In The Supreme Court of Ohio

State Of Ohio,	:	
Appellee,	:	
-Vs-	:	Case No. 05-2364
Kerry Perez,	:	**This Is A Capital Case.**
Appellant.	:	

On Appeal From the Court of
Common Pleas of Clark County
Case No. 03-CR-1010

REPLY BRIEF OF APPELLANT KERRY PEREZ

FILED
AUG 09 2007
CLERK OF COURT
SUPREME COURT OF OHIO

Stephen A. Schumaker – 0014643
Clark County Prosecutor

Clark County Prosecutor's Office
50 E. Columbia St.
Springfield, Ohio 45502
(937) 328-2574
(937) 328-2657 (FAX)

Counsel For Appellee

David H. Bodiker
Ohio Public Defender

Pamela J. Prude-Smithers – 0062206
Supervisor, Death Penalty Division
Counsel of Record

Brie A. Friedman – 0079414
Assistant State Public Defender

Robert K. Lowe – 0072264
Assistant State Public Defender

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394
(614) 644-0708 (FAX)

Counsel For Appellant

Table of Contents

Page No.

Table of Contents i

Table of Authorities iii

Preface v

Proposition of Law No. I 1

The trial court's failure to give the required narrowing construction to a course-of-conduct specification in a capital case creates a substantial risk that the death penalty will be inflicted in an arbitrary and capricious manner in violation of the United States Constitution. U.S. Const. amends. VIII and XIV. 1

Proposition of Law No. II 4

Where evidence of other crimes lacks a distinct behavioral fingerprint, such evidence is inadmissible. Even where such evidence may be admissible, undue emphasis on it may prejudice a capital defendant's right to a fair trial and reliable death sentence. U.S. Const. amends. V, VI, VIII, and XIV. 4

Proposition of Law No. III 6

The admission of taped statements of communications made between Perez and his wife without Perez's waiver of the marital privilege constituted a violation of Perez's right to exclude spousal testimony under Ohio law as well as his rights under the Due Process Clause of the United States Constitution. O.R.C. § 2317.02(D); U.S. Const. amend. VIII and XIV. 6

Proposition of Law No. IV 8

A pervasive pattern of police coercion violates a defendant's rights, as guaranteed by the Fifth Amendment and Due Process, to be free from compelled self-incrimination and renders a waiver of Miranda rights and subsequent confession involuntary and inadmissible at trial. U.S. Const. amends. V, XIV; Ohio Const. art. I, § 10. 8

Proposition of Law No. V 11

The trial court's admission of a taped conversation between a defendant and his wife, when the wife did not testify concerning the tape, constituted impermissible hearsay and violated the defendant's right to confrontation. U.S. Const. amend. VI. 11

Proposition of Law No. VI 13

Perez's right to effective assistance of counsel was violated when counsel's performance failed to meet the prevailing standards of practice, thus prejudicing Perez. U.S. Const. amends. VI, XIV; Ohio Const. art. I, § 10. 13

Proposition of Law No. VII 17

A defendant's right to a fair and impartial sentencing jury is denied when the trial court overrules a challenge for cause against a prospective juror who is biased in favor of capital punishment. 17

Proposition of Law No. IX 20

The failure of the trial court to merge duplicative capital specifications skews the weighing process and renders a death sentence invalid in violation of the Eighth and Fourteenth Amendments to the United States Constitution. 20

Proposition of Law No. X 22

A capital defendant is denied his substantive and procedural due process rights to a fair trial and reliable sentencing as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 9 and 16 of the Ohio Constitution when a prosecutor commits acts of misconduct during the trial phase and the sentencing phase of his capital trial. 22

Conclusion 26

Certificate of Service 27

Ohio R. Crim. P. 52 ..... A-1

Table of Authorities

Page No.

CASES

Berger v. United States, 295 U.S. 78 (1935) 22, 23, 24

Colorado v. Connelly, 479 U.S. 157 (1986) 9

Crawford v. Washington, 541 U.S. 36 (2004) 11, 12

Eddings v. Oklahoma, 455 U.S. 104 (1982) 14, 15, 25

Giglio v. United States, 405 U.S. 150 (1972) 15

Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995) 14

Gravley v. Mills, 87 F.3d 779 (6th Cir. 1996) 24

Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995) 15

Hartnett v. State, 42 Ohio St. 568 (1885) 18, 19

Illinois v. Perkins, 496 U.S. 292 (1990) 8

Irwin v. Dowd, 366 U.S. 717 (1961) 17

Kubat v. Thieret, 867 F.2d 351 (7th Cir. 1989) 14

Lockett v. Ohio, 438 U.S. 586 (1978) 25

McCall v. Dutton, 863 F.2d 454 (6th Cir. 1988) 9

Miranda v. Arizona, 384 U.S. 436 (1966) 9

Morgan v. Illinois, 504 U.S. 719 (1992) 17, 18, 19

Napue v. Illinois, 360 U.S. 264 (1959) 15

Rhode Island v. Innis, 446 U.S. 291 (1980) 9

Rompilla v. Beard, 545 U.S. 374 (2005) 13

Schledwitz v. United States, 169 F.3d 1003 (6th Cir. 1999) 15

Spano v. New York, 360 U.S. 315 (1959) 8

State v. Cornwell, 86 Ohio St. 3d 560, 715 N.E.2d 1144 (1999) 18, 19

State v. Jenkins, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984) 20

State v. Johnson, 24 Ohio St. 3d 87, 494 N.E.2d 1061 (1986) 18

State v. Madrigal, 87 Ohio St. 3d 378, 721 N.E.2d 52 (2000) 11

State v. Perryman, 49 Ohio St. 2d 14, 358 N.E.2d 1040 (1976), vacated on other grounds, 438 U.S. 911 (1978) 12

