

In The Supreme Court of Ohio

State of Ohio,

:

Appellee,

: Case No. 2010-1105

-vs-

: Appeal taken from Butler County
Court of Common Pleas

Gregory Osie,

: Case No. CR2009020302

Appellant.

: **This is a death penalty case**

REPLY BRIEF OF APPELLANT GREGORY OSIE

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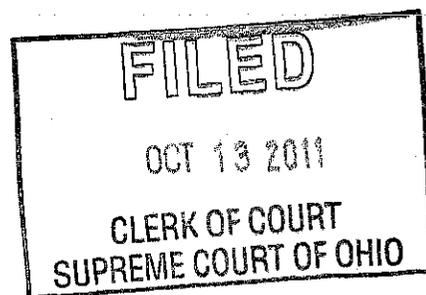


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Preface

Gregory Osie replies to the State's argument in Propositions of Law Nos. I, III, IV, VII, and XVIII. The absence of a reply by Osie on other claims is to avoid reargument of the merit brief.

PROPOSITION OF LAW NO. I

A CAPITAL DEFENDANT'S RIGHT TO DUE PROCESS, HIS RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT AND TO ALLOCUTION UNDER STATE LAW IS VIOLATED WHEN, THE DEFENDANT IS NOT GIVEN AN OPPORTUNITY TO SPEAK BEFORE THE DEATH PENALTY IS IMPOSED. U.S. CONST. AMENDS. V, VIII, XIV.

The State makes several erroneous claims in response to Osie's argument that the trial court committed reversible error by failing to provide Osie with the right to allocution. During the mitigation portion of Osie's trial, the trial court asked counsel, "Does he understand that he can make an unsworn statement here today?" Mit. Vol. II p. 144. The State argues that the exchange between the trial court and Osie, which occurred at the end of the mitigation phase of Osie's trial, was the equivalent of providing Osie with the right to allocution. The State is incorrect. Making an unsworn statement during the mitigation phase is not the same as being provided with allocution rights.

The right to make an unsworn statement is provided for in R.C. § 2929.03(D)(1). It is a separate and distinct right from the right to allocution found in Criminal Rule 32.

R.C. § 2929.03(D)(1) provides in pertinent part:

****The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.03 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, he is subject to cross-examination only if he consents to make the statement under oath or affirmation."

The Ohio Supreme Court has concluded that one primary purpose of the unsworn statement is to allow the defendant the opportunity to present a personal account so that the trier of fact may better determine if the aggravating evidence of the case is in any way mitigated when viewed through the subjective eyes of the capital defendant. State v. Mapes, 19 Ohio St. 3d 108, 120, 484 N.E.2d 140, 150 fn. 9 (1985) (Celebrezze, C.J., concurring).

On the other hand, the right to allocution is a right that is provided to a capital defendant during the sentencing hearing. This hearing is distinct and separate from a capital defendant's mitigation hearing. Crim. R. 32(A)(1) confers an absolute right of allocution by clearly specifying: "At the time of imposing sentence, the court shall do all of the following:

- (1) **Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment."**

Ohio R. Crim. P. 32(A)(1) (emphasis added). The State's attempt to equate a mitigation hearing to a sentencing hearing disregards the clear language of the rules and this Court's previous ruling on this issue. This Court in State v. Reynolds, 80 Ohio St. 3d 670, 687 N.E.2d 1358 (1998) warned that "[t]he penalty phase in a capital case is not a substitute for a defendant's right of allocution." Reynolds, 80 Ohio St. 3d at 682, 687 N.E.2d at 1372-73.

At the sentencing hearing, the court sentenced Osie to death without hearing any statements from Osie or advising him of his right to make a statement. Tr. 5/3/10 p. 10. The trial court did not provide defense counsel with an opportunity to speak on Osie's behalf either. The only matter the court advised Osie of during this hearing was his right to appeal. Id. at p. 12.

A week after Osie's sentencing the court held a second sentencing hearing. The State points to the fact that Osie was given an opportunity to speak at this subsequent sentencing hearing as evidence that he was given the right of allocution. Appellee's Brief at p. 12. The State further suggests that the panel clearly stated that the first sentence was void. Contrary to the State's assertions, the panel did not indicate that Osie's death sentence was void, but instead merely indicated that the post-release control portion of the sentence was void. Tr. 5/10/10 p. 3. The second sentencing hearing was for the purpose of correcting the error in applying post-release control. The court specifically advised Osie that he "must be resentenced to correct that

error, the same to include an advise on the application of post-release control to this matter. Tr. 5/10/10 p. 3. Because the trial court specifically stated that the resentencing was for the post-release control issue, the opportunity to speak was directed only towards the non-capital counts and was too ambiguous to comply with the requirements of Crim. R. 32(A).

