

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :

Plaintiff-Appellee, :

-vs- :

Case No. 08-0711

RICHARD E. JOSEPH, :

Defendant-Appellant. :

ON APPEAL FROM THE COURT OF APPEALS, THIRD
APPELLATE DISTRICT, ALLEN COUNTY, APP. NO. 1-07-50

APPELLANT RICHARD E. JOSEPH'S
MEMORANDUM IN SUPPORT OF JURISDICTION

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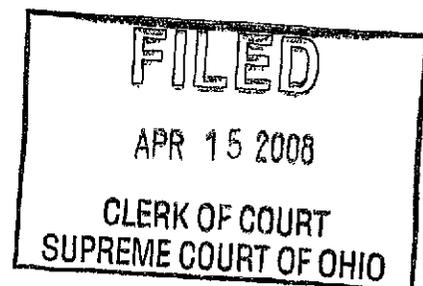


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EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Richard Joseph raises two propositions of law in this memorandum. The Court should accept jurisdiction as to both issues because each has an impact upon other cases.

In Proposition of Law No. I, Appellant challenges the manner in which the trial court imposed court costs. The trial court never addressed the issue at the sentencing hearing. It initially imposed costs in the sentencing entry. As detailed in the body of this Proposition, there is a division in the appellate courts as to whether a trial court can impose costs in the sentencing entry, having not addressed the issue in open court. The State in its merit brief in the court of appeals did not oppose this assignment. Appellant has filed a motion to certify which the state has not opposed. This issue deserves the Court's consideration.

In Proposition of Law No, II, Appellant raises as error the trial court's consideration and inclusion in the presentence investigation report of the proffer statement that both defendants made during plea negotiations. Judge Rogers dissented on this issue in the court of appeals. At the time of the proffer, the parties specifically enumerated the uses of the proffer and provided that the proffer could not be "used for any other purpose." The majority opinion held that this phrase did not preclude use of the proffer at the sentencing hearing. Proffer statements are an important tool for both parties in plea negotiations. As Judge Rogers concluded, the holding of the court of appeals

will certainly make defense counsel leery of using proffers if the language used by the parties in the proffer agreement to protect the defendant can easily be circumvented. It will reduce the number of cases resolved by plea bargains and increase the workload for the court system. This issue deserves the Court's consideration.

COMBINED STATEMENT OF THE CASE AND FACTS

On November 6, 2006, the United States Court of Appeals for the Sixth Circuit vacated Richard Joseph's ("Appellant") conviction for capital murder and remanded the matter for re-sentencing as to the offense of aggravated murder. *Joseph v. Coyle*, 469 F. 3d 441 (6th Cir. 2006).

On April 20, 2007, the trial court held in chambers an unrecorded pretrial/scheduling conference. The court, at the conclusion of that conference scheduled another conference for May 31, 2007. The court ordered Appellant, but not the state, to submit briefing on the issues of whether the court could consider and publicize a January 2, 1991 proffer statement. On April 27, 2007, Appellant timely submitted his briefing.

On May 31, 2007, the trial court held a recorded status conference in open court. The court ordered that the parties submit briefing on the issue of the inclusion of the January 2, 1991 proffer statement in the pre-sentence investigation. On June 1, 2007, the state submitted its briefing in the form of a motion, which was two pages in length and contained no authority. On June 4, 2007, Appellant submitted his briefing, which contained citations to applicable case law, rules, and constitutional provisions.

On June 6, 2007, the trial court conducted the sentencing hearing. It granted in part the state's motion to incorporate the January 2, 1991 proffer statement. [Sent Tr. 4]. The court sentenced Appellant to twenty years to life without making any provision as to court costs. [Sent. Tr. 22]. The court proceeded, over objection, to order that a part of the pre-sentence investigation be released to the public and media. [Sent. Tr. 25]. The court refused to stay that order pending appeal. [Sent. Tr. 25].

On June 14, 2007, the trial court placed its sentencing entry of record. For the first time therein, it ordered Appellant to pay the costs of prosecution and entered judgment for the court costs.

On July 13, 2007, Appellant timely filed his notice of appeal. Both sides submitted briefs. The state did not oppose the remand of the case because of the trial court's failure to impose court costs in open court.

On March 17, 2008, a divided court of appeals affirmed the sentence imposed by the trial court. *State v. Joseph*, Allen App. No. 1-07-50, 2008-Ohio-1138. Judge Rogers found error in the trial court's inclusion of the proffer statement in the pre-sentence investigation.

