

**ORIGINAL**

In the  
**Supreme Court of Ohio**

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

Relators-Appellants,

v.

HON. JAMES M. BURGE,

Respondent-Appellee.

: Case No. 2010-1216  
:  
: On Appeal from the  
: Lorain County  
: Court of Appeals,  
: Ninth Appellate District  
:  
: Court of Appeals Case Nos.  
: 09CA009723  
: 09CA009724  
:

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

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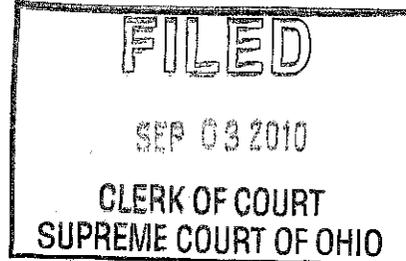
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## INTRODUCTION

The trial judge in this case, Respondent James M. Burge, granted judgments of acquittal to two defendants—Nancy Smith and Joseph Allen—*years* after their convictions became final on direct review. In doing so, Judge Burge disregarded the well-established principle “that the Ohio Constitution does not grant to a court of common pleas jurisdiction to review a prior mandate of a court of appeals.” *State ex rel. Cordray v. Marshall*, 123 Ohio St. 3d 229, 2009-Ohio-4986, ¶ 32 (internal quotations and citation omitted).

A jury convicted Smith and Allen of numerous sex offenses involving children in 1994. The trial court imposed a 30- to 90-year prison term on Smith, and a life term on Allen.<sup>1</sup> The Ninth District affirmed the two convictions in 1996, and this Court denied review.

In 2008, Smith filed a motion for resentencing, arguing that her 1994 judgment entry did not comply with Crim. R. 32(C). Shortly thereafter, Allen filed a similar motion. Judge Burge—who inherited the cases upon the retirement of his predecessor—entertained the motions. Although the defendants’ entries set forth the jury’s verdict, the trial court’s sentence, and the original trial judge’s signature, Judge Burge concluded that the entries were defective under Rule 32(C) because they did not indicate that the verdicts were found “by a jury.” Judge Burge then determined that he had jurisdiction over the case because no final appealable order had ever been entered. He thereafter issued *sua sponte* judgments of acquittal to both Smith and Allen.

Attorney General Richard Cordray and Lorain County Prosecuting Attorney Dennis Will promptly sought a writ of prohibition in the Ninth District, asserting that Judge Burge had no jurisdiction to issue the acquittals. A divided panel denied relief. The majority found that the

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<sup>1</sup> Technically there is only one trial court in this case. For the sake of clarity, however, Relators use the term “trial court” to refer to the common pleas court that oversaw Smith and Allen’s 1994 criminal proceedings; to identify the 2009 proceedings now under review, Relators refer to Judge Burge by name.

original sentencing entries were not final appealable orders, and that Judge Burge retained jurisdiction to revisit any non-final rulings entered by his predecessor. See *State ex rel. Cordray v. Burge* (9th Dist.), Nos. 09CA9723, 09CA9724, 2010-Ohio-3009, ¶ 20 (“App. Op.”). In dissent, Judge Carr concluded that Judge Burge’s actions were unlawful because they “constituted a review of [the Ninth District’s] prior mandate.” *Id.* at ¶ 48.

The dissent was exactly right. Judge Burge lacked jurisdiction to enter the judgments of acquittal for two reasons.

First, both sentencing entries satisfy Rule 32(C). They “set[] forth the jury verdict, the sentence, the judge’s signature, and the entry on the journal by the clerk of courts.” *State ex rel. Agosto v. Cuyahoga Court of Common Pleas*, 119 Ohio St. 3d 366, 2008-Ohio-4607, ¶ 9. Although Judge Burge criticized the entries for not specifying that the verdicts were found “by a jury,” “that additional language would have been superfluous.” *State ex rel. Barr v. Sutula*, 2010-Ohio-3213, ¶ 2. No one disputes that a jury convicted Smith and Allen, and that the sentencing entries properly recite the jury’s verdict.

Second, even if the sentencing entries deviate from Rule 32(C), “the appropriate remedy is correct[ion] [of] the journal entry.” *Dunn v. Smith*, 119 Ohio St. 3d 364, 2008-Ohio-4565, ¶ 10; accord *State ex rel. Alicea v. Krichbaum*, 2010-Ohio-3234, ¶ 2. The original trial judge’s failure to note “jury” on the defendants’ sentencing entries was, at most, a “clerical error”—“a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment.” *State ex rel. Cruzado v. Zaleski*, 111 Ohio St. 3d 353, 2006-Ohio-5795, ¶ 19 (citation omitted). In such cases, trial courts retain jurisdiction to do one thing—issue a “nunc pro tunc entry” correcting the record. *Id.*

Only two possible outcomes exist in this case: either (1) Judge Burge had no jurisdiction over Smith and Allen's criminal matter because the sentencing entries were valid final orders under Rule 32(C); or (2) Judge Burge had limited jurisdiction to issue a nunc pro tunc order correcting a clerical error in those entries. But under no circumstances did Judge Burge have jurisdiction to do what he did—revisit the merits of the criminal case and issue judgments of acquittal. That conduct invades the exclusive province of the Ohio appellate courts. The Ninth District should have found that Judge Burge lacked jurisdiction to entertain Smith and Allen's motions for resentencing. This Court should now reverse.

### STATEMENT OF THE CASE AND FACTS

In 1993, a Lorain County grand jury indicted Nancy Smith for numerous sex offenses involving children. App. Op. ¶ 3. The following year, the grand jury indicted Joseph Allen for offenses involving the same children. *Id.* The case proceeded to trial in 1994, and the jury returned guilty verdicts for both defendants. *Id.* The trial court imposed a 30- to 90-year sentence on Smith, and a life sentence on Allen. *Id.*

The trial court then issued two judgment entries. For Smith, the entry read: "Defendant appeared in Court for sentencing after having been found guilty to the following charge(s): 1. Gross Sexual Imposition, 2. Attempted Rape, 3. Rape, 4. Complicity to Rape, 5. Complicity to Rape, 6. Gross Sexual Imposition." Judgment Entry of Conviction and Sentence, *State v. Smith* (Lorain C.P. Aug. 4, 1994), Nos. 94CR0444489, 94CR045368 (citations and offense degrees omitted), attached as Ex. C-1. (Smith filed a motion for a new trial or judgment of acquittal, which the trial court denied. App. Op. ¶ 3.)

For Allen, the entry read: "Defendant appeared in Court for sentencing after having been found guilty to the following charge(s): 1. Rape, 2. Rape w/ Force, 3. Rape w/ Force, 4. Rape w/ Force, 5. Felonious Sexual Penetration, 6. Felonious Sexual Penetration w/ Force, 7. Felonious

Sexual Penetration w/ Force, 8. Gross Sexual Imposition.” Judgment Entry of Conviction and Sentence, *State v. Allen* (Lorain C.P. Aug. 4, 1994), No. 94CR045372 (citations and offense degrees omitted), attached as Ex. D-1.

