

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE ex rel. JOHN A  
JOHNSON,

Case No. 2010-1116

Petitioner-Appellant,

v.

On Appeal from the  
Hocking County Court of Appeals  
Fourth Appellate District,

FRANCISCO PINEDA, Warden,

Court of Appeals  
Case No. 10CA1

Respondent-Appellee.

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MERIT BRIEF OF APPELLEE WARDEN

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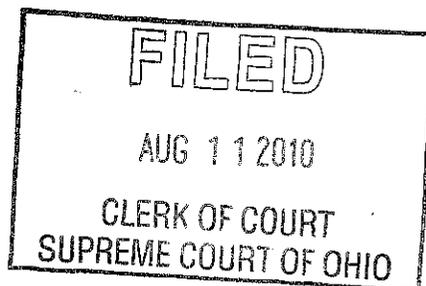
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# TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.....	3
ARGUMENT.....	6
Proposition of Law No. I: Appellant’s claims are not cognizable in a habeas corpus action.....	6
Proposition of Law No. II: Claims challenging the failure to comply with Crim.R. 32(C) are not cognizable in habeas corpus .....	8
Proposition of Law No. III: Sentencing errors are not cognizable in habeas corpus .....	9
Proposition of Law No. IV: Appellant’s sentence of life imprisonment, imposed by this Court in 1978 after the United States Supreme Court found Ohio’s death penalty unconstitutional is valid .....	10
Proposition of Law No. V: Ohio does not allow successive habeas corpus petitions .....	13
CONCLUSION.....	15
CERTIFICATE OF SERVICE.....	15
APPENDIX	

R.C. 2929.07, effective October 19, 1981  
Criminal Rule 32

## TABLE OF AUTHORITIES

### CASES

Page(s)

<u>Adams v. Humphreys</u> (1986), 27 Ohio St.3d 43.....	6
<u>Beard v. Williams Cty. Dept. of Social Services</u> (1984), 12 Ohio St.3d 40.....	6
<u>Birns v. Sweeney</u> (1950), 154 Ohio St. 137.....	9, 10
<u>Childers v. Wingard</u> , 83 Ohio St.3d 427, 1998 Ohio 27 .....	9
<u>Cornell v. Schotten</u> , 69 Ohio St.3d 466, 1994 Ohio 74 .....	7
<u>Dean v. Maxwell</u> (1963), 174 Ohio St. 193.....	9
<u>Dunn v. Smith</u> , 119 Ohio St.3d 364, 2008 Ohio 4565.....	8
<u>Durain v. Sheldon</u> , 122 Ohio St.3d 582, 2009 Ohio 4082.....	8
<u>Freeman v. Tate</u> , 65 Ohio St.3d 440, 1992 Ohio 76 .....	13
<u>Johnson v. Hudson</u> , 118 Ohio St.3d 308, 2008 Ohio 2451.....	4, 13
<u>Johnson v. Mitchell</u> , 85 Ohio St.3d 123, 1999 Ohio 441.....	4, 12
<u>Luna v. Russell</u> , 70 Ohio St.3d 561, 1994 Ohio 264 .....	7
<u>Maynard v. Eaton Corporation</u> , 119 Ohio St.3d 443, 2008 Ohio 4542.....	10
<u>McAllister v. Smith</u> , 119 Ohio St.3d 163, 2009 Ohio 3881 .....	9
<u>Mitchell v. Smith</u> , 120 Ohio St.3d 278, 2008 Ohio 6108.....	9
<u>Smith v. Walker</u> , 83 Ohio St.3d 431, 1998 Ohio 30.....	13
<u>State ex rel. Brantley v. Ghee</u> , 80 Ohio St.3d 287, 1997 Ohio 116 .....	13
<u>State ex rel. Childs v. Lazaroff</u> , 90 Ohio St.3d 519, 2001 Ohio 9.....	13, 14

