

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
Appellee, :  
-vs- : CASE NO. 2014-0273  
CURTIS L. CLINTON, : **This is a capital case.**  
Appellant. :

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On Appeal From the Court of  
Common Pleas of Erie County  
Case No. 2012 CR 0383

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**REPLY BRIEF OF APPELLANT CURTIS L. CLINTON**

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## STATEMENT OF THE FACTS

The State attempts to paint a fantastically inaccurate picture of the events preceding the discovery of the bodies of Heather Jackson and her children. Contrary to that portrayal, the clear reality is that many (if not most) of Heather Jackson's male acquaintances, who visited her house on the evening in question, were known to be dangerous and had criminal records involving drug abuse, drug trafficking, and violent behavior.

Danielle Sorrell, the first State's witness, described herself to the jury as Heather Jackson's best friend for about 13 years. Tr. 344. Sorrell candidly described to the jurors her opinion, as Heather Jackson's closest female friend, that Heather Jackson, in the weeks and months preceding her death in September 2012, surrounded herself with a number of drug-abusing male acquaintances. Sorrell was worried for Jackson's safety. Indeed, Sorrell stated unequivocally to the jurors that Sorrell had "lectured" Heather Jackson that her drug-abusing male acquaintances had become "a bad influence" on her. Tr. 406, 408-09, 417. Yet Sorrell never once mentioned Curtis Clinton's name, or identified Clinton as one of those drug-abusing "bad influences" that caused Sorrell to worry for Heather Jackson's well-being. And no evidence of record indicates that Clinton ever abused or sold drugs of any sort, unlike the *many* other male acquaintances who are known to have visited with and had relationships with Heather Jackson in the days and weeks preceding the murders.

On cross-examination, Sorrell *began* to explain to the jurors the circumstances, as she understood them, of Heather Jackson's recent run-in with Sandusky police. Sorrell summarized that Heather Jackson was driving with her one-year old son in the car, and she was pulled over by Sandusky police, who found drugs within the car she was driving. According to Sorrell, the Sandusky police then offered Heather Jackson the opportunity to become a police informant or

“snitch” by cooperating in their investigation of Sandusky drug trafficking – Heather Jackson would or could get reduced charges in exchange for “naming names” to Sandusky drug detectives. Tr. 419. However, the full story that Sorrell tried to tell the jury at trial never came out, because when defense counsel asked Sorrell if *she* knew or suspected who had supplied Heather Jackson with illegal drugs, the State immediately objected, and the trial court, without explanation, sustained the objection. Defense counsel then abandoned further questioning of Sorrell along these lines of inquiry. Yet, Sorrell’s testimony is quite telling as to crucial facts in understanding realities at play prior to the homicides. Tr. 419-20.

Joshua Case’s testimony candidly revealed to the jury that he had a sexual encounter with Heather Jackson during the final hours of her life, in the early hours of September 8, 2012. Case admitted that when he visited the Jackson home on John Street, he drank a fifth of vodka and was self-medicating with non-prescription Percocets, so his recollection of events was somewhat fuzzy. Case admitted that Heather Jackson also was taking the Percocets that night, and that Case and Heather Jackson had taken illegal drugs together before that night. Tr. 521-24. Case further testified that while he was drinking and getting high at Jackson’s house, Tom Hanson arrived, that Heather Jackson got into Hanson’s car for about ten minutes, and that when she returned she had an Adderall and a Soma. Tr. 534, 537-38. Case testified that at this point Hanson and Heather Jackson had some sort of argument, but he did not know the details. *Id.* After Hanson left Heather Jackson’s home, as Case later informed the jury, Case and Heather Jackson engaged in “regular sex.” Tr. 543, 526. Case recalled that after he had left Heather Jackson’s house that night, she had called him at about 3:05 a.m.. However, Case was purportedly so intoxicated by that time that he could not recall for the jurors what it was that he

and Heather Jackson had discussed by phone – Case stated he did not even remember receiving the call until he was shown Heather Jackson’s phone records by Detective Wichman. Tr. 529-31.

Tom Hanson, who Case recalled had visited Jackson’s home the night before the murders and who Case had observed had argued with Jackson and/or supplied her with some drugs, was the same Tom Hanson who testified that he was personally involved in the initial discovery of Jackson’s body. Hanson claimed that he had met Heather Jackson about two weeks prior to her death. Tr. 563. According to Hanson, Heather Jackson had asked for and obtained Hanson’s cell phone number, then Jackson began calling and texting Hanson. Tr. 564. Hanson admitted that he was present at Heather Jackson’s home on John Street the night before the murders, but he denied that any argument took place between himself and Heather Jackson (thus contradicting what Joshua Case had observed and detailed to both the police and the jury). Tr. 571. Hanson claimed to the jury that the day after his visit at Heather Jackson’s house, when he heard that people were concerned about her whereabouts and safety, Hanson and his friend Daniel Risner went to her residence on John Street to check on her. When they found Heather Jackson’s body inside the home, after first deliberating whether they should alert the police, they eventually called 911 to report their discovery. Tr. 572.

Hanson’s friend Risner also testified, telling the jurors that he agreed to go inside Heather Jackson’s residence to check on her well-being, along with Hanson, even though Risner did not even know who Heather Jackson was at the time. Tr. 445-446. Risner told the jurors that upon arriving at Heather Jackson’s house, he had told Hanson that “something ain’t right” when he saw a baby bottle and binkie on the back porch. Tr. 446. Risner admitted that he and Hanson then succeeded in breaking into Heather Jackson’s residence – though the door they entered was locked, Risner forced it open, by turning the handle “real hard and pushing.” Tr. 451-52, 460.

Yet later testimony revealed no signs of any forced entry as to this particular door. Tr. 490. Risner also admitted to the jurors that after forcing his way into Heather Jackson's home that day, he had wiped off the bathroom door handle to conceal potential evidence of his entry. Tr. 464. Risner told the jury that during his investigation of Jackson's home and welfare that day, he had seen no signs of any struggle within the home. Tr. 461.

The State's version of the facts opines that it is illogical to suppose that a drug trafficker motivated to kill Heather Jackson and her children might have entered the house without being seen on the surveillance video from Firelands Hospital, which was located across the parking lot from Heather Jackson's home. State's Brief p. 24. However, the hospital cameras were located some distance from Heather Jackson's home, the film was grainy, and it was dark and rainy at the relevant times in question, when the murders were thought to have occurred. Further, both Danielle Sorrell and BCI Agent Hammond testified that a side window of Jackson's home, which would have been beyond the range of the hospital's parking lot surveillance cameras, was in fact *unlocked* on the day the bodies were discovered inside the house. Further, this side window had no screen and was capable of being opened from the outside by a mere push upward. The State's brief concedes as much, at pp. 24-25 and 27. Thus, any person with the motivation to commit the crime of murder within Jackson's home, for example, a drug trafficker motivated to silence Heather Jackson before she had the chance to "snitch" to Sandusky police detectives, could have easily entered the home through the unlocked side window that was beyond range of the surveillance cameras.

The State's brief is also very selective as to its version of the facts regarding the alleged rape of "E.S." Sandusky detective Ken Nixon's testimony largely sought to justify why his department had failed to make an immediate arrest of Clinton after hearing E.S.'s version of

events. Tr. 743-49. Other than speaking with E.S. and E.S.'s friend Mercedes Charlton (Clinton's girlfriend), Nixon did little investigation of the alleged rape. But once Detective Nixon obtained cell phone records showing that Clinton may have been the last person to speak with Heather Jackson, Nixon very easily located Clinton at Bellevue Hospital, where he was questioned. Tr. 755, 758. Nixon convinced Clinton to return to the police headquarters for further questioning before Clinton had even been discharged from the hospital. Tr. 766-67.

Contrary to the State's assertions to the effect that all evidence pointed to Clinton as the perpetrator of the murders, the Sandusky police witnesses admitted that initially the witnesses who were interviewed were doing a lot of "finger pointing" in differing directions, and that the suspect pool actually was rather large, with a number of leads pointing towards Joshua Case and Tom Hanson, among others. Tr. 777-78. When asked on cross-examination about the state of his knowledge of Heather Jackson's recent traffic stop and status as a police "snitch," Detective Wichman confirmed that Jackson had been involved in a traffic stop and that drugs were found in her car. Tr. 855. Yet, Detective Wichman then backtracked when he testified that, despite learning during homicide investigation that Heather Jackson may have possessed a large stash of narcotics within her house, he simply failed follow-up on this lead or learn anything more about Heather Jackson's known status as a police informant with the Sandusky police. Tr. 855, 858.

The "facts" concerning the DNA evidence are not nearly so compelling as the State's brief asserts, given a number of significant gaps in the presentation of that evidence. Julie Cox, a forensic biologist from BCI, performed presumptive testing for DNA on Heather Jackson, Celina Jackson, and Wayne Jackson, Jr. Tr. 870. Cox further testified that the tests performed on Heather Jackson were *negative* for semen, thus casting doubts on the State's theory that Clinton

had raped Jackson. Tr. 878. Cox admitted that the following samples were *completely consumed* by BCI's testing efforts:

- swabs taken from Heather's wrists, ankles, back, shoulder, and fingernails; and
- swabs taken from Celina's rectum, fingernails, wrist, ankle, and ligature; and
- swabs taken from Wayne's wrist, fingernails, and ligature.

Tr. 890. Cox admitted that BCI had sent a letter requesting consent to consume this DNA to the prosecutor's office, but no such letter was sent to the defense. Tr. 889.

Also, "there were a number of testings that were unknown, unknown results," including unknown DNA that was found on Heather Jackson's left wrist, right ankle, left ankle, back/shoulder; Celina Jackson's right wrist; and, Wayne Jackson's right wrist, left wrist, and ligature. State's Exhibit 122, Tr. 944. Additionally, DNA swabs were taken from several alternate suspects whose DNA was never actually tested; unknown hairs that were found on the body of Celina Jackson were never tested; cigarette butts that were found around the house, particularly in the locked utility closet where the children were found, were never tested; and, latent fingerprints from the unlocked window, on the side of the Jackson residence where the hospital surveillance video could not reach, remain untested to this day.

Next, the State's brief asserts as fact that the deaths of Misty Keckler, some 15 years before, and the deaths of the Jacksons somehow are intertwined because Clinton was known to have some level of involvement with both women. But the State put on little tangible evidence to describe the circumstances as to the 1997 death of Misty Keckler. Trial counsel for Clinton objected to any testimony by State's witness Michael Clark, a retired Fostoria detective, who in his police capacity had investigated the 1997 death of Misty Keckler. Detective Clark was the only witness called by the State to substantiate the relevance of Keckler's death to the Jackson

testimony, and no forensic pathologist or other medical expert was called upon to compare the causes of death as between Keckler and the Jacksons; rather, the very prejudicial inference laid before the jury was that Keckler's evidence could be viewed as admissible "other acts evidence." The defense motion for mistrial as to Clark's testimony was denied. Tr. 954, 957-58, 962-63, 967.

As to the Jackson murders themselves, the Deputy Coroner's testimony was biased and lacking in scientific foundation. As she described the autopsies to the jurors, she specifically referred to the ligature around Wayne Jackson, Jr.'s neck as his "froggy blanket." Tr. 1110-11. She also speculated to the jury that Celina Jackson's underwear *might have been* removed, and then Celina Jackson's body somehow "redressed" at some unknown point, all without referring to evidence of record that any of this supposition of fact had in fact occurred. Tr. 1124-25. And the State's version of the facts fails to justify the Deputy Coroner's unusual decision to present for the jury's review a photograph of the rectum of an unidentified five year old child that she had taken a picture of in 2001. The Deputy Coroner claimed this photograph somehow could serve as a "point of reference" for comparing Celina Jackson's rectum, as it appeared after her death, with the rectum of the unidentified child, though no foundation was laid, or even attempted, regarding the gender of the other child, how that child had died, whether the other child's rectum had been diseased or injured, etc. Tr. 1110-11, 1130-31. *See also* State's Exhibit 60.

And incredibly, in a case in which the time of death is crucial, the State, through the Deputy Coroner, never even attempted to establish the times of death for the Jacksons. The State's theory assumed that the victims died at roughly 4:00 a.m. on the day that the bodies were

discovered, though the bodies themselves were not discovered for some 14 hours *after* that time. And the Deputy Coroner was silent on this crucial question.

The jury found Clinton guilty on all counts of the indictment. Tr. 1305. But the trial had been infected from its onset by a combination of ineffective assistance of counsel, misconduct by the prosecutor, and violations of Curtis Clinton's rights to due process and to a fair trial, among other errors. Intense traditional and social media coverage of the case should have led to a change of venue to protect Clinton's fair trial rights. The erroneous joinder of two factually unrelated cases (the separate matters involving Misty Keckler and "E.S.") resulted in the admission of highly prejudicial "other acts" evidence against Clinton. Jury confusion resulted where the State in essence tried Clinton in what became a three-ring circus, with one ring devoted to the alleged rape of E.S., one ring devoted to the speculative and as yet unresolved issues regarding the death in 1997 of Misty Keckler, and the final ring devoted to the homicides of Heather Jackson and her children. All of this combined to inflame the passions of the jury and to ensure an unfair verdict.

### **Proposition of Law No. I**

A defendant's constitutional right to present mitigating evidence is violated when the trial court fails to ensure a waiver of this presentation was made both knowingly and voluntarily.

Contrary to the State's arguments, Clinton made a complete waiver of his right to present mitigating evidence; thus, a colloquy to ensure that waiver was both knowing and voluntary was required in this case. *See State v. Ashworth*, 85 Ohio St. 3d 56 (1999); *State v. Barton*, 108 Ohio St. 3d 402 (2005). Yet, not one single question was asked, let alone a colloquy conducted, of Clinton by the trial court to ensure his constitutional rights were unharmed. This was structural error, and as such, this Court should reverse and remand this case for a hearing pursuant to *Ashworth* where Clinton may decide, on the record, and with full knowledge of the rights that he is waiving, whether or not he wants to pursue the presentation of mitigating evidence to the jury.

The State's initial argument focuses on two factual premises: 1) that this was not a waiver of the presentation of mitigating evidence because David Doughten, trial counsel for Clinton, unilaterally told the trial court on the record that what Clinton was doing in this case was "not a waiver of mitigation" and 2) that even if this was a full waiver, that Dr. Azkenazi's report, and the contents of the interview that she and Clinton had outside of court, ensured that Clinton's waiver was, in fact, knowing and voluntary. Both of these factual premises fail for one main reason: neither of these "conversations" that the State cites to repeatedly in its brief were had between the trial court and Clinton. Regardless of how many statements Clinton made to Dr. Azkenazi, and regardless of the comments made by trial counsel, outside of the presence of their client, to the trial court, it is of no consequence. This was not trial counsel's right to waive. And it was not Dr. Askenazi's duty to ensure that Clinton's waiver was knowing and voluntary. Rather, that duty rested with the trial judge, and the trial judge relinquished that duty here.

The State next argues because Clinton presented an unsworn statement that this was not a total waiver of mitigation, and thus no *Ashworth* hearing was required. State's Brief p. 43-47. This is a harsh interpretation of this Court's precedent. Although this Court has stated that unsworn statements *can* constitute mitigating evidence, use of the word "can" indicates that they do not always. See *State v. Roberts*, 110 Ohio St. 3d 71, ¶143 (2006). Further, as this Court indicated in *Roberts*, the trial court in that case did, in fact, make an inquiry in full compliance with *Ashworth*. *Id.* And, contrary to the State's claims, it would make sense that an unsworn statement asking for a sentence of death could be seen as mitigating, since that request is indicative of remorse, while an unsworn statement asking for a life sentence is not. As noted in Clinton's merit brief, nothing about Clinton's unsworn statement was mitigating. To find proof of this assertion, one must look no further than the trial court's opinion. The trial court did not rely on, or even point to, anything mitigating in Clinton's unsworn statement in its R.C. § 2929.03(F) Sentencing Opinion. See R.C. § 2929.03(F) Trial Court Opinion (no mention of *any* mitigating factors worthy of consideration).

Moreover, an unsworn statement, like Clinton's, where the defendant is seeking a sentence less than death, is indicative of the tremendous necessity for an on the record inquiry. If Clinton is requesting his life be spared, this raises serious concerns that he did not truly understand the ramifications of his waiver. Allowing a capital defendant to waive this integral right, without the protections afforded by an on the record colloquy by the trial court, is not something that this Court should tolerate.

