

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO : CASE NOS. 08-0711 and 08-1005  
Plaintiff-Appellee :  
-vs- :  
RICHARD E. JOSEPH : APPEAL FROM THE COURT  
OF APPEALS, THIRD  
Defendant-Appellant : APPELLATE DISTRICT, ALLEN  
COUNTY, OHIO

---

**MERIT BRIEF OF PLAINTIFF-APPELLEE**

---

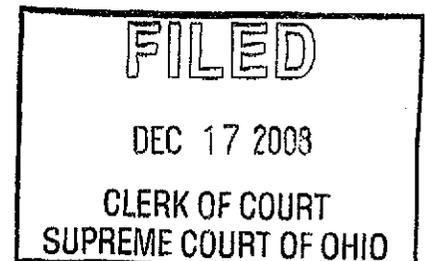
JANA E. EMERICK  
Reg. #0059550  
(COUNSEL OF RECORD)  
Assistant Prosecuting Attorney  
Allen County, Ohio  
Court of Appeals Bldg., Suite 302  
204 North Main Street  
Lima, Ohio 45801  
(419) 228-3700 Ext. 8876  
Fax: (419) 227-1072  
Email: jemerick@allencountyohio.com

COUNSEL FOR PLAINTIFF-  
APPELLEE

RANDALL L. PORTER  
Reg. #0005835  
(COUNSEL OF RECORD)

KATHERINE A. SZUDY  
Reg. #0076729  
(COUNSEL OF RECORD)  
Office of the Ohio Public Defender  
8 East Long Street – 11<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 466-5394  
Fax: (614) 752-5167  
Email: kathy.szudy@opd.state.oh.us

COUNSEL FOR DEFENDANT-  
APPELLANT



**TABLE OF CONTENTS**

**PAGES**

Table of Contents.....	i
Table of Cases, Statutes and Other Authorities .....	ii
Statement of the Case.....	1
Argument .....	4
<b>Proposition of Law.....</b>	<b>4</b>
<b>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.</b>	
Conclusion.....	7
Proof of Service .....	7
Appendix.....	8

**TABLE OF CASES, STATUTES AND OTHER AUTHORITIES**

**PAGES**

**Cases**

*Houk v. Joseph* (2007), 127 S.Ct. 1827 ..... 2

*Joseph v. Coyle* (6<sup>th</sup> Cir. 2006), 469 F.3d 441 ..... 2

*Joseph v. Ohio* (1996), 116 S.Ct. 1277..... 1

*State v. Clevenger* (2007), 114 Ohio St.3d 258 ..... 4

*State v. Frazier* (2007), 115 Ohio St.3d 139, at 160..... 5

*State v. Joseph* (1995), 73 Ohio St.3d 450..... 1

*State v. Joseph*, 3<sup>rd</sup> Dist. No. 1-07-50, 2008 Ohio 1138 ..... 2, 5

*State v. Joseph*, 3<sup>rd</sup> Dist. No. 1-91-11, 1993 Ohio App. LEXIS 6396 ..... 1

*State v. Peacock*, 11<sup>th</sup> Dist. No. 2002-L-115, 2003-Ohio-6772..... 3, 4

*State v. Powell*, 2<sup>nd</sup> Dist. No. 20857, 2006 Ohio 263 ..... 5

*State v. Smoot*, 10th Dist. No. 05AP-104, 2005-Ohio-5326..... 3, 4

*State v. Triplett*, 8<sup>th</sup> Dist. No. 87788, 2007-Ohio-75 ..... 3, 4

**Statutes**

Ohio Revised Code Section 2929.04(A)(7)..... 1

Ohio Revised Code Section 2947.23 ..... 4

**Rules**

Ohio Rules of Criminal Procedure 43(A)..... 4, 5

## STATEMENT OF THE CASE

Defendant-appellant, Richard E. Joseph (“defendant”), appeals from the judgment of sentence entered against him in the Allen County Court of Common Pleas in June of 2007, as a result of defendant having been convicted in 1991 of aggravated murder.

Procedurally, this case spans over a decade and a half. In 1990, defendant and another man, Jose Bulerin, were jointly indicted for the aggravated murder of Ryan Young. The indictment also contained a death penalty specification based upon R.C. 2929.04(A)(7).

Defendant’s case was tried to a jury in January of 1991, and the jury returned verdicts finding defendant guilty of aggravated murder and the death penalty specification. Following the penalty phase of the trial, the jury recommended a sentence of death. The trial court adopted the jury’s recommendation and ordered that defendant be sentenced to death.