The Ninth District affirmed both convictions on direct appeal. In *State v. Smith* (9th Dist. 1996), No. 95CA6070, 1996 Ohio App. Lexis 241, the appellate court found no error in the trial court’s decision to admit out-of-court statements by the child victims against Smith, *id.* at \*20-26, and it held that the State’s evidence was sufficient to sustain Smith’s convictions, *id.* at \*29-38. In *State v. Allen* (9th Dist. 1996), No. 94CA5944, 1996 Ohio App. Lexis 385, the Ninth District similarly concluded that the trial court properly admitted several out-of-court statements by the abused children, *id.* at \*7-9, and that the State’s evidence was sufficient to sustain Allen’s convictions, *id.* at \*11-16.

This Court denied discretionary review over both cases. See *State v. Smith* (1996), 76 Ohio St. 3d 1419; *State v. Allen* (1996), 76 Ohio St. 3d 1409.

In 2008, Smith filed a motion for resentencing, claiming that her sentencing entry failed to comply with Crim. R. 32(C). App. Op. ¶ 5. Allen filed a similar motion in 2009. *Id.* The cases were assigned to Judge Burge. Judge Burge concluded that Smith’s sentencing entry did not conform to Rule 32(C) because it “does not reflect that defendant was convicted by a jury.”<sup>2</sup> Slip. Op., at 1, *State v. Smith* (Lorain C.P. Feb. 13, 2009), Nos. 93CR44489, 94CR45368, attached as Ex. C-2. He then held that the remedy for a Rule 32(C) violation is either “a corrected sentencing entry, or, in the court’s discretion, a resentencing.” *Id.* at 7. Judge Burge

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<sup>2</sup> No dispute exists on whether Smith and Allen received jury trials. The daily journal entries are rife with “jury trial” notations, and the Ninth District’s opinions on direct review observed that Smith and Allen received jury trials. See *Smith*, 1996 Ohio App. Lexis 241, at \*3; *Allen*, 1996 Ohio App. Lexis 385, at \*3.

issued an identical opinion in Allen's case. See Slip Op., *State v. Allen* (Lorain C.P. Apr. 13, 2009), No. 94CR45372, attached as Ex. D-2.

Judge Burge then, on his own accord, entered judgments of acquittal for both Smith and Allen. See Judgment, *State v. Smith* (Lorain C.P. June 24, 2009), Nos. 93CR44489, 94CR45368, attached as Ex. C-3; Judgment, *State v. Allen* (Lorain C.P. June 24, 2009), No. 94CR45372, attached as Ex. D-3. In direct contravention of the Ninth District's earlier opinions, Judge Burge determined that the trial court had erred in admitting the out-of-court statements of the child victims, and further stated that he had "absolutely no confidence that these verdicts are correct."<sup>3</sup> Hr'g Tr. at 5-8 (June 24, 2009), attached as Ex. E. Judge Burge also ordered the State to remove Smith and Allen's sexual offender designations.

Attorney General Richard Cordray and Lorain County Prosecuting Attorney Dennis Will sought a writ of prohibition in the Ninth District, seeking to vacate Judge Burge's judgments of acquittal. The Ninth District found that Judge Burge had jurisdiction to entertain Smith and Allen's motions for resentencing because their initial sentencing entries did not comply with Rule 32(C) and, thus, were non-final orders. App. Op. ¶ 20. Because "a trial court may reconsider an interlocutory order at any time before final judgment," the appellate court held that Judge Burge acted within the scope of his authority. *Id.* ¶ 25. Judge Carr dissented, concluding that Judge Burge acted in contravention of the Ninth District's prior mandate. *Id.* ¶ 49.

The Ninth District nevertheless granted the writ of prohibition and vacated Judge Burge's judgment of acquittal for Allen. The court observed that Allen (unlike Smith) never filed a motion for judgment of acquittal after the jury's 1994 verdict, and that Judge Burge lacked

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<sup>3</sup> Judge Burge also exceeded his authority under Crim. R. 29 by considering evidence that was never presented to the jury in 1994.

authority to grant a non-existent motion. *Id.* ¶¶ 30-32. The Ninth District left the manner of Allen’s resentencing up to Judge Burge. *Id.* ¶ 35.

Attorney General Cordray and Prosecutor Will filed a timely appeal as of right. Both Smith and Allen were released pending the outcome of this proceeding.

### ARGUMENT

To obtain a writ of prohibition, relators must establish that “(1) Judge [Burge] was about to exercise judicial or quasi-judicial power, (2) the exercise of that power was unauthorized by law, and (3) denying the writ would result in injury for which no other adequate remedy existed in the ordinary course of law.” *Marshall*, 2009-Ohio-4986, at ¶ 25. As to the first prong, it is “uncontroverted” that Judge Burge exercised judicial power in vacating Smith and Allen’s convictions. *Id.* “For the remaining requirements, if 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.” *Id.* ¶ 26 (internal quotations, alteration, and citation omitted).

This case therefore turns on whether Judge Burge “patently and unambiguously lacked jurisdiction” to entertain Smith and Allen’s motions for resentencing and vacate their convictions. *Id.* He lacked such jurisdiction for two reasons.

#### **Relators’ Proposition of Law No. I:**

*Crim. R. 32(C) requires the judgment of conviction to recite the finding, but not the manner, of the defendant’s conviction.*

Judge Burge found that no valid judgment of conviction existed in either Smith or Allen’s criminal case. Therefore, Judge Burge asserted jurisdiction to resentence, and acquit, the two defendants. That ruling rests on a mistaken premise. The original sentencing entries in 1994 were *not* deficient. Rather, they were final appealable orders under Rule 32(C). Because the

Ninth District affirmed those orders on appeal in 1996, Judge Burge lacked jurisdiction to revisit them in 2009. See *Marshall*, 2009-Ohio-4986, at ¶ 32.

Under Crim. R. 32(C), a trial court's judgment of conviction must contain "the plea, the verdict, or findings, upon which each conviction is based, and the sentence." The rule further directs the judge to "sign the judgment" and the clerk to "enter it on the journal." *Id.* In *State v. Baker*, 119 Ohio St. 3d 197, 2008-Ohio-3330, this Court discussed the requirements for a Rule 32(C) entry: The order must "set[] 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) the entry on the journal by the clerk of court." *Id.* at syl. A sentencing judgment is final and appealable when all four requirements are met. *Id.*

In this case, Smith and Allen's sentencing entries satisfy the four *Baker* elements. With respect to the first element, each entry accurately recites the jury verdict—that is, the jury's "guilty" findings on each count of the indictment. See Ex. C-1 (Smith); Ex. D-1 (Allen). The entries also list the defendants' sentences, they were signed by the judge, and they were journalized by the clerk.