The State next indicates that requiring an *Ashworth* colloquy in any case where a defendant makes an unsworn statement could allow capital defendants an opportunity to manipulate the trial. State's Brief p. 45. This assumes a lot of legal knowledge on the part of

capital defendants. It also assumes that trial courts would not follow the dictates of this Court and conduct a hearing, when it is necessitated. This is simply untrue. In fact, the case law support that the State relies upon in the section of its brief is *Roberts*. Yet *Roberts* is a case where this Court held that *Ashworth* was complied with, although a full colloquy was not required under the facts of that case. 110 Ohio St. 3d at ¶143.

The State claims that it would make no sense to sometimes, but not always, require a colloquy when an unsworn statement is the sole evidence presented in mitigation. The State argues that trial courts should not have to guess as to what topics a defendant may or may not cover in their unsworn statement, making it so that trial courts will not know until after the unsworn statement whether a colloquy will be required. What the State fails to explain though is why the correct time to make this inquiry pursuant to *Ashworth* is not after the unsworn statement is completed. This seems like exactly the right time—at that moment in time during a trial, the trial court will be acutely aware whether or not the defendant is requesting to have his life spared, presumably all mitigation investigation will be concluded, and presumably trial counsel will have had several conversations with their client already on this topic. Inquiring of the defendant after he is done making an unsworn statement is not an additional burden on the trial court. On the contrary, this seems like the perfect time to conduct this inquiry.

The State next quotes *Schriro v. Landrigan*, 550 U.S. 465, 479 (2007), for the proposition that that United States Supreme Court has “never required a specific colloquy to ensure that a defendant knowingly and intentionally refused to present mitigating evidence.” State’s motion for summary judgment at p. 72. Yet, Clinton’s claim is not that the Court asked the wrong questions or failed to go through a specific, required colloquy. Instead, Clinton’s claim is that the Court failed to inquire at all. Indeed, another point that the State fails to mention from

*Landrigan* is the following phrase which precedes the language parsed out by the State and cited to above: “in Landrigan’s presence . . .” *Landrigan*, 550 US. at 479. In that case, and noted by the Supreme Court, counsel waived Landrigan’s right to present mitigating evidence *in his presence*. The facts at bar lie in stark contrast to those in *Landrigan*. As will be discussed in Proposition of Law No. II, Clinton was *not present* for any of the discussion between the trial court and trial counsel. Here, the trial court did not ask even one question on the record to ensure that Clinton was making this decision of sound mind and that it was truly his desired decision, after knowing all of the facts at issue.

In the end, what counts here is that Clinton never had an opportunity in open court to explain why it was that he was choosing to waive mitigation. It is unknown what he would have said had the trial court made an inquiry. Did Clinton understand what he was giving up? Did Clinton understand what could and would be presented on his behalf in mitigation? Did Clinton truly understand the process of capital trials and appeals? Was his waiver knowing and voluntary? The record is unclear. What is clear is that nothing even close to the required colloquy was had in this case. In fact, not a single question was asked of Clinton on the record to ensure that he was voluntarily and knowingly giving up his right to present mitigation. This is error pursuant to the United States and Ohio Constitutions as well as this Court’s precedent.

## **Proposition of Law No. II**

The accused has a right of presence at all critical stages of the trial under the Confrontation Clause and the Due Process Clause. The right of presence is personal to the accused and may only be waived by the accused. U.S. Const. amends. VI, XIV.

Contrary to the State's claims, Clinton was not present at all critical stages in the trial court proceedings against him. *See, e.g.*, Nov. 1, 2013 Mtn. Hear.; Nov. 7, 2013 Mtn. Hear. The State argues that neither the U.S. nor Ohio Constitutions were offended by Clinton's absence at the two hearings at issue. State's Brief p. 55-56. This is incorrect. Although Clinton remains steadfast that his constitutional rights were violated by his absence at both hearings, Clinton will focus on the November 7, 2013, hearing for purposes of this reply.

The State initially claims that because Clinton voluntarily waived his right to be present at the November 7, 2013, hearing, he cannot now complain that he was absent. However, even if Clinton had indicated that he did not want to be present at what the State terms a "status conference," it cannot now be presumed that Clinton knew that this hearing would become the point in time during the trial proceedings where the critical discussion concerning Clinton's "waiver" would take place. The fact that this was a mere "status conference" indicates that the assumption should actually be the opposite—that the hearing would instead be about scheduling or other routine procedural matters.

Next, the State, in arguing that this claim should be denied because Clinton was present during the mitigation phase of the trial, concedes that the mitigation phase of the trial is indeed a "critical stage" of the proceedings. *See* State's Brief p. 58. Thus, any hearing discussing the waiver of this critical stage would also be deemed "critical." It would defy logic to have it any other way.

The State next falls back to the arguments it made in relation to Clinton's Proposition of Law No. I. State's Brief p. 58. The State again claims that a knowing and voluntary waiver was not required pursuant to *Ashworth* and its progeny because Clinton presented an unsworn statement. *Id.* As stated previously, this is a harsh interpretation of this Court's precedent on this issue. Although this Court has stated that unsworn statements *can* constitute mitigating evidence, use of the word "can" indicates that they do not always. *See State v. Roberts*, 110 Ohio St. 3d 71, ¶143 (2006); *see also* Reply to Proposition of Law of No. 1.

Finally, the State claims that "even at this late date, Clinton is completely equivocal about whether he would have proffered evidence regarding his childhood." State's Brief p. 59. This is an unfair assertion, as the record is only equivocal because Clinton was absent when the discussion was had between the trial court and Clinton's trial counsel. Clinton never had an opportunity to definitively state anything, let alone lodge an objection, when his presence was waived by his counsel at this critical juncture. His absence violated his constitutional rights, as his presence at this hearing could have resulted in a different outcome in this case. Had the trial court conducted a proper inquiry as to Clinton's waiver, the court very well could have discovered through its questioning that Clinton's waiver was not voluntary and knowing and/or that Clinton, in fact, did not want to waive mitigation at all. In turn, there was a wealth of mitigating evidence, which likely would have convinced at least one juror to vote for a sentence of less than death in this case. *See* Proffer of Defense Exhibits A-P; Mit. Tr. 123-125; Proposition of Law No. XIX.

### **Proposition of Law No. III**

The introduction and admission of prejudicial and improper character and other acts evidence and the failure of the trial court to limit the use of the other acts evidence denied Clinton his rights to a fair trial, due process, and a reliable determination of his guilt and sentence as guaranteed by U.S. Const. amends. V, VI, VIII and XIV; Ohio Const. art. I, §§ 10, 16. Ohio R. Evid. 403, 404.

Clinton has asserted that the trial court abused its discretion when it allowed prior bad acts testimony to be admitted before the jury regarding facts relating to his prior conviction for the manslaughter of Misty Keckler. The State contends that this testimony was properly admitted by the trial court under Ohio R. Evid. 404(B), and even if the evidence was not properly admitted, any error was harmless due to the overwhelming evidence against Clinton. State's Brief p. 60 & 68. Where Clinton does not specifically address a point in the State's Brief, Clinton is not conceding the point but relying on his previous arguments.

#### **A. Law and analysis**

When evidence is "so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Moreover, when an individual's life is at stake, the Supreme Court has repeatedly insisted upon higher standards of reliability and fairness. *See Beck v. Alabama*, 447 U.S. 625 (1980) (need for heightened reliability); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (the death penalty is qualitatively different from any other sentence and requires a heightened degree of reliability).

Evidence is unfairly prejudicial when it may result in an improper basis for the jury's decision. *State v. Crotts*, 104 Ohio St. 3d 432, 437 (2004). If the evidence "arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish, the evidence

may be unfairly prejudicial.” *Id.* In other words, if the evidence appeals to the jury’s emotions rather than its intellect, it is usually prejudicial. *Id.*

Further, an Ohio Evid. R. 403 objection requires heightened scrutiny in capital cases. *State v. Morales*, 32 Ohio St. 3d 252, 257-58 (1987). Whereas exclusion under Ohio R. Evid. 403 generally requires that the probative value of the evidence be minimal and the prejudice great, in capital cases, the probative value of each piece of evidence must outweigh any potential danger of prejudice to the defendant. *Id.* at 258, 513 N.E.2d at 274. If the probative worth of the evidence does not outweigh the danger of prejudice to the defendant, it must be excluded. *Id.*

**B. The trial court abused its discretion and materially prejudiced Clinton in both phases of his capital trial by allowing the other acts evidence to be admitted.**

As cited in the State’s brief, evidentiary decisions made by a trial court *should* be disturbed when an abuse of discretion by the trial court creates material prejudice to a defendant. State’s Brief p. 60-61, citing *State v. Morris*, 132 Ohio St.3d 337 (2012), citing *State v. Diar*, 120 Ohio St. 3d 460 (2008). Decisions that lack a “sound reasoning process” have been described as an abuse of discretion. *Id.* citing *AAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161 (1990). Further, when a trial court acts in an arbitrary, unreasonable, or unconscionable manner it abuses its discretion. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

The trial court abused its discretion in allowing the other acts evidence to be admitted in Clinton’s case. Clinton requests that this Court consider the following facts in determining whether the trial court abused its discretion. The trial court did not limit any of the other acts evidence the State wished to admit against Clinton. The only limitation the trial court placed on the State was that the State actually had to call the witnesses to testify in order to meet the requirement of substantial proof of the alleged other acts. Docket Amended Opinion & Judgment

Entry, 10/23/13 pp. 6-7. The only reasoning that the trial court provided for the conclusion that the acts were so strikingly similar was that both involved choking or strangulation, but the trial court failed to consider any other similarities or differences in its opinion. This circular reasoning by the trial court is unsound, arbitrary, and unreasonable. What is clear is that the trial court did not adhere to the “heightened scrutiny” required in a capital trial when admitting the other acts evidence against Clinton. *See Morales*, 32 Ohio St. 3d at 257-58.

**C. The other acts evidence was far more prejudicial than probative and unfairly prejudiced Clinton in both the guilt and mitigation phases of his trial.**

The State argues that the evidence of Clinton’s prior manslaughter conviction was relevant because there was no question he had committed the offense. State’s Brief p. 63. This cannot be the standard, or all prior acts would be relevant and admissible. In capital cases, admissibility is the exception, not the rule.

Contrary to the State’s assertion, the other acts evidence does not prove that Clinton strangled his victims during or close in time to sex. State’s Brief p. 66. The testimony admitted concerning the Keckler case at trial did not address the timing of the sexual contact between Clinton and Keckler. It is unclear from the record when Clinton and Keckler had sexual contact in relation to her death. The State did not introduce that evidence to the jury, so it cannot now be used as a proper purpose, after-the-fact.

The State also asserts that the other acts evidence places Clinton’s call from the jail to his mother into context. State’s Brief p. 66. This is conjecture on the State’s part. To add some additional context, this call took place the day after Clinton was escorted by police from the hospital where he was admitted due to a suicide attempt. Tr. 766-67. Clinton was interrogated by Detective Wichman while he was still in a hospital gown. Tr. 767. During the interrogation,

Clinton was obviously confused and denied knowing what Detective Wichman was talking about. State's Exhibit 117; *see also* Proposition of Law X.

At the time of the jail call between Clinton and his mother, Clinton had been arrested for the murders of the Jackson family. Clinton stated in the call to his mother that he was "just confused." State's Exhibit 119. This was similar to what he had told Detective Wichman the day before. When Clinton stated he would just "plead guilty or whatever" the tone reflected a fatalistic mentality typical of a person who had recently attempted suicide. *Id.* Clinton also stated, "I hurt someone." Yet, this statement lacks any context and is likely based on what Clinton was told by Detective Wichman. Given Clinton's history of depression, suicide attempts, and black-outs, this call is not as easily interpreted as the State would have this Court believe. *See* Proffer of Defense Exhibit O.

Clinton then told his mother, "I thought I was just over it, I don't know. I thought after 13 years I would be over that, and I just wouldn't believe that shit would happen no more." State's Exhibit 119. Clinton stated, "look at all the people I hurt." *Id.* These statements that he made to his mother are ambiguous. It is just as likely Clinton was talking to his mother about his depression and suicide attempt and how he has hurt those who care about him, and not discussing the homicides or the rape. The State's argument that the prior manslaughter of Keckler fifteen years before puts this call into context is tenuous and hardly of probative value to outweigh the prejudicial nature of the other acts evidence.

Assuming *arguendo* that this Court finds that the evidence of Clinton's guilt is overwhelming in this case, the other acts evidence still unduly prejudiced Clinton in the mitigation phase of his trial, and should have been excluded. As this Court previously recognized, it "would be naïve 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.”

*State v. Thompson*, 33 Ohio St. 3d 1, 15 (1987).

**D. Conclusion**

Clinton’s right to due process and a fair trial, in both phases of his capital trial, were violated when the trial court permitted the introduction of the other acts evidence. Clinton raised objections to the admission of the evidence and properly preserved the issue for appeal. This Court should vacate Clinton’s convictions and remand this case to the trial court for a new trial.

## **Proposition of Law No. IV**

A trial court errs when it fails to grant a motion to sever rape charges from charges of aggravated murder and burglary in another unrelated case, in violation of a defendant's rights under the United States and Ohio Constitutions. U.S. Const. amends. VI, VIII, XIV; Ohio Const. art. I, §§ 9, 16, 20.

The State claims the trial court properly denied Clinton's motion to sever because the State satisfied both the other acts test and the joinder test. State's Brief p. 70. In fact, neither test was sufficiently satisfied. The trial court abused its discretion in denying Clinton's motion for severance.

### **A. Other acts test**

The State asserts that the Jackson case and the E.S. case were properly joined. State's Brief p. 70. The State first claims that the E.S. case was inextricably related to the Jackson case because the investigation of the rape of E.S. led to identifying Clinton as a suspect in the homicides of Heather Jackson, Celina Jackson, and Wayne Jackson, Jr. State's Brief p. 70. The State relies on *Curry* for this assertion. State's Brief p. 70. However, this is not a case where it was "virtually impossible to prove that the accused committed the crime charged without also introducing evidence of the other acts." *State v. Curry*, 43 Ohio St. 2d 66 (1975). Detective Wichman was completely capable of explaining how his investigation of the Jackson homicides led to Clinton, without ever discussing the E.S. case during his interrogation of Clinton. *See* Exhibit 117. In fact, it appears that, for Detective Wichman, the cases had little to do with each other at the time of Clinton's interrogation. In connecting Clinton's phone to Heather Jackson, there was no necessity to bring in any connection to E.S., since the crimes were completely independent of one another. Further, the investigation into the E.S. case was essentially closed prior to the Jackson homicides, and thus the Jackson case did not form part of the immediate

background of the E.S. case, nor was it inextricably related to the E.S. case. Neither case should have been admitted in a trial for the other for this reason.

The State next claims that the other acts evidence was admissible to prove Clinton's identity because it demonstrated his pattern of strangling and sexually assaulting victims. State's Brief p. 71. Proving Clinton's identity by showing that he has the propensity to strangle or choke people is essentially the unfair prejudice that Evid. R. 404 is meant to prevent. Additionally, identity was not an issue in E.S.'s case, so the Jackson case would not have been properly admitted to prove identity in E.S.'s case. Clinton relies on his previous arguments in Proposition of Law IV as to why the E.S. case should not have been admitted to prove identity in the Jackson case.

The State also claims that the attack on E.S. dispels any claim that Clinton lacked motive to kill Celina Jackson and Wayne Jackson, Jr. State's Brief p. 71. It is unclear how the attack on E.S. dispels a claim that Clinton lacked motive to kill Celina Jackson and Wayne Jackson, Jr. E.S. did not just happen to survive, as the State seems to assert. In fact, Clinton drove her home. E.S.'s case is also not probative of motive for the murders of Celina Jackson and Wayne Jackson, Jr. Additionally, the State fails to explain how the evidence of the homicides of the Jackson family would be admitted for a proper purpose in E.S.'s case.

Next, the State attempts to claim that Clinton's attack on E.S. shows motive and absence of mistake in the Jackson case. According to the State, part of the jail call references the other acts evidence from the Keckler case. State's Brief p. 71; *see also* Proposition of Law III. The State also claims that E.S.'s rape assisted in the jury's understanding of what Clinton said in this phone call. State's Brief p. 71. Clinton's call with his mother was discussed extensively in Proposition of Law III, and the same analysis applies here. This phone call had little probative

value so admitting highly prejudicial other acts evidence, such as the rape of E.S., to try to place it in to the alleged context, as argued by the State, was an abuse of discretion by the trial court.

