

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 :
 -vs- : Case No. 08-1012
 :
 DAVID B. CLINKSCALE, : On Appeal from the Franklin County
 : Court of Appeals, Tenth Appellate
 Defendant-Appellant. : District

APPELLANT DAVID B. CLINKSCALE'S MOTION TO
SUPPLEMENT THE RECORD

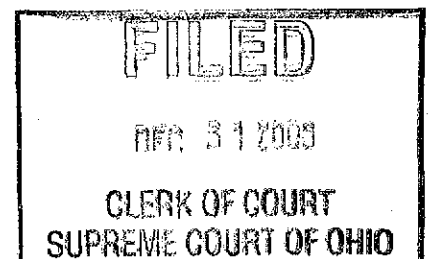
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**APPELLANT DAVID B. CLINKSCALE'S MOTION
TO SUPPLEMENT THE RECORD**

Now comes Defendant-Appellant, David B. Clinkscale, by and through counsel, and pursuant to Supreme Court Rule of Practice V, §6 hereby requests that a supplemental record containing the post-conviction affidavit of trial attorney Gerald Simmons be certified and transmitted to the Clerk of the Supreme Court.¹ This Motion is supported by the attached Memorandum in Support.

Respectfully submitted,



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**MEMORANDUM IN SUPPORT OF APPELLANT DAVID B. CLINKSCALE'S
MOTION TO SUPPLEMENT THE RECORD**

Supreme Court Rule of Practice V, entitled Transmittal of Record on Appeal, details the manner in which the lower court record is to be transmitted and filed in the Supreme Court of Ohio. Pursuant to Section 3 of the Rule, this Court issued an Order to Certify the Record to the Clerk of the Franklin County Court of Appeals on September 10, 2008. The Order provided that "[t]he record shall include, where applicable, all of

¹ The affidavit of trial attorney Gerald Simmons was attached to Clinkscale's petition for post-conviction relief as Exhibit A, and filed in Clinkscale's trial court case [*State of Ohio v. David B. Clinkscale*, Franklin C.P. No. 97CR-09-5339] on June 8, 2007. A copy of the Simmons' affidavit is also attached to this Motion as Exhibit A.

the [original papers and exhibits to those papers] from both the court of appeals and trial court cases.”

Pursuant to this Order, the Clerk of the Franklin County Court of Appeals filed the record in this Court on October 22, 2008. The record included all of the original papers [and exhibits to those papers] filed in the trial court case [*State of Ohio v. David B. Clinkscale*, Franklin C.P. No. 97CR-09-5339] through April 1, 2007. The record does not, however, include the affidavit of trial attorney Gerald Simmons, attached to Clinkscale’s petition for post-conviction relief as Exhibit A, and filed in the trial court case on June 8, 2007.

Supreme Court Rule of Practice V further provides:

Section 6. Supplementation of the Record.

If any part of the record is not transmitted to the Supreme Court but is necessary to the Supreme Court’s consideration of the questions presented on appeal, the Supreme Court, on its own initiative or upon stipulation of the parties or motion of a party, may direct that a supplemental record be certified and transmitted to the Clerk of the Supreme Court.

For the following reasons, Appellant requests that a supplemental record containing the affidavit of trial attorney Gerald Simmons be certified and transmitted to the Clerk of the Supreme Court.

On December 23, 2008, the State filed a Motion to Strike Part of Reply Brief and Attached Affidavit (hereafter “Motion”), asking this Court to strike portions of Appellant’s Reply Brief and the post-conviction affidavit of trial attorney Gerald Simmons demonstrating that the State learned that the dismissed juror was the sole dissenter shortly after the verdict was returned. (Motion, p. 1). In its Motion the State did not dispute the fact that the dismissed juror was the sole dissenter. Nor did the State

dispute the fact that the trial prosecutor was told by the jury foreman shortly after the verdict was returned that the dismissed juror was the sole dissenter.

Rather, the State argued that the affidavit of Gerald Simmons should be stricken because it was not part of the record reviewed by the Court of Appeals. (Motion, pp. 2-3). For the following reasons, Appellant's motion to supplement the record with the post-conviction affidavit of trial attorney Gerald Simmons should be granted.

As set forth in Appellant's Reply Brief, the State does not contest the fact that the dismissed juror was the "sole dissenter" at the time of her excusal, but asserts that Appellant's appeal should be dismissed because there is insufficient support in the record for such a finding. Brief of Appellee, p. 2. While acknowledging that Judge Whiteside made that finding in his dissent, the State asserts that Judge Whiteside's factual finding is somehow legally insufficient. *Id.*

As also set forth in Appellant's Reply Brief, neither Judge Klatt, who wrote the majority opinion in the Court of Appeals, nor Judge Tyack, who wrote a concurring opinion, disputed Judge Whiteside's finding that the dismissed juror was the sole dissenter. Nor did the State ever challenge the fact that dismissed juror was the sole dissenter in the Court of Appeals, either in its briefing or at oral argument.

