

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Appellee, : Supreme Court Case No. 05-192
-vs- : Trial Court Case No.: 204-2002CR
FREDERICK A. MUNDT, : **This is a capital case.**
Appellant. :

ON APPEAL FROM THE COURT OF
COMMON PLEAS OF NOBLE COUNTY
CASE NO. 204-2002

APPELLANT'S MOTION FOR REOPENING
PURSUANT TO S.CT. PRAC. R. XI, SECTION 6

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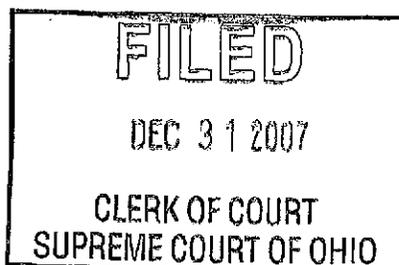
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Appellant Frederick A. Mundt, through counsel, moves this Court to reopen his direct appeal as of right in Case No. 05-192. S.Ct. Prac. R. XI, Section 6. Appellant shows good cause for this request, and he presents his assignments of error in support of this request, in his attached Memorandum.

Respectfully submitted,

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Memorandum in Support

A. Procedural history

Appellant Frederick Mundt was indicted for Brittany Hendrickson's murder. He was charged with four counts of aggravated murder, each carrying five death specifications. He was also charged with two counts of rape and one count of kidnapping. On December 3, 2004, after the trial court removed one of the specifications to the aggravated murder counts from the jury's consideration, the jury found Mundt guilty of all remaining counts and specifications. Attorneys Richard Vickers and Linda Prucha represented Mundt on appeal.

This Court affirmed Mundt's convictions and death sentence on October 3, 2007. State v. Mundt, 115 Ohio St. 3d 22, 873 N.E.2d 828 (2007).

B. Appellate Counsel was ineffective for failing to raise meritorious issues

After a review of the direct appeal brief that was filed on Mundt's behalf, it is apparent that his appellate attorneys were prejudicially ineffective for failing to raise meritorious issues that arose during his capital trial. (See Ex. A.) Therefore, this Court must reopen his appeal. State v. Murnahan, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992) and S.Ct. Prac. R. XI, Section 6(E). Specifically, Mundt's appellate counsel were ineffective for failing to raise the claims listed in subsection C, below.

C. Meritorious issues not raised on appeal

The Due Process Clause of the Fourteenth Amendment guarantees effective assistance of counsel on a criminal appeal as of right. Evitts v. Lucey, 469 U.S. 387 (1985). Appellate counsel must act as an advocate and support the cause of the client to the best of their ability. See, e.g., Anders v. California, 386 U.S. 738 (1967); Penson v. Ohio, 488 U.S. 75 (1988). Failure to present a meritorious issue for review constitutes ineffective assistance of appellate

counsel. See, e.g., Franklin v. Anderson, 434 F.3d 412 (6th Cir. 2007); State v. Ketterer, 111 Ohio St. 3d 70, 855 N.E.2d 48 (2006). Had Mundt's direct appeal counsel presented the following propositions of law to this Court, the outcome of his appeal would have been different¹:

PROPOSITION OF LAW NO. 1

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

Evidence Rule 403(A) provides that evidence is not admissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. Evidence is unfairly prejudicial when it may result in an improper basis for the jury's decision. Id. If the evidence "arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish, the evidence may be unfairly prejudicial." Id.

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

During the trial phase, the State introduced numerous photographs of Brittany Hendrickson's body next to the well and at the autopsy. Undoubtedly, these photographs had a strong emotional impact on the jury. This prejudice far outweighed any minimal probative value that the photographs may have had. Accordingly, the trial court should have excluded them.

¹ Due to the page limitation imposed by S. Ct. Prac. R. XI, Section 5(D), Mundt is unable to fully brief the issues not raised by prior appellate counsel. As such, Mundt's failure to fully brief every single point outlined should not be the basis of a waiver of that issue or point.

PROPOSITION OF LAW NO. 2

The failure to grant a mistrial after the testimony of a witness that an alternate suspect took a polygraph violates a capital defendant's right to a fair trial, due process, right to present a defense, and a reliable determination of guilt as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 10, and 16 of the Ohio Constitution.

Polygraph results are not admissible as evidence for purposes of corroboration or impeachment in criminal trials unless the defense and the State stipulate to their admissibility. State v. Jones, 91 Ohio St. 3d 335, n.2, 2001 Ohio 57, 744 N.E.2d 1163 (2001) (citing State v. Souel, 53 Ohio St.2d 123, 372 N.E.2d 1318 (1978)).

While the decision whether to grant a mistrial is within the sound discretion of the trial court, State v. Sage, 31 Ohio St. 3d, 173, 182, 510 N.E.2d 343 (1987), in this case, the decision not to grant a mistrial was error. A mistrial must be declared "when the ends of justice so require and a fair trial is no longer possible." State v. Franklin, 62 Ohio St. 3d 118, 127, 580 N.E.2d 1 (1991).

Mundt's theory at trial was that Misty Hendrickson was responsible for Brittany Hendrickson's death. When Detective Hannum testified that Ms. Hendrickson had taken a polygraph examination, it destroyed Mundt's defense because it improperly suggested that a polygraph excluded Ms. Henderson as Brittany's killer. A curative instruction was insufficient to remove the prejudice created by that statement. While it is normally presumed that a jury will follow a curative instruction, such an instruction does not cure the error if there is an "overwhelming probability" that the jury will be unable to follow the court's instruction and a "strong likelihood that the effect of the evidence would be 'devastating' to the defendant." Greer v. Miller, 483 U.S. 756, n.8 (1987) (citing Richardson v. Marsh, 481 U.S. 200, 208 (1987) and

Bruton v. United States, 391 U.S. 123, 136 (1968)). A mistrial was the only way to undo the damage done by the inadmissible evidence.

