ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	*	Supreme Court Case No. 2008-2370
Appellee,	*	On Appeal from the Wood County Court of Common Pleas
v.	*	
CALVIN NEYLAND, JR.,	*	
Appellant.	*	Common Pleas Case No. 2007-CR-0359

DEATH PENALTY CASE

REPLY BRIEF OF APPELLANT, CALVIN NEYLAND, JR.

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REPLY TO PROPOSITION OF LAW NUMBER ONE

In his first proposition of law Mr. Neyland urges this Court to find the trial court erred when it denied the defense motion seeking to find him incompetent to stand trial. The State of Ohio counters by averring that Mr. Neyland is seeking an order from this Court that would "supplant its opinion regarding competency for that of the trial Court." The State argues that Mr. Neyland understood the nature of the proceedings and was capable of assisting in his defense.

The record evidence suggests otherwise. Rather, as is appropriate in any review by this or any other appellate court, Mr. Neyland points to error committed by the trial court and the tandem constitutional violations in trying a capital defendant who is incapable, as a result of a diagnosed mental condition, to understand assist in his own defense and is therefore, incompetent within the meaning of R.C. 2945.37. This Court also has the additional benefit of reviewing the record in its entirely, arraignment to sentencing, in order to see clearly what the trial court did not see within the confines of Mr. Neyland's pre-trial hearings.

The State suggests that Mr. Neyland understood the proceedings against him and was able to assist his counsel because he refused to talk to police and evaluators, refused to waive his speedy trial rights, never acted "out of control" in the courtroom, filed a pro se pleading, often ranted about his 800 pages of discovery, and because he talked to his attorneys.

As is true of most mentally ill persons, Mr. Neyland is intermittently lucid. The problem is that he was very rarely lucid when discussing his case. Defense counsel, officers of the court, reported that he would not discuss the case with them in a rational manner, that he refused to cooperate with mitigation investigators, and that he was obsessed with details that had no bearing on the defense. In short, he provided counsel with no assistance.

Mr. Neyland's contact with the four mental health professionals was no better and bear out the findings, observations and diagnoses of the two psychiatrists, Dr. Thomas Sherman and Dr. Delaney Smith, and two psychologists, Dr. Kristen Haskins and Dr. Barbara Bergman, who examined Mr. Neyland.

Dr. Sherman stated that in his medical opinion Neyland "suffers from a mental illness which renders him incapable of understanding the nature and objectives of the proceedings against him and especially of assisting in his defense...This was not even a close call." 03/21/2008 Tr. at 12.

Dr. Haskins evaluated Mr. Neyland using the MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA) and stated "On the reasoning section he had a score of 4 out of a possible 16, suggesting clinically significant impairment and serious difficulty distinguishing relevant from less relevant factual information and difficulty in reasoning about legal options of pleading guilty or not guilty." She also found Mr. Neyland was unwilling or unable to disclose information and that his pattern of uncooperativeness may be due to a conscious distortion to present himself in a favorable light, a lack of psychological sophistication or a rigid neurotic adjustment. Dr. Haskins Report at 15; Joint Exhibit 2. Further, she found that Mr. Neyland was likely to be a very difficult defendant with whom to reason. Dr. Haskins Report at 16; Joint Exhibit 2.

Similarly, Dr. Bergman's observations of Mr. Neyland included that he had poor judgment; inflexible/rigid views and limited insight. Further, Dr. Bergman personally diagnosed Mr. Neyland with a severe personality disorder. She also had the advantage of interviewing trial counsel Scott Hicks who reported that Neyland was no help at all in preparing the case for defense. Dr. Bergman Report at 3, 7; Joint Exhibit 3

All four mental health professionals, Dr. Sherman, Dr. Smith, Dr. Haskins, and Dr. Bergman noted and diagnosed that Mr. Neyland does suffer from genuine and significant mental conditions that affect his judgment, his insight, his ability to disclose personal information; inflexible/rigid views which inhibit him from being able to consider alternative approaches/views and consequences of choices, and his likeliness to be a very difficult defendant with whom to reason. He has rigid neurotic adjustment and he has clinically significant impairment and serious difficulty distinguishing relevant from less relevant factual information and difficulty in reasoning about legal options.

