

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : CASE NO: 14-1862

Plaintiff -appellee :

-vs- : **THIS IS A CAPITAL CASE**

AUSTIN GREGORY MYERS : On appeal from the Warren County
Common Pleas Court, Judge Oda

Defendant-appellant : Trial Case No. 14 CR 29826

MOTION FOR STAY OF EXECUTION

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OCT 27 2014
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FILED
OCT 27 2014
CLERK OF COURT
SUPREME COURT OF OHIO

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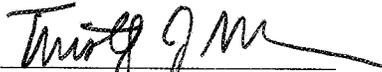
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MOTION FOR STAY OF EXECUTION

The Defendant-appellant, Austin Gregory Myers, by and through counsel, hereby moves this honorable Court for a stay of execution for the duration of the appeal process.

While no execution date was specified in the judgment entry or amended judgment entry (see "A" and "B", attached), the defendant is entitled to relief from a stay of execution as a matter of right, and moves this court for the such relief. See Ohio Const. Art IV, R.C. § 2929.05, and Ohio Sup. Ct. Practice R. 11.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing pleading was personally served upon the Warren County Prosecutor, at their office, , by US mail and fax, this 24 day of 02, 2014.



Timothy J. McKenna (0075027)

OCT 2014

COMMON PLEAS COURT
WARREN COUNTY OHIO
FILED

2014 OCT 16 PM 3:38

(A)

STATE OF OHIO, WARREN COUNTY
COMMON PLEAS COURT
CRIMINAL DIVISION

STATE OF OHIO,	:	
	:	
Plaintiff,	:	CASE NO. 14CR29826
	:	
v.	:	
	:	
AUSTIN GREGORY MYERS,	:	JUDGMENT ENTRY OF SENTENCE
	:	ON AGGRAVATED MURDER
Defendant	:	WITH DEATH SPECIFICATIONS
	:	PURSANT TO R.C. § 2929.03(F)

This matter is before the Court for Sentencing on October 16, 2014. Present before the Court is the Defendant Austin Gregory Myers, represented by his attorneys Greg Howard and John Kaspar. The State is represented by County Prosecutor David Fornshell, John Arnold and Travis Vieux.

The case was tried to a jury beginning on September 22, 2014. In the Trial Phase, the jury returned a verdict of guilty on two counts of Aggravated Murder with Specifications, Kidnapping (Count Three), Aggravated Robbery (Count Four), Aggravated Burglary (Count Five), Grand Theft of A Firearm (Count Six), Tampering With Evidence (Count Seven), Safecracking (Count Eight) and Abuse of a Corpse (Count Nine). The Defendant was also found guilty on all the firearm specifications.

The Court found Counts One and Two of Aggravated Murder merge for the purposes of sentencing. The Court also found the Aggravated Murder specifications merge. The State of Ohio elected to proceed on Aggravated Murder (Count One) and the Aggravated Robbery Specification (Third Specification) to Count One. In the Sentencing Phase, the jury unanimously recommended a sentence of death be imposed.

The Court inquired of the Defendant as to whether he had anything to say in mitigation or as to why his sentence should not be imposed.

FACTS

On January 27, 2014, the Defendant Austin Gregory Myers ('Myers') and his co-defendant Timothy Mosley ('Mosley') planned to rob the home of Justin Back - a

childhood friend of Myers. They visited the home of Justin Back in Waynesville, Ohio, where he lived with his mother, Sandy Cates and stepfather, Mark Cates. They were surprised to discover he was at home. They stayed for a short time, then left when Justin Back and Mark Cates had to leave to meet with a Navy recruiter.

Shortly thereafter, they formulated a plan to kill Justin Back and burglarize the home. As part of that plan, they originally attempted to purchase cold medicine, poison and syringes from stores in Waynesville. They were unsuccessful in these attempts when the debit card they were attempting to use was declined. Later that evening, they ended up borrowing \$20.00 from a mutual friend, Logan Zennie ('Zennie'). With that money, they purchased wire cable and two handles to form a garrote or choke wire. It was Zennie who actually fashioned the garrote.

