

In The Supreme Court Of Ohio

STATE OF OHIO, :
Appellee, :
-vs- : Case No. 2010-2198
CALVIN MCKELTON, :
Appellant. : **This Is A Capital Case.**

On Appeal From The Court Of
Common Pleas Of Butler County
Case No. CR-10-020189

REPLY BRIEF OF APPELLANT CALVIN MCKELTON

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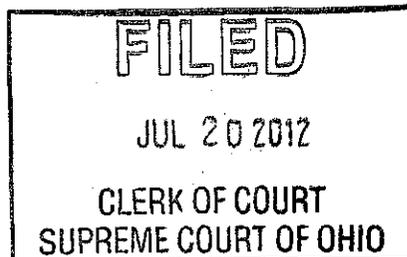


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Preface

Calvin McKelton replies to the State's argument in Propositions of Law Nos. I, II, IV, V, VI, VII, VIII, IX, X, XI, XIII, XV, XVI and XVII. The absence of a reply by McKelton on other claims is to avoid reargument of the merit brief.

As the State correctly notes in its brief, the heading for Proposition of Law No. 3 in McKelton's merit brief is incorrect due to a typographical error. The heading in the merit brief should read as follows:

The accused's rights to a fair trial and impartial jury are violated where he is not given sufficient opportunities to question potential jurors and prejudicial information is presented to the entire venire. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 5, 9, 10, 16.

The rest of the content in this section was correct.

Argument

Proposition of Law No. I

The accused's right to a fair trial is violated when the trial court unreasonably denies counsel's request to withdraw and reasonable requests for continuances in a capital case. U.S. Const. amends. V, VI, VIII, XIV; Ohio Const. art. I, §§ 9, 10, 16.

Before his trial, McKelton's attorneys both asked to withdraw. McKelton and his attorneys all agreed that his attorneys should withdraw because they would not be able to represent him properly. In its brief, the State asserts that McKelton merely disagreed with his attorney's strategy. State's Brief p. 23. This was not the case. In addition to the breakdown of their relationship, McKelton made the court aware that his attorneys had not communicated with him or hired experts. In spite of all of the indications that McKelton would receive ineffective assistance of counsel at trial, the court unreasonably denied McKelton's request to allow counsel to withdraw and for a continuance.

A. All three defense attorneys told the court that McKelton would not receive effective assistance of counsel with attorneys Cook and Howard.

Before attorney Goldberg withdrew, attorney Howard expressed concern that if Goldberg had to withdraw they would have lost somebody "on our case who was a critical cog in this." 8/6/10 Hrg. Tr. 22. Before withdrawing, Goldberg told the court he believed his withdrawal would deprive McKelton of effective assistance of counsel. 9/17/10 Hrg. Tr. 17.

Asking to withdraw, Howard said "**I never had to do this before**, but we'd ask the court permission to withdraw from this case." See 9/17/10 Hrg. Tr. 8. Attorney Cook said she did not believe she could continue to represent McKelton under her ethical duties. *Id.* at 22. Howard and Cook told the court that their relationship with McKelton had broken down and they could not effectively represent him. *Id.* at 6, 22.

The State however ignores the breakdown of attorney-client relationship and the foreseeability that McKelton would receive ineffective assistance of counsel at trial. In arguing “the only good cause” McKelton raised for his attorneys to withdraw was counsel’s alleged fear of him, the State does not address defense counsel’s repeated warnings that McKelton would not receive effective representation. State’s Brief p. 21.

B. The Trial court was aware that McKelton’s attorneys had not communicated with McKelton or hired experts.

Court appointed counsel must be discharged where a defendant shows a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant’s right to effective assistance of counsel. *State v. Coleman*, 37 Ohio St. 3d 286, 292, 525 N.E.2d 792, 798-799, (1988). This determination includes an inquiry as to what trial preparations were actually done by the attorney in question. There must be a legitimate reason for the client’s apparent lack of confidence in his or her counsel. *State v. Julious*, No. CA2409 1996 Ohio App. LEXIS 5561 (Scioto Ct. App. Dec. 5, 1996) (citing *McKee v. Harris*, 649 F.2d 927, 932, (2nd Cir. 1981)). In light of the inadequate preparations made, discussed below, McKelton had a legitimate reason for his lack of confidence in his counsel, and counsel should have been permitted to withdraw. The State’s contention that McKelton merely disagreed with strategic advice has no merit.

1. McKelton’s attorneys had not adequately communicated with him before plea negotiations.

With his trial weeks away, McKelton’s attorneys had seen him twice. *See* 9/17/10 Hrg. Tr. 13. The first visit was introductory. *Id.* at 14. During the second visit they told McKelton, in front of a police officer that he had to plead guilty. *Id.* at 14, 18. They had not consulted with McKelton about the State’s evidence. *Id.* at 15. McKelton brought all of these facts to the court’s

attention. His attorneys did not deny them, although they denied other allegations of McKelton's, such as the use of a racial slur towards him. 9/17/10 Hrg. Tr. 22.

McKelton's attorneys were deficient in not visiting McKelton or consulting him regarding the evidence against him. ABA Guideline 10.5 indicates counsel "at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client," and "engage in a continuing interactive dialogue with the client" concerning all matters material to the case. *American Bar Association Guidelines for the Appointment of Counsel in Death Penalty Cases* (ABA Guidelines). 10.5. Ohio Rule of Professional Responsibility 1.4 imposes similar requirements. McKelton's attorneys also violated their duty of confidentiality by telling McKelton to plead guilty in front of a police officer. 9/17/10 Hrg. Tr. 18. In short, McKelton's attorneys gave him sound reasons to distrust them, and McKelton brought these reasons to the court's attention.

2. McKelton's attorneys had not retained the necessary experts to make adequate investigations.

The trial court was also made aware that McKelton's attorneys were not utilizing the experts for which it had provided funding. McKelton's attorneys never hired any mitigation specialist or psychological expert. *See* Dkt. 235. ABA guideline 10.5(C) provides that the mitigation team should include, at a minimum, an investigator, mitigation specialist, and a professional capable of making psychological diagnoses.

In March McKelton's attorneys told the court that they had retained an investigator, forensic scientist, and a mitigation expert, and they were hard at work. 3/4/10 Hrg. Tr. 9. However, this was not true. McKelton told the court before trial:

My life have been in the hands of ineffective counsel ... When I first stood in front of you, you gave my lawyers funds to use to prepare for my defense ... My lawyers have not hired the special experts needed to assist me in my death penalty

case ... I am not a professional of the law, but I'm sure my attorneys are failing to do a lot of things to assist me in my case.

9/17/10 Hrg. Tr. 12-13. Further questioning by the court confirmed counsel's deficiencies:

The court: My sense is that he's not cooperating with you, but that beyond his lack of cooperation without, that since – as I mentioned, **in March you represented to the court that you had retained an investigator clearly, I believe a mitigation expert, psychologists, forensic experts** and you, and they have worked diligently to prepare for this case; is that an accurate statement?

Ms. Cook: We have hired **an investigator**. * * * She has worked diligently on this case.

9/17/10 Hrg. Tr. 23 (emphasis added). The court never inquired further about why counsel had not retained the experts that they represented to the court that they had retained. Even though the court was made aware that McKelton's counsel had not hired experts, it told McKelton that it believed experts had been hired when denying his motion to allow counsel to withdraw and for trial to proceed:

The court believes the issue in this case is that Mr. McKelton is voluntarily refusing to cooperate with counsel * * * if you study the American Bar Association 2003 Standards for Capital Litigation, they talk in terms of having two experienced capital attorneys and one mitigation expert. In this case, we have three attorneys **and four experts provided**. * * * [I]n March, the court specifically addressed the issue as to whether or not these people had been engaged and were participating. And counsel indicated on the record that they had been engaged and they were preparing through the normal discovery process * * * Now, last Friday the court became aware that there was a discussion about a possible resolution through a plea. And I – and apparently that's where these issues began to disintegrate. I can't make Mr. McKelton cooperate with his counsel, but the court is satisfied that counsel are competent, that they have worked diligently in this case to be prepared * * * Based upon what I've seen in this case, counsel is prepared to go forward with trial * * * the court is going to deny the defendant's motion to continue the case and permit counsel to withdraw and that McKelton can choose other attorneys.

9/17 Hr. Tr. 28-34. (emphasis added) McKelton made the court aware that experts had not been retained, and defense counsel confirmed this in subsequent questioning. Still, the court found that

a team of experts had been diligently preparing. This conclusion was demonstrably false, but the court relied on it in refusing to allow McKelton's counsel to withdraw or allow a continuance.

In its response the State ignores all of the evidence of ineffective assistance of counsel, and asserts that McKelton merely disagrees with counsel's strategic advice. State's Brief p. 23. However, defense counsel had not conducted an adequate investigation and had not communicated with McKelton at all, except to tell him he should plead guilty. Accordingly, McKelton's concerns cannot be dismissed as disagreement with reasonable strategy. *See Wiggins v. Smith*, 539 U.S. 510, 524, 533 (2003).

The court was made aware that defense counsel was not conducting an adequate investigation with McKelton's trial approaching, but did not grant counsel's request to withdraw. Instead the court ignored counsel's inadequate preparations and foreseeable future ineffectiveness, made the baseless conclusion that McKelton was simply not cooperating with his attorneys, and refused to let them withdraw. 9/17 Hr. Tr. 28-34. In doing so, the court acted unreasonably, and abused its discretion.

C. The Trial court unreasonably refused to grant a continuance.

McKelton was forced to ask for his first continuance because of the State's oversight. Attorney Howard expressed concern that they would need to ask for a continuance if it was discovered that attorney Goldberg represented an undisclosed witness. 8/6/10 Hrg. Tr. 23. In response the State falsely assured defense counsel that attorney Goldberg did not represent any witnesses. *Id.* at 24. Had the State diligently discovered and informed attorney Goldberg that the conflict existed, no continuance would have been necessary.

Proposition of Law No. II

It is violation of a capital defendant's right to due process, fair trial and effective assistance of counsel for a trial court to grant the State's motion for certification of a witness under Ohio R. Crim. P. 16(D) when the State has not provided reasonable articulable grounds for nondisclosure and to allow the State to withhold evidence until the evening before the commencement of a capital trial. U.S. Const. amends. VI, VIII, XIV; Ohio Const. art. I, §§ 10, 16.

The State in its brief argues that the non-disclosure of witnesses in McKelton's case was proper because the State presented sufficient evidence to demonstrate that disclosure would compromise the safety of the non-disclosed witnesses. The State recognizes that it largely failed to provide specific reasons as to why each particular witness was in danger, but instead mainly presented evidence regarding McKelton. The State argues that the rule does not intend the focus of non-disclosure to be on the individual witness but rather on the defendant and his potential for intimidation and coercion. State's Brief at p. 35. The State's proposed interpretation of the rule would permit, with no particularized showing of need, the non-disclosure of any and all witnesses in certain cases.

While the defendant's potential to intimidate is certainly a factor that a trial court may consider when making a decision on non-disclosure, that factor as a whole cannot be the deciding factor in reaching a decision not to disclosure. The trial court initially seemed to recognize this noting that, "if it was all about the defendant then you would have gone—you could have not disclosed any witnesses." 9/27/10 Hrg. Tr. 20. As the trial court pointed out, under the State's analysis, McKelton was a danger to any witness at his trial, yet the State cherry picked a handful of witnesses to withhold until the day before trial.

The State argued that past incidents of witness intimidation, recent events surrounding Michael Nix, and a phone call between McKelton and Michael Howell were evidence that would give the prosecutor "reasonable, articulable grounds to believe that disclosure will compromise

the safety of a witness, victim, or third party, or subject them to intimidation or coercion.” State’s Brief at p. 34. The prosecutor also mentioned Battles Co., but there is little support that the letter referenced a funeral home and not Butler County, as discussed in greater detail in Propositions of Law Nos. V and VIII. However, even if all of these claims about McKelton are true, there is no basis to allow the nondisclosure of witnesses without specific reasons for each witness to the court. McKelton was the defendant for every single one of the State’s witnesses; the State failed to explain to the court why these individuals were different than the other witnesses. Instead, the State proposes that it should have unfettered discretion in its decision of which witnesses not to disclose.

Assuming *arguendo* that the witnesses’ names could have properly been withheld, the trial court should have fashioned a remedy that would have protected the witnesses while at the same time ensuring that McKelton was provided a fair trial and an adequate opportunity to prepare a defense. An example of how such a remedy could have been fashioned is found in *State v. Blake*, No. CA2011-07-130, 2012 Ohio App. LEXIS 2756 (Butler Ct. App. July 9, 2012). In *Blake*, the trial court allowed the nondisclosure of four witnesses. At the hearing, the prosecutor provided details about each specific witness and the prosecutor’s reason for not disclosing the witness’s name. *Id.* at ¶ 17, *8-9. More importantly the prosecutor in *Blake* provided the defendant with summaries of the withheld witnesses’ anticipated testimony to assist in the preparation of his defense and for cross-examination. *Id.* at ¶ 17, *10. This allowed the defense to prepare for witness testimony before the eve of trial.

No such protections occurred in McKelton’s case. Instead, defense counsel was provided with the names of witnesses and summaries of their testimony sometime after 5:12 p.m. on October 4, 2010, the State disclosed the names and statements of the witnesses. Tr. 281, 285.

