

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 Appellee, : Supreme Court Case No. 2010-1105
 -vs- : **This is a capital case.**
 GREGORY OSIE, :
 Appellant. :

ON APPEAL FROM THE BUTLER COUNTY COURT OF COMMON PLEAS,
CASE NO. 2009-02-0302

APPELLANT GREGORY OSIE'S APPLICATION FOR REOPENING
PURSUANT TO S.CT. PRAC. R. 11.06

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 SUPREME COURT OF OHIO

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STATE OF OHIO,

Appellee,

-vs-

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PURSUANT TO S.Ct. Prac. R. 11.06

Appellant Gregory Osie asks this Court to grant his Application for Reopening based upon the ineffective assistance of counsel during his direct appeal. S.Ct. Prac. R. 11.06 and *State v. Murnahan*, 63 Ohio St.3d 60 (1992).

I. Osie's direct appeal counsel were constitutionally ineffective.

The Due Process Clause of the Fourteenth Amendment guarantees effective assistance of counsel on a criminal appeal as of right. *Evitts v. Lucey*, 469 U.S. 387 (1985). Appellate counsel must act as an advocate and support the cause of the client to the best of their ability. *See, e.g., Anders v. California*, 386 U.S. 738 (1967); *Penson v. Ohio*, 488 U.S. 75 (1988). After a review of the direct appeal that was filed on Osie's behalf, it is apparent that his appellate attorneys were prejudicially ineffective for failing to raise meritorious issues that arose during his capital trial.

As further evidence of appellate counsel's ineffectiveness, it is informative to look at the opinion and what issues this Court noted were not raised. For example, this Court discussed how expert testimony was never presented regarding the effects of cocaine. This information could have been used to suppress Osie's harmful statements. Further, a timeline was never presented to

show whether Osie used cocaine more recently than the night prior to the police interrogation. *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, *P 104.

Because appellate counsel were prejudicially ineffective in this case, this Court must reopen Osie's appeal. *State v. Murnahan*, 63 Ohio St.3d 60 (1992) and S.Ct. Prac. 11.06. Mr. Osie was denied the effective assistance of appellate counsel as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 9, 10, and 16 of the Ohio Constitution when his appellate counsel failed to include critical claims in his direct appeal.

II. Appellate counsel were prejudicially ineffective for failing to raise meritorious issues.¹

The failure to present a meritorious issue for review constitutes ineffective assistance of counsel. See e.g., *Franklin v. Anderson*, 434 F.3d 412 (6th Cir. 2007); *State v. Ketterer*, 111 Ohio St.3d 70 (2006). Had Appellant Osie's direct appeal counsel presented the following propositions of law, the outcome of this appeal would have been different.

Proposition of Law No. I: A defendant is denied the right to the effective assistance of counsel when trial counsel prejudicially fails his client during his capital trial. U.S. Const. Amends. V,VI, XIV; Ohio Const. Art. I, §§ 2, 9, 10 and 16.

The Sixth and Fourteenth Amendments guarantee the accused the right to counsel at trial. *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963). When evaluating claims of ineffective assistance of counsel, this Court must determine if counsel's performance was deficient, and if so, whether petitioner was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 686-87 (1984); *Glenn v. Tate*, 71 F.3d 1204, 1210-11 (6th Cir. 1995).

A. Trial counsel did not detail Osie's cocaine usage or present a substance abuse expert – voluntary intoxication is a relevant mitigating factor.

Appellate counsel did not raise as error trial counsels' failure to present voluntary

¹ Due to the page limitation imposed by S.Ct. Prac. R. 11.06, Osie is unable to fully brief the issues not raised by prior appellate counsel as he would like. This should not be construed as a waiver of that issue or point.

intoxication as a significant mitigating factor. Instead, trial counsel presented the case as a "confrontation that got out-of-hand," despite the trial testimony of several witnesses that Osie was a cocaine addict. (Tp. 51, 99, 112) (See Appx. p. 1, hereafter A-1 - A-3). Indeed, Osie "was getting high all day" the day of the murder according to one state's witness. (Tp. 112, A-3). Rather than expand upon cocaine addiction and its impact on the addict, trial counsel simply stated that "voluntary intoxication isn't a defense but goes to his [Wesson's] mind set." (Mitigation Tp. 160, A-4). Trial counsel did not present an expert in the area of substance abuse or pharmacy so that the three-judge panel could better understand this mitigating factor.