The Jackson case should not have been admitted in the E.S. case to show motive either. This Court in *Curry* recognized that a person commits rape for the obvious motive of sexual gratification and thus, motive could not be deemed a material factor that would have outweighed the prejudicial nature of the other acts evidence and allowed it to be admissible. *See State v. Curry*, 43 Ohio St.2d 66, 71 (1975).

Finally, absence of mistake was never an issue in either the Jackson or the E.S. case and thus could not be a basis for the admission of the other acts testimony in either case. *See id.* at 72.

**B. Joinder test**

The State attempts to have it both ways by first claiming that the crimes against E.S. and the Jacksons are inextricably linked and strikingly similar, and then simultaneously claiming the evidence is separate and distinct. State's Brief pp. 70 & 72. As Clinton previously stated, the State confused the issues and evidence in closing arguments at trial. Tr. 1164, 1241 & 1211-1213. There is at least some evidence that the jury consequently was confused. Tr. 1304. To this day, the State remains confused regarding who Clinton was proved to have raped at trial. State's Brief p. 187 ("The State proved that Heather and Celina were anally raped by the Defendant."). Clinton was never charged nor convicted of raping Heather Jackson. Trying the two cases together in a capital proceeding was unfairly prejudicial to Clinton, in both the guilt and the mitigation phases of his trial.

**C. Conclusion**

This Court should vacate Clinton's convictions and sentence and remand the case for new, separate trials.

### **Proposition of Law No. V**

The consumption of DNA evidence, and the State's failure to notify defense counsel about the consumption of such evidence, violates a defendant's right to Due Process. U.S. Const. amends. V, VI, VIII, XIV; Ohio Const. art. I §§ 2, 5, 9, 10, 16, and 20.

The State contends that this proposition of law lacks merit and should be denied because Clinton has not shown that the consumed DNA evidence was materially exculpatory or destroyed in bad faith. State's Brief p. 73. This argument fails. The State asserts that the determination of whether or not the failure to preserve evidence constitutes a due process violation "depends on whether the lost or destroyed evidence involves 'materially exculpatory evidence' or 'potentially useful evidence.'" *Id.*, quoting *State v. Powell*, 132 Ohio St. 3d 233 (2012). The State contends that it is Clinton's burden to prove that the evidence was materially exculpatory, or if the evidence was only potentially useful, then Clinton must show that the State destroyed the evidence in bad faith. State's Brief p. 73.

The State posits a Catch-22 scenario, under which it is Clinton's duty to prove that the evidence is materially exculpatory, but under the restriction that he is unable to test any material due to the fact that it was consumed before he had the opportunity to do so. What can be proven, however, is that "there were a number of testings that were unknown, unknown results," including unknown DNA that was found on Heather Jackson's left wrist, right ankle, left ankle, back/shoulder; Celina Jackson's right wrist; and, Wayne Jackson's right wrist, left wrist, and ligature. State's Exhibit 122, Tr. 944. Additionally, DNA swabs were taken from several alternate suspects whose DNA was never actually tested; unknown hairs that were found on the body of Celina Jackson were never tested; cigarette butts that were found around the house, particularly in the locked utility closet where the children were found, were never tested; and, latent fingerprints from the unlocked window, on the side of the Jackson residence where the

hospital surveillance video could not reach, remain untested to this day. Tr. 612-718. These facts alone demonstrate the materially exculpatory nature of the DNA evidence.

Even if the DNA evidence was not materially exculpatory, it is clear that the evidence is more than potentially useful and that the State's failure to notify Clinton of the consumption was not in good faith. The failure to notify Clinton or his counsel of the consumption of the above DNA evidence has afforded Clinton no opportunity to ever have this evidence tested, or re-tested by an independent lab in order to further develop the existence of unknown DNA in relation to the untested DNA of multiple alternative suspects. Despite the State's assertion to the contrary, the fact that the results of the State's DNA analysis were available for examination is of no importance as there is no assurance that the testing was done in compliance with proper protocols and procedures. And, while the State argues that it had no obligation to seek the permission or consent of Clinton or his counsel in order to conduct that testing, the ABA Standards require that "[b]efore approving a test that entirely consumes DNA evidence or the extract from it, the prosecutor should provide any defendant against whom an accusatorial instrument has been filed, or any suspect who has requested prior notice, an opportunity to object and move for an appropriate court order." ABA Standards for Criminal Justice: DNA Evidence, 3d ed. 2007; Standard 3.4(c). Though the State denigrates the importance of the ABA guidelines, this Court has shown a reliance on these guidelines as they relate to capital defense. *See Herring*, 142 Ohio St.3d at 178-79, 182-83, and 186.

The State took away Clinton's opportunity to test, or re-test, the DNA evidence used to convict him. Without this opportunity, Clinton did not have the ability to effectively challenge the testimony of BCI experts at trial. He also has no ability in the future to challenge this

testimony or evidence on appeal. As such, Clinton was precluded from having a fair trial, through the acts and omissions by the State.

## **Proposition of Law No. VI**

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.

The State's brief chooses to disregard the realities of Clinton's trial, by theorizing through sterile and academic analysis on the limits of "presumed" versus "actual" bias, that some sort of bright line can be divined by which this or any other Court can neatly decide how much pervasive pretrial publicity is enough to warrant a change of venue in any particular case. The premise is faulty; each case must be assessed individually by its individual circumstances as opposed to through a law textbook or treatise categorization.

The State seemingly would find a trial court's granting of a change of venue appropriate only where individual members of the jury have admitted, during voir dire, the full extent of their on-going local exposure to the rampant publicity surrounding the case, and further admitted to having some residual notions of the defendant's guilt. The State's theories are not tenable in the age of the internet and live streaming of "sensational" murder cases such as that accusing Clinton of the September, 2012 murders that occurred in Erie County, Ohio.

The State presumes that the jurors chosen to judge Clinton's fate necessarily must have harbored no inherent bias as to his guilt before the trial had even begun, since no seated juror admitted as much during the voir dire process. But the pervasive and voluminous media reporting that consistently blamed Clinton for the murders of Heather Jackson and her two children did not occur in a vacuum – members of the community of Sandusky obviously had ample opportunity to form individual opinions about Clinton's guilt or innocence and ultimate punishment *outside* of the courtroom, and the panel that determined Clinton's fate could not have been immunized from these outside forces.

And this is why the presiding judge over the trial, knowing the pulse of Sandusky and the effect the maelstrom of publicity would have had upon the average Erie County citizen, should have stepped into the fray to protect Clinton's rights to due process. The trial judge, after all, had allowed the *Sandusky Register* to conduct streaming coverage of this murder trial, ostensibly because he was aware of the citizenry's "need to know" how this trial would be resolved, where three local citizens lay dead and a full explanation of why was sought within the community.

Defense counsel had earlier tried to stop what they properly predicted would become a trial conducted within a media frenzy, by filing for a change of venue to have this trial conducted in a more neutral clime. *See* Motion to Change Venue filed October 7, 2013. With no responsive pleading whatsoever filed by the State, it was up to the presiding judge to determine whether Clinton's right to a fair trial would be compromised under these circumstances. Despite explicitly finding that media interest in this murder case had been "extensive and adverse to Clinton," the trial judge determined that this murder case should continue to go forward in his courtroom, in Erie County, Ohio. *See* Judgment Entry, October 21, 2013.

Pre-trial publicity obviously means something different to today's average American citizen, including any average citizen in Erie County, Ohio, in the age of the internet, smartphones, and live streaming coverage of murder trials. By comparison, in the early 1960s, this Court can take judicial notice that when the Sam Shepard murder trial became a "media sensation," what we now define as "media" was largely limited to newspaper reporting, radio broadcasts, and three or four television networks and their local affiliates. Yet the United States Supreme Court, nearly 40 years ago, fully recognized that even those limited media resources could easily infect a jury's impartiality and undermine fundamental notions of due process, in

probably the most often cited discussion of these issues. *See Sheppard v. Maxwell*, 384 U.S. 333 (1966); *see also State v. Fairbanks*, 32 Ohio St. 2d 34, 37 (1972).

Given the emergence and pervasive influence of social media, along with the proliferation of many more “traditional media” outlets since the 1960s, it is worth considering that Clinton’s pre-trial media exposure is of a different order than was contemplated in the leading court precedents of the 1960s and 1970s, and that, indeed, this type of media onslaught could never have been foreseen. Yet the guardians of our individual liberties exercised caution in those days, so as to preserve a criminal defendant’s full guarantee of due process. Clinton was portrayed as guilty of the crimes well before his trial began, through daily blogs, online chat rooms, links and Twitter feeds, live streaming, etc., all avenues for dispensing opinions that go well beyond what more traditional media had distributed when these leading case precedents were decided.

Consequently, Clinton was denied a fair trial. Chief Justice Marshall’s warnings issued over 200 years ago bear repeating here, as this Court determines whether jurors who had been exposed to pervasive social and other media accounts of “the facts” could truly set aside those notions and decide the case solely based upon what they heard at the trial:

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.

*United States v. Aaron Burr*, 25 F. Case 30, Case No. 14 (1807).

Seven jurors who decided Clinton’s capital case *admitted* that they had been exposed to pre-trial publicity via the media, largely as published by the *Sandusky Register*. Juror 70’s wife

had read to him a *Register* story stating that Clinton “was just involved in a murder, as far as a mother and I think it was two children.” Juror 96 had followed the Clinton investigation through the on-line version of the *Register* and its bloggers. Jurors 143 and 210 also admitted that they had followed the investigation in the newspaper, with Juror 210 adding that he knew Clinton “was a suspect in these murders.” Juror 397 had read newspaper accounts of the investigation just the night before appearing in court. And Juror 26 had not only read the newspaper accounts, but had conducted independent on-line research to learn all she could about the Clinton investigation before arriving at the courthouse for questioning on voir dire. See Individual VD Vol. 1, pp. 62-64, 76-78; Vol. 4, pp. 537-38; Vol. 5 and 6, pp. 665-66, 775, 785; and Vol. 7 and 8, pp.1076-77, 1080, 1132.

Clinton’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. The presiding judge admitted that the media coverage had been “extensive and adverse to Clinton,” yet failed to act to stop the constitutional violations that would result by keeping the case in Erie County, Ohio, and indeed allowed live streaming coverage from his courtroom. The convictions and sentence entered against Clinton must be vacated, and this case must be remanded for a new trial.

## Proposition of Law No. VII

When the trial court fails to remove eight jurors who are biased, the capital defendant is deprived of his rights as guaranteed by U.S. Const. amends. V, VIII and XIV; Ohio Const. art. I, §§ 9 and 16.

While Clinton stands on his merit brief for arguments relevant to this claim, Clinton would like to clear up a few misconceptions put forward by the State in its brief. The State contends that there was no basis to exclude Jurors 143 and 371, neighbors, or Jurors 63 and 341, friends, and that the trial court properly allowed them to serve on the jury. State's Brief p. 88. In an attempt to prove this point, the State relies on *State v. Lundgren*, a case where the fact that two jurors knew each other from church was not enough for juror exclusion. State's Brief p. 87 citing *State v. Lundgren*, 73 Ohio St. 3d 474 (1995). This case fails to reach the core problem at issue here. In *Lundgren*, the relationship between two jurors who saw each other for roughly one hour, once a week was seen as unproblematic. This comes nowhere close to the relationship between Jurors 143 and 371, two next-door neighbors who would presumably see each other every single day and whose lives could, and would, become extremely awkward or unpleasant should any conflict arise either in or out of the jury room. These two jurors share a property line, and they eat and sleep in houses that are right next to one another. The potential for conflict upon any sort of disagreement was great.

Despite the relationship between Jurors 143 and 371, neither the State nor defense counsel stepped in to properly ensure that there would be no effect on either of these jurors. Defense counsel did not inquire into whether the current relationship between the two was positive or negative, or whether a lack of trust or any other preconceived notions about one another already existed in the minds of either neighbor. Furthermore, perhaps even more importantly, defense counsel did not consider the danger in deliberating on a panel with a

neighbor, with whom a disagreement could have lasting, uncomfortable effects. This is evident because counsel did not use a peremptory challenge against either of these jurors. When the trial court, too, failed to adequately question or to disqualify either Juror 143 or 371, these jurors were permitted, to the prejudice of Clinton, to sit on the panel and ultimately deliberate together, knowing that they would have to remain neighbors, should any conflict arise.

Similarly, the relationship between Jurors 63 and 341, two friends, goes beyond the type of relationship that exists between two church-going acquaintances. Despite this friendship, neither the State nor Clinton's trial counsel engaged in any conversation with Juror 341 concerning just how familiar he was with Juror 63, whether any past relationship between the two was negative in any way, and whether Juror 341 had any preconceived notions of Juror 63's intelligence, trustworthiness, or character that would affect his ability to deliberate with him fairly. Additionally, the State admits that no one asked any questions of Juror 63. State's Brief p. 87. Defense counsel did not use a peremptory challenge against either juror. Both were permitted to sit on the jury that sentenced Clinton to death.

When defense counsel failed to pursue any voir dire questioning of Juror 341 or of Juror 63, the trial court should have acted. It did not. The court did not engage in any inquiry whatsoever with Juror 63, concerning his connection to Juror 341. While the trial court may have been assured after a brief discussion with Juror 341 that he would not be affected by his familiarity with another juror on the panel, it did nothing to make sure that Juror 63 would not be affected, either. Whether Juror 63 was able to remain impartial in deliberating with Juror 341 cannot now be known, as the trial court and defense counsel allowed both to remain on the same panel, without a single question to Juror 63.

As to Juror 344, the State contends that several courts, with neither binding nor persuasive authority, have held that a juror merely being acquainted with a State witness does not render him implicitly biased. State's Brief p. 88. What the State fails to consider, however, is the fact that Juror 344's relationship with a State witness goes beyond that of a mere acquaintance. Juror 344 not only worked with State witness Joshua Case, who was one of the last individuals to see Heather Jackson alive, at the time of trial, but he admitted to the prosecutor that he personally hired Case at his then-job as an operator, and that he held a supervisory position over Case, stating "he reports to a supervisor that reports to me." Tr. 291. When asked if he would assign more or less credibility to his employee's testimony given that he worked with and hired him, Juror 344 indicated that he didn't "think so," an answer that lacks commitment. *Id.* at 290. What supervisor would want to admit that the employee that he personally hired, and supervised, lacked credibility? Given the context of their relationship, it is highly unlikely that Juror 344 would want to admit to his own fallibility in finding Joshua Case to be a suitable employee if he actually lacked credibility, and thus it is likely that Juror 344 would assign more credibility to Case's testimony than he otherwise would have.

Given the supervisor-supervisee relationship between Juror 344 and Case, an important witness for the State, the trial court should have disqualified the juror, or, at a minimum, conducted further voir dire into the matter. The cursory inquisition that was performed was in no way sufficient to guarantee that Juror 344 would not assign more weight to this witness than to others. Juror 344 did not only work with the State's witness, but he knew him quite well. Given that he personally hired Case, it is very likely that he would have been charged with looking into his background and character. Knowing so much about a key witness outside the record put Juror 344 in a position of bias, ultimately to the prejudice of Clinton.

As to Juror 344's friendship with an assistant prosecutor, the State again relies on irrelevant case law in an attempt to prove its assertion that this was not problematic. Not only did Juror 344 teach a religious class with an assistant prosecutor, Jason Hinnners, but the trial prosecutor and the trial court continuously praised assistant prosecutor Hinnners for the "great job" that he does. Tr. 292. Rather than inquiring into whether this relationship would cause Juror 344 to be biased in favor of the prosecution, the trial court instead increased the likelihood of such by complimenting the prosecutor friend of the juror: "He's done a wonderful job handling all those foreclosures that we're getting." *Id.* The prosecutor agreed: "He does do a great job." *Id.* After the prosecutor then asked whether Juror 344 could "follow the instructions of the Court," the trial court conducted no further voir dire regarding this relationship. Tr. 292. Defense counsel, likewise, asked no questions to ensure that Juror 344's relationship with an assistant prosecutor who, apparently, was in quite good graces with the trial court and with the prosecutor on the case, would in any way affect his ability to remain impartial. The likelihood, however, of Juror 344 improperly increasing his belief of the credibility of the trial prosecutor, who works in the same office as, and repeatedly praised the great work of, Juror 344's friend, is great.

Finally, the State incorrectly contends that there was no issue with Jurors 70, 96, and 225 sitting on the jury despite their connection to numerous law enforcement officers. State's Brief p. 87. The State cites no binding or persuasive case law to support its position. The State also fails to consider the fact that Juror 70 was never questioned about his friendship with a police officer, and that Jurors 96 and 225 went through an inadequate voir dire process.