The trial began the next morning at 9:00 a.m., and an additional witness's statement was provided that morning. Tr. 281, 299. Had defense counsel not slept the entire night before the trial commenced, they still would only have had approximately fifteen hours to prepare for the eight witnesses.

The State cites to *State v. Williams*, 23 Ohio St. 3d 16, 490 N.E.2d 906 (1986), as evidence that this Court has approved waiting until commencement of trial to disclose witnesses' names. The State's explanation of the decision in *Williams* is a mischaracterization of the holding. This Court did not mention anything about the timing of the disclosure of witnesses in the *Williams* case. Instead, this Court merely stated that a defendant's right to confrontation is legitimately constrained by Crim. R. 16(B)(1)(e). *Id.* at 18, 490 N.E.2d at 910. Again, the trial court in the *Williams*' case provided protections to the defendant's right to a fair trial by offering indefinite continuances to defense counsel in light of the non-disclosure. *Id.*

Rule 16 was enacted to provide for a "just determination of criminal proceedings and to secure the fair, impartial, and speedy administration of justice through the expanded scope of materials to be exchanged between the parties." Staff Notes, 7/1/10 amendment Division (A). The rule contemplates that in most cases there be open discovery between parties and that criminal defendants not be convicted based on secret evidence and witnesses. Accordingly, the trial court should have protected the witnesses without trampling McKelton's right to a fair trial. The State's actions in McKelton's case demonstrate more of an attempt to gain an unfair advantage than an attempt to protect witnesses in this case. The trial court lost its way when it allowed the State to conduct McKelton's trial in such an unfair and secretive manner. The failure to balance the protections afforded by Rule 16 in this case denied McKelton a fair trial, effective assistance and right to confrontation.

Proposition of Law No. IV

The accused's rights of confrontation and due process are violated where hearsay is admitted against him under the forfeiture by wrongdoing doctrine and no showing is made that the defendant procured the unavailability of the witness with the purpose of preventing them from testifying as a witness. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 5, 9, 10, 16.

To circumvent the purpose requirement of the forfeiture doctrine, the State turns *Giles v. California* on its head and relies on a nonexistent domestic violence exception. State's Brief 45, 46, 47, 50. The State contends that this exception applies to the forfeiture doctrine's intent requirement. See State's Brief at 50. This argument fails because in *Giles* the Supreme Court **explicitly rejected** the notion of a domestic violence exception. *Giles v. California*, 554 U.S. 353, 376 (2008). The dissent in *Giles* argued that in domestic violence cases there should be no requirement of showing purpose before applying the forfeiture doctrine. *Id.* at 405-06. The majority took issue with this position:

Is the suggestion that we should have one Confrontation Clause (the one the Framers adopted and *Crawford* described) for all other crimes, but a special, improvised, Confrontation Clause for those crimes that are frequently directed against women? Domestic violence is an intolerable offense that legislatures may choose to combat through many means—from increasing criminal penalties to adding resources for investigation and prosecution to funding awareness and prevention campaigns. But for that serious crime, as for others, abridging the constitutional rights of criminal defendants is not in the State's arsenal.

Id. at 376.

The correct standard for forfeiture by wrongdoing requires a showing that the wrongdoer made the witness unavailable for the purpose of preventing him or her from testifying as a witness. *Id.* at 361. Evidence of domestic violence is highly relevant evidence of a defendant's intent, as are upcoming criminal proceedings where the victim is expected to testify. *Id.* at 377. But a showing of a relationship involving domestic violence is not a substitute for the intent requirement. *Id.* at 376. Courts have found forfeiture inapplicable and reversed murder

convictions where the intent to make a witness unavailable was not proven. This has happened even where there was a history of domestic violence toward the victim. *See Hunt v. State*, 218 P.3d 516, 518 (Okla. Crim. App. 2009) (past statements of domestic violence victim who is subsequently murdered not permitted because requisite showing of intent was not made); *Chavez v. State*, 25 So. 3d 49, 51-53 (Fla. Dist. Ct. App. 1st Dist. 2009) (forfeiture inapplicable where defendant made threats against his wife who was subsequently murdered, but intent was not proven); *United States v. Taylor*, 622 F. Supp. 2d 693, 697-698 (E.D. Tenn. 2008) (District court found forfeiture inapplicable where defendant killed kidnapping victim who was trying to escape. In spite of some evidence of intent to procure unavailability of a witness, the Court concluded that intent requirement was not proven).

The State's flawed interpretation of *Giles* informs its interpretations of other case law. The State claims this Court's ruling in *Fry* adopts a rule that the forfeiture doctrine allows statements of a domestic violence victim who is subsequently murdered, without mentioning the intent requirement. State's Brief p. 47. The State also cites three additional cases from other states that "help form and affirm the domestic violence exception." State's brief p. 50.

Fry and the other three cases the State provides all involve defendants who had restraining orders for domestic violence against the victims, and they violated these orders and killed the victims. *See State v. Fry*, 125 Ohio St. 3d 163, 179, 926 N.E.2d 1239, 1261-62 (2010); *State v. McLaughlin*, 265 S. W.3d 257 (Mo. 2008) (en banc); *People v. Banos*, 178 Cal.App.4th 483, 100 Cal.Rptr.3d 476 (Cal.App. 2 Dist. 2009); *State v. Supanchick*, 245 Or. App. 651, 263 P.3d 378 (2011). All but one involved pending hearings against the defendant at which the victims were expected to testify. In the one exception, *State v. Supanchick*, there was no hearing

pending, but the defendant confessed that he had killed the victim to escape punishment. *Supanchick*, 245 Or. App at 659, 263 P.3d at 383.

Forfeiture applied in these cases not because of a “domestic violence exception,” but because the facts, including the history of domestic violence, demonstrated by a preponderance of the evidence that the defendants were motivated by a desire to escape detection or punishment. In the case *sub judice*, there was no evidence that Allen had any intent to report McKelton when she was killed, and the State’s allegation was always that the killing was accidental. These facts cannot support the conclusion that, by a preponderance of the evidence, McKelton was motivated by a desire to escape detection or punishment.

The State also repeatedly relies on the proposition of law that intent to procure the unavailability of a witness need not be the sole purpose of the defendant. State’s Brief pp. 45, 46, 49, 50. This is a correct statement of the law, but it is of no help to the State. The State has never proven or alleged a purposeful killing.

Judge Sage never made the required finding regarding McKelton’s intent. His treatment of the issue cannot be dismissed as cursory, as he spent extensive time revisiting the issue and continued to apply the wrong standard. Tr. 609-12. He was not vague. (“Clearly the allegation in this case is that this defendant murdered the victim, Ms. Allen, and **I think this is exactly what the forfeiture by wrongdoing exception is.**” Tr. 404. (emphasis added.)) Judge Sage repeatedly applied the wrong standard in making his determinations, this cannot be minimized as failing to use the right words to espouse the correct standard, as the State claims. State’s Brief p. 54.

An act cannot be both accidental and done with a particular purpose. The State’s allegations against McKelton were that he killed Allen by accident during an argument, and there

is no way to know what the argument was about. The State's witness even testified that McKelton tried vigorously to revive Allen. *See* Tr. 910. The evidence cannot support the conclusion that McKelton killed Allen with the intent required by the forfeiture doctrine, so the State relies on a non-existent "domestic violence exception" to substitute for the required showing of intent. Similarly, Judge Sage repeatedly applied a standard which had no intent requirement and never made a finding regarding McKelton's intent. Forfeiture by wrongdoing is not applicable in most murder cases. *Giles*, 554 U.S. at 361. Because the record lacks evidence to show McKelton killed Allen with the purpose of preventing her from testifying as a witness, her statements were not admissible under the forfeiture doctrine.

Proposition of Law No. V

The defendant's rights to a fair trial, due process and freedom from cruel and unusual punishment are violated when the trial court allows the pervasive introduction of evidence which is irrelevant, unfairly prejudicial, and impermissible character evidence. U.S. Const. amends. VI, VIII and XIV, Ohio Const. art. I, §§ 9, 10. Ohio R. Evid. 402, 403, 404.

A. McKelton's Tattoos

In its response the State offers the same spurious explanation as it did at trial for the introduction of McKelton's prejudicial tattoos: they were introduced to identify McKelton at the police station. State's Brief P. 56. The tattoos were entirely unnecessary to make such a showing. McKelton was identified at the police station by clear pictures of his face, multiple witnesses, and his signature. Exs. 45A, 45B; Tr. 505, 885, 888.

The State's offered case law is inapplicable in this situation. All but one of the cases offered by the State deal with tattoos used to identify defendants **while they were committing crimes**. See *State v. Smith*, Nos. 08AP-736, 09AP-72, 2009 Ohio App. LEXIS 1816 (Franklin Ct. App. March 5, 2009); *State v. Webster* Nos. C-70027, C- 070028, 2008 Ohio App. LEXIS 1407 (Hamilton Ct. App. April 4, 2008); *State v. Morrison*, Nos, 91AP-90, 91AP- 91, 1991 Ohio App. LEXIS 5615 (Franklin Ct. App. Nov 19, 1991). The lone exception is *United States v. Thomas*, where a tattoo of guns was not used to show identity at all; it was to show defendants knowledge of guns to establish absence of mistake. 321 F.3d 627 (7th Cir. 2003). Even then, the blood drops around the guns and the words "made niggas" were redacted from the photo. *Id.* at 630. No authority supports the use of inflammatory tattoos to establish a defendant's presence at a police station where clear pictures of the defendant's face at the station are in evidence.

To the extent that error was waived because counsel failed to object to such overtly prejudicial evidence, counsel was ineffective.

B. The Testimony Of Lemuel Johnson

Tellingly, the State does not address the fact that on redirect examination, the prosecutor used leading questions to insinuate to the jury that McKelton had killed three other people who were wholly unrelated to this case. *See* Tr. 1780-81.

The State argues that testimony about McKelton's offer to kill witnesses in Johnson's brother's appeal was admissible to show modus operandi. Two victims sharing one common characteristic (as witnesses) is not specific enough to demonstrate a "behavioral fingerprint." *State v. Lowe*, 69 Ohio St. 3d 527, 530, 634 N.E.2d 616, 619-20 (1994). Further, Johnson testified that McKelton was guilty both of the crime charged and the extrinsic bad acts. Where the same witness testifies to the extrinsic, uncharged acts, as well as the ones charged, the testimony about other acts adds no independent probative weight. Its sole purpose is the forbidden inference of propensity towards bad acts. *State v. Pierson*, 128 Ohio App. 3d 255, 261, 714 N.E. 2d 461 (1998). Similarly, having the same witness testify about extrinsic acts as well as the ones charged increases prejudice and risk of confusion under Evid.R. 403(A). This is particularly true when considered with the many instances where McKelton was labeled a killer though inadmissible evidence.

C. Hearsay statements of Margaret Allen

The State contends that Allen's statements regarding domestic violence were relevant because they tended to prove that McKelton killed Allen intentionally. State's Brief p. 59. But the State never charged McKelton with killing Allen intentionally and claimed at trial that he killed her accidentally, as discussed in greater detail in Proposition of Law No. IV. The State's brief on appeal is the first time the State suggested McKelton killed Allen intentionally.

Accordingly, an “intent to kill” Allen was not relevant under Evid.R. 401, and fails the balance of Evid. R. 403(A).

Testimony of Allen’s was introduced that McKelton was a “killer” and a person who robbed other drug dealers. Tr. 497-99. This was evidence of the defendant’s character and other acts under Evid.R. 404(A) and (B). In its brief, the State does not offer any approved purpose enumerated in Evid.R. 404. Instead the State argues that this showed why Allen denied that McKelton had harmed her. This also fails the balancing test of 403(A) and McKelton is again labeled a robber and a murderer through inadmissible testimony as part of a pervasive pattern.

D. Testimony about McKelton as a drug dealer

Andre Ridley testified that Evans told him he had received “20 Os of cocaine from McKelton.” Tr. 913. The following conversation ensued:

State: Let me slow you down. What’s 20 Os?

Ridley: 20 ounces of cocaine of powder.

State: Is that a little bit? Is that a lot? How much is that 20 Os, 20 ounces?

Ridley: If you sell it...you can sell it as crack...it’s about 30, 40,000.

State: Did he ever show you that?

Ridley: Yes.

The State: You actually saw it?

Ridley: Yes....he already had cooked up some crack...

State: And where did he tell you he got this?

Ridley: He got that from Calvin.

Tr. 913-14. When Lemuel Johnson was asked the time in which period McKelton was selling drugs, he replied “starting from the late ‘90s until now.” Tr. 1734. These instances and many

other examples of testimony about McKelton as a drug dealer were irrelevant and prejudicial. The State argues in its brief that at trial it did not introduce testimony that McKelton's lavish spending was from drug proceeds. State's Brief p. 63. But after hearing extensive testimony about McKelton selling drugs, the jury would have assumed that McKelton's "stacks of cash" were not from some unmentioned legitimate source.

E. Unnecessary references to rap songs

The State's discussion of McKelton getting his ideas from Notorious B.I.G. songs at trial, in closing arguments, and during mitigation was part of a sustained effort to vilify McKelton. Tr. 915, 1979; Mit Tr. 19. The song was mentioned to connect McKelton to cultural connotations of crime, drugs, and murder. It was irrelevant and prejudicial.

