

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Supreme Court Case No. 2011-2005
-vs- : **This is a capital case.**
JASON DEAN, :
 :
 Defendant-Appellant. :

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

**APPELLANT JASON DEAN'S APPLICATION FOR REOPENING PURSUANT TO
S. Ct. Prac. R. 11.06**

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COUNSEL FOR APPELLANT

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STATE OF OHIO, :
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 Plaintiff-Appellee, : Supreme Court Case No. 2011- 2005
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 v. :
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 JASON DEAN, : **This is a capital case.**
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 Defendant-Appellant. :

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

APPELLANT JASON DEAN'S APPLICATION FOR REOPENING

Appellant Dean asks this Court to grant his Application for Reopening based upon the ineffective assistance of counsel during his direct appeal. S.Ct. Prac. R. 11.06 and *State v. Murnahan*, 63 Ohio St.3d 60 (1992).

I. Dean's direct appeal counsel were constitutionally ineffective.

The Due Process Clause of the Fourteenth Amendment guarantees effective assistance of counsel on a criminal appeal as of right. *Evitts v. Lucey*, 469 U.S. 387 (1985). Appellate counsel must act as an advocate and support the cause of the client to the best of their ability. *See, e.g., Anders v. California*, 386 U.S. 738 (1967); *Penson v. Ohio*, 488 U.S. 75 (1988). After a review of the direct appeal filed on Dean's behalf, it is apparent that his appellate attorneys were prejudicially ineffective for failing to raise meritorious issues that arose during his capital trial.

Because appellate counsel were prejudicially ineffective in this case, this Court must re-open Dean's appeal. *State v. Murnahan*, 63 Ohio St.3d 60 (1992) and S.Ct. Prac. 11.06. Here, Dean was denied the effective assistance of appellate counsel as guaranteed by the Fifth, Sixth,

Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 9, 10, and 16 of the Ohio Constitution when his appellate counsel failed to include certain critical claims in the direct appeal.

I. Appellate counsel were ineffective for failing to raise meritorious issues.¹

The failure to present a meritorious issue for review constitutes ineffective assistance of counsel. See e.g., *Franklin v. Anderson*, 434 F.3d 412 (6th Cir. 2007); *State v. Ketterer*, 111 Ohio St.3d 70 (2006). Had Appellant Dean's direct appeal counsel presented the following propositions of law, the outcome of this appeal would have been different.

Proposition of Law No. I: A defendant is denied the right to the effective assistance of trial counsel when trial counsel prejudicially fails his client during his capital trial. U.S. Const. Amends. V, VI, XIV; Ohio Const. Art. I, §§ 2, 9, 10 and 16.

The Sixth and Fourteenth Amendments guarantee the accused the right to counsel at trial. *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963). When evaluating claims of ineffective assistance of counsel, this Court must determine if counsel's performance was deficient, and if so, whether petitioner was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984); *Glenn v. Tate*, 71 F.3d 1204, 1210-11 (6th Cir. 1995).

A. Trial counsel failed to adequately prepare their client for allocution. This failure was detrimental as counsel presented little mitigation and did not call any experts on Dean's behalf.

The Eighth Amendment requires the sentencer to consider the circumstances of the crime and the defendant's character, history and background during the penalty phase of a capital trial. *Boyd v. California*, 494 U.S. 370, 377-78 (1990); *Lockett v. Ohio*, 438 U.S. 586 (1978). Defense counsel's duty to investigate the client's background for mitigating factors is "an indispensable

¹ Dean is unable to fully brief the issues not raised by prior appellate counsel due to the page limitation of S. Ct. Prac. R. XI. As such, the failure to fully brief every single point should not be construed as a waiver of that issue/point.

component of the constitutional requirement of ...effective representation and assistance from his lawyer." *State v. Johnson*, 24 Ohio St.3d 87 (1986).

In this case, trial counsel decided not to present testimony from any mitigation experts. Only two family members testified and Dean made an unsworn statement. Dean was given the death penalty at the conclusion of the mitigation phase. Thus, Dean needed to be prepared to give a final statement that could spare his life. He was not.

