ORIGINAL

NO. 2010-0944

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE CUYAHOGA COUNTY COURT OF COMMON PLEAS
NO. 532145

STATE OF OHIO,

Plaintiff-Appellee

-vs-

JEREMIAH JACKSON,

Defendant-Appellant

APPELLEE'S MEMORANDUM IN RESPONSE TO MOTION TO RECONSIDER AND TO STAY THE ISSUANCE OF MANDATE

DEATH PENALTY APPEAL

Counsel for Defendant-Appellant

DAVID L. DOUGHTEN
4403 St. Clair Avenue
Cleveland, Ohio 44103
(216) 361-1112

JOHN P. PARKER
988 East 185th Street
Cleveland, Ohio 44119
(216) 881-0900

Counsel for Plaintiff- Appellee

TIMOTHY J. McGINTY
CUYAHOGA COUNTY PROSECUTOR

SALEH S. AWADALLAH (00634422)
MARY H. McGRATH (0041381)
Assistant Prosecuting Attorneys
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

RECEIVED
SEP 19 2014
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
SEP 19 2014
CLERK OF COURT
SUPREME COURT OF OHIO

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STATE OF OHIO	)	
Plaintiff-Appellee	)	**MEMORANDUM IN RESPONSE TO MOTION TO RECONSIDER AND TO STAY THE ISSUANCE OF MANDATE**
vs.	)	
JEREMIAH JACKSON	)	
Defendant-Appellant	)	**DEATH PENALTY APPEAL**

Now comes Timothy J. McGinty, Cuyahoga County Prosecutor, by and through his undersigned assistants, and, pursuant to S.Ct.Prac.R. 18.03, respectfully submits Appellee's Memorandum in Response to Appellant Jeremiah Jackson's Motion to Reconsider and to Stay the Issuance of Mandate filed September 11, 2014.

Respectfully submitted,

TIMOTHY J. McGINTY
CUYAHOGA COUNTY PROSECUTOR

SALEH S. AWADALLAH (00634422)
MARY McGRATH (#0041381)
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

BRIEF

Appellee State of Ohio respectfully opposes Appellant Jeremiah Jackson's Motion to Reconsider and to Stay the Issuance of Mandate. Jackson's Motion constitutes an improper re-argument of his first Proposition of Law, which the majority opinion thoroughly considered and rejected. *State v. Jackson*, Slip Opinion No. 2014-Ohio-3707, ¶¶ 58-101. Jackson's Motion should be denied, as he has failed to set forth a proper basis for reconsideration.

Initially, Jackson re-argues that the trial court ordered the defense to file a request for an *Atkins* hearing. This statement is a misrepresentation of the trial court's order and actions. The order provided in part that defense counsel reported having received Dr. Fabian's report, that they provided a copy gratuitously to the prosecutors, and that the defense was to file **any** request for an *Atkins* hearing setting forth the factual foundation for such a hearing. (Journal Entry of March 19, 2010, emphasis added); *State v. Jackson*, Slip Opinion No. 2014-Ohio-3707, ¶ 65. The record establishes that the trial court did not order defense counsel to file a motion for an *Atkins* hearing.

Jackson re-argues that a "reverse-*Atkins*" hearing was held. No *Atkins* hearing, reverse or otherwise, was held. As found by the majority opinion, Jackson's self-titled "reverse-*Atkins*" hearing was "a misnomer, and the record does not indicate that the hearing was held for this purpose." *Jackson*, ¶ 80.

Jackson re-argues the trial court invaded the trial preparation of the defense, comparing the court's action to requiring a prosecutor or civil attorney to have an expert testify before trial to ensure counsel was doing its duty. The majority opinion properly rejected this claim. The trial court's purpose was not to delve into defense counsel's preparation. Noting Jackson's low IQ numbers, the court held the hearing as part of the court's duty to ensure Jackson received a fair trial, including whether he was mentally retarded and therefore ineligible for the death penalty.

> Instead, the trial court conducted the hearing to ensure that Jackson received a fair trial and to ensure the appropriateness of proceeding to trial with a potential death sentence. The trial court emphasized the importance of holding the hearing, because an *Atkins* hearing must be conducted during the trial and not later. *See State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263, ¶ 155 (defendant waives an *Atkins* claim by not raising it at trial). It is also clear that the trial court conducted the hearing with an open mind and would have ordered a further evaluation of Jackson if the evidence indicated that he might be mentally retarded.

Id.

Jackson re-argues the trial court's action of conducting the hearing interfered with an already fragile attorney-client relationship and violated work-product. The majority opinion properly rejected this claim, finding that "Jackson's generalized claim fails to explain how the trial court's action had any adverse impact on the attorney-client relationship." *Jackson*, ¶ 89. With respect to a claimed work-product violation, the trial court did not order the defense to provide the State a copy of Dr. Fabian's report. Instead, trial counsel gratuitously provided a copy of Dr. Fabian's report to the State. (Journal Entry of March 19, 2010).

Finally, Jackson makes much of the fact that the trial judge eventually was a factfinder as part of the three judge panel. Jackson states that the trial judge heard "strong evidence in mitigation" of his low intelligence "up front." Citing *State v. Gillard*, 40 Ohio St.3d 226, 533 N.E.2d 272 (1988), overruled in part on other grounds, *State v. McGuire*, 80 Ohio St.3d 390, 402-403, 686 N.E.2d 1112 (1997), Jackson again argues a different judge should have conduct the "*Atkins*" hearing so the trial judge's ultimate decision was not influenced. As the majority opinion pointed out, "testimony about mental retardation is not similar to testimony that the defendant may have intimidate witnesses." *Jackson*, ¶ 86.

Contrary to the situation in *Gillard*, Jackson's trial judge heard "strong evidence in mitigation" of his low intelligence "up front," as opposed to hearing information harmful to a defendant that may cause a judge to harbor bias. Instead of possibly "blunting the expert testimony's impact" as found by Justice O'Neill, the trial judge had the benefit of hearing mitigating evidence in Jackson's favor before mitigation. *Jackson*, ¶ 313.

Jackson has not presented this Honorable Court with any new argument or point of law to support reconsideration of this Court's opinion. The majority opinion

properly considered and rejected Jackson's claim of bias and impartiality. As Jackson's motion constitutes an improper re-argument of the case, the State respectfully requests it be denied.

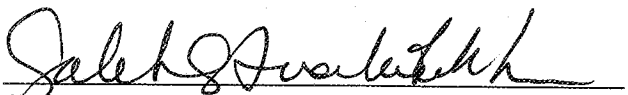
Respectfully submitted,

TIMOTHY J. McGINTY
CUYAHOGA COUNTY PROSECUTOR

SALEH S. AWADALLAH (00634422)
MARY McGRATH (#0041381)
Assistant Prosecuting Attorneys
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

CERTIFICATE OF SERVICE

A copy of the foregoing Appellee's Memorandum in Response to Appellant Jeremiah Jackson's Motion to Reconsider and to Stay the Issuance of Mandate has been sent by regular U.S. Mail and/or electronic service this 18th day of September, 2014, to David Doughten, 4403 St. Clair Avenue, Cleveland, Ohio 44103 and John Parker, 988 East 185th Street, Cleveland, Ohio 44119, attorneys for Appellant Jeremiah Jackson.



SALEH S. AWADALLAH (00634422)
MARY McGRATH (#0041381)