ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Appellee,	:	
-vs-	:	Case No. 2011-2005
JASON DEAN, Appellant	:	***Death Penalty Case***

ON APPEAL FROM THE CLARK COUNTY COURT OF COMMON PLEAS CLARK COUNTY, OHIO, CASE NO. 05 CR 0348

JASON DEAN'S MOTION TO STRIKE THE APPELLEE'S TRIAL TRANSCRIPT SUMMARY

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CLARK COUNTY, OHIO, CASE NO. 05 CR 0348

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Appellant Jason Dean, through counsel, moves this Court to strike Appellee State of Ohio's 52 page "Transcript Summary" which was attached as an Appendix to the Appellee's merit brief. The trial transcript summary is not authorized by any of the Supreme Court Rules of Practice, and as such should have been accepted for filing by the Clerk. Further reasons for this request are set forth in the attached Memorandum in Support.

Respectfully Submitted,

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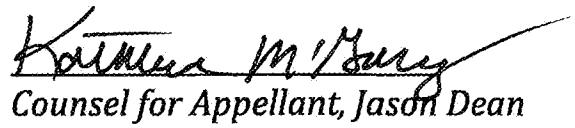

Counsel for Appellant, Jason Dean

MEMORANDUM IN SUPPORT OF MOTION

On January 22, 2013 Appellant Jason Dean filed his merit brief with this Court. On June 11, 2013, Appellee filed its brief in response. Attached to the Appellee's Brief is a 52 page "Trial Transcript Summary." The "summary" lists the various individuals that were called as witnesses in the case. (pp. 1-4) The "summary" then purportedly sets forth summaries of the pretrial hearings, voir dire, state's case in chief, witness summaries and exhibits and their description. The information included in the "summary" is the impression of the person who created the summary but who is never identified. The items chosen for

inclusion are apparently those that the anonymous writer thought were important. It is not a complete digest of this case.

The Supreme Court Rules of Practice

A party preparing a brief in this Court should be guided by the Supreme Court Rules of Practice, the most recent version became effective January 1, 2013 and thus controls the briefing in this case.

S.Ct.Prac.R. 16 is entitled "Brief on the Merits" and sets forth the rules for briefing in this Court. S.Ct.Prac.R. 16(B) sets forth the content of the brief of the Appellant. Included in the brief, should be a statement of facts. S.Ct.Prac.R. 16(B)(3) provides for "[a] statement of the facts with page references, in parentheses, to supporting portions of both the original transcript of testimony and any supplement filed in the case pursuant to S.Ct.Prac.R. 16.09 through 16.10."[1]

In addressing the Appellee's Brief, the rule sets forth that the Appellee's brief shall comply with S.Ct.Prac.R. 16.02(B). In addressing the statement of facts, the rule provides "[a] statement of facts may be omitted from the appellee's brief if the appellee agrees with the

[1] S.Ct.Prac.R. 16.09 through 16.10 reference Supplements to the Brief, which apply to civil cases in the Court and not applicable to this death penalty case.

statement of facts given in the appellant's merit brief." (S.Ct.Prac.R. 16.03(B)(2))

The rules of practice also address the contents of the appendix. S.Ct.Prac.R. 16.02(B)(5) provides:

> An appendix, numbered separately from the body of the brief, containing copies of all of the following:
>
> (a) The date-stamped notice of appeal to the Supreme Court, the notice of certified conflict, or the federal court certification order, whichever is applicable;
>
> (b) The judgment or order from which the appeal is taken;
>
> (c) The opinion, if any, relating to the judgment or order being appealed;
>
> (d) All judgments, orders, and opinions rendered by any court or agency in the case, if relevant to the issues on appeal;
>
> (e) Any relevant rules or regulations of any department, board, commission, or any other agency, upon which the appellant relies;
>
> (f) Any constitutional provision, statute, or ordinance upon which the appellant relies, to be construed, or otherwise involved in the case;
>
> (g) In appeals from the Public Utilities Commission, the appellant's application for rehearing.

The rule pertaining to the Appellee's Brief provides that the "appendix need not duplicate any material provided in the appendix of the appellant's brief. (S.Ct.Prac.R. 16.03(B)(3))

Nowhere in the rules is there any mention of a "trial transcript summary" or authorization for filing it as part of the brief in the case.

The Appellee's Brief

The Statement of Facts

As set forth above, the statement of facts should include page references to the trial court record or transcript supporting that fact in parenthesis. This makes perfect sense. It allows opposing counsel and the Court to make sure that a fact being cited by a party is actually a fact, supported by a transcript citation. A party or the Court can go directly to the record citation and determine if the party's assertion is accurate, or conversely, if they have misrepresented the facts.

