[Cite as *State v. Halder*, 2007-Ohio-5940.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87974

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

BISWANATH HALDER

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-437717

BEFORE: Blackmon, P.J., Dyke, J., and Boyle, J.

RELEASED: November 8, 2007

JOURNALIZED:

[Cite as *State v. Halder*, 2007-Ohio-5940.]

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Biswanath Halder appeals his conviction and sentence. Halder assigns the following errors for our review:

> "I. The trial court erred in finding appellant competent to stand trial."
>
> "II. The trial court erred by failing to allow appellant to represent himself."
>
> "III. Over defense objections, the trial court improperly dismissed prospective jurors based upon their views of capital punishment."
>
> "IV. The State improperly adduced victim-impact evidence during the culpability determination phase of trial."
>
> "V. The trial court improperly restricted appellant's ability to present evidence of diminished capacity to the jury in the culpability phase of trial."

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶ 3} On May 29, 2003, the Cuyahoga County Grand Jury handed down a 338 count indictment against Halder. The indictments included three counts of aggravated murder with firearm, felony murder, mass murder, and terrorism specifications. The grand jury also indicted Halder on thirty-five counts of attempted murder with three and five year firearm specifications, and fourteen counts of aggravated burglary with firearm specifications.

{¶ 4} In addition, the grand jury indicted Halder on two hundred and eighty-one counts of kidnapping with firearm specifications. Further, the grand jury indicted Halder on one count of terrorism with firearm, felony murder, mass murder and terrorism

specifications. Finally, the grand jury indicted Halder on one count of unlawful possession of a dangerous ordnance.

{¶ 5} The above indictments emanated from the May 9, 2003, nationally publicized shooting rampage at the Weatherhead School of Management, in the Peter B. Lewis building, on the campus of Case Western Reserve University. A video surveillance camera recorded Halder smashing his way into the building; he was wearing a flak jacket, an army helmet, and an athletic supporter with a cup; he was carrying a Tech 9 semi-automatic machine style handgun and a Berretta nine-millimeter handgun.

{¶ 6} The video showed that Halder shot and killed the first person he encountered. Thereafter, Halder fired indiscriminately at the occupants and at the police who later arrived. He then held numerous people hostage for approximately eight hours before surrendering to the Cleveland Strategic Weapons and Tactics ("SWAT") team.

{¶ 7} On June 3, 2003, Halder pleaded not guilty at his arraignment. Halder's defense team challenged his competency, and the trial court ordered a competency evaluation. Competency hearings were held on February 23, 24, March 21, 22, and 23, 2005.

{¶ 8} The evidence introduced at the hearings reveal that Halder was a 64 year-old man who was born in India and became a United States Citizen in 1980. Halder

has an IQ score of 130. In 1963, Halder obtained a bachelor's degree in electrical engineering from Calcutta University in India. He attended New York University Graduate School of Business in 1980, but dropped out because of financial challenges. He also attended the University of Massachusetts from 1989 through 1994 where he studied mathematics, computer science, and economics, but did not obtain a degree. From 1995 to 1996, Halder attended Boston University. In 1999, he received an MBA from the Weatherhead School of Management at Case Western Reserve University.

{¶ 9} The evidence also indicates that Halder had an erratic work history characterized by short-term jobs where he was either terminated or quit because of personality or monetary problems. In addition, Halder has sued many of his former employers alleging racial discrimination or unfair employment practices.

{¶ 10} In 1999, due to his inability to obtain employment, Halder started WIN (Worldwide Indian Network) Business Council with the stated purpose of assisting people of Indian descent in starting their own businesses. Halder's goal was to extend WIN worldwide. He envisioned that over time, he could solve mankind's problems by narrowing the debt between rich and poor. Halder believed that sometime in the year 2000, Shawn Miller, of Case Western Reserve University ("Case Western"), deliberately destroyed his website's record and deleted the addresses of more than 50,000 contacts.

{¶ 11} As a result of the alleged infraction, on June 7, 2001, Halder, represented by an attorney, filed a civil suit alleging that Miller maliciously and intentionally destroyed his website. On February 19, 2002, Halder's attorney withdrew stating that he had been unable to obtain cooperation from Halder in producing discovery and in other aspects of the case. Halder's attorney's withdrawal from the civil suit prompted Halder to write a letter to the judge alleging that his opponent had bribed his attorney. Halder further alleged in the letter to the judge that his attorney was withholding vital information from him.

{¶ 12} Thereafter, Halder represented himself pro se. In September 2002, the trial court dismissed Halder's civil suit, and on April 29, 2003, we dismissed his direct appeal. On May 9, 2003, the shooting incident occurred on Case Western's campus.

{¶ 13} The evidence introduced during the competency hearings reveal that from 1988 through 1992, Halder was found to be disabled and received social security disability insurance benefits. Halder had been evaluated by seven different social security administration doctors, five of whom diagnosed Halder with a personality disorder, and two diagnosed him with dysthymia and depression.

{¶ 14} At the hearing, three expert witnesses testified on the issue of competency including Dr. James Eisenberg, who testified that he has been a psychologist for 27 years, 15 of these as a forensic psychologist. Dr. Eisenberg testified that between August 2003 and May 2004, he met with Halder on five separate occasions lasting

approximately eleven hours. Dr. Eisenberg testified that in November 2003, he had issued a preliminary report indicating that Halder was competent to stand trial. Dr. Eisenberg testified that he diagnosed Halder with alcohol dependence, dysthymia and a possible delusional disorder with persecutory type. Dr. Eisenberg also testified that at that time he believed that Halder had the intellectual capacity to make important decisions after receiving advice from counsel.

{¶ 15} However, Dr. Eisenberg testified that he subsequently changed his opinion regarding Halder's competency to stand trial. Dr. Eisenberg testified that in May 2004, he diagnosed Halder with a personality disorder with narcissistic, paranoid, and obsessive qualities. Dr. Eisenberg testified that he also diagnosed Halder with persecutory and grandiose symptoms. Dr. Eisenberg testified that his subsequent meetings with Halder revealed that Halder was convinced that his attorneys were conspiring against him with the prosecutor and with Case Western. Dr. Eisenberg opined that Halder's delusional-based belief makes it almost impossible for him to have any meaningful collaborative relationship with his attorneys. Dr. Eisenberg testified that Halder's beliefs impairs his rational judgment; consequently, Halder will not accept the advice of his attorneys and will not consult with them as issues arise in the case.

{¶ 16} Dr. John Fabian testified that he has been a practicing forensic psychologist since 1999, and that he also has a law degree. Dr. Fabian testified that he was contacted by the Court to evaluate Halder because of the conflicting diagnoses

of the other two expert witnesses. He testified that he met with Halder on four separate occasions lasting a total of ten hours. Dr. Fabian testified that he believed that Halder suffered from both delusional and personality disorders. Dr. Fabian also testified that Halder was incapable of rationally assisting his attorneys. He further stated that Halder had a basic mistrust for his attorneys, which was heightened when his attorneys allegedly ceased communicating with him. Finally, he testified that Halder's goal was to take the stand and present all the facts which led to his actions of May 9, 2003.

{¶ 17} Dr. Barbara Bergman testified that she has been a psychologist for thirty-five years and had been a forensic psychologist for twenty-nine years during which she had completed over fifteen hundred competency evaluations. Dr. Bergman testified that she had met with Halder on five separate occasions lasting approximately 14 hours. She had met with Halder two weeks prior to her appearance at the hearing, so that she could base her opinion of Halder's competency on his present condition. She testified that her observation of Halder indicates that he suffers from a severe personality disorder. She found no evidence that Halder suffered from a major mental disorder, which led her to opine that Halder would be able to assist his trial counsel with his defense.

{¶ 18} Dr. Bergman testified that although Halder's trial counsels complained that Halder had no recollection of the murder and subsequent seizure of the Peter B. Lewis Building, when she interviewed Halder he recalled in great detail the events of that day.

She stated that if Halder could convey to her the details of the events and answer her questions, then he would be able to assist his attorneys. It was her opinion that Halder was capable of understanding the nature and significance of the charges, the adversarial nature of the prosecutorial process, and, thus was capable of assisting his attorneys.

{¶ 19} On April 19, 2005, the trial court issued a decision finding that Halder was competent to stand trial. On November 28, 2005, prior to the commencement of trial, the trial court dismissed forty counts of the indictment as being duplicitous. The trial court also dismissed another ninety-six counts and granted the State's motion to amend certain counts and renumber the remaining counts from1 through 202.