F. "Battles Co."

With two words in a letter that were hard to read, the State argued that McKelton was attempting to threaten witnesses through his criminal enterprise which was responsible for past murders. This testimony was misleading and prejudicial. Detective Witherell testified that he assumed the words meant "JC Battles Funeral Parlor." Tr. 1544. Detective Witherell then testified that he was familiar with "JC Battles Funeral Parlor." Tr. 1565. This was implausible. Were he familiar with the funeral home, he would have known that its name was "JC Battle & Sons Funeral Home," and not "JC Battles Funeral Parlor." *See* Ex. IV.

Detective Witherell's testimony went beyond allegations of witness intimidation and used the words to connect McKelton to an unrelated murder:

The State: In your past experience, have you ever been involved in cases where that particular funeral home was used as a source to disseminate information into the neighborhoods about things?

Mr. Howard: Objection.

The Court: Overruled.

Witherell: Yes, I have. As a matter of fact, I worked a homicide just last year that was right in front of – right down the street from JC Battles on Rockdale Avenue.

Tr. 1568. Using assumptions, improper suggestions, and speculation to connect McKelton to uncharged acts of witness intimidation and murder was misleading and unfairly prejudicial.

G. Generalized Assertions of Guilt

At trial the jury repeatedly heard multiple out-of-court assertions and “rumors” that McKelton was guilty of both murders. Inadmissible evidence repeatedly labeled McKelton as guilty with no explanation as to how or why.

Marcus Sneed testified that he asked McKelton “was it true what everybody was saying in the street about him killing his girlfriend.” Tr. 1598-99. He later testified that he asked McKelton if the body found in Inwood park was “the guy that help you get rid of the body that everybody saying on the street.” Tr. 1602. In addition to the obvious hearsay problem, addressed in Proposition of Law No. XI, nothing is known about the declarants except that there were many of them. Defense counsel cannot confront “everybody on the street.” The State argues that these statements were proper because they provided context for conversations. State’s Brief p. 65. Prejudice from multiple out-of-court assertions of a defendant’s guilt substantially outweighs any value from providing background. Evid.R. 403(A).

McKelton was again declared guilty of murder by unidentified friends or family members of Germaine Evans. Testimony that the State omits from its brief elucidates the prejudicial nature of this inadmissible evidence:

Q: And were you able to determine in general terms who these people were?

A: Yes.

Q: Who were they as a class?

A: It was pretty much the Evans family and closes (sic) friends led my (sic) by Sheridan Evans, the mother of Germaine.

Q: And were they communicating this information to you in that emotional, excited state?

A: Yes.

* * *

Q: Did they communicate any other information to you in that emotional, excited state in reaction to what had happened there?

A: They said he had last been seen Friday night around 9:30 at night.

Q: Okay.

A: They said that he – they believed that he was killed by his friend, Calvin McKelton.

Q: Did they use the term “his friend” or is that your term?

A: That’s their term.

Q: Okay.

A: And they said it was because he helped move that lawyer’s body.

Tr. 1316. In its brief, the State does claim this was not prejudicial, but that it was properly admitted under the excited utterance hearsay exception. This was not permissible hearsay, as discussed in Proposition of Law No. XI.

One of the reasons this is inadmissible hearsay is because to admit a statement as an excited utterance, it is required that “the declarant had an opportunity to observe personally the matters asserted in his statement or declaration.” *State v. Taylor*, 66 Ohio St. 3d 295, 300-01, 612 N.E.2d 316, 320-321 (1993). This requirement elucidates the prejudice from these assertions. The identity of these declarants is unknown, and the basis for their conclusions is not from

having observed the matters firsthand. One can only speculate as to what that basis might be. McKelton was again declared guilty by unknown out-of-court declarants.

Crystal Evans testified that there were rumors that McKelton was involved in Evans' death. Tr. 1108. The State argues that this was relevant "in that it explained why she forgot to provide information to police detectives during her initial interview with them." State's Brief p. 66. Whatever tenuous relevance this testimony had was substantially outweighed by McKelton, yet again, being implicated in murder through rumors.

When Detective Luke asked about her reaction to learning of Evans' death, she said "we were just like, where do we go from here . . . I can't believe this happened . . . [McKelton] did it again." Tr. 1254. In its response, the State claims there is no problem with Detective Luke jumping to conclusions in this instance or others. State's Brief p. 67. This testimony was improper because a witness may not testify to a matter without personal knowledge of the matter. Evid.R. 602. The prejudice from McKelton again being labeled guilty is self-evident.

Sheridan Evans testified that McKelton was a "serial killer." Tr. 1836. McKelton was again labeled a killer by a witness with no evidentiary basis.

Defense counsel did not object to any of the testimony discussed in this section, and was ineffective. Competent counsel would object when their client is repeatedly called a murderer through rumor and anonymous hearsay. *See State v. Kemper*, Nos. 2002-CA-101, 2002-CA-102, 2004 Ohio App. LEXIS 5520 (Clark Ct. App. Nov. 12, 2004) (Finding counsel ineffective for failing to object to references to unnamed persons identifying the defendant as the perpetrator while questioning the defendant. Plain error analysis was moot because of ineffective assistance of counsel, but the Court said it was "a nice question.")

The error from the testimony above could hardly be plainer. When the Court heard anonymous assertions and rumors that McKelton was guilty of the murders charged, as well others which were not charged, it should have intervened. Allowing this testimony in a case built entirely on circumstantial evidence rendered McKelton's trial fundamentally unfair.

H. McKelton as a misogynist

The State played for the jury a phone call where McKelton swears at Dumas, demands money from her, and threatens her. Tr. 1455; Ex. 77. The State justifies this recording being played because it shows Dumas is close to McKelton. State's Brief pp. 68, 70. However, the recording shows the opposite is true. Dumas tells McKelton that she does not want to be involved with him anymore because he had a son with Crystal Evans. Ex. 77. The recording does not show McKelton being close to Dumas; it shows him yelling, swearing, threatening, and cheating on her.

Similarly, any relevance from other testimony of Audrey Dumas and Charles Bryant where McKelton is depicted as a womanizer is outweighed by the prejudice to McKelton. Further, the State claimed McKelton called Allen a "Bitch" in its closing argument, where there is no evidence of that in the record. Tr. 989, 1975-76. The State argues that *Johnson* is different than this case in that there was other prejudicial evidence in *Johnson* which contributed to reversal. *See State v. Johnson*, 71 Ohio St. 3d 332, 340, 643 N.E.2d 1098, 1105-06 (1994). The prejudicial evidence in *Johnson* pales in comparison to the prejudicial evidence listed in this claim. Depicting McKelton as a misogynist was part of an extensive list of the State's efforts to engender antipathy towards McKelton.

I. Audrey Dumas

In the phone call played at trial, McKelton demands Dumas bring him money, and when she says she will not, McKelton demands that she “play her role.” Tr. 1455; Ex. 77. In subsequent questioning, the State, suggests that Dumas’ “role” was a secret code for two things: Dumas was supposed to rob people like she did with McKelton and bring him money, and she was to provide him a false alibi. Tr. 1457-58. This inference has no support in the record.

In questioning, the State asked Dumas, “Isn’t it true that part of your role was to set up guys at Vito’s to then get robbed later by Mr. McKelton? * * * Isn’t it true that that’s where the \$50 was always coming from and that’s where the money from the summer was supposed to be coming from?” Tr. 1457-58.

Given the bi-weekly nature of Dumas’ payments to McKelton, it is far more likely that the money was from a paycheck. The State had earlier elicited from Dumas that she would pay McKelton “every two weeks like clockwork.” Tr. 1368. The idea that McKelton and Dumas had a tight schedule for their robberies that was coincidentally the same as when most employees get paid is implausible. The State used this to justify introducing that McKelton and Dumas would rob people together, which is prohibited by Evid R. 402, 403, and 404. *See* State’s Brief at 70. In addition to being improper evidence of other acts, any purported value for impeachment is outweighed by unfair prejudice of McKelton being implicated in uncharged robberies. The prejudice is compounded by the absence of an instruction that the testimony could be considered for a limited purpose. Evid.R. 105.

The State’s contention in its brief that Dumas’ “role” could be logically inferred to mean false alibi is true only if one engages in speculation. State’s Brief p. 70. Nothing in the phone call suggests “role” meant false alibi. Further, to find through inference that “role” simultaneously

meant both false alibi and resuming the robbery business would require adding an additional layer of speculation.

J. Statement of Crystal Evans and letters to Crystal Evans

The transcript of Crystal Evans' interview with detectives was 67 pages long. Ex. 56. Between pages 26 and 30 Jenny Luke tells Evans that McKelton "beat the living shit" out of his ex-girlfriends, that McKelton is dangerous, that people around McKelton keep turning up hurt or dead, that Evans would "shit [her] pants" if she knew what McKelton's old attorney knew. Ex.56. Evans related to Luke that people had told her to be scared of McKelton. *Id.* The State contends the entire interview was relevant because Crystal's answers do not make sense without the context of questions being asked. State's Brief p. 71. But pages 26-30 could have been removed and the remaining 62 pages would still make perfect sense. *See* Ex. 56. Further, any probative value of "context" is outweighed by unfair prejudice of irrelevant assaults, innuendo, and anonymous warnings about McKelton. Similarly, the interview should have been redacted to exclude comments on McKelton's right to remain silent and invocation of counsel, in violation of his right against self-incrimination:

Q: Well, do you think Calvin ever said, about this [Allen's death], to the police?

A: Nothing.

Q: Do you know what he said?

A: I don't know.

Q: Give me a lawyer.

Id. at 34.

Similarly, the objectionable portions of McKelton's letters could have been redacted, and any probative value would not have been diminished. *See* Exs. 47-51.

K. Additional irrelevant or unfairly prejudicial evidence.

The jury should not have heard Ziala Danner relate that she heard from McKelton's daughter that he had choked a different woman with a phone cord. Evid.R. 402, 403(A), 404(B). (This was also inadmissible hearsay, as discussed in Proposition of Law No. XI.) The State in its brief contends that this was relevant to show McKelton's intent and a lack of mistake in killing Allen. State's Brief 71-72. As explained in more detail in Proposition of Law No. IV, the State never charged McKelton with killing Allen intentionally, and its witnesses only ever alleged that the killing was accidental. Accordingly, the "intent to kill" it now alleges for the first time is irrelevant.

The State mistakenly describes the hearsay about choking as prior violence towards Allen. State's brief p. 71. The hearsay describes McKelton choking an unrelated person with a phone cord, not Allen. *See* State's Ex. 2. McKelton choking someone with a phone cord is not evidence of intent to kill in the future where the victim in the prior incident was not killed. All that it evidences is McKelton's propensity towards bad acts. The State also mistakenly argues that the standard here is plain error; an objection was overruled at trial. *See* State's Brief p. 72; Tr. 348-49.

The State proposes that "The Anarchist Cookbook" is relevant to show that McKelton lived with Allen. State's Brief p. 72. McKelton and Allen's cohabitation was already clearly established by both parties, and the book was irrelevant.

The State asked Allen's physical therapist if it would have affected Allen's treatment plan if Allen told her that "her boyfriend broke her ankle by slamming a car door on it repeatedly." Tr. 481-82. Nothing else in the record suggests anything about a car door breaking Allen's ankle. The State could permissibly try to establish that McKelton broke Allen's ankle,

but it had no basis to put the image of McKelton repeatedly slamming a car door on Allen's ankle before the jury.

Bryant's testimony was that McKelton was either the driver or passenger in a car being driven aimlessly with an impaired driver who was drinking while driving and had illicit drugs in his car. Tr. 987. This is yet another instance of the State disparaging McKelton with irrelevant testimony.

Bryant's testimony of McKelton's prior conviction for witness intimidation was inadmissible as a prior bad act and was unfairly prejudicial. Evid.R. 403(A), 404(B). The State proposes that it was "not adduced as evidence of prior bad acts. Instead it was only introduced to offer context as to the manner in which he and Appellant met." State's Brief p. 74. However, there was no limiting instruction given to that effect. *See* Tr. 989. The State also asked for details about the prior intimidation incident, although Bryant knew none. Tr. 991. Further, contextual value was virtually non-existent, as Bryant could have simply said he met McKelton in prison for a separate offense. Conversely, the danger of unfair prejudice from McKelton's prior conviction is significant and self-evident.

Detective Gregory's testimony about Michael Nix reporting being shot at was unfairly prejudicial. The only purported action McKelton took to orchestrate Nix being shot at was telling Crystal Evans that "Scar Bob" (Nix) would be a witness at trial. Tr. 1677. The inference needed to support McKelton's responsibility for any shooting is that Crystal then related this information to McKelton's criminal enterprise so they could shoot at Nix. Nothing in the record suggests this happened, or that Crystal would participate in any crime. There is also nothing remarkable about the fact that McKelton told Evans that Nix would be at trial. Crystal had "many extensive phone calls, letters and personal visits" with McKelton, and they discussed many topics. Tr. 1026.

McKelton was unfairly prejudiced because the State was allowed to mislead the jury into thinking that McKelton had attempted to have a witness killed in his trial, and as a result, he was unfairly prejudiced. Evid.R. 403(A).

