

IN THE SUPREME COURT OF OHIO

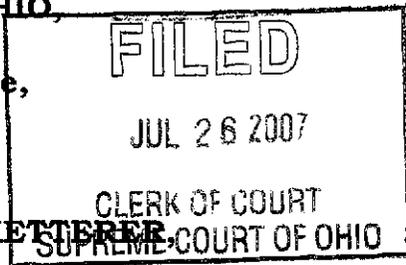
STATE OF OHIO,

Appellee,

-vs-

DONALD J. KETTERER,

Appellant.



Case No. 2007-1261

Appeal taken from Butler County
Court of Common Pleas
Case No. CR 2003-03-0309

: This is a death penalty case.

**APPELLANT DONALD J. KETTERER'S MEMO CONTRA TO
APPELLEE STATE OF OHIO'S MOTION TO DISMISS**

Donald Ketterer has timely appealed to this Court from the re-sentencing proceedings in the trial court. Those proceedings were ordered by this Court when it reviewed his capital case in the context of an Application for Reopening pursuant to S. Ct. Prac. R. XI §6.

This Court has previously ruled that in capital a case it has jurisdiction over the *whole* case, instead of counts, charges, or sentences." *State v. Smith* (1997), 80 Ohio St. 3d 89, 104 (emphasis added). Because the instant case is in fact a capital case, this Court has jurisdiction pursuant to *Smith*, even though the counts at issue do not involve the death penalty.

I. PROCEDURAL POSTURE

On February 7, 2006, this Court affirmed Donald Ketterer's convictions and death sentence. *State v. Ketterer* 111 Ohio St. 3d 70, 2006-Ohio-5283. On April 18, 2007, this Court vacated the non-capital sentences

and remanded the matter for re-sentencing. *State v. Ketterer* 113 Ohio St. 3d 1463, 2007-Ohio-1722.

On May 24, 2007, the three judge panel, pursuant to this court's remand order, re-sentenced Donald Ketterer. *State v. Ketterer*, Butler C.P. Case No. CR2003-03-0309. [Exhibit 1]. This was the same case in which the panel had previously imposed the sentence of death, as well as the non-capital offenses, which this Court had vacated. [Exhibit 2].

On July 13, 2007, Donald Ketterer timely initiated this appeal from the trial court's re-sentencing. This appeal originates from the case in which the three judge panel had sentenced Donald Ketterer to death and re-sentenced him on the non-capital charges. [Exhibit 3].

On July 23, 2007, the State filed its Motion to Dismiss, claiming that this Court lacks jurisdiction to hear the instant appeal. The State theorizes that because this Court only remanded the non-capital charges, the instant appeal has been transformed into a non-capital case.

On July 26, 2007 this Court *sua sponte* entered a briefing schedule.

For the reasons that will be identified herein, the State's motion should be denied. This Court's holding in *State v. Smith*, the clear language of the relevant state constitutional and statutory provisions, the arguments previously made by the Butler County Prosecutor's Office in *Smith* and the policy considerations cited by this Court in *Smith* refute the State's argument that this Court does not have jurisdiction.

II. THIS COURT'S PRIOR DECISION IN STATE V. SMITH IS CONTROLLING

On November 8, 1994, the Ohio voters approved a constitutional amendment which provided that in those cases in which the death penalty was imposed, the direct appeal should proceed directly to this Court. The Ohio General Assembly amended O.R.C. § 2953.02 to reflect the constitutional amendment.

This Court subsequently found those amendments to be constitutional. *State v. Smith*, 80 Ohio St. 3d at 94-104. This Court therein specifically held “[t]he courts of appeals shall not accept jurisdiction of *any case* in which the sentence of death has been imposed for an offense committed on or after January 1, 1995. Appeals in such cases shall be made directly from the trial court to the Supreme Court.” *Id.* at Syllabus 2. (emphasis added). The present appeal originates from a case in which the death penalty was imposed for an offense which occurred subsequent to January 1, 1995. The fact that this Court limited the re-sentencing to the non-capital offenses did not somehow transform the trial level proceeding into a non-capital case. This appeal is from the same case number in which three judge panel imposed Donald Ketterer’s sentence of death. [Exhibits 1 and 2].

This Court, consistently throughout its opinion in *Smith*, held that a death sentenced individual is entitled to have this Court on direct appeal review *all* of his issues. This Court concluded that “under the amendments, a

capital defendant also has one right to appeal *all* issues, but *all* of the capital defendant's non-capital convictions are still reviewed by the Supreme Court of Ohio, along with his or her capital convictions..." *Id.* at 101 (emphasis in original). This Court later reiterated the same conclusion, "[a]s stated, all of a defendant's issues, both noncapital and capital, constitutional or statutory are reviewed by the Supreme Court." *Id.* at 102. Finally this Court concluded "Thus the Supreme Court has jurisdiction over the whole case, instead of counts, charges, or sentences." *Id.* at 104.

It is undisputed that Donald Ketterer has been sentenced to death. It is likewise beyond dispute that the instant proceeding involves a direct appeal to this Court from a case in which a death sentence was imposed. Consequently, pursuant to the plain language of *Smith*, this Court is required to hear his appeal from his noncapital sentences.

III. THE RELEVANT STATUTE AND CONSTITUTIONAL PROVISIONS DICTATE THE RESULT THE COURT REACHED IN SMITH.

This Court in *Smith* did not produce its holding from whole cloth. Instead it reached the result that it did by applying the clear language of the relevant constitutional amendment and statute. The Ohio Constitution, as amended in 1994, provides that this Court has appellate jurisdiction in "[i]n direct appeals from the court of common pleas or other courts of record inferior to the courts of appeals as a matter or right in cases in which the death penalty has been imposed." (emphasis added to new material). Donald Ketterer's

present appeal to this Court is from a case in which the death penalty has been imposed.

In 1994, based upon the state constitutional amendments, the Ohio Legislature amended the relevant statute to read “[i]n a capital case in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the judgment or final order may be appealed from the trial court directly to the supreme court as a matter of right...”O.R.C. § 2953.02. Again, the instant appeal meets all of the requirements. The three judge panel imposed a sentence of death for an offense that occurred subsequent to January 1, 1995 and Donald Ketterer is appealing from a judgment or final order in that case.

The State ignores these constitutional and statutory provisions. It instead, relies exclusively on the following “[c]ourts of appeals shall have jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, that courts of appeals shall not have jurisdiction to review on direct appeal a *judgment* that imposes a sentence of death. Ohio Constitution, Article 4, §3(B)(2) [See Motion to Dismiss, p. 2] (emphasis added). The State theorizes that the instant appeal is not from a judgment that imposes a sentence of death and therefore the court of appeals has exclusive jurisdiction. [*Id.*]. The State, however, makes no effort to reconcile its reading with Art. IV, §2B)(2)(c) or O.R.C. §2953.02, both of which employ the term “cases.” This Court in *Smith* did not place any significance in the two terms.

State v. Smith, 80 Ohio St. 3d at 104. This Court, therein after acknowledging the existence of both terms ruled that “Thus the Ohio Supreme Court has jurisdiction over the whole case, instead of counts, charges, or sentences.” *Id.*

IV. THE STATE PREVIOUSLY REJECTED ITS PRESENT ARGUMENTS.

The Butler County Prosecutor’s Office was counsel of record for the appellee in *State v. Smith*. In that case the defendant argued that the court of appeals had exclusive jurisdiction to hear the non-capital charges, the same argument that the Butler County Prosecutor’s Office is now making.

The State therein emphatically argued that the court of appeals lacked jurisdiction to hear the appeal from the noncapital charges, “Appellant’s suggestion that the judgment of a trial court is somehow ‘divisible,’ and that this Court should have exclusive judgment over that part of the trial court’s judgment involving the death penalty whereas the court of appeals would retain jurisdiction over the remaining part of the trial court’s judgment as to the non-capital charges in the indictment, *is utterly without merit.*” [Exhibit 4, p. 16, n. 2] (emphasis added). The Butler County Prosecutor’s Office reached this conclusion in part by citing to Article IV, §2 and O.R.C. 2953.02 and that both provisions employed the term “cases.” [*Id.* at p. 16]. Ironically this is the same analysis that Donald Ketterer now employs. *See* §3, *supra*.

The State twice cites to the fact that Appellant has also timely perfected an appeal from the re-sentencing to the Butler County Court of Appeals. [Motion to Dismiss, pp. 2, 3]. The State does not, however, identify this inference that this Court should draw from this fact. In *Smith*, the death

sentenced defendant also filed simultaneous notices of appeals. [Exhibit 4, p. 15]. This Court did not cite to that fact in its opinion in *Smith*. This Court's silence leads to the conclusion that the filing of simultaneous notices of appeal is not relevant to the jurisdictional issue.¹

V. THE POLICY CONSIDERATION THAT THIS COURT IDENTIFIED IN SMITH SUPPORTS THE CONCLUSION THAT THIS COURT HAS JURISDICTION.

