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**EXPLANATION OF WHY THIS CASE DOES NOT
INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION
AND IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

This Honorable Court should not accept jurisdiction for the following reasons:

1. The decision of the Ninth Judicial District Court of Appeals to affirm the denial of Motion for Resentencing created no injustice as Appellant's arguments were addressed by existing case law. Contrary to Appellant's assertion, this is not an issue of first impression before this Honorable Court.
2. No issue or substantial constitutional question exists in the Appellant's appeal to this Honorable Court. The attempted appeal further presents no viable question of general public interest so as to warrant the exercise of this Court's jurisdiction.

STATEMENT OF THE CASE

On June 4, 1991, the Lorain County Grand Jury indicted Appellant on two (2) counts of Aggravated Murder, violations of R.C. 2903.01, unspecified felonies with capital specifications; one (1) count of Kidnapping, a violation of R.C. 2905.01, an aggravated felony of the first degree; and two (2) counts of Aggravated Arson, violations of R.C. 2909.02, aggravated felonies of the first degree.

On March 23, 1992, Appellant's case proceeded to jury trial before the Honorable Lynett McGough of the Lorain County Court of Common Pleas. The trial was conducted over a span of five (5) days.

The verdict and sentence were upheld on appeal to the Ninth District Court of Appeals as well as to this Court. See State v. Wilson (October 12, 1994), 9th Dist. No. 92CA005396; State v. Wilson, 74 Ohio St. 3d 381, 1996 Ohio 103. Appellant's application for reconsideration of this Court's decision was denied. State v. Wilson (1996), 75 Ohio St. 3d 1413. Certiorari was denied by the United States Supreme Court as well. Wilson v. Ohio, certiorari denied (1996), 519 U.S. 845.

Appellant filed an application with the Ninth District Court of Appeals pursuant to App. R. 26(B)(5) to reopen his appeal. That application was denied by the Ninth District Court of Appeals. State v. Wilson (January

16, 1997), 9th Dist. No. 92CA005396. On October 22, 1997, this Honorable Court affirmed the action of the appellate court. State v. Wilson (1998), 84 Ohio St. 3d 1423.

Appellant filed a petition for post conviction relief on September 20, 1996. This petition was amended on September 30, 1996. The trial court denied that petition on January 3, 1997. The denial of post conviction relief was upheld by the Ninth District Court of Appeals. State v. Wilson (June 24, 1998), 9th Dist. No. 97CA006683. This Court declined further review. State v. Wilson (1998), 83 Ohio St. 3d 1472.

On July 2, 1999, Appellant filed a petition for habeas corpus relief in the district court. See case number United States District Court, Northern District of Ohio case number 99-CV-00007. On January 14, 2003, the district court denied relief. Thereafter, the Sixth Circuit Court of Appeals upheld the denial of relief. Wilson v. Mitchell, 498 F. 3d 491 (6th Cir. 2007). The United States Supreme Court denied certiorari review. Wilson v. Houk (October 6, 2008), 77 U.S.L.W 3201, case number 07-11493.

On October 16, 2008, Appellant filed a Motion for Resentencing with the trial court. On October 20, 2008, Appellee filed a Motion to Set Execution Date with this Court. On January 7, 2009, the trial court held a hearing on the matter. Appellant was granted until February 9, 2009 to file a successor petition for post conviction relief or to proceed on the Motion for Resentencing.

On February 9, 2009, Appellant filed a successor Petition for Post Conviction Relief and a supplemental memorandum in support of the Motion for Resentencing. On February 18, 2009, Chief Justice Moyer of the Ohio Supreme Court scheduled an execution date for Appellant. This date is June 3, 2009. No stays have been issued.

On January 7, 2009 and March 24, 2009, the trial court heard argument as to the Motion for Resentencing and/or Petition for Post Conviction Relief. On the same date, the trial court denied

On April 7, 2009, Appellant filed notice of appeal with the Ninth District Court of Appeals. On May 21, 2009, the appellate court upheld the trial court's decision to deny Appellant's Motion for Resentencing. See State v. Wilson, 9th Dist. No. 09CA009562, 2009 Ohio 2347.

On May 21, 2009, Appellant filed for leave to file a discretionary appeal with this Honorable Court. Appellee now responds and urges this Honorable Court to decline jurisdiction over the instant matter.