The State's questioning of Marcus Sneed regarding "Fat Boy" was inappropriate. The State elicited from Sneed that Fat Boy "[e]nded up alongside of a road." Tr. 1640. The court did properly sustain the objection to testimony about McKelton robbing Fat Boy, but the jury heard the insinuation that McKelton was involved in killing someone named "Fat Boy." *Id.* The State added another item to the list of irrelevant evidence introduced to vilify McKelton. Detective Gregory indicated that McKelton's street name was "C-murderer." Tr. 1805. Error is plain where a detective indicates that the defendant's nickname is "C-Murderer" in a murder trial.

L. Gruesome Photographs

The State concedes in its brief that McKelton never challenged the manner and cause of death. State's Brief p. 76. In the same paragraph, the State concludes that the photographs were relevant to establish the manner of death. *Id.* The photographs were prejudicial and were not evidence of anything that was disputed. The probative value did not outweigh the danger of prejudice. *State v. Morales*, 32 Ohio St. 3d 252, 257, 513 N.E.2d 267, 273 (1987).

Conclusion

McKelton's trial was dominated by inadmissible evidence which vilified him. This inadmissible evidence included repeated declarations that McKelton was guilty of the crimes he was on trial for and many other charged and uncharged crimes, including murders. Unrelenting violations of Evid. R. 402, 403, and 404 rendered McKelton's trial fundamentally unfair.

Proposition of Law No. VI

Improperly impeaching a witness with a prior inconsistent statement and then playing a recording of the prior inconsistent statement to the jury violates a defendant's due process rights. U.S. Const. amend. XIV.

McKelton asserted that the State improperly impeached Gerald Wilson with his prior statement, that the statement was improperly played for the jury, that the State treated the statement as substantive evidence, and that the trial court erred by giving no limiting instruction regarding the use of the statement. The State contends that Wilson's recorded prior statement was properly played for the jury and that the State did not use it as substantive evidence. State's Brief p. 80. The State did not address the failure of the trial court to give a limiting instruction.

Wilson's testimony prior to the playing of his prior statement did not justify the playing of his statement for the jury. Wilson's testimony did not cause affirmative damage to the State's case as required by Evid.R. 607(A). Affirmative damage exists where the witness's testimony contradicts, denies, or harms the state's trial position. *State v. Jackson*, No. 24430, 2012 Ohio App. LEXIS 2057 (Montgomery Ct. App. May 25, 2012). In *State v. Davie*, this Court found that there was affirmative damage because the state's position was that Davie was solely responsible for the crime and the witness testified that another individual had threatened Davie into taking responsibility for the crimes. 80 Ohio St. 3d 311, 323, 686 N.E.2d 245, 258 (1997). Similarly, in *State v. Moore*, the court found that affirmative damage had been established in an aggravated murder case because the witness had "injected facts which, if believed by the jury, implied an accident or conduct done while defendant was in a fit of rage." 74 Ohio App. 3d 334, 343, 598 N.E.2d 1224, 1230 (1991). As the court noted, the effect of the witness's testimony could potentially be to "damage the state's case as to premeditation and therefore aggravated murder." *Id.*

Those cases are in contrast to cases in which a witness backtracks from his or her prior statement. For example, in *State v. Lewis*, the witness gave a statement that he was present the night of the alleged robbery and that he saw Lewis hitting and kicking a man. 75 Ohio App. 3d 689, 694, 600 N.E.2d 764, 767 (1991). On the stand, the witness testified that he was not present the night of the robbery. *Id.* The court in that case held that the witness's testimony did not cause affirmative damage because it "did not contradict, deny, or harm the state's case." *Id.* at 697, 600 N.E.2d at 769.

Wilson's statement recounted a conversation that he overheard McKelton having in which he indicated that he had choked Margaret Allen. According to Wilson's statement, another individual told McKelton to be quiet in front of Wilson and McKelton then said that Wilson would not say anything or he would end up like Germaine Evans. State's Ex. 15. On the stand, Wilson denied being at the bar where McKelton was that night, denied then being in the car with him, and denied knowing him. Tr. 1648-49. Wilson testified that he gave a statement to police. Tr. 1649-50. However, when asked if he remembered telling police that McKelton said "something to the effect that if she gave his shit away, he was going to choke her like he did Margaret and get away with it," Wilson said he did not recall saying that. Tr. 1650-51. The prosecutor gave him his statement to look over. Tr. 1651. At that point, Wilson denied saying some of the things contained in the statement and indicated that there was a "dirty cop" in Hamilton County who was trying to get people to lie about McKelton. Tr. 1651-52. After that, the prosecutor asked a series of questions about whether he remembered saying things to police. Wilson indicated each time that he did not remember. Tr. 1652-53. When the prosecutor asked if it would refresh his memory to hear his statement, Wilson said that he had lied. Tr. 1653.

This does not amount to affirmative damage. This is not a case in which the witness testified to facts that contradict the state's assertions regarding the elements of the crime. Accordingly, the trial court erred when it allowed the State to impeach Wilson by means of his prior statement.

This error rises to the level of a due process violation. When the substance of a "witness's disavowed, unsworn prior statement[], which, if credited by the jury would be sufficient to sustain a conviction," the defendant's due process right to a fair trial is violated. *United States v. Shoupe*, 548 F.2d 636, 643 (6th Cir. 1977).

Moreover, despite the State's protestations, the prosecutor absolutely used Wilson's prior statement as though it was substantive evidence, arguing to the jury that "[h]e brags about doing Mick like that to Gerald." Tr. 2002-03. Contrary to what the State now argues, the prosecutor in his closing argument was not referencing Wilson's prior statement for the purposes of impeaching Wilson's "denials of Appellant's guilty [sic] and his newly made claim that a 'dirty cop' was convincing witnesses to fabricate testimony." State's Brief p. 81. In his closing argument, the prosecutor notes that Wilson denied knowing McKelton or anything about the case. Tr. 2003. But then went on to recount the details of Wilson's prior statement, all of which go directly to McKelton's guilt in the deaths of both Allen and Evans. Tr. 2003.

Moreover, the State, in its brief, uses Wilson's statement as substantive evidence in arguing that McKelton's conviction for the death of Germaine Evans is not against the manifest weight of the evidence. According to the State, Wilson's prior statement should be considered in determining that there was sufficient evidence that McKelton killed Germaine Evans:

During Wilson's testimony, his recorded statement was played for the jury pursuant to Evid.R. 607(A). In the statement, Wilson describes a night in which he was in the backseat of a vehicle in which Appellant was also a passenger. During the car ride, Appellant discussed choking out a female like he did Allen,

which he claims he got away with. The driver of the vehicle, "Jello," told Appellant not to discuss these things in front of Wilson. Appellant's response was that Wilson was cool, and if he said anything he would end up like Mick did. Appellant and Jello laughed about this statement. Clearly this statement was another admission by Appellant that if Wilson became a snitch, like Mick was about to be, he would end up dead like Mick.

State's Brief p. 129 (internal citations omitted). Even as the State argues that Wilson's statement was not used as substantive evidence, it is using it as substantive evidence in its brief, arguing that "[t]his testimony coupled with Sneed's and Johnson's clearly proves Appellant's guilt as to the aggravated murder charge." *Id.* Given that the proper use of the statement is causing the State confusion, it is difficult to imagine that without a limiting instruction from the court, the jury understood that the statement could not be used as substantive evidence.

McKelton's rights to a fair trial, due process, and a reliable determination of his guilt and punishment were violated by the use of Wilson's prior statement. Accordingly, McKelton's conviction should be overturned, or, at a minimum, his death sentence vacated.

Proposition of Law No. VII

A defendant's due process right to a fair trial is violated when a trial court improperly allows leading questions and the State is resultantly able to present inflammatory evidence to the jury. U.S. Const. amend. XIV.

The State argues that Audrey Dumas' relationship to McKelton allowed for her to be asked leading questions on direct. The State's contends that Dumas and McKelton's on-again-off-again six-year relationship justified Dumas being declared an adverse witness pursuant to Evid.R. 611(C). State's Brief at p. 83. Dumas's testimony prior to the trial court granting the State permission to proceed with leading questions provided evidence that Dumas and McKelton had a relationship but not one sufficient to support a finding that the Dumas was an adverse witness. Dumas had visited McKelton while he was awaiting trial in this current case but had not done so in the month leading up to this case. Tr. 1371. Dumas also no longer had a romantic relationship with McKelton.

In the State's response, they cite to cases that have "this type of leading questions on direct examinations have found not only familial relationships to satisfy this requirement, but also pending relationships, and general friendships." State's Brief at p.83. However, in each case, in addition to the relationship between the defendant and witness, the witness was also evasive in his/her responses: *State v. Darkenwald*, No. 83440, 2004 Ohio App. LEXIS 2394, ¶ 22 (Cuyahoga Ct. App. May 27, 2004) (the witness, who was the defendant's daughter "was evasive and uncooperative, and she specifically stated she did not want to testify"); *State v. Fleming*, No. CA2002-11-279, 2003 Ohio App. LEXIS 6405 ¶40 (Butler Ct. App, Dec. 22, 2003) (witness "was evasive when answering the question"); and *State v. Stearns*, 7 Ohio App. 3d 11, 454 N.E.2d 139, 143 (1982) (Leading questions were allowed because not only did "the witnesses were shown to have a strong affinity to the defendant," but also "they frequently gave

incomplete or evasive answers, and they differed significantly from statements they had previously given to the prosecution”). The only case that the State cites in which the trial court established that the witness to be adverse, without the witness being evasive, was where the defendant’s fiancée was the witness. *State v. Warren*, 67 Ohio App. 3d 789, 588 N.E.2d 905, (Ohio App. 6th Dist. 1990). Dumas had a relationship with McKelton, but not one like a fiancée or spouse in which there is an obvious preconceived bias toward the witness.

The State replies that Dumas was evasive with her testimony, however there is no evidence of that. The State says Dumas was evasive about knowing that McKelton was dating Allen directly after she and Appellant broke up in 2008. Here is the transcript of that testimony:

Q: Did you know Calvin was dating Margaret Allen while he was dating you?

A: Huh-uh.

Q: You didn’t?

A: No.

Q: Did you know that he was living with her in 2008?

A: I knew when we broke up, like a month later, I found out that’s who he was with.

Q: When did you break up in 2008?

A: I can’t remember the exact month. I can’t recall the month.

Q: Was it early or late in the 2008?

A: I can’t recall.

Q: Are you saying that you were not aware that McKelton was living with Margaret Allen in Fairfield from late – middle or late 2007, you didn’t know that?

A: It was so many females, I didn’t really – it – when we broke up, we broke up.

Tr. 1369. Dumas’ responses are not indicative of evasiveness. This trial took place in October 2010, more than two years after the time period about which the prosecutor is asking. Moreover,

Dumas had testified that this was an on-again-off-again relationship. Tr. 1367. Given the nature of the relationship and the time between the events and the trial, it is not unusual or suspicious that Dumas did not know the exact date of that particular breakup with McKelton. Also, during this line of questioning, the prosecution is asking leading questions prior to being allowed to do so. Tr. 1373.

The State also argues that Dumas was evasive about what her cell phone numbers were during the 2009 time frame. State's Brief at p. 84. This is the testimony that the State argues is evasive:

Q: Okay. Are these phone numbers different from the phone number – the cell phone number you had back in February of 2009?

A: The 680 number is, because I just recently got that one. The 213 number, I had that for a while. I just can't recall exactly when I got that number.

Q: Okay. Do you recall having a phone number back in 2009 of 432-9767?

A: I'm not sure. I've had so many cell phone numbers. I'm not sure when I had that number.

Q: Are you saying it's possible that was your phone number and you just don't remember?

A: I'm saying I don't remember what my number was back then.

Tr. 1370. Again, there is nothing in Dumas' responses that demonstrates that she was being evasive. Dumas testified that she had had many cell phone numbers and that it was difficult to remember when she had the specific number the prosecutor asked about. *Id.*

Dumas' answers were not evasive and were not, as the State contends, "an obvious attempt to aid Appellant." State's Brief at p. 84. The prosecution failed to establish that Dumas was an adverse witness.

To further support their argument that Dumas was properly declared an adverse witness, the State argues that Dumas had the nickname "Fifty" because "during one of Appellant's previous stints of incarceration, she would bring him \$50 every two weeks 'like clockwork.'" State's Brief p. 83. However, this "previous stint" was when McKelton and Dumas first began dating back in 2004. Tr. 1367-68. The State also notes that there were frequent letters exchanged between McKelton and Dumas and that "strikingly, Appellant had attempted communications with Dumas during the pendency of the trial." State's Brief p. 83. But, Dumas' testimony was that a day or two prior to her testimony, McKelton had called someone else's phone and that she just happened to be with that person. Tr. 1372. Dumas stated that McKelton told her at that time that he would call her back later but never did. *Id.*

Even if the Dumas had properly been declared an adverse witness, the State's use of leading questions went beyond the limit of what is appropriate under Evid.R. 611(C). There are limits to what a prosecutor may do with leading questions: "A new trial is required when the prosecutor has misstated facts, put words into witnesses' mouths, spoke as if from personal knowledge, assumed prejudicial facts not in evidence, bullied witnesses, and conducted himself in a 'thoroughly indecorous and improper manner.'" *State v. Smidi*, 88 Ohio App. 3d 177, 183, 623 N.E.2d 655, 659 (1993) (citing *Berger v. United States*, 295 U.S. 78, 84 (1935)). Through its line of questioning, the prosecutor puts words into Dumas' mouth and assumed prejudicial facts not in evidence to give the impression that Dumas was manipulated by McKelton into providing an alibi. *See* Proposition of Law No. VII. The State utilized leading questions far beyond what the rules allow during Dumas' testimony.

