

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

CASE NO. 2007-1261

Appellee,

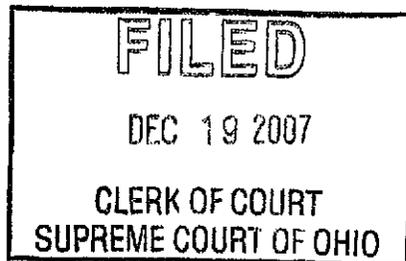
vs.

DONALD J. KETTERER,

Appellant.

*A Death Penalty Case on Appeal from the Court of Common Pleas
of Butler County, Case No. CR2003-03-0309*

MERIT BRIEF OF APPELLEE, STATE OF OHIO



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STATEMENT OF THE CASE

Procedural Posture:

This appeal is from the judgment of the Court of Common Pleas of Butler County, Ohio, wherein Defendant-Appellant, Donald J. Ketterer, was re-sentenced for his non-capital crimes, pursuant to this Court's remand decision in State v. Ketterer, 113 Ohio St.3d 1463, 2007-Ohio-1722. On May 24, 2007, the original three judge panel reconvened, and re-sentenced the Appellant to the same sentences that it had originally impose, being respectively, nine years and a \$2,000 fine as to Count Two, consecutive to Count One; nine years and a \$2,000 fine as to Count Three, consecutive to Count Two; 17 months as to Count Four, concurrent with Count(s) Two and Three; and 4 years and a \$1,000 fine as to Count Five, consecutive to Count(s) Two and Three. (See, *Re-Sentencing Judgment of Conviction Entry*, dated May 29, 2004.) However, in the Court's Entry, the Court had, by a clerical error, failed to list the five year mandatory term of post-release control that was imposed during the sentencing hearing. Therefore, the Court filed an Amended Re-Sentencing Judgment of Conviction on November 15, 2007, *nunc pro tunc*, to put the Entry on all fours with the record. (See, *Amended Re-Sentencing Judgment of Conviction*, dated, Nov. 15, 2007; Appendix A-1.)

Statement of Facts:

A. The underlying case

As this Court has already determined the underlying facts of the present case, the Appellee, in the interests of brevity and the law of the case, will herein adopt this Court's previous statement of facts. See, State v. Ketterer, 111 Ohio St. 3d 70, 2006-Ohio-5283, at ¶¶11-12.

B. Upon remand

Upon remand, the same three judge panel was reconvened to determine the appropriate sentence for the Appellant. (See, *Entry Granting Defendant's Motion To Reconvene The Three Judge Panel*, dated May 18, 2007.) Two days before the re-sentencing hearing was to be held, the Appellant filed two motions, one for the disclosure of favorable evidence, and one to withdraw his guilty pleas. The next day, the State attempted to respond to these two motions, in what little time it had.

On May 24, 2007, the Appellant appeared with Counsel and urged the three judge panel to allow him to have additional evidence turned over, arguing that it would be useful for purposes of the re-sentencing hearing. (T.p. 4-10) The State responded to this argument by indicating that the information was either already turned over in discovery or was not material. (T.p. 10-12) After hearing the arguments, the panel took a brief recess to deliberate. (T.p. 13) Upon taking the bench, the panel denied the Appellant's motion. (T.p. 13)

The panel then began the actual re-sentencing hearing by allowing defense counsel to make any arguments he wished in regards to the imposition of sentence. (T.p. 14) Defense counsel raised two issues, the *Foster* issue, and that the Appellant has a history of mental illness. (T.p. 14-18) The panel again adjourned to deliberate. (T.p. 21) Upon retaking the bench, the panel imposed the same sentence on the Appellant as it had originally, after being guided by the purposes and principals of sentencing. (T.p. 22-24)

After handing down its sentence, the panel split, and presiding judge Oney remained to hear arguments as to the Appellant's motion to withdraw his guilty plea. (T.p. 24) After hearing brief arguments from both side, the court ruled that it would deny the Appellant's motion as it was without jurisdiction. (T.p. 29) The current appeal now ensues.

ARGUMENT

Proposition of Law No. 1:

THE TRIAL COURT MADE ALL NECESSARY ADVISEMENTS TO THE APPELLANT IN REGARDS TO POST-RELEASE CONTROL.

In Appellant's first proposition of law, he argues that he was not properly advised of post release control sanctions at his re-sentencing hearing. However, as the trial court correctly stated on the record that the Appellant was subject to a mandatory five year term of post release control, and reflected this term of years in its *Nunc pro tunc* entry, the State of Ohio disagrees.¹

A. Lapse of the tongue

The Appellant first complains that the trial court erred when it failed to state on the record that the Appellant was subject to post release control as to court three. In support of that argument, the Appellant quotes the trial court when it stated "in regards to Count Two and Five, if you are released * * * will put you on post-release control, mandatory for a period of five years." (T.p. 23) However, the language used by the court, following this quote, should also be evaluated to truly understand what the trial court was saying. The trial court, in a continuous statement thereafter stated, "[a]nd if you violated their rules and regulations such that you were convicted of a new crime or if you didn't report to your parole officer they could send you back in increments of 30, 60, 90 days and they could send you back for a total

¹ It should be noted that the entirety of this argument is hypothetical and for the most part a superfluous exercise in legal argument. This is because even if something were to happen to the Appellant's death sentence, the most likely outcome would be that the sentence would become life without the possibility of parole. In either situation, the Appellant will never have the chance at post release control. However, to aid the Court in the disposal of this argument, the Appellee will address the merits.

amount of one half of what I have sentenced you to. So we are talking -- these sentences were the original sentences of -- total up to 22 that means the parole board could give you an additional 11 years on that. And in the -- also Counts Two through Five sentences that we are ordering are consecutive to Count One." (T.p. 23-24)(Emphasis added)

From this further advisement, it becomes obvious that the trial court merely had an inadvertent slip of the tongue when it stated "Count Two and Five," as the court clearly meant to say "Court Two through Five." This is supported by the court's continuing language, as well as the total time being calculated adding up to 22 years. This amount of time is the total of Counts Two through Five, and not Two and Five. Further, the court even stated "[a]nd in the -- also Counts Two through Five sentences that we are ordering are consecutive to Count One." (T.p. 24) In that phrase the court is now again correctly using the word "through" and not 'and'. What is more, the court in its sentencing entry informs that post release control is for counts Two, Three, Four, and Five. (See, *Nunc pro tunc* entry, dated 11/15/07) As such, there should not be an error found of such a magnitude to warrant a reversal for re-sentencing when one inadvertent slip of the tongue occurs.

Further, even with the inadvertent slip of the tongue, the trial court in this case still meet the requirements as set forth in both the majority opinion and the dissenting opinion of this Court's decision in Watkins v. Collins, 111 Ohio St.3d 425, 2006-Ohio-5082, 857 N.E.2d 78. In Watkins, twelve inmates filed an action seeking a writ of habeas corpus because, according to them, the trial court's never properly imposed post release control. *Id.* The inmates argued that because the trial courts had mistakenly included discretionary instead of mandatory language as to the post release control, the inmates could not be imprisoned for a violation. *Id.*

However, in finding the inmates argument to be without merit, this Court noted that the “preeminent purpose of R.C. 2967.28” is that the “offenders subject to post release control know at sentencing that their liberty could continue to be restrained after serving their initial sentences.” *Id.* at ¶ 52. In the case at bar, the Appellant was advised that he was subject to post release control, that the duration of that post release control would be for five years, and that imposition of the post release control was mandatory. (T.p. 23) Thus, while the trial court may have slipped and in one instance used the word “and” instead of the word “through”, the trial court did comply with advising that post release control was mandatory for five years. As such, the preeminent purpose of R.C. 2967.28 was complied with and no error should be found that warrants reversal.

B. The missing adjective and number

Appellant also claims error when the trial court failed to include the words “mandatory” and “five” in its original sentencing entry. Specifically, the original sentencing entry, by clerical error, stated that “[t]he Court has notified the defendant that post release control is in this case up to a maximum of years, as well ***.” (See, Re-Sentencing Judgment of Conviction, dated May 29, 2007). However, as the trial court became aware of this clerical error, a Nunc pro tunc entry was entered that reflected what the trial court had actually imposed in regards to post release control. This entry stated “[t]he Court has notified the defendant that post release control is **Mandatory** in this case up to a maximum of **5** years, as well ***.” (See, Amended Re-Sentencing Judgment of Conviction, dated Nov. 15, 2007 (Emphasis added).

Therefore, in the case at bar, the court's entry of amended sentence nunc pro tunc cured the clerical error contained in the original judgment entry. See, *State v. Trapp* (1977),

52 Ohio App.2d 189, 368 N.E.2d 1276, See, also, State ex rel. Cruzado v. Zaleski, 111 Ohio St.3d 353, 856 N.E.2d 263, 2006-Ohio-5795, Young v. State (1834), 6 Ohio 435, 1834 WL 33, 6 Hammond 435. Therefore, any possible error is no longer prejudicial to the Appellant, and does not require reversal.

C. The total trumps the sum of all parts

Additionally, Appellant appears to complain that the trial court did not make post release control specific to each individual count. However, this is not a requirement. The purpose of post release control is to notify an offender that after their release, they will be subject to post release supervision. Watkins, 2006-Ohio-5082. However, post release control sanctions do not run consecutively, so there is no valid reason for a defendant to need to know the exact amount of time that each count individually may carry. Rather, the defendant needs to be informed that post release control “could be imposed following the expiration of the person’s sentence.” Id., at ¶ 51.

Thus, the fact that the trial court in the case at bar informed the Appellant that he would have a mandatory five years of post release control following any possible expiration of his sentence, satisfies this Court’s requirements. See, generally, Watkins, 2006-Ohio-5082. What is more, to inform an offender that one count carries a discretionary three year term, while another count carries a mandatory five year term, would be an exercise in superfluous legal tongue twisters. The defendant needs to know what the total amount of post release control can be, and not what could be imposed for each individual count. Or in other words, the defendant needs to know the sum total, and not what all the parts were individually.