The following day, on Tuesday, January 28, 2014, Myers and Mosley purchased items to cover up the burglary, robbery and murder, specifically: septic enzymes, rubber gloves and ammonia from the Dollar General Store in Clayton. They traveled to Waynesville and Justin Back let them in the house under the pretense of hanging out and watching movies. The plan was for Myers to distract Justin Back in the kitchen area and for Mosley to come up behind him and strangle him with the garrote.

The two put this plan in motion sometime between the hours of 1:00 and 2:00 p.m. Myers lured the victim into the kitchen and Mosley approached him from behind. When Mosley attempted to use the garrote, he missed. The wire instead ended up across Justin Back's chin. Myers was attempting to restrain Justin Back's arms and a fight ensued where all three men ended up on the kitchen floor. In a panic, Mosley retrieved a knife from his pocket and proceeded to stab Justin Back in the back and chest. Justin Back died from blood loss on his kitchen floor as a result of the stab wounds.

Myers and Mosley cleaned up the crime scene and stole numerous items from the house, including jewelry, a safe, laptop, iPod, a gun and other items of personal property. It was their plan to make it appear as though Justin Back ran away. They wrapped the body in a blanket and put it in the trunk of Mosley's car. They dumped the body in Preble County in a secluded, wooded area near Fudge Road known as Cry Baby Bridge. Prior to leaving the body, Myers shot two rounds into Justin Back's dead body and placed the septic enzymes on the body to aid in decomposition.

The two were apprehended by law enforcement that same night. Both gave statements to police initially denying any involvement, but they eventually implicated themselves in most aspects of the theft and murder.

Both Myers and Mosley were charged with Aggravated Murder, Kidnapping, Aggravated Robbery, Aggravated Burglary, Theft of a Firearm, Safecracking and Abuse of a Corpse. Mosley reached a plea agreement in the week before trial in

which he agreed to testify against Myers and plead guilty to all charges in exchange for the dismissal of the death specifications.

AGGRAVATING CIRCUMSTANCE

The Aggravating Circumstance in this case is that the Aggravated Murder was committed with prior calculation and design and was committed while Myers was committing, attempting to commit and/or fleeing immediately after committing or attempting to commit the offense of Aggravated Robbery. At the Sentencing Phase, the State reintroduced some of the evidence submitted at the Trial Phase and no other evidence.

The Aggravating Circumstance in this case is significant. The Aggravated Murder was committed in the course of an Aggravated Robbery – meaning Myers and Mosley intended to inflict serious physical harm upon the victim in the course of a theft offense.

The offense was committed with Prior Calculation and Design. This fact, in and of itself, is not an Aggravating Circumstance. However, because the Defendant was not the principal offender in this case, the Court must consider whether the Aggravated Murder was committed with Prior Calculation and Design. The offense was planned out carefully over the course of two days. Myers and Mosley carefully considered a number of different methods by which to kill the victim and take property belonging to him and his family. This is not a case where a murder happens spontaneously in the course of the commission of another felony. Myers and Mosley entered the Back/Cates residence with a specific plan to kill.

The weight to be given to the Aggravating Circumstance is considerable.

MITIGATING FACTORS PRESENTED BY THE DEFENSE

The defense presented the following mitigating factors on behalf of Myers: 1) the youth of the Defendant; 2) the lack of significant prior criminal history or juvenile delinquency adjudications; 3) the love and support of his family; 4) the plea agreement of Mosley. The Court will address each of these factors in turn.

