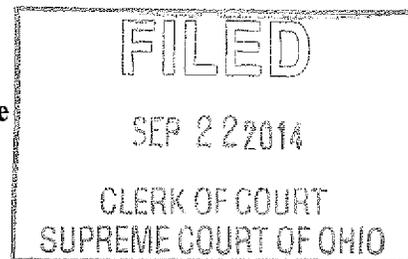


IN THE SUPREME COURT OF OHIO

STATE OF OHIO :
 Appellee, : CASE NO. 14-0313
 -vs- :
 RICHARD BEASLEY : **Death Penalty Case**
 Appellant. :



On Appeal from the Court of Common Pleas, Summit, Ohio
 Case No. CR-2012 01 0169(A)

MERIT BRIEF OF APPELLANT RICHARD BEASLEY

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
PROPOSITION OF LAW NO. 1	17
A trial court must make specific findings at the time of sentencing to impose consecutive sentences and court costs.	17
PROPOSITION OF LAW NO. 2	20
A capital defendant’s rights to due process and a fair trial by an impartial jury are violated by the trial court’s denial of a motion for change of venue where there is pervasive, prejudicial pretrial publicity. U.S. Const. amends. V, VI, IX and XIV; Ohio Const. art. I §§ 5 and 16.	20
PROPOSITION OF LAW NO. 3	26
A capital defendant is denied his substantive and procedural due process rights to a fair trial when a prosecutor commits acts of misconduct during the opening statement and in allowing a biased juror to remain seated during his capital trial. The resulting sentence is arbitrary and unreliable. U.S. Const. amends. VI, VIII, XIV; Ohio Const. art. I, §§ 9, 16, 20.	26
PROPOSITION OF LAW NO. 4	33
A trial court’s decision to allow a biased juror to sit on a defendant’s jury and participate in the deliberations that decided the defendant’s guilt and sentence violates the defendant’s Sixth Amendment right to an impartial jury. U.S. Const. amends. VI, XIV; Ohio Const. art. I §§ 5, 10.	33
PROPOSITION OF LAW NO. 5	39
A defendant’s right to a fair trial is violated when a trial court fails to grant a mistrial when the ends of justice required it and a fair trial was no longer possible. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 5, 10.	39
PROPOSITION OF LAW NO. 6	44
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).	44

PROPOSITION OF LAW NO. 7	54
The acts and omissions of trial counsel deprived a defendant of a fair and reliable result in both phases of a capital trial. U.S. Const. amends. VI, XIV; Ohio Const. art. I §§ 5, 10.	54
PROPOSITION OF LAW NO. 8	81
A trial court denies a capital defendant’s right to allocution when the defendant is given an exceptionally limited opportunity to speak before the death penalty is imposed. U.S. Const. amends. V, VIII, XIV.	81
PROPOSITION OF LAW NO. 9	86
Ohio’s death penalty law is unconstitutional. Ohio Rev. Code Ann. §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 do not meet the prescribed constitutional requirements and are unconstitutional on their face and as applied to Beasley. U.S. Const. amends. V, VI, VIII, And XIV; Ohio Const. art. I, §§ 2, 9, 10, And 16. Further, Ohio’s death penalty statute violates the United States’ obligations under international law.	86
PROPOSITION OF LAW NO. 10	99
A criminal conviction that is not supported by substantial credible evidence will be reversed on appeal.	99
PROPOSITION OF LAW NO. 11	109
The cumulative effect of trial error renders a capital defendant’s trial unfair and his sentence arbitrary and unreliable. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 5, 16.	109
CONCLUSION	111
CERTIFICATE OF SERVICE	112

APPENDIX:

Notice of Appeal	A-1
Journal Entry	A-4
Sentencing Opinion.....	A-13
Ohio Const. art. I, § 2.....	A-35
Ohio Const. art. I, § 5.....	A-36
Ohio Const. art. I, § 9.....	A-37
Ohio Const. art. I, § 10.....	A-38

Ohio Const. art. I, § 16.....	A-39
Ohio Const. art. I, § 20.....	A-40
U.S. Const. amend. V.....	A-41
U.S. Const. amend. VI.....	A-42
U.S. Const. amend. VIII.....	A-43
U.S. Const. amend. IX.....	A-44
U.S. Const. amend. XIV.....	A-45
U.S. Const. art. II, § 2.....	A-46
U.S. Const. art. VI.....	A-47
R.C. § 2903.01.....	A-48
R.C. § 2903.02.....	A-49
R.C. § 2905.01.....	A-50
R.C. § 2911.02.....	A-52
R.C. § 2913.02.....	A-53
R.C. § 2913.49.....	A-56
R.C. § 2923.13.....	A-59
R.C. § 2929.02.....	A-60
R.C. § 2929.021.....	A-61
R.C. § 2929.022.....	A-62
R.C. § 2929.023.....	A-64
R.C. § 2929.03.....	A-65
R.C. § 2929.04.....	A-71
R.C. § 2929.05.....	A-74

R.C. § 2929.14	A-76
R.C. § 2929.41	A-88
Ohio R. Crim. P. 11	A-89
Ohio R. Crim. P. 18	A-92
Ohio R. Crim. P. 32	A-93
Ohio R. Crim. P. 43	A-94
Ohio R. Evid. 401	A-95
Ohio R. Evid. 402	A-96
Ohio R. Evid. 403	A-97
Ohio R. Evid. 702	A-98
Ohio R. Evid. 801	A-99
Ohio R. Evid. 802	A-100
Ohio R. Evid. 803	A-101
Ohio R. Evid. 804	A-104
<i>D'Ambrosio v. Bagley</i> , 2006 U.S. Dist. LEXIS 12794 (N.D. Ohio 2006)	A-106
<i>State v. Bonnell</i> , __ Ohio St. 3d __, 2014 Ohio LEXIS 1934.....	A-169
<i>State v. Pawlak</i> , 2014 Ohio App. LEXIS 2104 (8 th Dist. May 22, 2014).....	A-178
<i>State v. Rutledge</i> , 1993 Ohio App. LEXIS 2851 (10 th Dist. June 1, 1993).....	A-198
<i>State v. Vasquez</i> , 2014 Ohio App. LEXIS 208 (10 th Dist. Jan, 24, 2014)	A-208

TABLE OF AUTHORITIES

CASES

<i>Albrecht v. Horn</i> , 485 F.3d 103 (3rd Cir. 2007).....	70, 73
<i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991).....	22, 59
<i>Arizona v. Washington</i> , 434 U.S. 497 (1977).....	40, 41
<i>Berger v. United States</i> , 295 U.S. 78 (1935).....	26, 31
<i>Blackburn v. Foltz</i> , 828 F.2d 1177 (6 th Cir. 1987).....	77
<i>Book v. Erskine & Sons, Inc.</i> , 154 Ohio St. 391 (1951).....	41
<i>Bracy v. Gramley</i> , 520 U.S. 899 (1997).....	57
<i>Cauthern v. Colson</i> , 736 F.3d 465 (6 th Cir. 2013).....	28
<i>Chapman v. California</i> , 386 U.S. 18 (1967).....	34, 37, 53
<i>Clinton v. City of New York</i> , 524 U.S. 417 (1998).....	95, 97
<i>Coker v. Georgia</i> , 433 U.S. 584 (1977).....	86
<i>Commonwealth v. O'Neal</i> , 339 N.E.2d 676 (Mass. 1975).....	87
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).....	44, 50, 51, 52
<i>Cross v. United States</i> , 325 F.2d 629 (D.C. Cir. 1963).....	56
<i>D'Ambrosio v. Bagley</i> , 2006 U.S. Dist. LEXIS 12794 (N.D. Ohio 2006).....	59
<i>Darden v. Wainwright</i> , 477 U.S. 168 (1986).....	26, 31, 32
<i>Davis v. Secretary for the Department of Correction</i> , 341 F.3d 1310 (11th Cir. 2003).....	64
<i>Davis v. Washington</i> , 547 U.S. 813 (2006).....	51
<i>Delo v. Lashley</i> , 507 U.S. 272 (1993).....	88
<i>Donnelly v. DeChristoforo</i> , 416 U.S. 637 (1974).....	32
<i>Doyle v. Ohio</i> , 426 U.S. 610 (1976).....	76
<i>Drake v. Kemp</i> , 762 F.2d 1449 (11th Cir. 1985).....	84
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982).....	85, 88
<i>Enmund v. Florida</i> , 458 U.S. 782 (1982).....	88
<i>Evitts v. Lucey</i> , 469 U.S. 387 (1985).....	92
<i>Farina v. Sec'y, Fla. Dep't of Corr.</i> , 536 Fed Appx. 966 (11 th Cir. 2013).....	28
<i>Filartiga v. Pena-Irala</i> , 630 F.2d 876 (2d Cir. 1980).....	92, 97
<i>Fisher v. Gibson</i> , 282 F.3d 1283 (10 th Cir. 2002).....	77
<i>Forsythe v. State</i> , 12 Ohio Misc. 99, 230 N.E.2d 681 (1967).....	23
<i>Forti v. Suarez-Mason</i> , 672 F.Supp. 1531 (N.D. Cal. 1987).....	92

<i>Franklin v. Anderson</i> , 434 F.3d 412 (6th Cir. 2006).....	37
<i>Free v. Peters</i> , 12 F.3d 700 (7th Cir. 1993).....	89
<i>Frolova v. Union of Soviet Socialist Republics</i> , 761 F.2d 370 (7th Cir. 1985).....	96
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972).....	86, 87, 89
<i>Glasser v. United States</i> , 315 U.S. 60 (1942).....	99
<i>Godfrey v. Georgia</i> , 446 U.S. 420 (1980).....	88, 90
<i>Goins v. McKeen</i> , 605 F.2d 947 (6th Cir. 1979).....	22
<i>Gomez v. United States</i> , 490 U.S. 858 (1988).....	37
<i>Government of the Virgin Islands v. Toto</i> , 529 F.2d 278 (3 rd Cir. 1976).....	73
<i>Gray v. Mississippi</i> , 481 U.S. 648 (1987).....	34, 37
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976).....	87, 88
<i>Groseclose v. Bell</i> , 130 F. 3d 1161 (6 th Cir. 1997).....	77
<i>Hammon v. Indiana</i> , 547 U.S. 813 (2006).....	51
<i>Hughes v. United States</i> , 258 F.3d 453 (6 th Cir. 2001).....	60
<i>Illinois v. Somerville</i> , 410 U.S. 458 (1973).....	40, 41, 42, 43
<i>In re Murchison</i> , 349 U.S. 133 (1955).....	57
<i>In re Winship</i> , 397 U.S. 358 (1970).....	21
<i>Irvin v. Dowd</i> , 366 U.S. 717 (1961).....	22, 23, 24, 37
<i>Irwin v. Dowd</i> , 366 U.S. 717 (1961).....	57
<i>Johnson v. Armontrout</i> , 961 F.2d 748 (8 th Cir. 1992).....	60
<i>Johnson v. Texas</i> , 509 U.S. 350 (1993).....	88
<i>Jones v. Kemp</i> , 706 F. Supp. 1534, 1560 (N.D. Ga. 1989).....	29
<i>Kordenbrock v. Scroggy</i> , 919 F.2d 1091 (6 th Cir. 1990).....	80
<i>Krulewitch v. United States</i> , 336 U.S. 440 (1949).....	74
<i>Lewis v. Jeffers</i> , 497 U.S. 764 (1990).....	90
<i>Liljeberg v. Health Services Acquisition Corp</i> , 486 U.S. 847 (1988).....	57
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978).....	84, 89
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803).....	96
<i>Mayberry v. Pennsylvania</i> , 400 U.S. 455 (1971).....	57
<i>Maynard v. Cartwright</i> , 486 U.S. 356 (1988).....	90
<i>Melendez-Diaz v. Massachusetts</i> , 575 U.S. 305 (2009).....	53
<i>Mempa v. Rhay</i> , 389 U.S. 128 (1967).....	55
<i>Michelson v. United States</i> , 335 U.S. 469 (1948).....	70, 73

<i>Miller v. Webb</i> , 385 F.3d 666 (6th Cir. 2004)	34, 36, 38, 60
<i>Moore v. Johnson</i> , 194 F.3d 586 (5 th Cir. 1999)	76
<i>Morgan v. Illinois</i> , 504 U.S. 719 (1992).....	21, 59, 65
<i>Mu'Min v. Virginia</i> , 500 U.S. 415 (1991)	33, 36, 37
<i>Mu'Min v. Virginia</i> , 500 U.S. 415 (1991).....	60
<i>Murphy v. Florida</i> , 421 U.S. 794 (1975).....	23
<i>Nowlin v. Commonwealth</i> , 40 Va. App. 327, 579 S.E.2d 367 (2003).....	52
<i>Ohio v. Roberts</i> , 448 U.S. 56 (1980)	50, 52
<i>Old Chief v. United States</i> , 519 U.S. 172 (1997).....	70, 73
<i>Parker v. Gladden</i> , 385 U.S. 363 (1966).....	33
<i>Parker v. Matthews</i> , 132 S. Ct. 2148 (2012)	32
<i>Patton v. Yount</i> , 467 U.S. 1025 (1984).....	33, 35, 37
<i>People v. Farrell</i> , 34 P.3d 401 (Colo. 2001)	52
<i>People v. Harlan</i> , 109 P.3d 616 (Colo. 2005)	29
<i>People v. Salgado</i> , 635 N.E.2d 1367 (Ill. App. 1994).....	67
<i>Proffitt v. Wainwright</i> , 706 F.2d 311 (11 th Cir. 1983).....	56
<i>Pulley v. Harris</i> , 465 U.S. 37 (1984).....	91
<i>Ramonez v. Berghuis</i> , 490 F.3d 482 (6 th Cir. 2007)	79
<i>Renico v. Lett</i> , 559 U.S. 766 (2010)	40, 42
<i>Rhodes v. Chapman</i> , 452 U.S. 337 (1981)	86
<i>Rideau v. Louisiana</i> , 373 U.S. 723 (1963)	23
<i>Robinson v. California</i> , 370 U.S. 660 (1962)	86
<i>Romine v. Head</i> , 253 F.3d 1349 (11 th Cir. 2001).....	29
<i>Rosales-Lopez v. United States</i> , 451 U.S. 182 (1981).....	60
<i>Satterwhite v. Texas</i> , 486 U.S. 249 (1988)	109
<i>Shelton v. Tucker</i> , 364 U.S. 479 (1960).....	87
<i>Sheppard v. Maxwell</i> , 384 U.S. 333 (1966).....	21, 24
<i>Silverthorne v. United States</i> , 400 F.2d 627 (9th Cir. 1968)	23
<i>Skipper v. South Carolina</i> , 476 U.S. 1 (1986)	85
<i>Smith v. Phillips</i> , 455 U. S. 209 (1982)	26
<i>Spaziano v. Florida</i> , 468 U.S. 447 (1984).....	92
<i>State v. Bonnell</i> , __ Ohio St. 3d __, 2014 Ohio LEXIS 1934	17, 18
<i>State v. Brewer, III</i> , 2012 Ohio App. LEXIS 1838 (2 nd Dist. May 11, 2012)	74

<i>State v. Butcher</i> , 170 Ohio App. 3d 52, 66, 866 N.E.2d 13 (2007).....	68
<i>State v. Campbell</i> , 90 Ohio St. 3d 320, 738 N.E.2d 1178 (2000).....	82, 84, 85
<i>State v. DeMarco</i> , 31 Ohio St. 3d 191, 509 N.E.2d 1256 (1987).....	110
<i>State v. Eley</i> , 56 Ohio St. 2d 169, 383 N.E.2d 132 (1978).....	99
<i>State v. Fairbanks</i> , 32 Ohio St. 2d 34, 289 N.E.2d 352 (1972).....	21
<i>State v. Fears</i> , 86 Ohio St. 3d 329, 715 N.E.2d 136 (1999).....	26
<i>State v. Fox</i> , 69 Ohio St. 3d 183, 631 N.E.2d 124 (1994).....	88
<i>State v. Franklin</i> , 62 Ohio St. 3d 118, 580 N.E.2d 1 (1991).....	40, 41
<i>State v. Gillard</i> , 40 Ohio St. 3d 226, 533 N.E.2d (1988).....	58
<i>State v. Glover</i> , 35 Ohio St. 3d 18, 517 N.E.2d 900 (1988).....	40
<i>State v. Green</i> , 90 Ohio St. 3d 352, 738 N.E.2d 1208 (2000).....	82, 83, 84, 85
<i>State v. Jenkins</i> , 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984).....	86
<i>State v. Joseph</i> , 125 Ohio St. 3d 76, 926 N.E.2d 278 (2010).....	19
<i>State v. Keenan</i> , 66 Ohio St. 3d 402, 613 N.E.2d 203 (1993).....	26
<i>State v. Liberatore</i> , 69 Ohio St. 2d 583, 433 N.E.2d 561 (1982).....	26
<i>State v. Lott</i> , 51 Ohio St. 3d 160, 555 N.E.2d 293 (1990).....	26
<i>State v. Martin</i> , 37 Ohio App. 3d 213 525 N.E.2d 521 (1987).....	70
<i>State v. Murphy</i> , 91 Ohio St. 3d 516, 747 N.E.2d 765 (2001).....	91
<i>State v. Pawlak</i> , 2014 Ohio App. LEXIS 2104 (8 th Dist. May 22, 2014).....	74
<i>State v. Pierre</i> , 572 P.2d 1338 (Utah 1977).....	87
<i>State v. Poindexter</i> , 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988).....	86
<i>State v. Reynolds</i> , 80 Ohio St. 3d 670, 687 N.E.2d 1358 (1998).....	82, 83
<i>State v. Ricks</i> , 136 Ohio St. 3d 356 (2013).....	50, 53
<i>State v. Rutledge</i> , 1993 Ohio App. LEXIS 2851 (10 th Dist. June 1, 1993).....	70
<i>State v. Sapp</i> , 105 Ohio St. 3d 104, 822 N.E.2d 1239 (2004).....	80
<i>State v. Shanklin</i> , 185 Ohio App. 3d 603, 925 N.E.2d 161 (2009).....	68
<i>State v. Smith</i> , 14 Ohio St. 3d 13, 470 N.E.2d 883 (1984).....	26
<i>State v. Steffen</i> , 31 Ohio St. 3d 111, 509 N.E.2d 383 (1987).....	91
<i>State v. Thompson</i> , 33 Ohio St. 3d 1, 514 N.E.2d 407 (1987).....	32, 80, 100
<i>State v. Thompson</i> , 78 Ohio St. 3d 380, 678 N.E.2d 541 (1997).....	100
<i>State v. Vasquez</i> , 2014 Ohio App. LEXIS 208 (10 th Dist. Jan, 24, 2014).....	100
<i>State v. Wilson</i> , 113 Ohio St. 3d 382, 865 N.E. 2d 1264 (2007).....	100
<i>State v. Wilson</i> , 787 P.2d 821 (N.M. 1990).....	109

<i>State, ex rel. Dayton Newspapers, Inc. v. Phillips</i> , 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976).....	21
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	54, 76, 77
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993).....	34
<i>Taylor v. Hayes</i> , 418 U.S. 488 (1974)	57
<i>The Paquete Habana</i> , 175 U.S. 677 (1900).....	92, 97
<i>Trop v. Dulles</i> , 356 U.S. 86 (1958).....	86
<i>Tuilaepa v. California</i> , 512 U.S. 967 (1994).....	90
<i>Tumey v. Ohio</i> , 273 U.S. 510 (1927)	57
<i>Turner v. Louisiana</i> , 379 U.S. 466 (1965).....	57
<i>Unger v. Sarafite</i> , 376 U.S. 575 (1964).....	57
<i>United States v. Aaron Burr</i> , 25 F. Case 30, Case No. 14 (1807)	24
<i>United States v. Blount</i> , 479 F.2d 650 (6 th Cir. 1973)	59
<i>United States v. Carney</i> , 461 F.2d 465 (3 rd Cir. 1972)	74
<i>United States v. Crutcher</i> , 405 F.2d 239 (2 nd Cir. 1968).....	56
<i>United States v. Dellinger</i> , 472 F.2d 340 (7 th Cir. 1972).....	23
<i>United States v. Gordon</i> , 829 F.2d 119 (D.C. Cir. 1987).....	56
<i>United States v. Jackson</i> , 390 U.S. 570 (1968)	89
<i>United States v. Myers</i> , 150 F.3d 459 (5 th Cir. 1998).....	84
<i>United States v. Orrico</i> , 599 F.2d 113 (6 th Cir. 1979).....	99
<i>United States v. Perez</i> , 22 U.S. 579 (1824)	39
<i>United States v. Range</i> , 982 F.2d 196 (6 th Cir. Ohio 1992).....	73
<i>United States v. Smith</i> , 18 U.S. (5 Wheat.) 153 (1820)	97
<i>United States v. Villalpando</i> , 259 F.3d 934 (8 th Cir. 2001)	76
<i>United States v. Wade</i> , 388 U.S. 218 (1967)	55
<i>United States v. Wallace</i> , 848 F.2d 1464 (9 th Cir. 1988).....	109, 110
<i>Virgil v. Dretke</i> , 446 F.3d 598 (5 th Cir. 2006)	60
<i>Walker v. Engle</i> , 703 F.2d 959 (6 th Cir. 1983).....	109
<i>Walton v. Arizona</i> , 497 U.S. 639 (1990), vacated on other grounds <i>Ring v. Arizona</i> , 536 U.S. 584 (2002)	90
<i>Ward v. Monroeville</i> , 409 U.S. 57 (1972)	57
<i>White v. McAninch</i> , 235 F.3d 988 (6 th Cir. 2000).....	68, 70
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003).....	79

<i>Withrow v. Larkin</i> , 421 U.S. 35 (1975)	57
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976)	84, 87
<i>Zant v. Stephens</i> , 462 U.S. 862 (1983)	91
<i>Zschemnig v. Miller</i> , 389 U.S. 429 (1968)	92

CONSTITUTIONAL PROVISIONS

Ohio Const. art. I, § 2	86, 98
Ohio Const. art. I, § 5	passim
Ohio Const. art. I, § 9	passim
Ohio Const. art. I, § 10	passim
Ohio Const. art. I, § 16	passim
Ohio Const. art. I, § 20	26, 32
U.S. Const. amend. V	passim
U.S. Const. amend. VI	passim
U.S. Const. amend. VIII	passim
U.S. Const. amend. IX	20
U.S. Const. amend. XIV	passim
U.S. Const. art. II, § 2	95
U.S. Const. art. VI	92

STATUTES

R.C. § 2903.01	1, 86, 98
R.C. § 2903.02	1
R.C. § 2905.01	1
R.C. § 2911.02	1
R.C. § 2913.02	1
R.C. § 2913.49	1
R.C. § 2923.13	1
R.C. § 2929.02	86, 98
R.C. § 2929.021	86, 90, 98
R.C. § 2929.022	86, 98
R.C. § 2929.023	86, 98
R.C. § 2929.03	passim
R.C. § 2929.04	passim
R.C. § 2929.05	86, 91, 92, 98

R.C. § 2929.14	18
R.C. § 2929.41	17

RULES

Ohio R. Crim. P. 11	89
Ohio R. Crim. P. 18	3, 20
Ohio R. Crim. P. 32	82, 83, 84
Ohio R. Crim. P. 43	55
Ohio R. Evid. 401	35
Ohio R. Evid. 402	35
Ohio R. Evid. 403	44, 50, 53
Ohio R. Evid. 702	75
Ohio R. Evid. 801	44, 52
Ohio R. Evid. 802	52, 53
Ohio R. Evid. 803	52
Ohio R. Evid. 804	52

OTHER AUTHORITIES

ABA Guidelines for the Appointment of Defense Counsel in Death Penalty Cases	65, 67
Cho, Capital Confusion: The Effect of Jury Instructions on the Decision To Impose Death, 85 J. Crim. L. & Criminology 532 (1994).....	89
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.....	93, 95
International Convention on the Elimination of All Forms of Racial Discrimination (1994).....	93, 94, 95
International Covenant on Civil and Political Rights (1992)	passim
National Research Council (U.S.), Strengthening Forensic Science in the United States: A Path Forward, pp. 163- 167 (2009)	75
Organization of American States.....	93, 98
Restatement (Second) of Foreign Relations Law of the United States, Sec. 154(1) (1965)	96
United Nations Charter	93, 98
Universal Declaration of Human Rights.....	97
Vienna Convention on the Law of Treaties.....	96
Wright, 2 Federal Practice and Procedure (1969)	59

STATEMENT OF THE CASE

The State alleged that Appellant Richard Beasley murdered Ralph Geiger, David Pauley, and Timothy Kerns in order to take their possessions or their identity. The State also alleged that Beasley attempted to murder Scott Davis. Beasley was charged with twenty seven different counts in his indictment. Nine counts were alleged violations of R.C. § 2903.01 (aggravated murder), four counts of alleged violations of R.C. § 2911.02 (aggravated robbery), four counts of alleged violation of R.C. § 2905.01(A)(2) (kidnapping), four counts of alleged violation of R.C. § 2923.13(A)(1), (2) (possessing weapons under disability), two counts of alleged violation of R.C. § 2913.02(A)(1) (grand theft), two counts of alleged violation of R.C. § 2913.02(A)(1) (petty theft), one count of alleged violation of R.C. § 2913.49(B)(1) (identity fraud), and one count of alleged violation of R.C. § 2903.02(A) (attempted murder). All nine aggravated murder charges included specifications for killing or attempting to kill two or more people, R.C. § 2929.04(5), that the aggravated murder occurred during an aggravated robbery, R.C. § 2929.04(A)(7), that the aggravated murder occurred during a kidnapping, R.C. § 2929.04(A)(7), and that the aggravated murder was committed while the offender was under detention or at large, R.C. § 2929.04(4).