In this case, the sum total is five years of mandatory post release control. The

individual counts and their lesser, and possibly discretionary, terms of post release control simply do not have any legal significance in regards to having to be explained to the Appellant. As such, the trial court committed no error in not spelling out what the post release control sanctions would be for each individual count. Rather, the trial court correctly, in accordance with this Court's directives, informed the Appellant of what his post release control time was in sum total.

As such, the trial court complied with the preeminent purpose of R.C. 2967.28, including advising the Appellant that his liberty would continue to be restrained after serving his sentences for a mandatory time period of five years . Therefore, the Appellant's first proposition of law should be held to be without merit.

Proposition of Law No. 2:

THE TRIAL COURT COMPLIED WITH THE SPIRIT OF CRIMINAL RULE 32 BY THE PROCEDURAL POSTURE USED AND THE ITEMS AND DETAILS INCORPORATED THEREIN.

In his second proposition of law, Appellant argues that because the words "guilty plea" are missing from the Judgment of Conviction Entry, this Court does not have jurisdiction to hear this case as there is no final appealable order. The State disagrees.

Criminal Rule 32(C) states:

A judgment of conviction shall set forth the plea, the verdict or findings, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.

In the present case, the trial court stated that it had considered "the record, the charges, the defendant's Guilty finding by Judges, and the findings as set forth on the record

herein, oral statements, any victim impact statement and presentence report, as well as * * *." (Amended Re-Sentencing Judgment of Conviction Entry, dated 11/15/07) Further, the court detailed the history of this case by stating that the re-sentencing was held pursuant to this Court's decision in State v. Ketterer, 113 Ohio St.3d 1463, 2007-Ohio-1722, and that the convictions and sentence as to Count One were affirmed in this Court's decision in State v. Ketterer, 111 Ohio St.3d 70, 2006-Ohio-5283.

The inclusion of this history therein incorporates not only that the Appellant plead guilty, but also much more than Crim.R. 32(C) requires. For example, in State v. Ketterer, 2006-Ohio-5283, at ¶ 10, this Court specifically stated that Appellant plead guilty, and noted that the State presented evidence before the panel, which then found the Appellant guilty. The trial court also referenced Count one, which has its own sentencing opinion, pursuant to R.C. 2929.03(F), which stated "entered a plea of guilty to all charges January 27, 2004." (See, Sentencing Opinion, dated Feb. 13, 2004). What is more, the first two issues raised by Appellant in his initial direct appeal, dealt with issues pertaining to the fact that he had entered a guilty plea. See, Ketterer, 2006-Ohio-5283, ¶¶ 13-64, 75-79, 82-90. Therefore, when making reference to the original direct appeal, the trial court references by incorporation that fact that this Court discussed and determined issues pertaining to the Appellant's guilty plea for approximately 66 paragraphs. *Id.*

Thus, it is hard to fathom how the fact that the Appellant plead guilty is completely missing from the language used and the cases incorporated by the trial court. However, it is true that the actual two words, guilty plea, are not directly found in the Amended Re-Sentencing Judgment of Conviction. While the State does not believe that any prejudice results from this omission, due to the incorporated procedural posture, if this Court were to

rule that these two exact words need to be inserted, the State would urge this court to use its powers pursuant to App.R. 12(B), and simply insert the words, guilty plea, into the Amended Re-Sentencing Judgment of Conviction.

Specifically, App.R. 12(B) states:

B) Judgment as a matter of law

When the court of appeals determines that the trial court committed no error prejudicial to the appellant in any of the particulars assigned and argued in the appellant's brief and that the appellee is entitled to have the judgment or final order of the trial court affirmed as a matter of law, the court of appeals shall enter judgment accordingly. When the court of appeals determines that the trial court committed error prejudicial to the appellant and that the appellant is entitled to have judgment or final order rendered in his favor as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and render the judgment or final order that the trial court should have rendered, or remand the cause to the court with instructions to render such judgment or final order. In all other cases where the court of appeals determines that the judgment or final order of the trial court should be modified as a matter of law it shall enter its judgment accordingly.

Pursuant to this rule, this Court can modify the trial court's Amended Re-Sentencing Judgment of Conviction to properly reflect the inclusion of Appellant's guilty plea. See, generally, State v. Bolden, Preble App. No. CA2003-03-007, 2004-Ohio-184. In so doing, this Court would greatly aid judicial economy, and the interests of justice. As such, the State asks that this Court overrule the second proposition of law as the incorporated case citations, procedural posture, and sentencing opinion as to Court one do detail that the Appellant plead guilty, or, in the alternative, the State would urge this Court to simply insert the words "guilty plea" into the Amended Re-Sentencing Judgment of Conviction.

Proposition of Law No. 3:

THE REMEDY AND SUBSEQUENT SENTENCING LAW AS MANDATED BY STATE v. FOSTER, IS CONSTITUTIONAL IN GENERAL AND AS APPLIED TO THE APPELLANT.

In the Appellant's third proposition of law, he argues that he should not be re-sentenced pursuant to this Court's decision in State v. Foster, 109 Ohio St.3d 1, 2006-Ohio-856, because that decision violates the Ex Post facto and Due Process Clauses of the Ohio and United States Constitutions, violated the rule of lenity, and had an unforeseeable outcome. Due to the overwhelming weight of Ohio case law to the contrary, the State of Ohio disagrees.

The scope of a re-sentencing mandate under Foster was expressly delineated in that decision, and in State v. Mathis, 109 Ohio St.3d 54, 2006-Ohio-855, at ¶¶ 23-27, 846 N.E.2d 1 (a section of that decision captioned "Appellate Review after State v. Foster"). On a remand for re-sentencing under Foster, "[t]rial courts have full discretion to impose a prison sentence within the statutory range [set forth in R.C. 2929.14(A)(1) through (A)(5)] and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences," Foster, at ¶ 100; the sentencing court "is to consider those portions of the sentencing code that are unaffected by [the Foster] decision *and impose any sentence within the appropriate felony range. If an offender is sentenced to multiple prison terms, the court is not barred from requiring those terms to be served consecutively.* While the defendants may argue for reductions in their sentences, nothing prevents the state from seeking greater penalties," Foster, at ¶ 105 (Emphasis added); See, also, Mathis, at ¶¶ 23-38.

Accordingly, the record in this case establishes that all prison terms imposed herein are

more-than-minimum terms, within the basic ranges provided in R.C. 2929.14(A)(1) (three to ten years for first-degree felonies), (A)(3) (one to five years for third-degree felonies), and (A)(4) (six to eighteen months for fourth-degree felonies), respectively. And multiple prison terms were imposed (some of them consecutively), resulting from the fact that appellant committed multiple offenses. See, *Foster*, at ¶ 105, and *Mathis*, at ¶¶ 26-27; See, also, *State v. Johnson* (1988), 40 Ohio St.3d 130, 133-134, 532 N.E.2d 1295 (“the decision whether the criminal defendant is to serve the sentences for all his crimes consecutively or concurrently is a matter of sentencing discretion, the exercise of which is committed to the trial court”).

Based on the *Foster* holding, that under *Blakely v. Washington* (2004), 542 U.S. 296, 124 S. Ct. 2531 and *United States v. Booker* (2005), 543 U.S. 220, 125 S. Ct. 738, certain provisions of Ohio’s felony sentencing scheme were unconstitutional because they required judicial fact-finding to impose maximum, more-than-minimum, or consecutive terms, Appellant suggests that a sentencing court, post-*Foster*, must impose presumptive *minimum* prison terms, and *concurrent* sentences for multiple-offense convictions. However, the *Foster* court considered that approach and emphatically rejected it: “*** We *** reject the criminal defendants’ proposed remedy of presumptive minimum sentences, for we do not believe that the General Assembly would have limited so greatly the sentencing court’s ability to impose an appropriate penalty.” *Foster*, at ¶ 89. The *Foster* court opted instead to find that the unconstitutional provisions were capable of being severed, reasoning that after such severance, in keeping with the General Assembly’s intent, the sentencing court is more properly given discretion to sentence offenders within the basic ranges for each level of felony provided in R.C. 2929.14(A)(1) – (5), and consecutively for multiple offenses, without the necessity of judicial fact-finding. The *Foster* court expressly stated “*** Excising the

unconstitutional provisions does not detract from the overriding objectives of the General Assembly, including the goals of protecting the public and punishing the offender. See R.C. 2929.11(A). The excised portions remove only the presumptive and judicial findings that relate to ‘upward departures,’ that is, the findings necessary to increase the potential prison penalty. We add no language, and the vast majority of S.B. 2, which is capable of being read and of standing alone, is left in place.” *Foster*, at ¶ 98.

Thus, while Appellant claims that he cannot be sentenced pursuant to the Ohio statutory scheme, his argument is without merit.

A. Due Process and Ex Post Facto

Appellant further argues that the decision in *Foster* is a violation of the Due Process and Ex Post Facto clause. Essentially, the Appellant is attempting to gain the benefit of *Foster’s* substantive holding, without being subject to its remedial holding. However, the Appellant’s argument must fail because there is no Ex Post Facto violation in the case at bar.

Section 10, Article I of the United States Constitution provides that “[n]o State shall * * * pass any * * * ex post facto Law.” ‘Ex Post Facto’ literally means “[a]fter the fact; by an act or fact occurring after some previous act or fact, and relating thereto ***.” Black’s Law Dictionary (6th ed. 1990) 581. As a threshold matter, the Ex Post Facto Clause applies only to criminal statutes.² *State v. Cook* (1998), 83 Ohio St.3d 404, 415, 700 N.E.2d 570, citing *California Dept. of Corrections v. Morales* (1995), 514 U.S. 499, 504, 115 S.Ct. 1597, and

² While the Ex Post Facto Clause of the United States Constitution applies only to legislative enactments, “ ‘due process places similar constraints on a court’s power to apply precedent to cases arising before the precedent was announced.’ ” *State v. Wickline*, 74 Ohio St.3d 369, 371, 1996-Ohio-19, quoting *State v. Webb* (1994), 70 Ohio St.3d 325, 330 fn.1, 638 N.E.2d 1023; see, also, *State v. Garner* (1995), 74 Ohio St.3d 49, 57, 656 N.E.2d 623.