State v. Sapp, 105 Ohio St. 3d 104, 822 N.E.2d 1239 (2004) 2, 3

State v. Savage, 30 Ohio St. 3d 1, 506 N.E.2d 196 (1987) 6

State v. Slagle, 65 Ohio St. 3d 597, 605 N.E.2d 916 (1992) 12

State v. Tenace, 109 Ohio St. 3d 255, 847 N.E.2d 386 (2006) 13
State v. Tyler, 50 Ohio St. 3d 24, 553 N.E.2d 576 (1990) 18, 19
State v. Williams, 79 Ohio St. 3d 1, 679 N.E.2d 646 (1997) 18, 19
Strickland v. Washington, 466 U.S. 668 (1984) 14
Stringer v. Black, 503 U.S. 222 (1992) 20
United States v. Abel, 469 U.S. 45 (1984) 15
United States v. Young, 470 U.S. 1 (1985) 22, 23
White v. Mitchell, 431 F.3d 517 (6th Cir. 2005) 17, 18
Wiggins v. Smith, 539 U.S. 510 (2003) 13, 14
Woodson v. North Carolina, 428 U.S. 280 (1976) 14, 25
Zant v. Stephens, 462 U.S. 862 (1983) 25

CONSTITUTIONAL PROVISIONS

Ohio Const. art. I, § 9 ..... 22, 25
Ohio Const. art. I, § 10 ..... 8, 13
Ohio Const. art. I, § 16 ..... 19, 22
Ohio Const. art. I, § 20 25
U.S. Const. amend. V 4, 8, 10
U.S. Const. amend. VI ..... passim
U.S. Const. amend. VIII ..... passim
U.S. Const. amend. XIV ..... passim

STATUTES

O.R.C. § 2313.42 17
O.R.C. § 2317.02 ..... 6, 7
O.R.C. § 2929.04 3
O.R.C. § 2929.06 ..... 3, 16

OTHER AUTHORITIES

A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the "CSI Effect" Exist?, 9 Vand. J. Ent. & Tech. L. 331 (2006) 22

State v. Tenace, 109 Ohio St. 3d 255, 847 N.E.2d 386 (2006) 13
State v. Tyler, 50 Ohio St. 3d 24, 553 N.E.2d 576 (1990) 18, 19
State v. Williams, 79 Ohio St. 3d 1, 679 N.E.2d 646 (1997) 18, 19
Strickland v. Washington, 466 U.S. 668 (1984) 14
Stringer v. Black, 503 U.S. 222 (1992) 20
United States v. Abel, 469 U.S. 45 (1984) 15
United States v. Young, 470 U.S. 1 (1985) 22, 23
White v. Mitchell, 431 F.3d 517 (6th Cir. 2005) 17, 18
Wiggins v. Smith, 539 U.S. 510 (2003) 13, 14
Woodson v. North Carolina, 428 U.S. 280 (1976) 14, 25
Zant v. Stephens, 462 U.S. 862 (1983) 25

CONSTITUTIONAL PROVISIONS

Ohio Const. art. I, § 10 ..... 8, 13
Ohio Const. art. I, § 16 ..... 19, 22
Ohio Const. art. I, § 20 25
Ohio Const. art. I, § 9 ..... 22, 25
U.S. Const. amend. V 4, 8, 10
U.S. Const. amend. VI ..... passim
U.S. Const. amend. VIII ..... passim
U.S. Const. amend. XIV ..... passim

STATUTES

O.R.C. § 2313.42 17
O.R.C. § 2317.02 ..... 6, 7
O.R.C. § 2929.04 3
O.R.C. § 2929.06 ..... 3, 16

OTHER AUTHORITIES

A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the "CSI Effect" Exist?, 9 Vand. J. Ent. & Tech. L. 331 (2006) 22

Preface

Kerry Perez replies to the State's argument in Propositions of Law Nos. I, II, III, IV, V, VI, VII, IX, and X. The absence of a reply by Perez on other claims is to avoid reargument of the merit brief.

Proposition of Law No. I

> The trial court's failure to give the required narrowing construction to a course-of-conduct specification in a capital case creates a substantial risk that the death penalty will be inflicted in an arbitrary and capricious manner in violation of the United States Constitution. U.S. Const. amends. VIII and XIV.

The State's characterization of Perez's first proposition of law as "founded on a false factual premise" (Appellee's Brief at p. 18), and "a pure academic debate" (Appellee's Brief at p. 20), demonstrates a misunderstanding and mischaracterization of the issue.

The State's theory of the case with regard to the course of conduct specification depended on convincing the jury that Perez's course of conduct was "...that these individuals are robbing business establishments, both armed with firearms, and if there's resistance, they are going to kill. If there's not resistance, they're not going to kill, and the other aggravated robberies that are alleged shows that...That's what this course of conduct shows." (7/5/05 Mtn. Supp. Tr. 11,14). Although the trial court admitted the evidence of the other robberies which did not include a killing or attempt to kill under Evid. R. 404(B), the State proceeded to use the evidence to prove the course of conduct specification in conformity with its theory.

The State's response disingenuously relies on the trial court's admission of the evidence of the other robberies as "other acts" in an attempt to rebut Perez's argument. (Appellee's Brief at 18-19). This reliance disregards the fact that the State used this evidence for the improper purpose of proving the course of conduct specification. The State's use of the evidence to establish course of conduct is evident from where it purposely presented the evidence in a manner to make it appear that Perez was on a crime spree beginning with the robbery and attempted murder at the Beverage Oasis followed by a series of robberies, culminating in a robbery and murder. (Tr. 977-1079).

It is also evident from the trial transcript quote in the State's own response brief:

> Mr. Shumaker: [Prosecutor] Paragraph 25 in this case, I think that something should be in that paragraph as that evidence may be relevant to course of conduct. The way the paragraph is structured, it kind of tells them not to use it in determining course of conduct. I realize that that's the 404(B) instruction, but in the context of this case, I thought it might be somewhat misleading.

(Appellee's Brief at p. 19, citing Tr. 1693). This statement by the prosecutor at trial clearly indicates that the prosecution was using the evidence of the other robberies to prove the course of conduct specification, and wanted the jury to be explicitly instructed in such a manner.