The inquiry should end there. But additional language from *Baker* has created confusion. After listing the four elements of a Rule 32(C) entry, the Court remarked: "Simply stated, a defendant is entitled to appeal an order that sets forth *the manner of conviction*." 2008-Ohio-3330, at ¶ 18 (emphasis added). If this language from *Baker* is read strictly, the sentencing entries here do not satisfy Rule 32(C). They indicate only that the defendants "ha[d] been found guilty" of the various offenses; they do not say that the verdicts were issued "by a jury." See Ex. C-1 (Smith); Ex. D-1 (Allen). Judge Burge adopted that formulation below: "Defendant's

judgment entry of conviction and sentence does not reflect that defendant was convicted by a jury . . . and is, therefore, contrary to law.” See Ex. C-2, p.1 (Smith); Ex. D-2, p.2 (Allen).

But this Court’s recent decision in *Barr* indicates otherwise—that the manner of conviction need not be listed in a Rule 32(C) entry. In *Barr*, the defendant was convicted of robbery in a bench trial. The trial court’s judgment entry stated only that “the court found the defendant guilty of robbery.” 2010-Ohio-3213, at ¶ 2. That notation did not conclusively fix the manner of the defendant’s conviction: It did not specify (1) whether the defendant had “enter[ed] a plea of no contest” and was “convicted upon a finding of guilt by the court”; or (2) whether the defendant was instead “found guilty by the court after a bench trial.” *Baker*, 2008-Ohio-3330, at ¶ 12.

The *Barr* Court nevertheless found no Rule 32(C) error: “The judge was not required to add language that the court found the defendant guilty of the offenses after a bench trial; that additional language would have been superfluous.” *Barr*, 2010-Ohio-3213, at ¶ 2. In other words, this Court did not enforce the language from *Baker* suggesting that a Rule 32(C) judgment entry must identify the precise manner of the defendant’s conviction.

The Ninth District has already recognized *Barr*’s clarifying force. In *State ex rel. Davis v. Ewers* (9th Dist. Aug. 9, 2010), No. 10CA9828, slip op. (attached as Ex. E), the court reviewed a sentencing entry identical to those at issue here. A jury convicted the defendant of aggravated murder, and the trial court issued the following entry: “Defendant appeared in Court for sentencing after having been found guilty of the following charges: Count 1: Aggravated Murder.” *Id* at 2. More than a decade after his conviction became final, the defendant moved for resentencing, claiming that his original judgment entry violated Rule 32(C) because it did not specify that he had been convicted “by a jury.”

The Ninth District disagreed: “According to *Barr*, a sentencing entry is sufficient to satisfy the first *Baker* requirement if it sets forth the trial court’s finding of guilt, without reference to the manner of conviction.” *Id.* at 5. As the court observed, “[t]his is the only logical explanation for the Supreme Court’s conclusion that including the manner of conviction in the sentencing entry ‘would have been superfluous.’” *Id.*

The same result must hold here. *Baker* states that the judgment of conviction must set forth “the jury verdict” to satisfy Rule 32(C). 2008-Ohio-3330, at syl. Both entries in this case meet that requirement; they accurately recite the verdicts for Smith and Allen. And *Barr* confirms that these orders were final and appealable in 1994, notwithstanding their omission of a “jury trial” notation. In all, because no Rule 32(C) error occurred, Judge Burge lacked jurisdiction to entertain Smith and Allen’s motions for resentencing on that ground.

**Relators’ Proposition of Law No. II:**

*To cure a deficient sentencing entry under Crim R. 32(C), the trial court’s limited jurisdiction allows it only to issue a corrected nunc pro tunc judgment entry.*

Even if Smith and Allen’s sentencing entries did not comply with Rule 32(C), Judge Burge exceeded the scope of his authority to remedy the error. He wrongly reopened the merits of the underlying criminal case (even though it had been affirmed on direct appeal). When faced with a deficient Rule 32(C) sentencing entry, trial courts have limited jurisdiction to perform only one task—issue a corrected nunc pro tunc judgment entry.

“[T]he Ohio Constitution does not grant to a court of common pleas jurisdiction to review a prior mandate of a court of appeals.” *Marshall*, 2009-Ohio-4986, at ¶ 32 (internal quotations and citation omitted). “This doctrine is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior

courts as designed by the Ohio Constitution.” *Id.* ¶ 27 (quoting *Hopkins v. Dyer*, 104 Ohio St. 3d 461, 2004-Ohio-6769, ¶ 15).

This rule “is subject to two exceptions under which the trial court retains continuing jurisdiction.” *Cruzado*, 2006-Ohio-5795, at ¶ 19. “First, a trial court is authorized to correct a void sentence.” *Id.* “Second, a trial court can correct clerical errors in judgment.” *Id.*

“[A] sentence is void” when “it does not contain a statutorily mandated term.” *Id.* at ¶ 20 (quoting *State v. Jordan*, 104 Ohio St. 3d 21, 2004-Ohio-6085, ¶ 23). A void sentence “is a mere nullity and the parties are in the same position as if there had been no judgment.” *State v. Bezak*, 114 Ohio St. 3d 94, 2007-Ohio-3250, at ¶ 12. By the same token, a void sentencing judgment “do[es] not constitute [a] final appealable order[.]” *State ex rel. Carnail v. McCormick*, 2010-Ohio-2671, ¶ 36. The “sentence must be vacated” and the case returned “to the trial court for resentencing,” notwithstanding any appellate proceedings that might have occurred. *Cruzado*, 2006-Ohio-5795, at ¶ 21 (quoting *Jordan*, 2004-Ohio-6085, at ¶ 27).

By contrast, a clerical error in the judgment “refers to a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment.” *Id.* at ¶ 19 (citation omitted). In such instances, the trial court retains limited jurisdiction “to correct clerical errors in judgment entries so that the record speaks the truth.” *Id.* Such “nunc pro tunc entries are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided.” *Id.* (citation omitted).

This Court easily distinguishes between a void sentence and a clerical error. A trial court pronounces a void sentence when it fails to include a statutorily required term. See, e.g., *State v. Boswell*, 121 Ohio St. 3d 575, 2009-Ohio-1577, ¶ 8 (“[S]entences that fail to impose a mandatory term of postrelease control are void.”). A clerical mistake is a scrivener’s error. No

dispute exists on the validity of the trial court's judgment, but some error occurred in the journalization of that judgment. See, e.g., *Jacks v. Adamson* (1897), 56 Ohio St. 397 ("The failure of the clerk of the court to enter the decree of confirmation on the minutes of the court is not fatal to the purchaser's title, where it appears that such decree, in fact, was ordered by the court.").

