

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Appellee, : CASE NO. 2007-1854
v. : Court of Appeals Case No. 98 AP 0005
: Trial Court Case No. 94 CR 0042
KEVIN KEITH, : REGULAR CALENDAR
Appellant. : This is a capital case.

REPLY BRIEF OF APPELLANT KEVIN KEITH

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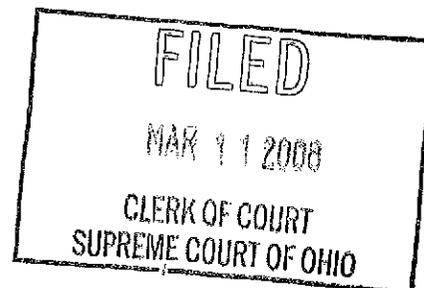


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PREFACE

Kevin Keith's Reply Brief addresses portions of the State's arguments contained in its Brief filed on February 25, 2008. By not responding to a specific argument, Keith does not concede that the State's argument is meritorious. Rather, Keith stands on the arguments set forth in his Merit Brief filed on January 25, 2008.

REPLY TO STATE'S RESPONSE

As an initial matter, Keith must clear up a few of the inaccuracies currently before this Court. The State asserts that the propositions of law submitted in Keith's Application for Reopening "have already been reviewed by state and federal courts" and that Keith is "repackag[ing] previously raised issues." Appellee's Merit Brief, p. 18. This is simply untrue, and in addition to the affidavit of Rachel Troutman, a review of the appellate record can confirm the inaccuracy of the State's assertion.

The State also argued that "Keith claimed in his brief to the Third District Court of Appeals that he was unskilled at law and therefore had no understanding that his three appellate counsel were all ineffective." *Id.* at 21. Keith never made this argument to the Third District Court of Appeals. Keith provided the same showing of good cause to the lower court as he did to this Court, never once relying on his lack of legal training. A review of the Application for Reopening he submitted to the Third District Court of Appeals can confirm the inaccuracy of the State's argument.

Purporting to correct what Keith included in his brief, the State wrote that "Keith incorrectly states in his brief that no *mitigation evidence was presented.*" *Id.* at 16, fn. 5 (emphasis added). Instead, Keith wrote that "counsel presented no mitigating evidence, *but for a*

presentencing report.” Brief of Appellant, p. 15 (emphasis added). Thus, the State’s characterization is erroneous.

Keith recognizes, however, that his Statement of Facts also failed to accurately convey what was presented in mitigation. To correct his own misstatement, Keith now acknowledges that a psychological report was also submitted to the jury. T.p. 885. “District Five” conducted Keith’s psychological evaluation after the trial judge suggested them (though there is no further explanation in the transcript about what is “District Five”), and Keith’s trial counsel offered no objection or suggestions for alternative psychologists. *Id.*

Keith’s appellate counsel were ineffective under Strickland v. Washington, regardless of the number of issues they did raise.

The State trumpets the amount of issues that Keith’s direct appeal counsel did raise, seemingly to imply that the few issues Keith now raises are meager by comparison. *See* Appellee’s Merit Brief, p. 20. But the issue is quality, not quantity. Thus, it is unimportant that Keith only adds “three additional claims” of trial counsel’s ineffectiveness, when former counsel “raised the issue of ineffective assistance of counsel on no less than seven aspects of Keith’s trial counsel’s performance.” *Id.*

Keith’s appellate counsel could not have strategically winnowed out the issues Keith has raised in his application for reopening. In capital cases, appellate counsel should approach the process of winnowing out claims with extreme caution. *See Greer v. Mitchell*, 264 F.3d 663, 679 (6th Cir. 2001) (“While appellate attorneys should always attempt to winnow out their best issues for presentation to the courts, in a capital case, which by definition involves the ultimate societal sanction, appellate attorneys must err on the side of inclusion, particularly when, as here, there appear to exist a significant number of facts to support the claim”). *See also Jamison v. Collins*, 100 F. Supp. 2d 647, 740-41 (S.D. Ohio 2000) *aff’d*, *Jamison v. Collins*, 291 F.3d 380

(6th Cir. 2002) (“[W]e believe that any ‘winnowing’ or narrowing of issues must be done very cautiously when a person’s life is at stake”). It was unreasonable for Keith’s direct appeal attorneys to exclude the issues now presented, and their “strategy” could not have been to prejudice their client.

