

In the Supreme Court of Ohio

State of Ohio, :  
Appellee, : Case No. 05-1678  
-vs- :  
Delano Hale, : **This is a Capital Case**  
Appellant. :

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On Appeal from the Court of  
Common Pleas of Cuyahoga County  
Case No. CR-04-454857

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**Appellant Delano Hale's Motion for Reconsideration**

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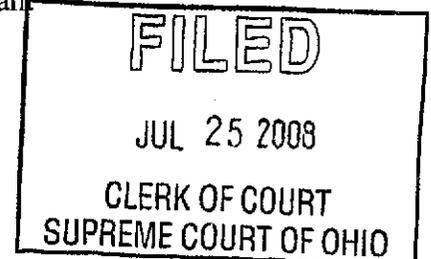
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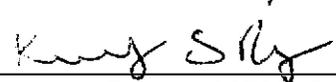
Appellant Delano Hale requests that this Court reconsider its merits ruling of July 15, 2008 affirming both his convictions and death sentence. This request is made under Sup. Ct. Prac. R. XI § 2(A)(4). The reasons for this Motion are more fully set forth in the attached memorandum in support.

Respectfully submitted,

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**Memorandum In Support**

**Proposition of Law No. II**

Hale Was Sentenced To More Than Minimum, Concurrent Sentences By The Trial Court, Despite The Fact That The State Proves The Statutory Criteria For Increasing The Sentence To A Jury Beyond A Reasonable Doubt, Depriving Hale Of His As Guaranteed By The Fifth, Sixth, And Fourteenth Amendments To The Constitution.

and

**Proposition of Law No. XX**

Hale's Right To Effective Assistance Of Counsel Was Violated When Counsel's Performance Was Deficient And He Was Thereby Prejudiced. U.S. Const. Amends. VI, XIV; Ohio Const. Art. I, § 10.

In his Second Proposition of Law, Hale challenged the non-capital sentences imposed in his case. This Court rejected Hale's claim finding that counsel's failure to object waived this issue. State v. Hale, 2008 Ohio LEXIS 1942, \*\*86, 2008 Ohio 3426 ¶ 242 (July 15, 2008). Hale notes that the State of Ohio conceded error on this issue. Id. at \*\*86, 2008 Ohio 3426 ¶ 241.

If this error is waived, Hale is entitled to relief based on ineffective assistance of counsel, raised in § E.9 of Hale's Twentieth Proposition of Law. Hale was sentenced on his non-capital counts on May 15, 2005. Blakely v. Washington, 542 U.S. 296 (2004), was decided on June 24, 2004. United States v. Booker, 543 U.S. 220 (2005), was decided on January 12, 2005. The law supporting Hale's claim was in existence well-before he was sentenced. Counsel, particularly

death penalty counsel, is expected to know the law and to preserve trial error for review. See, e.g., Groseclose v. Bell, 895 F. Supp. 935, 956 (M.D. Tenn. 1995), aff'd, 130 F.3d 116; Gravley 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. Freeman v. Lane, 962 F.2d 1252, 1259 (7th Cir. 1992) (appellate counsel ineffective for abandoning viable federal claim). This Court's precedent demonstrates that a properly preserved objection renders this precise error meritorious. See State v. Elmore, 111 Ohio St. 3d 515, 536, 857 N.E.2d 547, 570 (2006). Counsel's failure to object and preserve this error for appellate review was ineffective assistance of counsel, which prejudiced Hale.

Hale's rights were violated when he was sentenced, on his non-capital counts in violation of the Constitution. Moreover, trial counsel's failure to object to this error was deficient performance, which prejudiced Hale. This Court should vacate Hale's non-capital sentences and remand for re-sentencing.

### Proposition of Law No. III

The Trial Court Erred In Failing To Suppress Hale's Statements In Violation Of His Rights Guaranteed By The Fifth And Fourteenth Amendments Of The United States Constitution, As Well As Article I, §§ 10 And 16 Of The Ohio Constitution.

In his Third Proposition of Law, Hale argued that the trial court erred in failing to suppress his statements in violation of his constitutional rights. This Court rejected Hale's claim holding that "Baird was not required to preface the personal history questions with Miranda warnings." State v. Hale, 2008 Ohio LEXIS 1942, \*\*10-11, 2008 Ohio 3426 ¶ 32 (July 15, 2008). This Court reasoned that because these questions were "routine booking questions, and the requirement that police administer Miranda [v. Arizona], 384 U.S. 436 (1966)] warnings before questioning a suspect in custody does not apply to routine booking questions." Id.

