Supreme Court of Ohio Clerk of Court - Filed February 21, 2018 - Case No. 2017-0344

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2017-0344
Plaintiff-Appellant,	:	
	:	On Appeal from the Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
DARIN K. IRELAND,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case No. 15AP-1134

**BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER
IN SUPPORT OF APPELLEE DARIN IRELAND**

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The defense of blackout or automatism is an affirmative defense that must be proven by a defendant by a preponderance of the evidence, because it involves an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce supporting evidence. 2

OHIO ATTORNEY GENERAL'S PROPOSITION OF LAW I

A defendant's reliance on a dissociative episode caused by PTSD to excuse the defendant's actions is an affirmative defense analogous to other affirmative defenses that this Court has recognized. If anything, that defense should be treated as the functional equivalent of a diminished-capacity defense and so unavailable under Ohio law unless and until the General Assembly says otherwise 2, 3

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INTRODUCTION

The State has never—at trial, on direct appeal, in its memorandum in support of jurisdiction, or in its merit brief—argued that presenting a dissociative-state defense involves a simple repackaging of the diminished-capacity defense. At trial, the dispute centered on whether the evidence of Mr. Ireland's automatistic dissociation negated the State's case-in-chief or constituted an affirmative defense. (T.p. 439-444). On direct appeal, the State argued that the trial court *properly* allowed the jury to consider Mr. Ireland's dissociation as part of a blackout defense. State's Direct Appeal Merit Brief at pp. 7-10. When requesting that this Court accept jurisdiction of the case, the State did not reference Ohio's diminished-capacity jurisprudence. Despite the narrow framing of the issue before this Court, the Attorney General has proposed that this Court write broad and advisory law that prohibits evidence of a PTSD-induced, dissociative state in a criminal trial.

The question before this Court is not *whether* a jury should be instructed on an automatism defense when there is sufficient evidence to support the instruction; the question to be answered is *how* the jury should be instructed. Amicus supports Mr. Ireland's proposed resolution to this question—fact-finders should be permitted to consider evidence of automatistic-dissociation when determining whether the State has proven a voluntary act beyond a reasonable doubt. This Court, in considering the issue that is properly before it, should decline to consider the Attorney General's reframed Proposition of Law that analogizes a PTSD-induced automatism defense to a diminished-capacity defense.

STATEMENT OF INTEREST OF AMICUS CURIAE
OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender (OPD) is a state agency, designed to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The OPD also

plays a key role in the promulgation of Ohio statutory law and procedural rules. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

As amicus curiae, the OPD offers this Court the perspective of practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The OPD has an interest in the case sub judice, as this Court's decision will impact the right of an accused person to present a defense. Accordingly, the OPD has an enduring interest in protecting the integrity and manageability of Ohio's justice system and ensuring equal treatment under the law.

STATEMENT OF THE CASE AND FACTS

Amicus curiae adopts the statement of the case and the facts set forth in Mr. Ireland's merit brief.

LAW AND ARGUMENT

STATE'S PROPOSITION OF LAW I

The defense of blackout or automatism is an affirmative defense that must be proven by a defendant by a preponderance of the evidence, because it involves an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce supporting evidence.

ATTORNEY GENERAL'S PROPOSITION OF LAW I

A defendant's reliance on a dissociative episode caused by PTSD to excuse the defendant's actions is an affirmative defense analogous to other affirmative defenses that this Court has recognized. If anything, that defense should be treated as the functional equivalent of a diminished-capacity defense and so

unavailable under Ohio law unless and until the General Assembly says otherwise.

I. The question of whether Mr. Ireland's defense is the functional equivalent of a diminished-capacity defense is not properly before this Court.

Prior to entertaining a jurisdictional appeal of a felony, this Court must either grant leave or find that it involves a matter of "public or great general interest." Article IV, Section 2 of the Ohio Constitution. S.Ct.Prac.R. 5.02. Only after considering jurisdictional memoranda will this Court determine what, if any issues, meet this standard. S.Ct.Prac.R. 7.08(B). As a result, this Court has declined to rule upon issues not "raise[d] or even allude[d] to" in a jurisdictional memorandum. *In re Timken Mercy Medical Ctr.*, 61 Ohio St.3d 81, 87, 572 N.E.2d 673 (1991); *see also Johnston v. State,* 144 Ohio St.3d 311, 2015-Ohio-4437, 42 N.E.3d 746, ¶ 15; *Oliver v. Cleveland Indians Baseball Co. Ltd. P'ship,* 123 Ohio St.3d 278, 2009-Ohio-5030, 915 N.E.2d 1205, ¶ 3, fn. 2; *Estate of Ridley v. Hamilton County Bd. Of Mental Retardation & Developmental Disabilities*, 102 Ohio St.3d 230, 2004-Ohio-2629, 909 N.E.2d 2, ¶ 18.