Left unaddressed by the State in its brief is Mr. Neyland's argument that the trial court's factual findings were clearly erroneous. As outlined in the Merit Brief, the trial court made certain factual findings in support of its decision that Mr. Neyland did not overcome the presumption of competence. In its conclusions of law, the trial court noted that: "However, as noted in the findings of fact, the evaluators who supported a finding of competency had a thirty-day observational period when he resided at the Twin Valley Behavioral Healthcare center." The trial court added: "Thus, the weight of the evidence supports the conclusions of the expert witnesses establishing competency of the Defendant to stand trial." Decision and Judgment entry on Competency Hearing at 2-4; Apx at 62-64.

It is clear the record evidence suggests that these factual findings are clearly erroneous. First, Dr. Smith clearly testified that she did not perform a competency examination and she did not conduct her examination and observations with the exacting legal standard of R.C. 2945.371 in mind. Second, Dr. Haskins, for her part, testified she spent only four hours with Mr. Neyland. Finally, both Dr. Smith and Dr. Haskins clearly testified that the length of the examination is not a critical factor and that a valid examination may be conducted in as little as five minutes.

Thus, the factual findings that support the trial court's finding that Mr. Neyland did not overcome the presumption of competency are not supported by the record evidence. At a minimum, Dr. Sherman's report, along with his experience, deserves as much weight, if not more, than the other mental health processionals who testified at the March 21, 2008 hearing.

The entire record in this case is replete with examples of Mr. Neyland's inability to understand and assist in the preparation of his defense, trial and mitigation in his case. He could not sort out the relevant from the irrelevant. He was, because of his legitimate, diagnosed and documented mental condition, unable to assist his counsel and other members of his defense team or the doctors evaluating him.

For these reasons, as well as those set forth in his Merit Brief, the trial court abused its discretion and erred in finding Mr. Neyland competent to stand trial. As a result, Mr. Neyland's rights to a fair and reliable trial, due process, and protection against cruel and unusual punishment under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under the cognate provisions of the Ohio Constitution were violated.

REPLY TO PROPOSITION OF LAW NUMBER TWO

REPLY TO PROPOSITION OF LAW NUMBER THREE

In his Merit Brief Mr. Neyland argued that the trial court erred when it ordered, without any evidence of wrong doing or any indication that he may be a security risk, that he wear a leg brace while in trial. Trial counsel failed to object to this order of the trial court. Mr. Neyland further argued that trial counsel rendered ineffective assistance of counsel by failing to object, all in violation of his right to due process and a fair and reliable trial as guaranteed under the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and the applicable portions of the Ohio Constitution.

In its brief the State fails to address certain salient points rased by Mr. Neyland. First, the State fails to address the requirements, under established United States Supreme Court precedent, that discourages the routine use of restraints and requires rather an individualized determination of the necessity for such restraints during both the trial and guilt phases of a criminal proceeding.

The United States Supreme Court reinforced these principles in Deck v. Missouri (2005), 544 U.S. 622. Deck reflects the long-held thinking that absent some compelling reason, shackling of any kind in unacceptable and extended this principle to the penalty phases of capital trials. The prosecution has the burden to justify the use of shackles, and the interest asserted must be specific to the particular defendant on trial. Deck, 544 U.S. at 628. The need to prevent violence or escape must be particularized, articulated on the record, and specific to the conduct at this particular trial. Id. at 633. A trial court also has a duty to determine whether there is a less prejudicial but adequate means of providing security.

There was simply no such analysis performed by the trial court. Rather, it appears as if the trial court deferred to the local law enforcement personnel, which is clearly error under United States and Ohio Supreme Court precedent.