This Court has repeatedly recognized that "the diminished capacity of intoxicated persons to appreciate the wrongfulness of their conduct, and then refrain from such conduct, may be a relevant consideration in determining the degree of punishment inflicted upon them when such conduct is unlawful." *State v. Sowell*, 39 Ohio St.3d 322, 325 (1988). See also, *State v. Staten*, 18 Ohio St.2d 13 (1969); *State v. Bedford*, 39 Ohio St.3d 122 (1988). Voluntary intoxication, however, will be assigned little or no weight where the defendant fails to produce evidence of intoxication at the sentencing hearing. *Sowell*, at 337. That is exactly what happened in Osie's case. (Disposition Tp. 7, A-5).

Here, voluntary intoxication at the time of the murder was not the focus despite testimony that Osie drank several beers and did lines of cocaine prior to visiting the victim. (Tp. 112, A-3). Osie did not have a history of violence or an extensive criminal record. Given Osie's chronic drug usage, and the downturn it caused in his life (i.e., reduced to stealing from his elderly mother), it is unclear why voluntary intoxication and presentation of an expert on this topic would not be a key point in mitigation.

B. Counsel failed to present documented evidence of Osie's lack of a criminal record under R.C. 2929.04(B)(5) and his ability to adapt to prison life as a mitigating factor under 2929.04(B)(7).

The United States Supreme Court recognizes adaptability to prison life as a mitigating factor, as does the Supreme Court of Ohio. *Skipper v. South Carolina*, 476 U.S. 1 (1986); *State v. Simko*, 71 Ohio St.3d (1994). In *Skipper*, the U.S. Supreme Court reasoned "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." *Skipper*, 476 U.S. at 7. The ability to adapt and conform can make a life sentence a viable option.

Defense counsel in a capital case has a duty to investigate all possible mitigating factors, including a thorough review of the defendant's background. *Williams v. Taylor*, 529 U.S. 362 (2000). At trial, Osie's counsel were ineffective and Osie was prejudiced when counsel failed to investigate and present readily available evidence of his ability to adjust to and behave appropriately, while incarcerated.

The trial court never mentioned Osie's ability to adapt to prison life in its sentencing opinion. Indeed, defense counsel spent no time developing this mitigating factor and mentioned it only in passing during closing argument. (Mitigation Tp. 163, A-6). The panel could have given more weight to this mitigating factor had Osie's minimal criminal record been put into context by a qualified expert.

Further, this Court noted that counsel did not even bother to "place his [Osie's] criminal record, or lack thereof, in evidence" for its independent sentence review under R.C. 2929.04(A). *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966 at *P 178. This Court noted that the only evidence it had before it to support R.C. 2929.04(B)(5) was the testimony of Paul Rudemiller who stated that Osie had one or two offenses involving excessive drinking. Additionally, the state

submitted a motion with some information prior to trial. As a result of these omissions, defense counsel acted unreasonably and failed to meet the prevailing standards of practice.

C. Trial counsel failed to seek the appointment of an independent psychologist that was readily available to them pursuant to R.C. 2929.024.

An expert appointed pursuant to R.C. 2929.024 is treated as a defense expert and is protected by the doctrine of work product. Any report or testimony does not go to the trier of fact unless defense counsel so elects. Psychological evidence is strong mitigation pursuant to R.C. 2929.04(B)(7) even if it does not meet the requirement of a mental disease or deficit. The focal point of the psychological evaluation is the defendant's environment and how it led him to the situation in which he now finds himself.

In the present case, Osie compiled numerous rambling, ranting letters that were seized from his jail cell. Appellate counsel raised the issue in the context that the trial court should have questioned Osie's jury waiver given the erratic letters. The letters were manic in nature ranging from threats to declarations of love for a girlfriend that Osie also blamed for his situation. At a minimum, however, defense counsel had reason to question their client's mental health. Filing a request for a psychological expert pursuant to R.C. 2929.024 is a very basic request in a capital case that would have been granted by the trial court.

