

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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REPLY BRIEF OF APPELLANT, LARUE A. MONFORD

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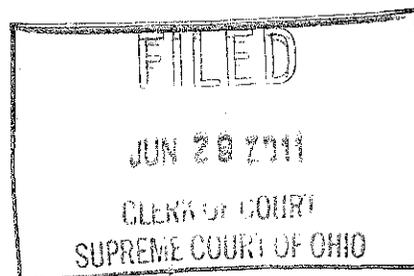
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## REPLY TO APPELLEE'S BRIEF

### I. Insanity is different from other affirmative defenses.

Appellant's brief begins by noting the federal system and most states, including Ohio, require advance notice when a defendant intends to rely upon the defense of insanity. This is because the plea challenges the propriety of punishing the defendant if he is proven responsible for the misconduct charged. The plea shapes the course of preparation for trial. It also give rise to an obligation extending to defense counsel, the prosecutor, and the judge to assure the insanity plea is duly addressed. Entry of an insanity plea is a matter of such gravity that once duly entered it may not be ignored.

Entry of an insanity plea is of immediate consequence. It forestalls the presumption set forth in R.C. 2943.03(E) that: "A defendant who does not plead not guilty by reason of insanity is conclusively presumed to have been sane at the time of the commission of the offense charged."

A verdict of not guilty by reason of insanity has dispositional consequences. It is not a conviction or the functional equivalent. State v. Tuomala, 104 Ohio St. 3d 93, 2004-Ohio-6239, paragraph two of the syllabus. It does not absolve the accused as does a verdict based on claims of self-defense, alibi or entrapment. Instead, pursuant to R.C. 2945.40, an insanity verdict requires the trial court to conduct a hearing within ten days to determine whether the acquittee is a mentally ill person subject to hospitalization by court order of a mentally retarded person subject to institutionalization by court order. If the defendant is so found, he is subject to the continuing jurisdiction of the trial court pursuant to R.C. 2945.401 and 2945.402. This may continue until "the expiration of the maximum prison term...that the defendant...could have received if...convicted of the most serious offense...in relation to which the defendant was found not guilty by reason of insanity." For appellant, convicted of murder, this could mean for life. [R.C. 2945.401(J)(1)(b).]

The United States Supreme Court has never decided one way or the other whether due process mandates recognition of the insanity defense. Clark v. Arizona (2006), 548 U.S. 735, 752, fn. 20. But when a state such as Ohio has provided for such a defense, set forth a statutory

definition, and regulated litigation of that plea and disposition, due process requires that such a plea, when duly entered, be properly addressed by the trial court. An analogy may be drawn to appeals. There is no constitutional right to appeal. Abney v. United States (1977), 431 U.S. 651, 656. But when the right to appeal has been created, other constitutional rights attach. Cf. Douglas v. California (1963), 372 U.S. 353; Ross v. Moffitt (1974), 417 U.S. 600; and Halbert v. Michigan (2005), 545 U.S. 645 addressing the right to counsel on appeal.

## **II. This court should not endorse ignoring a properly entered plea of not guilty by reason of insanity.**

Appellee responds to the first proposition of law by first arguing no error has been demonstrated, then further argues the error is not structural. Appellee tends to focus of the trial court's failure to instruct on insanity, but the broader issue is the trial court's failure to address insanity in any manner. This could have been as simple as asking defense counsel what his intentions were with regard to the insanity plea. Courts, litigants, and the public generally should not be comfortable with a rule that allows insanity pleas to be ignored.

## **III. State v. Cihonski**

Appellee attempts to distinguish State v. Cihonski, 178 Ohio App. 3d 713, 2008-Ohio-5159 factually, as did the Court of Appeals:

The present case, however, is "dissimilar to Cihonski" because "defendant did not present one shred of evidence to demonstrate, or even suggest, that he did not know the wrongfulness of his acts, nor did he ever indicate that he wished to present an NGRI defense." Id. at ¶74. Instead, the defense theory "was clearly one of misidentification" and "the record supports the belief that defendant was completely on board with the misidentification defense." Id.

(Appellee's brief at p. 6 quoting from State v. Monford, 190 Ohio App. 3d 35, 2010-Ohio-4732.)

Appellant first responds that it unfair to place the burden of assuring an insanity plea is addressed on the very individual whose sanity has been placed at issue by the plea. An individual may well have been "insane" at the time of the incident, but not believe himself to have been so. Furthermore, whatever ideation was the basis for the insanity plea may well persist, making the

accused a poor candidate for assuring the issue is addressed.

