

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 : Case Nos. 08-0711 and 08-1005
 :
 Plaintiff-Appellee, :
 :
 : On Appeal from the Allen
 vs. : County Court of Appeals
 :
 : Third Appellate District
 RICHARD E. JOSEPH, :
 :
 : C.A. Case No. 1-07-50
 :
 Defendant-Appellant. :

MERIT BRIEF OF APPELLANT RICHARD E. JOSEPH

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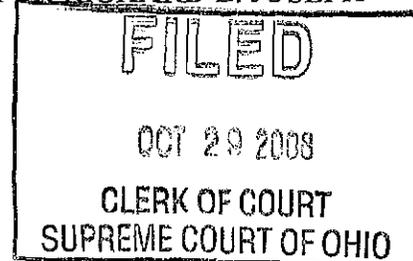


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STATEMENT OF THE CASE AND FACTS

During Richard Joseph's resentencing hearing, the trial court circumvented Ohio's statutory mandates regarding the imposition of court costs. The trial court's failure to impose court costs in open court, or to make a determination as to Mr. Joseph's financial status, renders his sentence void. As such, Mr. Joseph is entitled to a de novo resentencing hearing.

On July 12, 1990, Mr. Joseph and codefendant Jose Bulerin were jointly indicted for the aggravated murder of Ryan Young. (July 12, 1990 Indictment). The indictment alleged that the crime occurred "from on or about the 26th day of June, 1990 to on or about the 4th day of July, 1990...." Id. Additionally, the indictment provided for a death-penalty specification in accordance with R.C. 2929.04(A)(7). Id. In January 1991, a jury trial was held and Mr. Joseph was found guilty of the charged crime along with the capital specification. (January 23, 1991 Verdict with Finding of Specification). Subsequently, the jury recommended that Mr. Joseph receive a death sentence. (January 30, 1991 Jury Recommendation). The trial court accepted the jury's recommendation and sentenced Mr. Joseph to death. (January 30, 1991 Judgment Entry).

Mr. Joseph filed a timely notice of appeal. (March 7, 1991 Notice of Appeal). On December 23, 1993, the Third District Court of Appeals affirmed Mr. Joseph's conviction and sentence of death. *State v. Joseph*, 3rd Dist. No. 1-91-11, 1993 Ohio App. LEXIS 6334, supplemental decision reported at 1993 Ohio App. LEXIS 6396. On August 30, 1995, this Court affirmed the court of appeals' decision. *State v. Joseph*, 73 Ohio St.3d 450, 1995-Ohio-288. On March 18, 1996, the United States Supreme Court denied Mr. Joseph's petition for writ of certiorari. *Joseph v. Ohio* (1996), 516 U.S. 1178.

Thereafter, Mr. 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 that Mr. 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). *Id.*

Mr. Joseph appealed the district court's judgment with respect to his conviction to the United States Court of Appeals for the Sixth Circuit. The Warden cross-appealed the federal district court's decision to set aside the 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 Mr. Joseph's remaining claims. *Joseph v. Coyle* (6th Cir. 2006), 469 F.3d 441. On March 19, 2007, the Supreme Court declined to review the Sixth Circuit's determination. *Houk v. Joseph*, 127 S.Ct. 1827, 2007 U.S. LEXIS 3056.

On April 20, and May 31, 2007, the Allen County Court of Common Pleas held pretrial conferences with the parties. On June 6, 2007, in accordance with the federal district court's order, the trial court resentenced Mr. Joseph to life imprisonment with eligibility for parole in twenty years. (June 14, 2007 Judgment Entry of Sentencing). Mr. Joseph filed a timely notice of appeal and raised the following arguments:

1. The trial court erred when it included a punishment in the written sentencing judgment, that it had not impose[d] from the bench. (Sent. Tr. 22, Judgment Entry, p. 2);
2. The trial court erred when it incorporated the January 2, 1991 proffer statement into the pre-sentence investigation. (Sent. Tr. 4);

3. The trial court erred when it permitted the victims to make oral sentencing statements. (Sent. Tr. 10); and
4. The trial court erred when it released a portion of the pre-sentence investigation, to the general public. (Sent. Tr. 24).

State v. Joseph, 3rd Dist. No. 1-07-50, 2008-Ohio-1138. The court of appeals overruled Mr. Joseph's arguments. *Id.*

Subsequently, Mr. Joseph requested that the court of appeals certify a conflict between its decision as to Mr. Joseph's first assignment of error and the courts of appeals' decisions in *State v. Peacock*, 11th Dist. No. 2002-L-115, 2003-Ohio-6772; *State v. Smoot*, 10th Dist. No. 05AP-104, 2005-Ohio-5326; and *State v. Triplett*, 8th Dist. No. 87788, 2007-Ohio-75. (Richard Joseph's March 26, 2008 Motion to Certify a Conflict; Richard Joseph's May 21, 2008 Notice of Certification of Conflict). The court of appeals found Mr. Joseph's motion well taken, and certified the following issue:

May a trial court impose court costs pursuant to R.C. 2947.23 in its sentencing entry, when it did not impose those costs in open court at the sentencing hearing?

(*Id.*; Court of Appeals' April 22, 2008 Journal Entry).

Mr. Joseph also filed a timely notice of appeal and memorandum in support of jurisdiction in this Court. (Richard Joseph's April 15, 2008 Notice of Appeal; April 15, 2008 Memorandum in Support of Jurisdiction). The memorandum submitted the following propositions of law:

1. 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; and

2. A trial court...cannot consider for purposes of sentencing a proffer[ed] 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

(Richard Joseph's April 15, 2008 Memorandum in Support of Jurisdiction).

This Court accepted jurisdiction on Mr. Joseph's first proposition of law and also determined that the Third District Court of Appeals' resolution as to the court-costs issue conflicted with other Ohio appellate court decisions. *07/09/2008 Case Announcements*, 2008-Ohio-3369. This Court sua sponte consolidated the two cases for purposes of briefing and oral argument. *Id.* The issue as to whether a trial court may impose court costs in a defendant's judgment entry, when it failed to notify the defendant regarding the imposition of costs during his or her sentencing hearing, is now before this Court.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW

When a trial court fails to impose court costs during a defendant's sentencing hearing, the trial court may not order the imposition of such costs in the defendant's sentencing entry.

A. Introduction

Due to the date of the offense in the case sub judice, the sentencing statutes at issue—R.C. 2947.23 and R.C. 2949.092—are the ones that were in effect in June and July of 1990. However, because the substantive language of those statutes has remained relatively unchanged, the decision that this Court reaches in Mr. Joseph's case will impact numerous defendants who have not been sentenced in accordance with the current statutes regarding the imposition of court costs.

On the date in which the crime occurred in the case sub judice—from on or about June 26, 1990 to on or about July 4, 1990—R.C. 2947.23 provided:

In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs. If a jury has been sworn at the trial of a case, the fees of the jurors shall be included in the costs, which shall be paid to the public treasury from which the jurors were paid.

Law of June 1, 1990, R.C. 2947.23 (amended March 24, 2003; May 18, 2005; September 12, 2008).

The current version of R.C. 2947.23 provides, in pertinent part:

(A) (1) In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution, including any costs under section 2947.231 [2947.23.1] of the Revised Code, and render a judgment against the defendant for such costs. At the time the judge or magistrate imposes sentence, the judge or magistrate shall notify the defendant of both of the following:

(a) If the defendant fails to pay that judgment or fails to timely make payments towards that judgment under a payment schedule approved by the court, the court may order the defendant to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the court is satisfied that the defendant is in compliance with the approved payment schedule.

(b) If the court orders the defendant to perform the community service, the defendant will receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount.

Although the community-service portion of the statute is a significant addition, that section is not at issue in the case sub judice. The substantive language regarding the mandatory inclusion of court costs in a defendant's sentence has remained the same.

Furthermore, from June 26, 1990 through July 4, 1990, R.C. 2949.092 provided:

If a person is convicted of or pleads guilty to an offense and the court specifically is required, pursuant to section 2743.70 or 2949.091 [2949.09.1] of the Revised Code or pursuant to any other section of the Revised Code, to impose a specified sum of money as costs in the case in addition to any other costs that the court is required or permitted by law to impose in the case, the court shall not waive the payment of the specified additional court costs that the section of the Revised Code specifically requires the court to impose unless the court determines that the offender is indigent and the court waives the payment of all court costs imposed upon the offender.

Law of June 1, 1990, R.C. 2949.092 (amended July 25, 1990; September 29, 2005; September 23, 2008).

The current version of R.C. 2949.092 has remained relatively similar to the 1990 version:

If a person is convicted of or pleads guilty to an offense and the court specifically is required, pursuant to section 2743.70 or 2949.091 [2949.09.1], or 2949.093 [2949.09.3] of the Revised Code or pursuant to any other section of the Revised Code, to impose a specified sum of money as costs in the case in addition to any other costs that the court is required or permitted by law to impose in the case, the court shall not waive the payment of the specified additional court costs that the section of the Revised Code specifically requires the court to impose unless the court determines that the offender is indigent and the court waives the payment of all court costs imposed upon the offender.

As evidenced by the minor changes involving R.C. 2947.23 and R.C. 2949.092, this Court's decision will affect any defendant who has been sentenced under the current versions of those statutes.

At Mr. Joseph's resentencing hearing, the trial court failed to notify him as to the imposition of court costs. (June 6, 2007 Resentencing Hearing Transcript, p. 22). However, in the June 14, 2007 Judgment Entry, the trial court ordered the "[d]efendant to pay costs. Judgment for costs." (June 14, 2007 Judgment Entry). Because court costs are a part of a defendant's sentence, 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. (See Argument B, *infra*). Indeed, the trial court's failure to inform Mr. Joseph that court costs were going to be included in his sentence rendered it void. (See Argument C, *infra*). Consequently, Mr. Joseph is entitled to a *de novo* resentencing hearing. (See Argument C, *infra*).

B. Because court costs are a part of a defendant's sentence, a trial court must address the imposition of such costs in open court.

Court costs are a part of a defendant's sentence. See *State v. White*, 103 Ohio St.3d 580, 2004-Ohio-5989, at ¶15 ("a trial court may assess court costs against an indigent defendant convicted of a felony as part of the sentence"). And as mandated by the Due Process and Right to Counsel Clauses of the Ohio and United States Constitutions, a defendant must be present during the imposition of any portion of his or her criminal sentence. Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Sections 10 and 16, Article I of the Ohio Constitution; Crim.R. 43 (A) ("The defendant shall be present at...the imposition of sentence"); *United States v. Wade* (1967), 388 U.S. 218, 227-228 (right of presence through counsel at critical stages); *Mempa v. Rhay* (1967), 389 U.S. 128, 134 (sentencing is a critical stage of the proceedings); *State v. Comer*, 99 Ohio St.3d 463, 2004-Ohio-4165, ¶27 (trial court is required to make findings at a sentencing hearing); *State v. Brooks*, 103 Ohio St.3d 134, 2004-Ohio-4746, at paragraph one of the syllabus (when sentencing a defendant to a 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, at paragraph one of the syllabus (a trial court is required to notify a defendant as to his or her postrelease-control obligations in open court).

Various appellate courts have held that it is error for a trial court to impose costs in a defendant's sentencing entry when the trial court did not impose costs at the sentencing hearing. *State v. Peacock*, 2003-Ohio-6772, at ¶45 (Criminal Rule 43(A) "requires the trial court to inform the defendant, at his [or her] sentencing hearing, that...he [or she] is required to pay costs[, and s]imply adding these sanctions in the sentencing entry violates Crim.R.43(A)."); *State v. Smoot*, 2005-Ohio-5326, at ¶13 ("the trial court erred by...imposing court costs in the judgment entry without having imposed such costs in appellant's presence"); *State v. Triplett*, 2007-Ohio-75, at ¶28-29 (the trial court erred in imposing court costs outside of the defendant's presence).

