Supreme Court of Ohio Clerk of Court - Filed February 03, 2015 - Case No. 2010-1105

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	**Case No. 2010-1105**
Appellee	:	
v.	:	**[Capital Case]**
GREGORY C. OSIE,	:	
Appellant.	:	

On Appeal from the Court of Common Pleas of Butler County
Case No. CR2009-02-0302

APPELLEE'S RESPONSE TO APPELLANT'S APPLICATION FOR REOPENING PURSUANT TO S.CT.PRAC.R. 11.06

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On Appeal from the Court of Common Pleas of Butler County
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Appellee's Response to Appellant's Application for Reopening
Pursuant to S.Ct.Prac.R. 11.06

Appellant in his application for reopening alleges that his appellate counsel were ineffective for failing to raise an additional six assignments of error relating to the ineffective assistance of trial counsel. (Appellant's application, pages 2-10) Appellee disagrees. None of the now assigned six issues are "genuine issues" that present a "colorable claim" of ineffective assistance of counsel. Appellant was assigned three appellate counsel in his direct appeal, who raised 19 issues on appeal in a 132 page appellate brief.

This Honorable Court has previously outlined the pertinent burden of proof required for an application to reopen an appeal:

> The two-pronged analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.E.2d 674, 693, is the appropriate standard to assess whether Hooks has raised a "genuine issue" as to the ineffectiveness of appellate counsel, in his request under App.R. 26(B)(5). *State v. Spivey* (1998), 84 Ohio St.3d 24, 25, 701 N.E.2d 696, 697; *State v. Reed* (1996), 74 Ohio St.3d 534, 535, 660

N.E.2d 456, 458.

> To show ineffectiveness of counsel, Hooks must prove that his counsel were deficient for failing to raise the issues he now presents and that there was a reasonable probability of success had those claims been presented on appeal. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. Moreover, to justify reopening his appeal, Hooks "bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Spivey*, 84 Ohio St.3d at 25, 701 N.E.2d at 696–697.

State v. Hooks, 92 Ohio St.3d 83, 84, 748 N.E.2d 528, 530-531, 2001-Ohio-150.

In the matter at bar, Appellant's application for reopening should be denied as he fails to present genuine issues with colorable claim of ineffective assistance of appellate counsel.

Proposition of Law No. I:

Appellant Received the Effective Assistance of Appellate Counsel.

A. Substance Abuse Expert At Mitigation.

Appellant argues that his appellate counsel failed to raise the issue of ineffective assistance of trial counsel when trial counsel failed to "present an expert in the area of substance abuse or pharmacy so that the three judge-panel could better understand this mitigating factor." (Appellant's application, page 3) This claim is not a genuine issue since it was raised in the direct appeal. In his twelfth proposition of law in the direct appeal, Appellant argued that his trial counsel was ineffective for failing to present "expert testimony to explain the effects of cocaine on Osie's behavior." (Appellant's brief page 74) This Court overruled this assignment of error in the direct appeal. *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, ¶¶ 228, 232.

Moreover, this Court has consistently held that "voluntary intoxication deserves little weight in mitigation. *State v. Campbell*, 95 Ohio St.3d 48, 51, 765 N.E.2d 334 (2002)." *State v. Davis*, 139 Ohio St.3d 122, 2014-Ohio-1615, ¶109; *see also State v. Osie*, 2014-Ohio-2966, ¶211. In *Davis*, this

Court gave little mitigating weight to Davis' consumption of alcohol the day of the murder and affirmed Davis' death sentence. *Davis*, 2014-Ohio-1615, at ¶¶ 109, 118. As such, Appellant cannot demonstrate that presenting further argument on this issue would result in a reasonable probability of success on appeal. Wherefore, this Honorable Court should deny Appellant's application for reopening.

B. Lack of Criminal Record and Adaptability to Prison Life.

Under this subdivision, Appellant argues that an issue on appeal should have been trial counsel's failure to present evidence of his lack of prison record and his adaptability to adjust to prison life. (Appellant's application, pages 4-5) In support of his arguments, Appellant cites to this Court's statement that "Osie did not place his criminal record, or lack thereof, in evidence." *Osie*, 2014-Ohio-2966, ¶ 264. However, this Court acknowledged that there was testimony that Appellant only had "one or two offenses involving excessive drinking[,]" and further that Appellant "had a good upbringing [and] * * * led a life that kept him away from the court system." *Id.*, at ¶¶ 264, 248.

