

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
Plaintiff-Appellee, : Case No. **08-0348**  
v. : On appeal from the Court of Appeals,  
PATRICK L. LEONARD, : First Appellate District, Hamilton County,  
 : Case No. C-061025  
Defendant-Appellant. :  
 : **This is a Capital Case.**

---

APPELLANT PATRICK L. LEONARD'S  
MEMORANDUM IN SUPPORT OF JURISDICTION

---

JOSEPH T. DETERS  
Hamilton County Prosecuting Attorney

Office of the Ohio Public Defender

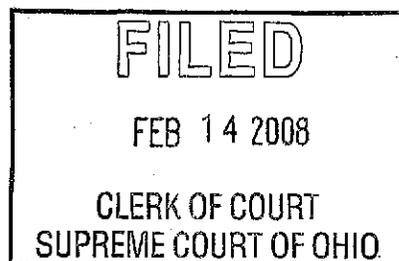
RONALD W. SPRINGMAN, JR. (0041413P)  
Chief Assistant Prosecuting Attorney  
230 E. Ninth St., Suite 4000  
Cincinnati, Ohio 45202  
(513) 946-3052; Fax: (513) 946-3021

MELISSA J. CALLAIS (0077833)  
Assistant State Public Defender  
Counsel of Record

Office of the Ohio Public Defender,  
8 E. Long Street, 11th Floor  
Columbus, Ohio 43215  
(614) 466-5394; Fax: (614) 644-0708

COUNSEL FOR APPELLEE

COUNSEL FOR LEONARD



**TABLE OF CONTENTS**

**TABLE OF CONTENTS** ..... i

**EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**..... 1

**STATEMENT OF THE CASE**..... 1

**STATEMENT OF THE FACTS** ..... 2

**ARGUMENT**..... 4

**PROPOSITION OF LAW NO. I**..... 4

**I. A TRIAL COURT ERRS WHEN IT DOES NOT APPLY THE APPROPRIATE FACTORS TO DETERMINE WHETHER RESTRAINT IS JUSTIFIED AND DOES NOT CONSIDER THE INHERENT PREJUDICE THAT ARISES WHEN A DEFENDANT IS FORCED TO WEAR A STUN BELT WITHOUT COMPELLING JUSTIFICATION**.....4

**II. FORCING A DEFENDANT TO WEAR A STUN BELT WITHOUT A COMPELLING NEED DEPRIVES HIM OF PHYSICAL INDICIA OF INNOCENCE BEFORE THE JURY AND CREATES AN UNACCEPTABLE RISK OF ERROR DURING THE SENTENCING PHASE**.....12

**III. PLACING A STUN BELT ON A DEFENDANT WITHOUT COMPELLING NEED INFRINGES UPON HIS RIGHT TO COUNSEL AND HIS ABILITY TO ASSIST IN HIS DEFENSE**.....17

**CONCLUSION** ..... 21

**CERTIFICATE OF SERVICE** ..... 22

**APPENDIX**

Judgment Entry, State of Ohio v. Patrick Leonard, Hamilton County Court of Common Pleas, Case No. B-0005891, entered November 3, 2006 ..... A-1

Decision, State of Ohio v. Patrick Leonard, First District Court of Appeals, Case No. C-061025, entered December 31, 2007 ..... A-2

**EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case is of critical importance because it involves a defendant's constitutional right to appear without restraints during trial. Deck v. Missouri (2005), 544 U.S. 522; Holbrook v. Flynn (1986) 475 U.S. 560; Illinois v. Allen (1970) 397 U.S. 337. Patrick Leonard, a capital defendant, was forced to appear at his trial and mitigation phase while restrained with a stun belt, violating his rights under the Sixth and Fourteenth Amendments to the United States Constitution. No compelling state interest in denying him his right to appear unshackled was ever presented, either pre-trial or at the post-conviction evidentiary hearing, despite the need for the State to show unusual circumstances justifying the use of the stun belt. See State v. Adams, 103 Ohio St. 3d 508, 2004-Ohio-5845, 817 N.E. 2d 29, at ¶ 104. Leonard's restraint violated his rights, including his right to the presumption of innocence, right to counsel and to participate in his defense, and his right to a reliable sentence. Substantial constitutional rights are at issue here, and this Court should accept jurisdiction in order to protect a defendant's right to appear without restraints absent compelling justification specific to the defendant on trial.

**STATEMENT OF THE CASE**

Patrick L. Leonard was tried by jury and found guilty of aggravated murder with a felony murder specification; felonious assault; attempted rape; and kidnapping. The court sentenced Patrick Leonard to death. His convictions and sentence were affirmed on direct appeal.<sup>1</sup>

Patrick Leonard filed a petition for post-conviction relief with the Hamilton County Court of Common Pleas. Leonard appealed to the Court of Appeals for Hamilton County, First Appellate District. The appellate court affirmed in part, reversed in part and remanded for an

---

<sup>1</sup> State v. Leonard, 104 Ohio St. 3d 54, 2004 Ohio 6235, 818 N.E.2d 229.

evidentiary hearing on the issue of whether petitioner was prejudiced by the trial court's employment of excessive security measures.<sup>2</sup> In accord with the mandate of the First District Court of Appeals, a hearing was held on May 16, 17, and 25, 2006.

Following the hearing, the trial court denied Petitioner's claim for relief. The court found that the emotional nature of the audience, the small size of the courtroom, and the nature of the charges against Leonard justified the use of the stun belt.<sup>3</sup> The trial court also found that Leonard was not prejudiced by wearing it, dismissing the unchallenged expert psychological testimony offered by Dr. Robert Smith, as "interesting in so much that it would provide for lively dinnertime debate, however it is not useful here."<sup>4</sup> The court found that Leonard was not prejudiced by wearing the belt, although it did find that the belt was visible on Leonard's back at least once.<sup>5</sup>

The First District Court of Appeals affirmed the trial court's decision as being supported by competent and credible evidence.<sup>6</sup> Presiding Judge Painter dissented, finding that Leonard should be granted a new trial.<sup>7</sup>

### **STATEMENT OF THE FACTS**

On July 29, 2000, Leonard Patrick Leonard was arrested for the murder of his girlfriend. He turned himself in to a friend who was a police officer in Highland Heights, Kentucky. He first appeared in a Hamilton County Court on or about August 1, 2000, and he was first secured with a stun belt on August 9, 2000. His attorneys filed a motion on November 13, 2000

---

<sup>2</sup> State v. Leonard, 157 Ohio App.3d 653, 813 N.E.2d 50, 2004-Ohio-3323 (Leonard I).

<sup>3</sup> T.d. 420, Findings of Fact and Conclusions of Law, p. 4-5.

<sup>4</sup> Id. at 10.

<sup>5</sup> Id. at 6-11.

<sup>6</sup> State v. Leonard, 2007 Ohio 7095, 2007 Ohio App. LEXIS 6214, at ¶ 16 (Hamilton Co., Dec. 31, 2007) (Leonard II).

<sup>7</sup> Id. at ¶17-19.

requesting that Leonard be allowed to appear at all court proceedings without restraints. Def.Mtn. #25.<sup>8</sup> On November 29, 2000, the trial court briefly addressed the issue of Leonard appearing in court in civilian clothing and without restraints which was requested in Defense Motion #24. Trial counsel William Welsh stated at that hearing that he did not want Leonard to appear “in any restraints whatsoever” before the jury. T.p. 39-40.

Leonard had no prior criminal history, had no incidents of violence while in the county jail or in the courtroom, made no threats to witnesses, courtroom personnel or others, and had no indication of risk of escape attempts. Despite the lack of evidence that Leonard would be a security risk, the trial judge stated that, regarding courtroom security, he was going to follow the directions of the Sheriff’s Office. T.p. 37, 40. Apparently, this was the only ruling the trial court made regarding defense counsel’s motion before the trial began.<sup>9</sup> The trial court never held a hearing to determine whether Leonard’s behavior justified the requirement that he wear the stun belt.

Before the stun belt was placed on Leonard, the Sheriff’s deputies who provided security in the courtroom during his trial read Leonard a list of what he could not do while wearing the belt. Hr.T.p. 66-67, 79-80; Jt.Hr.Ex. 1. The violation of these rules would cause the stun belt to be activated. Throughout the trial, Leonard was constrained to sit quietly, with limited motion toward his attorneys, and did not make eye contact with his family. Hr. T.p. 126-27; Depo. 11-

---

<sup>8</sup> Citations to transcripts, exhibits, and related documents will be as follows: Trial Docket – “T.d. \_\_\_;” Trial Transcript – “T.p. \_\_\_;” Hearing Transcript – “Hr.T.p. \_\_\_;” Trial Deposition of Fr. David DuPlantier – “Depo.T.p. \_\_\_;” Hearing Exhibit – “Hr.Ex. \_\_\_;” Joint Hearing Exhibit – “Jt.Hr.Ex. \_\_\_;” Court Hearing Exhibit – “Ct.Hr.Ex. \_\_\_;” and Defense Motion number – “Def.Mtn. #\_\_\_.”

<sup>9</sup> Curiously, on June 28, 2001, the day Petitioner was sentenced, Judge Schweikert signed an order (designated *nunc pro tunc* to May 1, 2001) granting Petitioner’s motion not to wear restraints in front of the jury. However, that Entry stated that the granting of the motion was “subject to the security requirements of the Hamilton County Sheriff.” T.d. 169.