Although the State has long known that the dismissed juror was the sole dissenter, the State now argues to this Court that the dissenting juror may not have been dismissed and could well have remained on the jury:

Contrary to defendant's and Judge Whiteside's contentions, there is no indication whatsoever in the appellate record (not even in counsel's comments) that the excused juror was a vote for acquittal. The jury question about a juror believing the testimony of one witness could never be enough did not identify the juror who held that belief. **It could have been any of the jurors, not necessarily the juror who was excused.**

The excused juror's heart palpitations could have arisen from the stress of deliberations generally, perhaps because *another* juror was being difficult in holding to the legally-incorrect position that corroboration was required.

Brief of Appellee, pp. 25-26. (Emphasis added; italics in original.) The State further argues:

In addition, the jury's returning of guilty verdicts within a few hours of the excusal and substitution does not show that the excused juror was a dissenting juror. The court had correctly instructed the jury that "the final test in judging evidence should be the force and weight of the evidence regardless of the number of witnesses on each side of the issue. The testimony of one witness that is believed by you is sufficient to prove any fact." (T. 1495) Corroboration is not legally required. **The juror who had believed that corroboration was required could have remained on the jury and could have merely been following the court's correct jury instruction.** Whether or not the excused juror held a similar view is simply not shown by this record.

Brief of Appellee, p. 26. (Emphasis added; footnote omitted.)

The Ohio Rules of Professional Conduct, which became effective on February 1, 2007, set forth the special duties of lawyers as officers of the court. They must avoid conduct which undermines the integrity of the adjudicative process. Rule 3.3 of the Ohio Rules of Professional Conduct provides in pertinent part:

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

- (a) A lawyer shall not knowingly do any of the following:
 - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

* * *

The Commentary to Rule 3.3 further provides:

This rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an

obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, **the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.**

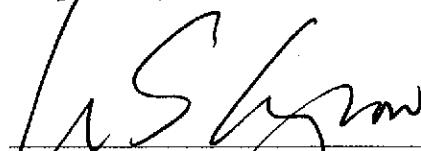
(Emphasis added.)

Here, the State has run afoul of the Ohio Rules of Professional Conduct by basing its legal arguments on facts known to be false. As such, Appellant should be permitted to submit evidence to rebut the State's knowingly false assertions. Furthermore the post-conviction affidavit of trial attorney Gerald Simmons is particularly relevant in this matter since the same assistant prosecuting attorney who now represents the State before this Court previously represented the State in regard to Appellant's post-conviction action.

CONCLUSION

For the foregoing reasons, Appellant's Motion to Supplement the Record should be granted.

Respectfully submitted,

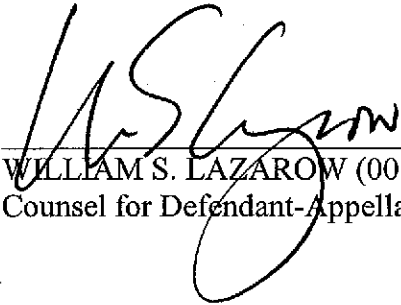


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Counsel for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing APPELLANT DAVID B. CLINKSCALE'S MOTION TO SUPPLEMENT THE RECORD was forwarded by regular U.S. mail to Ron O'Brien, Franklin County Prosecuting Attorney, and Steven L. Taylor, Assistant Prosecuting Attorney, 373 S. High Street, 13th Floor, Columbus, Ohio 43215, on the 31st day of December, 2008.


WILLIAM S. LAZAROW (0014625)
Counsel for Defendant-Appellant

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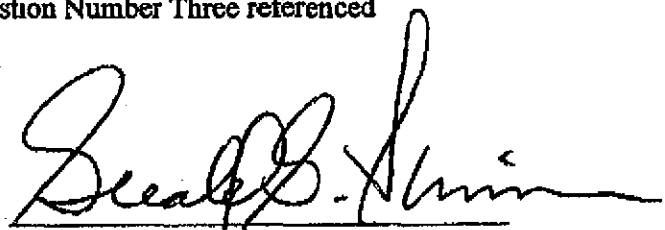
9 Ten minutes after Judge Cain told the jury that a hung jury would require "many more hours of deliberation", the jury foreman submitted the following question

We have one member who is not comfortable making a guilty verdict based on the testimony of one person (in this case Todne Williams) This inability is not specific to this witness. The juror does not believe a guilty verdict could ever be declared without more evidence. This issue appears to not be resolvable with more time and discussion. Any advice would be appreciated
(See Appendix)

