

**ORIGINAL**

In the  
**Supreme Court of Ohio**

**10-1216**

STATE OF OHIO EX REL. RICHARD  
CORDRAY, et al.,

Relators-Appellants,

v.

HON. JAMES M. BURGE,

Respondent-Appellee.

Case No. \_\_\_\_\_

On Appeal from the  
Lorain County  
Court of Appeals,  
Ninth Appellate District

Court of Appeals Case Nos.  
09CA009723  
09CA009724

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**NOTICE OF APPEAL OF RELATORS  
OHIO ATTORNEY GENERAL RICHARD CORDRAY AND  
LORAIN COUNTY PROSECUTING ATTORNEY DENNIS P. WILL**

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SUPREME COURT OF OHIO

**NOTICE OF APPEAL OF RELATORS  
OHIO ATTORNEY GENERAL RICHARD CORDRAY AND  
LORAIN COUNTY PROSECUTING ATTORNEY DENNIS P. WILL**

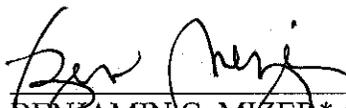
Relators Ohio Attorney General Richard Cordray and Lorain County Prosecuting Attorney Dennis P. Will hereby give notice of their appeal of the decision of the Lorain County Court of Appeals, Ninth Appellate District, entered in Case Nos. 09CA009723 and 09CA009724 on June 29, 2010. This case originated in the court of appeals.

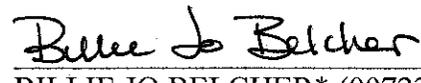
A date-stamped copy of the Court of Appeals' Decision and Journal Entry is attached to this Notice.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Notice of Appeal of Relators Ohio Attorney General Richard Cordray and Lorain County Prosecuting Attorney Dennis P. Will was served by U.S. mail this 12th day of July, 2010, upon the following:

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COURT OF APPEALS

STATE OF OHIO )  
 )ss:  
COUNTY OF LORAIN )

FILED IN THE COURT OF APPEALS  
LORAIN COUNTY NINTH JUDICIAL DISTRICT

2010 JUN 29 P 4: 23

STATE EX REL. CORDRAY, et al.

CLERK OF COMMON PLEAS  
RON HABAKOWSKI

C.A. No. 09CA009723  
09CA009724

Relators

v.

9th APPELLATE DISTRICT

JOURNAL ENTRY

THE HONORABLE JAMES M.  
BURGE

Respondent

{¶1} Relators, Ohio Attorney General Richard Cordray and Lorain County Prosecutor Dennis Will, petitioned this Court for a writ of prohibition to vacate acquittals ordered by Respondent, Judge James M. Burge. Judge Burge answered, and moved to dismiss for failure to state a claim upon which relief can be granted.

**Background**

{¶2} Although the questions before this Court involve decisions made by Judge Burge in 2009, the underlying cases stretch back to the early 1990s. A brief review of that history is necessary to analyze these cases.

{¶3} In 1993, Nancy Smith was indicted by the Lorain County Grand Jury for numerous sex offenses involving children. The following year, Joseph Allen was indicted for numerous sex offenses involving the same child victims. The two were tried together in 1994. In August 1994, the jury returned guilty verdicts on the charges. The trial court sentenced both Allen and Smith on August 4, 1994; Allen was sentenced

to life in prison and Smith received a sentence of 30 to 90 years in prison. On August 18, 1994, Smith – and only Smith – filed a motion for new trial or judgment of acquittal; the trial court denied this motion in February 1995.

{¶4} Both Allen and Smith appealed their convictions to this Court. This Court affirmed their convictions in 1996, and the Supreme Court declined review in both cases.

{¶5} Many years passed and, in 2008, Smith filed a motion for resentencing in the trial court. She argued that her 1994 judgment of conviction was not final because it did not comply with Crim.R. 32(C). In early 2009, Judge Burge held a hearing to consider whether he should enter a corrected journal entry or hold a new sentencing hearing. Shortly after that hearing, Allen filed a motion for resentencing, also arguing that his judgment of conviction was not final. Judge Burge entered orders in each case concluding that he could either enter a corrected order or resentence the defendant. After the State's attempted appeals of those orders were dismissed, Judge Burge scheduled a status conference.