Collins v. Youngblood (1990), 497 U.S. 37, 43, 110 S.Ct. 2715. Further, only penal statutes that disadvantage the offender affected by them will implicate the constitutional prohibition on Ex Post Facto laws. State v. Wall (2002), 96 Ohio St.3d 437, 444, 2002-Ohio-5059, 775 N.E.2d 829. In particular, the Ex Post Facto Clause applies to the following:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Rogers v. Tennessee (2001), 532 U.S. 451, 456, 121 S.Ct. 1693, 149 L.Ed.2d 697, quoting Calder v. Bull (1798) 3 U.S. (Dall.) 386, 3 U.S. 386, 1 L.Ed. 648, 3 Dall. 386.

The Ex Post Facto Clause does not apply to actions by the judiciary. Rogers, at 456, 460. Rather, it is “a limitation upon the powers of the Legislature[.] * * *” Id. at 456. Accordingly, the Supreme Court of Ohio’s remedial holding in Foster is not an Ex Post Facto law. See, generally, Id. at 458-59. Nevertheless, due process concepts of notice, foreseeability, and the right to fair warning require that “[i]f a judicial construction of a criminal statute is ‘unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,’ it must not be given retroactive effect.” Rogers, at 459; Bouie v. Columbia (1964), 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894.

To date, “[E]very Ohio Appellate District has * * * ruled that Foster did not violate the ex post facto clause or a defendant’s due process rights.” State v. Keeton, 5th Dist. No. 2007-CA-13, 2007-Ohio-6342, ¶17 (collecting cases). The reasoning for this is detailed in the following analysis from the Second District Court of Appeals:

Moreover, even if we were not bound by the mandate in *Foster*, we do not believe that the Ohio Supreme Court's holding in that case operates as an ex post facto law.

* * *

The federal appellate courts have addressed the ex post facto argument in relation to the United States Supreme Court's decision in *United States v. Booker* (2005), 543 U.S. 220, which held that the federal statutory sentencing guidelines were unconstitutional if mandatorily applied, and remedied the situation by making the guidelines advisory. See *U.S. v. Scroggins* (C.A. 5, 2005), 411 F.3d 572; *U.S. v. Duncan* (C.A. 11, 2005), 400 F.3d 1297; *U.S. v. Fairclough* (C.A. 2, 2006), 439 F.3d 76. In *United States v. Jamison*, the Seventh Circuit Court of Appeals held that the remedial holding in *Booker* did not violate the ex post facto clause. (C.A. 7, 2005), 416 F.3d 538, 539. The Court stated that "Jamison knew that he was committing a crime at the time he distributed cocaine base. The new judicial interpretation of the law brought about by *Booker* affects his punishment, not whether his conduct was innocent. Distributing cocaine base was not made a crime by the Court's decision in *Booker*. Jamison also had fair warning that distributing cocaine base was punishable by a prison term of up to twenty years, as spelled out in the United States Code. Jamison had sufficient warning of the possible consequences of his actions, and his sentence does not run afoul of any of the core concepts discussed in *Rogers*." *Id.*

* * *

we find the Seventh Circuit's rationale applicable to Smith's situation in light of the Ohio Supreme Court's decision in *State v. Foster*. Smith knew that his actions constituted a crime when he shot Dansby. The Ohio Supreme Court's decision to sever the provisions of the Ohio sentencing statutes in *Foster* affects Smith's punishment, not whether his actions constituted a criminal act. The statutory range of punishment Smith faced before the decision in *Foster* was between one and five years, and after *Foster*, Smith still faces between one and five years when his case is remanded for resentencing. Just as in *Jamison*, Smith was aware of the possible sentence he faced when committing the crime of felonious assault, and therefore, we conclude that the Ohio Supreme Court's decision in *Foster* does not violate the ex post facto clause.

State v. Smith, Montgomery App. No. CA21004, 2006-Ohio-4405, at ¶¶ 31-34.

In evaluating the case at bar, the Appellant had fair warning of the potential punishments he faced for his crimes of Aggravated Robbery, Grand Theft, Aggravated Burglary, and Burglary. At the time the Appellant was committing these illegal acts, R.C. 2929.14(A) set forth with specificity the range of possible prison terms for each felony level. Therefore, the amount of prison time to which the Appellant was exposed has not changed. Pre-*Foster*, the

Appellant faced the same amount of time that he did Post-Foster. See, R.C. 2929.14(A)(1),(3),(4). The only difference is that the trial court is not required to make certain required findings.

Furthermore, the Appellant can not claim that the holding in Foster was unexpected. This is because the Appellant committed the offenses at issue after the United States Supreme Court decided Apprendi v. New Jersey, which foreshadowed a major change in criminal sentencing law. (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435. Therefore, the Appellant was well aware that the United States Supreme Court was in the process of determining major changes in criminal sentencing law.

Thus, the Foster decision did not create an Ex Post Facto law because it was not an action done by the legislature, and because its holding was not unexpected and indefensible in reference to prior sentencing law that had the same potential punishment. Consequently, in the present case, the trial court was permitted to lawfully impose any sentence within the range set forth under R.C. 2929.14(A)(1),(3), & (4), and Appellant's argument is without merit.

What is more, the Third District in McGhee found that there were three central arguments that Federal Courts have employed in finding that Booker does not violate the Ex Post Facto clause because there has been no due process violation. See, State v. McGhee, Shelby App. No. 17-16-15, 2006-Ohio-5162. First, the Third District noted that most federal circuit courts have "held that defendants were on notice as to statutory maximums, regardless of whether the federal sentencing guidelines were mandatory." Id. at ¶ 15. In relating these Federal holdings to Ohio scenarios, the Third District stated:

Likewise, prior to *Foster*, people who decided to commit crimes were aware of what the potential sentences could be for the offenses committed. R.C. 2929.14(A). In this case, McGhee pled guilty to one count of engaging in corrupt activity, a first degree felony, for trafficking in drugs. The indictment alleged that McGhee engaged in this activity from January 2004 through March 2005. The first of McGhee's individual offenses were committed after *Apprendi*, but before *Blakely*; however, the last of McGhee's offenses were committed after *Booker*. The range of sentences available for a first degree felony remained unchanged during that time. McGhee clearly had notice that a first degree felony carried a potential penalty of three, four, five, six, seven, eight, nine, or ten years in prison.* * *. On this reasoning, we cannot find the protections of the due process clause implicated in this case.

Id. at ¶ 16.

The Third District then explored a specific holding of the Federal Circuit Court of Appeals that has jurisdiction over the State of Ohio, and noted that the "Sixth Circuit Court of Appeals found that *Booker* did not implicate the ex post facto clause for several reasons. *United States v. Barton* (6th Cir. 2006), 455 F.3d 649." *Id.* at ¶ 17. First, the Sixth Circuit determined that the "remedy announced in *Booker* was not unexpected. *Barton*, at 653-654." *Id.* The logic behind this argument was that "it would not have been a leap of logic to expect the Supreme Court to apply *Blakely* to the Guidelines in some manner." *Id.*, citing *Barton*, at 653-654.

This reasoning applies with equal force to the case at bar. Appellant has attempted to argue that the *Foster* decision changed presumptions, and thus was *unexpected*. However, the Appellant has offered no valid reason why the *Foster* decision has changed the sentencing ranges, or was so unexpected.

In Ohio, defendant's were continuously raising challenges pursuant to *Apprendi*. Therefore, the fact that a change might occur to Ohio's sentencing scheme would hardly be unexpected. The Appellant was clearly on notice that the Ohio sentencing guidelines were going to experience some change.

The second issue that arose in federal courts that the Third District evaluated was aptly

stated by the Sixth Circuit when it found “[f]or this court to find that notice is a significant concern in this situation, it would have to find that a defendant would likely have changed his or her conduct because of a possible increase in jail time.” *McGhee*, at ¶ 17 citing *Barton*, at 656. However, the Sixth Circuit expounded on this idea and deduced “it is difficult to see why a person who was intent on committing a bank robbery and who was presumably prepared to spend a lengthy period of time in prison if he or she was caught would be dissuaded by the prospect of a somewhat longer prison term. Notice concerns are, therefore, limited in this case.” *Id.*

This reasoning holds true in the case at bar. For an increase in a possible jail term would not have dissuaded Appellant from engaging in brutally and viciously murdering a family friend, which carried with it the possible sentence of death. Thus, notice concerns are extremely limited, if even present to any scintilla, in this case.

Finally, the Third District took note that the Sixth Circuit found “several circuit courts have held that the United States Supreme Court would not order ‘lower courts to engage in unconstitutional conduct.’” *Id.* at ¶ 17, citing *Barton*, supra at 659 (citing *Pennavaria*, supra; *United States v. Wade* (8th Cir. 2006), 435 F.3d 829; *United States v. Austin* (5th Cir. 2005), 432 F.3d 598; *Vaughn*, supra; *United States v. Rines* (10th Cir. 2005), 419 F.3d 1104; *Jamison*, supra; *Duncan*, supra). The Third District also noted that this conclusion “is similar to that reached by the Ohio Ninth District Court of Appeals in *Newman*.” *Id.*³

Therefore, based upon Federal Constitutional considerations, the Appellant knew the potential statutory sentence for committing a First, Third, and Forth degree felony, had notice

³ It should be noted that while the *Newman* court adopted this position, the *McGheee* court ultimately did not accept this third justification. See, *State v. Newman*, Summit App. No. CA 23038, 2006-Ohio-4082.

that Ohio's sentencing statutes were subject to judicial scrutiny, and because he was unlikely to amend his criminal behavior in light of a sentencing change, this Court should find that the *Foster* decision does not violate federal notions of due process.

