing the gunshots, she and the others at the house at that time went outside and saw the car come back down the street a second time. (Vol. 9, T.p. 1800-

02). She testified that she saw a “white boy” in the driver’s seat and he was the shooter. (Id. at 1803). She did not see anyone else in the car. (Id. at 1816). Devon Williams testified that when he saw the car come back the second time, he saw only one person in the car. (Vol. 10, T.p. 2061). That person was in the driver’s seat, shooting out of the passenger side. (Id.) When asked by defense counsel if he had seen the driver/shooter when he testified in the matter of State of Ohio versus Josh Wade, he replied “[y]eah.” (Id.) He also indicated that it was not Jason Dean whom he saw. (Id.)

The only witness to put Dean at the scene of that shooting was Crystal Kaboos. Kaboos claimed that she was in the car with Dean and Wade. (Vol. 11, T.p. 2104). According to her account, Wade was driving, Dean was in the passenger seat, and she was sitting in the back of the car. (Id. at 2105). As they drove down Dibert, Kaboos testified, Wade turned off the car lights, Dean rolled down his window, and Wade and Dean began shooting out the passenger window. (Id. at 2105).

Kaboos’ testimony was simply not credible. First, to believe her version of events, jurors would have to have believed that Shanta Chilton and Devon Williams missed not just one passenger in the car, but two. Jurors would also have to have believed that both of those witnesses failed to see a second gun firing and that neither mentioned that the car had no lights on.

Moreover, Kaboos had very little credibility. Kaboos had changed her story about this incident. On two separate occasions, when interviewed by the police, Kaboos told them that she was not in the car during the shooting on Dibert Avenue, even after police told her she would not be in any trouble if she had been in the car. (Id. at 2135) Kaboos admitted that she had said that on cross-examination. (Id. at 2135-37). Also incredible was Kaboos’ statement that although

she remembered the car turning around and driving back down Dibert, she did not recall hearing any more gunshots because, as she stated, “I just held my hands over my ears.” (*Id.* at 2138). This was the *only* evidence presented to the jury that Dean was involved in the shooting on Dibert Avenue. Also, as noted *supra*, Kaboos generally had very little credibility as many of the details of her story had changed repeatedly.

Dean’s convictions for the two counts of discharging a firearm into an occupied structure and for the attempted murders during the Dibert Avenue shootings are also against the manifest weight of the evidence. In assessing the manifest weight of the evidence, this Court must examine the entire record and determine whether the evidence produced attains the high degree of probative force and certainty required for a criminal conviction.

There was no such evidence presented at Dean’s trial. There is simply no credible evidence upon which the jury could have determined that Dean was even in the car from which the shots came, let alone the one doing the shooting at the homes on Dibert.

The attempted murder charges arising from the Dibert Avenue incident formed the O.R.C. § 2929.04(A)(5) specification. Because there is insufficient evidence of these charges, there is also insufficient evidence to support this death penalty specification.

4.2 Insufficient evidence to prove prior calculation and design.

Dean was charged with committing the aggravated murder of Titus Arnold with prior calculation and design under O.R.C. § 2929.04(A)(7). However, the only evidence supporting this specification was the testimony of a discredited witness—Crystal Kaboos.

There is no bright-line test for determining prior calculation and design. *State v. Fears*, 86 Ohio St. 3d 329, 341, 715 N.E.2d 136, 149 (1999). Determinations must be made on the individual facts of each case. *Id.* The question this Court must consider is “whether, after

reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Taylor, 66 Ohio St. 3d 295, 305, 612 N.E.2d 316 (1993) (citing Jackson, 443 U.S. at 319).

Kaboos testified that Dean told her:

That they were driving down the street. And they’d seen Titus Arnold walking down the street, and they stopped the car. Jason got out and held the silver gun at him, and Titus didn’t want to lay down on the ground as they were telling him to. He tried to run, and Jason tried to fire his gun; but it was on safety so then Josh got out of the driver’s seat and told him, I have—told him he had a bigger gun and shot Titus Arnold.

(Vol. 11, T.p. 2114-15). This is the only evidence in the record to support a theory of Dean as acting with prior calculation and design. This, however, was not the story that Kaboos originally told police investigators. (Id. at 2140-41). Kaboos first told police that Dean told her that he tried to shoot Arnold, found that his gun’s safety was on, took Wade’s gun, and shot Titus Arnold. (Id.) Kaboos testified on cross-examination that she had lied to police when she told them that version of events. (Id. at 2141).

Kaboos’ testimony is not credible. Virtually every detail of Kaboos’ story changed from the time she first talked to police until the time she testified at trial. She originally told police that Dean and Wade took the six dollars from Arnold’s person after he was shot. She then told police Arnold gave them the money, and she then testified at trial that they took the money from Arnold after he was shot. (Id. at 2142-44). She originally told police that she knew what Dean and Wade wore the night of the murder because she saw them put their clothes in the washing machine. (Id. at 2147). But that story also changed. At Wade’s bindover hearing, she testified that she knew what they wore because she found their clothes in the washing machine the following morning. (Id. at 2147-48). She testified before the grand jury that she knew what they wore because “his clothes and his shoes were on the drier . . . when [she] went to put [her]

laundry in the drier . . .” (Id. at 2148). At trial she said she had not told the police the truth and that she knew what they wore because she saw them before they left to go to the Nite Owl and also because she took their clothes out of the drier the following day. (Id. at 2147). Kaboos also lied about the events of the shootings on Dibert Avenue and the story she ultimately told at trial was simply not believable. (See subsection 4.1).

Kaboos’ testimony was contradicted by other witnesses at trial. Kari Epperson, Wade’s cousin, saw the shooting happen. (Vol. 8, T.p. 1401-02). She testified that she saw Wade jump out of the driver’s seat, run out to the middle of the street, fire two shots, and get back in the car. (Id. at 1401-05). Kari’s sister, Terri Epperson, also witnesses the events. (Id. at 1422). She testified that she saw a man get out of the driver’s side of the car, run down the street and shoot a man twice. (Id. at 1422). She further testified that she recognized the shooter as her cousin, Josh Wade. (Id. at 1430-31).

The only other testimony lending any credence to a theory of prior calculation and design was that of Terry Smith, a cellmate of Dean’s. (Vol. 11, T.p. 2076). Smith testified that Dean told him that “Mr. Arnold ran the scene, fled the scene. He fired, tried to fire his weapon and misfired. And then his—I guess he grabbed his partner’s gun or his partner shot him, shot Mr. Arnold.” (Id. at 2077). Given that Smith would have had access to Dean’s discovery packet as his cellmate, and that he is the only other witness besides Kaboos who mentions Dean as the shooter, it is likely that he simply picked up this version of events from Kaboos’ statement to police. Smith was not a credible witness. Accordingly, his contention at trial that Wade killed Arnold only after Dean’s weapon failed is not believable.

Neither of these witnesses, who were outside on the street when the shooting occurred, saw Dean at all. The evidence cannot support a finding that Dean acted with prior calculation and design.

Dean's conviction for the O.R.C. § 2929.04(A)(7) specification was also against the manifest weight of the evidence. There was not substantial evidence presented at Dean's trial upon which the jury could have reasonably concluded that all of the elements have been proved beyond a reasonable doubt. See Eley, 56 Ohio St.2d at syl. There is simply no credible evidence upon which the jury could have determined that Dean killed Titus Arnold with prior calculation and design.

5. Conclusion.

The State presented no evidence upon which the jury could have found Dean guilty of the attempted murder discharge of a firearm into occupied structure charges arising from the Dibert Avenue shootings or the prior calculation and design death penalty specification. Dean's convictions therefore violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Jackson, 443 U.S. at 316. His convictions on those counts and specifications must be vacated.

Proposition of Law No. XII

The introduction of graphic photographs with no probative value but which are highly prejudicial violates a capital defendant's right to a fair trial, due process, and a reliable determination of guilt as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 10, and 16 of the Ohio Constitution.

1. Introduction.

During the trial phase, the State introduced numerous photographs of Titus Arnold and the bloody crime scene. These included graphic photographs of Arnold's body at the crime scene, Arnold during the autopsy, the crime scene with pools of blood, and Arnold's bloody clothing. Undoubtedly, these photographs had a strong emotional impact on the jury. This prejudice far outweighed any minimal probative value that the photographs may have had. Accordingly, the trial court should have excluded them.

2. Facts.

State's Exhibit 10 shows Titus Arnold's body lying in the street at the crime scene, covered in blood. State's Exhibits 10-G, 10-V, 10-W, 30, 31, 40, 43, 45, 78, 84, 126, and 127 depict pools of blood on the street, some photos contain Titus Arnold's personal items scattered about. State's Exhibits 118-120, 122, and 230-233 are autopsy photographs of Titus Arnold's body. The State also introduced eleven photographs of Titus Arnold's blood-soaked clothing at the morgue. (State's Exhibits 106-117, and 121).

Trial counsel objected to the use of photographs from the murder scene that depicted blood. (Vol. 8, T.p. 1474). The parties then agreed to reduce the number of photographs admitted. (*Id.*) Even with this agreement, trial counsel objected to State's exhibits 10-V, 118, 120, and 122 (Vol. 12, T.p. 2501-03) but did not object to the admission of remaining photographs on the grounds being argued here. Thus, Dean's claim as to State's exhibits 10-V,

118, 120, and 122 is not waived and is subject to an abuse of discretion standard of review, while the remainder of the claim is subject to plain error review. An error is plain when it denies the defendant a fair trial. See State v. Fears, 86 Ohio St. 3d 329, 332, 715 N.E.2d 136, 143 (1999) (citing State v. Wade, 53 Ohio St. 2d 182, 189, 373 N.E.2d 1244 (1978)). See also State v. Lilly, 87 Ohio St. 3d 97, 104, 717 N.E.2d 322, 328 (1999) (Cook, J., concurring) (plain error is obvious, palpable and fundamental to the fairness of the judicial proceedings) (citations and quotation marks omitted). (See Proposition of Law No. XIV.)

3. Law.

Evidence Rule 401 provides: “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The admissibility of relevant evidence rests within the sound discretion of the trial court. State v. Drummond, 111 Ohio St. 3d 14, 28, 854 N.E.2d 1038, 1059 (2006).

Evidence Rule 403(A) provides that evidence is not admissible “if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. The determination of whether a piece of evidence is inadmissible under this standard is left to the sound discretion of the trial court. State v. Crotts, 104 Ohio St. 3d 432, 437, 820 N.E.2d 302, 308 (2004). All evidence that tends to prove the State’s version of the facts necessarily is prejudicial to the defendant. Id. Thus, the Rules of Evidence do not bar all prejudicial evidence, only unfairly prejudicial evidence is excludable. Id.

Evidence is unfairly prejudicial when it may result in an improper basis for the jury’s decision. Id. If the evidence “arouses the jury’s emotional sympathies, evokes a sense of horror,

or appeals to an instinct to punish, the evidence may be unfairly prejudicial.” *Id.* In other words, if the evidence appeals to the jury’s emotions rather than its intellect, it is usually prejudicial. *Id.*

Further, a Rule 403 objection requires heightened scrutiny in capital cases. *State v. Morales*, 32 Ohio St. 3d 252, 257-58, 513 N.E.2d 267, 273 (1987). Whereas exclusion under Rule 403 generally requires that the probative value of photographs be minimal and the prejudice great, in capital cases, the probative value of each photograph must outweigh any potential danger of prejudice to the defendant. *Id.* at 258, 513 N.E.2d at 274. If the probative worth of the photographs does not outweigh the danger of prejudice to the defendant, the evidence must be excluded. *Id.*

4. Argument.

It was undisputed that the cause of Titus Arnold’s death was a gunshot wound to the head. And, the location of the shooting was undisputed. The multiple photographs of Arnold’s dead body, bloody clothing, and bloody crime scene were therefore cumulative and highly prejudicial. Furthermore, most of the photographs were cumulative. Exhibits 10-G, 10-V, 10-W, 30, 31, 40, 43, 45, 78, 84 are all different angles of the same pool of blood on the street. There are two photos of Arnold’s bloody t-shirt (Exs. 106 and 107), three photos of his bloody hat (Exs. 108-110), and four photos of his bloody jacket (Exs. 114-117). Because the photographs were cumulative, they were unnecessary and had little or no probative value.

The prejudice produced by the photographs was substantial. The images are graphic. The photographs helped the State obtain convictions on all charges by playing upon the passions and prejudices of the jury. There was a very real danger that these photographs inflamed the jurors’ emotions and thus prejudiced Dean. The unfair prejudice generated by these photographs substantially outweighed whatever minimal probative value the photographs possessed. The

prejudice is even greater because there was not overwhelming evidence of Dean's guilt. (See Proposition of Law No. XI).

Dean was further prejudiced by the introduction of these graphic photographs in the sentencing phase. (See Proposition of Law XVI). The trial court admitted these photos in the penalty phase. (Vol. 14, T.p. 2730-32). These gruesome images would have roused the jury's emotions during its sentencing deliberations, violating the Eighth and Fourteenth Amendment guarantees "that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). See also State v. Thompson, 33 Ohio St. 3d 1, 514 N.E.2d 407 (1987).

5. Conclusion.

The prejudicial impact of the jury's exposure to inflammatory photographs deprived Dean of his right to a fair trial, due process, and a reliable determination of his guilt and sentencing in a capital case as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 10 and 16 of the Ohio Constitution. For these reasons, Dean's convictions should be overturned, or, at a minimum, his death sentence vacated.

Proposition of Law No. XIII

The accused's right to confront witnesses against him is violated when testimony from an out of court declarant is admitted against the accused in a criminal prosecution, and the accused lacked a prior opportunity for cross-examination. The accused's right to a fair trial is prejudiced when unreliable hearsay is admitted in a criminal prosecution against the accused. U.S. Const. amend. VI, XIV; Ohio Const. art. I, § 10; Ohio R. Evid. 403(A), 801(C).

Jason Dean's Sixth Amendment right to confront the witnesses against him was derogated. The State offered testimonial hearsay evidence and Dean had no prior opportunity to cross-examine the out of court declarants. See Crawford v. Washington, 541 U.S. 36 (2004). Further, the admission of this unreliable hearsay evidence prejudiced Dean's right to a fair trial; regardless of whether the Confrontation Clause was violated in this case. See Ohio R. Evid. 801(C).

1. Hearsay offered by State.

The State offered improper hearsay through the testimonies of Joshua Farmer, Devon Williams Sr. (aka Draztik) and Crystal Kaboos.

During direct examination by the State, Farmer testified about out of court statements made by Jeff Bowshier and Adonte Cherry (aka Tuna). The questioning concerned the theft of Bowshier's marijuana:

Q. Are you aware of the -- during this time period of the state of mind of Mr. Bowshier, how much Mr. Bowshier thought he was ripped off for?

A. Yes, sir.

Q. **How much did Mr. Bowshier think he was ripped off for during this time period?**

A. **42 pounds.**

Q. I'm sorry?

A. 42 pounds of weed.

(Vol. 10, T.p. 1860, emphasis added.)

Q. Now, during this time period on one occasion did you happen to be present for a meeting between Adonte Cherry or Tuna and Jeff Bowshier, TC Bowshier, and Danny Bowshier?

A. Yes, sir.

Q. Please tell us about that. **What -- what was told to you in your presence by Mr. Cherry and Mr. Bowshier's present?**

MR. MAYHALL: Objection. Hearsay.

MR. BUTZ: Object

MR. SCHUMAKER: Once again, for state of mind of these individuals, Your Honor.

MR. BUTZ: That's not an exception that should be applicable here.

MR. SCHUMAKER: It's certainly not going to be for the truth of the matter. May we approach, Your Honor?

THE COURT: No. I'm going to overrule the objection. It's not being offered for the truth of the matter. It's being offered for their states of mind. You can continue.