In the present case, the court of appeals acknowledged the *Peacock*, *Smoot*, and *Triplett* decisions, but noted, "We have rejected this argument before...and decline to overrule our precedent." *State v. Joseph*, 2008-Ohio-1138, at ¶10. The *Joseph* Court relied on *State v. Powell*, 2nd Dist. No. 20857, 2006-Ohio-263 in support of its decision to permit the trial court to add court costs as a sanction in Mr. Joseph's sentencing entry. *Joseph* at ¶9 ("At least one other appellate district has reached the same conclusion [that a trial court is not required to notify a defendant at his or her sentencing hearing that he or she must pay court costs]."), citing *Powell* at ¶11 ("Imposition of the costs of prosecution is mandatory in all criminal cases. Thus, the trial court has no discretion to waive said costs."). Internal citations omitted. However, the *Powell* Court, and consequently the *Joseph* Court, failed to read the relevant sentencing statutes in pari materia. See *State ex rel. Choices for South-Western City Schools v. Anthony*, 108 Ohio St.3d 1,

2005-Ohio-5362, at ¶46 (statutes that relate to the same subject matter must be construed in pari materia and harmonized so as to give full effect to the statutes); *State v. Hassler*, 115 Ohio St.3d 322, 2007-Ohio-4947, at ¶24 (same).

Former Revised Code Section 2947.23 provided that “[i]n all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs....” Law of June 1, 1990, R.C. 2947.23 (amended March 24, 2003; May 18, 2005; September 12, 2008). (See Argument (A), Introduction, p. 5, supra, for the entire text of former R.C. 2947.23). As explained by the *Powell* Court, the current version of R.C. 2947.23, as well as the former version of R.C. 2947.23, mandate that court costs be included as part of a defendant’s sentence. (See Argument (A), Introduction, p. 5, supra, for the current version of R.C. 2947.23).

However, former R.C. 2947.23 must be read in conjunction with former R.C. 2949.092, which stated that “...the court shall not waive the payment of the specified additional court costs that the...Revised Code specifically requires the court to impose *unless the court determines that the offender is indigent and the court waives the payment of all court costs imposed upon the offender.*” Law of June 1, 1990, R.C. 2949.092 (amended July 25, 1990; September 29, 2005; September 23, 2008). Emphasis added. (See Argument (A), Introduction, p. 6, supra, for the full-text versions of current and former R.C. 2949.092).

Although the current and former versions of R.C. 2947.23 direct that all criminal defendants receive court costs as part of their sentences, current and former R.C. 2949.092 “permit[] a trial court to waive the payment of costs imposed if the trial court finds the defendant to be indigent.” *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006, at ¶4. See, also, *State v. White*, 2004-Ohio-5989, at ¶14 (“[Revised Code Section] 2947.23 requires a

judge to assess costs against all convicted criminal defendants, and waiver of costs is permitted—but not required—if the defendant is indigent.”). Therefore, Ohio courts may not rely on the mandatory language in R.C. 2947.23 as a means of circumventing a defendant’s due process right to be present during sentencing. And because court costs are a part of a defendant’s criminal sentence, the trial court must notify the defendant as to the imposition of court costs in open court.

C. A trial court’s failure to impose court costs in open court renders a defendant’s sentence void, thus entitling the defendant to a de novo resentencing hearing.

Mr. Joseph was not present when the trial court imposed court costs as part of his sentence. Therefore, Mr. Joseph’s sentence is void and he is entitled to a de novo resentencing hearing. This Court has not yet determined whether a trial court must inform a defendant, during his or her sentencing hearing, as to whether he or she must pay court costs, and whether the failure to do so renders the defendant’s sentence void. However, the issues are analogous to the ones involved in *State v. Jordan*, 2004-Ohio-6085 and *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250.

This Court recited the facts of *Jordan* as follows:

Following his plea of no contest to one count of possession of cocaine, a felony of the fifth degree, the Cuyahoga County Court of Common Pleas convicted Lenorris Jordan of that offense. Upon the trial court determining that a prison term was necessary, R.C. 2929.19(B)(3)(d) required the court to advise Jordan that he could be subject to a period of postrelease control after his release from imprisonment if the parole board determined that to be necessary for him. The court did not notify Jordan at the sentencing hearing that he could be subject to postrelease control, but it included that notice in its sentencing entry.

Jordan at ¶3.

Accordingly, in *Jordan*, this Court addressed the issue as to whether a defendant's sentence should be vacated and remanded for a resentencing hearing when a trial court incorporated postrelease control into a defendant's journal entry of conviction, but failed to notify the offender about postrelease control at the sentencing hearing. *Jordan* at paragraphs one and two of the syllabus. Citing to *State v. Comer*, 2003-Ohio-4165 and *State v. Brooks*, 2004-Ohio-4746, this Court held that "[w]hen sentencing a felony offender to a term of imprisonment, a trial court is required to notify the offender at the sentencing hearing about postrelease control and is further required to incorporate that notice into its journal entry imposing sentence." *Jordan* at paragraph one of the syllabus. This Court explained that "[b]ecause a trial court has a statutory duty to provide notice of postrelease control at the sentencing hearing, any sentence imposed without such notification is contrary to law." *Jordan* at ¶23. And when "a sentence is void because it does not contain a statutorily mandated term, the proper remedy is...to resentence the defendant." *Id.*

Subsequently, this Court relied upon its opinion in *Jordan* when deciding the issues involved in *State v. Bezak*, 2007-Ohio-3250. *Bezak* involved the following facts and issues:

At trial, the [S]tate presented evidence, upon which Bezak was convicted, that he had given false information to the police about a parolee who had failed to report to his parole officer. At sentencing, the trial judge stated: "You'll be out in the not too distant future, at that point you won't have a—probably will not be on postrelease control given that it's a six-month sentence, but I can't guarantee that." The trial judge allowed for postrelease control in the journal entry imposing the sentence.

Bezak appealed his conviction and sentence to the Eighth District Court of Appeals. The court of appeals affirmed the conviction but remanded the case for resentencing pursuant to *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864. The court of appeals stated: “When a trial court fails to properly discharge its statutory duty with respect to postrelease control notification, the sentence must be vacated and the matter remanded for resentencing.” *State v. Bezak*, Cuyahoga App. No. 84008, 2004-Ohio-6623, at ¶40, citing *Jordan* at ¶28. The court of appeals held that Bezak’s case “must be remanded for resentencing so that appellant may be advised that he is subject to postrelease control.” *Id.* at ¶41.

Bezak filed a motion for reconsideration with the court of appeals, requesting that the court remove the clause that stated “so that appellant may be advised that he is subject to postrelease control.” Bezak argued that the clause was ambiguous and requested that the clause be removed to ensure that the trial court would grant Bezak a new sentencing hearing. Bezak’s motion for reconsideration was denied without opinion.

The question presented [to this Court was] whether, when a court of appeals remands a case for resentencing because of the trial court’s failure to inform the offender at the sentencing hearing that he may be subject to postrelease control, the court must conduct a new sentencing hearing or may instead merely give that information in open court and summarily reimpose the original sentence. [This Court] conclude[d] that Bezak was entitled to a de novo sentencing hearing pursuant to *Jordan*.

Bezak at ¶3-6.

In establishing that a trial court’s failure to inform a defendant of postrelease control at the sentencing hearing rendered the sentence for that offense void, this Court explained that “[t]he effect of determining that a judgment is void is well established. It is as though such proceedings had never occurred; the judgment is a mere nullity and the parties are in the same position as if there had been no judgment.” *Bezak* at ¶12, quoting *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267-268.

The principles that this Court articulated in *Jordan* and *Bezak* were later affirmed in *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197. The procedural and factual history of *Simpkins* was explained by this Court as follows:

On May 21, 1998, appellant, Curtis Simpkins, pleaded guilty to two counts of rape in violation of R.C. 2907.02, felonies of the first degree, and to one count of gross sexual imposition in violation of R.C. 2907.05, a felony of the third degree. The trial court sentenced Simpkins on June 11, 1998, to a term of eight years' incarceration for each count of rape and to three years' incarceration for the single count of gross sexual imposition, to be served concurrently. Although postrelease control was required, see R.C. 2929.14(F) and 2967.28, the journal entry on sentencing did not indicate that Simpkins was subject to postrelease control. That error went uncorrected for more than seven years.

In December 2005, however, the [S]tate moved to resentence Simpkins prior to his release from prison. The [S]tate asserted that the sentence imposed initially was void because it had not included postrelease control. The trial court held a hearing on the motion while Simpkins was still in custody and agreed that the initial sentence was void. The court resentenced Simpkins to the same sentence of incarceration imposed previously, but added a period of five years' postrelease control. The journal entry for the resentencing hearing reflects the imposition of postrelease control.

Simpkins appealed, arguing that [this Court's] decision in *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301, d[id] not support the after-the-fact resentencing of a defendant who has nearly completed his sentence. The court of appeals rejected his claim.

Relying on *State v. Rutherford*, Champaign App. No. 06CA13, 2006-Ohio-5132, the court of appeals explained, "The trial court retained its jurisdiction to resentence appellant. R.C. 2967.28 mandates that a trial court impose a term of postrelease control for the offenses to which appellant pleaded guilty; therefore, the trial court must impose postrelease control orally at the sentencing hearing and transcribe such imposition in the court's journal entry. Failure to do so renders the sentence void. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864.

Because appellant's 1998 sentence was void, resentencing was a proper remedy to correct the trial court's original error of omission. *Id.*; *State v. Beasley* (1984), 14 Ohio St.3d 74 [14 OBR 511], 471 N.E.2d 774." *State v. Simpkins*, Cuyahoga App. No. 87692, 2006- Ohio-6028, [at] ¶11.

[This Court] accepted appellant's discretionary appeal, *State v. Simpkins*, 113 Ohio St.3d 1440, 2007-Ohio-1266, 863 N.E.2d 657, which present[ed] a discrete proposition of law: "A defendant who has been sentenced to a term of imprisonment that does not include postrelease control may not be sentenced anew in order to add postrelease control unless the State has challenged the failure to include postrelease control in a timely direct appeal...."

Simpkins at ¶1-5.

This Court reiterated that a trial court's duty to include a notice to an offender about postrelease control at his or her sentencing hearing was the "same as any other statutorily mandated term of a sentence." *Simpkins* at ¶15, quoting *Jordan* at ¶26. Because "a trial court has a statutory duty to provide notice of postrelease control at the sentencing hearing, any sentence imposed without such notification is contrary to law' and void." *Simpkins* at ¶15, quoting *Jordan* at ¶23. Indeed, "[t]he underpinning of [this Court's] decisions from [*State v.*] *Beasley* [(1984), 14 Ohio St.3d 74] to *Bezak* is the fundamental understanding that no court has the authority to substitute a different sentence for that which is required by law. Because no judge has the authority to disregard the law, a sentence that clearly does so is void." *Simpkins* at ¶20, internal citations omitted.

Similarly, unless a trial court, in its discretion, determines that a defendant is indigent, court costs must be imposed as a part of that defendant's sentence. See *State v. Clevenger*, 2007-Ohio-4006, at ¶4, citing *State v. White*, 2004-Ohio-5989, at ¶14. Because the trial court failed to impose court costs in open court, or to waive payment of such costs on the basis of Mr. Joseph's indigency status, his sentence is void. See *Jordan* at ¶25, discussing *State v. Beasley*,

14 Ohio St.3d at 75 (Any attempt by a trial court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void.); *Simpkins* at ¶13 (“Although [this Court has] commonly h[e]ld that sentencing errors are not jurisdictional and do not necessarily render a judgment void, there are exceptions to that general rule. [And a] court’s failure to impose a sentence as required by law present[s] one such exception.”). Internal citations omitted.

As recognized by this Court in *Bezak* and *Simpkins*, the effect of a void sentence is just as though the initial sentencing had not occurred. *Bezak* at ¶12, *Simpkins* at ¶22. The judgment is a nullity and the parties are in the same position as if the defendant had never been sentenced. *Bezak* at ¶12; *Simpkins* at ¶13, 21-22 (a trial court’s failure to impose a sentence as required by law renders the sentence void, and the court has an obligation to correct the void and invalid sentence).