Proposition of Law I

A defendant is denied his due process rights and right to a fair trial when the State disseminates false information and no efforts were taken to insure that an impartial jury was seated.

The case law cited by the State in response to Keith’s argument is directly applicable, and it is precisely the reason why Keith deserves relief on this issue. See Appellee’s Merit Brief, pp. 22-24. For example, unlike the court in State v. Maurer, 15 Ohio St. 3d 239 (1984), Keith’s court did *not* rule only after “several days of voir dire and lengthy argument on the change-of-venue motion.” Id. at 251. And despite the mandate of State v. Bayless, 48 Ohio St. 2d 73 (1976), Keith’s case did *not* involve a “careful and searching voir dire” in order to determine “whether prejudicial pretrial publicity has prevented obtaining a fair and impartial jury from the locality.” Id. at 98.

The trial court acknowledged the extensive publicity surrounding Keith’s case, it knew about the falsities in the Mansfield News Journal, and yet it did nothing to ensure a fair and impartial jury for Keith. Cf. State v. Jackson, 107 Ohio St. 3d 53, 64 (2005) (trial court was on notice about potential jurors’ biases, so it was required to conduct an adequate inquiry.) As the judge told the jury, “it would be hard to live in this area and not read something about this case and the events that happened on February 13.” T.p. 23. See also T.p. 19 (“[T]his case has received publicity in the past and it will probably receive additional media attention while in progress.”)

The State urges this Court to disregard the police misconduct and the effect on Keith's jury, in part because "the trial court specifically advised the jurors of the burden of proof, the presumption of innocense [sic], and to approach the case with an open mind." Appellee's Merit Brief, p. 22. The fact that the trial court provided the jury with instructions regarding the burden of proof has nothing to do with the errors described in this proposition of law.

The judge's two questions to only some of the jurors were insufficient for ferreting out the jurors' views. See Jackson, 107 Ohio St. 3d at 64 (citing Morgan v. Illinois 504 U.S. 719, 734-735 (1992)) ("Questions on voir dire must be sufficient to identify prospective jurors who hold views that would prevent or substantially impair them from performing the duties required of jurors"). The potential for juror bias and confusion was all the more prevalent in light of the fact that it was the police chief himself who was the source of the false information in the Mansfield News Journal article. Id. at 12, 42-48. "The greater the probability of bias, the more searching the inquiry needed to make reasonably sure that an unbiased jury is impaneled." Id. (internal citations omitted.)

The State is wrong – there should be no deference afforded to the trial judge's opinion on the fairness or biases of Keith's jurors, since he clearly abused his discretion. State v. Cornwell, 86 Ohio St. 3d 560, 565 (1999). The judge only asked two questions: who had read the article at issue, and whether those who read it could put it out of their minds. T.p. 20-21. He never asked if any of the potential jurors had heard about the article's contents, though not read it, despite the fact that this possibility was brought to his attention by a juror. Id. at 22. He failed to follow-up when a juror gave the qualified answer that he "thought" he could put it out of his mind. Id. at 22. He never even asked late-comer Kenneth Garrison, who ultimately sat on Keith's jury,

whether he had seen the article. Garrison had even stated to the court that he “knew of” Keith, but the judge never asked him how he knew Keith. (Id. at 52).

Defense counsel never asked the jurors about any of the pretrial publicity. Even though Garrison acknowledged to the court that he had heard of Keith, defense counsel did not bother to ask him a single question; he simply passed for cause. (Id. at 181.) Astonishingly, counsel felt no need to question Garrison *even though he had no jury questionnaire for Garrison* at that time. (Id. at 179).

We can never know the extent of the partiality of Keith’s jurors. The trial judge failed to adhere to his duty to sufficiently question them. See State v. Williams, 79 Ohio St. 3d 1, 22 (1997) (dissent) (“[T]he trial judge did not discharge his duty to guarantee, to a reasonable degree of certainty, that Williams received a fair trial by twelve impartial jurors. As a result, we cannot know whether his panel was impartial”). Defense counsel failed to adhere to his duty to his client to meaningfully examine and elicit the potential biases of prospective jurors. See Jackson, 107 Ohio St.3d at 64 (“Moreover, the fact that defendant bears the burden of establishing juror partiality ... makes it all the more imperative that a defendant be entitled to meaningful examination at voir dire in order to elicit potential biases held by prospective jurors.”)

Proposition of Law II

A defendant is denied the right to effective assistance of counsel when his counsel’s performance falls well below professional standards of reasonableness.

