

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Appellee, : Case No. 2007-1261
-vs- : Appeal taken from Butler County
DONALD J. KETTERER, : Court of Common Pleas
: Case No. CR 2003-03-0309
Appellant. : This is a death penalty case.

REPLY BRIEF OF APPELLANT DONALD J. KETTERER

RANDALL L. PORTER (0005835)
Counsel of Record
Assistant State Public Defender
Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394 (Voice)
(614) 644-0703 (Facsimile)
COUNSEL FOR APPELLANT

Robin N. Piper (0023205)
Butler County Prosecuting Attorney
MICHAEL A. OSTER, JR. (0076491)
Counsel of Record
Assistant Prosecuting Attorney
315 High Street, 11th Floor
Hamilton, Ohio 45012-0515
(513) 887 3474 (Voice)
(513) 887-3429
COUNSEL FOR APPELLEE

RON O'BRIEN (0017245)
Franklin County Prosecuting Attorney

SETH L. GILBERT (0072929)
Counsel of Record
STEVEN L. TAYLOR
Assistant Prosecuting Attorneys
373 South High Street, 13th Floor
Columbus, Ohio 43215
(614) 462-3555 (Voice)
(614) 462-6103 (Facsimile)

COUNSEL FOR AMICUS CURIAE

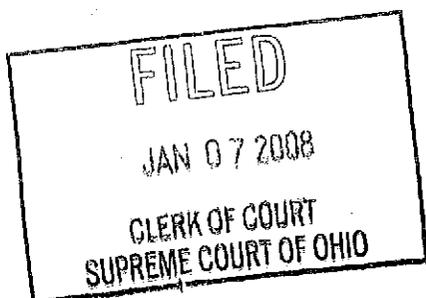


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PROPOSITION OF LAW NO. I

A DEFENDANT'S SENTENCE IS VOID WHEN THE TRIAL COURT FAILS TO PROPERLY ADVISE HIM CONCERNING POST RELEASE CONTROL ON ALL COUNTS.

The State concedes that the three judge panel erred when it imposed sentence in open court and subsequently journalized its entry. [Appellee's Merit Brief, pp. 3-5]. The State spends its entire Proposition suggesting various means by which this Court can avoid finding those errors prejudicial. The State's efforts violate this Court's principle that a trial court at sentencing should clearly and unambiguously notify a defendant as to all of the aspects of his sentence. *Woods v. Telb*, 89 Ohio St. 3d 504, 2000-Ohio-171, 733 N.E.2d 1103, Syllabus ¶ 1; *State v. Jordan*, 104 Ohio St. 3d 21, 2004-Ohio-6085, 817 N.E.2d 864, Syllabus ¶1; *State v. Brooks*, 103 Ohio St. 3d 134, 2004-Ohio-4746, 814 N.E.2d 837, Syllabus ¶1.

The State, in urging this Court to ignore the errors of the three judge panel, relies almost exclusively on this Court's decision in *Watkins v. Collins*, 111 Ohio St. 3d 425, 2006-Ohio-5082, 857 N.E.2d 78. [Appellee's Brief, pp. 4-6]. This Court therein expressly limited its holding to habeas corpus cases "[c]onsequently, in accordance with our general precedent, habeas corpus is not available to contest any error in the sentencing entries, and petitioners have or had an adequate remedy by way of appeal to challenge the imposition of post release control." *Id.* at ¶53. Because Donald Ketterer is now before this Court on direct appeal, *Watkins v. Collins* is inapposite.

A. THE THREE PANEL, IN OPEN COURT, IMPOSED A VOID SENTENCE.

The State suggests that this Court can ignore the three judge panel's error at the sentencing hearing because it simply constituted a "lapse of the tongue." [Appellee's Merit Brief, pp. 3-4]. The State claims that the panel corrected this "lapse of the tongue" in its subsequent

statement in open court by stating “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 consecutive to Count One.” (emphasis added by Appellee) [Appellee’s Brief, p. 4]. The State suggests that this statement placed Donald Ketterer on notice as to the imposition of post release control on Count 3 because the referenced twenty-two years included the sentence imposed on Count 3. [Appellee’s Brief, p. 4]. This argument would have required Donald Ketterer to ignore the three judge panel’s clear, but incorrect statement as to which counts it was imposing post release control. The trial court’s mere reference to twenty-two years did not place him on notice that the court’s initial pronouncement was in error. The panel’s reference to “Counts Two through Five” also did not place him on notice. Count Four charged the offense of Theft, a fourth degree felony, for which the panel could not have imposed post release control.

The State argues, in the alternative, that the mistake was not material because the longest period for which the panel could have imposed post release control was five years, and it did in fact impose five years post release control on Counts 2 and 5. [Appellee’s Brief, p. 5]. The statute, however, clearly required that the panel court impose post release control for each count that was either a first or second degree felony. *State v. Jordan*, 2004-Ohio-6085 at ¶ 20.

B. THE PANEL COULD NOT AND DID NOT CORRECT THE ERROR IN ITS RE-SENTENCING ENTRY

The State asserts that the panel corrected its “lapse of the tongue” in its re-sentencing entry. [Appellee’s Brief, pp. 5-6]. The panel, however, could not employ its re-sentencing entry to correct the “lapse of the tongue.” A trial, court to properly impose post release control, must correctly inform the defendant in *both* open court and in the sentencing entry. *State v. Jordan*, 2004-Ohio-6085, at Syllabus 1 (“When sentencing a felony offender to a

term of imprisonment, a trial court is required to notify the offender at the sentencing hearing about post release control and *is further required to incorporate that notice into its journal entry imposing sentence.*") (emphasis added). The panel's tardy addition of post release control as to Count 3 in the re-sentencing entry violated Donald Ketterer's right to be present for sentencing. *State v. Jordan*, 2004-Ohio-6085, ¶17, n.2. See also *State v. Haymon*, Stark App. No. 2005CA00163, 2006-Ohio-3296, 2006 Ohio App. LEXIS 3196, ¶ 14; *State v. Mullens*, Summit App. No. C.A. No. 23758, 2007-Ohio-5678, 2007 Ohio App. LEXIS 5002, ¶7; *State v. Quinones*, Cuyahoga App. No. 89221, 2007-Ohio-6077, 2007 Ohio App. LEXIS 5339, ¶ 4.