{¶ 20} During its case-in-chief, the State presented the testimony of 105 witnesses and then rested on December 14, 2005. The trial court dismissed all the terrorism specifications. On December 16, 2005, the jury found Halder guilty of counts one through three, capital murder, aggravated murder and capital specification. The jury also found Halder guilty of counts five through forty, capital murder, and counts forty-one through fifty-four, aggravated burglary. Finally, the jury found Halder guilty of one hundred forty-three counts of kidnaping and one count of unlawful possession of a dangerous ordnance.

{¶ 21} On January 17, 2006, the penalty phase of the trial began. On January 22, 2006, the jury returned a sentencing recommendation of life without the possibility

of parole. On February 17, 2006, the trial court sentenced Halder to life imprisonment without parole.

Competency to Stand Trial

{¶ 22} In the first assigned error, Halder argues the trial court erred in its determination that he was competent to stand trial. We disagree.

{¶ 23} As the Ohio Supreme Court has observed, "fundamental principles of due process require that a criminal defendant who is legally incompetent shall not be subjected to trial."[1] The test employed to determine if a criminal defendant is, in fact, competent to stand trial was articulated in *Dusky v. United States*.[2]

> "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."[3]

{¶ 24} The right to a hearing on the issue of competency rises to the level of a constitutional guarantee where the record contains, "sufficient indicia of

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[1] *State v. Berry* (1995), 72 Ohio St.3d 354, 359.

[2] (1960), 362 U.S. 402, 4 L.Ed.2d 824, 80 S.Ct. 788.

[3] Id.

incompetence," that an inquiry into the defendant's competency is necessary to ensure his right to a fair trial.[4]

{¶ 25} By statute, Ohio recognizes the right of a criminal defendant not to be tried or convicted of a crime while incompetent. R.C. 2945.37(A) provides in relevant part:

> "In a criminal action in a court of common pleas or municipal court, the court, prosecutor, or defense may raise the issue of the defendant's competence to stand trial. If the issue is raised before trial, the court shall hold a hearing on the issue as provided in this section. If the issue is raised after trial has begun, the court shall hold a hearing on the issue only for good cause shown.
>
> "A defendant is presumed competent to stand trial, unless it is proved by a preponderance of the evidence in a hearing under this section that because of his present mental condition he is incapable of understanding the nature and objective of the proceedings against him or of presently assisting in his defense."[5]

{¶ 26} It has long been recognized that a person who lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.[6]

{¶ 27} A defendant is presumed to be competent to stand trial. If, after a hearing, the court finds by a preponderance of the evidence that, because of the defendant's present mental condition, the defendant is incapable of understanding the nature and

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[4] *Berry*, supra at 359, quoting *Drope v. Missouri* (1975), 420 U.S. 162, 43 L.Ed.2d 103, 95 S.Ct. 896.

[5] *State v. Vrabel* (Mar. 2, 2000), 7th Dist. No. 95 CA 221.

[6] *State v. Smith* (2000), 89 Ohio St.3d 323, 329, 2000-Ohio-166, citing *Drope,* supra.

objective of the proceedings against the defendant or of assisting in the defendant's defense, the court shall find the defendant incompetent to stand trial.[7]

{¶ 28} Under constitutional due process principles, the standard for determining competency to stand trial is the same as the standard for determining competency to enter a guilty plea or a plea of no contest.[8] The burden of establishing incompetence, however, is upon the defendant.[9]

{¶ 29} In reviewing a judge's determination of competency, we examine whether the conclusion was supported by competent, credible evidence.[10] The adequacy of the data relied upon by the expert who examined the defendant is a question for the judge.[11] Where there is a divergence of opinion among experts, the issue becomes a matter of credibility. Under such circumstances, the weight to be given the evidence

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[7]R.C. 2945.37(G), see *Dusky v. United States* (1960), 362 U.S. 402, 4 L.Ed.2d 824, 80 S.Ct. 788.

[8]*State v. Kovacek* (May 30, 2001), 9th Dist. No. 00CA007713, citing *Godinez v. Moran* (1993), 509 U.S. 389, 391, 125 L.Ed.2d 321, 113 S.Ct. 2680, and *State v. Bolin* (1998), 128 Ohio App.3d 58, 61-62.

[9]See *State v. Williams* (1986), 23 Ohio St.3d 16, 19, citing *State v. Chapin* (1981), 67 Ohio St.2d 437; *State v. Bailey* (1992), 90 Ohio App.3d 58, 67, appeal dismissed (1992), 68 Ohio St.3d 1212, 1994-Ohio-516; *State v. Pruitt* (1984), 18 Ohio App.3d 50, 59.

[10]*State v. Hicks* (1989),43 Ohio St.3d 72, 79; *State v. Williams* (1986), 23 Ohio St.3d 16, 19; *State v. Stanley* (1997), 121 Ohio App.3d 673, 685-686.

[11]*State v. Williams*, supra.

and the credibility of the witnesses are primarily for the judge.[12] Moreover, a judge's decision on competency will not be disturbed absent an abuse of discretion.

{¶ 30} In the instant case, Halder's competency to stand trial was raised before the trial started. The record establishes that the trial court complied with the mandates of R.C. 2945.37 before the trial started. The trial court ordered mental examinations to ensure that Halder was competent to stand trial. Hearings were held pursuant to the statute and all parties were given the opportunity to question the doctors who rendered their impressions, or to lodge objections as to the admissibility of the doctors' reports.

{¶ 31} Three doctors submitted reports and testified at the competency hearing. Drs. Eisenberg and Fabian found that Halder was not competent to stand trial, while Dr. Bergman found that Halder was competent to stand trial. Dr. Bergman opined that Halder had a severe personality disorder, but showed no evidence of a major mental disorder. The trial court adopted the opinion of Dr. Bergman. A review of the record before us indicates that the trial court's decision was supported by competent, credible evidence.

{¶ 32} Initially, we note that the record indicates that at the time of the competency hearing, Dr. Eisenberg had not seen Halder for more than a year.

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[12] *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus.

Competency to stand trial is a present condition.[13] Since Dr. Eisenberg failed to conduct an evaluation of Halder within a reasonable time of the competency hearing, his subsequent opinion may be viewed by the trial court as tenuous.

{¶ 33} Further, the record indicates that Dr. Eisenberg provided two reports with inconsistent conclusions. In the first report dated November 5, 2003, Dr. Eisenberg indicated that Halder had the intellectual capacity to make important decisions after receiving advice from his attorneys and would be able to make intelligent and informed decisions concerning this advice. In the second report dated May 24, 2004, Dr. Eisenberg indicated that Halder's delusional beliefs now made it impossible for Halder to have any meaningful collaborative relationship with his attorneys. Dr. Eisenberg admitted that he arrived at his second conclusion without personally reevaluating Halder. This is fatal to the credibility of Dr. Eisenberg's second opinion.

{¶ 34} The record indicates that Halder was able to provide answers to direct questions posed by the experts who evaluated him. Dr. Bergman testified that when she interviewed Halder, she allowed him to first talk about things that were important to him. She would then talk with him about the shooting and other issues pertinent to Halder's competency to stand trial. Dr. Bergman found that this approach resulted in Halder providing detailed answers to her queries. Dr. Bergman testified as follows:

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[13] *Dusky*, supra.

"Q. Okay. Well, explain what did you ask Mr. Halder in response to your evaluation?

"A. Well, I started by asking him to tell me what happened that led up to that day. And of course we had talked for hours already, or I had listened for hours about - his belief that Shawn Miller had vandalized his website and how he believed that the university was involved. So we had talked about all of that. In Mr. Halder's mind that is all part of what happened that day. And then I asked him various questions based on what he told me and also based on the videotape. I asked him questions about why he was wearing the hairpiece; why he had the helmet; where he got - the flat [sic] jacket; why he wore the flat [sic] jacket.

"***

"Q. Okay. And what was his response to the hair wig, the helmet, the mask, the jacket?

