**IN THE SUPREME COURT OF THE UNITED STATES**

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| State of Ohio, | : | On Appeal from the Licking County Court of Common Pleas |
| Plaintiff-Appellee, | : | |
| vs. | : | Case No. 2005-1656 |
| Roland T. Davis, | : | |
| Defendant-Appellant. | : | THIS IS A DEATH PENALTY CASE |

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# RESPONSE TO MOTION FOR RECONSIDERATION

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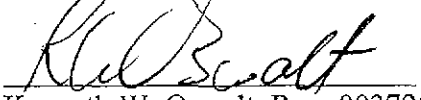
CLERK OF COURT
SUPREME COURT OF OHIO

## RESPONSE TO MOTION FOR RECONSIDERATION

Now comes the State of Ohio, Plaintiff-Appellee herein, and hereby moves this Court to deny the Appellant's Motion for Reconsideration. The issues raised in the current motion do no involve issues that this Court either did not previously consider, or did not fully consider. Instead, as noted below, the arguments in the instant motion simply rehash previously made – and previously rejected – arguments included in the initial brief filed by the Appellant.

Accordingly, the Appellant's Motion for Reconsideration should be *denied.*

Respectfully submitted,



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## STANDARD OF REVIEW

In considering an application for reconsideration, the proper standard for our review is whether the application calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court. See, Columbus v. Hodge *(1987), 37 Ohio App.3d 68,* citing Matthews v. Matthews *(1981), 5 Ohio App.3d 140.* An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by a reviewing court. State v. Owens *(1997), 112 Ohio App.3d 334, 336, dismissed, appeal not allowed, 77 Ohio St.3d 1487.*

The appellant's motion for reconsideration is nothing more than a recitation of rejected arguments based upon his disagreement with this Court's prior opinion. Indeed, as it relates to the issues presented in the motion for reconsideration, this Court's opinion was **unanimous**. With this said, however, the appellee will briefly respond to the current arguments separately.

**Proposition of Law No. 3**

**THE ADMISSION INTO EVIDENCE FOR USE BY THE JURY OF TAPE RECORDINGS THAT WERE NOT PLAYED IN OPEN COURT IS NOT A VIOLATION A DEFENDANT'S RIGHT TO BE PRESENT AT ALL "CRITICAL STAGES" OF THE TRIAL PROVIDED THAT THE RECORDING IS ADMISSIBLE IN EVIDENCE BY WAY OF AGREEMENT OR OTHERWISE.**

The appellant's renewed attack on the admission of a tape-recording of his statement to police without it being played in open court is groundless. His claim that the trial court was somehow required to engage the appellant in some form of colloquy prior to allowing this process ignores some long-recognized, indeed fundamental, tenets of trial advocacy. As this Court has previously noted "[a]greements, waivers and stipulations made by the accused, or by the accused's counsel in his presence, during the course of a criminal trial are binding and enforceable" *State v. Post (1987), 32 Ohio St.3d 380, 393.* See also, *State v. Turner (2005), 105 Ohio St.3d 331, 337.*

The appellant's claim that "[t]here is nothing in the record from which this Court could conclude that counsel made any decision – tactical or otherwise – to permit the introduction of the tapes and the transcripts without first having them played in open court" (Motion for Reconsideration, p. 8), is simply inaccurate. As observed by this Court in its initial opinion the jury instructions included the following:

> "[Y]ou will receive as an exhibit two tape recordings identified as being a portion of the statement the Defendant gave to Newark police officers. The portion on these tapes are those sections of the Defendant's statement that the parties have *jointly agreed to admit* into evidence."

*State v. Davis (2008), ____ Ohio St.3d ____, ¶ 85.* (Italics in original.)

Likewise, the appellant' claim that this Court failed to give adequate consideration to the reasons why trial counsel might agree to such an arrangement is also inaccurate. This Court noted:

> We also reject Davis's ineffectiveness claim. In his statement, Davis adamantly denied any responsibility for Sheeler's death. By introducing the tapes, counsel had the benefit of presenting Davis's proclamations of innocence to the jury, without the risk of having Davis take the stand. See State v. Adams, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶ 34. Thus, trial counsel made a tactical decision by agreeing to introduce Davis's tape-recorded statement.

*Id. at ¶ 88.*

The appellant's suggestion that had the tape been played in open court trial counsel would have had an opportunity to "object to any inaccuracies" in them is unavailing. (Motion for Reconsideration, p. 4.) The reason for this is simple: in neither his initial merit brief to this Court, nor in the current motion, has the appellant identified any inaccuracies between the tape, and the transcript, or between the tape and Det. Vanoy's testimony. Without material inaccuracies, the appellant can show no prejudice. Cf., *State v. Conway (2006), 108 Ohio St.3d 214, 222-23,* (While an accused has a fundamental right to be present at all critical stages of his criminal trial, his or her absence, however, does not result in prejudicial or constitutional error unless a fair and just hearing would be thwarted by his absence.)

Appellant's efforts to distinguish the case of United States v. Riddle *(6th Cir. 2001), 249 F.3d 329,* are unconvincing. In that case the defendant was absent from *voir dire*, a portion of the proceedings when, by definition, a defendant could have no way of knowing what was being said because live questioning was being conducted. Conversely, in the instant case, the appellant and trial counsel had the means to know exactly what was on the tape and the related transcripts prior to trial as both were provided in discovery as required by Crim.R. 16. Thus there is every reason to believe that the decision to agree to their admission was knowingly.