13. When he walked to the front of the courtroom to give his unsworn statement, the bulk of the stun belt positioned on his back was clearly visible and could have been seen by anyone in the courtroom. Hr. T.p. 129; Jt.Hr.Ex. 5.

Although Leonard was denied the opportunity to have a full and fair hearing regarding the necessity and implications of the stun belt during his capital trial, such hearings are now implemented in Hamilton County Common Pleas Court as a result of the first Court of Appeals decision in this case. Hr. T.p. 104-05, 272.

## ARGUMENT

### PROPOSITION OF LAW NO. I

**I. A TRIAL COURT ERRS WHEN IT DOES NOT APPLY THE APPROPRIATE FACTORS TO DETERMINE WHETHER RESTRAINT IS JUSTIFIED AND DOES NOT CONSIDER THE INHERENT PREJUDICE THAT ARISES WHEN A DEFENDANT IS FORCED TO WEAR A STUN BELT WITHOUT COMPELLING JUSTIFICATION.**

**A. The trial court abused its discretion by misconstruing and misapplying the appropriate factors to determine whether it was proper to force Leonard to wear a stun belt.**

A defendant has the right to appear in the courtroom without restraints, unless justified by an essential state interest. Deck v. Missouri (2005), 544 U.S. 622, 624; Holbrook v. Flynn (1986), 475 U.S. 560, 568-69; Illinois v. Allen (1970), 397 U.S. 337, 343-44. Restraints are to be used as a last resort. Allen, 397 U.S. at 344. Restraints are disfavored at both the trial and sentencing phase of capital cases because they infringe upon the presumption of innocence, interfere with the right to counsel, and intrude upon the dignified process and the respectful treatment of defendants. Deck, 544 U.S. at 630-32. If a trial court does not take into account circumstances “related to the defendant on trial” when ordering the use of restraints, a

defendant's due process rights are violated, and there is no need to show actual prejudice. *Id.* at 629-633.

The First District Court of Appeals had already determined that “the violent nature of the crimes for which Leonard was being tried could not, standing alone, justify the requirement that Leonard wear the stun belt.” Leonard I, 157 Ohio App.3d at ¶ 50. Because of the inherently prejudicial nature of restraints, their use must be justified by “an essential state interest specific to each trial.” Holbrook, 475 U.S. at 568-69. To deny Leonard his constitutional right to appear unshackled, “there must have been factors *caused by him* [Leonard] to warrant the restraint.” Leonard II, 2007 Ohio 7095 at ¶ 17 (Painter, P.J., dissenting). The trial court abused its discretion by considering impermissible factors in justifying the use of the stun belt on Leonard. Leonard's constitutional rights were violated when he was forced to wear the belt because no competent or credible evidence exists to justify the use of the stun belt on Leonard.

Leonard was secured with a stun belt because it was the practice of the Hamilton County Sheriff's Office to utilize the stun belt in every capital case. Hr.T.p. 82, 93, 271. When the Sheriff's Office created a blanket rule that all defendants charged with capital crimes had to wear a stun belt – and the trial court endorsed the judgment of the Sheriff's Office – Leonard's right to appear without restraints was violated. The nature of his crimes was not enough to justify the use of the stun belt, and no other essential state interest was brought before the trial court.

Other than capital defendants, defendants in Hamilton County are secured with stun belts based on their individual behavior. Hr.T.p. 82. Sheriff's deputies described circumstances in which other defendants had to wear the stun belt: the defendant behaved violently, was hostile to deputies, attorneys, courtroom staff or family members; or the defendant was disorderly or disrespectful. Hr.T.p. 82, 102. No one from the Sheriff's Office or the courtroom staff testified

that Leonard met any of those circumstances. Leonard did not have any disciplinary problems in jail. Hr.T.p. 145-46. He had never been arrested prior to his arrest in *this* case, and he voluntarily turned himself in to law enforcement. Hr.T.p. 140. Court Reporter Debbie Wallace said she did not fear for her safety because of Leonard. Hr.T.p. 239. Bailiff Vince Wallace testified that Leonard was “very well behaved” during his capital trial and “wasn’t a disruption.” Hr.T.p. 248-49.

Although the courtroom situation may have been “tense” because many members of the victim’s family were present, this tension did not provide a compelling need for Leonard to be secured with a stun belt. Leonard cannot be deprived of his right to appear without restraints based solely on the presence of a victim’s family in the courtroom. If anything, the hostility of the victim’s family would have justified an additional security presence in the courtroom to maintain the crowd, or securing audience members with stun belts, rather than Leonard. See Sheppard v. Maxwell (1966), 384 U.S. 333, 358-63, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (finding that a defendant’s constitutional rights were violated by the “carnival atmosphere at trial” and that “courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.”) When the subject of the Sheriff’s Office placing stun belts on audience members was discussed during Leonard’s post-conviction hearing, the trial judge even remarked, “There are some times that I wish they had.” Hr.T.p. 42. Having at least one deputy monitoring the spectators and possibly additional deputies to monitor the crowd was a practice already implemented by the Sheriff’s Office. Hr.T.p. 89-90, 111, 121, 280. Posting additional deputies in a courtroom to monitor the audience was a feasible alternative if the victim’s family was perceived to be a security risk.

Even the manufacturers of the stun belt did not condone the use of the belt because of the hostility of an audience in a courtroom. In the training manual produced by Stun-Tech (the stun belt manufacturer), the list of factors to be considered when determining the level of security necessary does not include any reference to the demeanor or number of courtroom spectators. Jt.Hr.Ex. 3, p. 100. Instead, these guidelines focus on characteristics of the individual to be secured, not characteristics of others in the courtroom. *Id.* The Hamilton County Sheriff's Office was aware of these guidelines because they were adopted in their official written policy on the use of the stun belt and included in the training materials given to deputies. Jt.Hr.Ex. 2, p. 6; Jt.Hr.Ex. 3, p. 100; Hr.T.p. 23-24.

Neither the tension in the courtroom, the size of the emotional audience, nor the manufacturer's guidelines could justify the placing of the stun belt on Leonard. Nor could the state have made such a justification before Leonard's trial. Consequently, the state cannot now demonstrate a compelling state interest. All the competent and credible evidence developed during the evidentiary hearing supports the fact that there was no compelling need for Leonard to have been made to wear the stun belt in front of the jury during his capital trial.

The trial court abused its discretion by finding that the use of the stun belt on Leonard was justifiable. The evidence cited by the trial court, namely the testimony of the trial prosecutor, Jerome Kunkel, was not competent or credible evidence when viewed in light of all of the other evidence presented at the hearing. T.d. 420—4-5. Kunkel was an unreliable witness, as his testimony was unsubstantiated and contradicted by credible testimony. Kunkel asserted that during the trial Petitioner "would turn around and stare at members of the Flick family who were attending the trial." He stated that Petitioner "was actually in front of Dawn Flick's family

and friends.” Hr.T.p. 218. However, testimony elicited from the Bailiff, deputies, spectators, and even other portions of Kunkel’s own testimony belies this assertion.

Joint Exhibit 5, as well as the testimony of Kunkel and Bailiff Vince Wallace establishes that Petitioner sat with his counsel at the table closest to the jury box, on the right-hand side of the courtroom when facing the judge. Hr.T.p. 219, 235, 244; Jt.Hr.Ex 5; Hr.Ex. 7. Fr. David DuPlantier, a friend of the Leonard family, stated that during the trial he sat “facing the judge, . . . on the right-hand side of the courtroom, where generally most of [Leonard’s] family was gathered. ” Depo.T.p. 11. Jeanne Hutcherson, Leonard’s sister, also testified that she was sitting behind Petitioner’s right shoulder, facing the front of the courtroom. Hr.T.p. 126. It is doubtful that the Flick family and the Leonard family would have been seated on the same side of the courtroom, and no one besides Kunkel testified otherwise.

Fr. DuPlantier and Hutcherson, who were seated behind Leonard, never saw him turn around, and stated that he kept his eyes facing down. Hr.T.p. 127; Depo.T.p. 12. Fr. DuPlantier had been trying to catch Petitioner’s eye to let Petitioner know that he was there, but was never able to do so. Depo.T.p. 12. Consequently, the credibility of Kunkel’s testimony was seriously undermined. Furthermore, the deputies sat closely behind Petitioner during the trial. Hr.T.p. 266-67; Hr.Ex. 7. Their testimony suggested that the moves reported by Kunkel clearly would have caused, at a minimum, a warning beep, if not full activation of the belt. Hr.T.p. 67-68, 94, 270, 275-76; Jt.Hr.Ex. 1.

The hearing court’s adoption of the state’s position, that the tension in the courtroom merited Leonard’s forcible restraint with the stun belt, was clearly an abuse of discretion. Tension in the courtroom does not merit a classification of “an essential state interest specific to

[Leonard's] trial," as required by this Court and the United States Supreme Court in Holbrook, 475 U.S. at 568-69.