Any Rule 32(C) deficiency in Smith and Allen's sentencing entries was "clerical" in nature. No dispute exists on the validity of their criminal sentences; the trial court had jurisdiction to impose the sentences in 1994, and the sentences contain all the statutorily required terms. Rather, the only purported deficiency is the trial court's failure to indicate on the entries that Smith and Allen had been found guilty "by a jury." That oversight was "mechanical in nature," "apparent on the record," and "does not involve a legal decision or judgment." *Cruzado*, 2006-Ohio-5795, at ¶ 19 (citation omitted). Judge Burge therefore had limited jurisdiction "to correct [the] clerical error[] in []the judgment entries so that the record speaks the truth," but nothing else. *Id.*

This Court's recent opinion in *Alicea* confirms that conclusion. A criminal defendant claimed that his sentencing entry violated Rule 32(C) and sought a writ of mandamus to compel the trial court "to hold a new sentencing hearing." 2010-Ohio-3234, at ¶ 1. This Court denied relief "for two separate reasons." *Id.* ¶ 2. First, it confirmed that "the remedy for failure to comply with Crim. R. 32(C) is a revised sentencing entry rather than a new hearing." *Id.* (emphasis added); accord *Dunn*, 2008-Ohio-4565, at ¶ 10 (holding that "the appropriate remedy" for "a trial court's failure to comply with Crim. R. 32(C) . . . is correcting the journal entry"). Second, the *Alicea* Court found that the defendant was not even entitled to a revised entry

because his original “sentencing entry fully complied with Crim. R. 32(C).” 2010-Ohio-3234, at ¶ 2.

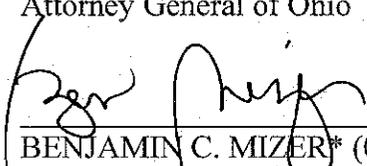
Put simply, even if there was Rule 32(C) error in Smith and Allen’s sentencing entries, the mistake was clerical. Judge Burge had limited jurisdiction to issue revised nunc pro tunc sentencing entries to correct the error. The Ninth District’s 1996 judgment affirming Smith and Allen’s convictions deprived him of jurisdiction to take any other action. Because Judge Burge plainly and unambiguously lacked authority to resentence or acquit Smith and Allen, Relators are entitled to a writ of prohibition.

## CONCLUSION

For these reasons, Relators respectfully ask this Court to reverse the Ninth District's decision below and issue a writ of prohibition ordering Judge Burge to vacate Smith's judgment of acquittal and deny the motions for resentencing.

Respectfully submitted,

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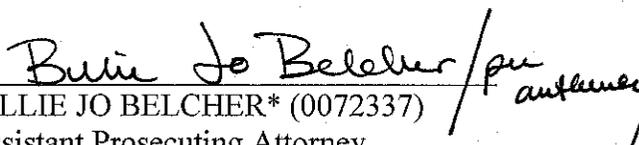
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Counsel for Relator-Appellant

Dennis P. Will

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Relators Ohio Attorney General Richard Cordray and Lorain County Prosecuting Attorney Dennis P. Will was served by U.S. mail this 3<sup>rd</sup> day of September, 2010, upon the following:

The Honorable James M. Burge  
Lorain County Justice Center  
225 Court Street, Room 705  
Elyria, Ohio 44035



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David M. Lieberman  
Deputy Solicitor

# EXHIBIT A

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

**NOTICE OF APPEAL OF RELATORS  
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LORAIN COUNTY PROSECUTING ATTORNEY DENNIS P. WILL**

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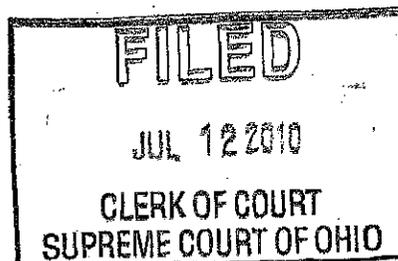
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**NOTICE OF APPEAL OF RELATORS  
OHIO ATTORNEY GENERAL RICHARD CORDRAY AND  
LORAIN COUNTY PROSECUTING ATTORNEY DENNIS P. WILL**

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,

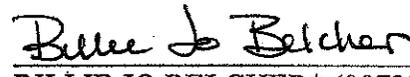
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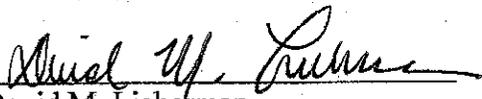
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**CERTIFICATE OF SERVICE**

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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\_\_\_\_\_  
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# EXHIBIT B

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 instant, 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. 415.

{¶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.

# EXHIBIT C-1

COURT OF COMMON PLEAS  
LORAIN COUNTY, OHIO  
Donald J. Rothgery, Clerk.

STATE OF OHIO,

Plaintiff

-vs-

Nancy Smith

Defendant

CASE NO.

93CR044481, 94CR04530P

[Signature]  
Assistant Prosecuting Attorney

Attorney for Defendant

JUDGMENT ENTRY OF CONVICTION AND SENTENCE

1. Defendant appeared in Court for sentencing after having <sup>been found</sup> entered a plea of guilty to the following charge(s):

1. Gross Sexual Imposition  
a violation of O.R.C. 2907.05 a 3<sup>rd</sup> degree felony/misdemeanor.
2. Attempted Rape  
a violation of O.R.C. 2923.02, 2907.02 a 2<sup>nd</sup> Agg degree felony/misdemeanor.
3. Rape  
a violation of O.R.C. 2907.02 a Agg 1<sup>st</sup> degree felony/misdemeanor.
4. Complicity to Rape  
a violation of O.R.C. 2923.03, 2907.02 a Agg 1<sup>st</sup> degree felony/misdemeanor.
5. Complicity to Rape  
a violation of O.R.C. 2923.03, 2907.02 a Agg 1<sup>st</sup> degree felony/misdemeanor.
6. Gross Sexual Imposition  
a violation of O.R.C. 2907.05 a 3<sup>rd</sup> degree felony/misdemeanor.
7. \_\_\_\_\_  
a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.
8. \_\_\_\_\_  
a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.

9. \_\_\_\_\_  
a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.
10. \_\_\_\_\_  
a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.
11. \_\_\_\_\_  
a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.
12. \_\_\_\_\_  
a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.
13. \_\_\_\_\_  
a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.
14. \_\_\_\_\_  
a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.
15. \_\_\_\_\_  
a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.
16. \_\_\_\_\_  
a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.
17. \_\_\_\_\_  
a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.
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a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.
20. \_\_\_\_\_  
a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.
21. \_\_\_\_\_  
a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.

22.

a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.

- 2. A pre-sentence Report and Investigation were <sup>not</sup> ordered and completed. A copy was/~~was not~~ shown to the defense.
- 3. Defendant was present with counsel in open court for sentencing 8-4, 1994. A stenographer was present. Defendant's counsel and defendant were afforded an opportunity to speak and present any information in mitigation of punishment, pursuant to Criminal Rule 32(A)(1).
- 4. Upon consideration of all matters set forth by law it is the judgment of law and sentence of the Court that defendant be sentenced to a term of confinement of:

1. 2 yrs  
in the ORW and pay fine of \$ — on Ct. I

2. 5 to 15 yrs  
in the ORW and pay fine of \$ — on Ct. II

3. 7 to 25 yrs  
in the ORW and pay fine of \$ — on Ct. III

4. 7 to 25 yrs  
in the ORW and pay fine of \$ — on Ct. IV

5. 7 to 25 yrs  
in the ORW and pay fine of \$ — on Ct. V

6. 2 yrs (Ct 1 in 4402045368)  
in the ORW and pay fine of \$ — on Ct. VI

B. All cases and all counts imposed immediately  
in the \_\_\_\_\_ and pay fine of \$ \_\_\_\_\_ on Ct. VII

8. \_\_\_\_\_  
in the \_\_\_\_\_ and pay fine of \$ \_\_\_\_\_ on Ct. VIII

9. \_\_\_\_\_  
in the \_\_\_\_\_ and pay fine of \$ \_\_\_\_\_ on Ct. IX

10. \_\_\_\_\_  
in the \_\_\_\_\_ and pay fine of \$ \_\_\_\_\_ on Ct. X

11. \_\_\_\_\_  
in the \_\_\_\_\_ and pay fine of \$ \_\_\_\_\_ on Ct. XI

12. \_\_\_\_\_  
in the \_\_\_\_\_ and pay fine of \$ \_\_\_\_\_ on Ct. XII

13. \_\_\_\_\_  
in the \_\_\_\_\_ and pay fine of \$ \_\_\_\_\_ on Ct. XIII

14. \_\_\_\_\_  
in the \_\_\_\_\_ and pay fine of \$ \_\_\_\_\_ on Ct. XIV

15. \_\_\_\_\_  
in the \_\_\_\_\_ and pay fine of \$ \_\_\_\_\_ on Ct. XV

16. \_\_\_\_\_  
in the \_\_\_\_\_ and pay fine of \$ \_\_\_\_\_ on Ct. XVI

17. \_\_\_\_\_  
in the \_\_\_\_\_ and pay fine of \$ \_\_\_\_\_ on Ct. XVII

18. \_\_\_\_\_  
in the \_\_\_\_\_ and pay fine of \$ \_\_\_\_\_ on Ct. XVIII

19. \_\_\_\_\_  
in the \_\_\_\_\_ and pay fine of \$ \_\_\_\_\_ on Ct. XIX

20. \_\_\_\_\_  
in the \_\_\_\_\_ and pay fine of \$ \_\_\_\_\_ on Ct. XX

21. \_\_\_\_\_  
in the \_\_\_\_\_ and pay fine of \$ \_\_\_\_\_ on Ct. XXI

22. \_\_\_\_\_  
in the \_\_\_\_\_ and pay fine of \$ \_\_\_\_\_ on Ct. XXII

5. The Defendant shall:

(a) Pay a mandatory fine pursuant to O.R.C. 2925.03(H) of \$ \_\_\_\_\_ on Count I;  
\$ \_\_\_\_\_ on Count II; \$ \_\_\_\_\_ on Count III; \$ \_\_\_\_\_ on Count IV;  
\$ \_\_\_\_\_ on Count V; \$ \_\_\_\_\_ on Count VI; \$ \_\_\_\_\_ on Count VII;  
\$ \_\_\_\_\_ on Count VIII; \$ \_\_\_\_\_ on Count IX; \$ \_\_\_\_\_ on Count X;  
\$ \_\_\_\_\_ on Count XI; \$ \_\_\_\_\_ on Count XII; \$ \_\_\_\_\_ on Count XIII;  
\$ \_\_\_\_\_ on Count XIV; \$ \_\_\_\_\_ on Count XV; \$ \_\_\_\_\_ on Count XVI;  
\$ \_\_\_\_\_ on Count XVII; \$ \_\_\_\_\_ on Count XVIII; \$ \_\_\_\_\_ on Count XIX;  
\$ \_\_\_\_\_ on Count XX; \$ \_\_\_\_\_ on Count XXI; \$ \_\_\_\_\_ on Count XXII.

(b) The mandatory fine listed in 5(a) shall be paid to the Clerk of Courts, who in turn shall pay the same to \_\_\_\_\_ and 25% to the Lorain County Prosecutor.

(c) Mandatory drug fines under any section of O.R.C. 2925 (other than R.C. 2925.03) shall be disbursed by the Clerk of Court as follows:  
50% in care of the Ohio State Board of Pharmacy, \_\_\_\_\_ % to \_\_\_\_\_  
and 25% to the Lorain County Prosecutor.

(d)  (If checked) Mandatory fines are HELD IN ABEYANCE pending hearing or/SUSPENDED pursuant to the affidavit of indigency.

6. Defendant is ordered to pay the costs of prosecution \_\_\_\_\_.

7. Sentence of imprisonment in the \_\_\_\_\_ is suspended, the fine and costs are not suspended, and the defendant is placed on probation for \_\_\_\_\_ year(s) ending \_\_\_\_\_, 199\_\_\_\_. Defendant is ordered to serve the first \_\_\_\_\_ days of his probationary period in the Lorain County Jail.

8.  (If checked) Defendant shall be committed to the Lorain County Correctional Facility and, thereafter, be released to the Adult Probation Department for \_\_\_\_\_ days for electronic monitoring.

9. Defendant is entitled to a credit of ADD days, AS DETERMINED BY LORAIN SHERIFF pursuant to R.C. 2967.191, to be applied to his minimum and maximum sentences if confined \_\_\_\_\_.

10. As a specific condition of probation, the defendant is ordered to:  
 Obey all orders and directions of the Adult Probation Department.  
 Seek Drug/Alcohol Abuse evaluation/counseling.  
 Make restitution in the amount of \$ \_\_\_\_\_  
 Seek and maintain employment/vocational training  
 No association with \_\_\_\_\_  
 Random urinalysis at Defendant's expense.  
 Repay court appointed attorney fees within \_\_\_\_\_  
 Fine and costs to be paid within \_\_\_\_\_ and to be paid in increments of \_\_\_\_\_  
 Intensive Supervision Program.

11. After expiration of the appellate process, all property not forfeited is hereby ordered returned to the victim(s)/owner(s) or sold at public auction with proceeds distributed as provided by law.

Seized money/property \_\_\_\_\_ in the custody of the police department is ordered forfeited pursuant to Defendant's plea and may be used or sold by the agency with proceeds deposited into law enforcement trust accounts as follows: \_\_\_\_\_ and 25% to the Prosecutor.

12. After expiration of the appellate process, all contraband and/or drugs are hereby ordered destroyed by the law enforcement agency.