Moreover, as part of these "routine booking questions," Detective Baird completed a personal-information form on Hale, and presented this form to Hale for his signature. Hale used his left hand to sign this form. Detective Baird noted that Hale had difficulty writing with his left hand. (T.p. 292) Hale later signed the Miranda waiver form with his right hand. Detective Baird testified that Hale tried to conceal his right-handedness. (T.p. 292) The prosecutor brought it up in closing argument. (Id. at 3604) And, this Court mentioned it as a key fact in its opinion. Hale, 2008 Ohio LEXIS 1942 at \*\*4, 2008 Ohio 3426 ¶ 11.

The violation of Hale's rights commenced *once* Detective Baird began to interview Hale concerning his personal history. Hale was already in a custodial environment deprived of freedom of action in a significant way. Miranda, 384 U.S. at 444. And, Detective Baird was not only eliciting a personal history, but also making observations relevant to Hale's truthfulness that would then become a crucial fact at trial—Hale was trying to conceal that he was right-handed. And, why is this crucial? This fact was testified to and stressed in closing argument as proof of

Hale's guilt. (T.p. 3604) Hale's credibility, and the credibility of his statement to the police were his defense at trial. But the prosecutor was able to use Hale's attempt at left-handedness to argue "picking up the pen with his left hand [when signing his Miranda waiver] was a lie." Hale, 2008 Ohio LEXIS 1942 at \*\*24, 2008 Ohio 3426 ¶ 67. Writing is a form of communication – and the State used Hale's communications against him despite the fact that Hale was not given his Miranda warnings prior to his written communication.

The trial court violated Hale's rights by failing to suppress Hale's statements when Detective Baird questioned Hale prior to administering Miranda warnings. Therefore, Hale requests that this Court vacate its opinion on this matter, and remand this case for a new trial.

#### **Proposition of Law No. IV**

The Accused Has A Right Of Presence At All Critical Stages Of The Trial Under The Confrontation Clause And The Due Process Clause. The Right Of Presence Is Personal To The Accused And May Only Be Waived By The Accused. U.S. Const. Amends. VI, XIV.

In Hale's Forth Proposition of Law, he argued that he was prejudiced because he was not present during ten pretrial hearings held between August 23, 2004, and March 10, 2005. The Court denied this claim, stating that, "[w]hatever the 'pretrials' were, none of them were recorded. . . . As no record was made, we cannot determine whether Hale was absent from the pretrials in question." State v. Hale, 2008 Ohio LEXIS 1942, \*\*38, 2008 Ohio 3426 ¶ 105 (July 15, 2008). In so ruling, this Court has created a Catch 22. Hale made several attempts to recreate the record, but this Court denied him the opportunity. (See Appellant Hale's Motion For Disclosure of Police Reports) Hale could not affirmatively recreate these hearings without a directive from this Court ordering the release of the requested notes. This Court cannot fault Hale for failing to do what it has precluding him from doing.

Therefore, Hale requests that this Court vacate its opinion on this matter, and remand this case for a new trial. Alternatively, this Court should grant Hale's motion for the requested notes and allow for supplementation of the record and additional briefing on this issue.

### **Proposition of Law No. V**

When A Trial Court *Sua Sponte* Death Qualifies A Capital Jury, But Fails To *Sua Sponte* Life Qualify That Same Jury, The Defendant Is Denied His Fundamental Right To A Fair Trial In Violation of the Equal Protection Clause And The Prosecution Inures A Benefit Unfairly Denied The Defendant In Violation Of The Due Process Clause. U.S. Const. amend. XIV.

In his Fifth Proposition of Law, Hale argued that he was denied his rights to a fair trial and to equal protection because the trial court *sua sponte* death-qualified his jury, but failed to similarly life-qualify his jury. This Court rejected Hale's claim, in part, because it held that the proper vehicle for making such a challenge was for Hale to file an affidavit of disqualification against the trial judge. State v. Hale, 2008 Ohio LEXIS 1942, \*\*28, 2008 Ohio 3426 ¶ 78 (July 15, 2008). The Court misunderstands Hale's claim. Hale did not argue that the trial judge was biased against him in this claim. Rather, Hale argued that the trial court's failure to both life and death qualify the jurors biased his jury, depriving him of his rights to a fair trial and equal protection. A claim of *juror bias* is inappropriate in an affidavit for disqualification of the *trial judge*. See O.R.C. § 2701.03(A) ("If a *judge* of the court of common pleas allegedly is interested in a proceeding pending before the court, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party's counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the court") (emphasis added).