This Court has consistently held that the provisions in Crim. R. 32(A) are mandatory in capital cases. Accordingly, error results when the trial court fails to ask the defendant if he wants to speak “before the imposition of sentence” on a capital count. Reynolds, 80 Ohio St. 3d at 684, 687 N.E.2d at 1372. Failure to comply with Crim. R. 32(A) constitutes reversible error. State v. Campbell, 90 Ohio St. 3d 320, 325-26, 738 N.E.2d 1178, 1189-90 (2000); State v. Green, 90 Ohio St. 3d 352, 359, 738 N.E.2d 1208, 1221 (2000).

The State recognizes this Court’s holding in Green, but argues that what occurred in Osie’s case is distinguishable from the facts in Green. Appellee’s Brief at p. 13. Contrary to the State’s argument, the facts in Osie’s case are quite similar to the facts in Green. In Green, the trial court sentenced Green on both his capital and noncapital offenses. Similarly to what occurred in Osie’s case, the court asked Green whether he had anything to say prior to the court imposing sentence on his noncapital offense. Green’s counsel commented on the firearm specification, but Green said nothing further. The court then imposed its sentence for all of the offenses including aggravated murder. This Court found that the trial court erred in not explicitly asking Green, in an inquiry directed only to him, whether he had anything to say before he was sentenced. Green, 90 Ohio St. 3d at 359, 738 N.E.2d at 1221. This Court further noted that the trial court’s reference to the counts on which Green could speak was ambiguous. “The context suggests that the court may have solicited comment only on the noncapital

offenses. Instead, the trial court should have specifically asked Green if he had anything to say about the capital counts as well as the other offenses.” Id.

Like the trial court in Green, the context of the trial court’s request here suggested that the court was only soliciting comment on the post-release control issue. Upon resentencing to correct its error, the trial court should have unambiguously asked if Osie had anything to say before he was sentenced on his capital counts. The context in which Osie was sentenced suggested that the trial court was only soliciting comment on the noncapital offenses. The failure to afford Osie an opportunity to speak was not harmless and resulted in reversible error. Campbell, 90 Ohio St. 3d at 325-26, 738 N.E.2d at 1189-90; Green, 90 Ohio St. 3d at 359, 738 N.E.2d at 1221.

Finally, the State requests this Court to reconsider its holding in Green. The State argues that compliance with Rule 32(A) is unnecessary when a case involves a three judge panel. Appellee’s Brief at p. 15. There is no reason for this Court to reverse its decade old holding in Green and Campell to accommodate the State’s failure to follow the rules. Like Osie, Green was tried and sentenced by a three judge panel. Despite the fact that Green was sentenced by a three judge panel, this Court recognized the importance of adhering to the mandates found in Rule 32. This Court has “consistently required strict compliance with Ohio statutes when reviewing the procedures in capital cases.” State v. Filiaggi, 86 Ohio St. 3d 230, 240, 714 N.E.2d 867, 877 (1999) citing State v. Pless, 74 Ohio St. 3d 333, 658 N.E.2d 766 (1996). Moreover, this Court has “repeatedly recognized that use of the term ‘shall’ in a statute or rule connotes the imposition of a mandatory obligation unless other language is included that evidences a clear and unequivocal intent to the contrary.” State v. Golphin, 81 Ohio St. 3d 543, 545-546, 692 N.E.2d 608, 611 (1998).

The State also argues that allowing a capital defendant to make an unsworn statement under R.C. 2929.03 and a statement in allocution under Rule 32(A) would somehow be a “windfall” to a capital defendant. Once again, the State does not distinguish between an unsworn statement during mitigation and a statement of allocution for sentencing purposes. Rule 32(A) requires not only for the court to afford the defendant to make a statement during sentencing, but it requires the court to allow the state to speak and the victim the right to speak. This is all to be done before the court imposes the final sentence. Therefore the defendant would not gain the “windfall” of being able to speak before being possibly sentenced to death.