This Court when it reviewed the constitutionality of the 1994 amendments to the Ohio Constitution and O.R.C. §2953.02, focused on the need to expedite the review of capital cases. Initially this Court identified the public's dissatisfaction with the prior system of appellate review: “[h]owever, the general public, both in Ohio and across the nation, has been increasingly dissatisfied with inordinate delays that pervade the death penalty system;” [t]he Supreme Court of Ohio recognized the public's frustration...;” and “[a]gainst this backdrop of extraordinary delay and loss of public confidence in the integrity of the death penalty system, the citizens of the state of Ohio have spoken through constitutional amendment.” *State v. Smith*, 80 Ohio St. 3d at 95-96.

This Court again cited to this public dissatisfaction when rejecting the defendant's equal protection challenge to the revised provisions, “[a]s a result, lengthy delays have risen in enforcing death sentences in Ohio. See *Steffen*. Under these circumstances, the Ohio voters had a rational basis to

¹ Given that this is a capital case, undersigned counsel would have been remiss if he had not, out of an abundance of caution, filed notices of appeals with both courts until the jurisdictional issue was resolved.

decide that the Supreme Court would -- in a single appeal as of right--directly review capital cases for crimes committed on or after January 1, 1995.” *Id.* at 100. This Court continued with respect to the equal protection issue that “[t]he state has a direct, legitimate and compelling interest in ensuring that the final judgments of its courts are expeditiously enforced.” *Id.* at 101. Finally, this Court concluded, “to so separate the convictions and appeals would lead to further delay, confusion in the record transmittal, waste of judicial resources, possible inconsistency in decisions and a further wait for the appeal to the Ohio Supreme Court from the appellate court on noncapital charges.” *Id.* at 104.

The State now advocates a system of appellate review which the Court has recognized will require additional time to complete the direct appeal process. The three judge panel’s error in sentencing Donald Ketterer on the noncapital charges has already lengthened the review process. Those noncapital charges must now “catch up” with the capital charges. The State requests this Court to adopt a review process that will retard, instead of expedite the “catch up” process.

The State argues that once the single appeal of right in a capital case to this Court has been completed, then any subsequent direct appeal in that capital case should be conducted pursuant to the prior two stage system. [Motion to Dismiss, p. 3]. The State fails to articulate the manner or reason the goal of expedited review is somehow lessened after a capital case is remanded to the trial court. The State further argues that in the present case there has

now been “a *de facto* severance” of the noncapital charges. [*Id.*]. The argument flies in the face of the clear holding of this Court that in capital cases, “the Ohio Supreme Court has jurisdiction over the whole case, instead of counts, charges, or sentences.” *State. Smith*, 80 Ohio St. 3d at 104.

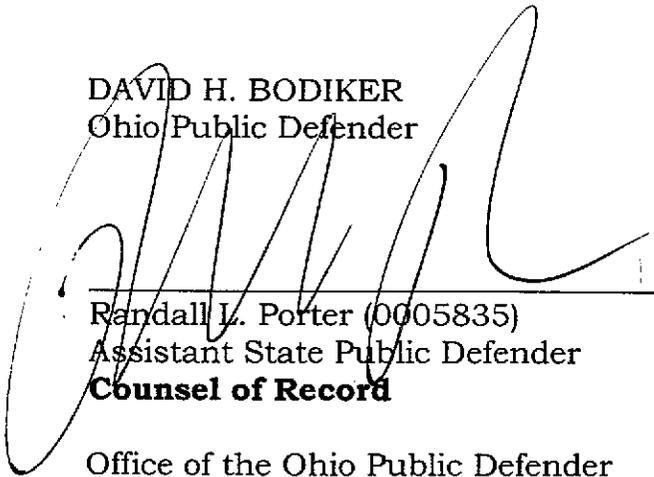
VI. THIS COURT SHOULD DENY THE STATE’S MOTION.

This Court in *State v. Smith* made it clear that it has jurisdiction to hear *all* facets of a direct appeal in a capital case. This Court reached this conclusion by accepting the arguments made therein by the Butler County Prosecutor’s Office. There is no reason for this Court to now reach a contrary result. The mere fact that the Butler County Prosecutor’s Office now desires a different result it, not a sufficient reason for this Court to reject *stare decisis*.

For the reasons identified herein and any other reason that may be apparent, this Court should deny the State’s Motion to Dismiss.

Respectfully submitted,

DAVID H. BODIKER
Ohio Public Defender



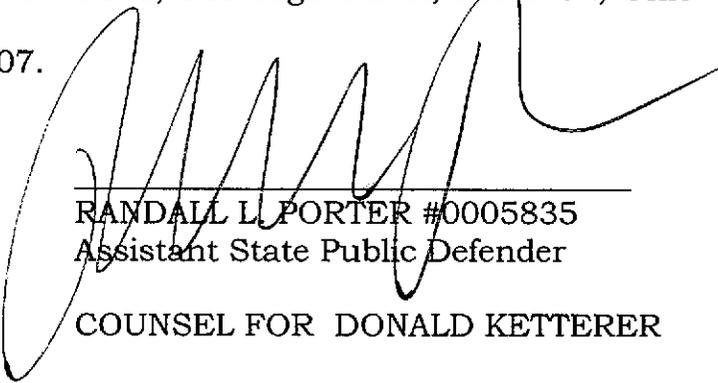
Randall L. Porter (0005835)
Assistant State Public Defender
Counsel of Record

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394 (Voice)
(614) 644-0703 (Facsimile)
Randall.Porter@OPD.Ohio.gov

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I certify a copy of the foregoing Appellant Donald J. Ketterer Memo Contra To Appellee, State Of Ohio's Motion To Dismiss has been sent by regular U.S. mail to Daniel G. Eichel, First Assistant Butler County Prosecuting Attorney, and Michael A. Oster, Jr. Assistant Butler County Prosecuting Attorney at the Government Services Center, 315 High Street, Hamilton, Ohio 45011 on this 26th day of July, 2007.



RANDALL L. PORTER #0005835
Assistant State Public Defender

COUNSEL FOR DONALD KETTERER

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

FILED IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO
MAY 29 2007

STATE OF OHIO

CASE NO. CR2003-03-0309

Plaintiff

ONEY, J., SAGE, J. and CREHAN, J.

vs.

RE-SENTENCING
JUDGMENT OF CONVICTION ENTRY

DONALD JOSEPH KETTERER

Defendant

On May 24, 2007 defendant's re-sentencing hearing was held on the noncapital offenses, Counts Two, Three, Four and Five, pursuant to Ohio Revised Code Section 2929.19 and the decision in State v. Ketterer, 113 Ohio St.3d 1463, 2007-Ohio-1722, the previous judgment of conviction and sentence as to Count One having been affirmed in State vs. Ketterer, 111 Ohio St.3d 70, 2006-Ohio-5283, certiorari denied (May 14, 2007), _____ U.S. _____, 2007 WL812004. Defense attorney Randall Porter, and the defendant were present and defendant was advised of and afforded all rights pursuant to Crim. R. 32. The Court has considered the record, the charges, the defendant's Guilty Finding by Judges, and findings as set forth on the record and herein, oral statements, any victim impact statement and pre-sentence report, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors of Ohio Revised Code Section 2929.12 and whether or not community control is appropriate pursuant to Ohio Revised Code Section 2929.13, and finds that the defendant is not amenable to an available community control sanction. Further, the Court has considered the defendant's present and future ability to pay the amount of any sanction, fine or attorney's fees.

The Court finds that the defendant has been found guilty of:

AGGRAVATED ROBBERY as to Count Two, a violation of Revised Code Section 2911.01(A)(3) a first degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 9 years.
This sentence will be served **consecutive** to Count One.
Fine in the amount of \$2,000

AGGRAVATED BURGLARY as to Count Three, a violation of Revised Code Section 2911.11(A)(1) a first degree felony. With respect to this Count, the defendant is hereby sentenced to:

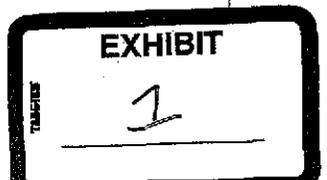
Prison for a period of 9 years.
This sentence will be served **consecutive** to Count Two.
Fine in the amount of \$2,000

GRAND THEFT as to Count Four, a violation of Revised Code Section 2913.02(A)(1) a fourth degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 17 months.
This sentence will be served **concurrent** with Count(s) Two and Three.

BURGLARY as to Count Five, a violation of Revised Code Section 2911.12(A)(3) a third degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 4 years.



