

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellee

vs.

DUANE ALLEN SHORT

Defendant-Appellant

CASE NO. 06-1366

On Appeal from the
Montgomery County
Court of Appeals,
Second Appellate District

Common Pleas Court
Case No. 04-CR-2635

DEATH PENALTY CASE

APPELLEE'S MERIT BRIEF

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Statement Of The Case

I. Procedural History

A. The indictment: On September 20, 2004, Duane Short was charged by indictment with three counts of aggravated murder with capital specifications, breaking and entering, aggravated burglary, unlawful possession of dangerous ordnance, and six firearm specifications. The indictment breaks down as follows:

Count One	Breaking and Entering – R.C. 2911.13(B) Firearm specification – R.C. 2929.145
Count Two	Aggravated Murder – R.C. 2903.01(A); Firearm specification – R.C. 2941.145 Two capital specifications - R.C. 2929.04(A)(5) and 2929.(A)(7) (Donnie R. Sweeney)
Count Three	Aggravated Burglary – R.C. 2911.11(A)(2) Firearm specification – R.C. 2941.145
Count Four	Aggravated Murder – R.C. 2903.01(A) Firearm specification – R.C. 2941.145 Two capital specifications - R.C. 2929.04(A)(5) and 2929.04(A)(7) (Rhonda M. Short)
Count Five	Aggravated Murder – R.C.2903.01(B) Firearm specification – R.C. 2941.145 Two capital specifications - R.C. 2929.04(A)(5) and 2929.04(A)(7) (Rhonda M. Short)
Count Six	Unlawful Possession of Dangerous Ordinance – R.C. 2923.17(A) Firearm specification – R.C. 2941.145

B. Appointment of Counsel: The court appointed qualified counsel, who accepted discovery, suggested that Short was incompetent to stand trial, and filed a motion to suppress.

C. Short informs the court that he wishes to plead guilty and waive all mitigation evidence: At the hearing on Short's competence to stand trial, on January 13, 2005, counsel stipulated that the evaluating psychologist would testify in conformity with his report, leading the court to find Short competent. (Tr. 10-11)

Against the advice of counsel and after having been cautioned by the court, Short stated that, although he respected his attorneys' advice, he had given the matter much thought and had decided that he wanted to withdraw his motion to suppress, enter guilty pleas to the charges, and offer nothing in mitigation. (Tr. 11-13) He also said that if his attorneys filed motions against his will, he would represent himself and discharge them from all duties except to act as advisory counsel. (Tr. 13) He assured the court that he was fully competent and aware of what he was asking for. (Tr. 13) Defense counsel told the court that they had spent a great deal of time trying to dissuade him from the path he was choosing, but he would not be deterred. (Tr. 14) Counsel also asked the court to review the decision in *State v. Ashworth*, 85 Ohio St.3d 56, 1999-Ohio-204, 706 N.E.2d 1231 before it took any action.

At a hearing the next day, January 14, 2005, Short told the judge that despite counsels' "prodding," he had not changed his mind. (18-19) She reminded him that his decision must be voluntary, and that he could change his mind and withdraw his request to plead guilty and waive mitigation. (Tr. 19-20) She also ordered a second evaluation, this one focusing on his competence to

plead guilty and waive all mitigation in conformity with the Court's decision in *State v. Ashworth*, supra. (Tr. 24-26) The court set the competence hearing for March 16, 2005.

But there was no hearing on that date because Short and the state were in plea negotiations, which, if successful, would make such a hearing unnecessary. Short signed a limited time waiver, and the court continued the "*Ashworth*" hearing. (Tr. 32- 36) Back in court one week later, Short had changed his mind: there would be no plea, and he wished to proceed on his motion to suppress. (Tr. 38-39) At Short's request, the court continued the "*Ashworth*" hearing until June 6, the date set for the suppression hearing. (Tr. 42-43) Short signed a time waiver and the court set a schedule for filing motions. (Tr. 42)

D. Short agrees to plead guilty in exchange for a life sentence: The parties were back in court on May 19, 2005. Although the court had received Dr. Kim Stookey's report on Short's competence to plead guilty and waive all mitigation, it did not make a finding because he had accepted the terms of a negotiated plea offer: he would plead guilty to all charges and specifications in the indictment, and the state would stipulate that the aggravating circumstances did not outweigh the mitigating factors. The court would sentence him to two consecutive terms of life without parole, consecutive to seven years. (Plea Agreement, filed May 19, 2005, Tr. 47)

That day, the judge reviewed each charge in the indictment with Short in the presence of his attorneys, as well as each specification, and every aspect of the

plea agreement. (Tr. 46-89) She also discussed the procedure that would be used in taking his pleas and imposing sentence, the rights he would give up by doing so, and confirmed that he had discussed the agreement with counsel. (Tr. 48-89) She asked him to explain the terms of the agreement to her, and he did. (Tr. 82-89) He acknowledged that he was aware that under the terms of the agreement he would remain in prison for the rest of his life. (Tr. 83-85) The court set June 6 and 7 for the three-judge panel to convene to take Short's plea, receive the stipulations, and impose sentence. (Tr. 88-89) The signed plea agreement was filed later that day.

E. Short goes to trial: On June 3, 2005, Short repudiated the agreement. (Tr. 91-96) His family had retained new counsel, who immediately asked for a continuance, filed a new motion to suppress, and, over the next few months, filed between 70 or 80 motions on Short's behalf. The case went to trial in late April 2006. Defendant was advised of his right to testify, but chose not to do so. (Tr. 2298-2299) The jury found him guilty of all counts and specifications. (Tr. 2446-2457)

On Monday, May 8, 2006, before the sentencing phase of the trial began, counsel advised the court that Short did not wish to introduce any additional evidence in mitigation. (Tr. 2465) Counsel said that they had done a thorough mitigation investigation in preparation for this part of the trial, including interviewing members of Short's family, but Short wanted no additional evidence given to the jury. (Tr. 2465) The court conducted a long colloquy with Short to

determine whether he understood his right to put on additional evidence in mitigation, the purpose of mitigation evidence, the nature of mitigation evidence, and the consequences of his choice. (Tr. 2465-2479)

The State asked the court to readmit the evidence it presented in the culpability phase of the trial. The defense did not object, and the court did so. The defense, in turn, asked that all defense evidence admitted in the guilt phase be re-admitted, which the court did. (Tr. 2482-2484, 2496-2497) In closing argument, defense counsel asked the jury to consider how hurt his client was when Rhonda left him, and to remember that his crimes were confined to seven hours of his 36 years on earth, during which time he was a husband who loved his wife, a father who worked hard to take care of his family, and a good employee. (Tr. 2052-2510) Nevertheless, the jury recommended death on all three counts of aggravated murder. (Tr. 2542) Sentencing was set for May 24, 2006.