A. What was the question again, sir?

Q. **Please tell us what was communicated to you, to Jeff Bowshier, to Danny Bowshier, and to TC Bowshier by Adonte Cherry when you were all together.**

A. That there was about -- about -- about who had ripped Jeff off for the weed.

Q. Okay. And who was it communicated to those individuals that had ripped off the weed by Mr. Cherry?

A. **Who -- who did he say did it?**

Q. Uh-huh.

MR. BUTZ: Object.

THE COURT: Overruled.

A. **Guy named Draztik, guy names Beeves, OZ and Tuna.**

Q. Okay. Now, as a result of -- all the -- as a result of receiving that information, did you do anything and did the Bowshiers do anything concerning an address on Dibert Avenue?

A. Nothing was done. We drove by there; and we was supposed to be looking for Draztik's car, which was a four-door blue Delta. It wasn't there.

Q. Who by drove by the house then?

A. Jeff.

Q. Were you with him?

A. Yes, sir.

Q. Was Danny with him?

A. Yes, sir.

Q. Was TC with him?

A. Yes, sir.

Q. Now, subsequent to that -- that occasion, did your belief change as to Draztik being involved?

A. Yeah. We -- yeah, it did.

Q. Okay. Who would -- as far as your state of mind after this, who -- **who did you believe or did Mr. Bowshier express to you his belief that was involved in ripping him off?**

MR. MAYHALL: Objection.

THE COURT: Overruled.

A. **OZ, Tuna, Beeves, and -- OZ, Beeves, and Zoomer.**

Q. Okay.

A. **And Brent Upshaw.**

(Vol. 10, T.p. 1861-63, emphasis added.)

The State returned to the topic of the marijuana theft during Devon Williams's testimony. Through William's testimony, the hearsay statements of Jeff Bowshier, William Calhoun (aka OZ), and Adonte Cherry were offered:

Q. Okay.

A. Yes, sir, I sure do.

Q. And do you know what his real name is?

A. William Calhoun.

Q. Okay. Now, during April, 2005, were you accused of stealing some drugs from Jeff Bowshier?

A. Yes, I was.

Q. And did you talk to anybody about that accusation?

A. No. We was just ready to fight. Wasn't nothing to talk about.

Q. Who was ready to fight?

A. Me.

Q. With who?

A. OZ, Little A, I call him Little A, whatever you want to call him.

Q. Was it your impression they had falsely accused you of doing this?

A. Yeah. Josh Farmer told me. **Josh Farmer and Jeff Bowshier told me --**

MR. MAYHALL: Objection.

THE COURT: Overruled.

Q. Wait a minute. I just want --

MR. CARTER: Your Honor, this is not being offered for the truth of the matter but what was his state of mind at the time that he was being accused of stealing his drugs.

THE COURT: Very well. Objection's overruled.

Q. Okay. You had a conversation with Josh Farmer?

- A. (Nods head.)
- Q. **And did you explain to Josh Farmer that you were not responsible for the drugs that were stolen from Jeff Bowshier?**
- A. **Yes, sir. He was the one that brought it to my attention that OZ and Adonte Cherry said that I was the one that did it.**
- Q. Did you ever talk to Jeff Bowshier about it?
- A. Yes, I did.
- Q. And did you tell Jeff Bowshier that you were not responsible for this theft?
- A. We talked for like a hour about it.
- Q. And do you remember where this conversation took place?
- A. Down at where Custom Effects -- they call it One Stop Customs now off of Main Street. He works on cars.
- Q. Did you believe in your mind that with the offense with Jeff Bowshier and Josh, you weren't responsible for that?
- A. Yea. We shook hands on it and everything.
- Q. Now, how long before the shooting on April the 12th did this conversation between you and Jeff Bowshier occur?
- A. I'd say -- I'd say about a week and a half. Exactly.
- Q. Did you discuss OZ with Mr. Bowshier?
- A. Yeah.

(Vol. 10, T.p. 2049-51, emphasis added.)

The State again offered hearsay testimony during its direct examination of Crystal Kaboos, who was Dean's estranged girlfriend. Through Kaboos, the out of court statement of Tim Watkins was presented to the jury:

- Q. Were you going to leave regardless of the relationship?
- A. Yes.
- Q. Did anybody help you leave?
- A. I called a friend, and he met me up the street.
- Q. And what was that friend's name?
- A. **Tim Watkins.**
- Q. About how old is he?
- A. In his 30s.
- Q. Where did he live?
- A. In Urbana.
- Q. And how did you make contact with him?
- A. I met him through --
- Q. Please speak up.
- A. I met him through some friends.
- Q. But on the day that you left 415 East Liberty, how were you in contact with him?

- A. I called him on his cell phone, and he came and picked me up a couple blocks down the street.
- Q. You had a cell phone?
- A. No. I called from Jason's mom's phone.
- Q. Okay. And how long was it before he came and got you?
- A. About ten minutes.
- Q. Okay. And where did he take you?
- A. To Urbana.
- Q. Did you have all your belongings with you?
- A. Yes.
- Q. And when you guys go to Urbana, did you discuss with Tim the events that you had learned about while staying at 415 East Liberty?
- A. Yes. Some of them.
- Q. And did you tell him that you knew the identity of the killers of Titus Arnold?
- A. Yes.
- Q. **And upon learning that from you, did he advise you on what to do about it?**
- A. Yes.
- Q. **And what did he tell you to do?**
- MR. MAYHALL: Objection.
- A. He told me the best thing to do --
- THE COURT: Overruled.
- Q. Okay. You can answer that.
- A. **He told me the thing to do was to do the right thing and turn them in before they killed anybody else.**

(Vol. 11, T.p. 2120-22, emphasis added.)

2. Improper hearsay statements prohibited.

In Crawford, the United States Supreme Court overruled the reliability test set out in Ohio v. Roberts, 448 U.S. 56 (1980). Crawford, 541 U.S. at 62-68. The Crawford court reasoned that the common law roots of the Sixth Amendment require that the accused must be afforded an opportunity to challenge his accusers through live, in court testimony where the core concerns of the Confrontation Clause are implicated. Id. at 43-53. Accordingly, the Court held that “[t]estimonial statements of witnesses absent from trial [may be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” Id. at 59; id. at 68-69.

The Court's holding in Crawford applies only to testimonial statements offered by an out of court declarant that the accused had no prior opportunity to cross-examine. See id. However, since the error presented in Crawford plainly involved testimony by an unavailable declarant, the Court found it unnecessary to flesh out all the permutations of which statements may be testimonial under the Sixth Amendment. See id.

Two years later, the Supreme Court revisited this question in the companion cases of Davis v. Washington and Hammon v. Indiana, ___ U.S. ___, 126 S. Ct. 2266 (2006) . Relying on Crawford, the court made clear that statements are testimonial under the Sixth Amendment if they were previously made by "sworn testimony in prior judicial proceedings or formal depositions under oath. ..." Davis, ___ U.S. ___, 126 S. Ct. at 2273-76. The court reasoned, however, that the Confrontation Clause is not so narrowly defined as to be limited only to formal proceedings. Id. at ___, 126 S. Ct. at 2276.

The court found constitutional error in Hammon's case because the unavailable declarant's statements were obtained "under official interrogation" by police officers. Id. at ___, 126 S. Ct. at 2278. Thus, the court held that "[s]tatements [made to law enforcement] are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Id. at ___, 126 S. Ct. at 2273. The court also made clear that its holdings in Davis and Hammon did not provide "an exhaustive classification of all conceivable statements [that qualify as testimonial under the Sixth Amendment]. ..." Id. at ___, 126 S. Ct. at 2273.

Regarding out of court statements that are not testimonial under Crawford and Davis, the Roberts reliability test may be applied to determine if a hearsay violation occurred. See Crawford, 541 U.S. at 68. Under the Roberts reliability test, the reviewing court must determine

if the out of court statement falls within a “firmly rooted” hearsay exception and if it bears sufficient “indicia of reliability.” See Crawford, 541 U.S. at 40. See Ohio R. Evid. 801(C), 802, 803, 804.

3. Dean’s rights violated by hearsay.

Kevin Bowshier testified at Dean’s trial; Jeff Bowshier did not. Neither did Adonte Cherry (aka Tuna). William Calhoun (aka OZ) and Tim Watkins’s were also not among the State’s witnesses. But through the testimonies of Farmer, Williams, and Kaboos, the out of court testimonies of Bowshier, Cherry, Calhoun, and Watkins were offered to the jury. Dean had no prior opportunity to cross-examine any of those hearsay declarants about their testimonies. Dean was denied his right to confront each of those unavailable declarants about their testimonies in violation of the Sixth Amendment. See Crawford, 541 U.S. at 68-69.

But even assuming for the sake of argument that the hearsay statements of Bowshier, Cherry, Calhoun, and Watkins were not testimonial under Crawford, Dean was nevertheless prejudiced by improper hearsay. For starters, none of those out of court declarants gave detailed accounts and none were in custody subject to a statement against penal interest. See e.g. People v. Farrell, 34 P.3d 401-406-07 (Colo. 2001) (hearsay statement more reliable because it was “detailed”); Nowlin v. Commonwealth, 40 Va. App. 327, 335-48, 579 S.E.2d 367, 371-72 (2003) (hearsay statement more reliable when made in custody against penal interest).

Moreover, those hearsay statements prejudiced Dean under Evidence Rule 403(A). The hearsay statement by Watkins, offered through Kaboos’s testimony, was nothing short of an assertion that Dean was guilty of a homicide — and that he posed a threat to kill again. (Vol. 11, T.p. 2120-22.) Additionally, Watkins’s hearsay assertion tended to bolster Kaboos’s testimony that Dean was guilty of Titus Arnold’s murder. This was especially prejudicial because Kaboos

had serious credibility problems. (See Proposition of Law No. XI.) Further, Kaboos's testimony put Dean in the car that did the drive by shootings on Dibert Avenue — whereas two victims of the Dibert shootings testified that Joshua Wade (Dean's co-defendant) was alone when those drive-by shootings happened. (Vol. 9, T.p. 1802-03, 1816-17 (Shanta Chilton); Vol. 10, T.p. 2046, 2061 (Devon Williams).)

Dean was likewise prejudiced by the hearsay statements of Bowshier and Cherry. See Ohio R. Evid. 403(A). Their hearsay statements provided the State with a motive for Dean to participate in the Dibert Avenue drive-by shootings; that is, Dean was paid by his acquaintance Bowshier to exact revenge on Devon Williams for the theft of the marijuana. (See Vol. 12, T.p. 2466; Vol. 13, T.p. 2577-78, 2581-82, 2586, 2597.) This again bolstered Kaboos's testimony that Dean participated in the Dibert shootings — testimony that was contradicted by other witnesses who were the victims of the Dibert shootings. (Vol. 9, T.p. 1816-17; Vol. 10, T.p. 2046, 2061.) Indeed, the course of conduct death penalty specification was premised in part on Dean's participation in the Dibert drive-by shootings. And the hearsay statements of Bowshier, Cherry and Calhoun, further supplied the State with a fall back position that Dean may have shot Arnold as a contract "hit." (See Vol. 13, T.p. 2597.)

4. Conclusion.

Jason Dean's Sixth Amendment right to confront witnesses against him was violated by the admission of testimony by unavailable declarants when Dean had no previous opportunity to cross-examine. But even if this hearsay was not testimonial under the Sixth Amendment, it was nevertheless unreliable and prejudicial. Dean's convictions must be reversed and his case remanded for a new trial.

Proposition of Law No. XIV

The right to the effective assistance of counsel is violated when counsel's deficient performance results in prejudice to the defendant. U.S. Const. amends. VI, XIV; Ohio Const. art. I, § 10.

Jason Dean's Sixth Amendment right to effective counsel was violated by the cumulative effect of errors and omissions by his trial counsel.

1. Standards for ineffective counsel claim.

The standard for assessing attorney performance found in Strickland v. Washington, 466 U.S. 668 (1984) applies to this claim. Under Strickland, this Court must determine if counsel's performance was deficient in view of "prevailing professional norms." 466 U.S. at 687, 689.

Counsel's actions are presumed reasonable. But Strickland also establishes that a reasonable investigation of both law and facts is required before a choice by counsel may be deemed strategic or tactical. Id. at 691. "[S]trategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation. ... A decision not to investigate thus must be directly assessed for reasonableness in all the circumstances." Wiggins v. Smith, 539 U.S. 510, 533 (2003) (citations and internal quotation marks omitted).

When assessing the performance prong in a capital case, this Court is informed by the American Bar Association Guidelines for the Appointment of Counsel in Death Penalty Cases (ABA Guidelines). See Wiggins, 539 U.S. at 524. "The ABA Guidelines provide that investigations into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence ..." Id. (citation and internal quotation marks omitted with emphasis in original). And in reviewing Dean's claim that relevant mitigation was not presented, "[the] focus [is] on whether the investigation supporting counsel's decision not to

introduce mitigating evidence ... was *itself reasonable*.” Id. at 523 (citations omitted and emphasis in original).

If counsel’s performance is deficient, this Court must determine whether Dean suffered prejudice resulting from counsel’s error. Strickland, 466 U.S. at 687. Prejudice results when this Court’s confidence in the result of Dean’s trial is undermined by counsel’s error. Id. at 694 Dean has no requirement to demonstrate that counsel’s error was outcome determinative under the Strickland prejudice prong. Id. at 693. Regarding Dean’s claim that relevant mitigating evidence was not presented, this Court “[i]n assessing prejudice, reweigh[s] the evidence in aggravation against the totality of available mitigating evidence.” Wiggins, 539 U.S. at 534. See also, Dickerson v. Bagley, 453 F.3d 690, 699 (6th Cir. 2006) (quoting Wiggins, 539 U.S. at 537).

2. Ineffective counsel at voir dire.

2.1 No voir dire on race issues.

In this case the State alleged that an inter-racial capital crime was committed against an African-American victim (Titus Arnold) by Jason Dean, a Caucasian defendant. The prosecutor made clear to the jury that the State’s theory of the case involved Dean’s racial animus toward African-Americans. The State asserted that Dean had a race-based motive for the crimes charged — all of which involved African-American victims. (See Proposition of Law No. XIV.)

However, trial counsel did virtually no voir dire to probe the views of the prospective jurors on issues of race or racial prejudice. The court permitted individual voir dire on publicity and the death penalty, on defense counsel’s motion. (Mar. 30, 2006, T.p. 5.) But counsel failed to request leave to voir dire the jurors on their attitudes regarding a crime deeply affected by race and racial prejudice. And counsel repeatedly failed to ask questions of the prospective jurors regarding race and racial prejudice. (See e.g. Vol. 1, T.p. 42, 55-66, 73, 86-88, 114-17, 118-125,

142-44, 172-76, 179-90, 203-10, 243-47, 268-74, 299-302, 323-25, 358-62; Vol. 2, T.p. 384-88, 394-99, 421, 425-31; Vol. 3, T.p. 648-51, 653-57, 675-77, 679-84, 694-97, 700-04, 720-27.) Counsel's lone attempt to voir dire on this sensitive, yet vital, topic occurred during general voir dire. (Vol. 5, T.p. 827.) However, this questioning was very brief, and only twelve jurors out of the entire venire were asked counsel's truncated questions at that time.

A trial court must permit voir dire on racial prejudice in any capital case in which the jury participates in sentencing and the jury has some discretion as to its sentencing verdict. Turner v. Murray, 476 U.S. 28, 33-37 (1986). This is so because "the [capital sentencing] jury is called upon to make a highly subjective, unique, and individualized judgment regarding the punishment that a particular person deserves." Id. at 33-34 (citation and internal quotation marks omitted). Thus, "there is a unique opportunity for racial prejudice to operate but remain undetected" when the jury exercises its sentencing discretion. Id. at 35.