The Fourteenth Amendment equal protection and due process clauses guarantee that indigent defendants, such as Greg Osie, have "access to the raw materials integral to the building of an effective defense." *Ake v. Oklahoma*, 470 U.S. 68, 77, 105 S.Ct. 1087, 1093 (1985). There is also a basic common sense principle that when a lawyer prepares the client's defense, he must often depend on competent, accurate assistance from experts. In Greg Osie's case, as in many capital cases, mental status was crucial to his defense. Courts have "repeatedly stressed the particularly critical interrelation between expert psychiatric assistance and minimally effective

representation of counsel.” *Beavers v. Balkcom*, 636 F.2d 114, 116 (5th Cir. 1981).

Because Osie had the burden to go forward with his penalty phase defense, and because his counsel obviously was not a psychologist or a psychiatrist, an expert was needed to evaluate Osie’s mental condition. This Court noted the tones of suspicion and anger in Osie’s letters and the swings between passion and hatred. *Osie* at *P 141. The failure of defense counsel to request the assistance of a psychological expert produced an incomplete picture of Osie at mitigation. *See Ake*, 470 U.S. at 82 (Psychiatric or psychological assistance is supposed to ensure accuracy in the fact-finder’s verdict.). The absence of this trial expert denied Osie due process and the effective assistance of counsel.

D. Counsel failed to call a substance abuse expert as the Suppression Hearing to substantiate their claim that Osie’s statements to police were made while he was under the influence of alcohol and cocaine.

Osie stated that he spent the entire day doing cocaine with his girlfriend and drank “several beers” and did more lines of cocaine the night prior to his interrogation at the police station. *See Osie* at *P 38, 103. This Court, however, noted that the defense did nothing to explain the effects of cocaine or provide a timeline to show how close Osie had used cocaine to the police questioning. *Id.* at *P 104. This explanation was necessary as one of the officers testified that Osie “did not appear” intoxicated. Thus, the failure to retain a substance abuse expert, or even submit additional information, significantly weakened Osie’s argument that he was incapable of providing a knowing, voluntary and intelligent waiver.²

The Supreme Court decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), created a presumption of a coercive atmosphere in custodial interrogation. The Court decided that where there is a custodial interrogation and government involvement, there is conclusive presumption. As

² For example, addicts, like Osie, will often take cocaine repeatedly in large doses to sustain the high. This in turn creates a flood of dopamine that disrupts normal brain communication.

result, any statement that a suspect in that environment gives is presumed to be coerced. Any statement that is coerced cannot then be used against the suspect.

That presumption of coerciveness is only overcome if two requirements are met. First, a suspect must be advised of certain rights. Then the suspect must issue a valid waiver of those rights. If both of those requirements are not met, any statement or confession from a suspect in custodial interrogation is presumed coerced in violation of the suspect's rights.

In Osie's case the totality of the circumstances, the alcohol, the cocaine, and the interrogation room rendered the waiver invalid. Osie's minimal prior record also reflected his lack of experience with the justice system. One state scene witness testified that Osie "did not appear intoxicated." But the presumption is that the waiver was invalid. The combination of factors rendered the waiver invalid. *State v. Edwards*, 49 Ohio St.2d 31 (1976). The testimony of a state's witness that Osie did not "appear" intoxicated is insufficient proof of his knowing, intelligent and voluntary waiver of his Fifth Amendment protections. Without doubt, a detailed account of Osie's cocaine usage and alcohol consumption prior to the interrogation, and the assistance of a substance abuse expert or pharmacological expert, would have been extremely valuable in making his claim. Indeed, the lack of this critical information was duly noted by this Court. *Osie* at *P104.

E. Defense counsel was ineffective for failing to follow the proper procedure to recuse Judge Powers. Additionally, defense counsel rendered ineffective assistance when they disregarded Judge Powers' concern over his ongoing relationship with Attorney Pagan. Cannons 2 and 3 of the Ohio Code of Judicial Conduct required him to recuse himself from Osie's case.

