

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
 :  
 Plaintiff-Appellee, :  
 :  
 -vs- : Case No. 08-1012  
 :  
 DAVID B. CLINKSCALE, : On Appeal from the Franklin County  
 : Court of Appeals, Tenth Appellate  
 Defendant-Appellant. : District

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**APPELLANT DAVID B. CLINKSCALE'S MEMORANDUM IN OPPOSITION  
TO APPELLEE'S MOTION TO STRIKE PART OF REPLY BRIEF AND  
ATTACHED AFFIDAVIT**

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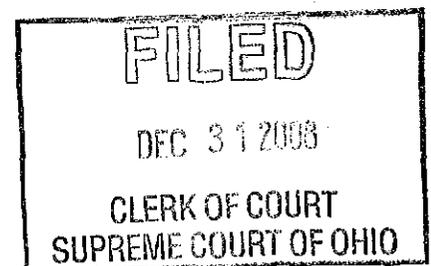
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In its Motion to Strike Part of Reply Brief and Attached Affidavit (hereafter "Motion"), the State asks this Court to strike portions of Appellant's Reply Brief and the post-conviction affidavit of trial attorney Gerald Simmons indicating that the State learned that the dismissed juror was the sole dissenter shortly after the verdict was returned. (Motion, p. 1). Notably the State does not dispute in its Motion that the dismissed juror was the sole dissenter. Nor does the State dispute the fact that, shortly after the verdict was returned, the jury foreman told the trial prosecutor and defense counsel that the dismissed juror was the sole dissenter.

Rather, the State argues that the affidavit of Gerald Simmons should be stricken because it was not part of the record reviewed by the Court of Appeals.<sup>1</sup> (Motion, pp. 2-3). For the following reasons the State's argument should be rejected.

As set forth in Appellant's Reply Brief, the State does not contest the fact that the dismissed juror was the "sole dissenter" at the time of her excusal, but asserts that Appellant's appeal should be dismissed because there is insufficient support in the record for such a finding. Brief of Appellee, p. 2. While acknowledging that Judge Whiteside made that finding in his dissent, the State asserts that Judge Whiteside's factual finding is somehow legally insufficient. *Id.*

As also set forth in Appellant's Reply Brief, neither Judge Klatt, who wrote the majority opinion in the Court of Appeals, nor Judge Tyack, who wrote a concurring

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<sup>1</sup> Contemporaneously with this Memorandum in Opposition, Appellant is also filing a Motion to Supplement the Record with the post-conviction affidavit of trial attorney Gerald Simmons.

opinion, disputed Judge Whiteside's finding that the dismissed juror was the sole dissenter. Nor did the State challenge the fact that the dismissed juror was the sole dissenter in the Court of Appeals, either in its briefing or at oral argument.

Although the State has long known that the dismissed juror was the sole dissenter, the State now argues to this Court that the dissenting juror may not have been dismissed and could well have remained on the jury:

Contrary to defendant's and Judge Whiteside's contentions, there is no indication whatsoever in the appellate record (not even in counsel's comments) that the excused juror was a vote for acquittal. The jury question about a juror believing the testimony of one witness could never be enough did not identify the juror who held that belief. **It could have been any of the jurors, not necessarily the juror who was excused. The excused juror's heart palpitations could have arisen from the stress of deliberations generally, perhaps because *another* juror was being difficult in holding to the legally-incorrect position that corroboration was required.**

Brief of Appellee, pp. 25-26. (Emphasis added; italics in original.) The State further argues:

In addition, the jury's returning of guilty verdicts within a few hours of the excusal and substitution does not show that the excused juror was a dissenting juror. The court had correctly instructed the jury that "the final test in judging evidence should be the force and weight of the evidence regardless of the number of witnesses on each side of the issue. The testimony of one witness that is believed by you is sufficient to prove any fact." (T. 1495) Corroboration is not legally required. **The juror who had believed that corroboration was required could have remained on the jury and could have merely been following the court's correct jury instruction.** Whether or not the excused juror held a similar view is simply not shown by this record.

Brief of Appellee, p. 26. (Emphasis added; footnote omitted.)

The Ohio Rules of Professional Conduct, which became effective on February 1, 2007, set forth the special duties of lawyers as officers of the court to avoid conduct

which undermines the integrity of the adjudicative process. Rule 3.3 of the Ohio Rules of Professional Conduct provides in part:

**RULE 3.3: CANDOR TOWARD THE TRIBUNAL**

- (a) A lawyer shall not knowingly do any of the following:
  - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

\* \* \*

The Commentary to Rule 3.3 further provides:

This rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, **the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.**

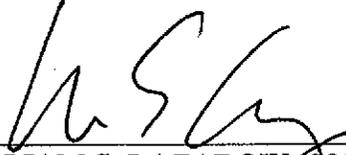
(Emphasis added.)

Here, the State has run afoul of the Ohio Rules of Professional Conduct by basing its legal arguments on facts that it knows to be false. As such, Appellant should be permitted to submit evidence and argument to rebut the State's knowingly false assertions. That is what he did in his Reply Brief.

**CONCLUSION**

For the foregoing reasons, the State's Motion to Strike Part of Reply Brief and Attached Affidavit should be dismissed.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing APPELLANT DAVID B. CLINKSCALE'S MEMORANDUM IN OPPOSITION TO APPELLEE'S MOTION TO STRIKE PART OF REPLY BRIEF AND ATTACHED AFFIDAVIT was forwarded by regular U.S. mail to Ron O'Brien, Franklin County Prosecuting Attorney, and Steven L. Taylor, Assistant Prosecuting Attorney, 373 S. High Street, 13<sup>th</sup> Floor, Columbus, Ohio 43215, on the 31<sup>st</sup> day of December, 2008.



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