LAW & ARGUMENT

RESPONSE TO FIRST & SECOND PROPOSITIONS OF LAW

I. THE TRIAL COURT LACKED JURISDICTION TO ADDRESS APPELLANT'S MOTION FOR RESENTENCING.

Appellant contends that the trial court erred in denying his Motion for Resentencing because his death sentence is invalid as the Sixth Circuit Court of Appeals invalidated the sole aggravating factor supporting his death sentence. Appellant's contention lacks merit.

Appellee asserts that the trial court lacked jurisdiction to address Appellant's Motion for Resentencing for two (2) reasons; 1) the opinion by the Sixth Circuit Court of Appeals denying Appellant habeas corpus relief did not invalidate the sole aggravating factor supporting Appellant's death sentence resulting in a void sentence; and 2) the trial court was precluded from considering Appellant's Motion due to the Ohio Supreme Court's decision in State v. Steffen, 70 Ohio St. 3d 399, 1994 Ohio 111.

Turning to the first prong of Appellee's assertion, "trial courts lack authority to reconsider their own valid final judgments in criminal cases." State ex rel. Cruzado v. Zaleski, 111 Ohio St.3d 353, 2006 Ohio 5795, quoting State ex rel. White v. Junkin (1997), 80 Ohio St.3d 335, 338, 1997 Ohio 340; State ex rel. Hansen v. Reed (1992), 63 Ohio St.3d 597, 599. See also State v. Simpkins, 117 Ohio St. 3d 420, 2008 Ohio 1197; State v. Jordan, 104 Ohio St.3d 21, 2004 Ohio 6085.

It is equally true, however, that this general rule is subject to two (2) exceptions under which the trial court retains continuing jurisdiction. State ex rel. Cruzado v. Zaleski, 111 Ohio St.3d 353, 2006 Ohio 5795, citing State v. Garretson (2000), 140 Ohio App.3d 554, 559. First, a trial court is authorized to correct a void sentence. Id., citing State v. Beasley (1984), 14 Ohio St.3d 74, 75. Second, a trial court can correct clerical errors in judgments. Id., citing Crim.R. 36.

In general, a void judgment is one that has been imposed by a court that lacks subject-matter jurisdiction over the case or the authority to act. State v. Simpkins, 117 Ohio St. 3d 420, 2008 Ohio 1197, citing State v. Payne, 114 Ohio St.3d 502, 2007 Ohio 4642. A void judgment can also result where a judge ignores a statutory mandate, such as the advisement of post release control obligations during sentencing. State v. Simpkins, 117 Ohio St. 3d 420, 2008 Ohio 1197. A voidable judgment is one rendered by a court that has both jurisdiction and authority to act, but in which the court's judgment is invalid, irregular, or erroneous. Id.

Appellant's representation that the Sixth Circuit Court of Appeals determined that the guilt phase jury instruction as it related to the charge of Kidnapping was error under federal law is a misrepresentation of the decision in that case. This was accurately recognized by the appellate court as the basis of their decision as well. State v. Wilson, 9th Dist. No. 09CA009562, 2009 Ohio 2347.

In its opinion, the Sixth Circuit Court of Appeals never explicitly states that the guilt phase jury instruction as it related to the charge of Kidnapping was error, despite Appellant's misrepresentation to the contrary. Wilson v. Mitchell, (C.A. 6 2007), 498 F. 3d 491. Rather, the Sixth Circuit stated as follows:

We are not certain that an error regarding the knowledge element of a kidnapping offense necessarily translates into an error regarding the knowledge element of an evading-kidnapping specification. In other words, one might say it is conceivable that a person could lack the requisite knowledge to commit kidnapping, yet have the requisite knowledge to commit murder to evade detection for kidnapping--for example, where the

person believes he has committed kidnapping (but actually has not, perhaps because of earlier intoxication), and then commits murder to evade detection for the kidnapping he (erroneously) believes took place. **But we do not decide this question. Instead, we assume that the instruction was erroneous with regard to the evading-kidnapping specification and address whether it was harmless.** (Emphasis added).