F. Short asks to present additional evidence to the court before sentencing: The day before the court was to impose sentence, Short filed a motion for leave to present additional mitigation evidence to the court. The court postponed the sentencing to allow the parties to brief the issue.

G. Imposition of Sentence: On May 30, 2006, the judge overruled the motion to put on additional evidence, adopted the jury's recommendations, and sentenced Short to death for the murders of Rhonda Short and Donnie Sweeney. (Tr. 2582). Before announcing the sentence, however, she gave her reasons for overruling the motion to present additional evidence, allowed the defense to renew

its objection to her refusal to order the children to meet with counsel, and accepted a letter from Short's son Justin for her consideration in mitigation. (The State did not object) (Tr. 2559) Short delivered a long allocution. (Tr. 2561-2580)

II. Summary of Evidence and Trial Proceedings:

A. The State's Case: In the summer of 2004, Rhonda Short was living in Middletown with her husband and their three children, Justin, Tiffany, and Jesse. Her husband, Duane Short, was jealous, suspicious, and controlling, and her marriage was deteriorating. (Tr. 1715-1717, 1739) Twelve-year old Tiffany heard her father threaten to kill Rhonda if she ever left him, and Rhonda's friend Amy Spurlock was at the house in May or June of 2004 when Duane came in waving a newspaper article about a man who had killed his wife after she left him. When Rhonda refused to read the article, Duane read it to her. He told her that if she ever left him or was unfaithful, he'd kill her, the children, and himself. (Tr. 1715, 1776-1778, 1784)

But on July 15, 2004 she did leave him, taking the two younger children with her. She sent Justin, who was 14, back to stay with his father with a letter. (Tr. 1719, 2151-2153) Rhonda was careful to keep Duane from tracking her down after she left him - she and the two children spent their first few nights in motel rooms. Five days after leaving Duane, Rhonda and the two children moved into a house on Pepper Drive in Huber Heights that her friend Brenda Barion helped her find and pay for. (Tr. 1721-1723, 1754, 1792, 1796) Brenda Barion was a Sunday School teacher, as was Rhonda, and it was she who provided Rhonda with the

money to rent the rooms and get the house. She went with Rhonda to rent furniture for the house, but the application asked for so much information that Rhonda wouldn't fill it out, fearing that Short would try to track her by any paper trail she might have left. (Tr. 1796) She used her maiden name to sign up for utilities for the same reason. (Tr. 1795-1796)

Duane Short spent the week that Rhonda left him looking for her, and he took Justin with him everywhere he went. He was convinced that she was having an affair with Donnie Sweeney, Brenda Barion's son, although there was no evidence that she was; Sweeney was a friend from church, and he had gone with Rhonda and the children to the Dairy Queen or McDonald's after Sunday services once or twice. (Tr. 1737, 1765, 2153-2155) At an evening church service on July 21 he told his cousin that he had been thinking about killing Sweeney. (Tr. 1818-1819) He also contacted Barion more than once to quiz her about Rhonda's whereabouts and her relationship with Sweeney. (Tr. 1795, 1810) Rhonda talked to Duane on her cell phone in the days after she left, but she did not tell him where she was staying. (Tr. 1723)

On July 22, using Rhonda's social security number and a made-up story, Short convinced a service representative of Dayton Power and Light to give him Rhonda's new address: 5033 Pepper Drive, Huber Heights. (Tr. 1843-1852, 1858-1862) With that information and with Justin in tow, he went looking for her again. After finding the house, he swapped trucks with his boss, bought a shotgun, ammunition, and a hacksaw, and rented a room so he could saw off the barrel of

the gun. (Tr. 1931, State's Ex. 90A, 110, 1952-1958, 2164-2175) Justin, who thought his dad meant to shoot only Sweeney, sat on the gun to steady it as his father cut it up with the hacksaw. (Tr. 2175-2176) Short told his son he had to shoot Sweeney, and he asked him if he thought he should get married again. (Tr. 2175)

On the same day, Brenda sent Donnie to the house on Pepper Drive to drop off a grill and some other household items for Rhonda and the children. He stayed to help them plant flowers and have a cookout. (Tr. 1723-1725) When Short walked onto the property that evening with the shotgun, Rhonda was in the shower, the two kids were watching TV, and Sweeney was in the backyard at the grill. Tiffany heard Sweeney say "No, man, Please. Stop," and then she heard a gunshot. (Tr. 1727-1728) Short pushed past Tiffany and Jesse on his way inside the house, pausing only to cock the gun. (Tr. 1758, 2138) The children ran out the door, past Sweeney's body, and to a nearby residence. (Tr. 1730-1731, 1757) Once inside the house on Pepper Drive, Short kicked in the bathroom door to get to Rhonda and shot her in the chest. (Tr. 1991, 1998-2000, 2239)

Meanwhile, Mr. and Mrs. Patrick had called 911 after Tiffany and Jesse, wild with fear and grief, arrived at their door. Tiffany spoke to the 911 operator while Jesse lay curled up on the couch, crying and sick to his stomach. (Tr. 1690-1694, 1699-1708)

The first officers to arrive on the scene saw Short leaning into the driver's-side door of a white pick-up truck parked in the grass at 5035 Pepper Drive. (Tr.

