IN THE SUPREME COURT OF OHIO

State of Ohio	:	
	:	
Appellee	:	Case No. 2005-0749
	:	
vs.	:	Capital Case
	:	
Vernon Brown	:	
	:	
Appellant	:	

Motion in Opposition to State's Motion for Reconsideration

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Memorandum

The State's motion for reconsideration must be denied for several reasons. First, the motion is improper under Supreme Court Rule XI, Section 2. This Rule allows a motion for reconsideration in four situations. None of those situations exist here.

Specifically, the State's motion does not challenge the Court's decision on the merits. (See paragraph 1 of the State's motion) The State is instead asking the Court to change the content of the record after this case has been fully briefed, argued and decided. Such a motion for reconsideration is not permitted by Rule XI, Section 2.

Moreover, the State's assertion that it had no opportunity to factually rebut the Brady claim is nonsense. Supreme Court Rule XIX, Section 3(D) provides for correction or modification of the record. The State has never sought to correct or modify the record under this Rule. Even now, the State has not sought to invoke this Rule.

In the State's brief before this Court, it simply argued the police reports were not material. It failed to argue, as it does now, that the reports were in fact disclosed. (Appellee's brief, pages 41-43) Now that this Court has determined that the reports are material, the State has changed course and argues that it did disclose the police reports. The State can't have it both ways.

It is also important to note that when Appellant's counsel moved this Court to unseal the prosecutor's file, the State opposed this motion. The State argued in its motion that its file should not be opened, even though it was part of the record, because there was never any suggestion that it contained exculpatory material. (Page 2 of the Motion)

If this Court had not unsealed the prosecutor's file, then the exculpatory police reports would still be hidden from the Appellant, the Brady violation would have gone undiscovered and quite likely Mr. Brown would have been executed.

The record in this case is complete. The State had every opportunity to correct or modify the record and it chose not to correct or modify the record.

If the State had properly disclosed the Brady material, then it would have filed it in the trial court as part of the unsealed record. Additionally, the State would not have opposed Appellant's effort to unseal its file which was part of the record.

It is now clear, as this Court found in its 7-0 decision, that there were exculpatory police reports that were not disclosed to the Appellant. The State could have and should have openly filed these exculpatory police reports just as it did its witness list. The State's failure to disclose the Brady material is supported by the record.

There is no basis in the Supreme Court Rules for the evidentiary hearing sought by the State. The State, even at this late date, has not invoked Rule XIX, Section 3(D) to correct or modify the record.

This Court has long held that

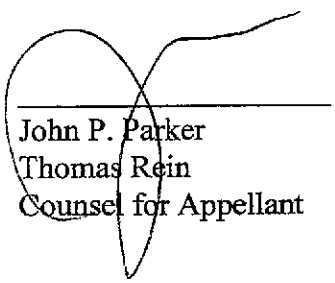
> A reviewing court cannot add matter to the record before it, which was not part of the trial court proceedings, and deny the appeal on the basis of the new matter.
>
> State v. Ishmail, 54 Ohio St.2d 402 (1978), Syllabus 1; State ex rel Office of Montgomery County Pub. Defender v. Siroki, 108 Ohio St.3d 207, 2006 Ohio 662 (paragraph 20); Morgan v. Eads, 104 Ohio St.3d 142, 2004 Ohio 6110 (paragraph 13).

Conclusion

The State's motion for reconsideration must be dismissed. The State is not challenging "the ultimate disposition" of the case. (Page 1, State's motion for reconsideration) As such, it is an improper motion for reconsideration under Rule XI, Section 2(A).

Additionally, the record fully supports this Court's opinion.

Respectfully submitted,



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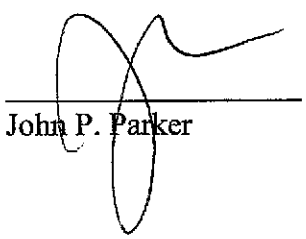
Certificate of Service

A copy of the foregoing document was served on A. Steven Dever, Ass't. Prosecuting Attorney, Cuyahoga County, 1200 Ontario St., Justice Center-9th Floor, Cleveland, Ohio 44113 this 18th Day of October 2007 via regular U.S. Mail postage prepaid.



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