

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,

Case No. 10-1949

Appellee,

vs.

On Appeal from the Franklin  
County Court of Appeals  
Tenth Appellate District  
Case No. 09AP-274

Larue A. Monford,

Appellant.

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MERIT BRIEF FOR APPELLANT, LARUE A. MONFORD

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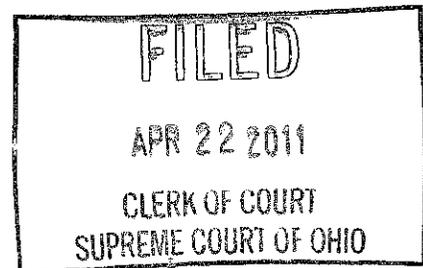
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## STATEMENT OF THE FACTS

This case concerns a not guilty by reason of insanity plea entered relatively early in the course of a homicide prosecution, but never withdrawn or submitted to the jury. Defense counsel who entered the plea died shortly before trial started. Co-counsel had previously been brought into the case, but was either unaware of the plea or forgot about it. Nor did the judge or prosecutor address the plea during the course of the trial.

Appellant LaRue A. Monford was indicted in Franklin County for murder (R.C. 2903.02), attempted murder (R.C. 2923.02 and 2903.02), felonious assault (R.C. 2903.11), and carrying a concealed weapon (R.C. 2923.12). The first three counts carried three-year firearm specifications. (R.C. 2941.145.) Charges arose from an incident on the afternoon of February 7, 2008 which left Eugene Brown dead and Alisa Brown (not related) wounded.

Appellant was arraigned on February 20, 2008. A general plea of not guilty was entered and attorney Myron Shwartz was appointed as counsel. The case was assigned for trial before the Honorable Stephen L. McIntosh of the Franklin County Court of Common Pleas. Through Mr. Shwartz, and by leave of the court, appellant entered a written plea of not guilty by reason of insanity on April 24, 2008. (R. 59-60.) Funds were allocated for Dr. Kristen Haskins to evaluate appellant in relation to this plea.

Because Mr. Shwartz was in failing health, attorney Tracy Younkin was appointed as co-counsel in August 2008. (R. 117.) Appellant's relationship with both attorneys was strained, leading to complaints to the bar association and the judge. (October 21, 2008 transcript.) In a letter to the judge dated July 7, 2008, appellant indicated he had paid Mr. Shwartz \$1,000 to represent him in advance of meeting with him before arraignment. Mr. Shwartz obtained an appointment at the arraignment. (R-94.)

Mr. Shwartz and Mr. Younkin both appeared for a suppression hearing on September 3, 2008. Mr. Shwartz died on December 5, 2008, just before jury trial commenced on December 9th. Mr. Younkin alone represented appellant at trial. Before jury selection, appellant complained of lack of contact with counsel during the weeks leading up to trial. (Tr. III, 3-6.)

No mention was made of the insanity plea during the trial. On December 17, 2008 appellant was found guilty on all counts. On January 15, 2009 he was sentenced to fifteen years to life for murder, ten years for attempted murder, eight years for felonious assault, and twelve months for carrying a concealed weapon. The terms for the last three counts were to be served concurrently, but consecutive to the sentence for murder. The court also imposed a three-year term on the firearm specification. The aggregate sentence was twenty-eight years to life. The sentence was not journalized until February 27, 2009.

An appeal was taken to the Tenth District Court of Appeals. Eight assignments of error were raised:

First Assignment of Error: The trial court erroneously overruled defendant's pretrial motion to suppress identification.

Second Assignment of Error: The prosecutor engaged in misconduct by utilizing the hearing on appellant's motion to suppress identification as a one-on-one showup for witnesses who had not previously made an out-of-court identification, and to obtain an initial in-court identification from those who had.

Third Assignment of Error: Counsel's failure to undertake meaningful inquiry during voir dire, and failure to excuse a plainly objectionable juror, denied appellant his Sixth Amendment and Article I, Section 10 right to the effective assistance of counsel.