<u>State ex rel. Cotton v. Ghee</u> , 82 Ohio St.3d 404, 1998 Ohio 679.....	13
<u>State ex rel. Golson v. Moore</u> , 116 Ohio St.3d 308, 2007 Ohio 6434.....	10
<u>State ex rel. Jackson v. McFaul</u> , 73 Ohio St.3d 185, 1995 Ohio 228.....	6
<u>State ex rel. Johnson v. Doe</u> , 122 Ohio St.3d 1518, 2009 Ohio 4776 .....	5
<u>State ex rel. Massie v. Rogers</u> , 77 Ohio St.3d 449, 1997 Ohio 258.....	10
<u>State ex rel. Raglin v. Brigano</u> , 82 Ohio St.3d 410, 1998 Ohio 222.....	7
<u>State ex rel. Rash v. Jackson</u> , 102 Ohio St.3d, 2004 .....	14
<u>State ex rel. Shackelford v. Moore</u> , 116 Ohio St.3d 310, 2007 Ohio 6462.....	10
<u>State v. Johnson</u> (January 30, 1978), Cuyahoga App. No. 33618, 1978 Ohio App. LEXIS 9687 .....	3
<u>State v. LaSalle</u> , 96 Ohio St.3d 178, 2002 Ohio 4009.....	11
<u>State v. Perry</u> (1967), 10 Ohio St.2d 175.....	7
<u>State v. Williams</u> , 103 Ohio St.3d 112, 2004 Ohio 4747 .....	11
<u>Walker v. Maxwell</u> (1965), 1 Ohio St.2d 136, 205 N.E.2d 394 .....	6
<u>Wireman v. Ohio Adult Parole Authority</u> (1988), 38 Ohio St.3d 322 .....	6

### CODES & RULES

R.C. §2929.06.....	11, 12
R.C. §2969.25.....	5
Criminal Rule 32.....	<i>passim</i>

## INTRODUCTION

Appellant Johnson is serving a life sentence for the brutal rape and murder of a child. Having been denied parole, Johnson, for the third time, is trying to use the extraordinary remedy of habeas corpus to secure his release from prison.

Ohio does not permit successive habeas corpus petitions if the petitioner could have raised his or her claims in the earlier petition(s). Johnson could have raised the claims he raises here in his two previous habeas petitions. In fact, he did raise the same or substantially similar claims in those petitions. As the lower court recognized, res judicata bars a petitioner from filing successive habeas corpus petitions. Therefore, the lower court dismissed Johnson's petition. The lower court was correct in its analysis, and its decision should be affirmed.

In addition to being barred by res judicata, Johnson's habeas petition suffers from other infirmities. His claims are not cognizable in habeas corpus and/or they have no merit.

## STATEMENT OF THE CASE

On January 22, 2010, Johnson filed the habeas petition that is the subject of this appeal as an original action in the Hocking County Court of Appeals. On March 10, 2010, the court, through a magistrate, ordered Respondent to file a response. Because Respondent's counsel did not receive the Magistrate's order, no response was filed. On April 2, 2010, Johnson filed a motion for summary judgment and/default judgment and served a copy on Respondent's counsel, the Ohio Attorney General. The Respondent then filed a memorandum opposing Johnson's motion for summary judgment and/or default judgment and a motion for summary judgment.

On June 1, 2010, the court issued a decision and judgment entry denying the writ and dismissing the case on the basis that Johnson's habeas petition was successive.

The case is before this Court pursuant to Johnson's appeal.

## STATEMENT OF FACTS

On November 20, 1975, as eight-year-old Melissa Hinke was walking to a neighborhood grocery store to buy a carton of milk, Johnson snatched her off the street, forced her into his car and proceeded to rape her and stab her to death. Johnson was apprehended within two days based on reports from three other children whom he had tried unsuccessfully to abduct and a witness who had managed to get the license plate number of his car. See State v. Johnson (January 30, 1978), Cuyahoga App. No. 33618, 1978 Ohio App. LEXIS 9687.