On January 15, 2012, Beasley entered a not guilty plea to each count and specification, and was held without bond. On February 8, 2012, Beasley waived his speedy trial rights. A little over four months before his capital trial, Beasley hired private counsel Jim Burdon and Larry Whitney to replace his court-appointed counsel, Brian Pierce and Rhonda Kotnik. Attorneys Burdon and Whitney made their first appearance at a status conference on September 26, 2012, and Beasley's trial was scheduled for January 7, 2013. Attorneys Burdon and Whitney eventually had to request that the trial date be pushed back to February 19, 2013. Beasley's jury

trial started on February 25, 2013 and ended on March 11, 2013. On March 12, 2013 the jury returned with the verdict that Beasley was guilty of every count and every specification in his indictment, except count twenty-five which was previously dismissed by the trial court. Tr. 3476. On March 20, 2013 the trial court held the mitigation hearing. On the same day the jury returned a death sentence for the aggravated murders of Ralph Geiger, David Pauley, and Timothy Kerns. Mit. Tr. 232-3. On April 4, 2013, the trial court accepted the jury recommendation and sentenced Beasley to death. Sentencing Tr. 7-8.

STATEMENT OF FACTS

1. Introduction

Beasley and co-defendant Brogan Rafferty were accused of luring individuals to a farm in southern Ohio through Craigslist and then murdering them, burying them, and taking the individual's belongings. Rafferty's trial was completed prior to Beasley's, with the same trial court judge presiding over both trials.

No physical evidence links Beasley to the murders. The only weapon (.22 caliber handgun) that was uncovered and determined to be used in this case was found in the possession of Brogan Rafferty. Beasley's fingerprints and DNA were not found on the gun. The only survivor (Scott Davis) could not identify Beasley as the person who shot him right after the incident. Tr. 1493. Scott Davis did, however, could identify Brogan Rafferty. Tr. 2352. Beasley also could not be directly linked to the calls made to the Craigslist Ad responders. His trial attorneys also failed to investigate into the background of the person who Beasley believed was responsible for these murders, Jerry Hood, Jr.

2. Pretrial Publicity

The pre-trial publicity in this case was overwhelming, not only because of the media coverage of Beasley's own case, but largely because co-defendant Brogan Rafferty's case was already completed and widely reported upon by the time Beasley went to trial. Information concerning Beasley's alleged involvement in this case was often disclosed during Rafferty's trial and reported on by the media.

Summit County, Ohio became "so saturated with the facts underlying this case that it is impossible for [Beasley] to receive a fair trial before a jury composed of impartial persons who learn of the case only through the evidence properly admitted through trial." (Motion #32, Change of Venue). As a result, defense counsel moved the trial court pursuant to Ohio R. Crim. P. 18(B) for a change of venue based upon the pervasive maelstrom of pretrial publicity. (Motion #32, Change of Venue). The State responded that any potential impact of pretrial publicity on Beasley's right to a fair trial could be cured during the voir dire process. (Response # 32, Change of Venue). The trial court held the motion in abeyance until voir dire, then ultimately impaneled a Summit County jury. (Motions hearing, 11/09/2012, Tr. 20).

3. Beasley's Trial

Beasley's jury trial started on February 25, 2013 and ended on March 11, 2013. Jeffrey Jones, a parole officer for the Adult Parole Authority, testified that he was given a fugitive case for Beasley. Tr. 1571. The report stated that Beasley's violation of parole was in January 2011. Tr. at 1584. Beasley testified that he was aware of the parole violation and it made him want to change his identity to avoid going back to prison. Tr. 2895. Beasley asked Ralph Geiger to help him change his identity and Ralph gave him a driver's license, a social security card, and some

medical documents. Tr. 2987, 2899. Beasley stated that he used Geiger's medical documents to visit Akron Community Health Services in January and September of 2011.

The State attempted to show that Beasley actually murdered Ralph Geiger for his identification. The State called Summer Rowley, who used to work for Geiger's cleaning business and was very close to him. Tr. 1318. She testified that Geiger's business collapsed and he was forced to live in a homeless shelter. Tr. 1323. In the summer of 2011, Geiger told her that he was hired to work on a farm in southern Ohio. Tr. 1326. Dwight Johnson, a social worker at Geiger's homeless shelter, confirmed Rowley's testimony, stating that Geiger also told him that he had a job in southern Ohio. Tr. 1340.

The State then called Karen McGilton, the general manager of the Best Western in Caldwell, Ohio. Tr. 1345. She testified that Ralph Geiger checked into the hotel on August 8, 2011. Tr. 1349. She claimed that three adults were checked in at that time. Tr. 1349. However, McGilton admitted that she was not at the hotel when Geiger checked in that night, so she did not know how many people actually stayed in the room. Tr. 1354-55.

The State called Dr. Michelle Moreno, a physician at Akron Community Health Services. Tr. 1366. She testified she treated a man named Ralph Geiger two times, once in January and once in September 2011. Tr. 1370, 1385. In September, Geiger told her that he was in an accident with a dump truck and needed medication for his pain. Tr. 1373. Dr. Moreno stated on that visit his hair was very dark, like it had been dyed. Tr. 1372. Dr. Moreno testified that a patient's picture was usually taken at the first clinic visit. Tr. 1387. The State attempted to use this information to show that the real Ralph Geiger was the one who visited in January, prior to Beasley allegedly killing him. However, Dr. Moreno was unsure that the patient's photograph was taken on the first visit this case. Tr. 1387.

Alex Hartke, an employee at Waltco Lift Corporation, testified that a man named Ralph Geiger started there in September 2011, and worked there for a month and a half. Tr. 1390, 1391, 1393. Hartke identified Beasley as the person he knew as Ralph Geiger.

The State called Bureau of Criminal Identification and Investigation (BCI) agents Chuck Thomas and Mark Kollar to testify concerning the use of cell phones in this case. Tr. 2549, 2691. The State used this testimony in an attempt to show that Beasley used a cell phone to contact the victims in this case. Thomas subpoenaed the phone records of Ralph Geiger, David Pauley, and Timothy Kerns. Tr. 2556. Both Thomas and Kollar testified extensively about cell phones that were used to contact the victims in this case, as well as Don Walters, Joe Bais, and Smitty's Gun Shop. Tr. 2549-2611, 2691-2755. However, none of the calls could be traced back to a phone owned by Beasley. The phones taken from Beasley when he was arrested and the phones taken from his room after he was arrested had no connections with the victims in this case. Tr. 2750. The phones used to contact these individuals were not used once Rafferty had been arrested. Tr. 2750.

Stephen Hannum, Noble County sheriff, testified that on November 6, 2011 he got a call around 7:00 p.m. that someone named Scott Davis had been shot. Tr. 1531. Davis described the two people involved in the shooting, and Hannum believed that the descriptions matched Jerry Hood and his son, Jerry Hood, Jr. Tr. 1539. Hannum believed that the shooting resulted from a drug deal that had gone wrong, as the Hoods were involved in drug dealing. Tr. 1551. Hannum talked to Hood's wife, who told him that Hood had recently been in an accident and was in the hospital. Tr. 1544-45. Hannum called Hood's son, Jerry Hood, Jr. and asked him if he still had a beard, in an attempt to see if he matched the descriptions given by Scott Davis. Tr. 1544-45.

Hood, Jr. stated that he did in fact have a beard. Tr. 1544-45. However, Hannum never went to see Hood, Jr. to verify this information.

Beasley testified that Hood, Jr. collaborated with him on posting the Craigslist ads. Tr. 2916. Beasley stated that Hood, Jr. did most of the computer work, and Beasley only interviewed the applicants for the position. Tr. 2916. Hood, Jr. later denied this and testified that he, Hood, Jr., was very computer illiterate and did not even know how to send an email. Tr. 3101.

Jerry Shockling was staying at his mother's house in Caldwell, Ohio on November 6, 2011, when Scott Davis appeared at the front door. Tr. 1423-25. Shockling called 911 after seeing Davis' injury, however Davis told Shockling not to ask for an ambulance and that friends would pick him up. Tr. 1438.

Scott Davis claimed that he met Beasley and Rafferty at Shoney's restaurant for breakfast. Tr. 1463. He also claimed they drove him to a wooded area, where Beasley shot him at close range. Tr. 1477. Despite sitting across from Beasley while they ate breakfast, riding in the car with Beasley, and allegedly being shot at close range by Beasley, Davis could not identify Beasley out of a line-up. Tr. 1493. Davis did identify Brogan Rafferty. Tr. 2352. Davis later made a claim during the trial that he could identify Beasley by a tattoo on Beasley's arm. Tr. 1470. However, Davis during the investigation never told any sheriff's department agent, FBI agent, or BCI agent about recognizing the tattoo. Tr. at 1494. Also, the photographs from Shoney's show that Beasley was wearing a long sleeved shirt that would have covered the tattoo. Tr. at 1505. The photographs also do not show Beasley pulling his sleeve up to show Davis his tattoo, as Davis claimed at trial. Tr. 1506. Davis refused to talk to the FBI when he was in the

hospital. Tr. 1524. Davis also did not tell Noble County Sheriff, Stephen Hannum, that he brought a gun with him when he traveled from South Carolina to Caldwell, Ohio. Tr. 1557.

Beasley claimed that Davis was the one with the gun and Davis shot at Beasley and missed, and that Davis was later was shot while Davis and Beasley struggled over the gun. Tr. 2968. Beasley believed that Davis was sent to shoot him because Beasley was an informant on motorcycle gangs. Tr. 2928. Keith Meadows, a detective in the gang unit for the Akron police, confirmed Beasley's claim that he was a confidential informant on the Brother's Motorcycle club, and the North Coast motorcycle gang. Tr. 3039. Beasley had told Meadows that if the motorcycle gangs found out he was an informant that he would in trouble. Tr. at 3050. Beasley also told Meadows on January 28, 2011 that he believed that information accusing Beasley of being an informant had been leaked to the gangs. Tr. 3054.

Federal Bureau of Investigations special agent Corey Collins investigated two ads that were placed on Craigslist. Tr. 1611. The IP address came back to a Joseph Bais, who lived in Akron, Ohio. Tr. 1626. Bais claimed that he did not place the Craigslist ads, but that someone (Beasley) who was living with him at the time must have placed the ads. Tr. 1657. Collins eliminated Bais as the person placing the Craigslist ads, based on other posts of the IP address inquiring about a room to rent. Tr. 1663. However, Collins could not eliminate Bais as the responder to emails from applicants for the job listed at Craigslist. Tr. 1667.

Debra Bruce, David Pauley's sister, testified that he had told her in October 2011 that he found a job offer through Craigslist to work on a farm in southern Ohio. Tr. 1730. Pauley told her that he put all of his things in a U-Haul vehicle and was driving from Norfolk, Virginia to Ohio. Tr. 1732-33. Pauley called her from Parkersburg, West Virginia and told he was meeting his boss the next day and was going to the farm. Tr. 1734-345. Pauley told her that he had

Christmas lights, a binder of NASCAR items, books on trains, a binder with old photographs, along with other miscellaneous items in his U-Haul vehicle. Tr. 1745-51.

Don Walters testified that he met Beasley, who went by the nickname Dutch, in August or July 2011. Tr. 1829. Walters claimed to have worked on a couple of trucks for Beasley. Tr. 1832, 1836. Walters testified that Beasley and Rafferty came to his home with a U-Haul full of stuff and unloaded the stuff into his garage. Tr. 1847. Walters claimed that Beasley and Rafferty gave him some of the things that were in the U-Haul, including Christmas decorations and NASCAR memorabilia. Tr. 1849. However, Walters was found by law enforcement with more of the property in his possession than either Beasley or Rafferty had. Walters was even wearing David Pauley's pants when the FBI showed up at his house. Tr. 1911. Walters also lied to the FBI agent to protect himself. Tr. 1905.

Cara Conley, a U-Haul employee in Akron, Ohio, testified that a U-Haul came in on October, 24, 2011 which was rented in Virginia and was supposed to be dropped off in Marietta, Ohio. Tr. 1953-54. She stated that two men returned the U-Haul, and she identified Beasley as one of the men. Tr. 1956-57. However, she did not know which man was returning the U-Haul. Tr. 1962. She also stated that Richard Pauley had rented the U-Haul. Tr. 1958. Beasley testified that Don Walters was the one who was returning the U-Haul, and that Beasley only went with Walters to have lunch with him. Tr. 2939. Beasley also testified that Walters gave him items from the U-Haul because Walters owed him money. Tr. 2940.

Tina Kern testified that her ex-husband, Timothy Kern, found a job on Craigslist for a job on a farm in southern Ohio. Tr. 1696. Tim's son, Nicholas, took him to the interview for the job. Tr. 1970. Nicholas Kern testified that the interview was at the Waffle house. Tr. 1986-87.

Tim told him the job was in Cambridge, Ohio. Tr. 1991. Tim's car was later located at Italo's Pizza Shop. Tr. 1977.

Steven Burke from the Ohio Bureau of Criminal Investigation was asked to locate the outside shooting scene of Scott Davis. Tr. 1757. During the search Burke found a hat that Davis claimed was his. Tr. 1759. Burke also found three gravesites, one was empty and the other two contained the dead bodies of David Pauley and Ralph Geiger. Tr. 1770-1801. Greg Staley, Jr., a Ohio Bureau of Criminal Investigation agent, was involved in an investigation in November 2011 at Rolling Acres Mall. Tr. 2032. Staley helped searched a wooded area by the mall and found a gravesite which contained the body of Timothy Kern. Tr. 2051.

FBI Special Agent Jack Vickery located Kern's car at Italo's Pizza Shop and reviewed Italo's video of the parking lot. Tr. 2359. The video showed a white passenger car pulling in next to Kern's car, and that when two men got out of the car, one was standing by Kern's car and the other walked into Italo's. Tr. 2362. Vickery also reviewed the video from the Waffle House where Kern had interviewed with his new employer. Tr. 2365. The video showed a white heavy set man carrying a black case entering the Waffle House and taking off his leather coat. Tr. 2369. A man meeting the description of Kern later walked in. Tr. 2369.

Penny Kaufman was living at 456 Gridley Avenue in Akron, Ohio when she rented a room to Beasley on November 1, 2014. Tr. 2113. Beasley was going by the name Ralph Geiger and said he was on worker's compensation and that he bought storage units and sold the property that was in the units. Tr. 2117. Beasley told her that he was going to southern Ohio to buy a storage unit that had a Harley Davidson motorcycle, a flat screen television and other items, and he asked her if he could store the items in her basement. Tr. 2121. Beasley returned from southern Ohio and told Kaufman that someone had pulled a gun on him, and that he struggled

with the man over the gun and the man was shot in the arm. Tr. 2124. Later, the FBI came to her house when she was at work, in an effort to search Beasley's room. Tr. 2126.

FBI Special Agent Michael Gerfin assisted in the execution of the search warrant at 456 Gridley Avenue. Tr. 2139. Gerfin searched Beasley's room and discovered NASCAR trading cards, an ammo box with shotgun shells, a large cooler with a train set inside. Tr. 2142, 2143, 2145. The items belonged to David Pauley. Gerfin also found a letter from PNC Bank, documents from St. Thomas Hospital, and a pill bottle, all with Ralph Geiger's name on them. Tr. 2149,50. Gerfin took Beasley's jean jacket and red ball cap. Tr. 2154. Gerfin did admit that anyone in the house had access to Beasley's room or that the items he found were not hidden, but were in plain view. Tr. 2157.

FBI Special Agent Bonnie Hartman assisted in the execution of the search warrant of Brogan Rafferty's house. Tr. 2180. She searched Rafferty's bedroom and found a briefcase with a hunting knife in it, a sawed off shotgun, a .22 caliber handgun, a box of .22 caliber ammunition, shot gun shells, and a gun cleaning kit. Tr. 2186-87.

FBI Special Agent Stacy Lough also assisted in the executing the search warrant on Brogan Rafferty's house. Tr. 2203. She found an ammo can that was in the closet of the living room. Tr. 2206. The ammo can belonged to one of the victims in the case. Tr. 2206. She confiscated Rafferty's computer and printed out a log from Rafferty's fax machine. Tr. 2209. Jonathan Gardner, a forensic scientist for the Ohio Bureau of Criminal Investigation who was trained as a firearm examiner, examined the Iver Johnson .22 caliber gun recovered in Rafferty's bedroom. Tr. 2214, 2233-34. Gardner testified that the fired bullets recovered from the head of Timothy Kern were consistent with test bullets fired from the .22 caliber gun found in Rafferty's possession. The test bullets and the bullets recovered from Kern's head could have been fired

from the same gun. Tr. 2242. However, because the bullets were fairly damaged and because lead bullets have poor markings, Gardner could not be conclusive. Tr. 2243. The Iver Johnson .22 caliber gun that was found in Rafferty's room was the only gun recovered by the police that could have been used in the shooting. Tr. 2272. Also fourteen .22 caliber bullets were missing out of the box of ammunition in Rafferty's room. Tr. 2257.

The State called Guy Smith, whose father owned Smitty's Gun Shop. Tr. 2400. Smith testified that a shop log showed that a .22 caliber Iver Johnson gun was checked in on November 8, 2011. Tr. 2405-06. The name on the tag stated that the owner of the gun was Ralph Geiger and the gun was retrieved on November 11, 2011. Tr. 2406-07. Smith admitted that he was not there when the gun was dropped off or when it was picked up. Tr. 2410-11. Smith also did not know who the owner of the gun was, just the name of the person who dropped it off. Tr. 2410-11.

Linda Eveleth, a DNA analyst with the Bureau of Criminal Identification, testified that Brogan Rafferty's DNA was found on the .22 caliber pistol that was allegedly used in this case. Tr. 2654. Beasley was excluded from the DNA that was on the gun. Tr. 2675. She also testified that DNA samples from Don Walter or Joe Bais were not given to her to analyze. Tr. 2670.

Joyce Grebelsky testified that she had known Beasley and Brogan Rafferty for a few years. Tr. 2297. At some point, Beasley asked her to call him Ralph Geiger because he wanted to be a different person and did not want to go back to jail. Tr. 2301. Beasley was driving a white truck that he painted black, and wanted her to put the title of the truck in her name. Tr. 2304-05. Beasley told her that he was in southern Ohio and two people tried to rob him at gun point, and he needed to go back and get his patent leather coat. Tr. 2307. After Beasley was arrested, she received a letter from the Summit County Jail. Tr. 2313. The letter stated that the

writer's life was in her hands, and asked her to go to the apartment at 456 Gridley Avenue and get two laptops that were buried under leaves in the backyard and destroy them. Tr. 2316. The letter also told her to get the truck from Reeves and scrap it. Tr. 2316. Grebelsky turned the letter over to the FBI. Tr. at 2319.

FBI Special Agent Jack Vickery was contacted about the letter Joyce Grebelsky received and went to the Gridley Avenue apartment and searched the back yard. Tr. 2369, 2373. Vickery recovered a black wallet, two laptop computers, and a computer case. The wallet had Ralph Geiger's driver's license, social security card, and other personal items. Tr. 2773-74.

The State called retired police officer William Bennett, who claimed he was a handwriting analysis expert. Tr. 3112. Bennett was asked to compare a letter Beasley wrote to his daughter to the writing on a gun repair tag and the letter sent to Joyce Grebelsky. Tr. at 3119. Bennett claimed that the handwritings were the same, and that it was Beasley who wrote on the gun tag and wrote the letter to Grebelsky. Tr. 3138-39. However, Bennett stated that getting a writing exemplar from Beasley was the preferred method for comparing writing, yet admitted he did not get one. Tr. 3146. Bennett also stated that he could not compare cursive and printed writing, and admitted that the letter to Beasley's daughter was in cursive, but the letter to Grebelsky and the tag from the gun shop were printed. Tr. 3151-52. Also, only one word was similar in the letters (please), and four of the letters in the word were written differently. Tr. 3161.

In the middle of Beasley's trial, Juror No. 5 notified the trial court that he was friends with State's witness Todd Wickerham. Tr. 2064. This notification was made prior to witness Wickerham's testimony. The trial court asked Juror No. 5 if his relationship with Wickerham would cause him to give Wickerham's testimony more credit because they were friends. Tr.

2067-68. Juror No. 5 answered that he did not know. Tr. 2068. Inexplicably, neither the trial court nor Beasley's trial counsel asked Juror No. 5 any follow-up questions to determine whether he would in fact be unbiased in his evaluation of Wickerham's testimony, and Juror No. 5 was allowed to assess Wickerham's testimony despite the fact that the juror himself had pointed out the possibility of a biased juror to the trial court and counsel.

State's witness Todd Wickerham was the supervisor for the Akron resident agency of the FBI. He testified that Beasley had warrants for his arrest, then advised the jury that he had a lot of background and history on Beasley and his previous criminal activity. Tr. 2767. The defense immediately objected, since the trial court had previously ruled that Beasley prior record was barred from being addressed by the State. Tr. 2767. The trial court sustained the objection, but stated explicitly that it was not going so far as to rule a mistrial had occurred. Tr. 2768. The trial court also told the State to scold Wickerham for what he had done. Tr. 2768. Despite the fact the State had just violated the trial court's Order by introducing evidence to the jury that the State was directed should be withheld, the State asked if it could scold Wickerham outside the view of the jury. Tr. 2768. The State's reasoning was that it did not want to bring too much attention to the jury of the State's misconduct. Tr. 2768. Wickerham then testified that he was one of the officers at the scene when Beasley was arrested and assisted in searching Beasley's apartment. Tr. 2777.

On March 12, 2013 the jury returned with the verdict that Beasley was guilty of every count and every specification in his indictment, except count twenty-five, which previously had been dismissed by the trial court. Tr. 3476.

4. Mitigation Hearing

On March 20, 2013 the trial court held the mitigation hearing. Only three witnesses testified for the defense in mitigation. William Jeffries testified the he knew Beasley through church. Mit. tr. 60. Jeffries was a member of the Faith Bible Fellowship in Tallmadge, Ohio for three to four years, and he had been visiting Beasley in jail once a week. Tr. 60-61.

Beasley's mother, Carol Beasley, testified that she became pregnant with Beasley when she was sixteen. Mit. tr. 67. She could not marry Beasley's biological father, Harold Demmel, because he was already married. Mit. tr. 67. Carol moved to Washington D.C. to stay at a Florence Crittenton home for unwed mothers. Mit. tr. 67. Carol eventually married Harold after he got divorced. She was 17, and Beasley was born six to eight weeks later.

Harold was not physically abusive to Carol or to Beasley but he neglected them; he was never around, and spent all of the money on himself. Mit. tr. 68. Carol was forced to raise Beasley on only the money she was making. Mit. tr. 68. She had to chase Harold down to get money for her and Beasley. Mit. tr. 68-69. Harold and Carol divorced when Beasley was a year-and-a-half years old. Mit. tr. 69.

Carol met her current husband, James Beasley, when Beasley was two. Mit. tr. 70. James liked to drink and gamble, but he was a mean drunk and very jealous. Mit. tr. 70. James adopted Beasley solely so his biological father would not come around. Mit. tr. 72. James was abusive to Carol; he slapped her, pushed her, and broke all the dishes and windows in the house. Mit. tr. 71. Beasley witnessed all of this abuse. Mit. tr. 72. Beasley also incurred James' constant abuse, including James' beating him with extension cords for doing anything wrong. Mit. tr. 73. Carol and her children had to lie about a lot of things so no one knew that James was abusing them. Mit. tr. 74. She would put music on in their rooms so they could not hear James

screaming and yelling at her. Mit. tr. 74. As Beasley got older, he would try to step in between James and Carol to stop the abuse, but Beasley would then just be pushed around, shoved, and belittled. Mit. tr. 74.

