

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO :
 Appellee, :
 -vs- : CASE NO. 2012-0405
 RAYSHAWN JOHNSON :
 Appellant : **Death Penalty Case**

On Appeal from the Court of Common Pleas
 Hamilton County, Ohio
 Case No. B9708745

REPLY BRIEF OF APPELLANT RAYSHAWN JOHNSON

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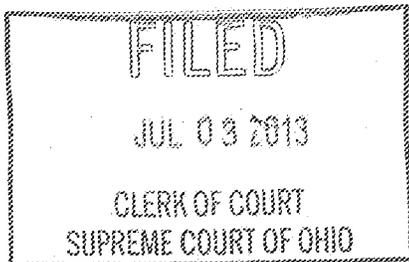
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ARGUMENT

Appellant Rayshawn Johnson hereby replies to the State's Merit Brief. Johnson relies on the arguments he presented in his Merit Brief where no reply is made herein.

Proposition of Law No. 1

A defendant's right to equal protection of the law is violated when the State puts him on trial before a jury from which members of his race were purposefully excluded. U.S. Const. Amends. VI, XIV; Ohio Const. Art. I, §§ 5, 10.

The State is now attempting to draw distinctions between Juror Julie Nippers, Juror Childs-Jeter, and Juror Deborah Middleton based on their answers in the jury questionnaires in order to argue that their peremptory challenges were not based on race. However, a court must look at the "clear and reasonably specific explanation" of the State's reason for exercising their challenge to determine whether there is purposeful discrimination. *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005). The State specifically cited to Juror Childs-Jeter's and Juror Middleton's answers to question 53 of the jury questionnaire as the reason they used their peremptory challenges. In reference to Juror Middleton, the State said that "[s]he also was very weak on the death penalty, felt it was inappropriate in most cases." Tr. 870. As for Juror Childs-Jeter, the State stated "she also put that the death penalty is inappropriate in most murder cases, one of those." Tr. 861. However, the State allowed Juror Nipper, who is white, to stay on the jury even though she made the same comment as the two stricken jurors.

No matter what Juror Nipper stated in the other questions of her jury questionnaire, she still stated that she believed the death penalty was inappropriate in most cases in her response to question 53 of her jury questionnaire. This was the same reason that the State used to say that Juror Childs-Jeter and Juror Middleton were weak on the death penalty, and thereby had them

removed from the jury. Although the “proposition that a prospective juror’s views on the death penalty are a legitimate basis for a peremptory challenge in a capital case,” (State’s Merit Brief p. 15) it is not a legitimate basis when it is used as a pretextual reason to remove an African-American juror, but not a white juror, who has the same views on the death penalty.

Johnson’s trial counsel believed that the State’s peremptory challenges of jurors Childs-Jeter and Middleton were racially based, as they brought *Batson* challenges for both jurors. Tr. 861, 870. However, they were ineffective for failing to follow up by demonstrating that the State’s specific reason for challenging these jurors was pretextual and equally applied to a potential white juror. Thus, they allowed the State to violate Johnson’s constitutional right to equal protection..

Proposition of Law No. 3

A capital defendant’s rights against cruel and unusual punishment and to due process are violated by the admission of prejudicial and irrelevant evidence in the penalty phase of the trial. U.S. Const. Amends. VII and XIV, Ohio Const. Art. I, §§ 9, 16.

Johnson replies to a portion of the State’s argument in this claim. The absence of a reply to parts of this claim is to avoid reargument of the merit brief, and should not be considered as concession to the State’s arguments.

2. Mr. Marks’ 911 Call.

The State concedes that Mr. Marks’ 911 call “was generally cumulative to the testimony of Norman Marks.” (State’s Merit Brief p. 20). Since the 911 call was cumulative to Mr. Marks’ testimony, there was no reason to admit the call except to inflame the emotions and passion of the jurors. Thus, it was error to admit Mr. Marks’ 911 call.