On March 26, 2008, Appellant moved the appellate court to certify its judgment with respect to the court cost issue. Appellee did not oppose the motion. Appellant's motion to certify the court cost issue remains pending before the appellate court.

PROPOSITION OF LAW NO. I

A TRIAL COURT LACKS THE AUTHORITY TO IMPOSE COURT COSTS IN ITS SENTENCING ENTRY, WHEN IT DID NOT IMPOSE COSTS WHEN PRONOUNCING SENTENCE IN OPEN COURT.

At the sentencing hearing, the trial court did not order Appellant to pay court costs. [Sent Tr. 22]. The trial court in its judgment entry, however, ordered "Defendant is to pay costs, Judgment for costs." [Judgment Entry, p. 2]. The trial court lacked the authority to impose the sanction of court costs in the sentencing entry, when it had not imposed the sanction in open court. The purpose of the journal entry is to memorialize the sentence it imposed in open court and not to impose additional sanctions that it did not announce in open court.

A court may only sentence a defendant in his or her presence at the sentencing hearing. Crim.R. 43(A) ("The defendant shall be present at . . . the imposition of sentence"); Fifth, Sixth and Fourteenth Amendments to the United States Constitution; *United States v. Wade*, 388 U.S. 218, 227-8 (1967) (right of presence through counsel at critical stages), *Mempa v. Rhay*, 389 U.S. 128, 134 (1967) (sentencing is a critical stage of the proceedings). This Court has reached the same conclusion with respect to other sentencing sanctions. *State v. Comer*, 99 Ohio St. 3d 463, 2004-Ohio-4165, ¶27 (trial court is required to making findings at sentencing hearing); *State v. Brooks*, 103 Ohio St. 3d 134, 2004-Ohio-4746, Syllabus 1 (when sentencing a defendant to community control sanction, the trial court is required to deliver the required notifications in open court); *State v. Jordan*, 104 Ohio St. 3d 21, 2004-Ohio-

6085, Syllabus 1 (trial court is required to notify defendant in open court concerning post release control). A defendant is not present when the judge signs the sentencing entry, so any additional punishments contained therein violate Crim Rule 43(A), and the Due Process and Right to Counsel Clauses of the Ohio and Federal Constitutions.

Other appellate courts have held that it is error for a trial court impose costs in the sentencing entry when the trial court did not impose costs at the sentencing hearing. *State v. Peacock*, Lake App. No. 2002-L-115, 2003-Ohio-6772, ¶45; *State v. Smoot*, Franklin App. No. 05AP-104, 2005-Ohio-5326, ¶13; *State v. Triplett*, Cuy. App. No. 87788, 2007-Ohio-75, ¶¶28-29. In the present case the appellate court acknowledged these decisions but noted “We have rejected this argument before as well and decline to overrule our precedent.” *State v. Joseph*, 2008-Ohio-1138 at ¶10.

The State, in its merit brief, did not contest that the trial court had erred, “Accordingly, it is likely that this court will determine that the sentence in the instant case should be reversed and the matter remanded for resentencing so the issue of court costs may be *corrected*.” *State v. Joseph*. Allen App. No. 1-07-50, Brief of Plaintiff-Appellee, p. 8 (emphasis added). Since the lower court’s decision Appellant moved that Court to certify the court cost issue. Appellee has not opposed the motion.

This Court should exercise its jurisdiction and accept this issue for review. The lower courts are divided on this issue. Appellant’s constitutional

rights were violated when the trial court imposed a sanction outside his presence.

PROPOSITION OF LAW NO. II

A TRIAL COURT CONSIDER CANNOT CONSIDER FOR PURPOSES OF SENTENCING A PROFFER STATEMENT MADE IN THE COURSE OF PLEA NEGOTIATIONS WHEN THE PARTIES HAVE EXPRESSLY LIMITED THE USE OF THE PROFFER AND THOSE TERMS DO NOT INCLUDE SENTENCING.

On June 1, 2007, prior to resentencing, the state filed a motion to admit a copy of a January 2, 1991 proffer statement that was made during the course of the pretrial negotiations. The prosecution submitted *no* authority for its request. On June 4, 2007, Richard Joseph filed a memorandum contra. The pleading cited to the relevant case law, rules, and constitutional provisions.