The State’s reliance on a Connecticut Supreme Court case to support the argument to eliminate the requirements of Rule 32(A) is misplaced. The Connecticut Supreme Court in State v. Colon, 272 Conn. 106, 864 A.2d 666 (2004), concluded that the rules governing capital sentencing hearings were silent with respect to whether a defendant has a right of allocution in a capital sentencing hearing. Colon, 272 Conn. at 306, 864 A.2d at 788. Since there was no right to allocution under Connecticut statutes, the court concluded that the denial of allocution did not amount to a constitutional violation. However, unlike the law in Connecticut, both Ohio’s criminal rules and this Court’s precedent provides for the right to allocution in a capital case. When a state acts with significant discretion, it must act in accordance with the Due Process Clause. Evitts v. Lucey, 469 U.S. 387, 401 (1985).

The right of allocution is important because it gives the defendant his last chance to obtain mercy and to obtain an individualized consideration from the sentencer. United States v. Myers, 150 F.3d 459, 463 (5th Cir. 1998). “An inquiry under Crim. R. 32(A) is much more than an empty ritual: it represents a defendant’s last opportunity to plead his case or express remorse.” Green, 90 Ohio St. 3d at 359-60, 738 N.E. 2d at 1221.

All valid capital sentencing schemes must afford individualized sentencing to the defendant. See Woodson v. North Carolina, 428 U.S. 280, 304 (1976); Lockett v. Ohio, 438 U.S. 586, 604 (1978). Because the right of allocution provides the defendant with his last chance for mercy, and for individualized sentencing, it follows that a denial of allocution unduly restricts the sentencer's consideration of all relevant mitigation. Lockett, 438 U.S. at 604; Skipper v. South Carolina, 476 U.S. 1, 8 (1986).

Because Osie was denied his right of allocution without the trial court having the benefit of hearing any information that would assist in their sentencing decision, Osie was denied the individualized consideration required by the Eighth Amendment. Osie's death sentence must be vacated and remanded for resentencing.

PROPOSITION OF LAW NO. III

WHERE THE STATE FAILS TO PRESENT EVIDENCE THAT THE WITNESS WAS KILLED TO PREVENT THEIR TESTIMONY IN A CRIMINAL PROCEEDING, THERE IS CONSTITUTIONALLY INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION FOR R.C. § 2929.04(A)(8) AND THE RESULTING CONVICTION VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

An unreported crime allegedly occurred within the business of United Unlimited Contractors. Robin Patterson was the office manager, and David Williams provided financial support for the business. *Id.* at pp. 24-25. Early on, there was concern about a possible forged check and Nick Wiskur, a partner in the business, investigated the situation. *Id.* at pp. 26-27; Ex. 47. Wiskur found that Osie was the individual who attempted to cash the check. *Id.* at pp. 30-31. On February 13, 2009, Osie and Williams had a heated phone conversation in which Williams informed Osie that he was considering reporting the fraudulent check to the authorities. *Id.* at p. 45. Osie went to Williams' apartment later that evening to talk him out of filing charges against Robin Patterson. Trial Ex. 55. At the time of Williams' murder, no criminal proceedings had been initiated. Nevertheless, Osie was convicted of R.C. § 2929.04(A)(8) death specification.

R.C. § 2929.04(A)(8) provides for imposition of the death penalty when:

“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...”

The State argues that this Court's precedent is clear that no criminal proceeding must be initiated to satisfy the R.C. § 2929.04(A)(8) specification. Appellee's Brief at p. 28. Osie disagrees. Pursuant to this Court's holding in State v. Malone, 121 Ohio St. 3d 244, 903 N.E.2d

614 (2009), “criminal proceeding” as used in R.C. §§ 2929.04(A)(8) indicates that some investigation or formal proceedings must have been initiated.

“Criminal proceeding” is not defined in the Ohio Revised Code. This Court defined “criminal proceeding” in Malone while interpreting R.C. § 2901.04(A), the witness intimidation statute. This Court held that “criminal proceeding” requires “a formal process involving a court.” Malone, 121 Ohio St. 3d at 247, 903 N.E.2d at 616. And “when no crime has been reported and no investigation or prosecution has been initiated, a witness is not “involved in a criminal [...] proceeding.” Id. at 249, 903 N.E.2d at 618. As a result, the definition of criminal proceeding within the Ohio Revised Code now requires some formal process to be initiated, either by a formal investigation or court filing.

