ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio

Plaintiff-Appellant,

vs.

Richard L. Underwood, Jr.

Defendant-Appellee.

Case No. 08-2133 & 08-2228

On Appeal from the Montgomery County Court of Appeals, Second Appellate District

Court of Appeals Case No. 22454

APPELLANT'S MOTION FOR RECONSIDERATION

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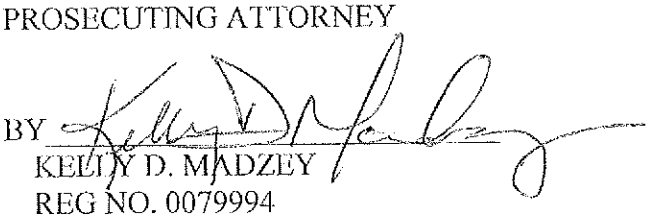
APPELLANT'S MOTION FOR RECONSIDERATION

Now comes Appellant, the State of Ohio, and asks the Court to reconsider its decision of January 5, 2010, and to reverse the judgment of the Court of Appeals.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

BY 
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Memorandum

The test generally applied upon the filing of a motion for reconsideration is whether the motion calls to the attention of the Court an obvious error in its decision, or raises an issue that was either not considered at all or not fully considered by the court when it should have been. *Columbus v. Hodge* (1987), 37 Ohio App.3d 68, 523 N.E.2d 68, *State v. Gabel* (1991), 75 Ohio App.3d 675, 600 N.E.2d 394. Oral argument is permitted upon an application for reconsideration. App.R. 26(A).

The State submits that this Court's opinion fails to fully reconcile the language used in the statute at issue, R.C. 2953.08. In this Court's majority opinion, this Court acknowledged that the statute specifically creates a right to appeal a sentence that is "contrary to law." The statute then specifically exempts from review sentences that are jointly recommended and otherwise "authorized by law." *State v. Underwood*, ____ N.E.2d ___, 2010-Ohio-1; R.C. 2953.08(A)(4), R.C. 2953.08(D)(1). The State's argument on appeal was that these two phrases necessarily have different meanings. This argument is based on the well established presumption that every word in the statute is designed to have legal effect, and every part of the statute must be regarded where practicable so as to give effect to every part of it. *State v. Wilson*, 77 Ohio St.3d 334, 1997-Ohio-35, 673 N.E.2d 1347. Further, the legislature is presumed to act intentionally and purposely when it includes particular language in one section of a statute but omits it in another. *NACCO Indust., Inc. v. Tracy*, 79 Ohio St.3d 314, 1997-Ohio-368, 681 N.E.2d 900.

Without explaining the distinction between the phrases in R.C. 2953.08(A)(4) and R.C. 2953.08(D), this Court's majority opinion merely rejects the State's argument and the conflict cases that held that "authorized by law" merely means that a sentence is within the statutory range. In fact, this Court holds that a sentence that fails to include a mandatory provision is both

"contrary to law," and not "authorized by law." 2010-Ohio-1, at para.21. In so doing, this Court failed to fully consider or explain the statute's use of two distinct phrases to essentially mean the same thing – an error in the rendered sentence.

Such an interpretation ignores the Legislature's intentional use of the two distinct phrases and renders R.C. 2953.08(D) meaningless. Pursuant to the suggested construction, R.C. 2953.08 effectively creates grounds for appeal of a sentence that is contrary to law, and then creates an exception for a jointly recommended sentence which is not contrary to law. In contrast, the General Assembly intended to recognize that a sentence may be contrary to law and yet still authorized by law, and created a specific exception for agreements under such circumstances.

Justice O'Donnell's dissent accurately depicts the problem with allowing these two distinct phrases to mean the same thing. While acting outside of a court's granted authority will render that action void, merely erring within that authority renders the action voidable. This Court has repeatedly held that errors with regard to allied offenses are merely voidable. To determine, as the majority opinion does, that an error in the implementation of a sentence otherwise issued within the court's jurisdiction is the same as acting without authority, risks altering the reviewability of any sentence which reviewing courts determine are flawed.

The State respectfully urges this Honorable Court to reconsider its decision in this case, rendered January 5, 2009, to consider the language employed by the Legislature and the impact of this Court's interpretation of that language.

Conclusion

The State asks this Honorable Court to reconsider its decision and reverse the judgment of the Court of Appeals.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

BY
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Reconsider was sent by first class mail on this 1st day of January, 2010, to the following: Claire R. Cahoon, Assistant State Public Defender, 250 E. Broad Street, Suite 1400, Columbus, OH 43215, Richard Cordray, Ohio Attorney General, Benjamin C. Mizer (Counsel of Record), Alexandra T. Schimmer (Chief Deputy Solicitor General), Robert Kenneth James (Assistant Solicitor), 30 East Broad Street, 17th Floor, Columbus, OH 43215 and Timothy Young, Ohio Public Defender Commission, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215 and Richard L. Underwood, Jr., Inmate #A559-433, London Correctional Institution, P.O. Box 69, London, Ohio 43140.

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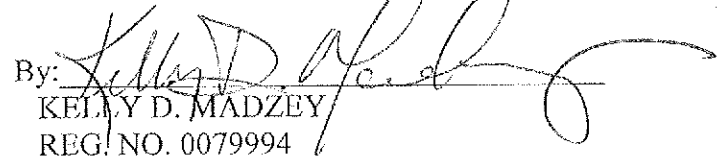
PROSECUTING ATTORNEY

By: 
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