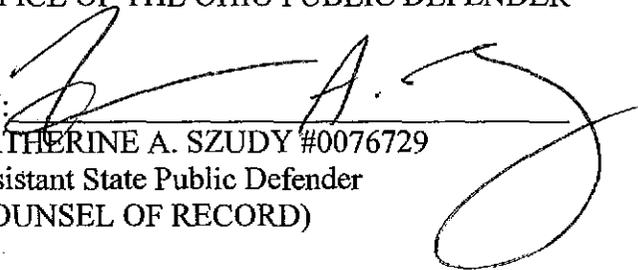
Moreover, *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245 is distinguishable and thus inapplicable to the issues presented by this case. In *Saxon*, this Court held that “[a]n appellate court may modify, remand, or vacate only a sentence for an offense that is appealed by the defendant and may not modify, remand, or vacate the entire multiple-offense sentence based upon an appealed error in the sentence for a single offense.” *Saxon* at paragraph one of the syllabus. However, court costs apply to a defendant’s entire sentencing hearing. As such, Mr. Joseph is entitled to a de novo resentencing hearing. See *Bezak* at ¶15 (When a defendant is convicted of only one offense, and postrelease control was not properly imposed as to that offense, the entire sentence should be vacated).

CONCLUSION

The trial court violated Mr. Joseph's right to due process when it added an additional sanction that had not been imposed at the resentencing hearing. This Court should remand Mr. Joseph's case for a de novo resentencing hearing.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

BY: 

KATHERINE A. SZUDY #0076729
Assistant State Public Defender
(COUNSEL OF RECORD)

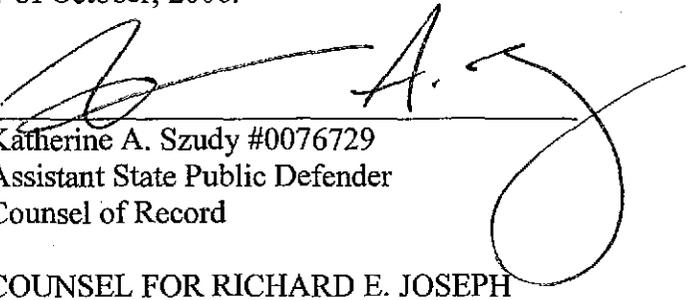
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COUNSEL FOR RICHARD E. JOSEPH

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Merit Brief of Appellant Richard E. Joseph** has been sent by regular U.S. mail, postage prepaid, to Assistant Allen County Prosecuting Attorney Jana E. Emerick, Court of Appeals Building, 204 N. Main Street, Suite 302, Lima, Ohio 45802-1243, on this 29th day of October, 2008.



Katherine A. Szudy #0076729
Assistant State Public Defender
Counsel of Record
COUNSEL FOR RICHARD E. JOSEPH

#282541

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case Nos. 08-0711 and 08-1005
Plaintiff-Appellee,	:	
	:	On Appeal from the Allen
vs.	:	County Court of Appeals
	:	Third Appellate District
RICHARD E. JOSEPH,	:	
	:	C.A. Case No. 1-07-50
Defendant-Appellant.	:	

APPENDIX TO

MERIT BRIEF OF APPELLANT RICHARD E. JOSEPH

COMMON PLEAS COURT
FILED

2007 JUN 14 AM 9:20

GINA C. STALEY-BURLEY
CLERK OF COURTS, OHIO
ALLEN COUNTY, OHIO

STATE OF OHIO

Plaintiff

VS.

RICHARD JOSEPH

Defendant

CASE NO. CR90 07 0325

CA 2007

050

JUDGMENT ENTRY
OF SENTENCING

This 6th day of June, 2007, this matter came on for re-sentencing pursuant to remand from the U. S. 6th Circuit Court of Appeals. The Defendant was present with Counsel Edmund Searby and Randall Porter. Juergen Waldick, Allen County Prosecuting Attorney, and M. Daniel Berry, Assistant Allen County Prosecuting Attorney were present for the State of Ohio.

The Court then personally addressed the Defendant and afforded the Defendant and his counsel an opportunity for mitigation according to law and proceeded to sentencing. The pre-sentence report of the Defendant is made part of the record.

IT IS THE JUDGMENT AND ORDER OF THIS COURT that the Defendant, Richard E. Joseph who has been adjudged to be guilty of the offense of:

COUNT 1 - AGGRAVATED MURDER

R. C. 2903.01(B)

be and hereby is sentenced to confinement in the Ohio Department of Rehabilitation and Correction for the following term:

LIFE WITH ELIGIBILITY OF PAROLE AFTER TWENTY (20) YEARS.

The Defendant shall receive credit for time served.

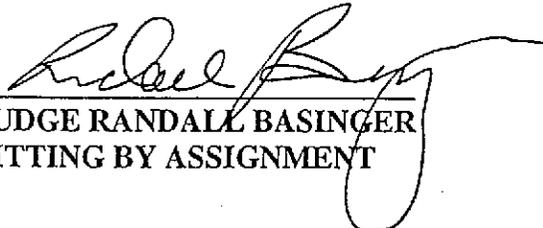
The Sheriff of Allen County, Ohio shall convey the Defendant to the Ohio Department of Rehabilitation and Correction.

The Court personally addressed the Defendant and advised the defendant that he has a right to an appeal, if he is unable to pay the costs of an appeal, he has the right to appeal without payment, if he is unable to obtain counsel for an appeal, counsel will be appointed without costs, if he is unable to pay the costs of documents necessary to an appeal, such documents will be provided without costs, and he has a right to have a notice of appeal timely filed on his behalf.

Defendant to pay costs. Judgment for costs.

IT IS SO ORDERED.

Dated: June 13, 2007


JUDGE RANDALL BASINGER
SITTING BY ASSIGNMENT

cc:

Prosecuting Attorney
Edmund Searby
Randall Porter
Crime Victim Services

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.

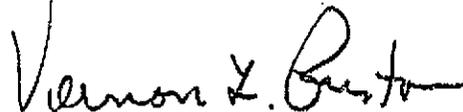
ENTRY

RICHARD E. JOSEPH,

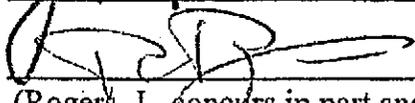
DEFENDANT-APPELLANT.

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

ALLIANCE COURT REPORTERS & VIDEO
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

ATTORNEYS:

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JANA E. EMERICK
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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, 19991 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.

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :

Plaintiff-Appellee, :

-vs- :

RICHARD E. JOSEPH, :

Defendant-Appellant. :

Case No. **08-0711**

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

NOTICE OF APPEAL

Office of the
Ohio Public Defender

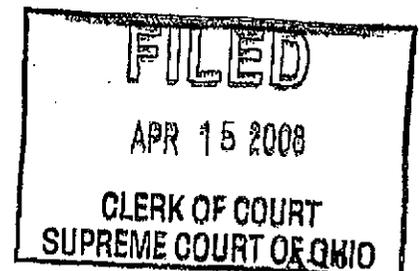
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Assistant State Public Defender

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(419) 227-1072 (Facsimile)

COUNSEL FOR STATE OF OHIO



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, OHIO, APP. NO. 1-07-50

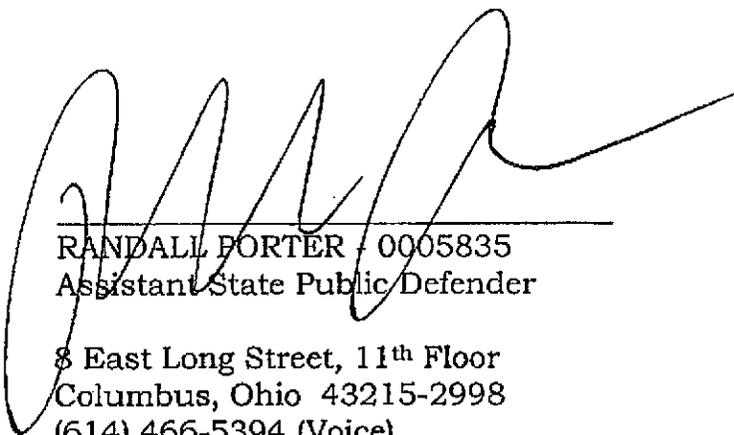
NOTICE OF APPEAL

Appellant Richard Joseph hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Allen County Court of Appeals, Third Appellate District, entered in Court of Appeals Case No. 1-07-50 on March 17, 2006.

This case involves the denial of Richard Joseph's direct appeal, in which he sought relief from the sentence imposed by the trial court. Richard Joseph now claims an appeal of right as this case substantial constitutional questions, and involves a felony. See Sup. Ct. R. Prac. II, Sections 1(A) (2) and (3).

Respectfully submitted,

Office of the
Ohio Public Defender



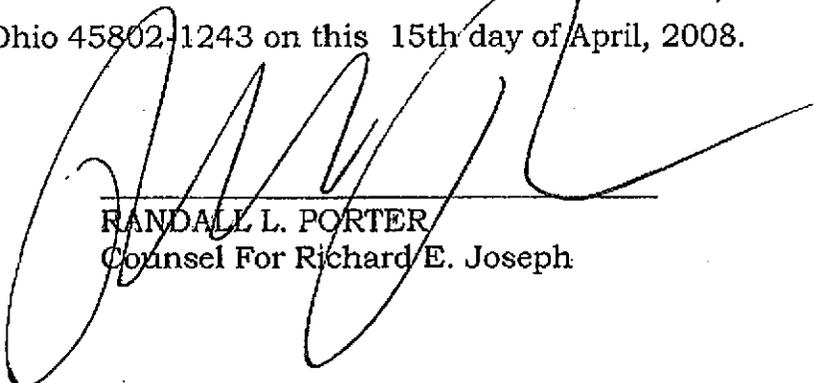
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COUNSEL FOR RICHARD E. JOSEPH

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice of 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.



RANDALL L. PORTER
Counsel For Richard E. Joseph

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 :
 -vs- : Case No. 08-1005
 :
 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
NOTICE OF CERTIFICATION OF CONFLICT

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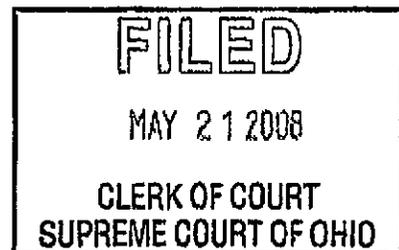
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IN THE SUPREME COURT OF OHIO

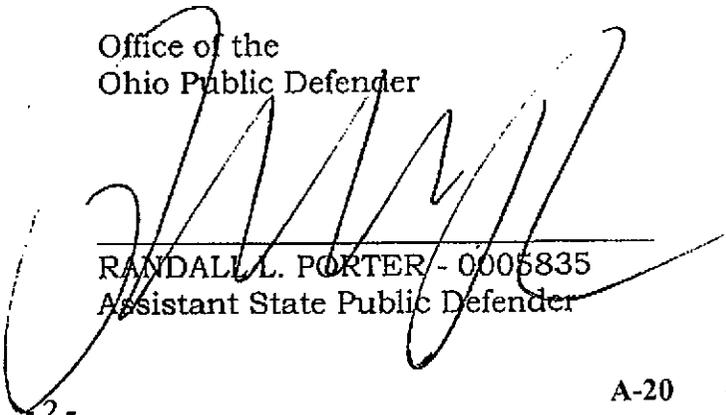
STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No.
 :
 -vs- :
 :
 RICHARD E. JOSEPH, : ALLEN COUNTY APP. NO. 1-07-50
 :
 Defendant-Appellant. :

**APPELLANT RICHARD E. JOSEPH'S
NOTICE OF CERTIFICATION OF CONFLICT**

Pursuant to Article IV, Section 3(B(4) of the Ohio Constitution, Appellant Richard Joseph hereby gives notice that on April 22, 2008, the Allen County Court of Appeals, Third Appellate District, certified that its March 17, 2008, decision in this case is in conflict with the decisions in *State v. Peacock*, 11th Dist. No. 2002-L-115, 2003-Ohio-6772; *State v. Smoot*, 10th Dist. No. 05AP-104, 2005-Ohio-5326; and *State v. Triplett*, 8th Dist. No. 87788, 2007-Ohio-75. More specifically the Court of Appeals certified the following question: "May a trial court impose court costs pursuant to R.C. 2947.23 in its sentencing entry, when it did not impose the costs in open court at the sentencing hearing?"

