

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

*On Appeal from the Clark County
Court Of Common Pleas
Clark County, Ohio, Case No. 05 Cr 0348*

REPLY BRIEF OF APPELLANT JASON DEAN

D. Andrew Wilson #0073767
Clark County Prosecuting Attorney
50 E. Columbia Street, 4th. Floor
P.O. Box 1608
Springfield, OH 45501
937-521-1770 (voice)

Counsel for Appellee, State of Ohio

Kathleen McGarry*, #0038707
*Counsel of Record
McGarry Law Office
P.O. Box 310
Glorieta, New Mexico 87535
505-757-3989 (voice)
888-470-6313 (facsimile)
kate@kmcgarrylaw.com

William S. Lazarow (#0014625)
Attorney at Law
400 South Fifth Street, Suite 301
Columbus, OH 43215
614.228.9058
614.221.8601 Fax
BillLazarow@aol.com

Counsel for Appellant, Jason Dean

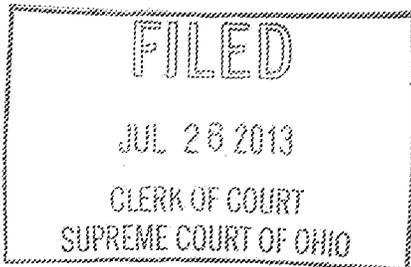


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PREFACE

Appellant has chosen to respond to all but the last Proposition of Law after reviewing Appellee's Brief. The Propositions chosen for response were so chosen because Appellant felt that Appellee either misunderstood the thrust of Appellant's argument in the Merit Brief, or because Appellee made an erroneous assertion in responding to the Proposition of Law.

Failure to respond to a Proposition of Law, or to an argument within a Proposition of Law should in no way imply *any concession* on Appellant's part, but instead that Appellant wishes to stand on the Proposition of Law as originally presented in his Merit Brief.

REPLY TO THE STATE'S STATEMENT OF FACTS

On July 18, 2013 Appellant Dean filed a motion to strike the appendix to the State of Ohio's Merit Brief, which consisted of a 52 page "Transcript Summary". At the time of filing this Reply Brief, the Court had not yet ruled on the motion to strike.

As set forth in that motion, the State, if it disagreed with Dean's statement of facts, should have complied with S.Ct.Prac.R. 16(B)(3) which 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.” 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. (State’s Brief, pp. 4-14). The State explained 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 State asserts “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.” (State’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)

In addition, the State’s transcript summary is no more definitive in setting forth where a certain fact is included in the transcript. The “summary” includes a range of pages, no specific pages so in order to determine where the alleged fact is presented, Appellant would have to read through the entire range of pages.

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.

Appellant has not examined every fact in the summary since the facts included were done so at the discretion of the anonymous writer and the inclusion of the summary in the appendix violated the Supreme Court Rules of Practice.

ARGUMENT IN REPLY

PROPOSITION OF LAW NO. 1

THE DEATH SENTENCE IS INAPPROPRIATE AND DISPROPORTIONATE.

Ohio Revised Code § 2929.05(A) obligates this Court to assess the appropriateness and proportionality of the death penalty in each capital case reviewed. The State does understand the review that this Court is to make, ie., that there are two inquiries: is the death sentence appropriate? and is the death sentence proportional? The State also relies heavily on the trial court's determination to follow the jury's recommendation and impose the death sentence. (State's Brief, pp. 16, 18, 19, 20) But the review this Court gives this issue is not a review of the trial court's opinion and determination, it is an independent review.

In determining whether a death sentence is appropriate, the United States Supreme Court established that the "the fundamental respect for humanity underlying the Eighth Amendment, [mandates the]. . . consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death *Lockett v. Ohio*, 438 U.S. 586 (1978); see also *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976). Only through a process which requires the sentencer to "consider[]" in

fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind," *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976), can capital defendants be treated "as uniquely individual human beings." *Id.* The *Lockett* principle "is the product of a considerable history reflecting, the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual. *California v. Brown*, 479 U.S. 537, 562 (1987) (Blackman, J. dissenting). Or, in Justice O'Connor's terms, "[u]nderlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *overruled in part on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

Because of the need for individualized treatment, the states have been required to permit the sentencer to consider, and in appropriate cases base a decision to impose a life sentence upon any relevant mitigating factor, not simply the mitigating factors specified in a statute. *Hitchcock v. Dugger*, 481 U.S. 393 (1987). As explained in *Eddings v. Oklahoma*, 455 U.S.104 (1982), *Lockett* followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not

at all. . . .By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency. 455 U.S. at 112.

The State would have this Court ignore all the decisions of the United States Supreme Court regarding individualized sentencing and instead find that since the Court may not have found similar kinds of mitigating evidence persuasive in other cases, it should not be considered here. (State's Brief, p 15) The State further argues that since there was "no evidence of sexual abuse, intellectual deficit or psychological impairment" that the evidence he presented is inconsequential. Neither of these arguments are persuasive; the Court is required to make its own determination based on the aggravating circumstance¹ and mitigating factors in Dean's case.

The facts presented in Dean's Merit Brief, (pp. 7-10) clearly set forth the mitigating factors in this case. Not only are Dean's history and background very persuasive, but it cannot be forgotten that Dean was not the principal offender, ie., actual shooter in this case.

¹ The State mistakenly argues that the aggravating circumstances that Dean was found guilty of committing outweighs the factors in mitigation. (State's Brief, p. 16) However, only one aggravating circumstance was weighed by the jury and the court.

The second inquiry the Court must undertake is whether the death sentence is proportional. The State concedes that this Court can consider the co-defendant's sentence as a non-statutory mitigating factor (and Dean urges the Court to do so), but then argues that co-defendant Wade's sentence could not be considered in its proportionality review. (State's Brief, p. 17) In *State v. Getsy*, 84 Ohio St. 3d 180, 702 N.E.2d 866 (1998), this Court did examine the comparative culpability levels of the four co-defendants in conducting the appropriateness and proportionality review. The Court was troubled that the co-defendant who actually hired Getsy to commit the murder was given a life sentence. But Getsy was the principal offender, the actual shooter in the case and here, Dean was not.

Dean argued in his Merit Brief that Ohio's method of examining proportionality is flawed, since the Court limits the pool of cases for review to only those death cases that the Court has reviewed. (Merit Brief, pp. 11-12) But that was not the sum and substance of the proportionality argument, as the State asserts. (State Brief, p. 21)

Dean argued that Josh Wade's life sentence should factor into the Court's proportionality review because Wade, the shooter, did not (nor could not) receive the death sentence. This is the opposite of what happened in *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶339, where the court found the disparity could

be explained because Lang was the principal offender. The facts of the case are clearly in front of the Court and the Court knows that disparate outcome of the two cases.