This Court has not considered the meaning of the phrase “criminal proceeding,” as used in R.C. § 2929.04(A)(8), within the context of how that phrase is used throughout the entire Ohio Revised Code. This Court has only looked at the specification and compared the facts of specific cases. See e.g. State v. Conway, 109 Ohio St. 3d 412, 422, 848 N.E.2d 810, 823 (2006). In Conway, this Court looked to the facts in State v. Keene, 81 Ohio St. 3d 646, 693 N.E.2d 246 (1998); State v. Brooks, 75 Ohio St. 3d 148, 661 N.E.2d 1030 (1996); State v. Hooks, 39 Ohio St. 3d 67, 529 N.E.2d 429 (1988); and State v. Yarbrough, 95 Ohio St. 3d 227, 767 N.E.2d 216 (2002). 109 Ohio St. 3d at 422, 848 N.E.2d at 823. In three of these cases, the crimes were already reported to the police or were part of an ongoing police investigation. Conway, 109 Ohio St. 3d at 422, 848 N.E.2d at 823; Brooks, 75 Ohio St. 3d at 148, 661 N.E.2d at 1035; and Yarbrough, 95 Ohio St. 3d at 228, 767 N.E.2d at 222. All five cases have one thing in common, this Court did not review the meaning of “criminal proceeding” within the Ohio Revised Code as it did in Malone.

The State asserts that Osie's argument is faulty because R.C. § 2929.04(A)(8) does not include the word "action." Appellee's brief, p. 31. The State argues that the Malone Court's definition of "action" is what provides the basis for court formality, not "proceeding." Id. Unfortunately, the State fails to read this Court's definition of "proceeding" as defined in Malone immediately following the definition of "action." Malone, 121 Ohio St. 3d at 247, 903 N.E.2d at 626. This Court defined "proceeding" as the "regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment." Id.; citing State ex rel. Steckman v. Jackson, 70 Ohio St. 3d 420, 432, 639 N.E.2d 83, 92 (1994). Thus, "proceeding" requires at least the formal reporting of a crime or investigation as interpreted by this Court. This is demonstrated by this Court's decision in Conway, 109 Ohio St. 3d at 422, 848 N.E.2d at 823; Brooks, 75 Ohio St. 3d at 148, 661 N.E.2d at 1035; and Yarbrough, 95 Ohio St. 3d at 228, 767 N.E.2d at 222. The State's argument that the lack of the word "action" in R.C. § 2929.04(A)(8) is unpersuasive as "proceeding" also requires a formal process, i.e., the initiation of a formal investigation or court filing.

Equally unpersuasive is the State's argument that the definition of "in" is exclusively a future event and "involved in" is a present tense phrase. Appellee's brief at p. 32. The State looks to the Oxford Dictionary for its definition of "in." Id. Looking at Oxford's definition of "in" there are eight (8) definitions. <http://oxforddictionaries.com/definition/in?region=us>. The State chooses the third definition, a future event to make its argument. Appellee's brief at p. 32. However, the fifth definition is "expressing inclusion or involvement" which indicates a present tense involvement. <http://oxforddictionaries.com/definition/in?region=us>. Thus, "in" is also a present tense word. The State's attempt to differentiate R.C. § 2929.04(A)(8) and R.C. §

2921.04(B) based upon the General Assembly's use of "in" and "involved in" in the statutes is baseless.

Additionally, the State's future event and present tense argument is defeated by the plain language of R.C. § 2929.04(A)(8). The phrase "in any criminal proceeding" is used twice within this statute. The second part of R.C. § 2929.04(A)(8) states, in pertinent part, that the victim "was purposely killed in retaliation for the victim's testimony in any criminal proceeding." The word "in" in this part of the statute does not refer to a future event because there can be no retaliation for a future criminal proceeding. The General Assembly used the same phrase with the same meaning—a present, pending criminal proceeding. It is illogical that the General Assembly would use the same phrase within the same statute—one meaning a future event and the second meaning is a present event without differentiating between the two.

Furthermore, this statute is a death penalty eligibility statute which narrows a type of aggravated murder for the ultimate punishment. The General Assembly could have made it an aggravating circumstance that the aggravated murder was committed to prevent the testimony of a witness to a crime committed by someone other than the offender without a formal criminal proceeding pending. However, it did not. The statute is to be liberally construed in favor of the accused. R.C. § 2901.04(A). Since there was no criminal proceeding, the State failed to meet its burden of proof on this capital specification.