Second, as set forth in appellant's initial brief, the issue of sanity was not directly raised during Mr. Cihonski's trial. The defendant testified he and his mother became lost while driving home from a mental institution in Kentucky, where he had been treated for anxiety and panic attacks, and that after being pulled over he had such an attack based on the officer's conduct. This may have suggested the viability of an insanity defense, but so does the sequence of events in the present case - an apparently senseless killing by a mature offender following what at most was a minor slight. But as in the present case, the defense did not present testimony or other evidence addressed to the question whether the accused met the definition of legal insanity set forth in R.C. 2901.01(A)(14).

Appellate counsel for Mr. Cihonski framed the third assignment of error as follows:

The trial court committed plain error [sic] 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.

Believing the broader problem was the court's failure to properly address and properly dispose of the insanity plea, in this case the fourth assignment of error stated:

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.

Counsel might have argued the issue as plain error, but based on Cihonski argued structural error instead.

In both cases, while the trial court had an obligation to address the not guilty by reason of insanity plea, counsel's concurrent duty was affected by a change in counsel, with new counsel by all indications being unaware of the insanity plea. Appellant submits courts are always under a duty to properly dispose of insanity pleas, whether there is a trial or a guilty plea. If there is a plea, the matter should be addressed as the court discharges its obligations under Criminal Rule 11. But even if the Court is of the view a guilty plea waives the defense, waiver may not be fairly inferred when there has been a trial with the defendant represented by new counsel who came into the case

after the plea was entered.

#### **IV. Plain error and structural error**

Plain error, harmless error, and structural error are separate concepts. Plain errors and structural error may be raised for the first time on appeal. Since plain errors may be recognized if the substantial rights of the accused are affected [Crim. R. 52(B)] reversal means the error was not harmless. Structural error means harmless error analysis is not required, or more accurately means such review is unnecessary in view of the magnitude of the constitutional violation.

Plain error was the basis for the third assignment of error in State v. Cihonski, supra, and the court's reasoning could readily have led to the conclusion the failure to address the insanity plea was plain error. But Cihonski was decided on October 6, 2008, not long after this court decided State v. Colon, 118 Ohio St. 3d 26, 2008-Ohio-1624 on April 9, 2008. This likely explains why the Court of Appeals chose to apply structural error analysis following Colon I's analytical method, even though on reconsideration Colon II [State v. Colon, 119 Ohio St. 3d 204, 2008-Ohio-3749] limited Colon I's to prospective application and confined the syllabus to the facts of that case.

Neither Colon II nor State v. Horner, 126 Ohio St. 3d 466, 2010-Ohio-3830, repudiates Colon I's methodology for structural error analysis. Instead Horner notes "the confusion created by Colon I and Colon II" and resolves an omitted mens rea issue applying different precedent. Widespread confusion is unlikely in the present circumstances where the court may adopt a rule applicable only in those rare cases where an insanity plea has been ignored following a change in counsel.

Alternately the Court may apply plain error analysis and determine the record is such that the record is such that the error may not be declared harmless. The record does not contain a report indicating no basis for believing the defendant was insane at the time of the incident. Thus there is no basis for concluding, applying Chapman v. California (1967), 386 U.S. 18, 24, that error was harmless beyond a reasonable doubt.

## **V. Ineffective assistance of counsel**

Appellee's brief at p. 21 maintains ineffective assistance of counsel claims are by nature beyond review in direct appeals, citing Massaro v. United States (2003), 538 U.S. 500, 504-505. This may be true in federal court where the defendant may wait until post-conviction proceedings to litigate all claims of ineffectiveness. But Ohio strictly applies the doctrine of res judicata. If a claim can be raised from the record on direct appeal, it must be raised. Otherwise it is waived. Cf. State v. Cole (1982), 2 Ohio St. 3d 112, syllabus.

Appellee asserts, "One of the recurring themes throughout appellant's brief is his speculation that Younkin was either unaware of the NGRI plea or forgot about it. But this speculation fails to credit Younkin with the necessary presumption of competence." (Appellee's brief at p. 21.) Presumed competence is inappropriate in this case. Appellant complained of counsel's efforts to the bar association, at an October hearing, and again immediately before trial. (October 21, 2008 Transcript; Voir dire Transcript 10-13.) Furthermore, though not accepted for review, the fifth proposition of law in appellant's memorandum in support of jurisdiction sought review of additional instances of incompetent and ineffective representation.