Respectfully submitted,

Office of the
Ohio Public Defender



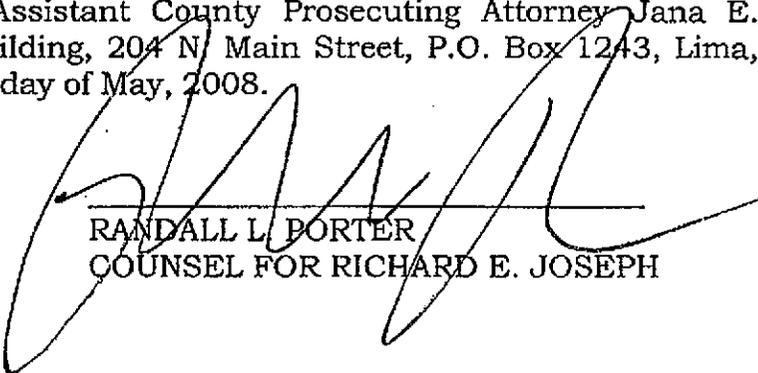
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COUNSEL FOR RICHARD JOSEPH

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Appellant Richard E. Joseph's Notice Of Certification Of Conflict* 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 21st day of May, 2008.



RANDALL L. PORTER
COUNSEL FOR RICHARD E. JOSEPH

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No.
 :
 -vs- :
 :
 RICHARD E. JOSEPH, : ALLEN COUNTY APP. NO. 1-07-50
 :
 Defendant-Appellant. :

APPENDIX TO APPELLANT RICHARD E. JOSEPH'S
NOTICE OF CERTIFICATION OF CONFLICT

Judgment Entry, *State v. Joseph*, 3rd Dist. No. 1-07-50
(April 15, 2008).....A-1

Opinion and Entry, *State v. Joseph*, 3rd Dist. No. 1-07-50,
2008-Ohio-1138A-3

State v. Peacock, 11th Dist. No. 2002-L-115, 2003-Ohio-6772A-16

State v. Smoot, 10th Dist. No. 05AP-104, 2005-Ohio-5326A-30

State v. Triplett, 8th Dist. No. 87788, 2007-Ohio-75A-35

COURT OF APPEALS
FILED

2008 APR 22 PM 1:53

GINA C. STALEY-BURLE
CLERK OF COURTS
ALLEN COUNTY, OHIO

IN THE COURT OF APPEALS OF THE THIRD APPELLATE DISTRICT OF OHIO
ALLEN COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO 1-07-50

v.

RICHARD E. JOSEPH,

JOURNAL
ENTRY

DEFENDANT-APPELLANT.

This cause comes on for determination of appellant's motion to certify a conflict as provided in App.R. 25 and Article IV, Sec. 3(B)(4) of the Ohio Constitution.

Upon consideration the court finds that the judgment in the instant case is in conflict with the judgments rendered in *State v. Peacock*, 11th Dist. No. 2002-L-115, 2003-Ohio-6772; *State v. Smoot*, 10th Dist. No. 05AP-104, 2005-Ohio-5326; and *State v. Triplett*, 8th Dist. No. 87788, 2007-Ohio-75.

Accordingly, the motion to certify is well taken and the following issue should be certified pursuant to App.R. 25:

May a trial court impose court costs pursuant to R.C. 2947.23 in its sentencing entry, when it did not impose those costs in open court at the sentencing hearing?

29 PLC

A-1

CAJ 008 230

It is therefore **ORDERED** that appellant's motion to certify a conflict be, and hereby is, granted on the certified issue set forth hereinabove.

Vernon L. Greston

John B. Hillamowski

J.B.
JUDGES

DATED: April 22, 2008

/jlr

COURT OF APPEALS
THIRD APPELLATE DISTRICT
ALLEN COUNTY

COURT OF APPEALS
FILED

2008 MAR 17 PM 1:01

W. C. STALEY-BURLEY
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

ATTORNEYS:

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For Appellant.

JANA E. EMERICK
Assistant Prosecuting Attorney
Reg. #0059550
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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, 19991 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.

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
CLERK OF COURTS
ALLEN COUNTY, OHIO

PLAINTIFF-APPELLEE,

JOURNAL

v.

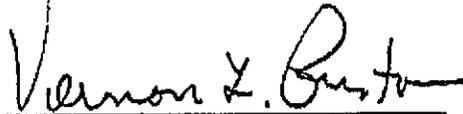
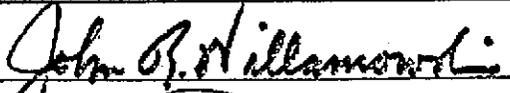
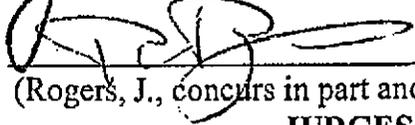
ENTRY

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

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

STATE OF OHIO, : OPINION
Plaintiff-Appellee, :
- vs - : CASE NO. 2002-L-115
JOHN T. PEACOCK, :
Defendant-Appellant. :

Criminal Appeal from the Court of Common Pleas, Case No. 01 CR 000615.

Judgment: Affirmed in part; reversed in part and remanded.

Charles E. Coulson, Lake County Prosecutor and *Brian L. Summers*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

John T. Peacock, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030 (Defendant, pro se).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, John T. Peacock, appeals from the trial court's judgment convicting him of one count of possession of crack cocaine in violation of R.C. 2925.11(C)(4)(c). Appellant also appeals from the trial court's sentencing entry. We affirm in part, vacate appellant's sentence and remand for resentencing.

{¶2} On the evening of November 28, 2001, Officer Eric Kacvinsky of the Painesville Police Department was on patrol in the Jefferson Street area of Painesville. Officer Kacvinsky saw appellant walking up and down Jefferson Street. Officer Kacvinsky turned his patrol car around and saw appellant talking to John Gibson. Officer Kacvinsky did not recognize appellant, but did recognize Mr. Gibson. Officer Kacvinsky testified that he knew Gibson to be involved in crime and drug trafficking.

{¶3} When Mr. Gibson saw Officer Kacvinsky he left the area. Officer Kacvinsky went around the block and stopped Mr. Gibson and spoke to him. Mr. Gibson said that he was in the area visiting relatives. Officer Kacvinsky went back around the block and saw appellant walking down Kerr Avenue. Officer Kacvinsky approached appellant to ascertain his identity.

{¶4} As Officer Kacvinsky exited his patrol car he saw a small white object fall out of appellant's right hand. The object landed on the sidewalk right on the edge of the grass. Officer Kacvinsky called appellant over to him. Officer Kacvinsky talked to appellant while waiting on other officers to arrive. After back up arrived Officer Kacvinsky retrieved the object appellant had dropped. The object was a Tylenol bottle that contained 7.1 grams of crack cocaine.

{¶5} Appellant was indicted for possession of crack cocaine in violation of R.C. 2925.11(C)(4)(c), tried by a jury and convicted. At a sentencing hearing the trial court sentenced appellant to four years in prison and imposed a fine of \$5,000.¹ The trial court's sentencing entry also suspended appellant's driver's license for four years,

1. Appellant subsequently filed an affidavit of indigency and the trial court amended the sentencing entry and vacated the fine.

stated that appellant could be subject to post release control, and ordered appellant to pay court costs.

{¶16} Appellant appeals his conviction and sentence asserting three assignments of error:

{¶17} “[1.] The trial court erred by adding punishment in the judgment entry of sentence.”

{¶18} “[2.] The trial court erred by imposing costs.”

{¶19} “[3.] Defendant was denied the effective assistance of counsel when his counsel failed to file a motion to suppress evidence in violation of his constitutional rights guaranteed by the United States and Ohio Constitutions.”

{¶10} In his third assignment of error appellant argues that he was denied effective assistance of counsel because his trial counsel failed to file a motion to suppress evidence obtained as a result of his stop and arrest. Because this assignment of error relates to the underlying conviction we address it first.

{¶11} When we review an ineffective assistance claim the benchmark is, “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington* (1984), 466 U.S. 668, 686. To prevail on his claim of ineffective assistance, appellant must show that his counsel’s performance was deficient. “This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed by the Sixth Amendment.” *Id.* at 687. He must also show prejudice resulting from the deficient performance. *Id.* “This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* Appellant must show, “that there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. We presume that counsel's conduct was within the wide range of reasonable professional assistance. *Id.* See, also, *State v. Bradley* (1989), 42 Ohio St.3d 136, 143.

{¶12} We need not address the two prongs of appellant's ineffective assistance claim in the order set forth in *Strickland*.

{¶13} "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, at 697.

{¶14} There are three types of police-citizen encounters: consensual encounters, *Terry* stops, and arrests. *State v. Taylor* (1995), 106 Ohio App.3d 741, 747-49. A consensual encounter occurs when a police officer approaches a person in a public place, engages the person in conversation, requests information, and the person is free to refuse to answer and walk away. *Id.* at 747. A consensual encounter does not implicate the Fourth Amendment's protection against unreasonable searches and seizures unless the police officer has restrained the person's liberty by a show of authority or physical force such that a reasonable person would not feel free to decline the officer's request or otherwise terminate the encounter. *Id.* at 747-48.

{¶15} A *Terry* stop is an investigatory detention of limited duration and purpose and can last only as long as it takes the police officer to confirm or dispel his suspicions.

Id. at 748. Such a stop is valid if the officer had reasonable and articulable suspicions of criminal activity. Id. at 749.

{¶16} The final type of police-citizen encounter is an arrest. For an arrest to be valid the officer must have probable cause to believe that the individual has committed an offense. Id.

{¶17} The initial encounter between appellant and Officer Kacvinsky was consensual. Thus, there was no basis to support a motion to suppress.

{¶18} Officer Kacvinsky testified that he knew Mr. Gibson to be involved in criminal activity; he testified that the area was known for drug trafficking. Officer Kacvinsky testified that he saw appellant drop the white object and that in his experience it was common for someone to drop drugs when approached by a police officer. Officer Kacvinsky testified that he watched the white object throughout his conversation with appellant until his back up arrived. Nothing in the record indicates that the encounter ceased to be consensual until other officer's arrived on the scene.

{¶19} Officer Kacvinsky stated that after back up arrived he had other officers watch appellant while he picked up the white object. This constituted a *Terry* stop. Based on Officer Kacvinsky's training and experience he had reasonable suspicion to justify the stop, i.e., he testified that it was common for an individual to discard drugs when approached by an officer. This stop lasted only long enough for the officer to verify his suspicions. Thus, the stop provided no basis to justify a motion to suppress.

{¶20} Finally, Officer Kacvinsky retrieved the object he saw appellant drop. As Officer Kacvinsky started to pick up the bottle appellant stated, "That's not my stuff." Officer Kacvinsky shook the bottle and it rattled. The officer testified that in his experience crack cocaine was often carried in small containers. Officer Kacvinsky field

tested the substance he found in the bottle and it tested positive for crack cocaine. Thus, the arrest was supported by probable cause and provided no basis for a motion to suppress. Appellant has failed to show a reasonable probability that, but for counsel's failure to file a motion to suppress, the result of the proceeding would have been different.

{¶21} Appellant also argues that Officer Kacvinsky questioned him after he was in custody and without informing him of his *Miranda* rights; however, appellant does not direct us to any statement elicited during this questioning that was admitted at trial. Again, appellant has failed to show a reasonable probability that, but for counsel's failure to file a motion to suppress, the result of the proceeding would have been different. Appellant's third assignment of error is without merit.