On November 25, 1975, the grand jury of Cuyahoga County indicted Johnson for the kidnapping, rape and aggravated murder (with specifications) of Melissa. A jury returned a verdict of guilty on all counts, and he was sentenced to death for the aggravated murder. He was ordered to serve sentences of seven to twenty-five years each for the kidnapping and rape convictions, sentences to be served consecutively. (Petition, Exhibit 1; Johnson's Brief, Appendix 1) Johnson's convictions were affirmed on appeal. Johnson, 1978 Ohio App. LEXIS 9687. After the United States Supreme Court found Ohio's death penalty unconstitutional, this Court modified Johnson's death sentence and reduced it to life imprisonment. (Petition, Exhibit 2; Johnson's Brief, Appendix 8) Johnson is currently incarcerated at the Hocking Correctional Facility where he is serving his sentences. Respondent-Appellee is the Warden at that Institution.

In 1998, Johnson filed a petition for a writ of habeas corpus in the Richland County Court of Appeals in which he claimed that he was entitled to immediate release from confinement because he was not returned to the common pleas court for resentencing pursuant to Rules 32 and 43 of the Ohio Rules of Criminal Procedure after his death sentence was vacated. The court dismissed his habeas petition, and this Court affirmed, holding that the Ohio Rules of Criminal Procedure do not apply to cases on appeal. This Court further held that, even assuming the invalidity of the life sentence, his sentences for the non-capital crimes preclude his release.<sup>1</sup> Johnson v. Mitchell, 85 Ohio St.3d 123, 1999 Ohio 441.

In 2007, Johnson filed another habeas petition in the Richland County Court of Appeals in which he claimed that he was entitled to immediate release from confinement because his sentences were illegal. He claimed that his sentences for rape and kidnapping were invalid for several reasons including that the sentencing entry did not comply with Rule 32 of the Ohio Rules of Criminal Procedure. He claimed that his life sentence for aggravated murder was invalid because the Entry was not properly captioned, filed, and/or signed. Once again, the lower court dismissed his petition and, once again, this Court affirmed. This Court held that the petition was successive and was therefore barred from review by the doctrine of res judicata. Johnson v. Hudson, 118 Ohio St.3d 308, 2008 Ohio 2451.

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<sup>1</sup>Johnson's maximum sentences for the kidnapping and rape convictions will expire in 2025.

In 2008, Johnson filed a motion to vacate void judgment in the trial court arguing that his sentencing entry did not comply with Rule 32 and asking to be resentenced. In 2009, he filed a petition for a writ of mandamus and/or procedendo asking this Court to compel the trial court to rule on his motion. Respondent Judge filed a motion to dismiss the case as moot because the judge had issued a ruling (overruling Johnson's motion). This Court granted the motion and dismissed the case. See Johnson's Affidavit of Indigence/Affidavit of Inmate Pursuant to R.C. §2969.25, p. 4-5, filed in the court below. Also see State ex rel. Johnson v. Doe, 122 Ohio St.3d 1518; 2009 Ohio 4776.

In the habeas petition that is the subject of this appeal, Johnson claimed he was entitled to immediate release from confinement because his sentences are illegal. He claimed that his sentences for rape and kidnapping are void because the sentencing entry does not comply with Rule 32(C), formerly Rule 32(B), of the Ohio Rules of Criminal Procedure. He complained that his life sentence for aggravated murder is invalid because this Court's Entry reducing his death sentence to life imprisonment does not contain a signature or a file stamp (requirements of Crim. R. 32(C), formerly 32(B)). He also argued that the life sentence is illegal because it should have been fifteen years to life, in which case he would have first been considered for parole in 1990 instead of 1995.

## ARGUMENT

**Proposition of Law No. I: Appellant's claims are not cognizable in a habeas corpus action.**

Habeas corpus is an extraordinary remedy and normally is appropriate only when there is no alternative legal remedy. The only relief that can be granted in a habeas action is immediate release from confinement. State ex rel. Jackson v. McFaul, 73 Ohio St.3d 185, 1995 Ohio 228; R.C. 2725.01, et. seq.