Although the State did not get the trial court to instruct the jury in the explicit manner it wanted, it argued the robberies as support for the course of conduct specification, (tr. 996-1003, 1009-34, 774-77, 1621-22, 1658-60), and the trial court's failure to give a sufficient narrowing instruction left the jury with no impression other than that the robberies were to be considered as evidence of Perez's course of conduct.

As discussed at length in Perez's merit brief, State v. Sapp, 105 Ohio St. 3d 104, 112, 822 N.E.2d 1239, 1250 (2004), requires a factual link between course of conduct crimes. (See Appellant's Brief at pp. 12-13). The State used impermissible evidence—namely, unrelated robberies that did not include a killing or attempt to kill—as the factual link required by Sapp to prove the course of conduct specification.

Furthermore, the jury was instructed to consider the evidence of the other robberies to determine whether Perez had a plan to commit the offenses charged. (Jury Instructions p. 6). The prosecutor repeatedly argued Perez's "plan" as the course of conduct. (Tr. 774-77, 1621-22, 1658-60). It is inconceivable that the jury considered the evidence of the other robberies only to establish "plan" but ignored the evidence as proof of the course of conduct. The jury's request during penalty phase deliberations for specific information about the Sugarbaker's robbery lends

further support to Perez's contention that the jury took the evidence of the other robberies into consideration in determining whether the other crimes were part of the course of conduct.

The State further misstates Perez's argument regarding the Beverage Oasis and Do Drop Inn incidents by arguing that Perez contends that the Beverage Oasis and Do Drop Inn incidents should not have been included under the course of conduct specification. (Appellee's Brief at p.20). However, Perez's contention is that those incidents are the only two crimes with which Perez was charged that could have properly been admitted under the course of conduct specification, as they involved a killing and attempted killing, as required by O.R.C. § 2929.04(A)(5). Nonetheless, those two incidents do not support a finding by the jury of a course of conduct, as explained in Perez's Merit Brief. (See Appellant's Brief at pp. 15-17).

The trial court erred in allowing the State to introduce evidence of separate crimes to support the course of conduct specification. The evidence does not meet the statutory requirement, or fall under the interpretation of the (A)(5) specification in Sapp. 105 Ohio St. 3d 104, 322 N.E.2d 1239. Despite the trial court's characterization of the admission of the evidence as "other acts" evidence, for all intents and purposes at trial, the State treated the evidence as proof of the course of conduct specification. The jury was misled and Perez was prejudiced by the improper evidence of a course of conduct. His death sentence on the basis of this improperly presented specification is invalid. This Court must reverse Perez's convictions and order a new trial. Alternatively, Perez is entitled to a new penalty phase. See O.R.C. § 2929.06(B).

Proposition of Law No. II

> Where evidence of other crimes lacks a distinct behavioral fingerprint, such evidence is inadmissible. Even where such evidence may be admissible, undue emphasis on it may prejudice a capital defendant's right to a fair trial and reliable death sentence. U.S. Const. amends. V, VI, VIII, and XIV.

The State argues that the other acts evidence proves Perez's intent or purpose to shoot when victims were non-compliant. (Appellee's Brief at p. 23). The State grossly misrepresents the record to make this argument. First, there is no evidence that Perez ever had a plan or that he intended to shoot if his robbery victims were non-compliant. In fact, the State cites no evidence in support of its argument. The State instead looks at the Beverage Oasis incident in an attempt to prove its argument. However, the State misconstrues the facts of that incident. Its own evidence shows that Perez and Howard attempted to rob the Beverage Oasis. Clifford Conley, the owner, saw this occurring on security monitors and proceeded to open fire in defense of his drive-thru. (Tr. 880, 893). Then, while outside the drive-thru, Perez exchanged gunfire with Conley. (Tr. 897-901, 905). These facts do not show that there was a plan by Perez to shoot an individual when they did not comply with the robbery. The State misconstrues the facts in an attempt to justify the improper introduction of the other acts evidence under 404(B).

This is further evident since the State initially sought to introduce the other acts evidence to prove the course of conduct specification attached to the aggravated murder count. (Mtn. Supp. Tr. 8-9; Tr. 775). The trial court, however, ruled that the evidence was "admissible under Evid. R. 404(B)." (Dkt. 128, Tr. 766). From this ruling, the State simply produced this evidence without showing that there was ever a plan or that it was Perez's motive to shoot non-compliant victims. As argued by the State, "[t]he lack of shooting with compliant robbery victims would 'tend to show' that Perez intended to shoot both Clifford Conley and Ronald Johnson; that he

'purposefully' (and not accidentally) attempted to cause the death of Conley, and that Perez did in fact purposefully cause the death of Johnson. The shootings of Conley and Johnson weren't accidental, they were purposeful, and the other crimes 'tended to show' that fact." (Appellee's Brief at p. 23). This became the State's theory which was not based upon or proven by any evidence produced at trial. This is shown by the lack of evidentiary support for its theory in its merit brief. In contrast, Perez refers this Court to his merit brief in which he details the lack of any plan or modus operendi which supports his argument that this other acts evidence was improperly admitted under Evid. R. 404(B). The State argues against Perez's claim based upon its own theory of the case and has no factual or legal basis in opposition.

The State does cite to the record where Perez admits that it was an accident. (Id. at p. 24). It argues that since Perez admits that the shooting of Johnson was accidental than that proves that the admission of the other acts evidence was proper to prove that the shooting was purposeful. (Id.). As the State's argument stands, the other acts evidence was used to show that Perez acted in conformity with his bad behavior, i.e., if robbery victim is non-complaint, he would shoot. This is exactly the type of evidence forbidden by Ohio R. Evid. 404(B).

The introduction of the other acts evidence violated Perez's due process rights and Perez's convictions must be reversed and his case remanded for a new trial. Furthermore, the prejudicial impact during the penalty phase merits reversal of the death sentence.

Proposition of Law No. III

> The admission of taped statements of communications made between Perez and his wife without Perez's waiver of the marital privilege constituted a violation of Perez's right to exclude spousal testimony under Ohio law as well as his rights under the Due Process Clause of the United States Constitution. O.R.C. § 2317.02(D); U.S. Const. amend. VIII and XIV.

