ORIGINAL

In The Supreme Court Of Ohio

State Of Ohio,	:	
Appellee,	:	
-Vs-	:	Case No: 2007-2021
Lamont Hunter,	:	
Appellant.	:	**This Is A Capital Case.**

On Appeal From The Hamilton County Court Of Common Pleas,
Case No. B 0600596

Appellant Lamont Hunter's Application For Reopening Pursuant To App. R. 26(B)

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Appellant Lamont Hunter asks this Court to grant his Application for Reopening based upon the ineffective assistance of counsel during Hunter's direct appeal. App. R. 26(B) and *State v. Murnahan*, 63 Ohio St. 3d 60 (1992).

A. Hunter's direct appeal counsel were constitutionally ineffective.

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). After a review of the direct appeal brief that was filed on Hunter'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* Exhibit A; Propositions of Law I - V, *infra*.

As further evidence of appellate counsel's ineffectiveness, it is informative to look at what counsel did raise. Instead of raising the multitude of meritorious arguments included

herein, counsel spent twenty-four pages of their forty-six page argument section in their Merit Brief arguing that the death penalty (on its face and as applied) in Ohio is unconstitutional and a violation of international law. See pgs. 24-48 of Appellant's Merit Brief. Despite this lengthy analysis concerning the constitutionality of the death penalty, appellate counsel forewent much, if any, factual or legal argument in support of other, potentially meritorious claims. Specifically, counsel expressly acknowledged on the record that they raised Propositions of Law II, III, IV, and VII solely to preserve them for federal court review. However, these claims are fact-based inquiries, which required both factual and legal support.[1] *See e.g. State v. Hunter*, 131 Ohio St. 3d 67, 74, 76, 82 (2011) for examples of where this Court specifically points out appellate counsel's failures to cite specific on-the-record support for their claims.

Appellate counsel additionally relied upon evidence *de hors* the record in their merit brief (see pgs. 11-15) and at the October 18, 2011 Oral Argument before this Court. This off-the-record evidence is relevant to Hunter's petition for post-conviction relief, but not to Hunter's direct appeal, as this Court could not consider anything outside of the record in deciding Hunter's direct appeal. *See e.g. State v. Keith*, 79 Ohio St. 3d 514, 536 (1997).

Because appellate counsel were prejudicially ineffective in this case, this Court must reopen his appeal. *State v. Murnahan*, 63 Ohio St. 3d 60 (1992) and App. R. 26(B).

C. Appellate counsel were prejudicially ineffective for failing to raise meritorious issues on appellant Hunter's behalf.[2]

The 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*,

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[1] If this Court finds that these Propositions of Law were not adequately raised or supported by facts and/or law, current appellate counsel respectfully requests that further briefing of these claims be allowed.

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

111 Ohio St.3d 70 (2006). Had Appellant Hunter's direct appeal counsel presented the following five propositions of law, the outcome of this appeal would have been different.

PROPOSITION OF LAW NO. I: A capital defendant is denied the right to the effective assistance of trial counsel when trial counsel prejudicially fails his client during his capital trial. U.S. Const. Amends. VI; XIV.

The Sixth and Fourteenth Amendments guarantee the accused the right to counsel at trial. *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963). When evaluating claims of ineffective assistance of counsel, this Court must determine if counsel's performance was deficient, and if so, whether petitioner was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984); *Glenn v. Tate*, 71 F.3d 1204, 1210-11 (6th Cir. 1995).

A. Trial phase

Hunter's trial counsel stated no less than five times during his opening statement to the three-Judge panel that the evidence "will prove" or "will show" that Luzmilda Blue was a horrible mother, who could have harmed Trustin, that Trustin was shaken, that these injuries could have been inflicted at a different time by a different person, and that Trustin could have died due to "rebleeding." Tr. 121, 123, 124-25, 126. As it turns out, trial counsel put forward absolutely nothing to prove any of these assertions; on the contrary evidence solicited by counsel on cross-examination further cemented the State's case against his client. This is clearly ineffective, particularly after making these declarations in opening statement. *Strickland*, 466 U.S. at 686-87.