Appellate counsel argued that Judge Powers should have recused himself from Osie's case. *Id.* at *P 142. Judge Powers alerted defense counsel prior to trial that he had an ongoing relationship with Attorney Pagan. Specifically, Judge Powers stated that Pagan "still owes me money." *Id.* at *P 141. Thus, the judge did not want to appoint his former law partner [Pagan] as a

mitigation expert for the defense. Defense counsel was aware that the former law partners “needed to settle or obtain a judgment” but wanted Pagan to assist them with Osie’s case. *Id* at *P 60. Judge Powers did not offer to recuse himself.

This Court stated that appellate counsel did not present the disqualification claim properly. Rather, “Osie should have brought his bias claim before the chief justice via affidavit for disqualification under R.C. 2701.03.” *Osie* at *P 142. Indeed, given the feelings that existed between the former law partners (i.e., Pagan and Powers needed to “settle or obtain a judgment”) it was ineffective for defense counsel not to take any action to remove Judge Powers from the case. It defies logic how Powers’ feelings towards Pagan, especially in a three-judge panel case, could be beneficial to Osie.³ “While defense tactics, even ineffective ones, are usually not considered grounds for reversal, where there has been such a deviation from the norm that ordinary trial would scoff at hearing of it, we may conclude that there has been reversible error. A physician may commit malpractice on a dying patient, just as an attorney may ineffectively represent a guilty defendant, but we cannot excuse either conduct because the result would have been the same.” *State v. Burgins*, 44 Ohio App.3d 158 (Ohio App. 4 Dist., 1988).

This Court also described appellate counsel’s bias claim as speculative because counsel framed the issue as though there may have been concern about Pagan’s reputation and it being harmed. *Osie* at * P 143. The harm is not to Pagan but to Osie. Osie was entitled to have three judges decide his capital case that did not have preconceived negative feelings towards his defense team. Further, because our system of justice is dependent upon the public’s confidence in the integrity and impartiality of the judicial system, this appearance of impropriety cannot be ignored. *James v. James*, 101 Ohio App.3d 668, 656 N.E.2d 399 (1995). Specifically, this Court held that

³Judge powers left his law practice with Pagan to take the bench in 2007. According to the transcript, disputes over money still had not been settled at the time of Osie’s trial in 2010.

"[n]ext in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness or integrity of the judge." *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 471(1956), quoting *Haslam v. Morrison*, 113 Utah 14, 20 (1948).

To take a case before a judge that: 1) is clearly uncomfortable with the requested appointment; and 2) airs that there is a money dispute with a former business partner that the defense wants on their team is ineffective. Further, there is an appearance of impropriety. This appearance of impropriety undermines any confidence in the outcome of Osie's case.

F. Appellant's trial counsel erred by failing to present the testimony of an expert on Essential Tremor (ET) to explain and further support Osie's defense.

Appellant's trial counsel erred by failing to present the testimony of an expert on the progression of ET and its linkage to dementia during the trial phase. *Ake v. Oklahoma*, 470 U.S. 68 (1984); *State v. Johnson*, 24 Ohio St.3d 87 (1986). Osie said that the victim became very aggressive with him and that he discussion quickly turned into a confrontation that "got out of control." Osie stated that he reacted and was defending himself.

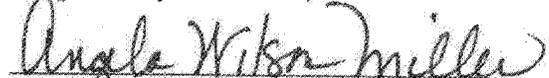
The victim, Mr. Williams, suffered with ET. Williams often drank alcohol in an effort to control the tremors. Defense counsel, however, never investigated the condition or presented an expert on the topic. Had counsel done some minimal investigation they would have discovered that ET patients are twice as likely to develop dementia as those without ET and that there is a link between the neurodegenerative disorders. Tremor and Other Hyperkinetic Movements, Felix Bermejo-Pareja and Veronica Puertas-Martin, Cognitive Features of Essential Tremor: A Review of the Clinical Aspects and Possible Mechanistic Underpinnings (September 14, 2012). Indeed, the traditional view that ET is a mono-symptomatic condition is an over-simplification of the disorder and physicians should discuss dementia and plans to deal with it with all of their ET patients. Medscape, Pauline Anderson, Essential Tremor May Raise Dementia Risk (August 27, 2009).