Second, the State failed to address how the use of a restraint, such as leg braces, has of inhibiting the interchange between client and counsel. A leg brace also poses the risk of interfering with the defendant's Sixth Amendment right to confer with counsel in an atmosphere free of interference. It cannot be disputed that Mr. Neyland suffers from a severe personality disorder, if not an organic brain defect. A man already suffering from fits of paranoia would most likely view the use of a restraint as an additional negative signal. It would certainly impact the attorney-client relationship.

Finally, the State fails to address, even in a cursory manner, Mr. Neyland's argument that trial counsel, by failing to object and inform the trial court of the applicable law, and compel the sort of analysis the case law demands, rendered ineffective assistance of counsel.

For these reasons, as well as those advanced in his Merit Brief, the use of the leg braces, particularly where, as here, it was unaccompanied by justification, nor the result of a meaningful hearing and an accurate finding of its necessity, or any consideration of any less restrictive means, renders Mr. Neyland's conviction and resultant death sentence as unreliable and in violation of his right to a fair trial and to due process under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Trial counsel's failure to object and cite to the relevant case law is a violation of his right to counsel. In addition, the trial court's decision permitting the use of the leg braces is contrary to, or

an unreasonable application of, clearly established federal law, or is based on an unreasonable determination of the facts in light of the evidence presented in the proceeding.

REPLY TO PROPOSITION OF LAW NUMBER FOUR

Mr. Neyland limits his reply to this position of law to the State's admission that the trial court failed to comply with the mandates of R.C. 2929.03(F). Specifically, the State concedes that there were no specific reasons given in support of its determination that the aggravating circumstances outweighed the mitigating factors. The State argues that this error may be cured by this Court under its statutory independent review pursuant to R.C. 2929.05(A).

The facts present here are similar to those in State v. Green (2000), 90 Ohio St.3d 352, where this Court found:

> We deem the deficiencies in this case too severe to correct by simply reevaluating the evidence. In this case, the collective deficiencies in the trial court's decision to impose the death penalty, as reflected in the sentencing opinion, undermine our confidence in that decision. The panel overlooked many of this court's prior decisions and the mandated statutory framework. These cumulative errors reflect grievous violations of the statutory deliberative process.

Id. at 363-64 (citations omitted).

It is submitted the same cumulative deficiencies are present here. The substantial evidence presented included that of Mr. Neyland's mental illness (Proposition of Law One), the use of a leg brace, without complying with established United States Supreme Court precedent (Propositions of Law Two and Three), and the absence of any penalty phase cross examination of Dr. Smith (Proposition of Law Thirteen). Other errors are present at the trial court level beyond those specifically described. As in Green, this Court should remand the matter to the trial court for further proceedings.

For these reasons, as well as those set forth in the Merit Brief, the errors addressed here violated Mr. Neyland's rights to due process and equal protection of the laws, and subjected him to

cruel and unusual punishment, all in violation of the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and of Sections 1, 2, 5, 9, 10, 16, and 20, Article I of the Ohio Constitution

REPLY TO PROPOSITION OF LAW NUMBER FIVE

In this proposition of law Mr. Neyland submits that trial counsel were ineffective in their representation. In his Merit Brief Mr. Neyland pointed to a number of areas where trial counsel's performance fell below acceptable standards. Most of these areas are dealt with elsewhere in the briefs. Those that remain are discussed in this section.

Failure to Follow up on Voir Dire

The State contends that trial counsel's failure to follow up in voir dire with prospective jurors who seemed reluctant to deliver a verdict that would result in a death penalty sentence was either a strategic or tactical course of action or would have been fruitless. This overlooks that individual voir dire is common in a death case and any failure of counsel to fully develop a panel of jurors which includes those who may be reluctant to deliver a death verdict, but who agree to follow the law, is substandard performance which prejudiced Mr. Neyland.