Before sentencing, Dean made a plea to the judge based on the fact that he was not the principal offender, stating:

You, I, God, and everybody in this courtroom knows [sic] I didn't kill Titus Arnold: and I don't have no bitterness, no angry [sic], no animosity toward the family. I really never could wrap my mind around the tragedy that they're going through; but once again, I played no part in Titus Arnold's murder.

(Disposition Tp. 10-13).

Counsel abdicated their duty to prepare their client and assist him in presenting a coherent, compelling statement. *See Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003) (Counsel did nothing to help their client prepare or give his statement in the penalty phase.). The purpose of allocution is to allow the defendant an opportunity to personally appeal for his life. *State v. Campbell*, 90 Ohio St.3d 320, 2000-Ohio-183. Words from the defendant himself can have great impact and the failure to provide this opportunity is reversible error. *See Campbell* at 325-326.

Indeed, allocution is a significant opportunity for a capital defendant. In *State v. Roberts*, 137 Ohio St.3d 230, 2013-Ohio-4580, this Court reversed Defendant Robert's case for a third time based on information she provided at allocution. In her allocution statement, Roberts presented detailed and compelling information about her life. This Court specifically noted that Roberts: 1) had a very, very abusive childhood; 2) was raped by her cousin; 3) felt empty due to a complete lack

of affection or attention; 4) had a long history of serious auto accidents resulting in serious head injuries and memory loss; 5) suffered with depression and attempted suicide; 6) suffered auditory hallucinations; and 7) presented several examples of selfless contributions to society.

Given Roberts' detailed allocution statement, this Court determined that the trial judge could not have considered it and given her a death sentence. Roberts' case was then reversed and remanded again for resentencing. *Id.* at ¶96. *Roberts* makes it clear that allocution can be very powerful and is a critical opportunity for a capital defendant.

Dean's brief, detached statement did not approach what Roberts provided at allocution. Dean did not seem to understand the importance his statement or that allocution was his final opportunity to speak to the court. Rather, the transcript reflects a confused and disjointed statement that rehashed that Dean did not shoot Titus and could be viewed as a failure to accept any responsibility. The fact that Dean took this opportunity to insist he was not the principal offender was duly noted and italicized by this Court in its opinion. *State v. Dean*, 2015-Ohio-4347 at ¶314.

"A Crim. R. 32 inquiry is much more than an empty ritual: it represents a defendant's last opportunity to plead his case or express remorse." *State v. Green*, 90 Ohio St.3d 352, 359-60, 2000-Ohio-182. It was counsel's duty to properly prepare Dean and explain the importance of his statement to the court. If Dean needed to be guided, the trial court could have allowed that had defense counsel bothered to ask. *Roberts* illustrates how profound allocution can be and the importance of this opportunity.

B. Trial counsel failed to object to the court's "anti-sympathy" instruction to jurors prior to deliberation.

The trial court provided instructions to the jury at the conclusion of the penalty phase. As part of its instruction, the court informed jurors that sympathy could not play any part in their deliberations. Specifically the court stated, "Now, you must not be influenced by *any consideration*

of sympathy or prejudice." (Vol. 11, Tp. 2717) (Emphasis added).

In *California v. Brown*, 479 U.S. 538 (1987), the United States Supreme Court held constitutional the instruction that "jurors must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." The focus of the Supreme Court's analysis was the use of the modifier "mere." In *Brown*, the Court wrote, "By concentrating on the noun 'sympathy,' respondent ignores the crucial fact that the jury was instructed to avoid basing its decision on mere sympathy." *Id.* at 840.

Not all forms of sympathy are impermissible considerations in the sentencing decision. Only general feelings of sympathy not connected to the particular defendant and the evidence introduced are prohibited, as it would allow for the death penalty to be applied in an arbitrary fashion. The *Brown* Court determined that an instruction prohibiting "mere sympathy" conveyed this critical distinction to the jury.

Dean's case, however, is different. Here the court instructed the jurors that they "may not be influenced by any consideration of sympathy." This instruction forecloses any possibility of considering sympathy of any sort and, thus, is distinguishable from *Brown*. By prohibiting consideration of all sorts of sympathy, the instruction violates *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978); and *Woodson v. North Carolina*, 428 U.S. 280 (1976). Moreover, the instructions given as a whole failed to cure this fatal defect.