"A. Well, he said that he has been wearing the hairpiece since 1985 so that was nothing unusual for him according to him. He has several hairpieces he said. *** He told me he bought the helmet and the flak jacket some time ago. He was - he would not tell me exactly how long ago he bought them. He was very evasive about where he bought them. He told me 'You can buy them anywhere.' And I said, 'Well, anywhere like Wal-Mart? You know, Target? Where? Where do you buy these things? I've never seen anything like that in a store I shop in.' He wouldn't tell me exactly where he bought them. He bought the weapons. They were already semiautomatic when he bought them he says. And I pressed him on that because I - it's my understanding that semiautomatic weapons are illegal so you wouldn't legally buy something that's illegal. He wouldn't tell me where he bought them but denied that he modified the weapons himself.

"Q. Okay.

"A. I asked him what he was thinking about before he ever went to Case Western Reserve. He said that he began to realize he would have to do something or Shawn Miller would just continue with the evil things that he was doing. He showed me an article from a newspaper about the

economic impact of cyber crime. He called Shawn Miller a cyber criminal because he hacked into his website. He realized after exhausting all his legal remedies and the suit not - him not being able to get anywhere with the civil suit that he wasn't able - that he wasn't going to be able to address the problem in the legal arena. [sic] He tried that first. So he said he decided to go to Case Western Reserve University. He put the bags with the paper, all those papers in the car and put the guns in the car. He put the ammunition in the car. He said he needed 4 or 500 rounds to fill up all the magazines on the guns. He put the hammer in the car. He drove the car and left it behind the Peter B. Lewis Building. In order to get inside he smashed through the door. He did not have - students have a card they swipe. He wasn't a student there at the time so he knew he wasn't going to be able to get into the building because it's a security building so he smashed through the door with the hammer to get in. He said that he put the helmet - I said 'Why did you put the helmet on your head?' He put a helmet on his head to protect his head from bullets. He knew that the police would be shooting at him."[14]

{¶ 35} The above excerpt indicates that Halder was able to provide detailed answers to questions that were pertinent to the issue of his present ability to assist his attorneys in defending him. Dr. Bergman testified about her reasons for asking the above questions as follows:

"My purpose in asking any of those questions is in order to determine whether or not an individual is capable of telling his attorneys what happened. I have to find out if he can tell me what happened. If he can't tell me what happened then I have to look elsewhere. But if a defendant can tell me in detail and answer questions that I have then I make the assumption they are capable of telling their attorneys as well."[15]

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[14]Tr. at 457-460.

[15]Tr. at 456.

{¶ 36} Dr. Bergman concluded that if Halder could provide answers to questions as excerpted above, then Halder was capable of consulting with his attorneys with a reasonable degree of rational understanding.

{¶ 37} In addition, Dr. Fabian acknowledged that Halder also provided detailed answers to questions he posed. For example, Halder indicated that he used a helmet and bulletproof vest to protect himself from the bullets the police would shoot. Halder also indicated that he did not wear a wig to conceal his identity, that he did not answer where he got the guns, and that he knew that he gave the police a statement that was not mirandized. Again, Halder's ability to provide this type of information to Dr. Fabian is further evidence that Halder can consult with his attorneys about the case.

{¶ 38} The record before us indicates that the prison nurse reported that Halder acted odd, presented himself as very entitled, and "wore out" one social worker with his demands. However, despite this behavior, the record indicates that Halder was not found to be mentally ill by any of the prison physicians who evaluated him. Dr. Bergman testified that Halder was seen by two prison physicians shortly after he was arrested, both of whom thought that Halder was psychotic. A third physician, Dr. Rizk, did follow up treatments once per month thereafter. Dr. Bergman testified as follows regarding Dr. Rizk's diagnosis:

> "*** The first time he saw him he diagnosed him with major depression with psychosis. That was in June. By July he diagnosed him with adjustment disorder depressed or no diagnosis on Axis I. Axis I is the

> axis on which you diagnose mental illness. And then he saw him again in September, October, December, and February. So as time went by and he had more experience and more observation with Mr. Halder, he decided that Mr. Halder was not mentally ill, diagnosed him with dysthymia, which was one of the diagnoses that one of the other psychologists had given when they were evaluating for the appeals for the disability. And in April he wrote in the clinical mode, 'Does not suffer from psychosis and does not require placement on the psych floor. No psychosis; no major depression; no anxiety; no need for further evaluation except PRN,' which means as needed. So he had prescribed Zoloft which is an anti-depressant but he discontinued that prescription in February."[16]

{¶ 39} It is clear from the above that Halder suffers from a severe personality disorder that makes him unwilling to assist his attorney with his defense. However, as the *Berry* Court noted, willingness to assist one's own attorney in one's defense is not the test for competency. The proper inquiry is the defendant's present ability to so assist.[17] We are also mindful of the holding in *State v. Bock,*[18] where the Ohio Supreme Court noted that incompetency to stand trial must not be equated with mere mental or emotional instability or even with outright insanity. A defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and of assisting his counsel.[19]

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[16]Tr. at 470.

[17](1995), 72 Ohio St.3d 354, 362.

[18](1986), 28 Ohio St.3d 108.

[19]Id. at 110.

{¶ 40} After reviewing the entire record before us and examining the totality of the evidence on the issue of competency, we conclude that there was competent, credible evidence before the trial court to support a finding of competency to stand trial. The trial court had sufficient evidence to indicate that Halder was presently capable of consulting with his attorneys. As such, this Court will not disturb that finding. Accordingly, we overrule the first assigned error.

Self-Representation

{¶ 41} In the second assigned error, Halder argues the trial court denied him the right to self-representation. We disagree.

{¶ 42} Halder was indicted on May 29, 2003, and the trial was set for November 14, 2005. On November 9, 2005, at a hearing to disqualify his second set of appointed lawyers and five days before trial was to start, Halder uttered the following words in response to the trial court's denial of his motion to disqualify and appoint new counsel: "In this case from now onward, I want to proceed pro se."

{¶ 43} Prior to this request, Halder had made various motions from September 2003 to November 9, 2005; he moved to disqualify and to replace his lawyers, but never to proceed pro se. Following the competency ruling, the first set of lawyers withdrew and the trial court appointed new counsel. On September 1, 2005, Halder moved to disqualify the second set of lawyers. The trial court held a hearing on September 21, 2005.

{¶ 44} At that hearing, Halder stated: "As of today they have not done anything. So far they have not done anything at all."[20] One of the assigned counsel, who Halder had specifically requested, indicated that the defense team had been working diligently on the case. Attorney John Luskin stated the following:

> "So the record is clear, Mr. Halder has given us a number of different tasks to accomplish. I have spent numerous hours trying to track down people and information as far as New Delhi, India, London, England. Places of that nature. I spent hours trying to obtain information for him. Much of the information that I tried to obtain off the internet pursuant to his instructions has been basically negated. A number of the web sites that I have been referred to have been shut down for whatever reasons. The people have not responded to my letters, and I asked them to contact me to help Mr. Halder. Those people seem to have abandoned him in his time of need. *** Your Honor, there is varying factors and theories in the case. I respect Mr. Halder's theory of the case. I understand thoroughly what his theory of the case is. As part of the defense strategy that I will not be able to reveal at this particular point in time, I am not sure those people are crucial. I think those individuals Mr. Halder needs or wants, friends that were called upon but for whatever reason they are not responding to me, and he is unable to get in touch with them himself."[21]

It was after denying Halder's motion to replace the second set of lawyers that the trial court set the trial for November 14, 2005.

{¶ 45} Subsequently, on November 4, 2005, Halder filed another motion to disqualify his attorneys. In the motion to disqualify his attorneys, Halder stated that his attorneys did not know the background of the case, had not conducted discovery, and

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[20] Tr. at 1116.

[21] Tr. at 1117-1119.

had not contacted a single witness. On November 9, 2005, the trial court held a hearing on the motion and all of Halder's assertions were refuted. The trial court ruled that the motion was without merit and denied it. After the trial court denied the motion, Halder, for the first time in the proceedings, made the following statement: **"In this case from now onward, I want to proceed pro se."**

{¶ 46} The record then reveals the following discourse:

"The Court: You want to represent yourself pro se?

The Defendant: Yes.

The Court: Would you like to say anything about that, sir?

The Defendant: Anything about what?

The Court: Your reason. You are making a motion of the Court, an oral motion of the Court to represent yourself?

