

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio

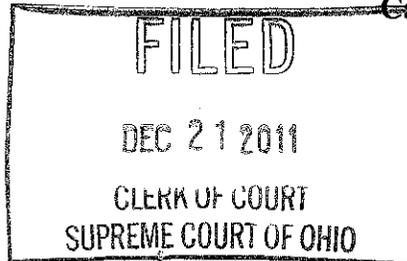
Plaintiff-Appellee

Vs.

Duane Allen Short

Defendant-Appellant

Case No. 06-1366



This Is A Capital Case.

**On Appeal from the
Montgomery County Court of Common Pleas
Case No. 2004 CR 02635**

Appellee's Memo Contra Application For Reopening

Mathias H. Heck, Jr.
Montgomery County Prosecutor

Carley J. Ingram - 0020084
Assistant Prosecuting Attorney

Montgomery County Prosecutor's Office
Appellate Division
Dayton-Montgomery County Courts Building
P.O. Box 972, 301 West. Third Street, 5th Floor
Dayton, Ohio 45422
(937) 225-4117
(937) 496-6555 (FAX)

Counsel for Appellee

**Office of the
Ohio Public Defender**

Kimberly S. Rigby - 0078245
Assistant State Public Defender
Counsel of Record

Gregory A. Hoover - 0083933
Assistant State Public Defender

Office of the Ohio Public Defender
Death Penalty Division
250 East Broad Street
Suite 1400
Columbus, OH 43215
(614) 466-5394
(614) 644-0708 (FAX)

Counsel for Appellant

IN THE SUPREME COURT OF OHIO

State Of Ohio

Case No. 06-1366

Plaintiff-Appellee

Vs.

Duane Allen Short

Defendant-Appellant

This is a Capital Case.

Appellee's Memo Contra

A. The Court should deny the application: The State of Ohio asks this Court to deny Appellant Duane Short's application for reopening. Short has failed to carry his burden of establishing that there is a genuine issue as to whether he has a colorable claim of ineffective assistance on appeal. S.Ct.Prac.R.11.6(E); *State v. Jones*, 91 Ohio St.3d 376, 377, 2001-Ohio-55, 745 N.E.2d 421.

B. The burden is on Appellant: To justify reopening his appeal, Appellant Short has the burden of establishing that there is a genuine issue as to whether he has a colorable claim of ineffective assistance on appeal. *State v. Jones*, supra. The two-pronged analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, is the appropriate standard to assess whether an applicant has raised a genuine issue as to the ineffectiveness of appellate counsel in a request to reopen under App.R. 26(B)(5). *Id.* Thus, to win re-opening, Short must demonstrate that appellate counsel's representation was

constitutionally deficient, which is to say that it fell outside of the wide range of professionally competent assistance, and that in the absence of counsels' unprofessional mistakes, there is a reasonable probability that the jury would have had concluded that he was not guilty of the crimes, or that the aggravating factors did not outweigh the mitigating factors beyond a reasonable doubt and the law demanded a sentence of a term of years rather than death. *Washington v. Strickland*, supra at 690, 695.

C. Argument: Short has identified nine propositions of law that he asserts that appellate counsel had a constitutional duty to raise on direct appeal. He is mistaken. In fact, most of the arguments he presents depend on a misapprehension of the facts in the record.

Appellants' Proposition of Law 1: "A capital defendant is constructively denied counsel when trial counsel advise their client to waive the presentation of mitigation without first investigating the facts or researching the law."

Appellant is mistaken on the facts: he did not waive mitigation; counsel did not advise him to do so, and counsel were well aware of the facts and the law.

First, Appellant waived only his right to present *additional* evidence in mitigation. He chose instead to rely on testimony admitted in the culpability phase of the trial. As found by this Court, trial counsel "did elicit mitigating evidence in the guilt phase by cross-examining the state's witnesses. Moreover, counsel used that evidence in the penalty phase to argue that Short did not deserve death." *State v. Short*, ¶71. See also ¶57, 63, 68, 72.