Fourth Assignment of Error: Failure to address appellant's plea of not guilty by reason of insanity, or to instruct the jury on insanity denied appellant his right to due process and trial by jury. Such omissions constituted structural error.

Fifth Assignment of Error: Appellant's convictions were not supported by legally sufficient evidence identifying him as the person responsible for the shootings at issue.

Sixth Assignment of Error: Attempted murder, as charged in two of the indictment, and felonious assault, as charged in count three, are allied offenses of similar import committed with a single animus. The court erred by imposing concurrent sentences for the two offenses when it should have directed the prosecutor to elect on which offense conviction would be entered and sentence pronounced. Furthermore, imposition of consecutive sentences violated the constitutional ban against double jeopardy.

Seventh Assignment of Error: The cumulative effect of trial counsel's unprofessional omissions denied appellant his Sixth Amendment and Article I, Section 10 right to the effective assistance of counsel.

Eighth Assignment of Error: Appellant's convictions were against the manifest weight of the evidence.

All were overruled in an opinion rendered on September 30, 2010.

State v. Monford, Franklin App. No. 09AP-274, 2010-Ohio-4732. Appellant sought to have the case certified as being in conflict with State v. Cihonski, 178 Ohio App. 3d 713, 2008-Ohio-5191.

This was denied. State v. Monford, Franklin App. No. 09AP-274, 2010-Ohio-5624.

Appellant also pursued further review by this court through an appeal as of right and through leave to appeal. Six propositions of law were advanced. On February 2, 2011 the Court accepted the first and second propositions of law for further review.

The facts underlying the prosecution are of secondary importance and are set forth here in abbreviated form. For the court's convenience, the complete statement of facts from appellant's brief in the Court of Appeals is included in the appendix.

The incident took place at the D#1 Happy Family Club, a bar at 764 St. Clair Avenue, near the Interstate 71/670 junction in downtown Columbus. Latayia Cummings was tending bar at the time. (Tr. III, 108.) Lenora Edwards and Cornell Rhodes, Jr. were seated at the bar to her left. Alisa Brown and Eugene Brown were to her right. (Tr. III, 110.) Alisa Brown had been seated at the bar for about two hours. Mr. Brown arrived later on. He was known as Rock, and worked as a disk jockey. He was a large man and was wearing a fur coat. (Tr. III, 109, 126, 137.)

Mr. Brown was shot at 2:55. Ms. Cummings identified appellant as the gunman. He had been in a rear room for about an hour and a half and had made three trips to the bar for drinks. (Tr. III, 109, 112.) As to interaction between the gunman and Mr. Brown:

At first it was friendly. Eugene and Alisa were sitting at the bar and he came up to order a drink and he stopped and talked to Eugene and they were laughing and joking. And then he said, buy my friends a drink, and he put \$20 on the counter and said keep the change and walked back to the back room.

(Tr. III, 110.) Fifteen to twenty minutes later:

A. That's when he walked -- he walked up to the bar and he kind of leaned on the bar and he says, Eugene, where's my money. And Eugene says, what money. And he said, Eugene, man, where's my money. And he, Eugene, says -- Eugene's laughing and he says, who has your money now.

\* \* \*

And he says, he's still just chuckling. He says, who has your money now. And then he kind of turns and that's when there was a shot.

Q. (by the prosecutor) Who kind of turned?

A. Eugene. Because he was sitting on a barstool so he kind of turned on the barstool

Q. Can you describe how this shooting occurred? What did you see?

A. I just saw -- I just seen the black barrel, like the barrel of the gun. Kind of --

Q. Do you recall. Go ahead, if you can show us how --

A. It was kind of like pointed and it was just a shot and then I turned. So I turned my back at that point and ran.

(Tr. III, 110-111.) As the incident began, she was facing the cash register. Her view of the gun was over her left shoulder. (Tr. III, 125.) She heard the shot, but did not see it fired because she had ducked. (Tr. III, 127-128.)