1965-1970) Ignoring the officers' orders to stop, he walked from the truck toward the back of the house. (Tr. 1965-1967) Eventually the police put Short and Justin, who had gone into the house after the shooting long enough to embrace his mother one last time, on the ground. (Tr. 1968, 2179) They found Donnie Sweeney's body in the backyard. (Tr. 1971, 1988) Rhonda Short, who had a massive gunshot wound to her chest, died several hours later at Miami Valley Hospital. (Tr. 1990-1992, 2244)

Police found the shotgun, the hacksaw, a map to 5053 Pepper Drive, and other evidence in the truck Short drove to the scene. They also collected wood and metal shavings from the room that Short rented to saw off the gun. The bathroom door at 5053 Pepper Drive was kicked in, and the lock was in the fixed position. (Tr. 2107-2116)

Short was calm and cooperative after being taken into custody. (Tr. 1972)

B. The Defense Case: The defense sought to show that Short was guilty of something less than aggravated murder. To support that theory, Short introduced the testimony of a police officer who went to his house on the night Rhonda left him and the next day. According to this officer, Short was very emotional and crying on the 15th and only somewhat better the next day. (Tr. 2292-2297)

The court informed Short of his right not to testify, and Short stated that after consulting with counsel, he'd decided not to do so. (Tr. 2298-2299)

C. Sentencing Phase: Before the penalty phase of the trial began, Short informed the court that he did not wish to present any additional mitigating

evidence, and the court conducted an “*Ashworth*” inquiry. (Tr. 2465-2477) The State and the defense both asked that all evidence from the culpability phase be readmitted, and the court did so. (Tr. 2496- 2497) The jury recommended a death sentence.

D. Imposition of Sentence: The court denied Short’s motion for leave to present mitigation evidence to the court on the capital counts, finding that the penalty phase of the trial was meant for that. (Tr. 2255-2258) The court did admit, without objection, a letter from Justin. Short then made a lengthy allocution. (Tr. 2561-2573) The court sentenced him to death.

Argument

Proposition of Law No. I:

A defendant in a capital case generally has the right to control his defense and may voluntarily choose not to introduce additional evidence of mitigation at the penalty phase of his trial.

It is a mistake to say that Short waived mitigation because he didn’t. He waived the opportunity to present additional evidence in mitigation. Tr. (2465-2466) Mitigation evidence had been admitted in the penalty phase, and from that, Short’s lawyers were able to argue forcefully at the end of the mitigation phase that a man who had led a life of decency for 36 years should not die for what grief and rage drove him to do over the course of seven hours. (Tr. 2502- 2510) The argument cast Short in the role of a good man who fought the demons that were driving him to violence as long as he could before he snapped. (Tr. 2505-2506, 2507, lines 7-10, 2508, lines 8-11) Thus, Short put on a simple and powerful

mitigation case that drew on evidence introduced at the trial in an attempt to show that he should not receive a death sentence.

What's more, only waiver of all mitigation evidence triggers the requirement of an *Ashworth* inquiry. *State v. Barton*, 108 Ohio St.3d 402, 2006-Ohio-1324, 844 N.E. 2d 307, ¶ 48. Short, who was not waiving all mitigation, had two: the first on May 19, 2005, when he intended to plead guilty and waive mitigation; and the second, a year later when he announced that he did not want to introduce additional evidence in the mitigation phase of his trial.

At the second, just before the mitigation phase opened, the court made a careful inquiry and found that:

- Short had stated to the court that he did not wish to present additional mitigation evidence.
- He had been evaluated twice as to mental competence, once as it related to his ability to stand trial and once, by Dr. Stookey, on his ability to waive all mitigation. Both times, the psychologist found him to be competent. Those evaluations included oral interviews, standard psychological testing, and relied on such collateral sources of information as court documents, investigative documents, and Short's statements to police.
- He rationally and logically answered the questions the court put to him that day.
- He appeared to be intelligent, based on his responses, and he possessed the logical and rational capacity to make this decision.
- Dr. Stuckey and previous counsel thoroughly discussed mitigation with Short and advised him of his rights, and counsel had stressed the need to present mitigation.

- He was presently competent to understand the choice between life and death and to make a knowing and intelligent decision not to pursue the presentation of mitigation evidence, and he fully understood the ramifications of the decision.
- His waiver of right to put on additional evidence in mitigation was knowing, intelligent, and voluntary waiver.

(Tr. 2475-2480)

The court's finding that he was competent to make that choice was supported by a) an unrebutted presumption of competence under R.C. 2945.37(G); b) two psychological reports documenting his understanding of the proceedings and his ability to assist the defense, one of which specifically addressed his ability to waive all mitigation under *Ashworth*; c) his answers to the second *Ashworth* inquiry, which showed that he could reason logically, knew the nature and purpose of mitigating evidence, and knew that the jury might be less inclined to recommend a life sentence if he introduced no additional evidence; and d) the representations from counsel that they had fully discussed the issue with him.

Contrary to Short's argument, his remarks at sentencing do not advance his cause. He gave the court a good reason for not wanting to introduce additional evidence in mitigation:

"But today, in this courtroom I would like to make it known what I said to my counsel and the reason I personally didn't want to put on mitigation, and that reason was that I felt like what little mitigation I had was insignificant compared to the aggravated circumstances and it would not bear much weight for the consideration of the jurors' recommendation for sentencing. And I-and I just wanted everything to be over with." (Tr. 2570)

(The record calls into question the accuracy of his next statement, which was that counsel had told him that putting on mitigation evidence was not part of their strategy. Counsel prepared a mitigation case as described above, and Short told the Court on May 8 that his attorneys had emphasized the importance of mitigation evidence, and he had made his decision despite counsels' advice. [Tr. 2473])

He also told the court at mitigation that the only thing he regretted about the proceedings was not presenting his allocution to the jury as an unsworn statement: "Other than that, I don't regret anything concerning the rights and opportunities that has been giving-given me during this portion or any other portion of the trial." (Tr. 2571)

A defendant is entitled to decide what he or she wants to argue and present as mitigation in the penalty phase of a capital trial. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 140. A capital defendant generally has the right to control the defense. *State v. Barton*, 108 Ohio St.3d 402, 2006-Ohio-1324, 844 N.E.2d 307, ¶ 47.