Dean also argued that in reviewing other course of conduct cases, the Court should necessarily keep in mind that Dean was not the principal offender. Likewise the Court should also be mindful that none of the other persons that were included in the course of conduct, were either injured in any way or killed. That certainly separates Dean's case from other cases which include the course of conduct specification. Therefore, the State's use of *Lang*, 2011-Ohio-4215, ¶341 in which two persons were killed by Lang himself, would weigh in favor of the death sentence in Dean's case being disproportionate. Dean did not make a "significant concession" as the State alleges. (State's Brief, p. 20)

This Court should conclude that Dean's sentence is inappropriate and unconstitutionally disproportionate and vacate Dean's sentence of death and remand for the imposition of a life sentence.

PROPOSITION OF LAW NO. II

WHEN THE STATE FAILS TO INTRODUCE SUFFICIENT EVIDENCE OF PARTICULAR CHARGES, A RESULTING CONVICTION DEPRIVES A CAPITAL DEFENDANT OF SUBSTANTIVE AND PROCEDURAL DUE PROCESS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 5, 9, AND 16 OF THE OHIO CONSTITUTION.

. Insufficient evidence to prove Dilbert Avenue counts.

The State acknowledges that Dean's convictions for the Dilbert Avenue shootings rests on Crystal Kaboos' testimony (the only person to place him at the scene), but argues that her credibility is irrelevant to a sufficiency of the evidence analysis. (State's Brief, pp. 22-24). Relying on *State v. Yarbrough*, 95 Ohio St.3d 227, ¶ 79 (2002), the State asserts that Kaboos' credibility cannot be considered by this Court in making its sufficiency determination. (*Id.* at 22).

Whereas the State correctly notes that a reviewing court will not normally engage in credibility determinations when conducting a sufficiency analysis pursuant to *Jackson v. Virginia*, 443 U.S. 307 (1979), exceptions do exist, particularly in cases in which the conviction rests upon the testimony of a single witness. For example, the Supreme Court of Indiana has repeatedly held that appellate courts may apply the "incredible dubiousity" rule to impinge upon a jury's

function to judge the credibility of a witness. *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). This rule is expressed as follows:

If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity. Application of this rule is rare and the standard to be applied is whether the testimony is so inherently improbable that no reasonable person could believe it.

Id. (citations omitted); *see also Stephenson v. State*, 742 N.E.2d 463, 497-498 (Ind. 2001); *White v. State*, 706 N.E.2d 1078, 1079 (Ind. 1999); *Bradford v. State*, 675 N.E.2d 296, 300 (Ind. 1996). Likewise, the Court of Appeals of Wisconsin has held that it will substitute its judgment for the trier of fact "when the fact finder relied upon evidence that was inherently or patently incredible – that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." *State v. Tarantino*, 458 N.W.2d 582, 590 (1990).

Here Kaboos' testimony conflicted with facts fully-established by all other witnesses.² To believe her version of events, jurors would have to have believed that Shanta Chilton and Devon Williams missed not just one passenger in the car,

² Contrary to the State's assertion, Dean does not "concede" that Kaboos was an eyewitness. (State's Brief, p. 22). In fact, Dean has argued that Kaboos testimony is contrary to the other witnesses in the case who never saw her in the car and is inconsistent with the facts presented by other witnesses at the scene.

but two. Jurors would also have to have believed that both of those witnesses failed to see a second gun firing, and that neither noticed that the car had no lights on.

Moreover, Kaboos had no credibility. Kaboos acknowledged on direct examination that she had lied to the police multiple times, including the times she told them that Dean had shot Titus Arnold and also the times she denied being in the car on Dibert. (Vol. 8, Tr. pp. 1837-1842). Also incredible was Kaboos' statement that although she remembered the car turning around and driving back down Dibert, she did not recall hearing any more gunshots because she was "just trying to block the noise out as much as possible 'cause the sound of it in the car was so overwhelming." (*Id.* at 1820). This was the *only* evidence presented to the jury that Dean was involved in the shooting on Dibert Avenue.

Dean's convictions for the two counts of discharging a firearm into an occupied structure and for the attempted murders during the Dibert Avenue shootings are also against the manifest weight of the evidence. In assessing the manifest weight of the evidence, this Court must examine the entire record and determine whether the evidence produced attains the high degree of probative force and certainty required for a criminal conviction.

There was no such evidence presented at Dean's trial. There is simply no credible evidence upon which the jury could have determined that Dean was even in the car from which the shots came, let alone the one doing the shooting at the homes on Dibert.

Even assuming *arguendo* that Dean was in the car, there was no evidence that Dean's intent was to fire shots into the home at 604 Dibert Avenue. The evidence showed that Devon Williams parked his car at the curb in front of the 604 Dibert Avenue house. The first round of bullets that were fired from the vehicle that Dean was allegedly in were aimed at Devon's car, not the house. The fact that bullets made their way into the house does not mean that there was intent to discharge a firearm into the home, as is required by the statute.

The State would seem to concede that there are issues with the attempted murder charges. In order to prove attempted murder, the state was required to prove that Dean had the purpose to cause the death of another. (R.C. §2903.02) The State admits that there was "no effort by the State to designate a specific human target for the gunfire either at the Mini Mart or the Dibert Ave. scenes. (State's Brief, p. 32) If there was no human target, there could be no purposeful intent to cause anyone's death.

Further, in addressing the shooting into a dwelling, the State now argues that it was Dean's intent to "terrorize a neighborhood." (State's brief, pp. 66-67) If the State's new theory is adopted, then there was no "attempted murder" intent, it was only the intent to shoot into dwellings, and the attempted murder charges should be vacated or merged into the shooting into a dwelling. (See, Proposition of Law No. XII)

The attempted murder charges arising from the Dibert Avenue incident also formed the basis for the O.R.C. § 2929.04(A)(5) "course of conduct" specification. Because there is insufficient evidence of these charges, there is also insufficient evidence to support this death penalty specification.

2. Insufficient evidence to prove prior calculation and design.

The State correctly observes that the evidence supporting prior calculation and design came from Crystal Kaboos, Jason Manns and Kevin Bowshier (none of whom were present at the scene), but argues that their credibility is irrelevant to a sufficiency of the evidence analysis. (State's Brief, pp. 24). Relying once again on *State v. Yarbrough*, 95 Ohio St.3d 227, ¶ 79 (2002), the State asserts that the credibility of Kaboos, Manns, and Bowshier cannot be considered by this Court in making its sufficiency determination. (*Id.* at 24).

However, as pointed out in the preceding section, a reviewing court can substitute its judgment for the trier of fact “when the fact finder relied upon evidence that was inherently or patently incredible – that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts.” *State v. Tarantino*, 458 N.W.2d 582, 590 (1990). Here, the testimony of Kaboos, Manns and Bowshier conflicted with facts fully-established by individuals who were actually present at the scene. For example, Kari Epperson, Wade’s cousin, testified that she saw a man get out of the driver’s side of the car, run down the street and shoot a man twice. (Vol. 5, Tr. pp. 1192-1196). She further testified that she recognized the shooter as her cousin, Josh Wade. (*Id.* at 1197).