She ran to the back room. "And at that time we heard two more shoots. So everybody ran to the back door to get out. And I cut back through the kitchen and hid under the sink in the kitchen area." (Tr. III, 117.) When the police arrived, "everyone is just kind of screaming and crying and just hysterical." (Tr. III, 118.)

The state also called Leonora Edwards (Tr. III, 135-154), Cornell Rhodes, Jr. (Tr. III, 273-303), and Alisa Brown (Tr. IV, 306-324) who were at the bar at the time of the shooting. Ms. Brown described being wounded as she ran for cover. (Tr. IV, 307-319.) Other prosecution witnesses included Antoinette Lee (Tr. III, 156-175) and Frank McKnight (Tr. III, 202-220), who were in the back room. Ronnie D. Williams had equipped the premises with cameras feeding into a

DVR. Images from that equipment covered the time of the shooting, but were of poor quality, not providing a clear image of the gunman. (Tr. III, 84-103.) The defense called Dr. Solomon Fulero as an expert witness on eyewitness identification (Tr. IV, 341-393.)

## ARGUMENT

**FIRST PROPOSITION OF LAW: When a plea of not guilty by reason of insanity has been duly entered, the complete failure to address such plea at trial constitutes structural error.**

Appellant entered a plea of not guilty by reason of insanity on April 24, 2008 and provision was made for an evaluation. The record is silent as to any further action being taken on this plea. It appears that as in the case of State v. Cihonski, 178 Ohio App. 3d 713, 2008-Ohio-5191, the plea was never withdrawn and was simply forgotten. As in Cihonski this may be attributable to a change in counsel, but as in Cihonski reversal is required because the omissions of counsel and the court constitute structural error.

### **I. The plea was entered, but then ignored**

Criminal Rule 10 calls for arraignment in open court at which time the defendant will be called upon to enter a plea to the indictment. Criminal Rule 11(A) provides:

A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas shall be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

Appellant entered a general plea of not guilty plea at arraignment on February 20, 2008. As is common practice, the not guilty by reason of insanity plea was entered later on. (R. 59-60.)

Criminal Rule 11(H) states:

The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

Thus, as required, the plea was duly entered in writing and upon leave of court.

There was no request appellant also be evaluated to determine whether he was competent to stand trial. The two issues are not inevitably linked, and the entry of a plea of not guilty by reason of insanity does not by itself place the issue of the defendant's competency to stand trial before the court. State v. Wilcox (1984), 16 Ohio App. 3d 273. As the court in Cihonski discussed at ¶13, competency and insanity are separate issues. Competency turns on whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him." State v. Hartman, 174 Ohio App. 3d 244, 2007-Ohio-6555, ¶13, quoting Dusky v. United States (1960), 362 U.S. 402. The standard for determining legal insanity is set forth in R.C. 2901.01(14):

A person is "not guilty by reason of insanity" relative to a charge of an offense only if the person proves, in the manner specified in section 2901.05 of the Revised Code, that at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts.

Because the standards are different, a defendant may be competent to stand trial, but still able to pursue an insanity defense based on his mental state at the time an offense was committed. See State v. Tenace (1997), 121 Ohio App. 2d 702.

Though Dr. Chris Haskins was appointed to interview and evaluate appellant in relation to his NGRI plea (R. 58), and funds were allocated for this purpose, no report or cover letter from Dr. Haskins appears in the record. This may be because competency is a matter for the court to decide in advance of trial and upon completion of an evaluation. Sanity is a matter for the jury to determine. State v. Thomas (1982), 70 Ohio St. 2d 79, 80. Thus the examiner might chose not to send a report to the judge and parties, but not file it. (See State v. Kulp (1996), 110 Ohio App. 3d 144, discussed in section III below.)