Even assuming the panel had the authority in its resentencing entry to correct the error, it instead therein exacerbated the error. The relevant part of the resentencing entry provides that the "Court has notified the defendant that post release control is in this case up to a maximum of [sic] years...." [Appellant's Merit Brief, A-10]. The panel neglected to "fill in" the appropriate number of years. Thus the resentencing entry did not provide the requisite information. *State v. Jordan*, 2004-Ohio-6085, at Syllabus 1.

C. THE PANEL'S AMENDED RESENTENCING ENTRY DID NOT CORRECT THE PRIOR ERRORS.

Since Donald Ketterer submitted his initial brief, the three judge panel placed of record an amended resentencing entry. [Appellee's Brief, A. 1-2]. After a party files a notice of appeal, a trial court retains only such jurisdiction which is not inconsistent with the reviewing court's authority to reverse, modify, or affirm the judgment. *Howard v. Catholic Social Service of Cuyahoga County* (1994), 70 Ohio St. 3d 141, 146, 637 N.E.2d 890; *State ex rel. Rock v. School Employees Ret. Brd.* (2002), 96 Ohio St. 3d 206, 207, 772 N.E.2d 1197. The three judge panel's effort to rewrite what was said in open court at the May 24, 2007 re-sentencing hearing and contained in the first re-sentencing entry was inconsistent with this Court's jurisprudence.

What the panel said in open court at the resentencing hearing was the issue on appeal. Consequently, the panel lacked jurisdiction to “lapse of the tongue” in the amended resentencing entry.

Even if the panel had jurisdiction, it lacked the authority to enter a *nunc pro tunc* entry. This type of pleading cannot be used to supply omitted action, or to indicate what the panel might or should have decided, or what the panel intended to decide. Its proper use is limited to what the panel actually did. *State ex rel. Fogle, et. al. v. Steiner, Judge, et al.* (1995), 74 Ohio St. 3d 158, 164, 656 N.E.2d 1288; *State ex rel. Cruzado v. Zaleski*, 111 Ohio St. 3d, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 19. In the present case the three judge panel in the *nunc pro tunc* entry was attempting to add a judicial release provision that it had failed to include in open court. This was improper. The correct remedy was to hold a new sentencing for Mr. Ketterer. *State v. Bezak*, 114 Ohio St. 3d 94, 2007-Ohio-3250, 868 N.E.2d 961, ¶ 16; *State v. Harris*, Cuyahoga App. No. 89128, 2007-Ohio-6850, 2007 Ohio App. LEXIS 5990, ¶ 14.

This Court should sustain Proposition of Law No. I

PROPOSITION OF LAW NO. II

A TRIAL COURT’S SENTENCING MUST BE VACATED IF IT DOES NOT CONTAIN THE INFORMATION MANDATED BY CRIM. R. 32(B).

The State of Ohio concedes that the Resentencing Judgment of Conviction Entry does not contain Donald Ketterer’s guilty plea. [Appellee’s Merit Brief, p. 8] (“it is true that the actual two words, guilty plea, are not found directly in the Amended Resentencing Judgment Entry of Conviction”). It follows from the state’s admission that the entry does not meet the express requirements of Crim. R. 32(C) that provides that a “judgment of conviction shall set forth the plea, the verdict or findings, and the sentence.”

This Court has jurisdiction to hear appeals taken directly from the trial courts in capital cases. § 2(B)(2)(c), Article 4 of the Ohio Constitution. R.C. 2505.03 restricts the appellate jurisdiction of this Court to the review of final orders, judgments and decrees. *State ex rel. Downs v. Panioto, Judge*, 107 Ohio St. 3d 347, 2006-Ohio-8, 839 N.E.2d 911 at 17; *State ex rel. Keith v. McMonagle*, 103 Ohio St. 3d 430, 2004-Ohio-5580, 816 N.E.2d 597 at ¶3.

To constitute a final appealable order, a judgment entry must meet the requirements of R.C. 2505.02 and if applicable, Crim. R. 32(C). *Chef Italiano Corp. v. Kent St. Univ.* (1989), 44 Ohio St. 3d 86, 88, 541 N.E.2d 64. A final appealable order consists of both a conviction and sentence. Crim. R. 32(C); *State v. Henderson* (1979), 58 Ohio St. 2d 171, 178, 389 N.E.2d 494; *State v. Vlad*, 153 Ohio App. 3d 74, 2003-Ohio-2930, 790 N.E.2d 1246, ¶10.

The State initially urges this Court to find that the error in the sentencing entry is harmless because this Court, when it originally reviewed Mr. Ketterer's direct appeal, found that he had pled guilty. [Appellee's Brief, p. 8]. The State misses the point. The issue is not whether Mr. Ketterer pled guilty, but whether the Re-sentencing Judgment Entry Conviction constitutes a final appealable order. If the entry is flawed, this Court has no jurisdiction.

The State alternatively suggests that this Court, pursuant to App. R. 12(B), "simply insert the words, guilty plea, into the Amended Re-Sentencing Judgment of Conviction." [Appellee's Brief, p. 9]. For this Court to accept this suggestion, it must possess jurisdiction over the appeal. The flaw in the sentencing entry deprives this Court of jurisdiction. In addition, appellate courts are precluded from adding matter to the record that was never before the trial court. *State v. Ishmail* (1978), 54 Ohio St. 2d 402, 405-406, 377 N.E.2d 500. This preclusion encompasses documents that were inadvertently omitted from the court file. *State v. Pless*

(1996), 74 Ohio St. 3d 333, 658 N.E.2d 766, Syllabus 1. This Court should extend this preclusion to appellate court's altering of documents contained in the trial court file.