The damage in this case was particularly severe given the little mitigating evidence that was presented. Two family members testified with respect to Dean's very difficult childhood and lack of positive intervention. The jury was instructed to ignore any influence of sympathy - even sympathy tethered to this testimony. It is constitutionally impermissible to prohibit jurors from considering, relative to the defendant, "compassionate or mitigating factors stemming from the diverse frailties of

humankind." *Woodson* at 304. *See also, Parks v. Brown*, 840 F.2d 1496 (10th Cir. 1987) (McKay, Circuit Judge, dissenting in part).

Proposition of Law No. II: A capital defendant's rights to due process and a fair trial by an impartial jury is 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, VIII, IX and XIV; Ohio Const. Art. §§ 5 and 16.

The premium on impartiality is no where greater than in a capital case where a jury must choose between life imprisonment and death if they find the accused guilty of capital murder. *Morgan v. Illinois*, 504 U.S. 719, 726-28 (1992). A biased juror is unable to apply the facts to the law and deliberate under the constitutionally required burden of proof. *In re Winship*, 397 U.S. 358 (1970).

In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), the Supreme Court recognized that pretrial publicity may result in a denial of a defendant's right to due process of law. The Court held that where: "[T]here is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, to transfer it to another county not so permeated with publicity." *Id.* at 363.

The trial court should transfer the case to another county when it is based in a small county that has been subjected to extensive publicity about the case - such that there is present a likelihood of prejudice. *See State ex. rel. Dayton Newspapers Inc. v. Phillips*, 46 Ohio St.2d 457 (1976). The trial judge has a "duty to protect [the accused] from [this type of] inherently prejudicial publicity ..." that renders the jury unfair in its deliberations. *Sheppard*, 384 U.S. at 363. The right to a fair and impartial jury is fundamental. The denial of that right is a structural error that is never harmless. *Arizona v. Fulminante*, 499 U.S. 279, 290 (1991).

In the present case, trial counsel filed a Motion for Change of Venue and a hearing was held on the motion. Defense counsel noted that both Dean's first trial and second trial were extensively

covered in the local paper and on television. The extended publicity covered the first trial, the Ohio Supreme Court decision and reversal, the co-defendant's bindover proceeding, and the upcoming retrial. Further, the local paper ran a front page story on Dean's case the Monday before voir dire was to begin - an article read and noted by several jurors. The publicity was of great concert to defense counsel. (Motion #23, p. 2). Further, jurors stated that they were aware that Dean's case was reversed on a "technicality."

Some of Dean's jurors did not follow local news but others were attentive and knew substantial details about the case. Juror #540 read newspaper articles, watched television reports and discussed the case with a co-worker. Juror #540 also remembered there was a big difference in age between the co-defendants and read the most recent article on Dean's case at his co-worker's urging since it was likely the case connected to his summons. (Vol. II, Tp. 308-312). Juror #453 served as an alternate juror and revealed that he read articles in the newspaper, was knowledgeable about the case and understood Dean's case was a retrial. (Vol. II, Tp. 250). Juror #452 also served as an alternate juror but discussed her views openly in the "small group" (not individual) voir dire. Juror #452 expressed to others in the room that the victim was an "innocent victim" and a "great upstanding person" and was unsure if this information would impact her deliberations. Further, Juror #452 stated that she could not understand why anyone would want to murder Arnold. (Vol. IV, Tp. 779, 827). Juror #452 informed everyone that she could not "guarantee 100 percent" that she could put her beliefs aside. (Vol. IV, Tp. 828).

At a minimum, Juror #452 should have been removed and questioned privately. Instead, she was allowed to express her knowledge and feelings about the case openly and possibly influence others. These jurors were then permitted to serve based on their "self-assessments" that they could be fair. *See Silverthorne v. United States*, 400 F.2d 627, 639 (1968) ("[W]hether a juror can render

a verdict solely on evidence adduced in the courtroom should not be adjudged on that jurors' own assessment of self-righteousness *without something more.*") (Emphasis in original).

The publicity surrounding Dean's case prevented him from obtaining a fair trial in Clark County. Thus, Dean's constitutional guarantees under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§5, 16 of the Ohio Constitution were violated.

