ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	
Plaintiff - Appellee,	:	**CASE NO. 10-0944**
v.	:	
Jeremiah Jackson,	:	
Defendant - Appellant.	:	**CAPITAL CASE**

REPLY BRIEF OF APPELLANT, JEREMIAH JACKSON

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SUPREME COURT OF OHIO

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Proposition of Law I:

> **Judicial bias is present when the trial court *sua sponte* orders and conducts a reverse-Atkins v. Virginia (2002), 536 U.S. 304, hearing for a capital defendant where the court is aware that the defense has not conducted a complete mental retardation investigation.**

In this case, the trial judge, *sua sponte*, ordered the defense to file a request for an Atkins v. Virginia (2002), 536 U.S. 304 hearing. In his Brief on the Merits, Jackson argued that the Court revealed biased against the appellant and in favor of the State when it conducted, *sua sponte*, an "anti-Atkins" hearing.

The State sought and obtained a death sentence; the trial court not only conducted the "anti-Atkins" hearing but also accepted a jury waiver from the appellant and then became a member of a three judge panel that decided the facts of the case and imposed the death penalty.

A thorough and complete investigation by the defense is required before an Atkins claim may be fully litigated. It is not simply a matter of looking at an IQ score but rather involves a complete investigation into the defendant's adaptive functioning. See United States v. Davis, 611 F.Supp.2d 472 (D. Md. 2009) and United States v. Paul Hardy, 2010 U.S. Dist. Lexis 129858 (E.D. Louisiana)(November 24, 2010). (Appellant's Brief on the Merits, pp. 15-24).

An Atkins claim is tantamount to an affirmative defense. A trial court judge has no business *sua sponte* conducting a hearing into possible affirmative defenses before the trial commences and calling as witnesses possible expert witnesses hired by the defense. In this case, Dr. Fabian was not hired to conduct a complete investigation into the defendant's intellectual ability or mental retardation; he was a "mitigation expert" according to the trial judge.

The State's position that "the trial court was required to make inquiry as to whether valid grounds existed for Jackson's failure to present an *Atkins* claim" is not supported by any case law or statute.

The State's reliance on State v. Ashworth (1999), 85 Ohio St.3d 56 is misplaced. Ashworth involves what a court must do when a defendant in a capital case desires to waive presentation of all mitigation evidence. The focus of an Ashworth hearing is whether the defendant is competent to make a decision to waive the presentation of all mitigating evidence. The defendant in Ashworth initiated the procedure by asking to waive his right to present mitigation.

The question here in Jackson is entirely different than the assertion of an Atkins defense to the imposition of the death penalty and whether the State may seek the imposition of the death penalty. Here, the trial court is not inquiring of the defendant himself but is interfering with decisions made by trial counsel for the defendant.

Perhaps the trial judge should conduct a hearing to determine why alibi was not being pursued by the defense; or why self defense was not being pursued; or why any number of defense strategies were not being pursued. The inquiry by the trial judge simply exceeded her authority and showed favoritism to the state seeking the death penalty. The trial judge wanted to protect the state's interest.

It is plausible that the defense did not pursue an Atkins claim because it had not hired an expert on mental retardation and had not conducted the thorough investigation into adaptive functioning that is required. The court's *sua sponte* hearing has now, arguably, prevented the appellant from ever raising an Atkins claim after the thorough adaptive functioning investigation

has taken place under the doctrine of *res judicata.*

The requirement of neutrality safeguards against the taking away of life, liberty or property on the basis of erroneous or distorted conception of the facts or law. *See* Matthews v. Eldridge (1976), 424 U.S. 319, 344. A trial judge's conduct must also "satisfy the appearance of justice." Offut v. United States (1954), 348 U.S. 11, 14.

The trial judge's overzealous desire to "build the record" evinced a bias in favor of the State who was seeking the death penalty. Rather than simply remain neutral and detached and accordingly decide the legal issues presented by the parties, the trial judge actively interceded on behalf of the State. The court's dissatisfaction with the defense investigation and strategy in representing Jackson reflects a bias against Jackson himself or his counsel. State v. Dean (2010), 127 Ohio St.3d 140. As suggested by this Court in Dean, if the trial court truly wished to remain and/or appear neutral, a separate judge should have been assigned to conduct the hearing so that the sitting judge and ultimate sentencer would not have been influenced in any manner by the adduced evidence.

Here, the trial judge lost at least the appearance of neutrality when she demanded and obtained testimony from Dr. Fabian as to why the defense was not pursuing an Atkins claim.

