

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Appellant, :
-vs- : Case No. 04-1163
MARVIN G. JOHNSON, : *Death Penalty Case*
Appellee. :

ON APPEAL FROM THE GUERNSEY COUNTY
COURT OF COMMON PLEAS
GUERNSEY COUNTY, OHIO, CASE NO. 03 CR 116

APPELLANT'S MOTION FOR RECONSIDERATION

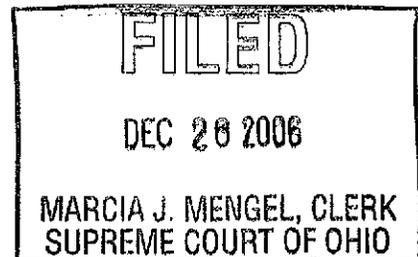
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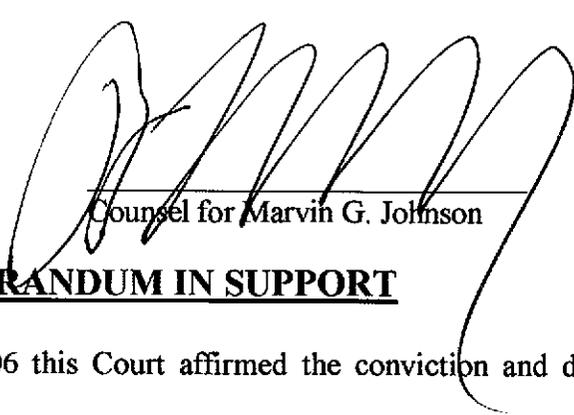
Now comes Marvin G. Johnson, by and through counsel, and moves this Court to grant this Motion for Reconsideration pursuant to S. Ct. Prac. R. XI, Section 2 for reasons that are more fully explained in the Memorandum in Support that is attached hereto and incorporated herein.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

On December 13, 2006 this Court affirmed the conviction and death sentence imposed by the Guernsey County Court Of Common Pleas. *State v. Johnson*, 2006-Ohio-6404, ___ Ohio St. 3d ___. Appellant respectfully requests that this Court rehear this case for the following reasons:

I. APPELLANT'S DEATH SENTENCE IS BASED UPON ON AN INVALID AGGRAVATING CIRCUMSTANCE.

In the Seventeenth Proposition of Law, Appellant argued that the jury was misled throughout both phases of the trial, including voir dire, jury instructions and the trial and sentencing phase verdict forms. [See, Brief of Appellant, pp. 98-109]. It was and continues to be Appellant's contention that he is sitting on death row based upon a capital specification that does not exist, and therefore is invalid.

In reviewing this issue, this Court does not address the argument that the jury was misled in voir dire through the erroneous discussions by all - the prosecutor, defense counsel and the trial court. The issue bears heavily on what the jury knew at the outset of the case. It was there that the verdict form error began, because the trial court incorrectly identified the aggravating circumstance as "prior calculation and design."

In ruling on this issue, this Court relies on the decision in *Mitchell v. Esparza* 540 U.S. 12 (2003), to find that the error in the specification could be reviewed under harmless error analysis. *Johnson*, at ¶ 33. However, the error is broader then that reviewed by the Court.

Recently, the Sixth Circuit examined a similar issue in the context of another Ohio capital case. *Joseph v. Coyle*, 469 F3d 461, (6th Cir. Nov. 9, 2006). Therein, the federal district court granted habeas relief, which the Sixth Circuit affirmed because the indictment contained an invalid 2929.04(A)(7) specification. In reviewing the *Esparza* decision, the Sixth Circuit stated:

We recognize, of course, that the Supreme Court reversed *Esparza I*. See *Mitchell v. Esparza (Esparza II)*, 540 U.S. 12 (2003). Yet that reversal was in response to our holding that the Eighth Amendment violation was not subject to harmless-error analysis. See *Esparza II*, 540 U.S. at 16-17. The Supreme Court did *not* disturb our conclusion that a constitutional violation occurred. Thus, we follow *Esparza I*'s Eighth Amendment analysis and conclude that the narrowing requirement was violated here.