This Court should sustain Proposition of Law No. II.

PROPOSITION OF LAW NO. III

A DEFENDANT MAY NOT BE RESENTENCED PURSUANT TO A STATUTORY SCHEME IN WHICH THE REQUIREMENT FOR ADDITIONAL FACT FINDING TO IMPOSE GREATER THAN THE MINIMUM AND CONSECUTIVE SENTENCES WAS ELIMINATED SUBSEQUENT TO HIS GUILTY PLEAS.

The Amicus Curiae claims the *Foster* remedy left intact the provisions of the statutory sentencing scheme, which preserve the goals of community safety, the seriousness of the offense, and the likelihood of recidivism. [Amicus Curiae Brief, pp. 5-6]. What it fails to acknowledge is that this Court preserved those goals at the expense of the principle that defendants equally situated should be treated equally by different courts. The Amicus Curiae does observe that “trial courts now have full discretion to impose non-minimum, maximum and consecutive sentences without making statutory findings,.” [*Id.* at p. 4]. It was the statutory fact finding that insured that trial judges did not impose totally arbitrary sentences and that similarly situated defendants were treated equally. Amicus Curiae claims that parties still “may pursue appeals of right when the sentence is contrary to law.” [*Id.* at p. 5]. Those appeals are now restricted to whether the trial court imposed a sentence within the statutory provisions, which in effect provides a defendant with little to no protection. The trial court can impose maximum, consecutive sentences on a first time offender and the defendant has little to no chance to prevail on appeal.

A. THE FOSTER REMEDY IS CONSTITUTIONALLY INFIRM.

Amicus Curiae concedes that an unexpected and indefensible judicial construction of a statute can constitute a violation of both the Ex Post Facto and the established notions of due process. [Amicus Curiae Brief, p. 6]. It contends however, the severance remedy in *Foster* does not constitute such a construction as to violate due process. This assertion is incorrect.

1. *Donald Ketterer did not have fair warning of the severance remedy.*

Amicus Curiae initially attempts to distinguish *Bouie v. City of Columbia* (1964), 378 U.S. 347, 84 S. Ct. 1967 by claiming that the *Foster* remedy was not the result of a “judicial construction” of the sentencing statutes, but rather the product of “constitutional challenges” to the statutory sentencing scheme. [Amicus Curiae Brief, p. 8]. Amicus Curiae offers no support for this distinction. There is no basis in logic or fact for this distinction. The constitution challenge resulted in this Court’s judicial construction of the statute. Most, if not all judicial constructions of a statute will be the product of challenges to the statute in question. Otherwise, the courts would have no reason to issue an opinion interpreting the statute.

Amicus Curiae then proceeds to argue that it was foreseeable that this Court would *both* find the statute unconstitutional *and* sever the statute in such a manner as to delete all protections afforded the defense, such as the requirement that the trial court make certain factual findings prior to imposing consecutive sentences. [Amicus Curiae Brief, pp. 8-9]. Amicus Curiae offers no citation to support its conclusion that a defendant could foresee *both* that this Court would find that the statute unconstitutional *and* that the remedy of severance will be employed to create a much different and onerous statute. This unsupported notion is rebutted by common sense. As previously discussed, the revised statute affords a defendant much fewer

protections. No rational defendant would have challenged the statute, if he or she knew that a victorious result would result in a statute that afforded not more, but fewer protections to defendants.

B. The statutory fact finding requirements constituted elements with respect to the sentences which a trial court was authorized to impose.

Amicus Curiae rejects the elements argument because “he [Donald Ketterer] assumes that sentence findings requirements were part of the statutory scheme at the time he committed the offenses. For cases not yet final, the rule is that a finding of unconstitutionality invalidates the statutory provision ab initio... Under this principle, the sentence-finding provisions were unconstitutional and severable and from the beginning and never were the law.” [Amicus Curiae Brief, p. 10].

This “principle” has been limited to civil cases. *See Roberts v. Treasurer* (2001), 147 Ohio App. 3d 403, 410-11, 770 N.E.2d 1085 (collecting cases). This “principle” cannot render void the Ex Post Facto Clause and Due Process provisions of the United States Constitution.

Even if this principle could overrule provisions of the Federal Constitution, it would not be applicable in the present case. This Court limited the *Foster* severance remedy to prospective application, it only applies to cases that were pending on direct appeal at the time of the decision. *State v. Foster*, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d 470 at ¶ 104 . The principle, upon which the State relies, does not apply in those cases in which the court expressly limited its decision to prospective application. *State ex rel. Bosch v. Indus. Comm.* (1982), 1 Ohio St. 3d 94, 98, 438 N.E.2d 415; *Lakeside Ave., L.P. v. Cuyahoga Bd. of Revision* (1999), 85 Ohio St. 3d 125, 127, 707 N.E.2d 472.

The Amicus Curiae also claims that the issue of severability is a matter of state law. [Amicus Curiae Brief, p. 11]. This is true, but only to the extent that the state court is interpreting state rules, statutes and other authority concerning whether severability is permitted and the manner in which it is permitted. It is an issue of constitutional significance whether the severed statute results in a violation of the federal constitutional. For instance, if this Court had severed the sentencing statutes to result in disparate treatment of African Americans and other minorities, a discrimination challenge could be brought based upon the Constitution.