When Beasley was in grade school he had to be placed on medication because he was hyperactive. Mit. tr. 79. During his grade school years, an incident occurred with some neighborhood boys in which they took Beasley down into a storm drain. Mit. tr. 79. Beasley told Carol that they made him take his pants down. Mit. tr. 79. Also, Carol would not let Beasley have any of his friends come to their house, because she never knew when James would go into a rampage. Mit. tr. 79.

Carol stated that the only refuge was visiting his grandparents in West Virginia for two weeks in the summer. Mit. tr. 85. However, Richard would then come home to face abuse by James. Mit. tr. 89. Carol concluded her testimony by stating that she still supported Beasley, and planned on visiting him in prison. Mit. tr. 82.

Dr. John Fabian also testified at Beasley's mitigation hearing. Dr. Fabian was contacted by Beasley's trial counsel to evaluate Beasley for potential mitigation factors. Mit. tr. 105. Dr. Fabian also performed a forensic psychological and forensic neuropsychological evaluation on Beasley. Mit. tr. 108. Fabian also examined Beasley's social history that was prepared by mitigation specialist Mary McDonald, and Dr. Fabian and met with Beasley ten times. Mit. tr. 108.

Dr. Fabian stated that because Beasley was exposed to abuse early in his life, he was prone to developmental problems, psychopathology, mental health issues, and criminality. Mit. tr. 119. Beasley had a history of attention deficit hyperactivity disorder, which is a neurodevelopmental disorder where one's brain circuitry is off. Mit. tr. 123. Beasley also had a

history of depression, and had been on antidepressants. Mit. tr. 124. Dr. Fabian stated that Beasley had a cognitive disorder and he had impairments in processing speed and some non-verbal problem solving skills. Mit. tr. 141. Dr. Fabian believed that this condition was related to Beasley's ADHD, and his history of transient ischemic attacks (mini-strokes) which disrupt blood flow to the brain. Mit. tr. 141.

Dr. Fabian also diagnosed Beasley as having a narcissistic personality disorder, and an antisocial personality disorder. Mit. tr. 131. He testified that Beasley was therefore at risk for inappropriate behaviors, dysfunctional relationships, criminality, substance abuse, and depression. Mit. tr. 134. However, this testimony allowed the State to present to the jury that Beasley's narcissistic traits included: a grandiose sense of self-importance, that he would exaggerate achievement and talents, would expect to be recognized as superior, would believe that he is special or unique, would require excessive admiration, would have a sense of entitlement, would be exploitive, and would lack empathy. Mit. tr. 155. It also allowed the State to present to the jury that Beasley's anti-social traits included: a failure to conform to social norms, a lack of respect for lawful behavior, committing repeated acts that are grounds for arrest, conning others for personal profit, and exhibiting lack of remorse. Mit. tr. 155.

On March 20, 2013 the jury returned a death sentence against Beasley. Mit. tr. 232-233. On April 4, 2013, the trial court accepted the jury recommendation and sentenced Beasley to death. Sentencing Tr. 7-8.

PROPOSITION OF LAW NO. 1

A trial court must make specific findings at the time of sentencing to impose consecutive sentences and court costs.

This Court has concluded that for a trial court to impose consecutive sentences it must make the required findings at the sentencing hearing. This Court has further concluded that for a trial court to impose court costs, it must so advise the defendant at the time of sentencing. The trial court did neither in this case.

A. The Trial Court Improperly Imposed Consecutive Sentences.

The general rule is that sentences must be served concurrently with any other term or sentence of imprisonment. R.C. § 2929.41(A) There is an exception to the general rule when the trial court finds that specific statutory criteria are met. *State v. Bonnell*, ___ Ohio St. 3d ___, 2014 Ohio LEXIS 1934, p. **17.

For a trial court to impose consecutive sentences, it must make two findings on the record. First, it must find that consecutive sentences are necessary to protect the public from future crime or to punish the offender, *and* that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public. Second, it must find that one of the following applies: 1) the offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, while under a sanction or while under post-release control for a prior offense, 2) at least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct, or 3) the offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender. R.C. §

2929.14(C). A trial court must correctly make both findings to lawfully impose consecutive sentences. *Bonnell* at **20. Furthermore, it must make those findings at the time of sentencing. *Id.* at **22.

The trial court imposed concurrent sentences as to the counts on which it sentenced Beasley to death, but imposed consecutive sentences as to the remaining counts: “[t]he Court will run the sentences in counts one, four, and seven concurrent with one another. All other counts, including the firearm specifications, will run consecutive to one another.” 4/04/13 Tr. 23.

Because the trial court imposed consecutive sentences, it was required to make the requisite findings contained in R.C. 2929.14(C). The trial court made the following findings with respect to consecutive sentences: “the Court specifically makes the finding that as required by law that the offenses were committed either while at large or awaiting trial and that consecutive sentences are necessary to protect the public.” 4/04/13 Tr. 23. The trial court failed to make the required finding “that consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public.” R.C. 2929.14(C). The trial court made the same error that this Court found in *Bonnell* at **20, in that the trial court “never addressed the proportionality of consecutive sentences to the seriousness of Bonnell’s conduct and the danger he posed to the public . . .”¹ After finding this error in *Bonnell*, this Court remanded the case to the trial court for resentencing. *Id.* at **22. This Court should similarly order this case remanded to the trial court for resentencing.

¹ The trial court made the same error in its sentencing entry, “IT IS FURTHER ORDERED THAT Counts 10, 13, 17, 19, 20, 21, 22, and 23 are to be served consecutively with each other, and that consecutive sentences are necessary to protect the public from future crime. The Court further finds that at the time the offenses were committed, the Defendant was awaiting trial on another case.” T.d. 638, p.8.

B. The Trial Court Improperly Imposed Court Costs.

The trial court bifurcated the sentencing proceedings. It initially sentenced Beasley on the counts charging capital offenses. 04/04/11 Tr. 7-9. It subsequently sentenced Beasley on the non-capital charges. *Id.* at Tr. 21-24. The trial court did not impose court costs either time. *Id.* at Tr. 7-9, 21-24. However, the trial court did impose court costs in its sentencing entry: “Court costs incurred in this case are to be taxed to the defendant.” [T.d. , p. 8].

This Court has held that a trial court errs when it imposes court costs in the sentencing entry without having addressed the issue in open court. *State v. Joseph*, 125 Ohio St. 3d 76, 80, 926 N.E.2d 278 (2010). (“Joseph was harmed here. He was denied the opportunity to claim indigency and to seek a waiver of the payment of court costs before the trial court. He should have had that chance.”) The error is not subject to a harmless error analysis. *Id.* Accordingly, the trial court erred when it imposed court costs in its sentencing entry but failed to address the issue at the sentencing hearing.

This Court should sustain both portions of this proposition of law and remand the matter for resentencing.

PROPOSITION OF LAW NO. 2

A capital defendant's rights to due process and a fair trial by an impartial jury are violated by the trial court's denial of a motion for change of venue where there is pervasive, prejudicial pretrial publicity. U.S. Const. amends. V, VI, IX and XIV; Ohio Const. art. I §§ 5 and 16.

A. Facts.

The community of Akron, and all of Summit County's residents and Ohio's population at large, were shocked by the extended news accounts of the "Craigslist murders." Indeed, the case quickly drew national and international notoriety in the press, given the alleged use of the Craigslist website to lure the victims of the murders.

Numerous blogs, television broadcasts, radio shows, online chatrooms, and newspaper articles provided extensive coverage of Beasley's case as well as the previously concluded Brogan Rafferty trial proceedings, which bandied Beasley's name about the media as the alleged co-defendant to Rafferty. Summit County, Ohio became "so saturated with the facts underlying this case that it [was] impossible for [Beasley] to receive a fair trial before a jury composed of impartial persons who [would] learn of the case only through the evidence properly admitted through trial." (Motion #32, Change of Venue). As a result, defense counsel moved the trial court pursuant to Ohio Crim. R. 18(B) for a change of venue based upon the pervasive maelstrom of pretrial publicity. *Id.* The State responded that any potential impact of pretrial publicity on Beasley's right to a fair trial could be cured during the voir dire process. (Response # 32, Change of Venue). The trial court held the motion in abeyance until voir dire, then ultimately impaneled a Summit County jury despite the torrent of local publicity surrounding the case. (Motions hearing, 11/09/2012, at Tr. 20).

B. Law.

Impartiality by an assigned jury is nowhere of greater importance than in a capital case, where a jury must choose between life imprisonment and death if they find the accused guilty of capital murder. *See Morgan v. Illinois*, 504 U.S. 719, 726-28 (1992) (jurors must be impartial with respect to culpability and punishment in a death penalty case). A biased juror is rendered unable to apply the facts to the law and deliberate under the constitutionally required burden of proof. *See In re Winship*, 397 U.S. 358 (1970).

In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the Supreme Court recognized that pretrial publicity may result in a denial of a defendant's right to due process of law. The Court held that where: "[T]here is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." *Id.* at 363. This Court has adopted the *Sheppard* standard and ruled that a showing of a "mere likelihood" of prejudice will support a venue change. *State v. Fairbanks*, 32 Ohio St. 2d 34, 37, 289 N.E.2d 352, 355 (1972). Although this Court in *Fairbanks* pointed out that news reports that are factual and without distortion, or which are non-inflammatory in character, do not establish the impossibility of a fair and impartial trial where the jurors are uninformed or undecided, this Court mandated that the rigid *Sheppard* standard of mere likelihood be applied. *Id.*

When a county has been subjected to such extensive publicity about the case that a likelihood of prejudice is evident, the trial court should transfer the case to another county. *See State, ex re., Dayton Newspapers, Inc. v. Phillips*, 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976). The trial judge has a "duty to protect [the accused] from [this type of] inherently prejudicial publicity . . ." that renders the jury unfair in its deliberations. *Sheppard*, 384 U.S. at 363.

Whether it is or is not likely that the Defendant would be convicted in another venue is irrelevant. The right to a fair and impartial jury is fundamental. The denial of that right is a structural error that is never harmless. *Arizona v. Fulminante*, 499 U.S. 279, 290 (1991).

C. Argument.

Beasley was denied a fair trial due to the extensive pretrial publicity surrounding the “Craigslit murders.” With the emergence and pervasive employment of social media, Beasley’s pretrial exposure became far more pervasive and prejudicial than might first appear. Beasley and co-defendant Rafferty became the subject of many daily blogs, online chat rooms, links and twitter feeds, above and beyond what more traditional media dispensed through the numerous local radio shows, television broadcasts and newspaper articles.

Under these circumstances, Beasley was denied a fair trial. Addressing a criminal defendant’s Constitutional right to be tried by a fair and impartial jury, the United States Court of Appeals for the Sixth Circuit emphasized:

In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, “indifferent” jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. “A fair trial in a fair tribunal is a basic requirement of due process.” *In re Murchison*, 349 U.S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty. In the language of Lord Coke, a juror must be as “indifferent as he stands unsworn.” His verdict must be based upon the evidence developed at trial. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies *** “The theory of the law is that a juror who has formed an opinion cannot be impartial.” *Reynolds v. United States*, 98 U.S. 145, 155.

Goins v. McKeen, 605 F.2d 947, 951 (6th Cir. 1979) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)).

In *Irvin*, the Supreme Court held that the Defendant’s right to an impartial jury was denied by a presumption of prejudice arising from extensive pretrial publicity. The Court found

a presumption of prejudice despite the sincerity of the jurors who stated that they could be “fair and impartial” to the defendant. *Id.* at 728. In *Irvin*, the viewpoint of the community was revealed by the media’s pretrial coverage, which, as here, painted the criminal defendant as a notoriously bad person. The Supreme Court found that the “force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people of Gibson County.” *Id.* at 726. *See also Rideau v. Louisiana*, 373 U.S. 723-27 (1963) (defendant denied due process without change of venue after confession was televised).

Even though many jurors indicated that they had read, heard or discussed Beasley’s case, the trial court maintained its position that Beasley could get a fair trial in Summit County because the jurors stated that they could nonetheless be fair and impartial. Questions requiring jurors’ subjective evaluation of their ability to be fair and impartial, however, have consistently been held to be an inadequate basis upon which to assess jurors’ qualification. *Murphy v. Florida*, 421 U.S. 794, 800 (1975); *Irvin*, 366 U.S. at 728. “[W]hether a juror can render a verdict solely on evidence adduced in the courtroom should not be adjudged on that jurors’ own assessment of self-righteousness *without something more.*” *Silverthorne v. United States*, 400 F.2d 627, 639 (9th Cir. 1968) (emphasis in original).

Similarly, in *United States v. Dellinger*, 472 F.2d 340, 367 (7th Cir. 1972), the court stated:

The government’s position . . . rest[s] upon an assumption that a general question to the group whether there is any reason they could not be fair and impartial can be relief on to produce a disclosure of any disqualifying state of mind. We do not believe that a prospective juror is so alert to his own prejudices.

As noted by the court in *Forsythe v. State*, 12 Ohio Misc. 99, 106, 230 N.E.2d 681, 686 (1967), an assumption by the trial judge that a jury could disregard pretrial publicity after being

instructed to do so, was a “triumph of faith over experience.” In *United States v. Aaron Burr*, 25

F. Case 30, Case No. 14 (1807), (1789-1880), Chief Justice Marshall stated:

Why do personal prejudices constitute a just cause of challenge? Solely because the individual who is under their influence is presumed to have a bias on his mind which will prevent an impartial decision on the case according to the testimony. He made it clear that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him *** he will listen with more favor to that testimony which confirms, than to that which would change his opinion.

Beasley was denied a fair trial because of the extended publicity surrounding the “Craigslist murders.” The trial court’s reliance on the jurors’ own self-assessments as to their individual abilities to be fair and impartial ignored the reality that these jurors could not set aside their opinions already formed from exposure to numerous and detailed media accounts of the Beasley case, including extensive reports leading up to and throughout the Brogan Rafferty trial, which concluded in Summit County (and was heard before the same presiding judge) before Beasley’s trial had begun.

As in *Irvin* and *Sheppard*, prejudice from the weight of the adverse publicity must be presumed in this case. Summit County was saturated with stories concerning every aspect of the Beasley case from the times of the arrests of Beasley and Rafferty and, well before Beasley ever went to trial, during the sensational coverage of the Rafferty trial (in which the State and the defense both bandied about allegations as to Beasley). Further, social media carried open and continuous discussions of the case by bloggers and other contributors’ various websites. Beasley’s constitutional guarantees under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 5 and 16 of the Ohio Constitution were violated.

D. Conclusion.

Beasley's case became so infected by pretrial publicity that he was unable to obtain a fair trial in Summit County. As a result, Beasley's constitutional guarantees under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 5, 16 of the Ohio Constitution were violated. Therefore, his convictions and sentences must be vacated and this case must be remanded for a new trial.

PROPOSITION OF LAW NO. 3

A capital defendant is denied his substantive and procedural due process rights to a fair trial when a prosecutor commits acts of misconduct during the opening statement and in allowing a biased juror to remain seated during his capital trial. The resulting sentence is arbitrary and unreliable. U.S. Const. amends. VI, VIII, XIV; Ohio Const. art. I, §§ 9, 16, 20.

The prosecutor has a unique role at a criminal trial. The prosecutor must ensure guilt is punished, but, just as importantly, also must ensure that justice is done. *State v. Lott*, 51 Ohio St. 3d 160, 165, 555 N.E.2d 293, 300 (1990) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)). Thus, “he may strike hard blows, [but] he is not at liberty to strike foul ones.” *Id.* It is incumbent upon the prosecutor to eschew foul blows that destroy a defendant’s right to a fair trial.

The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether they prejudicially affected the accused’s substantial rights. *State v. Smith*, 14 Ohio St. 3d 13, 14, 470 N.E.2d 883 (1984). The touchstone of the analysis “is the fairness of the trial, not the culpability of the prosecutor.” *Smith v. Phillips*, 455 U. S. 209, 219 (1982). Further, claims of prosecutorial misconduct are considered for their cumulative effect on the defendant’s trial. *See Darden v. Wainwright*, 477 U.S. 168, 181 (1986). *See also Berger*, 295 U.S. at 89 (“we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential.”) This Court has recognized the necessity of considering the cumulative effect of prosecutorial misconduct. *State v. Fears*, 86 Ohio St. 3d 329, 715 N.E.2d 136, 158 (1999) (Moyer, C.J., dissenting) (citing *State v. Keenan*, 66 Ohio St. 3d 402, 613 N.E.2d 203, 209-10 (1993); *State v. Liberatore*, 69 Ohio St. 2d 583, 433 N.E.2d 561, 566-67 (1982)).

A. Prosecutorial Misconduct where the State, in Opening Argument, made Biblical References describing Beasley as the “Sheep in Wolf’s Clothing”

“Beware of false prophets which come to you in sheep’s clothing, but inwardly they are ravening wolves.” King James Bible, “Authorized Version,” Cambridge Edition

Thus states the Bible. And thus also stated the State in nearly its first words to Beasley’s jury, as the prosecution deliberately and improperly sought to inflame the jury against Beasley by resorting to this Biblical reference as its opening volley to the jury.

Prosecutor Pelphry began her opening argument to Beasley’s jury with a power point visual demonstration that was accompanied by the following invocation of the Bible as she sought to characterize Beasley in a manner that would make an immediate early impression on the jury and set the stage for all else that followed:

MS. PELPHREY: So, ladies and gentlemen, in preparing this opening statement I tried my best to think of a word or phrase that best describes the defendant, Richard Beasley. And the phrase that kept echoing in my mind after reviewing everything and preparing for this case was *a wolf in sheep’s clothing*.

I wanted to be sure though before I put this in front of everybody that I truly understood what the *wolf in sheep’s clothing* means. So we probably used it at some point in our lives. So I did a little bit of research.

As it turns out, *the phrase originates from a sermon by Jesus reporting to Christians who –*

MR. BURDON: Excuse me, I hate to interrupt, but I object, your Honor.

Tr.. 1268-69 (emphasis added).

The objection then was argued to Judge Callahan at a sidebar conference as the jury sat nearby, at the onset of the trial. The ultimate result of the sidebar conference was that the objection ultimately was sustained, with the caveat that the State could continue to attack Beasley’s character during opening statement but would have to remove its visual demonstration of the “wolf in sheep’s clothing” from the jury’s further view. However, the trial court never

advised the jury that the Biblical reference relied upon as the opening salvo by the State was improper and so should not be considered by them. Instead, the Judge merely advised the jury members in vague terms that they were “instructed to disregard anything that you saw or read,” without stating what exactly it was the jury should have disregarded. Tr. 1274. The Biblical idiom carefully researched and planned thus remained as the elephant in the room, and the Prosecutor was allowed to continue with her opening statement.

The Prosecutor’s tactic thus succeeded despite the Defense objection and the trial court’s sustaining the objection. Thus, the Prosecutor admitted that she had “done a little bit of research” and determined that the phrase was of Biblical origin. Tr. 1268-69. Yet, the damage had been done. The opening “sheep in wolf’s clothing” analogy that the Prosecutor advised the jury was had derived from Biblical sources was allowed to remain forefront over the collective minds of the jury as they began considering the question of Beasley’s guilt or innocence, with no curative attempt from the trial court to undo the damage caused at the very onset of the proceedings. The direct and intended consequence of using this Biblical passage was to imbed a clear message in the minds of the jury that Beasley, according to Biblical teachings, was an evil person masquerading as a good person, thus coloring the jury’s future perceptions of Beasley, before any evidence of his guilt or innocence was ever admitted into the trial.

Courts must not allow capital trials to be infected by a prosecutor’s improper use of Biblical references to lead the jury towards a death verdict; the use of religion to steer the jury to this result violates the capital defendant’s criminal rights and constitutes fundamental error. *See Cauthern v. Colson*, 736 F.3d 465 (6th Cir. 2013) (State’s closing argument improperly invoked the Bible in an attempt to inflame the jury, writ of habeas corpus granted). *See also Farina v. Sec’y, Fla. Dep’t of Corr.*, 536 Fed Appx. 966 (11th Cir. 2013) (prosecutorial misconduct and

ineffective counsel claims resulted in reversal of capital conviction and remand for a new sentencing hearing); *Romine v. Head*, 253 F.3d 1349 (11th Cir. 2001).

The Bible and other religious documents are considered codes of law by many in the contemporary communities from which Colorado jurors are drawn. The book of Leviticus is one of the first five books of the Old Testament, which are considered the books of law, and it contains "ritual laws prescribed for the priests" and is "almost entirely legislative in character." *Holy Bible* (Papal Edition), "Introduction to the Books of the Old Testament" at xiii. Romans is contained in the New Testament and may be characterized as "a powerful exposition of the doctrine of the supremacy of Christ and of faith in him as the source of salvation." *Id.*, "Introduction to the Books of the New Testament" at xxxix. There can be little doubt that the Bible, including these two texts, is more authoritative to many typical citizens than the internet. *See Jones v. Kemp*, 706 F. Supp. 1534, 1560 (N.D. Ga. 1989)(considering jurors' consultation of a Bible and holding that "especially when, as here, such arguments come from a source which 'would likely carry weight with laymen and influence their decision,' the effect may be highly prejudicial to the defendant")(internal citations omitted).

People v. Harlan, 109 P.3d 616, 630-631 (Colo. 2005).

Here, the State itself brought the Biblical quotation to the attention of the jury, at the onset of the State's opening argument, and any jury members who may have been inclined to find the Bible more authoritative than the trial court judge would have been free to disregard her vague admonition to "disregard anything that you saw or heard," and instead to carry the Biblical passage into final deliberations.

B. Prosecutorial Misconduct in allowing Juror No. 5 to hear Evidence from an FBI Agent whom Juror No. 5 disclosed to the Court he knew personally

On February 28, 2013, the afternoon session of Beasley's trial began with Judge Callahan conferring with counsel and Juror No. 5, outside the presence of the rest of the jury and in a conference room. Juror No. 5 advised all present that he had become friends with FBI agent Todd Wickerham through the friendship of each of their daughters, and that he had just recently learned his friend Wickerham was the same person whose name had been mentioned at the trial.

Tr. 2064-2069. Todd Wickerham had not yet testified but was scheduled to be a State's witness. Tr. 2066.

Judge Callahan inquired of Juror No. 5 whether his view of Wickerham's testimony would tend to credit him as believable given their friendship, and Juror No. 5 responded: "I don't know. I can't answer that question until I hear his testimony, to tell the truth." Tr. 2068. The prosecutor represented to defense counsel and to the Judge that FBI agent Wickerham's testimony would not be subject to any credibility concerns that Juror No. 5 would have to weigh, and that FBI agent Wickerham would in fact testify to facts that were not in dispute. Tr. 2069-2070. Juror No. 5 remained on the jury, and the Beasley case proceeded. Tr. 2070.

In reality, despite the assurances that FBI agent Wickerham's credibility would not be at issue before Juror No. 5 and the rest of the jury, he testified at great length as to his personal involvement in the Beasley investigation, during the afternoon session on March 5, 2013. Tr. 2758. Despite the State's earlier position as to the friendship of Wickerham and Juror No. 5 that whatever Wickerham might testify would be non-substantive, Wickerham fully and readily agreed with the prosecutor under questioning that he was in fact "deeply involved" in the investigation. Tr. 2762. Indeed, through nearly 30 pages of court transcript, Wickerham explained to Juror No. 5 and the rest of the jury just how direct his involvement was throughout the investigation, search for, and arrest of Beasley on the capital charges. Tr. 2758-2785.

During his detailed testimony, FBI agent Wickerham, on direct examination and unprompted, blurted out to Juror No. 5 and the rest of the jury that the Akron Police Department had generated warrants for Beasley's arrest on issues unrelated to the charges at trial. Tr. 2766. Defense counsel objected and the trial court agreed that under pre-trial agreements no mention of the Akron warrants should have been made by Wickerham. Tr. 2767. The trial court announced

in response to Wickerham's pronouncement to the jury about the Akron warrants that "I'm not going to go for this and give him [Beasley] a mistrial." Tr. 2767-2768.

The trial court then then recessed the jury and advised the prosecutor to take Agent Wickerham into the hall and discuss with this State's witness that he must not mention the Akron warrants further. Tr. 2768-69. The jury then was recalled, and the examination continued, with no curative instruction or caution of any kind given to the jury as to the representation by Wickerham that the Akron Police Department had issued unrelated warrants against Beasley before he became a suspect in the crimes at issue here. TR. 2769. And no further mention was made of the fact that Juror No. 5 was allowed to listen to his friend Wickerham testify as to all of these events. The jury thus was free to credit *everything* Wickerham said as a witness, including the potential mistrial testimony (as characterized by the Judge), despite the fact that Juror No. 5 had alerted the Judge to the potential conflict, and despite the fact that the State promised that nothing Agent Wickerham would testify to would require credibility determinations by the jury. The case simply went on as if nobody noticed or cared that Juror No. 5 was correct when he identified the potential conflict, and Wickerham entered and exited the stage with no further thought of or concern for Juror No. 5's presence on the jury panel.