PROPOSITION OF LAW NO. 3

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

The Due Process Clause provides a remedy for prosecutorial misconduct when that misconduct prejudices a constitutional right or renders the trial fundamentally unfair. See Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974) (“when specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them”); United States v. Carter, 236 F.3d 777, 785 (6th Cir. 2001).

The United States Court of Appeals for the Sixth Circuit analyzes a due process claim of prosecutor misconduct under a two part test. The court first determines if the prosecutor's acts “were improper.” Washington v. Hofbauer, 228 F.3d 689, 698-99 (6th Cir. 2000) (citation omitted). The court then looks at “four factors” to “determine if the comments were sufficiently flagrant to warrant reversal” Id. (citation omitted). The four factors are: 1) whether the comments would likely mislead the jury or prejudice the accused; 2) whether the comments were extensive or merely isolated; 3) whether the comments were made deliberately or accidentally, and; 4) the strength of the evidence against the accused. Id. (citation omitted). Additionally, to be a viable claim, the prosecutorial misconduct must have “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637 (1974)).

Regarding prosecutor misconduct in the penalty phase of a capital case, the strength of the State's proof of legal guilt is irrelevant. Bates v. Bell, 402 F.3d 635, 648-49 (6th Cir. 2005).

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

The prosecutor in Mundt’s trial acted improperly during trial phase and penalty phase closing arguments. (See, Tr. Vol. 16, t.p. 5026, 5041-42; Tr. Vol. 20, t.p. 6178, 6241, 6179, 6180-81, 6193, 6242-43, 6190.) As a result, Mundt’s trial was rendered fundamentally unfair.

PROPOSITION OF LAW NO. 4

A Defendant’s due process rights are violated when the State is permitted to argue facts not in evidence in its closing argument. U.S. Const. amend. XIV; Ohio Const. art. I, § 16.

In trial phase closing argument, the prosecutor went over Joann Fleeman’s testimony that she had seen Misty Hendrickson’s red Cavalier on the property where Brittany’s body was found. (Tr. Vol. 16, t.p. 5041-42.) The prosecutor went on to state that the car was driven by Fred Mundt. (Id. at 5042.) There is no testimony anywhere in the record to this effect.

Trial counsel objected to this statement, noting that there was no testimony from Mrs. Fleeman that she saw Mundt driving the car. (Id.) The trial court overruled the objection because “[t]his is argument, Mr. Warhola.” (Id.)

This was error. The prosecutor was arguing facts not in evidence. This is impermissible as it improperly “invites the jury to speculate on facts not in evidence.” State v. Wogenstahl, 75 Ohio St. 3d 344, 357, 662 N.E.2d 311, 322-23 (1996) (citing State v. Combs, 62 Ohio St. 3d 278, 283, 581 N.E.2d 1071, 1077 (1991)).

PROPOSITION OF LAW NO. 5

A defendant’s right to effective assistance of counsel is violated when counsel’s performance is deficient and the defendant is thereby prejudiced. U.S. Const. amends. VI, XIV; Ohio Const. Art. 1 §10.

The Sixth and Fourteenth Amendments guarantee the accused the right to counsel at trial. Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963). The standard for judging counsel’s effectiveness is found in Strickland v. Washington, 466 U.S. 668 (1984). When evaluating claims of ineffective assistance of counsel under Strickland, this Court must first determine if counsel’s performance was deficient. Id. at 686-87. Second, this Court must determine if Mundt was prejudiced by counsel’s deficient performance. Id. at 686-87. This Court must assess whether Mundt was deprived of a reliable trial result. Id. at 693-94. Thus, an appellant need not demonstrate outcome-determinative error. See id.; Glenn v. Tate, 71 F.3d 1204, 1210-11 (6th Cir. 1995).

Mundt’s trial counsel rendered deficient performance in the following instances: (1) failing to challenge Juror Archer who said in voir dire that he would not consider 25 years or 30 years to life as real punishments; (2) failing to object to the unduly prejudicial crime scene and autopsy photos; (3) failing to object to the inflammatory, repetitive testimony of William

Hatfield, Gary Wilgus, and Stephen Hannum; (4) failing to object to a flawed instruction on the kidnapping count; (5) failing to object to a flawed mens rea instruction; (6) failing to object to prosecutorial misconduct during the State's trial phase closing argument; (7) failing to object to a flawed penalty phase instruction; and (8) failing to object to prosecutorial misconduct in the State's penalty phase closing argument.

Trial counsel's failures amounted to deficient performance and prejudiced Mundt. This was a highly emotionally charged case. The victim was an innocent seven-year-old girl who saw Mundt as her father. She was killed brutally. The likelihood of jurors being swayed by their emotions and passions was high. Yet trial counsel failed to protect against this by objecting to highly prejudicial evidence that should have been excluded because of its low probative value. They also failed to protect against this by ensuring that Mundt had a panel of jurors who could each consider all of the life sentence options. They failed to protect against this by ensuring that the State's burden was not lowered by a flawed mens rea instruction. They failed to protect against this by objecting to inflammatory statements by prosecutors in closing arguments or by objecting to a flawed penalty phase instruction that allowed jurors to consider the prosecutors statements as though they were evidence.

The jurors were only human. They would have reacted emotionally to this case. Trial counsel should have done whatever was necessary to protect against their emotions being inflamed by inadmissible evidence, flawed instructions, and prosecutorial misconduct. In this case, there was no physical evidence linking Mundt to the scene of Brittany's death, so without these errors, there would not have been sufficient evidence to convict Mundt of aggravated murder.

PROPOSITION OF LAW NO. 6

Considered together, the cumulative errors set forth in Appellant's brief merit reversal.

If this Court determines that there were instances of error in this case, then it must determine the cumulative effect of these errors. State v. Garner, 74 Ohio St. 3d 49, 656 N.E.2d 623 (1995). Should this Court determine that there is more than one instance of error that does not merit reversal, this Court must then analyze the cumulative effect of the errors to determine whether Mundt's convictions and sentence should be reversed. Cumulative error committed during the trial court proceedings violated Mundt's rights under the United States Constitution's Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as applicable provisions in the Ohio Constitution.