In response to Perez's third proposition of law, the State argues that Perez was aware that his wife intended to testify at trial and did not have an expectation of privacy during his conversations with his wife. (Appellee's Brief at p. 25). The State's arguments ignore the actual issue raised by Perez and Ohio's law on marital privilege. In fact, the State fails to cite to any case law in arguing against Perez's proposition of law. Of particular note is the State's failure to even acknowledge the existence of the Ohio Revised Code's statute making marital communications privileged or this Court's holding that allows the non-testifying spouse to apply a bar against such testimony. State v. Savage, 30 Ohio St. 3d 1, 2, 506 N.E.2d 196, 197 (1987); O.R.C. § 2317.02(D).

It is clear that Perez has the right under Ohio law to prohibit the testimony of communications made to his spouse regardless of whether his spouse elects in open court to testify. Id. Perez did not waive that privilege by communicating with his spouse while being visually watched at the county jail. The State argues that a county jail inmate could not expect to have a private conversation because there is always a third party present. (Appellee's Brief at p. 26). While there may always be guards present in the county jail, that does not lessen an inmate's ability to have a conversation outside of earshot of one of those guards. A review of the facts of the case demonstrate that is exactly what occurred in this case. Perez and his wife had a private conversation. The fact that a guard could see them when they had the conversation does not make the conversation any less private.

Perez made every effort to ensure the privacy of his communications. Perez did not openly converse with his wife so that others in the visiting room could hear. This is demonstrated by the fact that ultimately no person present in the visiting room was able to testify to anything in specific that Perez said to his wife. Although Deputy Spear was able to hear talking, he testified that he did not pay that much attention to what was going on. (8/17/04 Mtn. Supp. 273). If the State were able to succeed with their argument, a privilege could be destroyed anytime a conversation is made within eyesight of a third party because that third party could potentially attempt to hear the conversation.

The State further argues that a finding that Perez's conversation with his wife was private could very well mandate privacy during inmate visitations, and unwittingly lead to a serious threat to jail and prison security. (Appellee's Brief at p. 26). The State's argument defies logic. A finding that Perez had a conversation with his wife that he expected to remain private would simply mean that an inmate could make an effort to have a conversation outside of the earshot of a guard. It does not confer some substantive right to inmates, nor would it endanger the security of the prison.

The admission of the taped conversations between Perez and his wife violated Perez's right to exclude privileged spousal testimony pursuant to O.R.C. § 2317.02. The conversations did not openly take place in the presence of a third party. The fact that someone could have attempted to strain to overhear the conversation does not destroy the privilege. Perez asserted his privilege to exclude the communications. The admission of the tapes of the conversations was in violation of O.R.C. § 2317.02 and of Perez's right to due process under the Eighth and Fourteenth Amendments to the United States Constitution.

Proposition of Law No. IV

> A pervasive pattern of police coercion violates a defendant's rights, as guaranteed by the Fifth Amendment and Due Process, to be free from compelled self-incrimination and renders a waiver of Miranda rights and subsequent confession involuntary and inadmissible at trial. U.S. Const. amends. V, XIV; Ohio Const. art. I, § 10.

The State fails to argue against the issue presented by Perez—that the police scheme to secure a confession from Perez was a carefully crafted end-run around his Fifth Amendment rights, and that the police used Debra to exert psychological coercion on Perez, rendering his subsequent waiver of Miranda warnings involuntary.

Debra was used as an undercover police agent to apply enormous pressure on Perez in order to convince him to confess to the police. The scenario in this case is akin to the facts of Spano v. New York, 360 U.S. 315 (1959), as discussed at length in Perez's Merit Brief, where the United States Supreme Court specifically disapproved of a police scheme involving the use of a "childhood friend" of a suspect to coerce a confession. 360 U.S. at 323. (See Appellant's Brief at p. 47).

The State chooses to address only the issue of whether Perez should have been given Miranda warnings prior to his conversation with Debra, contending that Illinois v. Perkins, 496 U.S. 292 (1990), a case holding that a suspect is not entitled to Miranda warnings before being questioned by an undercover police agent, is controlling and dispositive of the issue. (Appellee's Brief at pp. 29-30). The State fails to explain how the facts of Perkins are similar to the situation involved in this case, or explain otherwise why Perkins is dispositive of this issue. (Id.). Additionally, the State fails to rebut any of the assertions made by Perez regarding the particular details of his conversations with Debra which differentiate this case from the facts of Perkins. (Appellant's Brief at pp. 43-44). Perez contends that he should have been given Miranda

warnings prior to being interrogated by Debra because (1) her statements were specifically designed to elicit incriminating responses from him, making her conversations with him the functional equivalent of an interrogation, Rhode Island v. Innis, 446 U.S. 291, 301 (1980); and (2) her interrogation of him was engineered in such a way that it created a coercive environment. See Miranda v. Arizona, 384 U.S. 436 (1966). (See Appellant's Brief at pp. 43-44).

However, Perez also argues that his ultimate confession to the detectives was not voluntary—an argument to which the State has no response. In fact, the State concedes that Perez subjectively believed that it was necessary to confess to the crimes to protect his wife. (Appellee's Brief at p. 28). The State's response to Perez's Merit Brief essentially agrees with Perez's contention that he was coerced into speaking to the police by Debra because he did not know she was secretly working as a police agent, (appellee's brief at p. 29, 31), that in Perez's subjective state of mind, he had no choice but to speak with the police in order to protect Debra, (appellee's brief at p. 28, 31), and that the pressure exerted by Debra was the motivating factor behind his decision to speak with the police. (Appellee's Brief at p. 31). The State's only response to this scheme is that it was good police work. (Appellee's Brief at p. 29). However, the State's concessions on these points demonstrate that the police's scheme rendered Perez's statement involuntary. Colorado v. Connelly, 479 U.S. 157 (1986); McCall v. Dutton, 863 F.2d 454 (6th Cir. 1988). (Appellant's brief at pp. 44-57).