Terri Epperson, Kari’s sister, also witnessed the events. She testified that she saw her cousin Josh Wade jump out of the driver’s seat, run out to the middle of the street, fire two shots, and get back in the car. (Vol. 5, Tr. pp. 1220-1225). She further testified that she saw only one person get out of and then back into the car. (*Id.* at 1225).

Furthermore, the three witnesses relied upon by the State had no credibility. Kaboos admitted to lying to the police and telling them a number of different stories. (Vol. 8, Tr. pp. 1837-1842). Manns, who was incarcerated with Dean and had access to the discovery in his case, indicated that in return for his testimony the

State had agreed to transfer him to another institution. (Vol. 5, Tr. pp. 2174-2177). And Bowshier, who was snorting cocaine elsewhere the night Titus Arnold was shot, acknowledged that he waited a year or more before telling the police what happened. (Vol. 9, Tr. pp. 2249, 2256-2257, 2258-2259).

Dean's conviction for the O.R.C. § 2929.04(A)(7) specification was also against the manifest weight of the evidence. There was no substantial evidence presented at Dean's trial upon which the jury could have reasonably concluded that all of the elements have been proved beyond a reasonable doubt. *See State v. Eley*, 56 Ohio St.2d at syl. (1978).

3. Insufficient evidence to prove Mini Mart robbery.

The State does not assert that a theft ever occurred, and acknowledges that the only evidence of an attempted theft came from Yolanda Lyles. (State's Brief, pp. 27-28). Lyles testified that she and Andre Piersol were sitting in her car when Dean approached the vehicle, spoke to Piersol, and offered to sell him some pills. (Vol. 6, Tr. pp. 1448-1450). Piersol declined and Dean walked away. (*Id.* at 1551).

According to Lyles, Dean came around the corner sometime later, shouted "give me your money," and then immediately started shooting at them through the windshield of her car. (Vol. 6, Tr. p. 1455-1456). Piersol, who was sitting in the

front passenger's seat, testified that he heard Yolanda shout "oh shit," and observed Dean run up to the car and start shooting. (*Id.* at p. 1412). Piersol further stated that after firing four shots, Dean retreated after his friend Neil Scott (who was apparently inside or next to their car) "fake threw" something at Dean. (*Id.* at 1413).

Without any factual support, the State speculates that Piersol did not hear Dean's demand for money because "[his] attention was directed elsewhere." (State's Brief, p. 28). The State chooses to ignore Piersol's direct response to the prosecutor's questions. When specifically asked by the prosecutor whether Dean had said anything to Yolanda or him before he started firing the gun, Piersol responded, "No, sir." (*Id.* at 1413-1414).

Lyles' belief that Dean was trying to rob her defies logic. If he was in fact trying to get money from her, he would need to give her time to hand the money to him. There would be no reason to ask for money and then immediately start shooting at the occupants of the vehicle. Furthermore, Lyles acknowledged that she was scared throughout the incident and at one point "froze." (Vol. 6, Tr. pp. 1457, 1474-1475). Piersol, who was seated next to her, described her as "stuck, panicked, like her eyes was shut." (*Id.* at 1415). As such, there is simply no

credible evidence upon which the jury could have determined that Dean attempted to rob Lyles or Piersol at the Mini Mart that evening.

4. Insufficient evidence to prove attempted murder of Yolanda Lyles.

As set forth above, Lyles testified that following his earlier attempt to sell pills to Piersoll, Dean returned, walked up to the front of her car, and started shooting through the windshield. (Vol. 6, Tr. pp. 1455-1466). Piersol testified that Dean fired four shots at him, and that he was struck by a bullet in his left arm, and was possibly hit in the face as well. (*Id.* at 1413-1415). Lyles testified that she was not struck by any of the bullets. (*Id.* at 1460).

The State argues that photographs of the windshield (State's Exhibits 223 and 224) show three bullet strikes on the driver's side of the windshield, thereby refuting Dean's contention that there was no attempt to murder Lyles. (State's Brief, p.29). The State chooses to ignore Lyles' testimony that Dean fired his shots at an angle towards Piersol who was seated in the front passenger's seat. (Vol. 6, Tr. pp. 1478-1479). Piersol likewise testified that although Dean was standing on the driver's side of the vehicle, he fired at an angle towards him. (*Id.* at 1415). The evidence thus supports a finding that the shooter was attempting to strike Piersol, not Lyles.

As such, there is simply no credible evidence upon which the jury could have determined that Dean attempted to murder Lyles at the Mini Mart on April 10, 2005.

5. Insufficient evidence to prove course of conduct specification.

Throughout the trial, the prosecution contended that Dean and Wade were involved in a two man crime wave lasting four days. Despite the prosecution's contention, there is no indication that any of the three events were interrelated. In fact the trial judge emphasizes this point in his trial opinion: "They were not committed in the heat of the moment, as a part of one continuous event." (Trial Court Opinion, A-10).

The State argues that one motive connecting the crimes was greed, since "obtaining money from the victims was a factor in the Mini Mart assault and the Arnold homicide." (State's Brief, p. 29). However it was the State's contention at trial that Arnold's death was a case of mistaken identity, not a robbery. Nor did a theft occur at the Mini Mart. If, as the State now contends, Dean's motive was to rob someone, he would of course need to give that person the opportunity to give him the money.

The motive in the Dibert Ave. crimes, the State contends, was "revenge for a dispute between victim Devon Williams and an individual named William

Calhoun, whose street name was O-Z.” (State’s Brief, pp. 29-30). Whether or not this is true, there is no evidence that Dean was responsible for or had anything to do with the alleged dispute between Williams and Calhoun. Nor does the State contend that there was any connection between Dibert Ave. and the Arnold and Mini Mart incidents.

As such, there is simply no credible evidence upon which the jury could have determined that Arnold’s death was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons. Dean’s convictions therefore violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Jackson*, 443 U.S. at 316.

PROPOSITION OF LAW NO. III

THE DOCTRINE OF TRANSFERRED INTENT CANNOT BE USED TO CONVICT THE DEFENDANT OF ADDITIONAL COUNTS OF ATTEMPTED MURDER WHEN THE CRIME WAS NOT COMPLETED.

The question of transferred intent arose during the jury deliberations. As set forth in the Merit Brief, the jury asked “[i]n *attempted* murder does it matter if the person identified in the charge is the intended target or not?” (Vol. 10, Tr. pp. 2532-2533, emphasis added)) So the issue on appeal is whether an instruction on transferred intent is proper as it relates to a charge of attempted murder.