Proposition of Law No. III: The trial court's instructions at the sentencing phase deprived Dean of his rights as guaranteed by the Sixth, Eighth and Fourteenth Amendments.

A. The trial court affirmatively failed to provide the jury with the instruction they could exercise mercy.

Prior to trial, defense counsel filed a motion requesting that the court instruct the jury to consider mercy in its sentencing deliberations. (Motion #32). The trial court denied the motion.

Mercy is a legitimate consideration at the penalty phase in a capital case. *Penry v. Lynaugh*, 492 U.S. 302 (1989); *California v. Brown*, 479 U.S. 538 (1987). In *State v. Rogers*, 28 Ohio St.3d 427, 434 (1986), this Court stated, "[D]efense counsel certainly has the right to plead for mercy and, indeed, has the very duty to cause the jury to 'confront both the gravity and the responsibility of calling for another's death.' (citation omitted)." Indeed, a jury is not precluded from extending mercy to a defendant. *State v. Zuern*, 32 Ohio St.3d 56, 64 (1987).

For these reasons, a trial court must instruct the jury to consider mercy in its mitigation phase deliberations. To do otherwise, violates Dean's rights to due process, equal protection, and freedom from cruel and unusual punishment.

B. The trial court failed to provide the jury with an instruction that they could consider residual doubt as a mitigating factor.

Defense counsel filed a pretrial motion requesting a residual doubt instruction. (Motion #33). Specifically, the defense wanted the jury instructed that they could consider "residual or lingering doubt" as a mitigating factor. Additionally, defense counsel requested the ability to

present rebuttal evidence of residual doubt. The trial court denied this motion.

It is elemental to due process that a defendant not be sentenced to death "on the basis of information which he had not opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362 (1977). Hence, a defendant has a right to present evidence of residual doubt, especially when a prosecutor argues that death is warranted because he has proven the aggravating circumstance beyond a reasonable doubt.

Here, the prosecution argued that "course of conduct" (the prior Dibert Avenue shooting and shooting during an attempted robbery) justified death for Dean and ultimately culminated in the murder of Arnold. Thus, according to the state, Dean was beyond rehabilitation. Numerous state witnesses, however, identified co-defendant, Josh Wade, as the shooter in the Dibert Avenue incident and the Arnold murder. *State v. Dean*, 2015-Ohio-4347 at ¶17, ¶26-30.

Dean should have been able to present, argue and receive instructions on residual doubt in order to confront the state's case in mitigation. The prosecutor's argument triggered Dean's due process rights under *Gardner* to present rebuttal evidence. *See Davis v. Coyle*, 475 F.3d 761 (6th Cir. 2007) (Judge Gibbons, concurring). To limit what mitigation Dean could argue and refuse to give a residual doubt instruction violated Dean's rights to due process and freedom from cruel and unusual punishment.

C. The trial court improperly instructed jurors that by they must not be influenced by any sympathy in their deliberations.

The instruction in Dean's case prohibited "any consideration of sympathy," which is qualitatively quite different from avoiding "mere sympathy." Sympathy is a legitimate consideration at the penalty phase of a capital case and the giving of an "anti-sympathy" instruction constitutes constitutional error. *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978). Dean's jury was instructed to ignore even

sympathy correctly tethered to mitigation testimony in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (This issue is also raised as ineffective assistance of counsel. See Proposition of Law I).

II. Conclusion.

Appellant Dean requests that this Application for Reopening be granted and that he be afforded an opportunity to file a new appellate brief with supporting materials. S.Ct. Prac. 11.06 and *State v. Murnahan*, 63 Ohio St.3d 60 (1992). Dean has shown that there is a genuine issue as to whether he was deprived of the effective assistance of counsel on appeal, with respect to each of the Propositions of Law.