Juror 70's friendship with a law enforcement officer went beyond a mere acquaintance relationship. At a minimum, it was necessary for the trial court to ensure that this relationship

would not cause Juror 70 to assign more weight to the testimony of members of law enforcement than to the testimony of other witnesses. The failure by the trial court to thoroughly examine Juror 70's indication that he was friends with a police officer was only exacerbated by defense counsel when they, too, neglected to inquire whatsoever into the friendship and Juror 70's ability to remain impartial.

Juror 96's relationships with law enforcement officers also went beyond that of a mere acquaintance relationship, as he was friends with the Perkins Township police chief, and his brother-in-law was also a police officer. Tr. 71. Additionally, the State pointed out that Juror 96 was related to the Joy family and that they have "a few police officers in that family." Tr. 72. Neither the State nor Juror 96 elaborated as to whether the Joy family officers are members of the Sandusky police force, who were expected to testify at trial, and who investigated these crimes. No questions specific to this relationship were asked of Juror 96, nor was his ability to remain impartial inquired into, despite this family connection. Defense counsel asked Juror 96 even fewer questions of his law enforcement contacts. Trial counsel asked only, "[t]here will be police officers testifying. Are you going to – the bottom line question is, are you going to feel more accepting of their testimony or willing to accept their testimony than any other witness?" Tr. 158. Juror 96 referred only to his brother-in-law in response: "He doesn't – we don't talk about his job, so – we never have, so it's no different." Tr. 158. Trial counsel did not ask a single follow-up question regarding Juror 96's other connections with friends and family in law enforcement to ensure that these connections would not cloud his judgment, thereby prejudicing Clinton. The trial court, likewise, did nothing to step in after defense counsel failed to properly vet Juror 96 on his multiple police connections and relationships.

Juror 225, a city employee, admitted to knowing all of the officers, yet the trial court did not conduct an adequate voir dire on the issue. In fact, the trial court asked only: “So you haven’t formed an opinion on this case and you can be fair and impartial to both sides in this case?” *Id.* The court did not determine whether Juror 225 knew any of the officers in charge of the investigation in this particular case and did not make sure that she would not assign more weight or credibility to the testimony of the officers who she knew or was familiar with.

An unacceptable risk exists that numerous jurors were biased against Clinton due to their connections with various players in the case. At a minimum, the trial court should have further inquired regarding these jurors’ familiarity with, and connection to, members of the community, other jurors, and witnesses for the prosecution. Although the trial court did gain cursory assurances from many of these jurors that they could “follow the law,” this generalized assertion is “wholly inadequate to protect a capital defendant” from a biased juror. *See Morgan v. Illinois*, 504 U.S. 719, 734-37 (1992). The trial court should have conducted a reasonable inquiry into these connections when defense counsel failed to do so. Jurors 63, 70, 96, 225, 143, 371, 341, and 344’s responses during individual and general voir dire demonstrated bias. These jurors’ service on Clinton’s jury panel violated the Due Process Clause. As such, Clinton’s death sentence must be vacated and he must receive a new trial. *See* R.C. § 2929.06(B).

### **Proposition of Law No. VIII**

When the trial court fails to remove two jurors who are biased and denies a challenge for cause for a third juror who is biased, the capital defendant is deprived of his rights as guaranteed by U.S. Const. amends. V, VIII and XIV; Ohio Const. art. I, §§ 9 and 16.

While Clinton stands on his merit brief for arguments relevant to this claim, Clinton would like to clear up a few misconceptions put forward by the State in its brief. Though the State is correct that “a defendant’s exercise of a peremptory challenge to cure a trial court’s error in denying a challenge for cause, without more, does not violate the constitutional right to an impartial jury,” they are incorrect in failing to acknowledge that in Clinton’s case there was “more.” State’s Brief p. 90 *citing State v. Hickman*, 205 Ariz. 192, 195 (Ariz. S. Ct. 2003). Additionally, contrary to the State’s argument that Clinton failed to show that any of the seated jurors were biased, Clinton relies on his reply to Proposition of Law VII to prove that this statement is inaccurate.

As it relates to this proposition of law, the State contends that the trial court was justified in denying the removal of Juror 73 for cause. State’s Brief p. 91. This contention falls flat. Juror 73 admitted to knowing the victim, the victim’s family, and Clinton himself. During individual voir dire, prospective Juror 73 explained to the trial court that she had a relationship with the victim’s family and one of the victim’s best friends. Ind. V.D. 641. Despite the State’s mistaken assertion to the contrary, this Court can take judicial notice that Danielle Arwood is the same person as Danielle Sorrell, as Arwood is Sorrell’s maiden name, and that Danielle (Arwood) Sorrell, a friend of Juror 73, did testify at Clinton’s trial. Evid. R. 201; Ind. V.D. 641, 646, and 653-656.

Again, despite the State’s assertion to the contrary, Juror 73 never stated that her relationship with Heather Jackson’s family was not substantial. Rather she admitted that she was

connected to the victim's family on social media, and had seen a petition headed by the victim's brother on Facebook. Ind. V.D. 646. Although Juror 73 stated that she didn't hang out with the victim's family "on a daily basis," she did know them well enough to speak with them whenever she would run into them. *Id.* In fact, Juror 73 knew Heather Jackson's brother, Nick Fee, State's witness Joshua Case, and Jeremy Griggs from when she was younger, and was Facebook friends with all three at the time of trial. Tr. 249, 260. Juror 73 further stated that she was Facebook friends with Joshua Case and Jeremy Griggs "way before" Heather Jackson's murder, but she did not add Nick Fee as a friend until Heather Jackson was murdered and Juror 73 realized that she knew him after her cousin began commenting that she was "sorry about [his] loss" on his Facebook page. *Id.* at 261-62. Finally, Juror 73 admitted that she had read Nick Fee's Facebook comments about Heather Jackson's murder, which included comments such as "court today" and "wish us luck." *Id.* at 263.

After all of this, the only guarantee that Juror 73 could give to the prosecutor was that she would "*probably*" follow what she heard in court over what she heard elsewhere through her connections to the victim. Ind. V.D. 647. This assurance is anything but strong, and lacks any sense of commitment.

Almost worse than Juror 73's connections with Heather Jackson's family and friends, including her best friend who testified for the State, was Juror 73's preconceived notions of Clinton as a "creepy" individual. *Id.* at 656. While the State attempts to diminish Juror 73's statements that Juror 73 merely thought Clinton was "creepy" because he "hit on" her close friend, this preconception is nothing less than damaging. State's Brief p. 91. Clinton was on trial for the murder of a family of three, and the rape of another individual, and Juror 73 was under the impression that Clinton had acted inappropriately toward her close female friend.

Further, the trial court's assumption of what Juror 73 may have meant by the word "creepy" because he has a daughter in her mid-twenties is completely speculative. State's Brief p. 94; Tr. 664. Even if this definition were accepted, that "creepy" meant "I don't want anything to do with that guy," that would be reason enough for this juror to be removed for cause because she clearly could not remain impartial with this preconception. The fact that this juror characterized Clinton as "creepy," regardless of what she or the court considered the meaning of the word to be, made her unfit to sit on Clinton's jury.

As to Juror 363, the State's claim that there was no basis for a challenge for cause until the juror admitted to knowing the victim is simply incorrect. From the moment that Juror 363 took the stand, Juror 363 repeatedly stated that he thought that Clinton was guilty, that he had a "pre-guilty feeling," and that he thought that Clinton had "admitted guilty." Ind. V.D. 26, 36, 50; Tr. 152. This juror was unfit to serve on the jury, and should have been removed for cause for his failure to see past his pre-conceived notions of Clinton's guilt. Instead, the juror was not immediately removed, and the failure to do so allowed the jury pool to be tainted in violation of Clinton's constitutional right to a fair trial. By the time the juror was finally excused, the other members of the jury pool, including individuals who would ultimately determine Clinton's fate, had already been exposed to his improper comments. Ind. V.D. 52.<sup>1</sup> Time and again, he insisted not only that Clinton admitted to the crime, but that he was guilty. He went so far to suggest that Clinton should be punished without trial because of his "obvious guilt." See Tr. 152-56. This contamination of the jury pool resulted in prejudice to Clinton.

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<sup>1</sup> Prospective Juror 363 was voir dired immediately prior to empaneled Juror 96 (*See* Clinton's Merit Brief, Proposition of Law VII), and was thereby seated directly next to him before and during voir dire.

The trial court's denial of counsel's challenge for cause of Juror 363, and refusal to remove Jurors 73 and 22, resulted in a denial of Clinton's rights as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and §§ 5 and 16, Article I of the Ohio Constitution. This Court must therefore vacate Clinton's death sentence.

## Proposition of Law No. IX

The admission of irrelevant and prejudicial photographs into evidence at both phases violated Clinton's right to due process when the probative value of the photographs was outweighed by the danger of prejudice, and the photographs were cumulative.

Photographs admitted at both phases of Clinton's trial were inflammatory, irrelevant, and duplicative to one another. For the most part, Clinton stands on his merit brief for arguments relevant to the photographs that should not have been admitted, as they were especially graphic and repetitive. However Clinton would like to clear-up a few misconceptions put forward by the State in its brief.

First, State's Exhibit 159 was not, as the State claims, "admitted to show Celina's vagina which had no visible injuries." State's Brief p. 101. Instead, this photograph was mistakenly published to the jury, as it was thought to be a photograph of Celina Jackson's rectum. Tr. 1129. Although Dr. Scala-Barnett explained that this photograph, in fact, did not depict Celina Jackson's rectum, no corresponding photograph of Celina's rectum was then admitted. Instead, the jurors were told that "the dilation was similar to Heather's \* \* \* it was more consistent with her mother's." Tr. 1130-31. This was prejudicial. No evidence of trauma, or the lack of trauma, to Celina's Jackson's rectum was admitted. The jurors were left considering the photograph of Heather Jackson's rectum in place of her daughter's. And it is very unlikely that these pictures would have, in fact, looked indistinguishable. As such, the "danger of prejudice" associated with this photograph was just too great. *See State v. Morales*, 32 Ohio St. 3d 252, 258 (1987).

Next, the State argues that the two autopsy photographs that were readmitted during the mitigation phase of the trial were properly admitted to "prove[] that the two victims were under the age of 13." State's Brief p. 102. Yet, the photographs of the two dead children did not shed light on the aggravating circumstances charged in this case, since it was absolutely clear from

both the autopsy reports (also admitted as evidence in the mitigation phase) as well as common sense that the victim children were under the age of thirteen. As such, admission of these two photographs would solely be motivated “to appeal to the jurors’ emotions.” *State v. Keenan*, 66 Ohio St. 3d 402, 407 (1993).

The admission of the objectionable photographs at both phases of the trial violated Clinton’s right to due process. U.S. Const. amend. XIV; Ohio Const. art. I, § 16.

## **Proposition of Law No. X**

When an involuntary statement is admitted as evidence against a defendant, that defendant's constitutional rights to due process and a fair trial are violated. U.S. Const. amends V, VI, VIII, and XIV.

Contrary to the State's claims, Clinton's interview with, and resulting statements to, Detective Wichman were involuntary under the totality of the circumstances. The State first goes through a lengthy recitation of the facts. Throughout this recitation, each time it notes Clinton's confusion, the State also offers that Clinton was "feigning" this confusion. State's Brief p. 103. Yet, the record indicates the opposite—during the time of this interview, Clinton was indeed confused, out of sorts, and not in his right mind when speaking with Detective Wichman.

The State next argues that this error was waived, because Clinton did not raise this argument at the time of trial. However, the State's point is not news to Clinton. This is, in fact, the reason that Clinton has also raised this error as ineffective assistance of counsel. As Clinton has detailed in Proposition of Law XVI, trial counsel were ineffective to Clinton's prejudice when they failed to file a motion to suppress the entirety of Clinton's involuntary statement.

Next, the State argues that even if this claim is not waived, that Clinton's statement was, under the totality of the circumstances, voluntary. This cannot be. As can be seen in State's Exhibit 117 (the video of Clinton's statement), Clinton looks weak, he still has the tape from the IVs in his arm attached to his skin, and he can barely raise his hand to his mouth to drink a cup of water. In addition, contrary to the State's assertions, Clinton's answers to Detective Wichman's questions were neither logical nor cohesive. Throughout the interview, Clinton made comments such as: "I don't even know what today is," "I cannot remember," "My days is so mixed up right now," "You're trying to confuse me," "I just have my days mixed up because I

thought yesterday was Saturday and today was Sunday,” “I can’t say something that I can’t remember,” “Ain’t nothing written all over my face, but I’m tired,” “I don’t want to say something and then lie. Do you want me to say something and then lie?,” “You’re trying to tell me I did something that I know I didn’t do,” “You’re trying to manipulate me,” “I don’t know what you’re talking about,” “Send me to jail,” and, “I can’t remember shit, man. You’re confusing me, too.” *See* State’s Supp. Hear. Ex. 2; May 28, 2013 Supp. Hear. Tr. 9-59; *see also* State’s Exhibit 117. It is clear through these statements, and through the circumstances as detailed above, that Clinton was not “feigning confusion,” but to the contrary that his mental state was obviously affected at the time of this interview.

Finally, the State attempts to compare this case to the facts in *State v. Jenkins*, 15 Ohio St.3d 164, 232-33 (1984). Yet, as the State concedes, the determination of voluntariness is more than “a mere color-matching of cases.” *Id.* at 232. Moreover, the defendant in that case was questioned for a mere forty-five minutes, while the interview here between Detective Wichman and Clinton was anything but brief—a three hour-long interview is, in fact, a long time when the interviewee is disoriented and still recovering from a hospital stay and serious suicide attempt!

Clinton’s statement was involuntary. As such, his constitutional right to due process was violated when this statement was allowed as evidence at his capital trial.

## **Proposition of Law No. XI**

The trial court erred when it allowed unqualified “expert” witness testimony under Ohio Rule of Evidence 702 and the Fourteenth Amendment of the United States Constitution as well as Article I, §§ 10 and 16 of the Ohio Constitution.

Defense counsel indeed objected, on a whole, to Detective Clark’s testimony. Before Detective Clark testified, during a sidebar, counsel renewed previously made objections to Detective Clark’s testimony: “So we just object to his testimony based on our other acts motion. So it’s renewed, and the motion in limine. .... [Also] .... we’ll object to the photos, but we’ll do that at the time, because it goes along with our motion.” Tr. p. 950. The defense objections continued when the sidebar had concluded and Detective Clark began his testimony, with the trial court overruling defense counsel’s stated objection, “for the record,” “to the entire line of questioning” as to all of the State’s questions posed to Detective Clark. Tr. p. 954. Defense counsel once again objected and were overruled when Detective Clark sought to describe what he perceived to be “ligature marks” on a 15 year old photo of Misty Keckler. Tr. p. 956. Defense counsel further objected when Detective Clark began interpreting autopsy photos as to what “we” (Detective Clark and the non-testifying coroner) had determined 15 years earlier as to when Keckler had died and of what causes. Tr. pp. 957-958. The trial court’s response was to merely “note the continuing objection,” and so to allow the retired detective to continue testifying as to autopsy concerns, with no coroner or other medical expert ever offered by the State to substantiate the varied opinions offered for the jurors’ consideration by retired Detective Clark. Tr. p. 958.

Further, the State’s brief overstates the amount of knowledge that retired Wood County Detective Clark seemed to have possessed regarding the death of Misty Keckler in 1997 and Clinton’s supposed role in that death. For example, Detective Clark testified that, when

questioned, Clinton had told him that he had had sexual contact with Misty Keckler before her death, but nowhere does Detective Clark state or opine *when* that sexual contact had occurred, whether minutes, hours, days or weeks before Keckler had died. Tr. 959. Detective Clark failed to testify that Clinton was even involved with the supposed attachment of ligatures to Misty Keckler or indeed as to the mysterious circumstances leading to her death – his testimony was not probative on whether Misty Keckler was murdered or may have died, for example, during a sex act. And despite the State’s brief’s arguments to the contrary, Detective Clark was indeed the *only* witness called by the State to talk with the jurors about the Misty Keckler scenario. Detective Clark was called to serve as a “pseudo-coroner” to opine medically on Misty Keckler’s supposed cause of death, even though he had no particular training or expertise upon which to base his conclusions, in direct violation of *State v. Baston*, 85 Ohio St. 3d 418 (1999).