The trial court's failure to *sua sponte* life-qualify Hale's jury, when it *sua sponte* death-qualified Hale deprived Hale of his right to a fair trial, a fair sentencing proceeding, and equal protection. Therefore, Hale requests that this Court vacate its opinion on this matter, and remand this case for a new trial.

### **Proposition of Law No. VIII**

A Trial Court Violates A Capital Defendant's Constitutional Rights To A Fair Trial And Due Process When It Allows The State To Violate The Rules Of Discovery, Allows Misleading, Prejudicial Evidence And Testimony To Be Introduced During The Trial, Arbitrarily Limits Evidence In The Defense's Case-In-Chief, And Makes Arbitrary Evidentiary Rulings. U.S. Const. Amends. VI, XIV.

#### **A. Discovery Violation.**

In section of A of Hale's Eighth Proposition of Law, he argued that the trial court's response to the State's violation of the rules of discovery allowed the State to introduce prejudicial evidence that deprived him of a fair trial and due process. This Court rejected Hale's argument, in part, because there is no due process right to discovery. See State v. Hale, 2008 Ohio LEXIS 1942, \*\*44, 2008 Ohio 3426 ¶ 120 (July 15, 2008). In so ruling, this Court ignores both its own precedent on the meaning of "shall" when contained in a statute or rule and United States Supreme Court precedent to the contrary.

Rule 16's use of "shall" demonstrates that its requirements are mandatory. See State v. Campbell, 90 Ohio St. 3d 320, 324, 738 N.E.2d 1178, 1188-89 (2000) (use of "shall in Rule 32 "does not merely give the defendant a right to allocution; it imposes an affirmative requirement on the trial court"); see id. at 324, 738 N.E.2d at 1189 (citing State v. Golphin, 81 Ohio St. 3d 543, 545-546, 692 N.E.2d 608, 611 (1998)) ("'shall' in a ... rule connotes the imposition of a mandatory obligation unless other language is included that evidences a clear and unequivocal intent to the contrary"). This Court has imposed a "duty of strict compliance" in capital cases. Id. That same strict-compliance is warranted in discovery matters, where the Rule being ignored includes mandatory "shall" language.

Moreover, Hale's due process rights are implicated by this violation. When a state affords a right beyond that which the Federal Constitution requires—as Ohio has done with discovery—and that right is an integral part of its criminal justice system, procedures used in carrying out that right “must comport with the demands of the Due Process . . . Clause of the Constitution.” Evitts v. Lucey, 469 U.S. 387, 393 (1985). Ohio has exceed federal constitutional requirements in a manner that is integral to the criminal justice system—what could be more integral then ensuring that all materials are produced by the State, particularly when the defendant's life is at risk.

**B. Inflammatory, Irrelevant, Prejudicial Testimony.**

In Section B of Hale's Eighth Proposition of law, Hale argued that the trial court erred in overruling a defense objection when State's witness, Robert Stewart, testified that when he saw the body, “It shook me up pretty good. I kind of, I don't know, I didn't work much the rest of the day.” (T.p. 2095) This Court agreed that this statement was irrelevant, and that the trial court erred in overruling the defense objection. See Hale, 2008 Ohio LEXIS 1942 at \*\*22, 2008 Ohio 3426 ¶ 61. However, the Court found that “Stewart was a minor witness, and his testimony that seeing the body was not inflammatory.” Id. The Court's statement infers that if Stewart was a more significant witness, than this error would have prejudiced Hale. This is contrary to reason. The fact that this irrelevant, inflammatory, and prejudicial statement was made in front of the jury is what prejudiced Hale. Which witness made the statement is irrelevant. The trial court erred by overruling defense counsel's objection. The prosecutor wanted the jurors to consider the emotional aspects of the case. The trial court's error allowed the prosecutor to appeal to the jurors' emotions. Such an appeal is improper. State v. Keenan, 66 Ohio St. 3d 402, 407-08, 613 N.E.2d 203, 207-08 (1993).

**C. Permissible Rebuttal Evidence Exceeded Issue of Peacefulness, Becoming Impermissible Victim Impact.**

In Section C of Hale's Eighth Proposition of law, he argued that Ricardo Cuffari and Vivian Wilson Jr.'s testimony introduced improper victim-impact evidence. This Court rejected the proposition of law, finding that both Cuffari's and Wilson's testimony were relevant to their knowledge of Green's character. See Hale, 2008 Ohio LEXIS 1942 at \*\*18, 2008 Ohio 3426 ¶ 63-68. In so ruling, this Court ignores Ohio R. Evid. 404 (A)(2)'s constraints on rebuttal testimony. In this case, rebuttal far exceeded testimony on Green's alleged peaceful character and ventured into impermissible, prejudicial victim-impact evidence. This Court's ruling gives prosecutor's unbridled discretion to present virtually all victim-impact evidence during the trial phase under the guise of demonstrating a character for peacefulness.