Joseph at 457.

While the indictment in the present case contained a proper capital specification, the trial court submitted to the jury a different aggravating circumstance than the grand jury had returned in the indictment. The jury returned a verdict on this flawed verdict form, thus finding Appellant guilty of an offense he was not charged with committing. "It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process. *Cole vs. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed. 644; *Presnell vs. Georgia*, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207." *Jackson vs. Virginia*, 443 U.S. 307, 314 (1979), see also *DeJonge vs. Oregon*, 299 U.S. 353, 362, 57 S.Ct. 255, 259 (1937) ("Conviction upon a charge not made would be sheer denial of due process."). Due process is denied where a defendant is charged with aggravated murder with one death penalty specification, but the jury convicts him of aggravated murder based upon another death penalty specification. *Watson vs. Jago*, 558 F2d 330, 338-39 (6th Cir., 1997).

Further, the aggravating circumstance, submitted to the jury and relied upon by the trial court, failed to perform the narrowing function as required by the Eighth Amendment. Based upon these errors, Appellant's death sentence cannot stand. Capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. In *Ring vs. Arizona*, 536 U.S. 584, 609 (2002). In the present case to correct the constitutional error, there would need to be a jury determination as to the correct aggravating circumstance, the specification contained in the indictment. Therefore, this Court can not cure the errors committed by the trial court.

Similarly, in the Twentieth Proposition of Law, Appellant challenged the trial court opinion. [See Brief of Appellant, pp. 119-123]. The trial court had no authority to impose the death sentence because the jury's death recommendation was premised upon an invalid specification.

The Court should reconsider its opinion as it relates to these propositions of law.

II. THE PROSECUTION PRODUCED INSUFFICIENT EVIDENCE THAT APPELLANT KIDNAPPED THE DECEDENT.

In the Thirteenth Proposition of Law, Appellant challenged his conviction for kidnapping and the related capital specification. [See, Brief of Appellant, pp. 76-85]. The prosecution had failed to prove that the minor victim was still alive when his body was hog tied in the living room and dragged down to the basement. [*Id.* at pp. 75-80].

This Court's analysis contains two flaws. The prosecution, in voir dire, told the jury that "The charges accuse Mr. Johnson of going into the house of the Constantina Bailey when Daniel was there alone, beating him to death, tying him up and dragging him into the basement..." This Court concluded that "[t]his statement is not a concession that Johnson killed

Daniel before restraining and taking him into the basement.” *Johnson* at ¶42. This Court offers no explanation for the reason that the prosecutor’s statement detailing the chronological sequence of the events should not be considered a concession.

This Court’s second flaw involves the Court’s failure to acknowledge and consider the testimony of the two investigating officers. Detective Clark twice acknowledged that the murder occurred in the living room and not the basement. [Tr. 1576-78]. The Lead Detective, Officer Harbin, testified that “I’m confident that he was assaulted and killed in the living room.” [Tr. 1620].

This Court relies exclusively on the testimony of Dr. David Lee for the contrary conclusion, “Dr. Lee testified that Daniel was still alive when Johnson tied his hands and feet and this testimony supports the jury finding that Johnson restrained Daniel of his liberty.” *Johnson* at ¶41. Dr. Lee, however, testified that the fatal blows were inflicted prior to the ligatures being placed around the victim’s hands and feet.” [Tr. 2027]. He had earlier stated that “I doubt that he would have survived” even if the injuries had occurred “right outside the emergency room.” [Tr. 2020].

Assuming *arguendo* that this Court was correct to ignore the prosecutor’s concession, there was still insufficient evidence that the victim was alive at the time that he was hogtied. Both detectives testified otherwise. Dr. Lee’s internally contradictory testimony was not sufficiently probative of the issue so as to offset the testimony of the detectives. From the prosecution’s perspective, Dr. Lee’s testimony, at the very best offered, the fact that the victim took a very short time to die, within a few seconds or minutes. *Johnson* at ¶41. This did not provide a factual basis for the jury to convict Appellant of kidnapping.