C. General Due Process Principles Lend Support to Donald Ketterer's Due Process Arguments.

Amicus Curiae initially asserts that “Defendant’s attempt to equate the *Foster’s severance remedy* with an ex post facto law is unconvincing. As noted above , ex post facto principles do not apply to judicial decision making. [Amicus Curiae, p. 12]. This contradicts its earlier concession that “In *Bouie v. City of Columbia* (1964), 378 U.S. 347, the United States Supreme Court held as a matter of due process that if a judicial construction of a criminal statute is ‘unexpected and indefensible by reference to law which had been expressed prior to the conduct in issue’ it must not be given retroactive effect.” [Amicus Curiae Brief, p. 6, quoting Hall, *General Principles of Criminal Law* (2d ed. 1960) at 61.] Whether this Court conducts its analysis in terms of ex post facto or due process, the same limitations are involved. *Rogers v. Tennessee* (2001), 532 U.S. 451, 456, 121 S. Ct. 1693.

Amicus Curiae spends a substantial portion of its Brief distinguishing *Miller v. Florida* (1987), 482 U.S. 423, 107 S. Ct. 2446. [Amicus Curiae Brief, pp. 13-15]. Donald Ketterer has already addressed most of those arguments. Amicus Curiae does argue that *Foster* is distinguishable because the new sentencing system “still allows defendants to receive minimum, concurrent sentences in the judge’s discretion.” [Amicus Curiae Brief, p. 15]. Prior to *Foster*,

defendants had a right to minimum concurrent sentences unless trial judges made certain findings, as opposed to exercising their discretion. The Supreme Court in *Foster* concluded that this exact type of change in a sentencing scheme rendered the sentence constitutionally infirm:

Petitioner has been 'substantially disadvantaged' by the change in sentencing laws. To impose a 7-year sentence under the old guidelines, the sentencing judge would have to depart from the presumptive sentence range of 3 1/2 to 4 1/2 years. As a result, the sentencing judge would have to provide clear and convincing reasons in writing for the departure on facts proved beyond a reasonable doubt, and his determination would be reviewable on appeal. By contrast, because a 7-year sentence is within the presumptive range under the revised law, the trial judge did not have to provide any reasons, convincing or otherwise for imposing sentence, and his decision is unreviewable.

Miller v. Florida, 482 U.S. at 423.

This is the exact situation in the present case. A trial judge, at the time of the commission of the offenses for which Donald Ketterer was convicted, could only impose non-minimum, maximum and consecutive sentences after providing reasons in writing that were subject to appellate review. Since *Foster*, trial judges and the panel in this case did not have to provide any reasons and as long as the sentences fell within the statutory ranges, their decisions are unreviewable.

This Court should sustain Proposition of Law No. III.

PROPOSITION OF LAW NO. IV

THE PROSECUTION IS REQUIRED TO PROVIDE THE DEFENDANT WITH EXCULPATORY EVIDENCE WHICH IS MATERIAL TO SENTENCING.

The State begins its argument by claiming that because Donald Ketterer pled guilty, it was not required to provide him with exculpatory, impeaching evidence. [Appellee's Brief, pp. 25-27]. The State, to support its argument, relies entirely upon *United States v. Ruiz* (2002), 536 U.S. 622, 122 S. Ct. 2450. [*Id.*]. The State characterizes the *Ruiz* holding as follows:

1) “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,” [Appellee’s Brief, p. 25]; 2) “the Court in *Ruiz* recognized the governmental and societal interest at stake in not having to disclose all evidence during a plea bargain;” [*Id.* at p. 26]; and 3) “the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant” [*Id.* at p. 26, quoting *Ruiz* at 633].

In the present case Donald Ketterer pled guilty without the benefit of a plea bargain. Thus, *Ruiz* has no applicability. *Ruiz* is distinguishable on another basis. Though Donald Ketterer pled guilty, he was still entitled to an evidentiary hearing to contest his guilt. *See* Crim. R. 12(C)(3). In addition, he still had to run the gauntlet of a contested mitigation hearing. The defendant in *Ruiz*, if he had pled guilty, did not face the prospect of contested guilt and sentencing hearings and being sentenced to death, but instead only receiving a reduced sentence. *Ruiz* did not overrule *Brady v. Maryland* (1963), 373 U.S. 83, 83 S. Ct. 1194 in which the Court held that a defendant was entitled to exculpatory information with regard to a capital sentencing hearing.

The State asserts that the evidence in question could not have been material because “neither the Appellant, nor his attorney, ever said one word about any of this supposedly critical and material evidence.” [Appellee’s Brief, p. 27]. The reason that neither Appellant nor his attorney never said one word about the evidence was that the panel overruled Donald Ketterer’s motion to disclose exculpatory evidence. Donald Ketterer did not rely upon the exculpatory evidence at the re-sentencing because the State refused to grant him access to the evidence.

Finally, the State asserts that Donald Ketterer was only entitled to present new evidence at his resentencing. The State defines “new” as evidence which implicates facts or events which have transpired since the original sentencing hearing. [Appellee’s Brief, p. 28]. Appellee cites to a long quote from *Davis v. Coyle* (6th Cir. 2007), 475 F.3d 761 to support its proposition. [*Id.*]. Nowhere in the lengthy quotation does the Court of Appeals define the term “new evidence.” The cases cited by Sixth Circuit in *Davis v. Coyle* do not support the State’s proposition that “new evidence” is limited to evidence which was not available at the time of the first sentencing hearing. *Spaziano v. Singletary* (11th Cir. 1994), 36 F.3d 1028, 1035 (trial judge entered order which permitted the defendant to present at re-sentencing “any evidence he might have and to respond to the PSI Report.”); *Smith v. Stewart* (9th Cir. 1999), 189 F.3d 1004, 1012 (trial counsel was ineffective at the resentencing hearing for failing to adduce additional “evidence of Smith’s mental illnesses and background [which] was readily available to Rempe which, cumulatively, might have had an effect on the sentencing judge.”); *Robinson v. Moore* (11th Cir. 2002), 300 F.3d 1320, 1347 (Counsel at the resentencing hearing was not ineffective because “most of the new mitigation evidence is cumulative of the nonstatutory mitigating circumstances presented during resentencing.”). In none of the cases did the courts attempt to limit the defense to presenting evidence at the resentencing which was not available at the time of the original sentencing.