- 10 Judge Cain called me at home to inform me of this question, and I returned to the courthouse in an effort to assist in formulating a response. Since this was a complicated question, and the parties were unable to agree upon a response that late on a Friday afternoon, the jury was excused for the weekend, at their request.
- 11 On Monday morning, September 11, 2006, I returned to the courthouse with supplemental jury instructions that I believed should be given in response to the jury's third question.
- 12 While I was reviewing my proposed jury instructions, Judge Cain's bailiff told us that Juror Number Three was in Judge Cain's office behind closed doors. We were told that Juror Number Three had experienced heart palpitations and did not want to remain on the jury. Judge Cain had left for vacation and his chambers mate, Judge Julie Lynch, was presiding. The defense was unaware of any conversations between Judges Lynch and Cain to that point.
- 13 Moments later, Judge Lynch gave the prosecutor and me an additional jury instruction. This instruction was pretty much what the prosecutors had argued the previous Friday in Judge Cain's chambers and which Mr. DiMartino and I had objected to as too narrow. Judge Lynch then went into Judge Cain's office to meet with Juror Number 3 alone.
- 14 We began reviewing Judge Lynch's supplemental instruction while she met with Juror Number Three.
- 15 At no time did Judge Lynch ever tell me that Juror Number Three was going to be excused.
- 16 During my review of Judge Lynch's supplemental instruction, and while Juror Number Three was in Judge Cain's chambers, I told the prosecutor that I wondered whether Juror Number Three was the dissenting juror that the juror questions had referenced.
- 17 The prosecutor asked me whether I wanted to ask her that question.
- 18 At that time I responded no because I believed that we would later be able to voir dire Juror Number Three on her request to be excused.
- 19 I did not learn of Juror Number Three's dismissal until Judge Lynch stated that the juror had a medical issue and had been excused.

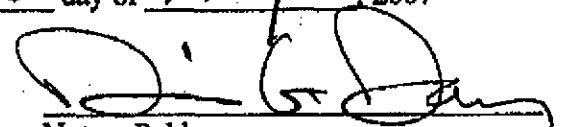
- 20 I did not formally object on the record to this process or when the alternate juror was sworn in because Juror Number Three had already been dismissed and had left
- 21 I later placed an objection on the record
- 22 Had I thought about it at the time the juror substitution had taken place, I would have objected to the new juror and requested that Judge Lynch declare a mistrial
- 23 Had Judge Lynch consulted with me before dismissing Juror Number Three, I would never have agreed to that juror's dismissal
- 24 I wanted to voir dire Juror Number Three and find out what brought on the heart palpitations
- 25 I would have wanted to explore whether Judge Cain's instruction that "many more hours of deliberation" was needed before a hung jury could have been declared, brought about added stress to this juror, contributing to her request to be excused
- 26 Furthermore, I would have wanted to address the question relating to the juror who needed more evidence before rendering a guilty verdict
- 27 Based upon the answers I received to these initial questions, I would have asked Juror Number Three a number of follow-up questions in order to assure myself that she was not being unduly pressured by the remaining jurors in an effort to get her to violate her oath as a juror to "diligently inquire into and carefully deliberate all matters between the State of Ohio and the defendant David Chnkscale" and to do this "to the best of [her] skill and understanding, without bias or prejudice"
- 28 After the guilty verdicts were returned, the prosecutor and I met with a number of the jurors in the jury room and were told by the jury foreman that Juror Number Three was the dissenting juror that Question Number Three referenced

Further Affiant sayeth naught



 Gerald Simmons

Signed and sworn before me this 30 day of MAY, 2007



 Notary Public

#257221

DENNIS G. DAY, Attorney-At-Law
 NOTARY PUBLIC - STATE OF OHIO
 My commission has no expiration date.
 Section 147.03 R.C.

DO WE GET A COPY OF THE TRANSCRIPTS
AS STANDARD PROCEDURE? NS

55092E08

~~DO~~ CAN WE GET SPECIFIC TESTIMONY
UPON REQUEST? WHAT PROCESS?

W. H. L.

3:27 PM
9-8-06

Please rely on your
collective memory of
the testimony.

W. H. L.

9/8/06
at 3:55 p.

~~WE~~ ~~HAVE~~

55092E09

WHAT WOULD REQUIRE DECLARATION OF
HUNG JURY?

Ada Snyd

Many more hours
of deliberations.

W. K. L.

9/8/06

4:40 p.

A-5

WE HAVE ONE MEMBER WHO IS NOT COMFORTABLE
MAKING A GUILTY VERDICT BASED ON THE TESTIMONY
OF ONE ~~PERSON~~ PERSON (IN THIS CASE TODNE WILLIAMS)
~~THIS~~ THIS INABILITY IS NOT SPECIFIC TO THIS WITNESS
THE JUROR DOES NOT BELIEVE A GUILTY VERDICT
COULD EVER BE DECLARED WITHOUT MORE EVIDENCE.
THIS ISSUE APPEARS TO [^]BE RESOLVABLE WITH TIME [^]AND DISCUSSION. _{NOT} _{MORE}

~~ANY~~ ~~ADVICE~~ ~~WOULD~~ BE APPRECIATED.

Mr. [Signature]

4:50 PM 9-8-06

55092E10