

**IN THE SUPREME COURT OF OHIO**

|                         |   |                           |
|-------------------------|---|---------------------------|
| <b>STATE OF OHIO,</b>   | : | <b>Case No. 2010-2198</b> |
|                         | : |                           |
| <b>Appellee,</b>        | : | <b>CAPITAL CASE</b>       |
|                         | : |                           |
| <b>v.</b>               | : |                           |
|                         | : |                           |
| <b>CALVIN MCKELTON,</b> | : |                           |
|                         | : |                           |
| <b>Appellant.</b>       | : |                           |

On Appeal from the Butler County Court of Common Pleas  
Case No. CR2010-02-0189

**MOTION TO STRIKE PROPOSITION OF LAW XV(A)  
AS CONTAINED IN APPELLANT'S REPLY BRIEF**

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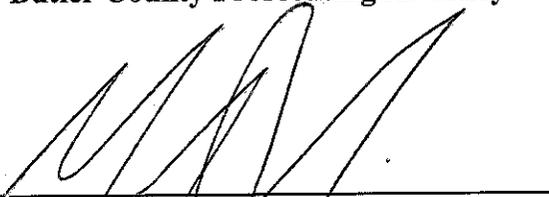
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**MOTION**

Appellee State of Ohio respectfully requests that this Court strike the arguments make in Proposition of Law No. XV(A), pages 57-60, of the Reply Brief of Defendant-Appellant, filed on July 20, 2012, because the reply brief raises issues not addressed in Appellant's opening brief. In the alternative, Appellee requests that the Court amend the Scheduling Order in this case and provide the State a reasonable time to file a sur-reply.

Respectfully submitted,

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## MEMORANDUM

For the first time during this appeal, Appellant in his reply brief (p. 57-60) argues that trial defense counsel were ineffective during plea negotiations. However, this Court has held that litigants may not raise arguments for the first time in a reply brief. *State ex rel. Colvin v. Brunner*, 120 Ohio St.3d 110, 2008-Ohio-5041, ¶ 61. “[A] reply brief is not the place for briefing new substantive arguments that were not raised in appellant's brief.” *Wells Fargo Bank, N.A. v. Jarvis*, Columbiana App. No. 08 CO 30, 2009-Ohio-3055, ¶ 34, citing App.R. 16(C). This is because a “reply brief is not to be used by an appellant to raise new assignments of error or issues for consideration; it is merely an opportunity to reply to the appellee’s brief.” *State v. Singh*, Butler App. No. CA2000-05-097, 2001-WL-322714, at \*3 n.1. Therefore, pages 57-60 of Appellant’s reply brief—the portion that deals with ineffective assistance during plea negotiations—should be stricken.

If this Court does not strike the offending portions of the reply brief, then the State requests the Court enter an amended scheduling order that permits the State a reasonable time to file a brief in sur-reply.

## PROOF OF SERVICE

This is to certify that a copy of the foregoing was served upon the following by ordinary U.S. mail this 31st day of July, 2012:

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