In Turner, the Court also noted that the mere risk of racial prejudice in capital sentencing is unacceptable because of the extreme finality of the death penalty and the corresponding need for heightened reliability in the administration of capital punishment. Id. at 35-36 (citations omitted). Accordingly, a trial court must question prospective jurors on the issue of racial prejudice in a case where the accused is charged with an interracial capital crime. Id. at 36-37. However, the trial court has no duty to question the prospective jurors on racial prejudice sua sponte, as defense counsel must request such examination. Id. at 37. Cf. State v. Stojetz, 84 Ohio St. 3d 452, 705 N.E.2d 329 (1999) (trial court has no duty to life qualify jurors sua sponte even if it death qualifies them sua sponte). Questioning jurors on racial prejudice is required, moreover, by the trial court under the Due Process Clause whenever the "circumstances" of a case "suggest a significant likelihood that racial prejudice might infect [a criminal] trial."

Ristaino v. Ross, 424 U.S. 589, 598 (1976). See also Ham v. South Carolina, 409 U.S. 524, 527-28 (1973).

Counsel had an obligation to voir dire on racial prejudice under Turner because this was an inter-racial crime where the jury had discretion in sentencing. And as in Ham and Ristaino, the risk of racial prejudice was “inextricably bound up with” the circumstances of the crime charged. Ristaino, 424 U.S. at 597. Counsel were ineffective because they failed to voir dire on race — in a case where race was a major factor for the jury’s consideration. See ABA Guideline 10.10.2.

2.2 Failed to voir dire on shackling.

Over objection, Dean was shackled at his trial. (See Proposition of Law No. V.) Counsel asked the first juror during individual voir dire about whether the shackling of Dean would effect the juror’s ability to be fair and impartial. (Vol. 1, T.p. 42.) A second juror was also asked this question by defense counsel. (Vol. 1, T.p. 73.)

Following this limited voir dire, counsel abandoned their attempts to question the jurors about the court’s decision to shackle Dean during the trial. (See e.g., Vol. 1, T.p. 55-66, 86-88, 93-99, 114-17, 118-25, 142-44, 172-76, 179-90, 205-10, 243-47, 268-74, 299-302, 323-25, 355-62; Vol. 2, T.p. 384-88, 394-99, 421, 425-31; Vol. 3, T.p. 648-51, 653-57, 675-77, 679-84, 694-97, 700-04, 720-27.) Counsel were rendered ineffective by their failure to conduct a thorough voir dire on whether the jurors’ ability to be impartial would be affected by the shackling of Dean. See Deck v. Missouri, 544 U.S. 622, 630 (2005) (shackling undermines presumption of innocence afforded to accused). See ABA Guideline 10.10.2.

2.3 Counsel failed to remove biased jurors.

Counsel failed to remove two biased jurors from the panel by exercising either a challenge for cause or a peremptory challenge. Jurors Gabe Kelly (#275) and Eric Hickman (#242) were empanelled for Dean's trial. However, neither juror was able to give firm assurances that he could fairly consider a life sentence upon a guilty verdict of capital murder.

Juror Kelly's questionnaire indicated that he was necessarily in favor of the death penalty upon a guilty verdict for murder. Moreover, at voir dire juror Kelly stated he was for the death penalty "100 percent" for a planned murder. (Vol. 2, T.p. 390.) Although juror Kelly seemed to relent a bit from this stance, (see id. at 394, 399), the totality of his statements at voir dire and his questionnaire create doubt that this juror was not biased in favor of the death penalty upon a guilty verdict.

Likewise, the totality of juror Hickman's voir dire raises serious concerns as to his ability to be fair and impartial on the issue of punishment. Although Hickman indicated he could consider a life sentence (Vol. 1, T.p. 174), he also said "no sir" when asked if he could consider a sentence less than death if the defendant were to be convicted of an intentional killing. (Vol. 1, T.p. 173.) Defense counsel's failure to remove those jurors prejudiced Dean because this record establishes an unacceptable risk that two automatic death penalty jurors served in the penalty phase of this case. See Morgan v. Illinois, 504 U.S. 719, 728-29 (1992); White v. Mitchell, 431 F.3d 517, 537-42 (6th Cir. 2005). See ABA Guideline 10.10.2.

3. Counsel ineffective at trial.

The cumulative effect of counsel's errors and omissions undermined Dean's right to a fair trial.

3.1 Counsel not prepared to defend.

Counsel failed in several ways to provide a basic defense for Dean. To a degree, counsel's failure may be attributed to the chilling effect of threats made by the trial judge during the case to discipline counsel over counsel's attempt to disqualify the trial judge. Dean incorporates proposition of law no. III, here by reference to highlight the adverse impact that the judge's threats had upon counsel's trial performance. Despite the trial judge's chilling effect on counsel's performance, counsel breached their duty to Dean with the following errors and omissions. See ABA Guidelines 10.7, 10.10.1.

Counsel were not prepared to go forward with evidence at the hearing on Dean's motion to suppress. (Vol. 6, T.p. 969-70.)

Counsel failed to object to a photo array that was the subject of Dean's motion to suppress. (Vol. 6, T.p. 1233-34.)

Counsel were not prepared to cross-examine State's witness Terry Smith — despite representations that the prosecutor provided defense counsel with letters (which were the topic of counsel's cross-examination) twelve days before defense counsel stated they were not prepared. (Vol. 11, T.p. 2079-83.) (See Proposition of Law No. VII.)

Counsel failed to object to all gruesome photographs admitted in the trial phase. (See Proposition of Law No. XII.)

Counsel failed to proffer the testimony of Mark Dean, Jason's brother. Mark Dean was unavailable to testify on the day he was supposed to be a witness — and the trial court refused to give Dean a continuance to present Mark as a witness. Trial counsel were ineffective because they failed to ensure Mark Dean's presence as a witness, or proffer the substance of his

testimony when he was not available. (Vol. 13, T.p. 2538-43.) (See Proposition of Law No. VI.)

Counsel were not prepared to direct Jason Dean's testimony. (Vol. 13, T.p. 2557.) Dean wished to testify in his own defense, but trial counsel were not prepared to direct Dean's testimony. Counsel explained they would be ineffective if they had to direct Dean's testimony unprepared. (Id.) The trial court, however, only granted counsel a short recess for them to speak to Dean. The trial court noted that counsel had been assigned to Dean's case for many months and counsel should have had a basic idea as to what Dean would testify to. (Vol. 13, T.p. 2560-61.) Dean was prejudiced by his counsel's lack of preparation. See ABA Guideline 10.5. Dean ultimately had to forego his constitutional right to testify because his counsel were not prepared to direct his testimony. (Vol. 13, T.p. 2561.) (See Proposition of Law No. VII.)

Trial counsel also failed to cross-examine many witnesses, thus demonstrating again counsel's lack of preparedness. Counsel failed to cross-examine Ronald Vincent (Vol. 6, T.p. 1090), Scott Powell (Vol. 6, T.p. 1093), Danny Mansfield (Vol. 6, T.p. 1220), Brian Miller (Vol. 7, T.p. 1246), Mark Parsons (Vol. 8, T.p. 1569), Doug Pergram (Vol. 9, T.p. 1760), Shani Applin (Vol. 9, T.p. 1792), Jeff Meyer (Vol. 9, T.p. 1824), Neil Davis (Vol. 10, T.p. 1876), Robin Roggenbeck (Vol. 10, T.p. 1911), David Allen (Vol. 10, T.p. 1917), William Harrington (Vol. 10, T.p. 1953), Louis Turner (Vol. 10, T.p. 1959), Mike Beedy (Vol. 10, T.p. 1977), Rebecca Rhea (Vol. 12, T.p. 2291).

Counsel were further ineffective because they failed to object to the court's curative instruction given during the testimony of Crystal Kaboos. See ABA Guideline 10.8. The curative instruction was given after Kaboos revealed to the jury that she had taken several polygraph tests. But the purported curative instruction went too far because it usurped the jury's

role as fact-finder by directing the jury to accept the trial court's own understanding of what Kaboos had said. (Vol. 11, T.p. 2173-890.) Dean incorporates proposition of law no. IX here by reference to further establish counsel's deficient performance and prejudice to Dean.

Counsel were ineffective because they failed to object to jury instruction errors and counsel failed to request proper instructions. Counsel failed to object to a jury instruction on guilt or innocence. See ABA Guideline 10.8. Dean incorporates his XVI proposition of law here by reference to further establish deficient performance and prejudice to Dean.

Counsel were also ineffective because they failed to object to instances of prosecutor misconduct during argument. (See Vol. 13, T.p. 2563-2600, 2618-21.) Dean incorporates proposition of law no. XV here by reference to further establish deficient performance resulting in prejudice to Dean from this error.

Counsel were ineffective because they failed to secure Dean's presence during a jury question regarding the testimony of Crystal Kaboos. Without consulting Dean, counsel even waived Dean's presence. See ABA Guideline 10.5. As Kaboos was a key State's witness, Dean should have been present when the jury's question was addressed. Moreover, the right of presence belonged personally to Dean, and thus counsel could not rightfully waive his right to be present. See Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Simons v. State, 75 Ohio St. 346, 352, 79 N.E. 555 (1906); Taylor v. Illinois, 484 U.S. 400, 417 (1988).

4. Counsel ineffective in penalty phase.

The record also demonstrates a lack of preparation by trial counsel in the penalty phase. The mitigation case presented by counsel was paltry. See ABA Guidelines 10.7, 10.11. Counsel's opening statement took up only two pages of transcript, and it was devoid of

advocacy. Counsel pointed out to the jury that their penalty case would only take up part of that morning and that the jury would not hear from Dean's mother.

The testimony of the main mitigation witness, Sarah Bennett, took up only four pages of transcript. Counsel's failure to develop mitigation should be attributed to counsel's lack of preparation for the penalty phase. It appears that counsel did not meet with Dean's family until just four days before the penalty phase. (The penalty phase was held on Tuesday, May 30, 2006 and the record shows that counsel met with Ms. Bennett and Dean's mother on the preceding Friday. See Vol. 14, T.p. 2770.) Moreover, on the day before the penalty phase attorney Butz was vacationing at a local lake. (Vol. 14, T.p. 2796.)

Additionally, counsel's failure to offer Dean's diabetes as a mitigating factor is especially prejudicial. The record makes clear that Dean is a diabetic who needed to take insulin shots during the trial. (See e.g. Vol. 5, T.p. 967; Vol. 8, T.p. 1544.) Dean's diabetic condition had negative consequences on his ability to remain alert throughout the trial. At a side bar, in the culpability phase, attorney Mayhall wanted the jury to be informed that Dean's diabetes caused him to close his eyes and lower his head. (Vol. 9, T.p. 1845.) Counsel did not want the jury to misconstrue the effects of Dean's diabetes as Dean merely being disrespectful or detached from the trial. (Id.) When counsel requested an instruction to inform the jury about Dean's diabetes, counsel noted that diabetes could be a mitigating factor but counsel was not sure of that. (Vol. 9, T.p. 1846.)

Counsel breached their duty to present relevant mitigating evidence of Dean's diabetes. Diabetes was relevant as evidence of Dean's history and background. See O.R.C. § 2929.04(B); Lockett v. Ohio, 438 U.S. 586, 604-05 (1978). Further, as a potentially serious medical condition, Dean's diabetes was relevant in mitigation as it may shorten Dean's life span or make

him less dangerousness while incarcerated. See State v. Campbell, 95 Ohio St. 3d 48, 56, 765 N.E.2d 334, 343 (2002); State v. Bradley, 42 Ohio St. 3d 136, 149, 538 N.E.2d 373, 385 (1989).

And on these facts, the jury should have been informed of the causal connection between Dean's disrespectful or detached courtroom behavior and his diabetes. The act of Dean nodding off during a capital trial could lead the jurors to view him as colder and more callous and thus worthier of the death penalty. However, evidence of diabetes could have explained or rebutted negative inferences drawn by the jurors from watching Dean react to his medical condition. See Complications of Diabetes in the United States, <http://www.diabetes.org/diabetes-statistics/complications.jsp> (visited Mar. 22, 2007) ("Diabetes is associated with an increased risk for a number of serious, sometimes life-threatening complications..."). In sum, there is a reasonable probability that Dean's unexplained court room behavior adversely affected his chance for mercy. See id. Counsel prejudiced Dean's right to present mitigation by not informing the jury that Dean's actions were brought on by a disease — and that Dean's life may be shortened by that disease. See id. See ABA Guideline 10.11.

Last, counsel were ineffective because they failed to object to various instances of prosecutorial misconduct during argument. (See Vol. 14, T.p. 2784-91, 2797-2806.) Dean incorporates XV proposition of law here by reference to further demonstrate the prejudice to him from this error.

5. Conclusion.

The "cumulative effect" of counsel's errors and omissions violated Jason Dean's Sixth Amendment right to effective counsel. See State v. Gondor, 112 Ohio St. 3d 377, 392, 860 N.E.2d 77, 90 (2006) (citing State v. DeMarco, 31 Ohio St. 3d 191, 196, 509 N.E.2d 1256, 1261

(1987); Stouffer v. Reynolds, 168 F.3d 1155, 1163-64 (10th Cir. 1999)). Dean is entitled to a new trial or alternatively a new penalty phase under O.R.C. § 2929.06(B).

Proposition of Law No. XV

The accused's right to due process is violated when the cumulative effect of prosecutor misconduct renders the accused's trial unfair. U.S. Const. amend. XIV; Ohio Const. art. I, § 16.

Multiple instances of prosecutor misconduct were committed at Jason Dean's capital trial. The cumulative effect of the professional misconduct violated Dean's due process rights.

1. Legal standards for prosecutor misconduct claim.

A prosecutor "may strike hard blows, [but] he isn't at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88 (1935). When a prosecutor strikes foul blows, the Due Process Clause provides a remedy. See id. To succeed on his claim of prosecutor misconduct, Dean must demonstrate either — that the prosecutor's misconduct prejudiced a constitutional right or — that the misconduct rendered his trial fundamentally unfair. See Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974) ("when specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them"); United States v. Carter, 236 F.3d 777, 785 (6th Cir. 2001).

The United States Court of Appeals for the Sixth Circuit analyzes a due process claim of prosecutor misconduct under a two part test. The court first determines if the prosecutor's acts "were improper." Washington v. Hofbauer, 228 F.3d 689, 698-99 (6th Cir. 2000) (citation omitted). The court then looks at "four factors" to "determine if the comments were sufficiently flagrant to warrant reversal" Id. (citation omitted). The four factors are: 1) whether the comments would likely mislead the jury or prejudice the accused; 2) whether the comments were extensive or merely isolated; 3) whether the comments were made deliberately or accidentally, and; 4) the strength of the evidence against the accused. Id. (citation omitted).

Regarding prosecutor misconduct in the penalty phase of a capital case, the strength of the State's proof of legal guilt is irrelevant. Bates v. Bell, 402 F.3d 635, 648-49 (6th Cir. 2005). "Importantly, in the death penalty context, [a reviewing court] must distinguish between evidence of the defendant's guilt of the underlying criminal charge and evidence of any attendant aggravating and mitigating circumstances Overwhelming evidence of guilt can oftentimes be sufficient to sustain a conviction despite some prosecutorial misconduct, but overwhelming evidence of guilt does not immunize the sentencing phase evaluation of aggravating and mitigating factors." Id. Compare Boyle v. Million, 201 F.3d 711, 717-18 (6th Cir. 2000) (habeas relief granted after finding egregious prosecutor misconduct tainted trial, without death penalty, despite strong evidence of petitioner's guilt). Thus, relief is warranted when prosecutor misconduct in the penalty phase alters the jury's ability to consider and weigh the capital selection factors. See Bates, 402 F.3d at 637, 648-49; DePew v. Anderson, 311 F.3d 742, 748 (6th Cir. 2002) (citation omitted).