This sentence will be served **consecutive** to Count(s) Two and Three.
Fine in the amount of \$1,000

Credit for 1556 served is granted as of this date.

As to Count(s) Two, Three, Four and Five:

The Court has notified the defendant that post release control is in this case up to a maximum of years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code Section 2967.28. The defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of that post release control. The defendant is therefore ORDERED conveyed to the custody of the Ohio Department of Rehabilitation and Correction.

Defendant is ORDERED to pay:

Costs of prosecution, supervision and any supervision fees permitted pursuant to Revised Code Section 2929.18(A)(4).

The Court further advised the defendant of all of his/her rights pursuant to Criminal Rule 32, including his/her right to appeal the judgment, his/her right to appointed counsel at no cost, his/her right to have court documents provided to him/her at no costs, and his / her right to have notice of appeal filed on his behalf.

Directive to Ohio Department of Rehabilitation and Correction: Please notify the Butler County Court of Common Pleas of any major changes of incarceration status including but not limited to release, transfer, execution or death of the defendant.

APPROVED AS TO FORM:

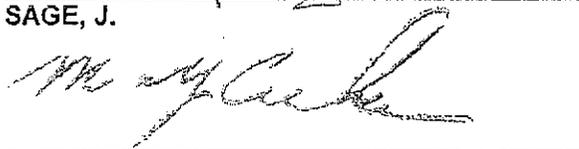
**ROBIN N. PIPER
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO**

ENTER



ONEY, J.

SAGE, J.



SAGE, J.

CREHAN, J.

MAO/beg
May 25, 2007

JSPK

PRIORITY

STATE OF OHIO

2004 FEB -9 AM 10:02

CASE NO. CR 2003-03-0309

Plaintiff

STATE OF OHIO

vs.

BUTLER COUNTY
CLERK OF COURTS

COUNTY OF BUTLER

COURT OF COMMON PLEAS

Oney, P.J.; Sage and Crehan, J.J.

DONALD J. KETTERER

PRIORITY

Defendant

JUDGMENT OF CONVICTION ENTRY

[This is a Final Appealable Order.]

: : : : : : : :

This 2nd - 4th days of February, 2004, came the Prosecuting Attorney into Court and the Defendant personally appearing with his counsel, J. Gregory Howard and Christopher J. Pagan, and the charges, plea of guilty, and findings of the three-judge panel being set forth in the previous Entries of the Court filed January 30, 2004, and February 4, 2004, which are expressly included herein by reference. Wherefore, the Defendant being informed that he stands convicted of **AGGRAVATED MURDER** contrary to R.C. 2903.01(B) with **Specification 1 to Count One** pursuant to R.C. 2929.04(A)(3), **Specification 2 to Count One** pursuant to R.C. 2929.04(A)(7), and **Specification 3 to Count One** pursuant to R.C. 2929.04(A)(7), as charged in Count One of the Indictment; **AGGRAVATED ROBBERY** contrary to R.C. 2911.01(A)(3), a felony of the first degree as charged in Count Two of the Indictment; **AGGRAVATED BURGLARY** contrary to R.C. 2911.11(A)(1), a felony of the first degree as charged in Count Three of the Indictment, **GRAND THEFT OF A MOTOR VEHICLE**, a felony of the fourth degree contrary to R.C. 2913.02(A)(1) as charged in Count Four of the Indictment, and **BURGLARY** contrary to R.C. 2911.12(A)(3); a felony of the third degree as charged in Count Five of the Indictment, and after having heard all the facts adduced by both parties, the panel of three judges having engaged in a determination of sentence for Count One pursuant to the requirements of R.C. 2929.03(D)(1)-(3) and having unanimously found that the aggravating circumstances the Defendant was found guilty of committing outweigh the mitigating factors presented by proof beyond a reasonable doubt, the Court afforded counsel an opportunity to speak on behalf of the Defendant, and the Court addressed the defendant personally and asked if he wished to make a statement in his own behalf or present any information in mitigation of punishment, and nothing being shown as to why sentence should not now be pronounced.

It is **ORDERED** as to Count One that the Defendant shall suffer death, which sentence is imposed pursuant to R.C. 2929.02(A) and 2929.03-.04. Pursuant to R.C. 2949-21-.22, a Writ for the execution of the death penalty shall be issued, directed to the Sheriff, requiring that the Defendant be conveyed to the custody of the Ohio Department of Rehabilitation and Correction and

OFFICE OF
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

ROBIN PIPER
PROSECUTING ATTORNEY

GOVERNMENT SERVICES CENTER
318 HIGH ST. - 11TH FLOOR
P.O. BOX 516
HAMILTON, OHIO 45012

EXHIBIT
2

that the Defendant be assigned to the appropriate correctional institution and kept until the execution of his sentence. This death sentence shall be executed by lethal injection in accordance with the provisions of R.C. 2949.22, within the walls of the state correctional institution designated by the Director of the Rehabilitation and Correction as the location for executions, and within an enclosure to be prepared for such purpose that shall exclude public view, under the direction of the Warden of such institution or, in his absence, a deputy warden, on the 24th day of June, 2004, or date otherwise designated by a court in the course of any appellate or postconviction proceedings.

It is **FURTHER ORDERED** as to **Count Two** that the Defendant be sentenced to be imprisoned for a **stated prison term of nine (9) years** and pay a fine of two thousand (\$2,000.00) dollars.

It is **FURTHER ORDERED** as to **Count Three** that the Defendant be sentenced to be imprisoned for a **stated prison term of nine (9) years**, which term of imprisonment shall be served **consecutively** with the term of imprisonment heretofore imposed as to Count Two, and pay a fine of two thousand (\$2,000.00) dollars.

It is **FURTHER ORDERED** as to **Count Four** that the Defendant be sentenced to be imprisoned for a **stated prison term of seventeen (17) months**, which term of imprisonment shall be served **concurrently** with the terms of imprisonment heretofore imposed as to Counts Two and Three. The Court has considered the factors under R.C. 2929.13(B) and finds the following:

- physical harm to a person;
- attempt or threat with a weapon;
- previous prison term served.

For reasons stated on the record, and after consideration of the factors under R.C. 2929.12, the Court also finds that prison is consistent with the purposes of R.C. 2929.11 and that the defendant is not amenable to an available community control sanction.

It is **FURTHER ORDERED** as to **Count Five** that the Defendant be sentenced to be imprisoned for a **stated prison term of four (4) years**, which term of imprisonment shall be served **consecutively** with the terms of imprisonment heretofore imposed as to Counts Two and Three, and pay a fine of one thousand (\$1,000.00) dollars.

With regard to sentences imposed herein as to Counts Two, Three and Five, pursuant to Revised Code Section 2929.14(E), the Court finds for the reasons stated on the record that:

- Consecutive sentences are necessary to protect the public from future crime or to punish the defendant and not disproportionate to the seriousness of the defendant's conduct and the danger the defendant poses to the public.

OFFICE OF
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

ROBIN PIPER
PROSECUTING ATTORNEY

GOVERNMENT SERVICES CENTER
315 HIGH ST. - 11TH FLOOR
P.O. BOX 515
HAMILTON, OHIO 45012

The Court also finds that:

- The harm caused by the defendant was so great or unusual that no single prison term for any of the offenses committed as part of a single course of conduct adequately reflects the seriousness of the defendant's conduct.
- The defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the defendant.

Therefore, the sentences as to Counts Two, Three and Five are to be served consecutively.

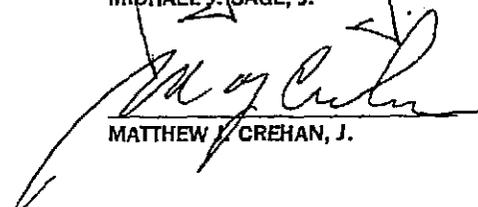
Defendant is hereby further advised of all of his rights pursuant to Criminal Rule 32, including his right to appeal the judgment, his right to appointed counsel at no cost, his right to have court documents provided to him at no cost, and his right to have a notice of appeal filed on his behalf.

Defendant is therefore **ORDERED** conveyed to the custody of the **Ohio Department of Rehabilitation and Correction**. Credit for 347 days is granted as of this date of sentencing along with future custody days in the Butler County Jail while Defendant awaits transportation to the appropriate state institution, to be certified by the Sheriff. Defendant is **ORDERED** to pay all costs of prosecution.

ENTER


PATRICIA ONEY, P.J.


MICHAEL J. SAGE, J.


MATTHEW J. CREHAN, J.

Approved as to Form:

ROBIN N. PIPER (0023205)
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO
CDH/DGE/mml
2/06/2004

OFFICE OF
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

ROBIN PIPER
PROSECUTING ATTORNEY

GOVERNMENT SERVICES CENTER
315 HIGH ST. - 11TH FLOOR
P.O. BOX 215
HAMILTON, OHIO 45012

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

-vs-

DONALD J. KETTERER,

Appellant.