This Court should reconsider its opinion as it relates to this proposition of law.

III. THIS COURT FAILED TO CONSIDER APPELLANT'S SIGNIFICANT MENTAL HEALTH LIMITATIONS IN REGARD TO HIS EXERCISE OF HIS CONSTITUTIONAL RIGHTS

Appellant has both bipolar and paranoid personality disorders. [Tr. 2399]. He is delusional and suffers from variable contact reality. [Tr. 2304]. When he experiences a stressor, particularly an unexpected stressor, Appellant is more likely to have an outburst. [Tr. 2404]. During these outbursts, he experiences "an alternation of reality contact." [*Id.*]. Prior to his arrest he was a frequent user of alcohol, marijuana, and crack cocaine. [Tr. 2509]. This Court found these facts to be accurate when addressing the appropriateness of Appellant's death sentence. *Johnson* at ¶¶ 292, 294, 297.

This Court addresses two issues involving whether Appellant properly invoked or waived certain constitutional rights; the right to request substitute counsel and the right to waive counsel. With respect to these issues, this Court fails to consider Appellant's significant mental health limitations. This is despite the fact that a defendant's mental limitations are a significant portion of the equation concerning whether a defendant properly invoke or waive his constitutional rights. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

In his first Proposition of Law, Appellant asserted that the trial court made an inadequate effort to determine if it should appoint substitute counsel for him. [See, Brief of Appellant, pp. 15-19]. This Court for this first time adopted the standard that a trial court only has a duty to inquire only if a defendant presents the court with "allegations [that] are sufficiently specific, vague or general objections do not trigger the duty to investigate further." *Johnson* at ¶ 68 (citation omitted) Persons with serious mental illnesses, such as Appellant, may be capable of raising only vague or general objections. They need the benefit of a hearing to have the judge ask the necessary questions to pinpoint the root of the defendant's concerns.

This Court found that “[t]he court gave him [Appellant] an opportunity to present any complaints against counsel in open court, on the record, or in the form of a letter to the judge.” *Johnson* at ¶ 68. A person with significant mental health issues may lack the skills necessary to write the judge, especially in such form that it will contain the “specific allegations” that this Court now requires. For instance, a person who is paranoid, as is Appellant, will not want or trust putting his private concerns in a letter that will he will have to give to the jailors for delivery to the trial judge.

Even setting aside this Court’s treatment of the mental health aspect of the First Proposition of Law, this Court’s own findings do not support its conclusion that the trial court gave Appellant ample opportunity to express his concerns. Concerning Appellant writing letter to the trial court, this Court finds that the following took place between the trial court and Appellant “‘If you wish to address the Court you may *** write a letter to the Judge.’ Johnson said that he had been ‘told not to do that,’ and the judge said, ‘Well then you should follow the advice of your counsel.’” *Johnson* at ¶ 73. This Court also finds that defense counsel repeatedly objected to Appellant making a statement in open court. *Johnson* at ¶¶ 72, 74. This Court further finds that the trial judge responded to these objections by stating “‘Your attorney has objected to that and I’m going to honor that objection at this time***.” *Johnson* at ¶ 74. Finally this Court concludes that the trial court terminated Appellant’s statement by informing him that “‘If you want to address these matters you may bring them to my attention in the proper form.” *Johnson* at ¶ 75. It is unclear what the proper forum was given that the trial court had already sustained defense counsel’s objections to Appellant voicing his concerns in open court and the trial court had told Appellant he should not write the him because that would contravene the advice of his

trial attorneys. Ironically, the trial court instructed Appellant to follow the advice of the persons who he was attempting to discharge.