What is more, pursuant to Ohio Constitutional considerations, this Court should also find the Appellant's argument to be without merit. When the Third District analyzed *Foster* in terms of the Ohio constitution, it first found that the *Foster* holding was to be retroactively applied. *McGhee*, at ¶ 21. However, the Third District continued by stating that "[e]ven though a law may apply retroactively, it is not necessarily unconstitutional. A substantive retroactive law will be held unconstitutional, while a remedial retroactive law is not. A statute is substantive if it 'impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction.'" *Id.* at ¶ 22 (internal citations omitted). After noting the difference between substantive and remedial, the Third District astutely found:

For the following reasons, we do not believe the court's holding in *Foster* creates a substantively retroactive law. As stated above, *Foster*'s holding applies retroactively in a limited number of cases. However, it does not affect a vested right or an accrued substantive right. A vested right "so completely and definitely belongs to a person that it cannot be impaired or taken away without that person's consent." *Smith*, at ¶ 20 (Resnick, J., dissenting) (quoting *Harden v. Ohio Atty. Gen.*, 101 Ohio St.3d 137, 2004-Ohio-382, 802 N.E.2d 1112, at ¶ 9 (quoting *Black's Law Dictionary* (7th Ed. 1999) 1324)). A vested right is "more than a mere expectation or interest based upon an anticipated continuance of existing law." *Id.* at ¶ 20 (quoting *In re Emery* (1978), 59 Ohio App.2d 7, 11, 391 N.E.2d 746 (citing *Moore v. Bur. of Unemp. Comp.* (1943), 73 Ohio App. 362, 56 N.E.2d 520)). "A right, not absolute but dependent for its existence upon the action or inaction of another, is not basic or vested." *Id.* (quoting *Emery*, at 11 (citing *Hatch v. Tipton* (1936), 131 Ohio St. 364, 2 N.E.2d 875)).

Under S.B. 2, Ohio's sentencing statutes created a "presumption" that a defendant would be sentenced to the lowest prison term of those available for the degree of offense. The statutes created a "presumption" that a defendant would be sentenced to concurrent sentences if more than one offense was

committed, and the statutes created a "presumption" that a defendant would not receive the maximum penalty available for any offense. Foster, at ¶ 49 ("Ohio has a comprehensive and complicated felony sentencing plan, both determinate and indeterminate in nature and containing aspects of presumptive sentencing"). By its very definition a presumptive sentence is not guaranteed. A "presumptive sentence" is "[a]n average sentence for a particular crime * * * that can be raised or lowered based on the presence of mitigating or aggravating circumstances." Black's Law Dictionary, (7th Ed. 1999) 1368. Most importantly, the defendant's sentence is dependent on the action of the judge. Even in cases where the State and defendant have negotiated a plea and the State agrees to a recommended sentence, we have not found the court bound by such a recommendation. State v. Smith, 3rd Dist. No. 14-2000-18, 2000-Ohio-1784 (citing State v. Miller (1997), 122 Ohio App.3d 111, 701 N.E.2d 390; State v. Tutt (1988), 44 Ohio App.3d 138, 541 N.E.2d 1090) ("the decision as to the sentencing of a defendant is within the sound discretion of the trial court and the trial court is not bound by any plea agreement. * * * An appellate court will not reverse a trial court's exercise of discretion in the sentence imposed is within the statutory limit and the trial court considered the statutory criteria."). These cases illustrate that a presumed sentence can be "taken away" without the defendant's consent. Therefore, we cannot find a vested right has been affected by Foster.

Nor can we find an accrued substantial right has been affected. A "substantial right" is a "right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2505.02(A)(1). We cannot find that Foster destroyed a substantial right because defendants are not entitled to enforce or protect specific sentences prior to sentencing. R.C. 2929.14(A) establishes a range of determinative sentences available for each degree of felony offense. Even under S.B.2, defendants could not expect a specific sentence because judges could make findings to sentence anywhere within the range provided by R.C. 2929.14(A). This is true even when the State and a defendant agreed on a recommended sentence, which the trial court opted not to impose. See State v. Smith, 2000-Ohio-1784 (citations omitted). Furthermore, an audit of those sentences challenged under S.B.2's "protections" will indicate the multitude of facts trial courts could rely upon in sentencing under R.C. 2929.14(B); (C); and (E)(4), so that defendants could not predict which facts a court might use in making the statutory findings. A substantial right has not been affected, and therefore, we cannot find that the retroactive application of Foster is substantive.

For the reasons stated above, we cannot find Foster in violation of Section 28, Article II of the Ohio Constitution or Article I, Section 10 of the United States Constitution. Therefore, the sole assignment of error is overruled.

Id. at ¶¶ 23-26. (Emphasis added)

Therefore, pursuant to the extremely well articulated opinion of the Third District, the Appellant has failed to demonstrate that either a vested or substantial right has been affected by *Foster*. Thus, *Foster* is not in violation of either the Ohio or the Federal Constitutions. As such, Appellant's first assignment of error is without merit.

B. *Foster* not within the purview of the rule of lenity

Contrary to the Appellant's final argument as to the *Foster* decision, the rule of lenity codified in R.C. 2901.04(A) (stating that " *** sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused") is simply not applicable to the present scenario. Appellant's argument is flawed since the rule of lenity is a rule of statutory construction, and is therefore only implemented as a last resort when two statutes are in conflict. In this case, there is no conflict between statutes or any ambiguity.

R.C. 2901.04(A) states in pertinent part: "[s]ections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused." The United States Supreme Court noted: "[w]e have repeatedly stated that the rule of lenity applies only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." *Holloway v. U.S.* (1999), 526 U.S. 1, 12, 119 S.Ct. 966. Furthermore, this Court held: "[w]hile we are required to strictly construe statutes defining criminal penalties against the state, this 'rule of lenity' applies only where there is ambiguity in or conflict between the statutes." *State v. Arnold* (1991), 61 Ohio St.3d 175, 178, 573 N.E.2d 1079. (Emphasis added) (Internal citation omitted).

There exists no ambiguity in Ohio's felony sentencing statutes because, after this Court

held that certain of its provisions were unconstitutional and void in Foster, this Court clearly and unambiguously severed the unconstitutional portions of these sentencing statutes and clearly and unambiguously stated how the remaining, constitutional portions of these statutes — to which the Court expressly added no words — would be applied. Foster, at ¶ 100 and ¶ 105, and Mathis, at ¶¶ 23-27 and ¶¶ 37-38.

Guidance on this issue can be obtained from the Eleventh District Court of Appeals in their State v. Green, Ashtabula App. Nos. 2005-A-0069 & 0070, 2006-Ohio-6695, decision.

In Green, the court found:

Green also argues in his supplemental brief that the retroactive application of Foster violates the principle of "lenity" in the construction of criminal statutes as codified at R.C.2901.04(A) ("sections of the Revised Code defining *** penalties shall be strictly construed against the state, and liberally construed in favor of the accused"). We disagree. The principle of lenity applies to the construction of ambiguous statutes, not to determinations of a statute's constitutionality or to the law regarding the retroactive effect of Supreme Court decisions. United States v. Johnson (2000), 529 U.S. 53, 59 ("[a]bsent ambiguity, the rule of lenity is not applicable to guide statutory interpretation").

Id. at ¶ 24.

Further, multiple other Ohio appellate courts have also found that the Foster decision does not violate lenity. See, State v. Sheets, Clermont App. No. CA2006-04-032, 2007-Ohio-1799; State v. Moore, Allen App. No. 1-06-51, 2006-Ohio-6860; State v. Elswick, Lake App. No. 2006-L-075, 2006-Ohio-7011; State v. Coleman, Sandusky App. No. S-06-023, 2007-Ohio-448; State v. Covington, Franklin App. No. 06AP-826, 2007-Ohio-5008. Therefore, the trial court did not err when it sentenced the Appellant, since Foster does not violate the rule of lenity. The rule of lenity applies when there is a statutory conflict, and in this case, there is no such conflict. Thus, Appellant's argument should be overruled.

C. Cunningham not applicable; but Rita is

Appellant also asserts that this Court should consider the recent case of Cunningham v. California (2007), ___ U.S. ___, 127 S.Ct. 856, and that if so considered, the decision in Cunningham would render the Foster severance remedy unconstitutional. In Cunningham, the Supreme Court held that California's determinate sentencing law was unconstitutional for allowing a judge to find facts that exposed a defendant to an "upper term" beyond the applicable statutory maximum. *Id.* at 868. However, when cases from other jurisdictions, that have considered the Cunningham case are analyzed, a different conclusion of law than what the Appellant has asserted, is reached.

In State v. Schiefelbein, 230 S.W.3d 88, 143 (Tenn.Crim.App. 2007), the court stated "[t]he Cunningham Court condemned the regime because it authorized the judge--not the jury--to find facts that permitted an upper term sentence of 16 years rather than the required 12-year middle term sentence. *Id.*, slip op. at 2." From this statement, it is clear, that the California scheme, is similar to the Pre-Foster Ohio scheme and not the Post-Foster sentencing scheme.

What is more, when turning to the concept, as applied Post-Foster in Ohio, of have discretion within a range of sentences, the Schiefelbein court found " * * the concept of employing a statutory sentencing range for discretionary sentencing, mentioned in Booker and Gomez as a marker for constitutionally permissible judge-sentencing, possibly received some affirmation in Cunningham. See Booker, 543 U.S. at 233, 125 S.Ct. at 750 ("For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."). The Cunningham Court said that the California sentencing scheme did not resemble the

"advisory system the *Booker* Court had in view" because California's judges were "not free to exercise their 'discretion to select a specific sentence within a defined range.'" *Cunningham*, slip op. at 19." *Id.* at 144-145.

Thus, the *Cunningham* case should not be read to condemn the *Foster* remedy, but in fact offers some support to the *Foster* severance remedy, which allowed for additional discretion to be given to trial courts. Further, while the Appellant mentions the *Cunningham* case, he fails to raise or mention another recent United States Supreme Court case, *Rita v. United States* (2007), __ U.S. __, 127 S.Ct. 2456. In *Rita*, the Supreme Court found that a federal appellate court may apply a presumption of reasonableness to a district court's sentence that is within the properly calculated sentencing range, and that such a presumption comports with the Sixth Amendment. *Id.* As such, *Rita* can be read to support the practice of an appellate court in Ohio to presume reasonable all Ohio trial court sentences that fall within the appropriate statutory ranges. Therefore, as the sentence in the present case falls clearly within the guideline ranges, the Appellant's sentence was reasonable and his third proposition of law should be held as meritless.

Proposition of Law No. 4:

THE PROSECUTION COMPLIED WITH ALL MANDATORY AND NECESSARY DISCOVERY REQUIREMENTS.

In his fourth proposition of law, the Appellant argues that his case should be reversed and remanded to the trial court because the State did not turn over all *Brady* material at the re-sentencing hearing. The State disagrees.