Thus, Osie's statements that Williams suddenly became very angry and came at him are possible. Had trial counsel obtained the assistance of an expert on ET, they would have had additional support for their defense that Osie's case was not one of aggravated murder but a confrontation that spun out of control. By explaining the victim's condition and giving context to Osie's account of what occurred, a more coherent, credible defense could have been presented. Without such an expert, it looked as though Osie was simply making excuses.

III. Conclusion.

Appellant Osie requests that this Application for Reopening be granted and that he be afforded an opportunity to file a new appellate brief with supporting materials. S.Ct. Prac. 11.06 and *State v. Murnahan*, 63 Ohio St.3d 60 (1992). Osie has shown that there is a genuine issue as to whether he was deprived of the effective assistance of counsel on appeal, with respect to the Proposition of Law and its sub-claims.

Respectfully submitted,



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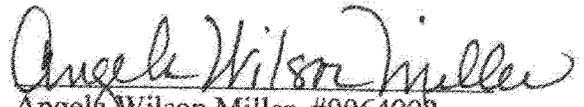
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2015, I served a copy of the foregoing by regular

United States mail addressed to:

Ms. Lina Alkamdawi
Asst. Prosecuting Atty.
315 High Street, 11th Floor
Hamilton, OH 45012-0515


Angela Wilson Miller, #0064902
Counsel for Appellant

IN THE SUPREME COURT OF OHIO

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-vs- : On Appeal from the Court of Common
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GREGORY OSIE, : 2009-02-0302
Defendant-Appellant. : This is a capital case.

AFFIDAVIT OF ANGELA WILSON MILLER

STATE OF FLORIDA,)
COUNTY OF PALM BEACH) ss:
)

I, Angela Wilson Miller, after being duly sworn, hereby state as follows:

- 1) I am an attorney licensed to practice law in the State of Ohio and I have practiced law for 19 years. I worked as an Assistant State Public Defender for 11 years and was assigned to the Death Penalty Unit. I am certified to practice in the United States District Court for the Southern District of Ohio, the United States District Court for the Northern District of Ohio, the Sixth Circuit Court of Appeals and the Supreme Court of the United States. I am currently in private practice and I am Rule 20 certified for appellate work.
- 2) Due to my focused practice of law and my attendance at several death penalty seminars, I am aware of the standards of practice involved in the appeal of a case in which the death penalty was imposed.
- 3) I was appointed by this Court to represent Mr. Osie and prepare an Application for Reopening (S.Ct. 11.06) on September 19, 2014.
- 4) I have read this Court's opinion, as well as the transcripts, record and appellate briefs filed on Mr. Osie's behalf. I also watched Mr. Osie's oral argument to prepare the Application for Reopening in this case.

- 5) The Due Process Clause of the Fourteenth Amendment guarantees the effective assistance of counsel on an appeal as of right. *Evitts v. Lucey*, 469 U.S. 587 (1985).
- 6) The initial responsibility of appellate counsel, once the transcript is filed, is to make sure that the entire record is filed with the Supreme Court of Ohio. When appellate counsel files only a partial transcript on appeal, the defendant is deprived of the due process of law guaranteed by the Fourteenth Amendment of the United States Constitution. *Entsminger v. Iowa*, 386 U.S. 748 (1967).
- 7) After making sure that the transcript is complete, counsel must then review the record for purposes of issue identification. This review of the record not only includes the transcript but also the pleadings and exhibits.
- 8) For counsel to properly identify issues, they must have a good working knowledge of criminal law in general. Most trial issues in capital cases will be decided by criminal law that is applicable to non-capital cases. As a result, appellate counsel must be informed as to the recent developments in criminal law when identifying potential issues on direct appeal. Counsel must remain knowledgeable about recent developments in the law after the merit briefs are filed.
- 9) Since the reintroduction of capital punishment in response to the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the area of capital litigation in general has become a recognized specialty in the practice of criminal law. Numerous substantive and procedural areas unique to capital litigation have been carved out by the United States Supreme Court. As a result, anyone who litigates in the area of capital punishment must be familiar with these issues in order to raise and preserve them for appellate and post-conviction review.
- 10) Appellate representation of a death-sentenced individual requires a recognition that the case will most likely proceed to the federal courts at least twice: first on petition for Writ of Certiorari in the United States Supreme Court, and again on a petition for Writ of Habeas Corpus filed in a federal district court. Appellate counsel must preserve all issues throughout the state court proceedings on the assumption that relief is likely to be eventually sought in federal court. The issues that must be preserved are not only issues unique to capital litigation, but also case and fact-related issues unique to the case that impinge upon federal constitutional rights.
- 11) It is a basic principle of appellate practice that to preserve an issue for federal review, the issue must be exhausted in the state courts. To exhaust an issue, the issue must be