The Defendant: Yes. I made myself very clear that my attorneys do not know the background of the case, have done no discovery whatsoever. They have not contacted a single witness, despite the fact that I know numerous people around the world. And they have not done anything. Therefore, I will be much better off having pro se than having these lawyers."[22]

{¶ 47} The trial court then heard from Halder's lawyer who assured the court that he was doing his best to represent Mr. Halder. The court then stated to Mr. Halder that it planned to rule on his motion at a later time. The court explained that it needed to

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[22]Tr. at 1160.

research his request to represent himself. The court especially wanted to read *Faretta v. California.*[23] Her concern was whether he had an absolute right to proceed pro se.

{¶ 48} On the next day, the judge made the following pronouncement from the bench:

> "*** That defendant made an oral motion to represent himself pro se. The motion is denied. While the defendant has a right to represent himself, pursuant to *State v. Vrabel*, the cite will be in my opinion, and under *Faretta versus California*, Mr. Halder, which is a case that you provided to the Court, your right to represent yourself pro se is not absolute. The defendant's request must be made in a timely fashion. On September 16 of '05 this Court set, on the agreement of all parties, that the trial was due to begin on November 14. Defendant's oral motion to represent himself was made on November 9, five days prior to trial beginning on Monday.
>
> "This Court finds the defendant's motion is untimely. Defendant was indicted on this case nearly two-and-a-half years ago, and the voir dire with respect to jurors and the jury is due to begin in five days. Furthermore, the defendant made his pro se motion immediately after the Court denied his written motion to disqualify his current attorneys. Therefore, the oral motion to represent himself pro se appears to be merely a tactic for delay and, due to the untimely request, it is denied. And then I cited the *United States versus Mackovich* case and the *Vrabel* case, which I talked about yesterday. And the cites are in here. So, I am going to sign this and put it in the docket today."[24]

{¶ 49} As a matter of law, a defendant has a right to represent himself and proceed without counsel when he constitutionally elects to do so.[25] Thus, his decision to proceed pro se must be made voluntarily, knowingly, and intelligently. When a trial

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[23](1975), 422 U.S. 806, 95 S.Ct. 2525.

[24]Tr. at 1265.

[25]*Faretta v. California* (1975), 422 U.S. 806, 95 S.Ct. 2525.

court denies a properly invoked right to self-representation, the denial is per se reversible error.[26]

{¶ 50} Our concern in this case is whether it was properly invoked. To be properly invoked, a pro se request must be unequivocal and timely; otherwise, the trial court may, in its discretion, deny the request.

{¶ 51} In *State v. Cassano,*[27] the Ohio Supreme Court held that a defendant's assertion of the right to proceed pro se must be clear and unequivocal, knowing, intelligent, voluntary, and timely. This requirement was also addressed in *United States v. Bush.*[28] In *Bush*, the court stated:

> "The requirement that the assertion be clear and unequivocal 'is necessary to protect *** against an inadvertent waiver of the right to counsel by a defendant's occasional musings,' and it also 'prevents a defendant from taking advantage of and manipulating the mutual exclusivity of the rights to counsel and self-representation.' Id. at 558-59 (internal quotation marks omitted.) Additionally, 'in ambiguous situations created by a defendant's vacillation or manipulation, we must ascribe a 'constitutional primacy' to the right to counsel.' Id. 'At bottom, the *Faretta* right to self-representation is not absolute, and the 'government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer.' Id. (quoting *Martinez v. Court of Appeal*, 528 U.S. 152, 145 L.Ed.2d 597, 120 S.Ct. 684 (2000))."

[26] *State v. Reed.*(1996), 74 Ohio St.3d 534 .

[27] 96 Ohio St.3d 94, 2002-Ohio-3751.

[28] (C.A. 4, 2005), 404 F.3d 263.

{¶ 52} In *Bush*, the appellate court did not disagree with the trial court's denial of Bush's request to proceed pro se; however, it did point out that a district court may deny a request when the request is made to manipulate.

{¶ 53} Before we address whether Halder properly invoked the right to proceed pro se, we will address whether the trial court made a sufficient inquiry into his right to waive counsel and represent himself. When the trial court first learned of Halder's request to proceed pro se, it was several years after his indictment, the second request for new lawyers, and after he had been held competent to stand trial. Each of his six written and several oral motions to disqualify his lawyers were made by him to the court.

{¶ 54} His first request to proceed pro se was in the environment of a denial to disqualify his lawyers and proceed on his own. The trial court heard from him, his lawyers, and the State. The trial court did not rule immediately; the trial judge ruled the next day and made it clear that the denial to allow him to proceed pro se was because his request was untimely. The trial court in making its decision relied on some, if not all, of the cases cited herein. Consequently, it is our conclusion that a sufficient inquiry of the waiver was made.

{¶ 55} Turning next to the proper invocation of the pro se request, we are persuaded as a matter of law that the request was equivocal and untimely. Halder had never in the two and one-half years asked to proceed pro se. His pro se request was

made four days before trial and only after the trial court had refused to disqualify his present counsel and appoint a third lawyer.

{¶ 56} We also note that Halder consistently maintained that his lawyers had not done what he had asked, which included having several people from India subpoenaed. The lawyer responded that under the circumstances much of what Halder wanted to pursue did not aid in the trial of his case. In *United States v. Frazier-El*, [29] cited in *State v. Cassano*, the court held that a trial court must be permitted to distinguish between a manipulative effort and a sincere desire to proceed pro se.

{¶ 57} Finally, we conclude that his request was untimely. In *United States v. Mackovich*,[30] a request made six-to-ten days before trial was viewed as a delay tactic. Here, the request was made four days before trial. Thus, under *United States v. Mackovich*, his request is, as a matter of law, untimely.

{¶ 58} During oral argument, this court interpreted Halder's attorney's argument to conclude that if Halder is competent to stand trial, he is competent to represent himself. This is a valid contention, but we are not concerned with his competency to defend pro se. The trial court was explicit that its denial of his pro se request was based on the timeliness of his request. Consequently, an otherwise competent

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[29](C.A.4, 2000), 204 F.3d 553 at 560.

[30](C.A. 10, 2000), 209 F.3d 1227.

defendant may be denied the right to proceed pro se when his request is manipulative and untimely.

{¶ 59} We are mindful that after the trial court denied the pro se request, the trial proceeded to closure. Halder never renewed his request the next day or thereafter. We are not saying that he has to do so, but we conclude that this fact is helpful in evaluating Halder's intended use of the request, i.e., was it a sincere desire to proceed pro se or manipulative. Ultimately, we believe that this issue is within the trial court's discretion, and our review is whether the record supports the trial court's conclusion. Accordingly, we hold that Halder's request to proceed pro se was properly denied by the trial court, and his second assigned error is overruled.

Juror Dismissal

{¶ 60} In the third assigned error, Halder argues the trial court erred in dismissing a prospective juror based on her views of capital punishment. We disagree.

{¶ 61} A prospective juror in a capital case may be excused for cause if his views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[31] A trial court's ruling on a challenge for cause will not be overturned on appeal "unless it is manifestly

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[31] *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, citing *Wainwright v. Witt* (1985), 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841, quoting *Adams v. Texas* (1980), 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581. See, also, *State v. Rogers* (1985), 17 Ohio St.3d 174, paragraph three of the syllabus , death penalty vacated on other grounds (1985), 474 U.S. 1002, 106 S.Ct. 518, 88 L. Ed.2d 452.

arbitrary and unsupported by substantial testimony, so as to constitute an abuse of discretion."[32]

{¶ 62} A review of the record in the instant case indicates that prospective Juror Number 43 initially indicated that she believed the death penalty was justified in some cases. However, when questioned further, the juror indicated that it would be difficult for her to sign a death verdict. Finally, when questioned by the trial court, the following exchange took place:

> "Juror No. 43: I am saying from a personal perspective, to say this person is going to die and sign my name to it, I don't believe I could do that.
>
> The Court: Under any circumstances?
>
> Juror No. 43: Under any circumstances."[33]

{¶ 63} The above colloquy indicates that the prospective juror was unequivocal that she could not sign a death verdict under any circumstances. As such, the prospective juror would be unable to substantially perform her duties in accordance with the instruction and oath. Consequently, the trial court properly dismissed the juror for cause.

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[32] *State v. Williams* (1997), 79 Ohio St.3d 1, 8, 1997-Ohio-407; accord *State v. Wilson* (1972), 29 Ohio St.2d 203, 211.

[33] Tr. at 2100.

{¶ 64} Moreover, Halder suffered no prejudice from the exclusion of the prospective juror because the death penalty was not imposed. Accordingly, we overrule the third assigned error.