It appears that the not guilty by reason of insanity plea was forgotten during the months after it was entered. The written plea was soon buried under numerous subpoenas and other documents

in the court file. It was entered before the attorney who ultimately tried the case was appointed as co-counsel prior to the September suppression hearing. The plea was not mentioned during that hearing. (See Tr. I.) It would have been a logical topic at the October 21, 2008 hearing which addressed appellant's complaints about counsel, a motion for funds for an expert witness on eyewitness identification, and appointment of new co-counsel, but no mention was made. (Tr. II.) Nor was disposition of the insanity plea addressed as trial was getting underway. (Tr. III, 3-6, Voir dire Tr. 10-13.) This may have been because Mr. Shwartz, who entered the plea on appellant's behalf, had recently died.

The insanity plea was not mentioned during the judge's preliminary instructions to the jury (Tr. III, 7-13), or in opening statements (Tr. III, 13-19). The defense rested without withdrawing the plea. (Tr. IV, 416.) Insanity was not mentioned during closing arguments. (Tr. IV, 417-449.) The jury was instructed that the plea of not guilty puts in issue the essential elements of the crime, on the presumption of innocence, and on the state's burden of proof beyond a reasonable doubt (Tr. IV, 450-451), but no mention of insanity was made. The verdict forms as read did not provide for verdicts of not guilty by reason of insanity. (Tr. IV, 465-474.) Given a final chance to object to the charge as given neither side mentioned the NGRI plea. (Tr. IV, 474.)

## **II. State v. Cihonski**

Factually this case corresponds to State v. Cihonski, supra., There, the defendant entered a plea of not guilty by reason of insanity the month after he was arraigned. He was evaluated for competency and was found competent to stand trial. With the defendant represented by new counsel, the case proceeded to trial without mention of the insanity plea. Insanity was not covered in the instructions to the jury. The defendant was found guilty. On appeal, the second assignment of error maintained, "The trial court committed plain (error) when it failed to notify the jury that appellant had entered a not guilty plea by reason of insanity and by failing to give a jury instruction on a not guilty by reason of insanity plea." The Court of Appeals went further and found the omissions constituted structural error.

Along the lines set forth above, the court in Cihonski differentiated competency and insanity. Finding the defendant competent to stand trial did not bar assertion of the insanity defense. *Id.*, ¶13. The plea may have been forgotten, but was never withdrawn. *Id.*, ¶14. Though plain error is the usual standard for review when incomplete or inaccurate jury instructions are at issue, plain error analysis was inappropriate because the omission met the criteria for structural error:

However, an error may be so egregious that it rises to the level of structural error. State v. Colon, 118 Ohio St. 3d 26, 2008-Ohio-1624 ("Colon I"), on reconsideration, State v. Colon, 119 Ohio St. 3d 204, 2008-Ohio-3749 ("Colon II"). Structural errors are "constitutional defects that "defy analysis by "harmless error" standards' because they 'affect [] the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself.'" Colon I, 2008-Ohio-1624, quoting State v. Perry, 101 Ohio St. 3d 118, 2004-Ohio-297, ¶, quoting State v. Fisher, 99 Ohio St. 3d 127, 2003-Ohio-2761, ¶9, quoting Arizona v. Fulminate (1991), 499 U.S. 279, 309-310. The Supreme Court of Ohio has held this type of error may be raised for the first time on appeal because "[s]uch error permeates "[t]he entire conduct of the trial from beginning to end" so that the trial cannot "reliably serve its function as a vehicle for determination of guilt or innocence.'" *Id.*, quoting State v. Perry, 101 Ohio St. 3d 118, 2004-Ohio-297, ¶9, quoting Arizona, 499 U.S. at 309-310, quoting Rose v. Clark (1986), 478 U.S. 570, 577-578.

