

IN THE SUPREME COURT OF OHIO

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

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

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**APPELLEE'S MEMORANDUM IN OPPOSITION TO MOTION FOR  
RECONSIDERATION**

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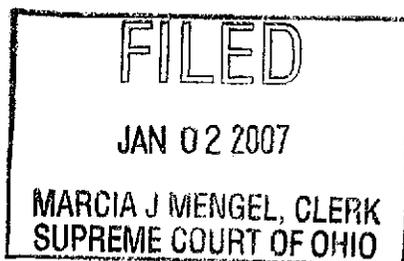
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## MEMORANDUM IN SUPPORT

Now comes the State of Ohio, by and through Daniel G. Padden Prosecuting Attorney, and hereby moves the Court to overrule the Motion for Reconsideration filed by Appellant on December 26, 2006 pursuant to S.Ct.Prac. R. XI, Section 2 for reasons that are more fully explained in the following memorandum in support.

### PROCEDURAL BACKGROUND AND STANDARD OF REVIEW

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 \_\_\_\_\_. On December 26, 2006, Appellant Marvin G. Johnson, by and through counsel Dennis L. Sipe, filed a Motion for Reconsideration of the Court's unanimous decision.*

The authority to reconsider decisions has been used to "correct decisions which, upon reflection, are deemed to have been made in error." *State ex rel. Shemo v. Mayfield Hts, 96 Ohio St. 3d 379 citing Buckeye Community Hope Found v. Cuyahoga Falls (1998), 82 Ohio St. 3d 539.* A motion for reconsideration shall be confined strictly to the grounds urged for reconsideration and shall not reargue the case. See Supreme Court Rule of Practice XI(2)(A). Based upon the above standard, this Court should overrule the motion for reconsideration.

**RESPONSE TO ARGUMENT NUMBER ONE**  
***APPELLANT'S DEATH SENTENCE IS BASED UPON A VALID  
AGGRAVATING CIRCUMSTANCE.***

In the seventeenth proposition of law, Appellant makes argument regarding the specification to Count Two of the indictment. As the Court found in its decision, the indictment rendered in this matter by the Grand Jury correctly charges the Appellant with two (2) counts of aggravated murder and death penalty specifications pursuant to R.C. 2929.04(A)(7). This specification contains aggravating circumstance of the felony-murder with the Defendant alleged to have been the principal offender.

The fact that the verdict form for Count Two contained the substitution of "prior calculation and design" for "principal offender" is to be considered under the plain error standard. This error did not determine the outcome of the trial. The Appellant was the only named suspect in the indictment and no evidence presented at trial suggested any involvement by anyone else other than the Appellant himself. Had the verdict form asked a jury to determine whether Johnson was a principal offender, the outcome "would surely have been the same." *Mitchell v. Esparza (2003), 540 U.S. 12, 124 S. Ct. 7, 157 L.Ed.. 2d 263.* Additional support for this position also lies with the fact that the verdict as to Count One in specification was proper and the verdict form was correct.

Appellant relies on the case of *Joseph v. Coyle* (6<sup>th</sup> Dist. Nov. 9, 2006), 469 F.3d 461. The *Coyle* case involves an invalid specification in the indictment. Appellant concedes that the indictment in the case at bar is correct.

Appellant additionally argues that the jury was misled throughout the entire trial as to the use of the phrase aggravating circumstances. However, there were two counts charging Appellant with aggravated murder, each one containing

a specification. Therefore, no prejudicial error occurred as was found by this Court.

**RESPONSE TO ARGUMENT NUMBER TWO**

***THE PROSECUTION PRODUCED SUFFICIENT EVIDENCE THAT THE APPELLANT KIDNAPPED THE DECEDENT, DANIEL J. BAILEY.***

In the thirteenth proposition of law, Appellant challenged his conviction for kidnapping and the related capital specification. Appellant alleges the prosecution had failed to prove that the minor victim was alive when his body was hogtied in the living room and dragged down to the basement.

At the trial in this matter, the State called Dr. C. Jeffrey Lee, the deputy Licking County Coroner as an expert witness. Dr. Lee had carefully reviewed all of the injuries to the victim which included injuries to the extremities of Daniel J. Bailey caused from being tied in a “hogtied manner”. Dr. Lee testified at the trial of this matter as follows:

Q. Doctor, do you have an opinion within a reasonable degree of medical certainty as to whether or not Daniel J. Bailey was alive prior to being tied up and restrained?