Victim Impact Evidence

{¶ 65} In the fourth assigned error, Halder argues that the victim impact evidence, adduced during the guilt phase of the trial, tainted the jury with irrelevant concerns of sympathy, which rendered it more prone to convict him. We disagree.

{¶ 66} Victim impact evidence is excluded because it is irrelevant and immaterial to the guilt or innocence of the accused - it principally serves to inflame the passion of the jury.[34] Nevertheless, the State is not wholly precluded from eliciting testimony from victims that touches on the impact the crime had on the victims: "circumstances of the victims are relevant to the crime as a whole. The victims cannot be separated from the crime."[35] In *State v. Fautenberry*,[36] the Supreme Court went on to say that "we find that evidence which depicts both the circumstances surrounding the commission of the

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[34]See *State v. White* (1968), 15 Ohio St.2d 146.

[35]*State v. Williams,* 99 Ohio St.3d 439, 2003-Ohio-4164, P43, quoting *State v. Lorraine* (1993), 66 Ohio St.3d 414, 420.

[36]72 Ohio St.3d 435, 439-440, 1995-Ohio-209, certiorari denied, 516 U.S. 996, 133 L.Ed. 2d 439, 116 S.Ct. 534.

murder and also the impact of the murder on the victim's family may be admissible during both the guilt and the sentencing phases."[37]

{¶ 67} With these precedents in mind, we decline to conclude that the victim impact testimony was improperly admitted. In the instant case, Halder alleges that the trial court improperly admitted the testimony of David Wallace, the brother of the slain victim. We are not persuaded.

{¶ 68} At trial, David Wallace testified about learning of the hostage situation at Case Western. Wallace further testified about watching the news reports and seeing the body of his slain brother being taken from the building. Finally, Wallace testified about how the death of his brother had affected the entire family. Wallace's testimony comports with the law espoused in *Fautenberry*, because it describes the surrounding circumstances of the murder and the impact it has had on the victim's family. Consequently, the trial court properly admitted Wallace's testimony.

{¶ 69} Halder also argues that the trial court improperly admitted parts of the testimony of twenty-eight other witnesses. Again, we are not persuaded.

{¶ 70} A review of the record indicates that the contested testimony was properly admitted. At trial, the State presented the testimonies of twenty-eight witnesses who Halder held hostage for approximately eight hours. These victims testified about their ordeal during those eight hours. Many of the victims testified they were forced by fear

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[37] Id.

of death to remain in the building. Several victims testified about receiving counseling since the incident and some testified about the fear of loud noises. Many of the victims testified that they currently plan exit strategies whenever they enter a building. The foregoing testimony sheds light on the surrounding circumstances of the hostage situation and how the experience has impacted the lives of each victim. Thus, the witnesses' testimony was properly admitted.

{¶ 71} Moreover, even if Wallace and the other witnesses had not testified, the outcome of the trial would not have been different. The record before us indicates that videotaped evidence was admitted at trial, which depicted Halder smashing his way into the building, pointing a gun at Norman Wallace, and shooting him point blank in the chest. Consequently, even if the victim impact statements were improperly admitted, there was sufficient evidence of Halder's guilt. Accordingly, we overrule the fourth assigned error.

Diminished Capacity

{¶ 72} In the fifth assigned error, Halder argues the trial court erred by not allowing him to present a claim of diminished capacity to the jury. We disagree. The defense of "diminished capacity," is not recognized in Ohio.[38] Since these assertions

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[38] *State v. Thomas*, Cuyahoga App. No. 85968, 2006-Ohio-280. See also, *State v. Wilcox* (1982), 70 Ohio St.2d 182, 194; *State v. Huertas* (1990), 51 Ohio St.3d 22, 27.

completely lack merit, Halder's argument is rejected. Accordingly, we overrule the fifth assigned error.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

ANN DYKE, J., CONCUR;
MARY J. BOYLE, J., DISSENTS. (SEE ATTACHED DISSENTING OPINION.)

BOYLE, M.J., J., DISSENTING:

{¶ 73} I respectfully dissent with the majority opinion regarding Halder's first two assignments of error. First, it is my view that the trial court incorrectly determined Halder to be competent to stand trial. In addition, if Halder was competent to stand trial – as the trial court found and the majority affirmed – then he had a constitutional right to defend himself at that trial.

{¶ 74} The majority thoroughly set forth the facts and procedural background of this case. In addition, the majority properly summarizes the law on competency to stand trial, as set forth in *Dusky v. United States* (1960), 362 U.S. 402, and the Ohio Revised Code. I further agree with the majority's standard of review an appellate court must abide by when reviewing a trial court's competency ruling.

{¶ 75} Where I depart from the majority opinion, is that it is my view there was no competent, credible evidence to support the trial court's finding that Halder was competent to stand trial. Thus, as fully explained in the following analysis, I would conclude that the trial court abused its discretion when it found Halder to be competent.

{¶ 76} In the case at bar, there is no dispute that if the test for competency *only* required that Halder understand the nature and objective of the proceedings against him, then he would be competent to stand trial. There is a divergence of opinion, however, with the second prong; i.e., whether he was capable of rationally understanding the proceedings against him, as well as rationally assisting with his defense.

{¶ 77} Prior to reaching that question, however, we must determine whether Halder *even* had the requisite "mental condition" under R.C. 2945.37. It is my view that Halder proved by a preponderance of the evidence that he did have the requisite "mental condition."

MENTAL CONDITION

{¶ 78} The trial court found Halder competent because it found Dr. Bergman to be more credible than the Dr. Eisenberg or Dr. Fabian. Although it is within the trial court's province to determine witness credibility, there must be some competent, credible evidence to base it on. *State v. Hicks* (1989), 43 Ohio St.3d 72, 79. It is clear that after reviewing Dr. Bergman's testimony in its totality, she improperly relied on the wrong legal standard when evaluating Halder's competency. As such, her opinion was not competent or credible.

{¶ 79} Dr. Bergman testified that Halder had a severe personality disorder, but not a "major mental disorder or mental illness, per se." She stated that with a severe personality disorder, "[t]here wouldn't be any kind of symptoms that would prevent someone *** from cooperating with their counsel." She explained that she was able to get Halder to cooperate with her by "just listening to what was very important to him," and nodding her head, and showing him that she was interested.

{¶ 80} Dr. Bergman explained the distinction between a delusional disorder and a personality disorder by describing diagnoses on either Axis I or Axis II. She explained

that "mental illness" or "major mental disorders" are diagnosed on Axis I, such as psychotic disorders and mood disorders. Personality disorders and mental retardation are diagnosed on Axis II. She stated that "[p]ersonality disorders are not to considered to be mental illness. They are disorders that create aberrations of behavior and disturb an individual's adjustment in functioning but they are not mental illnesses. Mental illnesses are metabolic, neurological. They are diagnoses. They are progressive diseases. And personality disorders are developmental disorders." She further explained that a person with an Axis II disorder, such as a personality disorder, "doesn't meet the criteria under Ohio law of mental disease or defect of the mind, so *** a personality disorder doesn't meet the first prong to be found incompetent."

{¶ 81} On cross-examination, Dr. Bergman agreed that her "threshold issue in determining competence under the statute [was] whether or not the person has a mental illness or mental disorder." Defense counsel had Dr. Bergman read from R.C. 2945.371(G)(4), which provides: "If the evaluation was ordered to determine the defendant's mental condition at the time of the offense charged, the examiner's findings as to whether the defendant, at the time of the offense charged, did not know, as a result of a severe mental disease or defect, the wrongfulness of the defendant's acts charged."