**B. The trial court abused its discretion by not addressing the inherent prejudice suffered by Leonard when he was not given a hearing before the stun belt was placed on him.**

The First District Court of Appeals has acknowledged that while the Supreme Court has yet to definitively mandate that a hearing be held before a defendant is restrained, "a hearing on the need for restraints serve[s] to facilitate meaningful appellate review." Leonard I, 157 Ohio App.3d 653, at ¶ 49. While no absolute rule exists, holding a hearing is "the preferred and encouraged practice prior to [imposing restraints upon] a defendant." State v. Franklin, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, at ¶ 82. On post-conviction review, the trial court failed to address the inherent prejudice suffered by Leonard when the capital trial court abdicated its duty to hold a hearing on the need for restraints.

While the decision to use restraints is left within the discretion of the trial court, Allen, 397 U.S. at 343-44, the trial court cannot relinquish its authority to another person or agency. In State v. Adams this Court stated: "The trial court must exercise its own discretion and not leave the issue up to security personnel." 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, at ¶104. The original trial court abdicated its duty to protect Leonard's constitutional rights by deferring to the Hamilton County Sheriff's Office on the issue of restraints. Instead of identifying on the record what essential state interest justified forcing Leonard to wear the stun belt, the trial judge relied on an off-the-record conversation with a member of the Sheriff's Office. Rather than ensure that Leonard's constitutional rights and the integrity of the judicial proceedings were protected by the use of the minimum necessary restraints, the trial court merely

deferred to the Sheriff's policies. See Allen, 397 U.S. at 344; United States v. Brooks (C.A.7, 1997), 125 F.3d 484, 502; Leonard I, 157 Ohio App.3d at ¶ 40.

Leonard filed a motion to appear at all proceedings without restraints. Def.Mtn. 25. The only information the trial judge received about the use of the stun belt at Leonard's trial came from an informal discussion with Lt. John Adkins<sup>10</sup>. Hr.T.p. 36, 39. Because of this off-the-record meeting with a member of the Sheriff's Office, trial counsel had no notice or opportunity to object to any information or recommendations regarding the stun belt provided by Lt. Adkins. When the trial court ruled on the defense motion during the pre-trial proceedings, the court essentially denied the motion and stated that the court would defer to the Hamilton County Sheriff, and that trial counsel should raise any objections with the Sheriff, rather than the court. T.p. 39.

Although the trial court engaged in only a cursory dialogue with counsel about the use of restraints at Leonard's trial, the court had the ability to hold a hearing regarding their use. These type of hearings, where law enforcement officers testify about the reasons why a particular defendant should be secured with a stun belt, are now held in the Hamilton County Court of Common Pleas. Hr.T.p. 104-05, 272. Consequently, it would not have been unduly burdensome for the trial court in Leonard's case to have held such a hearing.

Despite refusing to specify why Leonard would need to be secured with the stun belt, the trial court ultimately issued a written order granting defense counsel's motion permitting Leonard to appear at all proceedings without restraints, "subject to the security requirements of the Hamilton County Sheriff." T.d. 169. However, this written ruling on Defense Motion #25

---

<sup>10</sup> While Lt. Adkins did not recall whether the meeting was with the bailiff or the judge, Bailiff Vince Wallace testified that he never had a meeting with Lt. Adkins about the stun belt. Hr.T.p. 256.

was filed on July 5, 2001, about a week after Leonard was sentenced to death and long after his trial was completed, and designated *nunc pro tunc* to May 1, 2001, two weeks before Leonard's capital jury was impaneled. The court did not issue any findings justifying the use of the stun belt on Leonard, nor were any reasons ever put on the record at any point during Leonard's trial. Instead, at the motions' hearing and in its order, the trial court relinquished to the Sheriff's Office the task of determining courtroom security. This Court already recognized that despite the *nunc pro tunc* entry, the trial court in fact denied Leonard's motion to appear without restraints. Leonard, 157 Ohio App.3d at ¶ 40.

No record was made when the trial court ruled on the pre-trial motions, nor any evidence presented at the post-conviction evidentiary hearing, regarding the reason the trial court granted the motion that subjected Leonard to wearing the stun belt. Instead of hearing evidence as to whether Leonard should be forced to wear the stun belt, "the original trial judge abdicated his responsibility to control the courtroom by allowing the sheriff to follow a 'policy' of always restraining death-eligible defendants." Leonard II, 2007 Ohio 7095 at ¶ 19 (Painter, P.J., dissenting). The original trial court deferred to the Hamilton County Sheriff's policy without considering any factors unique to Leonard. The trial judge either willfully or negligently abdicated his responsibility to determine the need for placing a stun belt on Leonard and allowed the Sheriff's Office to make that decision. When Leonard was forced to wear a stun belt without a hearing, he suffered inherent prejudice. The trial court abused its discretion by not addressing this inherent prejudice when ruling on Leonard's post-conviction petition.

**II. FORCING A DEFENDANT TO WEAR A STUN BELT WITHOUT A COMPELLING NEED DEPRIVES HIM OF PHYSICAL INDICIA OF INNOCENCE BEFORE THE JURY AND CREATES AN UNACCEPTABLE RISK OF ERROR DURING THE SENTENCING PHASE.**

In Leonard I, the First District Court of Appeals stated that:

The placing of restraints upon a criminal defendant during his trial may significantly affect the jury's perception of the defendant, and may thus infringe upon the presumption of innocence, by stripping the defendant of the physical indicia of innocence.

157 Ohio App.3d at ¶ 44.

Five months later, that Court reiterated its position in State v. Fitzpatrick, Hamilton App. No. C-030804, 2004-Ohio-5615. Although the First District denied relief in Fitzpatrick<sup>11</sup> it continued to recognize that

. . . the use of restraints infringes upon the presumption of innocence if the restraints can be said to have affected how the defendant was perceived by those charged with determining his guilt. Id. at ¶16.

Quoting from Holbrook, 475 U.S. at 568-69, the First District stated that the use of restraints is an “inherently prejudicial practice.” Leonard I, 157 Ohio App.3d at ¶ 45. In Deck v. Missouri (2005), 544 U.S. 622, 125 S. Ct. 2007, 161 L. Ed. 2d 953, the United States Supreme Court reiterated its earlier holding in Holbrook. The Supreme Court again explained that the use of restraints before a jury was “inherently prejudicial” because the consequences of requiring a defendant to wear restraints cannot be seen from a trial transcript. Consequently, the defendant does not have to demonstrate “actual prejudice.” The state must “prove ‘beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.’” Id. at 635 (quoting from Chapman v. California (1967), 386 U.S. 18, 24. The shackling error in this

---

<sup>11</sup> State v. Fitzpatrick is distinguishable on the facts from Leonard's case. Fitzpatrick took a plea after the state's opening statement. His penalty phase was tried before a three-judge panel.

case, Leonard's restraint by a stun belt, created the perception of Leonard as a defendant with little interest in his own trial, who needed to be restrained by unique force. The state has presented no competent or credible evidence refuting such a perception or negating the likely negative impact that perception would have had on Leonard's capital jury.

**Adverse impact of the stun belt on Leonard's demeanor**

Here, the State failed to prove beyond a reasonable doubt that Leonard's wearing of a stun belt in front of the jury *did not* contribute to his guilty verdict and sentence of death. Leonard had to read and sign a Notification Form (Jt.Hr.Ex. 1) before wearing the stun belt. That form described the dire consequences he would face if a deputy determined it was necessary to activate the stun belt. The purpose of that notification was to inspire fear and anxiety. The state was unable to dispute the testimony of Sheriff's deputies that the success of the stun belt in controlling the behavior of a defendant in the courtroom was due primarily to its psychological impact. Hr.T.p. 64, 72, 274-75.

The state failed to impeach or refute the expert testimony of Dr. Robert Smith that the stun belt caused Leonard to be unable to function in front of the jury as an involved, interested defendant. Hr.T.p. 180-81, 206-07. Significant sections of the Notification Form resonated with Leonard because of his previous painful experiences with electricity on his former jobs. Hr.T.p. 146. Dr. Smith explained the psychological effects of the Notification Form and Leonard's history with electric shocks. Hr.T.p. 182-82, 195. Because of Leonard's past experiences and the warnings on the Notification form, "he completely controlled all of his behavior to the point that he did not express or react or respond to his environment." Hr.T.p. 195-96. The intimidation promoted in the stun belt training manual (Jt.Hr.Ex. 3) and exemplified in the Notification Form (Jt.Hr.Ex.1) prohibited Leonard from acting in a spontaneous manner. Hr.T.p. 206.

The use of the stun belt as a behavior modification tool adversely impacted Leonard's demeanor and involvement in his own trial. Leonard's movement was limited and he had very little facial expression. There was no indication he was responding to the environment around him. Rather, he appeared to lack interest in the serious capital trial in which he was involved. Jt.Hr.Ex.5; Hr.T.p. 193. After observing numerous capital defendants at jury trials, expert Smith determined that most defendants are fairly reactive to their environment. Leonard's spiritual advisor, Fr. David DuPlantier, has observed other defendants in courtroom settings. He observed that defendants not wearing the stun belt would have "far more fluid interaction with their attorneys." Depo. 13. While wearing a stun belt, Leonard was extremely inhibited. Hr.T.p. 207.