Perez's decision to submit to an interview with the police was the product of coercive police tactics which violated his constitutional rights, and rendered his waiver of his Miranda rights involuntary. The admission of his involuntary confession at trial was prejudicial and deprived him of his due process right to a fair trial. (Appellant's Brief at pp. 58-60). The circumstances surrounding Perez's confession requires reversal of his conviction and death

sentence. The police tactics violated Perez's right against compelled self-incrimination and were a carefully orchestrated effort by the police in violation of his Fifth Amendment, Due Process, and Ohio Constitutional rights. This Court must reverse Perez's conviction and vacate his death sentence.

Proposition of Law No. V

> The trial court's admission of a taped conversation between a defendant and his wife, when the wife did not testify concerning the tape, constituted impermissible hearsay and violated the defendant's right to confrontation. U.S. Const. amend. VI.

The State argues that Perez did not raise a Sixth Amendment Confrontation Clause claim despite the fact that he objected to the introduction of the hearsay evidence admitted at trial. (Appellee's Brief at p. 33). This is incorrect. The State sought to introduce the tape recorded statements between Perez and his wife through the testimony of Detective DeWine, the officer who made the arrangements for the recording of the statements. (Tr. 1251, 1253). Defense counsel raised an objection to the admission of the tapes arguing that it was hearsay and that Debra had to be on the stand when they played the tapes in order to satisfy the exception to the hearsay rule. (Tr. 1253-55). Although defense counsel never referred to the Sixth Amendment Confrontation Clause, the nature of the objection was clear. Pursuant to constitutional requirements, Perez had the right to confront the individual providing the hearsay testimony. Therefore, Debra had to be on the stand when the tape was being played.

The central concern of the Confrontation Clause is to ensure the reliability of the evidence by subjecting it to vigorous testing in the context of an adversary proceeding before the trier of fact. State v. Madrigal, 87 Ohio St. 3d 378, 721 N.E.2d 52 (2000). See also Crawford v. Washington, 541 U.S. 36 (2004). The hearsay rules are constructed to achieve this same purpose, and trial counsel's objections to the evidence on the basis of hearsay should be construed to contain an implied objection on Confrontation Clause grounds.

It is impossible to separate the evidentiary rules from the Confrontation Clause requirements. Evidence offered against an accused that constitutes hearsay will, as a general rule, violate the right of confrontation. State v. Perryman, 49 Ohio St. 2d 14, 358 N.E.2d 1040

(1976), vacated on other grounds, 438 U.S. 911 (1978). Ohio's hearsay rules and exceptions were enacted to satisfy the constitutional requirements imposed by the Sixth Amendment's confrontation clause. The objection by defense counsel to the admission of Debra's testimony incorporated an objection under the Sixth Amendment Confrontation Clause. To require more than a hearsay objection would have been cumbersome and an interruption to the trial.

To the extent that this Court finds that there was not a proper Confrontation Clause objection, this Court should find that counsel were ineffective for failing to raise the objection as a Confrontation Clause error. Defense counsel's failure was particularly deficient given that the facts in Perez's case are nearly identical to the case scenario presented in the recent United States Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004). Such a similar fact pattern should have alerted defense counsel to the fact that there was not only a violation of Ohio's evidentiary rules, but also a violation of Perez's right to confront the witness under the Sixth Amendment Confrontation Clause.[1]

Because the tape recorded statements played at trial were testimonial and Debra was not unavailable to testify, the trial court should have required the State to put Debra on the stand and allow defense counsel an opportunity to cross-examine her. The trial court's admission of the tape without Debra's testimony violated Perez's right to Confrontation under the Sixth Amendment to the United States Constitution.

[1] Should this Court determine that defense counsel failed to object to the Confrontation Clause error, this Court can still review for plain error. See Crim R. 52(B); State v. Slagle, 65 Ohio St. 3d 597, 604, 605 N.E.2d 916 (1992).

Proposition of Law No. VI

> Perez's right to effective assistance of counsel was violated when counsel's performance failed to meet the prevailing standards of practice, thus prejudicing Perez. U.S. Const. amends. VI, XIV; Ohio Const. art. I, § 10.

A. Ineffective assistance mitigation phase

In response to Perez's sixth proposition of law asserting defense counsel's ineffective assistance of counsel, the State argues that defense counsel's failure to present any meaningful mitigation evidence was a strategy to avoid bad character evidence from being presented. (Appellee's Brief at p. 34-35). The State's speculation regarding defense counsel's strategy is not derived from any information that was placed on the record to confirm such strategy, but instead is something that the State has conjectured to dismiss the fact defense counsel failed to advocate on behalf of Perez. The State's argument also seems to be based on the false assumption that the only evidence defense counsel could have presented in mitigation was evidence of good character. (Appellee's Brief at p. 35). However, a review of the United States Supreme Court and Ohio case law on evidence relevant to ineffective assistance of counsel claims demonstrates that a wealth of mitigation evidence exists that can and should be presented that does not go to a defendant's good character, and therefore would not open the door to bad character evidence. Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins v. Smith, 539 U.S. 510 (2003); State v. Tenace, 109 Ohio St. 3d 255, 272-73, 847 N.E.2d 386, 402-03 (2006).

In reaching a determination on an ineffective assistance of counsel claim, a reviewing court cannot make the illogical and unfounded leap made by the State that the mitigation case was sparse because it had to be. (Appellee's Brief at p. 44). The Supreme Court has warned against a tendency to invoke "strategy" as a "post-hoc rationalization of counsel's conduct

[rather] than an accurate description of their deliberations prior to sentencing" to explain counsel's decisions. Wiggins, 539 U.S. at 527.