D. Conclusion

Appellant Frederick Mundt has shown that there are genuine issues regarding whether he was deprived of effective assistance of counsel on appeal. Mundt requests that this Court grant his Application for Reopening. This Court should afford him an opportunity to file a new appellate brief with supporting materials in order to establish that prejudicial errors were made in the trial court, and that ineffective assistance of counsel in the prior appellate proceedings prevented these errors from being presented effectively to this Court.

Appellant offers the attached and sworn affidavit of current counsel, Jennifer A. Prillo, in compliance with S.Ct. Prac. R. XI, Section 6.

Respectfully submitted,

DAVID BODIKER
Ohio Public Defender



JENNIFER A. PRILLO - 0073744
Assistant State Public Defender
(Counsel of Record)

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellant Frederick A. Mundt's Application for Reopening pursuant to S.Ct. Prac. R. XI, Section 6 was sent by regular U.S. mail to Robert Watson, Noble County Prosecutor, 409 Poplar St., Ste. A, Caldwell, Ohio on this 31st day of December, 2007.



JENNIFER A. PRILLO
COUNSEL FOR APPELLANT

EXHIBIT A

IN THE SUPREME COURT OF OHIO

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FREDERICK A. MUNDT, : **This is a capital case.**
Appellant. :

AFFIDAVIT OF JENNIFER A. PRILLO

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

I, Jennifer A. Prillo, after being duly sworn, hereby state as follows:

1. I am an attorney licensed to practice law in the state of Ohio since 2001. I have been an assistant state public defender since 2005. My sole area of practice is capital litigation.
2. I was assigned to work on Frederick A. Mundt's post-conviction case.
3. I have read the transcript of the proceedings in State v. Mundt, Noble County Common Please Case No. 204-2002CR. I have also read the brief filed by counsel on the direct appeal as of right to the Ohio Supreme Court, and the opinion issued by this Court on the direct appeal.
4. Based on my review of this record and the opinion, it is my professional judgment that counsel on the appeal of right to this Court in Case No. 05-192 were deficient to Mundt's prejudice because they omitted compelling and meritorious issues that appear on the face of this record. See Freeman v. Lane, 962, F.2d 1252 (7th Cir. 1992).
5. Because of the focus of my practice of law and my attendance at death-penalty seminars, I am aware of the standards of practice involved in the appeal of a case in which the death sentence was imposed.
6. The Due Process Clause of the Fourteenth Amendment guarantees effective assistance of counsel on appeal as of right. Evitts v. Lucey, 469 U.S. 587 (1985). Ohio law provides a capital

defendant with a right to a direct appeal. See O.R.C. §2929.05(A). Appellant had a due process right, therefore, to the effective assistance of counsel on appeal to this Court. Evitts, 469 U.S. 387.

7. The standard of review for a claim alleging the ineffective assistance of appellate counsel (hereinafter IAC) is whether counsel's performance was objectively unreasonable or deficient, and, whether the client was prejudiced by counsel's deficient performance. See State v. Rojas, 64 Ohio St. 3d 131, 141, 592 N.E.2d 1376, 1386 (1992) (citing Strickland v. Washington, 466 U.S. 668 (1984)). The test for prejudice on an IAC claim is not an outcome-determinative test. Strickland, 466 U.S. at 694. Rather, prejudice results when confidence in the fairness of the case is undermined. See id.

8. The following issues should have been, but were not, raised on the direct appeal as of right:

9. Photographs that should have been excluded under Evid. R. 403 were admitted into evidence.

10. Evidence Rule 403(A) provides that evidence is not admissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. Evidence is unfairly prejudicial when it may result in an improper basis for the jury's decision. Id. If the evidence "arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish, the evidence may be unfairly prejudicial." Id.

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

12. During the trial phase, the State introduced numerous photographs of seven-year-old Brittany Hendrickson's body—in rigor mortis, bloody, cut, bruised, and with her pants unzipped and falling down—next to the well. (State's Exhibits A-403 to A-407.)

13. Additionally, numerous photographs—twenty in all—of Brittany Hendrickson's autopsy were admitted (State's Exhibits A-408 to A-427). As if the bloodied, bruised, and cut body of a seven-year-old girl on an autopsy table would not inflame a juror's emotions enough, the photographs included two close-up pictures of her torn and bloodied genitals (State's Exhibit A-420 and A-425)—one in which the opening is being held open (State's Exhibit A-425).

14. The autopsy photographs were also repetitive and cumulative of one another and of the testimony of Drs. Murthy and Bertin. The photographs of Brittany's body outside the well were repetitive and cumulative of one another and of the testimony of Dr. Murthy and the testimony of Gary Wilgus and William Hatfield of BCI as well as Detective Stephen Hannum.

15. Dr. Murthy described all of the injuries to Brittany's body—noting that there were 38 external injuries. (Tr. Vol. 12, t.p. 4036.) Dr. Murthy's description of Brittany's injuries goes on for thirty-two transcript pages. (Id. at 4036-68.) He described the bruises and lacerations on the head and face. (Id. at 4038-53.) He told the jury that there were extensive injuries under the skin, skull fractures, injuries to the muscles, hemorrhaging in the membranes surrounding the brain and in the substance of the brain. (Id. at 4049-53.) He told the jury about each injury in extreme detail. He described the injuries on Brittany's arms and hands. (Id. at 4054-55.) He described the injuries to her back and shoulders (Id. at 4058-59) and the injuries to her leg (Id. at 4059-60). Dr. Murthy also described Brittany's body when it was retrieved from the well, telling the jury that she was in rigor mortis and explaining what that is. (Id. at 4075-82.)