Trial counsel relied on cross-examination rather than hiring an expert to refute the coroner's and physician's testimony. Counsel incorrectly believed that he could convince the experts to admit that Trustin could have had a lucid interval after the injury, and therefore, he could argue that Trustin could have been injured before his time alone with Hunter. Tr. 122, 125-27, 419-20, 422-23, 433-44; 617-18. He also tried to show that the injuries that led to

Trustin's death were actually the aggravation of an earlier injury that resulted in "rebleeding" in Trustin's brain (Tr. 126, 365-70; 391-94), and that because Trustin's subdural hematoma was described as "acute," it could have occurred up to 24 hours before he presented at the hospital. Tr. 378-82; 399-400; 416-17; 433-34. None of these suggestions were supported by the evidence.

When the State's experts refused to change their opinion, counsel aggressively cross-examined Dr. Makoroff and Dr. Stephens on a point that clearly had no merit and did not help Hunter's case: the fact that they could not pinpoint the exact time of Trustin's injuries. What counsel did not seem to understand was that, based on the expert witnesses' testimony, it did not matter whether the State could determine the time of Trustin's injuries that morning. The medical evidence established that Trustin would have been in a coma after the injuries. The evidence also established that Trustin spoke on the phone with Wilma Forte at 9:00 a.m. on the day of his injuries. Tr. 515. And Hunter's statement verified that from the time of that telephone conversation until the time Trustin was injured, he was the only adult in the house with Trustin. State's Tr. Ex. 12.

The only effect of counsel's scattered and misinformed cross-examination was that the State's experts were able to repeatedly point out the flaws in counsel's theories and stress the severity of Trustin's injuries. Hunter was found guilty by the three judge panel of Trustin's rape, aggravated murder, and the attached death penalty specifications much because of information that expressly came out through trial counsel's own cross-examination. This was ineffective and constitutionally prejudiced Hunter. *Strickland*, 466 U.S. at 686-87.

B. Mitigation

During the opening and closing argument of the mitigation phase, defense counsel relied on a theory of residual doubt as part of his argument of why Hunter deserved a sentence of life with parole eligibility after twenty five years. Mit. Tr. 738, 807. Defense counsel's reliance on

residual doubt demonstrated his lack of knowledge and competency in defending a capital case. In 1997, the Ohio Supreme Court concluded that residual doubt was no longer a mitigating factor to be considered in death penalty cases in Ohio. *State v. McGuire*, 80 Ohio St. 3d 390, 403, 686 N.E. 2d 1112, 1123 (1997). Counsel's failure to know this law and his reliance on outdated principles to argue on behalf of less than a sentence of death for Hunter is inexcusable and prejudiced Hunter. The panel was given reasons that they could not even legally consider in reaching the sentencing determination. Had counsel known the law, there is a reasonable probability that the panel would have sentenced Hunter to life.

Ohio's statute specifies that in order to sentence a defendant to death, the State must prove that the aggravated circumstance(s) the offender was found guilty of committing outweigh the mitigating factors beyond a reasonable doubt. R.C. § 2929.03(D)(2). Counsel in Hunter's case misstated the weighing process by arguing during opening statements that the mitigating evidence outweighed the aggravating factor in Hunter's case. Mit. Tr. 737-38. During the closing argument, Hunter's counsel continued to argue that the mitigating evidence outweighed the aggravating circumstances. Mit. Tr. 806. Counsel's deficiencies were not inconsequential in this case. Both counsel's opening and closing arguments during the mitigation phase relied on incorrect or outdated Ohio case law. Effective defense counsel would have known what the State had to prove when arguing to the Court the appropriate sentence in a death penalty case.

During the mitigation phase, defense counsel elicited testimony from several of the witnesses testifying on Hunter's behalf that Hunter was a good father to his children, and that Hunter was not a violent or abusive person. In response to this testimony, the State questioned Hunter's witnesses about Hunter's drug convictions, domestic violence charges and his failure to pay child support. Mit. Tr. 758, 767, 780-81. Hunter did not testify at his capital trial, and there was no reason why Hunter's previous convictions should have been introduced at his trial.