Proposition of Law II:

> **A jury waiver is invalid under the Sixth, Eighth and Fourteenth Amendments of the Federal Constitution when the defendant's head is "banging," he has an "inability to focus" and his lawyer states he is a "little delusional."**

As noted in Jackson's Brief on the Merits, the trial court here erroneously accepted Jackson's attempt to waive his right to a jury trial. The State concludes that Jackson has "failed to demonstrate that his jury waiver was not voluntarily entered." (Appellee's Brief on the Merits, p. 50). However, a review of the colloquy reveals that the record does not support that the waiver was entered voluntarily, intelligently and knowingly as is required by the federal and state constitutions. At the time the waiver was entered, the record establishes that Jackson complained of dehydration at best, and was, as his attorney observed, delusional at worst. Minimally, the trial court should have recessed for the remainder of the day and determined whether Jackson should be again referred to the court clinic for an evaluation or just needed rest and hydration.

A waiver of a fundamental right to a jury trial, especially in a capital case, must be done knowingly, intelligently and voluntarily. First, the defendant must have the "ability" to knowingly, intelligently and voluntarily waive his right to a jury trial and then there must be a determination that he actually does understand the significance and consequences of a particular decision. *See* Godinez v. Moran (1993), 509 U.S. 389, 400-401 n.12.

In this case, neither the Court nor the State give any weight to the appellant's low IQ score which puts him in the range of one who is borderline mentally retarded or minimally intellectually disabled. Such a fact is a factor to be considered in deciding whether the waiver is knowingly and intelligently and voluntarily given. *See* State v. Blackstock, 19 S.W.3d 200, 208

(Tenn. 2000); United States v. Herra-Martinez, 985 F.2d 298, 302 (6th Cir. 1993).

The State chooses to give no weight to the portions of the transcripts where Jackson complains of feeling "sick", complains of his "banging head", that he is "out of it", that he "can't really focus right now", that he understands "a little, little by little" and that defense counsel states "he is a little delusional right now." (T. 224) "A little delusional" is strong language that should not have been ignored. Counsel did not say that Jackson was "not feeling well" or "a little under the weather" which would indicate a physical ailment. The word "delusional" denotes a mental rather than physical health issue. A drink of water is unlikely to fix the problem.

It is well understood that one's mental health condition when incarcerated and facing the death penalty may deteriorate over time. *See* Drope v. Missouri (1975), 420 U.S.162, 181. The State does not address this argument in its brief. However, the defendant's competency and sanity had been evaluated many months before this waiver hearing; under these peculiar facts, the trial judge should not have accepted the jury waiver until another competency evaluation had been conducted.

The offer to provide Jackson a drink of water is far from adequate under the circumstances and shows a disregard or lack of understanding of a capital defendant's mental health. Counsel's comment that the appellant was "delusional" must not be dismissed; instead, it is a red flag that something may have been seriously wrong with Jackson. The Court must take every precaution such as a referral to ensure the appellant was competent to waive his right to a jury trial in a capital case.

"[I]t is not enough for the district judge to find that the defendant is oriented to time and

place and has some recollection of events, but that the test must be whether he 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." Dusky v. United States (1960), 362 U.S. 402 (internal quotations and bracketing omitted); cf. Riggins v. Nevada (1992), 504 U. S. 127, 140 (Kennedy, J., concurring in the judgment) (noting distinction between "functional competence" and higher level "competence to stand trial").

Courts must indulge every reasonable presumption against the waiver of fundamental constitutional rights such as the waiver of a right to a jury trial in a capital case. *See* Johnson v. Zerbst (1938), 304 U.S. 458, 465. The trial court here failed to take the steps, or build a record, as to Jackson's level of competence or ability to waive a jury at that time. The waiver under these circumstances is void.

Proposition of Law IV:

> **The trial court abuses its discretion by having a capital defendant shackled throughout the trial without having first conducted an evidentiary hearing to establish the necessity of having the defendant shackled throughout the trial.**

The state argues that the issue was not preserved because trial counsel failed to raise the issue in the trial court as is required by Criminal Rule 12. A state procedural rule does not trump a constitutional mandate. Holmes v. South Carolina (2006), 547 U.S. 319, 324, citing Crane v. Kentucky (1986) 476 U.S. 683. In addition, the state erroneously argues that Jackson had the burden of proving he was prejudiced by the shackling. Where no hearing is held to establish the necessity of shackling a defendant, it is the state that bears the burden of proof that no prejudice occurred to Jackson. Deck v. Missouri (2007), 544 U.S. 622, 629.

The right to a presumption of innocence is at the very foundation of our system of criminal justice. Coffin v. United States (1895), 156 U.S. 432, 453 In Holbrook v. Flynn (1986), 475 U.S. 560, 568-69 the Supreme Court noted that shackling and other overt displays of security are inherently prejudicial and "should be permitted only where justified by an essential state interest specific to each trial," citing Illinois v. Allen (1970), 397 U.S. 337. In Allen, the Court explained the risks inherent in shackling a defendant, stating:

> Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.