C. Conclusion.

A prosecutor "may strike hard blows, [but] he isn't at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). When a prosecutor strikes foul blows, the Due Process Clause provides a remedy. *See id.* The clearly established federal law for this claim is *Darden v. Wainwright*, 477 U.S. 168 (1986). To succeed on his claim of prosecutorial misconduct, Beasley must demonstrate that the "prosecutor's improper comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Parker v. Matthews*, 132 S. Ct.

2148, 2153 (2012), (quoting *Darden*, 477 U.S. at 181) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

The State committed egregious errors during Beasley's capital trial. *See State v. Thompson*, 33 Ohio St. 3d 1, 15, 514 N.E.2d 407, 420 (1987). These errors "cannot be ignored or overlooked." *Id.* at 14, 514 N.E.2d at 420. The prosecutor's misconduct, taken together with the presence of jurors biased in favor of the death penalty, and the introduction of irrelevant and inflammatory evidence in the trial phase, so infected Beasley's trial as to result in a deprivation of his right to due process. The State's misconduct deprived Beasley of a reliable sentence as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution, as well as Article I, §§ 9, 16 and 20 of the Ohio Constitution. Beasley's sentence must be vacated and this case remanded.

PROPOSITION OF LAW NO. 4

A trial court's decision to allow a biased juror to sit on a defendant's jury and participate in the deliberations that decided the defendant's guilt and sentence violates the defendant's Sixth Amendment right to an impartial jury. U.S. Const. amends. VI, XIV; Ohio Const. art. I §§ 5, 10.

A. Introduction.

Beasley's Sixth Amendment right to an impartial jury was violated when the trial court allowed a biased juror to sit on his capital jury. Juror No. 5 notified the trial court in the middle of Beasley's trial that he was friends with one of the State's witnesses, Todd Wickerham. Wickerham had not testified yet. Juror No. 5 gave an equivocal statement that he did not know whether he would give the Wickerham's testimony more credence because they were friends. The trial court never asked Juror No. 5 any follow-up questions regarding Juror No. 5's equivocal statement to see whether he could be an unbiased juror. Without further questioning and an unequivocal statement from Juror No. 5 that he would be unbiased regarding Wickerham's testimony, the presumption must be that Juror No. 5 was a biased juror.

B. Legal Standard.

"The Sixth Amendment guarantees that an accused shall enjoy the right to a trial, by an impartial jury and be confronted with the witnesses against him." *Parker v. Gladden*, 385 U.S. 363, 364 (1966). "The obligation to empanel an impartial jury lies in the first instance with the trial judge." *Mu'Min v. Virginia*, 500 U.S. 415, 423 (1991). *A juror will be deemed unbiased if he* "swear[s] that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." *Patton v. Yount*, 467 U.S. 1025, 1036 (1984). "Accordingly, when the trial court is ultimately left with a statement of partiality, as in this case, that is coupled with a lack of juror rehabilitation or juror

assurances of impartiality, we are left to find actual bias.” *Miller v. Webb*, 385 F.3d 666, 675 (6th Cir. 2004).

A violation of a defendant’s Sixth Amendment right to a fair and impartial juror cannot be treated as harmless error. “We have recognized that some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error.” *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)). “The right to an impartial adjudicator, be it judge or jury, is such a right.” *Id.*

C. Argument.

“The **Sixth Amendment** provides that in all criminal prosecutions, the accused shall enjoy the **right** to a speedy and public trial, by an **impartial jury.**” *Sullivan v. Louisiana*, 508 U.S. 275 (1993). *Richard Beasley’s Sixth Amendment right to an impartial jury was violated when the trial court allowed a biased jury to sit on his jury. In the middle of Beasley’s capital trial, Juror No. 5 notified the trial court that he was friends with State’s witness Todd Wickerham. Tr. 2064. Juror No. 5 was questioned as to whether his relationship with Wickerman would cause him to give more credence to Wickerman’s testimony. Id. at 2068. Juror No. 5 stated that he did not know if it would or not. Id. Inexplicitly, there were no follow-up questions by the trial court to Juror No. 5 to determine whether he could be an impartial juror when it came to the testimony of Wickerham.*

Instead, the trial court somehow determined that Wickerham was not going to testify to any facts that were necessarily in dispute. Tr. 2070. Apparently, this determination meant that it did not matter to the trial court whether Juror No. 5 was biased or not. However, if Wickerham was not going to testify about any facts in dispute, his testimony was not relevant to Beasley’s case and should have been inadmissible. Rule 401 of the Ohio Rules of Evidence defines the

meaning of relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ohio R. Evid. 401. According to the trial court, Wickerham was not even going to address any facts of consequence, let alone make any of those facts more or less probable with his testimony. Therefore, the trial court’s own evaluation of Wickerham’s testimony was that it was irrelevant and therefore inadmissible under Rule 402 of Ohio’s Rules of Evidence. “Evidence which is not relevant is not admissible.” Ohio R. Evid. 402.

Furthermore, the United States Supreme Court has never held that the evaluation of whether a juror is biased is somehow based on the subject or importance of a witness’s testimony. The United States Supreme Court has simply looked at whether “a juror could swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror’s protestation of impartiality have been believed.” *Patton v. Yount*, 467 U.S. 1025, 1036 (1984). Here, the trial court never questioned Juror No. 5 under this standard, and Beasley was left with a juror who, did not know whether he would give a witness’s testimony more credence because of their personal relationship, and at worst a juror who clearly would give more credence to Wickerham’s testimony, as a friend often would.

Also, contrary to the trial court’s assessment of Wickerman’s testimony, he did testify to facts that were in dispute in this case. Todd Wickerman testified that he was a supervisor of Akron resident agency for the FBI. Tr. 2758. Wickerham stated that he got the surveillance photo from the Shoney’s where Beasley and Rafferty met Scott Davis. Tr. 2765. He also executed a search warrant on Joe Bais (one of Beasley’s former landlords) and interviewed Bais about his relationship with Beasley. Tr. 2769-71. Wickerham was involved in the Beasley’s arrest and detainment. Tr. 2775. Wickerham also assisted in the search of Beasley’s room on

Gridley street and Beasley's Ford Ranger, discovering paperwork and prescription medication with Ralph Geiger's name on them. Tr. 2778. The State used the information from Bais' interview to try to show Beasley used his computer to contact the victims, and the items found in Beasley's room on Gridley street were used by the State to try to show Beasley murdered Geiger for his identity. These facts were certainly in dispute in this case.

Not only did Wickerham testify about facts that were in dispute in this case, Wickerham also violated the trial court's previous order that Beasley's prior record was precluded for being introduced at his trial. Wickerham intentionally testified that "he had a lot of background and history on Beasley and his previous criminal activity" Tr. 2767. The trial court immediately sustained trial counsel's objection and ordered the State to go scold Wickerham for what he had done. *Id.* 2768. Despite this, based on his personal relationship with Wickerham, Wickerham's inappropriate testimony would have had a larger impact on Juror No. 5, causing him to improperly consider Beasley's prior record in his deliberations.

"The obligation to empanel an impartial jury lies in the first instance with the trial judge." *Mu'Min v. Virginia*, 500 U.S. 415, 423 (1991). In that capacity, the trial judge "must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to question." *Id.* at 424. Here, the trial court failed to ask any further questions of Juror No. 5 to see if he could put his opinions about Wickerham aside, and decide the case on the evidence. Therefore, Juror No. 5's equivocal statement must be presumed to show that he was biased. "For a juror to say, 'I think I could be fair', without more, however, must be construed as a statement of equivocation, and [i]t is essential that a juror swear that [he] could set aside any opinion [he] might hold and decide the case on the evidence." *Miller v. Webb*, 385 F.3d 666, 675 (6th Cir. 2004) (quoting *Patton v. Yount*, 467 U.S. 1025, 1036

(1984)). Juror No. 5 did not even get to the point where he said he thought he could be fair in deciding Beasley's case. Instead, he stated he did not know if he could be fair at all. "Accordingly, when the trial court is ultimately left with a statement of partiality, as in this case, that is coupled with a lack of juror rehabilitation or juror assurances of impartiality, we are left to find actual bias." *Id.* "The trial court's failure to ask questions [concerning Juror No. 5's equivocal statement] must render the defendant's trial fundamentally unfair." *Mu'Min*, 500 U.S. at 426.

"[T]he right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors, and [t]he failure to accord an accused a fair hearing violates even the minimal standards of due process." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Beasley had a right to have twelve impartial and indifferent jurors decide his guilt, and if needed, his sentence. The trial court violated his right by obviating its duty to ensure that Juror No. 5 was an impartial juror based upon his statements concerning State's witness Todd Wickerham. "Failure to remove biased jurors taints the entire trial, and therefore the resulting conviction must be overturned." *Franklin v. Anderson*, 434 F.3d 412, 428 (6th Cir. 2006).

The trial court's violation of Beasley's right to a fair trial with an impartial jury is a structural error, and therefore cannot be deemed to be harmless. "Among those basic fair trial rights that can never be treated as harmless is a defendant's right to an impartial adjudicator, be it judge or jury." *Gomez v. United States*, 490 U.S. 858, 876 (1988). *See also, Gray*, 481 U.S. at 668 "We have recognized that some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error." (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)). "The right to an impartial adjudicator, be it judge or jury, is such a right." *Id.*

D. Conclusion.

The trial court violated Beasley Sixth Amendment right to a fair trial by allowing an impartial juror to remain on Beasley's jury. The obligation to empanel an impartial jury in this case lied with the trial judge. The trial court failed to do so by failing to further question Juror No. 5 about his equivocal statements concerning State's witness Todd Wickerham. Without a statement from Juror No. 5 that he could put his opinion about Wickerham aside and decide the case on the evidence, Juror No. 5 must be presumed to be biased. *Miller*, 385 F.3d at 675. The trial court's failure to ensure Beasley's jury was impartial is a structural error and cannot be deemed to be harmless error. Beasley is entitled to a new trial with twelve impartial and indifferent jurors.

PROPOSITION OF LAW NO. 5

A defendant's right to a fair trial is violated when a trial court fails to grant a mistrial when the ends of justice required it and a fair trial was no longer possible. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 5, 10.

A. Introduction

Beasley's right to a fair trial was violated when the trial court failed to order a mistrial after the State presented evidence that the trial court previously deemed to be too prejudicial to be admissible in his trial. On August 3, 2012, Beasley filed a motion in limine moving the trial court to prohibit the introduction of Beasley's prior criminal record that was not related to this case. (Motion 52). On November 20, 2012, the trial judge granted Beasley's motion in limine. Docket No. 56. Despite the trial court's ruling, the State introduced information about Beasley's prior criminal record through witness, Todd Wickerham. Wickerham testified that "he had a lot of background and history on Beasley and his previous criminal activity" Tr. 2767. Even though defense counsel objected to Wickerham's statement, and the trial court sustained the objection, the State was still successful in disclosing information about Beasley's prior criminal record before the jury. Despite the State's misconduct and prejudicial information being disclosed to the jury, the trial court would not grant Beasley a mistrial. Tr. 2768.

Also, a biased juror sat on Beasley's capital trial and the trial court again failed to declare a mistrial. (See Proposition of Law No. 4).

B. Legal Standard.

"[T]he law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *United States v. Perez*, 22 U.S. 579, 580 (1824). Trial courts are "required to

exercise a sound discretion on the subject, as it is impossible to define all the circumstances which would render it proper to interfere.” *Arizona v. Washington*, 434 U.S. 497, 506 (1977). “In examining the trial judge’s exercise of discretion in declaring a mistrial, a balancing test is utilized, in which the defendant’s right to have the charges decided by a particular tribunal is weighed against society’s interest in the efficient dispatch of justice.” *State v. Glover*, 35 Ohio St. 3d 18, 19, 517 N.E.2d 900, 902 (1988). “This is not to say that we grant absolute deference to trial judges in this context, if the record reveals that the trial judge has failed to exercise the sound discretion entrusted to him, the reason for such deference by an appellate court disappears.” *Renico v. Lett*, 559 U.S. 766, 775 (2010). “Mistrials need be declared only when the ends of justice so require and a fair trial is no longer possible.” *State v. Franklin*, 62 Ohio St. 3d 118, 127, 580 N.E.2d 1, 9 (1991) (quoting *Illinois v. Somerville*, 410 U.S. 458, 462-63 (1973)). Here, Beasley could no longer get a fair trial when the State introduces evidence of his prior criminal record to his jury. At that point the trial court should have granted a mistrial.

C. Argument.

The trial court in Beasley’s capital trial should have declared a mistrial when the State introduced prejudicial evidence during the trial phase of Beasley’s trial. Prior to Beasley’s trial, the trial court determined that information concerning Beasley’s prior criminal history was so prejudicial to Beasley receiving a fair trial, the trial court granted Beasley’s motion in limine to prevent it from being presented. However, the State purposefully ignored the Court’s order and introduced evidence of Beasley’s prior criminal record through the testimony of FBI agent Todd Wickerham. Tr. 2767. “[W]here misconduct of counsel is of such a prejudicial character that the prejudice resulting therefrom cannot be eliminated or cured by prompt withdrawal, and admonition and instructions from the court of the jury to disregard it, a new trial should be

granted, or the judgment reversed, notwithstanding cautions, admonition, and instructions by the trial judge.” *Book v. Erskine & Sons, Inc.*, 154 Ohio St. 391, 401 (1951). The State’s misconduct was prejudicial based on the trial court’s own analysis. Also, trial counsel could only object to the introduction of the prejudicial information after it was already exposed to the jury. Prompt withdrawal of the information would have been useless. Making matters worse, the trial court not only failed to grant a mistrial, but it never gave an admonition or an instruction to the jury to disregard the prejudicial information from its deliberations.

Also, “[n]either party has a right to have his case decided by a jury which may be tainted by bias; in these circumstances, the public’s interest in fair trials designed to end in just judgments must prevail over the defendant’s valued right to have his trial concluded before the first jury impaneled.” *Washington*, 434 U.S. at 516. Here, Beasley’s jury may have been tainted by the disclosure of his prior criminal history. In *Washington*, the trial court declared a mistrial because the defendant’s lawyer made improper and prejudicial remarks during his opening statement to the jury. *Id.* at 511. The United States Supreme Court started its review on the premise that defense counsel’s comment was improper and may have affected the impartiality of the jury. *Id.* The Court determined that in that situation the trial court used sound discretion in granting a mistrial. *Id.* at 514. Here, the premise has to be that the misconduct by the State of introducing Beasley’s prior criminal history was improper and may have affected the impartiality of the jury. Again, this is based on the trial court’s own assessment of this information. Failing to grant a mistrial when this prejudicial information was put before Beasley’s jury was error.

“Mistrials need be declared only when the ends of justice so require and a fair trial is no longer possible.” *State v. Franklin*, 62 Ohio St. 3d 118, 127,580 N.E.2d 1, 9 (1991) (quoting *Illinois v. Somerville*, 410 U.S. 458, 462-63 (1973)). Again, the trial court’s own opinion was

that Beasley would not get a fair trial if his prior criminal record was disclosed to his jury. Once the State violated the court's order and introduced information concerning his prior criminal record to the jury, a fair trial was no longer possible.

Appellate courts have not “grant[ed] *absolute* deference to trial judges in this context., and we have made clear that [i]f the record reveals that the trial judge has failed to exercise the sound discretion entrusted to him, the reason for such deference by an appellate court disappears.” *Renico v. Lett*, 559 U.S. 766, 775 (2010). “[I]f a trial judge acts irrationally or irresponsibly, . . . his action cannot be condoned.” *Id.* The trial court's decision here not to grant a mistrial was irrational and irresponsible in light of its previous ruling.

In addition, the trial court allow prejudicial information to be introduced in Beasley's trial, but the trial court allowed a biased juror to sit on Beasley's jury. (See Proposition of Law No. 4). In the middle of Beasley's capital trial, Juror No. 5 notified the trial court that he was friends with State's witness Todd Wickerham. Tr. 2064. Juror No. 5 was questioned as to whether his relationship with Wickerman would cause him to give more credence to Wickerman's testimony. *Id.* at 2068. Juror No. 5 stated that he did not know if it would or not. *Id.* Inexplicitly, there were no follow-up questions by the trial court or defense counsel to Juror No. 5 to determine whether he could be an impartial juror when it came to the testimony of Wickerham.

“[T]here have been instances where a trial judge has discovered facts during a trial which indicated that one or more members of the jury might be biased against the Government or the defendant.” *Illinois v. Somerville*, 410 U.S. 458, 470 (1973). “It is settled that the duty of the judge in this event is to discharge the jury and direct a retrial.” *Id.* Based on Juror No. 5's comments there was a good chance that he would be biased against Beasley when it came to the

testimony of Todd Wickerham. Even more troubling, Wickerham was the witness the State used to purposefully violate the trial court's order and introduce the prejudicial information to Beasley's jury. Again, the trial court violated its duty to declare a mistrial and discharge the jury.

D. Conclusion.

The trial court failed to declare a mistrial in Beasley's case despite prejudicial evidence being introduced by the State, and a biased juror sitting on his jury. The trial court determined prior to Beasley's trial that evidence concerning his prior record would be too prejudicial to him to be introduced at his trial. Yet, when the State purposefully disregarded the trial court's order, and introduced evidence of Beasley's prior criminal record, the trial court did not declare a mistrial. The trial court's decision was not an exercise of sound discretion, based on its own opinion Beasley would not receive a fair trial if this information was disclosed to his jury. See Entries, Motion in Limine Motion (52), Docket Entry No. 56. Also, a biased juror sat on Beasley's jury. Again, the trial court failed to exercise sound discretion by failing to discharge the jury and direct a retrial. *Somerville*, 410 U.S. at 470.

Beasley is entitled to a new trial where prejudicial evidence is not presented against him, and where his jury does not contain a biased juror.

PROPOSITION OF LAW NO. 6

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).

Beasley's Sixth Amendment right to confront the witnesses against him consistently and repeatedly was derogated by the trial court judge. The State repeatedly offered testimonial hearsay evidence, and Beasley had no prior opportunity to cross-examine the out of court declarants. *See Crawford v. Washington*, 541 U.S. 36 (2004). Yet the trial court judge repeatedly allowed the hearsay testimony to be heard by the jury, often without stating any rationale for doing so. Further, the admission of this unreliable hearsay evidence prejudiced Beasley's right to a fair trial regardless of whether the Confrontation Clause was violated in this case. *See Ohio R. Evid. 801(C)*.

A. Hearsay was Repeatedly Offered by the State, and Objections to it were Over-Ruled.

The State offered and was allowed to introduce to the record improper hearsay as to a variety of declarations of out of court declarants through the testimony provided by Summer Rowley, Dwight Johnson, Jeff Schockley, Sheriff Hannum, Jeff Jones, Debra Bruce, Corey Collins, Guy Smith, Tina Kern, Nick Kern, Jack Vickery, Mike Daugherty, and Todd Wickerham. The pattern that emerged was that the defense counsel would make a hearsay objection that was overruled without explanation, though a "continuing objection" was recognized by the judge. And if the State objected to hearsay elicited through defense counsel's questioning the objection would be sustained.

Summer Rowley, the first witness called by the State, provided some background on her friendship with Ralph Geiger before his death, and almost immediately began testifying at length as to what Ralph Geiger had said to her during the summer of 2011: “Yes. He told me that he was going to --.” Tr. 1326. Despite numerous and continuing objections by Defense counsel based upon the hearsay testimony, Summer Rowley was allowed to detail her versions of conversations she had with Ralph Geiger and what he had told her in his out of court declarations. The trial court judge overruled all the hearsay objections without ever articulating a reason for allowing the hearsay’s admission. Tr. 1326, 1327, and 1329.

Dwight Johnson, the State’s second witness, similarly testified as to his past interactions with Ralph Geiger, specifically as to Geiger’s declarations about his job search in the summer of 2011. Defense counsel objected to the hearsay, and without stating any rationale for allowing the jury to hear it, the trial court judge simply stated, “Note your continu[ing] objection,” with no explanation of the ruling, then allowed the jury to hear more words from Ralph Geiger. Tr. 1340.

The State called Jeff Schockley, who over Defense counsel’s hearsay objection relayed to the jury everything that Scott Davis had said to him when the two of them encountered each other at Schockley’s home in Caldwell, Ohio on the day Davis suffered a gunshot wound to his elbow. Without explanation, the trial court overruled the objection, despite the fact that Scott Davis was available to testify at the trial, and indeed was the next State’s witness to testify. Tr. 1434, 1442. As relayed by Schockley, Scott Davis declared that he had come to the area to get a job, that somebody was going to rob Davis, that Davis had left his truck trailer at a particular store back in Caldwell, that Davis had a Harley Davidson motorcycle and a four-wheeler in his

truck, that Davis knew he was in trouble when he heard a click,” and that Davis had hid in the woods and got no cell phone reception while hiding. Tr. 1435-1436.

The State asked Sheriff Hannum to relay all of his conversations with Scott Davis, including Davis’ descriptions of where he was when the alleged shooting occurred, what the alleged suspects each looked like, and whether either of them wore a beard. Tr. 1539-1540. Sheriff Hannum also relayed to the jury a conversation that took place at the Ashton Tavern, where Lois had told the Sheriff about her husband Jerry Hood’s recent accident. Tr. 1541-42. Sheriff Hannum also relayed conversations that he had with Lois Hood’s son. Tr. 1543. And Sheriff Hannum advised the jury that “through chief deputy Miller I learned that they are keeping an eye out for a fella named Beasley.” Tr. 1547. No hearsay objections were made to these various statements made by various declarants, though as noted above the trial court judge had been allowing a variety of hearsay to be delivered to the jury by prior witnesses, over objections by defense counsel.

State’s witness Jeff Jones of the Adult Parole Authority was allowed to freely relay on direct examination various conversations he had with Beasley’s mother about her last conversations with him and what Beasley looked and dressed liked at the time, and also described to the jury what he, Jones, had learned about Beasley through his out of court conversations with a person named Edward Rogers. Tr. 1571, 1574-1575. And Jones also relayed hearsay on direct examination as to conversations he had had with Beasley’s ex-wife during his investigation. Tr. 1579-80. However, once Jones was questioned on cross-examination, the trial court judge *sustained* the State’s hearsay objection as to whether police officer Meadows had stated that Beasley was a police informant. Tr. 1588-1589.

But hearsay was again allowed by the trial court judge, over objection by defense counsel, when Debra Bruce testified concerning statements her brother David Pauley had made to her. Debra Bruce advised the jury of the details of several phone conversations she had had with her brother David Pauley. Tr. 1726-1752. The trial court once again denied hearsay objections made by Beasley's defense counsel, noting that a "continuing objection" to the continuing hearsay remained in place. Tr. 1731. This exchange repeated the pattern established throughout the trial, that most hearsay objections entered by the Defense were over-ruled with the proviso that a vague "continuing objection" would be allowed to hover over the proceedings, with no need for Defense counsel to seek particular rulings on particular hearsay testimony. Debra Bruce also advised the jury as to the contents of discussion she had with Detective Mackie, who supposedly had asked her about a bracelet that her brother David wore. Tr. 1742.

FBI agent Corey Collins testified at length for the State as to his involvement in the investigation, often invoking hearsay that he had picked up along the way. For example, Agent Collins talked about what he had learned through John Bais, including Bais statements that "someone else" had placed the Craigslist ads in question, (Tr. 1657), that Bais told him he rented the house to someone else and that on this basis Collins eliminated Bais as a suspect (Tr. 1663-1664), that FBI agents *other than* Collins had searched the house pursuant to a warrant (Tr. 1658), and that Beasley reportedly was arrested at his residence (Tr. 1664-1665).

State's witness Guy Smith testified almost exclusively by hearsay, as to statements he had learned from his father, who owned Smitty's Gun Shop before his death on June 11, 2012. Tr. 2401-2410. Guy Smith could not recall being involved in the issue of a gun that was supposedly delivered for cleaning by a person identifying himself as Ralph Geiger, stating that

he himself never saw Geiger and it might have been his father who was involved in the transaction that Guy Smith described to the jury. Tr. 2406, 2410.

Similarly, State's witness Tina Kern was permitted to relay to the jury numerous hearsay statements by her ex-husband Tim Kern regarding his job search and specifically his application to become a farm hand. Tr. 1964-1978. When defense counsel objected to the hearsay that she offered, the trial court once again over-ruled the objection, without any explanation as to the basis of the ruling that hearsay would be permitted, but invoking the "continuing objection noted" mantra that permeated Beasley's trial proceedings. Tr. 1969. And Tina Kern's son Nick Kern similarly was allowed to testify freely as to verbal and text conversations he had had with his father Tim Kern on similar issues, including what his father had said and thought about the job prospects, how and where the job interview took place, etc. Tr. 1983-1991.