A. Brady standard

Pursuant to Brady v. Maryland (1963), 373 U.S. 83, 83 S.Ct. 1194, the State is required to disclose material evidence to defense counsel. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. The possibility that certain undisclosed information might have been helpful to the defense, or might have affected the outcome of the trial does not satisfy the requirement that the evidence be material. Moreover, the United States Supreme Court has held that the prosecution's "omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." United States v. Agurs (1976), 427 U.S. 97, 112-13, 96 S. Ct. 2392.

Further, the making of a Brady request does not grant a criminal defendant "unfettered access to government files." United States v. Phillips (C.A.7, 1988), 854 F.2d 273, 276. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." Agurs, 427 U.S. at 110-111. "As the United States Supreme Court has stressed, 'the adjective ['reasonable'] is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'" Kyles, 514 U.S. at 434, 115 S.Ct. 1555, 131 L.Ed.2d 490; see, also, Strickler v. Greene (1999), 527 U.S. 263, 289-290, 119 S.Ct. 1936, 144 L.Ed.2d 286." State v. LaMar, 95 Ohio St.3d 181, 767 N.E.2d 166, 2002-Ohio-2128, at ¶ 27.

Additionally, while the Appellant claims that the Brady standard "is not a stringent one."

App Brief, p. 29, this Court has stated otherwise. In *State v. Jackson* (1991), 57 Ohio St.3d 29, 33, 565 N.E.2d 549, this Court noted: “[t]he *Brady* test, applied in *State v. Johnston*, supra, is stringent.”

B. *Brady* with a guilty plea

The United States Supreme Court in *United States v. Ruiz* (2002), 536 U.S. 622, 122 S. Ct. 2450, held that federal prosecutors are not required to disclose impeachment information relating to informants or other witnesses before entering into a binding plea agreement with criminal defendants. The Supreme Court emphasized that it is “particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant. The degree of help that impeachment information can provide will depend upon the defendant’s own independent knowledge of the prosecution’s potential case—a matter that the Constitution does not require prosecutors to disclose.” *Id.* at 630.

The Highest Court also found:

the Constitution, in respect to a defendant’s awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor. See *Brady v. United States*, 397 U.S., at 757, 90 S.Ct. 1463 (defendant “misapprehended the quality of the State’s case”); *ibid.* (defendant misapprehended “the likely penalties”); *ibid.* (defendant failed to “anticipate” a change in the law regarding relevant “punishments”); *McMann v. Richardson*, 397 U.S. 759, 770, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (counsel “misjudged the admissibility” of a “confession”); *United States v. Broce*, 488 U.S. 563, 573, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989) (counsel failed to point out a potential defense); *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973)

(counsel failed to find a potential constitutional infirmity in grand jury proceedings). It is difficult to distinguish, in terms of importance, (1) a defendant's ignorance of grounds for impeachment of potential witnesses at a possible future trial from (2) the varying forms of ignorance at issue in these cases.

Id. at 630-631.

What is more, the Court in *Ruiz* recognized the governmental and societal interest at stake in not having to disclose all evidence during a plea bargain in the following passage: “a constitutional obligation to provide impeachment information during plea bargaining, prior to entry of a guilty plea, could seriously interfere with the Government's interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice. The Ninth Circuit's rule risks premature disclosure of Government witness information, which, the Government tells us, could “disrupt ongoing investigations” and expose prospective witnesses to serious harm.” *Id.* at 631-632. The Supreme Court therefore found that to hold any other way would “require the Government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea-bargaining process of its main resource-saving advantages. * * * We cannot say that the Constitution's due process requirement demands so radical a change in the criminal justice process in order to achieve so comparatively small a constitutional benefit.” *Id.* at 632.

Combining these legal principles with the governmental and societal interests, the Supreme Court to conclude that “the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.” *Id.* at 633. (Emphasis added)

Therefore, as the Appellant plead guilty, he was not entitled to the information that he now claims was error for the State to withhold. Further, he fails to demonstrate how he was

prejudiced in any way from this supposed lack of information, when he would have been able to cross examine potential witnesses about these issues, if he had not chosen to plea guilty. Finally, while the Appellant now wants all of this information in an attempt to blame others for his crimes, (a direct contravention to his original trial tactic of pleading guilty and accepting responsibility) it must be pointed out that when it came time for his actual sentencing, neither the Appellant, nor his attorney, ever said one word about any of this supposedly critical and material evidence.

As such, it is hard to fathom how this evidence was so material to the Appellant's re-sentencing hearing, when the Appellant himself never said one iota about any of these pieces of evidence when he had that chance. Appellant's assignment of error should be overruled.

C. Raising claims that are not "new"

In State v. Chinn, 85 Ohio St.3d 548, 564-565, 709 N.E.2d 1166, 1999-Ohio-288, Chinn wanted, upon a sentencing remand, to raise matters that he claimed he could have presented, but did not present during the mitigation phase of his original trial. However, this Court found that in that type of situation, "Chinn was not entitled to an opportunity to improve or expand his evidence in mitigation" simply because a remand was issued for the trial court "to reweigh the aggravating circumstance and mitigating factors." *Id.* at 565. Thus, Chinn stands for the proposition that a criminal defendant can not introduce new evidence at a re-sentencing hearing that could have been presented during the first hearing, but was not.

This is exactly what the Appellant in the case at bar was trying to accomplish. The entire point of his request for new discovery was an attempt to supplement what could have been, but was not presented at his first mitigation hearing. However, per this Court's decision

in Chinn, the Appellant was not entitled to present these matters. Thus, it is axiomatic that if these matters cannot be presented, then they cannot form the basis for a valid Brady claim. As such, the Appellant's arguments are without merit.

The Appellant may argue that logic of Chinn has been called into question by the recent case of Davis v. Coyle, 475 F.3d 761 (6th Cir. 2007). However, Chinn is distinguishable from Davis v. Coyle, because the Chinn evidence was not 'newly discovered' or post-sentence evidence as it was in Davis. This important distinction between new or post-sentence evidence versus pre-existing evidence is seen in the authority that the Sixth Circuit cited in making its decision. In Davis, the Sixth Circuit used the following case law to make its decision: "Skipper, 476 U.S. at 8, 106 S.Ct. 1669, requires that, at resentencing, a trial court must consider any new evidence that the defendant has developed since the initial sentencing hearing. See, e.g., Robinson v. Moore, 300 F.3d 1320, 1345-48 (11th Cir.2002) (counsel is obliged to present newly available evidence at resentencing, although failure to do so in that case was not prejudicial); Smith v. Stewart, 189 F.3d 1004, 1008-14 (9th Cir.1999) (failure to investigate and present additional evidence at resentencing constitutes ineffective assistance of counsel); Spaziano v. Singletary, 36 F.3d 1028, 1032-35 (11th Cir.1994) (Lockett requires trial court to consider any new evidence that the parties may present at a resentencing hearing); Alderman v. Zant, 22 F.3d 1541, 1556-57 (11th Cir.1994) (at resentencing hearing, trial court must consider reliable evidence of relevant developments occurring after defendant's initial death sentence)." Davis, 475 F.3d, 774 (Emphasis added)

Davis relied on the foundation of new evidence and should only be read to allow new evidence to be admitted when a case is remanded for a new sentencing hearing. As such, Chinn is still authoritative, and the Appellant's assignment of error should be overruled.

D. Specific issues in the present case

I. *Gabbard and Williams*

The State of Ohio would first assert that because the Appellant plead guilty, he was not entitled to many, if any, of the items that he now basis a *Brady* violation on. See, *Ruiz*, 122 S. Ct. 2450. Additionally, the State would argue that pursuant to this Court's decision in *Chinn*, that Appellant was not entitled to improve or alter his position with evidence that could have been raised at the previous sentencing hearing, but was not. *Chinn*, 1999-Ohio-288. Finally, the request for all information relating to the commission of illegal activities at 706 East Avenue, should be denied because the information is not material.

The duty to disclose information concerning individuals who have some relationship to this case, does not include all information about those individuals, no matter the relevance or materiality. The information must be material to the Appellant's resentencing. As such, the Appellant's vague and overly broad request should be denied as the information requested is outside the scope of *Brady*.

However, even if this Court were to evaluate the merits of this claim, the Appellant's argument would fail on the facts. Specifically, Appellant in this section of his argument complains that he was entitled to more information concerning Donald Williams and Mary Gabbard. The Appellant requested information that the Donald Williams was involved in a criminal enterprise, that Williams sold drugs for property, and that Williams had the victims property. (See, Appellant's Brief, p. 23) In a similar vein, Appellant wanted information about Mary Gabbard and the facts that she sold drugs, was a prostitute, and that Williams was in some fashion, her pimp. (*Id.*)

The intriguing reality of this request, is that the Appellant already knew about this

information. At the hearing to support the Appellant's guilty plea, on January 28, 2004, (hereinafter "HSGP") Mary Gabbard testified. In said testimony, Gabbard admitted having a possession of drugs charge, petty theft charges, a check charge, and two prostitution charges. (HSGP, p. 42) Further, Gabbard stated that the Appellant came to Donald Williams place after stealing from the victim to try and trade the victim's belongings for crack cocaine. (*Id.* at 45) She also admitted that she was able to get this crack cocaine for his. (*Id.*) Further, Gabbard admitted on cross-examination that she sold cocaine, fenced property, prostituted herself from Williams' 706 East Avenue address, that 706 East Avenue was a place where criminal enterprises occurred, and that the head of these criminal operations was in fact Donald Williams. (*Id.* at 53-54) Gabbard also admitted that the Butler County Sheriff's Department had raided the 706 East Avenue address, leading to the arrest of herself and Williams. (*Id.* at 55)

What is more, Gabbard also discussed her and Williams arrest records, that Williams did not go to prison in association with the raid. (*Id.* at 57) Further, while Gabbard did not know the answers, she was asked about Williams having his charges dropped, and whether or not he was a confidential informant. (*Id.*) However, she denied working for him, a subtle reference to possibly denying him being her pimp. (*Id.* at 54)

With all of this testimony, coupled with the fact that the Appellant's counsel obviously knew about all of these facts, it is impossible to see where a Brady violation exists. All of the complained of items, were not only obviously known, but were also testified to and subject to cross-examination. As such, no violation can be supported, and this claim is without merit.