{¶22} In his first assignment of error appellant argues that the trial court erred in imposing additional punishments in the sentencing entry, i.e., suspending his driver's license, subjecting him to the possibility of post release control, and requiring that he pay costs. We agree.

{¶23} We may modify a sentence or vacate a sentence and remand the matter to the sentencing court for resentencing if we find by clear and convincing evidence that the sentence is contrary to law. R.C. 2953.08(G)(2)(b).

{¶24} R.C. 2967.28 provides in relevant part:

{¶25} "(B) Each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the

offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment. ***.

{¶26} "(C) Any sentence to a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (B)(1) or (3) of this section shall include a requirement that the offender be subject to a period of post-release control of up to three years after the offender's release from imprisonment, if the parole board, in accordance with division (D) of this section, determines that a period of post-release control is necessary for that offender."

{¶27} Thus, R.C. 2967.28(B) makes post release control mandatory for certain offenses, while R.C. 2967.28(C) grants the parole board discretion to determine if a period of post release control is necessary for other offenses. However, there is no question that post release control is a part of every sentence. See, R.C. 2929.14(F)²; *Woods v. Telb* (2001), 89 Ohio St.3d 504, 513.

{¶28} R.C. 2929.19(B)(3) states:

{¶29} "**** if the sentencing court determines at the sentencing hearing that a prison term is necessary or required, the court shall do all of the following:

{¶30} "****

{¶31} "****

2. R.C. 2929.14(F) provides:

"If a court imposes a prison term of a type described in division (B) of section 2967.28 of the Revised Code, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division. If a court imposes a prison term of a type described in division (C) of that section, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division, if the parole board determines that a period of post-release control is necessary."

{¶32} "(c) Notify the offender that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the first degree or second degree, for a felony sex offense, or for a felony of the third degree in the commission of which the offender caused or threatened to cause physical harm to a person;

{¶33} "(d) Notify the offender that the offender may be supervised under section 2967.28 of the Revised Code after the offender leaves prison if the offender is being sentenced for a felony of the third, fourth, or fifth degree ***.

{¶34} R.C. 2929.19(B)(3) grants the trial court no discretion. The trial court is required to notify the defendant at the sentencing hearing that post release control will be or may be imposed. *Woods, supra*. Placing the required notice in the sentencing entry is insufficient. Thus, in the instant case the trial court erred when it failed to notify appellant of the possibility of post release control at his sentencing hearing and simply placed the notice in the sentencing entry. R.C. 2929.19(B)(3)(c) and (d); R.C. 2967.28(B) and (C); *Woods, supra* at 513 (stating, "Further, we hold that pursuant to R.C. 2967.28(B) and (C), a trial court must inform the offender at sentencing or at the time of a plea hearing that post-release control is part of the offender's sentence.)

{¶35} What is not clear is the appropriate remedy when the trial court fails to inform the defendant that post release control is part of the sentence. Some cases have held that when the trial court fails to notify the defendant of post release control at the sentencing hearing, but includes post release control in the sentencing entry, post release control is not a part of the sentence. See, e.g., *State v. McAninch*, 1st Dist. No. C-010456, 2002-Ohio-2347; *State v. Morrissey* (Dec. 18, 2000), 8th Dist. No. 77179, 2000 Ohio App. LEXIS 5963; *State v. Hart* (May 31, 2001), 8th Dist. No. 78170, 2001

Ohio App. LEXIS 2428; *State v. Stell* (May 16, 2002), 8th Dist. No. 79850, 2002 WL 999306; *State v. Fitch*, 8th Dist. No. 79937, 2002-Ohio-4891; *State v. Colbert*, 8th Dist. No. 80631, 2002-Ohio-6315.

{¶36} Other cases have held that the sentence should be vacated and the matter remand for resentencing. *State v. Lattimore*, 1st Dist. No. C-010488, 2002-Ohio-723; *State v. Brooks* (Dec. 1, 1999), 3rd Dist. No. 9-99-40, 1999 WL 1076135; *State v. Miller* (Dec. 22, 2000), 6th Dist. No. L-00-1037, 2000 WL 1867274; *State v. Shine* (Apr. 29, 1999), 8th Dist. No. 74053, 1999 WL 258193; *State v. Williams* (Dec. 7, 2000), 8th Dist. No. 76816, 2000 WL 1800609; *State v. Rashad* (Nov. 8, 2001), 8th Dist. No. 79051, 2001 WL 1400013; *State v. Mallet* (Nov. 15, 2001), 8th Dist. No. 79306, 2001 WL 1456479; *State v. Bryant*, 8th Dist. No. 79841, 2002-Ohio-2136; *State v. Johnson*, 8th Dist. No. 80459, 2002-Ohio-4581; *State v. Jordan*, 8th Dist. No. 80675, 2002-Ohio-4587. We agree with the latter.

{¶37} R.C. 2953.08(G)(2)(b) permits us to remand a matter for resentencing if we find by clear and convincing evidence that the sentence was contrary to law. Further, “[c]rimes are statutory, as are the penalties therefor, and the only sentence which a trial judge may impose is that provided for by statute ***. A court has no power to substitute a different sentence for that provided by law.” *State v. Beasley* (1984), 14 Ohio St.3d 74, 75. When a trial court fails to impose a sentence as mandated by statute, the trial court exceeds its authority and the sentence is void. *Id.* Resentencing an offender to correct a void sentence does not constitute double jeopardy. *Id.*

{¶38} Appellant also contends that remanding for resentencing in this situation chills a defendant’s right to appeal. We disagree. While the state could have appealed the error in sentencing, R.C. 2953.08(B)(2), we may also recognize plain error.

{¶39} Were we to simply vacate the sentencing entry's reference to post release control, we would be usurping the power of both the legislative and executive branches of our government in violation of the separation of powers doctrine. The legislature has mandated post release control, or at least the possibility of post release control, for certain offenses. R.C. 2967.28(B) and (C). Courts have no authority to alter this mandate. The legislature has also granted the executive branch the discretion to determine if certain offenders will be subject to post release control. R.C. 2967.28(C). Courts have no authority to deprive the executive branch of this discretion. By vacating the sentence without remanding for resentencing we would return to courts discretion the sentencing guidelines were to eliminate.

{¶40} Finally, Crim.R. 43(A) requires the defendant to be present at sentencing except in limited circumstances. When a sentencing court imposes additional sanctions in its sentencing entry it violates Crim.R. 43(A). See *State v. Bryant* (May 2, 2002), 8th Dist. No. 79841, 2002 WL 962687, at ¶61 (stating "**** the inclusion of post-release control in the journal entry constituted a modification of [the defendant's] sentence outside [the defendant's] presence. The courts have consistently held that it is reversible error to modify a defendant's sentence in his absence pursuant to Criminal Rule 43(A).") (Internal quotations and citations omitted.)

{¶41} Here, the trial court disregarded the mandates of R.C. 2929.19(B)(3) and Crim.R.43(A) when it failed to inform appellant that he was subject to post release control at his sentencing hearing. Therefore, the sentence is void.

{¶42} Appellant also argues that the trial court violated Crim.R.43(A) when it failed to inform him at the sentencing hearing that his driver's license was to be suspended and that he was required to pay court costs.

{¶43} R.C. 2925.11(E)(2) mandated a driver's license suspension for appellant's conviction. Former R.C. 2947.23 stated:

{¶44} "In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs. If a jury has been sworn at the trial of a case, the fees of the jurors shall be included in the costs, which shall be paid to the public treasury from which the jurors were paid."

{¶45} Thus, the trial court was required to suspend appellant's driver's license and impose costs; however, Crim.R.43(A) required that appellant be present for his sentencing. The trial court erred by imposing these additional sanctions in the judgment entry. See, *Bryant*, supra. Thus, we hold that Crim.R.43(A) requires the trial court to inform the defendant, at his sentencing hearing, that his driver's license will be suspended and that he is required to pay costs. Simply adding these sanctions in the sentencing entry violates Crim.R.43(A). Appellant's first assignment of error has merit.

{¶46} In his second assignment of error appellant contends that the trial court cannot impose costs on him because he is indigent. We disagree.

{¶47} As discussed above, former R.C. 2947.23 required the court to impose costs. However, appellant contends that R.C. 2949.14 prohibits a court from imposing costs on an indigent defendant. This section provides:

{¶48} "Upon conviction of a *nonindigent* person for a felony, the clerk of the court of common pleas shall make and certify under his hand and seal of the court, a complete itemized bill of the costs made in such prosecution, including the sum paid by the board of county commissioners, certified by the county auditor, for the arrest and return of the person on the requisition of the governor, or on the request of the governor

to the president of the United States, or on the return of the fugitive by a designated agent pursuant to a waiver of extradition except in cases of parole violation. Such bill of costs shall be presented by such clerk to the prosecuting attorney, who shall examine each item therein charged and certify to it if correct and legal. Upon certification by the prosecuting attorney, the clerk shall attempt to collect the costs from the person convicted." (Emphasis added.)

{¶49} We agree with the reasoning of the Fifth District Court of Appeals, which held:

{¶50} "R.C. 2949.14 does not govern the court's ability to order costs. The statute is directed at the ability of the clerk of courts to collect the costs from the person convicted. While R.C. 2949.14 provides a collection mechanism only for non-indigent defendants, nothing in R.C. 2947.23 prohibits the court from assessing costs to an indigent defendant as part of the sentence. In the event the indigent defendant at some point ceases to be indigent, the clerk could then collect costs pursuant to the procedure outlined in R.C. 2949.14. Ohio law does not prohibit a judge from including costs as part of the sentence of an indigent defendant." *State v. White*, 5th Dist. No. 02CA23, 2003-Ohio-2289, ¶9. See, also, *State v. Roux*, 154 Ohio App.3d 360, 2003-Ohio-5155.

{¶51} Appellant also argues in his second assignment of error that O.A.C. 5120-5-03 violates the due process and equal protection clauses of the United States Constitution. This administrative code section provides a mechanism:

{¶52} "**** for withdrawing money that belongs to an inmate and that is in an account kept for the inmate by the department of rehabilitation and correction (DRC), upon receipt of a certified copy of a judgment of a court of record in an action in which

an inmate was a party that orders an inmate to pay a stated obligation. ***." Ohio Adm.Code 5120-5-03(A).

{¶53} The Fourteenth Amendment to the United States Constitution prohibits a state from denying a person within its jurisdiction equal protection of the laws. Because no suspect class or fundamental right is involved in this case we apply a rational basis analysis, i.e., whether there exists a permissible governmental objective and whether the means employed is rationally related to the achievement of that objective.

{¶54} Here the objective is the collection of a valid judgment. This is a permissible governmental objective. The means chosen to achieve that objective is the garnishment of an inmate's account. The procedures adopted parallel the collection procedures for non-inmate debtors but are adapted to fit the special problems associated with pursuing collections from inmates and their accounts. *Bell v. Beightler* (Jan. 14, 2003), 10th Dist. No. 02AP-569, 2003 WL 116146, ¶50. Thus, Ohio Adm.Code 5120-5-03 passes the rational basis test and does not violate the equal protection clause.

{¶55} Appellant also contends that Ohio Adm.Code 5120-5-03 violates his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. Garnishment procedures must afford the debtor procedural due process. *Id.*, citing *Peebles v. Clement* (1980), 63 Ohio St.2d 314; *Community Physical Therapy v. Wayt* (1994), 93 Ohio App.3d 612. Due process is a flexible concept that depends on the demands of the particular situation. *Bell*, at ¶51, quoting *Morrissey v. Brewer* (1972), 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484. Due process generally requires a right to notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Bell*, at ¶51, citing *State v. Hochhausler* (1996), 76 Ohio St.3d 455.

"In cases of garnishment or attachment, this specifically includes the opportunity to present objections and exemptions to the garnishment order." *Bell*, at ¶51.

