

**ORIGINAL**

IN THE SUPREME COURT OF OHIO

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STATE EX REL. JOHN A. JOHNSON	:	OHIO SUPREME COURT
	:	CASE NO. 10-1116
Appellant,	:	
	:	On Appeal from the
v.	:	Fourth Appellate District
	:	Hocking County, Ohio
FRANSICO PINEDA, Warden	:	Case No.10CA01
	:	
Appellee.	:	
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APPELLANT JOHN A. JOHNSON'S REPLY BRIEF TO  
APPELLEE'S MERIT BRIEF

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No. 98-2277, Submitted March 10, 1999,  
Decided March 31, 1999, Court of Appeals Richland  
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STATEMENT OF THE CASE

**APPELLEE'S RESPONSE, LINE 4 STATEMENT OF THE CASE:** In Appellee's Merit Brief on Page 2, Line 4, and for the very first time, Appellee's "claim" that they never received the Magistrates Order dated March 10th, 2010 wherein the Magistrate for the Fourth District Appellate Court Ordered Appellee's to respond to his Direct Order no later than 15 days from the date of said Order, which would place this date at March 25th, 2010.

However, now Appellee's 'claim' that they never received this Direct Order from the Magistrate, a claim for the very first time that they never received "any such" order, and never mentioned this contention in their Responsive Pleading Opposing Petitioner's Motion in the Court of Appeals. See Respondents Pleading Case No.10CA1, submitted April 8th, 2010. It is clear that the State (Appellee) were in Direct Default of the Magistrates Order of March 10th, and never once responded to such direct order, when mentioning this claimed issue of 'not' receiving said Order in their responsive pleading for Summary Judgment. For the above stated reasons Appellant herein disagree's with this portion of Appellee's Statement of the Case and states that Appellee were and are still in direct Default and have no legal right to respond at all.

Further, in this same portion of the Statement of the Case, Appellee 'claim' that Appellant's Appeal was dismissed

by the Fourth District Court of Appeals due to successive petitions. This is true, in part, but the rest of the reasoning by the Court stated quite plainly that the reasons for the Court's denial of Appellant's Appeal was due also to the claimed reason of it being against the doctrine of Res Judicata. See Appellant's Merit Brief, Appendix A. For this reason Appellant herein disagrees in part with this claimed statement of Appellee.

**APPELLEE'S STATEMENT ON PAGE 5, ¶1:** that Appellant was asking to be re-sentenced because his sentencing entry did not comply with Criminal Rule 32, is in error.

Appellant herein states that Appellee is not being totally truthful to this Court and Appellant directs this Court to review his Motion to Vacate Void Judgment, Void Ab Initio on the face of the Record, Case No.75-023071, filed in Cuyahoga County Court of Common Pleas on December 8, 2008. In this Motion, on Page 2, top paragraph this Court will see that Appellant's contention were and still are that his Journal Entry is a non-final and non-appealable entry order which must be vacated. Not merely some 'slight' sentencing error that is in non-compliance with the Criminal Rules as the Appellee would have this Court believe.

In fact, a further review of ¶12 of this same Motion will show this Court that Appellant cited State v. Baker (2008), 119 Ohio St.3d 535, 895 N.E.2d 163. This case is replete with Constitutional References, Statutes as well as

Criminal Rules defining what constitutes a "Final, Appealable Order." Appellee is in error claiming that Appellant complained of a simple sentencing error. Appellant's contentions then, as they are now, are such that Appellant's Journal Entry Order of Commitment has never become a Final, Appealable Order which would start the appellate clock ticking and 'give' Appellant the legal right to an appeal, direct or otherwise. Appellant herein disagrees with Appellee's contention on this issue.

Again, Appellee's claim on Page 5, line 11 of their Merit Brief, that Appellant's current Habeas Petition before this Honorable Court deals solely with a simple sentencing error. Appellant would direct this Court's attention to his (Appellant's) Merit Brief, Case No. 10-1116, filed with this Court on July 21, 2010. On page 1 under the heading of "Statement of the Facts", 4th paragraph, it is clearly seen that Appellant states in plain english; "Nor was Appellant's un-signed, non-final and non-appealable Journal Entry ever been modified or changed," further, Page 2, 1st paragraph; Appellant's Original Journal Entry remained unchanged, un-signed, non-final and non-appealable, a Void Journal Entry Order of Commitment as it still appears to this very day on the Court of Common Pleas Docket Entry in Cuyahoga County, Ohio.

