

Motion for Reconsideration
of Appellant WAYNE S. POWELL

Appellant, WAYNE S. POWELL, through undersigned counsel, moves this Court, pursuant to S.Ct. Prac. R. 11.2(B)(4), for reconsideration of its June 13, 2012 decision. The reasons for this motion are more fully set forth in the following memorandum in support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

INTRODUCTION

This Court, in a decision dated June 13, 2012, affirmed the Lucas County Common Pleas guilty verdict and death sentence. This Court, in its decision, identified five significant errors of federally guaranteed constitutional rights committed in the trial court. The errors identified by this Court consist of the following:

1. In its decision this Court (Opinion of Court at 11-16) found the admission of Isaac Powell's (a brother of Wayne Powell) grand jury testimony and of his taped statement to a detective, as well as the denial of a request for a limiting instruction, constituted error of federally guaranteed constitutional rights.

2. Permitting the jury to hear the testimony of Ms. Stuart that she possessed a baseball bat, potato grinder and a fork during an encounter she and Mary had with Mr. Powell the night of the fire. Ms. Stuart attributed the items to be used as self defense due to an unspecified fear of Mr. Powell and her state of mind. This Court (Opinion of Court at 27-29), found the testimony about the weapons and her state of mind irrelevant

3. The admission of victim impact testimony, principally testimony that did not concern the deceased victims. This Court

found the admission of this testimony to be of "questionable" relevance (Opinion of Court at 33-36).

4. Prosecutorial misconduct during the trial phase arguments (Opinion of Court at 38-42).

5. Prosecutorial misconduct during the penalty trial phase arguments (Opinion of Court at 46-50).

Although this Court found these errors occurred, it ultimately found the errors to not have affected Mr. Powell's right to a fair trial. It is submitted that this Court erred in making such a determination for the reason the errors were clear violations of the United States Constitutional magnitude and each error could stand individually. In the alternative, Mr. Powell argues these errors, viewed cumulatively, is also error.

BASIS OF SEEKING RECONSIDERATION OF PROPOSITION OF LAW I

This Court, in deciding Proposition of Law I, (decision of Court at 11-16), found the admission of Isaac's grand jury testimony, as well as the playing of his taped statement to a detective, a violation of federally protected constitutional rights, specifically hearsay. This Court also found as error the denial of a request for a limiting instruction.

However, the Court found the admission of this improper testimony harmless beyond a reasonable doubt where, as here, the declarant testifies at trial, citing to California v. Green, 399 U.S. 149, 90 S.Ct. 1930 (1970).

In finding the violation of these federal constitutional rights harmless beyond a reasonable doubt, this Court relied on a number of factors. Those findings are:

a. Mr. Powell's repeated statements that he had "fucked up";

b. Testimony that Mary and Stuart and Mr. Powell had a heated argument and that he told Ms. Stuart he would kill her;

c. That Mr. Powell poured gas on the porch and had gas on his clothing; and

d. Mr. Powell's telephone records and their timing on the night of the fire.

Each of these factors relied upon by this Court in finding harmless error has severe flaws and this Court's decision is contrary to established federal law and is an unreasonable interpretation of the facts presented to this Court. Each of these will be addressed seriatim.

a. Mr. Powell's repeated statements that he had "fucked up"

This factor is flawed for the simple reason that this testimony of Isaac was elicited by improper admission of hearsay and a statement to refresh Isaac's recollection, both of which this Court found improper. Mr. Powell lodged an objection to this testimony and sought a limiting instruction. The trial court denied

the limiting instruction and, at the same time, acknowledged a continuing objection to this testimony.¹ Tr. Vol. VI at 1734-35.

b. Testimony that Mary and Stuart and Mr. Powell had a heated argument and that he told Ms. Stuart he would kill her

This conclusion is flawed because it presumes the testimony of Mary and Stuart is admissible. However, this Court's discussion of Proposition of Law II established that Stuart's testimony was irrelevant and thus error. Thus, Stuart's testimony should not have been part of the equation and without it all that was left was Mary's testimony about her encounter with Mr. Powell the night of the fire. Mary, who had ample motive to fabricate her testimony, given her obvious dislike of Mr. Powell, with whom she had once been romantically involved, and her belief he had set the fire.

c. That Mr. Powell poured gas on the porch and had gas on his clothing

This factor was explained by Mr. Powell's account of the gas' presence on his clothing. Tr. Vol. VII at 1894. By itself, it cannot satisfy the burden of proof the State must meet to convict a citizen beyond a reasonable doubt.

d. Mr. Powell's telephone records and their timing on the night of the fire.

¹ Although not stated explicitly, it is reasonable to conclude the continuing objection referred to all aspects of the admission of the grand jury testimony and statement to the detective, including, but not limited to, the denial of any limiting instructions requested by the defense.

This factor confirms a theme played often at trial that Mr. Powell and Mary had an on again/off again relationship. Common sense tells us that people involved in such a relationship often cannot make up their minds about the relationship. Frequent phone contact is a characteristic of these relationships.

When viewed either individually, the factors this Court relied on in finding harmless error do not permit such a conclusion. Rather, each factor points to how they contributed to error that fails to protect Mr. Powell's his due process rights and right to a fair and reliable trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution

BASIS OF SEEKING RECONSIDERATION OF PROPOSITION OF LAW II

In Proposition of Law II Mr. Powell argued in support by pointing to the irrelevance of any mention of weapons possessed by Ms. Stuart. The testimony of Ms. Stuart had the jury hearing she possessed a baseball bat, potato grinder and a fork during an encounter she and Mary had with Mr. Powell the night of the fire. Ms. Stuart attributed the items to be used as self defense due to an unspecified fear of Mr. Powell and her state of mind.