Moreover, the lower court in its sentencing opinion noted that "[d]uring most of Defendant's adult life, he was a lawful and productive member of society. * * * The Panel accords the history, character, and background of Defendant, which includes some 46 years as a productive member of society, substantial weight." (Sentencing Opinion, filed on May 12, 2010, page 10) In addition, the three judge panel also specifically stated that it addressed and weighed "Defendant's lack of a prior criminal record[.]" (Id.) "The Panel believes that Defendant's lack of a prior criminal record has been clearly established. The evidence seems to indicate that Defendant may have had a single OVI (M1) offense and nothing more. This mitigation evidence the Panel gives significant weight." (Id.)

Therefore, since there was some evidence in support of the mitigation that Appellant lacked

a criminal record, and that the three-judge panel gave it "significant weight", it cannot be said that raising the issue of ineffective assistance of trial counsel for failing to present further evidence and advocate more aggressively for Appellant's lack of criminal record would have been a colorable claim that had a reasonable probability of success on appeal. As such, Appellant's application for reopening should be denied.

Appellant also argues that appellate counsel should have raised the issue of trial counsel's failure to present evidence of Appellant's ability to adjust to prison life and behave appropriately while incarcerated. (Appellant's application, page 4) It should be noted that Appellant acknowledges that his trial counsel did mention this mitigating factor in closing argument. (Appellant's application, page 4) Similar to previous arguments by Appellant, this argument is speculative. This Court recently affirmed a death sentence even when testimony, including an expert, was presented that a defendant will adjust to prison life:

> Maxwell argues that this court should consider testimony that he will be able to adjust well to prison life. *See State v. Madrigal*, 87 Ohio St.3d 378, 397, 721 N.E.2d 52 (2000). Dr. McPherson testified that Maxwell's prison records showed that his conduct had been exemplary in prison. We give some weight in mitigation to Maxwell's ability to adjust to prison life.
> * * *
> We affirm the judgment of conviction and the sentence of death.

State v. Maxwell, 139 Ohio St.3d 12, 2014-Ohio-1019, ¶¶ 281, 287.

Wherefore, this Honorable Court should deny Appellant's application for reopening since he fails to meet his burden of establishing a reasonable probability of success on appeal. *See State v. Hooks*, 92 Ohio St.3d 83, 84 (2001).

C. Psychologist.

In this subdivision, Appellant argues that appellate counsel should have raised the issue of

trial counsel's failure to "request for a psychologist expert pursuant to R.C. 2929.024." (Appellant's application, page 5) Appellee disagrees. As this Court has consistently stated: "[t]rial counsel's strategic decisions—including decision about how to present a mitigation case after a defendant is convicted of aggravated murder—are entitled to great deference. *See State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995)." *State v. Thompson*, Slip Opinion No. 2014-Ohio-4751, ¶ 266 (October 29, 2014). More recently, this Court overruled an argument that trial counsel were ineffective for failing to present psychologist evidence as mitigation stating that " '[a]ttorneys are not expected to present every potential mitigation theory, regardless of their relative strengths.' *Fears v. Bagley*, 462 FedAppx. 565, 576 (6th Cir.2012)." *State v. Pickens*, Slip Opinion No. 2014-Ohio-5445, ¶ 225 (December 16, 2014).

In the matter at bar, Appellant's argument is based on speculation, where the evidence at trial and mitigation did not establish any potential mental issues. To the contrary, this Court in its decision indicated that Appellant "had a good upbringing[,] * * * played softball, baseball, basketball, and football and participated in the Cub Scouts [,] * * * graduat[ed] from high school[, and] was an attentive parent." *Osie*, 2014-Ohio-2966, ¶¶ 248, 250, 254. Moreover, this Court in overruling Appellant's argument that his *Miranda* waiver was not voluntary held: "Osie's characterization of these letters as evincing mental illness is conclusory and speculative. Osie does not explain how the letters would tend to raise questions about his mental health. Moreover, as the state points out, there is nothing in the record to suggest that Osie had any mental-health issues." *Id.*, at ¶ 56.