16. Dr. Anthony Bertin's testimony described the injuries to Brittany's genitals. He described Brittany as she lay on the autopsy table. He went into extreme detail about her vaginal opening being "enlarged," "very traumatized," "bruised," and "imploded." (Tr. Vol 13, t.p. 4218.) He described the inside of the vagina as having "a large laceration practically the full length of the vaginal canal," and "extend[ing] all the way through the side walls of the vagina," so that "the entire wall thickness of the vagina was ripped apart." (Id.) He also noted that she "probably had considerable bleeding from this sort of trauma to that area." (Id. at 4218.) These points were repeated in response to questions by the prosecutor (Id. at 4219-20) as well as when Dr. Bertin read portions of the autopsy report (Id. at 4221-22). He also described the autopsy photos (State's Exhibits A-417, A-420, and A-425). In doing so, he described Brittany's "very blood stained" panties and described her vaginal opening as "very macerated and bleeding" and "destroyed." (Id. at 4224-25.) He explained that the vaginal opening was ripped open as through "something large forced through there with great force." (Id. at 4219-20.)

17. Special Agent William Hatfield of BCI described, in his testimony, State's Exhibits A-49 and A-50. (Tr. Vol. 10, t.p. 3555.) These were photos of Brittany's body after she was pulled from the well. He described the wounds on Brittany's body. (Id.)

18. BCI Agent Gary Wilgus also testified about the wounds on Brittany's body. He also described photos of Brittany's body (Exhibits A-403 through A-407). He explained that she was in rigor mortis. He described her pants being unbuttoned and unzipped. (Tr. Vol. 11, t.p. 3810-13.)

19. Detective Stephen Hannum described photos of Brittany's body in the well and after it had been removed from the well. (Exhibits A-7, A-8, and A-403 through A-407). (Tr. Vol. 14, t.p. 4671-76.)

20. Undoubtedly, these photographs had a strong emotional impact on the jury. This prejudice far outweighed any minimal probative value that the photographs may have had. Accordingly, the photographs should have been excluded under Evid. R. 403.

21. The admission of these photographs violated Mundt's right to a fair trial, due process, and a reliable determination of guilt as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 10, and 16 of the Ohio Constitution. The admission of this evidence violated Mundt's due process rights because it was

so egregious that it nullified the legitimacy of the properly admitted substantive evidence of the defendant's guilt. Lundy v. Campbell, 888 F.2d 467, 473 (6th Cir. 1989). To show that a state evidentiary ruling rises to the level of a due process violation, a defendant must demonstrate both that the trial court erred and that the error resulted in unfair prejudice. Chambers v. Mississippi, 410 U.S. 284, 302 (1973). Mundt was prejudiced. This was a highly emotionally charged case with a seven-year-old victim. The photographs of the child victim lying in rigor mortis outside of the well from which she had just been pulled and photographs of her injured and bloody body on an autopsy table inflamed the jurors' emotions to the point that they would have been unable to make a rational decision. This is especially true because there was no physical evidence linking Mundt to the scene of Brittany's death.

22. Detective Steve Hannum's testimony that Misty Hendrickson took a polygraph test destroyed Mundt's defense, and the trial court erred by failing to grant a mistrial.

23. On cross-examination, when asked if he had talked to any Monroe County officers about statements made by Misty Hendrickson, Detective Stephen Hannum testified, "As I recall, I had heard that both—well—I had heard that Misty had been given a polygraph test." (Tr. Vol. 14, t.p. 4690.)

24. Trial counsel moved for a mistrial. (Id. at 4692.) The trial court overruled the motion, and instead instructed the jury to disregard the testimony. (Id. at 4757-58.)

25. While the decision whether to grant a mistrial is within the sound discretion of the trial court, State v. Sage, 31 Ohio St. 3d, 173, 182, 510 N.E.2d 343 (1987), in this case, the decision not to grant a mistrial was error. A mistrial must be declared "when the ends of justice so require and a fair trial is no longer possible." State v. Franklin, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991).

26. This information was inadmissible. State v. Jones, 91 Ohio St. 3d 335, n.2, 2001 Ohio 57, 744 N.E.2d 1163 (2001). It was also not harmless. Mundt's entire defense was based upon the theory that Misty Hendrickson killed Brittany. Once the jury heard that Misty had taken a polygraph test, Mundt's defense was obliterated. Hannum's testimony implied that Ms. Hendrickson had passed a polygraph. Mundt's entire defense was based on the theory that Ms. Hendrickson was involved in Brittany's death. Once the jury had reason to believe Ms. Hendrickson was not involved, all reasonable doubt was gone. Mundt had a Sixth Amendment right to present a defense. California v. Trombetta, 467 U.S. 479, 485 (1984). That right was violated when this inadmissible evidence reached the jury.

27. A curative instruction was insufficient to undo the damage, and a fair trial was no longer possible. While it is normally presumed that a jury will follow a curative instruction, such an instruction does not cure the error if there is an "overwhelming probability" that the jury will be unable to follow the court's instruction and a "strong likelihood that the effect of the evidence would be 'devastating' to the defendant." Greer v. Miller, 483 U.S. 756, n.8 (1987) (citing Richardson v. Marsh, 481 U.S. 200, 208 (1987) and Bruton v. United States, 391 U.S. 123, 136 (1968)). A mistrial was the only way to undo the damage done by the inadmissible evidence.

28. The trial court's decision not to grant a mistrial violated Mundt's right to a fair trial, due process, his right to present a defense, and a reliable determination of guilt as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 10, and 16 of the Ohio Constitution.

29. The cumulative effect of prosecutorial misconduct at Mundt's trial and sentencing phase violated his due process rights.