The State further argues that if it was error to admit the tape, that it is harmless. (*Id.*) However, this error is not harmless. Since the 911 call added little to no additional information

to Mr. Marks' testimony, it had a very low probative value, and was solely admitted to inflame the jurors' emotions. The admission of this 911 call over defense counsels' objections, was reversible constitutional error.

3. Media coverage of Johnson.

The State cites *State v. Davis*, 116 Ohio St. 3d 404, 880 N.E.2d 31 (2008), as authority where this Court held that media interviews are admissible evidence as the nature and circumstances of the offense for mitigating value. (State's Merit Brief p. 21). The State is incorrect. This Court did not hold in *Davis* that media interviews were admissible evidence which a jury should examine for mitigating value when looking at the nature and circumstances of the offense. *See Davis*, 116 Ohio St. 3d 404, 880 N.E.2d 31. *Davis* merely states that "a prosecutor may legitimately refer to the nature and circumstances of the offense, both to refute any suggestion that they are mitigating and to explain why the specified aggravating circumstance[s] outweigh mitigating factors..." *Id.* at 447. The court never addressed any media coverage and in fact media coverage was not even an issue in the case. The State's reliance on *Davis* for the reason they proposed is misplaced and erroneous. The admission of the interviews during the sentencing phase was improper and created an improper basis for a jury decision.

Proposition of Law No. 4

A capital defendant's right to due process and a fair trial are denied when a prosecutor engages in misconduct during the penalty phase. U.S. Const. Amends. VIII, XIV; Ohio Const. Art. I, § 10.

The prosecutor's personal remarks about Marian Faulkner were prejudicial to Johnson because they effectively foreclosed the jury's consideration of mitigating evidence proffered by Johnson. Two federal courts overturned Johnson's previous death sentence because his original

trial counsel failed to present mitigating evidence that included the testimony of Marian Faulkner. *Johnson v. Bagley*, 544 F.3d 592 (6th Cir. 2008); *Johnson v. Bagley*, 2006 U.S. Dist. LEXIS 97378 (S.D. Ohio April 24, 2006). On remand, Johnson's new trial counsel pointed out that they were going to present the same mitigation evidence that was presented to the federal courts in this case. "It's going to be exactly what was testified to at the federal hearing level." Tr. 13. "We are not deviating." *Id.*

Since this case was remanded back to the trial court only for a new mitigation hearing, the sole issue was Johnson's sentence. Therefore, the jury's only duty was to determine whether the aggravating circumstances outweighed the mitigating factors. In doing so, "the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering as a mitigating factor, any aspect of the defendant's character or record or any circumstances of the offense that the defendant proffers as a basis for a sentence less than death" *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). This requirement includes actions of the State that are intended to preclude jurors from considering mitigating evidence. "The Eighth Amendment mitigation requirement also applies to the actions of prosecutors." *DePew v. Anderson*, 311 F.3d 742, 748 (6th Cir. 2002). "When a prosecutor's actions are so egregious that they effectively 'foreclose the jury's consideration of . . . mitigating evidence,' the jury is unable to make a fair, individualized determination as required by the Eighth Amendment." *Id.* (quoting *Buchanan v. Angelone*, 522 U.S. 269, 277 (1998)).

In its attempt to get another death sentence, the State decided to use improper disparaging remarks against Ms. Faulkner to undercut the effect of her mitigating testimony on Johnson's jury. However, "[i]t is improper for a prosecuting attorney in a criminal case to state his personal opinion concerning the credibility of witnesses or the guilt of a defendant." *Byrd v.*

Collins, 209 F.3d 486, 537 (6th Cir. 2000). Also, the United States Supreme Court has mandated that prosecutors have a duty to “refrain from improper methods calculated to produce a wrongful conviction.” *Berger v. United States*, 295 U.S. 78, 88 (1935). The State ignored this duty and intentionally used improper methods to get a death sentence, and is now crying “harmless error.” (State’s Merit Brief p. 28).