State's witness Jack Vickery, a special agent with the FBI, relayed hearsay testimony to the jury concerning what Scott Davis told Vickery when Vickery interviewed at the hospital, including what Davis had told Vickery about meeting a person named "Jack at the Shoney's Restaurant. Tr. 2349. Vickery then relayed to the jury what Davis said when Vickery presented Davis with a photo line-up of possible suspects. Tr. 2352. Vickery further relayed to the jury extensive hearsay regarding what type of job Tim Kern had been seeking prior to his death. Tr. 2355, 2363-2364, 2369. And Vickery was allowed to narrate, again over Defense counsel's objection, DVD surveillance videos from a pizza shop that captured video of events as to Tim Kern's automobile that had been parked in the vicinity and were captured by the camera. Tr. 2361-62, State's Exs. 187A and 187B.

The trial court allowed a number of law enforcement officials who testified for the State to testify in the passive voice and via hearsay as to what they "were advised." Thus, former FBI

agent Mike Daugherty told the jury that he “was advised” that Beasley was a suspect in the “Craigslist murders,” and that he, Daugherty, was advised that Brogan Rafferty was a “second suspect,” with no attribution as to where Daugherty got this information. Tr. 1998-1999. Daugherty further testified to the jury as to what Daugherty’s supervisor had told Daugherty about what Joe Bais’ girlfriend had told Daugherty’s supervisor regarding an alleged cell phone number for Beasley. Tr. 2001. Daugherty further advised the jury of hearsay as to the results of a cell phone search that another agent had conducted and that was relayed to Daugherty by an unidentified third FBI agent. Tr. 2003. Yet Daugherty freely admitted after testifying to all of this that he had no personal knowledge of statements concerning Joe Bais, that another FBI agent had conducted those communications. Tr. 2006. And Daugherty further relayed to the jury a variety of statements emanating from a person named Larry Baker, who supposedly had come into possession of David Pauley’s vehicle. Daugherty talked to Baker and described to the jury not only what Baker supposedly said to him, but Daugherty described Baker as changing his story and, in Daugherty’s view, not being entirely forthright with Daugherty. Tr. 2018-2020. Larry Baker never was offered as a witness at trial so that the jury (as opposed to Daugherty) could make any necessary assessment regarding Baker’s credibility.

FBI agent Todd Wickerham broadly testified for the State using the collective form of “we” as his basis for relaying various forms of hearsay, including telling the jury what he had learned from other FBI agents and other investigators. Tr. 2762-2771. Agent Wickerham repeatedly cast his testimony to the jury in terms of what “we did” or “we learned” or persons that “we talked with,” rarely mentioning who actually had relayed or received the information he was relaying to the jury. For example, he talks about what “we learned” from unspecified others as to where “Dutch” lived. Tr. 2770-2771. Wickerham’s testimony thus often can be

characterized as that emanating from a spokesman for a group rather than from any direct, personal knowledge he may have gleaned during the investigation.

Thus, under the prevailing rhythm of Beasley's trial as to the admission of hearsay testimony, the judge allowed a variety of out of court hearsay statements to be relayed to the jury when the State sought to use these statements *against* Beasley, but the judge sustained hearsay objections made by the State when Beasley's defense counsel sought to elicit out of court testimony. The State may argue that any information gathered by law enforcement witnesses is fair game, even if the information is in the nature of hearsay, because the statements sought to explain a course of conduct, but no explanation of such reasoning or limiting instruction ever was provided to Beasley's jury here.

This Court recently ruled that the potential for abuse and possible confusion by the jury are relevant considerations that a trial court *must* address in deciding whether to allow hearsay proffered by the State under the theory that a course of conduct by the police allows the hearsay's admission. See *State v. Ricks*, 136 Ohio St. 3d 356 (2013), reversing and remanding where hearsay improperly was admitted under the "police course of conduct" exception. And the trial court also must consider whether the danger of unfair prejudice, confusion of the issues, or misleading the jury substantially outweighs the probative value of the statement pursuant to Evid.R. 403(A).

B. Improper Hearsay Statements are Prohibited by the Constitution and Rules of Evidence.

In *Crawford*, the United States Supreme Court overruled the reliability test previously decided in *Ohio v. Roberts*, 448 U.S. 56 (1980). *Crawford*, 541 U.S. at 62-68. The *Crawford* court reasoned that the common law roots of the Sixth Amendment require that the accused must be afforded an opportunity to challenge his accusers through live, in court testimony where the

core concerns of the Confrontation Clause are implicated. *Id.* at 43-53. Accordingly, the Court held that “[t]estimonial statements of witnesses absent from trial [may be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” *Id.* at 59; *id.* at 68-69.

The Court’s holding in *Crawford* applies only to testimonial statements offered by an out of court declarant that the accused had no prior opportunity to cross-examine. *See id.* However, since the error presented in *Crawford* plainly involved testimony by an unavailable declarant, the Court found it unnecessary to flesh out all the permutations of which statements may be testimonial under the Sixth Amendment. *See id.*

Two years later, the Supreme Court revisited this question in the companion cases of *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813 (2006). Relying on *Crawford*, the court made clear that statements are testimonial under the Sixth Amendment if they were previously made by “sworn testimony in prior judicial proceedings or formal depositions under oath. ...” *Davis*, 547 U.S. at 821-26. The court reasoned, however, that the Confrontation Clause is not so narrowly defined as to be limited only to formal proceedings. *Id.* at 26.

The court found constitutional error in Hammon’s case because the unavailable declarant’s statements were obtained “under official interrogation” by police officers. *Id.* at 830. Thus, the court held that “[s]tatements [made to law enforcement] are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” *Id.* at 822. The court also made clear that its holdings in *Davis* and *Hammon* did not provide “an exhaustive classification of all conceivable statements [that qualify as testimonial under the Sixth Amendment]. ...” *Id.*

Regarding out of court statements that are not testimonial under *Crawford* and *Davis*, the *Roberts* reliability test may be applied to determine if a hearsay violation occurred. See *Crawford*, 541 U.S. at 68. Under the *Roberts* reliability test, the reviewing court must determine if the out of court statement falls within a “firmly rooted” hearsay exception and if it bears sufficient “indicia of reliability.” See *Crawford*, 541 U.S. at 40. See Ohio R. Evid. 801(C), 802, 803, 804.

C. Beasley’s Rights were Violated by the Admission of Hearsay.

The State put before the jury out-of-court testimony from a variety of individuals, many not even named, whom Beasley had no opportunity to cross-examine. Beasley was denied his right to confront each of those declarants about their testimonies in violation of the Sixth Amendment. See *Crawford*, 541 U.S. at 68-69.

But even assuming for the sake of argument that the hearsay statements were not testimonial under *Crawford*, Beasley was nevertheless prejudiced by improper hearsay. None of those out-of-court declarants gave detailed accounts and none were in custody subject to a statement against penal interest. See e.g. *People v. Farrell*, 34 P.3d 401 (Colo. 2001) (hearsay statement more reliable because it was “detailed”); *Nowlin v. Commonwealth*, 40 Va. App. 327, 335-48, 579 S.E.2d 367, 371-72 (2003) (hearsay statement more reliable when made in custody against penal interest).

Beasley was entitled to confront the witnesses against him, and the non-confronted statements admitted against him were not harmless beyond a reasonable doubt. The Confrontation Clause of the Sixth Amendment prohibits non-confronted testimonial statements. A statement is testimonial if made “under circumstances which would lead an objective witness

reasonably to believe that the statement would be available for use at a later trial.” *Melendez-Diaz v. Massachusetts*, 575 U.S. 305 (2009).

On direct appeal, constitutional error is harmless only if the prosecution proves it to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 26 (1967). Hearsay statements that are not confrontational are still prohibited by Evid.R. 802 if they do not fit an exception under the Ohio Rules of Evidence. Moreover, those hearsay statements prejudiced Beasley under Evidence Rule 403(A).

D. Conclusion.

Beasley’s Sixth Amendment right to confront witnesses against him was violated by the admission of testimony by unavailable declarants when Beasley had no previous opportunity to cross-examine. But even if this hearsay was not testimonial under the Sixth Amendment, it was nevertheless unreliable and prejudicial. Beasley is therefore entitled to a new trial. *See State v. Ricks*, 136 Ohio St. 3d 356 (2013).

PROPOSITION OF LAW NO. 7

The acts and omissions of trial counsel deprived a defendant of a fair and reliable result in both phases of a capital trial. U.S. Const. amends. VI, XIV; Ohio Const. art. I §§ 5, 10.

To prevail on an ineffective assistance of counsel claim, a defendant must meet a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant must demonstrate that counsel's performance was deficient and that he was prejudiced by that performance. *Id.* This test applies to the sentencing phase of a capital case. *Id.* at 686. Beasley can demonstrate the existence of both prongs with respect to both the trial and sentencing phases.

Prior to examining the specifics of this Proposition, it is important to note the challenges trial counsel faced that are unique to this case. There were “tens of thousands of pages of documents” produced in the course of the investigation. Tr. 2698. For the lead investigator “it was a several-month process just getting everything compiled and together.” Tr. 2699. Even after this several-month process, the lead investigator “continued throughout the entire year of 2011 compiling everything . . .” *Id.* The investigating officers executed “between twenty and thirty search warrants.” Tr. 2704 There were twenty to twenty-five different cell numbers that the investigating officer “obtained court orders for those records.” Tr. 2705. At the May 16, 2012, status conference, counsel announced: “I believe at this point we are up to approximately thirty thousand document pages” in discovery. 5/16/12 Tr. 3

Thus, trial counsel faced the daunting test of reviewing voluminous discovery. Beasley was arraigned on January 25, 2012. Jury selection commenced on February 9, 2013. Counsel who eventually tried the case were not the initial counsel on the case. At the September 26, 2012 new counsel appeared on behalf of Beasley. 9/26/12 Tr. 2. They announced their intention to

proceed with the initial trial date of January 7, 2013. Tr. 3. The Court eventually continued the trial date, but only by one month. 12/14/12 Tr. 2-3.

Other than status conferences, the trial court held only one pretrial hearing of any substance. It consisted of new counsel identifying those motions filed by prior counsel that they would either “stand on” or withdraw. 11/09.12 Tr. 8-59. There were no pretrial evidentiary hearings. This was despite the large number of search warrants, Beasley having made a custodial statement, and the investigating officers having shown photographic arrays to numerous witnesses.

Trial Counsel Performed Deficiently

Beasley will divide this portion of his ineffectiveness claim by area. Trial counsel performed deficiently in each area.

A. Counsel Deficiently Waived Beasley’s Presence.

A defendant has the right, absent misconduct, to attend all of the critical stages in his criminal proceedings. Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; Sections 10 and 16, Article I of the Ohio Constitution; Crim. R. 43(A) (“The defendant shall be physically present at every stage of the criminal proceeding and trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence”); *United States v. Wade*, 388 U.S. 218, 227-228 (1967) (right of presence through counsel at critical stages); *Mempa v. Rhay*, 389 U.S. 128, 134 (1967) (sentencing is a critical stage of the proceedings).

Counsel waived Beasley’s presence at some of those proceedings, but the record does not reflect a waiver entered on the record. 11/09/12, Tr. 2, TR. 22, 1594, 2829. In only one of those instances did counsel claimed to have discussed the matter with Beasley. 11/09/12, Tr. 2. The

record does not reflect if Beasley was present at other portions of the proceedings. TR. 2064, 2871, 3188, 3475, 3500. No waiver exists in the record that indicates that Beasley entered a knowing and intelligent waiver of his right to be present. *United States v. Crutcher*, 405 F.2d 239, 244 (2nd Cir. 1968) (“unless the Trial Court determines . . . that Payne has made a knowing waiver of his right to be present during the impanelling of the jury, a new trial must be granted as to him”).

Trial counsel cannot waive a defendant's right of presence at his trial. *United States v. Gordon*, 829 F.2d 119, 124-26 (D.C. Cir. 1987); (defense counsel's request, as a tactical position, that jury voir dire take place in defendant's absence insufficient to waive defendant's right of presence); *Proffitt v. Wainwright*, 706 F.2d 311, 312 (11th Cir. 1983) (court rejected argument defense counsel waived defendant's right to be present at competency hearing); *Cross v. United States*, 325 F.2d 629, 631-33 (D.C. Cir. 1963) (defense counsel's assertion defendant did not wish to attend trial insufficient to waive defendant's right of presence).

Trial counsel performed deficiently when they did not insure Beasley's attendance at all proceedings at this trial.

B. Counsel Deficiently Failed to File an Affidavit of Disqualification.

One of the most, if not the most fundamental of Constitutional protections, is the right to a fair and impartial judge. That is especially important in a capital case in the State of Ohio, where the presiding judge sits as the thirteenth juror with respect to the ultimate sentence. Trial counsel failed to file the requisite affidavit with Chief Justice O'Connor to recuse Judge Callahan. As a result, the trial started off on the “wrong foot.” Beasley's case was presided over and his death sentence imposed by a judge who had already heard most of the damning

evidence against Beasley. This evidence had not been subjected to cross examination. It was not only presented by the State, but also by Beasley's co-defendant Brogan Rafferty.

The Due Process Clause of the Fourteenth Amendment requires a fair trial in a fair tribunal. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997); *Withrow v. Larkin*, 421 U.S. 35, 46 (1975). A defendant's guilt and sentence must be decided upon the evidence received in the courtroom and not evidence from outside the courtroom. *Turner v. Louisiana*, 379 U.S. 466, 472 (1965). This is true regardless of the heinousness of the crime charged or the apparent guilt of the offender. *Irwin v. Dowd*, 366 U.S. 717, 722 (1961).

A fair trial subsumes the right to an unbiased judge with no interest in the outcome of the case. *In re Murchison*, 349 U.S. 133, 136 (1955); *Tumey v. Ohio*, 273 U.S. 510, 523, (1927). Moreover, a fair trial means more than simply the absence of actual bias; rather, "justice must satisfy the appearance of justice." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865, n.12, (1988); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465, 9 (1971). A trial judge is required to step aside when there is a likelihood of bias or even an appearance of bias or when there is too great a temptation to not hold the balance of neutrality. *Taylor v. Hayes*, 418 U.S. 488, 501 (1974); *Unger v. Sarafite*, 376 U.S. 575, 588, (1964); *Ward v. Monroeville*, 409 U.S. 57, 60, (1972); *Tumey*, 273 U.S. at 532. "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties." *In re Murchison*, 349 U.S. at 136.

Because of the unique role of the trial judge in a capital case in Ohio, it is especially important that there be no risk of bias. Where, as in this case, the trial is by jury, the sentence of death may be imposed only after the jury recommends the death penalty and "the court finds, by proof beyond a reasonable doubt . . . that the aggravating circumstances the offender was found

guilty of committing outweigh the mitigating factors” R.C. § 2929.03(D)(3) (emphasis added).

Richard Beasley and Brogan Rafferty were both indicted for the aggravated murders of Ralph Geiger, Timothy Kern, and David Pauley and the attempted murder of Scott Davis. Judge Callahan initially presided over Rafferty’s trial, which commenced with opening statements on October 12, 2012 and concluded on November 9, 2012. The jury found Rafferty guilty of aggravated murder and other charges, and Judge Callahan sentenced Rafferty to life in prison without parole. Shortly after the conclusion of Rafferty’s trial, Beasley’s trial commenced.

Judge Callahan, when presiding over Beasley’s trial, could not divorce notions of Beasley that she had developed while presiding over the Rafferty trial. For example, at the end of the State’s case against Beasley, when ruling on Beasley’s Rule 29 motion, Judge Callahan admitted that she was confusing specific pieces of evidence that she had learned during the Rafferty trial with what might (or might not) have been evidence in the Beasley trial:

THE COURT: All right. With regard to the renewal of the motions, they are then so renewed. The Court has been trying to think of the evidence adduced, the rulings on the motions, quite frankly I can think of nothing that would change the rulings that this Court has previously issued.

....

Count 25 is the grand theft, and it specifies the firearm of David Pauley. The Court needs to keep it separate *because I clearly remember the testimony regarding the firearm of David Pauley that was in the last trial. I don’t believe there is testimony of that in this trial.*

Tr. 2873-2874. Judge Callahan admitted holding within her mind evidence from *both* trials when deciding the Rule 29 motion.

This Court addressed a similar situation. *State v. Gillard*, 40 Ohio St. 3d 226, 533 N.E.2d (1988). In that case the trial judge presided over a pretrial certification hearing at which the court, at an *ex parte* hearing, received testimony concerning the defendant. This Court held:

“Where, as here, the certification is *ex parte*, it is especially troublesome, for the defendant has no chance to deny or explain the allegations.” *Id.* at 229. Similarly Beasley in the present case had no opportunity to rebut the evidence that was presented at Brogan’s trial.

The presence of a biased judge is not subject to the harmless error standard. Instead, it is structural error. *Arizona v. Fulminante*, 499 U.S. 279, 290 (1991). Beasley was deprived of a fair and impartial judge. He was sentenced to death by a judge who had received information from the co-defendant’s trial.

Counsel performs deficiently when he or she fails to seek recusal of the judge and there is a good faith basis for doing so. *D’Ambrosio v. Bagley*, 2006 U.S. Dist. LEXIS 12794, p. *179 (N.D. Ohio 2006) (“Moreover, a jurist of reason could conclude that, because Judge Corrigan accepted Espinoza's testimony in co-defendant Keenan's trial, he possessed an inherent bias against D'Ambrosio when presiding over his trial. Thus, a reasonable jurist could conclude, counsel's failure to file a recusal motion was unreasonable conduct that prejudiced the outcome of the trial.”)

C. Counsel Performed Deficiently in the Voir Dire Proceedings.

Among the most essential responsibilities of defense counsel is to protect his client's Constitutional right to a fair and impartial jury by using voir dire to identify and ferret out jurors who are biased against the defense. The Sixth and Fourteenth Amendments to the Constitution guarantee a criminal defendant the right to be tried by impartial and unbiased jurors. *See Morgan v. Illinois*, 504 U.S. 719, 729 (1992). The primary purpose of voir dire of jurors is to insure an impartial jury through questions that permit the intelligent exercise of challenges by counsel. *United States v. Blount*, 479 F.2d 650, 651 (6th Cir. 1973) (citing Wright, 2 Federal Practice and Procedure, P. 382 (1969)). “Voir dire plays a critical function in assuring the

criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). Voir dire "serves the dual purpose of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges". *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991).

Counsel's performance failed Beasley in three separate aspects of the voir dire proceedings and later trial proceedings at which time the continued seating of a juror became an issue.

1. Trial counsel unreasonably failed to challenge for cause Juror No. 5.

*Juror No. 5 came forward of his own volition and notified the trial court that he was friends with State's witness Todd Wickerham. Tr. 2064. Juror No. 5 was questioned as to whether his relationship with Wickerham would cause him to give more credence to Wickerham's testimony. Id. at 2068. Juror No. 5 stated that he did not know if it would or not. Id.*²

Absent the showing of a strategic reason, the failure to request the removal of a biased juror constitutes deficient performance. *Johnson v. Armontrout*, 961 F.2d 748, 755 (8th Cir. 1992). The decision to seat a biased juror cannot be a discretionary or strategic decision. *Miller v. Webb*, 385 F.3d 666, 675-76 (6th Cir. 2004).³ Counsel's performance is deficient if he fails to pursue an answer from a prospective juror in which the prospective juror indicates that he cannot be fair. *Hughes v. United States*, 258 F.3d 453, 461 (6th Cir. 2001); *Virgil v. Dretke*, 446 F.3d 598, 609-10 (5th Cir. 2006).

² Beasley more fully developed the facts underlying the bias of Juror No. 5, in other Propositions of Law within his merit brief. Beasley incorporates the facts set for those Propositions of Law.

³ If defense counsel's decision not to challenge Juror No. 5 was a valid strategy, then in effect defense counsel waived Beasley's right to a fair and impartial jury. *Hughes v. United States*, 258 F.3d at 463; *Miller v. Webb*, 385 F.3d at 675-76. However only a defendant can waive his Sixth Amendment right to trial by jury. *Id.*

Juror No. 5 explained to the court that “[o]ver the last month-and-a-half I have become friends with Todd Wickerham. His daughter and my daughter are very good friends. I have interacted with him, did not know he was an FBI agent until literally I asked my wife . . . I played basketball with him Saturday night. And I know his wife and three daughters.” Tr. 2064-65. In response to the trial court’s question as to whether he would find Wickerham’s testimony more credible, Juror No. 5 responded “I don’t know.” Tr. 2067-68.

Trial counsel apparently based their decision not to challenge Juror No. 5 on two factors. First, Juror No. 5 responded that he would not experience any difficulty interacting with his friend Wickerham in the future if the jury returned a not guilty verdict. Tr. 2066-67. This however, did not alleviate the *real* issue, whether Juror No. 5’s relationship with Wickerham would taint or interfere with his ability to assess the credibility of the witness. Defense counsel realized this fact: “we want to make sure that he was not in a position having to judge credibility between agent Wickerham” Tr. 2068. Defense counsel chose to rely upon the assurances of the prosecution that the credibility of Juror No. 5 would not be an issue: “[t]he government attorneys have assured us that that is not an issue, not an issue to worry about.” *Id.* However, the fact that Wickerham was going to testify meant that Juror No. 5 would, in fact, *have* to assess his credibility.

Second, trial counsel did not challenge Juror No. 5 because they believed that his testimony would not containing an information that was critical:

The COURT: This is not a situation where he [Juror No. 5] is going to be weighing credibility?

Mr. Burdon: No.

Mr. Whitney: No.

Mr. Burdon: As I understand it, he is an overall coordinator type witness.

Mr. Baumoel: Correct

Mr. Burdon: Similar to what agent Daugherty was.

The COURT: Basically - -

Mr. Baumoel: Painted a bigger pictures [sic] than Daugherty did, as far as the whole case is concerned.

The COURT: He is going to testify to facts that are not necessarily in dispute. Is that a fair statement?

Mr. Whitney: Correct.

Mr. Baumoel: At least facts that have been presented through other witnesses and challenged appropriately.

Tr. 2069-70

Defense counsel's understanding as to what the witness would testify to was erroneous. Whether that incorrect information was the product of the government's false assertions as to the scope of the witness's testimony, the incomplete investigation conducted by defense counsel, or a combination thereof is immaterial. Juror No. 5, in his role as a juror, had to assess the credibility of his admitted friend, Wickerham.

The witness then provided extensive testimony. Tr. 2758 - 79. He was the supervisor of the Akron office of the FBI, and in that capacity supervised twelve agents. Tr. 2759. Wickerham was contacted by Special Agent McConaghy, who requested to assist in the investigation of the Noble County murders. Tr. 2762. Wickerham was "deeply involved in the investigation." Tr. 2762. He both assigned the lead investigator and "oversaw" his activities on the case. Tr. 2763. He testified as to the initial information received by the FBI concerning the

possible involvement of Rafferty and Beasley. Tr. 2764-66. He testified including: 1) the outstanding warrants that the Akron Police Department had for Beasley (some of which trial counsel successfully objected). Tr. 2766-67; 2) the search of the Bais residence and the information that was learned during the course of the search. Tr. 2769-70; 3) the information that he received the following day from Samantha Binnegar and the note that was subsequently left at the Bais residence. Tr. 2770-71; 4) the means the Agency employed to locate Beasley. Tr. 2771-73; 5) the canvassing of the neighborhood to locate Beasley. Tr. 2773-75; 6) the arrest of Beasley. Tr. 2775-77; 7) the specifics of the investigation involving Ralph Geiger. Tr. 2777- 78; and 8) some of the specifics involving the Kern and Pauley homicides. Tr. 2778-79.

The State's assertion to the trial court that Wickerham was only going to repeat or summarize the testimony of prior witnesses was not at all accurate. As a result, defense counsel's decision not to ask for the removal of Juror No. 5 was based on inaccurate information. Wickerham provided the only admissible testimony from law enforcement witnesses as to the following issues: 1) the search of the Bais residence and the information that was learned during the course of the search. Tr. 2769-70; and 2) the information that he received the following day from Samantha Binnegar.

By this Proposition Beasley does not challenge the discretion of the trial court in not excusing Juror No. 5. The trial court was clearly willing to excuse the juror if trial counsel had requested:

THE COURT: Do you guys want him [Juror No. 5] excused?

Mr. Whitney: No

Mr. Burdon: No.

Tr. 2069.

Trial counsel performed deficiently when they consented to Juror No. 5 remaining on the jury as opposed to, in response to the trial court's question, asking that this particular juror be excused.