The trial court at the sentencing hearing, entertained oral argument on the prosecutor's motion. [Sent. Tr. 2-4]. The court then granted the motion in part with respect to the statements made by the co-defendant in the joint proffer. [Sent. Tr. 4]. The trial court, in reaching its conclusion, cited to no case law. [*Id.*]. It instead found that the parties had reasonably anticipated that the statement would be used in the course of sentencing proceedings. [*Id.*].

I. THE PARTIES HAD AGREED THAT PROFFER WOULD ONLY BE EMPLOYED FOR NEGOTIATION AND IMPEACHMENT PURPOSES.

On January 2, 1991, the two defendants in this matter and their respective counsel engaged in plea negotiations with the prosecution. Pursuant to those discussions, Jose Bulerin, the co-defendant proffered a twenty-four

page statement at the conclusion of which Richard Joseph proffered four responses that consisted in their entirety of either “yes” or “yes, sir.” [Statement, p. 23]

At the beginning of the proffer, counsel to insure that the proffer would not be used to the detriment of either defendant, provided the following ground rules.

the Statements are being given in furtherance of ‘plea’ negotiations pursuant to the rules of evidence in [sic] the relevant case law, which indicates that since they are for purposes of ‘plea’ discussions and ‘plea’ negotiations, that they are not admissible at trial, unless one or both of the co-defendants would like to take the stand in their own defense and testify differently from the facts that are about to be related. (emphasis in original)

[Statement, page 1]

At the conclusion of the proffer, counsel again emphasized that the proffer was “for purposes of furthering ‘plea’ negotiations in this case. Everybody understands that’s the purpose of this Interview and it is *not to be used for any other purpose.*” [Statement, p. 24] (emphasis added) The language of the agreement could not have been any more clear, the proffer was to be used only for plea negotiations and impeachment at trial. The agreement contained no exception for sentencing.

II. THE PROSECUTION IS BOUND BY THE JANUARY 2, 1991 AGREEMENT

Parties in criminal case are bound by the terms of pretrial agreements absent a demonstration that they involuntarily or unintelligently entered into the agreements. *Town of Newton v. Rumery*, 480 U.S. 386, 397 (1987); *Ricketts v. Adamson*, 483 U.S. 1, 12 (1987). Pretrial agreements

entered into by the prosecution are binding upon the prosecution. *Santobello v. New York*, 404 U.S. 257, 261 (1971). In that case the prosecution agreed during plea negotiations not to make a sentencing recommendation. Subsequently the prosecution violated the agreement by recommending that the defendant be sentenced to the maximum sentence. The Supreme Court found that the prosecutor's actions violated the Fourteenth Amendment. The Court reasoned that plea negotiations "presuppose fairness in securing agreement between an accused and a prosecutor." *Id.* at 261. The Court went on to hold that the plea bargaining phase "must be attuned by safeguards to insure the defendant what is *reasonably due in the circumstances.*" *Id.* at 262.

Even absent federal constitutional considerations, the proffer statement was inadmissible pursuant to state law. Proffer statements are "not admissible *in any civil or criminal proceeding...*" Evid.R. 410(A). The parties specifically incorporated Evid.R. 410 into their agreement: these "[s]tatements are being made too [sic], the Prosecuting Attorney, in contemplation with the relevant rule of evidence." The resentencing proceedings constituted a "criminal proceeding."

III. THE COURT OF APPEALS INCORRECTLY INTERPRETED THE PHRASE "ANY OTHER PURPOSE."

The court of appeals found that the term "any other purpose" should be "interpreted in the context of the parties' prior discussion relating to the rules of evidence and the statement's admissibility at trial." *State v. Joseph*, 2008-Ohio-1138, ¶ 15. The appellate court found that the phrase "any other

purpose” only precluded the “the proffer statement from being used against Joseph as an admission during guilt at trial.” *Id.* In reaching this conclusion, the appellate court ignored the statement of the parties that the proffer was to be used only “*for purposes of furthering ‘plea’ negotiations in this case.*” [Statement p. 24] (emphasis added) If that statement was not clear, then the very next sentence of the agreement made it clear, “[e]verybody understands that’s the purpose of this Interview and it is *not to be used for any other purpose.*” *Id.* (emphasis added) Certainly defense counsel had not agreed, as the appellate court suggested, that the prosecution could use the statement at sentencing.