In his Eighteenth Proposition of Law, Appellant challenged his waiver with respect to his right to counsel. [See Brief of Appellant, pp. 10-112]. This Court does not address Appellant's mental illnesses to the extent that they could have affected his ability to knowingly and intelligently waive his right to counsel. *Johnson* at ¶¶ 79-106. This is despite the Court's acknowledgement that this is in general a factor that should be considered. *Johnson* at ¶ 101. Appellant's understanding of the proceedings would have been sharply diminished if he was suffering a break from a reality. *Johnson* at ¶ 297. He would be more likely to suffer from such a break if he was under a great deal of stress. *Johnson* at ¶ 297. For many persons, standing trial in a capital case would be a stressful event. The present case is a prime example of a case in which the defendant's background should be considered with respect to the waiver of his constitutional rights, especially the right to counsel.

This Court determines that prior to waiving his right to counsel Appellant "correctly recited the charges against him and affirmed his understanding that a death sentence could be imposed." *Johnson* at ¶ 80. However more is required before a defendant is permitted to waive his right to counsel. He must understand "[t]he nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses..." *State v. Gibson*, 45 Ohio St. 2d 366, 376 (1976); *Von Moltke v. Gillis*, 332 U.S. 322 U.S. 708, 723 (1998). That a defendant's waiver of counsel was knowing and intelligently entered must affirmatively appear on the face of the record. *Corney v. Cochran*, 369 U.S. 506, 516 (1962). This Court's own finding concerning what the record reflects, leads to the conclusion that Appellant did not enter an appropriate waiver. *Johnson* at ¶ 80.

This Court, instead of requiring the entrance of a full and complete waiver, relies upon three assumptions, his trial counsel described all of the relevant waiver issues with him, Appellant learned all of the relevant rights by watching part of his trial, and Appellant had prior experience with the court system. *Johnson* at ¶¶ 91, 92-94, 95. These assumptions violate the principle that the knowing and intelligent aspect of the waiver must appear on the face of the record. *Corney v. Cochran*, 369 U.S. at 516. Even if it were constitutionally firm to presume the entrance of valid constitutional waivers, the presumptions are without any factual basis in the present case. Trial counsel, since they were representing him, had no need to review with Appellant the rights that he would be forfeiting if he discharged them. Appellant's mere presence at the trial did not insure that he possessed and comprehended all of the required information needed to waive his right to counsel. This is especially true given his mental illnesses. His prior court appearances on unrelated charges were not relevant to the penalties, defenses and mitigating factors present in this capital case,

In addition a defendant, who waives his right to counsel, must understand the dangers of proceeding as his own counsel. *Faretta v. California*, 422 U.S. 806, 808 (1975). This requirement is separate from all of the other required information discussed herein concerning waivers of the right to counsel. This Court contrasts the warnings provided to the defendant in *Faretta* with the warnings provided Appellant in the present case. *Johnson* at ¶¶ 102, 104. This Court concludes that the warnings were similar in content. *Johnson* at ¶ 104. Appellant respectfully disagrees. That is best highlighted by the details contained in the admonishments provided by the trial courts in both cases when the defendants wanted to waive their constitutional rights to counsel. *Johnson* at ¶¶ 102, 104.

This Court should reconsider its opinion as it relates to these propositions of law.

IV. THIS COURT FOUND NUMEROUS ERRORS WAIVED BY TRIAL COUNSELS' FAILURE TO MAKE APPROPRIATE OBJECTIONS, BUT SUBSEQUENTLY FAILED TO RECOGNIZE THOSE LAPSES WHEN IT REVIEWED THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

In reviewing the various substantive issues raised by Appellant, this Court made the following findings in its opinion:

Because he failed to object, however, he has waived all but plain error. . . .
Johnson at ¶31

Johnson did not object to the judge's statements. . . .*Johnson* at ¶35

However, Johnson again waived the issue because he failed to raise a timely objection*Johnson* at ¶36

Our examination of the record, however, reveals that Johnson did not object to the instructions*Johnson* at ¶63

However, because he did not object, Johnson waived all but plain error. *Johnson* at ¶227.

Johnson did not object to background evidence concerning the minor victim and therefore the court reviews the issue in the context of plain error. *Johnson* at ¶231.