In the context of a criminal conviction, habeas corpus normally may be used only to challenge the jurisdiction of the sentencing court.<sup>2</sup> Wireman v. Ohio Adult Parole Authority (1988), 38 Ohio St.3d 322. Habeas corpus may not be used as a substitute for other forms of action, such as direct appeal, post-conviction relief, or mandamus. Adams v. Humphreys (1986), 27 Ohio St.3d 43, Beard v. Williams Cty. Dept. of Social Services (1984), 12 Ohio St.3d 40; Walker v. Maxwell (1965), 1 Ohio St.2d 136, 205 NE2d 394. This Court, in State ex rel. Jackson v. McFaul, 73 Ohio St.3d at 186, held as follows:

[H]abeas corpus will lie in certain extraordinary circumstances where there is an unlawful restraint of a person's liberty . . . but only where there is no adequate legal remedy, *e.g.*, appeal or post-conviction relief.

The existence of an alternative remedy is enough to remove a petitioner's allegations from habeas consideration, whether the remedy is still available or not, as

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<sup>2</sup> The sentencing court (the Cuyahoga County Court of Common Pleas) had jurisdiction over Johnson's case pursuant to R. C. 2931.03, which gives the courts of common pleas jurisdiction over criminal offenses that occur in their respective counties.

long as the petitioner could have taken advantage of it previously. See Luna v. Russell, 70 Ohio St.3d 561, 1994 Ohio 264; State v. Perry (1967), 10 Ohio St.2d 175. Habeas corpus is not a substitute for appeal. Cornell v. Schotten, 69 Ohio St.3d 466, 1994 Ohio 74.

Johnson has or had other remedies in which to raise his claims. With regard to his complaints about Criminal Rule 32, he filed a motion asking the trial court to vacate the void judgment (the subject of his mandamus complaint). The trial court overruled the motion. Johnson could have filed an appeal. Whether or not he did so, his claim cannot be heard in this habeas action. If another remedy exists or existed at one time, habeas relief should not be granted. Luna v. Russell, 70 Ohio St.3d 561, 1994 Ohio 264. In State ex rel. Raglin v. Brigano, 82 Ohio St.3d 410, 1998 Ohio 222, this Court held that Petitioner's attack on the validity of his indictment should have been raised in his direct appeal, thus he was not entitled to habeas relief. In other words, whether the opportunity for another remedy still exists or not, as long as the petitioner could have taken advantage of it, habeas corpus is not an appropriate remedy.

Johnson's claims are not cognizable in this habeas corpus action.

**Proposition of Law No. II: Claims challenging the failure to comply with Crim.R. 32(C) are not cognizable in habeas corpus.**

This Court has repeatedly held that claims alleging a failure to comply with Crim.R. 32(C) are not cognizable in a habeas corpus proceeding and do not entitle the petitioner to immediate release from confinement.

A claim that a sentencing entry violated Crim.R. 32 is not remedial in habeas corpus, and a violation of Crim.R. 32 does not entitle the petitioner to immediate release from confinement. “[I]nsofar as Durain claims that his sentencing entry violated Crim.R. 32, which would render it nonappealable, his remedy is not immediate release from prison pursuant to a writ of habeas corpus.” Durain v. Sheldon, 122 Ohio St.3d 582, 2009 Ohio 4082, ¶1 (citing Dunn v. Smith, 119 Ohio St.3d 364, 2008 Ohio 4565).

In Dunn, this Court held that the proper remedy for a Rule 32(C) violation is to file a motion in the trial court requesting a revised sentencing entry. If the court fails to issue a revised sentencing entry, the defendant can compel the trial court to act through a writ of mandamus or procedendo. In no event is the failure to comply with Crim.R. 32(C) remedial in a habeas corpus action. “Finally, Dunn cites no case holding that a trial court’s failure to comply with Crim.R. 32(C) entitles an inmate to immediate release from prison; instead, the appropriate remedy is correcting the journal entry.” Dunn, 2008 Ohio 4565, ¶¶ 8-10.