The State argues that this issue was not raised below. (State’s Brief, p. 31) However, this is not true. There was much discussion on the appropriate response to the jury. Obviously, given the circumstances of the jury being in the midst of deliberations, the parties and the trial court were trying to quickly respond to the jury’s questions. At first, defense counsel thought that it was a correct statement of the law³, but upon further reflection relating to the attempted murder offenses, defense counsel hit the nail on the head in his objection:

MR. MEYERS: Well, I guess the other thought, if I may quickly, to the extent that some of our discussions moments ago before we went on record seemed to indicate that State's -- the State seems to be of the opinion this question is targeting the

³ The State cherry picks comments by defense trial counsel in an attempt to bolster its argument on the law or argue waiver. The comments of trial counsel clearly indicate he did not think it appropriate in the attempted murder context and clearly objected for the record.

Dibert Avenue drive-by victims. If that's correct, then frankly, as a matter of fact, again, from the adversarial perspective, if this was neutral or correct while we were sitting in law school is one thing; *but here the counts in the predicate original instructions, the verdict forms identify the names of the people on the porch. And there seems to be no valid application of the concept of transferred intent relative to that charge or that set of charges.*

(Vol. 10, Tr.p. 2535-2536)(emphasis added)

The State does not seem to appreciate the difference between transferred intent as it relates to an aggravated murder, and whether there is such a concept that applies to attempted murder. Clearly the law allows for transferred intent in an aggravated murder and even in a capital case. Dean is not disputing that, he is challenging whether the concept of transferred intent applies in an attempted murder charge. See, *State v. Solomon*, 66 Ohio St. 2d 214 (1981), paragraph one of the syllabus, *State v. Sowell*, 39 Ohio St.3d 322, 330 (1988).

In *People v. Bland*, 28 Cal.4th 313, 48 P.3d 1107, 1117 (2002)⁴ the California court held that “to be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else.” The State concedes that there was “no effort by the State to designate a specific human target for the gunfire

⁴ The State argued that Dean argued that this Court should follow “the purported rule of California” (State’s Brief, p. 39). Since there was no law directly on point in Ohio, Dean looked at the law of other states relating to use of transferred intent in an attempted murder and found not only California, but seven other jurisdiction that have rejected the use of transferred intent in an attempted murder charge. (See, Merit Brief, p. 38)

either at the Mini Mart or the Dibert Ave. scenes.” State’s Brief, p. 32. So if there was no specific human target for the gunfire at the MiniMart or the Dibert Avenue scenes, not only is there no intent, there is no transferred intent.

The State also argues that as it related to the Dibert Avenue shootings, the “vandalism of the vehicle” was the goal. (State’s Brief, p. 33). Again, if that was the intent, what intent to kill is transferred?

Dean is not trying to “obfuscate the reference by the State in its closing argument about transferred intent . . .” as the State suggest. Instead, Dean points out that it is the State that brought up the concept of transferred intent for the first time in its closing argument. Dean agrees that it was related to the Titus Arnold murder, but it certainly could have given the jury the suggestion that it applied to other offenses, leading to their question concerning attempted murder and transferred intent.

The State argues that Dean cannot speculate concerning the jury’s deliberations, but that is not the argument that Dean makes. Instead, Dean argues that the response to the jury’s question regarding the use of transferred intent in determining whether an attempted murder was committed is wrong and the verdicts for attempted murder cannot stand.

The jury instruction in Ohio Jury Instructions on Transfer of Purpose relate to an actual purpose to cause death:

1. PURPOSE TO CAUSE THE DEATH. If you find that the defendant did have a purpose to cause the death of a particular person and that *the shot accidentally caused the death of another person*, then the defendant would be just as guilty as if the shot had taken effect upon the person intended.

2. TRANSFERRED. The purpose required is to cause the death of another, not any specific person. *If the shot missed the person intended, but caused the death of another*, the element of purpose remains and the offense is as complete as though the person for whom the shot was intended had died.

3. NO PURPOSE. However, if there was no purpose to cause the death of anyone, the defendant cannot be found guilty of ...

OJI CR 417.09 (emphasis added)

The State is under the mistaken impression that the instruction given the jury was a correct statement of the law, it was not. The instruction on transfer of purpose was taken from the above-cited instruction, in was not “straight out of OJI” as the State argues (State’s Brief, p. 35). The trial court erroneously added the attempted murder charge, even though the instruction itself does not mention attempted murder, nor does the comment to the jury instruction. The cases cited by the State are all cases in which a person was killed and the intent was transferred. The State fails to cite one case in which a court has upheld the giving of a transferred intent instruction in an attempted murder situation.

The State incorrectly cites to this Court that the applicable standard of review is abuse of discretion, it is not. The question is not whether the trial court was to give or not give an instruction, the issue is that pursuant to Ohio law, the court gave an incorrect instruction. The correct standard of review when it is claimed that improper jury instructions were given is to consider the jury charge as a whole and determine whether the charge misled the jury in a manner affecting the complaining party's substantive rights. *Kokitka v Ford Motor Co.*, 73 Ohio St. 3d 89, 93 (1995). Arguably a de novo standard of review should be used in this case, where the jury instruction is in reality nothing more than a statement of law which the jurors must apply to the facts determined by them. Therefore a party claiming an error in the content of a jury instruction is essentially arguing that the court committed an error of law. *Whetstone v City of Cleveland*, 2005-Ohio-5715, ¶2.

In reviewing the error, the Court can certainly take into account that the jury had reviewed the jury instructions and were in their second day of deliberations when the question regarding attempted murder and transferred intent was asked. Thus the jury was focused on the instruction that the trial court gave to them as a result of the question. Unfortunately for Mr. Dean, the answer was an incorrect

statement of the law and the application in this case resulted in the conviction of six attempted murder charges and the course of conduct specification.

The verdicts for attempted murder must be vacated. The convictions violate Dean's rights as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Art.I, Sec. 10 and 16 of the Ohio Constitution.

PROPOSITION OF LAW NO. IV

AN ACCUSED’S RIGHT TO DUE PROCESS IS VIOLATED WHEN THE CUMULATIVE EFFECT OF PROSECUTOR MISCONDUCT RENDERS THE ACCUSED’S TRIAL UNFAIR IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 5, 9, AND 16 OF THE OHIO CONSTITUTION.

Dean asserts in this proposition that the cumulative effect of the prosecutorial misconduct which occurred at his capital trial violated his due process rights. The State raises two arguments. First, the State argues that Dean failed to object to any of the alleged error, and second, the State argues that none of the prosecutor’s actions constituted misconduct. (State’s Brief, pp. 39-41). The State’s arguments must be rejected.

1. The State’s misconduct constitutes plain error.

The State first argues that Dean’s claim must be rejected because none of the allegedly improper comments were objected to at trial and are thus subject to plain error review. (*Id.*, at 39). Other than citing to *State v. Powell*, 132 Ohio St.3d 233, ¶177 (2012), the State fails to explain why it believes the prosecutor’s actions do not constitute plain error.

An error is plain when it denies the defendant a fair trial. *See State v. Fears*, 86 Ohio St. 3d 329, 332, 143 (1999) (citing *State v. Wade*, 53 Ohio St. 2d 182, 189,

373 N.E.2d 1244 (1978)). *See also State v. Lilly*, 87 Ohio St. 3d 97 (1999) (Cook, J., concurring) (plain error is obvious, palpable and fundamental to the fairness of the judicial proceedings) (citations and quotation marks omitted).