The consequences of this behavior modification were obvious to Leonard's sister who attended every day of his capital trial. Jeanne Hutcherson testified that Leonard sat uncharacteristically still during the trial, appearing to be unable to move because of the stun belt on his back. She noticed that the jury was looking at Leonard. Hr.T.p. 131. The descriptions of Leonard's actions during his capital trial exemplified what this Court understood: [w]earing a stun belt may lead to an 'increase in anxiety' that may 'materially impair and prejudicially affect' a defendant's ability, and thus his right, to testify on his own behalf." Leonard I, 157 Ohio App.3d at ¶ 46 (quoting from People v. Mar (2002), 28 Cal. 4th 1201, 1224, 52 P.3d 95).

Leonard's restrained and stoic appearance was inherently prejudicial to a jury that was considering the fate of a man accused of murdering his girlfriend. The state did nothing to prove beyond a reasonable doubt that Leonard's appearance did not adversely effect the jury's verdicts of guilt and a death sentence. The testimony of Leonard's sister, religious advisor, and psychologist Dr. Robert Smith was uncontroverted as they all described the difference between Leonard's normal, animated behavior and the inexpressive and detached way he acted while

wearing the stun belt at his capital trial. Hr.T.p. 126-27, 136, 198; Depo.T.p. 11. Fr. DuPlantier did not even know Petitioner was wearing a stun belt (Depo. 33), but he was struck by how limited Petitioner's movement was in court – “very stiff, very almost immobilized.” Depo. 11. That description of Leonard's docile behavior while wearing the stun belt is the precise response desired by law enforcement and the manufacturer of the stun belt.

### **Impermissible visibility of the stun belt and remote activator in the courtroom**

In addition to what the jury saw of Leonard's unsympathetic demeanor during the trial and penalty phases, on at least one occasion the jury would have seen the outline of the actual stun belt on Leonard's back. As he approached the witness stand to give his unsworn statement, a portion of the back of his shirt was tucked into the top of the stun belt. The tucked-in shirt made a clear outline of the 50,000-volt power pack attached to his back. Jt.Hr.Ex. 5. As the DVD of news footage reveals, the outline of the stun belt was clearly evident to everyone in the courtroom. Jt.Hr.Ex.5. Hr.T.p. 128-29. Even the hearing court acknowledged that “the outline of a square object can be observed on his back and under his shirt,” and this object would have been visible during the time Leonard walked to and from the witness stand. T.d. 420—6-8.

The jury was no more than 14-to-17 feet away from the area where Leonard walked to give his unsworn statement. Ct.Hr.Ex. B. This was a critical moment in the sentencing phase of Leonard's trial, and the only time the jury heard the Leonard speak. After walking to the witness stand with the stun belt obvious under his shirt, Leonard was unable to complete his unsworn statement. Hr.T.p. 66.

Not only was the stun belt visible on the Leonard's back during at least one period of the trial, the remote transmitter used to activate the belt was also visible at points during the trial. If a deputy had to be relieved while he was holding the remote, it would be passed to another

deputy. Hr,T.p. 62, 103. Jeanne Hutcherson, seated in the courtroom within a few feet of the jury, was able to see the remote in a deputy's hand and was aware of it being passed from one deputy to another. Hr,T.p. 130-31.

The visibility of Leonard's stun belt, along with the noticeable passing of the remote activator among the deputies, created an unacceptable risk of improperly influencing the jury during Leonard's trial and sentencing. "[I]f the stun belt protrudes from the defendant's back to a noticeable degree, it is at least possible that it may be viewed by a jury. If seen, the belt 'may be even more prejudicial than handcuffs or leg irons because it implies that unique force is necessary to control the defendant.'" United States v. Durham (C.A.11, 2002), 287 F.3d 1297, 1305 (quoting from State v. Flieger (1998), 91 Wash. App. 236, 955 P.2d 872, 874).

Once again, the state failed to prove beyond a reasonable doubt that this obvious wearing of the stun belt, as Leonard walked to the witness stand to make his unsworn statement, did not contribute to the jury's death sentence. This Court recognized in its post-conviction decision that trial counsel had presented a "mitigation theory that proposed that Leonard was a good person who had acted out of character when he had killed Dawn Flick." Leonard I, 157 Ohio App.3d at ¶ 51. The state has failed to prove that the wearing of the stun belt in front of the jury did not contradict this theory by making it appear that unique force was required to control Leonard in the courtroom.

The hearing court abused its discretion when it ignored all of the above evidence, dismissed the prejudice that arose from Leonard being forced to wear the stun belt, and consequently disregarded the fact that the state had failed to meet its burden. Competent and credible evidence was presented regarding the adverse impact the stun belt had on Leonard's demeanor and behavior throughout his trial, and its visibility during at least one critical moment.

during the trial. To dismiss the prejudicial effect that would arise from the jury's awareness of Leonard wearing the stun belt or, at the very least, their perception of Leonard's inhibited and stoic demeanor when he was wearing the stun belt, was an abuse of discretion.

### **III. PLACING A STUN BELT ON A DEFENDANT WITHOUT COMPELLING NEED INFRINGES UPON HIS RIGHT TO COUNSEL AND HIS ABILITY TO ASSIST IN HIS DEFENSE.**

In Leonard I, the First District Court of Appeals found that:

[P]lacing a stun belt on a defendant who is all too aware of the possible consequences of the belt's activation presents ' far more substantial risk of interfering with [his] Sixth Amendment right to confer with counsel than do leg shackles . . . ”

Id. at ¶ 46. That is precisely what happened to Leonard. As Deputy James Moore and the stun belt training manual (Jt.Hr.Ex. 3) explained, most people fear electricity. Hr.T.p.65. The threat of electric shock was particularly significant for Leonard. His previous work experience in construction and with livestock had caused him to suffer the immobilizing pain of electric shock. T.p. 146-47. Consequently, Leonard did exactly as he was directed to do by the deputies and the Notification Form – no sudden movements, hands visible, no overt actions against a person. Jt.Hr.Ex. 1.

The behavior modification effect of the stun belt severely impaired Leonard's ability to adequately communicate with his attorneys. He could turn only his head to speak, but he was prevented from getting counsel's attention by physical contact or gestures. Had Leonard not had the stun belt on, periodically he would have gotten trial counsel's attention by motioning to one of them while they were at the podium or he would have touched their arms to get their attention in the midst of proceedings. Hr.T.p. 144. This is consistent with Assistant Prosecuting Attorney Jerome Kunkel's description that Leonard talked to defense attorney Michael Strong "like he

didn't want to be interrupting [defense co-counsel William] Welsh.” Hr.T.p. 217. Leonard could talk to Strong just as he described – by moving only his head. Leonard could not personally explain significant information to his attorney in a timely manner, a critical need during a trial where his life was hanging in the balance.

Both Dr. Robert Smith and Fr. David DuPlantier have observed other defendants in court and during capital trials. Both explained that Leonard's manner of interaction with his attorneys was different from how criminal defendants without a stun belt confer with their attorneys in the courtroom. Hr.T.p. 207; Depo.T.p. 13.

Leonard's behavior was inconsistent not only with how other defendants would behave with their attorneys, but also with his ordinary manner of communicating with others. Leonard's sister, Jeanne Hutcherson, and Fr. DuPlantier explained that the manner in which Petitioner sat in the courtroom was completely different from how he normally acted when he wasn't wearing the stun belt. Even Dr. Smith commented at the hearing that Leonard was much more animated and interactive with his attorneys during the evidentiary hearing than he was on the news footage in Joint Exhibit 5, shot during his capital trial and sentencing.

“A defendant is likely to concentrate on doing everything he can to prevent the belt from being activated, and is thus less likely to participate fully in his defense at trial.” United States v. Durham (C.A.11, 2002), 287 F.3d 1297, 1306. Leonard's Sixth Amendment rights were violated when he was required to wear the stun belt during his capital trial. His fear of electricity and the intimidation factor of the stun belt caused him to sit stoically in court, restrained from his normal animated, relaxed way of interacting with others. This forced modification of his characteristic and natural behavior prevented him from adequately conferring with his attorneys and assisting in his defense at trial and the penalty phase.

In order to reject the Sixth Amendment aspect of Leonard's stun-belt claim, the hearing court relied on the faulty and incredible testimony regarding Leonard's interactions with his counsel offered by Assistant Prosecutor Kunkel, Bailiff Vincent Wallace, and Court Reporter Deborah Wallace. T.d.420—9. The court ignored the fact that all of these individuals were involved in their regular duties during the trial. Kunkel spent half of his time in the courtroom questioning witnesses from the podium. Hr.T.p. 223-24. Bailiff Wallace was Judge Schweikert's administrative aid as well as his bailiff. In that capacity, he "took care of anything that needed to be taken care of" for the Judge. Hr.T.p. 241-42.

Despite giving significant weight to the testimony of those who had duties to perform throughout the trial, the hearing court ignored the testimony of Fr. David DuPlantier and Jeanne Hutcherson, who both focused their attention on Leonard. They offered credible and competent testimony regarding the difference in Leonard's demeanor with trial counsel while he wore the stun belt and how he normally related to people when he was not wearing the belt. Hr.T.p. 126-28, Depo.T.p. 12-13.