The youth of the Defendant is a significant mitigating factor. The Defendant is 19 years of age. Because of his youth, he lacks insight. The Defendant does not understand how precious life is – at his age, it would be virtually impossible for him to have such an appreciation. Likewise, the Defendant, because of his youth, has no concept of death. This is clear from his unsworn statement. Because he has had no time to appreciate his accomplishments, to reflect on his actions or even contemplate his own existence, he has no respect for death. His statements to the jury “wishing he could go back in time;” “If you kill me, it won’t fix anything;” “It won’t bother me;” “It won’t hurt me;” “I won’t feel anything.” These are the statements of a child. The youth of the Defendant was given substantial weight by the Court

The lack of prior criminal history or juvenile delinquency adjudications is also a significant mitigating factor and was given substantial weight by the Court. There was no evidence presented at trial that Myers had ever been previously convicted of any criminal offense or adjudicated delinquent for any offense. It is not uncommon for the Court to see criminal defendants, even at age 19, with considerable misdemeanor and felony criminal records beginning at a young age. It is likewise not uncommon for the Court to see criminal defendants who begin with smaller crimes that gradually increase in frequency and intensity. The evidence suggests this is the first time the Defendant has been incarcerated for any reason. This fact merits significant weight in the balancing process.

The love and support of family was considered by the Court but is not a significant mitigating factor. The Court has considered the testimony of Myers family, the letters he has written and the potential that Myers could have to be a good influence on his siblings. The Court has reviewed the letters from the Defendant to his family offered in mitigation and finds them to be of little value with respect to mitigation. The Court has considered the love and support of family as a mitigating factor, but gives it almost no weight.

The plea agreement of Timothy Mosley is a troublesome mitigating factor. Mosley is the principal offender in this case, i.e. he is the actual killer. He is the one who snuck up behind Justin Back and tried to strangle him with the garrote. After this failed, Mosley is the one that pulled a knife from his pocket and stabbed Justin Back no less than 21 times. This murder weapon was not produced at trial despite more than 400 exhibits offered by the State. There was no testimony as to what became of this knife. In fact, it was barely mentioned at the trial. While Myers and Mosley planned this crime together, it was Myers who selected Justin Back as the victim. The Court also notes that in every picture and nearly at all times in the video surveillance, it was Myers in front and Mosley following behind. Because of the plea agreement with the State, the Court cannot consider death as a possible penalty for Mosley, as deserving as he may be of such a sentence. But, a person who contracts a murder for hire, for example, is not less culpable than the actual killer. Under such circumstances, he is more culpable because without his acts and the continuous chain of events following, the victim would still be alive. This is true of Justin Back. Without Myers, Mosley had no real predisposition to kill - certainly no reason to kill Justin Back. The evidence clearly shows the murder was Myers' idea. He selected Justin Back as the victim. He selected the Cates home as the location for the Aggravated Robbery. He does not escape culpability just because Mosley cannot be put to death for his crimes. But, the Court must consider, in light of Mosley's plea deal, whether a life sentence is a more appropriate penalty in this case for Myers, who was not the principal offender/actual killer. The Court finds the fact that Mosley is receiving a life sentence for his involvement in the crimes to be a mitigating factor of some significance in the weighing process.

The Court has considered the statements made at today's hearing in mitigation.

The Court has not considered any victim impact evidence in the weighing process, nor has the Court considered the aggravated murder itself as an aggravating circumstance.

THE JURY'S VERDICT

The jury did their job in this case. They were thoughtful and deliberate. The Court is proud of their service and humbled at the gravity with which they undertook this difficult decision. Whether the Court ultimately agrees with their decision or not does not mean they were not correct in their evaluation of the Aggravating Circumstance and the Mitigating Factors.

In Ohio, the death penalty is not handed down by a jury. It is imposed by a judge. This is how the system is designed to work. The judge cannot even consider the death penalty until a jury has considered the case and unanimously determined death is appropriate. However, the law requires the judge make a separate and independent determination as to the appropriateness of death as a sentence in this case without deference to the verdict of the jury.

