

ORIGINAL

In The Supreme Court Of Ohio

State Of Ohio, :  
 Appellee, :  
 -vs- : Case No. 2010-1105  
 Gregory Osie :  
 Appellant. : **Death Penalty Case**

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**Appellant Gregory Osie's Motion for Reconsideration**

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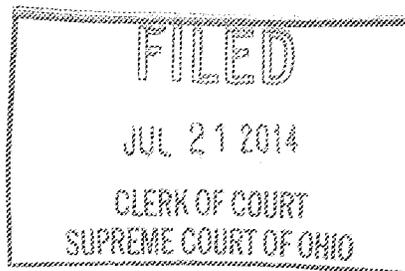
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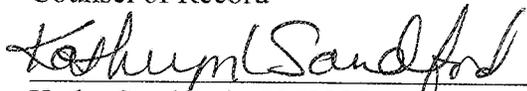
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Appellant Gregory Osie requests that this Court reconsider its merits ruling of July 10, 2014, affirming both his convictions and death sentence. This request is made under Rule 18.02 of the Supreme Court Rules of Practice. The reasons for this Motion are more fully set forth in the attached memorandum in support.

Respectfully submitted,

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**Memorandum In Support**

**Reason #1 Requiring Reconsideration**

**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.

In his first proposition of law, Osie argued that he was denied his right to allocution. The facts on the record demonstrate that during the sentencing hearing, the three judge panel sentenced Osie to death without hearing any statements from Osie or advising him of his right to make such a statement. Tr. 5/3/10 p. 10. The trial court failed to provide defense counsel with an opportunity to speak on Osie's behalf. The only matter the court advised Osie of during his hearing was his right to appeal. Id. at p. 12.

A week after Osie's sentencing, the court held a second hearing because "[it] failed to advise the defendant regarding the application of post-release control to the sentence imposed by the Court in this matter." Tr. 5/10/10 p.3. Because the court erred in applying post-release control, the sentence or a portion thereof was void. The court advised Osie that he must be resentenced to correct that error, the same to include "any advice on the application of post-release control to this matter." Id. At the second sentencing hearing, the trial court asked Osie if he wished to say anything. Osie declined and the court proceeded to resentence Osie on all of the counts and specifications. Osie argued that he was denied his right to allocution because he was only permitted to speak when he was brought back to correct the post-release control error. Osie argued that the opportunity he was given 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 rejected Osie's argument that the resentencing was for the post-release control issue only and was not for the capital counts concluding that the trial court complied with Crim. R. 32(A)(1) when it asked Osie whether he wished to say anything. "The trial court clearly regarded the sentence imposed at the May 3 hearing as void. Therefore, the May 10 hearing was 'the time of imposing sentence' for purposes of Crim. R. 32(A)(1)." *State v. Osie*, \_\_\_ Ohio St.3d \_\_\_, 2014-Ohio-2966, slip op. at ¶ 180.

In rejecting Osie's argument, this Court failed to recognize its previous case law which indicates that the trial court failed to follow the proper procedures in resentencing Osie. In *State v. Singleton*, 124 Ohio St.3d 173, 174, 920 N.E.2d 958, 959 (2009), this Court addressed the proper procedures to be utilized when correcting a failure to properly impose post-release control. This Court determined that for sentences imposed prior to July 11, 2006, the trial court shall conduct a de novo sentencing hearing. However, for sentences, such as Osie's, that were imposed after July 11, 2006, the trial courts shall apply the procedures set forth in R.C. 2929.191. *Id.* The mandatory language in *Singleton* makes it clear that a de novo hearing is not to be held in a case such as Osie's. Instead, the procedure set forth in O.R.C. 2929.191 should have been applied. Specifically, the court should have corrected the post release control error with a nunc pro tunc entry. *Id.* at 179, 920 N.E.2d at 963.

Significantly this Court determined that, "[t]he hearing contemplated by R.C. 2929.191(C) and the correction contemplated by R.C. 2929.191(A) and (B) pertain only to the flawed imposition of postrelease control. R.C. 2929.191 **does not address the remainder of an offender's sentence.** Thus, the General Assembly appears to have intended to leave undisturbed the sanctions imposed upon the offender that are unaffected by the court's failure to properly

impose postrelease control at the original sentencing.” *Id.* at 179-80, 920 N.E.2d at 964 (emphasis added).

