

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellant,

vs.

RICHARD L. UNDERWOOD, JR.,

Defendant-Appellee.

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Case Nos. 2008-2133, 2008-2228

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

C.A. Case No. 22454

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**MEMORANDUM IN OPPOSITION TO APPELLANT'S  
MOTION FOR RECONSIDERATION**

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Richard L. Underwood opposes reconsideration in the above-captioned case. The reasons supporting denial of the State's motion for reconsideration are in the attached memorandum.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



CLAIRE R. CAHOON #0082335

Assistant State Public Defender

Counsel of Record

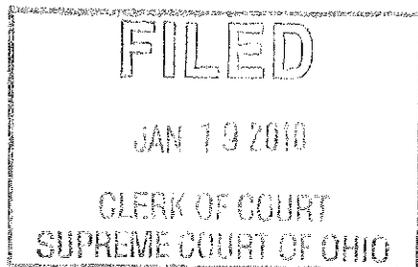
250 East Broad Street – Suite 1400

Columbus, Ohio 43215

(614) 466-5394

(614) 752-5167 – Fax

claire.cahoon@opd.ohio.gov



COUNSEL FOR DEFENDANT-APPELLEE

RICHARD L. UNDERWOOD, JR.

## MEMORANDUM IN OPPOSITION

The test generally applied to 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 for the court's consideration that was either not considered at all or was not fully considered by the court when it should have been. *Matthews v. Matthews* (February 25, 1982), 10<sup>th</sup> Dist. No. 80AP-841. This Court has cited *Matthews* approvingly with regard to the standard to be applied to a motion for reconsideration. *Oberlin Manor, Ltd. v. Lorain County Board of Revision et al.*, 69 Ohio St.3d 1, 1994-Ohio-500. Furthermore, S.Ct.Prac.R. 11.2(B) states that a motion for reconsideration "shall not constitute a reargument of the case . . . ." In the present case, the State's motion for reconsideration fails to meet those requirements, and as a result, that motion should be denied.

The State's motion for reconsideration does not point to an obvious error in this Court's decision in *State v. Underwood*, Slip Opinion No. 2010-Ohio-1, nor does it raise an issue that was not considered, or was inadequately considered, in this Court's decision. (Jan. 15, 2010 Motion for Reconsideration). Rather, the State seeks to argue again the distinction between "contrary to law" and "authorized by law" under R.C. 2953.08. That issue was one of the central questions of the instant case, and the issue was fully briefed and presented at oral argument to this Court. (See, Mar. 3, 2009 Brief of Appellant; May 12, 2009 Brief of Appellee). Reargument of the issues is not an appropriate basis for a motion for reconsideration. S.Ct.Prac.R. 11.2(B).

The State attempts to reopen this decided issue by pointing to the dissenting opinion in *Underwood*. *Underwood*, at ¶35. Justice O'Donnell's dissent asserts that "contrary to law" and "unauthorized by law" have distinct meanings and that the majority conflates the two ideas. *Id.* at ¶57. The State argues that the majority failed to distinguish the two concepts. (Jan. 15, 2010

Motion for Reconsideration, pp. 1-2). But the majority of this Court already considered and rejected that argument, holding that “contrary to law” and “authorized by law” do not mean the same thing. *Underwood*, at ¶21. Rather, the majority held that a defendant has a right to appeal a sentence that is “contrary to law,” but cannot appeal an agreed sentence unless it is also not “authorized by law.” *Id.*

The State’s discussion of the dissenting opinion in *Underwood* highlights that the State’s motion fails to meet the *Matthews* test. The fact that the State’s argument is essentially contained in the dissent in *Underwood* indicates that this Court *did* fully consider those arguments, but that the majority of this Court ultimately held otherwise. Contrary to the State’s and the dissent’s assertions, this Court’s opinion in *Underwood* did not conflate “contrary to law” and “authorized by law.” This Court correctly held that an agreed sentence is authorized by law, and therefore not appealable, only if it complies with mandatory sentencing provisions. *Underwood*, at syllabus. Therefore, Mr. Underwood requests that this Court deny the State’s motion for reconsideration.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

  
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CLAIRE R. CAHOON #0082335  
Assistant State Public Defender  
Counsel of Record

250 East Broad Street – Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 – Fax  
claire.cahoon@opd.ohio.gov

COUNSEL FOR DEFENDANT-APPELLEE  
RICHARD L. UNDERWOOD, JR.

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing **Memorandum in Opposition to Appellant's Motion for Reconsideration**, was forwarded by regular U.S. Mail to Kelly D. Crammer, Montgomery County Assistant Prosecutor, 301 W. Third Street, Fifth Floor, Courts Building, Dayton, Ohio 45422, on this 19th day of January, 2010.

  
CLAIRE R. CAHOON #0082335  
Assistant State Public Defender  
Counsel of Record

COUNSEL FOR DEFENDANT-APPELLEE  
RICHARD L. UNDERWOOD, JR.

#313419