Failure to Investigate

The State concedes in their Merit Brief that trial counsel's failure to investigate a capital defendant's background and to present mitigation evidence can be considered ineffective assistance of counsel. Trial counsel have an affirmative duty to conduct a full mitigation investigation and to present the mitigation they find to the jury, pursuant to established United States Supreme Court precedent.

The State contends that Mr. Neyland himself created a situation where his trial counsel failed to conduct a background investigation or prepare for mitigation. Clearly, the State fails to recall that Mr. Neyland is diagnosed with paranoid disorder and other mental conditions, the symptoms of which, according to all the medical professionals who examined him, affect his judgment, his

insight, his ability to disclose personal information; inflexible/rigid views which inhibit him from being able to consider alternative approaches/views and consequences of choices, and make him a difficult client to reason with. He has rigid neurotic adjustment and he has clinically significant impairment and serious difficulty distinguishing relevant from less relevant factual information and difficulty in reasoning about legal options.

For the State to suggest that Mr. Neyland invited error by convincing his trial counsel to be ineffective by making no effort to independently investigate his background, even without his assistance, is absurd. It is well-settled law that trial counsel has the affirmative duty to prepare for mitigation and to investigate a capital defendant's background, even if the defendant is uncooperative or instructs counsel not to prepare for mitigation. Further, Mr. Neyland suffers from legitimate, diagnosed, and ongoing mental conditions, including paranoia, which prevent him from assisting his counsel or allowing him to understand the importance of the background information for the presentation of mitigation in a capital case.

Failure to file motions to suppress statements and search warrants

Prior to trial counsel for Mr. Neyland failed to file any motions to suppress various oral statements given to police officers and search warrants executed by police. These statements and the fruits of the search warrants comprised a significant portion of the State's case against Mr. Neyland. The State argues that such failures on the part of counsel are "routine" and that trial counsel may have failed to file the necessary motions as part of trial strategy or because such motions might have been futile. However, there is nothing "routine" or futile about the trial of a defendant in a capital case. Death is different and counsel in a capital case are specially trained and held to a higher standard than in non-death cases. The State's case against Mr. Neyland was greatly strengthened in

the first phase and, by implication, the second phase, by these statements and the other evidence recovered as a result of the search warrants.

Mr. Neyland suffers from multiple issues relating to his mental health. At a minimum, the issues surrounding Neyland's mental health are of a sufficient nature to alert competent defense counsel that motions to suppress should be filed and taken to hearing. Similarly, trial counsel has an affirmative duty to preserve issues for the record in order to ensure that a capital defendant has an opportunity to continue to challenge such things as the admission of evidence upon review or in the case of favorable advances in the state of the law.

Conclusion

These multiple and cumulative failures by trial counsel, along with counsel's failure to object to the prosecutor's improper opening and closing arguments during the second phase and to improper penalty phase jury instructions, resulted in Mr. Neyland being denied his right to counsel and right to due process.

For these reasons, as well as those set forth in his Merit Brief, the only remedy is to remand the matter to the trial court for a new trial so that effective and competent counsel may be appointed to represent Mr. Neyland at the new trial. Such a course of action is necessary to protect Mr. Neyland's due process rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the applicable portions of the Ohio Constitution.

REPLY TO PROPOSITION OF LAW NUMBER SIX

In this proposition of law Mr. Neyland argued the prosecution's misstatements during the mitigation phase of the trial were in error and deprived him of a fair and reliable trial. The State counters that the remarks were within the bounds of the law and, in any event, Mr. Neyland has not demonstrated the requisite prejudice necessary to warrant a reversal.

The difficulty with this argument is that the theme of both phases of the trial was Mr. Neyland's profound mental illnesses. These mental illnesses comprised a large part of the testimony, even by lay witnesses, and were a constant factor throughout the trial.

