

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO, :  
 :  
 Plaintiff-Appellant, : Case No. 2015-1137  
 :  
 v. : On Appeal from the Hamilton County  
 : Court of Appeals,  
 : First Appellate District  
 DOMINIC JACKSON : Case No. C-140384  
 :  
 Defendant-Appellee. :

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**MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER  
IN SUPPORT OF APPELLEE DOMINIC JACKSON**

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## **STATEMENT OF THE CASE AND FACTS**

Amicus curiae hereby adopts the statement of the case and facts set forth in Appellee Dominic Jackson's merit brief.

## **STATEMENT OF INTEREST OF AMICUS CURIAE** **OFFICE OF THE OHIO PUBLIC DEFENDER**

The Office of the Ohio Public Defender (OPD) is a state agency designed to represent indigent criminal defendants and to coordinate criminal-defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio statutory law and procedural rules. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect and defend the rights of indigent persons by providing and supporting superior representation in the criminal and juvenile justice systems.

As amicus curiae, the OPD offers this Court the perspective of experienced practitioners who routinely handle criminal cases in Ohio courts. This work includes representation at both the trial and appellate levels. The OPD has an interest in the present case insofar as this Court will consider the fundamental right of allocution and when that right applies. As amicus curiae, OPD urges this Court to fully retain the important right encapsulated in Ohio Criminal Rule 32(A) by affirming the First District's decision in this case.

## **ARGUMENT**

### **STATE'S PROPOSITION OF LAW**

#### **The right of allocution does not apply to community control violation hearings.**

The State of Ohio is asking this Court to silence a defendant in the moments preceding a court's decision to deprive that defendant of his liberty. The State's argument is rooted heavily in

semantics and arbitrarily applied labels. It notes that defendants have the right to speak at sentencing hearings, and then simply refuses to acknowledge that courts impose sentences after community-control-violation hearings. The State's argument ignores not only the practical realities of those hearings and their effects, but also the importance of, and need for, allocution at them.

**I. Allocution is an important component of sentencing discretion.**

“The design of Rule 32(a) did not begin with its promulgation; its legal provenance was the common-law right of allocution.” *Green v. United States*, 365 U.S. 301, 304, 81 S.Ct. 653, 5 L.Ed.2d 670 (1961) (discussing federal rule). Allocution has a venerable history, dating back to the late 1600s. *See* Anonymous, 3 Mod. 265, 266, 87 Eng.Rep. 175 (K.B.1689). It is a right “ancient in the law.” *United States v. Behrens*, 375 U.S. 162, 165, 84 S.Ct. 295, 11 L.Ed. 2d 224 (1963). In essence, Criminal Rule 32(a) formalizes the longstanding tradition of ensuring that a defendant be “personally afforded the opportunity to speak before the imposition of sentence.” *Green* at 304.

When allocution was first recognized as an essential component of sentencing, the failure to do so constituted a basis for reversal. *Id.* At that time, most defendants faced a possible sentence of death and were not afforded counsel. *Id.* But, as the Supreme Court of the United States has explained, there is “no reason why a procedural rule should be limited to the circumstances under which it arose if reasons for the right it protects remain.” *Id.* And those reasons remain relevant at sentencing today.

Allocution allows the defendant to speak directly to the person in whose hands his liberty lies. It allows the defendant to offer evidence of mitigation and to apologize to the court for his actions. It “enables the defendant to participate in the process” and “provides the sentencing

judge and others with a better understanding of the defendant.” Bennett and Robbins, *Last Words: A Survey and Analysis of Federal Judges’ Views on Allocution in Sentencing*, 65 Ala.L.Rev. 735, 749 (2013). Perhaps most importantly, it “allows the court to recognize \* \* \* the humanity of the person before the court.” *Id.* Thus, the benefits of allocution cannot be achieved through representation by counsel. “The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.” *Green* at 304. In sum, allocution is an indispensable part of the sentencing process.

## **II. Because courts retain discretion in sentencing after a community-control violation, allocution remains essential.**

The State argues that a court has already “imposed” a sentence at the first hearing when community control is imposed. State’s Brief at 4. It argues that the sentence has just been “suspended.” *Id.* But this is not an accurate picture of what occurs after community control has been revoked. The original term of imprisonment is not automatically activated once a defendant is found to have violated the terms of community control. Instead, the previously stated term of imprisonment acts as a cap on the court’s ultimate decision with respect to that defendant. R.C. 2929.15(B)(2); *see also* State’s Brief at 4. Consequently, there is still discretion to be exercised in the imposition of a final sentence.

As such, the right to allocution would be “largely lost” if the defendant “were not permitted to invoke it when the sentence that counts is pronounced.” *See Behrens* at 165-166. “Even if he has spoken earlier, a defendant has no assurance that when the time comes for final sentence the district judge will remember the defendant’s words in his absence and give them due weight. Moreover, only at the final sentencing can the defendant respond to a definitive decision of the judge.” *Id.* at 168 (Harlan, J., concurring).

When community control is revoked, the court has a decision to make with respect to the defendant's liberty. At that moment, the court will decide whether and for how long to lock up the defendant standing before it. In such a significant moment, that defendant deserves the right to speak.

The need for allocution is dependent upon the imposition of a sentence. Criminal Rule 32(A) does not state that a defendant has the right to allocution at a sentencing hearing. It provides that "at the time of imposing sentence, the court shall \* \* \* address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf and present any information in mitigation of punishment." The context in which the court imposes that sentence is irrelevant. The act of imposing a sentence—of choosing whether and for how long to imprison someone—is what prompts the need for allocution.

### CONCLUSION

Often the individuals passing through the criminal justice system are those most marginalized by society. This Court should not sanction this marginalization by removing the defendant's last opportunity to speak before his liberty is taken. The Office of the Ohio Public Defender urges this Court to affirm the judgment of the First District Court of Appeals.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **Merit Brief of Amicus Curiae Office of the Ohio Public Defender in Support of Appellee Dominic Jackson** was sent by regular U.S. mail, postage prepaid, to Joseph T. Deters and Scott M. Heenan of the Hamilton County Prosecutor’s Office, 230 East Ninth Street – Suite 4000, Cincinnati, Ohio 45202; and Timothy Bicknell, 3268 Jefferson Avenue – First Floor, Cincinnati, Ohio 45220, on this 25th day of March 2016.

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