This Court observed that Ms. Stuart's testimony suggested that Mr. Powell should be viewed as a bad person and thus inadmissible under Evid.R. 404(A). This Court further found the testimony about the weapons and her state of mind irrelevant (Opinion of Court at 27-29), but that any error was harmless. This Court found there

was little chance this testimony affected Mr. Powell's right to a fair trial.

This conclusion fails to address the implication present here: That Mr. Powell is a dangerous person with whom an individual must protect themselves. The effect of this improperly admitted testimony served to bolster the testimony of other witnesses. This is improper and under one or more of the proffered reasons a violation of Mr. Powell's federally protected constitutional right to due process and to a fair and reliable trial.

BASIS OF SEEKING RECONSIDERATION OF
PROPOSITIONS OF LAW VII AND VIII

Propositions of Law VII and VIII focused on victim impact testimony, principally testimony that did not concern the deceased victims. The Court found the admission of this testimony to be of "questionable" relevance (Opinion of Court at 33-36).

This decision of the Court overlooks how this testimony bolstered an otherwise highly circumstantial case. That the jury heard this improper testimony is clear. What is also clear is that trial counsel failed to object to this improper testimony. The combination affected Mr. Powell's federally protected constitutional right to effective assistance of counsel and to due process and to a fair and reliable trial.

BASIS OF SEEKING RECONSIDERATION OF PROPOSITION OF LAW IV

Proposition of Law IV concerns the prosecutor's misconduct during the trial phase arguments. This Court agreed with Mr.

Powell's contention that the misconduct occurred, but that any misconduct was harmless beyond a reasonable doubt (Opinion of Court at 38-42).

Those improper comments consisted of a statement that Mr. Powell failed to turn himself in to police and not telling what happened. The implications of this highly improper argument is clear - Mr. Powell was hiding his guilt.

In finding the prosecutor's improper comments harmless, this Court relied on three points: first, the trial court sustained defense objection, second, the comments were brief and isolated, and third, there was overwhelming evidence of guilt.

This improper argument must be viewed in the context of this highly circumstantial case. This conclusion of the Court overlooks the credibility a prosecutor enjoys in our criminal justice system. It also fails to protect Mr. Powell's right to due process rights and right to a fair and reliable trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution

BASIS OF SEEKING RECONSIDERATION OF PROPOSITION OF LAW XVII

Proposition of Law XVII concerns the prosecutor's misconduct during the penalty trial phase arguments. This Court agreed with Mr. Powell's contention that the misconduct occurred, but that any misconduct did not deprive Mr. Powell of a fair sentencing determination or affect any other substantial right (Opinion of Court at 46-50).

The prosecutor asked the jury to "imagine what it was like inside that house." This Court found the prosecutor's comments to be improper because it focused on the nature and circumstances of the offense, as well as asking the jury to speculate on facts not in evidence.

This and other improper arguments must be viewed in the context of these aspects of the penalty phase. In particular, the defense's calling of Mr. Powell's juvenile court probation officer as a mitigation witness. The probation officer related on cross-examination that the conviction for which he was supervising Mr. Powell was arson (Opinion of Court at 48-50).

This Court's overruling of this proposition of law once again overlooks the credibility a prosecutor enjoys in our criminal justice system. It also fails to protect Mr. Powell's right to due process rights and right to a fair and reliable trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution

BASIS OF SEEKING RECONSIDERATION OF PROPOSITION OF LAW XXIII

Proposition of Law XXIII concerns cumulative error. This Court found that the doctrine of cumulative error is not applicable (Opinion of Court at 60-61).

In State v. DeMarco (1987), 31 Ohio St.3d 191, this Court recognized the existence of cumulative error. Id. at paragraph two of the syllabus ("conviction will be reversed where the cumulative

effect of the errors deprives a defendant of the constitutional right to a fair trial"). The Court cited DeMarco in State v. Garner (1995), 74 Ohio St.3d 49, 64, recognizing that the aggregate effect of multiple errors, which may individually be harmless, may be prejudicial.

In this case the Court has concluded that significant errors occurred during trial in both phases. These errors, the Court appears to be asserting, were not individually prejudicial. However, Mr. Powell urges this Court to reconsider its decision as to this proposition of law for the reasons contained in this motion and in the briefs. This would then protect Mr. Powell's right to due process right and right to a fair and reliable trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution

CONCLUSION

For the reasons offered in support of this motion for reconsideration, as well as those reasons set forth in the Merit Brief and Reply brief, and at oral argument, it is requested this Court issue an order granting any one or each of the reasons offered in support and remanding the matter to the trial court for a new trial.

Denial of Mr. Powell's motion for reconsideration would be contrary to and an unreasonable application of clearly established federal law as defined by the United States Supreme Court and would

result in a decision that is based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. In addition, Mr. Powell states that this motion for reconsideration and the relief sought is necessary to protect his due process rights and right to a fair and reliable trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.

Respectfully submitted,

Spiros P. Cocoves by *Gregory A. Hoover*
SPIROS P. COCOVES
and
GARY W. CRIM
Per Authorization

COUNSEL FOR APPELLANT,
WAYNE S. POWELL

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion for reconsideration was sent by regular U.S. Mail, postage prepaid, to David Cooper, Lucas County Prosecuting Attorney, Lucas County Courthouse, 700 Adams Street, Toledo, Ohio 43604, counsel of record for appellee, State of Ohio, this 22nd day of June 2012.

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