2. Prosecutor misconduct at voir dire.

During voir dire examination on the issue of capital punishment, the prosecutor repeatedly engaged in the tactic of securing from the jurors a commitment that they could sign a death verdict for Jason Dean. (Vol. 1, T.p. 41, 59-60, 78-70, 85, 112, 125, 141-42, 158-59, 171, 194, 219, 251, 279, 297-98, 321, 355-56; Vol. 2, T.p. 420, 484, 502; Vol. 3, T.p. 677-73, 693-709. Defense counsel objected to this line of questioning. (Vol. 1, T.p. 45, 285.) The prosecution's tactic of securing a commitment for the death penalty was improper as it turned the jury selection process into a tribunal organized for the death penalty. See Witherspoon v. Illinois, 391 U.S. 510, 540-41 (1968). The prosecutor's act of securing specific commitments from the jurors unfairly asked them to prejudge the ultimate issue of fact for the penalty phase.

Moreover, this specific line of questioning was not relevant to the statutory standard set out in O.R.C. § 2945.06.

3. Misconduct in trial phase.

Dean's trial was rendered unfair by the prosecutor's use of prejudicial themes to obtain convictions. First, the prosecutor saturated the trial with emotional victim impact evidence. Second, the prosecutor inflamed the jury with allegations that Dean was more culpable because he was a racist.

3.1 Opening arguments.

The prosecutor stressed the prejudicial victim impact theme from the outset of its case. The prosecutor began by pointing out that the victim, Titus Arnold, was a young father of three children, that Arnold was an assistant football coach who was a semester short of obtaining a bachelor's degree, that he was a youth counselor, and that Arnold left an infant child behind to go to work on the day of his murder. (Vol. 6, T.p. 1061.) Defense counsel objected. (Id.) The prosecutor then expanded the victim impact theme into a comparison between the relative worth of Dean and his alleged victim — by pointing out that Dean led a troubled youth into crime — unlike the “positive influence” that Arnold had on youth. (Vol. 6, T.p. 1064.) Defense counsel again objected. (Id.)

The prosecutor played upon the emotions of the jurors by stating that Dean's anger is the reason for Arnold's children wondering where their father was. (Vol. 6, T.p. 1069.) The prosecutor then asserted that Arnold's murder was a “coup de tat [sic].” (Vol. 6, T.p. 1070.) The prosecutor continued with the victim impact theme by pointing out that a victim at the Dibert Avenue shooting (Hassan Chilton) was holding a baby when shots were fired. (Vol. 6, T.p. 1075.)

The prosecutor injected race into the mix by characterizing Dean as a racist murderer. (Vol. 6, T.p. 1078.) Defense counsel objected. Defense counsel subsequently moved for a mistrial on the basis of victim impact arguments that the prosecutor made “at great length”, and attacks on Dean’s character. (Vol. 6, T.p. 1083.) The mistrial motion was overruled. (Id. at 1086.)

3.2 Presentation of evidence.

The prosecutor revisited the theme of victim impact evidence again during Michelle Cherry’s testimony. Cherry divulged that Arnold had two small boys and a new baby with a woman named Ebony. (Vol. 6, T.p. 1098.) The prosecutor also used Cherry’s testimony to inform the jury that Arnold, despite having little of his own money, used to save money to buy treats for the disadvantaged youth that he counseled. (Vol. 6, T.p. 1112-13.)

The jury was exposed to the full emotional effect of the prosecutor’s victim impact theme during Rose Haile’s testimony. A photograph of Arnold was displayed during Haile’s testimony. This prompted a strong, visceral reaction from Arnold’s partner, Ebony, who had been present in the courtroom. The photograph made Ebony cry and she angrily left the courtroom along with Arnold’s mother. (Vol. 6, T.p. 1148.) Ebony also made a comment as she left the courtroom. (Id.) Defense counsel noted that this occurrence undermined the atmosphere of fairness to the courtroom. (Id. at 1149.)

The theme of Dean’s alleged racism was again exploited by the prosecutor during Crystal Kaboos’s testimony. Over objection, the prosecutor elicited from Kaboos that Dean held prejudicial views against African-Americans. (Vol. 11, T.p. 2101.) Kaboos related that Dean often referred to African-Americans as “niggers” several times a day. (Id. at 2101-02.)

The prosecutor also undermined Dean's right to a fair trial by eliciting testimony, over defense objection, from Andre Piersoll that Dean "just came home." (Vol. 9, T.p. 1691.) Piersoll related an account where he mistook the identity of Dean's brother, Mark. (Vol. 9, T.p. 1691.) According to Piersoll, Mark Dean said "No, I ain't Jason Dean He just came home." However, the subject of Dean's prior incarceration was supposed to be kept from the jury. (See Vol. 11, T.p. 2072.) Defense counsel moved for mistrial, noting that the reference to Jason Dean's coming home was an "unmistakable" reference to his prior incarceration. (Id. at 1692.) The mistrial motion was overruled. (Id. at 1693-94.)

3.3 Closing arguments.

The prosecutor's themes of victim impact and race continued during the closing argument in the culpability phase — along with several other instances of misconduct. Resorting to victim impact arguments, the prosecutor again pointed out that when Arnold had money he used it to do something special for the youth he supervised. (Vol. 13, T.p. 2566.) The prosecutor then misled the jury by suggesting evidence of the attempted murder of Andre Piersoll was "more than enough" proof that Dean acted with prior calculation and design when committing the aggravated murder of Arnold. (Id. at 2575-76.) See O.R.C. § 2903.01(A) (aggravated murder occurs when defendant causes victim's death while acting purposely and with prior calculation and design).

The prosecutor also misled the jury with inconsistent theories about the crimes. The prosecutor put on evidence to show that Dean and Josh Wade were involved in a drive by shooting on Dibert Avenue to blow up a car by shooting at the gas tank. (Vol. 9, T.p. 1800; Vol. 10, T.p. 2047.) In argument, however, the prosecutor changed gears and argued that this same shooting was directed at the occupants at 604 Dibert Avenue. (Vol. 13, T.p. 2576.) Likewise,

the prosecutor argued, inconsistent to the charges, that Dean did a contract killing on Arnold by mistaking him for a drug dealer named Oz. (Vol. 13, T.p. 2597.) This was inconsistent with the State's case, which was offered to prove felony murder during an aggravated robbery, rather than a contract killing over drugs. The prosecutor also misled the jury by describing Dean's actions as "out hunting for victims" — and the prosecutor's remark also conflated the strict standard of proof for prior calculation and design with this "out hunting" remark. (Vol. 13, T.p. 2596-97.) And the prosecutor again stressed race and racism as factors for the jury. The prosecutor accused Dean of being a racist who used racial epithets. (Vol. 13, T.p. 2598, 2621.)

4. Penalty phase misconduct.

The prosecutor's misconduct continued into the penalty phase. As Dean's life hung in the balance, the prosecutor misled the jury and inflamed it through argument.

The prosecutor used the status of his office as the people's representative to argue for death. The prosecutor misled the jury with assertions that public policy considerations of vulnerable victims favored a death sentence. (Vol. 14, T.p. 2786-87.) The prosecutor also implored the jury to impose death out of a civic duty or a duty to follow the law because the law demanded Dean's execution. (*Id.* at 2804-06.) This was misleading, of course, because the decision of whether to assign weight to the selection factors, and how much weight to assign to them, was up to the jury. See Mills v. Maryland, 486 U.S. 367, 376-77 (1988); State v. Brooks, 75 Ohio St. 3d 148, 162, 661 N.E.2d 1030, 1042 (1996). The law did not command any certain result in the jury's weighing process.

The prosecutor also prejudiced Dean by working a de facto O.R.C. § 2929.04(A)(9) specification into the proceedings — even though Dean was not charged with killing a child

under age 13. The prosecutor argued that Dean was more morally culpable based on the “horror of almost killing a child....” (Vol. 14, T.p. 2789.)

The prosecutor conflated the burden of proof regarding the jury’s weighing process. (Vol. 14, T.p. 2791.) The prosecutor suggested that mitigation is what possibly outweighs the aggravating circumstances. (*Id.*) Instead, the State had the burden to persuade the jury that aggravation outweighed mitigation beyond a reasonable doubt. See O.R.C. § 2929.03(D)(2).

Last, the prosecutor misled the jury on Dean’s mitigation. The evidence established that Dean suffered some physical abuse and mistreatment from his father. The prosecutor dismissed this mitigation by pointing out that because Dean committed acts of violence against “vulnerable citizens,” the abuse from his father was irrelevant. (Vol. 14, T.p. 2801-02.) In other words, the prosecutor suggested that Dean’s mitigation had to have a causal nexus to the commission of the crime before it had true mitigating value. That assertion was wrong and harmful to Dean’s right to present mitigation evidence. It is improper under the Eighth Amendment to require a causal nexus between mitigation and the crime. See Tennard v. Dretke, 542 U.S. 274, 289 (2004).

5. Prejudice to Dean.

The cumulative effect of the prosecutor’s misconduct prejudiced Dean’s right to a fair trial. The themes of Dean’s racism and victim impact evidence were at best marginally relevant to the State’s charges. Dean was not charged with violating a hate-crime statute. And there was no proof that Dean’s crimes were motivated out of racial animus. See Dawson v. Delaware, 503 U.S. 159, 165-69 (1992).

Titus Arnold’s good deeds certainly made his death tragic, but the over-stressed details of his family life were simply not probative of whether he was murdered during a course of conduct and an aggravated robbery. The prosecutor’s themes of race and victim impact served to create

undue sympathy for the victims and an inference that Dean acted in conformity with a bad character. See Payne v. Tennessee, 501 U.S. 808, 825 (1991). Moreover, the frequency of the misconduct negates any likelihood that the challenged instances occurred accidentally. Dean was also prejudiced based on his degree of guilt and the lack of overwhelming evidence against him. Dean was not charged as the principal offender. Further, the State's proof of guilt was problematic. (See Proposition of Law No. XI.) For example, there was testimony that Dean was not even in the car that did the drive by shooting on Dibert Avenue (an offense in part used to elevate Arnold's death to a capital crime). (See Vol. 10, T.p. 2061.) This case does not present overwhelming proof of Dean's guilt on all of the charges. Accordingly, the cumulative effect of prosecutor misconduct violated Dean's right to a fair trial.

6. Conclusion.

Pervasive and deliberate prosecutor misconduct undermined Jason Dean's due process right. See Payne, 501 U.S. at 825. Dean is entitled to a new trial, or alternatively, a new penalty phase under O.R.C. § 2929.06(B).

Proposition of Law No. XVI

The accused's right to due process is violated when the trial court shifts the burden of proof from the State by instructing the jury to deliberate on the innocence of the accused. U.S. Const. amends. V, XIV.

At the trial phase, the Court instructed the jury to deliberate on the "guilt or innocence" of Jason Dean. (Vol. 13, T.p. 2672.) This instruction violated Jason Dean's right to due process. It shifted the burden of proof from the State to Dean by placing his "innocence" in issue. See id.

The Due Process Clause requires the State to prove each essential element of a criminal charge beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). At a criminal trial the State carries the entire burden of proof. Id. An acquittal is not a finding of innocence. Rather, an acquittal simply means that the State failed to meet its burden of proof on each essential element of the charge. Id.

The trial court's instruction on "innocence" conflated the juror's understanding of this bedrock principle. A reasonable juror would have been misled by this instruction to deliberate on whether Dean put forward evidence to show his "innocence." (Dean did not raise any affirmative defenses.) The trial court's instruction shifted the burden of proof to Dean in violation of his right to due process. Id. His convictions must be reversed and his case remanded for a new trial.

Proposition of Law No. XVII

A capital defendant's right to a reliable death sentence is violated when the trial court leaves it to the jury to determine which trial phase evidence is relevant to sentencing, and when the jury considers prejudicial evidence from the culpability phase that has only marginal relevance to sentencing. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 9, 16.

In the penalty phase the trial court admitted evidence from the culpability phase that had marginal relevance to sentencing — and much of this evidence stressed the homicide itself, which is not an aggravating factor. The trial court also left it to the jury to decide which trial phase evidence was relevant to sentencing. Accordingly, Jason Dean's death sentence is unreliable under the Eighth and Fourteenth Amendments.

1. Background information.

Before the penalty phase began, the prosecutor moved the trial court “to admit all exhibits ... that were admitted during the guilt phase.” (Vol. 14, T.p. 2728.) The prosecutor noted that the trial court “may wish not to admit some of the exhibits [from the culpability phase], such as the [autopsy] photographs. ...” (*Id.*) The prosecutor also stated that the “photographs for the attempted murders may or may not, depending on the Court's ruling, as to relevance at this stage would be appropriate.” (*Id.* at 2728-29.) Defense counsel argued the culpability phase exhibits “are nonstatutory aggravating factors [and are thus prejudicial].” (Vol. 14, T.p. 2729.)

The prosecutor then informed the trial court that the State did not want to readmit the “photographs that relate to the attempted murders.” (*Id.* at 2730.) Nor did the State move to admit “the different exhibits relating to what occurred on Selma and what occurred ... on Dibert Avenue as to specific projectiles and so forth” (*Id.*) Moreover, the State did not move to admit the autopsy photographs of Titus Arnold for sentencing. (*Id.*)

The trial court stated that the autopsy photographs of Arnold would not be admitted. (Id.) However, the court admitted the evidence from the attempted murder counts because it deemed that evidence as relevant to the O.R.C. § 2929.05(A) specification. (Id. at 2730-31.) The court further found that “all the remaining evidence [was] admissible ... for the jury to put in context the facts and circumstances of the underlying crime to support the aggravating circumstance, that the homicide was committed with prior calculation and design, and that it was committed during the course of an aggravated robbery.” (Id. at 2731.)

The State then moved to admit all culpability phase evidence in the penalty phase, except for the autopsy photographs of Arnold. (Id.) The trial court admitted all the exhibits for the penalty phase other than the autopsy photographs. (Id.) Defense counsel objected “on [the] same grounds [previously stated].” (Id. at 2732.)

In the trial court’s preliminary penalty phase instructions it stated: “During the trial phase ... you heard evidence [and] testimony ... and found the defendant guilty of aggravated murder with capital specifications. ... In this sentencing phase ... you will hear additional evidence [and] testimony. ... (Id. at 2746.)

The court’s final instructions stated:

Some of the evidence and testimony that you considered in the trial phase of this case may not be considered in the sentencing phase. For purposes of this proceeding, only that evidence admitted in the trial phase that is relevant to the aggravating circumstances and to any of the mitigating factors is to be considered by you. You will also consider all of the evidence admitted during this sentencing phase.

(Id. at 2813.)

2. Considerations of law.

In the sentencing phase the jury must weigh the aggravating circumstances against the collective weight of the defendant’s mitigation. O.R.C. § 2929.03(D)(2). But only the

aggravating circumstances may be weighed against the defendant's mitigation. State v. Wogenstahl, 75 Ohio St. 3d 344, 356, 662 N.E.2d 311, 322 (1996). The homicide itself is not an aggravating factor and may not be weighed, moreover. See State v. Hancock, 108 Ohio St. 3d 57, 78, 840 N.E.2d 1032, 1055 (2006). Constitutional error results when an invalid aggravator is placed on "death's side of the scale." See Stringer v. Black, 503 U.S. 222, 232 (1992); Sochor v. Florida, 504 U.S. 527, 532 (1992).

Under O.R.C. § 2929.03(D)(1), culpability phase evidence that is relevant to the nature and circumstances of the aggravating circumstances may be readmitted for the jury's consideration. However, any determination of the legal question of relevance respecting the readmission of culpability phase evidence lies strictly with the trial court. See State v. Getsy, 84 Ohio St. 3d 180, 201, 702 N.E.2d 866, 887 (1998).