:

:

:

:

:

Case No.

07-1261

Appeal taken from Butler County
Court of Common Pleas

Case No. CR 2003-03-0309

This is a death penalty case.

NOTICE OF APPEAL OF APPELLANT DONALD J. KETTERER

ROBIN PIPER
Prosecuting Attorney

Daniel Eichel (0008259)
First Assistant Prosecuting Attorney

Michael A. Oster (0076491)
Assistant Prosecuting Attorney
Prosecuting Attorney

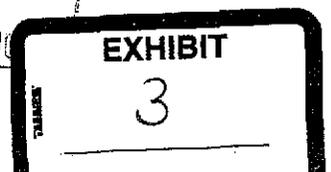
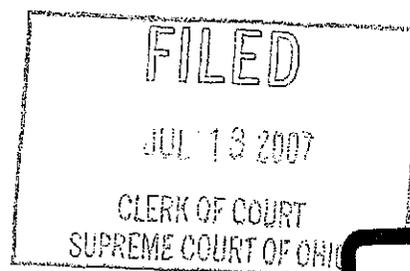
Butler County Prosecutor's Office
Government Services Center
315 High Street, 11th Floor
Hamilton, Ohio 45011
(513) 887-3474

COUNSEL FOR APPELLEE

DAVID H. BODIKER
Ohio Public Defender

RANDALL L. PORTER (0005835)
Assistant State Public Defender
Counsel of Record

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394 (Voice)
(614) 644-0703 (Facsimile)
COUNSEL FOR APPELLANT



IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No.
Appellee, :
-vs- : Appeal taken from Butler County
Court of Common Pleas
DONALD J. KETTERER, : Case No. CR 2003-03-0309
Appellant. : This is a death penalty case.

DONALD KETTERER'S NOTICE OF APPEAL

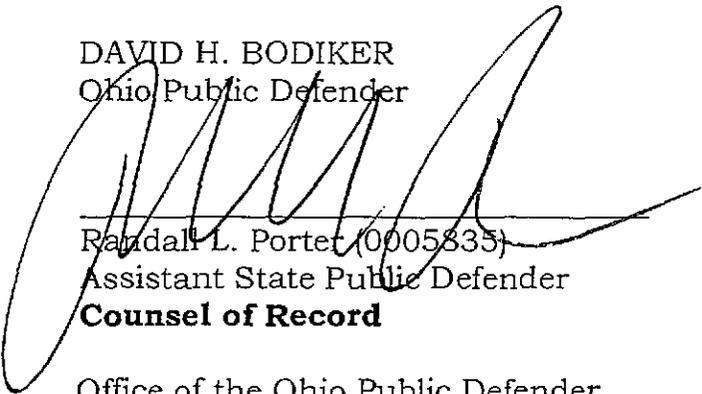
Appellant Donald J. Ketterer hereby gives notice of appeal to the Supreme Court of Ohio from the orders and judgment entry of the Butler County Court of Common Pleas entered in Case No. CR 2003-03-0309 on the following dates: May, 29, 2007 (Re-sentencing Judgment Entry of Conviction, Exhibit A); June 21, 2007 (Order Denying Defendant's Motion for The Disclosure of Favorable Evidence for Purposes of Re-Sentencing, Exhibit B) and June 21, 2007 (Order Denying Appellant's Motion to Withdraw Guilty Pleas, Exhibit C).

This is a capital case and the date of the offense is February 24, 2003. See Supreme Court Rule of Practice XIX, § 1(A). This Court has affirmed Donald Ketterer's convictions and death sentence. *State v. Ketterer* 111 Ohio St. 3d 70, 2006-Ohio-5283. On April 18, 2007, this Court vacated the non-capital offenses and remanded the matter for re-sentencing. *State v. Ketterer*

113 Ohio St. 3d 1463, 2007-Ohio-1722. The instant appeal is from the remand proceedings in the trial court.

Respectfully submitted,

DAVID H. BODIKER
Ohio Public Defender



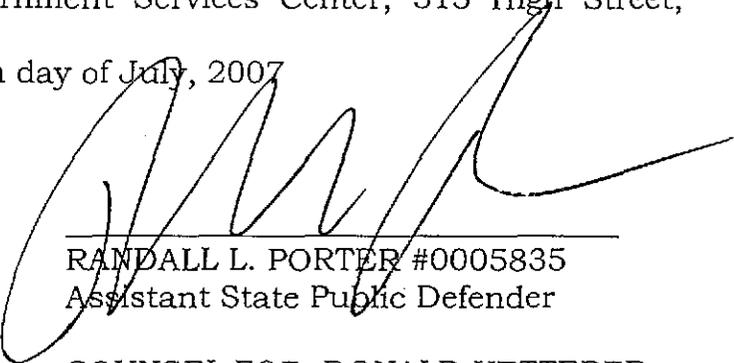
Randall L. Porter (0005835)
Assistant State Public Defender
Counsel of Record

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394
(614) 644-0703 (Fax)
Randall.Porter@OPD.Ohio.gov

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I certify a copy of the foregoing NOTICE OF APPEAL has been sent by regular U.S. mail to Daniel G. Eichel, First Assistant Butler County Prosecuting Attorney, and Michael A. Oster, Jr. Assistant Butler County Prosecuting Attorney at the Government Services Center, 315 High Street, Hamilton, Ohio 45011 on this 13th day of July, 2007



RANDALL L. PORTER #0005835
Assistant State Public Defender

COUNSEL FOR DONALD KETTERER

R. Porter

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

FILED in Common Pleas Court
BUTLER COUNTY, OHIO

MAY 29 2007

CINDY CARPENTER
CLERK OF COURTS

STATE OF OHIO

Plaintiff

CASE NO. CR2003-03-0309

ONEY, J., SAGE, J. and CREHAN, J.

vs.

RE-SENTENCING
JUDGMENT OF CONVICTION ENTRY

DONALD JOSEPH KETTERER

Defendant

On May 24, 2007 defendant's re-sentencing hearing was held on the noncapital offenses, Counts Two, Three, Four and Five, pursuant to Ohio Revised Code Section 2929.19 and the decision in State v. Ketterer, 113 Ohio St.3d 1463, 2007-Ohio-1722, the previous judgment of conviction and sentence as to Count One having been affirmed in State vs. Ketterer, 111 Ohio St.3d 70, 2006-Ohio-5283, certiorari denied (May 14, 2007), _____ U.S. _____, 2007 WL812004. Defense attorney Randall Porter, and the defendant were present and defendant was advised of and afforded all rights pursuant to Crim. R. 32. The Court has considered the record, the charges, the defendant's Guilty Finding by Judges, and findings as set forth on the record and herein, oral statements, any victim impact statement and pre-sentence report, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors of Ohio Revised Code Section 2929.12 and whether or not community control is appropriate pursuant to Ohio Revised Code Section 2929.13, and finds that the defendant is not amenable to an available community control sanction. Further, the Court has considered the defendant's present and future ability to pay the amount of any sanction, fine or attorney's fees.

The Court finds that the defendant has been found guilty of:

AGGRAVATED ROBBERY as to Count Two, a violation of Revised Code Section 2911.01(A)(3) a first degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 9 years.
This sentence will be served **consecutive** to Count One.
Fine in the amount of \$2,000

AGGRAVATED BURGLARY as to Count Three, a violation of Revised Code Section 2911.11(A)(1) a first degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 9 years.
This sentence will be served **consecutive** to Count Two.
Fine in the amount of \$2,000

GRAND THEFT as to Count Four, a violation of Revised Code Section 2913.02(A)(1) a fourth degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 17 months.
This sentence will be served **concurrent** with Count(s) Two and Three.

BURGLARY as to Count Five, a violation of Revised Code Section 2911.12(A)(3) a third degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 4 years.

EXHIBIT
A

This sentence will be served consecutive to Count(s) Two and Three.
Fine in the amount of \$1,000

Credit for 1556 served is granted as of this date.

As to Count(s) Two, Three, Four and Five:

The Court has notified the defendant that post release control is in this case up to a maximum of years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code Section 2967.28. The defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of that post release control. The defendant is therefore ORDERED conveyed to the custody of the Ohio Department of Rehabilitation and Correction.

Defendant is ORDERED to pay:

Costs of prosecution, supervision and any supervision fees permitted pursuant to Revised Code Section 2929.18(A)(4).

The Court further advised the defendant of all of his/her rights pursuant to Criminal Rule 32, including his/her right to appeal the judgment, his/her right to appointed counsel at no cost, his/her right to have court documents provided to him/her at no costs, and his / her right to have notice of appeal filed on his behalf.