Cuffari's testimony that he prayed with Green was irrelevant to Green's peaceful character and was prejudicial to Hale. (T.p. 3013) Further, Wilson's testimony that he had attended a barbeque with Green, "And then [Green] told me give me some love . . ." and that Green was going to sing happy birthday to Wilson's son the following day was also well outside the scope the permissible rebuttal about Green's character for peacefulness. (T.p. 3043, 3050) Their knowledge of Green's character could be established by stating that they were both friends of Green. Elaborating on that relationship with specific examples took their testimony from relevant rebuttal testimony to impermissible, prejudicial victim-impact evidence.

In addition, testimony regarding Green not smoking or drinking beer was not relevant to proving the aggravated robbery, as this Court suggests. Hale, 2008 Ohio LEXIS 1942 at \*\*67, 2008 Ohio 3426 ¶ 24. The State's evidence demonstrated that Hale used Green's card after his death; that fact alone demonstrates that the cigarettes and beer were not for Green.

Hale also alleged error from admission of the CD cover photograph of Green. Photographs need not be taken the day of the alleged offense, but this photograph was taken years prior to the offense. It does not accurately reflect Green's apparent at or around the time of the offense. Thus, it was irrelevant and potentially misleading to the jury.

**F. Unreasonable Restrictions On Defense's Case-In-Chief.**

In Section F of Hale's Eighth Proposition of law, Hale argued that the trial court denied him his right to due process by partly excluding defense testimony about a sexual assault Green committed in 1998. The Court denied Hale's claim finding that "Hale was able to present his self-defense claim to the jury by relying on his confession." Hale, 2008 Ohio LEXIS 1942 at \*\*18, 2008 Ohio 3426 ¶ 49. In so ruling, this Court ignores Hale's right "to be afforded a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. 479, 485 (1984).

Hale had the right to present his self-defense case. Id. And, contrary to this Court's ruling, Hale was not able to present this defense through his confession. Surely his confession was seen as self-serving, and was suspect from the beginning. Cf. Skipper v. South Carolina, 476 U.S. 1, 8 (1986) (finding defendant's and wife's testimony on mitigating factor "was the sort of evidence that a jury naturally would tend to discount as self-serving"). Further, the State repeatedly stated that Hale was a lying in his confession, stressing each and every discrepancy throughout Hale's trial. In order to present a meaningful defense, Hale needed credible, independent evidence to support his confession. Johnny Smith's testimony was just that. Id. ("The testimony of more disinterested witnesses . . . would quite naturally be given much greater weight by the jury"). However, when the trial court partly excluded defense testimony by Smith, it denied Hale a "meaningful opportunity to present a complete defense",

and thus, denied Hale's right to due process. Washington v. Texas, 388 U.S. 14, 19 (1967) ("Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.")

The court's rulings allowed the jurors to consider irrelevant, inflammatory, and prejudicial evidence and arguments in violation of Hale's rights to a fair trial, a reliable sentence, and due process. This Court should vacate Hale's convictions and remand this case for a new trial.

**Proposition of Law No. VIII**

A Trial Court Violates A Capital Defendant's Constitutional Rights To A Fair Trial And Due Process When It Allows The State To Violate The Rules Of Discovery, Allows Misleading, Prejudicial Evidence And Testimony To Be Introduced During The Trial, Arbitrarily Limits Evidence In The Defense's Case-In-Chief, And Makes Arbitrary Evidentiary Rulings. U.S. Const. Amends. VI, XIV.

and

**Proposition of Law No. XII**

The Admission Of Prejudicial And Irrelevant Evidence During The Sentencing Phase Of Hale's Capital Trial Denied Hale His Rights To Due Process And A Reliable Determination Of His Sentence As Guaranteed By U.S. Const. Amends. V, VI, VIII And XIV; Ohio Const. Art. I, §§ 10 And 16.

and

**Proposition of Law No. VIII**

A Trial Court Violates A Capital Defendant's Constitutional Rights To A Fair Trial And Due Process When It Allows The State To Violate The Rules Of Discovery, Allows Misleading, Prejudicial Evidence And Testimony To Be Introduced During The Trial, Arbitrarily Limits Evidence In The Defense's Case-In-Chief, And Makes Arbitrary Evidentiary Rulings. U.S. Const. Amends. VI, XIV.

and

**Proposition of Law No. XIX**

A Capital Defendant Is Denied Substantive And Procedural Due Process Rights To A Fair Trial And A Reliable Sentence When The Prosecutor Commits Acts Of Misconduct During The Capital Trial. U.S. Const. Amends. VI, VIII, XIV; Ohio Const. Art. I, §§ 9, 16.