The State argues that it was permitted to cross examine Dumas concerning a potential alibi per *State v. Gest*, 108 Ohio App. 3d 248, 670 N.E.2d 536 (1995). State's Brief p. 86.

However, in *Gest*, the witness had previously testified as an alibi witness for the defendant in a different case. *Id.* at 260, 670 N.E.2d at 544. *Gest* concerned the prosecutor's cross-examination of the witness regarding the fact that she had previously testified as an alibi witness for the defendant. *Id.* The *Gest* court allowed that questioning because it went "to the witness's credibility." *Id.* The line of questioning at issue in this case was regarding the potential of Dumas being an alibi witness in this case, not some previous case. Moreover, it went far beyond challenging her credibility; it was extremely prejudicial toward McKelton.

Rather than stop at testing Dumas' credibility, the prosecutor attempted to create the image that McKelton forced her to be an alibi witness:

Q: Okay. That wasn't the answer to my question. Isn't it true that that's the business? That when he tells you to start your business back up and start sending money to him and play your role to the fullest, it's not about being a friend or even being a girlfriend. It's about being a source of income and in this case, an alibi witness for him.

A: No. You got it all wrong.

Q: Okay. If I got it wrong, could you please explain to the jury why when you expressed resistance to playing your role to the fullest, he then threatened to have somebody come up and flatten your tires and started asking you what job you were at? Did you hear that? Do you remember that?

Tr. 1458. This testimony was extremely prejudicial and was improper as "[p]rosecutors must avoid insinuations and assertions calculated to mislead." *State v. Lott*, 51 Ohio St. 3d 160, 555 N.E.2d 293 (1990). But with its cross examination of Dumas that is exactly what the prosecutor did.

The State argues that it was proper to cross examine her about supposedly being brought to McKelton's attorney to be coached. State's Brief at p. 86. However, the "unsupported insinuation that defense counsel coached defense witnesses to lie directly affected [McKelton's]

entire defense, thereby depriving him of a fair trial.” *State v. Hicks*, 957 N.E.2d 866, 874 (Ohio App. 8th Dist. 2011) *appeal not allowed*, 957 N.E.2d 1169 (Ohio 2011).

The State cites, *Geders v. United States*, 425 U.S. 80 (1976), for the proposition that the State properly questioned Dumas about McKelton “trying to bring Dumas to his attorney to get her coached.” State’s Brief p. 86. But that is not an accurate portrayal of the questioning. The exchange was as follows:

Q: Do you know when [Margaret Allen] died?

A: No.

Q: And you don’t remember when you went to the bar and did whatever that night, right?

A: I can’t recall the date. That was two years ago, but I spoken [sic] with his lawyer at the time, Richard Goldberg, and he has all the—he have [sic] all the dates.

Q: Oh, I see. When did you talk to him? What is when your memory was fresher two years ago?

A: Yeah.

Q: And that attorney, Richard Goldberg, gave you all the dates I think you said of what had happened back when it was fresh?

A: Yeah.

Tr. 1378. The prosecutor put words in Dumas’ mouth. Dumas had not testified that Goldberg gave her the dates, but that she had given Goldberg the dates when the events were fresher in her memory. Not only was this line of questioning highly prejudicial, but the questions were unsupported.

The impact of the insinuations contained in the State’s questions to Dumas deprived McKelton of his right to a fair trial, due process, and a reliable determination of his guilt and

punishment in a capital case. For these reasons, McKelton's convictions should be overturned, or, at a minimum, his death sentence vacated.

Proposition of Law No. VIII

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

McKelton has asserted that the cumulative effect of multiple instances of prosecutorial misconduct violated his due process rights.

Regarding McKelton's assertion that the prosecutor asked an improper question of Margaret Allen's physical therapist, the State argues that it must be assumed that there was a good-faith basis for the question asked by the prosecutor of Mindie Nagal, Margaret Allen's physical therapist because defense counsel did not challenge the question. State's Brief p. 87-88. The State cites to *State v. Gillard*, 40 Ohio St. 3d 226, 533 N.E.2d 272 (1988), to support this proposition. However, in *Gillard*, this Court noted that it was adopting the good-faith standard because "*effective cross-examination* often requires a tentative probing approach to the witness' direct testimony . . ." *Id.* at 231, 533 N.E.2d at 278. The State was not cross-examining Mindie Nagal. Nagal was the State's witness. There was no justification for such a question. The State was simply using the questioning of its own witness to place innuendo before the jury that suggested that McKelton may have viciously attacked Ms. Allen by "slamming a car door on [her ankle] repeatedly" (tr. 481-82) and that Ms. Allen was lying to cover for him.

Audrey Dumas was also the State's witness, although she was improperly allowed to be treated as an adverse witness. *See* Proposition of Law VII. But even assuming she was properly treated as an adverse witness, the State crossed the line of what was appropriate when the prosecutor asked her "And when—when he told you in February 27th, 2009, you started blowing his phone up for the next three hours, you didn't ask him about why he wanted you to do that either, did you?" Tr. 1506. The State makes McKelton's point in its brief when it asserts that

the State had “adduced evidence indicating that Appellant had attempted to cajole Dumas into being his alibi witness.” State’s Brief p. 98. Dumas testified to no such thing. In fact, she testified that McKelton “never asked me to blow his phone up or anything. He was probably upset that I was blowing his phone up.” Tr. 1506. The only person who indicated that McKelton told Dumas to “blow up” his phone was the prosecutor.

While defense counsel did fail to object to this line of questioning, it amounts to plain error. This was not “a tentative probing approach to the witness’ direct testimony.” *See Gillard*, 40 Ohio St. 3d at 231, 533 N.E.2d at 278. This was the prosecutor inserting facts not in evidence under the guise of a question. Nothing in the record indicates that this information was true or relevant. And nothing in Dumas’ testimony suggested that this is what had happened. Yet the prosecutor again referenced the “double alibi” in his closing argument, telling the jury that McKelton decided he would “have Audrey blowing my phone up all night long, so that later I can say, hey, I’m asleep with Crystal” and then noting that Dumas had played her role that night. Tr. 1994. Prosecutors “may not allude to matters not supported by admissible evidence.” *State v. Lott*, 51 Ohio St. 3d 160, 166, 555 N.E.2d 293, 300 (1990) (citing *State v. Smith*, 14 Ohio St. 3d 13, 14, 470 N.E.2d 883, 884 (1984)).

McKelton has asserted that the State’s use of his letter to Crystal Evans regarding posting flyers to get attention for his case was a mischaracterization of the evidence to make McKelton look even more dangerous to the jury. The State argues that whether the letter said “Battles Co.” or “Buttler Co.” it was still an attempt to intimidate potential witnesses. State’s Brief, p. 95. This argument is disingenuous. The prosecution elicited testimony from Det. Witherell that the letter referred to a funeral home in Cincinnati and that it was a “scare tactic” because “it’s “meant for people to draw their own conclusions in terms of their safety.” Tr. 1568-69.

Moreover, the context of the letter makes it clear that McKelton was talking about getting media attention for his case. Ex. 49. McKelton even said in the letter that he would ask his original attorney, Richard Goldberg, if that was a good idea. *Id.* Once again, the State painted McKelton as guilty and dangerous by way of innuendo. This was an “improper insinuation[] . . . calculated to mislead the jury.” *Berger v. United States*, 295 U.S. 78, 85 (1935).

McKelton argued that the State improperly and excessively used leading questions with its own witnesses, particularly with the informants. The State asserts that leading questions are permitted when “the State is directing the witness’s attention to events or to matters on which testimony was already generated.” State’s Brief p. 99 (citing *State v. D’Ambrosio*, 67 Ohio St. 3d 185, 190, 616 N.E.2d 909, 914 (1993)). But that is a very different scenario from what occurred here.

For example, on redirect examination of Lemuel Johnson, the following took place:

Q: Okay. Did he [McKelton] tell you about a guy named Boo?

MR. HOWARD: Objection.

THE COURT: Overruled.

Q: Did he tell you about a guy named Boo?

A: Yes. He was another - -

Q: Let me just ask my questions. Did he tell you about a guy named Butter?

MR. HOWARD: Objection, leading.

THE COURT: Overruled.

A: Yes.

Q: Did he tell about a guy named Wilkes?

A: Yes.

Q: Are those guys dead or alive?

A: Dead.

MR. HOWARD: Objection.

THE COURT: Overruled.

Tr. 1781. Johnson had not testified about any of these individuals previously. The prosecutor was not merely directing his attention to something to which he had already testified. Moreover, it was another situation in which the State used questions to use innuendo to suggest to the jury that McKelton had killed others.

The State also improperly used Gerald Wilson's prior statement, which it used to impeach him, as substantive evidence in its closing. *See* Proposition of Law VI.

While the State is "entitled to a certain degree of latitude" in closing arguments, here the prosecution's missteps "are too extensive to be excused." *State v. Liberatore*, 69 Ohio St. 2d 583, 589, 433 N.E.2d 561, 566 (1982). Through its questioning of witnesses and in its closing arguments, the State referred to impeachment evidence as if it was substantive evidence, put before the jury inferences based on facts not in evidence, and painted a picture of the defendant that was clearly designed to inflame the jury. *Cf. Id.*

The cumulative effect of the prosecutorial misconduct that occurred during McKelton's capital trial requires the reversal of his conviction.

Proposition of Law No. IX

It is a violation of a capital defendant's right to Confrontation and Due Process for a trial court to improperly limit cross-examination of a jail house informant witness. U.S. Const. amends. VI, VIII, XIV; Ohio Const. art. I, §§ 10, 16.

The trial court improperly limited trial counsel's cross-examination of key witnesses in McKelton's trial. The failure to allow a full and through cross-examination violated Ohio's evidentiary rules and denied McKelton's right to Confrontation and Due Process under the United States Constitution.

Charles Bryant, Lemuel Johnson, and Marcus Sneed testified at McKelton's trial. These three jail house informants provided damaging and prejudicial evidence to support the State's theory of the case. Bryant testified that McKelton confessed to him that he killed Margaret Allen. Tr. 989. Johnson testified that McKelton admitted to killing Germain Evans. Tr. 1748. Sneed testified that McKelton confessed to the murders. Tr. 1599. All three of these jail house informants were facing criminal convictions. Their testimony was suspect given other information provided about McKelton. On the one hand, the State presented evidence that McKelton would do anything to avoid criminal prosecution for crimes including having people murdered who would be able to link him to criminal activity. Tr. 1602, 1748. Yet, the State now wanted the jury to believe that McKelton went around telling multiple people that he committed murder. This made the jail house informants' testimony suspicious, and defense counsel had a right to cross-examine them about their testimony to test its veracity and to determine whether there was motivation to testify for the State. Defense counsel began cross-examination on these issues, but the trial court cut questioning short for each of these witnesses. Tr. 998, 1758, 1606-08.

In response to McKelton's complaint that the trial court limited cross-examination of key state witnesses, the State argues that the evidence was not relevant. State's Brief pp. 104-06. The State's position on this issue is in stark contrast to its position throughout the rest of its brief. Throughout the State's brief, the State argues that there was a proper purpose for the wealth of the improper prejudicial evidence admitted against McKelton. See State's Brief pp. 56, 64-67, 70, 73-74, 114-15. The State comes up with any conceivable justification to invent relevance for evidence admitted against McKelton. However, when faced with McKelton's complaint that he was not allowed to present relevant evidence, the State argues that the testimony the defense uncovered during cross-examination was sufficient, and the trial court was correct not to allow defense counsel to question witnesses about certain testimony. State's Brief pp. 104-06.

Like the trial court in this case, the State holds the defense to a different standard when it comes to the admission of evidence. While the State was given wide latitude to introduce improper hearsay and prejudicial evidence, the defense was limited to asking key witnesses a few important details and then stopped in their tracks once evidence was uncovered to demonstrate bias or motivation. Tr. 996, 998, 1606-08, 1758. On the other hand, the State was permitted to introduce a witness statement admitted for impeachment as substantive evidence. See, Proposition of Law No. VI. The State was permitted to ask witnesses any unsubstantiated question that crossed the prosecutor's mind even when it was unsupported by evidence. See, Propositions of Law No. VII and X. The State was permitted to introduce improper and prejudicial other acts evidence and hearsay. See, Propositions of Law No. IV, and V. And the State was able to put evidence in front of the jury of testimony of the unidentifiable witness called the "streets." The streets were saying that McKelton was guilty of the murders. Tr. 1602; See, Proposition of Law No. XI.

