

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

CASE NO. 04-0485

Appellee,

vs.

DONALD KETTERER,

This is a death penalty case.

Appellant.

*On Appeal from the Court of Common Pleas
of Butler County, Ohio*

MOTION IN OPPOSITION OF MOTION TO RECONSIDER

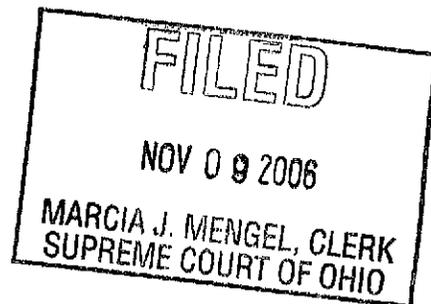
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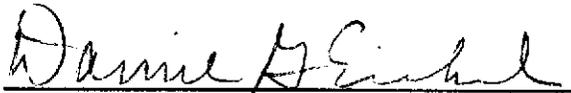
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MOTION IN OPPOSITION

Appellee, the State of Ohio, hereby gives notice of its opposition to Appellant's "Motion For Reconsideration." In general, the State opposes the Appellant's motion as it merely attempts to rehash the arguments that have already been correctly decided by this Honorable Court. What is more, the rules of this Court are clear that a motion for reconsideration "shall not constitute a reargument of the case." See Sup. Ct. Prac. R. XI § 2(A). However, this is exactly what the Appellant is attempting to do. Thus, for this reason and the reasons more fully set forth in the accompanying memorandum, this Honorable Court should DENY Reconsideration.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF DENIAL OF RECONSIDERATION

In general, a motion for reconsideration is governed by App.R. 26(A) and Supreme Court Practice Rule 11. While App.R. 26(A) itself does not provide an appellate court with a specific guideline to use in reviewing an application for reconsideration, relevant case law applying this rule has stated that “the test generally applied [in App.R. 26(A) motions] is whether the motion for reconsideration calls to the attention of the court an *obvious error* in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been.” **Matthews v. Matthews** (1981), 5 Ohio App.3d 140, 143 (Emphasis added). Stated otherwise, “[a]n application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court.” **State v. Owens** (1996), 112 Ohio App.3d 334, 336, See, also, Sup Ct. Prac. R. XI (Rule 11 states that a motion for reconsideration **shall not** constitute a reargument of the merits of the case). (Emphasis added)

Proposition of Law No. 1:

Ineffective assistance of counsel is not shown where, for strategic purposes, a defendant in a capital case chooses to enter a plea of guilty to all counts and specifications in a capital indictment with the advice of defense counsel without first securing an agreement from the prosecution that a death sentence would not be imposed.

In the First Proposition for reconsideration, Ketterer attempts to breathe life into his ineffective assistance of counsel argument. Specifically, Ketterer again argues that he should not have plead guilty, that he stood a better mathematical chance with 12 jurors as opposed

to 3 judges, that he did not have a meaningful relationship with his counsel, and that his counsel did not fully investigate his case. However, each point that Ketterer is arguing has already been decided by this Court using precedent from either the United States Supreme Court or this Honorable Court.

In addressing the “decision to plead guilty to three judges as opposed to twelve jurors” argument, this Court specifically found that the record did not support the proposition that Ketterer ever attempted to exchange a guilty plea for a life sentence, that “nothing in the record supports Ketterer’s claim that his counsel instructed him to plea guilty,” and “the record contradicts Ketterer’s claim that counsel ‘did not talk to their client’ about proceeding with a guilty plea after the court ruled that a guilty plea before a panel precluded jury sentencing. ***State v. Ketterer***, 111 Ohio St.3d 70, 2006-Ohio-5283, at ¶¶82-83. Thus, this Court found “[c]ounsel’s advice therefore reflects reasonable representation under *Strickland*.” ***Id.***, at ¶ 87. What is more, this Court also held that “Ketterer has failed to establish ‘a reasonable probability that, were it not for counsel’s errors, the result of the trial would have been different.’” ***Id.***, at ¶ 90. Thus, not only did this Court not find deficient performance, but this Court also held that there was no prejudice. As such, neither prong of an ineffective assistance claim was satisfied.

In determining Ketterer’s argument that his attorneys failed to establish a meaningful relationship with him, this Court found that there was “no credible evidence that counsel spent insufficient time with their client, failed to expend appropriate effort to communicate with or advise their client, or provided deficient representation.” ***Id.***, at ¶ 102. This Court continued by stating “[i]n fact, at several points during Ketterer’s jury waiver and guilty plea, Ketterer

asserted that he had talked with his lawyers at length and was satisfied with his attorneys and with their efforts to assist him.” *Id.* Thus, any failure to have a meaningful relationship argument must fail and need not be reconsidered.

Finally, in evaluating Ketterer’s “failure to investigate” argument, this Court stated that “[c]ounsel’s decision not to more vigorously pursue DNA testing of hairs allegedly found in the victim’s hands also reflected a reasoned tactical judgment and reasonable professional judgment.” *Id.*, at ¶ 106. This Court also correctly noted that “Ketterer cannot establish prejudice on this claim, as counsel concedes, because the record does not reflect the DNA results.” *Id.*, at ¶ 107. Therefore, as all of Ketterer’s claims of ineffective assistance have already been brought before this Court for consideration, and have all been correctly decided in a Unanimous opinion, his motion to reconsider should be denied.