{¶ 82} Defense counsel then asked Dr. Bergman, "can you show us where it says in there that mental illness or mental defect is a prerequisite for a determination of

competency to stand trial?" (531) Dr. Bergman agreed that this subsection did not have anything to do with competency to stand trial, but addressed the issue of sanity.[39]

{¶ 83} When further questioned by defense counsel, "where does it say mental disease or defect of the mind in regards to competency" is required, Dr. Bergman replied, "I'm not a lawyer. I can't tell you where in the statute it says that but I can tell you based on my training, my background and my experience for the past 29 years I know that in order to be incompetent to stand trial there has to be a mental disease or defect of the mind. A major mental disorder which prevents the person – makes them incapable of accomplishing to be competent. It can't just be that they are not cooperating or they don't like their attorneys or they don't agree with their attorneys. There is [sic] a lot of people who don't like their attorneys. ***"

{¶ 84} When pressed again by defense counsel to show the court where in the statute mental disease or defect was required for competency to stand trial, Dr. Bergman referred to R.C. 2945.37, which requires a mental condition. Defense counsel agreed that the statute required a mental condition, and then asked, "I assume that a severe personality disorder is a mental condition. Is it not?" Dr. Bergman replied, "It is not the type of mental condition that would prevent a person from being

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[39]R.C. 2901.01(14) states that, "A person is 'not guilty by reason of insanity' relative to a charge of an offense only if the person proves *** that at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts."

able to do those things." Defense counsel again asked, "That is a mental condition. Is it not?" Dr. Bergman then conceded that a personality disorder is a mental condition. (536)

{¶ 85} Dr. Bergman's "threshold issue" in determining competency, whether the person had a "mental disease or defect of the mind," was simply wrong. Specifically, she concluded that a person could not be found incompetent *unless* the person was first diagnosed with a "mental disease or defect of the mind." Because she diagnosed Halder as having a severe personality disorder, which she testified did not meet the "criteria under Ohio law of mental disease or defect of the mind," Halder could not be found incompetent under Ohio law. Ohio competency law, however, requires no such diagnosis.

{¶ 86} Even after defense counsel was able to get Dr. Bergman to admit that her "threshold issue," used as the basis of her competency opinion, was actually the legal standard for determining *sanity at the time the act was committed*, Dr. Bergman steadfastly reiterated, "I know that in order to be incompetent to stand trial there has to be a mental disease or defect of the mind." Again, the statute for determining competency to stand trial clearly does not require a "mental disease or defect of the mind."

{¶ 87} Thus, it is my view that Dr. Bergman's opinion was based upon the wrong legal standard, and therefore, was not competent or credible. Dr. Bergman testified

that a severe personality disorder is not a "mental disease or defect of the mind," but agreed it is a "mental condition," which is what the statute requires. Therefore, with Dr. Bergman's concession, it was undisputed that Halder had the requisite "mental condition," as all three experts then testified that he did.

CAPABILITY TO RATIONALLY UNDERSTAND PROCEEDINGS AND ASSIST COUNSEL

{¶ 88} R.C. 2945.37 *mandates* that the trial court "*shall* find the defendant incompetent" if "*because* of the defendant's present mental condition, the defendant is incapable *** of assisting in the defendant's defense[.]" (Emphasis added.) Again, Dr. Bergman conceded that a severe personality disorder is indeed a "mental condition." As discussed in the following analysis, she also opined that Halder's severe personality disorder prevented him from "assist[ing] his attorneys in a rational manner." This is exactly what *Dusky* and the statute require to show someone is incompetent.

{¶ 89} Throughout her testimony, Dr. Bergman refused to characterize Halder's behavior or thought processes as delusional. She did describe his behavior as "odd," "grandiose," "incredibly naive," "child-like," "bizarre," "paranoid," "not normal," "obsessed," and "extremely egocentric." She stated his statements were "outrageous," "inflammatory," "quite grandiose," "pretty off the wall," "pretty crazy," and "nonsensical." And she said his reasoning was "circular," "irrational," "illogical,"

"just silly," "faulty," "magical," "inflexible," and "single-minded." Yet still, Dr. Bergman concluded, "I don't consider anything that Mr. Halder has said to be delusional."

{¶ 90} It is apparent that when Dr. Bergman testified, she deliberately avoided saying the magical word "delusional." However, regardless of what Dr. Bergman labeled Halder's "mental condition," her testimony revealed that even she believed that his "mental condition" prevented him from "assist[ing] his attorneys in a rational manner" or rationally understand the proceedings.

{¶ 91} *Dusky* "mandates the conclusion that the defendant lacks the requisite rational understanding if his mental condition precludes him from perceiving accurately, interpreting, and/or responding appropriately to the world around him." *Lafferty v. Cook* (C.A.10, 1991), 949 F.2d 1546,1551, citing *Dusky* at 402. "[T]he relevant consideration is not the type of mental condition with which a particular defendant is afflicted, nor the way in which the condition manifests itself. Rather, the critical inquiry is whether the defendant's mental condition, however it may be labeled and whatever symptoms it may produce, prevents the defendant from having a rational or factual understanding of the proceedings against him or significantly prevents the defendant from consulting with his lawyer." Id. at fn. 3.

{¶ 92} The United States Supreme Court has explained that the *Dusky* standard meets the *minimum* due process requirements for determining competency. *Godinez v. Moran* (1993), 509 U.S. 389, 402 ("[W]hile States are free to adopt competency

standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements"). After further review of Dr. Bergman's testimony, this author is not sure how she, or the trial court for that matter, could conclude that Halder was competent.

{¶ 93} Significant to the analysis of whether Halder could "consult with his lawyer[s] with a reasonable degree of rational understanding," is Dr. Bergman's opinion "that everything that Mr. Halder says he believes." Keeping that statement in mind, a more extensive review of her testimony shows that Halder could not consult with his attorneys with *any* degree of rational understanding, let alone a reasonable one.

{¶ 94} Dr. Bergman agreed that Halder believed that Case Western Reserve University's actions "set in motion a course of events that resulted in him being in court here today." She also agreed that Halder came back to his theory of the case, "this basic theme," every time she talked to him. Moreover, every time she talked to him, he told her "that if he were to present through his attorneys the entire story of what happened that he would be acquitted."

{¶ 95} Dr. Bergman admitted that even after she confronted Halder and told him that "no jury or judge would acquit someone because someone aggravated them to the point that they lost control," that it "didn't deter him in the least from holding that

view."[40] She also stated, "the more he thinks about it and the more that he doesn't get acknowledged the bigger it gets for him."

{¶ 96} She explained, "He believes that by putting all this in front of the jury they will be as compelled by how much he was harmed as he is, and they might even exonerate him. They might acquit him because they would agree how egregiously he was harmed." She agreed that was not a "logical conclusion from the facts."

{¶ 97} Dr. Bergman said that Halder told her that "the judge is working with the Prosecutors." She acknowledged that Halder also believed his attorneys were "working for Case Western Reserve University" and stated, "[h]e believes that you're [his attorneys] not working in his best interest, that you're working with the Prosecutor." Halder told Dr. Bergman that his attorneys "only want to focus on the act of violence which is exactly what the Prosecutor wants to focus on." When asked if that sounded "delusional" to her, Dr. Bergman replied, "Well, in my opinion when Mr. Halder tells me that this is his proof, *** no, that doesn't sound delusional to me, that's just silly. It's just silly. It's circular reasoning."

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[40]After Dr. Bergman confronted Halder in February 2005, and weeks before his competency hearing, Halder wrote a letter to a professor at Case Western Reserve University. In it, he asked the professor to "contact some journalists" for him. He wanted to "tell the entire world the whole truth," and expose Case Western's "evil objectives," how it protected Shawn Miller after he "destroyed the information infrastructure," which Halder created, and ultimately caused the violence on May 9, 2003. Halder also claimed his attorneys and judge were working for the prosecutor.

{¶ 98} Despite Dr. Bergman's refusal to categorize Halder's reasoning as delusional, she admitted on cross-examination that when she wrote her evaluation report, she found that: "'Presently, Mr. Halder's ability to assist his attorneys in a rational manner is impaired by virtue of the characteristics of a severe personality disorder which interfere with his ability to consider alternative viewpoints and his ability to put his concerns into perspective in the context of the, "larger picture."' She agreed that she concluded this because "when he sees a fact he cannot rationally make the proper conclusion or he cannot rationally assess that. *** He cannot rationally assess what the facts *** are *** because he is obsessing on his defense and his theory." (643)

{¶ 99} Dr. Bergman further acknowledged that she concluded in her report: "'Mr. Halder has thus far insisted on advancing a situation which amounts to an obsession for him as the primary defense strategy, while the attorneys have attempted, with scant success, to direct him to legal issues which are prudent and necessary to pursue, given the gravity of the legal situation and the associated jeopardy. Mr. Halder consistently angrily maligns his present attorneys, asserting that they are not representing him, but rather are working for the Prosecutor.'" She then testified that Halder believed his attorneys must be "working for the Prosecutor because they [have been] paid off by Case Western Reserve."

{¶ 100} Thus, although Dr. Bergman would not agree that Halder had a mental illness, the foregoing testimony shows that she did opine that Halder's severe personality disorder (i.e., his mental condition) impaired his ability to rationally assist his counsel with his defense and rationally understand the proceedings.