presented to the state courts in such a manner that a reasonable jurist would have been alerted to the existence of a violation of the United States Constitution. The better practice to exhaust an issue is to cite directly to the relevant provisions to the United States Constitution in each proposition of law and in each assignment of error to avoid any exhaustion problems in the federal courts.

- 12) Based on the foregoing standards, I reviewed the opinion, record and appellate briefs, and communicated with former appellate counsel.
- 13) I have identified additional ineffective assistance of trial counsel issues and numerous sub-claims that should have been evaluated by appellate counsel and presented to the Supreme Court of Ohio. Thus, appellate counsels' failure to present these errors raises a genuine issue as to whether or not Mr. Osie was denied the effective assistance of appellate counsel.
- 14) For example, appellate counsel failed to raise the issue of trial counsels' failure to present voluntary intoxication as a relevant mitigating factor. Trial counsel downplayed Osie's cocaine addiction at mitigation stating that it "only went to mind-set." Trial counsel did not present an available, detailed timeline of Osie's drinking or drug usage the day of the murder or present the testimony of a substance abuse expert at mitigation. This omission occurred despite testimony at the trial phase that Osie drank heavily and did several lines of cocaine that day with his ex-girlfriend. This Court noted that trial counsel greatly limited its presentation of voluntary intoxication. *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, *P 104. It is well-recognized that "the diminished capacity of intoxicated persons to appreciate the wrongfulness of their conduct, and then refrain from such conduct, may be a relevant consideration in determining the degree of punishment to be inflicted upon them . . ." *State v. Sowell*, 39 Ohio St.3d 322, 325 (1988).
- 15) At trial, defense counsel tried to argue that Osie's case was not one of aggravated murder. Rather, it was an argument that spun out-of-control. Mr. Osie argued that the victim suddenly became very agitated and came at him. Osie stated that he reacted and stabbed the victim in self-defense. Cups with straws and alcohol in them were found in the victim's home.

The state explained that the victim often drank alcohol in an effort to control ET or Essential Tremors. Several studies have linked dementia to ET. ET patients are twice as likely to develop dementia as those without ET. Defense counsel, however, did nothing to explain that the victim could have been violent or physically aggressive due to the progression of the disease. Without additional investigation, or an expert to review the

medical records of the victim, the defense theory was empty and lacked credibility. Appellate counsel did not raise this issue on direct appeal.

- 16) Appellate counsel did not raise trial counsel's failure to seek the appointment of an independent psychologist. Ohio Revised Code 2929.024 gives defense counsel the ability to obtain an expert that works for them. Psychological evidence is strong mitigation under R.C. 2929.04(B)(7).

Osie compiled numerous rambling letters in his jail cell. The letters reflected flips between extreme highs and lows – manic in nature. This Court noted tones of suspicion and anger and swings between passion and hatred. *Osie* at *P 141. At a minimum, counsel should have requested a mental health expert and had Osie's mental condition evaluated. The absence of this expert, which could have been readily appointed, denied Osie the effective assistance of counsel.

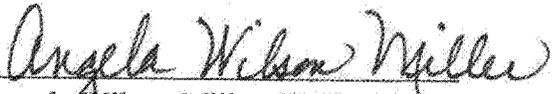
- 17) Counsel did not call a substance abuse expert at the suppression hearing. Further, defense counsel did not provide any information as to how close to the interrogation Osie drank and did lines of cocaine – information essential to claiming his rights waiver was not knowing, voluntary and intelligent. This evidence was necessary to refute the officer's testimony that Osie "did not appear intoxicated." The failure to place this additional information into evidence or secure a substance abuse expert amounted to ineffective assistance of counsel.