State v. Cihonski at ¶17. At ¶19 the opinion states:

In summary, in order to find structural error, a court must (1) determine that a constitutional error has occurred, (2) conduct analysis under the presumption that the error is not structural, and (3) determine that the constitutional error has permeated the entire trial, rendering it unable to serve its function as a "vehicle" for determination of the defendant's guilt or innocence. Where a structural error is present under these factors, the Supreme Court "mandates a finding of "per se prejudice.'" (Emphasis sic.) Colon I, 2008-Ohio-1624, at ¶20, quoting Fisher, 99 Ohio St. 3d 127, 2003-Ohio-2761, ¶9.

As examples of structural error the court offered the complete denial of counsel, a biased trial judge, racial discrimination in grand jury selection, denial of the right to self-representation, denial of the right to public trial, defective instructions on reasonable doubt, the Colon issue, not allowing the defendant to make a closing argument, and the trier of fact considering the defendant's silence. *Id.*, ¶21-22 (providing citations). In the court's estimation, neglect of a not guilty by reason of

insanity plea rose to this level.

Proceeding to structural error analysis the court cited Article I, Section 10 of the Ohio Constitution, which guarantees the defendant "a speedy and public trial by an impartial jury of the county in which the offense is alleged to have been committed." Failure to instruct the jury on the defense of insanity violated Cihonski's right to trial by jury. Cihonski, ¶22. As to the second and third steps of analysis:

We are mindful of the strong presumption that errors are not structural; however, we conclude that the complete lack of mention of Cihonski's NGRI plea permeated the entire trial. In addition to the court's failure to inform the jury and instruct the jury on this plea, neither the state nor Cihonski's counsel mentioned the defense of insanity or alluded to pleas of NGRI. Accordingly, no evidence exists in the record that the jury even considered Cihonski's defense. In light of this fact, we conclude that the trial was unable to reliably serve its function. Thus, due to the unique facts and circumstances before us, we hold that the trial court's failure to notify the jury that Cihonski entered a plea of NGRI or to instruct the jury on that plea constituted structural error and warrants reversal.

Id., ¶23. The same conclusion follows in the present case: Appellant duly entered a NGRI plea, it was never withdrawn, and it was not submitted to the jury. The omission constitutes structural error. Oversight possibly attributable to the change in counsel is no excuse. The court in Cihonski went on to find new counsel was ineffective because, "An attorney substituting himself in a pending case has a duty to review previous filings in the case." 178 Ohio App. 3d 713, ¶30.

Though the court in Cihonski premised its structural error analysis on denial of the right to jury trial, neglect of a NGRI plea may also be analyzed as a broad violation of due process. As with the list of examples of other structural errors provided in the opinion, due process has not been afforded when an insanity plea is ignored. Once the plea has been entered, due process requires it either be formally withdrawn or resolved by the trier of fact. Under either view, appellant in the present case is entitled to reversal of his convictions.

### **III. Other cases**

Though not directly on point, Evans v. State (1930), 123 Ohio St. 332 stressed the importance of addressing sanity issues whenever raised. A statute required determination whether

the accused was "sane" at the time of trial when the issue was raised before or after trial. The state contended it did not apply when the issue was raised during trial. This court disagreed. To the extent defense counsel may have been remiss in raising sanity, the opinion states at p. 137:

\* \* \* The law does unfortunately penalize, not only in civil cases but in criminal cases, sane men for the dereliction of their attorneys. To extend this penalization to persons charged with capital offenses, claiming in good faith to be insane, is an extent to which the law heretofore has not proceeded. It is unfair to the accused to bind him, in facts going to the very essence of the case, by the acts of his lawyer, when such accused claims to be insane.

At 138-139 it is indicated:

Two of the members of this court, including the writer of this opinion, are convinced an enactment which would deprive an insane person of a defense going to the very vitals of his case, because of non-action upon the part of his attorney, would necessarily be unconstitutional, upon the ground it would deprive such insane person of due process of law."

By analogy, appellant should not be denied consideration of the defense because trial counsel ignored or was unaware of the insanity plea.