Thus, Appellant fails to establish that the use of a psychologist expert would have revealed any mental illness, and in turn, that there was a reasonable probability of success if this issue was

presented on appeal. Appellant's application for reopening should be denied.

D. Substance Abuse Expert At Suppression.

In this subdivision, Appellant argues that his appellate counsel were ineffective for failing to argue that trial counsel should have presented an expert witness to demonstrate the effect of substance abuse on a defendant's ability to voluntary waive *Miranda*. (Appellant's application, pages 6-7) In support of this claim, Appellant relies on this Court's statement that the "defense submitted no evidence to show how long the effects of cocaine might be expected to continue." *Osie*, 2014-Ohio-2966, ¶104. (Appellant's application, page 6) Not only does Appellant take this Court's statement out of context, but this Court has addressed the issue of whether Appellant voluntarily waived his *Miranda* rights. In overruling Appellant's argument that "intoxication and cocaine use rendered him incapable of voluntarily waiving his right to remain silent" this Court stated:

> * * * Sometime after Detective Whitlock Mirandized Osie, Osie told him that he had "some beers" that day, and on the previous night (February 13), he and Robin Patterson had been "doing lines of cocaine." However, Whitlock testified that Osie did not smell of alcohol and did not appear to be intoxicated.
>
> There was no evidence at the suppression hearing indicating that Osie had used cocaine more recently than the night before the interrogation. Moreover, the defense submitted no evidence to show how long the effects of cocaine might be expected to continue. Therefore, there was nothing to refute Whitlock's testimony that Osie did not appear intoxicated.
>
> Moreover, the record shows that the confession was voluntary under the totality of the circumstances. The totality of the circumstances includes "the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *Edwards*, 49 Ohio St.2d 31, 358 N.E.2d 1051, paragraph two of the syllabus.
>
> * * *
>
> Under the totality of the circumstances, we conclude that Osie voluntarily waived his rights and that his confession was voluntary.

Osie, 2014-Ohio-2966, ¶¶ 103-105, 107.

Moreover, Appellant disregards this Court's decision in *State v. Otte*, 74 Ohio St.3d 555, 660

N.E.2d 711, 1996-Ohio-108. Appellant in his application states that 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 protection." (Appellant's application, page 7) In *Otte*, this Court, however, overruled the argument that a confession was not voluntarily given due to intoxication on the basis that the detective "testified that Otte did not appear to be under the influence that night." *Otte*, 74 Ohio St.3d at 562.

As such, Appellant's arguments in his application are based on the **speculation** that the expert would have testified that the effects of cocaine the night before did affect his capability to waive his rights and overcome Detective Whitlock's testimony that Appellant "did not appear to be intoxicated." Speculation, however, does not rise to the level of demonstrating a reasonable probability of success on appeal. Appellant's application for reopening should be denied.

E. Recusal of Judge.

Appellant argues that his appellate counsel were ineffective for failing to assert that trial counsel failed to correctly pursue the recusal of Judge Powers from the bench. (Appellant's application, pages 7-9) In support of his argument, Appellant relies on this Court's statement that "Osie should have brought his bias claim before the chief justice via affidavit for disqualification under R.C. 2701.03. Having failed to do so, he is likewise 'foreclosed from bringing such a complaint.' *id.*, on appeal of his conviction." *Osie*, 2014-Ohio-2966, ¶ 65. However, Appellant disregards the remainder of this Court's decision overruling the seventeenth proposition of law:

> In addition to being waived, Osie's **claim lacks merit**. * * *
> Osie's argument is **speculative**. Osie does not explain how Pagan's reputation stood to be harmed by participating in this case. Nor does he explain how an interest in protecting Pagan's reputation would give rise to a bias against the defense, given that Pagan was affiliated with the defense.

* * *

To demonstrate ineffective assistance, Osie would have to show both that trial counsel's failure to call Pagan as a witness was deficient performance and that it prejudiced him. *See generally Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). He does not attempt to make either showing here. **Defense counsel may have had valid strategic reasons for not wanting Judge Powers to recuse himself.** Moreover, the defense could present whatever witnesses and evidence Pagan's investigation might uncover without having to call Pagan to testify. Osie identifies nothing in the record to show why the defense needed Pagan to testify or how he might have testified. Consequently, Osie fails to demonstrate either deficient performance or prejudice.