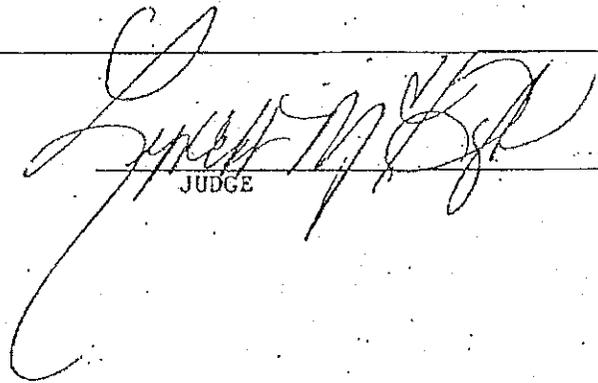
13. Money not distributed pursuant to paragraph 5 is ordered distributed as follows:

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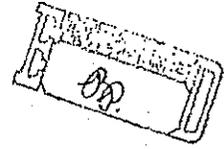
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\_\_\_\_\_  
JUDGE

# EXHIBIT C-2



FILED  
LORAIN COUNTY



2009 FEB 13 A 8:49

LORAIN COUNTY COURT OF COMMON PLEAS  
LORAIN COUNTY, OHIO

RON NABAKOWSKI, Clerk  
JOURNAL ENTRY  
James M Burge, Judge

Date	<u>2/13/09</u>	Case No.	<u>93CR044489</u> <u>94CR045368</u>
<u>STATE OF OHIO</u> Plaintiff		<u>THOMAS CAHILL, A.P.A.</u> Plaintiff's Attorney	
VS			
<u>NANCY SMITH</u> Defendant		<u>JACK W. BRADLEY</u> Defendant's Attorney	

OPINION

FACTS

1. Defendant has filed a motion for resentencing, claiming that her judgment entry of conviction and sentence is contrary to Ohio Crim. R. 32(C).
2. After a review of the Supreme Court's decision in State v. Baker (2008), 119 Ohio St. 3d 197, the court makes the following legal and factual findings:
  - (a) Pursuant to Crim. R. 32(C), a judgment entry of conviction and sentence must contain, *inter alia*, the guilty plea, **the jury verdict** or the finding of the court upon which the conviction is based.
  - (b) Defendant was convicted by a jury.
  - (c) Defendant's judgment entry of conviction and sentence does not reflect that defendant was convicted by a jury.
  - (d) Defendant's judgment entry of conviction is contrary to Crim. R. 32(C) and is, therefore, contrary to law.

EXHIBIT  
3



nat 1048 Page 1356



- (e) A document that does not contain the provisions mandated by Crim. R. 32(C), as construed in Baker, supra, is not a judgment entry of conviction and sentence.
- (f) Defendant's status is that she has been found guilty by a jury and the court has pronounced sentence; however, the court has not entered a judgment of conviction and sentence on the record of the clerk of courts.

### THE ISSUE

The issue for determination is what relief the trial court may grant to defendant, *in this case*, upon a determination that her judgment entry of conviction and sentence is not in compliance with Crim. R. 32(C).

### THE LAW

#### A. Former R.C.2929.51

Former R.C.2929.51(A), provided, in relevant part, as follows:

**"At any time...*between the time of sentencing...and the time at which an offender is delivered into the custody of the institution in which he is to serve his sentence*, when a term of imprisonment for felony is imposed; *the court may suspend the sentence* and place the offender on probation pursuant to section 2951.02 of the Revised Code..." (emphasis supplied)**

Under former R.C.2929.51, the jurisdiction of the trial court continued until the defendant's delivery to a state institution. Thus, under this statute, the trial court retained jurisdiction to reduce the sentence, or to place the defendant on probation, until the defendant





was admitted to a state correctional facility to begin serving his sentence. State v. Addison (1987), 40 Ohio App. 3d 7, 8-9; State v. Roberts (1986), 33 Ohio App. 201, 202.

Former R.C.2929.51(A) was included in the statutory sentencing scheme at the time of defendant's indictment. Because this sentencing statute was in effect on the date of defendant's indictment (pre-S.B.2), it is applicable to the court's determination here. State v. Rush (1998), 83 Ohio St. 3d 53 (syllabus 2).

#### **B. Conclusions of Law: R.C.2929.51(A)**

1. The court's post-verdict jurisdiction to modify a sentence, under former R.C.2929.51(A), continues until the defendant is admitted to a state correctional facility, pursuant to a judgment entry of conviction and sentence that has been filed with the clerk of courts.
2. Defendant has not been admitted to a state correctional facility pursuant to a judgment entry of conviction and sentence that has been filed with the clerk of courts.
3. The court has jurisdiction to modify defendant's sentence under former R.C.2929.51(A).

#### **C. Crim. R. 32(C) Violation: Remedies** **Case Law**

Recent cases decided by the Ohio Supreme Court discuss the jurisdiction of the trial court in affording a remedy to cure a Crim. R. 32(C) deficiency.

In the most recent case, State ex rel. Mitchell v. Smith (2008), 119 Ohio St. 3d 163, the petitioner filed an action in the Supreme Court requesting *habeas corpus* on the ground that the trial court had failed to enter a judgment entry of conviction and sentence which complied with Crim. R. 32(C).





Upon review, the court held that because a Crim. R. 32(C) violation would not compel Mitchell's release from confinement, the writ could not issue and the petition was dismissed.

However, in *dictum*, the court stated that, "***the appropriate remedy is resentencing***," citing State ex rel. McAllister v. Smith (2008), 119 Ohio St. 3d 163. (emphasis supplied)  
The Mitchell case was decided on December 2, 2008.

In State ex rel. McCallister v. Smith (2008), 119 Ohio St. 3d 163, the petitioner filed an action in the court of appeals seeking a writ of *habeas corpus* to compel his release from incarceration, claiming that his judgment entry of conviction and sentence was not in compliance with Crim. R. 32(C). The court of appeals dismissed the petition.

The Supreme Court affirmed the judgment of the court of appeals on the ground that a Crim. R. 32(C) violation does not entitle the *habeas corpus* petitioner to immediate release.

In *dictum*, the court went on to say that,

"McCallister cites no case in which a court has held that a failure to comply with Crim. R. 32(C) entitles an inmate to immediate release from prison; instead, ***the appropriate remedy is resentencing*** instead of outright release."  
(emphasis supplied) Id. at 915.

McCallister was decided on August 7, 2008.

In Dunn v. Smith (2008), 119 Ohio St. 3d 364, the Supreme Court held that a petition for *habeas corpus* would not be granted for a Crim. R. 32(C) violation, since (1) the violation would not entitle the petitioner to immediate release from confinement and (2) the petitioner had "an adequate remedy at law by way of a motion in the trial court ***requesting a revised sentencing entry***." (emphasis supplied) Id. at 365.





In *dictum* the court stated that if the trial court refused to provide an entry in compliance with Crim. R. 32(C), the appropriate remedy would be a petition for a writ of *mandamus* or *procedendo*. *Id.* The court further stated that "***the appropriate remedy is correcting the journal entry.***" *Id.* at 365-366. (emphasis supplied)

Dunn was decided on September 17, 2008.

In State ex rel. Culgan v. Medina County Court of Common Pleas (2008), 119 Ohio St. 3d 535, the Supreme Court reversed a judgment of the court of appeals and issued writs of *mandamus* and *procedendo* after the trial court denied the petitioner's motion to file a ***revised sentencing entry***, in accordance with Crim. R. 32 (C).

The court held that because Culgan had exhausted his legal remedies and the trial court had a clear duty to act in accordance with Culgan's request, the extraordinary writs were appropriate. *Id.* at 536-537.

Culgan was decided on June 24, 2008.

#### **D. Crim. R. 32(C) Violation** **Discussion**

In McAllister and Mitchell, *supra*, the Supreme Court, in *dictum*, stated that the appropriate remedy to cure a Crim. R. 32(C) violation is "resentencing."