{¶6} At the June 2009 status conference, Judge Burge orally granted Crim.R. 29(C) motions for acquittal for Allen and Smith. He later reduced those orders to writing and they were filed. The State has appealed those orders and those appeals are pending before this Court in separate cases. Relators subsequently filed these prohibition actions asking this Court to order Judge Burge to vacate his judgments of acquittal.

{¶7} Judge Burge filed answers in both cases along with motions to file the answers instanter, which we now grant. In his answers, Judge Burge asked this Court to dismiss the complaints for failure to state a claim upon which relief can be granted. Judge Burge also moved for judgment on the pleadings, prompting competing responses from the parties. For his part, Judge Burge argued that he inadvertently labeled his motions as motions for judgment on the pleadings rather than Civ.R. 12(B)(6) motions. Relators responded that he clearly sought relief pursuant to Civ.R. 12(C) and he should be held to the mistake he made in his motions. We need not resolve this question, however, because Judge Burge's answers also sought dismissal pursuant to Civ.R. 12(B)(6).

{¶8} To dismiss a complaint pursuant to Civ.R. 12(B)(6), it must appear beyond doubt from the complaint, after all factual allegations are presumed true and all reasonable inferences are made in favor of the Relators, that Relators can prove no set of facts warranting relief. *State ex rel. Dehler v. Sutula, Judge* (1995), 74 Ohio St.3d 33, 34.

#### Writ of Prohibition

{¶9} For this Court to issue a writ of prohibition, Relators must establish that: (1) the judge is about to exercise judicial power, (2) the exercise of that power is unauthorized by law, and (3) the denial of the writ will result in injury for which no other adequate remedy exists. *State ex rel Jones v. Garfield Hts. Mun. Court* (1997), 77 Ohio St. 3d 447, 448.

{¶10} Judge Burge has exercised judicial power – he has ordered acquittals for both Allen and Smith. Relators have recognized this, and rely on *State ex rel. Cordray v. Marshall*, 123 Ohio St.3d 229, 2009-Ohio-4986, to support their claims for a writ of prohibition. Because this case is critical to Relators' claims, we begin our analysis with *Marshall*.

*State ex rel. Cordray v. Marshall*

{¶11} In *Marshall*, the Ohio Supreme Court considered an issue similar to the one before us. In the underlying case, the defendant, Rawlins, shot and killed a man who was having an affair with his wife. *Id.* at ¶ 2. Rawlins was charged with aggravated murder and convicted of murder with a gun specification; he was sentenced to 15 years to life. *Id.* The court of appeals affirmed. *Id.* at ¶ 3. It specifically rejected Rawlins' claim that the trial court erred by failing to instruct the jury on a lesser included offense. *Id.*

{¶12} Several years later, Rawlins moved for relief from judgment. *Id.* at ¶ 4. His motion raised the same jury instruction claims that had been rejected in his direct appeal. *Id.* Judge Marshall, who had not presided over Rawlins' trial, held a hearing on the motion. *Id.* at ¶ 5. During the hearing, Judge Marshall orally granted the motion vacating the conviction, accepted Rawlins' plea to the lesser offense of voluntary manslaughter, sentenced him to ten years in prison, and granted him judicial release. *Id.* Judge Marshall also said at the hearing that he would make a finding that the jury's verdict was against the weight of the evidence and that the jury should have been

instructed on voluntary manslaughter. Id. Judge Marshall later reduced his oral statements to writing, but limited the journal entry to the jury instruction issue. Id. at ¶ 6.

{¶13} Shortly after Judge Marshall's entries were filed, the Ohio Attorney General petitioned the court of appeals for a writ of prohibition to compel Judge Marshall to vacate his entries that vacated the original conviction and convicted Rawlins of the lesser offense. Id. at ¶ 7. The court of appeals granted the petition, concluding that Judge Marshall lacked jurisdiction to grant the Civ.R. 60 motion. Id. at ¶ 10. The Ohio Supreme Court then considered the direct appeal from that order.