If the Court should find it necessary to go beyond the clear and unambiguous language of the agreement, then this Court should examine the intent of defense counsel, which was both to engage in plea negotiations, but at the same time to protect the defendant from being harmed in any manner from the prosecution’s use of the proffer. Defense counsel would have wanted to protect the defendant both with respect to guilt and sentencing. No defense counsel would reasonably agree to a proffer if prosecution could later use the statement to increase a defendant’s sentence or deny him parole.

The appellate decision will have a chilling effect on negotiations in other cases. Defense counsel will be much less likely to engage in proffers for plea purposes if the phrase for “no other purpose” is narrowly interpreted to permit use of the proffer to the detriment of a defendant. Judge Rogers, in his concurring opinion noted this fact, “If there are to be meaningful negotiations

between the prosecution and defense in criminal cases, the prosecution's comments as to the purpose and use of statements of defendants should also be strictly construed against the State. I would sustain the second assignment of error and direct the trial court to redact the subject statements from the presentence report." *State v. Joseph*, 2008-Ohio-1138, ¶32.

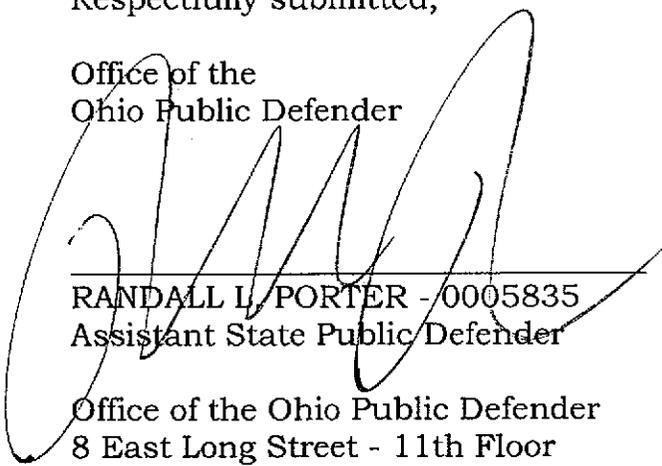
This Court should accept jurisdiction with respect to this issue. It should use this case to clarify that in plea negotiations the phrase "no other purpose" means just that.

CONCLUSION

This Court should grant jurisdiction and summarily grant Richard Joseph relief. In the alternative, this Court grant jurisdiction and set this matter for full briefing and oral argument.

Respectfully submitted,

Office of the
Ohio Public Defender



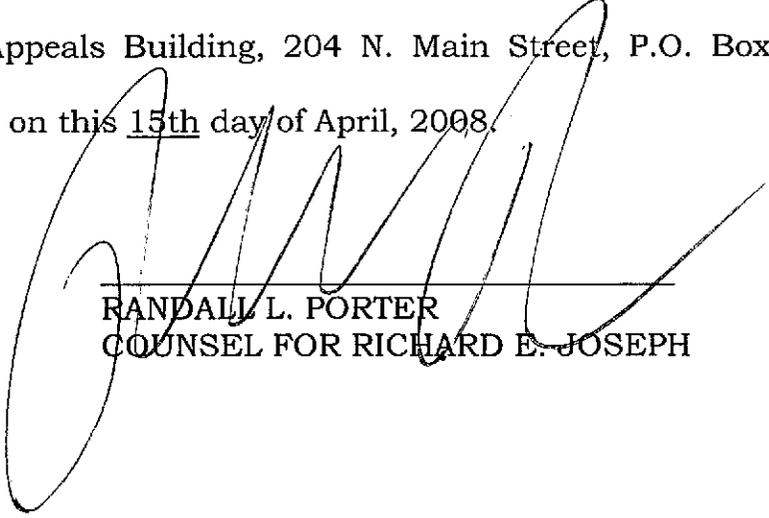
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Appellant Richard E. Joseph's Memorandum In Support Of Jurisdiction* was forwarded by first-class, postage prepaid U.S. Mail to Allen Assistant County Prosecuting Attorney Jana E. Emerick, Court of Appeals Building, 204 N. Main Street, P.O. Box 1243, Lima, Ohio 45802-1243 on this 15th day of April, 2008.