Hunter's questioning of his own defense witnesses opened the door to Hunter's criminal convictions being introduced. As a result additional prejudicial evidence was improperly considered by the panel when making its sentencing determination.

PROPOSITION OF LAW NO. II: The trial court erred when it allowed unqualified expert witness testimony in violation of Ohio Rule of Evidence 702 and the Fourteenth Amendment of the United States Constitution, as well as Art. 1, §§ 10 and 16 of the Ohio Constitution.

Both this Court and the Supreme Court of the United States have explicitly recognized the gatekeeping role of the trial court when it comes to expert testimony. *See Miller v. Bike Athletic Co.*, 80 Ohio St. 3d 607 (1998), *Daubert,* 509 U.S. at 595 (1993). A witness must first be qualified as an expert before testifying as one. And while an expert may be qualified to testify on one subject, he or she may not be similarly qualified to testify as an expert on a related subject. *Campbell v. Daimler Group*, 115 Ohio App. 3d 783, 793 (1996) (citation omitted). Thus, an expert may only give an opinion as to matters that are within his or her realm of expertise. *Shilling v. Mobile Analytical Services Inc.*, 65 Ohio St. 3d 252, 255 (1992). Here, Dr. Katherine Makoroff, although probably qualified to testify as a pediatrician, was not qualified to testify as an opthamologist, a neurosurgeon, or a neurologist. Even so, she was allowed to testify, over objection, as an "expert" as to injuries to Trustin's eyes and brain. Tr. 315-16, 320-31. This testimony was unreliable and prejudicial, as the prosecution capitalized on this testimony in its closing argument, and the trial court heavily relied upon Dr. Makoroff's findings in its Sentencing opinion. See Tr. 662-62, 667; Sentencing Opinion.

PROPOSITION OF LAW NO. III: When a trial court weighs uncharged circumstances against the mitigation evidence, a 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 and Ohio Const. §§ 9 and 16.

The trial court's opinion was inadequate and did not comply with the requirements of R.C. § 2929.03(F) because the court considered uncharged and nonstatutory aggravating

circumstances when reaching its sentencing determination. These errors denied Hunter the individualized sentencing guaranteed by the Eighth and Fourteenth Amendments to the United State Constitution. *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (plurality opinion); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982).

In providing its explanation of the aggravating circumstances to be weighed, the panel found that the murder was "a completely unnecessary and cold-blooded act" and that the killing evidenced the particularly "malicious outlook" of Hunter. Sentencing Opinion at p. 12. In finding that aggravating circumstances outweighed the mitigation factors, the court further found that the proven facts of aggravated circumstances reveal a "calculated, cruel, willful, cowardly, and cold-blooded disregard for human life and values." *Id.* at p. 20. It was improper for the court to consider the manner in which the murder was executed since that is not an aggravating circumstances that can be charged to make a defendant eligible to receive the death penalty.

This Court has recognized that only aggravating circumstances specifically enumerated in O.R.C. § 2929.04(A) may be considered in imposing the death penalty. *State v. Johnson*, 24 Ohio St.3d 87 (1986). The court's consideration of the vague nonstatutory aggravators specification was improper.[3] The panel abandoned the statutory framework for capital punishment and instead imposed its sentence with unguided discretion based upon arbitrary and capricious factors in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. *Gregg*, 428 U.S. 153. Hunter's death sentences must be reversed.

PROPOSITION OF LAW NO. IV: Sentencing before a court biased in favor of the death penalty deprives a capital defendant of his due process rights. U.S. Const. Amend. XIV; Ohio Const. Art. I, § 16.

[3] This Court cannot accept independent review as a cure because the Court cannot know if the result of the weighing process by the three judge panel would have been different had the impermissible aggravating circumstances not been present. *State v. Davis*, 38 Ohio St. 3d at 361, 371 (1988).

