

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	*	
	*	Case No. 2005-2364
Appellee,	*	
	*	Appeal taken from Clark County
- vs -	*	Court of Common Pleas
	*	Case No. 03CR1010
KERRY SPEAKES PEREZ,	*	
	*	This is a death penalty case
Appellant.	*	

APPELLEE STATE OF OHIO'S
 OPPOSITION TO APPELLANT'S MOTION
 FOR RECONSIDERATION

Relative to Propositional of Law 1 and 2 regarding the course of conduct specification, Perez does no more than reargue his case. Mere reargument is expressly precluded under the rules, and reconsideration should be denied for that reason alone. See Supreme Court Rules Of Practice, Rule XI(2)(B).

Relative to Proposition of Law 3, regarding statutory construction of the spousal testimonial privilege under R.C. 2945.42, Perez does no more than adopt a contrary position evaluated and rejected by the majority. Specifically, the majority cited to the cases of *Hicks v. Hicks*, 271 N.C. 204, 206-207 (1967) and *People v. Dubanowski*, 75 Ill. App. 3d 809, 812 (1979) to note that "some courts have held that marital confidences surreptitiously recorded by, or with the help of the recipient-spouse should be excluded." *State v. Perez*, ___ Ohio St. 3d ___, 2009 Ohio 6179, slip op. at P.119.

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In his motion for reconsideration, Perez cites to those cases already addressed by the Court, but even then for the incorrect proposition that “there is no distinction between live testimony and the playing of a taped (sic) recorded communication when it comes to privileged communications.” Perez Motion For Reconsideration, p. 8. In contradiction to Perez’s contention, the *Hicks* case stands for the proposition that the presence of the parties’ 8 year old child did not destroy the confidentiality of the communication between the spouses, which happened to be surreptitiously recorded by the recipient-spouse. See *Hicks*, at p. 207 (“In our opinion, and we so hold, that the presence of their 8 year old daughter during these conversations did not destroy the veil of confidence thrown over these confidential communications between husband and wife, and that these conversations were privileged, and were improperly admitted in evidence by the trial judge.”)

Relative to the *Dubanowski* case, Perez engages in similar mischaracterization of the proposition for which *Dubanowski* stands. The *Dubanowski* Court resolved questions whether “marriage” under the privilege statute included a separation period, and whether surreptitious electronic monitoring destroyed confidentiality of the privileged communication. Although the conversation happened to be tape recorded, its exclusion did not rest on a lack of distinction between live testimony versus prior tape recorded communication. *People v. Dubanowski*, 75 Ill. App. 3d 809 (1979). Accordingly, the resolution of the questions before the *Dubanowski* Court do not establish the proposition for which Perez claims it stands.

In any event, Perez does not raise a proper issue for reconsideration simply by adopting a legal contention that was evaluated and rejected by the majority.

Having no viable grounds for reconsideration, the Court should overrule Perez's motion for reconsideration.

Respectfully submitted,

BY S. MAHER
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Appellee State of Ohio's Opposition To Appellant's Motion For Reconsideration* has been delivered via e-mail delivery to Pamela Prude-Smithers, counsel of record, and Robert K. Lowe, Assistant State Public Defenders, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, on this the 24 day of December, 2009.

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