Here, by failing to raise the issue on direct appeal or in a jurisdictional memorandum, the State has waived any question about whether Mr. Ireland's trial defense was the functional equivalent of a diminished-capacity defense. Had the Office of the Attorney General wished to present the issue in this Court, despite the lack of a record below, it should have filed an amicus curiae jurisdictional memorandum. S.Ct.Prac.R. 7.06. It did not do so. Because it failed to file an amicus jurisdictional memorandum, the Attorney General denied this Court the opportunity to determine whether its Proposition of Law merited this Court's attention.

For these reasons, this Court should decline to address the Attorney General's Proposition of Law and confine its analysis to the question of whether blackout or automatism is an affirmative defense. If this Court wishes to consider the Attorney General's Proposition of Law, it should

dismiss this appeal as having been improvidently allowed and reserve the issue for a future case with a complete record.

II. An automatistic-dissociation defense is not the functional equivalent of a diminished-capacity defense.

If this Court does consider the Attorney General's Proposition of Law, it should hold that a defense of automatism—or blackout—is conceptually distinct from the diminished-capacity defense, and psychological testimony related to automatism or blackout may be presented to a jury.

A. A blackout defense concerns the voluntariness of the act itself, not the wrongness of the act.

A diminished-capacity defense puts the culpability of a defendant's mental state in issue by "posit[ing] a series of rather blurry lines representing gradations of culpability." *State v. Wilcox*, 70 Ohio St.2d 182, 193, 436 N.E.2d 523 (1982). In contrast, a properly introduced blackout defense based upon a PTSD-induced dissociative episode requires no line-drawing about the defendant's moral culpability. Instead, it is concerned with actus reus—i.e., whether the act was voluntary. *McClain v. State*, 678 N.E.2d 104, 107 (Ind. 1997) ("The [sleep-deprivation] evidence McClain seeks to present on automatism bears on the voluntariness of his actions * * *"); *see also* Wayne LaFave Substantive Criminal Law, 33 § 9.4(b) ("[I]t is undoubtedly more correct to say that such a person is not guilty of a crime because he has not engaged in an 'act' * * *, and without an act there can be no crime."). Indeed, as the State acknowledged in its own brief, the blackout defense (unlike the diminished-capacity defense) has established roots in Ohio's case law. State's Brief at 8-12.

In analogizing an automatistic-dissociation defense to the diminished-capacity defense, the Attorney General's amicus brief ignores this critical distinction between a defense that relates to

mens rea and a defense that relates to actus reus. In each case cited by the Attorney General to support this analogy, the disallowed defense was relevant to the culpability of the defendant's mental state, not the voluntariness of the defendant's actions.

- ***State v. Fulmer*, 117 Ohio St.3d 319, 2008-Ohio-936, 883 N.E.2d 1052**. In *Fulmer,* this Court held that a "metabolic derangement" defense is the functional equivalent of diminished capacity. There was no evidence presented by Mr. Fulmer that "metabolic derangement" as caused by an aspirin overdose, would cause him to act involuntarily. *Id.* Instead, Mr. Fulmer argued that metabolic derangement prevented him from forming the "right state of mind" during an assault. *Id.* at ¶ 60. Because Mr. Fulmer argued only that metabolic derangement impacted his mens rea, this Court held that he was asserting a diminished capacity defense. *Id.*

- ***State v. Napier*, 12th Dist. Clermont No. CA2016-04-022, 2017-Ohio-246.** In *Napier*, the Twelfth District held that a trial court "did not abuse its discretion in preventing the admission of [evidence of a PTSD diagnosis and prior military service] for the purpose of" challenging the defense element of his assault charge. *Id.* at ¶ 23. Although this case bears factual similarity to Mr. Ireland's case, the similarity ends with the facts. In *Napier*, defense counsel argued that Mr. Napier could not form the intent to assault a police officer because the assault was a "simple reaction" due to his PTSD. For the purposes of legal analysis, *Napier* fit squarely into the ban on offering "expert testimony to negate [the] capacity to form the specific mental state required for assault." *Id.* at ¶ 24.

- ***State v. Mobley*, 5th Dist. Richland No. 2011-Ohio-309.** In *Mobley*, the Fifth District affirmed convictions for attempted aggravated murder, aggravated burglary, felonious assault, and discharging a firearm into a habitation after he repeatedly shot his ex-wife in her home. *Id.* at ¶¶ 1-7. In affirming, the appellate court upheld the trial court's refusal to allow Mr. Mobley to call an expert "in order to negate the mens rea necessary to convict him of the crimes charged." *Id.* at ¶34. Although *Mobley* also addressed whether Mr. Mobley acted voluntarily, the court's discussion of actus reus did not speak to whether expert testimony could be used to establish a dissociative blackout. *Id.* at ¶ 45. Instead, the Court simply made a factual conclusion that "the offenses are not ones that could be committed as a result of a blackout, coma, disease, sleep, or injury" because "[n]o reflexes, convulsions, or other involuntary bodily movements by appellant could be involved in the conduct described *Id*. *Mobley* can be distinguished for that reason. In the case sub judice, unlike *Mobley*, there is an evidentiary foundation to support the claim that Mr. Ireland's acts were involuntary.