- 18) Appellate counsel also did not raise the issue of trial counsel's failure to present evidence of adaptability to prison life. Osie had a minimal criminal record and was a law abiding citizen that supported his family prior to this offense. These factors make him a good candidate for life without parole. Adaptability to prison life is a recognized mitigating factor. *Skipper v. South Carolina*, 476 U.S. 1 (1986); *State v. Simko*, 71 Ohio St.3d (1994). The three-judge panel could have given more weight to this mitigating factor had Osie's minimal criminal record been put into evidence and into context by a qualified expert. Additionally, appellate counsel should have supplemented the record on appeal so that this Court could view Osie's record, or lack thereof, during its independent weighing process. *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966 at *P 178.

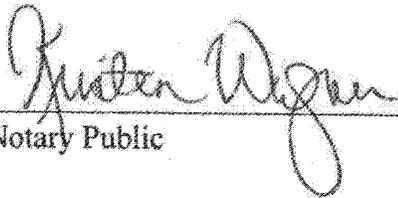
- 19) An appellate court has an independent duty to read the transcript and identify errors that are plain even if they are not presented on appeal. R.C. §2929.05. As a practical matter, however, appellate courts rely almost exclusively on appellate counsel to identify errors and the applicable law.

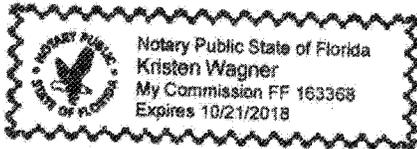
20) Therefore, Gregory Osie, was detrimentally affected by the deficient performance of his former appellate counsel.

Further affiant sayeth naught.


Angela Wilson Miller, #0064902
Counsel for Appellant, Gregory Osie

Sworn and subscribed in my presence this 6th day of January, 2015.


Notary Public



1 Q. And what did he say to you on the phone?

2 A. He asked me to come over.

3 Q. And what did he ask you to do?

4 A. Come over and do some cocaine with him.

5 Q. And what did you say to him when he asked you

6 that?

7 A. I said, "No, I don't have time. I'm going to set

8 up."

9 Q. And when you say set up, set up for the band?

10 A. Yes.

11 Q. And how -- have you been over to his house before?

12 A. Yes, I have.

13 Q. And about when?

14 A. The last time was probably six months prior to the
15 13th to move Robin out of his place.

16 Q. And did you hear Robin's voice on the phone?

17 A. Yes, I did.

18 Q. Now, I'm going to direct you back to the night
19 where you're playing at Cavanaugh's. In fact, did your band
20 play that night?

21 A. Yes.

22 Q. And did you happen to see Robin Patterson at the
23 bar?

24 A. Yes, I did.

25 Q. And about what time did you notice her?

1 A. Okay. Greg had told me that David Williams was
2 pressing charges on Robin Patterson for stealing around
3 \$18,000. She was Dave's personal assistant and I guess had --
4 I was told that she had done all of his payroll and was his
5 personal assistant and was pressing charges on Robin, and Greg
6 and Robin were dating, and I believe had been living together,
7 but she had asked Greg to go and speak with Dave. Greg had
8 said that Robin had asked him to go speak with Dave and to try
9 to get him to not press the charges.

10 Q. And in addition to the \$18,000, did Greg tell you
11 about any other items that she or he were alleged to have
12 taken?

13 A. Not -- not prior to Dave's death.

14 Q. Okay. Did he tell you about how they were -- how
15 they took the money?

16 A. Yes.

17 Q. And how was that?

18 A. Payroll checks.

19 Q. Okay. Now, let me direct your attention now to
20 when he was talking about the night of the event. Did he tell
21 you what he and Robin were doing prior to him going over to
22 Dave's house?

23 A. Yes.

24 Q. And what did he say?

25 A. They were getting high.

1 is that fair?

