

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Case No. 04-1163

Plaintiff-Appellee,

On Appeal from the
Guernsey County Court
of Common Pleas

-vs-

MARVIN JOHNSON,

Defendant-Appellant.

Trail Case No. 03 CR 116

STATE'S RESPONSE TO APPELLANT'S APPLICATION FOR REOPENING

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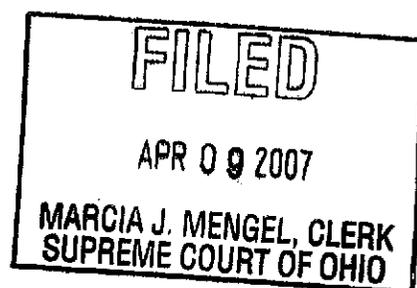
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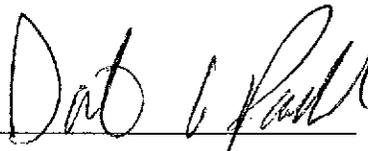
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Appellee, the State of Ohio, respectfully requests that this court deny appellant's application for reopening for the reasons set forth in the attached memorandum of law.

Respectfully submitted,



A handwritten signature in black ink, appearing to read "Dan G. Padden", is written over a horizontal line.

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MEMORADUM IN SUPPORT

The two-pronged analysis of *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052 at 2071 applies to applications to reopen appeals on claims of ineffective assistance of appellate counsel. In *State v. Fraizier, N.K.A. Haliym* (2002), 96 Ohio St. 3d 189, this Court said the following at P.6 and7:

The two-pronged analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 3d 674 is the appropriate standard to assess whether Haliym has raised a ‘genuine issue’ as to the ineffectiveness of appellate counsel in his request to reopen under App. R. 26(B)(5). *State v. Sheppard* (2001), 91 Ohio St.3d 329,330; 744 N.E. 2d 770; *State v. Spivey* (1998), 84 Ohio St.3d 24, 701 N.E.2d 696; *State v. Reed*(1996), 74 Ohio St.3d 534,535, 660 N.E. 2d 456

To show ineffective assistance, [defendant] must prove that his counsel were deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims on appeal. Sheppard, 91 Ohio st.3d at 330, 744 N.E.2d 770, citing *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E. 2d 373, paragraph three of the syllabus.***

Strickland charges us to “‘apply a heavy measure of deference to counsel’s judgments, Id. at 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674. ‘Moreover, we must bear in mind that appellate counsel need not raise every possible issue in order to render constitutionally effective assistance. See *Jones v. Barnes* (1983), 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987’ *State v. Sanders* (2002), 94 Ohio St.3d 150, 151-152, 761 N.E.2d 18.

Actions attributable to legal counsel’s tactics fail to prove ineffective assistance of counsel. *State v. Clayton* (1980), 62 Ohio St.3d 45. Appellate counsel’s conclusion that a case should have been handled differently fails to establish ineffective assistance of counsel. *State v. Decker* (1986), 28 Ohio St.3d 137. In death penalty cases, the issue is rarely whether the defendant committed the crime but rather is whether the defendant should be put to death. When evidence is overwhelming, concentrating on avoiding the death penalty is a reasonable strategy. *State v. Scott* (2004), 101 Ohio St.3d 31.

PROPOSITION OF LAW ONE

REASONABLE COUNSEL MAY FORGO CLAIMING THAT HEARSAY WAS ADMITTED WHEN THE QUESTIONED EVIDENCE WAS NOT A STATEMENT, AND WHEN, BECAUSE OF THE OVERWHELMING EVIDENCE AGAINST THE APPELLANT, ADMITTING THE EVIDENCE WOULD HAVE BEEN HELD TO BE HARMLESS ERROR EVEN IF THE COURT HAD AGREED WITH APPELLANT'S ASSESSMENT OF THE EVIDENCE.

The United States Supreme Court in *Crawford v. Washington* (2004) 541 U.S. 36 held that hearsay testimonial statements are inadmissible unless the declarant is unavailable and the defendant has had a chance to cross-examine the declarant. However, before there can be a testimonial statement, there must be a "statement." It has long been recognized that a "statement" means the actual words or conduct of the declarant. A statement does not include inferences a party seeks to draw from the statement or actions that the statement caused others to take. *State v. Lewis* (1970), 22 Ohio St.2d 125.

Appellant concedes that counsel objected to the declarant's statements and that the trial court sustained those objections. Appellate counsel argued in the initial appeal that the evidence recovered as a result of those statements should have been excluded as violating the sixth amendment right to counsel, claiming that Mr. Alexander was working for the police. This court rejected that argument. Moreover, even if the appellate counsel had argued that the statements were inadmissible under *Crawford v. Washington*, and even if this court had agreed, the error would have been harmless. This court in its opinion twice remarked that the evidence against appellant, including the victim's blood on appellant's clothing, was overwhelming. Raising the argument appellant now claims counsel should have raised would have accomplished nothing.