In Mitchell v. Smith, 120 Ohio St.3d 278, 2008 Ohio 6108, the Court held that habeas is not an appropriate remedy for a violation of Crim.R. 32(C). “We affirm the judgment of the court of appeals dismissing the petition of appellant, Ervin L. Mitchell, for a writ of habeas corpus because a claimed violation of Crim.R. 32(C) does not entitle an inmate to immediate release from prison. Instead, if a violation is established, ‘the appropriate remedy is resentencing instead of outright release.’” Mitchell, ¶1 (citing McAllister v. Smith, 119 Ohio St.3d 163, 2009 Ohio 3881).

**Proposition of Law No. III: Sentencing errors are not cognizable in habeas corpus.**

Johnson claims his life sentence imposed by this court is illegal because he was entitled to a sentence of fifteen years to life, in which case he would have first seen the parole board in 1990 instead of 1995.

This Court has repeatedly held that sentencing errors cannot be heard in a habeas corpus action. Childers v. Wingard, 83 Ohio St.3d 427, 1998 Ohio 27. “Even assuming error in sentencing, such errors are not of the nature which are cognizable in a habeas corpus proceeding.” Dean v. Maxwell (1963), 174 Ohio St. 193, 198, citing Birns v. Sweeney (1950), 154 Ohio St. 137. “A proceeding in habeas corpus cannot be used as a substitute for the remedy of appeal, nor can it be employed as a remedy by a person who has been convicted of a criminal offense and subjected to a fine and imprisonment which he claims to be in excess of the maximum prescribed by law. The petitioner having pursued the wrong remedy, we do not consider the validity

of the sentence.” Birns, at 138. Sentencing errors are not jurisdictional and are not cognizable in habeas corpus. State ex rel. Massie v. Rogers, 77 Ohio St.3d 449, 1997 Ohio 258. Extraordinary relief in habeas corpus is not available to rectify sentencing errors. State ex rel. Shackelford v. Moore, 116 Ohio St.3d 310, 2007 Ohio 6462; State ex rel. Golson v. Moore, 116 Ohio St.3d 308, 2007 Ohio 6434.

**Proposition of Law No. IV: Appellant’s sentence of life imprisonment, imposed by this Court in 1978 after the United States Supreme Court found Ohio’s death penalty unconstitutional, is valid.**

Johnson’s claim that his life sentence is illegal has no merit. To support his argument that his sentence should have been fifteen years to life, he attached part of the 1981 version of S.B. 1, effective on October 19, 1981. (Petition, Exhibit 10; Johnson’s Brief, Appendix 6) Section 3 contains the language on which Johnson relies. Johnson’s reliance on Section 3 is misplaced for three reasons.

First, Section 3 was not made part of any statute and cannot apply retroactively to Johnson. His next Exhibit indicates that Section 3 of S.B. 1 is an “UNCODIFIED LAW.” (Petition, Exhibit 11; Johnson’s Brief, Appendix 7) An uncodified law is a law of a “special nature that has a limited duration or operation and is not assigned a permanent Ohio Revised Code section number. \* \* \* [B]ecause it is not a law of a general and permanent nature, it does not appear in the statutes in codified form.” Maynard v. Eaton Corporation, 119 Ohio St.3d 443, 2008 Ohio 4542, §7. Whatever effect an uncodified law has, it does not apply retroactively. “A statute is presumed to

be prospective in its operation unless expressly made retrospective.” R.C. 1.48; State v. LaSalle, 96 Ohio St.3d 178, 2002 Ohio 4009, Syllabus. Thus, although a statute can apply retrospectively, nothing in Ohio law permits the retroactive application of an uncodified law. Even if it could be applied retroactively, however, the legislature did not expressly state that Section 3 applies retroactively to persons, such as Johnson, whose sentences had already been reduced to life imprisonment.

Second, Section 3 would not apply to Johnson anyway. Section 3, by its express language, applies to persons who are “resentenced” after a death sentence is vacated. Johnson was not resentenced. R.C. 2929.06, which requires a resentencing hearing in the trial court when a death sentence is vacated, was enacted in 1981 as part of S.B. 1. §2929.06 does not apply retroactively. State v. Williams, 103 Ohio St.3d 112, 2004 Ohio 4747, Syllabus.