Osie, 2014-Ohio-2966, at ¶¶ 66, 67, 70 (emphasis added).

Similarly, Appellant's argument in his application for reopening is speculative and does not rise to his burden of establishing a reasonable probability of success on appeal. Appellant's application for reopening should be denied.

F. Essential Tremor Expert.

In his final argument in his application for reopening, Appellant argues that appellate counsel should have raised the issue of trial counsel's failure to present an expert witness on essential tremors because it would have supported Appellant's defense that the victim came at him. (Appellant's application, pages 9-10) However, similar to the previous arguments, this is also speculative. Appellant states that the expert witness would have supported his "statements that Williams suddenly became very angry and came at him are **possible.**" (Appellant's application, page 10) Contrary to Appellant's assertion, "possible" does not rise to the level of demonstrating a "clorable claim."

Moreover, Appellant cannot demonstrate that the expert would have corroborated his defense as opposed to the State's position that the victim's essential tremors made him incapable of attacking anyone. This Court described the crime scene as:

Williams was found lying on the living-room floor, bruised and blood-soaked. The

> body lay near a coffee table, where police found a wallet lying open, with business cards and various papers scattered around it. On a table by a recliner was a spillproof cup containing whiskey and a drinking straw. * * * William's daughter and physician testified that Williams had a sever genetic disorder known as "essential tremor" or "familial tremor," which caused his whole body to shake so badly that he could not drink without a straw, use silverware, or negotiate steps.

Osie, 2014-Ohio-2966, ¶ 18, footnote 1.

Therefore, Appellant's speculative argument does not rise to the level of demonstrating a reasonable probability of success on appeal. Appellant's application for reopening should be denied.

CONCLUSION

In his direct appeal, Appellant was represented by three attorneys who raised nineteen assignments of error. Contrary to Appellant's assertions, none of the six assignments of error that he now claims should have been raised on appeal are colorable claims with a reasonable probability of success. To the contrary, they are all speculative. This Honorable Court should deny Appellant's application for reopening.

Respectfully submitted,
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PROOF OF SERVICE

This is to certify that a copy of the foregoing Appellee's Response to Appellant's Application for Reopening for was served upon the following by ordinary US mail, postage prepaid, this 3rd day of February, 2015:

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IN THE COMMON PLEAS COURT
GENERAL DIVISION
BUTLER COUNTY, OHIO

STATE OF OHIO,	*	CASE NO. CR 2009-02-0302
Plaintiff,	*	THREE-JUDGE PANEL: NOAH E. POWERS II (PRESIDING)
v.	*	PATRICIA ONEY CHARLES PATER
GREGORY C. OSIE	*	
		SENTENCING OPINION
Defendant	*	

****

This Opinion is issued pursuant to RC § 2929.03(F).

INTRODUCTION

Defendant Gregory C. Osie, hereinafter Defendant, was indicted in this matter in a five-count indictment, charging him with two counts of *Aggravated Murder* (Counts One and Two), one count of *Aggravated Burglary* (Count Three), one count of *Aggravated Robbery* (Count Four) and one count of *Tampering with Evidence* (Count Five). Both aggravated murder counts, which involved the death of David Williams, also contained three (3) *Death Penalty Specifications*, two pursuant to RC §2929.04(A)(7), one allegedly being in the course of an *Aggravated Burglary* and the other allegedly being in the course of an *Aggravated Robbery* with the other specification being 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 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," pursuant to RC §2929.04(A)(8).

Defendant pled ***Not Guilty*** to each of the charges and specifications. Defendant, after consultation with counsel, in writing and in open court, waived his right to a Jury Trial and requested that this matter be tried to a three-judge panel. That Panel, hereinafter "the Panel", consisting of the three above-referenced judges, was randomly selected by court personnel in

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pretrial proceedings which took place in the presence of Defendant and both defense counsel prior to Defendant's decision to waive a jury trial.

On April 19, 2010, the *Trial Phase* of this matter commenced before the Panel. Following the *Trial Phase* proceedings, viz: April 22, 2010, the Panel found Defendant guilty beyond a reasonable doubt of the following offenses: one count of *Murder* (Count One), one count of *Aggravated Murder* (Count Two), together with each of the three *Death Penalty Specifications* attached thereto, one count of *Aggravated Burglary* (Count Three), one count of *Aggravated Robbery* (Count Four) and one count of *Tampering with Evidence* (Count Five).