{¶ 101} The trial court, relying on Dr. Bergman, found that Halder had "a sufficient present ability to consult with his attorneys with a reasonable degree of rational understanding." However, in its analysis, the trial court only referred to Halder being able to "consult with his attorneys about the facts of May 9, 2003." In its conclusion, the trial court stated:

{¶ 102} "Defendant gave two of the expert witnesses detailed information about his involvement in the shooting on May 9, 2003. *** If Dr. Bergman and Dr. Fabian were able to get answers to specific questions from the Defendant, then there is no reason that Defendant cannot consult with his attorneys about the facts of May 9, 2003." (Details omitted.)

{¶ 103} The trial court further concluded: "Defendant's behavior also suggests that he is able to assist his attorneys in his defense. *** Defendant has engaged in a pattern of refusing to answer questions about his past and his involvement in the May 9, 2003 shooting. An example *** can be seen throughout his deposition taken by attorney Jennifer Schwartz in his civil case against Shawn Miller. At one point in the deposition, Defendant testified, 'I don't talk to anyone unless I have

to.' *** Defendant also refused to answer Ms. Schwartz's questions about why he received social security disability payments. This pattern of not answering questions continued when Defendant refused to answer the expert witness questions about where he purchased the gun and the helmet he used on May 9, 2003."

{¶ 104} Although the trial court paid lip service to the requirement that Halder be capable of *rationally* assisting his counsel, it is clear that it based its decision solely on Halder's factual understanding of the events and proceedings. The trial court properly concluded that Halder could talk about the *facts* of May 9, 2003, about what happened, and that he clearly understood the nature and objectives of the proceedings against him. However, the trial court did not address whether Halder had a "rational, as well as factual, understanding," or whether he could "consult with attorney[s] with a reasonable degree of rational understanding."

{¶ 105} Again, *Dusky* made clear that, "it is *not enough* for the [trial court] 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.'" (Emphasis added.)

{¶ 106} In *Godinez*, supra, the United States Supreme Court outlined numerous *rational* decisions a defendant *must* be able to make under the *Dusky*

standard, including whether to waive his privilege against compulsory self-incrimination; whether to waive his right to trial by jury; whether to waive his right to confront his accusers; and whether to put on a defense or raise an affirmative defense. Id. at 398-399.

{¶ 107} There have also been several foreign cases which have delineated the *Dusky* standard regarding the "rational" requirement.[41]

{¶ 108} In *Lafferty*, supra, an examiner found that Lafferty's "belief in a judicial conspiracy that included his lawyer did not detract from Lafferty's ability to aid in his defense, and that Lafferty's refusal to assist his attorney, while a product of his delusion, was a conscious choice." Id. at 1553. The district court agreed. Id. at 1554. The Tenth Circuit reversed the district court because "both [the examiner] and the court appear to have embraced the view that factual understanding alone is sufficient *** [and] that is totally contrary to the circumstances in *Dusky*." Id. at 1554-1555.

{¶ 109} In *New Hampshire v. Champagne* (1985), 127 N.H. 266, 270-271, the New Hampshire Supreme Court explained the *Dusky* rational requirement: "[M]erely a factual understanding, whereby the defendant can recite, civics-class style, the cast of characters, their roles and the object of the proceedings, and can recall some events, is not enough. The defendant must also have a rational understanding

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[41]The Ohio Supreme Court adopted the *Dusky* standard (*State v. Berry* (1995), 72 Ohio St.3d 354, 359), but it has never expanded on the rational element of the test. Thus,

[and] also have the ability to communicate meaningfully with his lawyer so as to be able to make informed choices regarding trial strategy. This often involves decisions of constitutional moment ***."

{¶ 110} In *United States v. Salley* (N.D.Ill. 2003), 246 F.Supp.2d 970, the district court concluded Salley was not competent. Id. at 980. "In light of the consistency of Salley's belief that the defenders, the prosecutors, the FBI and the court are all against him ***; the absence of any cooperation with counsel; the defendant's grandiose thinking with respect to his ability to represent himself and his prospects at trial, this court concludes that Salley is not competent to stand trial because, although he understands the nature and consequences of the proceeding, he lacks the capacity to cooperate with counsel. As a result, defendant lacks the competence to make rational choices about fundamental decisions ***." Id. at 979-980.

{¶ 111} A case strikingly similar to the case at hand, *State v. Nagy* (S.D.N.Y. 1998), Case No. 96 Cr. 601, 1998 U.S. Dist. LEXIS 9478, also cited by Halder, is worthy of discussion here. An examiner concluded the following about Nagy:

{¶ 112} "Mr. Nagy is an intelligent individual who possesses a significant level of knowledge regarding legal proceedings. However, his judgment regarding how to pursue his self interest in these proceedings is grossly diminished by his paranoid concerns. Mr. Nagy's quest to obtain recognition and restitution for (likely) imagined

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although these cases are not controlling, they are instructive.

slights has precedence over his pursuing reasonable defense strategies. He perceives a trial as a stage upon which he can publicly decry the multiple injuries he believes have been inflicted upon him." Id. at 5.

{¶ 113} The district court explained that, "'One can be intelligent *** yet still have underlying psychiatric and emotional problems which cause incompetence. Simply having the capacity for rational understanding in the abstract is not sufficient if psychiatric or emotional problems prevent applying rational faculties to the problem.'" Id. at fn. 4, quoting James A. Cohen, The Attorney-Client Privilege, Ethical Rules, and the Impaired Criminal Defendant, U. Miami L. Rev. 529, 543 (1998)."

{¶ 114} The district court then concluded that Nagy was not competent to stand trial, reasoning: "Nagy's paranoid delusions concerning a conspiracy against him and his grandiose notions regarding the function of a trial in this case *** demonstrate that Nagy is not properly or rationally able to consider or assist in decisions with respect to his defense[.] *** Nagy's desire to proceed to trial so that the conspiracy against him may be exposed is an example of his irrational thought process. *** Nagy does not have a rational understanding of the proceedings against him when he believes that a criminal trial at which the media is present will serve to expose the conspiracy against him[.] *** His understanding of the pending criminal proceedings is necessarily skewed by his belief that there is a conspiracy against him involving,

among others, judges, the Government, a priest, his landlord, and all psychiatrists who have examined him." Id. at 19-21.

{¶ 115} Again, in the case at hand, Dr. Bergman testified "that everything that Mr. Halder says he believes." Halder consistently obsessed about his belief that he would be vindicated if only he could explain to the jury how Case Western Reserve University caused "a course of events" that led him to the violence. Even when confronted by Dr. Bergman that no judge or jury would acquit him for that, Halder remained steadfast in his view. Halder insisted that because his attorneys would not focus on his "basic theme," and all they wanted to focus on was "the act of violence," he believed that they had been paid by Case Western Reserve University and were working for the prosecutor.

{¶ 116} Dr. Bergman refused to say that Halder's belief that his attorneys were working for Case Western Reserve University or the prosecutor was delusional, and instead, said it was "just silly" for Halder to believe that. Halder's conspiracy theory might be "silly" to Dr. Bergman, but to Halder, because of his mental condition (whether it was a severe personality disorder or delusional disorder), it was anything but silly. It was very real. Even Dr. Bergman testified that it was real to Halder. There was no suggestion that Halder was feigning his mental state or his belief in a "conspiracy theory." Dr. Bergman further admitted that Halder's "silly" and "circular" reasoning was irrational.

{¶ 117} Nevertheless, Dr. Bergman still opined that if Halder could tell her about the events of May 9, 2003, then he could cooperate with his attorneys. The trial court concluded as much in its opinion ("All of this information demonstrates that Defendant can, in fact, assist his counsel.").

{¶ 118} However, neither Dr. Bergman, nor the trial court addressed the "rational" element. The fact that Halder could talk about the "details" of May 9, 2003, and understood the nature of the proceedings against him, does not mean that he could *rationally* understand the proceedings or *rationally* assist in his defense. Rationally assisting with one's own defense presumes that one is able to make significant legal decisions about one's defense – with the advice counsel.