2 A. That's fair.

3 Q. He never told you it was his intention to go there
4 and cause any harm to Dave, is that fair?

5 A. Okay. Yes.

6 Q. He indicated to you that before he went to the --
7 to Dave's house, that he was with Robin Patterson?

8 A. Yes, sir.

9 Q. And he indicated that they were getting high?

10 A. Yes, sir.

11 Q. Did he indicate to you how much cocaine they used
12 before he went there?

13 A. No, he didn't tell me how much they had done, but
14 he said they'd been getting high all day, so I would assume
15 that it was fairly much.

16 Q. Okay. When you say getting high all day, what
17 time -- do you know what time they started and what time they
18 ended?

19 A. No, I have no idea.

20 Q. Okay. Do you -- did he indicate to you what time
21 he went to Dave Williams' house?

22 A. It was late, like I'd said, I don't know, 1:00,
23 1:30, 2 o'clock, somewhere around then. I --

24 MR. WASHINGTON: There's no question. Hold on one
25 second. Thank you. No further questions.

1 talk to him, to talk to Dave Williams, to talk to him
2 about what was going on, to talk to him about not
3 pressing charges, and he got there, and obviously
4 things got out of control, and Greg killed him. Greg
5 killed him. There's no question about it, but did he
6 go there to stalk, to stab, to slash, no. That's been
7 the testimony. That's been the confession, that things
8 got out of control.

9 In most murder cases that we deal with, things get
10 out of control. It doesn't mean it's a capital murder
11 case. It doesn't mean that the death penalty is the
12 appropriate penalty. It means that things get out of
13 control when people use drugs and are influenced by
14 other people who they -- who they sell their souls out
15 to and give their life to and love so much that they'll
16 do anything to get back and to keep them in their
17 lives, and they make bad choices, and that's what he
18 did. But does he deserve to die for that? Does he
19 deserve to die for losing control while under the
20 influence? Voluntary intoxication isn't a defense, but
21 it goes to his mind set. It goes to is this man worth
22 saving? Is he worth saving?

23 He is worth saving. He's not a career criminal.
24 He's not a psychopath. He's not a -- he's not a --
25 he's not a -- he doesn't kill multiple individuals, and

1 attention of the panel by the defense team. These
2 included the defendant's lack of a prior criminal
3 record, his cocaine usage, and his alleged cooperation
4 with the police during the homicide investigation which
5 gave rise to this matter. Panel addressed and weighted
6 each of those factors.

7 with respect to his criminal record, the
8 mitigating or lack of a criminal record, the Court
9 afforded that mitigating evidence significant weight.

10 The panel also, as I indicated, considered his
11 drug usage, but we considered the fact that his
12 consumption of drugs was voluntary on his part and gave
13 that mitigating value minimal weight.

14 with respect to his cooperation with police, we
15 found that in some respects he did cooperate with the
16 police, but a review of his statement indicates that he
17 was not forthcoming with respect to his conduct and
18 culpability and only admitted that which was dragged
19 out of him after he'd been caught in multiple lies and
20 falsehoods that he told the police. In the end, he was
21 denying even the smallest facts and never did really
22 indicate the location of the knife he used to kill Mr.
23 Williams as is borne out when he later admitted to his
24 cellmate, Donald Thompson, or excuse me, Simpson, that
25 the knife was located at or near the intersection of

1 someone's life. They're not crimes that although the
2 death penalty may be allowed, it may be an option, it
3 doesn't make it appropriate. There's a difference.
4 Just because -- just because you can doesn't mean you
5 should.

6 We're asking this Court consider his life work,
7 consider the fact that since he's been at the county
8 jail, he has shown good behavior. All these are things
9 that they may seem small or feathers. They are still
10 things that this Court can consider in allowing this
11 man to continue to live, be it he's going to be in
12 prison, but he can still do some good. He can still
13 resolve himself to doing well for himself, for his
14 spirit, for his life, for his family. He still
15 deserves a chance. He still deserves a chance.

16 I'm not going -- I'm not going through the law
17 with you. You're experienced judges. You don't need
18 me to tell you what the law is. You know the law
19 better than I do. What I would ask is that you -- you
20 see him, you know his history, you know his story, you
21 know he could have done better, you know the acts that
22 he committed, but what we would ask is that the Court
23 find that the mit -- that the aggravating circumstances
24 do not outweigh the mitigating factors and allow him to
25 continue to live and try to be as productive as he can