Respectfully submitted,



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Counsel for Appellant Dean

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2016, I served a copy of the foregoing Application for Reopening by regular U.S. mail addressed to:

Mr. D. Andrew Wilson
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50 E. Columbia St.
Springfield, OH 45502



Angela Wilson Miller, #0064902

Counsel for Appellant Dean

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Plaintiff-Appellee, : Case No. 2011-2005
-vs- : On Appeal from the Court of Common
JASON DEAN, : Pleas of Clark County, Ohio Case No.
 : 05 CR 0348
Defendant-Appellant. : **This is a capital case.**

AFFIDAVIT OF ANGELA WILSON MILLER

STATE OF FLORIDA,)
) ss:
COUNTY OF PALM BEACH)

I, Angela Wilson Miller, after being duly sworn, hereby state as follows:

- 1) I am an attorney licensed to practice law in the State of Ohio and I have practiced law for 20 years. I worked as an Assistant State Public Defender for 11 years and was assigned to the Death Penalty Unit. I am certified to practice in the United States District Court for the Southern District of Ohio, the United States District Court for the Northern District of Ohio, the Sixth Circuit Court of Appeals and the Supreme Court of the United States. I am currently in private practice and I am Rule 20 certified for appellate work in death penalty cases.
- 2) Due to my focused practice of law and my attendance at several death penalty seminars, I am aware of the standards of practice involved in the appeal of a case in which the death penalty was imposed.
- 3) I was appointed by this Court to represent Mr. Dean and prepare an Application for Reopening on March 2, 2016.
- 4) I have read this Court's opinion, as well as the transcripts, record and appellate briefs filed on Mr. Dean's behalf. I also consulted with appellate counsel and the Office of the Ohio Public Defender to prepare the Application for Reopening in this case.

- 5) The Due Process Clause of the Fourteenth Amendment guarantees the effective assistance of counsel on an appeal as of right. *Evitts v. Lucey*, 469 U.S. 587 (1985).
- 6) The initial responsibility of appellate counsel, once the transcript is filed, is to make sure that the entire record is filed with the Supreme Court of Ohio. When appellate counsel files only a partial transcript on appeal, the defendant is deprived of the due process of law guaranteed by the Fourteenth Amendment of the United States Constitution. *Entsminger v. Iowa*, 386 U.S. 748 (1967).
- 7) After making sure that the transcript is complete, counsel must then review the record for purposes of issue identification. This review of the record not only includes the transcript but also the pleadings and exhibits.
- 8) For counsel to properly identify issues, they must have a good working knowledge of criminal law in general. Many trial issues in capital cases will be decided by criminal law that is applicable to non-capital cases. As a result, appellate counsel must be informed as to the recent developments in criminal law when identifying potential issues on direct appeal. Counsel must remain knowledgeable about recent developments in the law after the merit briefs are filed.
- 9) Since the reintroduction of capital punishment in response to the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the area of capital litigation in general has become a recognized specialty in the practice of criminal law. Numerous substantive and procedural areas unique to capital litigation have been carved out by the United States Supreme Court. As a result, anyone who litigates in the area of capital punishment must be familiar with these issues in order to raise and preserve them for appellate and post-conviction review.
- 10) Appellate representation of a death-sentenced individual requires a recognition that the case will most likely proceed to the federal courts at least twice: first on petition for Writ of Certiorari in the United States Supreme Court, and again on a petition for Writ of Habeas Corpus filed in a federal district court. Appellate counsel must preserve all issues throughout the state court proceedings on the assumption that relief is likely to be eventually sought in federal court. The issues that must be preserved are not only issues unique to capital litigation, but also case and fact-related issues unique to the case that impinge upon federal constitutional rights.
- 11) It is a basic principle of appellate practice that to preserve an issue for federal review, the issue must be exhausted in the state courts. To exhaust an issue, the issue must be

presented to the state courts in such a manner that a reasonable jurist would have been alerted to the existence of a violation of the United States Constitution. The better practice to exhaust an issue is to cite directly to the relevant provisions to the United States Constitution in each proposition of law and in each assignment of error to avoid any exhaustion problems in the federal courts.

- 12) Based on the foregoing standards, I reviewed the opinion, record and appellate briefs, and communicated with former appellate counsel.
- 13) I have identified additional ineffective assistance of trial counsel issues and sub-claims as well as a change of venue issue and penalty phase instruction errors that should have been evaluated by appellate counsel and presented to the Supreme Court of Ohio. Thus, appellate counsels' failure to present these errors raises a genuine issue as to whether or not Mr. Dean was denied the effective assistance of appellate counsel.
- 14) For example, appellate counsel failed to raise the issue of trial counsels' failure to adequately prepare Mr. Dean for allocution. Defense counsel made the decision not to call any experts in mitigation and call only two family members to testify. Mr. Dean would also give an unsworn statement and allocute. Given the little mitigation presented, Mr. Dean needed to be prepared to give a statement that could save his life. He was not. Rather, Mr. Dean took the opportunity to deny responsibility, which was duly noted by this Court in its opinion. *State v. Dean*, 2015-Ohio-4347 at ¶ 314.