Additionally, the trial Court found, that Osie's motivation in committing this crime was "his desire to silence a witness against his paramour and himself." Trial Court Opinion, p. 9. The State encourages this Court to "hold faithfully to the fact that the legislature intends to protect victims of crimes from intimidation and execution." Appellee's Brief at p. 34. Contrary to the State's arguments, this protection already has been delineated by the legislature in R.C. §

2929.04(A)(3). R.C. § 2929.04(A)(3) makes the “intimidation and execution of a witness” already a capital specification that the State seeks to have under R.C. § 2929.04(A)(8). There is no need to unconstitutionally expand R.C. 2929.04(A)(8) as the State argues.

Independent reweighing by this Court is inappropriate to cure the error in this case. This Court cannot, in the present case, determine what the result of the reweighing by the panel would be absent consideration of the R.C. § 2929.04(A)(8) specification. The three judge panel acknowledged that the R.C. § 2929.04(A)(8) was given the “most weight, great weight” whereas the felony-murder specifications were “largely part of the commission of the aggravated murder, itself, or the ‘cover up’ which followed” and given some or moderate weight. Trial Court opinion, p. 6-7. The panel explained that this crime “represents a threat, an attack, not only upon the victim, but upon the criminal justice system itself. Defendant silenced Mr. Williams to subvert justice, to prevent Mr. Williams from lawfully seeking justice and redress in the Courts of this State.” *Id.*, p. 7. This admission alone indicates that a criminal proceeding had not been initiated. The Panel’s findings also indicate that Osie committed this crime to protect himself as it found that he was involved in the underlying crime that Mr. Williams was going to report the forged check to the police.

Since Osie was improperly convicted of the R.C. § 2929.04(A)(8) specification, it is unknown what the panel would have found, because the other two specifications were part of the “cover-up” to the aggravated murder. Johnson v. Mississippi, 486 U.S. (1988); State v. Penix, 32 Ohio St. 3d 369, 513 N.E.2d 744 (1987). Independent review cannot be a “cure all” for the errors committed by the trial court. See State v. Davis, 38 Ohio St. 3d 361, 372, 528 N.E.2d 925, 936 (1988) (independent review not a cure when court cannot know if the result of weighing process by three judge panel would have been different had impermissible aggravating

circumstance not been present). Therefore, this Court must remand Osie's case to the trial court for resentencing.

PROPOSITION OF LAW NO. IV

WHERE THE TRIAL COURT FAILS TO MERGE CAPITAL SPECIFICATIONS, THE RESULTANT SENTENCE IS IMPROPER BECAUSE THE WEIGHING PROCESS IS TAINTED WITH THE CONSIDERATION OF IMPROPER AGGRAVATING FACTORS.

In its response to Osie's Fourth Proposition of Law, the State cites a number of recent cases that are only tangentially related to the issue at hand. The State specifically attempts to apply Howard, a decision from the First District Court of Appeals, which is not a capital case and does not involve the merger of specifications. State v. Howard, No. C-100240, 2011 Ohio App. LEXIS 2442 (Ham. Ct. App. June 15, 2011). To support his argument, Osie pointed to State v. Fry, a recent decision by this Court which is directly on point. 125 Ohio St. 3d 163, 926 N.E.2d 1239 (2010). The State unsuccessfully attempts to distinguish the facts in Fry from the facts in Osie's case.

In his brief, Osie cited the State's theory at trial which was that he entered David Williams' home in the early morning hours of February 14, 2009, with the purpose to kill Williams to prevent him from pursuing criminal charges against his girlfriend, Robin Patterson. In Fry, the defendant was arrested for a domestic violence incident. 125 Ohio St. 3d at 164, 926 N.E.2d at 1249. After he was released on bond, he went to the victim's home and killed her in order to prevent her from testifying against him in the domestic violence case. Id. Fry was convicted of aggravated murder along with a specification for felony-murder/burglary (R.C. 2929.04(A)(7)) and a specification for witness-murder (R.C. 2929.04(A)(8)). The trial court merged these two specifications for sentencing, and the state appealed the ruling. This Court found that merger was appropriate, because given the facts of the case, these two specifications were "inextricably intertwined, and thereby constituted one indivisible course of conduct." Fry, 125 Ohio St. 3d at 192, 926 N.E.2d at 1272 (citing State v. Garner, 74 Ohio St. 3d 164, 656

N.E.2d 623 (1995)). Fry's intent was the same for entering the victim's home and for killing the victim – to prevent her testimony, and the killing occurred directly after the entry. Id.

The State disagrees with Osie's use of the prosecutors' trial theory as the appropriate guidance for merger. The State argues in its brief that the focus should be on the trial court's sentencing opinion which found Osie not guilty of the premeditated murder. Appellee's Brief, p. 37. As a result, the State asserts that merger is inappropriate because the animus of entering the house and the animus of killing the victim were different.