Thereafter, the matter was set for the *Sentencing Phase* of the trial. Defendant, after consultation with counsel and being fully advised of all of his rights, in writing and in open court, waived his right to a presentence investigation and to a court-ordered forensic (psychological) report for mitigation purposes.

Pursuant to RC § 2929.04, the *Sentencing Phase* of the trial commenced before the Panel on April 28, 2010, for the purpose of receiving evidence with respect to the issue of whether the three statutory, *Aggravating Circumstances*, proven by the Prosecution beyond a reasonable doubt during the *Trial Phase* of the proceedings, outweighed the *Mitigating Factors* beyond a reasonable doubt. The Panel permitted the State to use only selected *Trial-Phase* exhibits during the *Sentencing Phase* of the proceedings. The Prosecution presented with minimal evidence and introduced only the selected *Trial-Phase* exhibits. It presented no additional witnesses. However, the Court permitted all testimony from the *Trial Phase* to be admitted without objection by the Defense team. The Panel indicated that only evidence relevant to the proof of statutory aggravating circumstances would be considered.

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In accordance with RC § 2929.04(C), Defendant was given great latitude in the presentation of evidence of the factors listed in RC § 2929.04 (B) and of any other factors in mitigation of the imposition of the sentence of death. He presented mitigation evidence which included testimony from his mother, one of his brothers, a son, a community organizer, and a minister. Defendant exercised his right to remain silent, and specifically waived his right to any allocution.

An attempt by the Prosecution to present victim impact evidence in rebuttal to the evidence offered by the Defense Team was rejected by the Panel.

Counsel presented final arguments.

The Panel entered into deliberations for the purpose of determining whether the three statutory, *Aggravating Circumstances*, proven by the Prosecution beyond a reasonable doubt during the trial phase of the proceedings, outweigh the *Mitigating Factors* beyond a reasonable doubt. See RC § 2929.04

FACTUAL BACKGROUND

During the early morning hours of February 14, 2009, Defendant purposely caused the death of David Williams while committing, or attempting to commit, the offense of aggravated burglary. More specifically, Defendant, while knowingly entering or remaining on the premises of David Williams, without privilege to do so, did, by force, commit the following offenses: assault, theft, menacing, and did, at the time of the offense, have a deadly weapon on his person, to wit: a knife, on or about his person. More specifically, Defendant entered Williams' home to prevent Williams from testifying in a criminal proceeding against Defendant's alleged girlfriend, Robin Patterson, and Defendant himself. When coercion did not work, Defendant became enraged and assaulted and, eventually, killed Williams. As a

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result of his activities during the early morning hours of that day, Defendant was not only convicted of aggravated murder but three specifications charging that that offense was committed while he was committing or attempting to commit the offense of aggravated burglary, committing or attempting to commit the offense of aggravated robbery, and for the purpose of preventing David Williams from giving testimony in criminal charges against the aforementioned Patterson, all of which was proven to the satisfaction of the three judge panel beyond a reasonable doubt.

In this case, the statutory, Aggravating Circumstances (proven by the State beyond a reasonable doubt) that are being weighed against the mitigating factors are as follows:

- That Defendant purposely caused the death of David Williams while he was committing or attempting to commit the offense of aggravated burglary and was the principal offender in the aggravated murder. [RC §2929.04 (A)(7)]
- That Defendant purposely caused the death of David Williams while he was committing or attempting to commit the offense of aggravated robbery and was the principal offender in the aggravated murder. [RC §2929.04 (A)(7)]
- That Defendant purposely caused the death of David Williams, the victim of the aggravated murder, who was a witness to an offense, to prevent David Williams' 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 David Williams was a witness. [RC §2929.04 (A)(8)]

DISCUSSION: WEIGHING THE SPECIFIC AGGRAVATING CIRCUMSTANCES AND ALL MITIGATING FACTORS

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In order to sentence Defendant to death, the law requires that the Panel find beyond a reasonable doubt that the Aggravating Circumstances in this case outweigh the Mitigating Factors. The Panel must consider the evidence presented as to the aggravating circumstance that transformed the offense of aggravated murder from a case in which the death penalty

was not a potential penalty to one where it is a potential penalty. These aggravating circumstances must then be weighed against the mitigating factors that would weigh in favor of a decision that a sentence of life in prison is the appropriate sentence.