How Appellee can read this Merit Brief and assigned arguments by Appellant and not see a Void Judgment of a

non-final non-appealable Journal Entry Order of Commitment is a total mystery to Appellant. As such, Appellant disagrees totally with Appellee's contentions concerning this issue.

**APPELLEE'S CONTENTION OF PAGE 5, LINE 11 thru 17:** that Appellee is claiming on the one hand that his (Appellant's) sentences for Kidnapping and Rape do not comply with Criminal Rules, and that his sentence for aggravated murder is not valid because it does not contain a signature or a time stamp is in error. A clear review of Appellant's Appendix 1, filed in his Merit Brief, Case No. 10-1116 on July 20, 2010 with this Court clearly shows that the aforementioned charges of kidnapping, rape and aggravated murder are all contained on one document titled Journal Entry. "AND" this one document containing all the aforementioned charges is exactly the chief focus of this Habeas proceeding in this Court showing quite clearly that this one document containing all the charged offenses does not comply with §2505.02 or, the Crim.R.32(C) as it being a Final, Appealable Order. It is Void on its Face for, among other reasons quite apparent, it does not contain, show, or present a judges signature making said Journal Entry a Final, Appealable Order in compliance with §2505.02 and Crim.R.32(C). Nowhere in any filings made by Appellant will this Court see that Appellant has "claimed" that parts of his charges are sentencing errors and parts of it are something other than this. All the assigned errors dealing

with this issue, and stated by Appellant are contained on this one document titled Journal Entry. All these charges are Void as being 'contained' on a Void Journal Entry Order of Commitment. Appellant disagree's in whole with Appellee's contention on this issue.

Further, on page 5 line 17-19 Appellee states that Appellant claims that he should have been considered for parole for the first time in 1990 instead of 1995. For the reasons that Appellant will produce for this Court later and at the appropriate time this statement will be shown to be completely true and with Merit.

APPELLANT'S RESPONSE TO APPELLEE'S PROPOSITION OF LAW NO.1

Appellant herein disagrees with Appellee's contention that Habeas Corpus is precluded to Appellant in this appeal for the following reasons:

State ex rel. Jackson v. McFaul, 73 Ohio St.3d at 186, holds 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 above statement from the listed case law seems to be quite appropriate for Appellant's current appeal as Appellant's Journal Entry Order of Commitment is totally and unequivocally Void and has never become a final, appealable order in which to start the appellate clock ticking. As such, Appellant has never had any adequate legal remedy to the appellate process, thus proving that he (Appellant) is being unlawfully restrained of his liberty by Appellee Warden Fransisco Pineda. There is no 'legal' order of commitment filed anywhere, "certainly not at the prison where Appellant is confined," that would give the Appellee the legal or statutory jurisdiction in which to restrain the Appellant of his freedom.

Furthermore, it was this very State of Ohio that denied Appellant his alternate legal remedy by way of mooting out

his direct appeal once the death penalty was ruled to be unconstitutional through the cases of Lockett v. Ohio (1978) 438 U.S. 586 and Bell v. Ohio (1978) 438 U.S. 637. To make matters worse, once the State mooted Appellant's direct appeal, See Merit Brief Appendix 8 Case No.78-510 Cuyahoga County, dated August 16, 1978, the Appellant's state appointed attorneys also stopped their legal representation of Appellant due to the fact that the appeal had thus been mooted (stopped) by this State. In essence, whatever direct appeal Appellant had on his original case was mooted by this state due to the fact that Lockett and Bell, supra had won their cases and Ohio could no longer apply the death penalty to Appellant. However, this does not deal with the fact that Appellant's direct appeal was dealing with other direct issues and briefed errors that Appellant claimed happened during his original trial. These issues were never fully litigated through the courts. Appellant's rights to Due Process and Equal Protection under the laws and Constitutions of both State and Federal Law was denied to him by this being done.