{¶14} The Court began its analysis by setting out the same test we noted above. Id. at ¶ 25. It noted that it was "uncontroverted that Judge Marshall exercised judicial power in the underlying criminal case by vacating Rawlins's murder conviction and releasing him from prison." Id. The Court continued that, for "the remaining requirements, '[i]f a lower court patently and unambiguously lacks jurisdiction to proceed in a cause, prohibition \* \* \* will issue to prevent any future unauthorized exercise of jurisdiction and to correct the results of prior jurisdictionally unauthorized actions.' The dispositive issue is whether Judge Marshall patently and unambiguously lacked jurisdiction to vacate Rawlins's murder conviction and release him from prison." Id. at ¶ 26 (citation omitted).

{¶15} The Supreme Court then considered the law of the case doctrine. Id. at ¶ 27. The Court recognized that, 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.* The decision of the reviewing court in a case remains the law of that case on the legal questions for all subsequent proceedings at both the trial and appellate levels. *Id.* at ¶ 28. Although the Supreme Court recognized that a trial court has jurisdiction to consider postjudgment motions, it held that the Ohio Constitution does not grant a court of common pleas jurisdiction to review a prior mandate of a court of appeals. *Id.* at ¶¶31-32. The Court concluded that a writ of prohibition is an appropriate remedy to prevent a trial court from proceeding contrary to the mandate of the court of appeals. *Id.* at ¶ 32. It specifically held that "Judge Marshall's exercise of jurisdiction to grant the motion on the same grounds that had been previously rejected on appeal in the same case was unauthorized. Moreover, this lack of jurisdiction was patent and unambiguous." *Id.* at ¶ 36.

{¶16} Relators rely solely on *Marshall* to support their claim for a writ of prohibition. But the underlying facts of these cases differ in one significant respect.

#### **Crim.R. 32(C) and Final Orders**

{¶17} The trial court sentenced Allen and Smith in 1994. Both sentencing orders failed to comply with Crim.R. 32(C), a point the State conceded at a hearing before Judge Burge. Because the orders did not comply with Crim.R. 32(C), the orders were not final. This Court has held that a trial court can reconsider its earlier decisions where it had not yet entered a final, appealable order pursuant to Crim.R. 32(C). See,

e.g., *State v. Bashlor*, Ninth Dist.Nos. 07CA009199, 07CA009209, 2008-Ohio-997.

See, also, *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, 379 n.1.

{¶18} Because the trial court had not entered final, appealable orders for either Allen or Smith, these cases fall outside the analysis and holding in *Marshall*. If the trial court's 1994 judgments of conviction had been final, then these case would fall squarely within the reasoning of *Marshall* – the trial court could neither reconsider its final orders nor disregard the court of appeals' mandate. Clearly, Judge Burge's orders disregarded this Court's mandates in Allen and Smith's direct appeals. *Marshall* suggests that Judge Burge could not disregard this Court's mandate. We conclude, based on the facts of these cases, a different answer is compelled by *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609.

{¶19} In *Culgan*, the Ohio Supreme Court granted Culgan's petitions for writs of mandamus and procedendo to order Judge Collier to issue a sentencing order in compliance with Crim.R. 32(C) so that Culgan would have a final appealable order. *Id.* at ¶¶ 9-11. The Court concluded that his first sentencing entry, which did not comply with Crim.R. 32(C), was "nonappealable." *Id.* at ¶ 9. The Court ordered the trial court judge to enter a new sentencing order that complied with Crim.R. 32(C) so that Culgan would have a final appealable order. *Id.* at ¶ 11. The Supreme Court made no mention of the fact that Culgan had already taken an appeal and that this Court, on his direct appeal, had issued its mandate. Instead, the Supreme Court concluded that his initial sentencing entry was nonappealable and that he was entitled to a final, appealable order.

In the instant case, because the initial sentencing entries were, according to *Culgan*, nonappealable, this Court's prior decisions did not prevent Judge Burge from entering orders that comply with Crim.R. 32(C).

{¶20} In Allen and Smith's cases, the judgments of conviction did not comply with Crim.R. 32(C), so the trial court could reconsider its non-final orders, to the extent it had the authority to do so. Accordingly, we must examine whether the trial court had the authority to enter judgments of acquittal pursuant to Crim.R. 29(C).