The weighing process is just that. The Panel must put the aggravating circumstances on one side of the balance sheet and place all of the mitigating factors on the other, and then make a determination beyond a reasonable doubt whether the aggravating circumstances outweigh the mitigating factors. Proof beyond a reasonable doubt mandates that this Panel have a firm belief or conviction as to what has been established. Proof beyond a reasonable doubt requires that an ordinary person would be willing to act, and rely, upon that proof in the most important of his or her own affairs.

Pursuant to RC §2929.03(F), the Panel must make certain findings. The Panel must specifically find reasons why the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors. See ***State vs. Fox*** (1994), 69 Ohio St 3d 183; ***State vs. Green*** (2000), 90 Ohio St 3d 352. To satisfy the statutory and case law requirements, the Panel performed the within weighing process, weighting each circumstance and/or factor from least important to most important in significance, as follows: no weight, some weight, moderate weight, considerable weight, substantial weight, and great weight. The Panel did not consider the aggravated murder of David Williams an aggravating circumstance.

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AGGRAVATING CIRCUMSTANCES

The weight that the Panel allocates to the statutory, Aggravating Circumstances proven by the State beyond a reasonable doubt is as follows

THAT DEFENDANT PURPOSELY CAUSED THE DEATH OF DAVID WILLIAMS WHILE HE WAS COMMITTING OR ATTEMPTING TO COMMIT

THE OFFENSE OF AGGRAVATED BURGLARY AND WAS THE PRINCIPAL OFFENDER IN THE AGGRAVATED MURDER.
[Ohio Revised Code §2929.04 (A)(7)]

In many respects, the Court believes that the first two specifications were, largely part of the commission of the aggravated murder, itself, or the "cover up" which followed immediately thereafter, and accord each of those aggravating circumstances some weight. The Court finds the aggravated burglary specification somewhat more compelling because it was the first step in Defendant's criminal conduct that led to the *Aggravated Murder* of David Williams. Regardless of how Defendant entered the victim's residence, the trespass, which formed the basis of the *Aggravated Burglary* charge, commenced when Defendant began to menace and assault Mr. Williams in his own home and to commit the predicate offense, *Aggravated Burglary*, which invoked the felony murder rule in this case. This circumstance the Panel accorded considerable weight.

THAT DEFENDANT PURPOSELY CAUSED THE DEATH OF DAVID WILLIAMS WHILE HE WAS COMMITTING OR ATTEMPTING TO COMMIT THE OFFENSE OF AGGRAVATED ROBBERY AND WAS THE PRINCIPAL OFFENDER IN THE AGGRAVATED MURDER.
[OHIO REVISED CODE §2929.04 (A)(7)]

Of the two predicate felony murder specifications, the Panel found the Aggravated Robbery to be less compelling. That offense (specification) was more related to the cover-up, in terms of trying to make the murder look like a burglary gone awry. Nevertheless, the Panel was mindful of the fact that the Defendant took various items of property belonging to Mr. Williams, which he used to commit a theft against the victim, even after his death. For example, within minutes after leaving the residence, Defendant was at a local UDF store filling his gas tank on the victim's credit card and, later, proceeded to Meijer's Department Store, where he used that same card in an attempt to buy a ring, jewelry and a red negligee,

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ostensibly, to present to his paramour, Robin Patterson, as a Valentine's gift. This circumstance the Panel has also accorded moderate weight.

THAT DEFENDANT PURPOSELY CAUSED THE DEATH OF DAVID WILLIAMS, THE VICTIM OF THE AGGRAVATED MURDER, WHO WAS A WITNESS TO AN OFFENSE, TO PREVENT DAVID WILLIAMS' 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 DAVID WILLIAMS WAS A WITNESS [RC §2929.04 (A)(8)]

The Panel finds most compelling this specification, that Defendant killed Mr. Williams to prevent his testimony in a criminal proceeding. This was clearly Defendant's overwhelming motivation in this matter, as evidenced by the fact that he sent a text message to his paramour to assure her that her troubles were over and that the voice of the witness against her had been silenced, and goes to the heart of the circumstances of the aggravated murder. It 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. This specification the panel gives its most weight, great weight.