Certainly due to the fact that Appellant's original direct appeal was uncerimoniously stopped this would negate him (Appellant) from having any other legal remedy in any court by way of the appellate process, let alone the fact that his Journal Entry Order of Commitment is still a completely non-final and non-appealable order, nor does it comply with the statutory requirements of it being a Final

Appealable Order. See §2505.02 and Crim.R.32(C) as stated in State v. Baker, supra. See also State v. Dickey (1991), 74 Ohio App.3d 587, (failure to comply with Crim.R.32(C) results in a lack of a Final Appealable Order).

Statutes define what delineates a Final Appealable Order, whereas Criminal Rules define what elements constitute a Final Appealable Order. Taken together a sentence is thereby stated or imposed. The Appellee would have this Court think that the Criminal Rules and sentences for crimes are the most important aspects of Appellant's contentions completely leaving out the fact that both issues are directed by the statutes. Without which they cannot possibly operate in a legal manner.

Simply stated, Appellant did not have another adequate legal remedy available to him after the state mooted out his direct appeal; Appellant's Journal Entry Order of Commitment is an un-signed, non-final and non-appealable entry order of commitment and as such invokes the legal process of Habeas Corpus to deal with non-final and non-appealable issues.

Or, if the state (Appellee) still insists that Appellant has a legal incarceration, then let them produce a legal, Final and Appealable Journal Order of Commitment. At that point Appellant will concede this appeal.

Lastly, on page 7 of Appellee's Merit Brief line 12 Appellee tries subterfuge as a way of mis-directing this

Court's attention towards an issue that Appellant has never brought forward as an issue. That being the fact that Appellee contends that Appellant is attacking the validity of his indictment. At no time has Appellant ever attacked the validity of his indictment. This is a cheap ruse on the part of Appellee and, this Court should not allow this type of unprofessional legalese to remain unchecked.

Appellant's Journal Entry Order of Commitment is non-final, non-appealable and totally out of compliance with both State Statute §2505.02 and Crim.R.32(C) according to State v. Baker, supra, making Appellant's Journal Entry Order of Commitment Void, a Nullity and thus invoking the standards of Habeas Corpus to correct an illegal and unlawful restraint. If this Court were to take the opinion of Appellee then the reason that Appellant's direct appeal became moot would be due to the fact that Ohio could no longer apply the death penalty to Appellant, thus negating his direct appeal. This of-course, would be a total and ridiculous assumption for this Court or anyone else to make.

#### APPELLANT'S RESPONSE TO APPELLEE'S PROPOSITION OF LAW NO. II

Once again, the Appellee is using smokescreens to misdirect and confuse this Court into believing that Appellant is somehow complaining of mere sentencing issues and/or criminal rules violations. Not once when Appellant has cited the Statutory authority as given by this Honorable Court in State v. Baker, supra, see §2505.02, has Appellee

conceded that Appellant has actually cited this Statutory Authority. Instead, the Appellee tries to use subterfuge and ruses to confuse the issues presented to this Court.

Appellant is fully aware that Criminal Rules are not cognizable in a Habeas proceeding. Nor does a violation of any Criminal Rule entitle anyone to immediate release from prison. However, when this same person has shown that they are indeed held in continual confinement due to a non-final and non-appealable Journal Order of Commitment, in violation of Statutory Authority which invokes the elements of a Criminal Rule. This in no way is the same argument that the Appellee is attempting to make.

Further, Appellee goes on in this section to state that failure to comply with Criminal Rule 32(C) would not entitle Appellant to an immediate release from prison through the use of a Habeas Proceeding, rather the appropriate remedy would be that of correcting the Journal Entry.