The law does not allow a jury to be told their verdict is a recommendation for good reason: to do so would allow them to shift the responsibility to the judge - thus denying the gravity, immediacy and permanency of their decision. In the same vein, the law does not allow judges to give deference or weight to the jury's verdict in a capital case for the same reason: to do so would allow the Court to shift its responsibility to the jury and shirk the ultimate responsibility for the sentence.

OTHER MITIGATING FACTORS

The Court has carefully considered the nature and circumstances of the offense to determine if there is any mitigating value. There is not. The crime itself was carried out with precision and planning in a brutal fashion. Therefore, the Court finds no mitigating value in the nature and circumstances of the offense and therefore gives this potential mitigating factor no weight in the decision.

The Court has considered the troubled childhood of the Defendant to determine if there is any mitigating value. The evidence showed that Myers came from a dysfunctional home life and the circumstances of his parents' estrangement and ultimate divorce appear to have had a significant impact on him in his formative years. However, the Court notes that many children come from divorced parents and blended families. The Defendant stated to Dr. Chung in his examination at the Kettering Hospital Youth Services that his father physically abused him. This seems at odds with the rest of the evidence and the Defendant's choice to go live with his father shortly thereafter. The Court gives this potential mitigating factor some weight against the Aggravating Circumstance, but not much.

The Court finds the absence of other Aggravating Circumstances to be a mitigating factor, even though it was not raised by the defense. This is a not a case where the

victim was the president or governor. The victim was not a child under the age of 13 or a police officer. The Aggravated Murder was not committed as an act of terrorism, to escape detection for a separate crime or in the killing of two or more people. This is not to say the pain and loss of the Cates family are somehow less. They aren't. This does not mean the death of Justin Back is less tragic. It isn't. However, the law recognizes these classes of victims and categories of offenses as direct attacks on civilized society that go above and beyond an Aggravated Murder without those same qualities. To that extent, there is some mitigating value to the lack of other Aggravating Circumstances in this case.

The Court has carefully considered the testimony, exhibits and statement of the Defendant for any remorse and finds none. "I am sorry this happened" and "I made a horrible mistake" are not an apology nor are they a statement of genuine remorse. Therefore, the Court finds no mitigating value for any remorse of the Defendant and therefore gives this potential mitigating factor no weight in the decision.

THE WEIGHING PROCESS

The Court has considered all the evidence and balanced the Aggravating Circumstance against the Mitigating Factors set forth above.

The Court finds the State has proven beyond a reasonable doubt the Aggravating Circumstance outweighs the Mitigating Factors. Therefore, the sentence of death shall be imposed on Austin Gregory Myers on the charge of Aggravated Murder and the specification.

This matter shall be automatically appealed to the Ohio Supreme Court pursuant to R.C. § 2929.05



JUDGE DONALD E. ODA II

Cc: David Fornshell Warren County Prosecuting Attorney
John Arnold Assistant Prosecuting Attorney
Greg Howard Lead Counsel for Defendant
John Kaspar Co-Counsel for Defendant

Copies to be filed with the Court of Appeals and the Ohio Supreme Court

10-17-14

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THOMAS L. SPAETH
CLERK OF COURTS

(B)

STATE OF OHIO, WARREN COUNTY
COMMON PLEAS COURT
CRIMINAL DIVISION

STATE OF OHIO,	:	
	:	
Plaintiff,	:	CASE NO. 14CR29826
	:	
v.	:	
	:	
AUSTIN GREGORY MYERS,	:	
	:	AMENDED JUDGMENT ENTRY AND
Defendant	:	SENTENCE ON FELONY COUNTS
	:	AND SPECIFICATIONS

This matter is before the Court for Sentencing on October 16, 2014. Present before the Court is the Defendant Austin Gregory Myers, represented by his attorneys Greg Howard and John Kaspar. The State is represented by County Prosecutor David Fornshell, John Arnold and Travis Vieux.