Dean's trial was not a forum to resolve lingering questions over the progress of race-relations within Clark county. And the prosecution's injection of racial issues into capital sentencing undermines confidence in the proceedings. *Cf. Ohio R. Crim. P. 52(B); State v. Slagle*, 65 Ohio St. 3d 597, 615 n1, 605 N.E.2d 916, 932, n1. (1992) (Wright, J., dissenting) (plain error under Criminal Rule 52(B) guards against errors which "seriously affect the fairness, integrity, or public reputation of judicial proceedings." citing *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

Furthermore, the State is wrong when it asserts that the prosecutor's improper public demand for punishment was never objected to. (State's Brief, p. 41). In its rebuttal closing the State argued:

And here you have an aggravating circumstance that - - that is entitled to great weight. Why? Because you know that a course of conduct involving this many people involves a protection of the community.

MR. MEYERS: Objection.

THE COURT: Sustained.

(Vol. 11, Tr. pp. 2704-2705). The prosecutor's argument was clearly improper, and both Dean's counsel and the trial court immediately recognized it as such.

2. Pervasive misconduct.

The State next argues that none of the prosecutor's comments constituted misconduct. (State's Brief, pp. 39-41). The State first argues that the prosecutor's use of Michelle Cherry to introduce emotional victim impact evidence was "directly responsive to [the prosecutor's asking] why Cherry would arrive at 11:30 for her shift to relieve Arnold that did not commence until midnight." (State's Brief, p. 39). However, the State chooses to ignore the prosecutor's next three questions: "So you were familiar with his family to a certain extent?," "How many children did he have?," "So you were doing him a favor by coming a little early so he could leave a little early to be with his family?" (Vol. 5, Tr. p. 981). Clearly the prosecutor's intent was to introduce as much victim impact evidence as possible.

In regard to the prosecutor's improper racial comments, the State argues that Dean's reference to Arnold as a "moon cricket" was elicited solely to support the State's assertion that Dean acted with prior calculation and design. (State's Brief, p. 40). Yet Dean's statement had nothing to do with "prior calculation and design." The comment was made in response to a series of questions about why he

believed the prosecutor hated him and was seeking the death penalty. (Vol. 9, Tr. pp. 2204-2205). The balance of the recording consists of Dean's repeated denials of personal involvement in the shooting. The only reason the prosecutor had to introduce the tape, therefore, was to raise the issue of Dean's racism.

In regard to the prosecutor's argument that to Dean "Titus was a slur. That's what he is," the State argues that the comment simply meant that Dean viewed Arnold in a demeaning fashion, and had no racial connotation. (State's Brief, p. 40). The State ignores the fact that the prosecution chose to end its culpability phase argument by replaying only the race related lines of the tape to the jurors. The prosecutor then concluded his argument by asserting that to Dean "Titus Arnold was a slur. That's what he is." (Vol. 10, Tr. pp. 2462-2464). The prosecution thereby undermined Dean's right to a fair trial by urging the jurors to find Dean guilty because he was a racist.

Pervasive and deliberate prosecutor misconduct undermined Jason Dean's due process right. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Dean is entitled to a new trial, or alternatively, a new penalty phase under O.R.C. § 2929.06(B).

PROPOSITION OF LAW NO. V

A PROSPECTIVE JUROR SHOULD BE REMOVED FOR CAUSE WHEN HE OR SHE DISCLOSES BY THEIR ANSWERS THAT THEY CANNOT BE A FAIR AND IMPARTIAL JUROR OR IF THE COURT HAS ANY DOUBT AS TO THE JUROR'S BEING ENTIRELY UNBIASED

The State misunderstands Dean's argument. The State argues that Dean asks for a change in the law to succeed. (State's Brief, p. 41) This is not true. In addition, the State, at four separate points in its argument, characterizes Dean's argument as "concessions." (State's Brief, pp. 41-42) Again, this is not true.

Dean relied on the decisions of this Court, the Sixth Circuit and the United States Supreme Court in presenting this issue. All these decisions support Dean's argument that the trial court should have excused jurors whose answers indicate that they would automatically impose the death penalty.

Finally, after arguing that Juror 357 should have been excused for cause, Dean has raised his trial counsel's failure to excuse Juror 357 through the use of a peremptory challenge as ineffective assistance of counsel, in Proposition of Law No. VI.

For the reasons set forth in the Merit Brief, Jason Dean was denied a fair and impartial jury in violation of United States and Ohio Constitutions. His conviction and death sentence must be reversed.

PROPOSITION OF LAW NO. VI

THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IS VIOLATED WHEN COUNSEL'S DEFICIENT PERFORMANCE RESULTS IN PREJUDICE TO THE DEFENDANT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 5, 9, 10, AND 16 OF THE OHIO CONSTITUTION.

In this claim Dean asserts that his trial counsel were not prepared to take his case to trial. In regard to Dean's trial phase ineffectiveness claims, the State essentially argues that counsel's lack of preparation is irrelevant, because he was not prejudiced by the errors he attributes to his counsel. (State's Brief, pp. 45-47).

Recognizing the importance of Crystal Kaboos' testimony, the State spends a great deal of time arguing that Kaboos' purported reason for telling the police she had come forward because she felt sympathy for the victim (that they both had young children, when she did not) was at most *de minimus*. *Id.* at 46. However Kaboo's testimony was essential to the State's case since she was the only individual able to link Dean with the three incidents for which he was indicted.

Kaboos acknowledged she had lied numerous times to the Springfield Police while professing to tell them the whole truth. For example, she originally told them that Dean rather than Wade killed Titus Arnold. (Vol. 8, Tr. pp. 1838-1839). She also denied being in the car during the drive-by shooting. (Vol. 8, Tr. pp. 1841-1842).

Here, defense counsel acknowledged on the record that they were ineffective cross-examining Kaboos, the State's key witness. (Vol. 8, Tr. pp. 2016-2018, 2023). Trial counsel also failed to object to any of the Titus Arnold crime scene photographs, or cross-examine many witnesses, again demonstrating counsel's lack of preparedness. Counsel were also ineffective in their failure to submit proposed jury instructions as requested by the court or object to numerous instances of prosecutorial misconduct during closing argument.

As such, a pattern of ineffectiveness quickly emerges. Trial counsel simply were not prepared to take Dean's case to trial. And, despite the State's assertions to the contrary, Dean was prejudiced by his counsel's failure to prepare.