2. *Trial counsel unreasonably failed to object to repeated misstatements of law.*

Counsel performed deficiently when they failed to object to misstatements of law during the voir dire process. *Davis v. Secretary for the Department of Correction*, 341 F.3d 1310, 1314 (11th Cir. 2003) (counsel's performance was deficient when he failed to preserved *Batson* error for appeal).

In this case the trial court and prosecution repeatedly told the prospective jurors who eventually served on the jury that the jury would only reach the mitigation phase if it found Beasley guilty of one or more of the capital specifications attached to the indictment. Tr. 111-113, 140-41, 209-10, 221, 367, 370, 372, 411, 476. The Ohio death penalty statutory provisions specifically provided that a court's instructions in the trial phase "shall not mention the penalty that that may be of consequence of a guilty or not guilty verdict on any charge or specification." R.C. § 2929.03(B). This preclusion is equally applicable to information provided to prospective jurors in voir dire. The trial court and counsel should not inform or instruct prospective jurors that they will only have to consider the death penalty if they convict the defendant of one or more of the capital specifications contained in the indictment. To hold otherwise would render meaningless the statutory preclusion contained in R.C. § 2929.03(B). Defense counsel herein not only failed to object to this line of questioning, but also violated this preclusion when questioning jurors who ultimately served on the jury. Tr. 116-17, 383, 404-05.

Finally, the trial court misinformed three prospective jurors who eventually sat on the jury concerning the weighing process. The trial judge omitted the phrase "beyond a reasonable

doubt” when describing the sentencing deliberation process. Tr. 382, 406, 478. The death penalty can only be imposed in Ohio if the prosecution proves beyond a reasonable doubt that the aggravating circumstances outweigh the mitigation factors. R.C. § 2929.03(D) (1). Trial counsel did not object to these misstatements of law.

3. *Trial counsel unreasonably failed to adequately develop facts supporting the exercise of both challenges for cause and preemptory challenges.*

Trial counsel should “choose a jury with respect to the theories of mitigation that will be presented.” 2003 ABA Guideline 10.10.2, Commentary. Jurors who are unable to give meaningful consideration to mitigating evidence must be disqualified from service. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). Defense counsel are required to “be familiar with techniques: 1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction . . . 2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and 3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty render them possibly excludable.” ABA 2003 Standard, Guideline 10.10.02 (B)(1)-(3).

In this case, trial counsel made no effort to identify those prospective jurors who were unable to give meaningful consideration to Beasley’s mitigation evidence. Tr. 142-43, 223-24, 383-84, 374-75, 403-406. At most, trial counsel asked passing questions concerning the prospective jurors ability to consider Beasley’s “upbringing” and “personal history” Tr. 63, 117, 202-213, 414-45. They did not ask specific question concerning the prospective jurors’ abilities to consider as mitigation: child abuse, psychological testimony, intergenerational family conflict, and the proportionality of the co-defendant’s sentence. Trial counsel did not ask *any* questions concerning the death penalty of two prospective jurors who eventually sat on the jury. Tr. 305, 479.

The publicity was extensive surrounding this case. (See the earlier Proposition on Pretrial Publicity and Change of Venue issues). Just prior to the start of Beasley's case, the co-defendant was found guilty, which generated an additional wave of publicity. Trial counsel failed to question six of the prospective jurors who sat on the jury as to their exposures to publicity and abilities to set it aside. Tr. 137, 289, 303, 380, 410, 475. Trial counsel did not question Juror Kathryn Wieland, despite her initial reaction that she was leaning toward finding Beasley guilty: "My opinion leans toward he is guilty. But I guess there are - - I mean, you are the smart people that have searched it and have done the investigation, so if they find he is not guilty, I guess it is worth hearing out, but I lean towards more that he is guilty." Tr. 286.

D. Counsel Performed Deficiently in the State's Case in Chief.

There were no eyewitnesses to any of the murders charged in the indictment. The only forensic evidence linking Beasley to the murders were the results of the DNA testing. His DNA was found on the collar of a tee shirt that the investigating officers recovered and the armrest of the co-defendant's vehicle. The former is not surprising given that Beasley never denied knowing Rafferty. The investigating officers did not find Beasley's DNA or fingerprints on any of the property or vehicles that the prosecution alleged that Beasley stole from the victims.

Trial counsel's role in the state's case in chief involves two essential components. Trial counsel must: 1) timely object to inadmissible evidence and testimony, and 2) ask appropriate questions to raise doubts as to the credibility of the prosecution's witnesses and its theory of the case.

1. Trial counsel unreasonably failed to object to improper testimony and argument.

In the State's case in chief, trial counsel failed to object or otherwise challenge inadmissible testimony. "One of the most fundamental duties of an attorney defending a capital

case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review. Failure to preserve an issue may result in the client being executed even though reversible error occurred at trial. For this reason, trial counsel in a death penalty case must be especially aware not only of strategies for winning at trial, but also of the heightened need to fully preserve all potential issues for later review.” ABA Guideline 10.8, Commentary.

Trial counsel failed to object to inadmissible evidence and argument. As a consequence, the jury rested its decision on prejudicial information that it should not have considered and issues not being preserved for review by this Court.

a. The prosecution’s opening argument.

The State commenced its opening statement employing a power point demonstration from which it argued that Beasley was a “wolf in sheep’s clothing.” Tr. 1268 She attempted to support this argument by citing to the Bible, “the phrase originates from a sermon by Jesus reporting to Christians . . .” Tr. 1268-69. Defense counsel interjected, “[e]xcuse me, I hate to interrupt, but I object, your Honor.” Tr. 1269. The trial court sustained the objection, then tepidly instructed the jury “to disregard anything that you saw or read.” Tr. 1274.

Nothing in the trial court’s instruction told the jury which portion of the opening statement it was directed to ignore. The trial court did not advise the jury that the Biblical reference relied upon should not be considered by them. Instead, the Judge merely advised the jury members in vague terms that they were “instructed to disregard anything that you saw or read,” without stating what exactly it was the jury should have disregarded. Tr. 1274.

Defense counsel’s performance did not meet the prevailing standards of practice when they failed to request a more specific instruction with regard to the prosecutor’s ill-conceived argument. *People v. Salgado*, 635 N.E.2d 1367, 1374-75 (Ill. App. 1994) (finding counsel’s

performance deficient because he did not ask the trial court for a limiting instruction reading the use of impeachment evidence). *White v. McAninch*, 235 F.3d 988, 997 (6th Cir. 2000) (“After allowing the jury to hear testimony at great length about the incident, it was incompetent for McCrae [defense counsel] not to ask the judge to remind the jury that the act was not direct evidence of the crime charged in the indictment.”).

Defense counsel performed deficiently when it failed to request the appropriate instruction.

b. Hearsay testimony

The prosecution repeatedly adduced testimony which constituted inadmissible hearsay and violated Beasley’s right of confrontation. Tr. 1326, 1327, 1329, 340, 1434, 1435-36, 1442, 1539-40, 1541-43, 1547, 1571, 1574-75, 1588-89, 1726-52, 1657, 1663-65, 2401-10, 1964-78, 1983-1991, 2352, 2355, 263-64, 2369, 1998-99, 2001, 2003, 2018-20, 2762-71. Trial counsel objected to the admission of some of this evidence. Tr. 326, 1327, 1329, 1340, 1434, 1442, 1731, 1969. This Court only need address this issue if it finds that: trial counsel defaulted this issue by: 1) not objecting to every question that called for a hearsay response, 2) relying upon the trial court’s granting of a continuing objection, Tr. 1340, 1731, 1969, or 3) not stating the basis for their objections.

Trial counsel’s failures to object to inadmissible hearsay evidence (much of which also violated Beasley’s right of confrontation) constitute deficient performance. *State v. Shanklin*, 185 Ohio App. 3d 603, 609, 925 N.E.2d 161 (2009) (“We find defense counsel’s failure to object to the aforementioned [hearsay] fell below an objective standard of reasonableness”); *State v. Butcher*, 170 Ohio App. 3d 52, 66, 866 N.E.2d 13 (2007) (“These inadmissible hearsay statements directly pertained to the ultimate issue of Butcher’s guilt. Trial counsel should have

objected to them”). Trial counsel’s failure to object cannot be labeled “strategy” given counsel’s objections to some of the hearsay. There is no valid basis for distinguishing the hearsay to which they did object from the hearsay to which they did not object.

Counsel performed deficiently in this case to the extent that they failed to object to the hearsay testimony and preserve the hearsay/confrontation issue for review by this Court.

c. Other act testimony, the surveillance of the Hood Property

Noble County Sheriff Stephen Hannum testified that a few weeks prior to the shooting of Davis the United States Marshals had the nearby Hoods’ property under surveillance. Tr. 1546. The Sheriff further testified that the Marshals were looking for a guy named “Beasley.” Tr. 1547. On cross-examination defense counsel attempted to reduce the prejudice impact of this testimony by having the Sheriff acknowledge that he did not know of the scope of the Marshals’ investigation of the Hoods’ property. Tr. 1559-61. However, on redirect examination, the Sheriff repeated his earlier testimony that the United States Marshals were looking for Beasley, and not one of the Hoods. Tr. 1563. On recross-examination, defense counsel again confirmed this fact for the jury. Tr. 1564.

Jackson Mackie, a former deputy for Noble County Sheriff’s Department, provided similar testimony. He testified that he had personally been involved in the United States Marshals’ surveillance of the Hood property in their effort to locate Beasley. Tr. 2524. On cross examination, he repeated this testimony and the issue became one of how many times the Marshals had been to the Hood property looking for Beasley. Tr. 2538. On redirect examination, the former deputy repeated his direct testimony that the Marshals were looking for Beasley. Tr. 2546-47.

Testimony that a defendant has committed other illegal acts is extremely prejudicial to the defendant. *Old Chief v. United States*, 519 U.S. 172, 181, (1997) (explaining that propensity evidence “‘is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge’”) (quoting *Michelson v. United States*, 335 U.S. 469, 476, (1948)); *Albrecht v. Horn*, 485 F.3d 103, 127 (3rd Cir. 2007) (“Evidence that a defendant has committed prior criminal acts is highly prejudicial.”).

Because this type of testimony is so prejudicial to a defendant, counsel’s performance is deficient when he fails to object to the admission of other act evidence. *White*, 235 F.3d 988, 997 (“we conclude that [trial counsel] McCrae’s ‘strategy’ of failing to object to, and affirmatively eliciting, testimony regarding an uncharged act of sexual intercourse between White and the victim falls well below an objective standard of reasonableness.”). *State v. Rutledge*, 1993 Ohio App. LEXIS 2851, p. * 10 (10th Dist. June 1, 1993) (“while it is generally true that deference is given to trial counsel’s tactical decisions, evidence of other crimes which come before the jury due to defense counsel’s neglect, ignorance or disregard of defendant’s rights and which bears no reasonable relationship to a legitimate trial strategy will be sufficient to render the assistance of counsel ineffective.”); *State v. Martin*, 37 Ohio App. 3d 213, 214, 525 N.E.2d 521 (1987) (“[T]he dangers inherent in introducing the prior conviction evidence involved herein so outweighed any minimal benefit that no reasonable attorney would adopt such a tactic. Under these circumstances, counsel’s performance was deficient.”)

The surveillance of the Hood residence took place prior to the police attempting to apprehend Beasley for any of the charges contained in the indictment. Thus, they jury could have viewed the offense(s) for which the United States Marshals were seeking to apprehend

Beasley as directly related to the offenses for which he was standing trial. This is classic inadmissible other act evidence. Trial counsel lacked a reasonable basis for not objecting to this prejudicial testimony. Belatedly, defense counsel did object to a portion of this testimony, and the trial court sustained the objection to that question. Tr. 2525. Counsel then stood silent while the State adduced yet other similar act evidence. Tr. 2525-26.

Trial counsel performed deficiently when they did not object to the testimony from the two witnesses that Beasley had previously been the target of a United States Marshal's manhunt with respect to an related offense.

d. Other act testimony, Beasley's prior criminal record.

Prior to trial, the court granted Beasley's motion *in limine* to preclude the admission of his criminal history. T.d. No. 201. In contravention of this ruling, FBI Supervising Agent Wickerham testified that "he had a lot of background and history on Beasley and his previous criminal activity" Tr. 2767. Trial counsel objected to this testimony concerning "his previous criminal history" and the court sustained this objection. Tr. 2767. However, trial counsel erred when they failed to move for a mistrial given the extremely prejudicial nature of this testimony.

Trial counsel's failure to request a mistrial must be assessed in the context of their failure to object to identical other act testimony offered earlier in Wickerham's testimony:

A. . . . Beasley was a wanted fugitive, had a close associate in prison and was located in the area where Scott Davis had been shot . . .

* * * * *

Q. Okay. Let me go back and talk about that a little bit. So the first information that you have with respect to suspects comes from the Marshal's service?

A. It does, correct.

Q. And it is about Richard Beasley and his associations with the area in Noble County?

A. That's correct

Tr. 2764-65

* * * * *

A. . . . In addition to that, we - - some of the warrants in which Mr. Beasley was wanted for were generated from the Akron Police Department, again another law enforcement agency we have a very close relationship with and work a lot of cases with.

So we also brought Akron into this and Akron investigators and detectives who had previously dealt with Mr. Beasley and brought them in as part of this investigative team. And they had a lot of background and history on Mr. Beasley and his previous criminal history.

Tr. 2766-67

Only at this point did trial counsel object. Tr. 2767. The prior other act testimony of this witness had warranted a similar objection. After trial counsel finally objected, the trial court conducted the following sidebar:

Mr. Whitney: I gave him [the witness] one chance on the first thing he said about the federal warrants. Now he is just elaborating on this stuff.

The Court All right.

Mr. Whitney: I gave him one break but not three.

Tr. 2767

Trial counsel's decision to give the witness one break was not reasonable. The testimony in question was extremely prejudicial given the nature of this testimony. Trial counsel recognized this fact: "I think he [the witness] is attempting to give the jury - -" Tr. 2767. Beasley and not the witness was on trial for his life. Given that the Wickerham in his testimony had repeated three times the highly prejudicial other act information, it was unreasonable for counsel to believe that a single sustained objection would cure the error.

Trial counsel's need to request a mistrial was even more manifest because of the prejudicial similar act testimony that had transpired prior to Wickerham testifying. Two witnesses testified that Beasley had previously been the subject of a federal Marshals' manhunt. *See* Section C, *supra*. Jeffrey Jones testified that when he was assigned Beasley's case, his supervisor remarked: "[h]e had talked about Richard Beasley, and he is like, yeah, I am going to have a *good one* coming for you." Tr. 1571 (emphasis added). Later the witness testified that "I did an e-mail to the parole officer on September 30th outlining all of the characteristics of Mr. Beasley, what I - - what I what we knew we were looking for him for, and that this time, he had also additional warrants from Akron Police Department for - - for - -" Tr. 1576. While counsel objected to this testimony with "[e]xcuse me," he did not request that the trial court strike the testimony. *Id.* In addition, Jerry Hood testified that he (Hood) saw Beasley "for a while every weekend" "[w]hen him and my father was in prison together." Tr. 3092.

As set forth in the prior section of this Proposition of Law, the admission of other act testimony including the fact that the defendant had prior convictions is extremely prejudicial. *Old Chief, supra; Michelson, supra; Albrecht v. Horn, supra.* The admission of other act testimony in this case, because it was so voluminous and prejudicial in nature, rendered ineffective the trial court's sustaining of an objection. It did not cure the error because of the prior admission of equally prejudicial other act testimony. *Government of the Virgin Islands v. Toto*, 529 F.2d 278, 283 (3rd Cir. 1976) (when evidence suggesting "a propensity or disposition to commit crime . . . reaches the attention of the jury, it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence. A drop of ink cannot be removed from a glass of milk."); *United States v. Range*, 982 F.2d 196, 199 (6th Cir. Ohio 1992) ("Some testimony is simply too hotly prejudicial to be cured by the judge's cool voice of reason. . . . The

naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453, 93 L. Ed. 790, 69 S. Ct. 716 (1949) (Jackson, J., concurring)"); *United States v. Carney*, 461 F.2d 465, 466-68 (3rd Cir. 1972) ("Where, however, potential prejudice is such that there is inherent danger that jurors, in determining the issues, may be unable or unwilling to erase from their minds that which has improperly come to their attention, no instructions or admonitions by the trial judge will suffice. The only appropriate remedy in such a situation is to declare a mistrial.")

Given the facts of this case, trial counsel's failure to move for a mistrial constituted deficient performance. *State v. Brewer, III*, 2012 Ohio App. LEXIS 1838 (2nd Dist. May 11, 2012) ("Defense counsel's failure to request a mistrial or curative instruction regarding the prospective juror's remark that he had previously arrested Ashter was deficient"); *State v. Pawlak*, 2014 Ohio App. LEXIS 2104, ** 38 (8th Dist. May 22, 2014) ("[a]ccordingly, we find that counsel was deficient in failing to object, or in the alternative failing to move for a mistrial. Counsel's failures fell below an objective standard of reasonableness, thus the first prong of *Strickland* has been satisfied").

Trial counsel performed deficiently when they failed to move for a mistrial given the repeated other act testimony provided in response to the prosecution's questions. This was not a single isolated incident, but a repeated tainting of the proceedings.

e. Testimony concerning the handwriting analysis

The State called Paul Bennett, a retired Columbus police officer who had examined documents supposedly written by Mr. Beasley. Tr. 3111-2. The State, through this testimony, sought to demonstrate that Beasley was the individual who had written a letter from the jail

asking Joyce Grebelsky to hide the his wallet and computers located in the backyard of her residence. Tr. 3136-37. Trial counsel, on cross examination, made serious inroads to the credibility of the witness. Tr. 3139-66. However trial counsel performed deficiently when they failed to move to preclude the prosecution from calling the witness.

After the witness testified as to his credentials, the prosecution moved that the court declare him an expert. Tr. 3116. The trial court did not rule on the motion. *Id.* The witness rendered his opinion “within a reasonable degree of certainty based upon [his] experience and training.” Tr. 3139. This is an amorphous standard. Every time that any person states that he is sure about something, it is based upon his or her life experiences and training. More importantly, handwriting comparison does not have sufficient support in the relevant literature to be the subject of admissible expert testimony. National Research Council (U.S.), *Strengthening Forensic Science in the United States: A Path Forward*, pp. 163- 167 (2009). According to this widely accepted treatise, “[s]oftware tools recently have become available for the analysis of handwriting. *Id.* at 164. The witness did not employ any software in reaching his conclusions. Tr. 3112-39. The authors of the treatise found that “[t]he scientific basis for handwriting comparisons needs to be strengthened. Recent studies . . . suggest that *there may be* a scientific bases for handwriting comparison . . . Although *there has been only limited research to quantify the reliability and replicability of the practices* used by trained document examiners, the committee agrees that *there may be some value in handwriting analysis.*” *Id.* at 166-67 (emphasis added). Given the limited research and the tepid conclusion that there may be some validity to the field, the testimony should have been excluded. Evid. R. 702(C) (A witness’ testimony is only admissible if it is “based upon reliable, scientific, technical or other specialized information”).

Trial counsel performed deficiently when they failed to move the Court to exclude the testimony of this witness.

2. *Trial counsel conducted unreasonable cross examination.*

It goes without saying that trial counsel's cross-examination should call into question the strength of the prosecution's case and its witnesses. Cross-examination should not open the door to otherwise inadmissible evidence. *Moore v. Johnson*, 194 F.3d 586, 612 (5th Cir. 1999) ("Devine's cross-examination of Autry elicited some of the most damaging testimony against Moore. None of that testimony was elicited by the state on direct examination."); *United States v. Villalpando*, 259 F.3d 934 (8th Cir. 2001) ("Trial counsel's cross-examination of Dlouhy fell below an objective standard of reasonable competence, the first prong of the *Strickland* analysis. Trial counsel elicited testimony from Dlouhy tending to establish Villalpando's character as threatening and murderous.") The prosecution cannot elicit testimony that the defendant exercised his constitutional rights, and requested counsel during custodial interrogation. *Doyle v. Ohio*, 426 U.S. 610, 611 (1976) ("The use for impeachment purposes of petitioners' silence, at the time of arrest and after they received Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment."). Trial defense counsel did what the prosecution could not:

Q. And then he asked what charge, and you said - - you or McConaghy say, we are stopping here because you exercised your right to counsel and cannot discuss this with you anymore, right?

A. Yes.

Tr. 2544

Trial counsel chose not to cross-examine a large number of the prosecution's witnesses. Tr. 1333, 1343, 1396, 1708, 1713, 1724, 1753. This constituted deficient performance.

Blackburn v. Foltz, 828 F.2d 1177, 1183 (6th Cir. 1987); *Groseclose v. Bell*, 130 F. 3d 1161, 1170 (6th Cir. 1997).

Finally, trial counsel's cross-examination of the prosecution's witnesses often consisted of having the witnesses repeat or bolster their testimony from direct examination. Tr. 1513-14, 1798-1800, 2023-26, 2054-57, 2111-13, 2257-73, 2292-94, 2284-87, 2603-05, 2267-69, 2753. Having the witnesses on cross-examination repeat their direct testimony only served to bolster their credibility. This cross-examination constituted deficient performance. *Fisher v. Gibson*, 282 F.3d 1283, 1299 (10th Cir. 2002) (What made Mr. Porter's conduct different is that, to begin with, his cross-examination served solely to allow prosecution witnesses to reiterate the state's evidence, and did not challenge the testimony or the witnesses' credibility in any way. . . . Even worse, Mr. Porter directly bolstered the credibility of state witnesses . . .).

Counsel performed deficiently in their cross-examination of the prosecution's witnesses.

E. Beasley Was Prejudiced By Counsel's Deficient Performance.

In order for trial counsel's inadequate or deficient performance to constitute a Sixth Amendment violation, a defendant must show that counsels' performance prejudiced his defense. *Strickland*, 466 U.S. at 692. To establish prejudice, a petitioner must demonstrate that but for counsel's errors, there is a reasonable probability the result of the proceedings would have been different. *Id.* at 694. In this case, counsel's deficient performance so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Id.* at 692-93.

This case started wrong and only got worse. Defense counsel failed to file an affidavit of disqualification, which resulted in the trial being presided over by a judge who previously had heard the State's case blaming Beasley for the murders and who then made important factual and

credibility assessments against Beasley. While there is a presumption that judges can keep cases of co-defendants' separate, Beasley has overcome that presumption. Given the length and complexity of Beasley and Rafferty's cases, it was simply impossible for the trial court to keep the facts of the two cases "straight." That conclusion is borne out by the judge's comment when ruling on Beasley's Rule 29 motion. Tr. 2873-74. The issue of impartiality was not limited to the trial judge. Trial counsel failed to ask for the removal of Juror No. 5, who was a friend of the supervising FBI agent assigned to the case. Tr. 2064-2068. In addition, trial counsel failed to conduct an effective voir dire (and as to some jurors no voir dire) with respect to the jurors' ability to 1) set aside what they had learned in the extensive media coverage, and 2) meaningfully consider the mitigation factors that Beasley's would raise at the sentencing hearing.

The State's case was built upon inadmissible hearsay and prejudicial other acts testimony. There was no eyewitness testimony except to the count of attempted murder. The State introduced massive amounts of hearsay statements attributable to the victims prior to their death and the one victim who survived. Tr. 1535, 1539, 1731-35, 1764, 1969-75, 1988-91. The State buttressed this hearsay with additional hearsay from the law enforcement officers concerning information that they had obtained during their investigation. Tr. 1580, 1657, 1664-65, 1738, 1742, 1998-2003, 3006, 2007, 2140, 2349-50, 2355, 2363-64, 2395-96, 2512, 2524-25, 2722, 2764, 2770-74. Trial counsel did not object to most of this hearsay, much of which also violated Beasley's Constitutional right to confront witnesses testifying against him.

The prosecution also introduced voluminous testimony that Beasley had committed various offenses for which he was *not* on trial. The jury learned that: 1) prior to this case the U.S. Marshals were searching for Beasley and had placed the Hood property under surveillance

for purposes of apprehending him. Tr. 1546-47, 1559-64, 2524, 2538, 2546-47, 2764-65; 2) the Akron Police Department had outstanding warrants for Beasley. Tr. 2566-67; 3) the Ohio Adult Parole Authority considered Beasley's prior cases noteworthy. Tr. 1571, 1576; and 4) Beasley had previously served time with Jerry Hood ,Sr. Tr. 3092. Trial counsel did not object to nearly all of this other act testimony.