Given that even the State concedes that Mr. Neyland is mentally ill, but still well enough to be put to death for conduct he clearly does not understand, the prejudice to him is plain. The jury heard the prosecutor urge the jury to stack the mitigating factors, describing the murders as "heinous", arguing to the jury that if they found the aggravating and mitigating factors in equipoise they should opt for death, and to treat the nature and circumstances of the offense as aggravating factors. These are not minor infractions, particularly where the presence of such a mitigating factor as mental illness is present.

For these reasons, as well as those set forth in the Merit Brief, the errors addressed here violated Mr. Neyland's rights to due process and equal protection of the laws, represented a violation of his right to effective assistance of counsel, and subjected him to cruel and unusual punishment, all in violation of the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and of Sections 1, 2, 5, 9, 10, 16, and 20, Article I of the Ohio Constitution.

REPLY TO PROPOSITION OF LAW NUMBER EIGHT

In this proposition of law Mr. Neyland argues that the present practices in Ohio of putting to death a person through lethal injection violates all standards of decency and is cruel and unusual punishment as that term is defined by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article One, Sections Nine, Ten and Sixteen of the Ohio Constitution.

In response, the State argues that the change in protocol from a three drug to a single drug method of execution militates against this Court sustaining this proposition of law. However, all other aspects of Ohio's execution protocol remain unchanged. The State also argues that some risk of pain cannot be avoided and is inherent in any method of execution.

The aspects of lethal injection as administered in Ohio that are constitutionally troubling include, at least in part, the training of the technicians performing the lethal injection procedure, the reliability of any back up procedures in the event of any difficultly, such as an inability to locate a suitable vein for injection, and the efficacy of the single drug protocol. These issues and concerns remain and are a vital component of Ohio's lethal injection protocol.

Mr. Neyland stands on the authority and argument as set forth in his Merit Brief, except to note the development in Scott v. Houk, Case No. 4:07CV0753, United States District Court for the Northern District of Ohio, Eastern Division. Mr. Scott, like Mr. Neyland, is on Ohio's death row.

In Scott, the district court certified a state law question to this Court. The State, named in the action as the Warden, opposed the certification request. In that certification the district court sought an answer to the following question:

> Is there a post-conviction or other forum to litigate the issue of whether Ohio's lethal injection protocol is constitutional under Baze v. Rees, 533 U.S. –, 128 S.Ct. 1250 (2008), or under Ohio law?

In a reversal of the State's position in the district court, the State of Ohio encouraged the Supreme Court of Ohio to answer the certified question. In an order of October 14, 2009, the Supreme Court of Ohio agreed to answer the question and ordered briefing. The matter is decisional with the Court.

It is submitted that the matter pending in the Supreme Court of Ohio may be dispositive of some of the issues relevant to this proposition of law. It is suggested that this Court may wish to defer ruling or further action on this appeal pending resolution of the Scott matter.

For these reasons, as well as those set forth in the Merit Brief, it is requested that the Proposition of Law be sustained and that, under current technology, any death sentence by lethal injection cannot be imposed without violating the applicable provisions of the United States and Ohio Constitutions and every common standard of decency.

REPLY TO PROPOSITION OF LAW NUMBER NINE

In his Merit Brief Mr. Neyland argued that the trial court's penalty phase jury instructions contained a number of errors. He further argued the errors were of such magnitude as to deprive Mr. Neyland of a fair mitigation hearing. The result, it is submitted, is a violation of his right to due process and protection from cruel and unusual punishment as guaranteed under the Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and by Sections 9, 10, and 16, Article I of the Ohio Constitution

Initially, Mr. Neyland concedes that the trial court correctly instructed the jury that Mr. Neyland had no burden of proof at the mitigation hearing. That portion of his argument in withdrawn, subject to the approval of this Court

The State, in its turn, concedes that the trial court failed to instruct the jury what evidence from the trial phase was relevant to the mitigation hearing. The State argues, unpersuasively, that this error was remedied by the trial court determining what evidence would go to the jury for its review. This does not solve the problem, though, as the jury was never told what it could -- and more importantly -- not consider from the trial phase while deciding the punishment during the penalty phase.