MITIGATING FACTORS

RC § 2929.04(B) provides as follows:

> If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

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(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

Mitigating factors are factors which, while they do not justify or excuse the crime, nevertheless, in fairness and mercy, may be considered as they call for a penalty less than death, or less than the appropriateness of the sentence of death. Mitigating factors are those factors about an individual that weigh in favor of a decision of a sentence of life in prison as the appropriate sentence.

In accordance with RC § 2929.04(B), the Court has considered all of the evidence, information, reports and arguments relevant to the nature and circumstances of the aggravated circumstance or mitigating factors including, but not limited to, the history, character and background of the Defendant, and all of the following:

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1. NATURE AND CIRCUMSTANCES OF THE OFFENSE

This Court has weighed the nature and circumstances of the offense for any mitigating factors. The Court has done so with an eye toward relating them to any mitigating

factors or mitigating evidence that exists. After weighing all of the facts, the Court finds no mitigating factors exist concerning the nature and circumstances of the offense as they relate to the aggravated murder of David Williams. Indeed, there is nothing mitigating about the offense itself. Motivated by his desire to silence a witness against his paramour and himself, Defendant menaced, stalked, assaulted, and, finally, killed Mr. Williams after battering, stabbing him some ten times, and slashing his throat on at least two occasions before he succumbed.

2. THE HISTORY, CHARACTER, AND BACKGROUND OF DEFENDANT

Defendant was raised in an area of Cincinnati known as Camp Washington. He had a normal upbringing. His parents remained married for some forty-seven years until the death of his father in 2006.

Defendant's upbringing was typical and ordinary, in spite of the fact that he and his four siblings-- three brothers and one sister-- were raised in what has been characterized as a tough area of town. During his youth, he was actively involved in Cub Scouts and Weblows, and played several sports, football, baseball, and basketball.

His parents raised him with good, strong, German Catholic values and appropriate discipline. Those values included community service which Mr. Osie continued to perform during the formative years of his life up through high school. He performed paid and volunteer community service, cleaning up parks, playgrounds, and streets in his neighborhood.

Near the end, or just after completing, his high school career, Defendant married a lady by the name of Kate, to whom he stayed married until around 2006. That marriage resulted in two children, Gregory Jr. and Brian.

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During most of Defendant's adult life, he was a lawful and productive member of society. Indeed, the uncontroverted testimony is that from the time he was an older teen up until the time his marriage ended and his father passed, Defendant was gainfully employed and provided well for his family. He was actively attended the sporting activities of his son, Brian, even coaching his team at one point.

He remained close to his family and committed to family values until around 2006. He visited his family and participated in family activities and get-togethers with his children, siblings, and parents. His family loves him and remains committed to him.

The Panel accords the history, character, and background of Defendant, which includes some 46 years as a productive member of society, substantial weight.

3. ANY OTHER FACTORS THAT ARE RELEVANT TO THE ISSUE OF WHETHER DEFENDANT SHOULD BE SENTENCED TO DEATH

During the course of the mitigation Phase of the instant proceedings, several other matters came to the attention of the Panel by the Defense Team. These include the following: Defendant's lack of a prior criminal record, his cocaine usage, and his alleged cooperation with police during the homicide investigation which gave rise to this matter. The Panel has addressed and weighted each of that alleged mitigating evidence.

The Panel believes that Defendant's lack of a prior criminal record has been clearly established. The evidence seems to indicate that Defendant may have had a single OVI (M1) offense and nothing more. This mitigating evidence the Panel gives significant weight.

The Panel believes that there is some mitigating evidence that drug usage became a factor in Defendant's criminality. Indeed, subsequent to Defendant's marriage to Kate ending, and the death of his father in 2006, Defendant's family began to notice changes in

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him. Among the changes noticed was the fact that he began using cocaine, and, perhaps, other drugs and either borrowing and/or taking money from his mother. His brother, son and nephew attempted an intervention approximately one week before the incident that gave rise to this action, but without effect.