{¶56} Ohio Adm.Code 5120-5-03 provides a detailed garnishment procedure. It requires the warden's designee to determine whether "the judgment and other relevant documents are facially valid." Ohio Adm.Code 5120-5-03(C). The warden's designee then provides notice to the inmate of the debt and its intent to seize money from the inmate's account. *Id.* The notice must inform the inmate of a right to claim exemptions and the type of exemptions available under R.C. 2329.66. *Id.* Only after the inmate has had an opportunity to assert any exemption or defense, may money be withdrawn from the inmate's account. *Id.* Finally, only the amount of monthly income received in the inmate's account that exceeds ten dollars may be withdrawn to satisfy the judgment. Ohio Adm.Code 5120-5-03(E). There is no evidence in the record that this amount is insufficient to meet appellant's needs while incarcerated. Ohio AdmCode 5120-5-03 comports with the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution. Appellant's second assignment of error is without merit.

{¶57} For the foregoing reasons appellant's second and third assignments of error are without merit. Appellant's first assignment of error has merit. Appellant's sentence is vacated and this matter is remanded to the Lake County Court Common Pleas for resentencing consistent with this opinion.

JUDITH A. CHRISTLEY and DIANE V. GRENDALL, JJ., concur.

[Cite as *State v. Smoot*, 2005-Ohio-5326.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 05AP-104
	:	(C.P.C. No. 03CR10-6727)
Mark L. Smoot,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

O P I N I O N

Rendered on October 6, 2005

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Mark L. Smoot, appeals from the judgment of the Franklin County Court of Common Pleas, whereby the trial court sentenced appellant on his forgery and engaging in a pattern of corrupt activity convictions.

{¶2} On December 30, 2004, appellant pled guilty to forgery, in violation of R.C. 2913.31, a fourth-degree felony, and engaging in a pattern of corrupt activity, in violation of R.C. 2923.32, a second-degree felony. At the sentencing hearing, appellant and plaintiff-appellee, the State of Ohio, jointly recommended, in pertinent part, that the trial court impose consecutive sentences of two years on the corrupt activity count and 14 months on the forgery count. The trial court accepted the joint recommendation and imposed the sentence. Next, the trial court mentioned statutory factors and reasons to support the sentence. Although the trial court did not impose court costs at the sentencing hearing, it did order court costs when it issued its judgment entry journalizing the sentence.

{¶3} Appellant appeals, raising two assignments of error in his merit brief:

FIRST ASSIGNMENT OF ERROR

The trial court erred in imposing consecutive terms of imprisonment, in violation of R.C. 2929.14(E)(4).

SECOND ASSIGNMENT OF ERROR

The trial court erred in imposing a term greater than the minimum sentence for a person with no prior history of imprisonment based on facts not found by a jury or admitted by Appellant. This omission violated Appellant's rights to a trial by jury and due process under the state and federal Constitutions.

{¶4} Appellant raises the following supplemental assignment of error in a supplemental brief:

The trial court erred in ordering Appellant to pay court costs through the Judgment Entry when the penalty was not pronounced in Appellant's presence in court.

{¶5} In his first assignment of error, appellant claims that the trial court failed to make the requisite findings and reasons under R.C. 2929.14(E)(4) and 2929.19(B)(2)(c) when imposing consecutive sentences. Thus, according to appellant, we must reverse his sentences because the trial court erred when it imposed consecutive prison terms. We disagree.

{¶6} The trial court imposed a jointly recommended sentence. Under R.C. 2953.08(D):

A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge. * * *

{¶7} Under R.C. 2953.08(D), a sentence is "authorized by law" if it falls within the statutory range of available sentences. *State v. Atchley*, Franklin App. No. 04AP-841, 2005-Ohio-1124, at ¶8, citing *State v. Harris* (Dec. 31, 2001), Franklin App. No. 01AP-340; *State v. Gray*, Belmont App. No. 02 BA 26, 2003-Ohio-805, at ¶10. Here, the range for appellant's second-degree corrupt activity conviction is two to eight years imprisonment. R.C. 2929.14(A). Thus, the two-year sentence that the trial court imposed on the second-degree felony falls within the statutory range of available prison terms and is "authorized by law[.]" The range for appellant's fourth-degree forgery conviction is six to 18 months. R.C. 2929.14(A). Thus, the 14-month sentence that the trial court imposed on the fourth-degree felony falls within the statutory range of available prison terms and is "authorized by law[.]"

{¶8} Because the above sentences are "authorized by law," and because the trial court imposed the sentences on appellant and appellee's joint recommendation,

R.C. 2953.08(D) precludes our reviewing appellant's claim that the trial court failed to make the statutory findings and explanations when imposing consecutive sentences. See *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, at ¶26; *State v. Dingess*, Franklin App. No. 02AP-150, 2002-Ohio-6450, at ¶48. Thus, we overrule appellant's first assignment of error.

{¶9} In his second assignment of error, appellant contends that the trial court erred by imposing a sentence without the jury finding, or appellant admitting to, the requisite factors in Ohio's felony sentencing statute. In support, appellant relies on *Blakely v. Washington* (2004), 542 U.S. 296, 124 S.Ct. 2531; and *Apprendi v. New Jersey* (2000), 530 U.S. 466. In *Apprendi*, the United States Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Otherwise, the sentence violates a defendant's right to a jury trial under the Sixth Amendment to the United States Constitution and Fourteenth Amendment due process guarantees. *Apprendi* at 476-478, 497. In *Blakely*, the United States Supreme Court defined "'statutory maximum' for *Apprendi* purposes" as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (Emphasis sic.) *Blakely* at 2537.

{¶10} However, irrespective of R.C. 2953.08(D), appellant waived arguments under *Apprendi* and *Blakely* through the jointly recommended sentencing agreement. *State v. Tillman*, Huron App. No. H-04-040, 2005-Ohio-2347, at ¶5, citing *Blakely* at 2541. Accordingly, we overrule appellant's second assignment of error.

{¶11} In his supplemental assignment of error, appellant asserts that the trial court erred in ordering court costs in the judgment entry because the trial court did not order court costs in appellant's presence. Appellee concedes error, and we agree.

{¶12} Pursuant to Crim.R. 43(A), "[t]he defendant shall be present at * * * the imposition of sentence[.]" Likewise, trial courts impose costs as part of a sentence. R.C. 2947.23(A)(1). Thus, in *State v. Murphy* (Aug. 11, 1998), Franklin App. No. 97APA10-1357, we reversed a trial court's decision to impose court costs outside of a defendant's presence. We remanded the matter to the trial court to allow it to impose, "if it deem[ed] appropriate," such costs in accordance with Crim.R. 43(A). *Murphy*.

{¶13} Accordingly, here, Crim.R. 43(A) required the trial court to impose court costs in appellant's presence. However, the trial court did not mention in appellant's presence that it was imposing court costs. Therefore, the trial court erred by subsequently imposing court costs in the judgment entry without having imposed such costs in appellant's presence. See *Murphy*. As such, we sustain appellant's supplemental assignment of error.

{¶14} In summary, we overrule appellant's first and second assignments of error, but sustain appellant's supplemental assignment of error. The judgment of the Franklin County Court of Common Pleas is affirmed in part, reversed in part as to the court costs imposed outside of appellant's presence, and this matter is remanded to the trial court for proceedings on court costs consistent with this opinion.

*Judgment affirmed in part, reversed
in part, and cause remanded.*

McGRATH and TRAVIS, JJ., concur.

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87788

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KONSHAWNTE TRIPPLETT

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-461216

BEFORE: Blackmon, J., Gallagher, P.J., and Corrigan, J.

RELEASED: January 11, 2007

JOURNALIZED:

[Cite as *State v. Triplett*, 2007-Ohio-75.]
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[Cite as *State v. Triplett*, 2007-Ohio-75.]
PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Konshawnte Triplett appeals his conviction and sentence.

Triplett assigns the following errors for our review:

“I. The State failed to produce sufficient evidence to prove that Mr. Triplett was guilty of possession of criminal tools as alleged in the indictment. This deprived Mr. Triplett of his right to due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Section 16, Article I of the Ohio Constitution.”

“II. The trial court erred by imposing sentences in its journal entry when it did not impose those sentences in Mr. Triplett’s presence, in violation of Crim.R. 43(A), and the Fifth and Fourteenth Amendments to the United States Constitution, and Section 16, Article I of the Ohio Constitution.”

“III. The trial court erred by imposing court costs in its entry, but not in Mr. Triplett’s presence at sentencing, in violation of Crim.R. 43(A), and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Section 16, Article I of the Ohio Constitution.”

“IV. Konshawnte Triplett was deprived of his right to the effective assistance of counsel, in contravention of the Sixth and Fourteenth Amendments to the United States Constitution, and Section 10, Article I of the Ohio Constitution.”

{¶ 2} Having reviewed the record and pertinent law, we affirm Triplett’s conviction, but remand for re-sentencing to comport with the requirements of Crim.R. 43(A). The opposite facts follow.

{¶ 3} On January 20, 2005, the Cuyahoga County Grand Jury indicted Triplett on one count each of drug possession, corrupting another with drugs, tampering with evidence, and possession of criminal tools. Triplett pled not guilty at his arraignment. After numerous pre-trial conferences were conducted, a jury trial

commenced on April 26, 2005.

Jury Trial

{¶ 4} Detective David Sims of the Cleveland Police Department testified that on December 1, 2004, he arranged for a confidential reliable informant to make a controlled drug buy with marked money at 1010 East 70th Street, apartment #4, Cleveland, Ohio. The informant made the buy of one rock of crack cocaine and indicated he had purchased it from a female occupant at that address. Therefore, the officer obtained a search warrant for the residence.

{¶ 5} Two days later, Detective Sims arranged for a second controlled drug buy at the same residence. The same confidential informant returned with one rock of crack cocaine, which he claimed to have purchased from a female occupant. Detective Sims stated after the second controlled buy, the Cleveland Police SWAT unit executed the search warrant.

{¶ 6} Detective Sims testified he entered the apartment after the SWAT unit had secured it. He found Tripplett, a young girl named Cecelia Marks, and three other adults in the apartment. Detective Sims stated that he observed a camera that was pointed at the street, which he later learned was connected to a television monitor and video recording equipment located in Tripplett's bedroom. Detective Sims testified that the police recovered a rock of crack cocaine from a shelf in the bathtub and also recovered a bag of marijuana, along with several pieces of mail addressed to Tripplett.

{¶ 7} Swat Officer Jose Delgado testified that he was assigned the duty of breaching the front door of the residence. Officer Delgado stated that upon entering the apartment, he proceeded to the bathroom, but found the door locked. He then broke the door down and found Triplet and Marks hiding in the bathtub behind the shower curtain. Officer Delgado stated that the water in the toilet bowl was swirling and he saw a rock of crack cocaine floating in the water. Officer Delgado further stated that Triplet's arm and shirt sleeve were wet.

{¶ 8} Sergeant Fred Mone, another member of the SWAT unit, testified that he found a rock of crack cocaine in the bathtub.

{¶ 9} Cecelia Marks, age fourteen, testified that at the time the police executed the search warrant, she had been living with Triplet for several months. Marks testified that during this time, Triplet had given her drugs to sell. Marks stated that when the SWAT unit arrived, she hid with Triplet in the bathroom, and Triplet unsuccessfully tried to flush the crack cocaine down the toilet.

{¶ 10} Marks testified that at the time of her arrest, she told the police that the drugs belonged to her and not to Triplet. She also stated that she had indicated to Triplet's attorney, by telephone and in writing, that the charges against Triplet were false.

{¶ 11} Marks admitted that in exchange for her testimony against Triplet, her juvenile court charges for tampering with evidence, a third degree felony, would be reduced to obstruction of official business, a misdemeanor charge, for which she

was promised probation. Finally, Marks admitted, in attempting to help Tripplett, she had lied both to the police and to Tripplett's attorney.

{¶ 12} At the conclusion of the trial, the jury returned guilty verdicts on all charges. On May 26, 2005, the trial court sentenced Tripplett to a concurrent prison term of five years.