Despite the State’s mischaracterization of the claims in Keith’s new trial motion, Keith will focus on the argument as it relates solely to this Application for Reopening.

Keith's trial strategy was to point out that the evidence against him does not exist, the witnesses against him have been improperly influenced, and the police made a rush to judgment when they arrested Keith. In order to do that, defense counsel cross-examined the State's witnesses about the inconsistencies in their statements, presented alibi witnesses, and challenged the police about their tactics for "solving" the case. Amy Gimmets was the only witness against Keith that trial counsel did not get on the witness stand.

When Keith moved to suppress Richard Warren's identification of him as the shooter, due to improper suggestion tactics by the police, the State relied on Gimmets' words to rebut that challenge. Captain Stanley admitted to providing Warren with the name Kevin, but he claimed that he only mentioned the name after the nurse Gimmets gave it to him (Id. at 223-24, 226.)

After that suppression hearing, defense counsel was on notice that Amy Gimmets was a material witness. Gimmets was the first person to supposedly obtain the name "Kevin" from Warren, and no other witness could testify to those facts. "A material witness is one who is able to give testimony about a fact about which no other witness might testify." State v. Jackson (In re Stuard), 113 Ohio St. 3d 1236, 1237 (2006) (internal citations omitted). Thus, counsel's failure to challenge her testimony, in accordance with his trial strategy, was unreasonable.

Proposition of Law No. III

Cumulative effect of errors renders the trial and sentence unreliable and unfair.

As this Court surely knows, Keith did not list any cumulative errors in this proposition of law because he was referring to the errors listed in the other propositions of law contained in his Merit Brief.

Contrary to the State's assertion, this Court never "opined that the case against Keith is strong," and it did not "note the powerful weight of the evidence" against Keith. Appellee's

Merit Brief, p. 18, 27. Keith refers this Court to its own opinion in order to establish that it never specifically “noted” anything of the sort. See State v. Keith, 79 Ohio St. 3d 514 (1997). In fact, three justices would have accepted review of Keith’s discretionary appeal from his post-conviction appeal. State v. Keith, 84 Ohio St. 3d 1447 (1998).

The Third District Court of Appeals also never specifically “noted” that the evidence against Keith is strong. In upholding Keith’s sentence, that court compared it to the other capital cases it had reviewed and upheld – the cases of John Spirko, Kenny Richey, Richard Joseph, and Joseph Murphy. State v. Keith, No. 3-94-14, 1996 Ohio App. LEXIS 1721 *4 (Crawford Ct. App. April 5, 1996) (“We have examined our prior capital cases, State v. Joseph, No. 1-91-11, 1993 Ohio App. LEXIS 6334 (Allen Ct. App. Dec. 23, 1993); State v. Spirko, No. 15-84-22, 1989 Ohio App. LEXIS 710 (Van Wert Ct. App. March 6, 1989); State v. Richey, No. 12-87-2, 1989 Ohio App. LEXIS 4914 (Putnam Ct. App. Dec. 28, 1989), and State v. Murphy, No. 9-87-35, 1991 Ohio App. LEXIS 3014 (Marion Ct. App. June 26, 1991), and find the imposition of a sentence of death in this case to be proportional to that imposed in our four prior cases.”) Only one of those four is still on death row today.

Proposition of Law IV

The State violates the Defendant’s Sixth Amendment right to confront the witnesses against him when it uses out-of-court, testimonial statements, identifying the Defendant, and there is no showing that the witness is unavailable.

The State violated Keith’s rights under the Confrontation Clause, and defense counsel in no way “invited” this error. It is nonsensical to claim that Keith invited a violation of his constitutional rights by asking Captain Stanley – during a suppression hearing – about the circumstances under which Richard Warren identified him as the shooter. Furthermore, during

the actual trial, it was the prosecutor who solicited Stanley's testimony about "Amy Gimmets." T.p. 770.

The invited-error doctrine stands for the premise that "a litigant cannot be permitted, either intentionally or unintentionally, to induce or mislead a court into the commission of an error and then procure a reversal of the judgment for an error for which he was actively responsible." Lester v. Leuck, 142 Ohio St. 91, 93 (1943). Keith did not "mislead" the State into presenting testimony about Warren's nurse by pointing out that the police provided Warren with the name "Kevin." Keith did not "induce" the State to violate his rights under the Confrontation Clause by challenging the tainted identification procedure.