Directive to Ohio Department of Rehabilitation and Correction: Please notify the Butler County Court of Common Pleas of any major changes of incarceration status including but not limited to release, transfer, execution or death of the defendant.

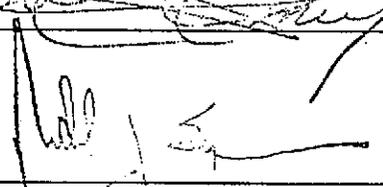
APPROVED AS TO FORM:

ENTER

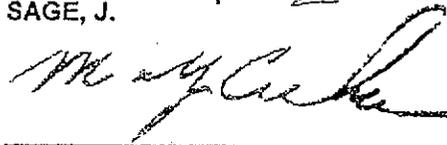
ROBIN N. PIPER
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO



ONEY, J.



SAGE, J.



CREHAN, J.

MAO/beg
May 25, 2007

R. Polter

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

JUN 21 2007
CLERK OF COURTS

STATE OF OHIO

Plaintiff

vs.

DONALD JOSEPH KETTERER

Defendant

CASE NO. CR2003-03-0309

ONEY, J.

ORDER DENYING DEFENDANT'S MOTION
FOR THE DISCLOSURE OF FAVORABLE
EVIDENCE FOR PURPOSES OF RE-
SENTENCING

This matter came before the Court, on May 24, 2007, upon Defendant's Motion for the disclosure of favorable evidence for purposes of re-sentencing. After due consideration of the Motion, Legal Memorandum and Oral Argument from both parties on said Motion, the Court finds that said motion is not well taken.

It is, **THEREFORE, ORDERED, ADJUDGED AND DECREED** that Defendant's Motion for the disclosure of favorable evidence for purposes of re-sentencing is hereby denied.

[Handwritten Signature]
Oney, J.

APPROVED AS TO FORM:

ROBIN PIPER
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

MAO/beg
June 19, 2007

EXHIBIT
B

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

FILED IN PROSECUTOR'S OFFICE
BUTLER COUNTY, OHIO
JUN 21 2007
CLERK OF COURTS

STATE OF OHIO

Plaintiff

vs.

DONALD JOSEPH KETTERER

Defendant

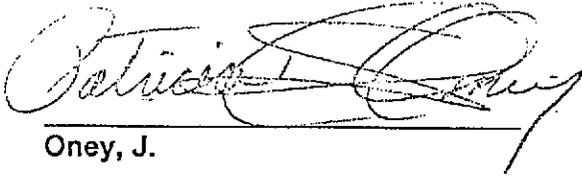
CASE NO. CR2003-03-0309

ONEY, J.

ORDER DENYING DEFENDANT'S MOTION
TO WITHDRAW GUILTY PLEAS

This matter came before the Court, on May 24, 2007, upon Defendant's Motion to withdraw guilty pleas. After due consideration of the Motion, Legal Memorandum and the Oral Argument from both parties, the Court finds that the motion is not well taken.

It is, **THEREFORE, ORDERED, ADJUDGED AND DECREED** that Defendant's Motion to withdraw his guilty pleas is hereby denied.

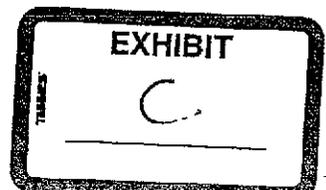


Oney, J.

APPROVED AS TO FORM:

ROBIN PIPER
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

MAO/beg
June 19, 2007



ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

CASE NOS. 96-677 &
96-678

Appellee/Cross-Appellant,

vs.

KENNETH WAYNE SMITH,

Appellant/Cross-Appellee.

*A Capital Case on Appeal from the Court of Common Pleas of Butler County, Case No. CR95-05-0471,
and from the Court of Appeals of Butler County, Case No. CA96-02-024, as consolidated*

MERIT BRIEF OF APPELLEE/CROSS-APPELLANT, STATE OF OHIO

Attorneys for Appellee/Cross-Appellant:

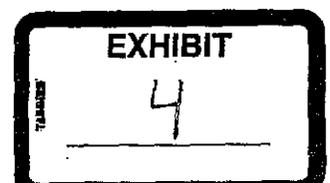
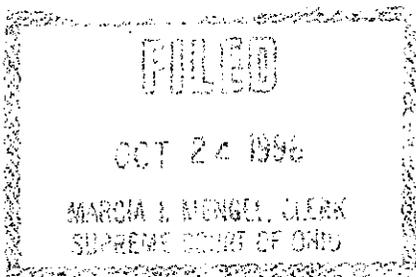
JOHN F. HOLCOMB (0001499)
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

DANIEL G. EICHEL (0008259) {Counsel of Record}
FIRST ASSISTANT PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

JOHN M. HOLCOMB (0055393)
ASSISTANT PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO
216 Key Bank Building
6 South Second Street
Hamilton, Ohio 45012-0515
Telephone (513) 887-3474; Fax (513) 887-3489

BETTY D. MONTGOMERY (0007102)
Attorney General

MICHAEL L. COLLYER (0061719)
Assistant Attorney General
Capital Crimes Section
615 West Superior Avenue, 12th Floor
Cleveland, Ohio 44113-1899
Telephone (216) 787-3030; Fax (216)



(additional counsel on next page)

(cover page continued)

Attorneys for Appellant/Cross-Appellee:

DAVID H. BODICKER (0016590)

Ohio Public Defender

KATHLEEN A. McGARRY (0038707)

Assistant State Public Defender

{Counsel of Record}

STEPHEN A. FERRELL (0061707)

Assistant State Public Defender

8 East Long Street - 11th Floor

Columbus, Ohio 43215-2998

Telephone (614) 466-5394; Fax (614) 728-3670

Attorney for *Amicus Curiae* in Support of Appellee:

WILLIAM E. BREYER (0002138)

Assistant Prosecuting Attorney

Hamilton County, Ohio

Counsel for Ohio Prosecuting Attorneys Association

914 Main Street, Suite 500

Cincinnati, Ohio 45202

Telephone (513) 632-8778; Fax (513) 632-7347

Attorneys for *Amicus Curiae* in Support of Appellant:

W. ANDREW HASSELBACH (0051803)

Rittgers & Mengle

Counsel for Ohio Assn. of Criminal Defense Lawyers

42 East Silver Street

Lebanon, Ohio 45036

Telephone (513) 932-2115; Fax (513) 398-6887

J. DEAN CARRO (0003229)

Counsel for the Law Professors'

Amicus Curiae Brief Committee

C. Blake McDowell Law Center

University of Akron

302 East Buchtel Avenue

Akron, Ohio 44325-2901

Telephone (330) 972-7791

the night in question, and that he went to Lewis Ray's premises with his brother only to steal items from the side yard, not to rob him; however, when the Rays's dog barked, Mr. Ray saw the Smiths outside and invited them inside the house. (T.p. 801-820) Appellant testified that he got into a fight with Lewis Ray over money and, after a struggle, he mortally wounded his friend Lewis Ray without an intent to kill him. (T.p. 821-824) Appellant insisted that the highly incriminating parts of his written statement and oral statement as testified by Detective Nugent were not true and were not what he had told the detective, (T.p. 841-845, 862-869, 885-888), and insisted that he hit Mr. Ray in the head with something he grabbed from the kitchen counter which "wasn't no hammer though." (T.p. 823)

However, the circumstantial evidence, in addition to the coroner's opinion (T.p. 375), indicated that a hammer was used by appellant. After the police returned his car, Russell Baker observed that a hammer which he believed to have been in his car previously, before the Smiths had borrowed it on May 12, was missing. (T.p. 475) Also, on the evening of May 12 at approximately 11:15 - 11:30 p.m., a young man named Lowell Lainhart, Jr. had gone to Angilo's Pizza, a pizza parlor at Five Points located in the same building as Five Points Pool Hall (where appellant had admittedly parked the black LeBaron), to pick up a food order. (T.p. 614-615) When Lainhart parked his car, he saw Randy Smith standing at the side of the building with a hammer in one hand and a white rag in the other. (T.p. 615-617) Lainhart, who had previously worked at a local car wash with Randy Smith, (T.p. 615), recognized him and said "hi" to him, but rather than replying, Randy Smith just "ducked back beside the building." (T.p. 617) This was approximately one block from the murder scene. (T.p. 621)

The jury found appellant's testimony at trial to be incredible and returned verdicts of guilty as to each charge and specification. Thereafter, in the penalty phase, appellant made

an unsworn statement and presented the testimony of his wife Brenda Smith, psychologist Janice Ort, Ph.D., and psychologist Jeffery Smalldon, Ph.D. Mitigating factors relating to appellant's history, character and background (abusive childhood, alcoholism and substance dependency, low-average intelligence, personality disorders, depression, and relatively mild brain impairment, and previous good behavior in prison) were developed; in his unsworn statement, appellant offered his remorse for the killing of his friend Lewis Ray and his wife as a mitigating factor. Taking these into consideration, the jury found that the aggravating circumstances of which appellant was found guilty outweighed the mitigating factors beyond a reasonable doubt and recommended sentences of death as to both murders.