Hence, the Panel believes that Defendant probably had used cocaine on the day preceding the homicide, and that he may have been under its effects at the time the offense occurred. However, given the fact that Defendant's consumption of the drug was voluntary on his part, the Panel gives its mitigating value minimal weight.

Finally, Defendant claims that his cooperation with the police is a mitigating factor in this matter. While, superficially, that sounds plausible, it is not supported by the facts, as revealed by his statement to the police. He did sign a Miranda card and indicated his willingness to talk to police. However, a review of his statement indicates that he was not forthcoming with respect to his conduct and culpability, and only admitted that which was dragged out of him after being caught in multiple lies and falsehoods he told the police. In the end, he was denying even the smallest facts and never did really indicate the location of the knife which he used to kill Mr. Williams. This is borne out when he later admitted to his cellmate, Donald Simpson, Jr., that the knife was located at or near the intersection of Grinn and Barret in West Chester Township, which knife he requested that Simpson plant on another individual. Accordingly, the Panel gives Defendant's alleged cooperation with the police minimal value.

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4. ALL OTHER FACTORS ENUMERATED IN ORC § 2929.04(B)

The Panel has also weighed the other factors that are relevant to the issue of whether Defendant should be sentenced to death. The Panel previously commented on Defendant's

background and will not recount those facts again. Further, the Panel finds that Defendant has two sons, a loving mother, three brothers and a sister. This has minimal mitigation value.

The Defendant raised the mitigating factors previously set forth in this opinion. Out of an abundance of caution and fairness, the Panel has also reviewed all other factors enumerated in ORC § 2929.04(B). The Panel finds that none of these factors applicable except as previously mentioned in this opinion.

5. STATEMENTS OF COUNSEL, ALLOCUTION OF DEFENDANT, AND VICTIM IMPACT EVIDENCE

The Panel has also considered statements of defense counsel at the sentencing. The Panel did not admit into evidence, and has not considered, any victim impact evidence in arriving at this decision. The Panel has not considered the aggravated murder itself as an aggravating circumstance.

CONCLUSION

The Panel has considered all of the evidence presented during both the *Trial* and *Sentencing Phases* as it relates to the three specific aggravated circumstances involved in the death of David Williams. The Panel has also considered all of the mitigating evidence and mitigating factors presented at both phases of the proceedings. The Panel has weighed the three specific aggravating circumstances against all of the mitigating factors and mitigating evidence. The Panel has weighed the mitigating factors individually and collectively. After weighing the specific aggravating circumstances against the mitigating factors, the members of the Panel ***unanimously find*** that the State of Ohio has proved beyond a reasonable doubt that the **specific aggravating circumstances** that the Defendant was found guilty of committing **outweigh the mitigating factors.**

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Therefore, it is **ORDERED, ADJUDGED, AND DECREED** that Defendant be, and is hereby, sentenced to **DEATH** on Count Two of the Indictment, and the specifications thereto, and it is further

ORDERED, ADJUDGED, AND DECREED that, on Count Three of the Indictment, Defendant is sentenced to **TEN (10) YEARS** in prison, which sentence shall be served ***concurrent*** to Count Two, and it is further

ORDERED, ADJUDGED, AND DECREED that, on Count Four of the Indictment, Defendant is sentenced to **TEN (10) YEARS** in prison, which sentence shall be served ***concurrent*** to Count Two, and it is further

ORDERED, ADJUDGED, AND DECREED that, on Count Five of the Indictment, the Defendant is sentenced to **FIVE (5) YEARS** in prison. The sentence in Count Five shall be served ***consecutive*** to Count One, and it is further

ORDERED, ADJUDGED, AND DECREED that Count One, upon no objection from the State, shall be merged with Count Two as an ***allied offense of similar import***, and it is further

ORDERED, ADJUDGED, AND DECREED that a separate judgment of conviction and sentencing entry shall be filed in this matter.

ENTER:

JUDGE NOAH E. POWERS II, PRESIDING

JUDGE PATRICIA ONEY

JUDGE CHARLES PATER

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Butler County, Ohio

Copies to:
Judge Patricia S. Oney
Judge Charles Pater
Jason Phillabaum, Prosecutor
Michael Oster, Prosecutor
J. Gregory Howard, Esq., Lead Defense Counsel
David Washington, Jr., Esq., Co-Defense Counsel

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