The State obviously hoped that the jurors would believe that Clinton had some sort of habit of strangling women by ligatures, by linking Misty Keckler’s 1997 death and the deaths of the Jackson family in 2012, through retired Detective Clark’s testimony. But Detective Clark had no professional expertise that would allow him to offer an opinion that Misty Keckler had died in a manner similar to the Jacksons, and the trial court improperly allowed Detective Clark to provide the jurors with testimony that went well beyond Clark’s realm of expertise or training. Simply stated, Detective Clark was an unqualified witness brought to the stand for improper purposes.

Clinton’s trial counsel objected to Detective Clark’s testimony, and a defense motion for mistrial following Detective Clark’s proffered testimony was summarily denied by the trial court. Tr. 954, 957-58, 962-69. This trial court error was not harmless, where the United States Supreme Court has declared that “before a federal constitutional error can be held harmless, the

court must be able to declare a belief that it was harmless beyond a reasonable doubt.” *See Chapman v. California*, 386 U.S. 18, 24 (1967). Clinton’s capital jury was fed scientific information from a non-scientifically qualified witness proffered by the State, and this very likely resulted in juror confusion as to how the disparate events as to Misty Keckler in 1997 and the Jacksons in 2012 should or could be reconciled, given the failure of the State to establish any clear connection through probative and qualified evidence. The trial court, as the “gatekeeper,” failed in its duty to assure that only reliable evidence from qualified witnesses would be heard by the jury. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). *See also State v. Hipkins*, 69 Ohio St. 2d 80 (1982); *State v. Morris*, 8 Ohio App. 3d 12 (1982).

Because the trial court erred in allowing Detective Clark’s unqualified “expert”, defense counsel’s mistrial should have been granted. As such, Clinton’s conviction and sentence must be reversed.

## Proposition of Law No. XII

The accused's due process right to a fair trial is violated when the trial court fails to take curative action when the trial is disrupted. U.S. Const. amends. VI, XIV; Ohio Const. art. I, § 10.

The State contends that Clinton's claim to an unfair trial fails, because neither event complained of took place during the trial. State's Brief p. 110. The State argues that because the complained of events took place during voir dire instead of during the actual guilt or mitigation phase of the trial, the events therefore would bear no consequence to Clinton. This argument fails. Voir dire is not a substantive part of trial; rather, it is a mechanism to seat an impartial jury so that the due process rights of a defendant are protected. *Morgan v. Illinois*, 504 U.S. 719, 729-730 (1992) (explaining that the Constitution does not provide for voir dire, but only that the defendant be afforded an impartial jury; voir dire plays a critical function in assuring the criminal defendant that his constitutional right to an impartial jury will be honored). The United States Supreme Court has also found that "constitutional safeguards relating to the integrity of the criminal process attend every stage of the criminal proceedings, starting with arrest and culminating with a trial 'in a courtroom presided over by a judge.'" *Cox v. Louisiana*, 379 U.S. 559, 562 (1965) (citing *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963)). It does not matter, as the State argues, that these disruptions did not take place during the actual guilt or mitigation phase of the trial. The issue is whether these disruptions infringed on Clinton's constitutional rights to due process and a fair trial. They did.

The State asserts that these events do not matter because they occurred in front of only one juror, Juror 70. State's Brief p. 111. However, as this Court is well aware, it would have only taken one juror for Clinton to have ended up with a life sentence, as opposed to death. *State v. Brooks*, 75 Ohio St. 3d 148, 161 (1996) ("In Ohio, a solitary juror may prevent a death penalty

recommendation by finding that the aggravating circumstances in the case do not outweigh the mitigating factors.”). Therefore, even *if* these disrupting events took place only in front of Juror 70, the consequences are still of constitutional magnitude.

The State also claims this would be a different circumstance if Juror 70 had expressed some consternation regarding these events. State’s Brief at p. 111. It is hard to believe that these events would not cause some consternation on the part of a juror. Further, as Clinton argued in his merit brief, the trial court should have made inquiry, as part of its duty to ensure that Clinton received a fair trial. *See Lakeside v. Oregon*, 435 U.S. 333, 341-42 (1978); *See also State v. Johnson*, 24 Ohio St. 3d 87, 91 (1986) (*citing Powell v. Alabama*, 287 U.S. 45 (1932)).

Finally, the State argues that because Fee’s final outburst did not take place until sentencing, it should not be considered significant. State’s Brief p. 110-11. However, Fee’s disruptions were not of the singular, discrete variety, but were in fact endemic throughout the entire trial. Even the trial court noted Fee’s refusal to abide by court orders. Ind. V.D. Tr. 810, 815. Fee’s clear intent was to disrupt Clinton’s trial. In doing so, he prejudiced Clinton by interfering with his rights to due process and fair trial. The trial court failed to take action to protect Clinton’s rights as it was required to do by notions of fundamental justice. *See Lakeside v. Oregon*, 435 U.S. 333, 341-42 (1978).

The pervasive, public demonstrations made at Clinton’s trial deprived Clinton of a fair trial and an impartial jury. U.S. Const. amends. VI, XIV. This Court must vacate Clinton’s convictions and remand for a new trial.

### **Proposition of Law No. XIII**

The broadcasting of attorney-client discussions over a closed-circuit video feed violates a defendant's right to due process. U.S. Const. amends. V, VI, VIII, IX, and XIV; Section 10, Article 1 of the Ohio Const., §§ 1, 2, 5, 9, 10, 16, and 20.

The State's assertions that this claim lacks merit, that Clinton's right to due process was not violated, and that no error occurred fall flat. Though the State claims that it was confirmed that no public spectators had heard anything from the live feed, the only assurances of this fact that were made were from Assistant Prosecutor Barylski and the State's victim's advocate, neither of whom are neutral observers. Tr. 179-80. Moreover, despite the statements made by the prosecutor and victim's advocate, the judge was still "a little nervous about who's hearing what at bench conferences or otherwise – or, counsel table." *Id.* at 180. Additionally, despite these mere reassurances, it is impossible to tell who heard what. The State cannot prove that nothing was heard or deciphered, and to this day that question is unresolved.

While the State claims that defense counsel never lodged any objection regarding the entire scenario, it is clear that defense counsel never consented to the disclosure of privileged attorney-client information and strategic discussions. To the contrary, counsel informed the judge that the issue with the dissemination of information via the closed-circuit feed was "infringing in our ability to discuss at the table who to exercise preemptory challenges and what questions to ask jurors, which we think is absolutely essential." *Id.* at 177. This is no waiver.

While the State's brief casts the attorney-client privilege as less important than it actually is, this privilege remains "the oldest of the privileges for confidential communications known to the common law...its purpose is to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (internal

citations omitted). The mere possibility of the disclosure of private, confidential discussions between attorney and client, or between attorneys strategizing about the client's defense, is horrific. The broadcasting of these discussions to another courtroom, where no one can ever be precisely sure what was overheard, or by whom, is a plain violation of Clinton's ability to confidentially communicate with his counsel and, ultimately, constitutes a violation of his right to a fair trial.

Such an error is of constitutional magnitude, and the State cannot prove that this error is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 26 (1967). Even if plain error was the proper standard of review, a manifest injustice resulted here, caused by this plain violation of Clinton's due process right to a fair trial. The broadcast of privileged discussions to another courtroom where no one can truly be sure what was heard, or by whom, was an inexplicable and inexcusable violation of Clinton's constitutional rights and protections.

### **Proposition of Law No. XIV**

The defendant's rights to due process, equal protection, and freedom from cruel and unusual punishment are violated when the State excludes an African-American juror without providing a satisfactory race-neutral reason. U.S. Const. amends. V, VI, VIII, XIV; Ohio Const. art. I §§ 2, 5, 9, 10, 16, and 20.

The State contends that this claim was waived because Clinton never objected to the removal of Juror 255. This is not news to Clinton. Rather, it is the reason that Clinton has also raised this error as ineffective assistance of counsel. As Clinton has detailed in Proposition of Law XVI, trial counsel were ineffective to Clinton's prejudice when they failed to challenge the prosecutor's use of a peremptory challenge on one of only two African-Americans in Clinton's final jury pool.

Next, the State claims that even if this argument was not waived it lacks merit. This is simply untrue. The State exercised its second peremptory challenge regarding Juror 255, an African-American woman. Prior to exercising this challenge, the prosecutor immediately stated that "for the record, there's another prospective juror on the jury that's an African-American female. The basis – the nondiscriminatory basis under *Batson v. Kentucky*, 476 U.S. 79 (1986) that we would cite is the fact that her family members...were both prosecuted by the State, by Erie County prosecutors, and convicted of felonies...and then, also, presently, we have a pending case against her brother..." Tr. 267-68. Because the prosecutor immediately made an attempt to state an alleged race-neutral reason, Clinton's burden of making a prima facie showing of racial discrimination was effectively waived. *See, e.g., Hernandez v. New York*, 500 U.S. 352, 359 (1991) (when the trial court immediately requires the State to provide a race-neutral reason, the preliminary issue of whether the defendant has made a prima facie showing becomes moot); *Braxton v. Gansheimer*, 561 F.3d 453, 461 (6th Cir. 2009).

The trial court's only input in the matter was that "[t]he Court's definitely in agreement with that and passes the *Batson* test." *Id.* The trial court, however, shirked its duty to evaluate the prosecutors' demeanor and credibility to determine whether the race-neutral reason that the State offered was pretextual. *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003). After all, "the critical question in determining whether a prisoner has proved purposeful discrimination is the persuasiveness of the prosecutor's justification for his peremptory strike." *Id.* at 338-39. Here, the trial court asked no questions, and instead went along with the allegedly race-neutral reason offered by the prosecution, a reason that was not utilized to strike any of the similarly situated Caucasian jurors. The only other offered reason by the prosecution – that there was another African-American in the jury pool – is irrelevant. "The law of equal protection does not offer 'one free bite.'" *State v. White*, 85 Ohio St. 3d 433, 436 (1999); *see also Snyder v. Louisiana*, 552 U.S. 472, 478 (2008); *Batson*, 476 U.S. at 95.

Additionally, the State's argument that defense counsel affirmatively believed the State's reasoning fails, as trial counsel were ineffective for failing to question the prosecutor's reasoning, and instead, simply agreeing with the stated reason. *See Strickland v. Washington*, 466 U.S. 668 (1984); *see also United States v. Jackson*, 347 F.3d 598, 604 (2003) citing *Batson*, 476 U.S. at 98. ("Once a race-neutral explanation is produced, the complaining party must prove purposeful discrimination."). There was no request for more information from defense counsel or the trial court, there was no challenge based on the fact that Juror 255 had stated numerous times that she could be fair and impartial, and there was no challenge based on the fact that only one other prospective juror was African-American in a case where the defendant was African-American and all three murder victims were white (the victim of the alleged rape charge was also

white). Despite these same facts, the trial court, without any questioning, immediately concurred with the prosecutor's reasoning and determined that the *Batson* test was met. Tr. 268.

The State is correct, however, that “[a]bsent intentional discrimination violative of the Equal Protection Clause, parties should be free to exercise their peremptory strikes for any reason, or no reason at all,” and the reasoning of the prosecutor must not be “inherently discriminatory.” *Hernandez v. New York*, 500 U.S. 352, 374 (1991) (O’Connor, J., concurring); *Rice v. Collins*, 546 U.S. 333, 338 (2006). Here, had defense counsel acted effectively, and had the trial court engaged in the analysis required by *Batson*, the inherent discrimination in the State’s peremptory challenge would have been made known.

Despite the fact that Juror 255’s brother and cousin were involved in the criminal justice system, Juror 255 stated *three* separate times that she could be fair and impartial, and that she was not prejudiced against the State of Ohio. Tr. 221, 224. She further stated that she never saw her cousin, and only dealt with her brother on occasion. *Id.* at 224. Moreover, it should be noted that the State apparently had no problem with three jurors and two alternate jurors, all of whom were Caucasian, whose friends and relatives had previously either been arrested for, or convicted of, a felony. *See* juror questionnaires, filed under seal. All prospective jurors were asked the question: “Have you, a friend, a relative or anyone you know ever been arrested for, or convicted of, a felony?” *Id.* Juror 341 answered that his brother had either been arrested for, or convicted of, possession of prescription meds. *See* Juror 341 questionnaire, filed under seal. Juror 225 answered that at least four of her nephews had either been arrested for, or convicted of, a felony. *See* Juror 225 questionnaire, filed under seal. Two friends or relatives of Juror 63 were either arrested for, or convicted of, a felony. *See* Juror 63 questionnaire, filed under seal. The niece of alternate Juror 359 was either arrested for, or convicted of, forgery of a prescription. *See* Juror

359 questionnaire, filed under seal. And, the sister of alternate Juror 202 was either arrested for, or convicted of, a felony. *See* Juror 202 questionnaire, filed under seal.

The State's failure to even question any of these individuals about the involvement of their siblings, nieces, nephews, and other relatives with the criminal justice system further proves the purposeful discriminatory intent in singling out Juror 255, who rarely saw her brother, and never saw her cousin. This is powerful evidence of discrimination, as the Supreme Court has stated: "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005).

Clinton was failed by both his counsel and by the trial court that allowed the impermissible exclusion of an African-American juror without question. As such, his rights to due process, equal protection, and freedom from cruel and unusual punishment as guaranteed by the United States and Ohio Constitutions were violated, and this Court should reverse and remand for a new trial. *See Ford v. Norris*, 67 F.3d 162, 170 (8th Cir. 1995) ("[C]onstitutional error involving racial discrimination in jury selection is not subject to harmless error analysis.")

## **Proposition of Law No. XV**

A trial court violates a capital defendant's constitutional rights to a fair trial and due process when it allows misleading and prejudicial evidence and testimony, improperly overrules defense motions and objections, and does not adequately conduct voir dire. U.S. Const. amends. V, VI, VIII, IX, and XIV; Section 10, Article 1 of the Ohio Const., §§ 1, 2, 5, 9, 10, 16, and 20.

Many of the instances of trial court error were addressed in other propositions of law in Clinton's merit and reply briefs. Thus, Clinton relies on those previously presented arguments. *See* Propositions of Law IV, VI, XI, XVI, XVII, and XX. Where no reply is made herein, Clinton relies on the arguments presented in his merit brief, and does not waive any previously made arguments.

The State is correct that the trial judge's evidentiary rulings are "not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" State's Brief p. 122, citing *Patterson v. New York*, 432 U.S. 197, 201-02 (1977). In Clinton's case, those principles of justice were offended.

The State's first contention, that most of Clinton's arguments are made in a perfunctory manner, is simply incorrect. State's Brief p. 122. Though the State claims that "most" of Clinton's arguments are perfunctory, they can only point to a handful of "sub-claims" that they believe should be waived. *Id.* The contention that the use of "bullet points" negates any analysis regarding the errors made by the trial court is illogical. *Id.* Clinton again would rely on the arguments made in his merit brief to further prove this point.

### **A.1 The trial court erred when it allowed the deputy coroner to make prejudicial and biased comments during her testimony.**

It is not news to Clinton that no objection regarding Dr. Scala-Barnett's testimony was made at trial, which is why Clinton has also raised the issues as an ineffective assistance of

counsel claim. *See* Proposition of Law XVI. The deputy coroner's use of child-like phrases such as "froggy blanket" and "jammies" was inappropriate, particularly when other words such as "blanket" or "pajamas" could have been used to accurately describe the items at hand. Tr. 1110-11, 1103. The only purpose behind the language that was chosen would have been to inflame the passion of the jury. Regardless of the number of autopsies performed by Dr. Scala-Barnett, there was no scientific foundation laid for the speculation regarding the "rolled-in" elastic of the waistband of Celina Jackson's underwear. Tr. 1124-35. Additionally, there is no way to guarantee that the cause of the "rolled-in" waistband was not due to the position of the body or the transportation to the coroner's office. There is also no way to tell whether the underwear, which appear to be "baggy," was not typically rolled down to keep them up, or whether this particular pair of underwear had a tendency to "roll" down throughout the day as undergarments sometimes do. State's Exhibits 7, 72, and 152. As such, Dr. Scala-Barnett was overreaching, as she laid no foundation for this conclusion, and she should not have been allowed to testify that the waistband was solely indicative of Celina Jackson having been "redressed."