Short could not have been more clear on the morning that the penalty phase of the hearing was to begin: He did not want to put on additional mitigation evidence. He did not make the decision on the fly – not only had he been considering it since before the jury found him guilty of the crimes and had discussed it with his attorneys, he had talked about it with his first set of lawyers and gave it a great deal lot of thought then. (Tr. 2471) The colloquy between

Short and the court demonstrated that he had knew what he was doing, had discussed it with his attorneys, was aware of the nature of mitigating evidence and the possible consequences of the path he was choosing. (Tr. 2466- 2480) Nothing that occurred after that undermined the court's finding that he had made a voluntary choice not to put on additional evidence.

This part of his argument fails.

Proposition of Law No. II:

R.C. 2929.19(A) does not apply to the imposition of sentence for aggravated murder in a capital case.

After the jury returned its verdicts and recommended a death sentence for each aggravated murder, Short asked the court to grant him a sentencing hearing at which he could introduce additional information for the court's consider in mitigation. (Tr. 2545-2551) He relied on R.C. 2929.19(A):

The court shall hold a sentencing hearing before imposing a sentence under this chapter upon an offender who was convicted of or pleaded guilty to a felony * * * At the hearing, the offender, the prosecuting attorney, the victim or the victim's representative in accordance with section 2930.14 of the Revised Code, and, with the approval of the court, any other person may present information relevant to the imposition of sentence in the case. * * *

The judge denied Short's request, finding that the imposition of sentence in a capital case is governed by a specific set of statutes. (Tr. 2545, line 15-17, 2255-2258) On appeal, he presents this as a violation of his right to Due Process of law under the Eighth and Fourteenth Amendments to the United States Constitution

and Article I, Sec. 9 and 16 of the Ohio Constitution. He is wrong for a number of reasons.

First, R.C. 2929.02(A) takes aggravated murder out of the general felony sentencing scheme:

Whoever is convicted of or pleads guilty to aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022, 2929.03, and 2929.04 of the Revised Code * * *

Thus, R.C. 2929.02(A) renders R.C. 2929.19(A) inapplicable to sentencing in aggravated murder cases.

Sentencing in capital cases is governed instead by R.C. 2929.03(C)(2)(b), which says that when the defendant has been found guilty of aggravated murder and at least one of the specifications alleged in the indictment, the penalty must be determined under R.C. 2929.03(D) and (E). R.C. 2929.03(D)(1) precludes the introduction of additional mitigation evidence to the court after the jury has recommended a death sentence:

R.C. 2929.03(D)(1) provides that all mitigation evidence must be presented to the jury, if the offender was tried by a jury, and the reports requested must be requested immediately following the guilt phase so that they may be presented to the jury. A defendant may not wait for an unfavorable jury recommendation before presenting all relevant evidence in mitigation of sentence.

State v. Roe (1989), 41 Ohio St.3d 18, 36, 535 N.E. 2d 1351.

This court has already established that when a defendant is charged with aggravated murder and death-penalty specifications, the statutes that pertain to the prosecution of capital cases apply, not the law governing

other felonies. See e.g. *State v. Harwell*, 102 Ohio St.3d 128, 2004-Ohio-2149, 807 N.E.2d 330; *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 121-124; *State v. Parker*, 95 Ohio St.3d 524, 2002-Ohio-2833, 769 N.E.2d 846, syllabus.

As put by the court in *State v. Hollingsworth* (2001), 149 Ohio App.3d 562, 567, 758 N.E.2d 713, aggravated murder is governed by a special statutory scheme, carries a mandatory punishment, is not classified by the degree of felony, and is expressly exempted from the Senate Bill 2 sentencing requirements applicable to felonies of lesser degrees.

This Court rejected Short's theory in *State v. Roe*, supra at 36, and he has not shown grounds for reconsidering the decision.

Finally, there is no proffer of the information Short wanted to present to the court. Evid.R. 103(A)(2), Cf. *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, 857 N.E.2d 547, ¶ 124. Mitigation evidence in the sentencing phase of a capital trial is to be liberally allowed, but the court can exclude evidence that is not relevant to the sentencing decision, and relevance is governed by the Rules of Evidence. *State v. Dixon*, 101 Ohio St.3d 328, 2004-Ohio-1585, 805 N.E.2d 1042, ¶67; Cf. *State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 678, ¶ 30. Without a proffer, it is impossible to determine whether the evidence was even admissible, much less persuasive.

This part of Short's argument fails to win him relief.

Proposition of Law No. III:

Due Process does not require the court to strike a witness's testimony, hold a lengthy evidentiary hearing, or order a witness to speak to opposing counsel when there is no evidence that the prosecution obstructed access to the witness.

A. Introduction: Short asserts that the court violated his right to Due Process by refusing to hold a hearing on the question of whether the Victim-Witness Division of the Prosecutor's Office was behind his lawyers' inability to interview his children in preparation for trial. He is mistaken: first, defense counsel admitted that they had no evidence that anyone from the Victim-Witness Division interfered with their access to the children; second, the court held a hearing on that issue and the evidence failed to suggest any improper action by the state; third, Short had the opportunity to call additional witnesses at that proceeding and did not do so; and finally, Short has not alleged, much less demonstrated, prejudice by not interviewing his children before they testified at his trial.

B. Governing Law: Generally, a prosecution witness for the State has the right to refuse an extra-judicial pre-trial interview, deposition, or examination by an agent of the defendant, as long as the prosecuting attorney has not obstructed access to the witness. *State v. Zeh* (1987), 31 Ohio St.3d 99, 102, 509 N.E.2d 414. Prejudice is unlikely if the witness whom the defense wanted to interview testifies at trial and is subject to cross-examination. Cf. *State v. Green*, 90 Ohio St.3d 352, 373, 738 N.E.2d 1208.