ARGUMENT

Proposition of Law No. 1:

Under Section 3(B)(2), Article IV, Ohio Constitution, a court of appeals has no appellate jurisdiction in a direct appeal of a case in which a sentence of death was imposed for an offense committed on or after January 1, 1995; such provision, read together with the provision for direct appeal in such cases to the Supreme Court under Section 2(B)(2)(c), Article IV, Ohio Constitution and R.C. 2953.02, does not violate the Eighth or Fourteenth Amendments of the United States Constitution.

Appellant's first proposition of law complains that he was denied the right to appeal his case to the court of appeals, but was required to take his direct appeal from the trial court to the Supreme Court of Ohio. For the reason that appellant clearly has no right of direct appeal to the court of appeals, his first proposition of law should be overruled.

Appellant was convicted of two counts of aggravated murder with specifications, committed on or about May 12, 1995, and he was sentenced to death for such offenses on February 8, 1996. (T.d. 151, Amended Judgment of Conviction Entry.) He filed a notice of appeal to the court of appeals on February 14, 1996. (T.d. 148) That notice of appeal was a nullity — an appeal to a court which has absolutely no jurisdiction. The prosecuting attorney simultaneously filed a motion in the court of appeals to dismiss the appeal for lack of jurisdiction (see Court of Appeals Docket No. 3) and a motion in the trial court to strike the notice of appeal.(T.d. 149) After the issues were briefed, the court of appeals dismissed the appeal for lack of jurisdiction, see State v. Smith (March 19, 1996), Butler App. No. CA96-02-024, unreported. (Court of Appeals Docket No. 7.) Likewise, after briefing of the issues, the trial court issued an opinion which, in effect, held that it was within the province of the courts superior to the trial court to determine the issue of their own appellate jurisdiction. (T.d. 160)

Pursuant to Sections 2 and 3, Article IV, Ohio Constitution, as amended effective on January 1, 1995, and the provisions of Amended Substitute Senate Bill 4 effective September 21, 1995, specifically R.C. 2953.02, the Court of Appeals of Butler County, Twelfth Appellate District of Ohio, correctly held that it lacked jurisdiction over the appeal in this case. The Ohio Constitution specifically provides that “courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death,” Section 3(B)(2), Article IV, Ohio Constitution; rather, the Supreme Court of Ohio is granted appellate jurisdiction “in direct appeals from the courts of common pleas *** as a matter of right in cases in which the death penalty has been imposed.” Section 2(B)(2)(c), Article IV, Ohio Constitution. The impetus for these constitutional amendments at issue, adopted by an overwhelming approval of “Issue One” by vote of the people of Ohio on November 8, 1994, was the “public scandal”

of interminable delays occasioned in appeals in cases in which the death penalty has been imposed; proponents of the amendment argued that by streamlining the appeals process in such cases, manipulation and exploitation of the process would be reduced and the wait for justice to be administered would be shortened, see Editor's Comment following Section 2, Article IV, Ohio Constitution, in Baldwin's Ohio Rev. Code Ann. (1996 supp.) These constitutional amendments eliminate one of the two levels of appellate review previously mandated by statutes *circa* 1981-1995, reducing the number of such direct appeals to one.

To implement these constitutional provisions, the General Assembly amended R.C. 2953.02 (effective September 21, 1995), which provides, in pertinent part:

*** In a capital case in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the judgment or final order may be appealed from the trial court directly to the supreme court as a matter of right. ***."

From the foregoing, it is apparent that the court of appeals lacked jurisdiction over a case on direct appeal in which sentences of death were imposed for offenses committed by appellant on May 12, 1995, and that this Court has *exclusive* jurisdiction in such a case.²

Contrary to appellant's further argument, there is no federal constitutional impediment to the Ohio's constitutional and statutory provisions in this respect. It is well established that all legislative enactments must be afforded a strong presumption of constitutionality, and the

2. The language of the constitutional provisions and statute also compel the conclusion that the Supreme Court has exclusive jurisdiction over the whole case, since it has been granted jurisdiction in "direct appeals from the courts of common pleas *** in cases in which the death penalty has been imposed" for offenses occurring on or after January 1, 1995, see Section 2(B)(2)(c), Article IV, Ohio Constitution (emphasis added), and R.C. 2953.02 (distributing jurisdiction between the court of appeals and Supreme Court "[i]n capital cases in which a sentence of death is imposed" with the former having jurisdiction in cases arising before January 1, 1995, and the latter in cases arising on or after that date); see also Section 3(B)(2), Article IV, Ohio Constitution, (denying the court of appeals "jurisdiction to review on direct appeal a *judgment* that imposes a sentence of death"). Appellant's suggestion that the judgment of a trial court in a criminal case is somehow "divisible," and that this Court should have exclusive jurisdiction over that part of the trial court's judgment involving the death penalty whereas the court of appeals would retain jurisdiction over the remaining part of the trial court's judgment as to the non-capital charges in the indictment, is utterly without merit.

party asserting that such enactment is unconstitutional must prove this assertion beyond a reasonable doubt. See, e.g., State v. Collier (1991), 62 Ohio St.3d 267, 269, 581 N.E.2d 552, 553, and State v. Thompkins (1996), 75 Ohio St.3d 558, 560, 664 N.E.2d 927, 929. Appellant falls well short of this burden.

Appellant complains that these constitutional and statutory provisions draw an irrational distinction between persons sentenced to death for offenses committed after January 1, 1995, and all other criminal defendants who are not sentenced to death, thus violating the Fourteenth Amendment's Due Process and Equal Protection Clauses. We disagree. The United States Supreme Court has clearly declared that there is no federal constitutional right to state appellate review of state criminal convictions, see McKane v. Durston (1894), 153 U.S. 684, 687, 14 S.Ct. 913, 914, 38 L.Ed. 867, 868, and Estelle v. Durrrough (1975), 420 U.S. 534, 536, 95 S.Ct. 1173, 1175, 43 L.Ed.2d 377, 380; see also Ross v. Moffitt (1974), 417 U.S. 600, 611, 94 S.Ct. 2437, 2444, 41 L.Ed.2d 341, 351. Moreover, neither the Due Process Clause nor the Equal Protection Clause exact uniformity of procedure, but rather a state may classify litigation and adopt one type of procedure for one class and a different type for another, see Dohany v. Rogers (1930), 281 U.S. 362, 369, 50 S.Ct. 299, 302, 74 L.Ed. 904, 912. Thus, it was held in Missouri v. Lewis (1880), 101 U.S. 22, 29-33, 25 L.Ed. 989, 991-993, that it did not violate the Equal Protection Clause for a state to arrange its appellate court jurisdiction pursuant to the constitution and laws of the state, so that certain appeals (from trial courts in a certain county) are taken to an intermediate appellate court, whereas other appeals (from trial courts in the remaining counties) are appealable directly to the state supreme court. This principle of basic federalism, that a State "has wide discretion in respect to establishing its systems of courts and distributing their jurisdiction," Ohio ex rel. Bryant v. Akron

Metropolitan Park District (1930), 281 U.S. 74, 81, 50 S.Ct. 228, 231, 74 L.Ed. 710, 716, has been applied in many cases since Missouri v. Lewis, see, e.g., Bryant and Dohany.

Nor does the Eighth Amendment exact uniformity of procedure among the states. "As the Court has several times made clear, [the Court has been] unwilling to say that there is any one right way for a State to set up its capital sentencing scheme." Spaziano v. Florida (1984), 468 U.S. 447, 464, 104 S.Ct. 3154, 3164, 82 L.Ed.2d 340, 355, and Cabana v. Bullock (1986), 474 U.S. 376, 386-387, 106 S.Ct. 689, 697, 88 L.Ed.2d 704, 717; see Gregg v. Georgia (1976), 428 U.S. 153, 195, 96 S.Ct. 2909, 2935, 49 L.Ed.2d 859, 887 (plurality opinion). The Court has held, for example, that there is no one right way for state courts to conduct appellate review in capital cases, see Pulley v. Harris (1984), 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (comparative proportionality review not required).