#### Crim.R. 29(C) Motion for Acquittal

{¶21} Judge Burge entered orders in both Allen and Smith's cases granting Crim.R. 29(C) motions for acquittal. We must determine whether Judge Burge had jurisdiction to enter these orders. As noted earlier, it is significant that only Smith made a Crim.R. 29(C) motion for acquittal.

{¶22} Crim.R. 29(C), which has not been amended since it was adopted in 1973, provides that if a jury returns a verdict of guilty, "a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal." The Rule clearly limits the time for filing a Crim.R. 29(C) motion to 14 days after the jury is discharged. The trial court can extend that time only before the expiration of the 14 day period. A trial court's interlocutory order denying the defendant's motion for acquittal at the close of the state's case or at the close of all of

the evidence cannot be reconsidered unless the defendant renews the motion pursuant to Crim.R. 29(C). *State v. Ross*, 184 Ohio App.3d 174, 2009-Ohio-3561, ¶ 18.

{¶23} *Ross* is critical to our analysis. The question in *Ross* was whether the trial court “can reconsider its initial denial of a timely postmistrial motion for acquittal.” *Id.* In *Ross*, this Court reviewed *Carlisle v. United States* (1996), 517 U.S. 416.

{¶24} *Carlisle* analyzed Federal Criminal Rule 29(c), which is identical to Crim.R. 29(C), except that the time limit for filing the postverdict motion for acquittal is seven days. *Carlisle* moved for acquittal one day beyond the seven days permitted by Rule 29(c). *Id.* at 418. The trial court initially denied the motion, but, at sentencing, reconsidered and granted the motion for acquittal. *Id.* The United States Supreme Court held that the trial court “had no authority to grant petitioner’s motion for judgment of acquittal filed one day outside the time limit prescribed by Rule 29(c).” *Id.* at 433. It was the untimeliness of the motion that deprived the trial court of jurisdiction to consider it, not its initial denial of the motion.

{¶25} After reviewing *Carlisle*, this Court in *Ross* recognized that a trial court may reconsider an interlocutory order at any time before final judgment. *Ross* at ¶ 24. *Ross* made a timely motion pursuant to Crim.R. 29(C); the trial court initially denied that motion. *Id.* at ¶ 25. This Court held that the initial denial of that motion was an interlocutory order, which the judge was free to reconsider up until the entry of a final judgment. *Id.* The *Ross* court concluded that the trial court had authority, pursuant to Crim.R. 29(C), to acquit *Ross* of the charges against him. *Id.*

{¶26} Having reviewed these key decisions, we now consider Allen and Smith's cases separately, beginning with Smith's case.

**Nancy Smith**

{¶27} Allen and Smith were tried together, but represented by different counsel. After the jury returned its verdicts, the trial court sentenced both Allen and Smith. There is no dispute that the trial court's sentencing orders did not comply with Crim.R. 32(C) and, therefore, the trial court's orders were not final pursuant to *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330 and Crim.R. 32(C).

{¶28} Smith filed a timely Crim.R. 29(C) motion for acquittal, which the trial court denied. If the trial court's 1994 sentencing entry had been final, then its order denying Smith's Crim.R. 29(C) motion would also have been final. But the trial court did not enter a final order that complied with Crim.R. 32(C). Because the judgment of conviction was not final, the trial court had authority to reconsider its interlocutory orders, including its order denying the Crim.R. 29(C) motion for acquittal. This is precisely what Judge Burge did.

{¶29} Judge Burge recognized, and the State agreed, that the 1994 judgment of conviction was not final. He initially considered two options – issue a corrected entry, or resentence Smith. He ultimately chose a third option – to reconsider the earlier denial of Smith's timely Crim.R. 29(C) motion. Based on *Baker*, *Culgan*, and *Ross*, Judge Burge had the authority to reconsider the interlocutory order and to grant the timely filed Crim.R. 29(C) motion. Accordingly, we conclude that Judge Burge did not

patently and unambiguously lack jurisdiction to act and, therefore, Relators are not entitled to a writ of prohibition for the order Judge Burge entered related to Nancy Smith.