Appellant would state to this Court that the time limit for this Court, or any Court to impose a legal, Statutory Sentence upon Appellant has now certainly passed. Over 30 plus years have elapsed since Appellant's original Order of Commitment was attempted. However, assuming for arguendo's sake, that the State could somehow correct Appellant's Journal Entry and somehow give Appellant a legal sentence, that sentence would have to comply with the Statutes that were in place during the time of Appellant's arrest and

conviction. Appellant herein contends that all sentences and/or statutes delineating sentences for criminal violations, viewed today, would all fall short as the minimums of even the most severe legal sentence that Ohio could impose would already now be completed. In order for Appellant to receive any sentence by Statute he would have to become parole eligible. Parole eligibility by nature happens at a persons minimum expiration of his sentence. Surely Appellant's 33 plus years of his current incarceration would now make any sentence that is statutorilly legal a violation of his Due Process rights of both the State and Federal Constitutions for a meaningful parole consideration. Thus, imposing any sentence at all that is statutorilly legal upon Appellant now would automatically violate his Due Process rights to a meaningful parole consideration. Thus, the Appellee citing Dunn v. Smith, 119 Ohio St.3d 364, 2008 Ohio 4565 is completely in-opposite to the current proceeding before this Court. Correcting Appellant's Void Journal Entry Order of Commitment is simply not an option open for the Court to use. To do so would create yet another Constitutional Violation that would automatically invoke the appellate process.

**APPELLANT'S RESPONSE TO APPELLEE'S PROPOSITION OF LAW NO.III**

Once again this Appellee has tried to confuse this issue by citing that sentencing issues cannot be heard in a

Habeas Corpus action. And once again Appellant herein states that he never stated this claim. What Appellant has stated in all his actions, including this Merit Brief to this Court, Case No. 10-1116, filed July 20, 2010, in his Statement of the Facts, Page 2 last paragraph, and Statement of the Case, Page 3 paragraph 3, as well as throughout his Merit Brief that he (Appellant's) Journal Entry Order of Commitment is a non-final, non-appealable order of commitment, not a mere sentencing error as the Appellee keeps stating.

Furthermore, Appellee boldly claims on the last line of Page 9 of their Merit Brief that Appellant has somehow pursued the wrong remedy.

Appellant will direct this Court's attention once again to Case No. 75-023071, filed in the Cuyahoga County Court of Common Pleas on December 08, 2008 titled 'MOTION TO VACATE VOID JUDGMENT, Void Ab Initio on The Face of the Record.' As is clearly seen "this" original Motion started out as a Motion to Vacate a Void Judgment due in part to the fact that Appellant's Journal Entry Order of Commitment has never become a final, appealable order which would invoke the bar of appellate procedures as guaranteed by both state and federal constitutions. The outcome thus far of this Original Motion is now before this Court properly in the form of a Habeas proceeding. The Appellee's cite Birns, at 138. However, Birns is totally opposite to Appellant's

contentions and this Court should not even consider such a 'sentencing error' as Appellee's are stating. This Petition to this Court started out a Void Judgment due to a Journal Entry having never been made final and appealable in the first instance. Nothing has or can change this fact. Not now and not later. Appellee's contentions are simply wrong.

**APPELLANT'S RESPONSE TO APPELLEE'S PROPOSITION OF LAW NO. IV**

Appellant contends that the 1981 version of Am.S.B.1, effective on October 19, 1981 is indeed "what" the State was to impose upon Appellant had Appellant's commitment and sentence ever been changed as was ordered by this very Court. On August 16, 1978 this Ohio Supreme Court issued an Entry Order containing the first 45 mens names and case numbers that were removed from Ohio's death row over the decision by the U.S. Supreme Court in the cases of Lockett v. Ohio supra, and Bell v. Ohio, supra. This Court ordered that a "Life" sentence be imposed at the bottom of paragraph (1) of this Entry Order. See Appellant's Merit Brief Appendix 8. Further, in paragraph (2) of this same Order this Court ordered it's own Clerk of Court to forward this Entry Order to the Clerks of the Common Pleas Court's of the 'below' listed counties. Obviously this Court wanted the court's of Original Jurisdiction to determine "which" sentence would be imposed, and of course, change the original Journal Entries to read properly to comply with these new changes. However, this was never done, so on

October 19, 1981 Ohio's Legislators adopted and passed into law Am.S.B.1. In Section 3 of said Bill it simply states in part: "Any such person shall, upon resentencing after the person's sentence of death is vacated, be sentenced to life imprisonment with parole eligibility after serving fifteen years of imprisonment." This section is covered by Statute §2967.19, and signed by among others the past Governor of Ohio James A. Rhodes.