Under the trial court's ruling, the act of the aggravated burglary and the act of silencing a witness are still inextricably intertwined. According to the trial court's sentencing opinion and the State's brief, Osie went to Williams' home that evening to persuade him against pressing charges against Patterson. Appellee's Brief at p. 37; Sentencing Opinion, p. 3. Williams allowed Osie into his home as an invited guest without Osie using force or fraud to enter. The intent to commit a crime resulting in the aggravated burglary charge and corresponding specification did not occur until Osie was unable to convince the victim to forego charges against Patterson. The moment that Osie began to attack the victim is when his invitation was revoked and the burglary was perpetrated according to the findings of the trial court. Sentencing Opinion, p. 6. The "menacing" which the state repeatedly refers to is simply the initiation of the assault which led to Williams' death. The "menacing" and the murder are one and the same, occurring simultaneously and with the same intent. To separate them is not logical in the way the facts of this case played out. Both the menace/assault on the victim leading to his death, in order to prevent his testimony, and the aggravated burglary were inextricably intertwined requiring the merger of these specifications under the holding in Fry.

PROPOSITION OF LAW NO. VII

THE TRIAL COURT'S ADMISSION OF ATTORNEY WORK PRODUCT OBTAINED FROM OSIE'S CELL, VIOLATED HIS RIGHT TO DUE PROCESS AND HIS RIGHT TO COUNSEL. U.S. CONST. AMENDS. VI, XIV; OHIO CONST. ART. I, §§ 10, 16.

The State's characterization of Osie's seventh proposition of law as a "flypaper argument" in which Osie has "thrown out a bunch of random facts" (Appellee's Brief at p. 50), demonstrates the State's misunderstanding and mischaracterization of the issue. In fact, the State seems to defend against several arguments that Osie did not make in his brief.

The State begins with an assertion that the search of Osie's cell was done for security purposes. However, in its explanation of why the search was conducted, the State makes it clear that the search was actually conducted for investigatory purposes. See Appellee's Brief at p. 50. Donald Simpson, Osie's cellmate at the Butler County Jail, testified at trial that he was about to be released when he was sharing a cell with Osie. Trial Tr. Vol. II p. 95-96. He stated that Osie told him where the murder weapon was located and asked him to plant it in Robin Patterson's car when he was released. Id. p. 103. However, an alleged knife located miles from the jail posed no security threat to the jail. Therefore, the search of Osie's cell was clearly conducted for investigatory purposes to find corroboration of Simpson's claims.

What the State fails to see in Osie's argument is that the purpose of the search is irrelevant. In its brief, the State included a block quote from Hudson v. Palmer, 468 U.S. 517 (1984). Appellee's Brief at p. 52. The holding in Hudson is that while detainees retain certain constitutional rights and liberties, their Fourth Amendment rights are limited compared to ordinary citizens. Id. at 518. However, Osie is not claiming that the State violated his Fourth Amendment rights. He is not asserting that his cell was improperly searched or that the materials seized from his cell were taken in violation of the Fourth Amendment. Osie is simply arguing

that the State's seizure and use of work-product taken from his cell interfered with his constitutional right to counsel as guaranteed by the Sixth Amendment. Unlike the rights protected by the Fourth Amendment, the Sixth Amendment right to counsel for pretrial detainees is not diminished. See Maine v. Moulton, 474 U.S. 159, 170 (1985) (“...[T]o deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.”)

The State seized two primary items that were used against Osie at trial. Both items qualify as work-product material that is protected by the attorney-client privilege. The first item is a journal that Osie was writing at the direction of his attorneys. It is a 48-page document with daily journal entries that he imagined himself writing to Robin Patterson about the night that David Williams was killed. The State's simple categorization of the document as a “letter” is not an adequate description. This document was not a letter as it was not a document he ever intended to send. It contained thirty-four days' worth of rambling thoughts about his case. His attorneys encouraged him to write down his thoughts in journal form in lieu of writing her letters, due to the possibility of her being called as a witness. State's Trial Exhibit 64, p. 1.

The second item of attorney-work product was a list of names, places, and phone numbers that Osie had written down at the direction of his trial attorneys. This list was designed to aid in the investigation and preparation of Osie's defense and mitigation presentation. The State's confiscation and subsequent use of these materials in the preparation of its case violated Osie's Sixth Amendment right to the effective assistance of counsel.