Finally, the State relied upon a letter allegedly written by Beasley from the jail. After his arrest in this case the writer requested that Joyce Grebeksy hide some of the evidence linking Beasley to the murders. Tr. 3136-37. The State, as with much of the rest of its theories of prosecution) lacked *any* direct evidence that Beasley had written this letter upon which the State placed a great deal of significance. The State called Paul Bennett, a retired Columbus policeman, to testify that Beasley's handwriting matched the handwriting on the letter in question. Tr. 3111-12. The witness offered opinions that did not fall within the requisite degree of reasonable degree of certainty. In addition, the methods Bennett employed for reaching his opinions were not supported by sufficient research. Trial counsel did not move the court to preclude the testimony of the witness.

The proper test to demonstrate prejudice is whether there is a reasonable probability a single juror would have reached a different conclusion. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003). The test applies to the trial phase of a capital case as well as the sentencing phase. *Ramonez v. Berghuis*, 490 F.3d 482, 491 (6th Cir. 2007). There is a reasonable probability that one or more jurors would have not have found Beasley guilty of capital murder, if trial counsel's performance had met the prevailing standards of practice.

Even if the jury had returned guilty verdicts as to the counts charging capital murder, Beasley was still prejudiced. The admission of evidence in the trial phase can affect the outcome

of the mitigation phase. *State v. Thompson*, 33 Ohio St. 3d 1, 15, 514 N.E.2d 407 (1987) (“We would be naive not to recognize that those matters which occur in the guilt phase carry over and become part and parcel of the entire proceeding as the penalty phase is entered”); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1098 (6th Cir. 1990) (improper admission of the defendant’s statement was not harmless error in the penalty phase). The jury entering the mitigation phase would have had a much more positive attitude toward Beasley if counsel’s performance in the trial phase had met the prevailing standards of practice. The jury may well have convicted Beasley of fewer aggravating circumstances. Not all aggravating circumstances “are the same.” *State v. Sapp*, 105 Ohio St. 3d 104, 124, 822 N.E.2d 1239 (2004) (“In particular, we believe that the R.C. § 2929.04(A)(5) circumstance deserves great weight”). Thus, the impact of trial counsel’s deficient performance in the trial phase carried over into the mitigation phase. There is a reasonable probability that one or more jurors would have voted to recommended a sentence of less than death if counsel’s performance had met the prevailing standards or practice.

This Court should sustain this proposition of law. It should vacate Beasley’s convictions and remand the matter for a new trial. In the alternative, it should vacate his death sentences and remand the matter for a new sentencing hearing.

PROPOSITION OF LAW NO. 8

A trial court denies a capital defendant's right to allocution when the defendant is given an exceptionally limited opportunity to speak before the death penalty is imposed. U.S. Const. amends. V, VIII, XIV.

A. Facts.

After hearing all of the evidence presented at trial, the jury found Beasley guilty of aggravated murder with death penalty specifications. A mitigation hearing was held at which Beasley presented mitigation evidence. After the presentation of mitigation phase evidence, victim impact statements were allowed, and the trial court advised Beasley that he had a right of allocution. Beasley asked if he could defer that right until after the victims had given their statements. Sentencing Tr. 5. The trial court then proceeded to sentence Beasley on the capital murder counts, and imposed sentences of death for each. Sentencing Tr. 7-9.

Later in the proceedings, after the victims' families had given their statements, and thus as initially had been proposed by Beasley when the right of allocution first was raised, Beasley asked the trial court: "Can I make a statement?" Sentencing Tr. 19. The court advised Beasley that he *could* make a statement, before the judge sentenced him on the remaining charges. However, only seven sentences into Beasley's statement, the Court interrupted and disrupted the allocution, firmly stating: "Mr. Beasley, if you want to address me about sentencing on the remaining charges, you may. *I am not going to sit here and retry this case with you.*" Sentencing Tr. 20 (emphasis added).

Thus chastised, Beasley proceeded to wrap up his allocution quickly, asserting his innocence and expressing sorrow to the families of the victims. The entire allocution effort, absent the trial court's admonishment in the middle of Beasley's statement, consisted of 14 sentences, and less than two pages of transcript. Sentencing Tr. 19-21.

Beasley was effectively denied his right to allocution by being sentenced to death without having a true opportunity to speak on his own behalf. The record makes clear that he chose to defer his right of allocution until after the victims' relatives had spoken, and that he promptly asserted that right when they had finished. Yet he received no meaningful right of allocution. Accordingly, his death sentence must be vacated. On remand, Beasley must be resentenced on the capital counts after he is afforded his right of allocution.

B. Ohio Criminal Rule 32(A)(1) Confers an Absolute Right to Allocution.

Ohio R. Crim. P. 32 (A)(1) confers an absolute right of allocution by clearly specifying:

“At the time of imposing sentence, the court shall do all of the following:

- (1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.”

Ohio R. Crim. P. 32(A)(1).

This Court consistently has held that the provisions in Crim. R. 32(A) are mandatory in capital cases. Accordingly, error results when the trial court fails to allow the defendant his right of allocution. *State v. Reynolds*, 80 Ohio St. 3d 670, 684, 687 N.E.2d 1358, 1372 (1998). Failure to comply with Crim. R. 32(A) constitutes reversible error. *State v. Campbell*, 90 Ohio St. 3d 320, 325-26, 738 N.E.2d 1178, 1189-90 (2000); *State v. Green*, 90 Ohio St. 3d 352, 359, 738 N.E.2d 1208, 1221 (2000).

C. Beasley was not Afforded a Meaningful Opportunity to Speak on his own Behalf before Sentencing.

Beasley was not provided with a meaningful opportunity to speak before he was sentenced to death. The court made it clear to Beasley that any reference he would make to the recently concluded capital trial witnesses would not be tolerated by the trial court. Sentencing Tr. 20. And the opportunity to speak was directed only towards the non-capital counts, and thus was too ambiguous to comply with the requirements of Crim. R. 32(A).

In *Green*, the trial court sentenced Green on both his capital and noncapital offenses. The Court asked Green whether he had anything to say prior to the Court imposing sentence on his noncapital offense. Green's counsel commented on the firearm specification, but Green said nothing further. The court then imposed its sentence for all of the offenses including aggravated murder. This Court found that the trial court erred in not explicitly asking Green, in an inquiry directed only to him, whether he had anything to say before he was sentenced. *Green*, 90 Ohio St.3d at 359, 738 N.E.2d at 1221. This Court further noted that the trial court's reference to the counts on which Green could speak was ambiguous. "The context suggests that the court may have solicited comment only on the noncapital offenses. Instead, the trial court should have specifically asked Green if he had anything to say about the capital counts as well as the other offenses." *Id.*

D. The Failure to Comply with Crim. R. 32(A) was not Harmless.

The facts of Beasley's case are distinguishable from instances where this Court has found the denial of allocution harmless. For example, in *Reynolds*, the defendant made an unsworn statement at the penalty phase, defendant addressed the trial court in a letter before sentencing, and counsel spoke on the defendant's behalf at sentencing. Unlike *Reynolds*,

Beasley did not make an unsworn statement or a statement in writing before his death sentence was imposed and his counsel made no argument on his behalf. *Id.*

Beasley's case is more similar to the violations that occurred in *Green* and *Campbell*. In those cases, this Court concluded that the failure to afford the defendant a meaningful opportunity to speak was not harmless and resulted in reversible error. *Campbell*, 90 Ohio St.3d at 325-26, 738 N.E.2d at 1189-90; *Green*, 90 Ohio St.3d at 359, 738 N.E.2d at 1221. Although Beasley was provided with a minimal opportunity to speak, the trial court's admonishment to him that it was "not going to sit here and retry this case with you" certainly placed a pervasive chilling effect on Beasley's willingness to exercise his right of allocution further -- he quickly stopped his right of allocution as a direct result of the trial court admonishment.

E. The Failure to Grant the Right of Allocution bears Constitutional Dimensions.

The right of allocution is a crucial tool of due process because it gives the defendant his last chance to obtain mercy and to obtain an individualized consideration from the sentencer. *United States v. Myers*, 150 F.3d 459, 463 (5th Cir. 1998). "An inquiry under Crim. R. 32(A) is much more than an empty ritual: it represents a defendant's last opportunity to plead his case or express remorse." *Green*, 90 Ohio St.3d at 359-60, 738 N.E.2d at 1221. The question of whether to extend mercy is "central" to the capital sentencing determination. *Drake v. Kemp*, 762 F.2d 1449, 1460 (11th Cir. 1985).

Further, all valid capital sentencing schemes must afford individualized sentencing to the defendant. *See Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Because the right of allocution provides the defendant with his last chance for mercy, and for individualized sentencing, it follows that a denial of allocution unduly restricts the sentencer's consideration of all relevant mitigation. *See also Skipper v. South Carolina*, 476

U.S. 1, 8 (1986). And while a sentencer is free to give a defendant's mitigating evidence the weight it deems appropriate, it "may not give it no weight by excluding such evidence from consideration." *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982).

F. Conclusion.

Beasley's right of allocution was summarily shortened by the trial court, so was not meaningful, thereby undercutting the Constitutional reliability of his death sentence. Beasley's right against cruel and unusual punishment under the Eighth Amendment to the United States Constitution was violated when he was precluded from speaking on his behalf on the issue of capital punishment. This error also denied him his right to due process under the Fifth and Fourteenth Amendments to the United States Constitution.

Notwithstanding Constitutional error, reversible error occurred under the holdings in *Green* and *Campbell* because Beasley was denied his full right of allocution when his final opportunity to plead his case or express remorse was cut off by the trial court admonition that it would not allow Beasley to "retry the case." Beasley's death sentence must be vacated and the case remanded for resentencing.

PROPOSITION OF LAW NO. 9

Ohio's death penalty law is unconstitutional. Ohio Rev. Code Ann. §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 do not meet the prescribed constitutional requirements and are unconstitutional on their face and as applied to Beasley. U.S. Const. amends. V, VI, VIII, And XIV; Ohio Const. art. I, §§ 2, 9, 10, And 16. Further, Ohio's death penalty statute violates the United States' obligations under international law.⁴

The Eighth Amendment to the Constitution and Article I, § 9 of the Ohio Constitution prohibit the infliction of cruel and unusual punishment. The Eighth Amendment's protections are applicable to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660 (1962). Punishment that is "excessive" constitutes cruel and unusual punishment. *Coker v. Georgia*, 433 U.S. 584 (1977). The underlying principle of governmental respect for human dignity is the Court's guideline to determine whether this statute is constitutional. See *Furman v. Georgia*, 408 U.S. 238 (1972) (Brennan, J., concurring); *Rhodes v. Chapman*, 452 U.S. 337, 361 (1981); *Trop v. Dulles*, 356 U.S. 86 (1958). The Ohio scheme offends this bedrock principle in the following ways:

A. Arbitrary and Unequal Punishment.

The Fourteenth Amendment's guarantee of equal protection requires similar treatment of similarly situated persons. This right extends to the protection against cruel and unusual punishment. *Furman*, 408 U.S. at 249 (Douglas, J., concurring). A death penalty imposed in violation of the Equal Protection guarantee is a cruel and unusual punishment. See *id.* Any arbitrary use of the death penalty also offends the Eighth Amendment. *Id.*

⁴ In *State v. Jenkins*, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984), this Court upheld this death penalty statute and this Court may, therefore, reject this claim on its merits if it disagrees with Appellant's federal constitutional arguments. *State v. Poindexter*, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988).

Ohio's capital punishment scheme allows the death penalty to be imposed in an arbitrary and discriminatory manner in violation of *Furman* and its progeny. Prosecutors' virtually uncontrolled indictment discretion allows arbitrary and discriminatory imposition of the death penalty. Mandatory death penalty statutes were deemed fatally flawed because they lacked standards for imposition of a death sentence and were therefore removed from judicial review. *Woodson v. North Carolina*, 428 U.S. 280 (1976). Prosecutors' uncontrolled discretion violates this requirement.

Due process prohibits the taking of life unless the state can show a legitimate and compelling state interest. *Commonwealth v. O'Neal*, 339 N.E.2d 676, 678 (Mass. 1975) (Tauro, C.J., concurring); *State v. Pierre*, 572 P.2d 1338 (Utah 1977) (Maughan, J., concurring and dissenting). Moreover, where fundamental rights are involved personal liberties cannot be broadly stifled "when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). To take a life by mandate, the State must show that it is the "least restrictive means" to a "compelling governmental end." *O'Neal II*, 339 N.E.2d at 678.

The death penalty is neither the least restrictive nor an effective means of deterrence. Both isolation of the offender and retribution can be effectively served by less restrictive means. Society's interests do not justify the death penalty.

B. Unreliable Sentencing Procedures.

The Due Process and Equal Protection Clauses prohibit arbitrary and capricious procedures in the State's application of capital punishment. *Gregg v. Georgia*, 428 U.S. 153, 188, 193-95 (1976); *Furman*, 408 U.S. at 255, 274. Ohio's scheme does not meet those requirements. The statute does not require the State to prove the absence of any mitigating factors or that death is the only appropriate penalty.

The statutory scheme is unconstitutionally vague, which leads to the arbitrary imposition of the death penalty. The language “that the aggravating circumstances ... outweigh the mitigating factors” invites arbitrary and capricious jury decisions. “Outweigh” preserves reliance on the lesser standard of proof by a preponderance of the evidence. The statute requires only that the sentencing body be convinced beyond a reasonable doubt that the aggravating circumstances were marginally greater than the mitigating factors. This creates an unacceptable risk of arbitrary or capricious sentencing.

Additionally, the mitigating circumstances are vague. The jury must be given “specific and detailed guidance” and be provided with “clear and objective standards” for their sentencing discretion to be adequately channeled. *Gregg; Godfrey v. Georgia*, 446 U.S. 420 (1980).

Ohio courts continually hold that the weighing process and the weight to be assigned to a given factor are within the individual decision-maker’s discretion. *State v. Fox*, 69 Ohio St. 3d 183, 193, 631 N.E.2d 124, 132 (1994). Giving so much discretion to juries inevitably leads to arbitrary and capricious judgments. The Ohio open discretion scheme further risks that constitutionally relevant mitigating factors that must be considered as mitigating [youth or childhood abuse (*Eddings v. Oklahoma*, 455 U.S. 104 (1982)), mental disease or defect (*Penry v. Lynaugh*, 492 U.S. 302 (1989) *rev’d on other grounds Penry v. Johnson*, 532 U.S. 782 (2001)), level of involvement in the crime (*Enmund v. Florida*, 458 U.S. 782 (1982)), or lack of criminal history (*Delo v. Lashley*, 507 U.S. 272 (1993))] will not be factored into the sentencer’s decision. While the federal constitution may allow states to shape consideration of mitigation, *see Johnson v. Texas*, 509 U.S. 350 (1993), Ohio’s capital scheme fails to provide adequate guidelines to sentencers, and fails to assure against arbitrary, capricious, and discriminatory results.

Empirical evidence is developing in Ohio and around the country that, under commonly used penalty phase jury instructions, juries do not understand their responsibilities and apply inaccurate standards for decision. *See* Cho, *Capital Confusion: The Effect of Jury Instructions on the Decision To Impose Death*, 85 J. Crim. L. & Criminology 532, 549-557 (1994), and findings of Zeisel discussed in *Free v. Peters*, 12 F.3d 700 (7th Cir. 1993). This confusion violates the federal and state constitutions. Because of these deficiencies, Ohio's statutory scheme does not meet the requirements of *Furman* and its progeny.

C. Defendant's Right to a Jury is Burdened.

The Ohio scheme is unconstitutional because it imposes an impermissible risk of death on capital defendants who choose to exercise their right to a jury trial. A defendant who pleads guilty or no contest benefits from a trial judge's discretion to dismiss the specifications "in the interest of justice." Ohio R. Crim. P. 11(C)(3). Accordingly, the capital indictment may be dismissed regardless of mitigating circumstances. There is no corresponding provision for a capital defendant who elects to proceed to trial before a jury.

Justice Blackmun found this discrepancy to be constitutional error. *Lockett v. Ohio*, 438 U.S. 586, 617 (1978) (Blackmun, J., concurring). This disparity violated *United States v. Jackson*, 390 U.S. 570 (1968), and needlessly burdened the defendant's exercise of his right to a trial by jury. Since *Lockett*, this infirmity has not been cured and Ohio's statute remains unconstitutional.

D. Mandatory Submission of Reports and Evaluations.

Ohio's capital statutes are unconstitutional because they require submission of the pre-sentence investigation report and the mental evaluation to the jury or judge once requested by a capital defendant. R.C. § 2929.03(D)(1). This mandatory submission prevents defense counsel

from giving effective assistance and prevents the defendant from effectively presenting his case in mitigation.

E. R.C. §§ 2929.03(D)(1) and 2929.04 are Unconstitutionally Vague.

R.C. § 2929.03(D)(1)'s reference to "the nature and circumstances of the aggravating circumstance" incorporates the nature and circumstances of the offense into the factors to be weighed in favor of death. The nature and circumstances of an offense are, however, statutory mitigating factors under R.C. § 2929.04(B). R.C. § 2929.03(D)(1) makes Ohio's death penalty weighing scheme unconstitutionally vague because it gives the sentencer unfettered discretion to weigh a statutory mitigating factor as an aggravator.

To avoid arbitrariness in capital sentencing, states must limit and channel the sentencer's discretion with clear and specific guidance. *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990); *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). A vague aggravating circumstance fails to give that guidance. *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *vacated on other grounds Ring v. Arizona*, 536 U.S. 584 (2002); *Godfrey*, 446 U.S. at 428. Moreover, a vague aggravating circumstance is unconstitutional whether it is an eligibility or a selection factor. *Tuilaepa v. California*, 512 U.S. 967 (1994). The aggravating circumstances in R.C. § 2929.04(A)(1)-(8) are both.

F. Proportionality and Appropriateness Review.

Ohio Revised Code §§ 2929.021 and 2929.03 require data be reported to the courts of appeals and to the Ohio Supreme Court. There are substantial doubts as to the adequacy of the information received after guilty pleas to lesser offenses or after charge reductions at trial. R.C. § 2929.021 requires only minimal information on these cases. Additional data is necessary to make an adequate comparison in these cases. This prohibits adequate appellate review.

Adequate appellate review is a precondition to the constitutionality of a state death penalty system. *Zant v. Stephens*, 462 U.S. 862, 879 (1983); *Pulley v. Harris*, 465 U.S. 37 (1984). The standard for review is one of careful scrutiny. *Zant*, 462 U.S. at 884-85. Review must be based on a comparison of similar cases and ultimately must focus on the character of the individual and the circumstances of the crime. *Id.*

Ohio's statutes' failure to require the jury or three-judge panel recommending life imprisonment to identify the mitigating factors undercuts adequate appellate review. Without this information, no significant comparison of cases is possible. Absent a significant comparison of cases, there can be no meaningful appellate review. *See State v. Murphy*, 91 Ohio St. 3d 516, 562, 747 N.E.2d 765, 813 (2001) (Pfeifer, J., dissenting) ("When we compare a case in which the death penalty was imposed only to other cases in which the death penalty was imposed, we continually lower the bar of proportionality. The lowest common denominator becomes the standard.")

The comparison method is also constitutionally flawed. Review of cases where the death penalty was imposed satisfies the proportionality review required by R.C. § 2929.05(A). *State v. Steffen*, 31 Ohio St. 3d 111, 509 N.E.2d 383, syl. 1 (1987). However, this prevents a fair proportionality review. There is no meaningful manner to distinguish capital defendants who deserve the death penalty from those who do not.

This Court's appropriateness analysis is also constitutionally infirm. R.C. § 2929.05(A) requires appellate courts to determine the appropriateness of the death penalty in each case. The statute directs affirmance only where the court is persuaded that the aggravating circumstances outweigh the mitigating factors and that death is the appropriate sentence. *Id.* This Court has not followed these dictates. The appropriateness review conducted is very cursory. It does not

“rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not.” *Spaziano v. Florida*, 468 U.S. 447, 460 (1984).

The cursory appropriateness review also violates the capital defendant's due process rights as guaranteed by the Fifth and Fourteenth Amendments to the Constitution. The General Assembly provided capital appellants with the statutory right of proportionality review. When a state acts with significant discretion, it must act in accordance with the Due Process Clause. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). The review currently used violates this constitutional mandate. An insufficient proportionality review violates Beasley's due process and liberty interest in R.C. § 2929.05.

G. Ohio's Statutory Death Penalty Scheme Violates International Law.

International law binds each of the states that comprise the United States. Ohio is bound by international law whether found in treaty or in custom. Because the Ohio death penalty scheme violates international law, Beasley's capital convictions and sentences cannot stand.

1. International Law Binds Ohio.

“International law is a part of our law[.]” *The Paquete Habana*, 175 U.S. 677, 700 (1900). A treaty made by the United States is the supreme law of the land. Article VI, United States Constitution. Where state law conflicts with international law, it is the state law that must yield. *See Zschernig v. Miller*, 389 U.S. 429, 440 (1968). In fact, international law creates remediable rights for United States citizens. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Forti v. Suarez-Mason*, 672 F.Supp. 1531 (N.D. Cal. 1987).

2. Ohio's Obligations Under International Charters, Treaties, and Conventions.

The United States' membership and participation in the United Nations (U.N.) and the Organization of American States (OAS) creates obligations in all fifty states. Through the U.N. Charter, the United States committed itself to promote and encourage respect for human rights and fundamental freedoms. Art. 1(3). The United States bound itself to promote human rights in cooperation with the U.N. Art. 55-56. The United States again proclaimed the fundamental rights of the individual when it became a member of the OAS. OAS Charter, Art. 3.

The U.N. has sought to achieve its goal of promoting human rights and fundamental freedoms through the creation of numerous treaties and conventions. The United States has ratified several of these including: the International Covenant on Civil and Political Rights (ICCPR) ratified in 1992, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) ratified in 1994, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) ratified in 1994. Ratification of these treaties by the United States expressed its willingness to be bound by these treaties. Pursuant to the Supremacy Clause, the ICCPR, the ICERD, and the CAT are the supreme laws of the land.

Ohio is not fulfilling the United States' obligations under these conventions. Rather, Ohio's death penalty scheme violates each convention's requirements and thus must yield to the requirements of international law. (*See discussion infra* Subsection 1).

a. Ohio's Statutory Scheme Violates the ICCPR's and ICERD's Guarantees of Equal Protection and Due Process.

Both the ICCPR, ratified in 1992, and the ICERD, ratified in 1994, guarantee equal protection of the law. ICCPR Art. 2(1), 3, 14, 26; ICERD Art. 5(a). The ICCPR further guarantees due process via Articles 9 and 14, which includes numerous considerations: a fair hearing (Art. 14(1)), an independent and impartial tribunal (Art. 14(1)), the presumption of

innocence (Art. 14(2)), adequate time and facilities for the preparation of a defense (Art. 14(3)(a)), legal assistance (Art. 14(3)(d)), the opportunity to call and question witnesses (Art. 14(3)(e)), the protection against self-incrimination (Art. 14(3)(g)), and the protection against double jeopardy (Art. 14(7)). However, Ohio's statutory scheme fails to provide equal protection and due process to capital defendants as contemplated by the ICCPR and the ICERD.

b. Ohio's Statutory Scheme Violates the ICCPR's Protection Against Arbitrary Execution.

The ICCPR speaks explicitly to the use of the death penalty. The ICCPR guarantees the right to life and provides that there shall be no arbitrary deprivation of life. Art. 6(1). It allows the imposition of the death penalty only for the most serious offenses. Art. 6(2). Juveniles and pregnant women are protected from the death penalty. Art. 6(5). Moreover, the ICCPR contemplates the abolition of the death penalty. Art. 6(6).

However, several aspects of Ohio's statutory scheme allow for the arbitrary deprivation of life. *See infra* Sections a–f.

c. Ohio's Statutory Scheme Violates the ICERD's Protections Against Race Discrimination.

The ICERD, speaking to racial discrimination, requires that each state take affirmative steps to end race discrimination at all levels. Art. 2. It requires specific action and does not allow states to sit idly by when confronted with practices that are racially discriminatory. However, Ohio's statutory scheme imposes the death penalty in a racially discriminatory manner. (*See infra* Section A). A scheme that sentences blacks and those who kill white victims more frequently and which disproportionately places African-Americans on death row is in clear violation of the ICERD. Ohio's failure to rectify this discrimination is a direct violation of international law and of the Supremacy Clause of the United States Constitution.

d. Ohio's Statutory Scheme Violates the ICCPR'S and the CAT'S Prohibitions Against Cruel, Inhuman or Degrading Punishment.

The ICCPR prohibits subjecting any person to torture or to cruel, inhuman, or degrading treatment or punishment. Art. 7. Similarly, the CAT requires that states take action to prevent torture, which includes any act by which severe mental or physical pain is intentionally inflicted on a person for the purpose of punishing him for an act committed. *See* Art. 1-2. As administered, Ohio's death penalty inflicts unnecessary pain and suffering. Thus, there is a violation of international law and the Supremacy Clause.

e. Ohio's Obligations Under the ICCPR, the ICERD, and the CAT are not Limited by the Reservations and Conditions Placed in these Conventions by the Senate.