Along with the observational evidence offered, Leonard himself testified as to his discomfort and inhibition while he was wearing the stun belt, and the adverse impact it had on his ability to participate in his defense and interact with his attorneys. Hr.T.p. 142-44. The hearing court erred when it determined that "Reason and common sense dictate that had Leonard's ability to confer with counsel or to assist in his defense been affected, Leonard or his trial attorneys would have brought it the attention of the trial court." T.d. 420—11. No competent or credible evidence exists to support this finding. Leonard was under no legal obligation to complain about being uncomfortable while wearing the stun belt, although he did testify that he complained to his counsel, a point that was uncontested at the hearing. Trial

counsel's pre-trial motion opposing Leonard having to wear any restraints in front of the jury was sufficient to preserve this issue. The objection did not have to be made throughout the trial. Brady v. Stafford (1926), 115 Ohio St. 67, 74, 4 Ohio Law Abs. 339, 152 N.E. 188.

While conflicting evidence exists as to whether or not Leonard complained to the deputies, even if Leonard had complained, the evidence suggests that such a complaint would have fallen on deaf ears. One other Hamilton County criminal defendant who refused the stun belt was held down by numerous deputies and forced to wear it. Hr.T.p. 93. Judge Schweikert had already made it clear that he would defer the issue of restraints to the Sheriff's Office, abdicating his duty to protect Leonard's constitutional rights. Whether Leonard or his attorneys repeatedly complained about the stun belt, after the initial motion was made and denied, is irrelevant. Trial counsel's original motion requesting that Leonard not have to wear restraints in front of the jury was sufficient to preserve his rights under the Sixth Amendment. The hearing court erred when it failed to recognize this.

The California Supreme Court in People v. Mar, which was relied on by the First District in Leonard I, concluded:

The psychological effect of wearing a device that at any moment can be activated remotely by a law enforcement officer (intentionally or accidentally), and that will result in a severe electrical shock that promises to be both injurious and humiliating, may vary greatly depending upon the personality and attitude of the particular defendant, and in many instances may impair the defendant's ability to think clearly, concentrate on the testimony, communicate with counsel at trial, and maintain a positive demeanor before the jury.

Mar, 28 Cal. 4th at 1226.

Because of Petitioner's adverse experience with electric shock, he was extremely impaired as he sat in front of the jury. Leonard had read the notification form (Hr.Jt.Ex. 1) which described in detail the consequences of the stun belt activation. Hr.T.p. 140-41. Because

he feared that if he made the wrong move he would be shocked, he became “very conscious and aware of his movements” and tried to move as little as possible while wearing the belt. Hr.Tr. 142. The negative psychological effects described in Mar – impaired abilities to think clearly, concentrate on testimony, communicate with counsel, and maintain a positive demeanor – were realized in Leonard’s case when he was forced to wear the stun belt during his trial.

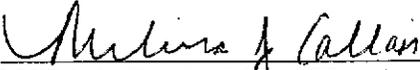
While the trial record may have been devoid of evidence of Leonard’s discomfort and inability to confer with counsel, Leonard created a record of the prejudicial impact of the stun belt with competent and credible evidence presented during his post-conviction hearing. An evidentiary hearing was ordered by this Court in order for Leonard to present this evidence of prejudice, and the trial court erred when it issued its findings without giving proper weight to the evidence presented by Leonard, and without applying the proper legal standards.

### CONCLUSION

This Court should accept jurisdiction because of the important constitutional concerns at issue in this case. Leonard seeks a new trial because his rights to a fair and impartial trial, due process, the presumption of innocence, and to counsel were denied when he was made to wear a stun belt throughout all courtroom proceedings in his capital case.

Respectfully submitted,

Office of the Ohio Public Defender

BY:   
MELISSA J. CALLAIS (0077833)

Assistant State Public Defender

8 E. Long Street, 11<sup>th</sup> Floor

Columbus, Ohio 43215

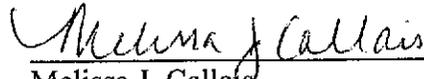
(614) 466-5394

Fax: (614) 644-0703

COUNSEL FOR PATRICK LEONARD

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing **LEONARD PATRICK L. LEONARD'S MEMORANDUM IN SUPPORT OF JURISDICTION** was sent via regular first class U.S. mail to the office of Ronald W. Springman Jr., Chief Assistant Prosecuting Attorney, 230 E. Ninth St., Suite 4000, Cincinnati, Ohio 45202 on this 14<sup>th</sup> day of February, 2008.



\_\_\_\_\_  
Melissa J. Callais  
Counsel for Leonard

# 271726

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No.
v.	:	On appeal from the Court of Appeals, First Appellate District, Hamilton County,
PATRICK L. LEONARD,	:	Case No. C-061025
Defendant-Appellant.	:	
	:	<b>This is a Capital Case.</b>

---

**APPENDIX TO APPELLANT PATRICK L. LEONARD'S  
MEMORANDUM IN SUPPORT OF JURISDICTION**

---

JOSEPH T. DETERS  
Hamilton County Prosecuting Attorney

Office of the Ohio Public Defender

RONALD W. SPRINGMAN, JR. (0041413P)  
Chief Assistant Prosecuting Attorney  
230 E. Ninth St., Suite 4000  
Cincinnati, Ohio 45202  
(513) 946-3052; Fax: (513) 946-3021

MELISSA J. CALLAIS (0077833)  
Assistant State Public Defender  
**Counsel of Record**

Office of the Ohio Public Defender  
8 E. Long Street, 11th Floor  
Columbus, Ohio 43215  
(614) 466-5394; Fax: (614) 644-0708

COUNSEL FOR APPELLEE

COUNSEL FOR LEONARD

dangerousness, and precluded him from proving in mitigation of the death sentence his ability to adjust to incarceration.

Judge Mark Schweikert, the Judge who presided over Leonard's trial, has retired. The Court has reviewed and considered the transcript of proceedings, the credibility of witnesses, exhibits admitted, the deposition of Father DuPlantier, the briefs and arguments of counsel, the law of the State of Ohio, and being fully apprised in the premises makes the followings findings of fact and conclusions of law.

#### Findings of Fact and Conclusions of Law

The various issues presented by Leonard in his first claim for relief concern the propriety of the trial court's requirement that he wear a stun belt. In an attempt to narrow each issue presented, there is some overlapping of facts and case law. The Court will address each issue separately.

Leonard's trial attorneys filed a pretrial "Motion to Permit Accused to Appear at all Proceedings without Restraints." Other than the following exchange between counsel and the Court, there is no further mention of restraints in the trial record:

"THE COURT: Number 25, motion to permit accused to appear at all proceedings without restraints.

MR. WELSH: Submit that, Your Honor. I would submit that based upon your previous rulings that I think --

THE COURT: Once again, we are going to follow the rules and regulations that are outlined by the Hamilton County Sheriff. To the extent that you have some objection to what -- how they are handling your client, raise that with me at that time and I'll consider what is appropriate.

MR. WELSH: Only thing I would bring up, and I think it's during the trial, that during -- in the presence of the jury we certainly would not like any restraints whatsoever and they don't do that anyway so --

THE COURT: Once again, depending on what the Sheriff suggests, I'm going to follow his directions for the purposes of security. If you have a problem with how the Sheriff's deputies are handling your client, you need to raise that at that time. Tp. 39-40

Judge Schweikert expressed his concern for courtroom security while ruling on another pretrial motion, "Security is a significant issue to the Court, both for the protection of the Defendant and the other persons involved in this case." Tp. 37

React Belt aka "Stun Belt"

Leonard was fitted with a Remote Electronic Activated Control Technology Device ("React Belt"), which is commonly referred to as a "stun belt." Each of the Hamilton County Sheriff's deputies assigned to courtroom security had been trained and certified in the use of the React Belt. There were two or three deputies assigned to courtroom security during Leonard's trial. Leonard was notified of the behaviors that would result in the activation of the React Belt and the results which could follow. The Notification Form (Joint Exhibit One) read as follows:

YOU ARE HEREBY ADVISED THAT YOU ARE BEING REQUIRED TO WEAR AN ELECTRONIC IMMOBILIZATION BELT.

This belt contains 50,000 volts of electricity. By means of a remote transmitter, an attending officer has the ability to activate the stun package attached to the belt, thereby causing the following results to take place:

1. Immobilization causing you to fall to the ground
2. Possibility of self-defecation
3. Possibility of self-urination

FAILURE TO COMPLY WITH OFFICER DIRECTIONS COULD LEAD TO ANY OF THE ABOVE.

The belt could be activated under the following actions on your behalf and notification is hereby made:

- A. Any outburst or quick movement
  - B. Any hostile movement
  - C. Any tampering with the belt
  - D. Failure to comply with verbal command for movement of your person
  - E. Any attempt to escape custody
  - F. Any loss of vision of your hands by the custodial officer
  - G. Any overt act against any person within a fifty (50) foot vicinity
- Leonard read and signed the notification form. (Joint Exhibit One)

The React Belt is fitted around one's waist with an electric pack that is placed on the back at the base of the spine. The receiver component of the React Belt has dimensions of five inches wide by five and one quarter inches long by two inches deep. The receiver is placed in a pouch measuring approximately six inches by six inches with a Velcro flap folding over the receiver. The React Belt was placed under Leonard's clothing to prevent the jury from seeing that he was restrained.