3. Unreliable death sentence imposed on Dean.

The trial court abused its discretion, and it rendered Dean's death sentence arbitrary, when it admitted all culpability phase evidence for sentencing (except the excluded autopsy photographs). The testimony and physical evidence related to counts 1, 2, 5, 6, 7, 8, 9, 10, and 11 had only marginal relevance to the jury's weighing task under O.R.C. § 2929.03(D)(2). Further, the testimony of the witnesses to Arnold's murder, and the testimony of the citizens and first responders who attempted to aid Arnold at the scene, would tend to unduly emphasize the homicide itself. (See e.g. Vol. 6, T.p. 1093 (Cherry); Vol. 6, T.p. 1114 (Banks); Vol. 6, T.p. 1124 (Haile); Vol. 6, T.p. 1170 (Panstingel); Vol. 6, T.p. 1190 (Nawman); Vol. 7, T.p. 1236 (Miller); Vol. 7, T.p. 1273 (Buskirk); Vol. 7, T.p. 1281 (Hupman); Vol. 8, T.p. (Bauer); Vol. 8, T.p. 1385 (Kranz); Vol. 8, T.p. 1390 (K. Epperson); Vol. 8, T.p. 1416 (T. Epperson); Vol. 8, T.p. 1452 (Steinmetz).) See Hancock, 108 Ohio St. 3d at 78, 840 N.E.2d at 1055.

The trial court abused its discretion, moreover, by admitting for sentencing purposes culpability phase evidence that the State did not ask to admit. (Vol. 14, T.p. 2730-31.) (See Proposition of Law No. III.)

Additionally, the trial court failed to identify for the jury which culpability phase evidence was relevant to sentencing. It is true that the court ruled on the issue of which culpability phase exhibits were relevant to sentencing. (Vol. 14, T.p. 2730-31.) However, neither the preliminary nor final jury instructions identified for the jury which culpability exhibits were relevant to the nature and circumstances of the aggravating circumstances. See Kelly v. South Carolina, 534 U.S. 246, 256 (2002) (“A trial judge’s duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question for the jurors or any other indication of perplexity on their part”). Accordingly, the legal issue of relevance regarding which culpability phase exhibits were admissible for sentencing was at best unclear to the jury. See id.

4. Conclusion.

The procedure followed in this case created an unacceptable risk that Dean’s jury weighed nonstatutory aggravators, and that it considered extraneous evidence that may have influenced its death penalty verdict. See e.g. Beck v. Alabama, 447 U.S. 625, 637 (1980) (lesser included offense required in capital case to avoid “risk of unwarranted conviction.”); Gardner v. Florida, 430 U.S. 349, 358 (1977) (death sentence must be based on reason and not caprice or emotion); Gregg v. Georgia, 428 U.S. 153, 158 (1976) (Eighth Amendment prohibits arbitrary sentencing procedures where death penalty may be imposed).

Dean’s death sentence must be vacated and his case remanded for a new penalty phase. O.R.C. § 2929.06(B).

Proposition of Law No. XVIII

A capital defendant's death sentence is disproportionate when a co-defendant who was arguably more culpable receives a life sentence in violation of the appellant's rights to due process, equal protection and to be free from cruel and unusual punishment. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 10, 16.

1. Dean and his co-defendant's sentences are disproportionate.

Dean's death sentence is disproportionate and violates his rights to due process, to equal protection, and his right against cruel and unusual punishment. Dean and his co-defendant, Joshua Wade, were indicted for the crimes that occurred in this case. (Vol. 14, T.p. 2761). Initially a complaint was filed charging Dean as the principal offender in the homicide of Titus Arnold. Subsequently that was changed such that Wade was indicted as the principal offender, or actual killer of Titus Arnold. (Vol. 13, T.p. 2536). Wade was a juvenile at the time of the homicide and therefore could not receive the death penalty upon conviction. (Vol. 14, T.p. 2764, 2767); see O.R.C. § 2929.02(A); Roper v. Simmons, 543 U.S. 551, 578 (2005). There was no question that Wade shot and killed the victim. (Entry, 6/2/06).

Dean's sentence of death is disproportionate to his co-defendant who was not eligible for the death penalty.

2. A disproportionate sentence for the same crime is unconstitutional.

Ohio Revised Code § 2929.05(A) obligates this Court to assess the appropriateness of the death penalty in each capital case reviewed. The statute mandates this Court to "consider whether the sentence [of death] is excessive or disproportionate to the penalty imposed in similar cases." The statute further requires this Court to make an independent review of the record and decide, without any deference to the court below, whether this defendant should be sentenced to

death. State v. Jenkins, 15 Ohio St. 3d 164, 208-09, 473 N.E.2d 264, 303-04 (1984); State v. Maurer, 15 Ohio St. 3d 239, 244, 473 N.E.2d 768, 776 (1984).

For the purpose of this Court's proportionality review, the comparison method used in Ohio is constitutionally flawed. See State v. Murphy, 91 Ohio St. 3d 516, 562-63, 747 N.E.2d 765, 813 (2001) (Pfeifer, J., dissenting). In State v. Steffen, 31 Ohio St. 3d 111, 123, 509 N.E.2d 383, 394-5 (1987) this Court held that a death sentence is disproportionate only if the sentence is disproportionate to cases already decided by this Court in which the death penalty had been imposed. But once the General Assembly provided capital appellants with the statutory right to proportionality review, that review must not violate the appellant's Due Process rights. Evitts v. Lucey, 469 U.S. 387, 401 (1985). This Court must review the sentence imposed on Wade to afford Dean with a meaningful proportionality review. Murphy, 91 Ohio St. 3d at 562-63, 747 N.E.2d at 813 (Pfeifer, J., dissenting).

A state must not allow the decision of whether a defendant is sentenced to life or death to the unfettered discretion of the jury because such a death penalty scheme results in death sentences that are "wantonly and freakishly imposed" and are "cruel and unusual in the same way that being struck by lightning is cruel and unusual." Furman v. Georgia, 408 U.S. 238, 309-10 (1972). (Stewart, J., concurring).

In Gregg v. Georgia, 428 U.S. 153 (1976), the Supreme Court affirmed the usefulness of proportionality review as it assured that "no death sentence is affirmed unless in similar cases throughout the State the death penalty has been imposed." Id. at 205 (citation omitted). "[T]he penalty of death is different in kind from any other punishment imposed under our system of justice." Id. at 188. Therefore, the death penalty must be imposed in a reliable manner that is not arbitrary. See generally, Furman, 408 U.S. 238 (1972).

The Fourteenth Amendment guarantees equal protection and mandates similar treatment of similarly situated persons. A death penalty imposed in violation of equal protection is cruel and unusual punishment which also violates the Eighth Amendment. Furman, 408 U.S. at 249 (Douglas, J., concurring).

Meaningful appellate review is intended to eliminate the arbitrary and capricious imposition of the death penalty. Zant v. Stephens, 462 U.S. 862, 879 (1983); Pulley v. Harris, 465 U.S. 37 (1984). The standard for review is one of careful scrutiny. Zant, 462 U.S. at 884-85. Review must be based on a comparison of similar cases and ultimately must focus on the character of the individual and the circumstances of the crime. Id.

In State v. Getsy, 84 Ohio St. 3d 180, 702 N.E.2d 866 (1998), four defendants were charged with attempted murder, conspiracy to commit aggravated murder, aggravated burglary and two counts of aggravated murder, with death penalty specifications. Id. at 208, 792 N.E.2d 892. Two of the co-defendants were allowed to plead guilty and received life sentences. Id. The other co-defendant, Santine, who was charged with hiring the other defendants to commit the murder, received a life sentence after a jury trial. Id.

In reviewing Getsy's case, this Court addressed the appropriateness and proportionality of Getsy's sentence. In so doing, this Court found that "[i]t is also troubling that Santine did not receive the death sentence even though he initiated the crime. If not for John Santine, it is unlikely the Serafinos [the victims] would have been shot. In sum, we give some weight to the fact that none of the co-defendants was sentenced to death" Id.

This Court cited to Parker v. Dugger, 498 U.S. 308, 314 (1991) for the proposition that "the United States Supreme Court implicitly recognized that a codefendant's sentence could be considered a nonstatutory mitigating factor." Getsy, 84 Ohio St. 3d at 208, 792 N.E.2d at 892.

Proposition of Law No. XIX

A capital defendant's right to due process and a reliable sentencing determination is violated when the sentencing court relies on arbitrary factors to impose the death penalty. O.R.C. § 2929.03; U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 9, 16.

Jason Dean's death sentence is unreliable in violation of the Ohio statutes and the Eighth and Fourteenth Amendments.

1. Trial court's sentencing function.

The Revised Code requires the trial court to independently weigh the capital selection factors if the jury recommends the death penalty. The trial court thus functions as the thirteenth juror with regard to whether the death penalty shall be imposed. *Cf. State v. Apanovitch*, 33 Ohio St. 3d 19, 30, 514 N.E.2d 394, 405 (1987) (describing appellate court's role as "super jury" regarding independent review of death sentence under O.R.C. § 2929.05(A).) Because the trial court is the capital sentencer under O.R.C. § 2929.03(D) and (F), its weighing task must comport with the requirements of the Eighth and Fourteenth Amendments. *See Espinosa v. Florida*, 505 U.S. 1079, 1082 (1992). Moreover, the General Assembly included a proper review by the trial court in its statutory scheme to assure reliable and nonarbitrary sentencing. O.R.C. § 2929.03. Accordingly, Dean has a life and liberty interest under the Due Process Clause in a reliable sentencing determination by the trial court. *See Clemons v. Mississippi*, 494 U.S. 738, 746 (1990) (citing *Hicks v. Oklahoma*, 447 U.S. 343 (1980)). *See Fetterly v. Paskett*, 997 F.2d 1295, 1301 (9th Cir. 1993).

2. Unreliable death sentence for Dean.

On June 2, 2006, the trial court sentenced Jason Dean on count 13 for the aggravated murder of Titus Arnold. At the sentencing hearing, the court read its O.R.C. § 2929.03(F)

opinion into the record. (Jun. 2, 2006, T.p. 5.) This sentencing opinion is replete with prejudicial error.

First, the trial court followed the prosecutor's argument to weigh a nonstatutory aggravation on "death's side of the scale." See Stringer v. Black, 503 U.S. 222, 232 (1992). The court noted that of the seven victims identified as part of the course of conduct, see O.R.C. § 2929.04(A)(5), one of them was a child. (Jun. 2, 2006, T.p. 12.) The court assigned tremendous "weight to the (A)(5) specification." However, Dean was not charged with the O.R.C. § 2929.05(A)(9) specification, nor was Dean sentenced for aggravated murder under O.R.C. § 2903.01(C). The status of one victim as a child was simply irrelevant to the trial court's weighing process under O.R.C. § 2929.03(D)(3). Thus, the trial court was influenced by the prosecutor's argument that Dean was more culpable based on de facto (A)(9) aggravator that was not included in the indictment or tried to the jury. See Ring v. Arizona, 536 U.S. 584, 609 (2002). (See Proposition of Law No. XV.)

The trial court was also influenced by the prosecutor's improper "causal nexus" argument to rebut the abuse Dean suffered from his father. (See Proposition of Law No. XV.) The trial court, following the prosecutor's argument, found that abuse inflicted on Dean by his father deserved minimal value — because Dean's criminal behavior was aimed at an innocent victim, and not Dean's abuser. This was improper because the trial court required Dean to establish a causal nexus between the abuse he suffered and the crimes charged. See Tennard v. Dretke, 542 U.S. 274, 289 (2004).

The trial court then gave no weight to the life sentence imposed on Dean's co-defendant, Josh Wade. (Jun. 2, 2006, T.p. 14.) However, because Dean's death sentence is disproportionate to Wade's (Wade was the actual killer), the sentence imposed on Wade should

have been assigned mitigating weight at Dean's sentencing. (See Proposition of Law No. XVIII.)

After stating that the aggravating circumstances outweighed the mitigating factors, the trial court then addressed two extraneous issues on the record — while disclaiming these had any impact on the sentence. (Jun. 2, 2006, T.p. 16-17.) First, the trial court suggested that sentencing Dean to death was a triumph of civil rights, because Dean was white and Arnold African- American. The court remarked that a death sentence in Dean's case dispelled lingering notions of racial bias in Clark County. (Id. at 16.) The trial court then injected its Christian religious views into the proceedings. The court sermonized in open court that the death penalty is a proper punishment because the wrath of God would not spare his own son (Christ) from the death penalty. (Id. at 17.)

The trial court's comments were improper and risk the type of arbitrariness prohibited by the Eighth Amendment. No individual defendant should have to bear the weight of larger societal concerns piled on top of a death penalty charge. See Gardner v. Florida, 430 U.S. 349, 358 (1977) (decision to impose death must be "and appear to be, based on reason rather than caprice or emotion."); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (individualized sentencing required in capital cases).

Dean's trial was not a forum to resolve lingering questions over the progress of race- relations within Clark county. (See Proposition of Law No. XV.) And the court's injection of its specific religious issues into capital sentencing undermined confidence in these proceedings. Cf. Ohio R. Crim. P. 52(B); State v. Slagle, 65 Ohio St. 3d 597, 615 n1, 605 N.E.2d 916, 932, n1. (1992) (Wright, J., dissenting) (plain error under Criminal Rule 52(B) guards against errors

which “seriously affect the fairness, integrity, or public reputation of judicial proceedings.” citing United States v. Atkinson, 297 U.S. 157, 160 (1936)).

For starters, the trial court’s remarks undermine public confidence in the justice system because, especially in a capital case, a sentence must appear to be based on reason and law — rather than the particular religious or social views of the judge. See Gardner, 430 U.S. at 358. The message sent by the trial court was that the common pleas court in Clark County may operate at the whim of this judge’s specific views of Christianity or social fairness. This message denigrated the notion that the courthouse is fully and equally accessible to persons of any religious sect or citizens with secular beliefs.

3. Conclusion.

The trial court relied on arbitrary factors when imposing this death sentence. This Court should vacate Jason Dean’s death sentence and remand him for resentencing. See State v. Green, 90 Ohio St. 3d 352, 356, 738 N.E.2d 1208, 1219 (2000); State v. D’Ambrosio, 67 Ohio St. 3d 185, 199-200, 616 N.E.2d 909, 920-21 (1993); State v. Davis, 38 Ohio St. 3d 361, 367-73, 528 N.E.2d 925, 931-36 (1988).

Proposition of Law No. XX

A capital defendant's right to present all relevant mitigating evidence is infringed when the trial court takes the defendant's unsworn statement from the jury's effective reach in the weighing process. U.S. Const. amend. VIII; Ohio Const. art. I, § 9.

Under O.R.C. § 2929.03(D)(1), a capital defendant has a statutory right to make an unsworn statement to the jury in mitigation. The statute requires the jury to consider the "statement of the offender" when imposing the penalty for a capital offense. O.R.C. § 2929.03(D)(2). A capital defendant may present relevant mitigating evidence to the jury through his unsworn statement. See e.g. State v. Reynolds, 80 Ohio St. 3d 670, 686, 687 N.E.2d 1358, 1374 (1998); State v. Carter, 64 Ohio St. 3d 218, 227-28, 594 N.E.2d 595, 602 (1992). Indeed, it is the intent of the General Assembly to give a capital defendant "great latitude in the presentation of [mitigating evidence]" O.R.C. § 2929.04(C).

A defendant's statutory right to present an unsworn statement furthers the constitutional imperative for capital sentencing juries to consider and give effect to all relevant mitigating evidence that a defendant proffers as a basis for a sentence less than death. See e.g. Penry v. Lynaugh, 492 U.S. 302, 317-19 (1989); Skipper v. South Carolina, 476 U.S. 1, 8 (1986); Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978). State's have some measure of discretion to shape the manner in which a capital jury considers and weighs a defendant's relevant mitigating evidence. See Johnson v. Texas, 509 U.S. 350, 372-73 (1993). However, states may not structure the capital selection process so as to place a defendant's relevant mitigation beyond the jury's "effective reach." Id. at 362 (quoting Graham v. Collins, 506 U.S. 461, 475 (1993)). When reviewing a claim that mitigation has been put beyond the jury's effective reach, the Court reviews the instructions as well as "the entire context

[of the penalty phase proceedings] in which the instructions were given” Buchanan v. Angelone, 522 U.S. 269, 278 (1998).