The language from this Court’s decision in *Singleton* makes it clear that the second sentencing hearing was incorrectly held and should not have addressed the sentence imposed upon Osie that was not affected by the court’s failure to properly impose post-release control. Osie’s aggravated murder count with death specifications was not subject to post-release control. Therefore, the trial court should not have resentenced Osie on that counts and could not correct the failure to provide Osie with his allocution right in the second resentencing.

In addition to failing to recognize the limitations of the resentencing hearing, this Court also failed to recognize its most recent case reiterating the importance of the right of allocution. On October 22, 2013, this Court remanded a capital case to the trial court because of the trial court’s failure to consider the defendant’s allocution statement. *State v. Roberts*, 137 Ohio St.3d 230, 245, 998 N.E.2d 1100, 1115 (2013). In *Roberts*, this Court reiterated the importance of the right to allocution and the need to strictly adhere to the requirements of Crim. R. 32. “Our decisions have acknowledged the importance of allocution in capital cases...Trial courts must painstakingly adhere to Crim. R. 32, guaranteeing the right of allocution.” *Id.*, quoting *State v. Green*, 90 Ohio St.3d 352, 3580360, 738 N.E.2d 1208 (2000).

In light of this Court’s holdings in *Singleton* and *Roberts*, this Court should reconsider its finding that Osie was provided with his right to allocution on his aggravated murder count and require the trial court provide Osie with the right of allocution upon sentencing.

**Reason #2 Requiring Reconsideration**

**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.

In his brief to this Court, Osie argued that there was insufficient evidence to support the R.C. 2929.04(A)(8) specification. Osie was charged with aggravated murder. The specification that elevated the aggravated murder to a capital charge and that the State was therefore required to prove was that 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. R.C. § 2929.04(A)(8).

Osie argued that pursuant to this Court's decision in *State v. Malone*, 121 Ohio St.3d 244, 903 N.E.2d 614 (2009), the meaning of criminal proceedings is "a formal process involving a court." *Id.*, at 247. At the time of Williams' death, he had not reported his suspicions that Robin Patterson was stealing to the police. Tr. Trial Vol. I pp. 23-25. The evidence established that Williams was not the only person who could have testified at a prosecution. Nick Wiskur could have testified about the alleged theft. Indeed this Court relied on Wiskur's testimony to find that there was sufficient evidence of the death specifications. *State v. Osie*, \_\_\_ Ohio St.3d \_\_\_, 2014-Ohio-2966, slip op. at ¶200.

This Court rejected *Malone's* application to Osie's case and concluded that *Malone's* construction of R.C. 2921.04(B) does not apply to the language in 2929.004(A)(8). *Id.* at ¶197.

This Court concluded that it was sufficient that the State proved that Osie killed Williams for the purpose of preventing him from filing a criminal charge. *Id.* at ¶ 121.

The purpose of a death penalty specification is to strictly narrow the class of defendants eligible for the death penalty. Instead of properly narrowing the class of defendants eligible for the death penalty, the majority opinion broadly interpreted the statute and allows conviction for those who do not fit within the plain meaning of the specification. As Justice French noted in her dissent, “The General Assembly could have chosen to create a specification that included language similar to the witness-intimidation statute, which brings within its scope ‘hinder[ing]’ the victim of a crime or delinquent act ‘in the filing or prosecution of criminal charges.’” *State v. Osie*, \_\_\_ Ohio St.3d \_\_\_, 2014-Ohio2966, slip op. at ¶ 283. The General Assembly did not exercise its authority to do so.

Specifications which elevate a case from a non-capital case to a capital case should be broadly construed. This Court affirmed Osie’s conviction despite the fact that the State did not prove the specification within the clear meaning of the statute.

In addition to failing to prove the statutory requirements of R.C. 2929.04(A)(8), the State failed to prove that Osie purposely killed Williams to prevent his testimony. Instead, the evidence presented established that it was an argument that got out of hand. Osie did not take a weapon with him and did not break in the house. He went to Williams’ house to talk to Williams. No evidence was presented to the contrary. In order to reach the conclusion that Osie went there to prevent Williams’ testimony, this Court had to infer the conclusion from the evidence presented through Nick Wiskur. *State v. Osie*, \_\_\_ Ohio St.3d \_\_\_, 2014-Ohio-2966,

slip op. at ¶ 201.<sup>1</sup> Osie should not be sentenced to death based on inferences. Osie requests this Court reconsider its holding on the Third Proposition of Law and remand for resentencing.