There is considerable variety regarding systems of appellate review of capital cases among the thirty-eight states which currently have provisions for capital punishment. Nine of these states have only a single appellate court (denominated "Supreme Court" in most of these states) with state-wide jurisdiction for review of all criminal cases, with no intermediate appellate court at all.³ Ohio and twenty-eight other states have established a two-tiered appellate court system with intermediate appellate courts having appellate jurisdiction within their respective judicial districts and a supreme court with state-wide (and usually discretionary) appellate jurisdiction; but in only five of the latter states will a case involving

3. Delaware [Del.Code Ann. 11-4209(g) (1995)]; Mississippi [Miss.Code Ann. 99-19-105 (1995)]; Montana [Mont.Code Ann. 46-18-308 (1995)]; Nevada [Nev.Rev.Stat. Ann. 177.055 (1995), and S.Ct. Rule 250(C) (1994)]; New Hampshire [N.H.Rev.Stat. Ann. 630:5(X) (1995)]; New Jersey [N.J. Court Rules 2:2-1(A)(3) (1995)]; South Dakota [S.D.Codified Laws 23A-27A-9 (1996)]; Texas [Tex.Crim.Proc. Code Ann. Art. 37.071, Sec. 2(h) (1996)]; and Wyoming [Wyo.Stat. 6-2-103 (1996)].

a death sentence be reviewed by both tiers of a two-tiered appellate court system,⁴ whereas in twenty-four states, including Ohio, a direct appeal in a capital case involving a death sentence “bypasses” the intermediate appellate court and is taken directly as a matter of right from the trial court to the state’s highest court of review.⁵ Thus, in 33 of the 38 states with provisions for capital punishment (or 86.85%), a defendant who is sentenced to death will have a right of only one direct appeal to the state’s highest court with no review by an intermediate court, whereas in only 5 of those 38 states (13.15%) will a case involving a death sentence be reviewed by two appellate courts.⁶ The fact that an appellate procedure involving only one direct appeal in a capital case is quite common among the states would be “objective indica” that there is neither a due process right to a two-tiered appellate review nor an Eighth or Fourteenth Amendment violation by having only one level of direct appeal. Accord, Gregg v. Georgia, 428 U.S. at 173, McKleskey v. Kemp (1987), 481 U.S. 279, 300, 107 S.Ct. 1756,

4. Alabama [Ala.Code 12-3-9 and 13A-5-53 (1996), and Ala.R.App.P. 39(k), 45A (1995)]; Colorado [Colo.Rev.Stat. 13-4-102(1) (1996)]; Georgia [Ga.Code Ann. 5-6-34 (1996)]; Oklahoma [Okla.Stat. 21-701.13 (1995)]; and Tennessee [Tenn.Code Ann. 39-13-206(a)(1) (1995)].

5. Arizona [Ariz.Rev.Stat. Ann. 13-4031 (1995)]; California [Cal.Const. Art. VI, Secs. 11, 12(d) (1995)]; Florida [Fla.Const. Art. V, Sec.3(b)(1) (1995)]; Illinois [Ill.Const. Art. 6, Sec. 4(b) (1996)]; Indiana [Ind.Const. Art. 7, Sec. 4 (1996)]; Kansas [Kan.Stat. Ann. 21-4627 (1995)]; Kentucky [Ken.Const. Sec. 110(2)(b) (1995)]; Louisiana [La.Const. Art. V, Sec. 5(D) (1996); La.Code Crim.Proc. Ann. Art. 912.1 (West 1996)]; Maryland [Md.Cts.&Jud.Proc. Code Ann. 12-307 (1995)]; Missouri [Mo.Const. Art. V, Sec. 3 (1995)]; Nebraska [Neb.Const. Art. I, Sec. 23 (1995)]; New Mexico [N.M.Const. Art. VI, Sec.2 (1996)]; New York [N.Y.Civ.Prac.L. 450.70 (McKinney 1996)]; North Carolina [N.C.Gen.Stat. 7A-27(a) (1995)]; Ohio [R.C. 2953.02 and Sections 2(B)(2)(c) and 3(B)(2), Article IV, Ohio Constitution (1996)]; Oregon [Or.Rev.Stat. 163.150(1)(g) (1995)]; Pennsylvania [42 Pa.Cons.Stat. 722 (1995)]; South Carolina [S.C.Code Ann. 18-9-20, 16-3-25(F) (Law.Co-op.1993)]; Utah [Utah Code Ann. 78-2-2(3)(I) (1995)]; Virginia [Va.Code Ann. 17-116.05:1 (1996)]; and Washington [Wash.Rev.Code 10.95.100, 2.06.030 (1995)]. Also included in this listing are Idaho, wherein all criminal appeals are filed in the supreme court which has discretion to transfer non-capital cases to the court of appeals, [Idaho Code 1-2406, 19-2801 (1996), and Idaho App.R. 11 (1996)]; and Arkansas and Connecticut, wherein all criminal appeals are filed in the state’s supreme court which has discretion to transfer any appeal to the Arkansas Court of Appeals or Connecticut Appellate Court, respectively. [Ark.S.Ct. & Ct.App.Rule 1-2 (1996); Conn.Gen.Stat. 51-199(b)(3) (1995)].

6. Also interesting is the fact that two states which have abolished capital punishment, Massachusetts and Minnesota, provide for direct appeal from the trial court to the state supreme court in cases involving first-degree murder, bypassing an existing intermediate appellate court. Mass.Gen.Laws Ann., Chapter 278, Sec. 33E (1981); Minn.Const. Art. 6, Sec. 2 (1983).

1777, 95 L.Ed.2d 262, 283, and Stanford v. Kentucky (1989), 492 U.S. 361, 370, 109 S.Ct. 2969, 2975, 106 L.Ed.2d 306, 318.

This diversity among the states is also indicative that there is no violation of the Equal Protection Clause under the circumstances presented here:

“The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. *** Each State prescribes its own modes of judicial proceedings. If diversities of laws and of judicial proceedings may exist in the several States without violating the equality clause of the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. A uniformity which is not essential as regards different States cannot be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different States are allowable in different parts of the same State.”

Missouri v. Lewis, 101 U.S. at 31-33, 25 L.Ed. at 992.

In two of the states wherein exclusive appellate jurisdiction is vested in the state's supreme court for direct review in cases in which the death penalty has been imposed, bypassing an intermediate appellate court, the courts have rejected arguments similar to that of appellant, that such a method of appellate review deprives him of due process and equal protection of the laws and/or violates the Eighth Amendment. See Payne v. Commonwealth (1987), 233 Va. 460, 474, 357 S.E.2d 500, 508-509, certiorari denied (1987), 484 U.S. 933, 108 S.Ct. 308, 98 L.Ed.2d 267, and State v. Ramirez (1994), 178 Ariz. 116, 122, 871 P.2d 237, 243, certiorari denied (1994), 513 U.S. ____, 115 S.Ct. 435, 130 L.Ed.2d 347. As reasoned in Payne v. Commonwealth, the claim that the Eighth and Fourteenth Amendments would require a state to afford appellate review of a death sentence by two tiers of appellate courts is seemingly foreclosed by the decision in Proffitt v. Florida (1976), 428 U.S. 242, 96

S.Ct. 2960, 49 L.Ed.2d 913, where the Court upheld Florida's capital sentencing procedures which included provision for direct appeal to the state's supreme court, bypassing Florida's intermediate appellate court in a manner similar to Ohio's current provision. Thus, while the decision in *Proffitt* clearly sets forth the proposition that the Eighth Amendment requires meaningful appellate review of a death sentence, (see Appellant's Brief at page 20), the direct review undertaken by the Supreme Court of Ohio will satisfy this requirement, and two reviews in two levels of appellate courts are not mandated. See also *Jurek v. Texas* (1976), 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929, where the Court upheld a Texas death penalty with approval of the Texas capital sentencing and appellate review procedures which included, *inter alia*, provision for "prompt judicial review of the jury's decision in a court with state-wide jurisdiction," *id.* at 276; since Texas has no intermediate appellate court, all criminal convictions are appealed to only one court, the Texas Court of Criminal Appeals.

Where a State has granted a *first* direct appeal as of right which complies with all the requirements of due process and equal protection, it does not run afoul of those constitutional principles by limiting a *second* tier of appellate review, see *Ross v. Moffitt* (holding that neither the Due Process Clause nor the Equal Protection Clause would require a state to provide an indigent criminal defendant with counsel on a discretionary appeal to the state supreme court from a decision of state's intermediate court of appeals affirming a conviction on direct appeal as of right), and *Pennsylvania v. Finley* (1987), 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (reaffirming the holding of *Ross v. Moffitt*). This Court applied that principle in *State v. Buell* (1994), 70 Ohio St.3d 1211, 639 N.E.2d 110, when it refused to grant reconsideration of its 1986 decision affirming a death sentence upon a claim of ineffective assistance of counsel on the capital defendant's direct appeal to that Court in 1986, quoting

the Finley decision's statement that "the right to appointed counsel extends to the first appeal as of right, and no further," Pennsylvania v. Finley, 481 U.S. at 555.