Donald Ketterer, by filing his motion for disclosure of favorable evidence, attempted to gain access to evidence that was not available to him at the time of the original sentencing. The State’s suppression of the evidence precluded him from presenting it at the first sentencing hearing. Donald Ketterer should not now be penalized and barred from presenting at

the re-sentencing hearing, the evidence that the State hid from him at the first sentencing hearing. *See Amadeo v. Zant* (1988), 486 U.S. 214, 222, 108 S. Ct. 1771.

A. The State Suppressed Exculpatory Evidence as to Gabbard and Williams

The State claims that Donald Ketterer already had all of the relevant information concerning Gabbard and Williams. [Appellee’s Merit Brief, pp. 30-31]. However, the State does not claim that in discovery it provided any of the evidence that it asserts constitutes the exculpatory evidence as to Gabbard and Williams.

The State, despite repeated requests, has never provided information regarding Williams and Gabbard concerning 1) their histories of working with local law enforcement agencies; 2) the potential charges they faced as a result of the raid on the premises at 706 East Avenue, 3) any deals or consideration they may have received in return for their cooperation, and 4) whether they were working as informants when they had contact with Donald Ketterer in regard to the homicide. The complexion of this case changes dramatically if two government informants were actively involved in the planning and murder of the decedent.

B. The State Suppressed Exculpatory Evidence as to Donald Ketterer’s Impairment.

The State again claims that Donald Ketterer currently possesses all of the relevant information concerning his alcohol and drug impairment at the time of the offense and his arrest. [Appellee’s Brief, p. 31]. The State supports its conclusion by citing to eight pages of the transcript in which there was testimony concerning his level of impairment. [*Id.*]. The State does not claim that it provided any information on this issue in discovery. The fact that some witnesses may have testified as to Donald Ketterer’s impairment does not relieve the State of its duty to provide the exculpatory information in its possession concerning his impairment. The prosecution should be required to provide to Donald Ketterer the reports contained in the law

enforcement files pertaining to those individuals who witnessed his alcohol and drug impairment.

C. The State Suppressed Exculpatory Evidence As To Jasper and Hestor.

The State relies upon *United States v. Ruiz* for its assertion that it was not required to disclose the impeaching information as to these two jail house informants. [Appellee's Brief, p. 32]. As previously discussed herein, that case is distinguishable. The State does not claim that Donald Ketterer possessed the exculpatory information as to these two individuals.

The State accuses Donald Ketterer of attempting to try to change trial strategy by now blaming other individuals, as opposed to his trial strategy of accepting blame by entering guilty pleas. [Appellee's Brief, p. 33]. At the time of his second custodial statement Donald Ketterer told the officers that Williams and Gabbard were involved in the offense. At trial he did not go forward with evidence of Williams and Gabbard's involvement because the State suppressed the supporting evidence which supported this defense.

D. The Suppressed Evidence Was Relevant to the Re-Sentencing Proceedings.

The State accuses Donald Ketterer of confusing materiality with respect to trial and sentencing. [Appellee's Merit Brief, p. 34]. This is incorrect. The facts of the offenses affect the sentences that a trial court or panel imposes.

Exculpatory evidence claims are driven by the facts of the individual case. The facts warranted disclosure in the present case. Cellmark Laboratories determined that the hair found on both of the victim's hands did not belong to the victim or Petitioner. Donald Ketterer told the investigating officers that Donald Williams and Mary Gabbard were involved in this instant offense. Williams possessed information concerning the offenses and some of the

property which was stolen. Gabbard was with Donald Ketterer on the night of the offenses and had supplied him with drugs during that time period. Both Gabbard and Williams were persons of interest. The panel erred when it failed to order disclosure as 1) to the two individuals of interest, 2) Donald Ketterer's impairment, and 3) any consideration provided to any third parties who the State identified as potential witnesses.

This Court should sustain Proposition of Law No. IV.

PROPOSITION OF LAW NO. V

WHEN A DEFENDANT IN A CAPITAL CASE WAIVES HIS RIGHT TO A JURY AND A THREE JUDGE PANEL ACCEPTS HIS GUILTY PLEAS AS TO BOTH THE CAPITAL AND NON CAPITAL CHARGES CONTAINED IN THE INDICTMENT, THE PANEL AND NOT THE PRESIDING JUDGE SHOULD DECIDE THE DEFENDANT'S SUBSEQUENT MOTION TO WITHDRAW HIS GUILTY PLEAS.

The gravamen of Donald Ketterer's proposition is that the wrong entity ruled on his motion to withdraw his guilty pleas; the three judge panel and not the presiding judge should have ruled on the motion. The State spends the majority of its response claiming that various legal doctrines, such as the law of the case, dictated the presiding judge's ruling. [Appellee's Brief, pp. 35-39]. The State's argument misses the point. Donald Ketterer is not, in this Proposition of Law, contesting the correctness of the ruling. He is only contesting the entity that made the ruling.¹

The State contends that the Sixth Circuit definitively decided this issue in *Stumpf v. Mitchel* (6th Cir. 2004), 367 F.3d 594, 617. [Appellee's Brief, pp. 40-41]. The State is incorrect. First, it is not the job of the federal habeas court to decide issues involving the proper interpretation of state statutes. *Bradshaw v. Richey* (2005), 546 U.S. 74, 76, 126 S. Ct. 602 ("We

¹ Donald Ketterer will address the merits of the ruling in the Sixth Proposition of Law.

have repeatedly held that that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.")