There is a reasonable likelihood that Jason Dean’s jury did not understand that it could consider and weigh his unsworn statement in mitigation. Despite reservations from his counsel, Dean chose to address the jury in his unsworn statement. (Vol. 14, T.p. 2773, 2779-80.) However, the trial court refused to let Dean address the jury from the witness stand. Dean instead spoke to the jury from counsel’s table. (Id. at 2781.) The trial court instructed the jury that Dean’s statement was not evidence because Dean was not a witness — but that Dean had the right to make the statement. (Id. at 2782.)

In the final jury instructions, the trial court did not list Dean’s unsworn statement as a mitigating factor. (Id. at 2809-10.) Rather, the trial court told the jury that Dean’s failure to testify could not be considered for any purpose. (Id. at 2814.) No guidance was given to the jury with regard to the jury’s ability to consider Dean’s unsworn statement in mitigation.

Taking into account the entire context of the penalty phase proceedings, Dean’s unsworn statement was outside the jury’s “effective reach” as mitigation. See Johnson, 509 U.S. at 362 (quoting Graham v. Collins, 506 U.S. at 475). The jury should have been permitted to weigh Dean’s unsworn statement in mitigation. However, the actions of the trial court minimized Dean’s unsworn statement and the instructions failed to guide the jury to consider and weigh Dean’s statement. And unlike in Buchanan v. Angelone, the arguments of counsel failed to inform the jury that Dean’s unsworn statement was a possible mitigating factor. See 522 U.S. at 278. Indeed, in the context of this proceeding, Dean’s unsworn statement would likely have been treated as if it were similar to a mere argument of his counsel. But this was insufficient to satisfy Dean’s Eighth Amendment right to present all relevant mitigation.

The trial court made it clear that the arguments of counsel were not evidence — just as the trial court made it clear that Dean’s statement was not evidence. (See Vol. 14, T.p. 2782, 2783, 2812-13.) Under these circumstances, the jury was not able to place Dean’s statement on the mitigation side of the weighing scale. The trial court removed any mitigating value of Dean’s statement, placing it beyond the effective reach of his jury. Jason Dean’s death sentence must be vacated and his case remanded for a new penalty phase under O.R.C. § 2929.06(B).

Proposition of Law No. XXI

The accused may not be punished multiple times for crimes of similar import that are committed during one indivisible course of conduct. U.S. Const. amends. V, XIV; Ohio Const. art. I, § 10; O.R.C. §§ 2941.25(A); 2929.14.

Jason Dean's constitutional and statutory rights against multiple punishments were violated because the trial court sentenced him more than once for criminal acts occurring within one course of conduct.

1. Background information.

Jason Dean was indicted on twelve counts that carried firearm specifications under O.R.C. § 2941.145 (counts 1, 2, 3, 5, 6, 7, 8, 9, 10, 12, 13, and 14). Four counts alleged that Dean had a weapon under a disability under O.R.C. § 2923.13 (counts 4, 11, 15, and 16). Dean was also indicted on improperly discharging a firearm into 609 Dibert Avenue in count 5 — in addition to four counts of attempted murder, based on shots fired at persons residing at 609 Dibert Avenue (counts 7, 8, 9, and 10). See O.R.C. §§ 2923.161; 2903.02; 2923.02.

The State's theory of this case was that Dean and his co-defendant, Joshua Wade, committed all the alleged offenses as part of one continuing course of conduct. (See e.g. Vol. 6, T.p. 1061-78; Vol. 13, T.p. 2564-2600, 2620-21; Vol. 13, T.p. 2660, 2665; Vol. 14, T.p. 2788-89.) Dean was found guilty of all counts and specifications. (Vol. 13, T.p. 2710-70.)

The trial court sentenced Dean to consecutive terms of imprisonment for each non-capital count. (Jun. 2, 2006, T.p. 17-19.) Dean was sentenced to three years imprisonment on each firearm specification. (Id.)

2. Multiple convictions and punishments prohibited.

The Double Jeopardy Clause of the Fifth Amendment applies to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784 (1969). The right against double

jeopardy protects the criminally accused from multiple punishments, as well as multiple trials. See Whalen v. United States, 445 U.S. 684, 688 (1980). The key to determining if multiple punishments are prohibited is whether the legislature intended separate punishments for both types of criminal conduct. Id. at 688-89; State v. Grant, 67 Ohio St. 3d 465, 620 N.E.2d 50, 63 (1993).

The Revised Code provides an additional protection from multiple convictions and punishments: “Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment ... may contain counts for all such offenses, but the defendant may be convicted of only one.” O.R.C. § 2941.25(A).

3. Dean’s rights violated by multiple convictions and punishments.

Dean’s conviction and sentence for improperly discharging a firearm into 609 Dibert (count 5) must be vacated. Dean was convicted and punished for four attempted murders (counts 7, 8, 9, and 10) based on gun shots allegedly fired by him into 609 Dibert Avenue. (But see Proposition of Law No. XI.) The State presented no evidence to support a separate animus on Dean’s part for the shootings at 609 Dibert — other than the attempted murders. See State v. Logan, 60 Ohio St. 2d 126, 131-32, 397 N.E.2d 1345, 1349-50 (1979). Dean was thus improperly convicted and punished twice for the same criminal conduct in violation of the Fifth Amendment and the Revised Code.

The multiple sentences imposed on the firearm specifications must also be reduced to a single three year term of imprisonment. Dean was sentenced twelve times on firearm specifications. The State’s case against Dean plainly alleged that each violation for the firearm specifications occurred during one course of conduct. In addition to violating Dean’s rights

under the Fifth Amendment and O.R.C. § 2941.25(A), these multiple three year sentences ran afoul of O.R.C. § 2929.14(D)(1)(a) and (b):

(D)(1)(a) Except as provided in division (D)(1)(a) of this section, if an offender who is convicted of or pleads guilty to a felony also convicted of or pleads guilty to a specification of the type described ... section 2941.145 [2941.14.5] of the Revised Code, the court shall impose on the offender one of the following prison terms ...

(ii) A prison term of three years if the specification is of the type described in section 2941.145 [2941.14.5] of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense ...

(b) If a court imposes a prison term on an offender under division (D)(1)(a) of this section, the prison term shall not be reduced pursuant to section 2929.20, section 2967.193 [2967.19.3], or any other provision of Chapter 2967 or Chapter 5120 of the Revised Code. **A court shall not impose more than one prison term on an offender under division (D)(1)(a) of this section for felonies committed as part of the same act or transaction.**

(Emphasis added.)

Dean's use of a firearm to commit felonies on April 10, 12, and 13 — during the continuous course of conduct under O.R.C. § 2929.05(A) — qualifies as “the same act or transaction” under O.R.C. § 2929.14. Compare State v. Sapp, 105 Ohio St. 3d 104, 111-13, 822 N.E.2d 1239, 1249-51 (2004). Accordingly, Dean may receive only one three-year term of imprisonment for the firearm specification.

Proposition of Law No. XXII

The accused's right to due process under the Fourteenth Amendment to the United States Constitution is violated when the State's burden of persuasion is less than proof beyond a reasonable doubt.

During the trial phase instruction to the jury, the trial court instructed Jason Dean's jury on the statutory definition of reasonable doubt under O.R.C. § 2901.05. (See Vol. 13, T.p. 2625-26.)³ This charge, taken as whole, did not adequately convey to jurors the stringent "beyond a reasonable doubt" standard. The "willing to act" language of O.R.C. § 2901.05 did not guide the jury because it is too lenient. The statutory definition of reasonable doubt is further flawed because the "firmly convinced" language represents only a clear and convincing standard. Additionally, the trial court's use of the phrase "moral evidence" was improper. The jury convicted Jason Dean on a standard below that required by the Due Process Clause of the Fourteenth Amendment. This is a fundamental, structural error that requires reversal of Dean's convictions. See Sullivan v. Louisiana, 508 U.S. 275 (1993).

In re Winship, 397 U.S. 358 (1970), the Supreme Court addressed the fundamental nature of the reasonable doubt concept. The Court noted that "[t]here is always in litigation a margin of error" and stressed that "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." Id. at 364. To maintain confidence in our system of laws, the Court continued, proof beyond a reasonable doubt must be held to be proof of guilt "with utmost certainty." Id. Accordingly, the Supreme Court reversed a Louisiana defendant's capital conviction and death sentence because the instruction on reasonable doubt could have led jurors to find guilt "based on a degree of

³ The trial court gave a substantially similar instruction on reasonable doubt at the penalty phase. (Vol. 14, T.p. 2807.) The trial court correctly omitted the "truth of the charge" phrase from its penalty phase definition of reasonable doubt.

proof below that required by the Due Process Clause.” Cage v. Louisiana, 498 U.S. 39, 41 (1990).

Likewise, the trial court’s definition of reasonable doubt allowed the jurors to find guilt on proof below that required by the Due Process Clause. While this Court has held that the statutory reasonable doubt definition is not an unconstitutional dilution of the State’s burden of proof, State v. Nabozny, 54 Ohio St. 2d 195, 202-03, 375 N.E.2d 784, 791 (1978), the Supreme Court of the United States, the majority of federal circuit courts, and lower Ohio courts have condemned the language in the statute that defines reasonable doubt as “proof of such character that an ordinary person would be willing to rely and act upon in the most important of his own affairs.”

In Holland v. United States, 348 U.S. 121, 140 (1954), the Court indicated strong disapproval of the “willing to act” language when defining proof beyond a reasonable doubt. The United States Court of Appeals has also noted that “there is a substantial difference between a juror’s verdict of guilt beyond a reasonable doubt and a person making a judgment in a matter of personal importance to him.” Scurry v. United States, 347 F.2d 468, 470 (D.C. Cir. 1965). The Scurry court stated that human experience shows that a prudent person, called upon to act in his more important business or family affairs, would gravely weigh the risks and considerations tending in both directions. After weighing these considerations, however, a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment. Id. Indeed, the majority of the federal circuit courts have disapproved the “willing to act” phrase and adopted a preference for defining proof beyond a reasonable doubt in terms of a prudent person who would hesitate to act when confronted with such evidence. See, e.g., Monk v. Zelez, 901

F.2d 885 (10th Cir. 1990); United States v. Colon, 835 F.2d 27 (2nd Cir. 1987); United States v. Pinkney, 551 F.2d 1241 (D.C. Cir. 1976); United States v. Conley, 523 F.2d 650 (8th Cir. 1975).

Ohio courts have also criticized the “willing to act” language of O.R.C. § 2901.05 (D). In State v. Frost, No. 77AP-728, slip op. at 8 (Franklin Ct. App. May 2, 1978), the court concluded that the final sentence of O.R.C. § 2901.05(D) should be eliminated or modified by adding the word “unhesitating” to the last sentence before the phrase “in the most important of his own affairs.” Ordinary people who serve as jurors are frequently required to make important decisions based upon proof of a lesser nature by choosing the most preferable action. This was recognized in State v. Crenshaw, 51 Ohio App. 2d 63, 65, 366 N.E.2d 84, 85 (1977), where the court held that the “willing to act” language was the traditional test for the clear and convincing evidence standard of proof: “A standard based upon the most important affairs of the average juror ... reflects adversely upon the accused.” A majority of federal courts and several Ohio courts have recognized, the “willing to act” language in O.R.C. § 2901.05(D) does not meet the standard of proof beyond a reasonable doubt standard. This is because most people do not make important decisions based upon a reasonable doubt standard but rather are “willing to act” upon a lesser standard.

The “firmly convinced” language in the first sentence of the court’s instruction did not define the reasonable doubt standard. Rather, it defined the clear and convincing standard. In Cross v. Ledford, 161 Ohio St. 469, 120 N.E.2d 118, syl. (1954), the Court defined clear and convincing evidence as that “which will provide in the mind of the trier of facts a firm belief or conviction to the facts sought to be established.” That definition is similar to O.R.C. § 2901.05 (D), where reasonable doubt is present only if jurors “cannot say they are firmly convinced of the

truth of the charge.” The jurors were given a definition of reasonable doubt in this instruction that failed to satisfy the requirement of the Due Process Clause.

The court’s definition of reasonable doubt was further flawed because it informed the jury that “[r]easonable doubt is not mere possible doubt, because everything relate[d] to ... human affairs or depending on moral evidence is open to doubt.” (Vol. 13, T.p. 2625-26.) The phrase “moral evidence” improperly shifted the focus of this jury to the subjective morality of Dean rather than the required legal quantum of proof, Victor v. Nebraska, 511 U.S. 1 (1994), notwithstanding.

In Victor, the Court rejected a due process challenge to a jury instruction that included the phrase “moral evidence.” Id. at 13. But see id. at 21 (Kennedy J., concurring). The Court found no error because the phrase “moral evidence” was proper when placed in the context of the jury instruction on reasonable doubt that was given:

[T]he instruction itself gives a definition of the phrase. The jury was told that “everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt” - in other words, that absolute certainty is unattainable in matters relating to human affairs. Moral evidence, in this sentence, can only mean empirical evidence offered to prove such matters - the proof introduced at trial.

Id. at 13 (emphasis added). Unlike Victor, the instruction in this case did not guide the jury by placing the phrase “moral evidence” within any proper context. In Victor, the jury was properly guided on the phrase “moral evidence” because it was conjunctively paired with the phrase “matters relating to human affairs.” Id. Here, “moral evidence” was disjunctively stated as an alternative to the phrase “relating to human affairs.” (Vol. 13, T.p. 2625-26.) Dean’s jury was not directed to consider “moral evidence” as evidence that is “related to human affairs.” Instead, his jury was instructed to consider both evidence related to human affairs “or moral evidence.”

Compare Vol. 13, T.p. 2625 with Victor, 511 U.S. at 13. Accordingly, his jury was allowed to convict him based on considerations of subjective morality, rather than evidentiary proof required by Due Process Clause. Victor, 511 U.S. at 21 (Kennedy J., concurring) (“[the] use of ‘moral evidence’ ... seems quite indefensible ... the words will do nothing but baffle”).

Juries in Ohio are convicting criminal defendants on a clear and convincing evidence standard. A majority of the federal courts agree that the “willing to act” language found in O.R.C. § 2901.05(D) represents a standard of proof below that required by the Due Process Clause. Furthermore, the “firmly convinced” language in the first sentence of O.R.C. § 2901.05(D) defines the presence of reasonable doubt in terms nearly identical to the accepted definition of clear and convincing evidence. Courts that have disapproved the “willing to act” language have generally allowed it to be used only when the instruction, taken in its entirety, conveyed the true meaning of “reasonable doubt” as required by the Due Process Clause. See Holland, 384 U.S. at 140.

This is not, however, the case in Ohio. O.R.C. § 2901.05(D) defines reasonable doubt in terms far too similar to the definition of “clear and convincing” evidence. The “willing to act” language in the last sentence of O.R.C. § 2901.05(D) is defective because reasonable doubt is also defined in a clear and convincing standard from the outset in the phrase “firmly convinced.” Moreover, the reference to “moral evidence” obfuscates each juror’s duty to focus upon the evidence at trial rather than on subjective considerations of morality. O.R.C. § 2901.05(D), as applied to this case, defines reasonable doubt by an insufficient standard. Accordingly, the instructions in Jason Dean’s trial allowed his jury to find him guilty “based on a degree of proof

below that required by the Due Process Clause.” Cage, 498 U.S. at 41. His convictions must be reversed.⁴

⁴ Similar claims have been denied on the merits by this Court, e.g. State v. Van Gundy, 64 Ohio St. 3d 230, 594 N.E.2d 604 (1992), and this Court may summarily reject this claim on the merits if it disagrees with Dean’s view of Federal law. State v. Poindexter, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988).

Proposition of Law No. XXIII

Ohio's death penalty law is unconstitutional. Ohio Rev. Code §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 do not meet the prescribed constitutional requirements and are unconstitutional on their face and as applied. U.S. Const. Amends. V, VI, VIII, and XIV; Ohio Const. Art. I, §§ 2, 9, 10, and 16. Further, Ohio's death penalty statute violates the United States' obligations under international law.