**Joseph Allen**

{¶30} There is one significant difference between the cases of Smith and Allen that requires a different result as it relates to Judge Burge's order in Allen's case. It is undisputed that the trial court's 1994 sentence was not final and that Allen did not file a motion for acquittal pursuant to Crim.R. 29(C). Judge Burge's order challenged in this action, however, purported to grant Allen's Crim.R. 29(C) motion, a motion he never made.

{¶31} Because the trial court failed to enter a final order in Allen's case, Judge Burge had jurisdiction to reconsider interlocutory orders and to enter a final order. But Judge Burge did not have jurisdiction to grant motions that were not before the court. Allen did not file a Crim.R. 29(C) motion for acquittal, either timely or untimely. Crim.R. 29(C) does not authorize the trial court to sua sponte grant relief; the defendant must act timely to authorize the trial court to consider this remedy. Allen invoked the trial court's jurisdiction by filing a motion for resentencing; he did not file a motion for acquittal – and, of course, he could not because it would have been untimely. Judge Burge did not resentence Allen, as he had authority to do because the trial court's 1994 judgment of conviction was not final. Instead, Judge Burge attempted to grant a motion that was not before him.

{¶32} Allen did not invoke the trial court's jurisdiction by filing a postverdict Crim.R. 29(C) motion for acquittal. Judge Burge could not sua sponte raise the issue and grant a Crim.R. 29(C) motion. Because Allen did not file a timely Crim.R. 29(C) motion, Judge Burge lacked authority to enter the order challenged in this action. We conclude, therefore, that Judge Burge patently and unambiguously lacked jurisdiction to act.

{¶33} Relators have established that Judge Burge exercised judicial power and that the exercise of that power was unauthorized by law. To grant the writ of prohibition, Relators must also show that the denial of the writ will result in injury for which no other adequate remedy exists. *State ex rel Jones v. Garfield Hts. Mun. Court*, 77 Ohio St. 3d at 448. They have satisfied this burden by demonstrating that there is no other adequate remedy. Although the State has appealed Judge Burge's decision in the underlying criminal case, that appeal is limited to the substantive law ruling and cannot undo the acquittal that Judge Burge entered. The writ of prohibition is the only remedy available that can correct Judge Burge's unauthorized exercise of authority. See, e.g., *Marshall*.

{¶34} Accordingly, we reach the same result the Ohio Supreme Court did in *Marshall*. We grant the Relators' petition as it relates to Allen and order Judge Burge to vacate the June 24, 2009, order that granted Allen an acquittal.

{¶35} After Judge Burge vacates the acquittal, he may elect how to proceed to enter a final, appealable order. In *McAllister v. Smith*, 119 Ohio St.3d 163, 2008-Ohio-

3881, ¶ 9, the Ohio Supreme Court held that the appropriate remedy for a trial court's failure to comply with Crim.R. 32(C) is resentencing. A month later, in *Dunn v. Smith*, 119 Ohio St.3d 364, 2008-Ohio-4565, ¶ 10, the Ohio Supreme Court held that the appropriate remedy for a trial court's failure to issue an order that complies with Crim.R. 32(C) "is correcting the journal entry." Earlier this month, the Ohio Supreme Court relied on *Culgan* to grant writ of mandamus to order a trial court judge "to issue a sentencing entry" to correct an improper order. *State ex rel. Carnail v. McCormick*, Slip Opinion No. 2010-Ohio-2671, ¶ 39. The Supreme Court has not been clear whether a full resentencing hearing is required under these circumstances. As that question is not before us, and has not been briefed by the parties, we leave it for the trial court and parties in the first instance to determine the appropriate means for the trial court to enter an order that complies with Crim.R. 32(C).

#### Conclusion

{¶36} Judge Burge had jurisdiction to reconsider and grant Smith's Crim.R. 29(C) motion for acquittal. Accordingly, Judge Burge's motion to dismiss case number 09CA009724 is granted. Judge Burge lacked jurisdiction to order an acquittal in Allen's case and, therefore, the petition is granted in case number 09CA009723.

{¶37} Costs of this action are taxed equally to the Relators and Respondent Allen.