In each of the propositions of law identified above, this Court found some of Hale's claims waived despite the fact that trial counsel objected to the alleged error. See State v. Hale,

2008 Ohio LEXIS 1942, \*\*47, 2008 Ohio 3426 ¶ 127 (July 15, 2008) (“counsel did not state any grounds for the objection”); id. at 49, 2008 Ohio 3425 ¶ 132 (“defense made nonspecific objections to the prosecutor’s questions”) ; id. at 62, 2008 Ohio 3425 ¶ 169 (“Hale did not cite the irrelevant and inflammatory nature of the question as grounds for his objection”).

This Court held Hale to a standard inconsistent with Ohio law. Ohio Rule of Evidence 103 only requires that counsel state the “specific ground of objection, if the specific ground was not apparent from the context.” In the capital context, this Court has recognized this principal, holding that objections are preserved where the “basis for the objection is apparent from the transcript.” State v. Conway, 109 Ohio St. 3d 412, 426, 848 N.E.2d 810, 827 (2006) (citing Ohio R. Evid. 103(A)(1)). See also State v. Bethel, 110 Ohio St. 3d 416, 435, 854 N.E.2d 150, 176 (2006) (“although Bethel did not state specific grounds for objecting to the excusals of Hackney and Stynchula, the basis of Bethel’s objections can be fairly discerned from the record. Hence, Bethel’s objections to these excusals were not waived”).

In the instances identified by Hale, the reason for counsel’s objection is apparent from the record. The errors are preserved and plain error review is inapplicable. In his Twelfth Proposition of Law, Hale attacked the admission of his sister Laquatia’s testimony about an alleged threat made by Hale to kill his father. Hale argued this was error because Laquatia testified that “she had heard about the threat, but ‘wasn’t present’ when it was made.” Hale, 2008 Ohio LEXIS 1942 at \*\*47, 2008 Ohio 3426 ¶ 127. The reasons for Hale’s objection is apparent on the face of the record. First, Laquatia was testifying about matters of which she had no personal knowledge, thus hearsay is obvious from the record. Second, the matter to which Laquatia testified related to a threat by Hale to kill his father. Threats to kill demonstrate dangerousness and also bad character, thus that objection is apparent on the record. Finally, the

prosecutor asked a question to elicit a hearsay response, demonstrating the last component of the argument Hale asserted in his Merit Brief. Each of these reasons are apparent on the face of the record. Hale's objections to Laquatia's testimony are preserved.

Similarly, Hale's arguments in Proposition of Law Twelve relating to Dr. Fabian are not waived. Hale asserted that it was error to permit the prosecutor's examination, which elicited irrelevant and prejudicial information about parole. Relevancy as the ground for this objection is apparent on the face of the record. Hale's prior prison term and the parole board's determination in that matter were not relevant to the issues before the jury at the penalty phase. Hale's objection is preserved.

In his Nineteenth Proposition Law, this Court mischaracterizes Hale's claim respecting Detective Baird in order to treat it as waived. In pertinent part, Hale argued "[t]he prosecutor asked Detective James Baird about a post-Miranda discussion in which Hale allegedly said he disposed of certain items, including Green's shoulder bag. (T.p. 3242) Defense counsel objected. (Id.) The prosecutor purposely disregarded the court's prior ruling on the scope of this questioning. (T.p. 3214) Defense counsel moved for a mistrial, which the court denied. (T.p. 3243) The witness, following the prosecutor's lead, also improperly referred to the bag. (T.p. 3244) Again, the court did not grant defense counsel's request for a mistrial." (See Merit Brief at p. 132) Nowhere in this argument does Hale suggest that this was the presentation of "irrelevant and inflammatory evidence." Hale clearly argued that the prosecutor improperly elicited evidence that the trial court had excluded. The reason for Hale's objection and request for a mistrial are apparent on the record, since the court had excluded this evidence. The application of waiver for failure to make a specific objection is inappropriate. Moreover, this Court fails to address the merits of the very claim Hale was making.

These errors, which deprived Hale of his due process right to a fair trial, were properly preserved. Therefore, this Court should vacate Hale's convictions and remand this case for a new trial. Alternatively, this Court should vacate Hale's death sentence and remand this case for a new sentencing hearing.