30. In the trial phase closing argument, the prosecutor improperly introduced victim-impact evidence about Brittany's mother Misty Hendrickson. The prosecutor told the jury that after learning about Brittany's death, "Over the course of the next hours, days, weeks and months, Misty learned that her live-in boyfriend of four or five years, and father of her youngest child, was responsible for this brutal rape and murder of her seven-year-old daughter." (Vol. 16, t.p. 5026.) She went on to say, "And, ladies and gentlemen, that is a fact that Misty Hendrickson will have to live with for the rest of her life." (*Id.*) Victim-impact evidence is "irrelevant and immaterial to the guilt or innocence of the accused and the penalty to be imposed [and] it serves to inflame the passion of the jury with evidence collateral to the issue at bar." State v. White, 15 Ohio St. 2d 146, 151, 239 N.E.2d 65 (1968); State v. Tyler, 50 Ohio St. 3d 24, 35, 553 N.E.2d 576, 591(1990). Accordingly, such evidence is excluded from Ohio capital trials. *Id.*

31. In trial phase closing argument, the prosecutor went over Joann Fleeman's testimony that she had seen Misty Hendrickson's red Cavalier on the property where Brittany's body was found. (*Id.* at 5041-42.) The prosecutor went on to state that the car was driven by Fred Mundt. (*Id.* at 5042.) There is no testimony anywhere in the record to this effect. The prosecutor was arguing facts not in evidence. This is impermissible as it improperly "invites the jury to speculate on facts not in evidence." State v. Wogenstahl, 75 Ohio St. 3d 344, 357, 662 N.E.2d 311, 322-23 (1996) (citing State v. Combs, 62 Ohio St. 3d 278, 283, 581 N.E.2d 1071, 1077 (1991)). The car belonged to Misty, not Fred. Evidence that Fred had been driving the car and parked it near the well would have been a crucial piece of incriminating evidence, accordingly, leading the jury to believe that there was such evidence was highly prejudicial to Mundt.

32. In sentencing phase closing argument, a prosecutor stated that "[m]itigating factors include the nature and circumstances of the offense." (Tr. Vol. 20, t.p. 6178.) The prosecutor also told the jury, "[y]ou can find any mitigating factor from the circumstance of the offense." (*Id.* at 6241.)

33. It is difficult to conceive how anything mitigating can be found in the nature and circumstances of the murder of Brittany Hendrickson. Accordingly, defense counsel did not argue that the nature and circumstances of the crime were mitigating.

34. The State's argument called the jury's attention to a mitigating factor available to, but not presented by, Mundt. This amounted to misconduct because Mundt should have retained control over the presentation of his mitigation evidence. Lockett v. Ohio, 438 U.S. 586, 604 (1978).

35. The prosecutor attempted to undercut Mundt's mitigating evidence that he had grown up in a troubled home by arguing that "an unsubstantiated children's services allegation means

nothing.” (Tr. Vol. 20, t.p. 6179.) To illustrate this point, she argued that if her daughter were sick and crying in the middle of the night, a neighbor might call Children’s Services; that Children’s Services would then investigate the allegation, learn the real reason her daughter was screaming, and note in their report that the allegation was not substantiated. (Id. at 6180-81.)

36. The prosecutor was arguing facts not in evidence. There was nothing presented at trial regarding the way in which Children’s Services investigates or handles a case. This is impermissible as it improperly “invites the jury to speculate on facts not in evidence.” State v. Wogenstahl, 75 Ohio St. 3d 344, 357, 662 N.E.2d 311, 322-23 (1996) (citing State v. Combs, 62 Ohio St. 3d 278, 283, 581 N.E.2d 1071, 1077 (1991)).

37. The prosecutor argued that Mundt’s siblings “have gone on to be very productive members of society.” (Tr. Vol. 20, t.p. 6193.) The prosecutor also described each sibling’s job and told the jury that Mundt’s siblings “did not go out and commit this horrible act...” (Id. at 6242-43.)

38. These comparisons were irrelevant to whether Mundt should be sentenced to death. At sentencing, the jury was to consider Mundt’s life circumstances and their impact on him, regardless of every other person in the world. See Lockett v. Ohio, 438 U.S. 586, 604-05 (1978); Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (plurality opinion). The prosecutor’s improper argument deprived Mundt of a fair sentencing proceeding, a reliable sentence, and due process. U.S. Const. amends. VIII, XIV.

39. By comparing Mundt to his siblings, the prosecutors improperly diminished the value of powerful mitigation evidence. It was Mundt, not his siblings, who faced the death penalty. The Eighth Amendment requires fully individualized sentencing.

40. The prosecutor also improperly used Mundt’s good behavior in jail against him, asking the jury, “do you get points or gold stars for doing what you’re supposed to do?” (Tr. Vol. 20, t.p. 6190.)

41. Evidence of Mundt’s adjustment to life jail was important to his mitigation, offering a compelling reason for the jury to sentence him to life. Mundt’s jail record demonstrated that he would not be a continuing threat while in prison. “[A] defendant’s disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination.” Skipper v. South Carolina, 476 U.S. 1, 7 (1986).

42. The State improperly diminished the value of this important mitigation evidence. Its misconduct deprived Mundt of a fair sentencing proceeding, a reliable sentence, and due process. U.S. Const. amends. VII, XIV.

43. The prosecutors’ statements must be considered for their cumulative effect. Darden v. Wainwright, 477 U.S. 168, 193 (1986). Here, the prosecutors’ comments “so infected [Mundt’s] trial with unfairness as to make the resulting conviction a denial of due process.” Id. at 181 (citing Donnelly v. DeChristoforo, 416 U.S. 637 (1974)).

44. The trial court erred by allowing the prosecutor to argue that Fred was seen driving Misty's car near the well site.

45. In trial phase closing argument, the prosecutor went over Joann Fleeman's testimony that she had seen Misty Hendrickson's red Cavalier on the property where Brittany's body was found. (Tr. Vol. 16, t.p. 5041-42.) The prosecutor went on to state that the car was driven by Fred Mundt. (*Id.* at 5042.) There is no testimony anywhere in the record to this effect.

46. Trial counsel objected to this statement, noting that there was no testimony from Mrs. Fleeman that she saw Mundt driving the car. (*Id.* at 5042.)

47. The trial court overruled the objection because "[t]his is argument, Mr. Warhola." (*Id.*)

48. This was error. The prosecutor was arguing facts not in evidence. This is impermissible as it improperly "invites the jury to speculate on facts not in evidence." *State v. Wogenstahl*, 75 Ohio St. 3d 344, 357, 662 N.E.2d 311, 322-23 (1996) (citing *State v. Combs*, 62 Ohio St. 3d 278, 283, 581 N.E.2d 1071, 1077 (1991)).