Part of effective appellate advocacy is winnowing arguments to those most likely to succeed. *Smith v. Murray* (1986), 477 U.S. 527; *State v. Smith N.K.A. Mahdi* (2000), 89 Ohio St.3d 323. Appellant's first proposition of law warrants no further review.

PROPOSITION OF LAW TWO

AN APPELLATE ATTORNEY MAY CHOOSE TO LIMIT ARGUMENTS TO THOSE COUNSEL BELIEVES WILL BENEFIT HIS CLIENT THE MOST.

Appellate counsel cannot be faulted for failing to raise ineffective assistance of trial counsel for failing to object to admitting the evidence counsel discusses in proposition of law one because the evidence was admissible, and, even if it had been inadmissible, its admission would have been harmless error. Appellant's second proposition of law warrants no further review.

PROPOSTION OF LAW THREE

APPELLATE CANNOT CLAIM INEFFECTIVE ASSISTANCE OF COUNSEL IN AN APPLICATION TO REOPEN WHEN THE RECORD SHOWS THAT COUNSEL CONSIDERED AND REJECTED AS A MATTER OF TRIAL STRATEGY THE SENTENCING ISSUE UNDER STATE V. FOSTER, 109 OHIO ST. 3D 1, 2006 Ohio 856.

Unlike most cases, in which the record offers nothing to explain why appellate counsel failed to raise a claim, the instant case affirmatively shows that appellate counsel deliberately declined to argue the issue of sentencing under *Blakely v. Washington*, (2004) 542 U.S. 296 and *State v. Foster* , 109 Ohio St.3d 1, 2006 Ohio 856. This court's docket shows that counsel Kathleen McGarry, a lawyer experienced in

death penalty cases and well-known to this court, and Dennis Sipe filed a “Motion for Leave to file Supplemental briefing to address sentencing issues arising from *State v. Foster*” on September 8, 2006. On October 11, 2006, however, counsel filed a “Motion to Withdraw the Motion for Leave to File Supplemental briefing to address Sentencing issues arising from *State v. Foster*.”

In *State v. Elmore*, 111 Ohio St.3d 515, 2006 Ohio 6207, decided the same day as the instant case, counsel raised the *Foster* issue in supplemental briefing. This court remanded for re-sentencing on the non-capital offenses. Counsel in the instant case, however, deliberately decided to withdraw an argument based on *Foster*.

Winning an argument based on *State v. Foster* gains a capital defendant nothing except a heavily-guarded daytrip to the courthouse for re-sentencing. Whether counsel decided to concentrate on arguments that had a chance of real gain or whether counsel deliberately sought to gain delay by providing new counsel with an argument to claim ineffective assistance of appellate counsel is unknowable. However, it is indisputable that counsel made a tactical decision to withdraw counsel’s request to raise the issue in supplemental briefing.

This court on May 22, 2007 will hear argument in *State v. Payne* 06-1245, 06-1383, to decide whether a defendant who failed to raise the sentencing issue at a trial held after *Blakely v. Washington* waived it. Appellant was sentenced two weeks before *Blakely*. Thus under *Foster*, he could not have waived the issue at trial. On appeal, however, appellant affirmatively withdrew his request to raise the issue. If appellant is allowed to raise the issue in an application for reopening based on ineffective assistance of counsel for that deliberate tactic, every defense counsel representing a capital

defendant in which sentencing of non-capital offenses is an issue, will decline to raise the issue on direct appeal. Initial appellate counsel will have nothing to lose and everything to gain from deliberately failing to raise the issue.

Although raising the issue would have caused a different result in the appeal, counsel cannot be called deficient. Appellant was not prejudiced because winning on re-sentencing gains nothing in the long run. Reasonable counsel could concentrate on issues that counsel believed might gain defendant a new trial. Withdrawing a request to raise an issue that might detract from issues counsel considered more compelling is a reasonable trial strategy. Appellant's third proposition of law warrants no further review.

CONCLUSION

Appellee respectfully requests that appellant's application for reopening be denied. Appellant's first two propositions of law are legally unsound. Appellant's third proposition of law argues that counsel was ineffective for making a decision that was indisputably tactical. Withdrawing a request to raise the sentencing issue under *State v. Foster* was not so unreasonable that counsel was "acting as no counsel at all" as, even if appellant had prevailed, in the long run, he would have been no better off.

Respectfully submitted,



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CERIFICATE OF SERVICE

Undersigned counsel hereby certifies that he served a copy of the above upon
KIMBERLY S. RIGBY, 8 East Long Street, 11th Floor, Columbus, Ohio 43215, Counsel
for Appellant, by ordinary mail, postage prepaid this 6th day of April, 2007.



Daniel Padden

Guernsey County Prosecuting Attorney