Moreover, the issue herein was also decided by this Court based upon "invited error". *Id. at ¶ 87.* The invited error doctrine is applied when counsel is "actively responsible" for the trial court's error, or when he "has asked the court to take some action later claimed to be erroneous, or affirmatively consented to a procedure the trial judge proposed." State v. Campbell *(2000), 90 Ohio St.3d 320, 324.* "[A] litigant cannot be permitted, either intentionally or unintentionally to induce or mislead a court into the commission of an error and then procure a reversal of the judgment for an error for which he was actively responsible." Lester v. Leuck *(1943), 142 Ohio St. 91, 93.* Thus, assuming that error occurred, the appellant cannot benefit from it.

As noted by the appellee in its initial merit brief, as a practical matter, should appellant be correct (which he is not), the same argument could be made in nearly every case – even if the case does not involve the use of a tape recording! There is no difference between the appellant's current argument, and an argument that a *document* would not be admissible in evidence unless it was first fully *read* to the jury in the defendant's presence.

## Proposition of Law No. 5

**A WITNESS IS NOT PROHIBITED FROM TESTIFYING THAT A DEFENDANT "LIED" DURING THE COURSE OF A POLICE INTERVIEW WHEN THAT TESTIMONY IS BASED UPON THE DEFENDANT IN A SUBSEQUENT INTERVIEW ADMITTING TO HAVING LIED.**

The appellant's continued attack on Det. Vanoy's testimony raises nothing new that was not considered previously by this Court. The appellant can show, as this Court previously noted, no prejudice. This is partly because the evidence was overwhelming, and partly because the appellant admitted to having lied. *Id.* ¶¶ *123-26.* Thus, Det. Vanoy's "isolated comment" was not plain error. Nothing the appellant now tries to raise calls this Court's prior unanimous opinion into question.

The appellant's assessment that this Court's initial opinion resulted in the conclusion that the case of *Crawford v. Washington (2004), 541 U.S. 356,* was inapplicable "because Davis was available to testify" (Motion for Reconsideration, p. 13) is a gross mischaracterization of what this Court said. This Court merely concluded that *Crawford* does not apply to the statement of a defendant. It did not make any observation that this was because the defendant was able to testify if he wanted to, but simply that *Crawford* does not apply to a witness who is merely repeating what a defendant told them. *Davis,* ¶ *127.* *Crawford* and "the Confrontation Clause is simply inapplicable when the 'witness' is the accused himself." *State v. Hardison (9th Dist.), 2007 WL 257680,* quoting, *State v. Lloyd (2nd Dist.), 2004 WL 2445224.*

## Proposition of Law No. 7

**WRITTEN FORENSIC REPORTS ARE INADMISSIBLE HEARSAY AT LEAST WHEN THEY ARE PREPARED IN ANTICIPATION OF A SPECIFIC PROSECUTION, AS OPPOSED TO BEING DONE IN THE ROUTINE COURSE OF BUSINESS.** *[Evid.R. 803(6), applied.]*

The appellant renewed claim suggesting that the report of DNA expert Clement was admissible as a business record is meritless. As this Court observed "[t]rial counsel did not offer defense exhibit L into evidence as a business record and did not lay the necessary foundation for doing so." *Davis*, ¶ *127*. (Emphasis added.) Thus, the appellant's current claim that the information necessary to conclude that the item would constitute a "business record" is of little value when trial counsel failed take the steps necessary to formally offer it into evidence as such a record.

Furthermore, the "foundation" the appellant seeks to point this Court to fails in some substantial regard. There is no evidence that the report prepared by Ms. Clement was anything but something presented in specific anticipation of this litigation. Indeed, as noted in its earlier brief, the record, if anything, would suggest that the report at issue was prepared specifically for this case as it was entitled: "**Amended** Certificate of Analysis." The appellant points to no evidence in the record to demonstrate that an "**Amended** Certificate of Analysis" was "regularly" prepared in Clement's business.

Forensic reports that are prepared in anticipation of a specific case are typically deemed to be hearsay and do not typically fall under the exception for business records, Evid.R. 803(6). In addition to requiring that records sought to be introduced be generated by a systematic entry kept in the ordinary course of business, Evid.R. 803(6) denies admission to any record that meets this general requirement if "the source of information or the method or circumstances of

preparation indicate lack of trustworthiness". *Evid.R. 803(6).* When a document is prepared in anticipation of specific litigation, the underlying rationale of trustworthiness is, arguably, supplanted by a natural motivation to color the facts in favor of the party requesting that the document be generated. *State v. Lane (1995), 108 Ohio App.3d 477, 488-89.*

Finally, the appellant's argument , once again, fails to take into account that defense counsel was not attempting to admit the entirety of Clement's report, by only a portion of it. (Tr. p. 1970.) Appellant fails to cite to any cases that would allow for the admission of only the part of Clement's report that defense counsel sought to admit.

## CONCLUSION

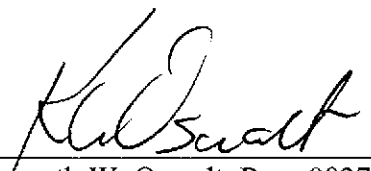
The appellant's Motion for Reconsideration lacks merit. The appellant received a fair trial, a fair mitigation hearing, and a more than fair review of his claimed error by this Court in its initial opinion. As this Court unanimously agreed, the evidence and law fully supported the appellant's convictions and sentences as it relates to all issues raised by way of this current motion. Accordingly, the Motion for Reconsiderations should be DENIED.

Respectfully submitted,

Kenneth W. Oswalt, Reg. 0037208
Prosecuting Attorney

## CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and accurate copy of the forgoing was sent this 18th day of Jan., 2008 by regular U.S. Mail to David C. Stebbins, Counsel of Record, 400 South Fifth Street, Suite 202, Columbus, Ohio 43215.



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