- ***State v. Pennington*, 4th Dist. Pickaway No. 99 CA 26, 2000 Ohio App. LEXIS 2145 (May 16, 2000).** In *Pennington*, the Fourth District affirmed the trial court's denial of a continuance that would have allowed Mr. Pennington "the opportunity to further inquire whether [he] possessed the requisite mental capacity to commit

> the offense. *Id.* at *2. The continuance was based upon a psychologist's letter that addressed whether someone experiencing a "dissociative episode" could "consciously form intent to harm someone" or "distinguish the wrongfulness of their actions." *Id.* The *Pennington* court based its holding in part upon the fact that testimony about Mr. Pennington's mental capacity is not admissible under *State v. Wilcox*. *Id.* at *13.

Because there is no case law that draws a direct parallel between the diminished-capacity defense and an automatism defense, the Attorney General's brief avoids arguing similarities between the two legal theories and simply relies upon factual comparison:

> In sum, just as in *Mobley*, Ireland "was not 'unconscious.'" 2011-Ohio-309, ¶ 46. And "[n]o reflexes, convulsions, or other involuntarily bodily movements compelled or contributed to [his] actions. Rather, [Ireland's] argument suggests something more in the nature of 'a functional equivalent' of a diminished-capacity defense."

Amicus Curiae Brief of the Office of the Ohio Attorney General at p. 20. Although this argument may be persuasive in closing before a jury, it is argument about the specific facts of the case that offers no insight into the general legal principles that should govern available defenses. It is illogical to argue that Mr. Ireland should be denied the opportunity to present evidence of his unconsciousness because the State believed that he was not unconscious.

B. A successful blackout defense results in acquittal, not conviction of a lesser-included crime.

Beyond the analytical distinction between a mens rea defense and an actus reus defense, there are policy considerations that separate Mr. Ireland's defense from the functional equivalent of a diminished-capacity defense.

In *Wilcox*, this Court outlined and rejected the policy justifications for a difficult-to-administer diminished-capacity defense. *Wilcox*, 70 Ohio St.2d at 194. This Court noted that diminished-capacity is a partial defense that—when successful—results not in acquittal, but conviction of a lesser crime. *Id.* at syllabus paragraph one. Its primary purpose was to "ameliorate the limitations of the traditional, M'Naghten, right from wrong test for insanity." *Id.* at 187.

Proponents of diminished capacity also argued that it could permit fact finders to "avoid imposing the death penalty on mentally disabled killers who are criminally responsible for their acts" and "make more accurate individualized culpability judgments." *Id.* at 186. Because, by the time of *Wilcox*, Ohio had a test for insanity that was more flexible than M'Naghten and a sentencing regime that allowed for more tailored considerations of culpability, the policy rationales behind presenting a diminished-capacity defense at trial had eroded. *Id*. at 194.

Unlike diminished capacity, presenting evidence of automatistic dissociation to negate actus reus can result in a full acquittal. It does not rest upon tailored considerations of individual culpability or comparisons between the culpability of mentally disabled criminals and their cognitively able counterparts. Because someone who commits a crime with diminished capacity still commits a crime, the policy objective of mitigating punishment after careful weight of individual culpability can still be accomplished at sentencing. In *Wilcox*, this Court determined that there is not a sufficient policy justification to having this work done in the guilt phase of a trial and not the punishment phase. But an involuntary act is *not* a criminal act, so someone who presents a successful automatistic-dissociation defense will never be sentenced. Prohibiting the use of this defense at trial does not move it to another part of the criminal-justice process; it simply removes it from all consideration.

CONCLUSION

Mr. Ireland did not rely upon the functional equivalent of a diminished-capacity defense in his trial. Instead, he attacked the State's proof that he acted voluntarily. This Court should disregard the Attorney General's Proposition of Law and focus on the question properly before it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLEE DARIN IRELAND** was sent by regular U.S. mail to Paul Giorgianni, 1538 Arlington Avenue, Columbus, Ohio 43212, Michael P. Walton, Franklin County Assistant Prosecutor, 373 South High Street, 13th Floor, Columbus, Ohio 43215, and Eric E. Murphy, State Solicitor, 30 E. Broad Street, 17th Floor, Columbus, Ohio 43215, on this 21st day of February, 2018.

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