

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee

Vs

MARVIN JOHNSON,

Defendant-Appellant

CASE NO 04-1163

On appeal from the Guernsey County Court
of Common Pleas

Trial Case No. 03 Cr 116

STATE'S RESPONSE TO APPELLANT'S APPLICATION FO REOPENING

DANIEL G. PADDEN 0038781

Prosecuting Attorney Guernsey County Ohio

139 West Eighth Street

Cambridge, Ohio 43725

740-439-2082; FAX 740-439-7161

COUNSEL FOR PLAINTIFF-APPELLEE

KORT GATTERDAM 0040434

280 Plaza, Suite 1300

280 North High Street

Columbus, Ohio 43215

614-365-4100 : FAX 614-365-9145

Counsel of Record

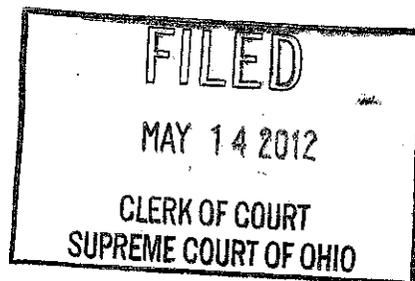
LAURENCE E. KOMP 0060142

P.O. Box 1785

Manchester, Mo 63011

636-207-7330; FAX 636-207-7351

COUNSEL FOR APPELLANT



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Appellee, the State of Ohio, respectfully requests that this court deny appellant's application for reopening for the reasons set forth in the attached memorandum of law.

Respectfully Submitted

Daniel Padden by Joyce Anderson

DANIEL G. PADDEN 0038781

Prosecuting Attorney Guernsey County Ohio

139 West Eighth Street

Cambridge, Ohio 43725

740-439-2082; FAX 740-439-7161

COUNSEL FOR PLAINTIFF-APPELLEE

MEMORANDUM OF LAW

The two-pronged analysis of *Strickland v. Washington* 466 U.S. 668, 104 S.Ct. 2052 (1984) applies to applications to reopen appeals on claims of ineffective assistance of appellate counsel. *State v. Fraizier, K.K.A. Haliym* 96 Ohio State. 3d 189 (2002). A defendant must prove that his counsel were deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had he presented those claims.

Actions attributable to legal counsel's tactics fail to prove ineffective assistance of counsel *State v. Clayton*, 62 Ohio St.3d 45 (1980). When evidence in death penalty cases is overwhelming, concentrating on avoiding the death penalty is a reasonable trial tactic. *State v. Scott* 101 Ohio St.3d 31 (2004).

Appellant beat a twelve year old boy to death and then raped and robbed the boy's mother. He was sentenced to death and this court affirmed in *State v. Johnson*, 112 Ohio St.3d 210, 2006 Ohio 6404, 858 N.E.2d, 2006 Ohio LEXIS (2006). He pursued all state remedies, including an application to reopen filed in this court in 2007. In that application, appellant raised the confrontation issue under *Crawford v. Washington* 541 U.S. 36 (2004). This court denied reopening in *State v. Johnson*, 114 Ohio St.3d 1474, 2007 Ohio 3699, 870 N.E.2d 728, 2007 Ohio LEXIS 1662 (2007).

Appellee respectfully asserts that an appellant may file only one application for reopening. Rule 11.6 of the Supreme Court Rules of Practice refers to "the" or "an" application. Nothing in the rule suggests allowing successive applications. Although counsel for appellee

found no case in which this court addressed the issue under the Supreme Court Rules, the court has many times affirmed decisions of appellate courts holding that a defendant may file one application only under App. R. 26(B). *State v. Williams* 99 Ohio St.3d 179, 2003 Ohio 3079, 790 N.E.2d 299 (2003).

Appellant assumes a right to file a successive application, claiming the federal court's finding "good cause for Petitioner's failure to exhaust his claim first in state court[.]" establishes good cause for that application's untimely filing. Appellant announces the state cannot argue otherwise because of collateral estoppels and that the federal holding "should bind this court."

However, appellant filed a timely application in 2007. Moreover, to establish issue preclusion, a party must prove that the identical issue was actually decided between the same parties and that the issue was essential for the judgment handed down. *Goodson v. McDonough Power Equip., Inc.* 2 Ohio St. 3d 193, 201, 739, 443 N.E.2d 978, 985 (1983). Finally, this court is not bound by lower federal courts.

Appellant fails to prove the issue was identical. "Good cause for failing to exhaust his remedies in state courts" could mean any court and any action. If a judgment could mean more than one thing, a party fails to prove issue preclusion. Moreover, as this court decided the *Crawford* issue in the first application for reopening, appellant is barred by the doctrine of res judicata from raising it in a second application for reopening.

PROPOSITION OF LAW ONE

REASONABLE COUNSEL MAY FORGO CLAIMING THAT HEARSAY WAS ADMITTED WHEN THE QUESTIONED EVIDENCE WAS NOT A STATEMENT, AND WHEN, BECAUSE OF THE OVERWHELMING EVIDENCE AGAINST THE APPELLANT, ADMITTING THE EVIDENCE WOULD HAVE BEEN HELD TO BE HARMLESS ERROR EVEN IF THE COURT HAD AGREED WITH APPELLANT'S ASSESSMENT OF THE EVIDENCE.

The United States Supreme Court in *Crawford v. Washington* 541 U. 36 (2004) held that hearsay testimonial statements are inadmissible unless the declarant is unavailable and the defendant has had a chance to cross-examine the declarant. However, before there can be a testimonial statement, there must be a "statement." A "statement" means the actual word or conduct of the declarant. *State v. Lewis* 22 Ohio St.2d 125 (1970).

The United States Supreme Court decided *Crawford* while appellant's lawyers were preparing his appeal. His lawyers considered and rejected raising evidence about Mickey Alexander as a confrontational issue and raised it as a *Massiah* issue. Appellant complains that Mr. Sipe misunderstood *Crawford*. If so, he was not alone. Courts are still litigating issues raised by *Crawford*.

Finally, as this court said on direct appeal, the evidence against appellant was so overwhelming that keeping out any evidence about Mickey Alexander would have made no difference. Counsel told the jury in the beginning that appellant committed the crime and that they were trying to save his life. As Ms. Magary observed, most of the questioned evidence

came in from another source. This court's finding in the direct appeal that the questioned evidence was harmless should be binding.

SECOND PROPOSITION OF LAW

WHEN DEFENSE COUNSEL'S OBJECTIONS WOULD HAVE BEEN OVERRULED, COUNSEL VIOLATES NO DUTY IN DECLINING TO OBJECT.

The trial court sustained objections to actual statements of Mickey Alexander. Counsel objected to some of the officer's testimony that did not include the actual statements and the court overruled those objections. This court upheld the conviction not because counsel failed to object but because this court found the questioned evidence harmless.

CONCLUSION

Counsel for Appellee claims no knowledge of appellant's thought process, but presumes he filed the instant application for reopening to avoid even the possibility that the federal court might find non-exhaustion of remedies again. This court considered the identical issues in appellant's first application for reopening. Appellee respectfully requests that appellant's application for reopening be denied.

Respectfully submitted,

Daniel Padden by Joyce Anderson

DANIEL G. PADDEN 0038781

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that he served a copy of the above upon Kort Gatterdam, 280 Plaza, Suite 1300, 280 North High Street, Columbus, Ohio 43215, counsel for appellant, by ordinary mail, postage prepaid this day, May 14, 2012.

Daniel Padden by Joyce Anderson

DANIEL G. PADDEN 0038781

Prosecuting Attorney Guernsey County Ohio