The State cites *State v. Gonzales*, 151 Ohio App. 3d 160, 783 N.E.2d 903 (2002) as support for the argument that the trial court properly limited the cross examination of the jail house snitches. State's Brief p. 107-08. In *Gonzales*, the trial court refused to allow counsel to cross-examine a witness regarding the fact that he had received, in exchange for his testimony, an agreed sentence that was less than the mandatory sentence for drug possession. *Id.* at 176, 783 N.E.2d at 915. The court adopted the explanation provided by the Seventh Circuit in *United States v. Nelson*, 39 3d 708, 708 (7th Cir. 1994).

Where limitations directly implicate the Sixth Amendment right of confrontation, we review the limitation de novo. Thus when deciding whether limitations of cross-examination are permissible, courts have striven to distinguish between the core values of the confrontation right and more peripheral concerns which remain with the ambit of trial judge's discretion.

Id.

The court in *Gonzales* determined that under this standard, it must determine whether "the jury had sufficient information to make a discriminating appraisal of the witness's motives and bias...The primary question in this context is whether a defendant has been afforded an opportunity to expose a cooperating witness's subjective understanding of his plea bargain because it is the witness's subjective understanding that is probative of bias or motive." *Id.* at 178, 783 N.E.2d at 917.

The *Gonzales* court determined that the trial court's limitation was technically erroneous but that the error was not an abuse of discretion because the jury had sufficient evidence to enable it to make a discriminating appraisal of the witness's bias. The same is not true in the present case. The jurors in McKelton's case were not provided with sufficient evidence to enable it to make a decision about the testimony of the jail house informants. Instead, counsel

spent most of the cross-examination justifying its questions and rewording questions for the witness.

The purpose of a criminal trial is to allow the defendant to test the strength of the State's evidence against it. This is why Ohio mandates the right to cross examination and the Sixth Amendment guarantees an accused right to confront witness. Ohio Evid. R. 611(B); *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987). The right to confrontation is essential to due process and is the primary right that the Confrontation Clause secures. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *Davis v. Alaska*, 415 U.S. 308, 315 (1974). Contrary to the State's argument, the defense was not looking for limitless cross-examination. Defense was not just trying to "hammer it home." That is was the State did in this case. Instead, defense was simply looking to sufficiently inform the jury of the witnesses' incentive to testify. Defense had a right to present evidence of possible bias of Bryant and Johnson and to challenge Sneed's pious reasoning offered for coming forward to the police with information about the murder.

The trial court's limitation on the cross examination of Byrant, Johnson and Sneed denied McKelton the opportunity to demonstrate that these witnesses had a motive to lie and infringed on core Sixth amendment rights, the right to present a meaningful defense and right to due process and equal protection. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

Proposition of Law No. X

The State's use of a prior statement to demonstrate that a witness called by the State lied to law enforcement and admission of that statement into evidence violates a capital defendant's right to a fair trial, due process, a reliable determination of guilt, and a reliable sentencing determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and of Article I, §§ 9, 10, and 16 of the Ohio Constitution.

McKelton has asserted that the State improperly and excessively used leading questions and brought in inadmissible evidence through its witness Crystal Evans. The prosecution questioned Ms. Evans extensively about her statements to police during the course of their investigation into her brother's death for the purpose of demonstrating that she had not been forthcoming with the investigators about her and McKelton's activities on the night of Germaine Evans' death. The State, in its brief, takes issue with McKelton's contention that the prosecutor began questioning Ms. Evans about her statement to detectives before it ever questioned her about the night at issue. The State says that this is untrue. State's Brief p. 109. However, a review of the record indicates that McKelton's assertion is correct. The State did question Ms. Evans about her comings and goings during the day, but never asked about what she and McKelton did after she returned home from getting her hair done. Tr. 1049-56. It was her statements to police regarding the events that took place after she returned home from her hair appointment that the State focused on to make its point that Crystal had attempted to provide a false alibi for McKelton. Yet the prosecutor never asked her about the events of that night, instead asking her about what she told investigators about the events of the night.

Furthermore, the State does not address McKelton's contention that the evidence introduced through Ms. Evans should have been excluded pursuant to Evid.R. 403(A).

Proposition of Law No. XI

The accused's right to confront witnesses against him is violated when testimony from an out-of-court declarant is admitted against the accused in a criminal prosecution, and the accused lacked a prior opportunity for cross-examination. The accused's right to a fair trial is prejudiced when unreliable hearsay is admitted in a criminal prosecution against the accused. U.S. Const. amend. VI, XIV; Ohio Const. art. I, § 10; Ohio R. Evid. 403(A), 801(C).

The accused's right to confront witnesses against him is violated when testimony from an out-of-court declarant is admitted against the accused in a criminal prosecution and the accused lacked a prior opportunity for cross-examination. The accused's right to a fair trial is prejudiced when unreliable hearsay is admitted in a criminal prosecution against the accused. U.S. Const. amend. VI, XIV; Ohio Const. art. I, § 10; Evid.R. 403(A), 801(C).

A. Detectives Luke and Witherell

The State argues that the statements made to detectives Luke and Witherell were made to them in the course of investigating the murder of Margaret Allen and introduced to explain why they took certain steps in their investigations. The statements were made months after Allen's death. Statements made to police in the course of criminal investigations are testimonial. *Davis v. Washington*, 547 U.S. 813, 829-830 (2006).

The hearsay exception for statements to explain why investigations were made is narrow and typically allows only brief out-of-court statements that bridge gaps in the testimony that would otherwise substantially confuse or mislead the jury. *Jones v. Basinger*, 635 F.3d 1030, 1046 (7th Cir. 2011) (internal citations omitted). It may not be used to spread before juries damning information that is not subject to cross-examination. *Id.* at 1047.

In its brief, the State relies on *State v. Thomas*, where this Court found no hearsay problem with the testimony by police that "they had received information about a 'sports bookmaking' operation." State's Brief p. 113. *State v. Thomas*, 61 Ohio St. 3d 223, 232, 400

N.E.2d 401, 408 (1980). The distinction between *Thomas* and this case shows why the testimony was inadmissible. Detective Luke could have kept her statement brief, as in *Thomas*, and testified only that she received a tip that Germaine Evans might have information about a murder. Instead she testified, “We were told that Mick [Germaine Evans] was present during Missy’s homicide, that he knew about it and that he was scared and that he may have either helped move the body or that he was present in the house when Missy was killed.” Tr. 1249. Detective Luke included details that connect McKelton with the crime, and her statement should have been excluded. See *State v. Richcreek*, 196 Ohio App. 3d 505, 516, 964 N.E.2d 442, 450 (2011).

The State argues that no prejudice resulted from the hearsay implicating McKelton, because Andre Ridley also testified that Evans was present when Allen was killed and helped to move her body. State’s Brief pp. 113-14. The opposite is true; this demonstrates prejudice. The anonymous declarant, who implicated McKelton to Detective Luke, and Ridley are now both given more credibility because they now corroborate each other’s accounts. Similarly, this hearsay corroborates the out-of-court assertions of some anonymous family or friends of Evans that McKelton killed him because he helped to move Allen’s body, discussed below.

These statements are another example of the pervasive pattern of the State introducing evidence that inculpates or vilifies McKelton under the guise of some legitimate purpose.

B. Ziala Danner

The hearsay offered about McKelton’s daughter telling Danner that he had assaulted his ex-girlfriend had nothing to do with the declarant’s “then existing state of mind.” The state of mind exception to the hearsay rule allows for the introduction of a “statement of **the declarant’s** then existing state of mind, emotion, sensation, or physical condition.” Evid.R. 803(3)(emphasis

added). Here, the hearsay was purportedly introduced to show the witness' (Danner's) state of mind, not the declarant's.

These statements were also inadmissible because testimony that encompasses the underlying basis for a declarant's mental state goes beyond the scope of Evid.R. 803(3). *State v. Leonard*, 104 Ohio St. 3d 54, 73, 818 N.E.2d 229, 256 (2004). The "critical requirement is that the statement refer to a present and not a past condition * * * Where the statement does not relate to a 'then existing' condition, it must be viewed as a narrative account formulated after the time for reflection, and therefore it is not admissible under Evid.R. 803(3)." *State v. Apanovitch*, 33 Ohio St. 3d 19, 21-22, 514 N.E.2d 394 (1987) (citations omitted). Here the hearsay statement – that McKelton had assaulted an ex-girlfriend – is a narrative account of a past occurrence, not a present condition. It was not admissible under Evid.R. 803(3).

Further, the State continues the pattern of introducing prejudicial evidence under the guise of a purported legitimate purpose. It is highly damaging to McKelton to introduce evidence of him choking an ex-girlfriend. The value of the statement is virtually non-existent, because it is offered only to show Danner's frightened mental state, which would have been fully apparent without including the vilifying hearsay. (See State's ex. 2). The statement should have been excluded on the basis of Evid.R. 403(A) alone, as discussed in Proposition of law V.

C. Detectives Luke and Witherell interview Crystal Evans.

The State argues that everything Detectives Luke and Witherell's said in their interview of Crystal Evans was a question, and thus not a statement. However, most of the statements Detectives Luke and Witherell made were assertions of fact, not questions.

Merriam-Webster's dictionary defines question as "an interrogative expression," or "an interrogative sentence or clause." (<http://www.merriam-webster.com/dictionary/question>,

Retrieved 7/6/2012). "An 'assertion' for hearsay purposes 'simply means to say that something is so, e.g., that an event happened or that a condition existed.'" *State v. LaMar*, 95 Ohio St. 3d 181, 197, 767 N.E.2d 166, 192 (2002), (quoting 2 McCormick on Evidence (4th Ed.1992) 98, Section 246.)

To give an example from the interview, Detective Luke tells Evans:

I want you to understand something. You, and I have no reason to lie to you. Listen to me. (McKelton)Beat the living shit out of Tiffany Austin. Beat the living shit out of um, Andrea Jackson. Okay. No doubt about those, and it, without going into, I, I would no reason [sic] to lie to you.

Ex. 56 at 26. These were assertions, not questions. Similarly, most statements in the interview were assertions of fact, not interrogative expressions. Further, most of the questions are leading or rhetorical, such as when Detective Luke asks, "What do you think [attorney Ken Lawson would] tell me about Calvin? Bet you'd shit your pants if you knew." *Id.* at 29. This asserts that Lawson knows bad things McKelton has done. Detective Luke is not attempting to elicit information from Evans by asking her something she would not know. Among Detective Luke's assertions were comments on McKelton's decision not to talk to the police, in violation of his constitutional rights against self-incrimination:

Q: Well, do you think Calvin ever said, about [Margaret Allen's death], to the police?

A: Nothing.

Q: Do you know what he said?

A: I don't know.

Q: Give me a lawyer.

Id. at 34.

Not only is the interview filled with out-of-court assertions, but they are part of the pattern of vilifying McKelton with inadmissible evidence.

D. Detective Eric Karaguleff

The statements made to Detective Karaguleff were quintessential testimonial statements. A crime was being investigated and the anonymous declarants that arrived told the investigating detective that they believed McKelton had committed the crime. The objective circumstances indicated that they wanted to be witnesses to help the government to punish McKelton for Evans' death. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321 (2009). The fact that the information was unsolicited does not change the classification of the statements as testimonial. *Davis v. Washington*, 547 U.S. 813, 822 (n. 1) (2006).

The State's argument that statements of the amorphous group were excited utterances fails for two separate reasons. The first reason is that one required condition to admit a statement as an excited utterance is that "the declarant had an opportunity to observe personally the matters asserted in his statement or declaration." *State v. Taylor*, 66 Ohio St. 3d 295, 301 (1993). Nothing in the record suggests that the unknown declarants witnessed McKelton kill Evans or Allen. For this reason alone the testimony was not admissible.

The second independent reason the statements were not excited utterances is that an excited utterance requires "that there was some occurrence startling enough to produce a nervous excitement in the defendant, which is sufficient to still his reflective faculties." *Id.* To establish the excited utterance at trial the prosecutor established that the unknown declarants were "upset" and "emotional" and then asked, "were they communicating this information to you in that emotional, excited state?" Tr. 1316. However, being upset is not the same as being startled, and "clearly does not meet the standard for admissibility under Evid.R. 803(2)." *Taylor*, 66 Ohio St. 3d at 303, 612 N.E.2d at 322. The nature of detective Karaguleff's testimony shows that the declarants were not incapable of reflective thought. *See Id.* The declarants provided clothing

and tattoo descriptions of Germaine Evans, stated the last time that they had seen him, indicated who they believed had killed Evans and provided a possible motive. Tr. 1316. This shows they were fully capable of reflective thought.

The prejudice from these statements is overwhelming. In a case built entirely on circumstantial evidence, the State introduced statements of multiple anonymous out-of-court declarants expressly asserting that McKelton is guilty of both murders.

E. Sheridan Evans' testimony

"Pooh said you did it" (killed Germaine Evans) is an assertion. Tr. 1839. It is not, as the State contends, a question. Any questioning happening elsewhere in the conversation was being done by the witness, not the out-of-court declarant.