The Eighth Amendment to the Constitution and Article I, § 9 of the Ohio Constitution prohibit the infliction of cruel and unusual punishment. The Eighth Amendment's protections are applicable to the states through the Fourteenth Amendment. Robinson v. California, 370 U.S. 660 (1962). Punishment that is "excessive" constitutes cruel and unusual punishment. Coker v. Georgia, 433 U.S. 584 (1977). The underlying principle of governmental respect for human dignity is the Court's guideline to determine whether this statute is constitutional. See Furman v. Georgia, 408 U.S. 238 (1972) (Brennan, J., concurring); Rhodes v. Chapman, 452 U.S. 337, 361 (1981); Trop v. Dulles, 356 U.S. 86 (1958). The Ohio scheme offends this bedrock principle in the following ways.⁵

1. Arbitrary and unequal punishment.

The Fourteenth Amendment's guarantee of equal protection requires similar treatment of similarly situated persons. This right extends to the protection against cruel and unusual punishment. Furman, 408 U.S. at 249 (Douglas, J., concurring). A death penalty imposed in violation of the Equal Protection guarantee is a cruel and unusual punishment. See id. Any arbitrary use of the death penalty also offends the Eighth Amendment. Id.

Ohio's capital punishment scheme allows the death penalty to be imposed in an arbitrary and discriminatory manner in violation of Furman and its progeny. Prosecutors' virtually

⁵ Dean moved to dismiss his death penalty specifications on constitutional grounds by motions filed on March 7, 2006.

uncontrolled indictment discretion allows arbitrary and discriminatory imposition of the death penalty. Mandatory death penalty statutes were deemed fatally flawed because they lacked standards for imposition of a death sentence and were therefore removed from judicial review. Woodson v. North Carolina, 428 U.S. 280 (1976). Prosecutors' uncontrolled discretion violates this requirement.

Ohio's system imposes death in a racially discriminatory manner. Blacks and those who kill white victims are much more likely to get the death penalty. While African-Americans comprise about 12% of Ohio's population, nearly half of Ohio's death row inmates are African-American. See Ohio Public Defender Commission Statistics, July 14, 2006; see also The Report of the Ohio Commission on Racial Fairness, 1999. While 4 Caucasians were sentenced to death for killing African-Americans (or an African-American), 45 African-Americans sit on Ohio's death row for killing a Caucasian. Ohio Public Defender Statistics, July 14, 2006. Ohio's statistical disparity is tragically consistent with national findings. The General Accounting Office found victims' race influential at all stages, with stronger evidence of racial influence involving prosecutorial discretion in the charging and trying of cases. Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities, U.S. General Accounting Office, Report to Senate and House Committees on the Judiciary (February 1990). In short, Ohio law fails to assure against race discrimination playing a role in capital sentencing.

Due process prohibits the taking of life unless the state can show a legitimate and compelling state interest. Commonwealth v. O'Neal, 339 N.E.2d 676, 678 (Mass. 1975) (Tauro, C.J., concurring); State v. Pierre, 572 P.2d 1338 (Utah 1977) (Maughan, J., concurring and dissenting). Moreover, where fundamental rights are involved, personal liberties cannot be broadly stifled "when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479,

488 (1960). To take a life by mandate, the State must show that it is the “least restrictive means” to a “compelling governmental end.” O’Neal II, 339 N.E.2d at 678.

The death penalty is neither the least restrictive nor an effective means of deterrence. Both isolation of the offender and retribution can be effectively served by less restrictive means. Society’s interests do not justify the death penalty.

2. Unreliable sentencing procedures.

The Due Process and Equal Protection Clauses prohibit arbitrary and capricious procedures in the State’s application of capital punishment. Gregg v. Georgia, 428 U.S. 153, 188, 193-95 (1976); Furman, 408 U.S. at 255, 274. Ohio’s scheme does not meet those requirements. The statute does not require the State to prove the absence of any mitigating factors or that death is the only appropriate penalty.

The statutory scheme is unconstitutionally vague, which leads to the arbitrary imposition of the death penalty. The language “that the aggravating circumstances ... outweigh the mitigating factors” invites arbitrary and capricious jury decisions. “Outweigh” preserves reliance on the lesser standard of proof by a preponderance of the evidence. The statute requires only that the sentencing body be convinced beyond a reasonable doubt that the aggravating circumstances were marginally greater than the mitigating factors. This creates an unacceptable risk of arbitrary or capricious sentencing.

Additionally, the mitigating circumstances are vague. The jury must be given “specific and detailed guidance” and be provided with “clear and objective standards” for their sentencing discretion to be adequately channeled. Gregg; Godfrey v. Georgia, 446 U.S. 420 (1980).

Ohio courts continually hold that the weighing process and the weight to be assigned to a given factor are within the individual decision-maker’s discretion. State v. Fox, 69 Ohio St. 3d

dismissed regardless of mitigating circumstances. There is no corresponding provision for a capital defendant who elects to proceed to trial before a jury.

Justice Blackmun found this discrepancy to be constitutional error. Lockett v. Ohio, 438 U.S. 586, 617 (1978) (Blackmun, J., concurring). This disparity violated United States v. Jackson, 390 U.S. 570 (1968), and needlessly burdened the defendant's exercise of his right to a trial by jury. Since Lockett, this infirmity has not been cured and Ohio's statute remains unconstitutional.

4. Mandatory submission of reports and evaluations.

Ohio's capital statutes are unconstitutional because they require submission of the pre-sentence investigation report and the mental evaluation to the jury or judge once requested by a capital defendant. O.R.C. § 2929.03(D)(1). This mandatory submission prevents defense counsel from giving effective assistance and prevents the defendant from effectively presenting his case in mitigation.

5. O.R.C. § 2929.04(A)(7) is constitutionally invalid when used to aggravate O.R.C. § 2903.01(B) aggravated murder.

“[T]o avoid [the] constitutional flaw of vagueness and over breadth under the Eighth Amendment, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence of a defendant as compared to others found guilty of (aggravated) murder.” Zant v. Stephens, 462 U.S. 862, 877 (1983). Ohio's statutory scheme fails to meet this constitutional requirement because O.R.C. § 2929.04(A)(7) fails to genuinely narrow the class of individuals eligible for the death penalty.

O.R.C. § 2903.01(B) defines the category of felony-murderers. If any factor listed in O.R.C. § 2929.04(A) is specified in the indictment and proved beyond a reasonable doubt the defendant becomes eligible for the death penalty. O.R.C. §§ 2929.02(A) and 2929.03.

The scheme is unconstitutional because the O.R.C. § 2929.04(A)(7) aggravating circumstance merely repeats factors that distinguish aggravated felony-murder from murder. O.R.C. § 2929.04(A)(7) repeats the definition of felony-murder as alleged, which automatically qualifies the defendant for the death penalty. O.R.C. § 2929.04(A)(7) does not reasonably justify the imposition of a more severe sentence on felony-murderers. But, the prosecuting attorney and the sentencing body are given unbounded discretion that maximizes the risk of arbitrary and capricious action and deprivation of a defendant's life without substantial justification. The aggravating circumstance must therefore fail. Zant, 462 U.S. at 877.

As compared to other aggravated murderers, the felony-murderer is treated more severely. Each O.R.C. § 2929.04(A) circumstance, when used in connection with O.R.C. § 2903.01(A), adds an additional measure of culpability to an offender such that society arguably should be permitted to punish him more severely with death. But the aggravated murder defendant alleged to have committed during the course of a felony is automatically eligible for the death penalty — not a single additional proof of fact is necessary.

The killer who kills with prior calculation and design is treated less severely, which is also nonsensical because his blameworthiness or moral guilt is higher and the argued ability to deter him less. From a retributive stance, this is the most culpable of mental states. Comment, The Constitutionality of Imposing the Death Penalty for Felony Murder, 15 Hous. L. Rev. 356, 375 (1978).

Felony-murder also fails to reasonably justify the death sentence because this Court has interpreted O.R.C. § 2929.04(A)(7) as not requiring that intent to commit a felony precede the murder. State v. Williams, 74 Ohio St. 3d 569, 660 N.E.2d 724, syl. 2 (1996). The asserted state interest in treating felony-murder as deserving of greater punishment is to deter the commission of felonies in which individuals may die. Generally courts have required that the killing result from an act done in furtherance of the felonious purpose. Id., referencing the Model Penal Code. Without such a limitation, no state interest justifies a stiffer punishment. This Court has discarded the only arguable reasonable justification for the death sentence to be imposed on such individuals, a position that engenders constitutional violations. Zant, 462 U.S. 862. Further, this Court's current position is inconsistent with previous cases, thus creating the likelihood of arbitrary and inconsistent applications of the death penalty. See e.g., State v. Rojas, 64 Ohio St. 3d 131, 592 N.E.2d 1376 (1992).

Equal protection of the law requires that legislative classifications be supported by, at least, a reasonable relationship to legitimate State interests. Skinner v. Oklahoma, 316 U.S. 535 (1942). The State has arbitrarily selected one class of murderers who may be subjected to the death penalty automatically. This statutory scheme is inconsistent with the purported State interests. The most brutal, cold-blooded, and premeditated murderers do not fall within the types of murder that are automatically eligible for the death penalty. There is no rational basis or any State interest for this distinction and its application is arbitrary and capricious.

6. O.R.C. §§ 2929.03(D)(1) and 2929.04 are unconstitutionally vague.

O.R.C. § 2929.03(D)(1)'s reference to "the nature and circumstances of the aggravating circumstance" incorporates the nature and circumstances of the offense into the factors to be weighed in favor of death. The nature and circumstances of an offense are, however, statutory

mitigating factors under O.R.C. § 2929.04(B). O.R.C. § 2929.03(D)(1) makes Ohio's death penalty weighing scheme unconstitutionally vague because it gives the sentencer unfettered discretion to weigh a statutory mitigating factor as an aggravator.

To avoid arbitrariness in capital sentencing, states must limit and channel the sentencer's discretion with clear and specific guidance. Lewis v. Jeffers, 497 U.S. 764, 774 (1990); Maynard v. Cartwright, 486 U.S. 356, 362 (1988). A vague aggravating circumstance fails to give that guidance. Walton v. Arizona, 497 U.S. 639, 653 (1990), *vacated on other grounds* Ring v. Arizona, 536 U.S. 584 (2002); Godfrey, 446 U.S. at 428. Moreover, a vague aggravating circumstance is unconstitutional whether it is an eligibility or a selection factor. Tuilaepa v. California, 512 U.S. 967 (1994). The aggravating circumstances in O.R.C. § 2929.04(A)(1)-(8) are both.

O.R.C. § 2929.04(B) tells the sentencer that the nature and circumstances of the offense are selection factors in mitigation. Moreover, because the nature and circumstances of the offense are listed only in O.R.C. § 2929.04(B), they must be weighed only as selection factors in mitigation. See State v. Wogenstahl, 75 Ohio St. 3d 344, 356, 662 N.E.2d 311, 321-22 (1996). However, the clarity and specificity of O.R.C. § 2929.04(B) is eviscerated by O.R.C. § 2929.03(D)(1); selection factors that are strictly mitigating become part and parcel of the aggravating circumstance.

Despite wide latitude, Ohio has carefully circumscribed its selection factors into mutually exclusive categories. See O.R.C. § 2929.04(A) and (B); Wogenstahl, 75 Ohio St. 3d at 356, 662 N.E.2d at 321-22. O.R.C. § 2929.03(D)(1) makes O.R.C. § 2929.04(B) vague because it incorporates the nature and circumstances of an offense into the aggravating circumstances. The sentencer cannot reconcile this incorporation. As a result of O.R.C. § 2929.03(D)(1), the "nature

and circumstances” of any offense become “too vague” to guide the jury in its weighing or selection process. See Walton, 497 U.S. at 654. O.R.C. § 2929.03(D)(1) therefore makes O.R.C. § 2929.04(B) unconstitutionally arbitrary.

O.R.C. § 2929.03(D)(1) is also unconstitutional on its face because it makes the selection factors in aggravation in O.R.C. § 2929.04(A)(1)-(8) “too vague.” See Walton, 497 U.S. at 654. O.R.C. § 2929.04(A)(1)-(8) gives clear guidance as to the selection factors that may be weighed against the defendant’s mitigation. However, O.R.C. § 2929.03(D)(1) eviscerates the narrowing achieved. By referring to the “nature and circumstances of the aggravating circumstance,” O.R.C. § 2929.03(D)(1) gives the sentencer “open-ended discretion” to impose the death penalty. See Maynard, 486 U.S. at 362. That reference allows the sentencer to impose death based on (A)(1)-(8) plus any other fact in evidence arising from the nature and circumstances of the offense that the sentencer considers aggravating. This eliminates the guided discretion provided by O.R.C. § 2929.04(A). See Stringer v. Black, 503 U.S. 222, 232 (1992).

7. Proportionality and appropriateness review.

Ohio Revised Code §§ 2929.021 and 2929.03 require data be reported to the courts of appeals and to the Ohio Supreme Court. There are substantial doubts as to the adequacy of the information received after guilty pleas to lesser offenses or after charge reductions at trial. O.R.C. § 2929.021 requires only minimal information on these cases. Additional data is necessary to make an adequate comparison in these cases. This prohibits adequate appellate review.

Adequate appellate review is a precondition to the constitutionality of a state death penalty system. Zant, 462 U.S. at 879; Pulley v. Harris, 465 U.S. 37 (1984). The standard for review is one of careful scrutiny. Zant, 462 U.S. at 884-85. Review must be based on a comparison of

similar cases and ultimately must focus on the character of the individual and the circumstances of the crime. Id.

Ohio's statutes' failure to require the jury or three-judge panel recommending life imprisonment to identify the mitigating factors undercuts adequate appellate review. Without this information, no significant comparison of cases is possible. Absent a significant comparison of cases, there can be no meaningful appellate review. See State v. Murphy, 91 Ohio St. 3d 516, 562, 747 N.E.2d 765, 813 (2001) (Pfeifer, J., dissenting) ("When we compare a case in which the death penalty was imposed only to other cases in which the death penalty was imposed, we continually lower the bar of proportionality. The lowest common denominator becomes the standard.")

The comparison method is also constitutionally flawed. Review of cases where the death penalty was imposed satisfies the proportionality review required by O.R.C. § 2929.05(A). State v. Steffen, 31 Ohio St. 3d 111, 509 N.E.2d 383, syl. 1 (1987). However, this prevents a fair proportionality review. There is no meaningful manner to distinguish capital defendants who deserve the death penalty from those who do not.

This Court's appropriateness analysis is also constitutionally infirm. O.R.C. § 2929.05(A) requires appellate courts to determine the appropriateness of the death penalty in each case. The statute directs affirmance only where the court is persuaded that the aggravating circumstances outweigh the mitigating factors and that death is the appropriate sentence. Id. This Court has not followed these dictates. The appropriateness review conducted is very cursory. It does not "rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." Spaziano v. Florida, 468 U.S. 447, 460 (1984).

The cursory appropriateness review also violates the capital defendant's due process rights as guaranteed by the Fifth and Fourteenth Amendments to the Constitution. The General Assembly provided capital appellants with the statutory right of proportionality review. When a state acts with significant discretion, it must act in accordance with the Due Process Clause. Evitts v. Lucey, 469 U.S. 387, 401 (1985). The review currently used violates this constitutional mandate. An insufficient proportionality review violates Jason Dean's liberty interest in O.R.C. § 2929.05 that is protected by the Due Process Clause.

8. Ohio's statutory death penalty scheme violates international law.

International law binds each of the states that comprise the United States. Ohio is bound by international law whether found in treaty or in custom. Because the Ohio death penalty scheme violates international law, Dean's capital convictions and sentences cannot stand.