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IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 :
 -vs- : Case No.
 :
 RICHARD E. JOSEPH, :
 :
 Defendant-Appellant. :

ON APPEAL FROM THE COURT OF APPEALS, THIRD
APPELLATE DISTRICT, ALLEN COUNTY, APP. NO. 1-07-50

APPENDIX TO APPELLANT RICHARD E. JOSEPH'S
MEMORANDUM IN SUPPORT OF JURISDICTION

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COURT OF APPEALS
IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

ALLEN COUNTY

2008 MAR 17 PM 1:01

STATE OF OHIO,

CASE NUMBER 1-07-50

PLAINTIFF-APPELLEE,

JOURNAL

v.

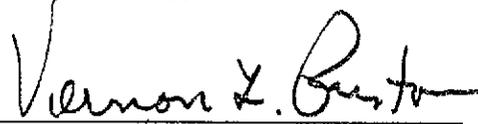
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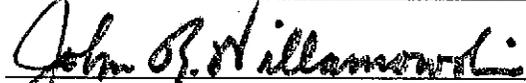
RICHARD E. JOSEPH,

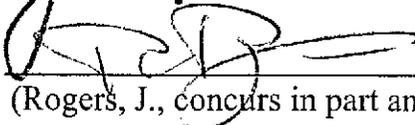
DEFENDANT-APPELLANT.

For the reasons stated in the opinion of this Court rendered herein, the assignments of error are overruled, and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs to appellant for which judgment is rendered and the cause is remanded to that court for execution.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge and parties of record.







(Rogers, J., concurs in part and dissents in part)
JUDGES

DATED: March 17, 2008

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
ALLEN COUNTY**

COURT OF APPEALS
FILED

2008 MAR 17 PM 1:01

W. C. STALL / DURL
CLERK OF COURTS
ALLEN COUNTY, OHIO

STATE OF OHIO,

CASE NUMBER 1-07-50

PLAINTIFF-APPELLEE,

v.

OPINION

RICHARD E. JOSEPH,

DEFENDANT-APPELLANT.

CHARACTER OF PROCEEDINGS: Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: March 17, 2008

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For Appellee.

PRESTON, J.

{¶1} Defendant-appellant, Richard E. Joseph (hereinafter “Joseph”), appeals the Allen County Court of Common Pleas judgment of sentence imposed as a result of resentencing mandated by the Federal Sixth Circuit Court of Appeals. For reasons that follow, we affirm.

{¶2} In 1990, Joseph and co-defendant Jose Bulerin were jointly indicted for the aggravated murder of Ryan Young. The indictment also provided for a death penalty specification pursuant to R.C. 2929.04(A)(7). In January 1991, a jury trial was held wherein Joseph was found guilty and sentenced to death.

{¶3} On December 23, 1993, this Court affirmed Joseph’s conviction and sentence of death. *State v. Joseph*, 3d Dist. No. 1-91-11. On August 30, 1995, the Ohio Supreme Court affirmed our decision. *State v. Joseph* (1995), 73 Ohio St.3d 450, 653 N.E.2d. 285. On March 18, 1996, the U.S. Supreme Court denied Joseph’s petition for writ of certiorari. *Joseph v. Ohio*, 516 U.S. 1178, 116 S.Ct. 1277, 134 L.Ed.2d 222.

{¶4} Thereafter, Joseph filed a writ of habeas corpus in federal district court. *Joseph v. Coyle* (N.D. Ohio Dec. 22, 2004), No. 1:98 CV 527 (Memorandum of Opinion and Order). The federal court ordered Joseph’s death sentence be set aside and that he be resentenced to life imprisonment with parole eligibility after twenty years as mandated by R.C. 2929.03(A).

{¶5} Joseph then appealed the district court's judgment with respect to his conviction. The State cross-appealed the federal district court's grant of writ of habeas corpus as to the imposed sentence of death. On November 9, 2006, the Sixth Circuit Court of Appeals affirmed the district court's issuance of the writ with respect to the death penalty but denied Joseph's remaining claims. *Joseph v. Coyle* (6th Cir. 2006), 469 F.3d 441. On March 19, 2007, the U.S. Supreme Court declined to review the Sixth Circuit's determination. *Houk v. Joseph* (2007), 127 S.Ct. 1827, 167 L.Ed.2d 321.

{¶6} On April 20th and May 31st of 2007, the Allen County Court of Common Pleas held pretrial conferences with the parties. On June 6, 2007, the trial court held a sentencing hearing wherein it sentenced Joseph to life imprisonment with eligibility for parole in twenty years per the federal court's order. On June 14, 2007, the trial court filed its judgment entry of sentence.