Most egregious of all is the fact that Dr. Scala-Barnett presented the photo of an unknown child's anus to the jury. Tr. 1110-11, 1130-31, State's Exhibit 60. Though she told the jury that the photo was only being used as a point of reference, she laid no scientific foundation as to the gender of the child, how the child had died, whether the child's rectum was diseased or injured, or the duration of time between the child's death and the taking of the photograph, etc. Dr. Scala-Barnett also testified that, though dilated, "there were no injuries," "there was no tearing," and "there was no bruising" of Celina's rectal area. Tr. 1130. There is no way to guarantee that the result of Celina Jackson's rectal dilation was not a natural phenomenon that sometimes

occurs upon death, but which did not occur in the singular reference photo of an unknown child upon which no foundation or background had first been laid.

**A.2 The trial court erred when it allowed victim impact testimony to be introduced by the prosecutor.**

Though it was initially laid out in Clinton's original argument, and Proposition of Law XVII, Clinton will attempt anew to make his analysis more clear given the State's response. Victim impact evidence is inadmissible during the culpability phase of a capital trial because it is immaterial to the issue of guilt. *See State v. Fautenberry*, 72 Ohio St. 3d 435, 440 (1995); *State v. Tyler*, 50 Ohio St. 3d 24, 35 (1990); *State v. White*, 15 Ohio St. 2d 146, 151 (1968). The trial court erred in allowing improper and irrelevant victim impact testimony from witnesses Thomas Hanson, Detective Gary Wichman, Detective Ken Nixon, and E.S.

Thomas Hanson's statements regarding his feelings toward the person who committed the crime were not relevant to any fact at issue in trial and as such should not have been admissible. The statements made by Detective Wichman were not relevant to who committed the crimes in question. Detective Wichman's opinion that the interview was the "worst interview I ever did, situation wise," was not relevant to any fact at issue in trial. Tr. 826-27; *see State v. Fautenberry*, 72 Ohio St. 3d 435, 440 (1995). It was improper and prejudicial to Clinton for a detective who had expounded to the jury about his twenty-three years of experience to then insinuate to the jury that the crime was the worst he had ever seen. Tr. 772. Detective Nixon's statements regarding why E.S. had been reluctant to file charges were also improper. Tr. 743 & 747. Detective Nixon's statements were speculative in nature, and were not proper evidence for any fact of consequence in Clinton's capital trial.

E.S.'s testimony regarding her involvement in counseling was not related to the facts attendant to the offense, as the State claims. State's Brief p. 127, citing *State v. McKnight*, 107

Ohio St. 3d 101, 116 (2005), citing *Fautenberry*, 72 Ohio St. 3d 435, 440. Nor was this statement relevant for any purpose in Clinton's trial. The fact that E.S. had engaged in counseling subsequent to the offense had nothing to do with how or whether the crime was committed, and so was not relevant. Additionally, the State offers no proof that "a person fabricating an accusation of rape" would never seek counseling. As such, this testimony was improperly admitted over defense counsel's objection.

**A.3 The trial court erred when it overruled the following objections made by defense counsel.**

The trial court erred by overruling many of defense counsel's objections. Clinton's initial brief made clear that all of the testimony that defense counsel objected to lacked any legitimate evidentiary value. A trial court should exclude irrelevant evidence. Ohio R. Evid. 402. Evidence is relevant if it has "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. Even if any of the below testimony is found relevant, Evidence Rule 403 requires a judge to exclude even relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice." Ohio R. Evid. 403(A). "Usually, though not always, unfairly prejudicial evidence appeals to the jury's emotions rather than intellect." *Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St. 3d 169, 172 (2001) (quoting Weisenberger's Ohio Evidence, pp. 85-87, Section 403.3 (2000)).

Specifically, the statements made by Thomas Hanson were inadmissible victim impact testimony and hearsay. The statements made by Detective Nixon, Detective Wichman, and E.S. are all inadmissible victim impact testimony. Clinton would rely on his arguments made *supra* and in Proposition of Law XVII to refute the State's contentions. The fact that the trial court held a *Daubert* hearing does not mean that the trial court is thus immune from any error. Clinton

would rely on his arguments made *infra* to further support this issue. Similarly, Clinton would rely on Proposition of Law XI to further support his argument that the trial court erred in overruling defense counsel's objections to Michael Clark's testimony and the admission of exhibits related to Misty Keckler. Additionally, the testimony of Lisa Dettling as to what E.S. had told her was irrelevant and unduly prejudicial, as was argued by defense counsel at trial.

Finally, a review of the entire record provides clarity in relation to all of defense counsel's objections, as it is clear from the record why defense counsel made their objections as well as why these objections should have been sustained.

**A.4 The trial court erred by allowing the telephone call between Clinton and his mother, recorded by the Erie County Jail, to be played at trial.**

The State is incorrect in its analysis of the telephone call between Clinton and his mother. This call took place the day after Clinton's release from the hospital for a suicide attempt and following his subsequent interrogation by Detective Wichman. Clinton stated that he was "just confused," which is similar to what he had told Detective Wichman the day before. State's Exhibit 119. Further, when Clinton stated he would just "plead guilty or whatever," the tone reflected a fatalistic mentality typical of a person who has recently attempted suicide. *Id.* Clinton stated, "I hurt someone," not I hurt *them* or I killed *them*. This statement lacks any context and is likely based on what Clinton was told by Detective Wichman. Given Clinton's history of depression, suicide attempts, and black-outs, this call is not as easily interpreted as the State would have the Court believe. *See* Proffer of Defense Exhibit O.

The statements made by Clinton during the conversation with his mother have no evidentiary value and cannot be shown to be relevant to the case at hand. Even if relevancy was not an issue, the prejudicial value of such statements being played at Clinton's capital murder trial would require that the judge exclude the statements from being heard by the jury. Allowing

such statements to be played for the jury allowed for confusion of the issues, and for jurors to make assumptions that were not warranted. The trial court erred by allowing this conversation between Clinton and his mother to be played at trial.

**A.5 The court erred by allowing the video of Clinton’s police interview, accompanied by inaccurate captions, to be played to the jury.**

The State contends that Clinton made no attempt to describe the alleged inaccuracies in the police interview videotape or how they affected his trial. This is incorrect. At trial, Clinton’s counsel stated:

Ms. Kendall: Well, just in reviewing the first half, inaccuracies with the timing, inaccuracies with the words, doesn’t match up with the transcripts. There’s times when what they caption is the action, which is not timed properly. It doesn’t contain the words. You can sometimes read what Curtis Clinton says, but sometimes you can’t because it goes too quickly. And so, because, you know, we don’t have an issue of accessibility, there’s no reason the jurors can’t determine for themselves what they’re hearing with a printed transcript not being provided.

...

Ms. Kendall: There are phone numbers, like it has the Human Services hotline phone number mixed in in part of it. It’s not in the transcript.

Tr. 829-36. Further, trial counsel offered to “break it down and get the iPad and [state] exactly what time that occurs in the video.” *Id.* Trial counsel stated that the number of inaccuracies “distracts from hearing the video, and there are parts that...are substantively inaccurate from what he says.” *Id.*

Ms. Kendall: There are times when there’s not audible speaking off camera and there’s captions for it.

Mr. Doughten: There's one major discrepancy. There's one major inaccuracy that's down that's different.

The Court: Don't hold back. Let me know what it is.

Mr. Doughten: Okay. It was the "was" versus "was not." You can hear it. We can tell you exactly the location. Now, we can do it, I suppose, by going back and trying to find the exact location and –

...

Mr. Baxter: I guess we don't want the jury to know what he exactly said.

Ms. Kendall: Did you watch this?

Mr. Baxter: I watched it.

Ms. Kendall: There's parts you can't even read it. It's so fast, you can't even follow it. It doesn't aid in that way.

*Id.*

As Clinton previously argued, the trial court did nothing to further inquire as to what substantive inaccuracies existed, nor did it do anything to prevent the jury from hearing and/or seeing such inaccurate statements. Additionally, a review of State's Exhibit 117 shows that the video of Clinton's police interview is accompanied by large, bright yellow text that moves across the screen very quickly in a distracting manner. While there may be little issue with understanding the audio portion on its own, the addition of the quick-moving text across the screen makes it difficult to listen and read at the same time. Such difficulty may cause the viewer to focus only on one or the other, either the text or the audio, making it even more prejudicial that the text is not accurate. At the very least, the advisory instruction provided by the trial court is not adequate to prevent the harm from the substantively inaccurate text on the screen. As such, the trial court erred, to Clinton's prejudice, by not doing more to prevent the police interview with incorrect captions from being played to the jury.

**B. The trial court erred when it overruled defense motions prior to, and during, Clinton’s capital trial.**

The State asserts that it “should not be required to guess arguments not raised, and then attempt to tear them down.” State’s Brief 134. But a thorough review of the record, in addition to a review of Propositions of Law IV, VI, and XVII, will demonstrate why the trial court erred in denying the motions at issue. Further, Clinton would rely on the arguments previously raised in B.1, B.2, and B.3, as well as Propositions of Law XI and XX. Clinton notes, however, that the State’s reliance on the appearance of Heather Jackson’s rectum is irrelevant, as Clinton was never charged with raping Heather Jackson. State’s Brief p. 141. Also, the case law that the State attempts to apply in B.3 has no application to Clinton’s case. The State’s reliance on *State v. Rojas* is inapplicable as it involves an aggravated robbery offense and does not address the sensitive issue of whether or not a sexual assault even occurred at all. 64 Ohio St. 3d 131 (1992); State’s Brief p. 141. Additionally, the State attempts to rely on the Missouri Supreme Court, a decision that is neither binding nor persuasive. *Id.* at p. 142. Finally, as this Court is aware, the *Daubert* hearing referred to in B.1 refers to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and progeny, including *State v. Pierce*, 64 Ohio St. 3d 490 (1992).

**D. The trial court erred during voir dire when it failed to: give a cautionary instruction to the venire concerning remarks made by Juror 363, conduct additional voir dire of seated jurors following Juror 363’s comments, and conduct voir dire on the issue of race.**

Clinton would rely on the arguments previously raised in sections D.1, D.2, and D.3 as well as in Proposition of Law VIII. Clinton would note, however, that the State fails to completely re-state Clinton’s argument in D.1. The State asserts that Clinton complains that the trial court was obligated to give a cautionary instruction after Juror 363 made comments that he thought Clinton “admitted guilty.” State’s Brief p. 143. What the State fails to recite is the fact

that Clinton also made clear that the trial court had agreed to give such an instruction, but then failed to do so. Clinton's Merit Brief p. 131; Tr. 180, 182. The parties had clearly agreed that these statements were prejudicial, and, in turn, that the jury was in need of a cautionary instruction. Thus, the trial court erred by failing to give this cautionary instruction.

Overall, Clinton was prejudiced by the trial court's errors in allowing misleading and prejudicial evidence and testimony, improperly overruling defense motions and objections, and conducting an inadequate voir dire. These errors are not harmless, particularly when considered cumulatively, and as such the trial court's errors and omissions mandate reversal of Clinton's conviction and sentence.

## Proposition of Law No. XVI

The cumulative errors of trial counsel in failing to fulfill a litany of duties and not functioning as counsel denies a criminal defendant the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution and Ohio Constitution, Article I, Sections 1, 2, 10 and 16.

Contrary to the State's claims, Clinton's trial counsel provided ineffective assistance in myriad ways during his capital trial. As such, Clinton's rights as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution were violated.

When reciting the legal authority for this claim, the State omits this Court's most recent authority on ineffective assistance of counsel claims: *State v. Herring*, 142 Ohio St. 3d 165 (2014). This Court's recent pronouncement in that case makes clear that: "Trial counsel's responsibility to ensure that an investigation was completed cannot be excused." *Id.* at ¶111. This duty of investigation is integral to the right of effective assistance. Trial counsel failed to complete both their trial phase and mitigation phase investigations, and as such, Clinton deserves a new trial and/or mitigation phase. Where no reply is made herein, Clinton rests on his merit brief for many of the arguments he asserted as to the individual ineffective assistance of counsel claims that he raised. However, Clinton replies as follows to the several misconceptions put forward by the State in its response brief.

### **B.1. Failure to present a complete defense on Clinton's behalf through effective cross-examination of, and eliciting information from, State's witnesses**

The State's brief erroneously casts ineffectiveness of counsel in failing to pursue questioning on alternative suspects to the Jackson murders as some form of "strategic" thinking by defense counsel. The short answer to this paradoxical assertion is that there can be nothing strategic about capital defense counsel's choice to fail to wholeheartedly pursue evidence that

someone *other than* the defendant is a viable alternative suspect who possibly committed the murders for which the client faces capital punishment.

The issue of ineffectiveness of counsel for failing to pursue the alternative suspect theory cannot be resolved on the theory espoused by the State's brief. Even if Clinton's defense counsel sometimes touched upon the borders of what should have been Clinton's primary defense, cross-examination of State's witnesses about the little tangible information defense counsel had learned as to viable alternative suspects was meager. Yet, enough evidence existed through the State's case, from the first witness onward, to put Clinton's defense counsel on notice as to this very real opportunity.

The State's brief opines that Danielle Sorrell's testimony about Heather Jackson's "snitch arrangement" with the Sandusky Police Department was sufficiently covered on cross-examination before the trial court brought a halt to the inquires and limited further cross-examination. Yet, worth summarizing here is what *should have, and could have*, been pursued by trial defense counsel.

Danielle Sorrell explicitly told the jurors, and trial defense counsel, that Heather Jackson associated with a number of drug-using male acquaintances, to the point that Sorrell had "lectured" Heather Jackson that these men were "a bad influence" on her. Tr. 406, 408-09, 417. Clinton's trial defense counsel *began* to explore Jackson's relationship with drugs and drug traffickers in the days preceding her murder, and in the process learned, apparently for the first time, that her car had been pulled over by the police shortly before her murder, that drugs were found in the vehicle, and that Jackson made some sort of deal with the Sandusky police to identify her source for the drugs. Tr. 419. But this line of inquiry was summarily halted when the trial court intervened to stop it.

Contrary to the State's position that given this order, defense counsel had to abandon all further efforts, Sorrell's testimony opened the door to a whole new line of inquiry for Clinton's defense team, not just as to Clinton but as to a variety of other State's witnesses. For example, both Sandusky police detectives Nixon and Wichman, on cross-examination, could and should have been cross-examined at length as to all details concerning the snitch arrangement that Heather Jackson just recently had made with the Sandusky Police Department. The alternative suspect defense would not have been dependent on the trial court's order barring any answer to the precise question to Danielle Sorrell of *who* supplied Heather Jackson with drugs before she and her children were murdered. Indeed, the better witnesses to ask, given what Danielle Sorrell had disclosed, would have been the police witnesses called by the State, but they were asked little or nothing about the "snitch arrangement" that Danielle Sorrell knew about and had candidly discussed with the jurors at the onset of the trial.

Given the reality that Heather Jackson was known to have entered into a confidential informant status with the Sandusky Police Department in the days preceding her murder, the alternative suspect theory was viable and should have been ardently pursued, but was not, to Clinton's prejudice. And, while the State claims that Clinton cannot demonstrate prejudice because he cannot explain away the DNA evidence, or his presence at Heather Jackson's house (State's Brief p. 148), the State fails to consider that "there were a number of testings that were unknown, unknown results," including unknown DNA that was found on Heather Jackson's left wrist, right ankle, left ankle, back/shoulder; Celina Jackson's right wrist; and, Wayne Jackson's right wrist, left wrist, and ligature. State's Exhibit 122, Tr. 944. Additionally, DNA swabs were taken from several alternate suspects whose DNA was never actually tested; unknown hairs that were found on the body of Celina Jackson were never tested; cigarette butts that were found

around the house, particularly in the locked utility closet where the children were found, were never tested; and, latent fingerprints from the unlocked window, on the side of the Jackson residence where the hospital surveillance video could not reach, remain untested to this day. Tr. 612-718. Also, Clinton never once denied his presence at Heather Jackson's house.

The proper test of prejudice asks whether a reasonable probability exists that a single juror would have reached a different conclusion, as to both the guilt and punishment phases of a capital trial. *See Wiggins v. Smith*, 539 U.S. 510, 537 (2003); *Ramonez v. Berghuis*, 490 F.3d 482, 491 (6th Cir. 2007). Here, a reasonable probability could have been established by defense counsel that one or more of Clinton's jurors would have reached different conclusions as to both guilt and punishment, had Clinton's counsel more fully pursued and presented the alternative suspect defense for the jurors' consideration.