F. Marcus Sneed's testimony

Sneed asked McKelton if it was true "what everybody was saying in the street about him killing his girlfriend." Tr. 1599. The out-of-court statement is an assertion that McKelton killed his girlfriend, not a question. The only question involved here is asked by Sneed, asking if the out-of-court declarant's assertion is true. (The same is true for Sheridan Evans' testimony above) In *State v. Tucker*, the case the State relies on in its brief, it is a question **by the out-of-court declarant** which is considered to be admissible because it is not offered for the truth of the matter asserted. No. 83419, 2004 Ohio App. LEXIS 4909 (Cuyahoga Ct. App. Oct. 7, 2004). Here the out-of-court declarants have made an assertion of fact (that McKelton killed his girlfriend), not asked a question. The only question involved is from the witness. Similarly, when Sneed asked, "was that the guy that help you get rid of the body that everybody was saying on the street," (Tr.1602), the out-of-court declaration was an assertion, not a question. See *State v. Kemper*, Nos. 2002-CA-101, 2002-CA-102, 2004 Ohio App. LEXIS 5520 at ¶¶ 34, 47 (Clark Ct.

App. Nov. 12, 2004), (Reversed because a videotape was played in which the police, questioning the defendant, told him unnamed declarants identified him as the perpetrator.) Once again, out-of-court declarants' assertions, that McKelton is guilty of the murders, were admitted. The result is overwhelming prejudice to McKelton.

G. Ineffective Assistance of Counsel

To the extent that defense counsel failed to object to any of the hearsay above, McKelton received ineffective assistance of counsel, as detailed in Proposition of Law no. XV.

Conclusion

Through inadmissible hearsay, the State repeatedly brought in prejudicial testimony vilifying McKelton and declaring his guilt. This included repeated discussions of anonymous declarants saying that McKelton was guilty of the murders that he was charged with. In a case built entirely on circumstantial evidence, upholding McKelton's conviction in light of the testimony discussed above would be a miscarriage of justice.

Proposition of Law No. XIII

When the State fails to introduce sufficient evidence of particular charges and there is not substantial evidence upon which a jury can conclude that all elements have been proven beyond a reasonable doubt., a resulting conviction deprives a capital defendant of substantive and procedural due process. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 9, 16.

The State argues that McKelton's conviction for killing Germaine Evans was not against the manifest weight of the evidence or based on insufficient evidence. In doing so, it relies mainly on inadmissible hearsay and misleading evidence. The State's response mainly serves to illustrate points where the jury likely lost its way and decided the case on inadmissible evidence. Marcus Sneed testified that he asked McKelton, "was that the guy that help you get rid of the body that everybody was saying on the street." Tr. 1602. The State includes this question and McKelton's affirmative answer in its brief to demonstrate guilt. State's Brief p. 128. But this mainly illustrates the jury being subject flagrantly inadmissible hearsay, discussed in greater detail in Proposition of Law No. XI.

For purposes of McKelton's conviction being against the manifest weight of the evidence, this court can consider Sneed's credibility. *State v. Thompkins*, 78 Ohio St. 3d 380, 387, 678 N.E.2d 541, 547 (1997). Sneed testified implausibly that McKelton told him Evans was killed to eliminate someone who could link him to the murder, even though McKelton casually creates someone else who can implicate him. Tr. 1602. Further, the Court did not allow defense counsel to confront Sneed on relevant matters, including a pending sentencing hearing which had been continued until later that week, and how many counts were in his indictment. Tr. 1608, 1612, *See* Proposition of Law No. IX.

Similarly, the testimony of Lemuel Johnson was compromised by legal deficiencies. McKelton was not permitted to properly confront Johnson about biases, as discussed in greater

detail in Proposition of Law No. IX. Johnson's testimony about McKelton creating a witness by telling him that he killed Evans to remove a witness was implausible. Tr. 1748. Further, Johnson's testimony was tainted by the State leading him on redirect to insinuate that McKelton killed three other people in unrelated matters:

Mr. Piper: Did [McKelton] tell you other things to let you know how serious he was?

Johnson: Yes.

Mr. Piper: Okay. Did he tell you about a guy named Boo?

Mr. Howard: Objection.

The Court: Overruled.

Mr. Piper: Did he tell you about a guy named Boo?

Johnson: Yes. He was another –

Mr. Piper: Let me just ask my questions. Did he tell you about a guy named Butter?

Mr. Howard: Objection, leading.

The Court: Overruled.

Johnson: Yes.

Mr. Piper: Did he tell about a guy named Wilkes?

Johnson: Yes.

Mr. Piper: Are those guys dead or alive?

Johnson: Dead.

Mr. Howard: Objection.

The Court: Overruled.

Tr. 1781. As discussed in Proposition of Law No. V, this ran afoul of Evid.R. 404(B) and Evid.R. 403(A).

The State relies on more problematic evidence in its brief. The State references the words “Butler Co. or Battles Co.” in a letter to show McKelton wanted to intimidate witness. State’s Brief p. 132. As discussed in Proposition of Law No. V this was misleading and prejudicial evidence. The State also relies on erroneously admitted hearsay of Michael Nix. *Id.* See Proposition of Law No. V. The State also references Sheridan Evans’ testimony, but Evans testified that “Pooh said you did it” (killed Germaine Evans), which was prejudicial hearsay. Tr. 1839.

In its brief, the State also relies on the Statement of Gerald Wilson played for the jury pursuant to Evid.R. 607(A). State’s Brief p. 129. State’s ex. 15; *see* Tr. 1654. The State argues that this testimony inculpatates McKelton. State’s Brief p. 129. But this testimony was allowed only for impeachment purposes pursuant to Evid.R. 607(A). The State, in its brief, argues it should be taken as substantive evidence, but that is a prohibited purpose for such a statement. *State v. Dick*, 27 Ohio St. 2d 162, 165, 271 N.E.2d 797, 799 (1971). The jury never received a limiting instruction under Evid.R. 105 that the statement could be considered only for Wilson’s credibility and not McKelton’s guilt. The State argued in closing argument (Tr. 2002-03) and again in its brief (State’s Brief p. 129) that Wilson’s statement should be considered to establish McKelton’s guilt. The jury likely made the same mistake, and this further illustrates how inadmissible evidence caused the jury to lose its way.

Conclusion

The probative force from the evidence against McKelton was almost entirely from inadmissible sources. Even on appeal, the State relies largely on hearsay and a statement introduced only for impeachment purposes to establish McKelton’s guilt. If all of the inadmissible evidence against McKelton had been excluded, the remaining evidence would not

be sufficient and would not support a conviction that was not against the manifest weight of the evidence.

Proposition of Law No. XV

The right to the effective assistance of counsel is violated when counsel's deficient performance results in prejudice to the defendant. U.S. Const. amends. VI, XIV; Ohio Const. art. I, § 10.

A. Defense counsel was ineffective during plea negotiations and not adequately prepared to defend McKelton at trial.¹

On March 21, 2012, the Supreme Court decided *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376 (2012) and *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399 (2012). The Court held that the Sixth Amendment guarantees effective assistance of counsel during plea negotiations, including where counsel's deficient performance leads a defendant to reject a plea which would have resulted in a lesser sentence than what resulted from trial. *See Lafler*, 132 S. Ct. at 1385. To succeed in such a claim, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the defendant would have accepted a plea which would have been less severe than the sentence that was in fact imposed. *Id.* at 1384-85. McKelton's attorneys were ineffective during plea negotiations, as discussed below.

1. Defense counsel failed to retain adequate experts.

Defense counsel has a duty to make reasonable investigations. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Counsel's strategic choices made after less than complete investigation are

¹ In *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) and *Missouri v. Frye*, 132 S. Ct. 1399 (2012) the United States Supreme Court held that the Sixth Amendment guarantees effective assistance of counsel during plea negotiations, including where counsel's deficient performance leads a defendant to reject a plea which would have resulted in a lesser sentence than what resulted from trial. *See Lafler* 132 S. Ct. at 1385. These cases were decided after McKelton's merit brief was filed. McKelton filed notice of supplemental authority on May 1, 2012. McKelton now intends to modify his Fifteenth proposition of law to incorporate ineffective assistance of counsel during plea bargaining. Because this change in the law occurred while McKelton's appeal was still pending, it is applicable to his case. *See State v. Evans*, 32 Ohio St. 2d 185, 291 N.E.2d 466, 467 (1972). McKelton recognizes that the State has not had an opportunity to respond to this particular argument, and if the State requests an opportunity for additional briefing to address ineffective assistance of counsel during plea bargaining, McKelton will not oppose it.

reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984)). "Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable." *Wiggins*, 539 U.S. at 522, (quoting *Strickland* 466 U.S. at 688-98.) This Court has, through its rules of superintendence, recognized the ABA guidelines as the required standard for appointed capital defense attorneys. Sup.R. 20.03.

The ABA Guidelines provide that the defense team should consist of no fewer than two attorneys, an investigator, a mitigation specialist, and at least one member qualified to screen individuals for the presence of mental or psychological disorders or impairments. American Bar Association Guidelines for the Appointment of Counsel in Death Penalty Cases (ABA Guidelines) 4.1; *see also Wiggins*, 539 U.S. at 524. The Guidelines address the importance of utilizing multiple experts to conduct a thorough pretrial investigation, negotiate plea bargains effectively, build rapport with clients and persuade them to accept advantageous plea bargains. *See* ABA Guideline 1.1 Commentary, "representation at trial,"; ABA guideline 4.1 commentary, "the mitigation specialist."

McKelton's attorneys did not retain any experts except one investigator. *See* Dkt. 235. There was no good reason for defense counsel to retain no other experts. The court granted funding for an investigator, a mitigation specialist, a mental health professional, and a forensic expert. 2/16/10 Hrg. Tr. 9. McKelton's attorneys should have retained a mitigation specialist and psychological professional. This is what professional norms require and what McKelton's attorneys represented to the court that they had done. 3/4/10 Hrg. Tr. 9.

Investing heavily in an investigator does not justify counsel's failure to retain experts to conduct an investigation that is reasonable under professional norms the State argued in response

to Proposition of Law XVI. State's Brief p. 156. The investigator's bill was \$8,162.16. Dkt. 235. At the hearing of February 16, 2010, the Court approved at least \$5,000 each for the four experts, and indicated that it would approve additional reasonable amounts if necessary. 2/16/10 Hrg. Tr. 9.

McKelton had no reason to trust his counsel's advice regarding a plea bargain where his attorneys had not conducted an adequate investigation in his case.

2. Defense counsel did not adequately communicate with McKelton.

ABA Guideline 10.5 indicates counsel "at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client," and "engage in a continuing interactive dialogue with the client" concerning all matters material to the case. ABA Guideline 10.5. Ohio Rule of Professional Responsibility 1.4 imposes similar requirements.

McKelton's attorneys had seen him once before they advised him to accept the State's plea deal, and that was an introductory visit. *See* 9/17/10 Hrg. Tr. 13. During the second visit they told McKelton, in front of a police officer, that he had to plead guilty but did not discuss the relevant evidence with McKelton. *Id.* at 14, 15, 18.

McKelton received ineffective assistance of counsel where his attorneys did not adequately communicate with him before advising that he accept a plea bargain. McKelton's attorneys did not build any rapport with him, and they did not inform him about the evidence in his case so he could make an informed decision as to whether or not to plead guilty.

3. Prejudice

McKelton's attorneys' performance was deficient because they failed to investigate and advise him adequately regarding plea bargaining. To establish prejudice, McKelton must show a

reasonable probability that he would have accepted a plea which was less severe than the sentence that was in fact imposed. *Lafler* 132 at 1384-85. Any sentence that could have been offered would have been less severe than the death sentence that McKelton received. McKelton might have accepted an advantageous plea had he received effective assistance of counsel. Accordingly, McKelton was prejudiced by his counsel's deficient performance.

B. Counsel failed to object to the State's Misconduct.

McKelton rests on his merit brief for this issue.

C. Counsel failed to object to the State's questioning and improper admission of evidence during Crystal Evans' testimony.

McKelton rests on his merit brief for this issue.

D. Counsel failed to object to hearsay.

The State argues that nothing objected to in Proposition of Law No. XI was hearsay, so trial counsel was not deficient for failing to object. Accordingly, the issue of counsel's ineffectiveness turns on whether the statements in Proposition of Law No. XI were hearsay. As discussed in greater detail in Proposition of Law No. XI, the statements at issue were impermissible hearsay.

Defense counsel were ineffective for failing to object when Detective Karaguleff testified that a group of anonymous declarants told him Calvin McKelton killed Germaine Evans. Tr. 1316. They were ineffective for failing to object when Sheridan Evans testified that someone named "Pooh" told her that McKelton killed Germaine Evans. Tr. 1839. They were ineffective for not objecting when Marcus Sneed testified "everybody was saying in the street" that McKelton was guilty of both murders. Tr. 1599, 1602. They were ineffective for failing to object to all of the other hearsay in Proposition of Law No. XI.

McKelton was prejudiced as a result of his counsel's ineffectiveness. It would be difficult to devise hearsay more unfair and prejudicial than repeated assertions of guilt by anonymous declarants.

E. Counsel failed to request limiting instructions.

When evidence which is admissible for one purpose but not admissible for another purpose is admitted, "the court, **upon request of a party**, shall restrict the evidence to its proper scope and instruct the jury accordingly." Evid.R. 105. (emphasis added) Gerald Wilson's prior statement and many other pieces of evidence were arguably admissible for impeachment purposes, but certainly not as substantive evidence against McKelton. *See* Propositions of Law Nos. V, VI, and X. If defense counsel was unable to exclude the statements, they should have at least requested a limiting instruction under Evid.R. 105.