Allen, 387 U.S. at 344.

~~To strip a defendant of that right, a judge must decide, following an evidentiary hearing,~~ that the defendant is a dangerous person prone to outbursts of violence, that he must be

restrained, and what minimal level of restraint is necessary to maintain courtroom decorum and security. Holbrook v. Flynn, supra; Rhoden v Rowland, 172 F.3d 633 (9th Cir. 1999); Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987); Atkins v. State, 499 N.E.2d 1180 (Ind. Ct. App. 1986). The decision can neither be delegated to a sheriff's department, United States v. Brooks, 125 F.3d 484 (7th Cir. 1997); Lemons v. Skidmore, 985 F.2d 354 (7th Cir. 1993), nor be justified as a matter of convenience. Walker v. State, 410 N.E.2d 1190 (Ind. 1980).

Other states have required that a restraint of a defendant at trial must be predicated upon a prosecutorial showing of extreme need. State v. Finch, 975 P.2d 967 (Wash. 1999)(decision to shackle defendant was abuse of discretion without specific particularized showing of need. Violation found harmless as to guilt but prejudicial as to penalty.); Evans v. State, 571 N.E.2d 1231 (Ind. 1991).

Additional Federal Court Decisions

The state failed to make reference to any federal court decisions, which is a dangerous tactic in a death penalty case. A reason for this might be that the federal courts demand a high standard in instituting shackling. For instance, in Laird v. Horn, 2001 U.S. Dist. Lexis 13627 (E.D. Pa. 2001) the district court found that forcing petitioner to appear at sentencing in a capital case in shackles was an unreasonable application of clearly established federal law. Other courts are in accord; see Elledge v. Dugger, 823 F.2d 1439 (per curiam), modified, 833 F.2d 250 (per curiam) (11th Cir. 1987); Rhoden v. Rowland, 172 F.3d 633, 637 (9th Cir. 1999) (Due process was denied when the trial court ordered [the defendant] shackled ... without a proper determination of the need for shackles.); Duckett v. Godinez, 67 F.3d 734, 747 (9th Cir. 1995) (shackling defendant during sentencing comports with due process only when last resort to protect essential

state interest).

Burden on State to Prove Prejudice Where No Hearing Conducted on Propriety of Shackles

A proper summation of the shackling issue was relatively recently addressed by the Tenth Circuit Court of Appeals in United States v. Banegas, 600 F.3d 342, 345 (10th Cir 2010) The Supreme Court has held that "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." Deck v. Missouri, 544 U.S. at 629. As shackling is considered inherently prejudicial, the trial court must state its reasons for shackling outside of the presence of the jury. United States v. Joseph, 333 F.3d 587, 590-91 (5th Cir. 2003) The Supreme Court has explained that shackling "undermines the presumption of innocence and the related fairness of the proceedings," "can interfere with a defendant's ability to participate in his own defense," and affronts the "dignity and decorum of judicial proceedings that the judge is seeking to uphold. Deck, 544 U.S. at 630-31 (internal citations and punctuation omitted).

The Babegas Court noted that an essential state interest justifying shackling is found where there is a danger of escape or injury to the jury, counsel, or other trial participants. Therefore, even when a court has not stated the reasons for its decision to shackle a defendant, however, the reasons therefor might nevertheless be apparent when viewed in light of the specific facts of the case. But when no reasons are given by the trial court, and it is not apparent that shackling is justified, the defendant need not demonstrate actual prejudice on appeal to make out a due process violation; rather, the burden is on the government to prove "beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict obtained." Id., at

345-46, citing Deck, at 635. If the government cannot bear its burden, the conviction must be vacated and the case remanded for a new trial. Id.

No Basis for Shackling Provided

As noted in the Merit Brief, the trial court had Jackson wearing shackles for no apparent reason. It is apparent that Jackson began the trial wearing handcuffs. At one point early in the proceedings, the court ordered his handcuffs removed and ordered that he be placed in leg-irons so that Jackson could sign documents. (T. 375 -80) The record reflects that he wore leg-irons throughout the proceedings. (T. 753)

The state argued that Jackson "failed to demonstrate that he suffered prejudice." (Merit Brief of Appellee at p. 54.) This is backward. It is the State that has the burden of proof that no prejudice has occurred. It has failed to meet that burder here.

Proposition of Law X:

> **The sentencing body may not refuse to consider evidence presented in mitigation where such evidence is relevant to the inappropriateness of the death penalty.**

The state misinterpreted Jackson's argument. It is not being argued that the three-judge panel was legally precluded from considering evidence, it was that the court chose not to consider evidence. As the sentencing body in this case, it was improper to not consider evidence presented in mitigation.