Due process requires a fair trial before a disinterested judge, one who has no bias against the defense or interest in the outcome. *See Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997). The Due Process Clause requires a "neutral and detached judge in the first instance[.]" *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 617 (1993) (citing *Ward v. Monroeville*, 409 U.S. 57, 61-62 (1972)). Here, Hunter's trial was not conducted before a neutral and detached panel of judges. Rather, the three-judge panel expressed its intent to impose death because of their feelings of contempt for Hunter. They described Hunter as "a savage," who "raped and devoured a three-year old child," and was "the lowest form of dehumanized individual . . . a cowardly, calculated, cold-blooded and really unremorseful kill[er]." Tr. 831-32; *see also* Tr. 829-30. The panel likewise sentenced Hunter to death to teach "the system" and society a lesson. Tr. 832. Much like an automatic death penalty juror may not constitutionally serve on a capital jury, *Morgan v. Illinois*, 504 U.S. 719 (1992), an automatic death penalty judge should not be permitted to preside over or impose sentence on a capital defendant. *Cf. id.* Here, Hunter's panel was pre-disposed to sentence Hunter to death because of their disdain for him and to teach society a lesson; these are not aggravating factors pursuant to O.R.C. § 2929.04(A). Hunter's right to federal due process was violated.

PROPOSITION OF LAW NO. V: A capital defendant is denied his substantive and procedural due process rights to a fair trial and reliable sentencing as guaranteed by U.S. Const. Amends. VIII and XIV; Ohio Const. Art. I, §§ 9 and 16 when a prosecutor commits acts of misconduct during his capital trial.

To succeed on his claim of prosecutor misconduct, Hunter must demonstrate either that the prosecutor's misconduct prejudiced a constitutional right or that the misconduct rendered his trial fundamentally unfair. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *United States v. Carter*, 236 F.3d 777, 785 (6th Cir. 2001). Here, during phases of Hunter's capital trial, the prosecutor committed acts of misconduct that deprived Hunter of a fair trial and a reliable sentence. U.S. Const. Amends. VIII and XIV; Ohio Const. Art. I, §§ 9 and 16.

During Amber White's testimony, the State introduced a photograph of White kissing Trustin while he was in the hospital. Tr. 562; State's Ex. 18. This evidence was not relevant to the issues to be considered by the trier of fact. The prosecutor may only introduce victim impact evidence at the trial phase when it relates to the "facts attendant to the offense." *See State v. Fautenberry*, 72 Ohio St. 3d 435, 440 (1995); *State v. Allard*, 75 Ohio St. 3d 482, 495 (1996). The photo of White kissing the victim while he was in the hospital before he died did not relate to the facts attendant to the offense.

The State also elicited testimony from Barbara Mirlenbrink, the Cincinnati police officer criminalist who responded to the crime scene in this case. Tr. 254-55. During Mirlenbrink's testimony, the State asked what kind of evidence she collected pertaining to the alleged rape and then specifically mentioned a tiki torch and tire gauge. Tr. 261. The State's motive for mentioning this evidence was to place in the panel's mind the image of Trustin being raped with a tiki torch. Although Mirlenbrink testified that the torch was negative for blood, the visual that the testimony created and the prejudice to Hunter was clear. Testimony regarding the tiki torch was irrelevant and merely utilized to prejudice Hunter.

The prosecutor further elicited improper hearsay evidence during testimony of Wilma Forte (Tr. 493-521) and continuously requested expert witnesses to provide speculative testimony. *See, e.g.* Testimony of Dr. Makoroff at Tr. 293, 299, 301, 303-04; Dr. Stephens at Tr. 592, 593-94, 598, 601-02.

Last, during the State's closing argument, the prosecutor made inflammatory and prejudicial comments regarding facts not in evidence. Specifically, the prosecutor argued that Hunter's motive toward Trustin was sadistic and that hurting Trustin was what he enjoyed. Tr. 715. The State speculated that Hunter enjoyed hurting Trustin because he did not want to spend time with Trustin. *Id.* Finally, the State stated that the basement was the torture chamber. *Id.*

Prosecutors are not permitted to "allude to matters not supported by admissible evidence." *State v. Lott*, 51 Ohio St. 3d 160, 166 (1990). It is "improper for the state to attempt to prove its case by suggestion rather than evidence." *State v. Liberatore*, 69 Ohio St. 2d 583, 588 (1982). While the prosecution is entitled to some degree of latitude during closing arguments, the State in this case went far beyond the latitude ordinarily afforded during closing arguments. *State v. Keenan*, 66 Ohio St. 3d 402, 410 (1993). No verdict achieved by such means can be deemed reliable, rational or fair.[4]