Third, Section 3 conflicts with the version of R.C. 2929.06 that became effective on October 19, 1981, as part of the same bill, S.B. 1.<sup>3</sup> That version of §2929.06 provided that at a resentencing hearing after a death sentence has been vacated, the court “shall sentence the offender to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.” A sentence of fifteen years to life would have been illegal pursuant to §2929.06, regardless of Section 3.

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<sup>3</sup>Johnson failed to include that part of S.B. 1. Appellee Warden has attached a copy of the 1981 version of R.C. 2929.06. Appellee Warden has also attached a copy of the version of Rule 32 that was in effect at the time of Johnson’s sentencing.

At the time this Court reduced Johnson's death sentence to life imprisonment, there was no statute that required a resentencing hearing. Further, there was no statute that mandated any particular sentence, much less a sentence of fifteen years to life. Therefore, there is nothing illegal about the life sentence that this Court imposed. Further, even though this Court did not impose a sentence of twenty full years to life, the fact that Johnson saw the parole board in 1995, after serving twenty years of incarceration, indicates that the prison officials and the Ohio Adult Parole Authority treated him as if his sentence had been reduced to twenty full years to life, consistent with the provisions of former R.C. 2929.06.

As for Johnson's complaint that this Court's Entry reducing his death sentence to life imprisonment does not contain a signature or a file stamp, those are requirements of Crim.R. 32(C), formerly 32(B). As this Court held in its decision affirming the denial of Johnson's first habeas petition, the Rules of Criminal Procedure do not apply to cases on appeal.<sup>4</sup> Johnson v. Mitchell, 85 Ohio St.3d 123, 124, 1999 Ohio 441. Further, as demonstrated above, the failure to comply with Crim.R. 32 is not cognizable in a habeas corpus action.

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<sup>4</sup> At the time this Court issued its Entry reducing Johnson's death sentence to life imprisonment (August 16, 1978), Johnson's appeal from his convictions was pending. Exhibit 3 of Johnson's habeas petition is this Court's Entry denying Johnson's appeal on November 9, 1978.

**Proposition of Law No. V: Ohio does not allow successive habeas corpus petitions.**

Johnson has filed two previous habeas petitions in which he either did or could have raised the claims raised in the instant habeas petition. As such, the instant habeas petition is successive and is barred from review by the doctrine of res judicata. In fact, this Court has already ruled that his second habeas petition was barred by res judicata on that basis. Johnson v. Hudson, 118 Ohio St.3d 308, 2008 Ohio 2451.

This Court has repeatedly held that the filing of successive habeas corpus petitions is barred by the doctrine of res judicata if the claim could have been raised in the earlier petition. Smith v. Walker, 83 Ohio St.3d 431, 1998 Ohio 30; State ex rel. Cotton v. Ghee, 82 Ohio St.3d 404, 1998 Ohio 679; State ex rel. Brantley v. Ghee, 80 Ohio St.3d 287, 1997 Ohio 116; Freeman v. Tate, 65 Ohio St.3d 440; 1992 Ohio 76. In State ex rel. Childs v. Lazaroff, 90 Ohio St.3d 519, 2001 Ohio 9, the Court stated:

Nevertheless, in Hudlin v. Alexander (1992), 63 Ohio St. 3d 153, we held that res judicata is applicable to successive habeas corpus petitions because habeas corpus petitioners have the right to appeal adverse judgments in habeas corpus cases. See, also, McCleskey v. Zant (1991), 499 U.S. 467, 479, 111 S. Ct. 1454, 1462, 113 L. Ed. 2d 517, 535 (“As appellate review became available from a decision in habeas refusing to discharge the prisoner, courts began to question the continuing validity of the common-law rule allowing endless successive [habeas corpus] petitions”). We have since consistently applied res judicata to bar petitioners from filing successive habeas corpus petitions.

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Childs previously filed two habeas corpus actions in which he could have raised his present claim. See *id.*, 65 Ohio St.3d at 441, 605 N. E. 2d at 15 (“In this case, the record demonstrates that appellant has

previously filed at least one habeas corpus action \*\*\* in which [his successive habeas corpus claim] could have been raised”).