In regard to Dean's penalty ineffectiveness claim, the State argues that counsel were not ineffective because they were "fully aware their mitigation presentation had to be abbreviated to avoid 'opening the door' to cross examination about Dean's extensive criminal record, as well as significant instances of misbehavior by Dean while incarcerated." (State's Brief, p. 48). Here, however, Dean's counsel essentially made the State's penalty phase case for them. The mitigation case presented by counsel can most charitably be described as paltry. At the mitigation hearing Dean first gave a brief unsworn statement asking the jurors to spare his life. (Vol. 11, Tr. pp. 2625-2627). Counsel then presented

the testimony Dean's aunt Gloria Elliott and cousin Brandy Murphy, both of whom reside in Florida. (Vol. 11, Tr. pp. 2627-2677). No other witnesses were called. The two witnesses testified about Dean's dysfunctional family life and that when problems arose his mother would bring or send him to Florida to stay with them. Both witnesses indicated that they were willing to do whatever they could to help Dean and had frequently offered their assistance.

Although these two lay witnesses were able to introduce anecdotal evidence about Dean's dysfunctional life, counsel failed to introduce any documentary evidence (such as school, medical, or juvenile court records) to corroborate their testimony. Counsel also failed to call a psychologist or other expert who could have provided the jury with an explanation of Dean's conduct.⁵

Because counsel failed to introduce the testimony of a psychologist or other expert to explain Dean's behavior, the prosecution was able to argue in mitigation rebuttal that Dean "turned his back" on those willing to help him, and "freely [chose]" not to take advantage of the opportunities offered him. (Vol. 11, Tr. p. 2701).

⁵ Although the trial court provided counsel with funds to hire two experts (Dr. Stinson, a psychologist, and Dr. Doninger, a neuropsychologist) counsel failed to call either in an effort to explain Dean's behavior and avoid a death sentence. (Vol. 11, Tr. p. 2726).

Defense counsel also misstated the weighing process during closing argument in the penalty phase, and failed to object to various instances of prosecutorial misconduct during argument. (*See* Vol. 11, Tr. pp. 2681-2687, 2696-2706.)

The “cumulative effect” of counsel’s errors and omissions violated Jason Dean’s Sixth Amendment right to effective counsel. Dean is entitled to a new trial or alternatively a new penalty phase under O.R.C. § 2929.06(B).

PROPOSITION OF LAW NO. VII

THE TRIAL COURT SHOULD NOT IMPOSE COURT COSTS ON AN INDIGENT DEFENDANT WITHOUT ANY CONSIDERATION OF THE DEFENDANT'S ABILITY TO PAY SUCH COSTS.

The State argues that Dean's argument is specious since he is indigent. If only that were true. Yes, Jason Dean is indigent. But that does not mean that the order of court costs is a nullity.

As set forth in the Merit Brief, at p. 79, a death row inmate must pay the costs of his own personal hygiene (soap, toothpaste, etc.), medical needs (doctor, dentist, eye doctor), and most recently, even electricity to run a radio, or television set. The State does not address R.C. §5120.133 which allows the Department of Rehabilitation and Correction to "garnish" an inmate's account to satisfy the judgment. So if Dean's family were to send him \$20.00 to pay for his personal needs, \$10.00 of that would be taken to satisfy the court costs judgment.

The State further attempts to assert prejudicial evidence to the Court by discussing Dean's disciplinary reports during the time period between the first and second trials and argues he will never have a job, therefore there is no error. Not true. As mentioned above, even money received from his family is subject to garnishment and the State's argument does not account for the probability that

Dean, assuming no further disciplinary reports make one day be entitled to get a job.

Finally the State argues that trial counsel's failure to raise the issue waives it, but fails to address the fact that Dean acknowledged this failure in his Merit Brief (at pp. 77-79) and raised it as ineffective assistance of counsel. The State fails to address the ineffective assistance of counsel claim.

PROPOSITION OF LAW NO. VIII

A JURY CANNOT PROPERLY WEIGH AN AGGRAVATING CIRCUMSTANCE AGAINST MITIGATING FACTORS WHEN THE JURY IS GIVEN THE WRONG DEFINITION OF WHAT IS A MITIGATING CIRCUMSTANCE. THE FAILURE TO CORRECTLY INSTRUCT THE JURY IN THE SENTENCING PHASE DENIES THE DEFENDANT'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 5, 9, AND 16 OF THE OHIO CONSTITUTION.

The State asserts that Dean does not argue that the trial court's instruction on mitigating factors were factually or legally incorrect. Not true. Dean specifically argued that the instructions the trial court gave the jury were contrary to the Ohio Jury Instructions and the decisions of this Court, specifically *State v. Holloway* (1988), 38 Ohio St.3d 239, paragraph one of the syllabus; *State v. Getsy*, 84 Ohio St.3d 180, 200 (1998).

The State is correct that the defense failed to object. This means that the Court can either review this as plain error, and/or ineffective assistance of counsel. Dean raised counsel's ineffectiveness for failing to object in his merit brief.

The error in the jury instruction is also plain. The Ohio Jury Instructions and the comment to those instructions which reference this Court's caselaw set out the correct instruction and the reasons for those instructions. The trial court's failure to give the correct instruction, particularly on the definition of mitigating factors,

violated the Eighth Amendment. See *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)(The Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence offered by a criminal defendant in capital sentencing proceedings.) His death sentence must be vacated.

PROPOSITION OF LAW NO. IX

THE ACCUSED’S RIGHT TO A FAIR TRIAL IS VIOLATED WHEN THE TRIAL COURT PERMITS THE PROSECUTION TO PLAY NON-PROBATIVE EMOTIONALLY CHARGED 911 TAPES IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 5, 9, AND 16 OF THE OHIO CONSTITUTION.

In regard to the 911 call of Rose Haile, the State argues that the content of the call was relevant to the issue of prior calculation and design because Haile had previously testified that she had seen two men get out of a vehicle, chase a third man, before gunshots caused the third man to fall. (State’s Brief, p. 56). Even assuming that Haile’s hearsay statements in her 911 call were admissible as either a “present sense impression” or “excited utterance” under Ohio R. Evid. 803, **and** were relevant under Ohio Evid. R. 401, the State fails to address Dean’s argument that exclusion was mandated by Ohio Evid. R. 403(A) which provides:

Exclusion mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

Evidence is unfairly prejudicial if it has “an undue tendency to suggest decision on an improper basis,” commonly, though not necessarily, an emotional one. Advisory Committee’s Note, Fed. R. Evid. 403. It is unfairly prejudicial if it “appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct

to punish,” or otherwise “may cause a jury to base its decision on something other than the established propositions in the case.” *Carter v. Hewitt*, 617 F.2d 961 (3rd Cir. 1980). *Accord, Old Chief v. United States*, 519 U.S. 172, 180 (1997).

Here, Haile provided the jurors with a detailed rendition of events prior to the playing of the tape. (Tr. Vol. 5, pp. 999-1007). The prosecution’s sole reason to play the tape was to improperly play on the jurors’ emotions. Haile made repeated emotional outbursts throughout the tape, and was frequently told by the 911 operator that she needed to calm down. (*Id.* at pp. 1009-1018).

Furthermore, at the start of the tape the 911 operator informed Haile that officers were already on the scene and caring for the victim. The balance of the tape deals with the investigation of the crime. All of the investigatory information had already been testified to by Haile in her direct examination. As such, there was no need to play the tape other than to improperly appeal to the jurors’ emotions.