The State argues that "one sure way to keep the door closed to the mitigation jury learning of the defendant's long history as a violent career criminal is to keep the mitigation presentation brief." (Appellee's Brief at p. 36). Keeping the mitigation presentation brief and not providing any information to the jury is also one sure way to ensure that your client receives a death sentence. An advocate has to provide the jury with evidence to demonstrate why a sentence less than death is appropriate. That evidence may take many forms other than evidence of good character. The purpose of mitigation is to provide a complete picture of the defendant and humanize him in the eyes of the jury. Moreover, counsel should be familiar with recent case law from the United States Supreme Court which stresses the importance of mitigation evidence and the importance of properly presenting such evidence. No reasonable attorney can believe that the best strategy is to leave the jury with incomplete information so that the jury, who has already convicted the client of aggravated murder, will not find out that the client has a bad character.

The sentencing phase is likely to be "the stage of the proceeding where counsel can do his or her client the most good." Glenn v. Tate, 71 F.3d 1204, 1207 (6th Cir. 1995) (quoting Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989)). It is defense counsel's obligation to humanize and personalize their client: to have the jurors see not merely a murderer, but a person in who we see the "diverse frailties of humankind." Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion). Perez had the right to present and to have the jury consider all of the mitigating evidence available in his case. Strickland v. Washington, 466 U.S. 668, 706 (1984) (Brennan, J., concurring in part and dissenting in part) (citing Eddings v. Oklahoma, 455

U.S. 104 (1982)). The paucity of mitigation presented by counsel demonstrates that defense counsel did not take the necessary time to prepare a case sufficient to even attempt to convince the jury that the aggravating circumstances did not outweigh the mitigating factors. Counsel's ineffectiveness effectively sealed Perez's fate.

B. Ineffective assistance-trial phase

The State also took issue with Perez's argument that defense counsel did an inadequate job of cross examining Debra Perez. The State argues that Debra's motive for testifying against Perez was inconsequential and not viable grounds for impeachment of her testimony. (Appellee's Brief at p. 42). Contrary to the State's argument, evidence that the State induced Debra to cooperate with the prosecution's theory of the case, without disclosing that inducement, is material evidence which proves Debra's bias and impeaches her credibility. See United States v. Abel, 469 U.S. 45, 51 (1984); Giglio v. United States, 405 U.S. 150, 154-155 (1972); Napue v. Illinois, 360 U.S. 264, 270 (1959); Schledwitz v. United States, 169 F.3d 1003, 1008 (6th Cir. 1999). In order for the jury to reach a conclusion on Debra's credibility, it was important that trial counsel question her regarding potential benefits so the jury could know that this was a witness who had an incentive to testify in a way that helped the government. Defense counsel's failure to do so was deficient.

Perez was prejudiced by counsel's deficient performance both during the trial and sentencing phases. The cumulative effect of defense counsel's errors and omissions as set forth in Perez's brief, infringed upon Perez's Sixth Amendment right to effective assistance of counsel. See Harris v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995) (counsel's errors assessed for cumulative effect on defendant's right to fair trial). His convictions must be reversed and his

case remanded for a new trial. Alternatively, his death sentence must be vacated and his case remanded for re-sentencing. See O.R.C. § 2929.06(B).

Proposition of Law No. VII

> A defendant's right to a fair and impartial sentencing jury is denied when the trial court overrules a challenge for cause against a prospective juror who is biased in favor of capital punishment.

The State completely ignores the Ohio Revised Code and the law of this Court to argue against Perez's claim that the trial court erred in overruling the challenge for cause against prospective juror Ronald Dirlam. Ohio Rev. Code Ann. § 2313.42(J) (Anderson 2006) establishes when a prospective juror should be removed for cause: when "he discloses by his answers that he cannot be a fair and impartial juror **OR** will not follow the law as given to him by the court." (Emphasis added.) The provisions of O.R.C. § 2313.42(J) are posed in the alternative; if either factor exists, an individual is not fit to serve on a jury. The State continues to ignore the first part of O.R.C. § 2313.42(J) and argues that that only relevant inquiry as to whether a juror is fit to serve is whether he/she will follow the law. (Appellee's Brief at p. 49). This is incorrect as a juror must be fair and impartial. See Irwin v. Dowd, 366 U.S. 717 (1961); Morgan v. Illinois, 504 U.S. 719, 726 (1992); White v. Mitchell, 431 F.3d 517, 537 (6th Cir. 2005).

Looking at Juror Dirlam's voir dire and juror questionnaire, one theme remained consistent: once an individual is convicted of a purposeful killing, death is automatic and that mitigating evidence would not make a difference. Juror Dirlam could not be fair and impartial under O.R.C. § 2313.42(J). The most important inquiry is not how the juror answers the leading questions "can you be fair," or "can you follow the law," but instead how the juror answers all questions concerning bias.

Dirlam's responses to defense counsel's questions made clear that he considered mitigating evidence entirely irrelevant. Dirlam said, "No. Background of the person should not

[be mitigating]," and that remorse would not make any difference. (Tr. 280). He also stated that once a defendant is found guilty of a purposeful killing, the inquiry is over and death is the only appropriate sentence. (Tr. 280). Dirlam's voir dire is also consistent with his responses on his juror questionnaire. He would require a criminal defendant to prove his innocence, regardless of the law. (Question 54(d)). Dirlam also wrote that there are too many loopholes making it too hard for police and prosecutors to convict. (Question 62). Dirlam was consistent and unambiguous in voir dire and on his questionnaire that he would not be fair and impartial and would be unable to follow the law as instructed by the trial court. This was an unambiguous expression of bias under Morgan, 504 U.S. at 729. See also White, 431 F.3d at 537-42. The trial court had a duty to excuse Dirlam for cause in light of Morgan. See State v. Johnson, 24 Ohio St. 3d 87, 91, 494 N.E.2d 1061, 1065 (1986) (trial court has duty to protect the rights of the accused).

The State argues that even if Juror Dirlam should have been dismissed, Perez has no claim because he exercised a peremptory challenge to correct the trial court's error. (Appellee's Brief at p. 50). This is completely incorrect. This Court has consistently held that "where the defense exhausts its peremptory challenges before the full jury is seated, the erroneous denial of a challenge for cause in a criminal case may be prejudicial." State v. Cornwell, 86 Ohio St. 3d 560, 564, 715 N.E.2d 1144, 1150 (1999); citing Hartnett v. State, 42 Ohio St. 568, syl. 4 (1885); State v. Tyler, 50 Ohio St. 3d 24, 30-31, 553 N.E.2d 576, 586-87 (1990); State v. Williams, 79 Ohio St. 3d 1, 8, 679 N.E.2d 646, 655 (1997). Perez has a claim of error for the trial court's failure to remove Dirlam who was peremptorily struck by defense counsel.