Appellee claims that Appellant did not include another section to said Bill. Statute §2929.06 as seen in Appellee's Appendix in their Merit Brief. This Statute, Appellee claims, is the one that was 'supposed' to be imposed upon Appellant. However, Appellant would direct this Court to review the enclosed Appendix 1 titled JOHNSON v. MITCHELL, No.98-2277-Submitted March 10, 1999-Decided March 31, 1999. This was an Appeal from the Court of Appeals for Richland County, No. 98 CA 88. On page (2) on the very first line of this Decision it will be noted that this Court states that §2929.06 did not become effective until 1981, a few years after the vacation of Johnson's death sentence. 139 Ohio Laws, PartI, 1, 18-19.

Now for clarity Appellant will state that he was removed from death row on August 16, 1978, See Merit Brief of Appellant Appendix 8. This Court ordered that a "Life" sentence be imposed and informed it's own Clerk of Court to send a Copy of said Entry Order to the Clerks of Courts of

the Common Pleas. Following this line of investigation it should be noted that "no" specific "Life" sentence was ever imposed upon Appellant. This was to be left up to the Common Pleas Court, or Court of Original Jurisdiction to determine. However, for whatever reason the lower court never received this Entry Order and thus never complied with said Entry Order. Ohio's Legislators realizing this mistake took it upon themselves to adopt and enact Am.S.B.1 of October 19, 1981. On the 2nd page under the title of "AN ACT" it should be noted: To Amend sections. Nowhere in this section will this Court find §2929.06. However, a review of this Section will show what Appellant has claimed, that §2967.19 is included within this section. Further, on page 32 of said Bill at Section 2 it will be noted: That existing sections §2967.19 of the Revised Code are hereby repealed, not, as the Appellee states §2929.06. This Court can read this Legislative Enactment and see for itself that this Bill was indeed intended to be applied to Appellant and not §2929.06 as Appellee claims. Legislative Intent is a pre-eminent consideration to be determined as to Legislative Intent. See, State v. Grosse, 2009 WL 3756960 (Ohio App.9th Dist.), 2009-Ohio-5942, detailing Legislative Intent; and State ex rel. Wolfe v. Delaware County Bd. of Elections, 88 Ohio St.3d 182, 184, 724 N.E.2d 771 (2000), dealing with "unambiguous language."

In the 1980's while Appellant was at the London Correctional Facility there was also another inmate there

who is listed on this very same Entry Order by this Court of August 16, 1978. His name is the third listed name on this Entry Order, See Appellant's Merit Brief Appendix 8; State of Ohio v. John William Harris, Franklin County, Case No.75-843. Mr. Harris received a 20-Life sentence, yet in the 1980's the Franklin County Court of Common Pleas notified him (Harris) by way of letter that his sentence was now being changed to 15-Life to comply with a Legislatively enacted new law. Now, Appellant poses this question to this Court, why would this 15-Life of October 19, 1981 be applicable to Mr. Harris, who was on this very same order and sat on the very same death row awaiting electrocution as did Appellant, but this 15-Life sentence is somehow "not" applicable to Appellant? And, Appellant has proven that §2929.06 was definetly inapplicable according to this Court's ruling in Appellant's case of 1999 before this Court. This being the case, then exactly "what" Statutory Law or Authority existed to impose a legal determination upon Appellant, Codified, Uncodified or otherwise? Appellee would have this Court now believe that this Legislative Enactment was meant for no one to receive. Perhaps the Legislators never really meant what they adopted and passed into law. Or perhaps the Statute they attached this amended law to §2967.19 isn't really a law, and isn't really in the law books in this State. This is a totally ridiculous statement for Appellant to make, and equally ridiculous for the Appellee to claim now.