49. Trial counsel were ineffective in their representation of Mundt.

50. The Sixth and Fourteenth Amendments guarantee the accused the right to counsel at trial. *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963). The standard for judging counsel's effectiveness is found in *Strickland v. Washington*, 466 U.S. 668 (1984). When evaluating claims of ineffective assistance of counsel under *Strickland*, this Court must first determine if counsel's performance was deficient. *Id.* at 686-87. Second, this Court must determine if Mundt was prejudiced by counsel's deficient performance. *Id.* at 686-87. This Court must assess whether Mundt was deprived of a reliable trial result. *Id.* at 693-94. Thus, an appellant need not demonstrate outcome-determinative error. See *id.*; *Glenn v. Tate*, 71 F.3d 1204, 1210-11 (6th Cir. 1995).

51. Trial counsel failed to challenge Juror Archer who said in voir dire that he would not consider 25 years or 30 years to life as real punishments.

52. A prospective juror may be excluded for cause if his views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 420, (1985) quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980).

53. In voir dire, Juror Archer was asked if he would consider a thirty-year-to-life sentence and a 25-year-to-life sentence as severe enough sentences. (Tr. Vol. 5, t.p. 2021-22) His response was "no." (*Id.* at 2021-22) Defense counsel then asked, "[u]nder no circumstances?" Juror Archer responded, "not if we have gotten to all the other phase, through phase one." (*Id.* at 2022)

54. It was clear that although Juror Archer said he would consider life without parole a severe enough punishment, he could not consider the other life options. The State questioned Archer about whether he could consider the other life options if so instructed by the judge. Unsurprisingly, he responded that he could. (*Id.* at 2024-25) However, general questions about one's ability to follow the law are insufficient to overcome specific statements indicating bias. Morgan v. Illinois, 504 U.S. 719, 734-36 (1992).

55. Trial counsel's failure to challenge Juror Archer fell below an objective standard of reasonableness. See Strickland, 466 U.S. 668. Their failure to do so prejudiced Mundt. Mundt was entitled to jurors who were able to consider all of the possible sentences. This is particularly true given that one juror could have spared his life. State v. Brooks, 75 Ohio St. 3d 148, 162 (1996).

56. Trial counsel failed to object to unduly prejudicial crime scene and autopsy photos.

57. For the reasons set forth in paragraphs 9-21, defense counsels' failure to object to these photographs fell below an objective standard of reasonableness because they were inadmissible under Evidence Rule 403. See Strickland, 466 U.S. 668. Mundt incorporates paragraphs 9-21, *supra*, here by reference in support of this claim.

58. While "failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel," such a claim is viable when it is demonstrated that counsel abdicated a duty to his or her client and that there was resulting material prejudice. State v. Holloway, 38 Ohio St. 3d 239, 244, 527 N.E.2d 831, 837 (1988). Strickland's duty to advocate and employ "skill and knowledge" includes the necessity for trial counsel to object or otherwise preserve federal issues for review. See e.g., Groseclose v. Bell, 895 F.Supp. 935, 956 (M.D. Tenn. 1995) *aff'd* 130 F.3d 116; Gravely v. Mills, 87 F.3d 779, 785 (6th Cir. 1996); Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994); Cabello v. United States, 884 F.Supp. 298, 302-03 (N.D. Ind. 1995); *Cf. Freedman v. Lane*, 962 F.2d 1252, 1259 (7th Cir. 1992).

59. Trial counsel abdicated their duty to protect Mundt from these unduly prejudicial, cumulative, and repetitive photographs. Mundt was prejudiced by this evidence as it allowed the jury to draw improper inferences and inflamed their emotions in what was already an emotionally-charged case.

60. Trial counsel failed to object to the inflammatory, repetitive testimony.

61. Special Agent William Hatfield of BCI described State's Exhibits A-49 and A-50. (Tr. Vol. 10, t.p. 3555.) These were photos of Brittany's body after she was pulled from the well. He described the wounds on Brittany's body. (*Id.*)

62. BCI Agent Gary Wilgus also testified about the wounds on Brittany's body. He also described photos of Brittany's body (Exhibits A-403 through A-407). He explained that she was in rigor mortis. He described her pants being unbuttoned and unzipped. (Tr. Vol. 11, t.p. 3810-13.)

63. Detective Stephen Hannum described photos of Brittany's body in the well and after it had been removed from the well. (Exhibits A-7, A-8, and A-403 through A-407). (Tr. Vol. 14, t.p. 4671-76.)

64. Dr. Murthy testified that he requested the assistance of an urologist in Brittany's autopsy due to the blood and lacerations of her vagina. He described all of the injuries to her body—noting that there were 38 external injuries. He described the autopsy photographs (State's Exhibits A-408 through A-410, A-413, and A-422 through A-427). He told the jury that there were extensive injuries under the skin, skull fractures, injuries to the muscles, hemorrhaging in the membranes surrounding the brain and in the substance of the brain. (Tr. Vol. 12, t.p. 4049-52) He described blunt trauma as being caused by "a fist, could be an elbow, a blunt object like a brick or a stone." (Id. at 4043.) He also described the difference in the effect of trauma on "a strong person like Mike Tyson" versus "a delicate person like you [the prosecutor] and a small child," stating that "the same force will result in larger injury." (Id. at 4044.) He went on to say that this was "insult on top of insult on top of insult." (Id. at 4065.) (Trial counsel objected only when the prosecutor asked Dr. Murthy to describe the pain Brittany might have been in because of her injuries, and Dr. Murthy responded that "there is a tremendous amount of pain and suffering and shock and fright." (Id. at 4068.) The rest of Dr. Murthy's graphic testimony went on without objection.)