C. Pertinent Facts: About a month before trial, Short asked the trial court for an order allowing counsel to interview his children, which the State opposed on the grounds that the children and their legal custodians, not the court, should decide whether they would discuss the case with their father's lawyers. (Motion, Apr. 4, 2006; Memorandum Contra, Apr. 6, 2006) At a pre-trial conference, counsel for Short informed the court that children's Guardian Ad Litem ("GAL") would not arrange an interview because the children's legal guardians opposed it. (Tr. 295-297) Counsel later specifically stated that there was no evidence that the State interfered with his ability to speak to the children, but he noted that one of the legal guardians either has discussed the matter with an advocate from the Victim-Witness Division of the Montgomery County Prosecutor's Office, or intended to do so. (Tr. 1044-1045)

At the end of Justin Short's direct examination at trial, the defense asked the court to strike his testimony because the State had not disclosed what Short had said to him on the day of the crimes, specifically, that Short had told Justin he had to kill Sweeney or that he'd asked Justin if he ought to remarry. (Tr. 2181-2189) The defense also asked for a hearing to determine whether the State had interfered with its access to the children, although they again admitted they had no evidence that the State had done so. (Tr. 2192-2193) The assistant prosecutors argued that they had provided open-file discovery to the defense under Crim.R. 16 and the Local Rule, neither of which required disclosure of any oral statements the defendant may have made to his son. (Tr. 2190-2192) The State also noted that

the defense informed the court before trial began that there was no evidence that the State had interfered with the witnesses, and they'd not yet produced any evidence to the contrary. (Tr. 2190-2192) Counsel for the defense, however, told the court that he believed that someone from the Victim-Witness Division of the Prosecutor's Office may have been involved in the legal guardians' decision not to allow the interviews with the children. (Tr. 2196, lines 14-25)

As a result of this allegation, the court recessed the trial and called Jeffrey Livingston, the GAL, to the courtroom for a hearing. (Tr. 2197) Livingston testified that he spoke to all of the legal guardians for the children about meeting with defense counsel, and as far as he knew, no one from the Victim-Witness Division of the Prosecutor's Office was involved in the decision not to allow the interviews. (Tr. 2199-2206) The defense declined the court's invitation to put on more evidence, and the court overruled the motion, finding no evidence of interference on the part of the State. (Tr. 2206, Decision and Entry, May 4, 2006)

D. Argument: Short's argument is that Justin's recital on direct examination of his father's statements required the court to either strike his testimony or hold a hearing to find out if a victim advocate from the prosecutor's office had interfered with counsels' ability to set up interviews with the children. But the defense agreed that they had no evidence of interference, and the court did hold a hearing, at which the GAL testified that as far as he knew, no one from the Victim-Witness Division of the Prosecutor's Office was involved in the decision not to allow the interviews. (Tr. 2192-2193, 2196-2197, 2203-2204) And

although the victim witness advocates were in the courtroom until the judge asked them to step out, Short's attorneys did not call upon them to testify. (Tr. 2188, line 12-17) Thus, there is simply no evidence that anyone associated with the State did anything to prevent Short's attorneys from meeting with the children.

What's more, Short has not shown that he was prejudiced by not interviewing the children before the trial. The children all testified and were all subject to cross-examination, and Short has not shown that prior knowledge of his statements to Justin would have aided the defense in any material way. He has not shown a constitutional violation. Cf. *State v. Green*, 90 Ohio St.3d 352, 373, 2000-Ohio-182, 738 N.E.2d 1208.

Short is not entitled to relief on this claim.

Proposition of Law No. IV:

Counsel were not ineffective.

To prevail on a claim of ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. To demonstrate deficiency, a defendant must show that counsel's representation fell below an objective standard of reasonableness. *Strickland*, supra. Even assuming that counsel's performance was deficient, a defendant must still show that the error had an effect on the judgment. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, 538 N.E.2d 373. Reversal is warranted only where a defendant demonstrates

that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.*

A. Interviews with the children: With their father in jail and their mother dead, Duane Short's three children were put in the custody of legal guardians, and a Guardian Ad Litem was appointed for them. Through the Guardian Ad Litem, the legal guardians for the children refused to allow their father's lawyers to interview them before the trial. However, at some point in the conversations between defense counsel and the Guardian Ad Litem ("GAL") about setting up a meeting, defense counsel said that the GAL told him that one of the legal guardians was planning to speak to someone from the Victim-Witness Division of the Prosecutor's Office before deciding whether to permit the interview. He did not know whether the legal guardian had done so, but the interview never occurred (Tr. 1046) Defense counsel never said that the anyone from the prosecutor's office or its Victim-Witness Division obstructed access, they said they wanted to find out if anyone had, and their only basis was the hearsay conversation counsel recalled. The court granted a hearing, took testimony from the GAL who said he did not know whether one of the legal guardians had called a Victim-Witness Advocate, and he did not recall telling defense counsel that she planned to do so. (Tr. 2203-2204) There was nothing more for counsel to do.

In any case, Short has never specified how not being able to interview his children in preparation for trial hampered his ability to defend against the charges or prevented him from eliciting evidence that could be used in mitigation. The

defense had been given open-file discovery in this case, which included a written statement from Justin. And since Short never denied the killings, it is not clear how lack of access to the children deprived him of a defense or otherwise deprived him of a fair trial. Without a showing of prejudice, he cannot prevail on a claim of ineffective assistance of counsel.

B. Officer Rosenbalm's testimony: The record shows that Officer Mike Rosenbalm saw Short at his house the night Rhonda left, and Short was an emotional wreck. (Tr. 2293) Rosenbalm stayed at the house for an hour that night and came back the next day, when he found Short still upset, but not as emotional as the night before. (Tr. 2292) Testimony that Short was threatening suicide that evening and had a gun, which is what the defense sought to show through the witness, even if allowed, would have had limited value in mitigation since it would have been pertinent to Short's state of mind a full week before the killings. It also would have been offset by evidence that he was well enough to work his regular schedule that week. (Tr.1895)

D. Mitigation: There is no doubt that the defense prepared a mitigation case. At the end of March, counsel asked for an extension of time to file its list of mitigation witnesses, and Mr. Katchmer informed the court that he would be interviewing Short's parents in a few days and would provide the prosecution with any discoverable mitigation information he obtained. (Tr. 272) He also said then that the defense did not anticipate putting on any psychological evidence if the case proceeded to a mitigation hearing. (Tr. 272) (The two witness lists the

defense eventually filed do not identify the persons named as culpability-phase witnesses or witness in mitigation. Witness list, filed Apr. 6, 2006, Supplemental list, filed Apr. 21, 2006) After trial began, counsel informed the court that the defendant did not intend to call any family members if there was a mitigation hearing. (Tr. 2272) It is also clear that Short agreed not to engage a mitigation specialist. (Tr. 2466)