Kerry Perez was prejudiced when the trial court failed to excuse Ronald Dirlam for cause. The erroneous ruling gave Perez "fewer peremptories than the law provides" to remove

Juror Soledad Fitzwater. See Cornwell, 86 Ohio St. 3d at 564, 715 N.E.2d at 1150; Hartnett, 42 Ohio St. 568, syl. 4; Tyler, 50 Ohio St. 3d at 30-31, 553 N.E.2d at 586-87; Williams, 79 Ohio St. 3d at 8, 679 N.E.2d at 655. Accordingly, Kerry Perez's right to due process under the Fourteenth Amendment and Article I, § 16 of the Ohio Constitution was violated and "the State is disentitled to execute [his death] sentence." See Morgan, 504 U.S. at 729.

Proposition of Law No. IX

> The failure of the trial court to merge duplicative capital specifications skews the weighing process and renders a death sentence invalid in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

At trial, the State's theory was that the robberies were a course of conduct. (Tr. 8-9, 1658-59). Based upon this argument, the State was permitted to introduce evidence related to the aggravated robberies for the purpose of showing "a unique identifiable plan of criminal activity which are probative as to the identity of the Defendant...." (Dkt. 128). This Entry limited the aggravated robbery evidence only to show a course of conduct. Now the State argues that these crimes are separate events and not "the 'same act'" in order to argue against merger. (Appellee's Brief at p. 54). The State simply may not have it both ways. The trial court should have merged the two aggravating circumstances. See State v. Jenkins, 15 Ohio St. 3d 164, 200, 473 N.E.2d 264, 296-97 (1984).

In applying the holding in Jenkins, this Court should conclude that the trial court, in Perez's case, was obligated to merge the aggravated robbery specification with the course of conduct specification. The evidence presented at trial established that there was a string of robberies and Ronald Johnson was murdered during the course of the Do Drop Inn robbery. Furthermore, the State specifically argued that the robberies were part of the course of conduct. (Tr. 8-9, 1658-59). Since the act of murder during the commission of an aggravated robbery arose from the same indivisible course of conduct in the present case, the two specifications should have been merged for the jury's consideration.

The instructions the trial court provided failed to merge the capital specifications, thus impermissibly tilting the proceedings in favor of death. Stringer v. Black, 503 U.S. 222 (1992).

Perez's death sentence therefore violates the Eighth and Fourteenth Amendments to the United States Constitution.

Proposition of Law No. X

> A capital defendant is denied his substantive and procedural due process rights to a fair trial and reliable sentencing as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 9 and 16 of the Ohio Constitution when a prosecutor commits acts of misconduct during the trial phase and the sentencing phase of his capital trial.

In an attempt to explain his misconduct, the prosecutor either ignores or misstates Perez's claims to justify his improper arguments at trial.

The prosecutor vouched for police officers.

In response to Perez's claim that he vouched for police officers, the prosecutor argues that he "was explaining that the police fully investigated the Beverage Oasis crime scene, in an attempt to head off unrealistic 'CSI' expectations." (Appellee's Brief at p. 55). In support of this argument, the prosecutor cites to *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the "CSI Effect" Exist?*, 9 Vand. J. Ent. & Tech. L. 331 (2006). The prosecutor's reliance on this article is misplaced as it concludes that there is no "CSI effect" among juries. Id. at 367. The findings of the study found that watching "CSI or a similar show did not have a causative impact on juror demands for scientific evidence as a condition of a guilty verdict in most criminal case scenarios." Id. Although the prosecutor may feel he must explain the lack of physical evidence, he must do so within the bounds of the law. Vouching for the investigation by the police officers is an improper method as this carries the "imprimatur of the Government" and is forbidden. See United States v. Young, 470 U.S. 1, 18-19 (1985) (citing Berger v. United States, 295 U.S. 78, 88-89 (1935)). Vouching for police officers in an attempt to explain a non-existent theory is improper and highly prejudicial.

Next, the prosecutor argues that he was simply "reminding the jury of the overwhelming evidence of guilt, as patently displayed by Perez's own words". (Appellee's Brief at p. 55). If

the prosecutor was truly commenting on the strength of evidence then why argue and note that "the police had a wonderful plan". (Tr. 1631-32). The prosecutor's argument in his brief is simply a stretch to justify his improper arguments at trial. If there was overwhelming evidence of guilt, there is no need to comment on the police officers' plan. The prosecutor simply does not get this as he acknowledges that he "referred to police officers in a general sense, and did so in context of the hard work behind a thorough investigation." This is the prosecutor's opinion and it is completely improper as stated by the United States Supreme Court. See Young, 470 U.S. 1, 18-19 (citing Berger v. United States, 295 U.S. 78, 88-89 (1935)).

The prosecutor's vouching for police officers permitted the jury to resolve any doubts it had about the officers' testimony in favor of the State. This deprived Perez of a fair trial and due process.

Presentation of irrelevant and prejudicial other acts evidence.

The prosecution diverts this Court's attention away from the issue by focusing on the Beverage Oasis robbery evidence. This robbery evidence was conceded by defense counsel as being proper during this trial. However, the Beverage Oasis robbery is not the main contention for this issue. See Proposition of Law No. II. The main thrust of this issue is the presentation of witnesses called to discuss the Nite Owl Tavern, 19th Hole, Sugarbaker's, and Lantern Bar robberies. Not once does the prosecution attempt to argue that this evidence was proper. Since this testimony was never linked to the facts and circumstances of Johnson's murder, it is irrelevant and the presentation thereof was entirely inappropriate.