In Appellee's brief, the State purports to set forth a statement of facts but actually sets forth a narrative, followed by a paragraph of citations to the witnesses testimony and the transcript summary. (Appellee's Brief, pp. 4-14). The Appellee explains that "[a] more complete summary of facts and evidence is set forth in a transcript summary, attached to the State's Merit Brief as Appendix Summary, which should be considered as an adjunct to this statement of facts." (Id., p. 5) This procedure flies in the face of this Court's rules of practice.

It is impossible to determine where a certain fact cited in the narrative comes from.

For example, the Appellee states "Lyles and Piersoll were treated for cuts from the windshield glass that had been shattered by the bullet strikes." (Id., p. 6) The paragraph of citations that follows does not tell counsel or the Court where to find that exact fact. A review of the "summary" indicates statements such as "Lyles and Piersoll were struck by window glass flying from the bullet strikes to the windshield" and "Piersoll and Lyles got to Mercy Hospital and were treated for their injuries." (Appellee's Trial Transcript Summary, p. 29) But an actual review of the transcript of Yolanda Lyles indicates:

> Q. At some point when you got in the hospital, did you notice that you were injured?
> A. I wasn't bad, just like little scratches on my face, but *nothing that I had to be treated.*
> Q. Okay. And did they do anything to you as far as --
> A. Just wiped my face.
> Q. Were you bleeding?
> A. I wouldn't say bleeding, just like grazed.
>
> (Tr. Vol. 6, p. 1460)(emphasis added)

While this is only one small example, it does illustrate the problem when a party fails to follow the court rule and instead decides to submit their own version of events under the guise of a statement of

facts. A opposing party, or the Court, should not have to scour forty pages of transcript (as in the citation to "testimony of Yolanda Lyles, tr. Vol. 6, pgs. 1444-1483", Appellee's Brief, p. 6) in order to determine if the facts as set forth on a single page of transcript are correctly cited.

The Appellee Appendix

Pursuant to the rules of practice, the only items in the appendix should be those listed in S.Ct.Prac.R. 16.02(B)(5). If the items were already included in the Appellant's Brief, they do not need to duplicate items. A review of the tables of contents in both briefs indicates that there were two statutes (R.C.§§2701.03 and 2901.22) and two rules (Evid. R. 613 and Evid. R. 801) that were used in the Appellee's brief, but not in Appellant's Brief. These are the *only* items that should have been included in Appellee's appendix. But these items were *not* there, only the trial summary was included.

The trial summary which the State chose to include in its appendix was prepared by one or more persons, unidentified by Appellee, who read the transcript and then decided what items to include in the "summary." Significantly much was omitted. For example there were eight pretrial hearings in the case, but only parts of two of

them made it into the "summary." Likewise, the summary includes only those objections the anonymous writer felt should be included. For example, there was no "summary" of the lengthy discussions regarding the jury instructions.

Unnecessary and duplicative material was also included in the transcript summary. For example, the anonymous writer of the summary included the list of exhibits in the summary. Only the list, and the writer's description is included. Yet the court reporter included a list of the exhibits, described them, indicated where they were identified and where they were admitted or not admitted into evidence. Inclusion in the "trial transcript summary" was duplicative and unnecessary.

Counsel for appellant should not have to review the appellee's "trial transcript summary" for errors and misstatements, or for items an anonymous writer decides to exclude. The Appellee should follow the rules and Appellant should only be responsible for replying to the actual Brief, not a trial transcript summary in the appendix.

Conclusion

The Supreme Court Rules of Practice should guide the parties in the preparation of their briefs for the Court. The Rules were initially created, and over time have been amended, to permit the full and fair

adjudication of matters coming before the Court. One party should not be permitted to flaunt the rules in an attempt to gain an advantage over another individual, particularly a person fighting for his life.

Counsel for a capital appellant should not have to take valuable time and resources from representing him on appeal to review an additional 52 pages, single spaced "trial transcript summary" that is not required or allowed by the rules of practice. Likewise, it is not a good idea to permit the parties to summarily add lengthy subjective documents to their Supreme Court pleadings. Such a practice could ultimately lead to a "battle of appendixes," an outcome that would not benefit the Court, the parties, or the public at large.

For all these reasons, the "trial transcript summary" should be stricken from Appellee's Brief.

Respectfully submitted,

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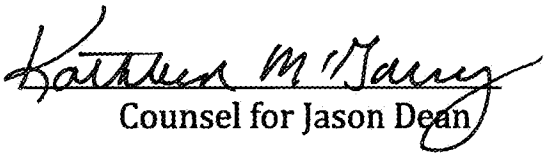
Counsel for Appellant, Jason Dean

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Strike "Trial Transcript Summary" was forwarded by regular U.S. Mail to D. Andrew Wilson, Prosecuting Attorney, P.O. Box 1608, Springfield, Ohio 45501, this 15th. day of July, 2013.



Counsel for Jason Dean