### Proposition of Law No. XIII

The Capital Defendant's Right Against Cruel And Unusual Punishment And His Right To Due Process Are Violated When The Legal Issue Of Relevance Is Left To The Jury Regarding Sentencing Considerations And, The Sentencing Proceeding Creates An Unacceptable Risk Of Arbitrary, Nonstatutory Aggravators In The Weighing Process. U.S. Const. Amends. VIII And XIV. Those Same Rights Are Violated When The Trial Court Instructs The Jury Not To Consider Relevant Mitigating Evidence.

In his Thirteenth Proposition of Law, Hale argued that the trial court's penalty phase instruction informing the jury that mitigation did not exist "within the context of the crime itself" warranted reversal of his sentence. State v. Hale, 2008 Ohio LEXIS 1942, \*\*50, 2008 Ohio 3426 ¶ 135 (July 15, 2008). This Court noted that this instruction was "unclear" but declined to find plain error because the physical evidence was inconsistent with Hale's claim of an unwanted sexual advance and because the jury was correctly instructed on "duress, coercion or strong provocation." Id. at 50, 2008 Ohio 3426 ¶ 137. Hale argued in his Merit Brief that there was compelling evidence of a sexual advance, which he incorporates herein by reference. See, e.g., Proposition of Law No. XVIII.

Moreover, the instruction on duress, coercion, or strong provocation does not cure this error. This was merely a conflicting and inconsistent instruction on how the jury was to perform its weighing task. While the jury was told it could consider duress, coercion, or strong provocation, it was also told that it could not consider the best evidence in support of this defense. The competing, and irreconcilable instructions, eviscerated Hale's due process right to present a defense against the death penalty. See Holmes v. South Carolina, 547 U.S. 319, 324 (2006). This error deprived Hale of the opportunity to have the jury give any meaningful

consideration to mitigation evidence that Green's death was the byproduct of an unwanted sexual advance. See Holmes, 547 U.S. at 324.<sup>1</sup>

Even if this Court does not believe that Hale's evidence rose to the level of the O.R.C. § 2929.04(B)(1) mitigating factor, the jury would have been free to consider the evidence of an unwanted sexual advance under the catchall O.R.C. § 2929.04(B)(7) mitigating factor. But, again, the trial court's erroneous instruction removing the nature and circumstances of the offense from the jury's purview deprived the jury of its ability to do so. See id.

The trial court's instructions were improper and violated Hale's Eighth Amendment rights. This Court should vacate Hale's death sentence and remand this case to the trial court for a new sentencing hearing.

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<sup>1</sup> In Holmes, the Supreme Court held that a capital defendant's due process right was violated by a state evidentiary rule that precluded the jury's consideration of credible evidence about an alternative suspect. 547 U.S. at 330-31.

**Proposition of Law No. XVI**

When A Trial Court Weighs Mitigation Evidence Separately, Relies On An Improper Expert Opinion, Diminishes Relevant Mitigation, And Fails To Specify Why The Aggravating Factors Outweigh The Mitigating Circumstances, The Capital Defendant Is Deprived Of The Right To Individualized Sentencing And Of His Liberty Interest In The Statutory Sentencing Scheme In Violation Of Rights As Guaranteed By U.S. Const. Amends. V, VIII And XIV; Ohio Const. art. I, §§ 9 And 16.

**C.1 The Trial Court Weighed Each Piece Of Mitigation Evidence Separately Against The Aggravating Circumstance.**

In Hale's Sixteenth Proposition of Law, he argued that flaws in the trial court's sentencing opinion violate Hale's constitutional rights, and in turn, invalidate Hale's death sentence. Specifically, in section C.1, Hale claimed that the trial court failed to weigh the mitigating factors collectively against the aggravating circumstances. This Court found that although "it is not clear that the trial court failed to weigh the mitigating circumstances collectively . . . our independent review will cure it." See State v. Hale, 2008 Ohio LEXIS 1942, \*\*56, 2008 Ohio 3426 ¶ 151 (July 15, 2008).

However, this Court's independent re-weighing cannot cure this error. Because it is unclear how the trial court would have weighed the mitigation, had it weighed it cumulatively against the aggravating circumstance, this Court cannot determine the result by re-weighing the evidence. Moreover, this Court has concluded that sometimes deficiencies in a case are too severe to correct by simply re-evaluating the evidence. State v. Green, 90 Ohio St. 3d 352, 364, 738 N.E.2d 1208, 1224 (2000). The failure of the trial court to consider the aggravating circumstance against the cumulative mitigation evidence renders the trial court's opinion deficient.