Allocution is a significant opportunity for the defendant and can influence the outcome of the proceedings. Words from the defendant himself can have great impact. *State v. Campbell*, 90 Ohio St.3d 320, 2000-Ohio-183. In *State v. Roberts*, 137 Ohio St.3d 230, 2013-Ohio-4580, this Court reversed and remanded Defendant Robert's case for resentencing given the powerful statement provided at allocution. Roberts expressed remorse and personally detailed a very abusive childhood, rapes, lack of self-worth, history of head injuries and memory loss, history of deep depression and attempted suicide, auditory hallucinations and also provided examples of selflessness and contributions to society. This Court determined that the trial judge could not have considered Robert's statement and handed down a death sentence.

Mr. Dean's brief, detached statement did not approach what Roberts provided at allocution. Allocution is not an empty ritual but is the defendant's last opportunity to plead his case or express remorse. *Roberts* illustrates the difference a sincere, thoughtful statement from a defendant can make.

- 15) Prior to deliberations, the trial court informed jurors that they "must not be influenced by any consideration of sympathy or prejudice." Appellate counsel did not address defense counsel's failure to object to the trial court's "anti-sympathy" instruction at the penalty phase.

In *California v. Brown*, 479 U.S. 538 (1987), the United States Supreme Court upheld an instruction that cautioned relying on mere sympathy and disregarding other evidence. The instruction in *Brown* was different than that given in Dean's case. In *Brown*, the judge stated that "jurors must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." The Court noted that the crucial fact was that the jury was instructed to avoid basing its decision on "mere sympathy." *Id.* at 840.

The modifier "mere" is far different than "any." An anti-sympathy instruction was unnecessary in Dean's case - the jurors were told repeatedly not to deviate from the trial court's instruction on applicable law. And the trial court's instruction was incorrect. Only general feelings of sympathy not connected to the particular defendant and evidence introduced in mitigation are prohibited. Sympathy tethered to evidence introduced during the penalty phase, such as evidence of a disadvantaged background or mental health problems, is a proper element for the jury to consider when deciding whether to impose the death penalty. *See Brown* at 543. Jurors are not expected to make life and death decisions in a vacuum.

The anti-sympathy instruction given in Dean's case foreclosed any possibility of considering sympathy of any sort and is thus distinguishable from the instruction narrowly condoned in *Brown*. The damage was particularly acute in this case as the only mitigation evidence produced was the testimony of two family members and an unsworn statement from Dean. The testimony from the two family members depicted a chaotic family life for Dean filled with physical abuse, instability, poverty, and a lack of any real affection or attention from parents. The jury was instructed to ignore any influence of sympathy - presumably sympathy connected to this testimony, which was the only mitigation presented. *Brown v. California* does not support the instruction given in Dean's case.

- 16) Appellate counsel did not raise trial counsel's refusal to grant defense counsel's motion for change of venue. When faced with a trial in a small county that has been subjected to extensive publicity about the case such there is a likelihood of prejudice, the trial court should transfer the case to another county. *See State ex. rel. Dayton Newspapers Inc. v. Phillips*, 46 Ohio St.2d 457 (1976). The right to a fair and impartial jury is fundamental.

The denial of that right is a structural error that is never harmless. *Arizona v. Fulminante*, 499 U.S. 279 (1991).

Dean's trial counsel filed a change of venue motion noting the long history of media coverage around the case. Dean's first trial and second trial were extensively reported on in the local paper and on television. The publicity also covered the reversal of Dean's case by the Ohio Supreme Court as well as the bindover of co-defendant, Josh Wade, and the upcoming retrial. The local paper was also sure to run a front page story on Dean's case right before voir dire was to begin.