{¶7} Joseph appeals the trial court's sentence and asserts four assignments of error for review.

ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ERRED WHEN IT INCLUDED A PUNISHMENT IN THE WRITTEN SENTENCING JUDGMENT, THAT IT HAD NOT IMPOSE [SIC] FROM THE BENCH. [SENT. TR. 22, JUDGMENT. ENTRY, P.2]

{¶8} In his first assignment of error, Joseph argues that the trial court erred by imposing costs in its written judgment entry when it did not impose costs

on the record at the sentencing hearing. The State of Ohio conceded in its brief and at oral argument that the judgment entry was in error for the reason cited by Joseph. We disagree.

{¶9} This Court has previously held that a trial court is not required to orally address a defendant at the sentencing hearing to inform him that he is required by R.C. 2947.23 to pay for the costs of prosecution. *State v. Ward*, 3d Dist. No. 8-04-27, 2004-Ohio-6959, ¶16. At least one other appellate district has reached the same conclusion. *State v. Powell*, 2d Dist. No. 20857, 2006-Ohio-263, ¶11.

{¶10} In addition, the cases Joseph cites rely upon Crim.R. 43(A). *State v. Smoot*, 10th Dist. No. 05AP-104, 2005-Ohio-5326, ¶12; *State v. Peacock*, 11th Dist. No. 2002-L-115, 2003-Ohio-6772, ¶45; *State v. Triplett*, 8th Dist. No. 87788, 2007-Ohio-75, ¶¶28-29; *State v. Clark*, 11th Dist. No. 2006-A-0004, 2007-Ohio-1780, ¶¶35-36.¹ We have rejected this argument before as well and decline to overrule our precedent. *State v. Clifford*, 3d Dist. No. 11-04-06, 2005-Ohio-958, ¶18, overruled on other grounds by *In re Ohio Criminal Sentencing Statute Cases*, 109 Ohio St.3d 313, 2006-Ohio-2109, 847 N.E.2d 1174.²

¹ *Clark* is currently on appeal before the Ohio Supreme Court but on a different issue. *State v. Clark*, 114 Ohio St.3d 1503, 2007-Ohio-4285, 872 N.E.2d 947; *State v. Clark*, 114 Ohio St.3d 1504, 2007-Ohio-4285, 872 N.E.2d 950.

² Our opinion in *Clifford* was overruled based on *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. However, we have since relied upon *Clifford* for propositions of law not affected by *Foster*. *State v. Didion*, 173 Ohio App.3d 130, 2007-Ohio-4494, 877 N.E.2d 725.

{¶11} Joseph's first assignment of error is, therefore, overruled.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT ERRED WHEN IT INCORPORATED THE JANUARY 2, 1991 PROFFER STATEMENT INTO THE PRE-SENTENCE INVESTIGATION. [SENT. TR. 4].

{¶12} In his second assignment of error, Joseph argues that the trial court erred when it incorporated a portion of the proffer statement into the pre-sentence investigation. Specifically, Joseph argues that the statement was made only for purposes of a plea agreement in accordance with Evid.R. 410(A) and could not be used for the pre-sentence investigation. This argument lacks merit.

{¶13} The proffer statement provides the following pertinent language:

*** * * the Statements are being given in furtherance of 'plea' negotiations pursuant to the rules of evidence and relevant case law, which indicates that since they are for purposes of 'plea' discussions and 'plea' negotiations, that they are *not admissible at trial*, unless one or both of the co-defendant's would take the stand in their own defense and testify differently from the facts that are about to be related. * * * these statements are being made too [sic], the Prosecuting Attorney, in contemplation with the *relevant rule of evidence*.**
* * *

This has been [sic] discussion that Counsel and the clients here, as well as Mr. Berry of the Prosecutor's Office, for the purpose of furthering 'plea' negotiations in this case. Everybody understands that's the purpose of this Interview and *is not to be used for any other purpose*. And we do have some representatives of the Law Enforcement Agencies here. We're at a sensitive stage right now of this and so I ask you 'not to disclose to anyone the contents other than in the course of your official duties.' We don't want this to become public knowledge *at this point*.

(Emphasis added). (Jan. 2, 1991 Proffer Statement at 1, 24).