II. Possible impairment

Appellant next claims that he wanted any information relating to his possible impairment at the time that he was arrested. Again, the State would assert that he is either not entitled to this information due to its immateriality, or the fact that he plead guilty. Further, the State would argue that this information, to the extent that it was know to the State, was testified to and also known by the Appellant.

In the present case, the Appellant was originally taken to the Hamilton police station at 7:30p.m., on February 25, 2003. (*Motion to Suppress Hrg., Vol. 1, p. 44*). According to the detectives, Appellant was able to understand them and give coherent statements. (Id. at 9-10, 41, 97, 105). Additionally, many of the detectives that interviewed the Appellant noticed the smell of alcohol on his breath when he was first brought to the police station, but did not believe him to be in a diminished mental state. (*Suppression Hearing, p. 41, 97, 105, 152*). Any further information from an untrained police officer would have been speculation. Thus, the police, at the Motion to Suppress, did testify to all of the details that they knew about the Appellant's degree of possible impairment.

Further, defense counsel also evaluated a possible NGRI plea, but it was determined that appellant was competent to stand trial and an insanity plea could not be sustained by expert opinion. (*Pretrial, Jan. 20, 2004, p. 4*). What is more, while defense counsel did not retain a specific substance abuse expert, both of the psychologists who testified at the mitigation hearing did discuss appellant's substance abuse and its relevance to his crime and his state of mind. Specifically, Dr. Bobbie Hopes testified that appellant has been diagnosed as both alcohol dependent and poly-substance dependent. (*Mitigation Hrg., p. 13*).

Therefore, any possible Brady material was either already known, or was not subject to

disclosure pursuant to *Chinn* and *Ruiz*. *Ruiz*, 122 S. Ct. 2450; *Chinn*, 1999-Ohio-288. As such, Appellant's argument is without merit.

III. Jasper and Hestor

All of the information that the Appellant requests in this subsection is not *Brady* material or was not subject to disclosure pursuant to the standard as enunciated in *Ruiz*. *Ruiz*, 122 S. Ct. 2450. This is especially true in light of the Supreme Court's statement in *Ruiz* that: "[c]onsequently, the Ninth Circuit's requirement could force the Government to abandon its "general practice" of not "disclos[ing] to a defendant pleading guilty information that would reveal the identities of cooperating informants, undercover investigators, or other prospective witnesses." Brief for United States 25. It could require the Government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea-bargaining process of its main resource-saving advantages. Or it could lead the Government instead to abandon its heavy reliance upon plea bargaining in a vast number-90% or more-of federal criminal cases. We cannot say that the Constitution's due process requirement demands so radical a change in the criminal justice process in order to achieve so comparatively small a constitutional benefit." *Id.*, at 633. Thus, as the Appellant plead guilty, there was no Constitutional requirement for the information concerning Jasper and Hestor, that the Appellant now requests.

Further, the State of Ohio would also point out that all of this additional discovery seems to 'fly in the face' of the reason that the Appellant plead guilty. This Court has stated: "Ketterer is not a sympathetic defendant. He brutally murdered a family friend because he felt that his friend had been disrespectful to him when Ketterer asked to borrow some money.

After the ruthless murder, Ketterer stole whatever he could find and traded the ill-gotten goods for cocaine." *Ketterer*, 2006-Ohio-5283, at ¶ 209, (Lundberg Stratton, J., concurring). Due to these horrific facts, and the unsympathetic nature of the Appellant, the Appellant's original trial strategy was to accept responsibility and ask the trial court for mercy.

However, upon remand, the Appellant appears to want to try a new strategy, which is to blame others and substances for his actions. But, the Appellant is not entitled to this second bite at the apple, and he is not entitled to any additional information to aid him in this second strategy that he did not use at his first sentencing hearing. See, *Chinn*, 1999-Ohio-288. As such, this Court should overrule the Appellant's arguments as to Jasper and Hestor.

IV. Re-sentencing, not re-trial

In a final catch-all argument, the Appellant argues that the *Brady* standard is *not stringent* and that the State should give over all exculpatory information. (Appellant's Brief, p. 29)(Emphasis added) Again, the State disagrees.

First, it should be clarified that this Court has noted that "[t]he *Brady* test, applied in *State v. Johnston*, supra, is stringent." *Jackson* (1991), 57 Ohio St.3d at, 33. (Emphasis added) This Court continued, in finding that "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Id.*, citing *Agurs*, 427 U.S., at 109-110; see *United States v. Bagley* (1985), 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481. As the test is stringent, and for the reasons stated in argument sections 'B-D,' the Appellant was either not Constitutionally entitled to, or was given all material that the State possessed. The Appellant's argument, is therefore without merit.

What is more, the Appellant appears to want a new trial when he argues “[t]he prosecution’s case would look much different if the prosecution disclosed all of the evidence.” (Appellant’s Brief, p. 30) But, it is critical to remember that this Court remanded Appellant’s case back for re-sentencing on the non-capital charges. Ketterer, 2007-Ohio-1722. Nowhere in that remand were any of the Appellant’s convictions found infirm, or was there any indication that the capital sentence was improper. Thus, any information that went to trying to reduce culpability or blame another was not proper for this remand.

Finally, after the trial court denied the Appellant’s motion for all of this supposedly needed Brady material, the Appellant never mentioned Mary Gabbard, Donald Williams, Tyrone Jasper, Scott Hestor, or that he was impaired at the time of these crimes during his re-sentencing hearing! The Appellant merely argued Foster issues and that he has a mental illness. (Re-Sentencing T.p. 14-18) Thus, while the Appellant has argued to this Court that he needs this additional information, when presented with the perfect opportunity to argue these points during the re-sentencing hearing, the Appellant said nothing about any of these items.

For all of the aforementioned reasons, the State argues that the Appellant’s forth proposition of law is without merit.

Proposition of Law No. 5:

WHEN A DEFENDANT HAS ALREADY HAD HIS CONVICTIONS AFFIRMED BY A COURT OF REVIEW, NEITHER A TRIAL COURT NOR A PANEL OF THREE JUDGES WOULD BE VESTED WITH JURISDICTION TO ENTERTAIN A MOTION TO WITHDRAW A GUILTY PLEA.

In Appellant's fifth proposition of law, he complains that his case should be remanded because the three judge panel, and not the presiding judge, should have decided his motion to withdraw his guilty plea. However, in light of the clear case precedent which would give neither the three judge panel, nor a single judge the jurisdiction to even entertain said motion, the State of Ohio disagrees.

In State v. Thompson, Lucas App. No. L-05-1213, 2006-Ohio-1224, at ¶ 25, the court found that "[i]n reviewing a trial court's decision of whether to grant or deny a motion to withdraw a guilty plea, an appellate court is limited to a determination of whether the trial court's decision constituted an abuse of discretion." Citing, State v. Zinn, 4th Dist. No. 04CA1, 2005-Ohio-525, at ¶ 14. In defining the parameters of what constitutes such an abuse, the court used the well settled law that "[a]n abuse of discretion involves more than a mere error of judgment; it suggests an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary. Id., citing State v. Clark (1994), 71 Ohio St.3d 466, 470 (citation omitted). Thus, for the Appellant to prevail on the instant proposition, he must show that the single judge did not make an error in judgment, but demonstrated an attitude that was unconscionable. As the Appellant cannot make such a demonstration, for the reasons argued below, this proposition of law should be denied.

A. Decision was correct

I. No jurisdiction

In the case of *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 97-98, 378 N.E.2d 162, 9 O.O.3d 88, this Court specifically stated that: "Crim.R. 32.1 does not vest jurisdiction in the trial court to maintain and determine a motion to withdraw the guilty plea subsequent to an appeal and an affirmance by the appellate court. While Crim.R. 32.1 apparently enlarges the power of the trial court over its judgments without respect to the running of the court term, it does not confer upon the trial court the power to vacate a judgment which has been affirmed by the appellate court, for this action would affect the decision of the reviewing court, which is not within the power of the trial court to do. Thus, we find a total and complete want of jurisdiction by the trial court to grant the motion to withdraw appellee's plea of guilty and to proceed with a new trial."

In following this Court's decision, the Twelfth District Court of Appeals found "[a]fter the direct appeal of a judgment is decided, the trial court has no jurisdiction to consider a defendant's Crim.R. 32.1 motion to withdraw his guilty plea, and the trial court is correct in dismissing the motion. (Crim.R. 32.1 does not vest jurisdiction in the trial court to maintain and determine a motion to withdraw the guilty plea subsequent to an appeal and an affirmance by the appellate court); *State v. Laster*, Montgomery App. No. 19387, 2003-Ohio-1564, ¶ 9, appeal not allowed, 94 Ohio St.3d 1434, 2002- Ohio-5651; *State v. Green*, Stark App.2004CA00229, 2005-Ohio----, ¶ 7, appeal not accepted, 106 Ohio St.3d 1558, 2005-Ohio-5531." *State v. Allen*, Warren App. No. CA2006-01-001, 2006-Ohio-5990, at ¶ 13 (Internal citations omitted).

Therefore, in *Allen*, the court held that "[t]he trial court in the case at bar was without

jurisdiction to consider appellant's post-sentence motion to withdraw his guilty plea on count six. It was proper to dismiss appellant's motion." *Id.* at ¶ 15. As such, the rule of law is that after a direct appeal and affirmance of the conviction, a trial court is without jurisdiction to entertain a motion to withdraw a guilty plea, and must dismiss the motion. See, State v. Sanchez, Defiance App. No. 4-06-31, 2007-Ohio-218, ¶ 16 (Appellate court's "judgment affirming the finding of guilt is 'controlling upon the lower court as to all matters within the compass of the judgment' and, therefore, the trial court had no jurisdiction to consider Sanchez's motion, much less to allow him to withdraw his guilty plea and grant a new trial.")