For these reasons, as well as those set forth in the Merit Brief, the errors in the mitigation phase jury instructions deprived Mr. Neyland of his right to due process, a fair trial and reliable verdict and subjected him to cruel and unusual punishment, all as protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by the cognate provisions of the Ohio Constitution.

REPLY TO PROPOSITION OF LAW NUMBER ELEVEN

Mr. Neyland has nothing to add on this issue except to agree with the State that counsel objected to the exclusion of jurors #17, #24, #55 and #111. Each of the four jurors excused by the trial court were excluded over objection of the defense. As a result this issue is properly before this Court.

For these reasons, as well as those set forth in the Merit Brief, the exclusions are in violation of Mr. Neyland's rights to due process and a fair and reliable trial under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the applicable portions of the Ohio Constitutions.

REPLY TO PROPOSITION OF LAW NUMBER THIRTEEN

In this proposition of Mr. Neyland argued that the trial court's permitting the use of testimony of Dr. Delaney Smith, Ph.D., from the competency hearing at the penalty phase hearing was error. The defense objected to this testimony, stating that the testimony had been intended for a specific purpose, the competency of Mr. Neyland, a different issue, rather than for the purpose of mitigation at a death penalty phase hearing. Finally, Mr. Neyland questions whether the State made a good faith effort to secure her presence at trial.

The State points to the lack of cross examination of Dr. Bergman or Dr. Haskins as proof that any error may have been harmless. What this overlooks is that Dr. Smith testified that Mr. Neyland suffers from a paranoid personality disorder, rather than a mental illness. In addition, Mr. Neyland appeared more guarded when he discussed certain matters Dr. Smith termed to be not in his interest to discuss, such as details of his case. She added that she saw no signs of malingering.

The absence of cross examination and confrontation of Dr. Smith prevented Mr. Neyland from utilizing portions of evidence from the trial at the mitigation hearing that may have had an impact on Dr. Smith's views. Certainly after the conclusion of the trial phase counsel were better educated as to what each witness' testimony contributed to the over all facts.

The State contends that this was not error but fails to appreciate the constitutional magnitude of the error. At the competency hearing the concern was just that -- competency -- and not saving Mr. Neyland's life. The admission and publishing to the jury of this testimony clearly implicates Mr. Neyland's right to confrontation and to due process. In addition, the inability of Mr. Neyland, through counsel, to cross examine Dr. Smith as to specific factors as to a statutory mitigating factor, R.C. 2929.04(B)(3), renders her absentee testimony as unreliable.

For these reasons, as well as those set forth in the Merit Brief, the admission of this testimony denied Mr. Neyland his to confrontation and to due process, guaranteed him under Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. See, e.g., Crawford v. Washington (2004), 541 U.S. 36. The only remedy is to sustain this proposition of law and remand the matter to the trial court for a new sentencing hearing, at which time the State either produce Dr. Smith for in court testimony or not present the testimony at all.

CONCLUSION

For all of the above stated reasons, as well as those set forth in his Merit Brief, Mr. Neyland's rights under the Constitution of the United States and the Ohio Constitution were violated and he was denied a fair trial and sentencing proceeding. Accordingly, this Court should adopt his Propositions of Law, vacate his death sentence, and either impose a life sentence, remand the case to the trial court for a new trial, or for a new sentencing proceeding.

Respectfully submitted,

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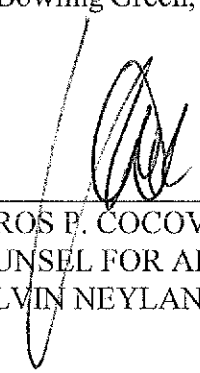
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Appellant was mailed to the Prosecutor of Wood County, Wood County Courthouse, Bowling Green, Ohio, 43502, on the 16th day of April 2010.



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