In analyzing prosecutorial misconduct under the Due Process Clause, the "touchstone" is "the fairness of the trial." *Lott*, 51 Ohio St. 3d at 166 (*citing Smith v. Phillips*, 455 U.S. 209, 219 (1982)). The prosecutor's misconduct in its entirety so infected Hunter's trial and sentencing phase as to result in a deprivation of his rights to Due Process. *Donnelly*, 416 U.S. at 643; *Darden v. Wainwright*, 477 U.S. 168 (1986). Hunter's conviction and sentence must be vacated and this case remanded.

D. Conclusion

Appellant Lamont Hunter requests that this Application for Reopening be granted. App. R. 26(B) and *State v. Murnahan*, 63 Ohio St. 3d 60 (1992).

Respectfully submitted,

Office of the Ohio Public Defender

By: _____
Kimberly S. Rigby - 0078245
Assistant State Public Defender

By: _____
Pamela Prude-Smithers - 0062206
Chief, Death Penalty Division

[4] Trial counsel failed to object to some of the instances of prosecutorial misconduct. However, a number of instances of misconduct were objected to by defense counsel and sustained by the trial court. Therefore, this Court is not precluded from reviewing this issue in its entirety. *State v. Fears*, 86 Ohio St. 3d 329 (1999)(Moyer, C.J., dissenting); *See also, State v. Keenan*, 66 Ohio St. 3d 402 (1993).

Certificate of Service

I hereby certify that a true copy of the foregoing was forwarded by regular U.S. mail to Ronald W. Springman, Assistant Prosecutor, Hamilton County, 230 E. Ninth Street, Suite 4000, Cincinnati, Ohio 45202 on the 5th day of April, 2012.

By: _____
Kimberly S. Rigby - 0078245
Counsel for Appellant

EXHIBIT A

In The Supreme Court Of Ohio

State Of Ohio,	:	
Appellee,	:	
-Vs-	:	Case No: 2007-2021
Lamont Hunter,	:	
Appellant.	:	**This Is A Capital Case.**

AFFIDAVIT OF KIMBERLY S. RIGBY

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

I, Kimberly S. Rigby, after being duly sworn, hereby state as follows:

1. I am an attorney licensed to practice law in the state of Ohio, and I have been an assistant state public defender since 2004. My sole area of practice is capital litigation.

2. I was assigned to work on Lamont Hunter's post-conviction case.

3. I have reviewed the record in *State v. Hunter*, Hamilton County Common Pleas Case No. B 0600596. I have also reviewed the direct appeal briefs presented to this Court in this case.

4. I am Rule 20 certified to represent indigent clients in death penalty appeals.

5. Because of the focus of my practice of law, my Rule 20 certification, 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. Because of my specialized practice, I have also taught as faculty at the Ohio Association of Criminal Defense Lawyers annual death penalty seminar held in Columbus, Ohio.

6. The Due Process Clause of the Fourteenth Amendment guarantees effective assistance of counsel on an appeal as of right. *Evitts v. Lucey*, 469 U.S. 587 (1985).

7. The initial responsibility of appellate counsel, once the transcript is filed, is to ensure that the entire record has been filed with the appellate court. Appellate counsel has a fundamental duty in every criminal case, and especially in a capital case, to ensure that the entire record is before the reviewing courts on appeal. R.C. 2929.05; *State ex rel. Spirko v. Judges of the Court of Appeals,* Third Appellate District, 27 Ohio St. 3d 13, 501 N.E. 2d 625 (1986); *see also Griffin v. Illinois*, 351 U.S. 12 (1956) (recognizing the necessity of the transcript in order to vindicate a defendant's constitutional right to appellate review).

8. After ensuring that the record is complete, counsel must then review the record for purposes of issue identification. This review of the record not only includes the transcript, but also the trial motions, exhibits, and the jury questionnaires.