Early on, when Short seemed to change his mind about a possible plea deal, the court made a point of telling him that it intended to make sure his rights were honored, and that his re-thinking the plea deal was not a problem: “Sir, in some ways you’re driving the train * * * .” (Tr. 43) Short did drive the train – he called the shots from the outset. He rejected his first set of attorneys’ advice and declared his intention to plead guilty and waive all mitigation. When his attorneys obtained a plea deal that would prevent imposition of the death penalty, he accepted it, then repudiated it. When he stood before the court for imposition of sentence, he said the his only regret throughout the proceedings was that he’d followed counsel’s advice and not delivered his allocution as an unsworn statement to the jury. Short controlled his defense, and it was he who decided not to present additional evidence in mitigation. Counsel cannot be faulted for the consequences of the choices Short voluntarily made when he was “driving the train.”

E. Definition of mitigation factors: The court instructed the jurors on mitigating factors just before they retired to deliberate in the penalty phase of the

trial. (Tr. 2515-2516) Short cites no authority to suggest that the court must define mitigation for the prospective jurors in voir dire, or that counsel violated an essential duty by not insisting on a definition in voir dire. Without a showing of breach of an essential duty and consequent prejudice. *Strickland v. Washington*, supra.

F. International Law: Counsel had no obligation to challenge the constitutionality of Ohio's death penalty statutes when that argument has been rejected again and again by this Court.

Short has failed to show that counsel was ineffective.

Proposition of Law No. V:

The trial court properly overruled Short's pre-trial motion to prevent the State from referring to the nature and circumstances of the offense until raised by the defense, but his claim fails because the State did not do so.

Appellant correctly notes that this Court has previously ruled against him on this issue: guilt-phase evidence bearing on the nature and circumstances of the offense is not categorically inadmissible in the penalty phase simply because it is introduced by the prosecution rather than the defense. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160 ¶ 127-128, 840 N.E.2d 1032.

In addition, since the state never used nor referred to the nature and circumstances of the offense before being raised by the defense, Short could not have been prejudiced by the trial court's disposition of his motion.

There is no error here.

Proposition of Law No. VI:

Ohio's capital sentencing scheme does not violate international law.

Short argues that his death sentence violates international law and must be vacated. His failure to raise this objection in the trial court means he has forfeited the claim. *State v. Bey* (1999), 85 Ohio St.3d 487, 502, 709 N.E.2d 484.

Nonetheless, this Court has rejected the argument that Ohio's death penalty statutes are in violation of treaties to which the United States is a signatory many times. *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283; 855 N.E.2d 48, ¶ 178; certiorari denied (2007), 127 S.Ct. 2266, 167 L.Ed.2d 1105; *State v. Bey*, supra; *State v. Phillips*, 74 Ohio St. 3d 72, 103-104, 1995-Ohio-171, 656 N.E.2d 643. See also *Jamison v. Collins* (S.D. Ohio 2000) 100 F. Supp. 2d 647, 676-677; *United States v. Bin Laden* (S.D.N.Y. 2001) 126 F. Supp.290, 295-296.

Proposition of Law No. VII:

Ohio's capital punishment statutes do not violate Short's constitutional right to equal protection.

Short claims that Ohio's framework for imposing the death penalty is unconstitutional because it treats similarly situated individuals differently, in violation of the Equal Protection Clauses of the state and federal constitutions. Every part of his argument has been discredited. In addition, since he failed to raise this issue at trial, he has forfeited it. *State v. Ferguson*, 108 Ohio St.3d 451, 2006-Ohio-1502, 844 N.E.2d 805, ¶ 84.

The argument that Ohio's death penalty statutes are unconstitutional because the prosecutor has the discretion to choose whom to charge with capital murder has been rejected numerous times: *State v. Jenkins* (1984), 15 Ohio St.3d 164, 169; *State v. Glenn* (1986), 28 Ohio St. 451, 453, 504 N.E.2d 701; *State v. Van Hook* (1988), 39 Ohio St.3d 256, 265.

Short's assertion that the death penalty in Ohio is imposed in a racially discriminatory manner has also been rejected. *State v. Jenkins* (1984), 15 Ohio St.3d 164, 473 N.E.2d 264; *State v. Steffen* (1987), 31 Ohio St.3d 111, 124, 125, 508 N.E.2d 974; *State v. Sowell* (1988), 39 Ohio St.3d 322, 336, 131 N.E.2d 1212. In *State v. Steffen*, the Court said, "without any evidence that racial bias affected the sentencing process *in his case*, appellant's claim of violation of his right to equal protection must fail." (Emphasis in original)

Short also argues that where a right as fundamental as life is at stake, a state must employ the least restrictive means possible to achieve a compelling interest. This Court in *Jenkins*, *supra*, however, found the "least restrictive means" argument had been rejected years before in *Gregg v. Georgia* (1976), 428 U.S. 153, 96 S.Ct. 2909. It has also been rejected several times since the *Jenkins* decision. *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407; *State v. Stumpf* (1987), 32 Ohio St.3d 95, 512 N.E.2d 598.

Each argument Short raises in support of this proposition of law has been rejected in earlier decisions. There is no merit in this argument.

Proposition of Law No. VIII:

Ohio's framework for imposing the death penalty does not violate Article 1, Section 9 of the Ohio Constitution or the Eighth and Fourteenth Amendments to the United States Constitution because of unreliable sentencing procedures.