## **B.2 Failure to ensure that Clinton's waiver of the presentation of mitigating evidence was knowing and voluntary**

The State asserts that the trial court was under no obligation to conduct an *Ashworth* colloquy because Clinton had given an unsworn statement, and the record demonstrates that defense counsel ensured that Clinton's decision to limit the penalty phase presentation to his unsworn statement was knowing and voluntary. State's Brief p. 149. Contrary to the State's assertions, however, Clinton did not decide to limit his presentation of mitigation evidence. Rather, he made a complete waiver of mitigating evidence, thus requiring a colloquy to ensure that this waiver was both knowing and voluntary. *See State v. Ashworth*, 85 Ohio St. 3d 56 (1999); *State v. Barton*, 108 Ohio St. 3d 402 (2005). Yet, not one single question was asked, let alone a colloquy conducted, of Clinton by the trial court to ensure his constitutional rights were unharmed. This was structural error, and as such, this Court should reverse and remand this case for a hearing pursuant to *Ashworth* where Clinton may decide, on the record, and with full

knowledge of the rights that he is waiving, whether or not he wants to pursue the presentation of mitigating evidence to the jury. *See* also Proposition of Law No. I.

The State further asserts that there is no basis to support Clinton's argument that his decision to present only an unsworn statement was related to being intimidated by Nick Fee. State's Brief p. 150. The State claims that it is clear from the record that Clinton's claims of intimidation by Nick Fee lack credibility. *Id.* at p. 51. What the State fails to consider, however, is the fact that at Clinton's sentencing hearing, Nick Fee made clear his threats toward Clinton. Nick Fee stated: "Be glad you're on death row and my buddies can't find you. I wish they gave you life in prison. I begged for it. Begged to save your worthless life so my friends could get you." Sent. Hear. Tr. 35. That is intimidation. And the fact that these intimidating statements were not made until the sentencing hearing does not mean that the intimidation did not exist prior to that date.

Finally, the State asserts that Clinton cannot show prejudice because counsel cannot be found ineffective for following their client's specific directives. State's Brief pp. 151-52. This assertion fails, however, as Clinton never had the opportunity to explain whether or not these truly were his directives. Clinton never had an opportunity in open court to explain why it was that he was choosing to waive mitigation. It is unknown what he would have said had the trial court made an inquiry. Did Clinton understand what he was giving up? Did Clinton understand what could and would be presented on his behalf in mitigation? Did Clinton truly understand the process of capital trials and appeals? Was his waiver knowing and voluntary? The record is unclear. What is clear is that nothing even close to the required colloquy was had in this case. In fact, not a single question was asked of Clinton on the record to ensure that he was voluntarily and knowingly giving up his right to present mitigation. Clinton's counsel were ineffective

when they failed to ensure that his waiver was knowing and voluntary by, at the very least, requesting that trial court conduct the required *Ashworth* colloquy.

### **B.3 Failure to ensure Clinton's presence at all critical proceedings**

The State asserts that Clinton cannot demonstrate prejudice because even if Clinton had attended the hearing in question, it is pure speculation to assume that, after doing so, he would have given his attorneys the green light to present a traditional mitigation case. State's Brief p. 153. This is an unfair assertion, as the record is only equivocal because Clinton was absent when the discussion was had between the trial court and Clinton's trial counsel. Clinton never had an opportunity to definitively state anything, let alone lodge an objection, when his presence was waived by his counsel at this critical juncture. His absence violated his constitutional rights, as his presence at this hearing could have resulted in a different outcome in this case. Had trial counsel not waived their client's presence, and, in turn, the trial court conducted a proper inquiry as to Clinton's waiver, the court very well could have discovered through its questioning that Clinton's waiver was not voluntary and knowing and/or that Clinton, in fact, did not want to waive mitigation at all. In turn, there was a wealth of mitigating evidence, which likely would have convinced at least one juror to vote for a sentence of less than death in this case. *See* Proffer of Defense Exhibits A-P; Mit. Tr. 123-25; Propositions of Law II and XIX.

### **B.4 Failure to object to unqualified "expert" witness testimony**

The State's claim that defense counsel's failure to adequately object to Detective Michael Clark's testimony was a strategic decision fails. State's Brief p. 153. Although defense counsel objected to the entirety of retired Wood County Detective Clark's testimony on the basis that his testimony constituted inadmissible "other acts" testimony, they failed to object to portions of his testimony on the basis that he was unqualified to render a medical opinion as to Misty Keckler's

cause of death or whether or not ligatures were applied before or after death. The details of this error are further outlined in Proposition of Law No. XI, and Clinton's reply, and are incorporated herein.

#### **B.5 Failure to challenge seated jurors who demonstrated bias**

The State contends that trial counsel were not ineffective because there were no biased jurors who sat on the jury. State's Brief pp. 153-54. This is inaccurate. While the State claims that simply knowing another juror, a witness, or a law enforcement officer does not render a juror biased, the State fails to consider the facts as they relate to the actual jurors who sat on Clinton's panel. *See also* Proposition of Law No. VII and Clinton's reply.

In an attempt to prove this point, the State relies on *State v. Lundgren*, a case where the fact that two jurors knew each other from church was not enough for juror exclusion. State's Brief p. 87, citing *State v. Lundgren*, 73 Ohio St. 3d 474 (1995). This case fails to reach the core problem at issue here. In *Lundgren*, the relationship between two jurors who saw each other for roughly one hour, once a week, was seen as unproblematic. This comes nowhere close to the relationship between Jurors 143 and 371, two next-door neighbors who would presumably see each other every single day and whose lives could, and would, become extremely awkward or unpleasant should any conflict arise in or out of court. These two jurors share a property line, and they eat and sleep in houses that are right next to one another. The potential for conflict upon any sort of disagreement was great. Similarly, the relationship between Jurors 63 and 341, two friends, goes beyond the type of relationship that would exist between two church-going acquaintances.

Finally, Juror 344 not only worked with State witness Joshua Case, who was one of the last individuals to see Heather Jackson alive, at the time of trial, but also supervised him. What

supervisor would want to admit that the employee that he personally hired, and supervised, lacked credibility? Given the context of their relationship, it is highly unlikely that Juror 344 would want to admit to his own fallibility in finding Joshua Case to be a suitable employee if he actually lacked credibility, and thus it is likely that Juror 344 would assign more credibility to Case's testimony than he otherwise would have. As to Juror 344's friendship with an assistant prosecutor, not only did Juror 344 teach a religious class with assistant prosecutor Jason Hinners, but the trial prosecutor and the trial court continuously praised assistant prosecutor Hinners for the "great job" that he does. Tr. 292. Therefore, the likelihood of Juror 344 improperly increasing his belief of the credibility of the trial prosecutor, who works in the same office as, and repeatedly praised the great work of Juror 344's friend, is great.

Trial counsel failed in their duty to Clinton when they failed to challenge these biased jurors, who were then allowed to sit in judgment of their client, and ultimately, sentenced him to death.

#### **B.9 Failure to effectively argue for a change of venue**

The State claims that defense counsel competently sought a change of venue, however in the State's response to Proposition of Law No. VI, the State admits that Clinton's motion for change of venue did not contain any records, documents, or evidence of pretrial publicity. State's Brief pp. 76 and 156. The State admits that Clinton never supplemented the record with evidence of pretrial publicity and therefore there were no newspaper stories, no audio or video recordings, no media studies, nor any evidence whatsoever before the trial court in support of defense motion 28. *Id.* The State further admits that Clinton never presented any evidence as to pretrial publicity, and the sole support for his motion was uncorroborated and unsubstantiated allegations contained entirely within defendant's motion 28 change for venue. *Id.* Finally, the

State admits that this absence of evidence should be considered a fatal defect. *Id.* The State's attempt to have its cake and eat it too fails. Clinton's counsel cannot be considered effective when that would support the State's argument, and then be considered ineffective on the same claim when that conclusion also would support the State's argument. Clinton's counsel were either ineffective or they were not. And here, even the State has admitted that Clinton's counsel were ineffective in their attempts to seek a change of venue.

#### **B.10 Failure to hire a forensic pathologist and/or a DNA expert**

The State asserts that Clinton's trial counsel made a strategic decision not to call a DNA expert, because such an expert may provide more inculpatory evidence. State's Brief p. 157. What the State fails to consider, however, is that "there were a number of testings that were unknown, unknown results," including unknown DNA that was found on Heather Jackson's left wrist, right ankle, left ankle, back/shoulder; Celina Jackson's right wrist; and, Wayne Jackson's right wrist, left wrist, and ligature. State's Exhibit 122, Tr. 944. Additionally, DNA swabs were taken from several alternate suspects whose DNA was never actually tested; unknown hairs that were found on the body of Celina Jackson were never tested; cigarette butts that were found around the house, particularly in the locked utility closet where the children were found, were never tested; and, latent fingerprints from the unlocked window, on the side of the Jackson residence where the hospital surveillance video could not reach, remain untested to this day. Tr. 612-718. These facts alone show the importance of hiring a DNA expert, and the ineffectiveness of counsel for failing to do so.

It should also be noted that the State entirely fails to respond to Clinton's claims that his trial counsel were ineffective for failing to hire a forensic pathologist.

### **B.11 Failure to object to prejudicial, irrelevant, and cumulative photos**

The State claims that crime scene photos were neither irrelevant nor redundant and that Clinton cannot show deficient performance or prejudice. State's Brief pp. 157-58. This is incorrect, however, as photographs admitted at both phases of Clinton's trial were inflammatory, irrelevant, and duplicative to one another. Clinton relies on his merit brief, and his reply to Proposition of Law No. IX, for arguments relevant to the photographs that should not have been admitted, as they were especially graphic and repetitive.

### **B.14 Failure to object to the admission of Clinton's involuntary statement**

The State contends that Clinton's statement was voluntary under the totality of the circumstances. State's Brief pp. 159-60. This contention fails. As can be seen in State's Exhibit 117 (the video of Clinton's statement), Clinton looks weak, he still has the tape from the IVs in his arm attached to his skin, and he can barely raise his hand to his mouth to drink a cup of water. In addition, contrary to the State's assertions, Clinton's answers to Detective Wichman's questions were neither logical nor cohesive. Throughout the interview, Clinton made comments such as: "I don't even know what today is," "I cannot remember," "My days is so mixed up right now," "You're trying to confuse me," "I just have my days mixed up because I thought yesterday was Saturday and today was Sunday," "I can't say something that I can't remember," "Ain't nothing written all over my face, but I'm tired," "I don't want to say something and then lie. Do you want me to say something and then lie?," "You're trying to tell me I did something that I know I didn't do," "You're trying to manipulate me," "I don't know what you're talking about," "Send me to jail," and, "I can't remember shit, man. You're confusing me, too." See State's Supp. Hear. Ex. 2; May 28, 2013 Supp. Hear. Tr. 9-59; *see also* State's Exhibit 117. It is clear through these statements, and through the circumstances as detailed above, that Clinton was not

“feigning confusion,” but instead his mental state was obviously affected at the time of this interview. Nothing about this statement could be considered voluntary. Thus, trial counsel could have, and should have, challenged the admission of the statement in the State’s case-in-chief.

The State further contends that even if trial counsel had successfully convinced the trial court to suppress the entire statement, Clinton still would have been convicted due to overwhelming evidence. This contention, however, ignores the voluminous unknown DNA found on the victims and the untested DNA, as discussed *supra*.

#### **B.15 Failure to object to the admission of Clinton’s phone call with his mother**

The State asserts that Clinton’s phone call to his mother was highly relevant, inculpatory, and not more prejudicial than probative. State’s Brief pp. 160-61. This is factually incorrect. This call took place the day after Clinton’s release from the hospital for a suicide attempt and following his subsequent interrogation by Detective Wichman. Clinton stated that he was “just confused,” which is similar to what he had told Detective Wichman the day before. State’s Exhibit 119. Further, when Clinton stated he would just “plead guilty or whatever,” the tone reflected a fatalistic mentality typical of a person who had recently attempted suicide. *Id.* Clinton stated, “I hurt someone,” not I hurt them or I killed them. This statement lacks any context and is likely based on what Clinton was told by Detective Wichman. Given Clinton’s history of depression, suicide attempts, and black-outs, this call is not as easily interpreted as the State would have the Court believe. *See* Proffer of Defense Exhibit O.

The State attempts to use this phone call to draw a link between the Jackson murders and the Keckler murder, but this simply cannot be done. State’s Brief p. 160. Clinton told his mother, “I thought I was just over it, I don’t know. I thought after 13 years I would be over that,

and I just wouldn't believe that shit would happen no more." State's Exhibit 119. The statements he made to his mother are ambiguous. It is just as likely Clinton was talking to his mother about his depression and suicide attempt and how he had hurt those who care about him, not discussing the homicides or the rape. The State's argument that the prior manslaughter of Keckler fifteen years before put this call into context is highly tenuous, and hardly of probative value to outweigh the prejudicial nature of the admission of the phone call or the other acts evidence.

The statements made by Clinton during the conversation with his mother have no evidentiary value and cannot be shown to be relevant to the case at hand. Even if relevancy was not an issue, the prejudicial value of such statements being played at Clinton's capital murder trial would require that the judge exclude the statements from being heard by the jury. Allowing such statements to be played for the jury allowed for confusion of the issues, and for jurors to make assumptions that were not warranted. Trial counsel were ineffective to Clinton's prejudice when they failed to challenge the admission of this phone call.

**B.18 Failure to make a sufficient argument that the trial court should have dismissed the rape count and specification regarding Celina Jackson pursuant to Criminal Rule 29**

While Clinton relies on his merit brief, several points must be stressed. As to the alleged evidence of the rape of Celina Jackson, the State recites DNA evidence that was testified to at trial. Notably, many of the DNA statistics cited to are quite low. Further, the State ignores the fact that "there were a number of testings that were unknown, unknown results," including unknown DNA that was found on Heather Jackson's left wrist, right ankle, left ankle, back/shoulder; Celina Jackson's right wrist; and, Wayne Jackson's right wrist, left wrist, and ligature. State's Exhibit 122, Tr. 944. Additionally, DNA swabs were taken from several alternate suspects whose DNA was never actually tested; unknown hairs that were found on the

body of Celina Jackson were never tested; cigarette butts that were found around the house, particularly in the locked utility closet where the children were found, were never tested; and, latent fingerprints from the unlocked window, on the side of the Jackson residence where the hospital surveillance video could not reach, remain untested to this day. Tr. 612-718. Finally, the ligature, upon which “touch DNA” consistent with Clinton was found, was a pair of Heather Jackson’s pants. State’s Exhibit 84; Tr. 677. It would not be unusual for Clinton’s DNA to be on the pants of an individual who had been involved in a consensual sexual relationship with him.

The State also relies on Dr. Scala-Barnett’s testimony regarding evidence of the alleged rape of Celina Jackson. Clinton notes, however, that neither the condition of Celina’s rectum, nor the fact that the waistband of her underwear was “rolled-in,” is indicative of sexual assault. Dr. Scala-Barnett presented the photo of an unknown child’s anus to the jury. Tr. 1110-11, 1130-31, State’s Exhibit 60. Though she told the jury that the photo was only being used as a point of reference, she laid no scientific foundation as to the gender of the child, how the child had died, whether the child’s rectum was diseased or injured, or the duration of time between the child’s death and the taking of the photograph, etc. It should be noted that Dr. Scala-Barnett also testified that, though dilated, “there were no injuries,” “there was no tearing,” and “there was no bruising” of Celina’s rectal area. Tr. 1130. There is no way to guarantee that the result of Celina Jackson’s rectal dilation was not a natural phenomenon that sometimes occurs upon death, but which did not occur in the singular reference photo of an unknown child upon which no foundation or background had first been laid.

Additionally, the claim that Celina’s “rolled-in” underwear is indicative of sexual assault is speculation. First, there is no way to guarantee that the cause of the “rolled-in” waistband was

not due to the position of the body or the transportation to the coroner's office. There is also no way to tell whether the underwear, which appear to be "baggy," was not typically rolled down to keep them up, or whether this particular pair of underwear had a tendency to "roll" down throughout the day as undergarments sometimes do. State's Exhibits 7, 72, and 152. Whatever the reason, the waistband of the underwear provides no concrete indication of sexual assault.

As such, Clinton was prejudiced by his counsel's failure to present this information during the Rule 29 motion, as there is a reasonable probability that the trial court may have rendered a different decision had this motion been adequately prepared and delivered.

**B.19 Failure to, in the alternative, put on mitigating evidence during the mitigation portion of Clinton's trial**

The State claims that Clinton is now criticizing trial counsel for following his own instructions to not present a traditional mitigation case, and that "this is pure gamesmanship." State's Brief 163-64. This could not be further from the truth, however, as Clinton never had the opportunity to explain whether or not these truly were his directives. Clinton never had an opportunity in open court to explain why it was that he was choosing to waive mitigation. It is unknown what he would have said had the trial court made an inquiry. Did Clinton understand what he was giving up? Did Clinton understand what could and would be presented on his behalf in mitigation? Did Clinton truly understand the process of capital trials and appeals? Was his waiver knowing and voluntary? The record is unclear. What is clear is that nothing even close to the required colloquy was had in this case. In fact, not a single question was asked of Clinton on the record to ensure that he was voluntarily and knowingly giving up his right to present mitigation.