The React Belt is designed to be activated remotely via a hand held transmitter in the possession of a deputy stationed at the main entrance to the courtroom. The dimensions of the hand-held transmitter are two and one quarter inches wide by three and three quarters inches long by one inch deep. When activated, the React Belt emits a one-second tone to warn the defendant to stop the undesired behavior. Failure to comply to the warning results in the administration of an eight second electric charge. The React Belt is generally effective at stopping the undesired behavior.

Each individual reacts differently to the React Belt's activation. It was described as "a thousand tiny bee stings" by Lt. John Adkins. As part of his training and certification, Lt. Adkins volunteered to have the React Belt activated while he was wearing it. Lt. Adkins is of the opinion that the React Belt is a safe and effective method of restraining a Defendant in a courtroom setting. The React Belt was not activated during Leonard's trial.

#### Courtroom Security

Judge Schweikert expressed concern for the safety of Leonard as well as others involved in this case. The Court Services Division of the Hamilton County Sheriff's Department is specifically trained in maintaining courtroom security. Jerome Kunkel, an experienced prosecutor, who had personally prosecuted more than twenty-five murder

trials, testified that Leonard's trial courtroom was "probably the most emotional and tension-filled courtroom that I have ever been in." Kunkel further testified that during the trial Leonard would turn and look at the decedent's family members. The courtroom was described as small, with counsel tables situated close to each other. During the three-week trial, the courtroom was filled with spectators. Because the room was filled to capacity, spectators were seated closely to each other.

Representatives of the Hamilton County Sheriff's Department expressed their security concerns as well. Leonard's trial was considered to be a high-risk trial, due to (1) the nature of the charges against him; (2) the high level of emotion in the courtroom which emanated from Leonard's family members, the surviving victims of Leonard's crimes, and the decedent's family members; (3) the small, crowded courtroom setting; and (4) the responsibility of protecting Leonard, spectators, lawyers and court personnel.

In a criminal trial, the decision to impose restraints is committed to the sound discretion of the trial court. *Illinois v. Allen* (1970), 397 U.S. 337; *State v. Richey* (1992), 64 Ohio St.3d. 353. The use of restraints is permitted only where justified by an essential state interest specific to each trial. *Holbrook v. Flynn* (1986), 475 U.S. 560. Although Judge Schweikert did not hold a hearing regarding Leonard's wearing the React Belt, his order was proper based on the foregoing factors.

Courtroom security is a consideration in all criminal proceedings, due to the unpredictability of human nature and emotions surrounding criminal proceedings, the nature of the charges, the physical setting of the trial, and the responsibility for the protection of all involved. That was particularly true in this case.

Accordingly, had the Court conducted a hearing prior to requiring Leonard to wear the React Belt, there were sufficient reasons, as set forth above, supporting the

Court's decision requiring Leonard to wear the React Belt. The Court's decision was in furtherance of the essential state interest of maintaining courtroom security.

The allegation that the presence of two or three sheriff's deputies assigned as courtroom security was a show of overwhelming force is unsupported by the law or facts, given the conditions existing in the courtroom. The United States Supreme Court held in *Holbrook v. Flynn*, supra:

"[...] the conspicuous, or at least noticeable, presence of guards in a courtroom during trial is not the sort of inherently prejudicial practice that should be permitted only where justified by an essential state interest. Such presence need not be interpreted as a sign that the defendant is particularly dangerous or culpable. Jurors may just as easily believe that the guards are there to prevent outside disruptions or eruptions of violence in the courtroom. Reason, principle, and human experience counsel against a presumption that any use of identifiable guards in a courtroom is inherently prejudicial....[T]he troopers' presence was intimately related to the State's legitimate interest in maintaining such custody, and thus did not offend the Equal Protection Clause."

#### Restraint by React Belt While the Jury was Present in the Courtroom

Leonard's sister, Jean Hutchenson, testified that she had noticed "a big bulky thing under the back of his (Leonard's) shirt" when he was escorted in and out of the courtroom. She subsequently found out that it was a React Belt. There is nothing in her testimony to indicate how she found out it was a React Belt. Hutchenson also noticed the belt while Leonard was seated at counsel table and when he approached the witness stand to make his unsworn statement to the jury during the penalty phase of the trial.

Joint Exhibit Five is a compilation of pooled television scenes from the penalty phase of Leonard's trial. As Leonard walked to the witness box to read his unsworn statement to the jury, the outline of a square object can be observed on his back and under his shirt. Watching the television scenes, the bulge is not identifiable as a stun belt. There is nothing to indicate what the bulge was. It took no more than six (6) seconds for

Leonard to walk from counsel table to the witness chair. Allowing the same amount of time for Leonard to walk back to his seat, the Jury may have seen the bulge beneath Leonard's shirt for approximately twelve (12) seconds.

The remaining witnesses called did not observe the React Belt being worn by Leonard. Hamilton County Sheriff's Deputy Donald Maher testified that neither the React Belt nor its outline had been visible in the courtroom. Deputy Maher's observations occurred while Defendant was seated at counsel table. Deputy Robert Weber testified that Leonard had worn a baggy shirt that concealed the React Belt. Father DuPlantier attended Leonard's trial and was unaware that Leonard was wearing a react belt. Prosecutor Jerome Kunkel, Bailiff Vince Wallace, and Court Reporter Debbie Wallace testified that they were aware of Leonard's wearing the React Belt throughout the trial, but it was not visible to them.

Significantly, no evidence was presented that would indicate that any trial jurors had observed the React Belt or had known that Leonard wore it. The React Belt was worn under Leonard's clothing, thus preserving the physical indicia of innocence. There was absolutely no testimony from jurors indicating they either observed or were aware that Leonard was wearing the React Belt. Moreover, there is no evidence that the belt itself was ever exposed to the jury.

The fact that the React Belt was worn under Leonard's clothing is significant. In *Deck v. Missouri* (2005), 544 U.S. 622, the United States Supreme Court reversed a conviction for aggravated murder, because the defendant had appeared in court during the trial's penalty phase, shackled with handcuffs, a belly chain and leg irons, all of which were visible to the jury. The Court reasoned that visible shackling undermined the presumption of innocence, could affect the accused's ability to communicate with

defense counsel, and diminished the decorum of judicial proceedings. The Supreme Court noted that during the guilt phase, Deck was required to wear leg braces that were not visible to the jury, distinguishing between restraints that are visible to the jury.

At the time that Leonard approached the witness stand to read his unsworn statement, the pooled television scenes (Joint Exhibit Five) reveal the outline of a square object on his back. That outline is apparently the React Belt. There is no evidence to suggest that any of the jurors had seen the square object under Leonard's clothing, and if they had, there is no evidence any juror knew that it was the React Belt as opposed to a medical device, a physical deformity, or any number of other objects. There is nothing to indicate the use of the React Belt infringed upon Leonard's presumption of innocence in that there is absolutely no evidence the jury was aware he was wearing a React Belt. Accordingly, the jury's perception of Leonard would not have been affected. It would be pure speculation for this Court to find otherwise.

This finding is dispositive of Leonard's claim that the stun belt stripped him of the physical indicia of innocence, created a risk that the jury might consider as a sentencing factor his future dangerousness, and precluded him from proving in mitigation of the death sentence his ability to adjust to incarceration.

#### Leonard's Ability to Confer with Counsel and Assist in his Defense

Leonard argues that his Sixth Amendment right to confer with counsel and assist in his defense was infringed as a result of being required to wear the React Belt during all phases of his trial.

Leonard testified that as a consequence of his being required to wear the React Belt, he kept his movements to a minimum so as not to cause problems. Concerned about

the activation of the React Belt, he believes that had he not been wearing it, he would have interacted more freely with his attorneys.

Leonard stated that the React Belt was uncomfortable and that he had mentioned it to his attorneys. Leonard stated his attorneys did not bring it to the attention of the trial court. Leonard admitted that Deputy Weber advised him that if the React Belt was uncomfortable he would be willing to adjust it. Despite the alleged discomfort of the React Belt and his concerns about its activation, Leonard was able to read his unsworn statement to the jury during the mitigation phase of his trial.

Jerome Kunkel testified that he observed Leonard constantly consulting with his attorneys during trial.

The courtroom Bailiff, Vincent Wallace, observed Leonard writing notes and leaning over to whisper to his attorneys. He did not observe Leonard having any difficulty communicating or interacting with counsel during the trial.

The Court Reporter, Deborah Wallace, stated that she did not see Leonard having any difficulty consulting with his attorneys during the trial.

Leonard's testimony is belied by the trial record and his actions as depicted by the pooled television scenes (Joint Exhibit Five). Those scenes depict Leonard frequently conferring with his attorneys. At all times, either one or both of Leonard's attorneys were at his side. Additionally, Leonard showed no difficulty in taking the witness stand to read his unsworn statement to the jury.

Leonard contends that he advised his two attorneys and the sheriff's deputies of his discomfort caused by the React Belt. The record does not support this contention. If so, neither of the attorneys brought it to the attention of the Court as directed by Judge Schweikert. In order to believe Leonard's assertion, one would have to find that his two

attorneys believed their role as defense counsel was limited to mere courtroom adornment. Moreover, by Leonard's own admission, the sheriff's deputy assigned to fit Leonard with the React Belt advised him that if the React Belt became uncomfortable it would be adjusted. The deputy testified that Leonard did not complain to him that the belt was uncomfortable. Leonard's testimony was not credible when viewed in light of the trial record and testimony of the other witnesses.