The defense had brought into evidence through Dr. John Fabian that Jackson had endured physical and sexual abuse in his youth. (T. 1993, 2026)

A capital sentencer must consider and give effect to properly introduced mitigation. It is understood that this means that the panel was entitled to provide no weight to established mitigation. In other words, the court is legally entitled to hear the evidence, consider it as mitigation, but decide to give it little or no weight in its consideration. However, it was not permitted to just refuse to consider the evidence at all.

The Supreme Court clearly established this concept in Eddings v. Oklahoma (1982), 455 U.S. 104. In Eddings, a majority of the Court reaffirmed that a sentencer may not be precluded from considering, ***and may not refuse to consider***, any relevant mitigating evidence offered by the defendant as the basis for a sentence less than death. The Court found no distinction under Lockett v. Ohio (1978), 438 U.S. 586, between a statutory provision precluding a judge or jury from considering mitigation evidence and a trial judge's refusal to do so. "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. Id. at 113-114.

It should also be mentioned that constitutionally, mitigation evidence is admissible and must be considered by the sentencing jury if it meets a law threshold test for relevance. Tennard v. Dretke (2004), 542 U.S. 274, 284-88 (rejecting Fifth Circuit's test for "constitutional relevance.") see e.g. U.S. v. Fell, 531 F.3d 197, 222 (2nd Cir. 2008) (mitigating evidence need only be relevant and need not have a "nexus" to the murder); Lambright v. Schirro, 490 F.3d 1103, 1114-1115 (9th Cir. 2007)(admissibility of mitigation evidence does not require showing of "explanatory nexus" to crime.)

If the sentencer has refused to consider and give effect to viable mitigation, the sentence of death must be reversed. This is because the sentence imposed at the penalty failed to reflect a reasoned *moral* response to the defendant's background, character, and crime. California v. Brown, 479 U. S. 538, 545 (1987).

Ohio Revised Code 2929.03(F) is a direct codification of the United States Supreme Court's dictates of Lockett. The statute simply requires the sentencing judge to place the analysis required in Lockett into writing and enter the opinion into the record. The statute provides, in relevant part:

> The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.

The statute requires the sentencing judge to do what the constitution requires under Lockett, that is, identify the factors and explain why the aggravators outweigh the mitigation. In this way, the statute requires the sentencer, here the three-judge panel, to consider and give effect

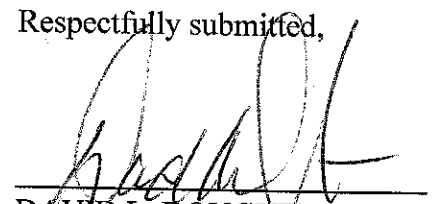
to the mitigation evidence presented.

Where, as here, the panel does not even mention significant evidence in mitigation, as they are required to do constitutionally and by stature, the presumption of correctness cannot be afforded to its procedure. That statute requires identification of the mitigating factors. Where a factor is not identified by the panel, it should be presumed it was not considered. Otherwise, the purpose of the statute in requiring death sentences to comport with Lockett is defeated.

CONCLUSION

Pursuant to the preceding Propositions of Law I, II, IV, V, and VI the defendant-appellant, Jeremiah Jackson, respectfully requests that this Honorable Court reverse the convictions and remand this case with a new trial order. Pursuant to Proposition of III, it is requested that convictions of stemming for Counts 19 through 31 as the trial court here did not have jurisdiction to hear the case. In the alternative, it is respectfully requested that pursuant to Propositions of Law VII, VII, VIII, IX, X, XI, XII, XIII and XIV, that this Court reverse his death sentence and a remand with an order for a new sentencing hearing.

Respectfully submitted,



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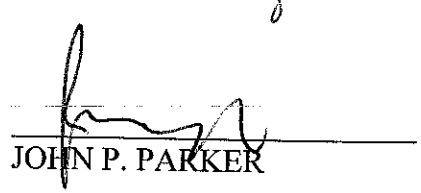

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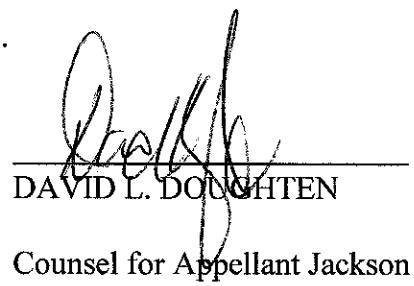
CERTIFICATE OF SERVICE

A copy of the foregoing Appellant's Merit Brief was served upon William D. Mason, Esq., Cuyahoga County Prosecutor, The Justice Center, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113 on this 15th day of August, 2011.



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