In Dunn and Culgan, *supra*, the Supreme Court, in *dictum*, stated that the appropriate remedy for a Crim. R. 32(C) violation is a "revised judgment entry."





### E. Conclusion of Law

The court finds that upon notice of a Crim. R. 32(C) violation, the trial court has a "clear duty" *only* to provide an amended sentencing entry. The court finds also, that upon a showing of a Crim. R. 32(C) violation, the trial court retains jurisdiction, under former R.C. 2929.51(A), to resentence defendant.

### HOLDINGS

1. The court holds that the post-verdict jurisdiction of the trial court, under former R.C.2929.51(A) and the facts of this matter, extends until defendant's admission to a state correctional facility, pursuant to a judgment entry of conviction and sentence that complies with Crim. R. 32(C).
2. Though defendant's sentence was announced in open court, the court finds that no judgment entry of conviction and sentence was filed with the clerk of courts. Thus, the court holds that defendant has not been admitted to a state correctional facility, pursuant to a lawful sentencing order, filed with the clerk of courts, and hence, that the court has jurisdiction to resentence defendant.
3. When a trial court issues a sentencing judgment entry that fails to comply with Crim. R. 32(C), the only action required of the trial court is to provide an amended sentencing entry that complies with Crim. R. 32(C).
4. The Supreme Court has stated, in *dicta*, that appropriate remedies to cure a Crim. R.32(C) deficiency include a "corrected journal entry" and "a resentencing."
5. The court finds that the Supreme Court understands the difference between a "revised sentencing entry" and a

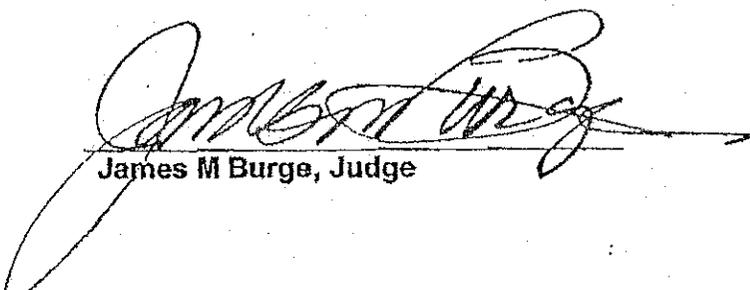




"resentencing." The former requires only the redrafting of a judgment. The latter requires a hearing and a new sentencing entry. The court holds that either is an appropriate remedy here.

6. The court holds further that upon notice of the Crim. R. 32(C) violation, herein, the jurisdiction of the court includes the preparation of a corrected sentencing entry or, in the court's discretion, a resentencing.

VOL \_\_\_\_\_ PAGE \_\_\_\_\_

  
James M Burge, Judge

cc: Pros.  
Atty. Bradley



# EXHIBIT C-3



LORAIN COUNTY COURT OF COMMON PLEAS  
LORAIN COUNTY, OHIO

RON NABAKOWSKI, Clerk  
JOURNAL ENTRY  
James M Burge, Judge

Date 6/24/09

Case No. 93CR044489  
94CR045368

STATE OF OHIO  
Plaintiff

ANTHONY CILLO  
Plaintiff's Attorney

VS

NANCY SMITH  
Defendant

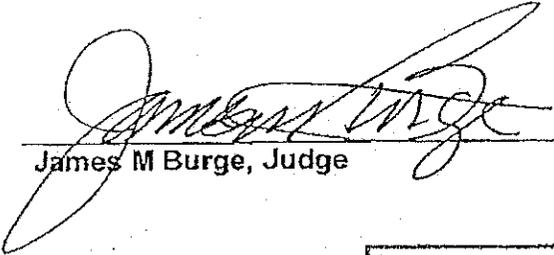
JACK W. BRADLEY  
Defendant's Attorney

Upon consideration of the record and the law applicable thereto, and the jury having been discharged, the court, pursuant to Ohio Criminal Rule 29(C), enters a judgment of acquittal, *sua sponte*.

Defendant discharged.

Bond released.

VOL \_\_\_\_\_ PAGE \_\_\_\_\_

  
James M Burge, Judge

cc: Pros. Cillo  
Atty. Bradley

COPY



EXHIBIT

4

# EXHIBIT D-1

FILED  
LORAIN COUNTY

AUG 4 1 12 PM '94

CLERK OF COMMON PLEAS  
DONALD J. ROTHGERY

**B**  
COURT OF COMMON PLEAS  
LORAIN COUNTY, OHIO  
Donald J. Rothgery, Clerk

EXHIBIT

1

STATE OF OHIO,

Plaintiff

-vs-

Joseph Allan

Defendant

CASE NO. 94 CR045372

James E. M.  
Assistant Prosecuting Attorney

Attorney for Defendant

JUDGMENT ENTRY OF CONVICTION AND SENTENCE

1. Defendant appeared in Court for sentencing after having <sup>been found</sup> entered a plea of guilty to the following charge(s):

1. Rape  
a violation of O.R.C. 2907.02 a 1st degree felony/~~misdeamnor.~~
2. Rape w/ Force  
a violation of O.R.C. 2907.02 a 1st degree felony/~~misdeamnor.~~
3. Rape w/ Force  
a violation of O.R.C. 2907.02 a 1st degree felony/~~misdeamnor.~~
4. Rape w/ Force  
a violation of O.R.C. 2907.02 a 1st degree felony/~~misdeamnor.~~
5. Felonious Sexual Penetration  
a violation of O.R.C. 2907.12 a 1st degree felony/~~misdeamnor.~~
6. Felonious Sexual Penetration w/ Force  
a violation of O.R.C. 2907.12 a 1st degree felony/~~misdeamnor.~~
7. Felonious Sexual Penetration w/ Force  
a violation of O.R.C. 2907.12 a 1st degree felony/~~misdeamnor.~~
8. Gross Sexual Impropriety  
a violation of O.R.C. 2907.05 a 3rd degree felony/~~misdeamnor.~~

9. \_\_\_\_\_  
a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.
10. \_\_\_\_\_  
a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.
11. \_\_\_\_\_  
a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.
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a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.
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a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.
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a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.
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a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.
17. \_\_\_\_\_  
a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.
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a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.
19. \_\_\_\_\_  
a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.
20. \_\_\_\_\_  
a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.
21. \_\_\_\_\_  
a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.

22.

a violation of O.R.C. \_\_\_\_\_ a \_\_\_\_\_ degree felony/misdemeanor.

- 2. A pre-sentence Report and Investigation were <sup>not</sup> ordered and completed. A copy ~~was~~ was not shown to the defense.
- 3. Defendant was present with counsel in open court for sentencing 8/4, 1994. A stenographer was present. Defendant's counsel and defendant were afforded an opportunity to speak and present any information in mitigation of punishment, pursuant to Criminal Rule 32(A)(1).