Consistent with the United States Supreme Court holding in *Richey*, the Sixth Circuit in *Stumpf* did not decide the issue of whether the presiding judge or the three judge panel rules on post-judgment motions. The relevant part of the Sixth Circuit's opinion in *Stumpf* reads as follows:

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 by the Ohio Supreme Court:

R.C. 2945.06 expressly provides that "the judges or a majority of them may decide all questions of fact and law arising upon the trial. . . ." Unanimity is mandated only when the panel finds a defendant guilty or not guilty. Whether appellant was entitled to withdraw his guilty plea or to a new sentencing hearing were questions of law, properly determined by a majority of the panel.

State v. Stumpf (1987), 32 Ohio St. 3d 95, 105, 512 N.E.2d 598, 609.

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.

The State focuses, to the exclusion of the other language in the quotation, upon the following language "Under Ohio Rev. Code § 2945.06, then, only one judge's opinion was required to deny Stumpf's motion." [Appellees Brief, p. 41]. The Sixth Circuit therein did not hold that one judge could preside or rule on a post-judgment motion. Instead, the Sixth Circuit was only observing that because one of the judges on Stumpf's panel had died, there remained only two judges and therefore if one judge voted against a post-judgment motion, it was sufficient to deny the motion because the proponent of the motion could not obtain a majority of the judges remaining on the panel.

This Court's decision in *State v. Stumpf*, 32 Ohio St. 3d 95, 97, 98, 105, 512 N.E. 2d 598 resolved this issue when it interpreted R.C. 2945.06. The State's reliance on a tortured reading of *Stumpf v. Bradshaw* highlights the weakness of its position.

This Court should sustain Proposition of Law No. V.

PROPOSITION OF LAW NO. VI

A DEFENDANT'S GUILTY PLEA, TO BE KNOWING AND INTELLIGENTLY ENTERED, MUST BE BASED UPON AN ACCURATE UNDERSTANDING OF THE FACTS AND APPLICABLE LAW.

The State does not address the merits of this issue. Instead, it claims because Donald Ketterer raised this issue on his first direct appeal to this Court he is now precluded from raising the issue in the present appeal. [Appellee's Brief, pp. 41-44]. The situation now before this Court is analogous to a post-conviction proceeding. Given these similarities, this Court's rulings are instructive with respect to the incorrectness of the State's reliance upon the affirmative defense of *res judicata*.

A defendant will be barred from raising a claim in post-conviction that he could have fully and fairly litigated on direct appeal. *State v. Perry* (1967), 10 Ohio St. 2d 175, 178-180, 226 N.E.2d 104. However, he will not be barred if his post-claim is totally dependent upon evidence *de hors* the record. *State v. Milanovich* (1975), 42 Ohio St. 2d 46, 50, 325 N.E.2d 540; *State v. Mishelek* (1975), 42 Ohio St. 2d 140, 141, 326 N.E.2d 659. Similarly, he will not be barred if the claim is supported by evidence outside the record, as well as evidence contained in the appellate record. *State v. Smith* (1985), 17 Ohio St. 3d 98, 477 N.E.2d 1128. In *Smith*, trial counsel did not file a notice of alibi. The lack of notice was apparent in the record, but counsel's

reason for not filing the notice was not contained in the record. Because the issue could not be *fully* litigated on direct appeal, it was not subject to the bar of res judicata. *Id.* at 101 n.1.²

Although some of the factual basis for Donald Ketterer's Motion to Withdraw his Guilty Pleas was contained in the record on his first direct appeal to this Court, when this Court remanded his case, he submitted non record evidence to support to support his Motion.³ He attached thirty-two exhibits to his motion including his own affidavit [Exhibit 1]; affidavits from two individuals with whom he had discussed his understanding of the guilty pleas [Exhibits 2-3]; and the affidavit of Dr. Bob Stinson who opined that Donald Ketterer lacked the necessary reading level to meaningfully understand the forms that he signed at the time he entered his plea. [Exhibit 5]. These five exhibits, as well as the other twenty-seven exhibits attached to the motion, placed his guilty pleas in a totally different light, than what existed at the time of his first direct appeal. Therefore, Donald Ketterer has properly raised this Proposition and this Court should address the merits.

This Court should sustain Proposition of Law No. VI

CONCLUSION

For the reasons contained in his Initial Brief, this Reply Brief, and any other reasons apparent on the face of the record, Appellant Donald Ketterer requests that this Court vacate the noncapital sentences imposed by the three judge panel. He further requests that this Court remand this matter with instructions that the three judge panel to grant his Motion to

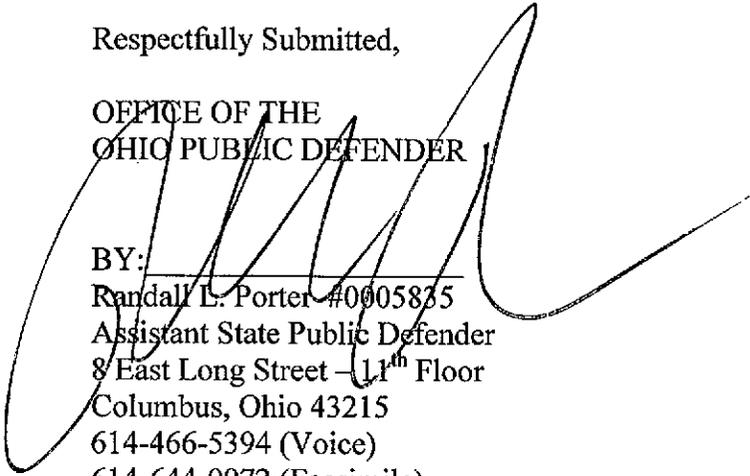
² When evidence is not contained in the direct appeal record (filed initially with the trial court during the proceedings in that court), it cannot be supplemented into the appellate record. *State v. Ishmail*, 54 Ohio St. 2d 402, 405-406, 377 N.E.2d 500 (1978).