{¶14} Proffer agreements are similar to other plea agreements and are governed by principles of contract law. *State v. Lynch*, 10th Dist. No. 06AP-128, 2007-Ohio-294, ¶11, citing *United States v. Chiu* (C.A.9, 1997), 109 F.3d 624; *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶50. Contracts are interpreted to carry out the intent of the parties as evidenced by the contract's language. *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, 801 N.E.2d 452, ¶9. Contracts should be interpreted as a whole, giving effect to each provision when reasonable. *Id.* at ¶16. Furthermore, courts should read provisions of a contract in harmony with one another so that each provision is given effect. *Christe v. GMS Mgt. Co.* (1997), 124 Ohio App.3d 84, 88, 705 N.E.2d 691.

{¶15} In this case, the term “any other purpose” appearing in the proffer statement should be interpreted in the context of the parties’ prior discussions relating to the “rules of evidence” and the statement’s admissibility “at trial”. (Proffer Statement at 1, 24); *Mortensen*, 2004-Ohio-24, at ¶16; *Christe*, 124 Ohio App.3d at 88. The parties’ reference to “rules of evidence” and admissibility at trial indicates their intent to prevent the proffer statement from being used against Joseph as an admission of guilt during the trial. Here, the statement was not used *at trial* against Joseph; but rather, was incorporated into the pre-sentence

investigation to aid the court in rendering its sentence. We, therefore, find Joseph's argument lacks merit.

{¶16} Joseph further contends that the proffer statement language incorporated Evid.R. 410. As such, Joseph argues that the agreement prevented the proffer statement from being used for sentencing because sentencing is a criminal proceeding under Evid.R. 410. We disagree.

{¶17} Evid.R. 101(C)(3) provides that the rules of evidence do not apply at sentencing. Therefore, even if the parties incorporated Evid.R. 410 into the agreement as Joseph argues, the trial court was not bound by Evid.R. 410 at sentencing and was within its discretion to consider the proffer statement.

{¶18} Joseph's second assignment of error is, therefore, overruled.

ASSIGNMENT OF ERROR NO. III

TRIAL COURT ERRED WHEN IT PERMITTED THE VICTIMS TO MAKE ORAL SENTENCING STATEMENTS. [SENT. TR. 10].

{¶19} In his third assignment of error, Joseph argues that the trial court erred by allowing victim impact statements at the time of sentencing because R.C. 2930.14, the statute which provides victims with the right to speak at sentencing, was not in effect at the time the crime occurred. The State argues that the assignment of error is without merit or harmless error at most. We agree.

{¶20} The current version of R.C. 2930.14(A) provides, in pertinent part:

Before imposing sentence upon, or entering an order of disposition for, a defendant or alleged juvenile offender for the commission of a crime or specified delinquent act, the court *shall* permit the victim of the crime or specified delinquent act to make a statement.

(Emphasis added). As Joseph argues, the original version of R.C. 2930.14 became effective on October 12, 1994 following the passage of Senate Bill 186, which was after the offense in this case occurred. 1994 Ohio Laws 172. Accordingly, Joseph argues that prior to October 12, 1994 trial courts could not allow victim statements. We disagree.

{¶21} Joseph cites *State v. Hedrick* for the proposition that “Ohio did not statutorily permit a victim impact statement to be presented orally in court during sentencing prior to 1994.” (Feb. 9, 1999), 9th Dist. No. 18955 at *1. Although Joseph is correct that prior to 1994 Ohio did not *statutorily mandate* that trial courts allow oral victim impact statements at sentencing, the revised code did mandate that trial courts consider written victim impact statements at sentencing.

See e.g. *State v. Bell* (May 3, 1991), 3d Dist. No. 9-90-79, at *9, citing R.C. 2947.05.1. Since the court would have had these statements before it in written form, we fail to see the prejudice that resulted by the victim’s oral statement, and the Court’s opinion in *Hedrick* does not persuade us otherwise for several reasons.

{¶22} First, the proposition cited by Joseph from *Hedrick* is interesting but, nonetheless, dicta. Second, as the Court in *Hedrick* recognized, the U.S. Supreme

Court's decision in *Booth v. Maryland* (1987), 482 U.S. 496, 509, 107 S.Ct. 2529, 96 L.Ed.2d 440 that victim impact statements violated the Eighth Amendment was only applicable to the sentencing phase of *capital* cases. *Id.* at *1. At the time of Joseph's resentencing, capital punishment was not an option per the federal court's writ. Consequently, we do not see any constitutional implications arising from *Booth*. Third, *Booth*, *supra*, has now been overruled by *Payne v. Tennessee* (1991), 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720. Fourth, the Court in *Hedrick* did not find that the trial court erred by allowing victim impact statements during sentencing; rather, the court *assumed* that it was error and found it harmless. 9th Dist. No. 18955 at *2.