{¶38} The clerk of courts is hereby directed to serve upon all parties not in default notice of this judgment and its date of entry upon the journal. See Civ.R. 58(B).



Judge

Concurs:  
Belfance, J.

Carr, J., dissents saying

{¶39} I respectfully dissent. Although I dissent from the relief ordered for both Joseph Allen and Nancy Smith, for clarity's sake, I will focus my comments on Smith's case but my analysis applies equally to both.

#### Background

{¶40} Nancy Smith was indicted in 1994. After months of pretrial proceedings, she received a nine-day jury trial. The jury found her guilty, the trial court sentenced her, and entered judgment. She moved for a new trial and acquittal; the trial court denied both motions. Smith appealed her conviction and this Court affirmed in 1996. Later that year, she filed a petition for postconviction relief. The State responded. The trial court denied relief in 1997. This Court affirmed the trial court's decision the following year. In 2003, Smith moved to reopen her direct appeal; this Court denied the motion.

{¶41} Five years later, Smith moved to be resentenced. Her motion argued that the trial court never entered a final, appealable order because the August 4, 1994,

sentencing entry failed to reflect that she was found guilty by a jury. According to *State v. Baker*, Crim.R. 32(C) requires that the means of conviction be included in the judgment of conviction for the order to be a final, appealable order. This elevates form over substance to a new level. Smith sat through a nine-day jury trial. She was sentenced shortly after the jury returned its verdict. She moved for a new jury trial after being sentenced. She appealed to this Court within 30 days of August 4, 1994. In her petition for postconviction relief, she raised an issue related to the fairness of her jury trial. That a jury found her guilty was apparent to Smith, and to anybody who glanced at the record.

#### Final appealable orders in criminal cases

{¶42} *Baker* concludes that “[s]imply stated, a defendant is entitled to appeal an order that sets forth the manner of conviction and the sentence.” *Baker* at ¶ 18. The “manner of conviction” language comes from Crim.R. 32(C), which defines “judgment.” The Court held that a “judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court.” *Baker* at ¶ 18. R.C. 2505.02(B), however, states that “[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following: \* \* \*.” The statute does not refer to Crim.R. 32 or “judgments.” The *Baker* Court used Crim.R. 32(C) as a means to define what constitutes a final appealable order, however,

that was not the purpose of the rule. Crim.R. 32(C) describes what is required for a judgment, but that definition should not be used to limit the orders that are appealable as defined in R.C. 2505.02(B). To do so leads to absurd results.

{¶43} I encourage the Supreme Court to revisit this use of Crim.R. 32(C). The Court should focus on its statement from an earlier decision: "The important consideration is that the parties, particularly the defendant in a criminal case, be fully aware of the time from which appeal time commences running." *State v. Tripodo* (1977), 50 Ohio St.2d 124, 127. Smith knew when her appeal time commenced, and she was fully aware of the sentence imposed by the trial court. The absence of the "means of conviction" was meaningless. Put another way, if the trial court had included the words "by a jury" after "having been found," there would have been absolutely nothing different that would have happened in her legal proceedings from 1994 through 2008 -- she would have had no greater appellate rights, no additional postconviction remedies, and no additional opportunities to challenge her conviction. The absence of this language did not effect the enforceability or duration of her sentence. The only thing that happened as a result of the trial court omitting these three words is that it provided the trial court with the opportunity to enter a judgment of acquittal 15 years after a jury found her guilty.

{¶44} One last thought -- if the trial court had not crossed out the words on the form journal entry, so that it stated "having entered a plea of guilty," the order would have been final under *Baker* and Crim.R. 32(C), it would have just been wrong. It is

certainly an odd result that an order can be final, but clearly wrong, rather than correct, but not final.

{¶45} In *Culgan*, the Ohio Supreme Court had an opportunity to limit the impact of *Baker* in cases like this. *Culgan* had pleaded guilty and had already appealed his conviction by the time *Baker* was decided. His sentencing entry failed to reflect that he entered a guilty plea. In resolving his original action, this Court concluded that, because *Culgan* had exhausted his appellate remedies from his conviction and sentence in 2003, his conviction was final. This Court's conclusion relied on *State v. Greene*, 6th Dist. No. S-03-045, 2004-Ohio-3456, ¶ 10, where the Sixth District held that "once a conviction has become 'final' because the defendant can no longer pursue any appellate remedy, any new case law cannot be applied retroactively even if it would be relevant to the facts of his case." The *Culgan* Court adopted a different approach, but it is not too late to recognize a "practical finality" approach to avoid reopening cases long thought final.