In State v. Kulp (1996), 110 Ohio App. 3d 144, a case proceeded to trial without due attention to either the defendant's competency to stand trial or to an insanity plea entered on his behalf. An out of state truck driver led officers on a four mile chase during which he tried to run two police vehicles off the road, stopped abruptly trying to wreck pursuing vehicles, attempted to hit officers or their vehicle with his truck, and resisted arrest. He was charged with felonious assault and fleeing. His Oklahoma based union provided a lawyer who entered pleas of not guilty and not guilty by reason of insanity. The court put on an entry directing he be taken from the jail to a diagnostic center for evaluation of his competency to stand trial and insanity at the time of the offense, but no reports appeared in the record, there was no record of a hearing, and there was no entry setting forth the court's findings. Nor was the insanity plea withdrawn.

Like appellant, Mr. Kulp was not satisfied with the efforts of counsel. While appellant agreed to proceed represented by counsel, Mr. Kulp insisted on discharging counsel and representing himself, and was found guilty by a jury. On appeal he assigned as error ineffective

assistance of counsel and absence of a proper waiver of the right to counsel. Instead of addressing these claims the court sua sponte considered whether omissions with regard to the insanity plea and related evaluations required reversal as plain error. It concluded they did. If competency to stand trial is raised, R.C. 2945.37 requires a hearing and R.C. 2945.371 requires the examiner's report be filed. With respect to evaluation in relation to the insanity defense, R.C. 2945.39(C) requires a written report be furnished the parties and the court, but does not require that it be filed. The case was remanded to the trial court to address these issues.

Ohio precedent splits on the effect of a guilty plea when a plea of not guilty by reason of insanity has not been expressly addressed. In State v. Fore (1969), 18 Ohio App. 2d 264, the defendant pled guilty to second degree murder as a lesser-included offense to first degree murder. His previously entered plea of not guilty by reason of insanity was not withdrawn. In the court's view the guilty plea was an "implied admission of sanity." Id. at 269. The same conclusion was reached in State v. McQueeney, 148 Ohio App. 3d 606, 2002-Ohio-3731, ¶31-36.

By contrast, State v. Burton (May 5, 1982), Butler App. No. CA81-05-0037, 1982 WL 3123, declined following Fore. Entry of the insanity plea negated the conclusive presumption of sanity set forth in R. C. 2943.03. Applying Henderson v. Morgan (1976), 424 U.S. 637, sometimes cited in Rule 11 compliance cases, for a plea to be voluntary the defendant must be informed of the nature of charges against him. The failure to do so could not be considered harmless when there were indications the accused had limited mental capacity, as in Henderson v. Morgan, or the seriousness of the of the insanity plea was brought to the court's attention, as it was in Burton through a letter from a psychiatric consultant.

In cases from other jurisdictions, in People v. Leon (1958), 163 Cal. App. 2d 791, 329 P.2d 99, the evidence was deemed sufficient to support an insufficient funds conviction at a bench trial, but conviction was "premature" because the court failed to address the defendant's insanity plea. In People v. Boyd (1971), 16 Cal. App. 3d 901, 94 Cal. Rptr. 575, jury trial commenced, but was recessed for a week when the defendant manifested heroin withdrawal symptoms. The judge

denied a motion to determine present sanity (competency). A further motion to enter a NGRI plea was set over for determination after trial, but was neglected. Since the trial court had discretion whether to allow entry of the plea, the defendant was entitled to an opportunity to establish good cause. The case was remanded.

#### **IV. Why reversal is necessary**

In this case, the Court of Appeals opinion distinguished State v. Cihonski, supra, on the basis counsel for appellant did not present an insanity defense. (State v. Monford, Franklin App. No. 09AP-274, 2010-Ohio-4732, ¶74.) In fact neither did counsel for Mr. Cihonski. Though Mr. Cihonski testified he had been treated for panic and anxiety attacks, and fled as a "reflex action" when the officer that pulled him over acted aggressively, according to the opinion counsel did not obtain an expert witness or introduce the defendant's medical records in support of the defense. Nor did counsel make a closing argument. Cihonski, 178 Ohio App. 3d 723 at ¶25.

