

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

vs.

CALVIN NEYLAND, JR.,

Appellant.

\* Supreme Court Case No.:2008-2370  
\*  
\* On Appeal from the  
\* Wood County Court of  
\* Common Pleas  
\*  
\*  
\* Common Pleas  
\* Case No. 2007-CR-0359

DEATH PENALTY CASE

MOTION FOR RECONSIDERATION OF APPELLANT,  
CALVIN NEYLAND, JR.

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Motion for Reconsideration of Appellant Calvin Neyland, Jr.

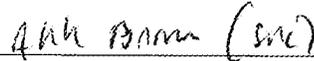
Appellant, Calvin Neyland, Jr., through undersigned counsel, moves this Court, pursuant to S.Ct. Prac. R. 18.2(B)(4), for reconsideration of its May 8, 2014 decision. The reasons for this motion are more fully set forth in the following memorandum in support.

Respectfully submitted,



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## **MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION**

### **INTRODUCTION**

This Court, in a decision dated May 8, 2014, affirmed the Wood County Common Pleas guilty verdict and death sentence. This Court, in its decision, identified four significant errors of federally guaranteed constitutional rights committed in the trial court. The errors identified by this Court consist of the following:

1. The trial court erred in delegating the use of a second leg brace to the county sheriff;
2. Prosecutorial misconduct committed during opening statements, where improper victim impact was referenced;
3. Weapons and other items from Mr. Neyland's hotel room and storage locker were improperly presented to the jury; and
4. Cumulative error should be applied, for numerous reasons.

Although this Court found these errors occurred, it ultimately found the errors to not have affected Mr. Neyland's right to a fair trial. It is submitted that this Court erred in making such a determination for the reason the errors were clear violations of United States Constitutional magnitude and each error could stand individually. Mr. Neyland argues these errors, viewed cumulatively, is also error.

### **BASIS OF SEEKING RECONSIDERATION OF PROPOSITION OF LAW II**

In this proposition of law Mr. Neyland argued the trial court erred in ordering the leg brace be placed on him at trial without following the protocol mandated by established United States Supreme Court. Mr. Neyland further argued that the trial court erred in delegating the use of the leg brace to law enforcement.

This Court agreed, finding that error occurred, but that it was harmless. This Court referred to what it described as “overwhelming evidence” of guilt and a perception that the jury did not know Mr. Neyland was wearing the brace. ¶¶ 107-10.

This analysis fails to consider two important points: first, the defense did not mount a vigorous defense, and second, the impact the use of the leg brace may have had on the jury during the penalty phase deliberations. These important factors were not addressed by the Court, an error Mr. Neyland asserts is critical.

Physically restraining a defendant in front of the jury has long been regarded as an unavoidably prejudicial act that is justified only in extraordinary circumstances. See Illinois v. Allen (1970), 397 U.S. 337, 344, 90 S.Ct. 1057, 1061; Holbrook v. Flynn (1986), 475 U.S. 560, 568, 106 S.Ct. 1340, 1345; Deck v. Missouri (2005), 544 U.S. 622, 626–29, 125 S.Ct. 2007, 2010–12;

A visible restraint sends a message to the jury that the judge is of the view that the defendant must be physically separated from the community at large, including the jury. Id. at 630, 125 S.Ct. at 2013. It also tells the jury that the defendant is untrustworthy, out of control, likely to flee, menacing, bad. To the extent it hobbles the defendant's movements (or, in the case of a stun belt, preoccupies his mind with worry that he may be zapped with a 50,000–volt jolt of electricity), it may also interfere with the defendant's ability to participate in his own defense. Deck, 544 U.S. at 631, 125 S.Ct. at 2013.

A visible restraint is, consequently, “a last resort,” Allen, 397 U.S. at 344, 90 S.Ct. at 1061. This analysis of the Court fails to adequately consider that the type of sentence was the critical decision for the jury. This Court found the record is not clear whether the second leg brace was

placed on Mr. Neyland. This, alone, suggests that its impact on the jury is equally difficult to discern.

It cannot be seriously disputed that the mitigating evidence was strong. That the leg brace may have swayed even one juror who might otherwise have voted for a life sentence to find a death sentence appropriate is a strong possibility. This Court is urged to reexamine this issue.

#### **BASIS OF SEEKING RECONSIDERATION OF PROPOSITION OF LAW XII**

In this proposition of law Mr. Neyland argues the prosecutor during opening statements made reference to improper victim impact consideration. The defense offered no objection to this improper comment on victim impact. This Court, reviewing this issue under a plain error standard of review, found no error. ¶¶ 146-51.