Sufficiency of Evidence

{¶ 13} In the first assigned error, Tripplett argues the evidence was insufficient to sustain a conviction for possession of criminal tools. We disagree.

{¶ 14} A challenge to the sufficiency of the evidence supporting a conviction requires the appellate court to determine whether the State met its burden of production at trial.¹ On review for legal sufficiency, the appellate court's function is to examine evidence admitted at trial and determine whether such evidence, if believed, would convince the average person of the defendant's guilt beyond a reasonable doubt.² In making its determination, an appellate court must view the evidence in a light most favorable to the prosecution.³

{¶ 15} Tripplett was convicted of possession of criminal tools in violation of R.C. 2923.24, which provides in pertinent part as follows:

“(A) No person shall possess or have under the person's control any

¹ *State v. Thompkins* (1997), 78 Ohio St.3d 380.

² *Id.*; *State v. Fryer* (1993), 90 Ohio App.3d 37.

³ *Id.* at 43.

substance, device, instrument, or article, with purpose to use it criminally.

(C) Whoever violates this section is guilty of possessing criminal tools. Except as otherwise provided in this division, possessing criminal tools is a misdemeanor of the first degree. If the circumstances indicate that the substance, device, instrument, or article involved in the offense was intended for use in the commission of a felony, possessing criminal tools is a felony of the fifth degree.”

{¶ 16} In the instant case, Tripplett specifically contends that the video camera located outside his apartment, which was connected to a video recorder and television in his bedroom was not used to commit a felony. We are not persuaded.

{¶ 17} Detective Sims testified in pertinent part as follows:

“A. Once we – once I entered the premises, one of the SWAT members told me: He’s got a video hookup where you can see the street, people coming, people leaving the house. I entered the bedroom; you can see people driving down the street, walking down the street, right on the TV, the monitor.

Q. Which TV? You said you recovered a smaller monitor and a 19-inch I believe it was.

A. Yes.

Q. Which monitor was showing you what you just described?

A. Both of the TVs were on.”

“Q. Now, based on your knowledge and experience as a Cleveland vice detective, what does a set-up such as the one you just describe in Exhibits 14 through 20 indicate to you?

A. This set-up indicates to me that this person knew what he was doing. He was trying to prevent being captured from doing what he was doing

and it was a good set-up.”

“***

“Q. Okay. Thank you. How would it prevent someone who used that set-up from being caught by the police?

A. Well, if he can see us coming, they can get rid of the drugs or they can even escape from the location.”⁴

{¶ 18} After viewing the evidence in the light most favorable to the State, we conclude the testimony supports a determination that Tripplett possessed criminal tools. Detective Sims’ testimony revealed an elaborate video surveillance system, which was monitored from Tripplett’s bedroom. Detective Sims also testified that two controlled drug buys were effected at the residence including one that occurred shortly before the police executed the search warrant.

{¶ 19} Further, Officer Delgado testified that when he entered the bathroom, the toilet had just been flushed and he saw a rock of crack cocaine floating in the water. The totality of the circumstances indicate that the video surveillance equipment was being used for a criminal purpose. As such, the State presented sufficient evidence to convict Tripplett of possessing criminal tools. Accordingly, we overrule the first assigned error.

Ineffective Assistance of Counsel

{¶ 20} In his fourth assigned error, Tripplett argues his counsel was ineffective

⁴Tr. at 219-221.

for allegedly conceding that he was guilty of drug possession. We disagree.

{¶ 21} We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington*.⁵ Under *Strickland*, a reviewing court will not deem counsel's performance ineffective unless a defendant can show his lawyer's performance fell below an objective standard of reasonable representation and that prejudice arose from the lawyer's deficient performance.⁶ To show prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different.⁷ Judicial scrutiny of a lawyer's performance must be highly deferential.⁸

{¶ 22} In his closing argument, Tripplett's trial counsel made the following statement:

"If you want to find Mr. Tripplett guilty of possession of drugs, if you think the State proved that because he was in the bathroom with these rocks of crack cocaine, please go ahead. I don't have a big problem with that. It's everything else that is real distasteful to me. I'm very serious. And I don't think it's been proven beyond a reasonable doubt."⁹

Admittedly, the above statement is not the most artful. However, we decline to

⁵(1984), 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052.

⁶*State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph one of syllabus.

⁷*Id.* at paragraph two of syllabus.

⁸*State v. Sallie* (1998), 81 Ohio St.3d 673, 674.

⁹Tr. at 361-362.

conclude that trial counsel conceded Tripplett's guilt to the charge of drug possession. The record before us reveals that Tripplett's trial counsel expended a considerable effort and time discrediting Marks' testimony that the drugs did not belong to her. The following exchange took place during cross examination of Marks:

"Q. Cecelia, you're telling us that you're telling the truth today?

A. Yes.

Q. So in other words, when you told the police back at the time of your arrest, that was a lie?

A. Yes.

"Q. Do you remember calling me on the phone to tell me about Shawn, Konshawnte?

A. Yes.

Q. Do you remember telling me that the charges were all false?

A. Yes.

Q. Were you lying then?

A. Yes.

Q. Were you telling the truth?

A. I was lying."¹⁰

¹⁰Tr. at 282-283.

{¶ 23} Here, Tripplett's trial counsel elicited three separate admissions from Marks that she was lying. The record also reveals that Tripplett's trial counsel continued to attack Marks' credibility during closing argument. During closing argument Tripplett's trial counsel stated:

"Before you can find the defendant guilty you must find beyond a reasonable doubt, you'll read the rest, to commit a felony drug abuse offense, to-wit possession of drugs; it flies in the face of reason. She's in the bathroom. She's now denying all possession of drugs."¹¹

{¶ 24} We decline to view the statement at issue in a vacuum. We conclude that when Tripplett's trial counsel's attack on Marks' credibility is juxtaposed with the statement he made during closing argument, a rational juror would not infer that the statement was made as a concession of guilt to drug possession.

{¶ 25} We also conclude that Tripplett was not prejudiced by trial counsel's statement because there was sufficient evidence that Tripplett constructively possessed the drugs. Possession may be actual or constructive.¹² To establish constructive possession, the evidence must prove that the defendant was able to exercise dominion and control over the contraband.¹³ Dominion and control may be proven by circumstantial evidence alone.¹⁴ Circumstantial evidence that the

¹¹Tr. at 355.

¹²*State v. Trembly* (2000), 137 Ohio App.3d 134. See also *State v. Haynes* (1971), 25 Ohio St.2d 264; *State v. Hankerson* (1982), 70 Ohio St.2d 87.

¹³*State v. Wolery* (1976), 46 Ohio St.2d 316, 332.

¹⁴*State v. Taylor* (1997), 78 Ohio St.3d 15.

defendant was located in very close proximity to readily usable drugs may constitute constructive possession.¹⁵

{¶ 26} In the case herein, viewing the evidence presented in a light most favorable to the prosecution, the testimony of Detective Sim, Officer Delgado and Sergeant Mone supports the determination by the jury that Tripplett did, in fact, constructively possess crack cocaine at the time of his arrest. A review of the record demonstrates that the State established that Tripplett exercised both dominion and control over the crack cocaine discovered in the bathroom. Detective Sims testified the officers found a rock of crack cocaine on the shelf in the bathtub where Tripplett was attempting to hide. Office Delgado also testified that a rock of crack cocaine was floating in the toilet. Clearly, the State established that the crack cocaine was within arms length of Tripplett at the time the search warrant was executed.

{¶ 27} Under the circumstances presented herein, any rational trier of fact could have found from the evidence presented that the essential elements of the offense of drug possession were proven beyond a reasonable doubt.¹⁶ As such, the outcome of the trial would not have been different, despite trial counsel's statement. When viewed in its entirety, Tripplett was not denied the effective assistance of

¹⁵*State v. Barr* (1993), 86 Ohio App.3d 227, 235; *Wolery*, supra; *State v. Bell* (May 14, 1998), Cuyahoga App. No.72691.

¹⁶*State v. Lundy* (June 25, 1998), Cuyahoga App. No. 71849; *State v. Jimenez* (Nov. 25, 1998), Cuyahoga App. No. 73804.

counsel. Accordingly, we overrule the fourth assigned error.

Sentencing

{¶ 28} We sustain Tripplett's second and third assigned errors. The State concedes that the trial court erred when it sentenced Tripplett without informing him of the specific sentence imposed for each individual count for which the jury found him guilty and the trial court erred in imposing court costs outside Tripplett's presence.

{¶ 29} At sentencing, a trial court has no option but to assign a particular sentence to each offense, separately.¹⁷ Further, Crim.R. 43(A) requires the physical presence of a defendant during sentencing.¹⁸ Moreover, a trial court cannot abrogate the defendant's right of allocution by imposing its sentence in the defendant's absence.¹⁹

{¶ 30} Based on the above authority, we vacate the journal entry in its entirety and remand the matter for the limited purpose of re-sentencing Tripplett in conformity with Crim.R. 43(A).

Conviction affirmed, remanded for re-sentencing.

It is ordered that appellee recover from appellant its costs herein taxed.

¹⁷*State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245.

¹⁸*State v. Bell* (1990), 70 Ohio App.3d 765.

¹⁹*State v. Pavone* (June 21, 1984), Cuyahoga App. No. 47700.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

SEAN C. GALLAGHER, P. J., and
MICHAEL J. CORRIGAN, J.*, CONCUR

(*SITTING BY ASSIGNMENT: JUDGE MICHAEL J. CORRIGAN, RETIRED, OF THE EIGHTH DISTRICT COURT OF APPEALS.)

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution

of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim or the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 10 [Trial of accused persons and their rights; depositions by state and comment on failure to testify in criminal cases.]

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court

and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended September 3, 1912.)

CONSTITUTION OF THE STATE OF OHIO

ARTICLE I: BILL OF RIGHTS

§ 16 REDRESS FOR INJURY; DUE PROCESS

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

HISTORY: 1912 constitutional convention, am. eff. 1-1-13

1851 constitutional convention, adopted eff. 9-1-1851

LEXSTAT ORC ANN. 2929.03

PAGE'S OHIO REVISED CODE ANNOTATED

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH OCTOBER 27, 2008

*** ANNOTATIONS CURRENT THROUGH JULY 1, 2008 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 20, 2008 ***

TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2929. PENALTIES AND SENTENCING

PENALTIES FOR MURDER

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ORC Ann. 2929.03 (2008)

§ 2929.03. Imposing sentence for aggravated murder

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of *section 2929.04 of the Revised Code*, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose sentence on the offender as follows:

(1) Except as provided in division (A)(2) of this section, the trial court shall impose one of the following sentences on the offender:

(a) Life imprisonment without parole;

(b) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;

(c) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(d) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(e) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (A)(1)(a) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of *section 2971.03 of the Revised Code* to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be served pursuant to that section.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to *section 2971.03 of the Revised Code*.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of *section 2929.04 of the Revised Code*, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to *section 2929.023 [2929.02.3] of the Revised Code*, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard. The instruction to the jury shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but the instruction shall not mention the penalty that may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) (1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of *section 2929.04 of the Revised Code*, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to *section 2929.023 [2929.02.3] of the Revised Code*, the trial court shall impose sentence on the offender as follows:

(a) Except as provided in division (C)(1)(b) of this section, the trial court shall impose one of the following sentences on the offender:

- (i) Life imprisonment without parole;
- (ii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;
- (iii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;
- (iv) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;
- (v) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (C)(1)(a)(i) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of *section 2971.03 of the Revised Code* to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to *section 2971.03 of the Revised Code*.

(2) (a) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of *section 2929.04 of the Revised Code* and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be one of the following:

(i) Except as provided in division (C)(2)(a)(ii) or (iii) of this section, the penalty to be imposed on the offender shall be death, life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(ii) Except as provided in division (C)(2)(a)(iii) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of death or life imprisonment without parole on the offender pursuant to division (C)(2)(a)(i) of this section, the penalty to be imposed on the offender shall be an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be imposed pursuant to division (B)(3) of *section 2971.03 of the Revised Code* and served pursuant to that section.