### **C.3 The Trial Court Improperly Diminished Relevant Mitigating Evidence.**

In section C.3, Hale argued that the trial court improperly diminished the mitigating weight of Hale's adjustment to prison. This Court denied this claim, finding that "a trial court need not accept mitigating factors as the defendant's proposed valuation; their weight is for the trial court to determine." Hale, 2008 Ohio LEXIS 1942 at \*\*57, 2008 Ohio 3426 ¶ 153. However, the trial court misunderstood Hale's mitigation evidence relevant to his time spent in prison, and therefore it improperly diminished the value of this mitigating evidence.

Here, the trial court misunderstood the nature of Hale's Skipper v. South Carolina, 476 U.S. 1 (1986), evidence. Skipper evidence has nothing to do with a defendant's ability to adapt outside of prison. But, evidence that Hale had served 12 years in prison while completing programs and living relatively incident-free was relevant mitigating evidence for the trial court to consider when assessing Hale's sentence. See id. The mitigation evidence Hale presented demonstrated that despite his inability to conform his conduct to the rules of the outside world, he was a highly well-functioning inmate. The trial court improperly diminished the value of Hale's ability to adjust to incarceration as a mitigating factor by determining Hale's inability to adjust to free society somehow lessened the importance of his ability to conduct himself appropriately in prison.

The trial court's sentencing opinion abandoned the statutory framework for capital punishment, imposing death with unguided discretion based on arbitrary and capricious factors. Therefore, this Court should vacate Hale's death sentence and remand this case to the trial court for a new sentencing hearing.

### **Proposition of Law No. XIX**

A Capital Defendant Is Denied Substantive And Procedural Due Process Rights To A Fair Trial And A Reliable Sentence When The Prosecutor Commits Acts Of Misconduct During The Capital Trial. U.S. Const. Amends. VI, VIII, XIV; Ohio Const. Art. I, §§ 9, 16.

In his Nineteenth Proposition of Law, Hale argued that repeated acts of misconduct by the prosecutor prejudiced him during both phases of his capital trial. This Court rejected Hale's claims individually.

In addition to arguing each individual claim of misconduct, Hale argued that the cumulative impact of the misconduct committed warranted relief. Walker v. Engle, 703 F.2d 959, 963 (6th Cir. 1983) (the "cumulative effect" of misconduct committed by the state constituted denial of fundamental fairness). (See Merit Brief at p. 145) Nowhere in its opinion does this Court consider the totality of the misconduct committed by the prosecutor. This is particularly significant given that this Court found that some of the claims Hale raised were meritorious, but, in isolation, harmless.

Hale does not concede that this Court correctly ruled on his independent claims of misconduct. Regardless, cumulative review of the wealth of improprieties committed by the prosecution, from inappropriate questions, to discovery violations, to prejudicial and inflammatory arguments, warrants relief. Id. at 963. Cf. Washington v. Hofbauer, 228 F.3d 689, 698-99 (6th Cir. 2000) (citation omitted) (reviewing prosecutor misconduct in light of two factors: 1) whether the prosecutor's acts "were improper," and 2) whether the misconduct was "sufficiently flagrant to warrant reversal.").

Additionally, Hale takes issue with this Court's conclusion that the record failed to demonstrate that the "jury could or did hear" the prosecutor indicate that defense counsel was

“out of [his] mind” for objecting. State v. Hale, 2008 Ohio LEXIS 1942, \*\*68, 2008 Ohio 3426 ¶ 191 (July 15, 2008). Elsewhere in its opinion, this Court made what it termed as “reasonable inferences” from the record. Id. at \*\*66, 2008 Ohio 3246 ¶ 184. (“That inference is a reasonable one based on the evidence.”). A reasonable inference that the jury heard this comment can similarly be made on the face of the record—the *court reporter* heard the comment and transcribed it in the record. (T.p. 3063) Moreover, the record *does not* indicate that this comment was made during a sidebar. All of the record evidence supports the conclusion that the jury heard this comment. It is misconduct to belittle the defendant’s attorney for making objections. See State v. Keenan, 66 Ohio St. 3d 402, 406, 613 N.E.2d 203, 207 (1993). This type of disparaging comment is particularly prejudicial to counsel’s credibility and warrants relief.