Proposition of Law No. 2:

A jury waiver and guilty plea are knowingly, intelligently and voluntarily entered where the record evidences a written jury waiver and the advice of counsel and indicates that the defendant had sufficient mental capacity, unimpaired by the influence of medication, to understand the rights he was waiving and the consequences of his guilty plea.

In his Second Proposition of Law, Ketterer makes the same arguments concerning his guilty plea and jury waiver that this Court has already extensively considered. In fact, this Court spent 67 paragraphs of its decision analyzing and determining that Ketterer had in fact knowingly, intelligently, and voluntarily plead guilty and waived his right to a jury trial. See Ketterer, 2006-Ohio-5283, at ¶¶13-79. Merely because Ketterer did not win this argument

is not a valid reason for this Court to reconsider its well articulated decision. Thus, because no new issues were raised, and because this Court has already Unanimously determined this issue, the Second Proposition for reconsideration should be denied.

Proposition of Law No. 11:

A death sentence will be affirmed on independent review where the aggravating circumstances outweigh the evidence in mitigation by proof beyond a reasonable doubt.

Again, in Proposition Eleven, ¹ Ketterer reargues a point that has already been addressed by this Court. However, after noting all of the mitigating evidence, this Court clearly stated “we conclude that the aggravating circumstances outweigh the collective mitigating factors. In the course of an aggravated robbery and aggravated burglary, Ketterer savagely beat and stabbed his friend, an 85-year-old man. Although Ketterer suffers from a major mental illness, his condition is ‘one of the most treatable of the major mental illnesses.’ * * * Accordingly, we affirm the judgment of the common pleas court.” Ketterer, 2006-Ohio-5283, at ¶¶ 204-208. Thus, as Ketterer’s Eleventh proposition merely readdresses an issue that was clearly decided by this Court, there is no legal justification for reconsideration.

¹ The Appellee has intentionally misnumbered the remaining Propositions in order to match the numbering system used by the Appellant in his motion to reconsider. It should be pointed out that the numbering and the wording of these propositions further supports the argument that the Appellant is merely trying to reargue this case as the numbering is the same, and the wording is almost identical to that which was used in the Appellant’s original merit brief.

Proposition of Law No. 13:

It does not violate the Eighth Amendment to impose a death sentence where the evidence shows that notwithstanding some degree of mental illness, a person sentenced to death has the mental capacity to understand the nature of the death penalty and why it was imposed upon him.

In his Thirteenth proposition of law, Ketterer asks this Court to become an activist Court and break new legal ground by finding that the evolving standards of decency would not permit mentally ill persons from being subjected to capital punishment. In support of this argument, Ketterer points to Justice Stratton's concurring opinion. However, what Ketterer overlooks is that the concurring opinion is not advocating for the Ohio Supreme Court to become activist judges; rather, the concurring opinion is asking the Ohio General Assembly to evaluate and then consider legislation that might set forth criteria for people with severe enough mental illness to be excluded from capital punishment. *Ketterer*, 2006-Ohio-5283, at ¶ 247. Thus, as there is no reason now for this Court to become judicial activists, this Court should deny reconsideration of the Thirteenth proposition.

Furthermore, Ketterer's argument is also in direct conflict with existing precedent from this Court. In *State v. Scott* (2001), 92 Ohio St.3d 1, 748 N.E.2d 11, 2001-Ohio-148, this Court noted that "Scott cited no authority, and we are not aware of any authority, that supports Scott's claim that the prohibitions against cruel and unusual punishment of the Eighth Amendment and the Ohio Constitution preclude the execution of mentally ill persons who understand their crimes and the capital punishment that they face." *Scott*, 92 Ohio St.3d at

2. It must also be acknowledged that this legal position is also supported by precedent from other States. See, **State v. Lafferty** (Utah 2001), 20 P.3d 342, 365, 415 Utah Adv. Rep. 29, 2001 UT 19 (finding that imposing punishment on one who is to some degree mentally ill but not legally insane is not cruel and unusual punishment); See, also, **State v. Ross** (2004), 269 Conn. 213, 849 A.2d 648; **United States v. Battle** (N.D.Ga. 2003), 264 F.Supp.2d 1088, 1209 (defendant's claim that the application of the death penalty in his case is cruel and unusual punishment because he is mentally ill and his ability to conform his conduct to the requirements of the law at the time of the offense was significantly impaired was rejected). Thus, Ketterer's Thirteenth proposition for reconsideration should be denied.

CONCLUSION

In the present case, there is no obvious error in this Honorable Court's decision, and this motion for reconsideration does not raise an issue that was either not considered at all or was not fully considered on direct review. At most, Ketterer simply disagrees with the conclusions reached by this Court. For these reasons, the State submits that reconsideration is inappropriate in this case and asks that this Court **DENY** Ketterer's Motion for Reconsideration.

PROOF OF SERVICE

This is to certify that a copy of the foregoing Motion In Opposition was sent to:

Ruth L. Tkacz [*Counsel of Record*]

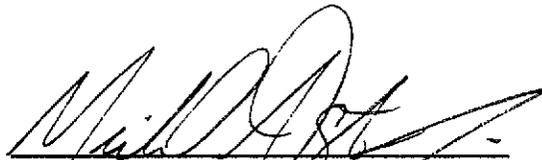
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by U.S. ordinary mail this 8th day of November, 2006.



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