The impact of the State’s personal remarks on Johnson’s jury cannot be overstated. The State made a personal assertion that Marian Faulkner was committing perjury during her testimony at Johnson’s mitigation hearing. “The prosecutor’s opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government’s judgment rather than its own view of the evidence.” *United States v. Young*, 470 U.S. 1, 18 (1985). *See also, Bates v. Bell*, 402 F.3d 635, 644 (6th Cir. 2005) (“Jurors are mindful that the prosecutor represents the State and are apt to afford undue respect to the prosecutor’s personal assessment.”) The State’s improper statements were made even more prejudicial by the trial court when it deemed that the State’s improper remarks were appropriate, overruling the objection of trial counsel. Instead of giving the jury “an appropriate cautionary instruction designed to overcome or dissipate any prejudice that may have been caused” by the prosecutor’s remarks, the trial court stated “its cross-examination.” *United States v. Leon*, 534 F.2d 667, 679 (6th Cir. 1976), Tr. 1263.

Johnson was prejudiced by the prosecutor’s misconduct. The State intentionally used disparaging remarks against Marian Faulkner in an attempt to foreclose the jury’s consideration of her mitigating testimony. The jury would have not only have been swayed by the State’s remarks because they were coming from a state actor of the government, but also the trial court itself led them to believe that these remarks were appropriate. Johnson’s constitutional rights

under the Eighth and the Fourteenth Amendment were violated. Johnson should receive a new mitigation hearing that is free from prosecutorial misconduct.

Proposition of Law No. 5

The sentence of death imposed on Rayshawn Johnson was unreliable and inappropriate. U.S. Const. Amends. VIII and XIV; Ohio Const. Art. I, §§ 9 and 16 and O.R.C. § 2929.05.

The State argues that Johnson's death sentence is appropriate. (State's Merit Brief pp. 29-33). The State's reasons in support of their argument are that the testimony from Johnson's mother, Demeatra Johnson, and grandmother, Marion Faulkner, are incredible and that this Court's previous review of the death penalty remains unchanged. (*Id.*) These arguments are legally and factually incorrect.

Demeatra and Marion are credible. The State to argues that they are incredible, even though the Federal Courts specifically relied upon their testimony to find that Johnson was prejudiced by counsels' failure to present this evidence at the first trial. *Johnson v. Bagley*, 544 F.3d 592, 604 (6th Cir. 2008); *Johnson v. Bagley*, 2006 U.S. Dist. LEXIS 97378, pp. 153-54 (S.D. Ohio April 24, 2006). The State argues that Demeatra and Marion are incredible because their testimony was too different from the first trial and that they were also impeached on cross. (State's Merit Brief pp. 30-31). Their testimony was different from the first trial because trial counsel did not develop these facts and present them during the first trial as found by the Sixth Circuit Court of Appeals. *Johnson*, 544 F.3d at 605. The expert presented at this trial did not present a new alternative theory. (State's Merit Brief p. 32). Dr. Smith presented an expert opinion based upon a competent and thorough investigation. A competent investigation was not completed at the time of the first trial, hence that is one reason why the Federal Courts vacated

Johnson's death sentence and ordered a new sentencing hearing in order for a jury to evaluate these facts.

These facts are not insignificant. The State's argument that none of these facts change this Court's previous analysis is incorrect. (State's Merit Brief pp. 32-33). If these facts were insignificant, the Federal Courts would not have found Johnson to be prejudiced by trial counsels' failure to develop these facts during the first trial. *Johnson*, 544 F.3d at 604; *Johnson*, 2006 U.S. Dist. LEXIS 97378, pp. 153-54. As detailed in his Merit Brief, (Johnson's Merit Brief pp. 37-41), Johnson's death sentence is unreliable and inappropriate because the wealth of mitigation is compelling to call for a sentence less than death.

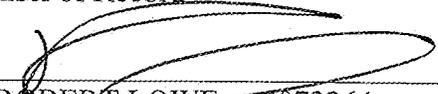
CONCLUSION

For each of the foregoing reasons and the reasons set forth in his merit brief, Rayshawn Johnson's sentence must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Reply Brief of Rayshawn Johnson was forwarded by regular U.S. Mail to Joseph T. Deters, Hamilton County Prosecutor, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202 this 3rd July, 2013.

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