In the present case, this Court affirmed the Appellant's convictions and remanded solely for re-sentencing. Therefore, the trial court was without jurisdiction to do anything but deny and dismiss the Appellant's motion to withdraw his guilty plea, which was exactly what the court did. (See, Order Denying Defendant's Motion To Withdraw Guilty Pleas, dated June 21, 2007) As such, the argument of the Appellant is truly one that appear to present the legal paradox of whether it matters which judge, or panel of judges is completely divested of any form of jurisdiction to even entertain the motion to withdraw the guilty plea, and are therefore, duty bound to dismiss the motion. While the State will assert, and later argue, that the judge was correct in ruling on this motion, it is hard to fathom what possible prejudice or harm the Appellant has suffered when even if the three judge panel had ruled, the ruling had to be the same as neither the single judge nor the panel had any jurisdiction to rule any other way. As such, any potential irregularity would merely be a procedural irregularity that was harmless. The Appellant's argument is therefore without merit.

II. Law of the case

What is more, in State v. Cvijetinovic, Cuyahoga App. No. 82894, 2003-Ohio-7071, ¶ 17, the court addressed this issue by not only finding that a court would be without authority to consider this type of motion to withdraw a guilty plea, but also found that any ruling to the contrary would violate the law of the case doctrine. "The doctrine of the 'law of the case' provides that a 'decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.'" *Id.* at ¶ 18, citing Nolan v. Nolan (1984), 11 Ohio St.3d 1, 3, 462 N.E.2d 410.

Therefore, according to the Cvijetinovic court, when "at a rehearing after remand, a judge 'is confronted with substantially the same facts and issues as were involved in the prior appeal, the [judge] is bound to adhere to the appellate court's determination of the applicable law.' *Id.* 'Absent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.' *Id.* at syllabus. A judge is without authority to extend or vary the mandate given. *Id.* at 4, 462 N.E.2d 410." [Emphasis added.] State v. Kincaid (Dec. 14, 2000), Cuyahoga App. No. 77645." *Id.*

As such, in the present case not only would any ruling other than a dismissal have been a violation of the lower court's jurisdiction, but it also would have violated the law of the case doctrine. The Appellant's argument is without merit and the Appellant has suffered no harm or prejudice as a result of the single judge's ruling.

B. No jurisdiction to expand on mandate

As previously stated, the mandate from this Court stated that this case was remanded “to the trial court for resentencing on the noncapital offenses in accordance with *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.” *Ketterer*, 2007-Ohio-1722 (Table). “On remand, a trial court must obey the mandate of the court of appeals.” *State v. Roper*, Summit App. No. 22988, 2006-Ohio-3661, at ¶ 10, citing *State ex rel Davis v. Cleary* (1991), 77 Ohio App.3d 494. As such, “[t]he remand order gives the trial court jurisdiction to carry out the directive of the court of appeals.” *Id.*, citing *International Union of Operating Engineers, Local 18 v. Wannemacher Co.* (1990), 67 Ohio App.3d 672, 675. This principle of law dictates that an “action by the trial court inconsistent with the mandate of the appellate court exceeds the trial court's authority and constitutes error.” *Id.*

Therefore, in the case at bar, the trial court was also without jurisdiction to entertain the Appellant's motion because to do so would have been an incorrect expansion of this Court's mandate. It is beyond cavil that the trial court did not prejudice the Appellant when only one judge denied his motion as the *Roper* case would call into question whether any judge, or for that matter, any panel of judges, should have even entertained this motion. The *Roper* court found it was error, although harmless error, for the trial court to even consider Appellant's motions to withdraw his pleas/vacate his pleas and the State's motion to reconsider. *Id.* at ¶¶ 11-12. As such, the trial court in the Appellant's case, was not permitted to entertain the Appellant's motion, and no reversible error can be assigned to the single judge denying the Appellant's motion to withdraw his guilty plea.

C. Stumpf is not a foundation

Even without all of the aforementioned jurisdictional mandates, the Appellant's argument is still without merit as the entire foundation of his argument is ambiguous dicta. The foundation of the Appellant's argument is the case of State v. Stumpf (1987), 32 Ohio St.3d 95, 512 N.E.2d 598. In Stumpf, this Court stated "[t]he three-judge panel questioned appellant extensively prior to accepting his guilty plea. He indicated that he made an informed and knowledgeable plea, with full realization as to its effect. Based upon appellant's guilty plea and the evidence adduced at his sentencing hearing, we cannot say that the panel abused its discretion or that appellant met his burden of showing that manifest injustice had occurred. Thus, we uphold the panel's decision not to permit appellant to withdraw his plea." Stumpf, 32 Ohio St.3d at 104-105. This language is merely this Court using the correct noun, 'the panel', to describe who had taken the action of denying the motion. The language should not be read as a holding of law, as the Appellant attempts to argue, that this Court expressly found that the panel was the correct 'who' to have made this ruling. Thus, this language does not condone or promote the procedure that was used, and clearly does not establish case precedent in this type of situation. As such, that language in the Stumpf case is of little guidance.

However, when the litigation that has continued to occur in the Stumpf case is examined, there is guidance to be found. When the Sixth Circuit Court of Appeals had the Stumpf case pending before it, an express statement of law was made. The Sixth Circuit, in discussing the motion to withdraw the guilty plea stated: "However, the fact that the panel did not grant Stumpf's motion to withdraw his guilty plea does not dictate * * *. Second, only two of the three judges on the original panel were still alive when Stumpf brought his motion.

Stumpf's contention that his motion should have been heard by three judges was rejected * * *. Under Ohio Rev.Code § 2945.06, then, only one judge's opinion was required to deny Stumpf's motion. However, under the same provision, unanimity was required as to questions of guilt and penalty." *Stumpf v. Mitchell*, 367 F.3d 594, 617, 2004 Fed.App. 0124P (C.A. 6 2004), reversed on other grounds, *Bradshaw v. Stumpf*, 545 U.S. 175, 125 S.Ct. 2398. (Emphasis added)

Thus, as the Sixth Circuit expressly stated "only one judge's opinion was required to deny" the motion. *Id.* As such, there can be no error assigned to the present case when only one judge denied Appellant's motion. Appellant's fifth proposition of law should accordingly be denied.

Proposition of Law No. 6:

A DEFENDANT CANNOT ASSERT ERRORS THAT HAVE ALREADY BEEN DETERMINED.

In proposition of law six, Appellant claims that his guilty plea was not knowingly, intelligently, and voluntarily entered. While the State of Ohio disagrees, the crux of this proposition is that this Court itself already has disagreed with this issue when it was previously, and properly, before this Court. This issue is barred by res judicata.

"Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant * * * on an appeal from that judgment." *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, ¶ 17, quoting *State v. Perry* (1967), 10 Ohio St.2d 175, 39 O.O.2d 189, 226 N.E.2d 104, paragraph nine of the syllabus. By the

plain language of Perry, the doctrine of res judicata is directed at procedurally barring convicted defendants from relitigating matters that were, or could have been, litigated on direct appeal.

As such, res judicata precludes a defendant, who has had his day in court, to have a second day on the same issue. Saxon, 2006-Ohio-1245, at ¶ 18. "In so doing, res judicata promotes the principles of finality and judicial economy by preventing endless relitigation of an issue on which a defendant has already received a full and fair opportunity to be heard." Id., citing State ex rel. Willys-Overland Co. v. Clark (1925), 112 Ohio St. 263, 268, 147 N.E. 33. Further, whether the original claim or argument explored all the possible theories of relief is not relevant. "It has long been the law of Ohio that 'an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit. (Emphasis added.) * * * The doctrine of res judicata requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it." Natl. Amusements, Inc. v. Springdale (1990), 53 Ohio St.3d 60, 62, 558 N.E.2d 1178, 1180, quoting Rogers v. Whitehall (1986), 25 Ohio St.3d 67, 69, 25 OBR 89, 90, 494 N.E.2d 1387, 1388.

To overcome the res judicata, competent, relevant, and material evidence that is outside the record must demonstrate that the petitioner could not have appealed the constitutional claim based upon information in the original record. State v. Smith (1997), 125 Ohio App.3d 342, 348; State v. Lawson (1995), 103 Ohio App.3d 307, 315. The evidence outside the record, therefore, must not be evidence that was in existence and available for use at the time of trial and that could and should have been submitted at trial if the defendant wished to use it. State v. Goff (March 05, 2001), Clinton App. No. CA2000-050014, 2001

WL 208845, at *2 , unreported. Moreover, if the evidence outside the record is only “marginally significant and does not advance the petitioner's claim beyond a mere hypothesis and a desire for further discovery,” res judicata still applies to bar the claim. *Id.*, citing *Lawson*, 103 Ohio App.3d at 315.

In the present case, Appellant claims that his guilty plea was not knowingly given, that he did not understand the ramifications of his guilty plea, that his trial counsel was ineffective, and that evidence that existed at that time should have been brought forth. However, not only are all of these claims nonmeritorious, but they have all been decided in the State's favor by this Court. As such they are barred by the doctrine of res judicata.

A brief list of excerpts from this Court's October 25, 2006 decision is enlightening to this point. See, generally, *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283.

First, as to the issue of the guilty plea, this Court stated:

In proposition II, Ketterer argues that he did not "knowingly, intelligently, and voluntarily" waive a jury trial and enter a guilty plea. Ketterer further argues that the trial court did not adequately inform him of his rights, particularly in view of his mental illness and medication.

Contrary to Ketterer's claims, the record establishes that Ketterer consulted with his lawyers and was competent to be tried, plead guilty, make decisions about his case, and communicate with his attorneys. Further, the record is clear that Ketterer understood what he was doing by waiving a jury trial and pleading guilty as charged to the indictment.

Ketterer, 2006-Ohio-5283, at ¶¶13-14.

This Court went on to find:

In challenging the voluntariness of his guilty plea, Ketterer again challenges the sufficiency of the trial court's inquiry into the medication he was taking. Again, we find no error. Ketterer also asserts deficiencies in his understanding of the legal process based on the pretrial competency report. But that report was issued 11 days before Ketterer pleaded guilty. Thus, that report was issued before counsel had lengthy discussions with Ketterer and before the trial court's inquiry on his jury waiver and guilty plea.

Here, the trial court fully complied with the requirements to accept a guilty plea.