The Court has, by separate Judgment Entry, set forth the sentence for the Aggravated Murder and Death Penalty Specification. With respect to the remaining counts, the Court has considered the record and the principles and purposes of sentencing under R.C. §2929.11. The Court has balanced the seriousness and recidivism factors under R.C. §2929.12 and considered the factors under R.C. §2929.13. The Court inquired if the Defendant had anything to say in mitigation regarding the sentence.

The Court finds the Defendant is not amenable to an available community control sanction and that prison is consistent with the purposes and principles of R.C. §2929.11.

It is hereby **ORDERED** that Defendant is hereby sentenced to a total of fifteen (15) years in prison, set forth as follows:

- 1) The Court finds Count Three – Kidnapping, R.C. § 2905.01(A)(2), a felony of the first degree (victim not released in a safe place); Count Four – Aggravated Robbery, R.C. § 2911.01(A)(3), a felony of the first degree;

and Count Five – Aggravated Burglary, R.C. § 2911.11(A)(1) a felony of the first degree merge for the purposes of sentencing. The defendant is sentenced to eleven (11) years in prison for the offenses of Kidnapping, Aggravated Robbery, and Aggravated Burglary.

- 2) Count Six Grand Theft of a Firearm, R.C. §2913.02(A)(1), a felony of the third degree: The defendant is sentenced to 36 months in prison.
- 3) Count Seven Tampering With Evidence, R.C. §2921.12(A)(1) a felony of the third degree: The defendant is sentenced to 36 months in prison.
- 4) Count Eight Safecracking, R.C. §2911.31(A), a felony of the fourth degree: The defendant is sentenced to 12 months in prison.
- 5) Count Nine Abuse of a Corpse, R.C. §2927.01(B), a felony of the fifth degree: The defendant is sentenced to 12 months in prison.
- 6) These prison terms shall be served concurrently with one another and concurrently with the sentence for Aggravated Murder with Specifications.
- 7) The defendant was also convicted of specifications to counts 4, 5, 6 (violations of R.C. 2941.141 1 year firearm) and count 9 (violation of R.C. 2941.145(A) 3 year firearm). As to the Firearm Specification to Count Nine, the Court imposes a sentence of 3 years in prison, to be served consecutively to all other sentences.
- 8) The Court finds the remaining Firearm Specifications merge. The Court imposes a sentence of one year in prison, to be served consecutively to all other sentences.

The Court finds the Defendant does not have nor is he reasonably expected to have the means to pay the financial sanctions, fines and court costs. There is no fine and costs are waived.

The Defendant is not eligible for a Risk Reduction Sentence pursuant to R.C. §2929.143.

Defendant shall receive jail time credit in the amount of 261 day(s) as of this date.

The Defendant shall submit a DNA sample pursuant to R.C. §2901.07.

The Defendant is also subject to a mandatory period of post-release control with a maximum term of five years.

The Defendant is hereby notified that a violation of any post-release control rule or condition can result in a more restrictive sanction when released, an increased duration of supervision or control, up to the maximum set out above and/or re-imprisonment even though the Defendant has served the entire stated prison sentence. Re-imprisonment can be imposed in segments of up to 9 months but cannot exceed a maximum of one-half of the total term imposed for all of the offenses set out above. The Defendant was also notified that commission of a new felony while subject to this period of control or

supervision may result in an additional prison term consisting of the maximum period of unserved time remaining on post-release control as set out above or 12 months whichever is greater. This prison term must be served consecutively to any term imposed for the new felony. The sentence imposed by the Court automatically includes any extension of the stated prison term by the Parole Board.

The Defendant did cause or threaten to cause physical harm to a person. Any Temporary Protection Order issued in this case is hereby terminated.

The Defendant shall be conveyed by the Warren County Sheriff to the custody of the Ohio Department of Rehabilitation and Corrections forthwith.



JUDGE DONALD E. ODA II

Cc: David Fornshell Warren County Prosecuting Attorney
John Arnold Assistant Prosecuting Attorney
Greg Howard Lead Counsel for Defendant
John Kaspar Co-Counsel for Defendant