65. Dr. Anthony Bertin's testimony was similarly graphic and inflammatory. He described Brittany as she lay on the autopsy table. He went into extreme detail about her vaginal opening being "enlarged," "very traumatized," "bruised," and "imploded." He described the inside of the vagina as having "a large laceration practically the full length of the vaginal canal," and "extend[ing] all the way through the side walls of the vagina," so that "the entire wall thickness of the vagina was ripped apart." He also noted that she "probably had considerable bleeding from this sort of trauma to that area." (Tr. Vol. 13, t.p. 4217-18.) These points were repeated in response to questions by the prosecutor (Id. at 4219-20) as well as when Dr. Bertin read portions of the autopsy report (Id. at 4221-22). He also described the autopsy photos (State's Exhibits A-417, A-420, and A-425). In doing so, he described Brittany's "very blood stained" panties and described her vaginal opening as "very macerated and bleeding" and "destroyed." (Id. at 4224-25.) He explained that the vaginal opening was ripped open as through "something large forced through there with great force." (Id. at 4219-20.)

66. The State asked Dr. Bertin what types of objects would be consistent with Brittany's vaginal injuries. The following questions and answers ensued:

A. I've seen these sort of injuries with small baseball bats, broom handles, the ends of coke bottles, that sort of thing.

Q. Okay.

A. Dildos.

Q. Handles, like a hammer handle?

A. Yes.

Q. Or a shovel handle?

A. Right.

Q. The handle to a toilet bowl plunger?

A. Correct.

- Q. Beer bottle?
A. Uh-huh, yes.
Q. A cucumber?
A. Could be, yes.

(Id. at 4228-29.)

67. The testimony of these witnesses was inflammatory and cumulative and was excludable under Ohio Evid. Rule 403. Trial counsel should have objected to the introduction of this evidence. Strickland's duty to advocate and employ "skill and knowledge" includes the necessity for trial counsel to object or otherwise preserve federal issues for review. See e.g., Groseclose v. Bell, 895 F.Supp. 935, 956 (M.D. Tenn. 1995) aff'd 130 F.3d 116; Gravely v. Mills, 87 F.3d 779, 785 (6th Cir. 1996); Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994); Cabello v. United States, 884 F.Supp. 298, 302-03 (N.D. Ind. 1995); Cf. Freedman v. Lane, 962 F.2d 1252, 1259 (7th Cir. 1992). Mundt was prejudiced by the introduction of this evidence. This is particularly true because there was no evidence placing Mundt at the scene of Brittany's death. This evidence allowed the jurors to make improper inferences based on their emotional reactions to the evidence.

68. Trial counsel failed to object to a flawed instruction on the kidnapping count.

69. Mundt was charged with the kidnapping of Brittany Hendrickson. The indictment sets out the elements of O.R.C. 2905.01, and adds that "The Grand Jury further finds that the victim was under the age of thirteen at the time of the commission of the offense, and that the victim was not released in a safe place unharmed." (Indictment, filed March 22, 2004.)

70. The language regarding whether the victim is released in a safe place unharmed from O.R.C. 2905.01(C), is a mitigating provision to reduce a kidnapping conviction to a second-degree felony. It is an affirmative defense. State v. Leslie, 14 Ohio App. 3d 343, 345, 471 N.E.2d 503, 506 (1984) (citing State v. Cornute, 64 Ohio App. 2d 199, 412 N.E.2d 416 (1979)). This is not an element of kidnapping. State v. Sanders, 92 Ohio St. 3d 245, 265, 750 N.E.2d 90, 117 (2001) (citing Cornute, 64 Ohio App. 2d at 201, 412 N.E.2d at 417-18).

71. The trial court instructed the jury that "[i]f you find the Defendant guilty of kidnapping beyond a reasonable doubt, you will further consider whether the Defendant did or did not release the victim in a safe place, unharmed." (5182-83)

72. Trial counsel's failure to object to this instruction fell below an objective standard of reasonableness because it was not applicable to his case and it had a harmful effect on him. Strickland's duty to advocate and employ "skill and knowledge" includes the necessity for trial counsel to object or otherwise preserve federal issues for review. See e.g., Groseclose v. Bell, 895 F.Supp. 935, 956 (M.D. Tenn. 1995) aff'd 130 F.3d 116; Gravely v. Mills, 87 F.3d 779, 785 (6th Cir. 1996); Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994); Cabello v. United States, 884 F.Supp. 298, 302-03 (N.D. Ind. 1995); Cf. Freedman v. Lane, 962 F.2d 1252, 1259 (7th Cir. 1992). Their failure to do so prejudiced Mundt because the improper instruction converted the mitigating factor into an aggravating element. Once the jury heard this instruction, it was left to consider the fact that Mundt had not left Brittany in a safe place unharmed. In fact, she was left

in a cold well, beaten and bleeding. These facts then became an aggravator to the kidnapping charge.

73. Trial counsel failed to object to a flawed instruction on the mens rea element of aggravated murder.

74. When the trial court instructed the jury that it must find that Mundt caused the death of Brittany Hendrickson purposely and with prior calculation and design, it also instructed as follows:

Cause is an act or failure to act which in the natural and continuous sequence directly produces the death, and without which it would not have occurred.

“Cause” occurs when the death is the natural and foreseeable result of the act or failure to act.

75. The second sentence in this instruction shifted the burden of proof to Mundt and diluted the State’s burden of proof regarding the element of specific intent to kill.

76. The Due Process Clause of the Fourteenth Amendment provides that the State must prove each essential element of the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970).

77. A jury instruction that relieves the State of its burden of proof regarding the mens rea element is unconstitutional. See Mulaney v. Wilbur, 421 U.S. 684, 698-701 (1975).