**SECOND PROPOSITION OF LAW: When a plea of not guilty by reason of insanity has been duly entered by prior counsel, appears in the court file, and has not been withdrawn, new counsel renders ineffective assistance of counsel by totally neglecting to address such plea.**

The court and counsel shared a duty to properly dispose of the not guilty by reason of insanity plea. Underlying State v. Cihonski, 178 Ohio App. 3d 713, 2008-Ohio-5191; State v. Kulp (1996), 110 Ohio App. 3d 144; People v. Leon (1958), 163 Cal. App. 2d 791, 329 P.2d 99; and People v. Boyd (1971), 16 Cal. App. 3d 901, 94 Cal. Rptr. 575, is the notion a court fails to provide due process when a case tried to either to the bench or a jury prematurely proceeds to judgment without disposition of an insanity plea. Defense counsel's omissions present ineffective assistance of counsel as an alternative avenue to reversal.

The Sixth Amendment guarantees "(i)n all criminal proceedings, the accused shall enjoy the right...to have the Assistance of Counsel for his defence." This has been construed to mean effective assistance of counsel and not merely nominal representation. Glasser v. United States

(1942), 315 U.S. 60; McMann v. Richardson (1970), 397 U.S. 759. The assistance of counsel is one of the means by which an accused is guaranteed due process in the form of a fair trial, as "(l)eft without the aid of counsel, he may be...convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible." Powell v. Alabama (1932), 287 U.S. 45, 69. The Sixth Amendment right to counsel is extended to state court proceedings through the Due Process Clause of the Fourteenth Amendment. Powell v. Alabama, supra; Gideon v. Wainwright (1963), 372 U.S. 335.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington (1984), 466 U.S. 668, 686. A two part test is to be applied to claims that counsel's assistance was so defective as to require the reversal of a conviction:

...First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

(466 U.S. 668, 687.) Also see State v. Bradley (1989), 42 Ohio St. 3d 136; State v. Lytle (1976), 48 Ohio St. 2d 391, 396-397.

It is the professional duty of counsel to become familiar with the history of a case when he enters pending litigation. Here the plea was entered by Mr. Shwartz before Mr. Younkin entered the case. If Mr. Shwartz told Mr. Younkin of the NGRI plea, Mr. Younkin either forgot, or neglected the plea. If Mr. Shwartz did not tell co-counsel, it was nonetheless the responsibility of Mr. Younkin to become familiar with the contents of the court file. Under any of these scenarios, counsel's performance was deficient.

Appellant's second burden is to demonstrate that counsel's ineffectiveness prejudiced the

defense. The test adopted by the court in Strickland was: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, supra, at 694. In Lockhart v. Fretwell (1993), 506 U.S. 364, the court stressed that the touchstone of an ineffective assistance of counsel claim remains the fairness of adversary proceedings and the reliability of the trial process.

In State v. Cihonski, 178 Ohio App. 3d 713, 2008-Ohio-5191, ¶29-31 the court found the same omission by the attorney who took over representation after the insanity plea had been entered warranted reversal as ineffective assistance of counsel, reasoning:

Initially, we note that the record reflects that Cihonski was represented by different counsel at the time he entered his plea of NGRI from the time of trial. Although this may explain counsel's oversight, it does not excuse the error. An attorney substituting himself as counsel in a pending case has a duty to review previous filings in the case. We also note that had trial counsel believed that the insanity defense was not viable under the facts and had he wished to withdraw the plea of NGRI, after consulting with Cihonski and obtaining his compliance. We find that trial counsel's failure to even notify the jury of Cihonski's plea and defense fell below objective standards of reasonable representation. Further, we find that Cihonski was clearly prejudiced by trial counsel's error, as a defendant has a substantial right to enter a plea of NGRI as well as a constitutional right to trial by jury, and the jury was never made aware of the plea. See (State v) Tenace, 121 Ohio App 3rd 702.