On December 23, 1993, defendant’s conviction and sentence of death were affirmed on direct appeal in *State v. Joseph*, 3<sup>rd</sup> Dist. No. 1-91-11, 1993 Ohio App. LEXIS 6396. On August 30, 1995, defendant’s conviction and sentence were affirmed by this court in *State v. Joseph* (1995), 73 Ohio St.3d 450. On March 18, 1996, the Supreme Court of the United States denied defendant’s petition for a writ of certiorari in *Joseph v. Ohio* (1996), 116 S.Ct. 1277.

Defendant subsequently filed a petition for a writ of habeas corpus in federal district court. The district court granted a writ of habeas corpus relating to the death penalty, as the court found there were fundamental errors in the case concerning the capital specification. The district court issued the following order:

**[T]his Court issues a writ of habeas corpus ordering that Mr. Joseph's death sentence be set aside and that he 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. Unless Mr. Joseph is resentenced within 180 days from the effective date of this Order, the respondent shall release him from custody. On this Court's own motion, execution of this Order and hence, its effective date, is stayed pending appeal by the parties.**

Defendant next filed an appeal in the United States Court of Appeals for the Sixth Circuit, seeking review of the district court's denial of claims relating to defendant's conviction. The state cross-appealed the district court's issuance of the writ of habeas corpus.

On November 9, 2006, the Sixth Circuit issued a decision in the case. The federal court of appeals affirmed the district court's issuance of the writ, but denied all other claims raised by defendant. *Joseph v. Coyle* (6<sup>th</sup> Cir. 2006), 469 F.3d 441.

On March 19, 2007, the United States Supreme Court declined to review the matter. *Houk v. Joseph* (2007), 127 S.Ct. 1827.

On April 20, 2007, the trial court held a pretrial and scheduling conference with the parties. Another conference was held on May 31, 2007. On June 6, 2007, a sentencing hearing was held. Pursuant to the writ of habeas corpus issued by the federal court, the trial court resentenced defendant to life in prison with parole eligibility after twenty years. On June 14, 2007, the trial court filed its judgment entry of sentencing in the case.

Defendant thereafter filed an appeal of his sentence. On March 17, 2008, in *State v. Joseph*, 3<sup>rd</sup> Dist. No. 1-07-50, 2008 Ohio 1138, the court of appeals affirmed the judgment of sentence entered in the trial court.

On April 22, 2008, the court of appeals granted defendant's motion to certify the case as in conflict with *State v. Peacock*, 11<sup>th</sup> Dist. No. 2002-L-115, 2003-Ohio-6772; *State v. Smoot*, 10th Dist. No. 05AP-104, 2005-Ohio-5326; and *State v. Triplett*, 8<sup>th</sup> Dist. No. 87788, 2007-Ohio-75.

On July 9, 2008, this Court determined that a conflict exists on 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 those costs in open court at the sentencing hearing?**

This appeal now follows.

## ARGUMENT

### Proposition of Law No. I

**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.**

In his sole proposition of law, defendant asserts that the trial court erred in including an order that defendant pay court costs in the judgment entry of sentencing when the trial court did not make that same order in open court at the sentencing hearing.

Pursuant to R.C. 2947.23, it is mandatory that court costs be imposed upon the defendant as part of any criminal sentence. See, also, *State v. Clevenger* (2007), 114 Ohio St.3d 258.

In his brief, defendant correctly notes that several appellate courts in Ohio have held that it is an error for a court to impose court costs in a judgment entry of sentencing without having ordered such costs in defendant's presence at the sentencing hearing. See, e.g., *State v. Peacock*, 11<sup>th</sup> Dist. No. 2002-L-115, 2003-Ohio-6772; *State v. Smoot*, 10<sup>th</sup> Dist. No. 05AP-104, 2005-Ohio-5326; and *State v. Triplett*, 8<sup>th</sup> Dist. No. 87788, 2007-Ohio-75.

In the cases which so hold, the courts based their decisions on Crim.R. 43(A). Crim.R. 43(A) provides in relevant part that “ \* \* \* the defendant must be physically present at every stage of the criminal proceeding and trial, including the \* \* \* imposition of sentence.” Those courts determined that because Crim.R. 43(A) provides that a defendant must be present for all stages of the proceedings against him, a sentence must be reversed and the case remanded for resentencing where the judgment entry of

sentencing ordered the payment of costs by defendant but the trial court failed to make such an order in open court when the defendant was present.