The Sixth Circuit Court of Appeals only "assumed for the sake of argument" to conduct the federal Brecht harmless error standard of review that the guilt phase jury instruction as it related to the charge of Kidnapping was error, Appellant's arguments as to "actual case and controversy" and "advisory opinion" jurisprudence as well as allegations of state courts blatantly ignoring federal court mandates to the contrary.

This is entirely different from actually finding that the guilt phase jury instruction as it related to the charge of Kidnapping was error. The distinction between assuming an issue is error for purposes of argument and actually finding an issue to be error is vast. Yet, Appellant still represents to this Court that the guilt phase jury instruction as it related to the charge of Kidnapping was determined to be error by the Sixth Circuit Court of Appeals when it was not. It is beyond comprehension that an error assumed for the sake of argument can be a basis for post conviction relief and thus vacate a duly imposed, legal death sentence.

Since the Sixth Circuit Court of Appeals did not invalidate the sole statutory aggravating factor supporting Appellant's death sentence, the trial court lacked the ability to reconsider or alter Appellant's death sentence in any fashion as Appellant's sentence was a valid final judgment, incapable of modification by the trial court.

It must also be noted that, despite Appellant's claim to the contrary, the issue of the alleged error in a single guilt phase jury instruction has been raised and litigated previously. This error was previously addressed in Appellant's appeal to this Court. This Honorable Court conducted the only harmless error analysis applicable in the State of Ohio and determined that any error in the guilt phase jury instruction was harmless. State v.

Wilson (1998), 84 Ohio St. 3d 1423. (“Nevertheless, **we find the error to be harmless** under the facts of this case since the kidnapping of Lutz continued into the late morning and early afternoon. At that point, he clearly knew what he was doing and intoxication would not reasonably be available as a defense to negate “knowledge.”) (Emphasis added). It is equally unclear how a jury instruction given only at the guilt phase that was not given at the mitigation phase could somehow render the sole aggravating factor supporting Appellant's death sentence invalid.

It strains reason and logic to suggest that despite this very issue being duly considered by the highest court in this state, that the issue was not in fact considered and needed to be further considered by a trial court. Moreover, if, as Appellant claims, this Court failed to conduct a harmless error analysis as to the guilt phase jury instruction as it related to the charge of Kidnapping, the appropriate court to make such a determination would be this Court and not the trial court. It is also not clear that the remedy to such an issue is a resentencing by a trial court as again a valid final judgment still exists. Assuming arguendo that it was not addressed to the extent desired by the Sixth Circuit Court of Appeals, the Circuit Court clearly had the ability to remand the matter to this Court with a request for further analysis and yet it did not, but rather denied Appellant relief. The Circuit Court's decision made clear that no further analysis was warranted.

In regards to the second prong of Appellee's argument, in State v. Steffen, 70 Ohio St. 3d 399, 1994 Ohio 111, this Court held that when a criminal defendant has exhausted direct review, one (1) round of post conviction relief, and one (1) motion for delayed reconsideration under State v. Murnahan in the court of appeals and in the Supreme Court, any further action a defendant files in the state court system is likely to be interposed for purposes of delay and would constitute an abuse of the court system. In order to prevent such abuse, this court will fashion appropriate relief upon application by the prosecuting authority. The defendant wishing to stay his execution to engage in further state court proceedings must petition this court for such a stay.

Here, Appellant had exhausted direct review, one (1) round of post conviction relief, and one (1) motion for delayed reconsideration under State v. Murnahan in the court of appeals and in the Supreme Court. As such, the Motion for New Sentencing Hearing filed before the trial court was presumed likely to be interposed for purposes of delay and constitutes an abuse of the court system. State v. Steffen, 70 Ohio St. 3d 399, 1994 Ohio 111. Since Appellant did not have leave to file such request, the trial court lacked the ability to address Appellant's request.

Appellant's previously advanced argument that State v. Steffen, 70 Ohio St. 3d 399, 1994 Ohio 111 is not applicable to the instant matter, while novel, lacks merit. If Appellant's argument, which can best be summed up as, because he filed his presumptively frivolous motion before the State requested that an execution date be set, the Ohio Supreme Court's decision in State v. Steffen, 70 Ohio St. 3d 399, 1994 Ohio 111, is rendered inapplicable. Accordingly, Appellant would then be free to litigate a number of frivolous motions at the state court level unless and until the State filed for an execution. This assertion is clearly contrary to this Court's intention as expressed in Steffen.