F. Counsel failed to object to irrelevant, prejudicial, and inadmissible evidence.

The State again argues only that counsel was not ineffective for failure to object because all of the evidence was admissible. The inadmissibility of this evidence is discussed in greater detail in Proposition of Law V. Because the evidence in question was not admissible, McKelton received ineffective assistance of counsel.

The jury should not have seen McKelton's tattoos with words like "straight killer" and images including skulls and guns. Tr. 877-9. They should not have heard that McKelton had been selling drugs since "the late '90s." Tr. 1734. They should not have heard that McKelton's street name was "C-murderer." Tr. 1805. They should not have heard all of the anonymous declarants' statements that McKelton was guilty of both murders, on both hearsay and unfair prejudice grounds. Tr. 1316, 1599, 1602, 1839.

G. Counsel failed to adequately object to the introduction of the statements of Margaret Allen.

Evidence Rule 804(b)(6) specifically provides that “the adverse party must provide written notice of an intention to introduce the statement sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement.” Defense counsel did not utilize this protection and waited until the hearsay was introduced at trial to object.

In its brief, the State says, “Appellant’s argument in this regard is truly bizarre.” State’s Brief p. 145. However, at trial, the State argued that it was “misguided to bring an objection to this now when we previously filed the memorandum addressing that.” Tr. 403. The State was correct that it was “misguided.” As a result of defense counsel’s failure to brief the issue and request a pre-trial hearing, the court applied the wrong standard and ignored the intent requirement of forfeiture by wrongdoing. (“Clearly the **allegation in this case is that this defendant murdered the victim, Ms. Allen, and I think this is exactly what the forfeiture by wrongdoing exception is.** So therefore, I’m going to permit it under the hearsay rule. Tr. 404.”) *See* Proposition of Law IV.

H. Counsel failed to request a voir dire of the jury after a courtroom incident.

McKelton rests on his merit brief for this issue.

I. Counsel failed to move to sever Counts One and Two from the remaining counts in the indictment.

McKelton rests on his merit brief for this issue.

J. Further evidence of ineffectiveness.

Circumstances of Juror Number 31’s departure have strong indicia that she was a holdout. Defense counsel should have sought to question her outside of the presence of the media. They should have asked her why she herself did not approach the court. They should have

asked her why, if the purported surgery was planned ahead, did she not raise the issue sooner. They should have asked why the jurors who initially approached the court presented the problem as a juror refusing to participate and not that there was a surgery she needed to attend. Instead, the following exchange took place:

Mr. Howard: Judge, just for purposes of the record note our objection to the juror being excused.

The Court: What alternative do you think should have been followed?

Mr. Howard: None, Judge. I'm just making a record since this is a capital case. I'm just making a record.

The Court: So you're just objecting because you can?

Mr. Howard: Yes, sir.

K. Conclusion.

McKelton's trial was replete with instances of ineffective assistance of counsel. The result was overwhelming prejudice to McKelton. McKelton's Sixth Amendment right to effective counsel was violated, and he is entitled to a new trial or alternatively a new penalty phase under O.R.C. § 2929.06(B).

Proposition of Law No. XVI

The right to the effective assistance of counsel is violated when counsel's deficient performance results in prejudice to the defendant in the sentencing phase of his capital trial. U.S. Const. amends. VI, XIV; Ohio Const. art. I, § 10.

In this claim, McKelton asserts that his counsel rendered ineffective performance to his prejudice in the mitigation phase of his capital trial under *Strickland v. Washington*, 466 U.S. 668 (1984). Trial counsel offered a paltry and disjointed mitigation presentation. Trial counsel failed to properly prepare for the sentencing phase by hiring the appropriate experts or performing the necessary investigation. And, trial counsel gave a closing argument that was devoid of advocacy at a time when they should have been fighting for their client's life.

The State takes issue with McKelton's use of the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, arguing that they are "only guides" to what is reasonable. State's Brief p. 154. The State cites *Bobby v. Van Hook*, ___ U.S. ___, 130 S.Ct. 13 (2009), for this proposition. However, in *Van Hook*, the United States Supreme Court took issue with the fact that the court below had relied on the 2003 ABA Guidelines which were issued 18 years after Van Hook's trial and noted that they were very different from the ABA Guidelines in effect at the time of the trial. *Id.* at 16-17. Unlike Van Hook's trial, McKelton's trial took place seven years after the current ABA Guidelines were published. Thus, those guidelines "describe the professional norms prevailing when the representation took place." *Id.* at 16. The U.S. Supreme Court has cited the ABA Guidelines with approval in capital cases. *Rompilla v. Beard*, 545 U.S. 374, fn. 7 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

Moreover, McKelton was represented by attorneys who were appointed pursuant to Superintendence Rule 20. This Court, through Rule 20.03, has recognized the importance of the ABA Guidelines and has explicitly applied those standards to appointed counsel in capital cases.

The State makes much of the deference that reviewing courts must give to trial counsel's decisions. State's Brief pp. 150-52. However, as the State itself has noted, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). That is precisely what happened here—counsel's performance undermined the adversarial nature of the trial. In closing argument at the sentencing phase of a capital trial—when counsel should have been advocating for his client's life—he instead did all but tell the jury that death was appropriate.

The State has said that "Appellant takes issue with the fact that counsel acknowledged that Appellant's crimes and specifications were extremely severe" and argues that this was a strategic attempt to build trust with the jury. State's Brief p. 157. But that is not an accurate characterization of defense counsel's closing. Counsel did not merely acknowledge the seriousness of the crime. Counsel did nothing to humanize his client, undermined the mitigation evidence, and added reasons to vote for death. McKelton's daughter took the stand and told the jury that her father was always there for her and asked the jury to spare his life. Mit. Tr. 32-36. Counsel stood up in closing and told the jury, "[m]aybe she shouldn't love her father." *Id.* at 112. Counsel goes on to ask the jury, "would you rather have somebody as bad as he is, as bad as Calvin McKelton is, trying to influence his children . . . ?" *Id.* at 113. The jury was left with the idea that McKelton would be a negative influence on his daughter who loved him blindly despite him being a horrible person.

McKelton's mother and McKelton in his unsworn statement both told the jury that McKelton lived with his grandmother for a time. McKelton said that he slept on the floor there because there were so many people living with her. *Id.* at 69. He also told the jury that his grandmother kicked him out because he did not follow her rules. *Id.* at 71. Counsel got up and told the jury to imagine, given the horrible things that McKelton has done, how he must have manipulated his grandmother to take advantage of him to the point where she threw him out of the house. *Id.* at 115-17. Where counsel should have used the opportunity to explain how McKelton's family and background shaped him into who he is, instead, counsel told the jury that he was always a monster, always manipulative, always using people—even as a child. Defense counsel completely abdicated their duty to advocate on behalf of their client.

The State also makes the argument that the failure to hire a mitigation specialist or expert does not constitute ineffective assistance of counsel. State's Brief p. 154. The State also contends that counsel "chose to utilize an investigator as opposed to a 'mitigation specialist'" and asserts that this criminal investigator, along with counsel, "was more than able to satisfy the requirements of competent counsel with the aid of a specialist." State's Brief p. 156. But the record is clear that the trial court indicated that it would grant funds for an investigator, a mitigation specialist, a mental health professional, and a forensic expert. 2/16/10 Hrg. Tr. 9; Dkt. 20. The trial court even checked in a few weeks later to ask if the experts had been retained and were working on the case. 3/4/10 Hrg. Tr. 9. Counsel told the trial court that they were. *Id.* Counsel did not have to choose the criminal investigator over a mitigation specialist and mitigation expert. The trial court would have provided funding for all of those experts.

Moreover, a decision cannot be deemed strategic unless it is made after a complete investigation or when the lack of complete investigation can be justified by reasonable

professional judgments. *Strickland*, 466 U.S. at 691; *Wiggins v. Smith*, 539 U.S. 510, 533 (2003). In the instant case, it is clear from the record that a reasonable investigation was not conducted and that there was no justification for that. Counsel did not hire a mitigation specialist to collect records and conduct interviews only to determine that there were reasons to not present what was found in the course of that investigation to the jury. And counsel did not hire a psychologist or other mental health expert only to determine that it would be detrimental to have that expert testify. Counsel simply failed to go down these avenues.

McKelton was prejudiced by counsel's deficient performance at the sentencing phase of his capital trial. McKelton is entitled to a new penalty phase.

Proposition of Law No. XVII

The accused's right to due process is violated when the cumulative effect of prosecutor misconduct at the sentencing phase of trial renders the accused's trial unfair. U.S. Const. amends. VIII and XIV; Ohio Const. art. I, §§ 9 and 16.

A. The State improperly commented on McKelton's unsworn statement.

The State commented on McKelton's unsworn statement regarding what McKelton did not say, in violation of his fifth amendment rights. Tr. 98-99. The State concedes that the comments were prohibited but argues harmless error. State's Brief p. 162. However, the error in this case was not harmless. The State not only made improper comments on McKelton's unsworn statement, it told the jury that what McKelton did not say "is the weight that goes on the side of that specification." Tr. 99. In other words, the State made improper comments and then argued to the jury that what McKelton did not say is part of what it should weigh against the mitigating factors. This was not harmless error.

To the extent that any error was waived, McKelton received ineffective assistance of counsel.

B. The State devoted more attention to Margaret Allen than Germaine Evans.

The State devoted more of its arguments to Allen than it did Evans. In doing so, it went beyond permissible discussion of the nature and circumstances of the aggravating circumstance. The State's case law is inapplicable. The State cites case law to establish that "because the prior murder conviction is an aggravating circumstance, the prosecutor is permitted to discuss the elements of it including the name of the victim. *State v. Evans*, 63 Ohio St. 3d 231, 239, 586 N.E.2d 1042 (1992)." State's Brief pp. 165-66. (emphasis added by the State). The State provides cases in which prior crimes are appropriately mentioned as part of the nature and circumstances of the aggravating circumstance. However, the State provides no case where those

prior crimes dominate the mitigation presentation. This was an overreach and should not have been permitted.

C. Autopsy Photographs

These photographs should never have been admitted at trial in the first place. *See* Proposition of Law No. V. Similarly, they serve no purpose in the mitigation phase of the trial except to inflame the prejudices of the jury. Accordingly, they should not have been admitted.

D. The prosecutor compared his own difficult childhood to McKelton's.

Defense counsel's remarks were made to highlight McKelton's difficult childhood. They did not open the door for Prosecutor Piper to argue that McKelton's conduct should be measured against his. This argument was inappropriate.

E. The State improperly referred to facts unrelated to the aggravating circumstance as "the weight that goes on the side of that specification."

Not only does the State argue that Allen's death should be weighed as an aggravating circumstance, it argues that McKelton not mentioning Allen or Evans in his closing statement, and not paying his respects to them, should be weighed as aggravating circumstances. In its brief, the State disregards the paragraphs before the prosecutor improperly tells the jury about what to weigh as aggravating circumstances:

You heard Calvin McKelton tell you, let me talk to you about why we're here. And you never heard him say Missy's name. You never heard him talk about Germaine Evans' death. And you know because of Specification 2 to Count 10, that those are the reasons we are here, is because in July of 2008 Missy was killed by this defendant. Her body was dumped by this defendant. Her house was attempted to be burned with by this defendant. And Germaine saw all those things and he knew.

* * *

So Germaine met his fate and you know how and you know why. That's why you're here. And you never heard Calvin McKelton say a single word about it. He told you, Calvin did, about going out to Moosewood to the body of his friend Tey and paying respects and putting his hands on his back, went out to Moosewood. He never went

out to Inwood to see his friend Germaine, to pay his respects. Like Missy, Germaine's body lay out in the open waiting to be found by people not involved. That is why you're here. That is the weight that goes on the side of that specification.

Tr. 98-99. In doing so, it violates this court's admonishment in *State v. Gumm* and misinforms the jury about what to weigh in its deliberations. 73 Ohio St. 3d 413, 422, 653 N.E.2d 253, 263 (1995).

Conclusion

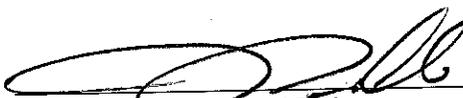
The mitigation phase of McKelton's trial was dominated by improper statements by the State. He is entitled to a new penalty phase under O.R.C. § 2929.06(B).

Conclusion

For the foregoing reasons, Calvin McKelton's convictions and sentence must be reversed.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true copy of the foregoing Reply Brief of Appellant Calvin McKelton was forwarded by regular U.S. Mail to Michael Gmoser, Butler County Prosecutor, 315 High Street – 11th Floor, Hamilton, Ohio 45011, this 20th day of July, 2012.



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372223

In The Supreme Court Of Ohio

STATE OF OHIO,

:

Appellee,

:

-vs-

:

Case No. 2010-2198

CALVIN MCKELTON,

:

Appellant.

:

This Is A Capital Case.

On Appeal From The Court Of
Common Pleas Of Butler County
Case No. CR-10-020189

APPENDIX TO REPLY BRIEF OF APPELLANT CALVIN MCKELTON

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RULE 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request of a party, shall restrict the evidence to its proper scope and instruct the jury accordingly.

[Effective: July 1, 1980.]

RULE 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

[Effective: July 1, 1980; amended effectively July 1, 2007.]