Dr. Robert Smith, a clinical psychologist, retained by the State Public Defenders Office, testified as to behavior modification experiments conducted by B.F. Skinner. The gist of Dr. Smith's testimony was that the React Belt may have affected Leonard's manner, appearance, and ability to confer with and assist his attorneys, due to his fear of the React Belt being activated.

After Leonard's conviction, Dr. Smith met with Leonard to discuss issues touching upon the React Belt. He also viewed the pooled television scenes (Joint Exhibit Five) before reaching his conclusions.

During cross-examination, Dr. Smith admitted Leonard could be viewed in a negative light by the jurors for reasons other than being restrained by the React Belt. The fact that he was on trial for capital murder could potentially cause jurors to view him negatively. Dr. Smith also stated that shame, the media filming and taking notes, feelings of humiliation, fear and apprehension could have contributed to the behavior described in his testimony.

At one point Dr. Smith admitted that the React Belt may even produce behavior which would cast Leonard in a more favorable light.

Dr. Smith's testimony was interesting in so much as it would provide for a lively dinnertime debate, however, it is not useful here. In light of the testimony of Dr. Smith,

this Court is not convinced that the React Belt affected Leonard's manner, appearance, or ability to confer with counsel and assist in his defense. Those characteristics could be attributable to any number of other factors described by Dr. Smith.

Neither of Leonard's trial attorneys testified during the Post-Conviction Petition hearing. Both were experienced trial attorneys and had been advised by Judge Schweikert to promptly advise him if they had "a problem with how the sheriff's deputies are handling your client." At no time did Leonard or his attorneys notify Judge Schweikert that Leonard experienced any problems with the belt. Moreover, there is nothing in the trial record reflecting Leonard's discomfort, inability to confer with counsel, or fear that the React Belt may be activated.

The First District Court of Appeals in reversing the trial court's dismissal of Leonard's Post-Conviction Petition found that "placing restraints on a criminal defendant during trial violates the Sixth Amendment if the restraints impede the defendant's ability to confer with counsel or to assist in his defense." *State v. Leonard*, supra.

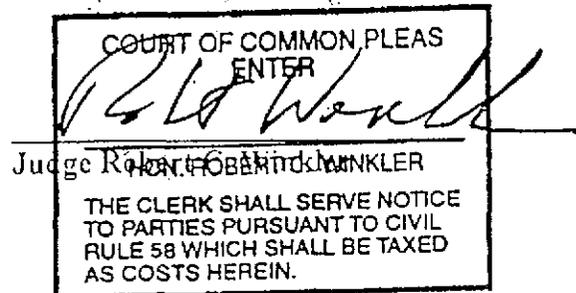
Leonard cites the case of *United States v. Durham* (2002), 287 F.3d 1297, for the proposition that a defendant's awareness of the possible consequences of the React Belts activation presents a substantial risk of interference with his right to confer with counsel and may affect his right to be present at trial and participate in his defense. In *People v. Mar* (2002), 28 Cal.4<sup>th</sup> 1201, the court held that the wearing of a stun belt may lead to an increase in anxiety that may materially impair and prejudicially affect a Defendant's ability to testify on his own behalf.

Reason and common sense dictate that had Leonard's ability to confer with counsel or to assist in his defense been affected, Leonard or his trial attorneys would have brought it to the attention of the trial court.

Therefore, based on the foregoing findings of fact, the trial record, and evidence produced, Leonard's claim that his Sixth Amendment Right to consult with his attorneys and assist in his defense was infringed as a result of wearing the React Belt is not supported.

In accord with the foregoing findings of fact and conclusions of law, the Court hereby DENIES Leonard's Post-Conviction Petition for Relief and Amended Post-Conviction Petition for Relief.

IT IS SO ORDERED.



Copies to:

Ron Springman, Esq.  
Phillip Cummings, Esq.  
Assistant Prosecuting Attorney  
Hamilton County Prosecutor's Office  
230 East Ninth Street  
Cincinnati, Ohio 45202

Susan M. Roche, Esq.  
Melissa J. Callais, Esq.  
Assistant State Public Defender  
Office of the Ohio Public Defender  
8 East Long Street, 11<sup>th</sup> Floor  
Columbus, Ohio 43215

**ENTERED**  
NOV 03 2006

COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO



STATE OF OHIO, : Case No. B-0005891  
Plaintiff-Respondent : Judge Robert C. Winkler  
-v- : FINDINGS OF FACT,  
PATRICK L. LEONARD, : CONCLUSIONS OF LAW, AND  
 : ENTRY DENYING  
Defendant-Petitioner : DEFENDANT'S POST-  
 : CONVICTION PETITION AND  
 : AMENDED POST-CONVICTION  
 : PETITION

This matter came before the Court on Defendant's Post-Conviction Petition and Amended Post-Conviction Petition filed pursuant to Ohio Revised Code Section 2953.21. Defendant seeks to vacate or set aside his convictions. Defendant's original Post-Conviction Petition was filed on July 30, 2002 and dismissed without hearing in accord with the Trial Court's Findings of Fact and Conclusions of Law filed on June 3, 2003.

An appeal ensued, wherein the First District Court of Appeals reversed the Trial Court's denial of Defendant's first ground for relief without a hearing. *State v. Leonard*, 157 Ohio App. 3d 653, 2004-Ohio-3323. In accord with the mandate of the First District Court of Appeals, a hearing on Defendant's Post-Conviction Petition and Amended Post-Conviction Petition was held May 16, 17, and 25, 2006.

In his first claim for relief, Defendant ("Leonard") contends that the trial court's order that he be restrained throughout his trial with a stun belt violated his rights to a fair trial, due process of law, presumption of innocence, and the effective assistance of counsel.

More specifically, Leonard claims that his restraint by the stun belt in the presence of the jury stripped him of the physical indicia of innocence, hampered his ability to assist his counsel, created a risk that the jury might consider as a sentencing factor his future

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-061025
	:	TRIAL NO. B-0005891
Respondent-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	
PATRICK L. LEONARD,	:	PRESENTED TO THE CLERK
	:	OF COURTS FOR FILING
Petitioner-Appellant.	:	
	:	DEC 31 2007
	:	COURT OF APPEALS

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: December 31, 2007

*Joseph T. Deters*, Hamilton County Prosecuting Attorney, and *Ronald W. Springman, Jr.*, Assistant Prosecuting Attorney, for Respondent-Appellee,

*David H. Bodiker*, Ohio Public Defender, and *Melissa J. Callais*, Assistant Public Defender, for Petitioner-Appellant.

**DINKELACKER, Judge.**

{¶1} Petitioner-appellant Patrick L. Leonard appeals the Hamilton County Common Pleas Court's judgment denying his petition for postconviction relief. We affirm the court's judgment.

{¶2} In 2001, Leonard was convicted of aggravated murder, felonious assault, attempted rape, and kidnapping, in connection with the shooting death of Dawn Flick and the wounding of Ryan Gries. For aggravated murder, the trial court sentenced Leonard to death. The Ohio Supreme Court affirmed his convictions.<sup>1</sup>

{¶3} While his appeal to the supreme court was pending, Leonard filed with the common pleas court a petition for postconviction relief under R.C. 2953.21 et seq. The common pleas court denied the petition, and Leonard appealed that decision to this court. We reversed the court's judgment in part and remanded for a hearing on Leonard's postconviction claim challenging the trial court's order that he be restrained throughout his trial by an electronic immobilization device known as a "stun belt."<sup>2</sup> Following the hearing, the common pleas court again denied the claim, and this appeal ensued.

{¶4} Leonard presents on appeal three assignments of error. The assignments of error, when reduced to their essence, challenge the balance struck by the common pleas court in weighing the evidence adduced at the hearing on his postconviction claim. This challenge is untenable.

*1. The Law Governing the Use of Restraints*

{¶5} Imposing restraints on a criminal defendant during his trial violates the Sixth Amendment to the United States Constitution if the restraints impede the

---

<sup>1</sup> See *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229.

<sup>2</sup> See *State v. Leonard*, 157 Ohio App.3d 653, 2004-Ohio-3323, 813 N.E.2d 50.

defendant's ability to confer with counsel or to assist in his defense. And the use of restraints infringes upon the presumption of innocence, secured by the fair-trial guarantee of the Fourteenth Amendment, if the restraints affect how the defendant is perceived by those charged with determining his guilt.<sup>3</sup>

{¶6} The decision to require a defendant to wear a stun belt at trial is, like the decision to require any other physical restraint, committed to the sound discretion of the trial court.<sup>4</sup> But the court's discretion is not unfettered.<sup>5</sup> The violent nature of the crimes for which a defendant is being tried will not alone justify the use of a stun belt.<sup>6</sup> A stun belt may be used only under "unusual circumstances"<sup>7</sup> and only as a "last resort."<sup>8</sup> And a court may order a stun belt only when the record shows that restraints are justified "by an essential state interest specific to each trial,"<sup>9</sup> and when, upon consideration of "the [defendant's] actions both inside and outside the courtroom, as well as his demeanor while court is in session," the court finds that the stun belt is necessary to advance that state interest.<sup>10</sup>

{¶7} A trial court, having been charged with the responsibility to determine the need for a stun belt, may not delegate that responsibility to law enforcement authorities.<sup>11</sup> A hearing on the need for a stun belt, while not mandatory, is the better

---

<sup>3</sup> See *Illinois v. Allen* (1970), 397 U.S. 337, 344, 90 S.Ct. 1057; *Coffin v. United States* (1895), 156 U.S. 432, 453, 15 S.Ct. 394; *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, at ¶79.