See State v. Turner, 105 Ohio St.3d 331, 2005-Ohio-1938, 826 N.E.2d 266, ¶ 33-34; State v. Ballard (1981), 66 Ohio St.2d 473, 20 O.O.3d 397, 423 N.E.2d 115, paragraph one of the syllabus; Crim.R. 11(C)(2)(c). We hold that the inquiry was adequate. * * *

In this case, the trial court conducted a thorough inquiry in open court to ensure that Ketterer's guilty plea was made knowingly, intelligently, and voluntarily. The court informed Ketterer at length of the possible sentences that could be imposed on the aggravated murder charge as well as the other charges, that a separate hearing would be held to determine the penalty on the aggravated-murder charge, and that the three-judge panel would determine, after hearing evidence, what penalty to impose.

Ketterer, 2006-Ohio-5283, at ¶¶ 75-77.

What is more, in regards to the ineffective assistance claims, this Court was asked to determine these issues, and held as follows: “[i]n proposition I, Ketterer contends that when defense counsel advise their client to plead guilty to a capital offense without first securing an agreement that a life sentence be imposed, they are per se ineffective. * * *. Accordingly, we reject proposition I.” Ketterer, 2006-Ohio-5283, at ¶¶80, 90.

Finally, this Court has also determined more specific issue that surrounded an ineffective assistance of counsel claim:

In proposition IV, Ketterer claims that his attorneys provided ineffective assistance in maintaining the attorney-client relationship and in failing to secure the suppression of evidence, obtain DNA testing, object to death specifications, and assist effectively in presenting mitigation evidence. We will discuss these ineffective-assistance claims separately.

* * *

Ketterer has not established either deficient performance or prejudice, both of which Strickland requires in order to demonstrate ineffective assistance of counsel. For the foregoing reasons, we overrule proposition IV.

Ketterer, 2006-Ohio-5283, at ¶¶ 100, 114.

With all of the aforementioned already determined, it is beyond cavil that all of Appellant's claims in proposition of law six are barred by the doctrine of res judicata. As such, the State asks that this Court deny proposition of law six, and decline to give the Appellant another bite at the proverbial legal apple.

CONCLUSION

For the foregoing reasons, this Court should affirm the re-sentencing of the Appellant.

Respectfully submitted,

ROBIN N. PIPER (0023205)
Butler County Prosecuting Attorney



MICHAEL A. OSTER, JR. (0076491)

[Counsel of Record]

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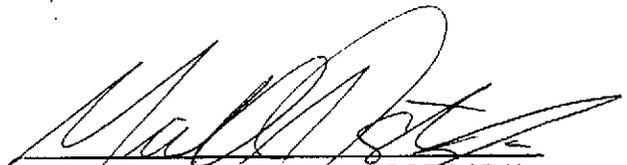
PROOF OF SERVICE

This is to certify that a copy of the foregoing Merit Brief of Appellee, State of Ohio, was sent to:

RANDALL L. PORTER [*counsel of record*]
Assistant State Public Defender
8 East Long Street, 11th Floor
Columbus, OH 43215

SETH L. GILBERT [*counsel of record*]
Assistant Prosecuting Attorney
373 South High Street—13th Floor
Columbus, Ohio 43215

by U.S. ordinary mail this 18th day of December, 2007.



MICHAEL A. OSTER, JR. (0076491)

Assistant Prosecuting Attorney

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

CASE NO. 2007-1261

Appellee,

vs.

DONALD J. KETTERER,

Appellant.

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APPENDIX OF APPELLEE, THE STATE OF OHIO

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COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

STATE OF OHIO

Plaintiff

vs.

DONALD JOSEPH KETTERER

Defendant

CASE NO. CR2003-03-0309

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

AMENDED RE-SENTENCING
JUDGMENT OF CONVICTION ENTRY
{NUNC PRO TUNC: May 29, 2007}

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

PROSECUTING ATTORNEY, BUTLER COUNTY, OHIO
P.O. BOX 515, HAMILTON, OH 45012-0515

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 Mandatory in this case up to a maximum of 5 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.

{This *nunc pro tunc* entry is necessary to properly and legally reflect the Court of Common Pleas Judgement of Conviction that was originally entered on May 24, 2007, and journalized on May 29, 2007}.

APPROVED AS TO FORM:

ENTER

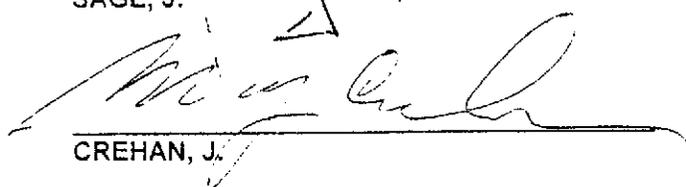
ROBIN N. PIPER
PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO



ONEY, J.



SAGE, J.



CREHAN, J.

MAO/beg
May 25, 2007
November 7, 2007 amended

PROSECUTING ATTORNEY, BUTLER COUNTY, OHIO
P.O. BOX 515, HAMILTON, OH 45012-0515

THE UNITED STATES CONSTITUTION

Article. I.

Section. 10.

Clause 1: No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Clause 2: No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

Clause 3: No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

R.C. § 2929.03

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure

Chapter 2929. Penalties and Sentencing (Refs & Annos)

Penalties for Murder

→2929.03 Imposing sentence for a capital offense; procedures; proof of relevant factors; alternative sentences

<Note: See also following version of this section with later effective date.>

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose sentence on the offender as follows:

(1) Except as provided in division (A)(2) of this section, the trial court shall impose one of the following sentences on the offender:

(a) Life imprisonment without parole;

(b) Life imprisonment with parole eligibility after serving twenty years of imprisonment;

(c) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(d) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard. The instruction to the jury shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but the instruction shall not mention the penalty that may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 of the Revised Code, the trial court shall impose sentence on the offender as follows:

(a) Except as provided in division (C)(1)(b) of this section, the trial court shall impose one of the following sentences on the offender:

(i) Life imprisonment without parole;

(ii) Life imprisonment with parole eligibility after serving twenty years of imprisonment;

(iii) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iv) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(2)(a) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be one of the following:

(i) Except as provided in division (C)(2)(a)(ii) of this section, the penalty to be imposed on the offender shall be death, life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(ii) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the penalty to be imposed on the offender shall be death or life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(b) A penalty imposed pursuant to division (C)(2)(a)(i) or (ii) of this section shall be determined pursuant to divisions (D) and (E) of this section and shall be determined by one of the following:

(i) By the panel of three judges that tried the offender upon the offender's waiver of the right to trial by jury;

(ii) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental

examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to one of the following:

(a) Except as provided in division (D)(2)(b) of this section, to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, to life imprisonment without parole.

If the trial jury recommends that the offender be sentenced to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the sentence is a sentence of life imprisonment without parole imposed under division (D)(2)(b) of this section, the sentence shall be served pursuant to section 2971.03 of the Revised Code. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Except as provided in division (D)(3)(b) of this section, one of the following:

(i) Life imprisonment without parole;

(ii) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iii) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Except as provided in division (E)(2) of this section, one of the following:

(a) Life imprisonment without parole;

(h) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(c) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating

circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. For cases in which a sentence of death is imposed for an offense committed before January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. For cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G)(1) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed before January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

(2) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed on or after January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the supreme court.

(2004 H 184, eff. 3-23-05; 1996 H 180, eff. 1-1-97; 1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96; 1995 S 4, eff. 9-21-95; 1981 S 1, eff. 10-19-81; 1972 H 511)

<Note: See also following version of this section with later effective date.>

R.C. § 2929.03, OH ST § 2929.03

Current through 2007 File 36 of the 127th GA (2007-2008),
apv. by 12/7/07, and filed with the Secretary of State by 12/7/07.

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R.C. § 2929.11

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Title XXIX. Crimes--Procedure

*Chapter 2929. Penalties and Sentencing (Refs & Annos)*Felony Sentencing➔**2929.11 Overriding purposes of felony sentencing**

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

(C) A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.

App. R. Rule 12

Baldwin's Ohio Revised Code Annotated Currentness

Rules of Appellate Procedure

Title II. Appeals from Judgments and Orders of Court of Record

→ **App R 12 Determination and judgment on appeal****(A) Determination**

(1) On an undismissed appeal from a trial court, a court of appeals shall do all of the following:

(a) Review and affirm, modify, or reverse the judgment or final order appealed;

(b) Determine the appeal on its merits on the assignments of error set forth in the briefs under App.R. 16, the record on appeal under App.R. 9, and, unless waived, the oral argument under App.R. 21;

(c) Unless an assignment of error is made moot by a ruling on another assignment of error, decide each assignment of error and give reasons in writing for its decision.

(2) The court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A).

(B) Judgment as a matter of law

When the court of appeals determines that the trial court committed no error prejudicial to the appellant in any of the particulars assigned and argued in the appellant's brief and that the appellee is entitled to have the judgment or final order of the trial court affirmed as a matter of law, the court of appeals shall enter judgment accordingly. When the court of appeals determines that the trial court committed error prejudicial to the appellant and that the appellant is entitled to have judgment or final order rendered in his favor as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and render the judgment or final order that the trial court should have rendered, or remand the cause to the court with instructions to render such judgment or final order. In all other cases where the court of appeals determines that the judgment or final order of the trial court should be modified as a matter of law it shall enter its judgment accordingly.

(C) Judgment in civil action or proceeding when sole prejudicial error found is that judgment of trial court is against the manifest weight of the evidence

In any civil action or proceeding which was tried to the trial court without the intervention of a jury, and when upon appeal a majority of the judges hearing the appeal find that the judgment or final order rendered by the trial court is against the manifest weight of the evidence and do not find any other prejudicial error of the trial court in any of the particulars assigned and argued in the appellant's brief, and do not find that the appellee is entitled to judgment or final order as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and either weigh the evidence in the record and render the judgment or final order that the trial court should have rendered on that evidence or remand the case to the trial court for further proceedings; provided further that a judgment shall be reversed only once on the manifest weight of the evidence.

(D) All other cases

In all other cases where the court of appeals finds error prejudicial to the appellant, the judgment or final order of the trial court shall be reversed and the cause shall be remanded to the trial court for further proceedings.