78. Trial counsel’s failure to object to this instruction fell below an objective standard of reasonableness because the instruction lowered the degree of intent that the jury had to find Mundt had at the time of the crime. See Strickland, 466 U.S. 668. Strickland’s duty to advocate and employ “skill and knowledge” includes the necessity for trial counsel to object or otherwise preserve federal issues for review. See e.g., Groseclose v. Bell, 895 F.Supp. 935, 956 (M.D. Tenn. 1995) aff’d 130 F.3d 116; Gravelly v. Mills, 87 F.3d 779, 785 (6th Cir. 1996); Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994); Cabello v. United States, 884 F.Supp. 298, 302-03 (N.D. Ind. 1995); Cf. Freedman v. Lane, 962 F.2d 1252, 1259 (7th Cir. 1992). Mundt was prejudiced by their failure to do. Once the jury found the diluted mens rea element of these offenses was proved beyond a reasonable doubt, it would necessarily also have determined that the predicate facts were proved beyond a reasonable doubt. Thus, once the jury decided that Brittany’s death was the “natural and foreseeable result” of Mundt’s actions, they had to find him guilty of aggravated murder and never had to reach the question of whether he did it “purposely and with prior calculation and design.” There was no physical evidence linking Mundt to the scene of Brittany’s death. This instruction allowed the jury to easily find him guilty of this charge without having to consider the dearth of evidence.

79. Trial counsel failed to object to prosecutorial misconduct.

80. The State committed various acts of misconduct during the trial phase and penalty phase closing arguments. Mundt incorporates paragraphs 29-43, *supra*, here by reference in support of this claim.

81. Trial counsel's failure to object to any of this evidence (with the exception of that discussed in paragraphs 42-46) fell below an objective standard of reasonableness because the State acted improperly in closing argument and this misconduct was harmful to Mundt. See Strickland, 466 U.S. 668. Strickland's duty to advocate and employ "skill and knowledge" includes the necessity for trial counsel to object or otherwise preserve federal issues for review. See e.g., Groseclose v. Bell, 895 F.Supp. 935, 956 (M.D. Tenn. 1995) aff'd 130 F.3d 116; Gravelly v. Mills, 87 F.3d 779, 785 (6th Cir. 1996); Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994); Cabello v. United States, 884 F.Supp. 298, 302-03 (N.D. Ind. 1995); Cf. Freedman v. Lane, 962 F.2d 1252, 1259 (7th Cir. 1992). Mundt was prejudiced by their failure to do so. Brittany was an innocent, seven-year-old girl. She was the quintessential sympathetic victim. She was murdered brutally. Her death was bound to pull at jurors' heartstrings. Presenting them with evidence of what a good child she was and her parent-child relationship with Mundt would have inflamed their emotions even further. Brittany treated Mundt as her father, yet he killed her so brutally. The jurors would have wanted him to pay for that. Anyone would have a difficult time setting those emotions aside to come to a rational decision as to guilt and penalty. The introduction of this evidence further blinded the jurors' to their job by playing on their emotions.

82. Trial counsel failed to object to a flawed penalty phase instruction.

83. At the conclusion of the penalty phase, the trial court instructed the jury as follows:

The opening statements and the final arguments of counsel were designed to assist you, but they are not evidence. While the arguments of counsel are not evidence in this case, the law permits you to consider the arguments of counsel to the extent that they are relevant to the sentence that should be imposed on Frederick Allen Mundt.

84. This instruction allowed the jurors to give undue consideration to the State's closing argument. It allowed them to consider nonstatutory aggravating factors and negated the mitigating evidence presented in the case.

85. O.R.C. 2929.04(A) sets out the aggravating circumstances that may be weighed against a defendant's mitigating factors in a capital trial. These are the *only* factors that can be weighed in favor of death. See Stringer v. Black, 503 U.S. 222, 232 (1992).

86. O.R.C. 2929.04(B) sets out the mitigating factors to be considered. A jury may not be precluded from considering relevant mitigating factors. Lockett v. Ohio, 438 U.S. 584 (1978).

87. Trial counsel's failure to object to the flawed instruction fell below an objective standard of reasonableness because the instruction allowed the jury to improperly consider prejudicial

argument as though it were evidence. See Strickland, 466 U.S. 668. Strickland's duty to advocate and employ "skill and knowledge" includes the necessity for trial counsel to object or otherwise preserve federal issues for review. See e.g., Groseclose v. Bell, 895 F.Supp. 935, 956 (M.D. Tenn. 1995) aff'd 130 F.3d 116; Gravely v. Mills, 87 F.3d 779, 785 (6th Cir. 1996); Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994); Cabello v. United States, 884 F.Supp. 298, 302-03 (N.D. Ind. 1995); Cf. Freedman v. Lane, 962 F.2d 1252, 1259 (7th Cir. 1992). Mundt was prejudiced because the flawed instruction impermissibly tipped the scales in favor of death. It allowed the jury to consider the State's closing argument in its sentencing determination. Throughout its closing argument, the State diminished Mundt's mitigating evidence. This was a highly emotionally charged case. The victim was an innocent seven-year-old girl. Mundt had an uphill battle at the penalty phase. The jurors would have found it difficult to set aside their emotions from their decision making. This instruction allowed the jurors to consider the State's improper arguments about that took away from Mundt's Skipper evidence and evidence about his troubled childhood. This error improperly tipped the scales in favor of death.

88. Considered together, the cumulative errors set forth in Appellant's brief merit reversal.

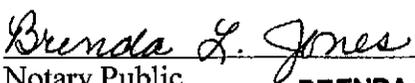
89. If this Court determines that there were instances of error in this case, then it must determine the cumulative effect of these errors. State v. Garner, 74 Ohio St. 3d 49, 656 N.E.2d 623 (1995). Should this Court determine that there is more than one instance of error that does not merit reversal, this Court must then analyze the cumulative effect of the errors to determine whether Mundt's convictions and sentence should be reversed. Cumulative error committed during the trial court proceedings violated Mundt's rights under the United States Constitution's Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as applicable provisions in the Ohio Constitution.

90. For each of the foregoing reasons, I believe that Appellant Mundt's right to the effective assistance of counsel was violated in Case No. No. 05-192, and this Court should grant Mundt's motion for reopening pursuant to S.Ct. Prac. R. XI, Section 6.

Further affiant sayeth naught.


JENNIFER A. PRILLO
Counsel for Appellant Mundt

Sworn to and subscribed before me on this 31st day of December, 2007.


Notary Public
BRENDA L. JONES
Notary Public, State of Ohio
My Commission Expires 9-24-2010