Second, it is not accurate to state that trial counsel advised Appellant to waive the presentation of mitigating evidence – the record shows that Appellant waived the introduction of additional evidence in mitigation *in spite of* counsel's advice, *not because of* it. (Tr. 2473)

Third, the record refutes the assertion that counsel failed to investigate facts in mitigation. Trial counsel assured the trial court they had done so, and this Court so noted in its opinion. *State v. Short*, ¶129. (Tr. 2465)

And finally, there is not a shred of evidence that counsel had failed to research the applicable law. In fact, the record shows that counsel filed all appropriate motions before trial, made numerous motions and objections during the trial, and represented their client assiduously and skillfully throughout the entire proceeding. Although Appellant spins a theory that trial counsel made a foolish tactical decision not to provide additional mitigation evidence to the jury out of blind ignorance of the law, there is nothing to support this fanciful notion. The record shows that counsel were well-versed in the law, that Short himself decided to forego the introduction of additional mitigation, and that counsel's motion to present additional mitigation to the judge was a last-ditch effort on behalf of their client.

Appellate counsel cannot be faulted for not making an argument that is refuted by the facts in the record.

Appellant's Proposition of Law 2: "A capital defendant is denied the right to effective assistance of trial counsel when trial counsel prejudicially fails his client during his capital trial."

Appellant's second proposition of law consists of a list of perceived errors by trial counsel, which he claims appellate counsel was ineffective for not arguing on appeal. This is nonsense.

First, as noted, there is nothing to support the theory that counsel closed the door to mitigation because they foolishly believed the law allowed them a second mitigation hearing with the court. Second, the remarks of counsel during voir dire that Appellant complains of were not promises at all, and, in any case, counsel kept their word: it was evident that the goal was to

save their client's life; the jury was given a great deal of information about Short; and they introduced evidence that they asked the jury to consider in mitigation. Third, trial counsel cannot be faulted for agreeing to excuse a juror whose demeanor immediately prompted the judge to offer a sidebar and whose answers were not responsive at all to the questions asked. (Tr. 1033-1034) As to Appellant's complaints about trial counsels' failure to challenge or excuse five other jurors, neither new counsel nor the court is in a position to second-guess counsel on this point. See *State v. Bradley* (1989), 42 Ohio St.3d 136, 143, 538 N.E.2d 373.

Appellant's Proposition of Law 3: "A capital defendant's waiver of the presentation of mitigation evidence is not knowingly made when that waiver is not based upon reasonably competent advice."

The third proposition of law is flawed for the same reason as the first – Appellant did not waive all mitigation, counsel did not advise him to do so, and the record dispels the idea that counsel forced Appellant to give away a valuable right because they were ignorant of the law.

Appellant's Proposition of Law 4: "A capital defendant's rights to a fair trial, impartial jury, due process, and freedom from cruel and unusual punishment are violated when the trial court excludes a juror for cause when cause did not exist."

The juror named in Appellant's motion indicated on voir dire that she had preconceived notions that might prevent her from following the law, that she did not know whether she could overcome those beliefs, and that even if the state proved beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors, she might not be able to sign a verdict sentencing the defendant to death. (Tr. 667-668) Later, she stated that "I guess I could" when asked if she could follow the law, but she also said she would still have reservations about the death penalty. (Tr. 689-690) The trial court excused her, noting that she "so clearly evidenced more than trepidation" about serving on the jury and the death penalty, and finding that her views on capital punishment would prevent or substantially impair her performance of her duties

in accordance with the law. (Tr. 693) Neither new counsel nor this court is in a position to second-guess trial counsel or the trial court on this point. See *State v. Bradley* (1989), 42 Ohio St.3d 136, 143, 538 N.E.2d 373.

Appellate counsel did not breach a duty he owed to his client by not making these arguments.

Appellant's Proposition of Law 5: "A capital defendant is denied the right to effective representation of trial counsel when trial counsel labors under a conflict of interest during the capital trial."

There is no evidence whatsoever that counsel's ability to consider, recommend, or carry out an appropriate course of action for Appellant was materially limited by the fact that they were retained by his father, or that Appellant's father directed or regulated counsel's professional judgment. Prof. Cond. R. 1.7, 1.8, 5.4. Nor is there any suggestion that Appellant's father's interests were not aligned with his own.

Appellant's Proposition of Law 6: "A trial court violates a capital defendant's constitutional rights to a fair trial and due process when it commits prejudicial errors during the capital defendant's trial."