As for the Cecil Howard evidence, this was also inappropriate. The prosecution argues that it was necessary to prove identity. (Appellee's Brief at pp. 56-57). However, identity was not at issue since Perez confessed to his participation in the Beverage Oasis robbery. The extent

of evidence presented that applied only to Howard was irrelevant, misleading, and prejudicial to Perez. The prosecution deliberately put forth this irrelevant evidence and was improper.

Sentencing phase: improper argument of the aggravating circumstances and mischaracterized mitigation evidence.

Yet again, the prosecutor fails to argue against the issue presented by Perez and simply defends his comments as being proper because he says so. The evidence shows and as stated in his opening statement, Perez was remorseful. (Tr. 783). However, the prosecutor then argued that Perez was not remorseful. (Tr. 1762). The issue is the prosecutor's deliberate misstatement of the evidence that was presented and acknowledged in his opening statement. As an officer of the Court, it is improper for the prosecutor to purposefully mislead the jury by misstating the evidence. See Berger v. United States, 295 U.S. 78, 85 (1935).

Next, the prosecutor believes that he is permitted to appeal to the fears and passions of the jurors in order to secure a death sentence. (Appellee's Brief at p. 59). However, this directly contradicts the law of the United States Supreme Court as he is a servant of the law, not above it. See Berger, 295 U.S. at 88. See also Gravley v. Mills, 87 F.3d 779, 789 (6th Cir. 1996) (citing Berger, 295 U.S. at 88). The prosecutor improperly argued public policy to secure a death sentence.

Lastly, the prosecutor mischaracterizes Perez's claim to this Court in attempt to show he committed no misconduct. At trial, the prosecutor argued that Perez was "assigned to hold people at gunpoint and make the decision as to whether to kill or not to kill." (Tr. 1747). The prosecutor defends this claim by saying he may comment on this because it goes to the course of conduct. (Appellee's Brief at p. 59.) What the prosecutor ignores, is that the record is completely void of any evidence that Howard and Perez ever formulated a plan and assigned duties during the commission of the robberies. The prosecutor's argument fabricating facts not in

evidence violated his duty to be a servant of the law and denied Perez individualized sentencing as guaranteed by the Eighth and Fourteenth Amendments. See Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976) (plurality opinion).

The prosecutor's conduct was improper and a deliberate disregard of the law. The prosecutor's arguments deprived Perez of a fair trial and due process. U.S. Const. amends. VI, XIV. Moreover, the State's misconduct during the sentencing phase of Perez's trial deprived him of a reliable sentence as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution, as well as Article I, §§ 9, 16, and 20 of the Ohio Constitution. Perez's conviction and sentence must be vacated and this case remanded.

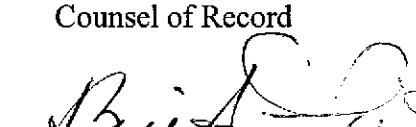
Conclusion

For each of the foregoing reasons, this Court must reverse Kerry Perez's convictions and remand for a new trial. Alternatively, his death sentence must be vacated and his case remanded for a new penalty phase hearing.

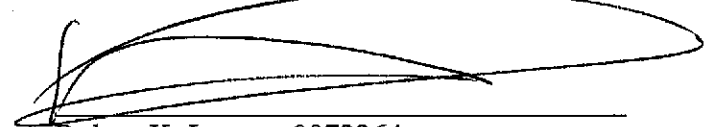
Respectfully submitted,

David H. Bodiker
Ohio Public Defender

Pamela J. Prude-Smithers – 0062206
Supervisor, Death Penalty Division
Counsel of Record



Brie A. Friedman – 0079414
Assistant State Public Defender



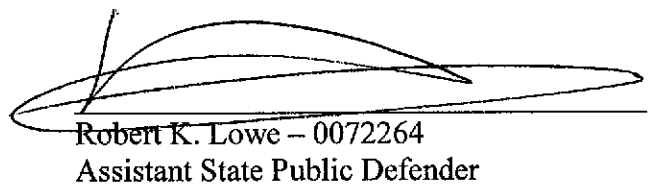
Robert K. Lowe – 0072264
Assistant State Public Defender

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394
(614) 644-0708 (FAX)

Counsel For Appellant

Certificate of Service

I hereby certify that a true copy of the Reply Brief of Appellant Kerry Perez and Appendix to Reply Brief of Appellant Kerry Perez was forwarded by regular U.S. Mail to Stephen A. Schumaker, Clark County Prosecutor, 50 E. Columbia Street, Springfield, Ohio 45502 this 9th day of August, 2007.



Robert K. Lowe – 0072264
Assistant State Public Defender

261916

In The Supreme Court of Ohio

State Of Ohio,	:	
Appellee,	:	
-Vs-	:	Case No. 05-2364
Kerry Perez,	:	**This Is A Capital Case.**
Appellant.	:	

On Appeal From the Court of
Common Pleas of Clark County
Case No. 03-CR-1010

APPENDIX TO REPLY BRIEF OF APPELLANT KERRY PEREZ

David H. Bodiker
Ohio Public Defender

Pamela J. Prude-Smithers – 0062206
Supervisor, Death Penalty Division
Counsel of Record

Brie A. Friedman – 0079414
Assistant State Public Defender

Robert K. Lowe – 0072264
Assistant State Public Defender

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394
(614) 644-0708 (FAX)

Counsel For Appellant

Stephen A. Schumaker – 0014643
Clark County Prosecutor

Clark County Prosecutor's Office
50 E. Columbia St.
Springfield, Ohio 45502
(937) 328-2574
(937) 328-2657 (FAX)

Counsel For Appellee

LEXSTAT OHIO CRIM. R. 52

OHIO RULES OF COURT SERVICE
Copyright © 2007 by Matthew Bender & Company, Inc.
a member of the LexisNexis Group.
All rights reserved.

*** RULES CURRENT THROUGH UPDATES RECEIVED JULY 15, 2007***
*** ANNOTATIONS CURRENT THROUGH MAY 14, 2007 ***

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 52 (2007)

Rule 52. Harmless Error and Plain Error

(A) Harmless error.

Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(B) Plain error.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.