{¶23} *Hedrick* is persuasive to the extent that it found the possible error harmless. In this case, Joseph was resentenced following the federal court's grant of writ of habeas corpus as to the imposition of death. *Joseph v. Coyle* (N.D. Ohio Dec. 22, 2004), No. 1:98 CV 527 (Memorandum of Opinion and Order), *aff'd* in *Joseph v. Coyle* (6th Cir. 2006), 469 F.3d 441. The federal district court specifically ordered that Joseph "be re-sentenced according to the statutory guidelines for aggravated murder in the absence of a capital specification, as set forth in O.R.C. § 2929.03(A), which mandates a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment." *Joseph v. Coyle* (N.D. Ohio Dec. 22, 2004), No. 1:98 CV 527 (Memorandum of Opinion

and Order). The trial court below followed the federal court's ruling. (Jun. 14, 2007 JE at A-2). Therefore, even assuming that the admission of the victims' statements was in error, we fail to see how Joseph was harmed because the sentence imposed was mandatory under Ohio law and consistent with the federal court's ruling.

{¶24} Joseph's third assignment of error is, therefore, overruled.

ASSIGNMENT OF ERROR NO. IV

TRIAL COURT ERRED WHEN IT RELEASED A PORTION OF THE PRE-SENTENCE INVESTIGATION, [SIC] TO THE GENERAL PUBLIC. [SENT. TR. 24].

{¶25} In his fourth assignment of error, Joseph argues that the trial court erred when it released a portion of the pre-sentence investigation (PSI) to the public. Joseph argues that these reports are confidential. We agree that the trial court erred, but we are without an appropriate remedy and must overrule the assignment of error for mootness.

{¶26} R.C. 2951.03(D)(1) provides, in pertinent part:

The contents of a presentence investigation report * * * are confidential information and are not a public record. The court * * * may inspect, receive copies of, retain copies of, and use a presentence investigation report or a written or oral summary of a presentence investigation *only for the purposes of or only as authorized by Criminal Rule 32.2 or this section, division (F)(1) of section 2953.08, section 2947.06, or another section of the Revised Code.*

{¶27} Interpreting this revised code section, the Court of Appeals for the Eleventh District has found only three instances when a PSI's contents can be released:

(1) pursuant to R.C. 2951.03(B), to the defendant or his counsel prior to the imposition of his sentence; (2) pursuant to R.C. 2947.06, to the trial court when it is making its sentencing determination; and (3) pursuant to R.C. 2953.08(F), to the appellate court when it is reviewing the sentencing determination on appeal.

State ex rel. Sharpless v. Gierke (2000), 137 Ohio App.3d 821, 825, 739 N.E.2d 1231. Noticeably missing from this list is a release to the public. Furthermore, Crim.R. 32.2 does not authorize the release of a PSI to the public.

{¶28} We, therefore, find that Joseph's argument has merit. However, aside from our finding that the trial court was in error, any further remedies that might exist would be civil in nature and not now before us. This Court cannot provide anything further that would remedy this error; and therefore, we must overrule the assignment of error as moot.

{¶29} Joseph's fourth assignment of error is, therefore, overruled.

{¶30} Having found no error prejudicial to the appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed.

WILLAMOWSKI, J., concurs.

Rogers, J., Concurring in part and dissenting in part.

{¶31} I concur with the majority's disposition of the first, third, and fourth assignments of error. However, I respectfully disagree with the majority's disposition of the second assignment of error.

{¶32} On the second assignment of error, I would find from the comments of counsel that the statements given were to be considered exclusively for the purposes of plea discussions and were "not to be used for any other purpose." (Jan. 2, 1991 Proffer Statement, pp. 1, 24). We all understand that criminal statutes are to be interpreted strictly against the State and liberally in favor of the defendant. See R.C. 2901.04(A). If there are to be meaningful negotiations between the prosecution and defense in criminal cases, the prosecution's comments as to the purpose and use of statements of defendants should also be strictly construed against the State. I would sustain the second assignment of error and direct the trial court to redact the subject statements from the presentence report.