While conditions, reservations, and understandings accompanied the United States' ratification of the ICCPR, the ICERD, and the CAT, those conditions, reservations, and understandings cannot stand for two reasons. Article II, § 2 of the United States Constitution provides for the advice and consent of two-thirds of the Senate when a treaty is adopted. However, the Constitution makes no provision for the Senate to modify, condition, or make reservations to treaties. The Senate is not given the power to determine what aspects of a treaty the United States will and will not follow. Their role is to simply advise and consent.

Thus, the Senate's inclusion of conditions and reservations in treaties goes beyond that role of advice and consent. The Senate picks and chooses which items of a treaty will bind the United States and which will not. This is the equivalent of the line item veto, which is unconstitutional. *Clinton v. City of New York*, 524 U.S. 417, 438 (1998). The Supreme Court specifically spoke to the enumeration of the president's powers in the Constitution in finding that the president did not possess the power to issue line item vetoes. *Id.* If it is not listed, then the President lacks the power to do it. *See id.* Similarly, the Constitution does not give the power to

the Senate to make conditions and reservations, picking and choosing what aspects of a treaty will become law. Thus the Senate lacks the power to do just that. Therefore, any conditions or reservations made by the Senate are unconstitutional. *See id.*

The Vienna Convention on the Law of Treaties further restricts the Senate's imposition of reservations. It allows reservations unless: they are prohibited by the treaty, the treaty provides that only specified reservations, not including the reservation in question, may be made, or the reservation is incompatible with the object and purpose of the treaty. Art. 19(a)-(c). The ICCPR specifically precludes derogation of Articles 6-8, 11, 15-16, and 18. Under the Vienna Convention, the United States' reservations to these articles are invalid under the language of the treaty. *See id.* Further, the ICCPR's purpose is to protect the right to life and any reservation inconsistent with that purpose violates the Vienna Convention. Thus, United States reservations cannot stand under the Vienna Convention as well.

f. Ohio's Obligations Under the ICCPR Are Not Limited by the Senate's Declaration that it is Not Self-Executing.

The Senate indicated that the ICCPR is not self-executing. However, the question of whether a treaty is self-executing is left to the judiciary. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370 (7th Cir. 1985) (Restatement (Second) of Foreign Relations Law of the United States, Sec. 154(1) (1965)). It is the function of the courts to say what the law is. *See Marbury v. Madison*, 5 U.S. 137 (1803).

Further, requiring the passage of legislation to implement a treaty necessarily implicates the participation of the House of Representatives. By requiring legislation to implement a treaty, the House can effectively veto a treaty by refusing to pass the necessary legislation. However, Article 2, § 2 excludes the House of Representatives from the treaty process. Therefore, declaring a treaty to be not self-executing gives power to the House of Representatives not

contemplated by the United States Constitution. Thus, any declaration that a treaty is not self-executing is unconstitutional. *See Clinton*, 524 U.S. at 438.

3. Ohio's Obligations Under Customary International Law.

International law is not merely discerned in treaties, conventions and covenants. International law “may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law.” *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820). Regardless of the source “international law is a part of our law[.]” *The Paquete Habana*, 75 U.S. at 700.

The judiciary and commentators recognize the Universal Declaration of Human Rights (DHR) as binding international law. The DHR “no longer fits into the dichotomy of ‘binding treaty’ against ‘non-binding pronouncement,’ but is rather an authoritative statement of the international community.” *Filartiga*, 630 F.2d at 883 (internal citations omitted).

The DHR guarantees equal protection and due process (Art. 1, 2, 7, 11), recognizes the right to life (Art. 3), prohibits the use of torture or cruel, inhuman or degrading punishment (Art. 5) and is largely reminiscent of the ICCPR. Each of the guarantees found in the DHR are violated by Ohio's statutory scheme. Thus, Ohio's statutory scheme violates customary international law as codified in the DHR and cannot stand.

However, the DHR is not alone in its codification of customary international law. *Smith* directs courts to look to “the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law” in ascertaining international law. 18 U.S. (5 Wheat.) at 160-61. Ohio should be cognizant of the fact that its statutory scheme violates numerous declarations and conventions drafted and

adopted by the United Nations and the OAS, which may, because of the sheer number of countries that subscribe to them, codify customary international law. *See id.*

Ohio's statutory scheme is in violation of customary international law.

H. Conclusion.

Ohio's death penalty scheme fails to ensure that arbitrary and discriminatory imposition of the death penalty will not occur. The procedures actually promote the imposition of the death penalty and, thus, are constitutionally intolerable. Ohio Revised Code §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution and Article I, §§ 2, 9, 10, and 16 of the Ohio Constitution and international law. Beasley's death sentence must be vacated.

PROPOSITION OF LAW NO. 10

A criminal conviction that is not supported by substantial credible evidence will be reversed on appeal.

Beasley and co-defendant Brogan Rafferty were accused of luring two individuals through a Craigslist posting, to a rural area in southeastern Ohio, fatally shooting them, burying their bodies, and stealing their property. They were also accused of luring a third individual, who had survived when a firearm malfunctioned. Finally, they were accused of murdering another individual whose body, unlike the others, was found behind a mall in Akron, Ohio.

There is no physical evidence linking Beasley to the murders in this case. The only firearm, a .22 caliber handgun, that the investigator recovered was found in Brogan Rafferty's bedroom. Beasley's fingerprints and DNA were not found on the gun. The only survivor, Scott Davis, prior to trial court could not identify Beasley as the person who shot him. Tr. 1493. Scott Davis did, however, identify Brogan Rafferty. Tr. 2352. Beasley was not directly linked to the telephone calls to the individuals who responded to the Craigslist posting.

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. This inquiry is separate from the examination for sufficiency of the evidence. This review must be directed toward a determination of whether there is substantial evidence upon which a jury could reasonably conclude that all of the elements of the offense(s) have been proved beyond a reasonable doubt. *State v. Eley*, 56 Ohio St. 2d 169, 172, 383 N.E.2d 132 (1978); *Glasser v. United States*, 315 U.S. 60, 80 (1942). Substantial evidence is more than a mere scintilla. *See United States v. Orrico*, 599 F.2d 113, 117 (6th Cir. 1979). It is evidence affording a substantial basis of fact from which the fact at issue can be reasonably inferred. *Id.*

An appellate court when it decides a proposition of law or assignment of error sits as a thirteenth juror. *State v. Thompson*, 78 Ohio St. 3d 380, 387, 678 N.E.2d 541 (1997). It may assess the credibility of witnesses. *State v. Vasquez*, 2014 Ohio App. LEXIS 208, *31 (10th Dist. Jan, 24, 2014). The appellate court concerns itself with which side presented the “greater amount of credible evidence.” *Thompson*, at 387. “In other words, [the appellate courts] are reviewing court asks whose evidence is more persuasive - - the state’s or the defendant’s?” *State v. Wilson*, 113 Ohio St. 3d 382, 387, 865 N.E. 2d 1264 (2007).

The State in this case did not produce substantial evidence upon which a jury could have reasonably concluded by proof beyond a reasonable doubt that the Beasley was the individual who murdered Ralph Geiger, David Pauley, and Timothy Kern, and attempted to murder Scott Davis. Beasley will separately address the evidence as to all four victims. Initially, however, it is important to “step back” and assess the State’s theory, which was the same for all four victims.

The State theorized that Beasley and Rafferty made contact with four victims through a posting on Craigslist. The posting promised a job on a farm located in rural Noble County, southeastern Ohio. The State further claimed when three of the victims arrived in a desolate part of Noble County for the jobs that they had been promised, Beasley and Rafferty fatally shot two of them and seriously wounded the third victim. As to the fourth victim, Timothy Kern, the State claimed that Beasley and Rafferty fatally shot him in the greater Akron area while they were preparing to leave for Noble County.

For the State’s theory prosecution to prevail, both Beasley and Brogan had to possess more than a modicum of intelligence. The supposed plan requires intricate maneuvering and involves more sophistication than the typical robbery which “goes bad” and escalates into a killing.

Alternately, however, for the State's theory to prevail, Rafferty and Beasley would have had to *lack* common sense and intelligence. People that are unemployed and are living a marginal existence of living lack the resources to be a considered desirable "victims," as to the purported property theft motivation the State consistently ascribed to Beasley and Rafferty. For instance, Ralph Geiger prior to his death was living in a homeless shelter. Tr. 1336. No one with the intelligence necessary to enact the sophisticated alleged plan of placing listings on Craigslist and creating various email addresses and telephone numbers for the readers' response would have believed that all that work was worth the effort entailed, when the result of these labors would be to rob homeless, destitute individuals with little or no property or money. Three of the victims fit this category. This is especially true given the distance from Akron to Noble County, a drive of approximately two hours. Under the State's theory, Beasley and Rafferty would have been motivated to made a four hour round trip to steal inconsequential property such as Christmas tree lights and toy trains.

Finally, the State argued that if it had proven this theory correctly as to just one of the victims, the identical logic would support the theory of prosecution as to the other three victims. However, the converse is also true. If the State's theory was incorrect as to just one of the victims, that failure significantly decreased the likelihood of the same theory of prosecution holding true as to the other victims.

A. The prosecution failed to produce substantial evidence linking Beasley to the murder of Ralph Geiger.

The State theorized that Rafferty and Beasley lured Ralph Geiger approximately one hundred miles (the distance from Akron to Caldwell) to steal his identification. The State's theory defies common sense. Given the easy availability of fake or stolen identifications, Beasley and Rafferty would not have needed to developed such an elaborate and violent plan to

obtain someone else's identification. High school and college students often possess fake identifications to permit them to engage in underage drinking. None of their efforts to obtain fake identifications involves the killing of other individuals.

The State's theory also defies or contravenes the facts. Geiger died on or about August 8, 2011. Tr. 1342. According to the State's witnesses, the first advertisement for a farm hand in Caldwell was not placed on Craigslist until October 6, 2011, two months *after* Geiger's death. Tr. 1629. Thus, Geiger was not part of the notorious "Craigslist murders," though Geiger's death was lumped into that theory by the State's mode of prosecution.

Beasley used Geiger's identification on January 28, 2011, almost seven months *prior to* Geiger's death, to obtain medical care from Akron Community Services. Tr. 1385–1387. The State claimed that Geiger was the individual who obtained the medical services on January 2011, not Beasley. That dispute is resolved by referencing Defense Exhibit A, the medical clinic's records concerning the services rendered to "Ralph Geiger" on January 28, 2011. The exhibit reflects that the recipient of the medical services that day lived at 2119 Comer, Akron, Ohio. Exhibit A; Tr. 566-67. This was Beasley's address, not Geiger's address. Tr. 2294, 2295, 2302-03.

Geiger was homeless at the time of his untimely death. Tr. 1336. Neither Beasley nor Rafferty would have any discernible motivation to lure a homeless individual to Caldwell on the pretense of a job opportunity but in reality for purposes of stealing his meager belongings. If Geiger had any belongings of value, he likely would not have been homeless. Geiger had told his caseworker that he had obtained a job in Dover, Ohio. Tr. 1339. The distance from Dover, Ohio to Caldwell Ohio is approximately sixty miles. The prosecution introduced no evidence

linking Beasley or the crimes in issue to Dover, Ohio, where Geiger purportedly was going to obtain employment.

The State produced testimony that an individual using the name “Ralph Geiger” checked into the Best Western Hotel on August 8, 2011. Tr. 1349. The registration records reflect that the individual claimed to be with two other individuals. *Id.* However, for unknown reasons, the State did not call the desk clerk from the hotel who checked in the party of three. Tr. 1349-50. Thus, the State offered no probative evidence with respect to the persons who checked into the hotel on the night in question.

The State called Bureau of Criminal Identification and Investigation (BCI) agents Chuck Thomas and Mark Kollar to testify concerning the use of cell phones. Tr. 2549, 2691. Thomas subpoenaed the phone records of Ralph Geiger, David Pauley, and Timothy Kern. Tr. 2556. The State attempted to show that Beasley used a cell phone to contact Geiger as well as the other victims. Both Thomas and Kollar testified extensively about cell phones that were used to contact the victims in this case, as well as Don Walters, Joe Bais, and Smitty’s Gun Shop. Tr. 2549-2611, 2691-2755. However, neither Thomas nor Kollar could connect the cell phones in question to Beasley. The officers when they arrested Beasley seized cell phones from his person and the room that he was renting. The officers subsequently determined that those cell phones had not been used to contact the victim. Tr. 2750.

The State failed to produce substantial evidence, by proof beyond a reasonable doubt, linking Beasley to the death of Ralph Geiger.

B. The prosecution failed to produce substantial evidence linking Beasley to the murder of David Pauley.

No eyewitness testified as to the murder of David Pauley. The State’s case as to the death of Pauley was dependent upon the testimony of Don Walters and the BCI agents

concerning the use of the cell phones. As was the case with Geiger, the testimony of the BCI agents did not connect Beasley to the murder of Pauley.

Walters testified, on direct examination, that on the day of Pauley's death, Beasley and Rafferty drove to his house a U-Haul that was full of property that was similar to the property that was stolen from Pauley. *Id.* at 1847, 1849. Walter said that they unloaded the property into Walters' garage. This testimony constituted some circumstantial evidence linking Beasley and Rafferty to the murder of Pauley. However, on cross examination, it became evident that Walters' testimony was not credible. Walters did not approach the investigating officers about the stolen property. Instead, they approached him, two weeks *after* Beasley was arrested. Tr. 1884. This delay by Walters took place despite the fact that Walters testified that he believed that the property stored in his garage may have been stolen. Tr. 1888.

Further, Walters on cross-examination *admitted* that one-quarter of the property stored in his garage did not belong to him. Tr. 1886. Walters was wearing David Pauley's pants when the FBI showed up at his house. Tr. 1911. Walters had stored some property that did not belong to him in his attic. Tr. 1874, 1910. Walters testified that he believed that it was acceptable for him to retain the property that he believed may have been stolen because he was only keeping it for Beasley. Tr. 1887-88. Walters further testified that he had not come forward because he believed that Beasley had been arrested for prostitution as opposed to murder. Tr. 1895-96. However, Walters simultaneously had advised the FBI agents that he had closely followed the media coverage concerning Beasley's arrest for murder. Tr. 1891. Walters testified that when the FBI agents initially approached him, he had given them permission to search his residence. Tr. 1897-98. But this assertion again was not quite accurate, because in fact when the FBI agents approached him that they had a warrant to search his residence. *Id.* The witness admitted on

cross-examination that he had lied in his initial statement to the FBI protect his friend and himself. Tr. 1900-05. Walters, later during his cross examination, after being repeatedly confronted when his initial statement to the FBI special agent, claimed that that the agent had incorrectly summarized the statement that he had given him. Tr. 1902-04.

Similarly, FBI agents later interviewed Larry Baker, who had purchased the Pauley's vehicle. Tr. 2019. Baker followed the pattern of Walters when questioned, and initially was not forthright about the purchase of the vehicle. Tr. 2109-10. Baker apparently preferred retaining Pauley's vehicle in his possession over assisting law enforcement with their inquiries.

Cara Conley, a U-Haul employee in Akron, Ohio, testified that on October, 24, 2011, two men delivered a U-Haul trailer which has been rented in Virginia and was supposed to be dropped off in Marietta, Ohio. Tr. 1953-54. She identified Beasley as one of the two men. Tr. 1956, 57. He supposedly attempted to strike up a conversation with her, and in the process did not attempt to hide his identity. Tr. 1956, 1963. The other male never made any eye contact with her and did not attempt to speak with her. Tr. 1959, 1962. This evidence is equivocal at best as to whether it reflects any form of wrong-doing by Beasley.

The investigating officers did a thorough search in the area that Pauley's body was found. Tr. 1813. Yet they found no evidence at the scene tending to link Beasley or Rafferty to the murder. Tr. 1813-15.

The State failed to produce substantial evidence, by proof beyond a reasonable doubt, linking Beasley to the death of David Pauley.

C. The prosecution failed to produce substantial evidence linking Beasley to the attempted murder of Scott Davis.

Scott Davis was the only victim who survived. Thus, he was the only eyewitness to any of the shootings. During the initial course of the investigation, he was unable to identify Beasley as the person who shot him. Tr. 1493. However, he could identify Brogan Rafferty. Tr. 2352.

Jerry Shockling was staying at his mother's house in Caldwell, Ohio on November 6, 2011 when Scott Davis appeared at the front door. Tr. 1423-25. Shockling called 911, even though Davis told him to not ask for an ambulance and that friends would pick him up. Tr. 1438. Davis repeatedly claimed to Shockling that the assailants were going to rob him. Tr. 1435. However, the Sheriff did not find any evidence that he was the victim of a robbery. Tr. 1544, 1557. The Sheriff, upon his arrival at the Shockling residence, interviewed Davis, but did not find Davis' story to be truthful. Tr. 1487, 1535.

Davis provided the Sheriff with a physical description of the two people involved in the shooting. Davis told the Sheriff that the older male was fifty-one or fifty-two years old and freshly shaven. Tr. 1539. He described the younger male as being seventeen years old and six foot five inches in height. Tr. 1539. The Sheriff believed that the descriptions provided by Davis matched Jerry Hood and his son, Jerry Hood, Jr. Tr. 1539. Based his prior contacts with the Hoods, Hannum believed that the shooting was the product of a "dope deal gone bad" because the Sheriff had previously executed served a search warrant on the Hood residence. Tr. 1551.

Scott Davis claimed that he met Beasley and Rafferty at Shoney's restaurant for breakfast. Tr. 1463. He also claimed they drove him to a wooded area, where Beasley shot him at close range. Tr. 1477. However, this testimony of Davis on direct examination is suspect. Davis refused to talk to the FBI for the first week after the shooting. Tr. 1524. Despite his

testimony that he had sat across from Beasley at Shoney's, ridden in a car with him, and later been shot at close range by him, Davis was not able to choose Beasley's photograph from a photo array. Tr. 1493. Davis did, however, identify Brogan Rafferty. Tr. 2352. Davis claimed on direct examination that he recalled that Beasley had a tattoo on his left arm. Tr. 1469-70. However, Davis never told any of the investigating officers that he ever saw a tattoo. Tr. 1494. He later claimed that he did not remember the tattoo until a week before trial when he told "Emily," the prosecutor about it. Tr. 1494. The photographs from the security cameras at Shoney's indicate that Beasley was wearing a long sleeved shirt that covered the tattoo. Tr. 1505. Davis claimed that he saw the tattoo in question when they "were comparing tattoos." Tr. 1506. However, the photographs from the security camera video record did not show Beasley roll up his sleeves, so that Davis and he could "compare tattoos." Tr. 1506. Similarly, Davis also did not tell Noble County Sheriff, Stephen Hannum, that he had brought a gun with him from South Carolina. Tr. 1503, 1557.

The State failed to produce substantial evidence, by proof beyond a reasonable doubt, linking Beasley to the attempted murder death of Scott Davis.

D. The prosecution failed to produce substantial evidence linking Beasley to the attempted murder of Tim Kern.

Tim Kern's body was found in a shallow grave near the Rolling Acres Mall in Akron, Ohio. Tr. 2049-50. Fifty officers were involved in the search for the body. Tr. 2054. They used all of the methods available to conduct the search and collect evidence. Tr. 2055-56. The officers, the in the course of their search, did not find any evidence that linked Beasley to the murder. Unlike the bodies of the other two victims, Kern's body was fully clothed. Tr. 2058. The victim had suffered five gunshots to his heads, as opposed to the other two victims who had died from a single gunshot. Tr. 2083-84.

The FBI agents executed a search warrant for the residence of Brogan Rafferty. Tr. 2180. In his bedroom they found a briefcase containing a hunting knife, a sawed off shotgun, a .22 caliber handgun manufactured by Iver Johnson, a box of .22 caliber ammunition, shotgun shells, and a gun cleaning kit. Tr. 2186-87. The investigating officers determined that fourteen .22 caliber bullets were missing from the box of ammunition. Tr. 2257. They also found an ammo can in the living room closet which belonged to David Pauley. Tr. 2206.

The investigating officers submitted the firearms and ammunition to BCI for testing. The BCI ballistics experts conclude that the bullets recovered from the head of Timothy Kern were consistent to the bullets test fired from the .22 caliber gun found in Rafferty's bedroom. Tr. 2214, 2233-34 The test bullets and the bullets recovered from Kern's head could have been fired from the same gun. Tr. 2242. The Iver Johnson .22 caliber gun found in Rafferty's room was the only gun recovered by the investigating officers that could have been used in the shooting. Tr. 2272.

A DNA analyst with the Bureau of Criminal Identification found Rafferty's DNA on the .22 caliber pistol found in his room. Tr. 2654. The same analyst found that Beasley's DNA was *not* present on that firearm. Tr. 2675.

The State failed to produce substantial evidence, by proof beyond a reasonable doubt, linking Beasley to the murder death of Timothy Kern.

E. Conclusion.

This Court should sustain this Proposition of Law as to all four victims and remand this matter for a new trial.

PROPOSITION OF LAW NO. 11

The cumulative effect of trial error renders a capital defendant's trial unfair and his sentence arbitrary and unreliable. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 5, 16.

Beasley raised numerous errors worthy of this Court granting relief from his death sentence. Each error, standing alone, is sufficient to warrant a reversal. However, by viewing the many errors together, it is apparent that their cumulative impact rendered Johnson's trial fundamentally unfair. *See Walker v. Engle*, 703 F.2d 959, 963 (6th Cir. 1983). This Court must reverse Johnson's sentence.

From beginning to end, Beasley's capital trial was replete with prejudicial error. *See* Propositions of Law Nos. 1 – 10. Assuming *arguendo* that none of the errors Johnson raised alone warrant reversal of his sentence, the cumulative effect of the errors is so prejudicial that this Court must order a new trial.

The adequacy of the legally admitted evidence is only one factor for this Court to consider in determining the influence that an error has on a jury. The Supreme Court made clear in *Satterwhite v. Texas*, 486 U.S. 249 (1988), that it "is not whether the legally admitted evidence was sufficient to support" the verdict, but rather "whether the [prosecution] has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* at 258-59. Review must also determine whether the cumulative effect of the errors rendered the trial fundamentally unfair. *See Walker*, 703 F.2d at 963. "We must reverse any conviction obtained in a proceeding in which the cumulative impact of irregularities is so prejudicial to a defendant that he is deprived of his fundamental right to a fair trial. Fourteenth Amendment, United States Constitution." *State v. Wilson*, 787 P.2d 821, 821 (N.M. 1990); *United States v.*

Wallace, 848 F.2d 1464, 1475 (9th Cir. 1988); *State v. DeMarco*, 31 Ohio St. 3d 191, 509 N.E.2d 1256, 1261 (1987).

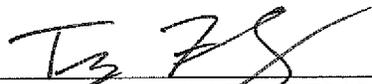
The result of cumulative error entitles Beasley to a new trial. His sentence based upon cumulative error denied him a fair trial and his right to due process. U.S. Const. amends. VI, XIV; Ohio Const. art. I, § 5, 16. These errors render Johnson's death sentence unreliable and arbitrary. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 9, 16.

CONCLUSION

Errors were committed by every participant in Beasley's capital trial, at the trial phase, the mitigation phase, and at the sentencing hearing. The trial court failed to ensure Beasley received a fair trial by failing to even deal with Beasley's change of venue motion despite the overwhelming pretrial publicity, by allowing a biased juror to sit on Beasley's jury, and, a by failing to grant a mistrial when a fair trial was no longer possible. Trial counsel were clearly ineffective in several areas; including failing to ensure a juror was not biased, and failing to move for a mistrial when it was obviously warranted. The State committed several serious acts of misconduct, including purposefully violating the trial court's order and presenting prejudicial evidence, and misrepresenting to the trial court what a key witness's testimony would entail.

These violations ensured that Beasley did not receive a fair trial by an impartial jury in violation of his Sixth Amendment rights. Beasley is entitled to a new trial where errors such as these are absent, especially when what is at stake in this case is a man's life.

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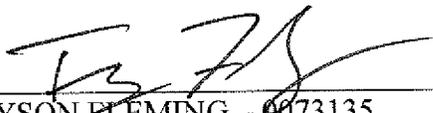
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MERIT BRIEF OF APPELLANT RICHARD BEASLEY was forwarded by U.S. Mail first class to Sherri Bevan Walsh, Summit County Prosecutor, 53 University Avenue, 6th Floor, Akron, OH 44308, Stephen E. Maher and Thomas Madden, Special Prosecutors, Office of the Ohio Attorney, 150 East Gay Street, 16th Floor, Columbus, OH 43215 on this 22nd day of September, 2014.



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