Johnson failed to make Detective Harbin's report a part of the record, and he failed to object to its omission. *Johnson* at ¶239.

However, because Johnson neither objected to the court's order nor requested a hearing on the matter,*Johnson* at ¶242.

Johnson failed to object at trial to this instruction. *Johnson* at ¶275.

Johnson waived that error by failing to object. *Johnson* at ¶278.

In his Nineteenth Proposition of Law, Appellant challenged the assistance of counsel that he received. Much of the challenge was devoted to trial counsels' failure to raise timely objections. [See, Brief of Appellant, pp. 115-116, 117,118]. In assessing the counsel's failure to object, this Court stated:

As the United States Court of Appeals for the Sixth Circuit has recently explained, "experienced trial counsel learn that objections to each potentially objectionable event could actually act to their party's detriment. * * * In light of this, any single failure to object usually cannot be said to have been error unless the evidence sought is so prejudicial * * * that failure to object essentially defaults the case to the state. Otherwise, defense counsel must so consistently fail to use

objections, despite numerous and clear reasons for doing so, that counsel's failure cannot reasonably have been said to have been part of a trial strategy or tactical choice." *Lundgren v. Mitchell* (C.A.6, 2006), 440 F.3d 754, 774. Accord *State v. Campbell* (1994), 69 Ohio St.3d 38, 52-53, 630 N.E.2d 339.

The scenario set out in *Lundgren*, is exactly what happened herein. While this Court reviews independently assesses each failure to object, it fails to acknowledge that, "defense counsel so consistently failed to use objections despite numerous and clear reasons for doing so, that counsel's failure cannot reasonably have been said to have been part of a trial strategy or tactical choice." A court, when it evaluating the performance of counsel, should take into account all of counsel's actions. *Strickland v. Washington*, 466 U.S. 668, 690 (1984). When determining the prejudice prong of an ineffectiveness claim, the court should assess the cumulative impact of all of counsel's errors. *Kyles v. Whitley*, 514 U.S. 419, 436-437 (1995) (applying reasonable probability test in the context of prosecution's failure to disclose evidence).

This Court should reconsider its decision on this Proposition of Law in light acts and all of the acts and omissions on the part of trial counsel, and review counsel's performance as a whole, not as a long series of isolated incidents.

CONCLUSION

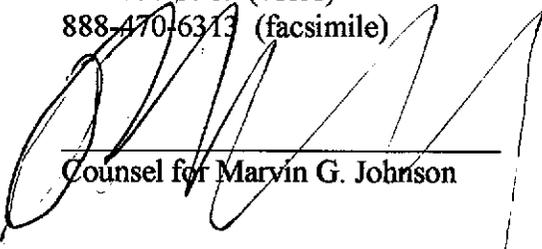
For all of the reasons stated above, Appellant requests that this Court grant reconsideration.

Respectfully submitted,

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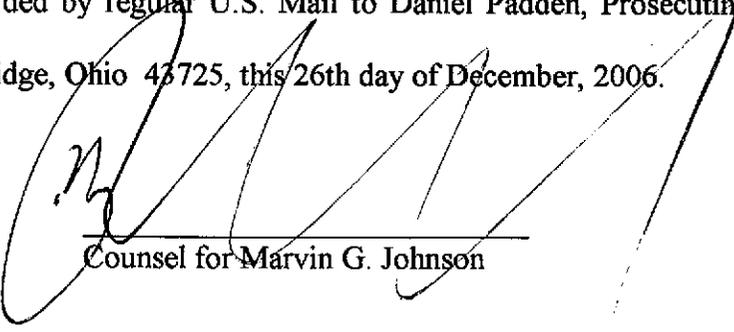
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion for Reconsideration and Memorandum in Support was forwarded by regular U.S. Mail to Daniel Padden, Prosecuting Attorney, 139 West 8th. Street, Cambridge, Ohio 43725, this 26th day of December, 2006.



Counsel for Marvin G. Johnson