In Steffen, this Court noted as follows:

Ohio's present death penalty statute was enacted in 1981, following the United States Supreme Court's decision in Gregg v. Georgia (1976), 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859. Convicted persons have engaged in sometimes ingenious, sometimes frivolous courses of conduct that have successfully thwarted imposition of the death sentence. The judiciary has participated in this endeavor by adhering to procedures intended to ensure that every effort is made to protect due process and to determine guilt.

Herein lies the internal conflict that death row inmates have seized upon and used to their advantage. We, as a society, are justifiably tentative about imposing death as a punishment for crimes. Having assumed the power to take life, we have striven for a level of assurance in our decisions that is probably not humanly possible. We have created a web of procedures so involved that they threaten to engulf the penalty itself. We arrive at a point, however, where greater certitude is not reasonably possible. There comes a time where the possibility that

something else can be discovered approaches the vanishing point. Then we must end our inquiry and act upon the conclusion we have reached. Procrastination will not satisfy the soul.

Appellant also contended that because the argument raised in the Motion for Resentencing was not previously presented in state court, this Court's decision in State v. Steffen, 70 Ohio St. 3d 399, 1994 Ohio 111, does not apply. Again, this assertion is clearly contrary to this Court's intention as expressed in Steffen.

This Court's decision in State v. Steffen, 70 Ohio St. 3d 399, 1994 Ohio 111 was clearly applicable to Appellant's Motion for New Sentencing Hearing. As such, Appellant was required to demonstrate to this Court reasons sufficient to support a stay of his execution in order to litigate the presumptively frivolous Motion for New Sentencing Hearing in the trial court. To date, Appellant has yet to make such demonstration. This is no doubt why this Court denied Appellant's request for a stay to engage in the instant litigation on March 13, 2009. See State v. Wilson, Ohio Supreme Court case number 1994-2537 as listed on the docket located at www.sconet.state.oh.us.

"The law of the case doctrine 'provides that the 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.'" State v. Ortega, 9th Dist. No. 08CA009316, 2008 Ohio 6053, citing Neiswinter v. Nationwide Mut. Fire Ins. Co., 9th Dist. No. 23648, 2008 Ohio 37, at P10, quoting Nolan v. Nolan (1984), 11 Ohio St.3d 1, 3. Ultimately, "the doctrine of law of the case precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal. New arguments are subject to issue preclusion, and are barred." State v. Ortega, 9th Dist. No. 08CA009316, 2008 Ohio 6053, quoting Hubbard ex rel. Creed v. Sauline (1996), 74 Ohio St.3d 402, 404-05, 1996 Ohio 174.

Further, the doctrine of res judicata bars Appellant from raising issues that were, or could have been, raised on direct appeal. State v. Pordash, 9th Dist. No. 05CA008673, 2005 Ohio 4252, citing, State v.

Perry (1967), 10 Ohio St. 2d 175.

Here, Appellant's claim is barred by both the law of the case doctrine as well as res judicata. The decision of this Court as to the validity, legality and appropriateness of Appellant's death sentence is final pursuant to the law of the case doctrine. This Court determined that Appellant's death sentence was appropriate and valid. State v. Wilson (1998), 84 Ohio St. 3d 1423. An inferior court cannot determine otherwise. The law of the case doctrine and res judicata also prohibit further litigation as to the legality of Appellant's death sentence. Appellant litigated this matter during his direct appellate process. The issue before the court was addressed by this Court during the direct appellate process. State v. Wilson (1998), 84 Ohio St. 3d 1423.

Moreover, if, as Appellant claims, this Court failed to conduct a harmless error analysis as to the guilt phase jury instruction as it related to the charge of Kidnapping, the appropriate court to make such a determination would be this Court and not the trial court. Assuming arguendo that it was not addressed to the extent desired by the Sixth Circuit Court of Appeals, the Circuit Court clearly had the ability to remand the matter to this Court with a request for further analysis and yet it did not, but rather denied Appellant relief. The Circuit Court's decision made clear that no further analysis was warranted.