³ The exhibits Donald Ketterer submitted to support his Motion were initially attached to his post-conviction petition.

Disclose Exculpatory Evidence, after which the panel rule on his Motion to Withdraw his Guilty Pleas, and then, only if necessary, resentence him on the noncapital charges.

Respectfully Submitted,

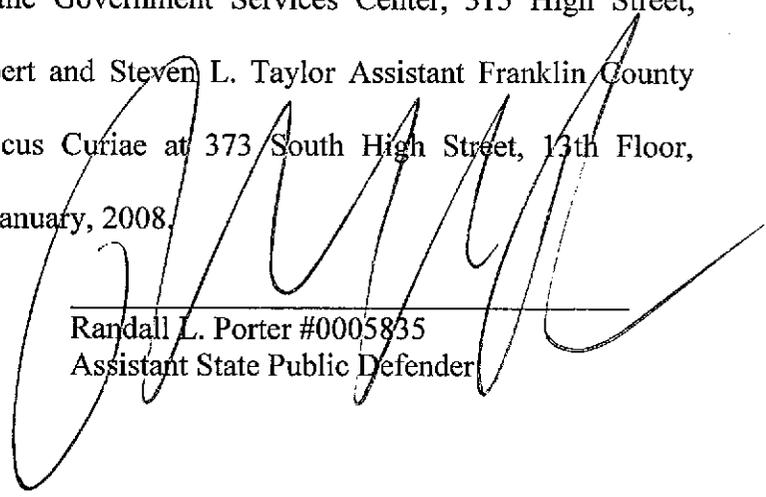
OFFICE OF THE
OHIO PUBLIC DEFENDER

BY: 
Randall L. Porter #0005835
Assistant State Public Defender
8 East Long Street – 11th Floor
Columbus, Ohio 43215
614-466-5394 (Voice)
614-644-9972 (Facsimile)

Counsel for Donald Ketterer

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply Brief of Appellant Donald J. Ketterer was forwarded by first-class U.S. Mail, postage prepaid to Michael A. Oster, Jr. Assistant Butler County Prosecuting Attorney at the Government Services Center, 315 High Street, Hamilton, Ohio 45011 and Seth L. Gilbert and Steven L. Taylor Assistant Franklin County Prosecuting Attorneys, Counsel for Amicus Curiae at 373 South High Street, 13th Floor, Columbus, Ohio 43215 on this 7th day of January, 2008.


Randall L. Porter #0005835
Assistant State Public Defender

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Appellee, : Case No. 2007-1261
-vs- : Appeal taken from Butler County
DONALD J. KETTERER, : Court of Common Pleas
: Case No. CR 2003-03-0309
Appellant. : This is a death penalty case.

APPENDIX TO REPLY BRIEF OF APPELLANT DONALD J. KETTERER

RANDALL L. PORTER (0005835)
Counsel of Record
Assistant State Public Defender
Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614) 466-5394 (Voice)
(614) 644-0703 (Facsimile)
COUNSEL FOR APPELLANT

Robin N. Piper (0023205)
Butler County Prosecuting Attorney
MICHAEL A. OSTER, JR. (0076491)
Counsel of Record
Assistant Prosecuting Attorney
315 High Street, 11th Floor
Hamilton, Ohio 45012-0515
(513) 887 3474 (Voice)
(513) 887-3429
COUNSEL FOR APPELLEE

RON O'BRIEN (0017245)
Franklin County Prosecuting Attorney

SETH L. GILBERT (0072929)
Counsel of Record
STEVEN L. TAYLOR
Assistant Prosecuting Attorneys
373 South High Street, 13th Floor
Columbus, Ohio 43215
(614) 462-3555 (Voice)
(614) 462-6103 (Facsimile)

COUNSEL FOR AMICUS CURIAE

BALDWIN'S OHIO REVISED CODE ANNOTATED
CONSTITUTION OF THE STATE OF OHIO
ARTICLE IV. JUDICIAL

Current through 1995 portion of 121st G.A., laws passed and filed through 12-31-95.

O CONST IV § 2 ORGANIZATION AND JURISDICTION OF SUPREME COURT

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B) (1) The supreme court shall have original jurisdiction in the following:

- (a) Quo warranto;
- (b) Mandamus;
- (c) Habeas corpus;
- (d) Prohibition;
- (e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

- (i) Cases originating in the courts of appeals;

(ii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained,

(c) In direct appeals from the courts of common pleas or other courts of record inferior to the court of appeals as a matter of right in cases in which the death penalty has been imposed;

(d) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(e) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(f) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3 (B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor.

OHIO REVISED CODE

TITLE 25. COURTS -- APPELLATE
CHAPTER 2505. PROCEDURE ON APPEAL

ORC Ann. 2505.02 (2007)

§ 2505.02. Final order

(A) As used in this section:

(1) "Substantial right" means 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.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party

with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234 [2305.23.4], 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018 [5111.01.8], and the enactment of sections 2305.113 [2305.11.3], 2323.41, 2323.43, and 2323.55 of the Revised Code or or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131 [2305.13.1], 2315.18, 2315.19, and 2315.21 of the Revised Code.

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

OHIO REVISED CODE ANNOTATED

TITLE 25. COURTS -- APPELLATE
CHAPTER 2505. PROCEDURE ON APPEAL

ORC Am. 2505.03 (2007)

§ 2505.03. Final order may be appealed; exception

(A) Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction.

(B) Unless, in the case of an administrative-related appeal, Chapter 119. or other sections of the Revised Code apply, such an appeal is governed by this chapter and, to the extent this chapter does not contain a relevant provision, the Rules of Appellate Procedure. When an administrative-related appeal is so governed, if it is necessary in applying the Rules of Appellate Procedure to such an appeal, the administrative officer, agency, board, department, tribunal, commission, or other instrumentality shall be treated as if it were a trial court whose final order, judgment, or decree is the subject of an appeal to a court of appeals or as if it were a clerk of such a trial court.