Counsel failed to conduct a meaningful voir dire. This may have been attributable to the death of co-counsel a few days before trial commenced. Questionnaires filled out by prospective jurors are not of record, but examination from the bench and by the prosecutor plainly suggest detailed inquiry by defense counsel was essential in a number of instances. Yet counsel failed to follow through. Instead he offered what was essentially a monologue. Inquiry into whether members of the panel knew counsel or the defendant only briefly interrupted talk about counsel's background and the seriousness of the case. (Voir Dire Tr. 83-92.) He blundered into an inappropriate and counterproductive anecdote invoking O.J. Simpson, who in the majority view was unjustly acquitted of stabbing to death his ex-wife and the man she was with, and F. Lee Bailey, whom jurors may have known was disbarred. (Voir Dire Tr. 93.) He then spoke of a wake he had attended and mentioned that deceased co-counsel was famous for abbreviated voir dire.

(Voir Dire Tr. 94-96.)

Counsel was ineffective for not excusing a juror seated following exercise of a defense peremptory. This individual told the judge he might not be able to sit as a fair and impartial juror because: "One of my uncles died from a gunshot wound and I witnessed it. So that would be hard for me to hear the evidence and to sit." The juror agreed with the court's follow up question, "So you think that listening to testimony regarding a shooting, that you either would not have the ability, one, to be fair and impartial for the State or for the Defendant, but would be so distracting, I guess, that you couldn't actually listen to the evidence?" (Voir Dire Tr. 19-20, 112-119.)

Other instances of ineffectiveness include counsel's failure to file a notice of alibi though in opening counsel said appellant was at home at the time of the shooting, not at the bar, and didn't learn of the crime until the following day. (Tr. III, 18.) Defense counsel failed to move for acquittal pursuant to Criminal Rule 29 at the close of the state's case or at the close of the evidence. (Tr. IV, 327-334, 416.) Counsel in artfully argued merger, and failed to point out that R.C. 2941.25 is not satisfied by the imposition of concurrent sentences. (Tr. V, 22-23.)

Nothing in the record fairly suggests defense counsel knew of the insanity plea and abandoned it, deliberately choosing not to inform the court of this decision. Nor can the viability of the plea be rebutted, absent the examiner's report.

At p. 25 appellee cites Ohio Rule of Professional Conduct 1.2(a): "In a criminal case, the lawyer shall abide by the client's decision as to a plea to be entered." In State v. Tenace (1997), 121 Ohio App. 3d 702, defense counsel withdrew an insanity plea over the defendant's objection. The Sixth District reversed, concluding "once appellant was found competent to stand trial, he was also competent to make a decision regarding what plea to enter. Even if his trial counsel believed that appellant's choice was not the best tactical choice, appellant's decision should have been final." *Id.* at 715. The opinion quotes the following passage from State v. Turner (September 17, 1980), Medina App. No. 963, unreported:

\* \* \* The primary duty of counsel in this sphere (choosing how to plead) is to present defendant those choices available, to explain their meanings, and then, to abide by his client's choices. Defense counsel cannot decide himself the path to be chosen by his client; ne cannot waive one or more of the defenses once chosen by his client or withdraw one or more of the pleas entered, without the consent of the person he represents.

(Tenace at 121 Ohio App. 3d 710.) Applied to the present circumstances, once the plea had been entered by deceased former counsel, new counsel could not ignore it without the client's permission.

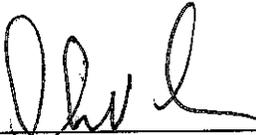
Once he took over representation trial counsel had a professional duty to become familiar with the contents of the court file. This would have brought the plea to his attention, and as an officer of the court, he was under a duty to either press forward on the plea, or withdraw it. His failure to do so undermines the necessary degree of confidence in the correctness of the outcome of these proceedings.

### CONCLUSION

Based on the above and matters previously addressed in appellant's merit brief, the decision of the Franklin County Court of Appeals should be reversed.

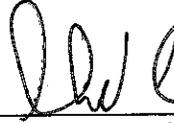
Respectfully submitted,

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**PROOF OF SERVICE**

I hereby certify that a copy of this reply 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 29th day of June, 2011.



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