In regard to the 911 call of Laroilyn Burd, the State argues that the content of the call was relevant because “one motive for the Dilbert Ave. shooting was revenge arising from a dispute with O-Z.” (State’s Brief, p. 57). Therefore, the State reasons, Burd’s comments about “O-Z, Snuff, and Aaron Johnson” having a connection with Devon Williams, the ostensible victim, were admissible. *Id.*

Whether or not this information was relevant,⁶ the content of the 911 call constituted inadmissible hearsay.

Ohio Evid. R. 801(c) provides:

“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

As such Burd’s statements on the 911 tape constitute inadmissible hearsay under Evid. R. 802, unless they fall into one of the enumerated exceptions. Evid. R. 803 provides a specific exception for “present sense impressions” and “excited utterances.” Although courts have noted that “911 calls are generally admissible as excited utterances or present sense impressions,” (*State v. Johnson*, 10th Dist. No. 08AP-652, 2009-Ohio-3383, ¶22), that is not the case here.

When questioned by the State, Burd testified that Devon’s most recent altercation with the other individuals occurred a week or two before her 911 call. (Vol. 7, Tr. p. 1573). As such, it was something she already knew about at the time she made the 911 call. And as such, the trial court erred in permitting the prosecution to play Burd’s 911 call.

⁶ The trial court did not believe the information contained in the 911 tape was relevant to any of the issues. (Vol. 7, Tr. p. 1557).

PROPOSITION OF LAW NO. X

WHEN THE TRIAL COURT MAKES NUMEROUS ERRONEOUS EVIDENTIARY RULINGS, THE DEFENDANT IS DENIED A FAIR TRIAL AND DUE PROCESS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

Dean argued in his Merit Brief that the trial court erred in admitting certain testimony from Crystal Kaboos, evidence concerning the search of Joshua Wade's House, and letters and audio tapes.

The State's argument concerning the admission of the Kaboos testimony is that "Dean appears to concede admission was proper as motive evidence under Evid. R. 404(B)". (State's Brief, p. 58) The State comes to this conclusion because Dean argued in his Merit Brief, p. 96: "It is not enough to just say it meets one of the purposes set forth in Evid. R. 404(B), the trial court also must determine if the prejudice outweighs any acceptable justification for admission." This was not a concession, this was an argument that it is not enough for the prosecutor to utter the word "motive" and the evidence is magically admissible. Instead, Dean argued that the admission of evidence is a two-step process, first the court must determine if the evidence the party is seeking to admit is relevant; if the court determines it is relevant, then the court must go on and complete the second step

by determining if the prejudice outweighs any acceptable justification for admission. Here, the trial court stopped after the first step. The basis for Dean's argument was the Ohio Rules of Evidence, specifically Evid. R. 404 (B). Therefore the State's claim that Dean failed to cite to "any legal authority to support his claim" is erroneous.

The State is also incorrect when it argues that Dean did not properly challenge the ruling. The defense specifically argued:

MR. MEYERS: Objection on the grounds of relevancy; and even if marginally probative, the prejudice outweighs the answer to this and is reflected in the prior testimony would be he was gonna (sic) rob me and he didn't.

(Vol. 8, Tr. pp. 1804)

This objection was preserved.

The State argues that the trial court determined that the evidence relating to the search of Joshua Wade's house was admissible. The State seems to argue that ends the inquiry, but we are here on appeal and that is the precise ruling that Dean is challenging. As set forth in the Merit Brief, the evidence was not relevant, and even if arguably relevant, the admission was prejudicial.

Finally, the State argues that Dean fails to state a claim of error relating to the admission of the letters written by Dean and audio recordings of Dean's conversations. (State's Brief, p. 59) Yet the argument in the Merit Brief, pp. 98-

106, set forth that “[d]espite these redactions, the portions of the letters and recordings admitted were *unfairly prejudicial* to Dean.” (Id., at p. 99). Dean painstakingly went through the letters and audio recordings and presented the Court with reasons as to why the admission of this evidence was unfairly prejudicial. Again the State is wrong that there was no objection to this evidence. The defense objected to their admission, both in the discussions before they came in (Vol. 8, Tr. pp. 2030-2033, Vol. 9, Tr. pp. 2076-2085) and during the admission of exhibits at the end of the state’s case. (Vol. 9, Tr. p. 2328)

For the first time the State now argues that the admission of the evidence comes in as an admission of a party opponent pursuant to Evid. R. 801 (D)(2)(a). (State’s Brief, p. 60) That argument was not made in the court below. This evidence rule largely relates to civil cases or in trying to admit evidence of a conspiracy which is why the State did not argue it below.

Even, assuming *arguendo* that the evidence at issue falls into Evid. R. 801(D)(2)(a), that does not insulate the evidence from objections based on the fact that the prejudice of the admission outweighs any probative value. The prejudicial impact of the jury’s exposure to this inflammatory evidence deprived Dean of his right to a fair trial, due process, and a reliable determination of his guilt and punishment in a capital case as guaranteed by the Fifth, Sixth, and Fourteenth

Amendments to the United States Constitution and Article I, §§ 9, 10 and 16 of the Ohio Constitution. For these reasons, Dean's convictions should be overturned, or, at a minimum, his death sentence vacated.

PROPOSITION OF LAW NO. XI

A TRIAL COURT ABUSES ITS DISCRETION IN DENYING THE SEPARATE TRIAL OF OFFENSES THAT OCCURRED AT DIFFERENT TIMES AND WITH DIFFERENT VICTIMS, PARTICULARLY WHEN ONE SET OF CHARGES ALLEGES A CAPITAL OFFENSE SUCH THAT A DEFENDANT IS DENIED THE RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State's argument in this response is that Ohio Crim R. 8 allows joinder of offenses. While this is true, Ohio Crim. R. 14 recognizes that joinder, even when proper under Rule 8, may prejudice either a defendant or the State. Here the defendant was prejudiced by the joinder.

The State attempts to counter this by arguing that the evidence was "simple and direct." It was not. There were three distinct incidents and the witnesses were constantly coming and going on the witness stand. Some of the law enforcement witnesses testified at three separate times concerning each incident.

In addition the jury deliberated over three days and had a multitude of questions relating to the different offenses. The trial court erred in joining the offenses.

PROPOSITION OF LAW NO. XII

THE ACCUSED MAY NOT BE PUNISHED MULTIPLE TIMES FOR CRIMES OF SIMILAR IMPORT THAT ARE COMMITTED DURING ONE INDIVISIBLE COURSE OF CONDUCT. U.S. CONST. AMENDS. V, XIV; OHIO CONST. ART. I, § 10; O.R.C. §§ 2941.25(A); 2929.14.