Here Short states that Ohio's framework for imposing the death penalty violates Article 1, Section 9 of the Ohio Constitution and the Eighth and Fourteenth Amendments to the United States Constitution because the sentencing procedures are unreliable. Because Short did not raise this argument in the trial court, he has forfeited it. *State v. Ferguson*, supra, at ¶ 87

What's more, Short is wrong. The idea that Ohio's death penalty scheme is unconstitutional because it does not require the State to prove the absence of mitigating factors has been rejected in *State v. Esparza* (1988), 39 Ohio St.3d 8, 12-13. So has been rejected the theory that the statutes are unconstitutionally vague because they give the jury inadequate guidelines for weighing the aggravating circumstances and mitigating factors. *State v. Glenn* (1986), 28 Ohio St.3d 451, 453, 504 N.E.2d 701; *State v. Coleman* (1989), 45 Ohio St.3d 298, 308-309, 544 N.E.2d 622. Nor are the mitigating factors set out in R.C. 2929.04(B) unconstitutionally vague. *State v. Stumpf*, supra, at ¶ 104; *State v. Wiles* (1991), 59 Ohio St.3d 71, 92, 571 N.E.2d 97.

Proposition of Law No. IX:

Ohio's framework for imposing the death penalty provides individualized sentencing.

Short did not raise this issue in the trial court, so he has forfeited his ability to pursue it on appeal. *State v. Ferguson*, supra, at ¶ 84. Appellant maintains that by requiring proof of aggravating circumstances at the guilt phase of the trial, Ohio has effectively prohibited individualized sentencing. This argument has no merit. *Id.* at ¶ 88, citing *Lowenfield v. Phelps* (1988), 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568; *State v. Henderson* (1988), 39 Ohio St.3d 24, 28-29, 528 N.E.2d 1237; *State v. Jenkins*, supra, at ¶ 178.

Proposition of Law No. X:

Crim.R. 11(C)(3) does not burden a defendant's right to a jury trial.

Under Crim.R. 11(C)(3), if a defendant pleads guilty to the substantive offense of aggravated murder, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice. Short argues that this provision coerces pleas and exposes one who exercises his constitutional right to trial to a greater risk of being sentenced to death. This court has repeatedly rejected this argument. *State v. Ferguson*, supra, at ¶ 89; *State v. Buell* (1986), 22 Ohio St.3d 124, 138, 489 N.E.2d 795; *State v. Zuerne* (1987), 32 Ohio St.3d 56, 64; *State v. Van Hook* supra, at 264.

Proposition of Law No. XI:

Ohio's death penalty statutes genuinely narrow the class of persons eligible for the death penalty.

This issue is forfeited because it was not raised below. *State v. Ferguson*, supra, at ¶ 84.

This court rejected the idea that Ohio's death penalty framework did not actually narrow the class of people eligible for a death sentence in *State v. Barnes* (1986), 25 Ohio St.3d 203, 495 N.E.2d 922, on the basis of *Zant v. Stephens* (1983), 462 U.S. 862, 877, 103 S.Ct. 2733. Accord, *State v. Poindexter* (1988), 36 Ohio St. 19, 520 N.E.2d 568, *State v. Henderson* (1989), 39 Ohio St.3d 24, 28-29, 528 N.E.2d 1237. See also *Buell v. Mitchell* (C.A. 6, 2001), 274 F.3d 337, 369-370. (The aggravating circumstances alleged and proved in Short's trial were actually those found in R.C. 2929.04(A)(5) and (A)(7), and did not include an (A)(4) specification as stated in his brief.)

Proposition of Law No. XII:

R.C. 2929.03(D)(1) which refers to the nature and circumstances of the aggravating circumstances and R.C. 2929.04, which refers to the nature and circumstances of the offense, are not unconstitutionally vague.

Short's arguments lack merit because "the 'nature and circumstances of the aggravating circumstances' referred to in R.C. 2929.03(D)(1) are separate and distinct from the 'nature and circumstances of the offense' referred to in 2929.04(B)." *State v. McNeill*, 83 Ohio St.3d 438, 453, 1998-Ohio-293, 700 N.E.2d 596. Furthermore, "the 'aggravating circumstances' against which the

mitigating evidence is to be weighed are limited to the specifications of aggravating circumstances set forth in R.C. 2929.04(A)(1) through (8) that have been alleged in the indictment and proved beyond a reasonable doubt.” *State v. Wogenstahl* (1996), 75 Ohio St.3d 344, 356, 662 N.E.2d 311. Therefore, neither R.C. 2929.03(D)(1) nor 2929.04 are unconstitutionally vague. *State v. McNeill*, 83 Ohio St.3d 438, 453, 1998-Ohio-293, 700 N.E.2d 596. In addition, his failure to raise this argument in the trial court prevents him from raising it now. *State v. Ferguson*, *supra*, at ¶ 84.

Proposition of Law No. XIII:

Ohio’s standard for proportionality review violates neither the United States nor Ohio Constitutions.

Short did not raise this issue below and has therefore forfeited its review by this court. *State v. Ferguson*, *supra*, at ¶ 84. This Court has rejected Short’s contention that the extent of proportionality review in Ohio is constitutionally infirm. *State v. Jenkins*, *supra*. In fact, proportionality review is not required by the United States Constitution. *Pulley v. Harris* (1984), 465 U.S. 37, 104 S.Ct. 871; *State v. Evans* (1992), 63 Ohio St.3d 231, 586 N.E.2d 1042; *State v. Rojas* (1992), 64 Ohio St.3d 131, 592 N.E.2d 1376; *State v. Loza* (1994), 71 Ohio St.3d 61, 641 N.E.2d 1082. “By statutorily incorporating a form of comparative proportionality review that compares a defendant’s death sentence to others who have also received a sentence of death, Ohio’s death penalty regime actually adds

an additional safeguard beyond the requirements of the Eighth Amendment.”

Getsy v. Mitchell (C.A. 6, 2007), 495 F.3d 295, 306.

The death penalty in this case is proportionate to death sentences approved in other cases for other course-of-conduct murders. *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, ¶ 130; *State v. Hughbanks*, 99 Ohio St.3d 365, 2003-Ohio-4121, 792 N.E.2d 1081, ¶ 145; and *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, 785 N.E.2d 439, ¶ 162; *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047, ¶ 182. It is also proportional to cases in which the defendant murdered his estranged wife during an aggravated burglary. *State v. Turner*, (2005) 105 Ohio St.3d 331, 2005-Ohio-1938, 826 N.E.2d 266, ¶¶ 101, 102; *State v. O'Neal*, 87 Ohio St.3d 402, 421, 2000-Ohio-449, 721 N.E.2d 73.