This Court also rejected Hale’s misconduct claim relating to the State’s repeated use of leading questions during direct examination of the witnesses. Hale, 2008 Ohio LEXIS 1942 at \*\*60, 2008 Ohio 3426 ¶ 163. In rejecting Hale’s claim, this Court found that “Hale [made] no attempt to explain how the trial court abused its discretion in overruling his objections.” Id. This Court analyzes Hale’s claims under the wrong standard. Hale did not argue this as a claim of trial court error. Instead, this is a claim of prosecutor misconduct that should be analyzed under the relevant United States Supreme Court standards: did the prosecutor’s misconduct prejudice a substantive right, see Donnelly v. DeChristoforo, 416 U.S. 637, 644 (1974) (citing Griffin v. California, 380 U.S. 609 (1965)) (footnote omitted); United States v. Carter, 236 F.3d 777, 785 (6th Cir. 2001), or did the prosecutor’s misconduct render the trial fundamentally unfair. See Berger v. United States, 295 U.S. 78 (1935); Gravley v. Mills, 87 F.3d 779, 786 (6th Cir. 1996).

The prosecutor's misconduct violated Hale's due process rights. This Court should vacate Hale's convictions and remand this case for a new trial. Alternatively, this Court should vacate Hale's death sentence and remand this case for new sentencing proceedings.

## Proposition of Law No. XX

Hale's Right To Effective Assistance Of Counsel Was Violated  
When Counsel's Performance Was Deficient And He Was Thereby  
Prejudiced. U.S. Const. Amends. VI, XIV; Ohio Const. Art. I, §  
10.

### **E. Failure To Object During Both Phases Of Hale's Capital Trial.**

In Hale's Twentieth Proposition of Law, he argued that his trial counsel's performance failed to meet the prevailing standards of practice, and as a result, Hale's rights guaranteed by the Sixth and Fourteenth Amendments and Article I, §§ 10 and 16 of the Ohio Constitution were violated. Specifically, in section E, he argued that his trial counsel failed to object to numerous errors at trial. This Court dismissed this claim finding that "the failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel. . . . In our view, none of Hale's claims of error is so compelling that competent counsel would have been obligated to object to them at trial, nor were they prejudicial." (internal citation omitted). State v. Hale, 2008 Ohio LEXIS 1942, \*\*85, 2008 Ohio 3426 ¶ 233 (July 15, 2008).

However, trial counsel had an obligation to ensure that Hale received a fair trial. And, that 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; Gravley 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. Freeman v. Lane, 962 F.2d 1252, 1259 (7th Cir. 1992) (appellate counsel ineffective for abandoning viable federal claim). Trial counsel repeatedly failed to object and thus protect Hale's rights.

Counsel rendered deficient performance to Hale's prejudice. This Court should vacate Hale's convictions and remand this case for a new trial. Alternatively, this Court should vacate Hale's death sentence and remand this case for new sentencing proceedings.

**Proposition of Law No. XXI**

The Cumulative Effect Of Trial Error Renders A Capital Defendant's Trial Unfair And His Sentence Arbitrary And Unreliable. U.S. Const. Amends. VI, XIV; Ohio Const. Art. I, §§ 5, 16.

In his Twenty-First Proposition of Law, Hale argued that cumulative error at his trial warranted relief from his convictions and/or death sentence. This Court rejected that claim. In doing so, however, this Court inappropriately limited its consideration to Hale's First, Eighth, and Nineteenth Propositions of Law. State v. Hale, 2008 Ohio LEXIS 1942, \*\*85-86, 2008 Ohio 3426 ¶ 235-39 (July 15, 2008). In his Merit Brief, Hale argued the error arose from Propositions of Law Nos. I-XX. (See Merit Brief at p. 173) This Court's review failed to encompass Hale's complete claim—it is the repeated errors, from start to finish, that warrant relief in Hale's case. See Walker v. Engle, 703 F.2d 959, 963 (6th Cir. 1983); State v. Wilson, 787 P.2d 821, 821 (N.M. 1990); United States v. Wallace, 848 F.2d 1464, 1475 (9th Cir. 1988); State v. DeMarco, 31 Ohio St. 3d 191, 509 N.E.2d 1256, 1257, syl. 2 (1987); State v. Brown, 115 Ohio St. 3d 55, 70, 873 N.E.2d 858, 871 (2007) (“when considered together, these two errors call into question the fundamental fairness of Brown's trial”).

The cumulation of errors occurring at Hale's trial calls “into question the fundamental fairness of [his] trial.” Brown, 115 Ohio St. 3d at 70, 873 N.E.2d at 871. This Court should vacate Hale's convictions and remand this case for a new trial. Alternatively, this Court should vacate Hale's death sentence and remand this case for a new sentencing hearing.

**Conclusion**

For each of the forgoing reasons, Appellant Delano Hale requests that this Court reconsider its decision on the merits issued on July 15, 2008.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true copy of the foregoing Appellant Delano Hale's Motion for Reconsideration has been served upon William Mason, Prosecuting Attorney, Cuyahoga County Prosecutor's Office, Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 25th day of July, 2008.



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