On page 11 line 9 of Appellee's Merit Brief they make a correct statement; "Johnson was not resentenced." As such, what then is Appellant doing in a prison? Appellee claims on page 12 line 4 that there is nothing illegal about the life sentence that this Court imposed. This is a preposterous allegation to make. It is common knowledge that this Honorable Supreme Court is "not" a sentencing Court. It can very well "Order" that a new sentence be carried out, but this procedure is totally up to the original court of jurisdiction to carry out and "not" this Supreme Court. Secondly, there is no Statutory Authority for a "Life" sentence in 1978 to be imposed upon Appellant. Without Statutory Authority no Court can Legally Act. This statement by Appellee is totally false. Further, on this same page line 7-8 the Appellee next claims that Ohio's Adult Parole Authority saw fit to impose a twenty to life sentence upon Appellant. Now the Appellee is claiming that Ohio's Parole Authority has the power to enact and implement sentences, an Administrative Branch of Ohio's Government. This definitely shows a Separation of Powers violation as the Ohio Adult Parole Authority cannot possibly step in and do the job of Ohio's Legislators or the Court's, it is not within their power or job description to do so. Appellee is totally mistaken on this point.

Lastly, on this same page 12 of Appellee's Merit Brief on the second paragraph, line 10 Appellee agrees with Appellant that this Court failed to 'sign' the Entry Order,

but Appellant did not state anywhere that this would make this Entry Order by this Court Void, as is his Journal Entry Order of Commitment. This Court's Entry Order is not a sentencing instrument and thus does not fall under the same principles of §2505.02 and Crim.R.32(C). Appellee is mistaken again. And finally, Appellee is once again trying to confuse this Court and this issue making it appear to be an issue of sentencing, where it is clear and has been clear that this fully briefed petition deals solely with a Void Judgment. A non-final and non-appealable Journal Entry Order of Commitment.

**APPELLANT'S RESPONSE TO APPELLEE'S PROPOSITION OF LAW NO.V**

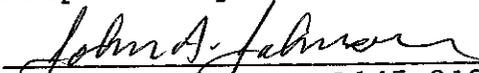
Appellee contends that Ohio does not allow successive habeas corpus petitions. Appellant has detailed this argument ad-infinitum in his Merit Brief on pages 16-19, and Appellant will stand by these aforementioned contentions already on file with this Court. However, for clarity sake and to once and for all deal with Appellee's contentions as to Res Judicata. In State v. Perry (1967), 10 Ohio St.2d 175, 39 O.O.2d 189, 226 N.E.2d 104 "[W]here no statutory authority exists to support a judgment, res judicata does not act to bar a trial court from correcting the error. State v. Ramey, Franklin App.No.06AP-245, 2006-Ohio-6429, 2006 WL 3518010, ¶12. See also, State v. Barnes Portage App.No.2006-P-0089, 2007-Ohio-3362, 2007 WL 1881509 ¶49-51; State v. Rodriguez (1989), 65 Ohio App.3d 151, 154, 583

N.E.2d 347 (Quillen, J. dissenting) ("A void judgment can be attacked in post-conviction relief \*427 proceedings even if the matter could have been, but was not, raised on direct appeal. If the Appellant's sentences are Void, the doctrine of res judicata is inapplicable"). Further, along these same lines as to changing a Void Commitment containing a Void sentence see, Beasley, 14 Ohio St.3d at 75, 140 BR 511, 471 N.E.2d 774. "Such actions are not mere errors that render a sentence voidable rather than void. If a judge imposes a sentence that is unauthorized by law, the sentence is unlawful. "If an act is unlawful it is not erroneous or voidable, but is wholly unauthorized and void. State ex rel. Kudrick v. Meredith (1922), 24 Ohio N.P. (N.S.) 120, 124, 1922 WL 2015, \*3. Appellant contends that Appellee is wrong on this issue and this Court should view Appellant's argument as being on point with this issue.

#### CONCLUSION

For the foregoing reasons Appellant is entitled to the issuance of the Writ of Habeas Corpus and asks this Honorable Court to issue the Writ.

