

ORIGINAL

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 FOR RECONSIDERATION, MOTION FOR  
SUPPLEMENTAL BRIEFING, AND MOTION FOR ORAL REARGUMENT**

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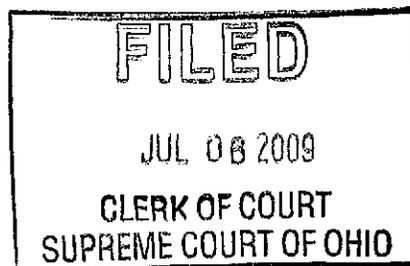
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In its Motion for Reconsideration, Motion for Supplemental Briefing, and Motion for Oral Reargument (hereafter "Motion"), the State asks this Court to reconsider its decision of June 17, 2009, order supplemental briefing regarding Crim.R. 22, and also order oral reargument of the case. (Motion, p. 1). For the reasons which follow, the State's arguments should be rejected and its Motion denied.

As the State recognizes, this Court reversed Clinkscale's convictions on two separate and distinct grounds: (1) that the trial court violated Crim.R. 22 and due process by not recording the proceedings surrounding the dismissal of a deliberating juror, and (2) that the trial court violated former Crim.R. 24(G)(2) by substituting an alternate for the dismissed juror during deliberations. (Motion, p. 1).

**1. The Record.**

In regard to the first ground, the failure to record the juror dismissal proceedings, the State asserts that it was "blindsided" by the majority's consideration of a claim of Crim.R. 22 error to which it had no opportunity to respond. (Motion, p. 3). The State goes on to argue that the Court erred by considering an error "beyond this Court's narrow grant of review." (Motion, p. 2). The State appears to be suggesting that this Court must accept or reject *in toto* the specific proposition of law upon which it accepts jurisdiction. The State has cited no authority, nor is Clinkscale aware of any, which requires this court to limit its consideration of an issue to the specific wording of the proposition of law upon which it grants jurisdiction.

Although the State complains about its inability to respond to the Court's reliance on Crim. R. 22, Crim.R. 22 is not even mentioned in the syllabus the State challenges. Syllabus 1, dealing with the dismissal of the deliberating juror, provides:

1. The proceedings in which a deliberating juror is dismissed in a capital case, and an alternate juror is seated, must be recorded.

Opinion, at Syllabus 1. And, as has long been the rule in Ohio, the syllabus of an opinion issued by this Court states the law of the case. *See, e.g., DeLozier v. Sommer*, 38 Ohio St.2d 268 (1974); *Cassidy v. Glossip*, 12 Ohio St.2d 17 (1967). The Court's failure to mention Crim.R. 22 in its syllabus undercuts the State's argument that it was prejudiced by its inability to fully brief the applicability of the rule in its merit brief.

Furthermore, this Court did in fact anticipate and address the concerns raised by the State in its Motion. For example, the Court noted that in *State v. Palmer*, 80 Ohio St.3d 543, 560 (1997), it had held the failure to record a jury view and conferences in the judge's chambers or at the bench did not warrant reversal when the appellant had not requested that the view or the conferences be recorded and did not demonstrate that any prejudice arose from the failure to record those proceedings. (Opinion, p. 6). But, as this Court pointed out, *Palmer* "addresses the failure to record relatively unimportant portions of a trial," not "a matter as the dismissal of a deliberating juror." (Opinion, at pp. 6-7). This Court explicitly noted that it declined "to extend the holding of *Palmer* to encompass a trial court's failure to record proceedings relating to the dismissal of a juror in a capital case after the jury has begun its deliberations." (Opinion, p. 7).

The State also restates its previously rejected argument that review is precluded because Clinkscale placed his objection to the dismissal of the juror on the record at the

sentencing hearing rather than using App.R. 9 to supplement the record. (Motion, pp. 7-

13). But, as this Court observed:

[T]he timing of the objection is not as important as appellant's attempt to address the deficiency during the sentencing phase of the trial. What is of concern is the trial court's failure to make either party's rendition official, stating, "Well, the record is what it is. \* \* \* [T]hat record is not going to be changed."

(Opinion, p. 8). For all of these reasons, Clinkscale maintains that the State's Motion should be denied.

## **2. Crim. R. 24 Violation.**

In regard to the second ground of error, namely that the trial court violated former Crim.R. 24(G)(2) by substituting an alternate for the dismissed juror during deliberations, the State raises no new arguments but reasserts two previously rejected arguments from its merit brief. The State first asserts that it was denied the right to fair review because the Court did not conduct a plain-error analysis of the claim as the State requested in its merit brief. (Motion, pp. 16-19). In regard to the Crim.R. 24 violation, this Court found:

Despite the clear statement in former Crim.R. 24(G)(2) that no alternate is to be substituted during any deliberation, the judge dismissed a juror and seated an alternate during the deliberation of guilt. Such a clear violation of the Rules of Criminal Procedure cannot occur during a capital trial.

(Opinion, p. 9). Relying on the plurality opinion in *State v. Hutton*, 53 Ohio St.3d 36, 47 (1990), in which Chief Justice Moyer concluded that a mistrial results if a juror becomes ill or is otherwise disqualified after the jury begins its deliberations on guilt or innocence, this Court concluded:

A trial judge may not act in direct contravention to the Rules of Criminal Procedure. Although appellant did not request a mistrial, the violation of former Crim.R. 24(G)(2) constitutes reversible error.

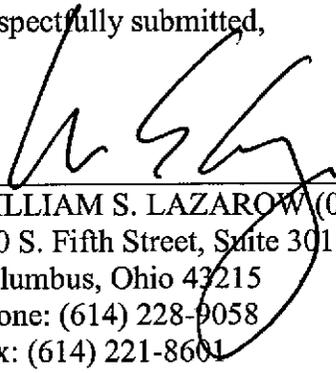
(Opinion, p. 10). Based upon *Hutton*, there was no need for this Court to conduct a plain-error analysis. The State has cited no authority, nor is Clinkscale aware of any, which requires a court to specifically address all legal arguments raised by a party in its merit brief.

The State next asserts that it was denied the right to fair review because the Court did not address its argument that former Crim.R. 24(G)(2) is unconstitutional: “As the State has argued ever since this issue was first raised, the substitution of the alternate complied with R.C. 2945.29 and R.C. 2313.37(D), both of which commanded the substitution.” (Motion, p. 19). Once again, the State has cited no authority, nor is Clinkscale aware of any, which requires a court to specifically address all legal arguments raised by a party in its merit brief. Since the State offers no new arguments for reconsideration and its previous arguments regarding Crim.R. 24 have been rejected, Clinkscale maintains that the State’s motion should be denied.

### CONCLUSION

For the foregoing reasons, the State’s Motion for Reconsideration, Motion for Supplemental Briefing, and Motion for Oral Reargument should be denied.

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 FOR RECONSIDERATION, MOTION FOR SUPPLEMENTAL BRIEFING, AND MOTION FOR ORAL REARGUMENT 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 6<sup>th</sup> day of July, 2009.

  
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