A. Yes. There's no question he was alive.

Q. Why?

A. Because of the skin reaction, the red hyperemia next to the bindings around his wrist shows that the bindings were put on and the heart was still pumping while these tight bindings were around the wrist.

Q. You would agree, Doctor, that the injuries sustained to Daniel Bailey are extremely severe?

A. Yes.

Q. Do you have an opinion within a reasonable degree of medical certainty as to whether or not Daniel J. Bailey's freedom of movement was limited or restrained?

A. Yes it was.  
(Tr. p. 2014)

Appellant argues that the statements made by the prosecution in voir dire amount to a concession. As the trial court has properly told the jury in this matter, opening statements and remarks of counsel are not evidence.

With respect to Detective Greg Clark and Detective Brian Harbin, the physical evidence revealed the blood spatter and blood stains were in the living room area of the home. Blood was present in the basement area but in a manner that would reveal that it was pooled as compared to blood spatter.

Based upon the above, this Court should not reconsider its opinion as it relates to this proposition of law.

### **RESPONSE TO ARGUMENT NUMBER THREE**

#### ***THE COURT PROPERLY CONSIDERED APPELLANT'S SIGNIFICANT MENTAL HEALTH LIMITATIONS IN REGARD TO HIS EXERCISE OF HIS CONSTITUTIONAL RIGHTS.***

In the first proposition of law, Appellant asserted that the trial court made an inadequate effort to determine if it should appoint substitute counsel. In *State v. Deal (1969)*, 17 Ohio St.2d 17, this Court held that a trial court has a duty to inquire into a request made by an indigent defendant who questions the effectiveness and adequacy of assigned counsel. However, as this Court has ruled, the limited judicial duty arises only if the allegations are sufficiently

significant. *Johnson at Paragraph 68.* At the pretrial hearing on March 10, 2004, approximately three months before trial, the trial court offered the Defendant a chance to describe his dissatisfaction. The trial court gave the Defendant time to meet with counsel. Whatever differences existed on March 10, they had been reconciled by the pretrial hearing on March 30, 2004. At that pretrial, defense counsel Andrew J. Warhola, Jr. advised the court that the Defendant wanted Mr. Warhola to speak on his behalf. (Tr. p. 287) The Defendant said nothing to contradict the statements by defense counsel Warhola. For the period between March 30, 2004 and the start of the trial, no further dissatisfaction was expressed.

The trial court reviewed the nature of the charges and the potential sentence the Defendant could face in this matter. (Tr. p. 2076) The court further explained the Defendant's rights with respect to the second phase of the trial and his rights for standby counsel. (Tr. pp. 2077-2079) Additionally, this Court has found that the Defendant had been continuously represented prior to and during trial and had experience in the courts due to his prior criminal history. *Johnson at signed paragraph 95.*

With respect to the competency issue, the trial court stated, "I have observed you throughout the trial. I've addressed you, not under oath, but during the trial I have seen nothing from you that leaves me to believe that you are not competent at this time but I have a duty to determine that." (Tr. p. 2076) The court thereafter conducted a limited competency evaluation of the Defendant which revealed his competence to proceed in this matter.

The Court should overrule the motion for reconsideration.

**RESPONE TO ARGUMENT NUMBER FOUR**

***THE DEFENDANT RECEIVED THE EFFECTIVE ASSISTANCE OF  
COUNSEL.***

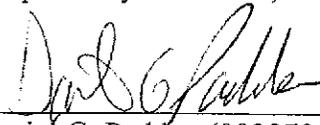
Appellant argues that the failure of trial defense counsel to object on a number of occasions resulted in the ineffective assistance of counsel. A court, when evaluating the performance of counsel, should take into account all of counsel's actions. As this Court held, failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel. To prevail on such a claim, a Defendant must first show that there was a substantial violation of any of defense counsel's essential duties to his client and, second, that he was materially prejudice by counsel's ineffectiveness. *State. v. Holloway (1988), 38 Ohio St.3d 239; Johnson at paragraph 138.* This Court has already ruled on the issue of failing to object and found that after review of the trial transcript revealed no such failure by Johnson's trial counsel. *Johnson at paragraph 140.*

The Court should overrule this motion for reconsideration.

**CONCLUSION**

For all the reasons stated above, Appellee respectfully requests this Court deny Appellant's Motion for Reconsideration.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he served a true copy of the foregoing APPELLEE'S MEMORANDUM IN OPPOSITION TO MOTION FOR RECONSIDERATION this 2<sup>nd</sup> day of January 2007, by regular U.S. Mail, postage prepaid as follows:

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