(iii) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the penalty to be imposed on the offender shall be death or life imprisonment without parole that shall be served pursuant to *section 2971.03 of the Revised Code*.

(b) A penalty imposed pursuant to division (C)(2)(a)(i), (ii), or (iii) of this section shall be determined pursuant to divisions (D) and (E) of this section and shall be determined by one of the following:

(i) By the panel of three judges that tried the offender upon the offender's waiver of the right to trial by jury;

(ii) By the trial jury and the trial judge, if the offender was tried by jury.

(D) (1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to *section 2929.023 [2929.02.3] of the Revised Code* and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to *section 2947.06 of the Revised Code*. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of *section 2929.04 of the Revised Code*, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defen-

dant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of *section 2929.04 of the Revised Code* and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to one of the following:

(a) Except as provided in division (D)(2)(b) or (c) of this section, to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(b) Except as provided in division (D)(2)(c) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the jury does not recommend a sentence of life imprisonment without parole pursuant to division (D)(2)(a) of this section, to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of *section 2971.03 of the Revised Code* and served pursuant to that section.

(c) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, to life imprisonment without parole.

If the trial jury recommends that the offender be sentenced to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, life imprisonment with parole eligibility after serving thirty full years of imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of *section 2971.03 of the Revised Code*, the court shall impose the sentence recommended by the jury upon the offender. If the sentence is an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment imposed as described in division (D)(2)(b) of this section or a sentence of life imprisonment without parole imposed under division (D)(2)(c) of this section, the sentence shall be served pursuant to *section 2971.03 of the Revised Code*. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Except as provided in division (D)(3)(b) of this section, one of the following:

(i) Life imprisonment without parole;

(ii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(iv) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (D)(3)(a)(i) of this section, the court or panel shall sentence the offender pursuant to division (B)(3) of *section 2971.03 of the Revised Code* to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to *section 2971.03 of the Revised Code*.

(E) If the offender raised the matter of age at trial pursuant to *section 2929.023 [2929.02.3] of the Revised Code*, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of *section 2929.04 of the Revised Code*, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Except as provided in division (E)(2) of this section, one of the following:

(a) Life imprisonment without parole;

(b) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(c) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(d) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (E)(2)(a) of this section, the court or panel shall sentence the offender pursuant to division (B)(3) of *section 2971.03 of the Revised Code* to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to *section 2971.03 of the Revised Code*.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of *section 2929.04 of the Revised Code*, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of *section 2929.04 of the Revised Code* it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. For cases in which a sentence of death is imposed for an offense committed before January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. For cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G) (1) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed before January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

(2) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed on or after January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the supreme court.

HISTORY:

134 v H 511 (Eff 1-1-74); 139 v S 1 (Eff 10-19-81); 146 v S 4 (Eff 9-21-95); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 180, Eff 1-1-97; 150 v H 184, § 1, eff. 3-23-05; 152 v S 10, § 1, eff. 1-1-08.

LEXSTAT ORC ANN. 2929.04

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TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2929. PENALTIES AND SENTENCING

PENALTIES FOR MURDER

Go to the Ohio Code Archive Directory

ORC Ann. 2929.04 (2008)

§ 2929.04. Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to *section 2941.14 of the Revised Code* and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or a person in line of succession to the presidency, the governor or lieutenant governor of this state, the president-elect or vice president-elect of the United States, the governor-elect or lieutenant governor-elect of this state, or a candidate for any of the offices described in this division. For purposes of this division, a person is a candidate if the person has been nominated for election according to law, if the person has filed a petition or petitions according to law to have the person's name placed on the ballot in a primary or general election, or if the person campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, "detention" has the same meaning as in *section 2921.01 of the Revised Code*, except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or mental retardation and developmentally disabled facility unless at the time of the commission of the offense either of the following circumstances apply:

(a) The offender was in the facility as a result of being charged with a violation of a section of the Revised Code.

(b) The offender was under detention as a result of being convicted of or pleading guilty to a violation of a section of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer, as defined in *section 2911.01 of the Revised Code*, whom the offender had reasonable cause to know or knew to be a law enforcement officer as so defined, and either the victim, at the time of the commission of the offense, was engaged in the victim's duties, or it was the offender's specific purpose to kill a law enforcement officer as so defined.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim's testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the

aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding.

(9) The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.

(10) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to *section 2929.023 [2929.02.3] of the Revised Code* or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender but shall be weighed pursuant to divisions (D)(2) and (3) of *section 2929.03 of the Revised Code* by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

HISTORY:

134 v H 511 (Eff 1-1-74); 139 v S 1 (Eff 10-19-81); 147 v S 32 (Eff 8-6-97); 147 v H 151 (Eff 9-16-97); 147 v S 193 (Eff 12-29-98); 149 v S 184. Eff 5-15-2002.

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2947. JUDGMENT; SENTENCE
SENTENCE AND PROCEEDINGS

§ 2947.23. Judgment for costs and jury fees.

In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs. If a jury has been sworn at the trial of a case, the fees of the jurors shall be included in the costs, which shall be paid to the public treasury from which the jurors were paid.

HISTORY:

GC § 13451-18; 113 v 123(201), ch 30, § 18; 120 v 320; Bureau of Code Revision, Eff. 10-1-53.

LEXSTAT ORC ANN. 2947.23

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TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2947. JUDGMENT; SENTENCE

SENTENCE AND PROCEEDINGS

Go to the Ohio Code Archive Directory

ORC Ann. 2947.23 (2008)

§ 2947.23. Judgment for costs and jury fees

(A) (1) In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution, including any costs under *section 2947.231 [2947.23.1] of the Revised Code*, and render a judgment against the defendant for such costs. At the time the judge or magistrate imposes sentence, the judge or magistrate shall notify the defendant of both of the following:

(a) If the defendant fails to pay that judgment or fails to timely make payments towards that judgment under a payment schedule approved by the court, the court may order the defendant to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the court is satisfied that the defendant is in compliance with the approved payment schedule.

(b) If the court orders the defendant to perform the community service, the defendant will receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount.

(2) The following shall apply in all criminal cases:

(a) If a jury has been sworn at the trial of a case, the fees of the jurors shall be included in the costs, which shall be paid to the public treasury from which the jurors were paid.

(b) If a jury has not been sworn at the trial of a case because of a defendant's failure to appear without good cause, the costs incurred in summoning jurors for that particular trial may be included in the costs of prosecution. If the costs incurred in summoning jurors are assessed against the defendant, those costs shall be paid to the public treasury from which the jurors were paid.

(B) If a judge or magistrate has reason to believe that a defendant has failed to pay the judgment described in division (A) of this section or has failed to timely make payments towards that judgment under a payment schedule approved by the judge or magistrate, the judge or magistrate shall hold a hearing to determine whether to order the offender to perform community service for that failure. The judge or magistrate shall notify both the defendant and the prosecuting attorney of the place, time, and date of the hearing and shall give each an opportunity to present evidence. If, after the hearing, the judge or magistrate determines that the defendant has failed to pay the judgment or to timely make payments under the payment schedule and that imposition of community service for the failure is appropriate, the judge or magistrate may order the offender to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the judge or magistrate is satisfied that the offender is in compliance with the approved payment schedule. If the judge or magistrate orders the defendant to perform community service under this division, the defendant shall receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed shall reduce the judgment by that amount. Except for the credit and reduction provided in this division, ordering an offender to perform community service under this division does not lessen the amount of the judgment and does not preclude the state from taking any other action to execute the judgment.

(C) As used in this section, "specified hourly credit rate" means the wage rate that is specified in 26 U.S.C.A. 206(a)(1) under the federal Fair Labor Standards Act of 1938, that then is in effect, and that an employer subject to that provision must pay per hour to each of the employer's employees who is subject to that provision.

HISTORY:

GC § 13451-18; 113 v 123(201), ch 30, § 18; 120 v 320; Bureau of Code Revision, 10-1-53;
149 v H 271. Eff 3-24-2003; 150 v S 71, § 1, eff. 5-18-05; 152 v H 283, § 1, eff. 9-12-08.

TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2949. EXECUTION OF SENTENCE

FINES AND COSTS

[§ 2949.09.2] § 2949.092. Conditions for waiver of specified additional court costs.

If a person is convicted of or pleads guilty to an offense and the court specifically is required, pursuant to section 2743.70 or 2949.091 [2949.09.1], of the Revised Code or pursuant to any other section of the Revised Code to impose a specified sum of money as costs in the case in addition to any other costs that the court is required or permitted by law to impose in the case, the court shall not waive the payment of the specified additional court costs that the section of the Revised Code specifically requires the court to impose unless the court determines that the offender is indigent and the court waives the payment of all court costs imposed upon the offender.

HISTORY:

143 v S 131. Eff 7-25-90.

LEXSTAT ORC ANN. 2949.092

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TITLE 29. CRIMES -- PROCEDURE

CHAPTER 2949. EXECUTION OF SENTENCE

FINES AND COSTS

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ORC Ann. 2949.092 (2008)

§ 2949.092. Condition for waiver of specified additional court costs

If a person is convicted of or pleads guilty to an offense and the court specifically is required, pursuant to *section 2743.70* or *2949.091 [2949.09.1]*, *2949.093 [2949.09.3]*, or *2949.094 [2949.09.4]* of the Revised Code or pursuant to any other section of the Revised Code to impose a specified sum of money as costs in the case in addition to any other costs that the court is required or permitted by law to impose in the case, the court shall not waive the payment of the specified additional court costs that the section of the Revised Code specifically requires the court to impose unless the court determines that the offender is indigent and the court waives the payment of all court costs imposed upon the offender.

HISTORY:

143 v S 131. Eff 7-25-90; 151 v H 66, § 101.01, eff. 9-29-05; 152 v H 562, § 101.01, eff. 9-23-08.

LEXSTAT OHIO CRIM R 43

OHIO RULES OF COURT SERVICE

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*** RULES CURRENT THROUGH SEPTEMBER 1, 2008 ***

*** ANNOTATIONS CURRENT THROUGH DECEMBER 31, 2007 ***

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 43 (2008)

Rule 43. Presence of the Defendant

(A) Defendant's presence.

(1) Except as provided in Rule 10 of these rules and division (A)(2) of this rule, the defendant must be physically present at every stage of the criminal proceeding and trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules. In all prosecutions, the defendant's voluntary absence after the trial has been

commenced in the defendant's presence shall not prevent continuing the trial to and including the verdict. A corporation may appear by counsel for all purposes.

(2) Notwithstanding the provisions of division (A)(1) of this rule, in misdemeanor cases or in felony cases where a waiver has been obtained in accordance with division (A)(3) of this rule, the court may permit the presence and participation of a defendant by remote contemporaneous video for any proceeding if all of the following apply:

(a) The court gives appropriate notice to all the parties;

(b) The video arrangements allow the defendant to hear and see the proceeding;

(c) The video arrangements allow the defendant to speak, and to be seen and heard by the court and all parties;

(d) The court makes provision to allow for private communication between the defendant and counsel. The court shall inform the defendant on the record how to, at any time, communicate privately with counsel. Counsel shall be afforded the opportunity to speak to defendant privately and in person. Counsel shall be permitted to appear with defendant at the remote location if requested.

(e) The proceeding may involve sworn testimony that is subject to cross examination, if counsel is present, participates and consents.

(3) The defendant may waive, in writing or on the record, the defendant's right to be physically present under these rules with leave of court.

(B) Defendant excluded because of disruptive conduct.

Where a defendant's conduct in the courtroom is so disruptive that the hearing or trial cannot reasonably be conducted with the defendant's continued physical presence, the hearing or trial may proceed in the defendant's absence or by remote contemporaneous video, and judgment and sentence may be pronounced as if the defendant were present. Where the court determines that it may

be essential to the preservation of the constitutional rights of the defendant, it may take such steps as are required for the communication of the courtroom proceedings to the defendant.

HISTORY: Amended, eff. 07/01/08.