*State ex rel. Cordray v. Marshall*

{¶46} Turning away from what I would hope the Supreme Court might do in the future, *Marshall* requires the conclusion that the trial court lacked jurisdiction to enter acquittals in Smith's case.

{¶47} I disagree with the majority's application of *Marshall*. I would apply the precise language used by the Supreme Court in its decision – that "the Ohio Constitution does not grant to a court of common pleas jurisdiction to review a prior

mandate of a court of appeals. Therefore, a writ of prohibition is an appropriate remedy to prevent a lower court from proceeding contrary to the mandate of a superior court.” (quotations and citations omitted) *Marshall*, 2009-Ohio-4986, ¶ 32. This Court decided Smith’s appeal on January 25, 1996. *State v. Smith* (Jan. 25, 1996) 9th Dist.No. 95CA006070. Following a lengthy review, including a review of the sufficiency of the evidence, this Court affirmed the trial court’s judgment. *Id.* at 27. This Court also “order[ed] that a special mandate issue out of this court, directing the County of Lorain Common Pleas Court to carry this judgment into execution.” *Id.*

{¶48} This Court issued its mandate in 1996. There is nothing in the record to show that this Court’s mandate has been vacated or modified. Neither *Baker* nor *Culgan* held that a court of appeals’ mandate is void or a nullity if the trial court’s judgment does not comply with Crim.R. 32(C). Because this Court entered its mandate in 1996, and it remained in effect when the trial court acted contrary to it, I would conclude, pursuant to *Marshall*, that the trial court lacked jurisdiction to enter any order that constituted a review this Court’s prior mandate.

{¶49} To be clear, that is precisely what the trial court did. On her direct appeal, this Court reviewed Smith’s assignments of error, including an argument that her convictions were not supported by sufficient evidence. This Court, after a review of the trial court record, concluded that the jury’s verdict was supported by sufficient evidence. *Smith* at 19-27. By granting Smith’s Crim.R. 29(C), the trial court determined that the convictions were not supported by sufficient evidence. This

conclusion was contrary to this Court's mandate and, pursuant to *Marshall*, the trial court lacked jurisdiction to enter this order.

#### Finality in criminal cases

{¶50} The acts that formed the basis for Smith's convictions took place as late as 1993. A jury convicted her in 1994. Almost two decades later, the litigation continues. The Ohio Supreme Court eloquently addressed the effect of continued litigation, albeit in the capital punishment context:

The constitutions and courts of our country have established procedural safeguards reflecting our society's concern for the rights of citizens accused of committing crimes. When those safeguards are used to thwart judgments rendered pursuant to the procedures, it is predictable that citizens will lose confidence in the ability of the criminal justice system to enforce its judgments.

*State v. Steffen* (1994), 70 Ohio St.3d 399, 406. I would add to this passage that citizens will also lose confidence in the criminal justice system when they see defendants who have been convicted, received appellate review, and pursued postconviction relief, released with a judgment of acquittal because the original judgment of conviction failed to include the word "jury."

{¶51} As this Court has recognized, the application of new rules to cases long thought final can lead to the reopening of cases with absurd results. If Judge Burge resentences Allen, the victims of his offenses will have a right to be present. In fact, the Ohio Constitution now requires that they receive notice of the sentencing hearing. Fifteen years after they testified at his trial, they will again confront Allen, reopening old wounds in the process. As other courts have done, I ask the Supreme Court to

reconsider these issues of finality and void sentences. See, e.g., *State v. Mitchell*, Sixth Dist.No. L-10-1047, 2010-Ohio-1766, ¶¶ 30-31.

#### Conclusion

{¶52} I believe the trial court acted without jurisdiction when it entered acquittals for Allen and Smith. Accordingly, I would grant the petitions for writ of prohibition and order the trial court to vacate its orders granting acquittals.