(C) An appeal of a final order, judgment, or decree of a court shall be governed by the Rules of Appellate Procedure or by the Rules of Practice of the Supreme Court, whichever are applicable, and, to the extent not in conflict with those rules, this chapter.

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 12 (2007)

Rule 12. Pleadings and Motions Before Trial: Defenses and Objections

(A) Pleadings and motions.

Pleadings in criminal proceedings shall be the complaint, and the indictment or information, and the pleas of not guilty, not guilty by reason of insanity, guilty, and no contest. All other pleas, demurrers, and motions to quash, are abolished. Defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(B) Filing with the court defined.

The filing of documents with the court, as required by these rules, shall be made by filing them with the clerk of court, except that the judge may permit the documents to be filed with the judge, in which event the judge shall note the filing date on the documents and transmit them to the clerk. A court may provide, by local rules adopted pursuant to the Rules of Superintendence, for the filing of documents by electronic means. If the court adopts such local rules, they shall include all of the following:

- (1) the complaint, if permitted by local rules to be filed electronically, shall comply with Crim. R. 3.
- (2) any signature on electronically transmitted documents shall be considered that of the attorney or party it purports to be for all purposes. If it is established that the documents were transmitted without authority, the court shall order the filing stricken.
- (3) a provision shall specify the days and hours during which electronically transmitted documents will be received by the court, and a provision shall specify when documents received electronically will be considered to have been filed.
- (4) any document filed electronically that requires a filing fee may be rejected by the clerk of court unless the filer has complied with the mechanism established by the court for the payment of filing fees.

(C) Pretrial motions.

Prior to trial, any party may raise by motion any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue. The following must be raised before trial:

- (1) Defenses and objections based on defects in the institution of the prosecution;
- (2) Defenses and objections based on defects in the indictment, information, or complaint (other than failure to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceeding);
- (3) Motions to suppress evidence, including but not limited to statements and identification testimony, on the ground that it was illegally obtained. Such motions shall be filed in the trial court only.
- (4) Requests for discovery under Crim. R. 16;
- (5) Requests for severance of charges or defendants under Crim. R. 14.

(D) Motion date.

All pretrial motions except as provided in Crim. R. 7(E) and 16(F) shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier. The court in the interest of justice may extend the time for making pretrial motions.

(E) Notice by the prosecuting attorney of the intention to use evidence.

- (1) At the discretion of the prosecuting attorney. At the arraignment or as soon thereafter as is practicable, the prosecuting attorney may give notice to the defendant of the prosecuting attorney's intention to use specified evidence at trial, in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under division (C)(3) of this rule.
- (2) At the request of the defendant. At the arraignment or as soon thereafter as is practicable, the

defendant, in order to raise objections prior to trial under division (C)(3) of this rule, may request notice of the prosecuting attorney's intention to use evidence in chief at trial, which evidence the defendant is entitled to discover under Crim. R. 16.

(F) Ruling on motion.

The court may adjudicate a motion based upon briefs, affidavits, the proffer of testimony and exhibits, a hearing, or other appropriate means.

A motion made pursuant to divisions (C)(1) to (C)(5) of this rule shall be determined before trial. Any other motion made pursuant to division (C) of this rule shall be determined before trial whenever possible. Where the court defers ruling on any motion made by the prosecuting attorney before trial and makes a ruling adverse to the prosecuting attorney after the commencement of trial, and the ruling is appealed pursuant to law with the certification required by division (K) of this rule, the court shall stay the proceedings without discharging the jury or dismissing the charges.

Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(G) Return of tangible evidence.

Where a motion to suppress tangible evidence is granted, the court upon request of the defendant shall order the property returned to the defendant if the defendant is entitled to possession of the property. The order shall be stayed pending appeal by the state pursuant to division (K) of this rule.

(H) Effect of failure to raise defenses or objections.

Failure by the defendant to raise defenses or objections or to make requests that must be made prior to trial, at the time set by the court pursuant to division (D) of this rule, or prior to any extension of time made by the court, shall constitute waiver of the defenses or objections, but the court for good cause shown may grant relief from the waiver.

(I) Effect of plea of no contest.

The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence.

(J) Effect of determination.

If the court grants a motion to dismiss based on a defect in the institution of the prosecution or in the indictment, information, or complaint, it may also order that the defendant be held in custody or that the defendant's bail be continued for a specified time not exceeding fourteen days, pending the filing of a new indictment, information, or complaint. Nothing in this rule shall affect any statute relating to periods of limitations. Nothing in this rule shall affect the state's right to appeal an adverse ruling on a motion under divisions (C)(1) or (2) of this rule, when the motion raises issues that were formerly raised pursuant to a motion to quash, a plea in abatement, a demurrer, or a motion in arrest of judgment.

(K) Appeal by state.

When the state takes an appeal as provided by law from an order suppressing or excluding evidence, the prosecuting attorney shall certify that both of the following apply:

(1) the appeal is not taken for the purpose of delay;

(2) the ruling on the motion or motions has rendered the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.

The appeal from an order suppressing or excluding evidence shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the trial court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal taken under this rule shall be prosecuted diligently.

If the defendant previously has not been released, the defendant shall, except in capital cases, be released from custody on his or her own recognizance pending appeal when the prosecuting attorney files the notice of appeal and certification.

This appeal shall take precedence over all other appeals.

If an appeal pursuant to this division results in an affirmance of the trial court, the state shall be barred from prosecuting the defendant for the same offense or offenses except upon a showing of newly discovered evidence that the state could not, with reasonable diligence, have discovered before filing of the notice of appeal.