The Sixth Circuit reviewed a similar situation in Bishop v. Rose, 701 F.2d 1150 (6th Cir. 1983). In Bishop, the defendant was detained at the county jail pending trial on a murder charge. His cell was searched by the Sheriff's department, and material was seized which consisted of

writings about the offense made at the direction of his attorneys. Id. at 1151. Like Osie, the defendant did not challenge the legality of the search itself. Id. Rather, he argued that the seizure of the writings and the subsequent use of the writings against him interfered with his Sixth Amendment right to counsel. The state court of appeals agreed, and the Sixth Circuit affirmed the lower appellate courts' ruling. The Sixth Circuit additionally noted that the error of allowing the State to use a privileged document at the detriment of the defendant was prejudicial and could not be considered harmless error. Id.

The State cites Mitchell v. Dupnik, 75 F.3d 517 (9th Cir. 1996), a Ninth Circuit decision, in their assertion that proper cell searches may include an inmate's legal materials. Appellee's Brief at p. 53. In Dupnik, the inmate had already been convicted and was serving his sentence in a state prison. He was being housed in segregation due to disruptive activities and disciplinary problems. Id. at 520. Dupnik focuses primarily on institutional regulations and whether an inmate has a right to be present during the search of his legal materials. There are many distinctions between Dupnik and the facts in Osie's case. In Dupnik, the inmate was not awaiting trial – he was in a state prison, filing a pro se civil rights lawsuit. However, the primary distinction is that Osie was being represented by counsel and was therefore accorded certain protections of materials relating to his case under the attorney-work product privilege. The legal materials in question in Dupnik related to a civil lawsuit filed by the inmate. The inmate in Dupnik was not represented by counsel, and therefore the search did not invoke this privilege or violate his Sixth Amendment right to counsel.

The State references the motion hearings in which the issue arose that the State had confiscated and viewed attorney-work product. Appellee's Brief at p. 50-51. At these hearings, Osie's trial counsel had recently learned of the search and stated that attorney-work material

“may” have been seized. They also stated that this material “may be used” to prepare for his defense. The State argues that the use of the word “may” demonstrates that these statements are untrue. Appellant disagrees. Trial counsel did not know at that point whether or not the material that was seized consisted of attorney-work product. The fact that Osie’s trial counsel failed to investigate this issue as encouraged by the trial court and failed to file the proper motions with the trial court is the basis of one of the claims of ineffective assistance of counsel found in Appellant’s Proposition of Law No. XII.

The State also cites to State v. Woods, Nos. 94141, 94142, 2011 Ohio App. LEXIS 708 (Cuy. Ct. App. Feb. 24, 2011). Appellee’s Brief at p. 53. Although the defendant in Woods raised an assignment of error about attorney-work product seized from his jail cell, the analysis in Woods primarily focuses on the right to a public trial. On the issue of the search of Woods’ cell, Woods makes both a Fourth Amendment and a Sixth Amendment argument. The day before Woods’ trial, his cell was searched and letters were taken. The common pleas court ordered the State to return the letters to the defense and they were not used at trial. The court of appeals ruled that Woods had no Fourth Amendment claim under Hudson, and ruled that his Sixth Amendment rights were not violated because the letters were not used at trial. These circumstances are drastically different than those in Osie’s case. The Butler County Common Pleas Court did not order the State to return the work-product taken from Osie’s cell. Rather, it allowed the State to introduce the documents as direct evidence in its case in chief. State’s Trial Exhibit 64.

The State unconstitutionally interfered with the vital relationship between an accused person and his attorneys. The material seized from Osie’s cell was unlawfully used against him in violation of his Sixth Amendment right to counsel.

PROPOSITION OF LAW NO. XVIII

POLICE INTERVIEWS THAT ARE SELECTIVELY RECORDED DEPRIVE DEFENDANTS OF DUE PROCESS OF LAW. THE ADMISSION OF ONLY PORTIONS OF THE DEFENDANT'S STATEMENTS VIOLATES THE DEFENDANT'S RIGHT TO A FAIR TRIAL AND THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION. U.S. CONST. AMEND. XIV.

When the State responded to Osie's Eighteenth Proposition of Law in their brief, they mistakenly refer to it as "Proposition of Law XVII." Appellee's Brief at p. 104. Osie's Seventeenth Proposition of Law concerns the disqualification of Judge Powers which was discussed in the preceding proposition.