The State confuses a sufficiency of the evidence argument with the issue of merger. Sufficiency was addressed in Proposition of Law No. II. Here, Dean is arguing that of the offenses that he was found guilty of committing, certain of those offenses should have been merged for sentencing. For example, the State seems to think that since Dean did not make a merger argument regarding the shooting at 604 Dibert Avenue that “there is a conclusive showing Dean possessed an animus to support a charge of shooting at a dwelling. Sufficiency of this charge was attacked in Proposition of Law No. II. In this issue, unlike the shooting at 609 Dibert, where there were separate charges for shooting at a dwelling and attempted murder, which should have been merged, there was no attempted murder charge relating to 604 Dibert, therefore no merger argument. No inferences or assumptions should be assigned regarding this or other charges.

The State has argued that the three incidents involved in this case are a course of conduct - -except when they are not. (State’s Brief, p. 29-31) The State wants it both ways.

In addressing the shooting into a dwelling, the State now argues that it was Dean's intent to "terrorize a neighborhood." (State's brief, pp. 66-67) If the State's new theory is adopted, then there was no "attempted murder" intent, it was only the intent to shoot into dwellings, and the attempted murder charges should be vacated or merged into the shooting into a dwelling.

The State fails to address this Court's decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, syllabus. *Johnson* was decided a year before Dean was sentenced in this case and therefore is fully applicable to his case. Yet rather than address *Johnson's* application to Dean's sentencing, as was argued in the Merit Brief, the State chooses to cite the Court to court of appeals decisions that predate the *Johnson* decision. In *Johnson*, this Court held: when determining whether two offenses are allied offenses of similar import subject to merger statute, the conduct of the accused must be considered. The court went on to find that in determining whether offenses are allied offenses of similar import under R.C. §2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other. * * * If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import. If the multiple

offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., “a single act, committed with a single state of mind.” If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged.

As set out in the merit brief, the trial court should have merged the offenses in this case.

PROPOSITION OF LAW NO. XIII

A TRIAL COURT SHOULD NOT MAKE ANY STATEMENTS THAT WOULD LEAD A DEFENDANT TO BELIEVE THAT THE COURT HAS PREJUDGED HIS CASE OR HAS AN ANIMUS TOWARD HIM, THEREBY DENYING HIS A FAIR TRIAL BY AN IMPARTIAL COURT AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State confuses an appellate issue based on the record of the case with the procedures set forth in R.C. §2701.03. Dean's issue before the Court is whether Dean was denied a fair trial and due process because of the remarks of the trial judge. The comments themselves occurred after the verdict in the trial phase of the case and then at the sentencing. Given the timing of the remarks, the procedures in R.C. §2701.03 were appropriate.

The cases cited by the State support rather than defeat the claim. The State cites to *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463(1956) paragraph four of the syllabus, as providing a definition of judicial bias: "a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts." In the trial court's remarks to Dean apprising him of his appellate right to take the case directly to this Court once the death sentence is imposed, in

spite of the fact that the trial court had not yet reviewed the jury's recommendation, the court indicated an "anticipatory judgment" without making his own review. It was not "simply a recitation of the defendant's rights" since the case had not yet completed and until the trial court entered his decision on the capital charge, it would not be determined whether the appeal went to the court of appeals or the Ohio Supreme Court. By stating the appeal would be filed in the Ohio Supreme Court after the death penalty is imposed, the trial court was indicating he had already made a decision in the case, even though the jury had just made its recommendation.

Likewise the second comment concerning the court's hopes that Dean "never again walk the street as a free man" indicates a "hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants."

The two incidents combined show that the trial court was biased against Mr. Dean, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution. The sentence in this case must be vacated and the case remanded for a new sentencing hearing.

PROPOSITION OF LAW NO. XIV

IT IS THE TRIAL COURT'S RESPONSIBILITY TO ADMIT ONLY THAT EVIDENCE IN THE SENTENCING PHASE THAT IS RELEVANT TO THE AGGRAVATING CIRCUMSTANCE THE JURY WILL CONSIDER IN DETERMINING THE APPROPRIATE SENTENCE. *STATE V GETSY*, 84 OHIO ST.3D 180, 201, 1998-OHIO-533 (FOLLOWED)

Contrary to the State's assertion, Dean did not argue that NONE of the State's evidence was admissible in the penalty phase of the trial. In addition, the State seems to be arguing that since the State's exhibit list was pared down between the trial and penalty phases that the trial court's decision is insulated from any challenge that the "pared down list" still contained exhibits that should not have gone to the jury in the penalty phase. That is not the law.

In *State v. Getsy*, 84 Ohio St.3d. 180, 201, 1998-Ohio-533 the Court found that it is the trial court responsibility to determine what evidence from the trial phase is relevant in the penalty phase. The evidence from the trial phase is not to be admitted wholesale. *State v. Hancock*, 108 Ohio St3d 57, ¶121 (2006).

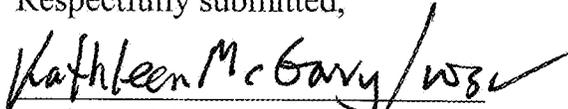
The evidence admitted by the trial court was not relevant to the aggravating circumstance and therefore should not have been admitted in the penalty phase. The trial court abused its discretion, and it rendered Dean's death sentence arbitrary, when it admitted the trial phase evidence for sentencing. The death

penalty must be vacated because it violates the Eighth and Fourteenth Amendments to the United States Constitution

CONCLUSION

For all the reasons set forth in this brief as well as in the Merit Brief, the convictions and death sentence must be reversed.

Respectfully submitted,



Kathleen McGarry*, #0038707

*Counsel of Record

McGARRY LAW OFFICE

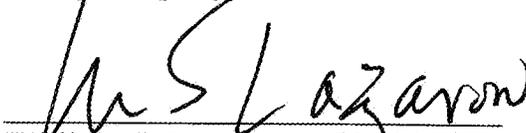
P.O. Box 310

Glorieta, New Mexico 87535

505-757-3989 (voice)

888-470-6313 (facsimile)

kate@kmcgarrylaw.com



William S. Lazarow (#0014625)

Attorney at Law

400 South Fifth Street, Suite 301

Columbus, OH 43215

614.228.9058

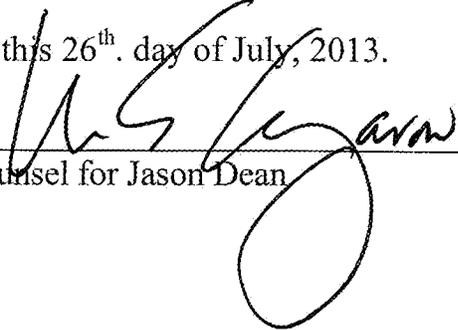
614.221.8601 Fax

BillLazarow@aol.com

Counsel for Appellant, Jason Dean

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply Brief of Appellant was forwarded by regular U.S. Mail to D. Andrew Wilson, Prosecuting Attorney, P.O. Box 1608, Springfield, Ohio 45501, this 26th. day of July, 2013.



Counsel for Jason Dean