

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	<b>Case No. 2010-0827</b>
Plaintiff-Appellee,	:	On Appeal from the Court of Appeals Ninth Appellate District
-vs-	:	Summit County, Case No. CA-24580
DONALD L. CRAIG,	:	<b>Capital Case</b>
Defendant-Appellant	:	

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**APPELLANT'S MEMORANDUM IN OPPOSITION TO STATE'S MOTION TO DISMISS**

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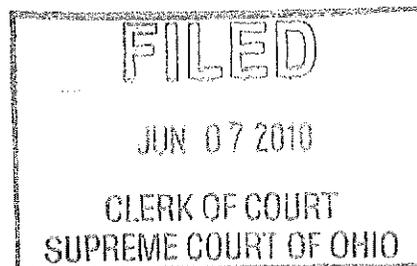
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Appellant Donald L. Craig filed a Notice of Appeal and Memorandum in Support of Jurisdiction May 10, 2010. On May 28, 2010, the State filed a Motion to Dismiss. Appellant Craig opposes the State's motion. A memorandum is attached.

Respectfully submitted,

Office of the  
Ohio Public Defender

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## Memorandum in Support

### A. Procedural History

Donald Craig was sentenced to death for the aggravated murder, kidnapping, and rape of Malissa Thomas. On May 16, 2007, under O.R.C § 2953.21, Craig filed his post-conviction petition. On December 19, 2008, the trial court issued its Decision on the post-conviction petition. It denied all of Craig's grounds for relief.

Craig appealed the trial court's decision on January 16, 2009. On September 16, 2009, the Court of Appeals affirmed the judgment of the Court of Common Pleas. State v. Craig, Case No. 24580, 2009 Ohio 4861, 2009 Ohio App. LEXIS 4119 (Summit Ct. App. September 16, 2009). The Court of Appeals noted that on appeal, the petition for post-conviction relief was missing from the record. Presuming the regularity of the proceedings, the Court of Appeals affirmed the trial court's decision. Craig filed a Motion for Reconsideration with the Court of Appeals on September 25, 2009, contemporaneously with a Motion to Supplement the Appellate Record with the Postconviction Petition.

On October 30, 2009, Craig filed a Notice of Appeal and Memorandum in Support of Jurisdiction with this Court. Under Ohio R. App. P. 26, filing an application for reconsideration does not extend the time for filing a notice of appeal with this Court. As a result, Craig's motions had not yet been ruled on when he filed his appeal in this Court.

On November 5, 2009, the Summit County Court of Appeals granted Craig's Motion to Supplement the Record and his Motion for Reconsideration. The matter was returned to the court's active docket for consideration. (Ex. 1.) Craig asked that this Court stay ruling on jurisdiction in this matter pending the opinion from the Court of Appeals. The State of Ohio filed a Suggestion of Mootness. (Ex. 2.) This Court requested that Appellant Show Cause why

the appeal should not have been dismissed as moot. (Ex. 3.) Appellant filed a Response December 22, 2009. (Ex. 4.)

On March 24, 2010, the Court of Appeals issued its opinion on the merits of Appellant's appeal. After review of the court's opinion, Appellant asked this Court to dismiss the appeal in Case No. 2009-1986. The State filed Notice of Final Judgment March 26, 2010.

#### B. Argument

"The Court speaks through its judgment," Chapman v. United States, 247 F.2d 879, 881 (6th Cir. 1957) so the Ninth District's rulings from its earlier decision stood until it released a new decision. Rather than vacate its prior ruling, the Court of Appeals "returned [the case] to the court's active docket for consideration of the merits of appellant's appeal." In other cases, courts have vacated their earlier rulings when granting reconsideration. In Helms v. Akron Health Dep't., Case No. 21735, 2004 Ohio 2002, 2004 Ohio App. LEXIS 1735, ¶2 (Summit Ct. App. April 21, 2004) the court held, "[t]he application for reconsideration is granted. The appeal is reinstated, and the decision and journal entry of this Court...is hereby vacated. This Court shall issue a new decision and journal entry in due course." In Craig's case, the Court of Appeals did not vacate its earlier ruling. This would have been premature to dismiss the appeal to this Court as moot; Appellant may still have needed to appeal parts of the Court of Appeals' first decision.

If the Court of Appeals had failed to issue a new ruling on any of the claims, its ruling from the first opinion would have still been valid. At the same time the Court of Appeals agreed to reconsider its decision, it also consented to supplement the record. When the Court of Appeals released its new ruling, it could have limited its decision to the claims that were dependent on the supplemented post-conviction petition. Some of the claims in Appellant's Merit Brief did not rely on the post-conviction petition; Appellant filed claims requesting an

evidentiary hearing and funds to employ experts. The Court of Appeals rejected those claims. State v. Craig, 2009 Ohio 4861, at ¶ 8. If the Court of Appeals had not revisited them, its first opinion would have been the only ruling on those issues. If this Court had dismissed Appellant's first appeal, those claims would be defaulted.