The heading of the State's response to Osie's Eighteenth Proposition of Law demonstrates a lack of understanding of Osie's argument. The heading reads: "The Recording of Appellant's interview did not violate Evid.R. 106." Appellee's Brief at p. 104. Osie is not arguing that the selective recording procedure employed by the Butler County Sheriff's Office violated the evidence rules. The reference to the evidence rules was merely an analogy used to demonstrate the fundamentally unfair practices that the detectives utilized in their investigation of Osie.

Osie's argument goes to the fairness of the proceedings against him. If Osie's statements to the police had been recorded in their entirety, the prosecution would not have been able to introduce only segments of the statements, without the defense having the opportunity to introduce the statements in their entirety. This guarantee is protected by Evidence Rule 106, which codifies the common-law Doctrine of Completeness. Rule 106 insures against the mischaracterization of evidence by one party. Without a complete recording of a suspect's statements to law enforcement, a complete picture cannot be considered by a judge or jury. Osie's argument is not that the selective recording procedure employed by the Butler County

Sheriff's Office violated Rule 106, rather he argues that it circumvented the rule in a way that deprived him of the guarantees of fairness that Rule 106 was designed to protect.

The State argues that there is no violation of Osie's rights, because the State did not attempt to present only parts of Osie's two interviews. Appellee's Brief at p. 105. The State is correct in that the prosecutor did not present only part of the recordings. However, the "State" encompasses more than just the prosecution—it also includes law enforcement. The detectives investigating Osie's case did present only parts of his interview by recording and turning over only segments of the interviews.

Contrary to the State's assertions, Osie is not arguing for a requirement that entire interactions between suspects and law enforcement be recorded. It would be unnecessarily burdensome to require police to record every interaction with every potential suspect from the commencement of an investigation until the time that a case is disposed. However, if a law enforcement official is actively interrogating a suspect and a recording of the statement is going to be made and presented in court, Osie argues that due process requires that the interrogation be recorded in its entirety. It is fundamentally unfair to allow law enforcement to pick and choose which statements they are going to record. If given free rein to selectively record statements, law enforcement may record only those parts of a statement which will be detrimental to a defendant and fail to record the parts of an interview that would conflict with the State's theory of the case. "For the admission of evidence to violate constitutional due process, it must be shown that admitting the evidence violates 'fundamental fairness,' i.e., that it violates those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency." Burton v. Renico, 391 F.3d 764, 774 (6th Cir. 2004) (quoting Dowling v. United States, 493 U.S. 342, 352-53 (1990)).

Osie was prejudiced by having only segments of his statement played for the court. The three-judge panel did not benefit from the full picture of Osie's interrogation. At the suppression hearing, Detective Whitlock clearly demonstrated either confusion or deception on the stand and without a complete statement, there was no way to properly impeach him. Tr. 9/11/09, pp. 8-12. Osie's trial counsel was unable to effectively cross-examine the detectives without the benefit of Osie's complete statements.

The State cites several cases from other states to demonstrate that there is no requirement that an interrogation be recorded. See Appellee's Brief at p. 104-105. Osie is aware that there is no duty to record any part of a suspect's statement. Osie is not advocating that all statements should be recorded. Osie is merely arguing that if part of a statement is going to be recorded and introduced in court, it should be recorded in its entirety to prevent mischaracterizations of events and evidence.

Conclusion

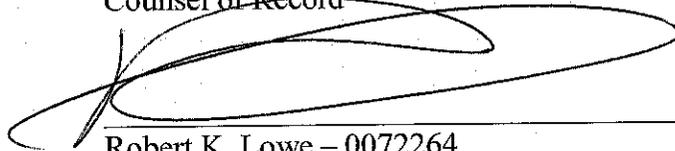
For each of the foregoing reasons, this Court must reverse Gregory Osie's convictions and remand for a new trial. Alternatively, his death sentence must be vacated and his case remanded for a new penalty phase hearing.

Respectfully submitted,

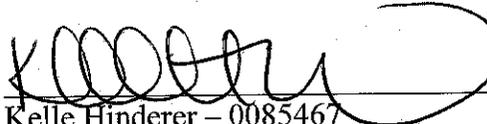
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Certificate of Service

I hereby certify that a true copy of the foregoing Reply Brief of Appellant Gregory Osie was forwarded by first-class, postage prepaid U.S. Mail to Michael T. Gmoser, Prosecuting Attorney, and Michael Oster, Assistant Prosecutor, Butler County, 315 High Street, 11th Floor, Hamilton, Ohio 45011, on this 13th day of October, 2011.



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