8.1 International law binds the State of Ohio.

"International law is a part of our law[.]" The Paquete Habana, 175 U.S. 677, 700 (1900). A treaty made by the United States is the supreme law of the land. Article VI, United States Constitution. Where state law conflicts with international law, it is the state law that must yield. See Zschernig v. Miller, 389 U.S. 429, 440 (1968); Clark v. Allen, 331 U.S. 503, 508 (1947); United States v. Pink, 315 U.S. 203, 230 (1942); Kansas v. Colorado, 206 U.S. 46, 48 (1907); The Paquete Habana, 175 U.S. at 700; The Nereide, 13 U.S. (9 Cranch) 388, 422 (1815); Asakura v. Seattle, 265 U.S. 332, 341 (1924). In fact, international law creates remediable rights for United States citizens. Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987).

8.2 Ohio's obligations under international charters, treaties, and conventions.

The United States' membership and participation in the United Nations (U.N.) and the Organization of American States (OAS) creates obligations in all fifty states. Through the U.N. Charter, the United States committed itself to promote and encourage respect for human rights and fundamental freedoms. Art. 1(3). The United States bound itself to promote human rights in cooperation with the U.N. Art. 55-56. The United States again proclaimed the fundamental rights of the individual when it became a member of the OAS. OAS Charter, Art. 3.

The U.N. has sought to achieve its goal of promoting human rights and fundamental freedoms through the creation of numerous treaties and conventions. The United States has ratified several of these including: the International Covenant on Civil and Political Rights (ICCPR) ratified in 1992, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) ratified in 1994, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) ratified in 1994. Ratification of these treaties by the United States expressed its willingness to be bound by these treaties. Pursuant to the Supremacy Clause, the ICCPR, the ICERD, and the CAT are the supreme laws of the land. As such, the United States must fulfill the obligations incurred through ratification. Former President Clinton reiterated the United States' need to fulfill its obligations under these conventions when he issued Executive Order 13107. In pertinent part, the Executive Order states:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and bearing in mind the obligations of the United States pursuant to the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination on All Forms of Racial Discrimination (CERD), and other relevant treaties concerned with the protection and promotion

of human rights to which the United States is now or may become a party in the future, it is hereby ordered as follows:

Section 1. Implementation of Human Rights Obligations.

(a) It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD.

Ohio is not fulfilling the United States' obligations under these conventions. Rather, Ohio's death penalty scheme violates each convention's requirements and thus must yield to the requirements of international law. (See discussion infra Subsection 1).

8.2.1 Ohio's statutory scheme violates the ICCPR's and ICERD's guarantees of equal protection and due process.

Both the ICCPR, ratified in 1992, and the ICERD, ratified in 1994, guarantee equal protection of the law. ICCPR Art. 2(1), 3, 14, 26; ICERD Art. 5(a). The ICCPR further guarantees due process via Articles 9 and 14, which includes numerous considerations: a fair hearing (Art. 14(1)), an independent and impartial tribunal (Art. 14(1)), the presumption of innocence (Art. 14(2)), adequate time and facilities for the preparation of a defense (Art. 14(3)(a)), legal assistance (Art. 14(3)(d)), the opportunity to call and question witnesses (Art. 14(3)(e)), the protection against self-incrimination (Art. 14(3)(g)), and the protection against double jeopardy (Art. 14(7)). However, Ohio's statutory scheme fails to provide equal protection and due process to capital defendants as contemplated by the ICCPR and the ICERD.

Ohio's statutory scheme denies equal protection and due process in several ways. It allows for arbitrary and unequal treatment in punishment. (See discussion infra § 1). Ohio's sentencing procedures are unreliable. (See discussion infra § 2). Ohio's statutory scheme fails to provide individualized sentencing. (See discussion infra § 1, 2). Ohio's statutory scheme

burdens a defendant's right to a jury. (See discussion infra § 3). Ohio's requirement of mandatory submission of reports and evaluations precludes effective assistance of counsel. (See discussion infra § 4). O.R.C. § 2929.04(B)(7) arbitrarily selects certain defendants who may be automatically eligible for death upon conviction. (See discussion infra § 5). Ohio's proportionality and appropriateness review is wholly inadequate. (See discussion infra § 7). As a result, Ohio's statutory scheme violates the ICCPR's and the ICERD's guarantees of equal protection and due process. This is a direct violation of international law and of the Supremacy Clause of the Constitution.

8.2.2 Ohio's statutory scheme violates the ICCPR's protection against arbitrary execution.

The ICCPR speaks explicitly to the use of the death penalty. The ICCPR guarantees the right to life and provides that there shall be no arbitrary deprivation of life. Art. 6(1). It allows the imposition of the death penalty only for the most serious offenses. Art. 6(2). Juveniles and pregnant women are protected from the death penalty. Art. 6(5). Moreover, the ICCPR contemplates the abolition of the death penalty. Art. 6(6).

However, several aspects of Ohio's statutory scheme allow for the arbitrary deprivation of life. Punishment is arbitrary and unequal. (See discussion infra § 1). Ohio's sentencing procedures are unreliable. (See discussion infra § 2). Ohio's statutory scheme lacks individualized sentencing. (See discussion infra § 1, 2). The (A)(7) aggravator maximizes the risk of arbitrary and capricious action by singling out one class of murderers who may be eligible automatically for the death penalty. (See discussion infra § 5). The vagueness of O.R.C. §§ 2929.03(D)(1) and 2929.04 similarly render sentencing arbitrary and unreliable. (See discussion infra § 6). Ohio's proportionality and appropriateness review fails to distinguish those who deserve death from those who do not. (See discussion infra § 7). As a result, executions in Ohio

result in the arbitrary deprivation of life and thus violate the ICCPR's death penalty protections. This is a direct violation of international law and a violation of the Supremacy Clause.

8.2.3 Ohio's statutory scheme violates the ICERD's protections against race discrimination.

The ICERD, speaking to racial discrimination, requires that each state take affirmative steps to end race discrimination at all levels. Art. 2. It requires specific action and does not allow states to sit idly by when confronted with practices that are racially discriminatory. However, Ohio's statutory scheme imposes the death penalty in a racially discriminatory manner. (See discussion infra § 1). A scheme that sentences blacks and those who kill white victims more frequently and which disproportionately places African-Americans on death row is in clear violation of the ICERD. Ohio's failure to rectify this discrimination is a direct violation of international law and of the Supremacy Clause of the United States Constitution.

8.2.4 Ohio's statutory scheme violates the ICCPR's and the CAT's prohibitions against cruel, inhuman or degrading punishment.

The ICCPR prohibits subjecting any person to torture or to cruel, inhuman, or degrading treatment or punishment. Art. 7. Similarly, the CAT requires that states take action to prevent torture, which includes any act by which severe mental or physical pain is intentionally inflicted on a person for the purpose of punishing him for an act committed. See Art. 1-2. As administered, Ohio's death penalty inflicts unnecessary pain and suffering, see discussion infra § I, in violation of both the ICCPR and the CAT. Thus, there is a violation of international law and the Supremacy Clause.

8.2.5 Ohio's obligations under the ICCPR, the ICERD, and the CAT are not limited by the reservations and conditions placed on these conventions by the Senate.

While conditions, reservations, and understandings accompanied the United States' ratification of the ICCPR, the ICERD, and the CAT, those conditions, reservations, and understandings cannot stand for two reasons. Article II, § 2 of the United States Constitution provides for the advice and consent of two-thirds of the Senate when a treaty is adopted. However, the Constitution makes no provision for the Senate to modify, condition, or make reservations to treaties. The Senate is not given the power to determine what aspects of a treaty the United States will and will not follow. Their role is to simply advise and consent.

Thus, the Senate's inclusion of conditions and reservations in treaties goes beyond that role of advice and consent. The Senate picks and chooses which items of a treaty will bind the United States and which will not. This is the equivalent of the line item veto, which is unconstitutional. Clinton v. City of New York, 524 U.S. 417, 438 (1998). The Supreme Court specifically spoke to the enumeration of the president's powers in the Constitution in finding that the president did not possess the power to issue line item vetoes. Id. If it is not listed, then the President lacks the power to do it. See id. Similarly, the Constitution does not give the power to the Senate to make conditions and reservations, picking and choosing what aspects of a treaty will become law. Thus the Senate lacks the power to do just that. Therefore, any conditions or reservations made by the Senate are unconstitutional. See id.

The Vienna Convention on the Law of Treaties further restricts the Senate's imposition of reservations. It allows reservations unless: they are prohibited by the treaty, the treaty provides that only specified reservations, not including the reservation in question, may be made, or the reservation is incompatible with the object and purpose of the treaty. Art. 19(a)-(c). The ICCPR specifically precludes derogation of Articles 6-8, 11, 15-16, and 18. Under the Vienna

Convention, the United States' reservations to these articles are invalid under the language of the treaty. See id. Further, the ICCPR's purpose is to protect the right to life and any reservation inconsistent with that purpose violates the Vienna Convention. Thus, United States reservations cannot stand under the Vienna Convention as well.

8.2.6 Ohio's obligations under the ICCPR are not limited by the Senate's declaration that it is not self-executing.

The Senate indicated that the ICCPR is not self-executing. However, the question of whether a treaty is self-executing is left to the judiciary. Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985) (Restatement (Second) of Foreign Relations Law of the United States, Sec. 154(1) (1965)). It is the function of the courts to say what the law is. See Marbury v. Madison, 5 U.S. 137 (1803).

Further, requiring the passage of legislation to implement a treaty necessarily implicates the participation of the House of Representatives. By requiring legislation to implement a treaty, the House can effectively veto a treaty by refusing to pass the necessary legislation. However, Article 2, § 2 excludes the House of Representatives from the treaty process. Therefore, declaring a treaty to be not self-executing gives power to the House of Representatives not contemplated by the United States Constitution. Thus, any declaration that a treaty is not self-executing is unconstitutional. See Clinton, 524 U.S. at 438.

8.3 Ohio's obligations under customary international law.

International law is not merely discerned in treaties, conventions and covenants. International law "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law." United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820).

Regardless of the source “international law is a part of our law[.]” The Paquete Habana, 75 U.S. at 700.

The judiciary and commentators recognize the Universal Declaration of Human Rights (DHR) as binding international law. The DHR “no longer fits into the dichotomy of ‘binding treaty’ against ‘non-binding pronouncement,’ but is rather an authoritative statement of the international community.” Filartiga, 630 F.2d at 883 (internal citations omitted); see also William A. Schabas, The Death Penalty as Cruel Treatment and Torture (1996).

The DHR guarantees equal protection and due process (Art. 1, 2, 7, 11), recognizes the right to life (Art. 3), prohibits the use of torture or cruel, inhuman or degrading punishment (Art. 5) and is largely reminiscent of the ICCPR. Each of the guarantees found in the DHR are violated by Ohio’s statutory scheme. (See discussion infra §§ 1-8). Thus, Ohio’s statutory scheme violates customary international law as codified in the DHR and cannot stand.

However, the DHR is not alone in its codification of customary international law. Smith directs courts to look to “the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law” in ascertaining international law. 18 U.S. (5 Wheat.) at 160-61. Ohio should be cognizant of the fact that its statutory scheme violates numerous declarations and conventions drafted and adopted by the United Nations and the OAS, which may, because of the sheer number of countries that subscribe to them, codify customary international law. See id. Included among these are:

1. The American Convention on Human Rights, drafted by the OAS and entered into force in 1978. It provides numerous human rights guarantees, including: equal protection (Art. 1, 24), the right to life, (Art. 4(1)), prohibition against arbitrary deprivation of life (Art. 4(1)),

imposition of the death penalty only for the most serious crimes (Art. 4(2)), no re-establishment of the death penalty once abolished (Art. 4(3)), prohibits torture, cruel, inhuman or degrading punishment (Art. 5(2)), and guarantees the right to a fair trial (Art. 8).

2. The United Nations Declaration on the Elimination of All Forms of Racial Discrimination proclaimed by U.N. General Assembly resolution 1904 (XVIII) in 1963. It prohibits racial discrimination and requires that states take affirmative action in ending racial discrimination.

3. The American Declaration of the Rights and Duties of Man adopted by the Ninth International Conference of American States in 1948. It includes numerous human rights guarantees: the right to life (Art. 1), equality before the law (Art. 2), the right to a fair trial (Art. 16), and due process (Art. 26).

4. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the U.N. General Assembly in Resolution 3452 (XXX) in 1975. It prohibits torture, defined to include severe mental or physical pain intentionally inflicted by or at the instigation of a public official for a purpose including punishing him for an act he has committed, and requires that the states take action to prevent such actions. Art. 1, 4.

5. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty adopted by the U.N. Economic and Social Council in Resolution 1984/50 in 1984. It provides numerous protections to those facing the death penalty, including: permitting capital punishment for only the most serious crimes, with the scope not going beyond intentional crimes with lethal or other extremely grave consequences (1), requiring that guilt be proved so as to

leave no room for an alternative explanation of the facts (4), due process, and the carrying out of the death penalty so as to inflict the minimum possible suffering (9).

6. The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, adopted and proclaimed by the U.N. General Assembly in Resolution 44/128 in 1989. This prohibits execution (Art. 1(1)) and requires that states abolish the death penalty (Art. 1(2)).

These documents are drafted by the people Smith contemplates and are subscribed to by a substantial segment of the world. As such they are binding on the United States as customary international law. A comparison of the §§ 1-9 clearly demonstrates that Ohio's statutory scheme is in violation of customary international law.

9. Conclusion.

Ohio's death penalty scheme fails to ensure that arbitrary and discriminatory imposition of the death penalty will not occur. The procedures actually promote the imposition of the death penalty and, thus, are constitutionally intolerable. Ohio Revised Code §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution and Article I, §§ 2, 9, 10, and 16 of the Ohio Constitution and international law. Jason Dean's death sentence must be vacated.⁶

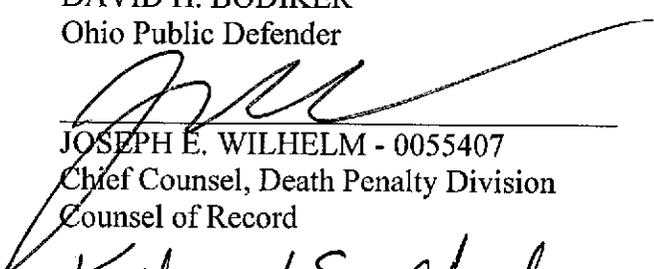
⁶ In State v. Jenkins, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984), this Court upheld this death penalty statute and this Court may, therefore, reject this claim on its merits if it disagrees with Dean's federal constitutional arguments. State v. Poindexter, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988).

CONCLUSION

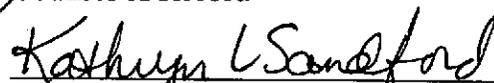
For each of the foregoing reasons, Appellant Jason Dean's convictions and death sentence must be reversed.

Respectfully submitted,

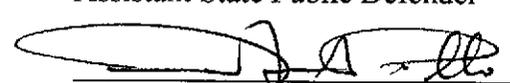
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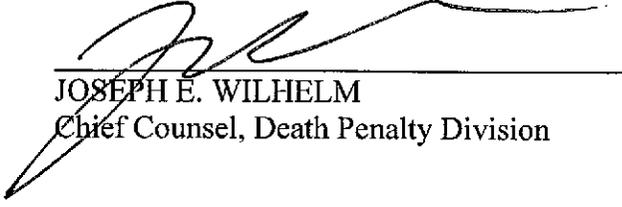
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MERIT BRIEF OF APPELLANT JASON DEAN and APPENDIX TO MERIT BRIEF OF APPELLANT was forwarded by regular U.S. Mail to Stephen Shumaker, Prosecuting Attorney, Darnell Carter, Assistant Prosecuting Attorney, and David Wilson, Assistant Prosecuting Attorney, Clark County, 50 E. Columbia Street, Springfield, Ohio 45502, on this 13th day of April, 2007.



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