The State argued to this Court that because the Court of Appeals granted reconsideration of its decision, Appellant's October 30, 2009, Notice of Appeal and Memorandum in Support of Jurisdiction were moot. (Ex. 2.) This Court treated the question as a matter of mootness and required Appellant to show cause why the appeal should not have been dismissed as moot. (Ex. 3.) The entry did not require Appellant to defend against the mootness of the first opinion, but to defend sustaining the appeal. Thus, the approach Appellant took was the proper procedure. Once the Court of Appeals granted reconsideration, the first Appeal to this Court was moot. But for the reasons above, Appellant did not dismiss the appeal until the Court of Appeals issued a new ruling. Once it did, Appellant properly dismissed the appeal of the first opinion and then appealed the second opinion.

The State also argued that once the Court of Appeals granted reconsideration, the appeal to the Supreme Court was moot and the original opinion was not a merits ruling. (Ex. 1.) After the Court of Appeals issued its second opinion, the State argued that the appeal to this Court was no longer moot. The State argues that Appellant may not appeal the second decision of the Court of Appeals because Appellant dismissed the appeal. However, Appellant did not dismiss the appeal of the Court of Appeals' March 24, 2010 opinion.

The State's argument is that Appellant's first appeal transmogrified into an appeal of the March 24, 2010 opinion. But Appellant could not have properly appealed the March 24, 2010 opinion, based on his Notice of Appeal and Memorandum in Support of Jurisdiction for the

September 16, 2009 opinion. Under S.Ct. Prac. R. 3.1(B)(4), a memorandum in support of jurisdiction must include “[E]ach proposition of law supported by a brief and concise argument.” Appellant’s original Memorandum in Support of Jurisdiction contained only propositions of law and arguments based on the first decision from the Court of Appeals. Once the Court of Appeals issued a second opinion, the original Memorandum was insufficient. Because the “Decision and Journal Entry dated March 24, 2010 supplanted the Decision and Journal Entry dated September 16, 2009” the first Notice of Appeal was moot. (Motion to Dismiss, p. 2.)

Appellant had no means of addressing the merits of the March 24, 2010 decision aside from a new appeal. Parties are prohibited from filing supplemental memoranda. S.Ct. Prac. R. 3.3. Nor was the provision for corrections or additions to documents applicable as the second opinion was not issued “within the time permitted by these rules for filing the original document.” S.Ct. Prac. R.8.7. An appellant has 45 days from the date of entry of the judgment to file an appeal. The Court of Appeals issued its first opinion September 16, 2009 and did not issue its second opinion until March 24, 2010, well past the deadline for corrections or additions.

The State’s Motion implies that Appellant’s Application to Dismiss was a response to the State’s Notice of Final Judgment. The Application to Dismiss and Notice of Final Judgment were filed on the same day.<sup>1</sup> (Ex. 5.) The State suggests that once the second opinion replaced the first, the original appeal became an appeal of the second opinion. This would mean the appeal was filed before the decision was announced.

The State argues that “Appellant seeks to appeal from the same judgment that was on appeal in case number 09-1986.” (Motion to Dismiss, p. 2.) Appellant has not appealed the same judgment. Because the “Decision and Journal Entry dated March 24, 2010 supplanted the Decision and Journal Entry dated September 16, 2009[.]” Appellant’s first appeal was of a

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<sup>1</sup> Appellant’s Application to Dismiss appears on the docket before the State’s Notice. (Ex. 5.)

decision that was replaced. (Motion to Dismiss, p. 2.) Once the second decision took the place of the first, the appeal of the earlier judgment could not be maintained. It was a new judgment and required a new appeal.

The Court of Appeals also had a different understanding than the State. The Court ordered that the period of review begin with the filing of the Decision. This includes filing an appeal. Under the State's interpretation, there would be no period for review as the appeal had already been taken.

Appellant asked this Court to hold its decision regarding the first appeal in abeyance out of an abundance of caution. If rulings made in the first Court of Appeals decision were not made part of the second, the only means of addressing those issues would have been through the first appeal. Once it was apparent that those issues were fully part of the second decision, the first decision was fully superseded.

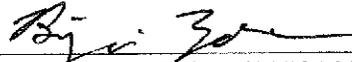
C. Conclusion

Appellant has a right to have his notice of appeal and memorandum in support of jurisdiction considered by this Court. The Summit County Court of Appeals' March 24, 2010 decision mooted his first appeal to this Court. Appellant correctly dismissed his first appeal. His appeal to this Court of the March 24, 2010 decision was timely filed and this Court should deny the State's Motion to Dismiss.

Respectfully submitted,

OFFICE OF THE  
OHIO PUBLIC DEFENDER

  
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COUNSEL FOR PETITIONER

### CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing **APPELLANT'S MEMORANDUM IN OPPOSITION TO STATE'S MOTION TO DISMISS** was forwarded by regular U.S. Mail to Richard Kasay, Assistance Prosecuting Attorney, Summit County, 53 University Avenue, Akron, Ohio 44308 on this 7th day of June, 2010.

By:   
Benjamin D. Zober (0079118)  
Counsel for Craig