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<sup>1</sup> Osie maintains that this evidence was improperly admitted hearsay evidence.

### Reason #3 Requiring Reconsideration

#### 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 his Fourth Proposition of Law, Osie argued that the trial court should have merged the R.C. 2929.04(A)(7) and 2929.04(A)(8) specifications. This Court in its opinion agreed that pursuant to the Court's authority in *State v. Fry*, 125 Ohio St.3d 163 (2010), the specifications should have merged. Despite finding error on the failure to merge, this Court determined that it could "cure any error related to the duplicative specifications by merging the two specifications as part of our independent sentence review." *State v. Osie*, \_\_\_ Ohio St.3d \_\_\_, 2014-Ohio-2966, slip op. at ¶ 189.

In reaching the conclusion that the failure to merge could be cured by independent reweighing, this Court failed to recognize its holding in *State v. Whitfield*, 124 Ohio St. 3d 319, 324, 922 N.E.2d 1982 (2010). In *Whitfield*, this Court stated that when merger is appropriate, the proper remedy is to remand the case back to the trial court and direct the prosecution to elect the charges on which the defendant will be sentenced. *Id.* Pursuant to the decision of this Court in *Whitfield*, the proper remedy is to remand the case to have the prosecution make the proper election regarding the specification.

This Court recognized in *State v. Green*, 90 Ohio St. 3d 352, 364, 738 N.E.2d 1208, 1224 (2000) and *State v. Davis*, 38 Ohio St. 3d 361, 372, 528 N.E.2d 925, 936 (1988) that sometimes deficiencies are too severe to correct by simply reevaluating the evidence. Like Osie, both *Green* and *Davis* were three judge panel cases. A defendant whose rights have been substantially,

prejudicially affected, cannot have his rights to a fair trial restored by the independent review of an appellate court.

Assuming *arguendo* that it was appropriate for this Court to conduct an independent review to correct the merger error, Osie requests this Court reconsider its independent reweighing and determine that the death sentence is not appropriate, given the lack of evidence of the capital specifications and given the mitigation evidence in this case.

From all accounts, Osie worked, took care of his family and had no involvement with the criminal justice system. *Mit. Tr. Vol. I* at p. 73. Osie's family testified to two significant occurrences that seemed to change Osie. First was his divorce. Osie's divorce from his wife was very hard on him. *Id.* at p. 89, 104.

The other event that significantly altered Osie's behavior was the death of his father. Osie was fairly close to his father. *Id.* at p. 123. After Osie's father died, his family noticed a change in him. *Id.* at p. 90, 123. Osie stopped regularly participating in family events. *Id.* at p. 95. He was not as close to his family as he was before his father's death. *Id.* After his father died Osie also began using drugs. *Id.* at p. 90, 109, 130. Osie's drug use significantly altered the course of Osie's life.

A review of this evidence demonstrates that Osie led a fairly normal life and was an asset to both his family and his community. Osie's background also demonstrated that he suffered a number of setbacks that caused his otherwise good behavior to change and impacted his ability to make good decisions. Osie's desire, as he told State's witness Simpson, was to convince Williams not to pursue criminal charges against Robin. Although Osie's desire to protect Robin was certainly misplaced, the evidence demonstrates that it played a significant role in the murder.

Osie requests this Court find that a life sentence is the appropriate sentence in this case

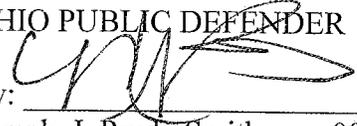
when weighing the lack of evidence of the capital specification against the mitigating factors in this case.

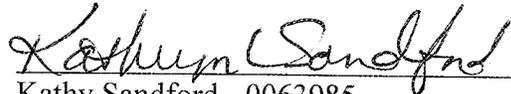
**Conclusion**

For the foregoing reasons, this Court should reconsider its decision on Osie's First, Third and Fourth Propositions of Law and remand Osie's case for resentencing.

Respectfully submitted,

OFFICE OF THE  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of **Appellant Osie's Motion to Reconsider** was forwarded by regular U.S. First Class Mail on July 21, 2014 to Michael A. Oster, Jr., Butler County Prosecutor's Office, Government Services Center, 315 High St., 11<sup>th</sup> floor, Hamilton, Ohio 43012-0515

A handwritten signature in black ink, appearing to read 'P. Prude-Smithers', written over a horizontal line.

Pamela Prude-Smithers-0062206  
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