Proposition of Law No. XIV.

The aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt, and the death sentences should stand.

Short was found guilty of two specifications in connection with each of the three counts of aggravated murder for which the jury recommended the death penalty. The trial court re-weighed the aggravating circumstances against the mitigating factors and adopted the jury’s recommendation of death. (Tr. 2580-2581, Opinion of the trial court, June 7, 2006, Appendix to Appellant’s Br. A-27) The State asks this Court to find that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt and to impose death sentences upon Duane Short for the aggravated murders of Rhonda Short and Donnie Sweeney.

A. Aggravating Circumstances: Duane Short was found guilty of a course-of-conduct specification and a felony-murder specification based on aggravated burglary on each of the three counts of aggravated murder for which the jury recommended the death penalty. R.C. 2929.04(A)(5) and (A)(7).

B. Mitigation Evidence:

1. Allocution: Contrary to Short's argument, there is no mitigation to be found in his allocution, which bears re-reading its entirety in connection with this part of his argument. (Tr. 2561-2580) He argues in his brief that in his remarks to the court he took responsibility for his actions, but that's not true – every time he said he accepted responsibility for his actions, he immediately blamed someone else. "I never tried to blame anyone else for my actions * * * But, other people played crucial parts in what led up to my actions * * *" (Tr. 2563, lines 17-22) "Did my wife deserve what happened to her? No, not even if she was having an affair." (There was no evidence that she was.) (Tr. 2563) He quoted scripture to condemn the mother of the man he killed and suggested that her decision to help Rhonda "helped and contributed to bringing this to the point where I stand today." (Tr. 2574) "Four people made crucial decisions which led up to this tragedy, Mr. Sweeney, Mrs. Barion (*sic*) my wife, and me, of course, mine being the worst." (Tr. 2573) Well, yes. Throughout, he eloquently described how he'd suffered, but he really showed no remorse for killing the mother of his children and an innocent man. "I have cried many tears for what happened, and that makes me feel really

bad about myself as a human being. I do not want to be portrayed as a husband who was all bad as well.” (Tr. 2563)

His remarks to the court are self-righteous, self-centered, and self-aggrandizing. The trial court gave them very little weight, noting that he blamed everyone else for his crimes, including the mother of the man he murdered. (Tr. 2581) The State asks this court to do the same.

2. Mental State: Short did not put on any expert testimony to show that he suffered from a mental disease or defect that made him less culpable for his crime, although counsel sought to show throughout the trial that he was driven to irrationality by pain and sorrow when his wife left him. There was no hope of showing diminished capacity through expert testimony since two psychologists had examined him in connection with his plea of NGRI, and both found that at the time of his crimes he was not suffering from a mental disease or defect and that he knew that what he was doing was wrong. The trial court considered the evidence that tended to show his emotional distress but gave it little weight. In fact, his emotional state did not prevent him from lying to DP&L to get his wife’s new address, coming up with a Plan B to get a gun when his first idea didn’t work out, buying a gun and ammunition, buying a hacksaw, renting a room to saw off the barrel, and hacking off the end of the gun with Justin sitting on the other end to steady it. He was no doubt badly hurt when his wife left him, but his emotional distress does not mitigate his conduct.

3. Cooperation: It is unlikely that the State would have been hampered in its prosecution had Short not cooperated with police after his arrest, as Short argues in his brief - his son Justin was a witness to everything Short did from the time he found out where he wife was staying until he stepped out of the pickup with the sawed-off shotgun, and Tiffany and Jesse were witnesses to what he did afterwards. The gun, the hacksaw, and the map he used to find the house were in the pick-up truck, and DP&L had the record of his call. Thus, his cooperation was not the key to solving the case, and he should get very little credit for it. What's more, it is inaccurate to suggest that he was entirely cooperative because he ignored orders from the first officers on the scene to stop. (Tr. 1967)

4. Family Ties: The trial court did not consider Tracey Watson's statement as mitigation evidence on the aggravated murder charges. She did not testify, and her unsworn message is not before this Court as mitigation evidence. Even so, his sister's love for him counts for very little when the aggravating circumstances are that he killed two people after committing an aggravated burglary to get to them.

5. History and Background: Trial counsel argued forcefully in summation that what Short did in the week after his wife left, particularly on the day of the crime, could not outweigh the prior 36 years of his life and his contributions as a husband, father, and good employee. Certainly his prior history is entitled to some weight, but as stated above, killing two people after committing and aggravated burglary to get to them outweighs the slight value in mitigation his history and background provides.

The jury and the trial court got it right; there is very little mitigation here, and the aggravating circumstances are powerful. Short is not remorseful for his crimes; he feels sorry for himself because his wife is gone. He does not accept responsibility for his crimes; he blames others for the choices they made that forced him to kill two people. He asks for consideration because of his history and background, but given a choice between the teachings of his faith and violence, he chose violence. He suggests that he was suffering from diminished capacity due to the pain and shock of his wife's defection, but the acumen he displayed on the day he killed her proved otherwise.

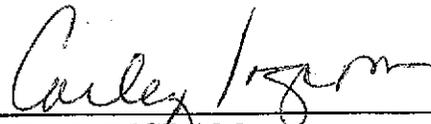
The aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt, and this Court should impose sentences of death upon Duane Short for the aggravated murders of Rhonda Short and Donnie Sweeney.

Conclusion

The judgment of the trial court should be affirmed, and the Court should find that the aggravating circumstances out-weigh the mitigating factors beyond a reasonable doubt, that the death sentence are proportional, and should sentence Short to death.

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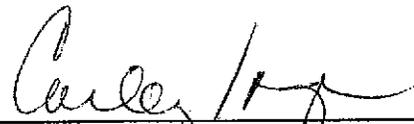
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I hereby certify that a copy of the foregoing Merit Brief was sent by first class on this 19th day of November, 2007, to Opposing Counsel: Gary W. Crim, 943 Manhattan Avenue, Dayton, Ohio 45406-5141 and Dennis J. Adkins, Altick & Corwin., L.P.A., 1700 One Dayton Centre, One South Main Street, Dayton, Ohio 45402.

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