

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

CASE NO. 2011-0538

Appellee,

vs.

VON CLARK DAVIS,

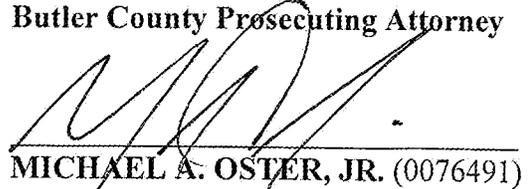
Appellant.

*On Appeal from the Court of Appeals of Butler County,
Case No. CA2009-10-263*

MOTION IN OPPOSITION OF RECONSIDERATION

Now comes Appellee and moves this Court to DENY Appellant's "Application for Reconsideration." Appellant's motion is without merit and should be denied as more fully discussed in the Memorandum in Support attached hereto.

Respectfully Submitted,
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MOTION IN OPPOSITION

Appellant, State of Ohio, hereby gives notice of its opposition to Appellant's "Motion For Reconsideration." In Appellant's motion he argues that this Court did not provide a thorough enough analysis of his proportionality argument, and that the cases that this Court did cite, were not similar enough to satisfy the proportionality requirements. However, as this Court fully complied with all requirements of a proportionality review, and a motion for reconsideration is not to be filed simply on the basis that a party disagrees with the prior appellate court decision, the State prays that this motion will be denied.

S.Ct.Prac.R. 18.02(A) provides that a motion for reconsideration "must be filed within ten days after the Supreme Court's judgment entry or order is filed with the Clerk of the Supreme Court." The Rule continues and requires that "[a] motion for reconsideration shall not constitute a reargument of the case and may be filed only with respect to the following Supreme Court decisions: (1) Refusal to accept a jurisdictional appeal; (2) The sua sponte dismissal of a case; (3) The granting of a motion to dismiss; (4) A decision on the merits of a case." S.Ct.Prac.R. 18.02(B). The standard for reviewing a motion for reconsideration is "whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been." *Columbus v. Hodge*, 37 Ohio App.3d 68, 523 N.E.2d 515 (1987), paragraph one of the syllabus. "An application for reconsideration may not be filed simply on the basis that a party disagrees with the prior appellate court decision." *State v. Owens*, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (1996).

Contrary to Appellant's argument, this Court did not commit an "obvious error" nor did it fail to consider fully an issue. Rather, Appellant's motion is merely a written expression of

Appellant's disagreement with this Court's decision. As such, reconsideration should be denied.

However, even if this Court were to evaluate Appellant's arguments on their merit, they must fail as this Court satisfied the requirements of a proportionality review as mandated by R.C. 2929.05.

According to R.C. 2929.05(A):

Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall review upon appeal the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They also shall review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

A court of appeals that reviews a case in which the sentence of death is imposed for an offense committed before January 1, 1995, shall file a separate opinion as to its findings in the case with the clerk of the supreme court. The opinion shall be filed within fifteen days after the court issues its opinion and shall contain whatever information is required by the clerk of the supreme court.

In *State v. Steffen*, 31 Ohio St.3d 111, 509 N.E.2d 383 (1987) this Court held that an

appellate court satisfies the proportionality review mandated by Section 2929.05 when it reviews those cases it has already decided in which the death penalty has been imposed. *Id.*, at paragraph one of the syllabus. The Ninth District has correctly recognized that since deciding *Steffen*, this Court has: “consistently reaffirmed that an Ohio court, when reviewing the proportionality of a death sentence, need only compare the case at bar to those cases that court has already decided in which the death penalty was imposed. *State v. Poindexter* (1988), 36 Ohio St.3d 1, 4 (citations omitted), certiorari denied (1988), 488 U.S. 916, 102 L.Ed.2d 261; *State v. Bedford* (1988), 39 Ohio St.3d 122, 131; *State v. Combs* (1991), 62 Ohio St.3d 278, 289, certiorari denied (1992), --- U.S. ---; 119 L.Ed.2d 573; *State v. Green* (1993), 66 Ohio St.3d 141, 151, certiorari denied (1993), 510 U.S. 891, 126 L.Ed.2d 203.” *State v. Wilson*, 9th Dist. No. Civ.A. 92CA005396, 1994 WL 558568, *8 (Oct. 12, 1994).

Importantly to the case at bar, there is no express requirement about a finding of fact and conclusion of law under R.C. 2929.05. Rather, only a comparison is mandated. As such, when this Court stated “[w]e have approved death sentences in cases in which the prior-murder-conviction specification under R.C. 2929.04(A)(5) was the sole aggravating circumstance presented. *Taylor*; *State v. Mapes*, 19 Ohio St.3d 108, 484 N.E.2d 140 (1985),” it satisfied the requirements of R.C. 2929.05 and *Steffen*. See, *State v. Davis*, --- Ohio St.3d ---, 2014-Ohio-1615, ¶117¹. Simply stated, by finding Appellant’s death sentence comparable to that of *Mapes* and *Taylor*, the proportionality review was complete and no further analysis was required.

Appellant also argues that since the *Mapes* and *Taylor* cases have been reversed, they are not appropriate. However, neither *Mapes* nor *Taylor* were reversed because the death penalty was

¹ See, *State v. Taylor*, 78 Ohio St.3d 15, 676 N.E.2d 82 (1997).

inappropriate for the crimes committed by those defendants. This Court expressly used these two past decisions as a proportionality guidepost of when the death penalty was appropriate under the prior-murder-conviction specification. This was appropriate. The fact of reversal on other, legal grounds, does not negate that this Court had found the death penalty appropriate. As such, this Court satisfied its requirements under R.C. 2929.05.

Finally, Appellant argues that because *Mapes* and *Taylor* involved slightly different facts, they were not appropriate cases to be utilized in a proportionality review. This argument is flawed. A proportionality review under R.C. 2929.05 does not require a comparison of cases that have identical facts. If this was so, there would be almost no practical way to complete such a review. Instead, the proportionality review only dictates that a court review similar cases. See, R.C. 2929.05(A) (“the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in **similar cases.**”)(Emphasis added.) There can be no doubt in the case at bar that both *Mapes* and *Taylor* are similar prior-murder-conviction specification cases.

What is more, as cited to this Court in the State’s initial merit brief, the death penalty imposed upon Appellant for the aggravated murder of his estranged girlfriend is appropriate when compared with cases involving persons who were previously convicted of the prior-murder-conviction specification. See, e.g., *State v. Cassano*, 96 Ohio St.3d 94 (2002); *State v. Cowans*, 87 Ohio St.3d 68 (1999); *State v. Taylor*, 78 Ohio St.3d 15 (1997); *State v. Carter*, 64 Ohio St.3d 218 (1992); *State v. Bradley*, 42 Ohio St.3d 136 (1989); *State v. Mapes*, 19 Ohio St.3d 108 (1985).

As such, this Court’s proportionality review was appropriate and reconsideration should be denied.

Respectfully submitted,

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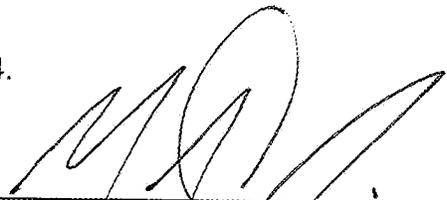
This is to certify that a copy of the foregoing Motion In Opposition was sent to:

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