Respectfully Submitted,

  
John A. Johnson, A145-213  
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**CERTIFICATE OF SERVICE**

I hereby Certify that a True Copy of the Foregoing Reply Brief of Appellant John A. Johnson, has been served by Regular U.S. Mail, postage pre-paid to Diane Mallory, Assistant Attorney General, 150 East Gay Street, Columbus, Ohio 43215-3130, this 17th day of August, 2010.

  
Signature

JOHN A. JOHNSON, A145-213  
Name & Number

APPELLANT - PRO SE

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**A P P E N D I X**

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## JOHNSON, APPELLANT, v. MITCHELL, APPELLEE.

[Cite as *Johnson v. Mitchell* (1999), — Ohio St.3d —.]*Habeas corpus to compel relator's release from prison—Petition dismissed, when.*

(No. 98-2277—Submitted March 10, 1999—Decided —, 1999.)

APPEAL from the Court of Appeals for Richland County, No. 98 CA 88.

In 1976, the Cuyahoga County Common Pleas Court convicted appellant, John A. Johnson, of aggravated murder with specifications, kidnapping, and rape. The common pleas court sentenced Johnson to death for the aggravated murder with specifications and further sentenced him to consecutive seven-to-twenty-five-year prison terms for his kidnapping and rape convictions. On appeal, the court of appeals affirmed. *State v. Johnson* (Jan. 30, 1978), Cuyahoga App. No. 36618, unreported. In 1978, we reversed Johnson's death sentence and reduced that sentence to life imprisonment based on *Lockett v. Ohio* (1978), 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973, and *Bell v. Ohio* (1978), 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010.

In September 1998, Johnson filed a petition in the Court of Appeals for Richland County for a writ of habeas corpus to compel his release from prison. Johnson claimed that he was entitled to extraordinary relief in habeas corpus because he was never returned to the common pleas court for resentencing pursuant to Crim.R. 32 and 43 after his death sentence was vacated. Johnson did not attach a copy of his sentencing entries to his petition. The court of appeals subsequently dismissed Johnson's petition.

This cause is now before the court upon an appeal as of right.

*John A. Johnson, pro se.*

*Betty D. Montgomery, Attorney General, and Diane Mallory, Assistant Attorney General, for appellee.*

*Per Curiam.* Johnson asserts in his sole proposition of law that the court of appeals erred in dismissing his habeas corpus petition. For the following reasons, however, Johnson's claims lack merit, and the court of appeals properly dismissed his petition.

First, the Rules of Criminal Procedure, including Crim.R. 32 and 43, do not apply to cases on appeal. Crim.R. 1(C)(1); *State v. McGettrick* (1987), 31 Ohio St.3d 138, 141, 31 OBR 296, 299, 509 N.E.2d 378, 381, fn. 5. And, as appellee

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cogently observes, R.C. 2929.06, which requires a resentencing hearing in the trial court when a death sentence is vacated on appeal based on the unconstitutionality of the statutory procedures for imposing the death penalty, did not become effective until 1981, a few years after the vacation of Johnson's death sentence. 139 Ohio Laws, Part I, 1, 18-19.

Second, even assuming the invalidity of Johnson's new sentence, which replaced his vacated death sentence, his aggregate prison sentence for his non-capital crimes precludes the writ. In other words, "[w]here a petitioner is incarcerated for several crimes, the fact that the sentencing court may have lacked jurisdiction to sentence him on one of the crimes does not warrant his release in habeas corpus." *Marshall v. Lazaroff* (1997), 77 Ohio St.3d 443, 444, 674 N.E.2d 1378, 1379, quoting *Swiger v. Seidner* (1996), 74 Ohio St.3d 685, 687, 660 N.E.2d 1214, 1216.

Finally, Johnson did not comply with the mandatory R.C. 2725.04(D) requirement to attach his pertinent commitment papers to his habeas corpus petition. *Boyd v. Money* (1998), 82 Ohio St.3d 388, 389, 696 N.E.2d 568, 569.

Based on the foregoing, we affirm the judgment of the court of appeals.

*Judgment affirmed.*

MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY, PFEIFER, COOK and LUNDBERG  
STRATTON, JJ., concur.

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