<sup>4</sup> See *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, at ¶104, citing *State v. Richey*, 64 Ohio St.3d 353, 358, 1992-Ohio-44, 595 N.E.2d 915.

<sup>5</sup> See *State v. Adams*, 103 Ohio St.3d 508, at ¶104-110.

<sup>6</sup> See *State v. Leonard*, 157 Ohio App.3d 653, at ¶50.

<sup>7</sup> *State v. Adams*, 103 Ohio St.3d 508, at ¶104, quoting *State v. Kidder* (1987), 32 Ohio St.3d 279, 285, 513 N.E.2d 311.

<sup>8</sup> See *State v. Leonard*, 157 Ohio App.3d 653, at ¶45, quoting *Illinois v. Allen*, 397 U.S. at 344.

<sup>9</sup> See *id.* at ¶45, citing *Holbrook v. Flynn* (1986), 475 U.S. 560, 568-569, 106 S.Ct. 1340; accord *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, at ¶242, citing *State v. Adams*, 103 Ohio St.3d 508, at ¶106-110.

<sup>10</sup> *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, at ¶79-80; accord *State v. Adams*, 103 Ohio St.3d 508, at ¶104.

<sup>11</sup> See *State v. Adams*, 103 Ohio St.3d 508, at ¶104.

practice because it serves to facilitate meaningful appellate review.<sup>12</sup> But with or without a hearing, a trial court's exercise of its discretion to use a stun belt will not be disturbed on appeal if the record discloses "facts and circumstances surrounding [the] defendant [that] illustrate a compelling need to impose exceptional security procedures \* \* \*."<sup>13</sup>

## **II. Leonard's Stun-Belt Claim**

{¶8} Before Leonard's trial, the defense had filed a motion requesting that he be permitted to appear at trial without restraints. The trial court did not conduct a hearing on the motion. It instead summarily rejected the request, expressly deferring to the policy of the Court Services Division of the Hamilton County Sheriff's Office that all death-eligible defendants be restrained by a stun belt. Thus, the trial record did not demonstrate an essential state interest specific to Leonard's trial that could be said to have justified requiring that he be so restrained.<sup>14</sup>

{¶9} At the hearing on our remand of Leonard's postconviction stun-belt claim, the state sought to remedy this deficiency. Leonard testified at the hearing that he had had no prior criminal record; that he had turned himself into the police; that he had displayed no violent tendencies while in the custody of sheriff's deputies or during those proceedings before the trial court where he had appeared without a stun belt; that the stun belt had caused both physical and psychological discomfort; that this discomfort had restricted his communications with his counsel; and that he had complained of his discomfort to his counsel, to the deputies who had outfitted him with the belt, and to friends who had visited him in jail.

{¶10} Leonard's sister testified that the six-inch-square stun-belt receiver strapped to Leonard's midsection had been apparent to all observers in the courtroom

---

<sup>12</sup> See *State v. Leonard*, 157 Ohio App.3d 653, at ¶49, citing *State v. Franklin*, 97 Ohio St.3d 1, at ¶82.

<sup>13</sup> See *id.*, citing *State v. Franklin*, 97 Ohio St.3d 1, at ¶82.

<sup>14</sup> See *State v. Leonard*, 157 Ohio App.3d 653, at ¶50.

because of his uncharacteristically stiff and stoical bearing at trial, and because of the open manner in which the sheriff's deputies had handled the stun belt's remote control. In his videotaped deposition, a Catholic priest who had counseled Leonard, and who had attended and testified at trial, seconded Leonard's sister's observations concerning Leonard's demeanor at trial, but confessed that he had not been aware of the stun belt.

{¶11} A psychologist provided expert opinion testimony that Leonard's fear that the stun belt would be activated, exacerbated by his prior experiences with electrical shock, might have modified his behavior, his appearance, and his interaction with his counsel. And news footage from the penalty phase of the trial, depicting Leonard's walk to the witness stand to give his unsworn statement, showed, for a few seconds, a bulge on his back.

{¶12} The state countered this evidence with testimony by court personnel, including sheriff's deputies who had provided security for Leonard's trial, an assistant prosecuting attorney, the court's bailiff, and the court reporter. The deputies testified that, at the time of Leonard's trial, the supervisor of the sheriff's office's Court Services Division had determined the extent and type of courtroom security needed and had, as a matter of policy, used a stun belt in all capital cases. Following this court's 2004 decision in Leonard's appeal from the denial of his postconviction petition, the sheriff's office changed its procedure to require submission of the matter of restraints to the trial court at a hearing.

{¶13} The state insisted that, regardless of this procedural lapse, the circumstances surrounding Leonard's trial had justified requiring him to wear a stun belt. The deputies testified that the violent nature of Leonard's crimes and the possibility of a death sentence made Leonard's trial "high-risk." They asserted that the presence in the small courtroom of a large number of supporters both for Leonard and

for the murder victim, along with special considerations like the victim's father's suicide, made for a "tense" and "emotional" courtroom.

{¶14} The state's witnesses asserted that the stun belt had not been visible under Leonard's shirt, and that the defense table had concealed it when he was seated. They stated that the deputy responsible for the remote control had been stationed at the back of the courtroom and had concealed the remote either by cupping it in his hand or by clipping it to his belt. They asserted that they had neither observed nor heard Leonard complain about any discomfort caused by the stun belt, and that they had not perceived Leonard to be limited by the stun belt in his communications with his counsel.

{¶15} Following the hearing, the common pleas court denied Leonard's postconviction claim upon its conclusion that the circumstances of Leonard's trial showed that the trial court had been justified in ordering Leonard's restraint with the stun belt. Specifically, the court concluded that the stun belt furthered the state's essential interest in maintaining the security of the crowded, "emotional," and "tension-filled" courtroom, during a trial that was, for security purposes, "high risk." The court also concluded that, although the stun belt had been visible to Leonard's sister and on the news footage, Leonard had failed to prove that he had been stripped of the physical indicia of innocence, or that his restraint with the stun belt had factored into the jury's determination of his future dangerousness or ability to adjust to incarceration, because nothing suggested that the stun belt had been visible to the jurors or that the stun belt had been identifiable as such. The court also found less than credible, in light of the testimony of other witnesses, Leonard's statements concerning his discomfort with the stun belt and the limits the stun belt had imposed on his interaction with his counsel. And the court found less than compelling, in light of its contradictions, the psychologist's testimony concerning the negative impact of the stun belt on Leonard's manner,

appearance, or ability to interact with counsel. Thus, the court concluded that Leonard had failed to prove that the order that he wear the stun belt infringed on his right to confer with counsel and to assist in his defense.

{¶16} Our review of Leonard’s challenge on appeal, to the balance struck by the common pleas court in weighing the evidence adduced at the hearing on his postconviction claim, entails an inquiry into whether the court’s findings were “supported by competent and credible evidence.”<sup>15</sup> The record of the hearing provides competent and credible evidence to support the common pleas court’s conclusion that the circumstances surrounding Leonard’s trial demonstrated a compelling need for exceptional security in the form of a stun belt. We, therefore, hold that the common pleas court properly denied Leonard’s claim. Accordingly, we overrule the assignments of error and affirm the judgment of the common pleas court.

Judgment affirmed.

SUNDERMANN, J., concurs.

PAINTER, P.J., dissents.

PAINTER, P.J., dissenting.

{¶17} The constitutional right to appear unshackled was Leonard’s. To deny that right, there must have been factors *caused by him* to warrant the restraint. As the majority states, it is “the [defendant’s] actions both inside and outside the courtroom, as well as his demeanor while court is in session,” that warrants restraint.<sup>16</sup>

{¶18} Here there was nothing: Leonard had no criminal record, he turned himself in, and he did not “act up” in any manner. The cited factors—a small and crowded courtroom, the nature of the charges, and the possibility of a death sentence—

---

<sup>15</sup> See *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, at ¶58.

<sup>16</sup> See *State v. Franklin*, 97 Ohio St.3d 1, at ¶79-80; accord *State v. Adams*, 103 Ohio St.3d at ¶104.

in addition to being present in any death-penalty trial, were not specific evidence of Leonard's tendency to disrupt the proceedings. And the nature of the charges alone can never justify restraint.<sup>17</sup>

{¶19} The problem in this case is that the original trial judge abdicated his responsibility to control the courtroom by allowing the sheriff to follow a "policy" of always restraining death-eligible defendants. If the law had been consulted then, and a hearing held, it would have been obvious that there was no necessity for the restraint. And we would not be at this juncture. But we are, and the Constitution applies now as it did when this court reversed the case before. We should reverse and grant a new trial.

*Please Note:*

The court has recorded its own entry on the date of the release of this decision.

---

<sup>17</sup> *State v. Leonard*, 157 Ohio App.3d 653, at ¶150; see *Florida v. Miller* (Fla.App.2003), 852 So.2d 904, 906.