Based on the foregoing, res judicata barred Childs from filing successive habeas corpus petitions. Therefore, we affirm the judgment of the court of appeals.

Childs, 90 Ohio St.3d at 520-1 (citations omitted).

More recently, in State ex rel. Rash v. Jackson, 102 Ohio St.3d, 2004 Ohio 2053, this Court held:

[\*\*P10] In addition, res judicata barred Rash from filing a successive habeas corpus petition when he could have raised his same claim in his previous petition. State ex rel. Johnson v. Ohio Dept. of Rehab. & Corr. (2002), 95 Ohio St. 3d 70, 71, 2002 Ohio 1629, 765 N.E.2d 356. \* \* \*

[\*\*P11] We have applied res judicata to bar petitioners from filing successive habeas corpus petitions. See, generally, State ex rel. Childs v. Lazaroff (2001), 90 Ohio St. 3d 519, 520-521, 2001 Ohio 9, 739 N.E.2d 802, and cases cited therein. In Childs, we applied res judicata to bar a successive habeas corpus petition even though it raised a potentially viable jurisdictional claim. Id. at 520, 739 N.E.2d 802.

Johnson’s habeas petition is successive and is barred from review by the doctrine of res judicata. The lower court decision denying Johnson’s petition on that basis was correct and should be affirmed.

**CONCLUSION**

For the foregoing reasons, Johnson is not entitled to relief in habeas corpus. Therefore, Appellee Warden asks this Court to affirm the lower court's dismissal of Johnson's habeas petition.

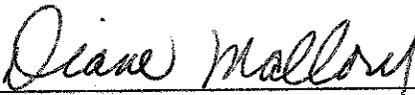
Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was mailed by regular, first-class mail to John Johnson, #145-213, Hocking Correctional Facility, 16759 Snake Hollow Road, Nelsonville, Ohio 45764, on the 11<sup>TH</sup> day of August, 2010.

  
\_\_\_\_\_  
Diane Mallory

# APPENDIX

**§ 2929.06 Resentencing hearing after vacation of death sentence.**

If the sentence of death that is imposed upon any offender is vacated upon appeal because the court of appeals or the supreme court, in cases in which the supreme court reviews the sentence upon appeal, could not affirm the sentence of death under the standards imposed by section 2929.05 of the Revised Code, is vacated upon appeal for the sole reason that the statutory procedure for imposing the sentence of death that is set forth in sections 2929.03 and 2929.04 of the Revised Code is unconstitutional, or is vacated pursuant to division (C) of section 2929.05 of the Revised Code, the trial court that sentenced the offender shall conduct a hearing to resentence the offender. At the resentencing hearing, the court shall sentence the offender to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

**HISTORY: 139 v S 1. Eff 10-19-81.**

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## Rule 32

## SENTENCE

**(A) Sentence.**

(1) Imposition of sentence. Sentence shall be imposed without unnecessary delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant, and shall also address the defendant personally and ask him if he wishes to make a statement in his own behalf or present any information in mitigation of punishment.

(2) Notification of right to appeal. After imposing sentence in a serious offense which has gone to trial on a plea of not guilty, the court shall advise the defendant that: (a) he has a right to appeal; (b) if he is unable to pay the cost of an appeal he has the right to appeal without payment; (c) if he is unable to obtain counsel for an appeal, counsel will be appointed without cost; (d) if he is unable to pay the costs of documents necessary to an appeal, such documents will be provided without cost; and (e) he has a right to have a notice of appeal timely filed on his behalf. Upon defendant's request the court shall forthwith appoint counsel for appeal.

**(B) Judgment.** A judgment of conviction shall set forth the plea, the verdict or findings and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

## Rule 32.1

## WITHDRAWAL OF GUILTY PLEA

A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

## Rule 32.2

## PRESENTENCE INVESTIGATION

**(A) When made.** In felony cases the court shall, and in misdemeanor cases may, order a presentence investigation and report before granting probation.

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