{¶ 119} Under *Dusky*, it cannot reasonably be said that Halder could rationally understand the nature and proceedings against him if he genuinely believed that his attorneys, and the judge for that matter, were working for Case Western Reserve University and the prosecutor. Nor can it be reasonably said that Halder could rationally assist with his defense if he believed that by taking the stand and testifying to the jury about how Case Western Reserve harmed him, that the jury would understand how he had been egregiously harmed and exonerate him. Moreover, it cannot be said that Halder could rationally assist with his defense if he would not consider a plea that admitted any guilt, despite the strong case against him, even if it meant possibly saving

him from the death penalty. Halder insisted on presenting his conspiracy theory to the jury - and nothing could detract him from this.

{¶ 120} The trial court also concluded that Halder's "behavior" suggests that he could assist his attorneys, but instead, Halder "engaged in a pattern of refusing to answer questions." As an example of Halder's "pattern" of refusing to answer questions, the trial court explained how Halder would not answer questions in his "deposition taken by attorney Jennifer Schwartz in his civil case against Shawn Miller."[42] It is my view that a deposition taken nearly three years prior to the competency hearing, especially in light of the fact that competency is a present condition, had no bearing on Halder's competency to stand trial.

{¶ 121} Halder may have understood the nature and objectives of the proceedings against him, but in no way could he understand it rationally, nor could he rationally assist with his defense. Thus, I would conclude that the trial court's finding of competency cannot stand under the due process requirements set forth in *Dusky* and codified in R.C. 2945.37. Therefore, I would vacate Halder's conviction and sentence, and reverse and remand this case.

SELF-REPRESENTATION

[42]Halder filed his civil case against Shawn Miller in June of 2001. The trial court granted summary judgment to Miller in September 2002. Halder appealed, and this court dismissed the appeal on April 29, 2003.

{¶ 122} In addition, if Halder was competent to stand trial, then the trial court had a duty to inquire into Halder's request to represent himself at that trial in order to determine if his request was made knowingly, voluntarily, and intelligently. It is my view that the trial court did not properly inquire into Halder's request. If Halder did make his request knowingly, voluntarily, and intelligently, then he had a constitutional right to represent himself at trial.

{¶ 123} This court has explained, "To invoke the right to self-representation, the right to the assistance of counsel must be knowingly, voluntarily and intelligently waived. A two-part inquiry may be required. First, the court must determine the defendant is competent to waive the right to counsel if the court has reason to doubt the defendant's competence. Second, the court must decide whether the waiver is knowing and voluntary. [*Godinez*, supra, at 400-402]." *State v. Watson* (1998), 132 Ohio App.3d 57, 63.

{¶ 124} Once a defendant clearly and unequivocally informs a trial court that he wishes to represent himself, the court is obligated to determine whether the defendant knowingly, voluntarily, and intelligently waives his right to counsel. "The court's failure to inquire whether appellant knowingly, intelligently and voluntarily" waives his right to counsel violates the defendant's Sixth Amendment right to defend himself. Id. at 65.

{¶ 125} Moreover, "[s]ince the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to "harmless error" analysis. The right is either respected or denied; its deprivation cannot be harmless.' *McKaskle* [*v. Wiggins* (1984), 465 U.S. 168,] at 178, n. 8." *Watson* at 66.

{¶ 126} In order to make this determination, a trial court should candidly and thoroughly discuss with the defendant "the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." Id. at 64, quoting *Von Moltke v. Gillies* (1948), 332 U.S. 708, 723. "The defendant must fully understand the advantages that counsel can provide and the practical effect of giving up those advantages. The defendant also should be informed of the standards with which he will be expected to comply in conducting his own defense; for example, the Rules of Criminal Procedure and the Rules of Evidence. [*State v. Gibson* (1943), 45 Ohio St.2d 366, 376-77]; *State v. Overholt* (1991), 77 Ohio App.3d 111." *Watson* at 64.

{¶ 127} Whether a defendant has knowingly and voluntarily waived his right to counsel must be considered on a case-by-case basis. Id. In *Watson*, this court quoted the Ohio Supreme Court to serve as a guideline "for a common sense explanation of the factors relevant to the decision to waive the right to counsel:

{¶ 128} ‘THE COURT: One other point that I am going to mention, and then you can do as you see fit. You cannot and will not be forced to have (counsel) participate in the case. I caution you, however, that if you attempt to defend yourself, you are bound by the same rules of evidence that bind a lawyer, and if you don't know those rules of evidence - and I presume you don’t since you are not a lawyer to the best of my knowledge - when you attempt to question any witness to defend yourself, you may find that you are not able to ask any questions simply because you don’t know the proper way to put the questions; and if a question is improperly asked, the court; that is, me, will stop you from asking the question. So, I am cautioning you that you may find you are in the position that you are unable to ask any questions, and you are unable to present a defense, because you do not know how. If you wish to take that risk, which could possibly prevent you from ever getting your story told, that’s up to you. I cannot and will not function as your lawyer to lead you along. That’s not my role, so I am telling you with caution you are facing a heavy charge, a first degree felony under Ohio law, which I am sure you are well aware carries a maximum penalty of 25 years; so, this is hardly a trifling matter. So, I personally would strongly urge you to permit experienced counsel to participate in your defense. If you do not wish to do so, you are over 21, I presume, and I have made it as plain to you as I am capable of making it what a dangerous course you are embarking on in my opinion. You are facing the heaviest charge in Ohio law with the exception of two or three charges such as a

murder, and to attempt to do so without an attorney to represent you in my opinion is a most dangerous course.'"

{¶ 129} "Now, I am not saying that because you have an attorney you would be acquitted. I have no idea if the Prosecutor can prove the case he is going to attempt to prove or not. You are, of course, presumed innocent. It is simply my opinion that you have a much, much lesser chance to be adequately represented if you are representing yourself." Id. at 64-65, quoting *Gibson*, supra, at 372-373.

{¶ 130} The majority adequately set forth the scant colloquy between Halder and the trial court, as well as the trial court's decision denying his request as untimely. The trial court did not discuss any of the relevant factors with Halder.

{¶ 131} In its decision, the trial court relied upon *State v. Vrabel*, 99 Ohio St.3d 184 and *United States v. Mackovich* (C.A.10, 2000), 209 F.3d 1227. After reviewing these cases, it is my view that they are distinguishable from the case at bar.

{¶ 132} In *Vrabel*, the Supreme Court of Ohio, in upholding the trial court's decision denying Vrabel's "13th hour change of heart," reasoned, "appellant repeatedly changed his mind as to whether he wanted to represent himself or have counsel represent him prior to trial. The trial judge went to great lengths to accommodate appellant's continual changes of mind, and it is clear that the judge avoided acting hastily to ensure a correct and just decision." Id. at _52 (appellant had changed his mind at least six times from March 2005 to September 2005).

{¶ 133} In *Mackovich*, the district court denied Mackovich's request to represent himself, concluding that it was an abuse of the judicial process and "merely a tactic for delay." Id. at 1237. The Tenth Circuit court upheld the trial court's denial for several reasons, including the fact that Mackovich had "coupled his request for self-representation made on the first day of trial with yet another 'motion for continuance to prepare.'" Id.

{¶ 134} In this case, I agree that Halder did not request to represent himself until the trial court denied his motion to disqualify his counsel, which was only five days before trial was to commence. Significant to this analysis, however, is the fact that there is absolutely no evidence that Halder made his request to proceed pro se in order to delay the trial. He did not simultaneously request a continuance or inform the trial court that he was not prepared to go to trial as scheduled. When the trial court denied the motion, Halder immediately and unequivocally moved to represent himself. When he did so, the trial court was obligated to engage in the required colloquy with him – in order to determine if he was knowingly, voluntarily, and intelligently waiving his right to assistance of counsel.

{¶ 135} Had the trial court engaged Halder in the required colloquy, to determine if he was knowingly, intelligently, and voluntarily waiving his right to assistance of counsel, then the trial court could have determined if he possessed the requisite mental faculties to make such an important decision. In addition, when a trial

court advises a defendant of the dangers and disadvantages of self-representation, then the record will establish that he knows – or does not know – what he is doing and that his choice is made with eyes wide open. *Godinez*, supra, at fn. 12, citing *Faretta v. California* (1975), 422 U.S. 806, 835.

{¶ 136} Thus, I would conclude that the trial court erred when it did not inquire into Halder's request to represent himself, and as such, violated his Sixth Amendment right. Therefore, if Halder was competent to stand trial as the trial court determined, then in my view, his conviction would have to be vacated and remanded for a new trial – because deprivation of the right of self-representation cannot be harmless.