Contrary to those decisions, the court of appeals determined in this case that that a trial court is not required to orally inform a defendant at a sentencing hearing that court costs must be imposed against the defendant. *State v. Joseph*, 3<sup>rd</sup> Dist. No. 1-07-50, 2008 Ohio 1138. The court of appeals noted that at least one other appellate district has reached the same conclusion, citing *State v. Powell*, 2<sup>nd</sup> Dist. No. 20857, 2006 Ohio 263.

One potential resolution of the conflict in authority would be for this court to determine that Crim.R. 43(A) requires that court costs must be imposed in the defendant's presence in open court. A strict and literal reading of Crim.R. 43(A) certainly supports such a conclusion.

A second potential resolution would be for this court to determine that substantial enough compliance with Crim.R. 43(A) has occurred if a defendant is present at the sentencing hearing, even if the matter of court costs are not specifically addressed at that time, given that court costs are mandatory in any event.

A third potential resolution would be for this court to determine that while Crim.R. 43(A) requires court costs to be imposed in a defendant's presence in open court, failure to do so is harmless error. A harmless error determination is supported by the fact that court costs are a fairly *de minimis* aspect of a criminal sentence, and by the fact that court costs are mandatory under Ohio law.

Moreover, there is ample legal support for the position that a violation of a defendant's right to present at all stages of the criminal proceeding may be harmless error. As this court set forth in *State v. Frazier* (2007), 115 Ohio St.3d 139, at 160:

**An accused has a fundamental right to be present at all critical stages of his criminal trial. Section 10, Article I, Ohio Constitution; Crim.R. 43(A). An accused's absence, however, does not necessarily result in prejudicial or constitutional error. "[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Snyder v. Massachusetts* (1934), 291 U.S. 97, 107-108, 54 S.Ct. 330, 78 L.Ed. 674.**

Pursuant to such standards, it could certainly be determined that the defendant suffered no prejudice in this case by the trial court's failure to order court costs in the defendant's presence.

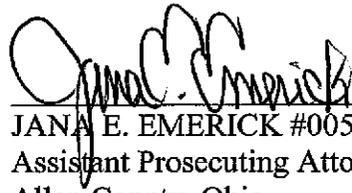
Upon a consideration of all the factors relevant to the issue certified in this case, the State of Ohio respectfully submits that the most legally appropriate resolution would be a determination that any error committed by the trial court in ordering court costs imposed against the defendant was harmless beyond a reasonable doubt.

The State of Ohio, appellee herein, therefore requests that the certified question be resolved in the manner set forth, and that the judgment of the court of appeals be affirmed.

**CONCLUSION**

For all of the reasons stated above, the State of Ohio submits that the proposition of law should be overruled, and requests that the judgment of the court of appeals be affirmed.

Respectfully submitted,



---

JANA E. EMERICK #0059550  
Assistant Prosecuting Attorney  
Allen County, Ohio  
Court of Appeals Bldg., Suite 302  
204 North Main Street  
Lima, Ohio 45801  
(419) 222-2462  
Fax: (419) 227-1072

**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing was served upon Katherine A. Szudy and Randall L. Porter, Attorneys for Appellant, 8 East Long Street - 11<sup>th</sup> Floor, Columbus, Ohio 43215 on this 16th day of December, 2008, by regular United States mail delivery.



---

JANA E. EMERICK #0059550  
Assistant Prosecuting Attorney  
Allen County, Ohio

**APPENDIX**

## **2929.04 Death penalty or imprisonment - aggravating and mitigating factors.**

(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

## **2947.23 Costs and jury fees - community service to pay judgment.**

(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 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.

Effective Date: 03-24-2003; 05-18-2005; 2008 HB283 09-12-2008

**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.

[Effective: July 1, 1973; amended effective July 1, 2008.]

**Staff Note (July 1, 2008 amendments)**

Rule 43 is amended so that in misdemeanor cases and in felony cases where the defendant has waived the right to be present, the "presence" requirement can be satisfied either by physical presence or presence by video teleconferencing. Advances in video teleconferencing technology have enabled courts to save considerable expense by conducting proceedings by video teleconferencing while still preserving the rights of the defendant.

In order to ensure that the defendant's rights are protected, any proceeding conducted through video teleconferencing must meet certain requirements: the defendant must be able to see and hear the judge, the judge must be able to see and hear the defendant, and the defendant must have the ability to communicate confidentially with his or her attorney. Furthermore, presence by video teleconferencing is permitted under limited circumstances involving sworn testimony. Counsel must be present and must consent to the use of video teleconferencing. Contemplated in this type of hearing is a miscellaneous criminal proceeding such as probation revocation, protection order hearing or bond motion.