Further, as Appellee argued during the hearing, it is incumbent upon Appellant to present any and all arguments at the first available occasion. While Appellant waffles about whether this issue was considered by this Court, the fact remains that it was duly considered. Finally, if the issue of the erroneous jury instruction, i.e. that this Court did not consider how the instruction impacted mitigation phase of the proceeding when it was only given during the guilt phase of the proceeding, the obvious court in which to seek redress would have been this Court in a Motion for Reconsideration. As Appellant notes, reconsideration is permitted as to a decision on the merits of a case. Obviously, Appellant had a strong

argument on reconsideration that the decision affirming his conviction and death sentence would be different had the Court considered his assignment of error, yet opted not to avail himself of such action. Appellant also could have easily raised this issue when he moved the Ninth District Court of Appeals to reopen his direct appeal so that the Court might have fully considered the issue pursuant to App.R. 26 as at the time Appellant had a direct appeal as of right to the Ninth District Court of Appeals. Appellant could have then appealed the issue, assuming he was unsuccessful, to this Court.

Since Appellant failed to establish that the trial court had jurisdiction to address the instant motion, the trial court was required to dismiss the instant motion without a hearing. It is Appellee's position that the trial court, not sitting as an appellate court, rendered a void judgment in its March 24, 2009 order as it was without jurisdiction to render any decision other than a dismissal of Appellant's Motion for Resentencing due to a lack of jurisdiction. See State v. Haught, 9th Dist. No. 23265, 2007 Ohio 508 ("Because the court acted without jurisdiction by modifying Appellant's probation during the pendency of his initial appeal as though the matter remained on the court's active docket, the trial court's order modifying the conditions of Appellant's probation entered on June 16, 2006 is void. Accordingly, this Court vacates the trial court's judgment").

Moreover, the trial court lacked the ability to apply the doctrine of harmless error, to the instant matter. The trial court, pursuant to the Ohio Constitution and the Ohio Revised Code, lacks the ability to review the decision of a superior court, i.e. this Court and insert its judgment as to this issue. The trial court, not sitting as an appellate court, is also without the ability to apply this doctrine as this doctrine is designed for purposes of appellate court review. Accordingly, the trial court's order of March 24, 2009 is void for that reason.

Also, it is clear that any further litigation at a trial court level had no force or effect. Appellant, as previously mentioned, has been ordered by Chief Justice Thomas Moyer of the Ohio Supreme Court to be executed by the Ohio Department of Rehabilitation and Corrections. When

the State of Ohio filed its Request to Set Execution Date, the State attached a copy of Appellant's original Motion for Resentencing. This Court was fully apprised of the litigation and still opted to schedule an execution date. The decision to set an execution date, as well as deny a request for a stay to engage in the instant litigation, when fully apprised of the nature of the litigation pending indicates that regardless of the outcome in the trial court, Appellant's sentence will finally be implemented. Since the trial court lacked the jurisdiction to modify Appellant's valid sentence, the matter should have been dismissed.

In conclusion, the trial court lacked jurisdiction to address Appellant's Motion for Resentencing for two (2) reasons; 1) the opinion by the Sixth Circuit Court of Appeals denying Appellant habeas corpus relief did not invalidate the sole aggravating factor supporting Appellant's death sentence resulting in a void sentence; and 2) the trial court was precluded from considering Appellant's Motion due to the Ohio Supreme Court's decision in State v. Steffen, 70 Ohio St. 3d 399, 1994 Ohio 111. Accordingly, the appellate court decision was proper and requires no additional review from this Court.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Honorable Court decline jurisdiction over the instant matter.

Respectfully Submitted,

DENNIS P. WILL, #0038129

Prosecuting Attorney
Lorain County, Ohio

By:

Billie Jo Belcher / *am*

BILLIE JO BELCHER, #0072337

Assistant Prosecuting Attorney
225 Court Street, 3rd Floor
Elyria, Ohio 44035
(440) 329-5389

PROOF OF SERVICE

A copy of the foregoing Response was served upon Appellant by serving a copy upon David Doughten, Esq., Counsel for Appellant, 4403 St. Clair Avenue, Cleveland, Ohio 44103 and Alan Rossman, Esq., 1660 W. 2nd Street, Ste. 750, Cleveland, Ohio 44113, Counsel for Appellant, by regular U.S. Mail this 26th day of May, 2009.

Billie Jo Belcher / *am*

BILLIE JO BELCHER
Assistant County Prosecutor