Trial counsel's failure to object to this Confrontation Clause violation in no way disposes of the issue. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Ohio R. Crim. P. 52(B). Keith's right to confront the witnesses against him is certainly a substantial right – especially when an out-of-court witness is used to shore up an otherwise weak case.

Nurse Amy Gimmets was supposedly the first person to report to police that Warren remembered "Kevin," and it was plain error to admit her statements through Captain Stanley. The State used Gimmets' statements to convey to the jury that Warren identified Keith as the shooter before any police influenced him.

It was especially important for the State to show that Warren identified Keith since Quanita Reeves said it was *not* Keith. Plus, the rest of the State's evidence against Keith was flimsy at best. In other words, but for this statement by nurse Amy Gimmets, "the outcome of the trial clearly would have been otherwise." State v. Jalowiec, 91 Ohio St. 3d 220, 226 (2001).

Proposition of Law No. V

An appellant is entitled to a complete and correct record on appeal.

The State essentially claims that a complete record has no import. See Appellee's Merit Brief, p. 29. Both this Court and the United States Supreme Court have found otherwise. See Dobbs v. Zant, 506 U.S. 357, 358 (1993). And this Court has acknowledged in other cases that jury questionnaires are an important part of the appellate record. See State v. Murphy, 91 Ohio St. 3d 516, 530 (2001) ("Unfortunately, the [juror] questionnaires are not in the record....") See also State v. Davis, 108 Ohio St. 3d 1501 (2006); State v. Johnson, 104 Ohio St. 3d 1430 (2004); State v. Hand, 102 Ohio St. 3d 1414 (2004).

Keith's jury questionnaires are important not only to the issues raised in this action, but they are relevant to the propositions of law raised by former counsel in Keith's direct appeal. For example, Keith's direct appeal included an issue regarding the trial court's removal of "scrupled" jurors, and the questionnaires could have contrasted those excused jurors with the seated jurors. Thus, they should have been a part of the appellate record.

Proposition of Law No. VI

The lower court erred in denying Keith's Application for Reopening his direct appeal, and it failed to address Keith's good cause for the delay.

The State correctly asserts that "the appellate court has no obligation to ferret out the basis of a claim to re-open a direct appeal." Appellee's Brief, p. 29. Keith has never claimed that is the burden placed on the Court of Appeals. Rather, Keith pointed out that the Court of Appeals never addressed the argument for good cause that Keith specifically put forth in his application for reopening.

There is a difference between “ferreting out” an argument and reading and analyzing the plain words on the page. The Court of Appeals never addressed the actual cause for Keith’s untimely filing, despite the fact that Keith submitted his good cause to that court.

Proposition of Law No. VII

The lower court erred in denying Keith’s Motion to Correct the Record with the jury questionnaires.

Keith moved the Court of Appeals – not the trial court – to correct the record with his jury questionnaires.

CONCLUSION

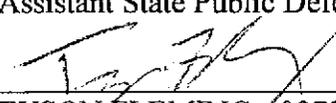
Again, this is not a case where Keith is claiming that he is unskilled at law and thus did not understand the legal issues his direct appeal attorneys missed. This is a situation where Keith had no reason to believe it would get any better than the attorneys he was appointed through the court. Losing those attorneys by calling them ineffective was not an option at that time, and he could only hope they would assist him better in post-conviction and federal habeas corpus proceedings. Considering he was not even provided the basics at *trial* – he received one, uncertified attorney – it is understandable that he believed his choices were bleak.

Keith’s case is an anomaly, and his showing of good cause is fact-specific. This Court should re-open his direct appeal, despite the eleven-year delay since his case was decided.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC
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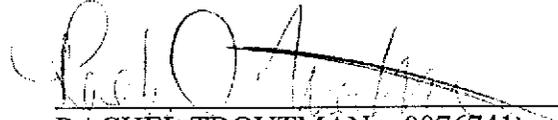

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this REPLY BRIEF OF APPELLANT KEVIN KEITH was served by U.S. mail to Clifford J. Murphy, Assistant County Prosecutor, 112 East Mansfield Street, Rm. 305, Bucyrus, Ohio 44820 on this 11th day of March, 2008.


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OHIO RULES OF COURT SERVICE
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*** RULES CURRENT THROUGH FEBRUARY 25, 2008 ***
*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 ***

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 52 (2008)

Rule 52. Harmless Error and Plain Error

(A) Harmless error.

Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(B) Plain error.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.