Ohio does provide a right of one direct appeal as of right to every person convicted of a criminal offense, see generally R.C. 2953.02; in non-capital cases this first direct appeal is from the trial court to the court of appeals, pursuant to Section 3(B)(2), Article IV, Ohio Constitution, and in capital cases appeal is from the trial court directly to the Supreme Court, pursuant to Section 2(B)(2)(c), Article IV, Ohio Constitution. Having provided such a right of first appeal, it must be granted equally to all; for example, a state cannot deny an appeal as of right to those unable to pay for a transcript while granting the right to appeal only to those able to pay such costs, cf. Williams v. Oklahoma (1969), 395 U.S. 458, 89 S.Ct. 1818, 23 L.Ed.2d 440, and the Equal Protection Clause would also be offended "[w]here the merits of **the one and only appeal** an indigent has as of right are decided without benefit of counsel," cf. Douglas v. California (1963), 372 U.S. 353, 357, 83 S.Ct. 814, 816, 9 L.Ed.2d 811, 814 (emphasis sic). Ohio's appellate process for criminal cases does not run afoul of the Equal Protection Clause, because its scheme will treat capital and non-capital appellants equally by providing them **both** with **one** direct appeal as of right; this comports with the Due Process and Equal Protection Clauses as to one convicted of a capital offense, see Ross v. Moffitt, Estelle v. Durrrough, and Pennsylvania v. Finley. Indeed, the capital appellant, who is given a unique direct appeal to this Court and will **always** obtain review of his conviction and death sentence by the highest court in the state, see R.C. 2929.05 and 2953.02, is treated more favorably than the non-capital appellant whose appellate process as a matter of right begins and ends with the court of appeals; for the non-capital defendant only discretionary review is possible in the Ohio Supreme Court. See Dickerson v. Latessa (C.A. 1, 1989), 872 F.2d 1116,

(holding that requiring that capital felons in Massachusetts must obtain leave to appeal the denial of post-conviction relief without imposing a similar requirement on non-capital felons is not a denial of equal protection where capital felons, unlike non-capital felons, are accorded a unique right to appeal directly to the state's highest court for plenary review).

Appellant argues that this Court should engage in "strict scrutiny" in assessing his equal protection challenge, citing *Massachusetts Bd. of Retirement v. Murgia* (1976), 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520, 524. However, in dealing with equal protection challenges to state regulation of the right of appeal in criminal cases, the United States Supreme Court has applied the traditional rational-basis test – whether the particular distinction drawn by the state between classes has some relevance to the purpose for which the classification is made, see, e.g., *Estelle v. Durrrough*, 420 U.S. at 538-539, 95 S.Ct. at 1176, 43 L.Ed.2d at 381-382. Absent a classification which "trammels fundamental personal rights [e.g., First Amendment freedoms, see *Murgia*, 427 U.S. at 312 n. 3] or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. *** [I]t is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment," *New Orleans v. Dukes* (1976), 427 U.S. 297, 303-304, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511, 517. The standard for determining if a statute violates equal protection is essentially the same under state and federal law, see *State v. Thompkins*, 75 Ohio St.3d at 560, 664 N.E.2d at 929; "[u]nder rational-basis scrutiny, legislative distinctions are invalid only if they bear no relation to the state's goals and no ground can be conceived to justify them." *Thompkins, id.*

Appellant urges that it is not rational to distinguish, for appellate purposes, between persons sentenced to death as opposed to others sentenced to lesser penalties. However, this argument would have the Court overlook the rational basis here which is self-evident: “[t]he penalty of death differs from all other forms of punishment, not in degree but in kind,” Furman v. Georgia (1972), 408 U.S. 238, 306, 92 S.Ct. 2726, 2760, 33 L.Ed.2d 346, 388 (Stewart, J., concurring). Unlike others convicted of non-capital felonies, persons under a sentence of death are rationally accorded a unique right to appeal directly to the state’s highest court for plenary review⁷ – a right of review which is not subject to the Court’s discretion.

Appellant also complains that the constitutional/statutory distinction made between those capital defendants who committed offenses *before* January 1, 1995 (whose direct appeal as of right is taken to the court of appeals first, and Supreme Court second), and those capital defendants such as appellant who committed offenses *after* January 1, 1995 (whose direct appeal as of right is taken to the Supreme Court), is violative of the Equal Protection Clause. However, appellant is simply not similarly situated to those defendants who are sentenced to death for offenses committed before January 1, 1995. See Dobbert v. Florida (1977), 432 U.S. 282, 301, 97 S.Ct. 2290, 2302, 53 L.Ed.2d 344, 361 (defendant sentenced to death in case tried after the effective date of remedial statutes amending Florida’s capital sentencing procedure in the wake of the Furman decision was not similarly situated to those tried before the statute’s effective date, whose death sentences had been commuted to life imprisonment, hence no equal protection violation). It was held long ago that a classification as to time that

7. Appellant and *amicus curiae* in support of appellant express a concern that persons sentenced to death whose cases are reviewed only in the Ohio Supreme Court will be unable to challenge their convictions as being against the manifest weight of the evidence. For reasons more fully outlined in the State’s argument as to **Proposition of Law No. 13**, this Brief *infra* at pages 112-114, that concern is not well taken.

is not arbitrary is not repugnant to the Constitution, and that the Fourteenth Amendment does not forbid statutory changes to have a beginning and thus to discriminate between rights of an earlier and later time. Williams v. Walsh (1912), 222 U.S. 415, 32 S.Ct. 137, 56 L.Ed. 253; Sperry & Hutchinson Co. v. Rhodes (1911), 220 U.S. 502, 31 S.Ct. 490, 55 L.Ed. 561. Because the jurisdictional provisions of Ohio's Constitution and statute involve criminal procedure, it is obvious that retrospective operation of the enactments is to be avoided and might be illegal, see Williams v. Walsh, 222 U.S. at 420. Preferring not to run afoul of the Ex Post Facto Clauses of the Federal and Ohio Constitutions, the General Assembly drew a line of demarcation at January 1, 1995, the effective date of the constitutional amendment. There is nothing irrational about Ohio's decision to steer wide of the ex post facto concerns and make the application of the Ohio Constitution and statutes prospective only, thus including appellant within the class of defendants whose death sentence was imposed for a crime committed after the effective date of the constitutional amendment, see Dobbert v. Florida, 432 U.S. at 301, 97 S.Ct. at 2302, 53 L.Ed.2d at 361.

To carry appellant's argument to its logical conclusion, no state could make changes to its constitution or judicial structure, and no state court could amend its rules of practice and procedure, without offending the Equal Protection Clause; once a judicial system is in place in Ohio, as appellant would have it, that system cannot be reformed or altered in any manner, even if that reform is widely practiced among the other states (e.g., in three of our neighbor-states, Indiana, Kentucky, and Pennsylvania). However, appellant's argument simply lacks common sense; it is hardly the purpose of the Equal Protection Clause to freeze a state's criminal justice system in place and to deny a state the opportunity to reform it where the state, through an amendment to its constitution, has deemed such reform to be appropriate.

Proposition of Law No. 2:

It was not plain error prejudicial to the defendant for the trial court to instruct the jury in the penalty phase of a capital case to consider and weigh, as a single aggravating circumstance, the three statutory specifications of which the jury had previously found the defendant guilty of committing in the guilt phase of trial, together with an instruction directing the jury to consider the *quality* rather than quantity of the evidence pertaining to the aggravating circumstance and mitigating factors.

In his second proposition of law, appellant complains that instructions given in the penalty phase which directed the jury to consider all three specifications to Count One as a single aggravating circumstance, listing the three specifications to be so merged, (Mitigation T.p. 6-7, 310-311) created a "super aggravating circumstance" which was reversible error. Similar complaint is made as to the trial court's instruction merging all three specifications to Count Two for consideration as a single aggravating circumstance. Appellant further claims that an instruction directing the jury to consider the *quality* of the evidence, as opposed to its *quantity*, in deciding whether the aggravating circumstance outweighs the mitigating factors by proof beyond a reasonable doubt, (T.p. 313-314), compounded the error.

At trial, appellant did not object to the instructions of which he now complains. Under Crim.R. 30(A), his failure to object constitutes a waiver of any claim relative thereto, unless but for the error, the outcome of the trial would have been otherwise. *State v. Underwood* (1983), 3 Ohio St.3d 12, 444 N.E.2d 1332, syllabus; *State v. Long* (1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 372 N.E.2d 804, at paragraph two of the syllabus. This plain-error standard is equally applicable to procedure in capital cases, see, e.g., *State v. Mills* (1992), 62 Ohio St.3d 357, 374, 582 N.E.2d 972, 987 (declining the suggestion that the plain-error standard be relaxed or broadened in capital cases), and *State v. Campbell* (1994), 62 Ohio St.3d 38,