Yet it is clear the prosecutor's comments were directed not only to the first phase, but to the second, or penalty phase as well. Once again, the impact that these statements on the jury during the penalty phase was not addressed by the Court.

#### **BASIS OF SEEKING RECONSIDERATION OF PROPOSITION OF LAW XV**

At trial, the State sought to introduce evidence seized during the execution of a search warrant of Mr. Neyland's hotel room and storage locker. The defense objected to this evidence and accompanying testimony. The trial court permitted this evidence to go to the jury.

This Court found the admission of this evidence was error, but any error was harmless beyond a reasonable doubt. The Court noted this evidence was not admitted during the penalty phase, limiting its prejudicial impact to the first phase, where the evidence against Mr. Neyland was, in the words of the Court, "overwhelming." ¶¶ 156-59.

Although the evidence did not follow the jury to the jury room, the imaged remained in the minds of the jury. The bell, to use a phrase, could not be “unrung.”

This conclusion fails to address the implication present here: That Mr. Neyland is a dangerous person with whom an individual must protect themselves. The effect of this improperly admitted testimony served to bolster the testimony of other witnesses. This is improper and under one or more of the proffered reasons a violation of Mr. Neyland’s federally protected constitutional right to due process and to a fair and reliable trial.

### **BASIS OF SEEKING RECONSIDERATION OF PROPOSITION OF LAW XXIII**

Proposition of Law XXIII concerns cumulative error. This Court found that the doctrine of cumulative error is not applicable. ¶¶ 256-58.

In State v. DeMarco (1987), 31 Ohio St.3d 191, this Court recognized the existence of cumulative error. Id. at paragraph two of the syllabus (“conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial”). The Court cited DeMarco in State v. Garner (1995), 74 Ohio St.3d 49, 64, recognizing that the aggregate effect of multiple errors, which may individually be harmless, may be prejudicial.

In this case the Court has concluded that significant errors occurred during trial in both phases. These errors, the Court appears to be asserting, were not individually prejudicial. However, Mr. Neyland urges this Court to reconsider its decision as to this proposition of law for the reasons contained in this motion and in the briefs. This would then protect Mr. Neyland’s right to due process right and right to a fair and reliable trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

## DISCUSSION

This Court's opinion of May 8, 2014 found that there was no error as to most of the propositions of law advanced in the briefs. Where the Court did find error, it ultimately found that error to be harmless, for any number of reasons.

This determination overlooks the substantial mitigating evidence presented to the jury for its review. That same mitigating evidence was also reviewed by the trial court. Both the jury and trial court found the mitigating circumstances did not outweigh the aggravating factors.

The jury clearly heard evidence it should not have had before it when it decided the penalty in this case. That improperly received evidence diminished the value of what this Court's majority termed to be Mr. Neyland's personality disorders and other mental problems, his lack of a significant criminal record, his continual employment history, good behavior in jail awaiting trial, as well as other factors. ¶¶ 295-304.

In the face of this substantial mitigating evidence it is conceivable that had the jury not heard the improperly admitted evidence, a different sentence recommendation is likely. The jury, after all, acquitted Mr. Neyland on one count, that the deaths were part of a plan to escape detection. They obviously took their responsibilities seriously.

In State v. Brooks, 75 Ohio St.3d 148, 162, 661 N.E.2d 1030, 1042 (1996), this Court observed: "We cannot know what was going on in the minds of the jurors when they were given the duty of deciding Brooks's fate, and we thus cannot say for certain whether one of the jurors would have been moved enough by the mitigating factors in Brooks's favor, his youth and harrowing childhood, to have recommended a life sentence." Id.

It is noteworthy that two members of this Court found the mitigating evidence persuasive. It is reasonable to ask how a jury hearing only properly admitted evidence would have decided the penalty. Principles of justice and fairness compel a remand for a new sentencing hearing, if not a new trial.

### CONCLUSION

For the reasons offered in support of this motion for reconsideration, as well as those reasons set forth in the Merit Brief and Reply brief, and at oral argument, it is requested this Court issue an order granting any one or each of the reasons offered in support and remanding the matter to the trial court for a new trial.

Denial of Mr. Neyland's motion for reconsideration would be contrary to and an unreasonable application of clearly established federal law as defined by the United States Supreme Court and would result in a decision that is based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. In addition, Mr. Neyland states that this motion for reconsideration and the relief sought is necessary to protect his due process rights and right to a fair and reliable trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing motion for reconsideration was delivered to the office of the Wood County Prosecuting Attorney, Wood County Courthouse, Bowling Green, Ohio 43402 vis email this 15<sup>th</sup> day of May, 2016.

  
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