Nothing about the arguments raised in this proposition of law are so compelling that appellate counsel can be condemned for not making them. This court has found that evidence that Short was suicidal nearly a week after the murders would have little relevance or mitigating value and that there was already considerable evidence in the record to show that Short was deeply upset after his wife left him. *State v. Short*, ¶¶123-128. There is no prejudice shown by the court's denial of the defense request for additional time to study the jury questionnaires. What's more, the trial court noted that it was not limiting the amount of time counsel could question the jurors, that counsel had the questionnaires quite a while before and during the break, and that the panels the next day would be smaller. (Tr. 473-474)

Appellant also complains about a misstatement of law by the prosecutor in closing argument in the mitigation phase of the trial, at p. 2499 of the transcript. Taken literally and out of context, the prosecutor's statement appears to be an incorrect statement of the law. In context, however, it is evident that the prosecutor was informing the jury that the deliberations they were about to undertake did not amount to a numbers game, where a finding of one aggravating circumstance required a sentence of death. (If that were so, the guilty verdicts on the aggravating circumstances that the jury had already returned would have rendered the mitigation phase of the trial unnecessary.)

In any case, the prosecutor almost immediately stated the law correctly: "The State submits that after you've thoroughly — after you thoroughly and separately review each of the aggravating circumstances for each count of aggravated murder and you weigh those against the mitigating factors offered by the Defendant, you're going to find that beyond a reasonable doubt that these aggravating circumstances outweigh the mitigating factors". (Tr. 2500)

Appellate counsel could not have been at fault for not arguing this as an assignment of error – it is weightless.

Appellant's Proposition of Law 7: "A capital defendant is denied his substantive and procedural due process rights to a fair trial and reliable sentencing as guaranteed by the U.S. Const. Amends. VIII and XIV; Ohio Const. Art. I, § 9 and 16 when a prosecutor commits acts of misconduct during his capital trial."

As noted above, it also appears, in context, that the prosecutor was informing the jury that their deliberations were not a numbers game, where a sentence of death is required simply because the jury found him guilty of an aggravating circumstance. But in any case, the prosecutor almost immediately stated the law correctly: "The State submits that after you've thoroughly — after you thoroughly and separately review each of the aggravating circumstances

for each count of aggravated murder and you weigh those against the mitigating factors offered by the Defendant, you're going to find that beyond a reasonable doubt that these aggravating circumstances outweigh the mitigating factors". (Tr. 2500)

There was no misconduct, and appellate counsel did not violate a duty owed to Appellant by not making this argument.

Appellant's Proposition of Law 8: "A capital defendant is denied his substantive and procedural due process rights to a fair trial and reliable sentencing as guaranteed by U.S. Const. Amends. VIII and XIV; Ohio Const. Art. I, § 9 and 16 when the venire systematically excludes distinctive groups in the community."

This Court has consistently upheld the calling of venires from voter registration lists. *State v. Yarbrough*, 2002-Ohio-2126, ¶103-106, 95 Ohio St.3d 227, 244, 767 N.E.2d 216, citing *State v. Moore* (1998), 81 Ohio St.3d 22, 28, 689 N.E.2d 1; *State v. Johnson* (1972), 31 Ohio St.2d 106, 60 O.O.2d 85, 285 N.E.2d 751, paragraph two of the syllabus.

Appellant's proposition of Law 9: "A capital defendant has the constitutional right to present a defense."

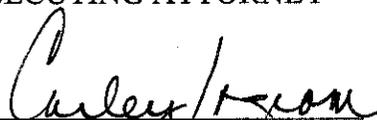
Appellate counsel made this argument, and this Court rejected it, on direct appeal. Opinion, ¶91-111.

Conclusion

Appellant has not shown, nor can he show, that appellate counsel was ineffective for failing to argue the positions presented in the application to reopen. The Court should overrule Short's request.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By 

CARLEY J. INGRAM

REG. NO. 0020084

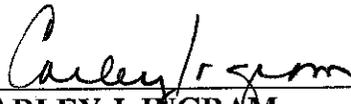
Assistant Prosecuting Attorneys

APPELLATE DIVISION

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memo Contra was sent by first class on this 20th day of December, 2011, to Opposing Counsel: Kimberly S. Rigby, and Gregory A Hoover, Assistant State Public Defender's, Office of the Ohio Public Defender, Death Penalty Division, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By: 

CARLEY J. INGRAM
REG. NO. 0020084
Assistant Prosecuting Attorney
APPELLATE DIVISION