9. For counsel to properly identify issues, they must have a good knowledge of criminal law in general. Most trial issues in capital cases will be decided by criminal law that is applicable to non-capital cases. As a result, appellate counsel must be informed about the recent developments in criminal law when identifying potential issues to raise on appeal. Counsel must remain knowledgeable about recent developments in the law after the merit brief is filed.

10. Since the reintroduction of capital punishment in response to the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the area of capital litigation has become a recognized specialty in the practice of criminal law. Many substantive and procedural areas unique to capital litigation have been carved out by the United States Supreme Court. As a result, anyone who litigates in the area of capital punishment must be familiar with this Supreme Court precedent and developments in the law to raise and preserve all relevant issues for appellate review.

11. Appellate representation of a death-sentenced client requires recognizing that the case will most likely proceed to the federal courts at least twice: first, on petition for Writ of Certiorari in the United States Supreme Court, and again on petition for Writ of Habeas Corpus filed in a federal district court. Appellate counsel must preserve all issues throughout the state-court proceedings on the assumption that relief is likely to be sought in federal court. The issues that must be preserved are not only issues unique to capital litigation, but also case-and fact-related issues unique to the case that impinge on federal constitutional rights.

12. It is a basic principle of appellate practice that to preserve an issue for federal review, the issue must be exhausted in the state courts. This is all the more important in light of a recent case out of the United State Supreme Court, *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). To exhaust an issue, the issue must be presented to the state courts in such a manner that a reasonable jurist would have been alerted to the existence of a violation of the United States Constitution. The better practice to exhaust an issue is to cite directly to the relevant provisions of the United States Constitution in each proposition of law to avoid any exhaustion problems in federal court.

13. It is important that appellate counsel realize that the reversal rate in the state of Ohio is approximately eleven percent on direct appeal and two percent in post-conviction. It is my understanding that forty to sixty percent (depending on which of several studies is relied upon) of all habeas corpus petitions are granted. Thus, appellate counsel must realize that in Ohio, a capital case is very likely to reach federal court and, therefore, counsel should prepare the appeal accordingly.

14. Based on the foregoing standards, I have identified the following issues that should have been evaluated by appellate counsel and fully presented to this Court:

PROPOSITION OF LAW NO. I: A capital defendant is denied the right to the effective assistance of trial counsel when trial counsel prejudicially fails his client during his capital trial. U.S. Const. Amends. VI; XIV.

PROPOSITION OF LAW NO. II: The trial court erred when it allowed unqualified expert witness testimony in violation of Ohio Rule of Evidence 702 and the Fourteenth Amendment of the United States Constitution, as well as Art. 1, §§ 10 and 16 of the Ohio Constitution.

PROPOSITION OF LAW NO. III: When a trial court weighs uncharged circumstances against the mitigation evidence, a 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 and Ohio Const. §§ 9 and 16.

PROPOSITION OF LAW NO. IV: Sentencing before a court biased in favor of the death penalty deprives a capital defendant of his due process rights. U.S. Const. Amend. XIV; Ohio Const. Art. I, § 16.

PROPOSITION OF LAW NO. V: A capital defendant is denied his substantive and procedural due process rights to a fair trial and reliable sentencing as guaranteed by U.S. Const. Amends. VIII and XIV; Ohio Const. Art. I, §§ 9 and 16 when a prosecutor commits acts of misconduct during his capital trial.

15. These issues are meritorious and warrant relief. Thus, appellate counsel's failure to present these errors amounts to ineffective assistance of appellate counsel in this case.

16. Appellate counsel failed to raise these issues in appellant Lamont Hunter's direct appeal to this Court. Based on my evaluation of the record and understanding of the law, I believe the issues raised in this Application to Re-open are meritorious. Also, had appellate counsel raised these issues, each error would have been properly preserved for federal-court review.

17. Therefore, Appellant Lamont Hunter was detrimentally affected by the deficient performance of his former appellate counsel.

Further affiant sayeth naught.

KIMBERLY S. RIGBY
Counsel for Lamont Hunter

Sworn to and subscribed before me on this 5th day of April, 2012.

Notary Public

GREGORY A. HOOVER
Notary Public, State of Ohio
My Commission Does Not Expire