The State's arguments are inconsistent, and they cannot have it both ways. Either Clinton made a voluntary and knowing waiver, or he did not, because it was not necessary. In other

words, if Clinton made a voluntary and knowing waiver of his right to present mitigating evidence, then, in turn, that “waiver” would have triggered the need for an on the record inquiry pursuant to *Ashworth*. And no part of *Ashworth’s* four-part inquiry was complied with here. On the other hand, if Clinton did not make an informed waiver of the presentation of mitigating evidence, trial counsel indeed had a duty to present the wealth of now known evidence. *See* Proffered Defense Exhibits A-P. Tr. 123-25. *See also* Proposition of Law No. XIX for a summary of that evidence that was available. *See also Herring*, 142 Ohio St. at 165.

**B.21 Failure to challenge the prosecutor’s use of a peremptory challenge on one of two African-Americans in Clinton’s jury pool**

The State is correct that “a prosecutor may strike a jury for any reason that is not based on discriminatory intent.” State’s Brief p. 168 citing *Purkett v. Elem*, 514 U.S. 765 (1995). The prosecutor’s strike of Juror 255, however, was discriminatory. Therefore, the State’s contention that any *Batson* challenge at Clinton’s trial would have been baseless is wholly incorrect. *See* Proposition of Law No. XIV.

Clinton’s trial counsel were ineffective for failing to question the prosecutor’s alleged race-neutral reasoning for striking Juror 255, and instead, simply agreeing with the stated reason. *See Strickland v. Washington*, 466 U.S. 668 (1984); *see also United States v. Jackson*, 347 F.3d 598, 604 (2003) citing *Batson v. Kentucky*, 476 U.S. 79 (1986) at 98. (“Once a race-neutral explanation is produced, the complaining party must prove purposeful discrimination.”). There was no request for more information from defense counsel or the trial court, there was no challenge based on the fact that Juror 255 had stated numerous times that she could be fair and impartial, and there was no challenge based on the fact that only one other prospective juror was African-American in a case where the defendant was African-American and all three murder victims were white (the victim of the alleged rape charge was also white).

Despite the fact that Juror 255's brother and cousin were involved in the criminal justice system, Juror 255 stated *three* separate times that she could be fair and impartial, and that she was not prejudiced against the State of Ohio. Tr. 221, 224. She further stated that she never saw her cousin, and only dealt with her brother on occasion. *Id.* at 224. Moreover, it should be noted that the State apparently had no problem with three jurors and two alternate jurors, all of whom were Caucasian, whose friends and relatives had previously either been arrested for, or convicted of, a felony. *See* juror questionnaires, filed under seal. All prospective jurors were asked the question "Have you, a friend, a relative or anyone you know ever been arrested for, or convicted of, a felony?" *Id.* Juror 341 answered that his brother had either been arrested for, or convicted of, possession of prescription meds. *See* Juror 341 questionnaire, filed under seal. Juror 225 answered that at least four of her nephews had either been arrested for, or convicted of, a felony. *See* Juror 225 questionnaire, filed under seal. Two friends or relatives of Juror 63 were either arrested for, or convicted of, a felony. *See* Juror 63 questionnaire, filed under seal. The niece of alternate Juror 359 was either arrested for, or convicted of, forgery of a prescription. *See* Juror 359 questionnaire, filed under seal. And, the sister of alternate Juror 202 was either arrested for, or convicted of, a felony. *See* Juror 202 questionnaire, filed under seal.

The State's failure to even question any of these individuals, all Caucasian, about the involvement of their siblings, nieces, nephews, and other relatives with the criminal justice system further proves the purposeful discriminatory intent in singling out Juror 255, who rarely saw her brother, and never saw her cousin. This is powerful evidence of discrimination, as the United States Supreme Court has stated: "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is

evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005).

Clinton's trial counsel failed him when they allowed the impermissible exclusion of an African-American juror without question. As such, his case should be reversed and remanded for a new trial.

**B.22 Failure to challenge the inaccurate captions attached to the video of Clinton's interview with Detective Wichman**

The State claims that Clinton's counsel were not ineffective for agreeing that the Court's instruction regarding inaccurate captions attached to Clinton's police interview video were proper. State's Brief p. 169. However, because this cautionary instruction did nothing to rectify the "substantive" inaccuracies (*see* Tr. 829-36), trial counsel were ineffective for acquiescing and accepting this "remedy" that did nothing to actually remedy the problem with the captions. For brevity, Clinton incorporates here Proposition of Law No. XV, Section A.5, and Clinton's reply, for cites to the record and to argue prejudice.

**B.23 Failure to object to speculative, biased, and prejudicial testimony of the coroner, Dr. Scala-Barnett**

The State claims that counsel's failure to object must have been a strategic decision. State's Brief p. 169. Counsel's failure to object, however, to Dr. Scala-Barnett's inflammatory, inappropriate, and sometimes inaccurate testimony cannot be seen as strategic. The deputy coroner's use of child-like phrases such as "froggy blanket" and "jammies" was inappropriate, particularly when other words such as "blanket" or "pajamas" could have been used to accurately describe the items at hand. Tr. 1110-11, 1103. The only purpose behind the language that was chosen would have been to inflame the passion of the jury. Regardless of the number of autopsies performed by Dr. Scala-Barnett, there was no scientific foundation laid for the

speculation regarding the “rolled-in” elastic of the waistband of Celina Jackson’s underwear. Tr. 1124-35. Additionally, there is no way to guarantee that the cause of the “rolled-in” waistband was not due to the position of the body or the transportation to the coroner’s office. There is also no way to tell whether the underwear, which appear to be “baggy,” was not typically rolled down to keep them up, or whether this particular pair of underwear had a tendency to “roll” down throughout the day as undergarments sometimes do. State’s Exhibits 7, 72, and 152. As such, Dr. Scala-Barnett was overreaching, as she laid no foundation for this conclusion, and she should not have been allowed to testify that the waistband was solely indicative of Celina Jackson having been “redressed.”

Most egregious of all is the fact that Dr. Scala-Barnett presented the photo of an unknown child’s anus to the jury. Tr. 1110-11, 1130-31, State’s Exhibit 60. Though she told the jury that the photo was only being used as a point of reference, she laid no scientific foundation as to the gender of the child, how the child had died, whether the child’s rectum was diseased or injured, or the duration of time between the child’s death and the taking of the photograph, etc. Further, Dr. Scala-Barnett also testified that, though dilated, “there were no injuries,” “there was no tearing,” and “there was no bruising” of Celina’s rectal area. Tr. 1130. There is no way to guarantee that the result of Celina Jackson’s rectal dilation was not a natural phenomenon that sometimes occurs upon death, but which did not occur in the singular reference photo of an unknown child upon which no foundation or background had first been laid.

The State also claims that “it is highly unlikely that strung out drug dealers ‘seeking revenge’ would have been even thought about video surveillance from the hospital across the street, and how they are positioned with respect to the house, before devising a plan to enter the house through the only window unrecorded by surveillance.” State’s Brief p. 170. But, is it not

just as unlikely that someone would call the person they are planning to murder before arriving at their house and parking in their driveway, and then later returning and parking in front of their house again? The State's assertions are pure speculation and do not change the fact that Clinton's trial counsel were ineffective for failing to ask the deputy coroner about her lack of establishment of time of death, particularly where unknown and untested DNA existed on all of the victims. Trial counsel were further ineffective for failing to ask even one question of the coroner on cross-examination.

Defense counsel's failure to object here failed to subject the State's case to meaningful adversarial testing and was thus ineffective.

#### **B.28 Cumulative ineffective assistance**

The State contends that Clinton could not overcome the overwhelming evidence of guilt supporting his conviction even if cumulative errors exist. State's Brief p. 171. The State fails to consider that "there were a number of testings that were unknown, unknown results," including unknown DNA that was found on Heather Jackson's left wrist, right ankle, left ankle, back/shoulder; Celina Jackson's right wrist; and, Wayne Jackson's right wrist, left wrist, and ligature. State's Exhibit 122, Tr. 944. Additionally, DNA swabs were taken from several alternate suspects whose DNA was never actually tested; unknown hairs that were found on the body of Celina Jackson were never tested; cigarette butts that were found around the house, particularly in the locked utility closet where the children were found, were never tested; and, latent fingerprints from the unlocked window, on the side of the Jackson residence where the hospital surveillance video could not reach, remain untested to this day.

Here, if the above claims of ineffective assistance of counsel are not deemed to merit relief when considered individually, then considered cumulatively the effect of the errors or

omissions of counsel establish that Clinton's constitutional rights were violated under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

### Proposition of Law No. XVII

A capital defendant is denied his substantive and procedural due process rights to a fair trial and reliable sentencing as guaranteed by U.S. Const. amends. VIII and XIV; Ohio Const. art. I, §§ 9 and 16 when a prosecutor commits acts of misconduct during his capital trial.

Many of the instances of prosecutorial misconduct were addressed in other propositions of law in Clinton's merit and reply briefs. Thus, Clinton relies on those previously presented arguments. *See* Propositions of Law III, IV, V, IX, & XVI. Where no reply is made herein, Clinton relies on the arguments presented in his merit brief, and does not waive any previously made arguments.

Clinton was denied a fair trial because prosecutorial misconduct prejudicially affected his substantial rights. *State v. Smith*, 14 Ohio St. 3d 13, 14 (1984). In analyzing prosecutorial misconduct under the Due Process Clause, the "touchstone" is "the fairness of the trial." *State v. Lott*, 51 Ohio St. 3d 160, 166 (1990), (citing *Smith v. Phillips*, 455 U.S. 209, 219 (1982)). 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). The State's brief undervalues the probable impact on the collective minds of the jurors as to the instances of prosecutorial misconduct that infected Clinton's capital trial in both the guilt and mitigation phases.

The State claims that it did not introduce victim impact testimony. State's Brief p. 174. The State asserts that the statements were proper and permissible. *Id.* It is Clinton's submission, however, that the State is incorrect and that these statements were not proper or permissible. The statements made by Detective Wichman were not relevant to who committed the crimes in question. Detective Wichman's opinion that the interview was the "worst interview I ever did, situation wise" was not relevant to any fact at issue in trial. Tr. 826-27; *see State v. Fautenberry*, 72 Ohio St. 3d 435, 440 (1995). It was improper and prejudicial to Clinton for a detective, who

had expounded to the jury about his twenty-three years of experience, to then insinuate to the jury that the crime was the worst he had ever seen. Tr. 772. Detective Nixon's statements regarding why E.S. had been reluctant to file charges were also improper. Tr. 743 & 747. Detective Nixon's statements were completely speculative in nature, and were not proper evidence for any fact of consequence in Clinton's capital trial.

E.S.'s testimony regarding her involvement in counseling was not related to the facts attendant to the offense, as the State claims. State's Brief p. 174, citing *State v. McKnight*, 107 Ohio St. 3d 101, 116 (2005) (further citing *Fautenberry*, 72 Ohio St. 3d 435, 440 (1995)). Nor was her statement relevant for any purpose in Clinton's trial. The fact that E.S. had engaged in counseling subsequent to the offense had nothing to do with how or whether the crime was committed, and so was not relevant. This testimony was improperly admitted over defense counsel's objection.

The State claims next that all of the instances of prosecutorial misconduct in closing argument raised by Clinton were not objected to by trial counsel, and thus, were waived. State's Brief p. 176. For that very reason, Clinton raised these claims as ineffective assistance of counsel as well. *See* Proposition of Law XVI. The one objection raised by defense counsel was sustained by the court. Tr. 1211-12.

The State's actions in this case must be examined in totality, revealing a pattern of deliberate, flagrant misconduct. The prosecutorial misconduct in this case was designed to inflame the passions of the jury, to induce the jury to render a decision based on considerations other than proper law and evidence, and to tip the scale in favor of death. The cumulative effect of the prosecutorial misconduct that occurred during Clinton's capital trial requires the reversal of his conviction.

## **Proposition of Law No. XX**

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

While Clinton stands on his merit brief for arguments relevant to this claim, Clinton would like to clear up a few misconceptions put forward by the State in its brief.

In the State's recitation of the facts as they relate to evidence of the rape of E.S., the State leaves out the fact that E.S. had failed to tell the nurse who examined her that she had been drinking alcohol prior to her sexual encounter with Clinton. Tr. 1092-94. This information, and E.S.'s failure to disclose this information, brings into question the rest of the statement made to, and potential omissions kept from, Nurse Dettling.

As to the alleged evidence of the rape of Celina Jackson, the State recites DNA evidence that was testified to at trial. Notably, many of the DNA statistics cited to are quite low. Further, the State ignores the fact that "there were a number of testings that were unknown, unknown results," including unknown DNA that was found on Heather Jackson's left wrist, right ankle, left ankle, back/shoulder; Celina Jackson's right wrist; and, Wayne Jackson's right wrist, left wrist, and ligature. State's Exhibit 122, Tr. 944. Additionally, DNA swabs were taken from several alternate suspects whose DNA was never actually tested; unknown hairs that were found on the body of Celina Jackson were never tested; cigarette butts that were found around the house, particularly in the locked utility closet where the children were found, were never tested; and, latent fingerprints from the unlocked window, on the side of the Jackson residence where the hospital surveillance video could not reach, remain untested to this day. Tr. 612-718. Finally, the ligature, upon which "touch DNA" consistent with Clinton was found, was a pair of

Heather Jackson's pants. State's Exhibit 84; Tr. 677. It would not be unusual for Clinton's DNA to be on the pants of an individual who was involved in a consensual sexual relationship with him.

Finally, as to Dr. Scala-Barnett's testimony regarding evidence of the rape of Celina Jackson, Clinton would note that neither the condition of Celina's rectum, nor the fact that the waistband of her underwear was "rolled-in," is indicative of sexual assault. Dr. Scala-Barnett presented the photo of an unknown child's anus to the jury. Tr. 1110-11, 1130-31, State's Exhibit 60. Though she told the jury that the photo was only being used as a point of reference, she laid no scientific foundation as to the gender of the child, how the child had died, whether the child's rectum was diseased or injured, or the duration of time between the child's death and the taking of the photograph, etc. It should be noted that Dr. Scala-Barnett also testified that, though dilated, "there were no injuries," "there was no tearing," and "there was no bruising" of Celina's rectal area. Tr. 1130. There is no way to guarantee that the result of Celina Jackson's rectal dilation was not a natural phenomenon that sometimes occurs upon death, but which did not occur in the singular reference photo of an unknown child, upon which no foundation or background had first been laid.

Additionally, the claim that Celina's "rolled-in" underwear is indicative of sexual assault is speculative. First, there is no way to guarantee that the cause of the "rolled-in" waistband was not due to the position of the body or the transportation to the coroner's office. There is also no way to tell whether the underwear, which appear to be "baggy," was not typically rolled down to keep them up, or whether this particular pair of underwear had a tendency to "roll" down throughout the day as undergarments sometimes do. State's Exhibits 7, 72, and 152. As such,

Dr. Scala-Barnett was overreaching and should not have been allowed to testify that the waistband was solely indicative of Celina Jackson having been “redressed.”

There was insufficient evidence that Clinton caused the deaths of the Jackson family, committed the rapes of Celina Jackson or E.S., or committed aggravated burglary. Moreover, a review of the entire record demonstrates that Clinton’s convictions were against the manifest weight of the evidence. Clinton’s convictions therefore violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). His convictions on the aggravated murder charge, rape charges, and aggravated burglary charge, and his death sentence must be vacated.

## CONCLUSION

For the foregoing reasons, Curtis L. Clinton's convictions and sentence must be reversed, and his case remanded for a new trial and/or sentencing phase.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Reply Brief of Appellant Curtis L. Clinton was sent via electronic mail and by first-class mail to Kevin J. Baxter, Erie County Prosecutor, Erie County Office Building, 247 Columbus Avenue, Suite 319, Sandusky, Ohio 44870 and to Thomas E. Madden, Senior Assistant Attorney General – Special Prosecutor, Ohio Attorney General’s Office, 150 East Gay Street, 16<sup>th</sup> floor, Columbus, Ohio 43215 on this 15th day of June, 2015.

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