The same conclusion follows in the present case.

As to other cases, In State v. Hatt 2000, 140 Ohio App. 3d 694, an not guilty by reason of insanity plea was entered in a driving under the influence case and a competency hearing was scheduled. The case proceeded to trial with neither issue being addressed. While the record was incomplete, the file indicated the defendant was hospitalized in a psychiatric ward shortly after the time of the offense and again before the case was tried. The court found neglecting to address competency and insanity:

...drops well below a reasonable level of representation. We have only to guess whether appellant was competent to stand trial or whether he was not guilty by reason of insanity. Such demonstrates as reasonable probability that but for

counsel's ineffective representation, the outcome of the proceeding would have been different.

Id., 697-698. This is reminiscent of State v. Kulp (1996), 110 Ohio App. 3d 144, discussed under the first proposition of law, where a truck driver was allowed to represent himself at trial without the court first addressing competency and an NGRI plea.

Pennsylvania appears to involve a different protocol for trying the issue of insanity, but in Commonwealth v. Gass (Supreme Court of Pennsylvania, 1987), 514 Pa. 287, 523 A. 2d 741, a case where insanity was plainly an issue for the jury to address, counsel was ineffective for not requesting the jury be instructed that not guilty by reason of insanity was a possible verdict.

Because counsel's deficient performance undermines confidence in the fairness of the trial's outcome, appellant's convictions must be reversed.

Here, while the defense at trial was mistaken identification, this did not foreclose the possibility there was a substantial basis for arguing the defendant was not guilty by reason of insanity because as a result of a severe mental disease or defect, he did not know the wrongfulness of his acts. [Paraphrasing R.C. 2901.01(A)(14).] Setting aside identification as an issue, the person who shot and killed Mr. Brown, and wounded Ms. Brown acted in a bizarre and unexpected manner. Despite previous direction to keep the change, the gunman surged to a sudden homicidal fury directed towards Mr. Brown, whom he blamed for withholding the money. Nothing in that individual's earlier behavior at the bar foreshadowed such an outburst.

Ohio law does not condition going forward on an NGRI plea on an admission of culpability. Experience has taught that a person with substantial mental illness or low intelligence is likely to be a poor prospect for obtaining such an admission. Individuals presenting a basis for pursuing an NGRI plea are at least as likely to be fixated on an outright denial of guilt as the average defendant, even in the face of strong evidence to the contrary. In fact this obstructionism often compromises presentation of the affirmative defense.

Something said to or observed by deceased counsel led him to enter the insanity plea and to have funds allocated for an evaluation. What may have been revealed through evaluation of

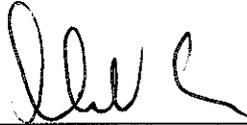
appellant in relation to the plea is unknown. Appellant's history of mental illness, if any, is similarly unknown, though a high degree of anxiety and distrust may be inferred from his letters to the judge. Conventional harmless error analysis is not responsive to the circumstances, much as it is not responsive to assessing the effect of outright denial of counsel, racial bias, or judicial prejudice, where claims of overwhelming evidence are advanced to excuse the due process violation. Ignoring a duly entered plea of not guilty by reason of insanity constitutes structural error.

### CONCLUSION

The language of the indictment and the defendant's plea or pleas in response define a court's obligations in litigating a case to its conclusion. Failure to resolve a not guilty by insanity plea constitutes structural error. Neglect of such a plea means counsel has failed to meet his or her professional obligations. For the above stated reasons, the decision of the Franklin County Court of Appeals should be reversed.

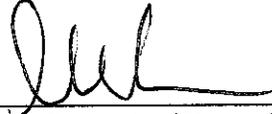
Respectfully submitted,

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**PROOF OF SERVICE**

I hereby certify that a copy of this brief was hand delivered to the office of the Franklin County Prosecuting Attorney, Counsel for Appellee, 373 South High Street, 13th Floor, Columbus, Ohio 43215, this 22nd day of April, 2011.



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