Numerous jurors stated that they understood Dean's case was reversed on a "technicality." Jurors #540, #453 and #452 all were well-informed about the case. The most disturbing aspect, however, was that Juror #452 openly discussed her feelings, knowledge and understanding of the case in "small group," which was in front of several other individuals being chosen as jurors. Juror #452 stated that the victim in the case was an "innocent victim" and a "great upstanding person." She also could not understand why anyone would murder this person. Finally, Juror #452 could not guarantee she could put her feelings "aside" and deliberate. (Vol. IV, Tp. 779, 828). If the other potential jurors in the room had no prior knowledge of Dean's case they did now. The publicity surrounding Dean's case prevented him from obtaining a fair trial in Clark County.

- 17) Appellate counsel did not address several sentencing phase instructions that deprived Dean of his rights as guaranteed by the Sixth, Eighth and Fourteenth Amendments. The errors in the penalty phase instruction can be grouped into two types of errors: 1) instructions that were given, but were incorrect; and 2) instructions that were not given that should have been provided to the jury.

Improper instruction: The trial court informed jurors at the conclusion of the penalty phase that sympathy could play no part in their deliberations. Sympathy is a legitimate consideration at the penalty phase of a capital case. Indeed, sympathy rooted in the evidence presented for a particular defendant is permissible, whereas generalized "untethered" sympathy is not. *Cf. Eddings v. Oklahoma*, 455 U.S. 104, 112-116 (1982) (evidence of turbulent family history, beatings by father, and a serious emotional disturbance all proper considerations in assessing death penalty).

In Dean's case, with the limited mitigation presented, the court's directive to avoid "any consideration of sympathy" was detrimental. The jury could easily understand that it was to ignore any feelings of sympathy tethered to mitigation testimony that Dean presented. It is constitutionally impermissible to prohibit the jury from considering, relative to Dean,

the "compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson v. North Carolina*, 428 U.S. 280 (1976).

The trial court affirmatively failed to provide the jury with necessary instructions:

Prior to trial, defense counsel filed motions requesting an instruction on mercy and an instruction on residual doubt. Mercy is a legitimate consideration at the penalty phase of a capital case. The Supreme Court of Ohio has rejected the argument that the death penalty process does not permit the extension of mercy to a defendant. "[Defense counsel certainly has the right to plead for mercy, and indeed, has the very duty to cause the jury to 'confront both the gravity and the responsibility of calling for another's death.' (citation omitted)." *State v. Rogers*, 28 Ohio St.3d 427, 434 (1986).

A trial court must instruct the jury to consider mercy at the conclusion of the penalty phase. The failure to do so in Dean's case violated his rights to due process, equal protection, and freedom from cruel and unusual punishment.

The trial court also refused to give the jury an instruction on residual doubt. Defense counsel wanted a residual doubt instruction in light of state's repeated argument that the "course of conduct" Dean engaged in mandated the death penalty. Specifically, the drive-by shooting on Dibert, the attempted robbery and shooting at the minimart, and the eventual murder of Arnold, all perpetrated with Josh Wade, left no other option but death according to the state.

Several state witnesses, however, identified co-defendant, Josh Wade, as the shooter in the Dibert Avenue incident and the individual responsible for shooting Arnold. Thus, Dean should have been able to present, argue and receive instructions on residual doubt to confront the state's case in mitigation. Without doubt, the prosecutor's argument triggered Dean's due process rights to present rebuttal evidence. *Gardner v. Florida*, 430 U.S. 349, 362 (1977).

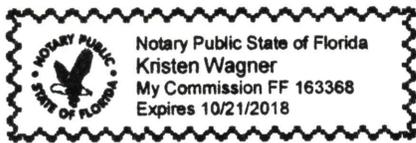
- 18) An appellate court has an independent duty to read the transcript and identify errors that are plain even if they are not presented on appeal. R.C. §2929.05. As a practical matter, however, appellate courts rely almost exclusively on appellate counsel to identify errors and the applicable law.
- 19) Therefore, Jason Dean, was detrimentally affected by the deficient performance of his former appellate counsel.

Further affiant sayeth naught.



Angela Wilson Miller, #0064902
Counsel for Appellant, Jason Dean

Sworn and subscribed in my presence this 19th day of April, 2016.





Notary Public