4. Upon consideration of all matters set forth by law it is the judgment of law and sentence of the Court that defendant be sentenced to a term of confinement of:

1. 10 to 25 yrs min imposed as actual  
in the LCI and pay fine of \$ — on Ct. I

2. life  
in the LCI and pay fine of \$ — on Ct. II

3. life  
in the LCI and pay fine of \$ — on Ct. III

4. life  
in the LCI and pay fine of \$ — on Ct. IV

5. 10 to 25 yrs min imposed as actual  
in the LCI and pay fine of \$ — on Ct. V

6. life  
in the LCI and pay fine of \$ — on Ct. VI

7. life  
in the LCI and pay fine of \$ — on Ct. VII

8. 2 yrs  
in the LCI and pay fine of \$ — on Ct. VIII

9. All sentences are imposed concurrently  
in the \_\_\_\_\_ and pay fine of \$ \_\_\_\_\_ on Ct. IX

5. The Defendant shall:

(a) Pay a mandatory fine pursuant to O.R.C. 2925.03(N) of \$ \_\_\_\_\_ on Count I;  
\$ \_\_\_\_\_ on Count II; \$ \_\_\_\_\_ on Count III; \$ \_\_\_\_\_ on Count IV;  
\$ \_\_\_\_\_ on Count V; \$ \_\_\_\_\_ on Count VI; \$ \_\_\_\_\_ on Count VII;  
\$ \_\_\_\_\_ on Count VIII; \$ \_\_\_\_\_ on Count IX; \$ \_\_\_\_\_ on Count X;  
\$ \_\_\_\_\_ on Count XI; \$ \_\_\_\_\_ on Count XII; \$ \_\_\_\_\_ on Count XIII;  
\$ \_\_\_\_\_ on Count XIV; \$ \_\_\_\_\_ on Count XV; \$ \_\_\_\_\_ on Count XVI;  
\$ \_\_\_\_\_ on Count XVII; \$ \_\_\_\_\_ on Count XVIII; \$ \_\_\_\_\_ on Count XIX;  
\$ \_\_\_\_\_ on Count XX; \$ \_\_\_\_\_ on Count XXI; \$ \_\_\_\_\_ on Count XXII.

(b) The mandatory fine listed in 5(a) shall be paid to the Clerk of Courts, who in turn shall pay the same to \_\_\_\_\_ and 25% to the Lorain County Prosecutor.

(c) Mandatory drug fines under any section of O.R.C. 2925 (other than R.C. 2925.03) shall be disbursed by the Clerk of Court as follows:  
50% in care of the Ohio State Board of Pharmacy, \_\_\_\_\_ % to \_\_\_\_\_  
and 25% to the Lorain County Prosecutor.

(d)  (If checked) Mandatory fines are HELD IN ABEYANCE pending hearing or/SUSPENDED pursuant to the affidavit of indigency.

6. Defendant is ordered to pay the costs of prosecution \_\_\_\_\_.

7. Sentence of imprisonment in the \_\_\_\_\_ is suspended, the fine and costs are not suspended, and the defendant is placed on probation for \_\_\_\_\_ year(s) ending \_\_\_\_\_, 199\_\_\_\_. Defendant is ordered to serve the first \_\_\_\_\_ days of his probationary period in the Lorain County Jail.

8.  (If checked) Defendant shall be committed to the Lorain County Correctional Facility and, thereafter, be released to the Adult Probation Department for \_\_\_\_\_ days for electronic monitoring.

9. Defendant is entitled to a credit of 110 days <sup>AS DETERMINED BY L.C. SHERIFF</sup> pursuant to R.C. 2967:191, to be applied to his minimum and maximum sentences if confined \_\_\_\_\_.

10. As a Specific condition of probation, the defendant is ordered to:

- Obey all orders and directions of the Adult Probation Department.
- Seek Drug/Alcohol Abuse evaluation/counseling.
- Make restitution in the amount of \$ \_\_\_\_\_.
- Seek and maintain employment/vocational training.
- No association with \_\_\_\_\_.
- Random urinalysis at Defendant's expense.
- Repay court appointed attorney fees within \_\_\_\_\_.
- Fine and costs to be paid within \_\_\_\_\_ and to be paid in increments of \_\_\_\_\_.
- \_\_\_\_\_ Intensive Supervision Program.

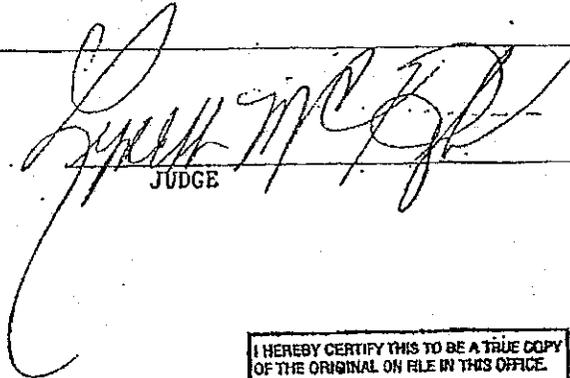
11. After expiration of the appellate process, all property not forfeited is hereby ordered returned to the victim(s)/owner(s) or sold at public auction with proceeds distributed as provided by law.

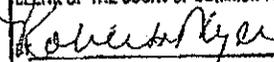
Seized money/property \_\_\_\_\_ in the custody of the police department is ordered forfeited pursuant to Defendant's plea and may be used or sold by the agency with proceeds deposited into law enforcement trust accounts as follows: \_\_\_\_\_ and 25% to the Prosecutor.

12. After expiration of the appellate process, all contraband and/or drugs are hereby ordered destroyed by the law enforcement agency.

13. Money not distributed pursuant to paragraph 5 is ordered distributed as follows:

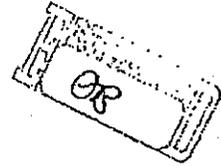
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

  
JUDGE

I HEREBY CERTIFY THIS TO BE A TRUE COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.  
RON KABAKOWSKI, LORAIN COUNTY  
CLERK OF THE COURT OF COMMON PLEAS  
 DEPUTY

# EXHIBIT D-2

FILED  
LORAIN COUNTY



2009 APR 13 P 3:29

LORAIN COUNTY COURT OF COMMON PLEAS  
LORAIN COUNTY, OHIO  
CLERK OF COMMON PLEAS  
RON NABAKOWSKI

RON NABAKOWSKI, Clerk  
JOURNAL ENTRY  
James M Burge, Judge ✓

Date 4/13/09 Case No. 94CR045372

STATE OF OHIO LORAIN COUNTY PROSECUTOR  
Plaintiff Plaintiff's Attorney

VS

JOSEPH LEE ALLEN K. RONALD BAILEY  
Defendant Defendant's Attorney

Upon motion of defendant, judgment of conviction and sentence filed 8-4-94 vacated. Defendant referred to the Lorain County Adult Parole Authority for presentence investigation and report. Bond reinstated at \$50,000.00 cash.

EXHIBIT  
3

OPINION

FACTS

1. Defendant has filed a motion for resentencing, claiming that his judgment entry of conviction and sentence is contrary to Ohio Crim. R. 32(C).
2. After a review of the Supreme Court's decision in State v. Baker (2008), 119 Ohio St. 3d 197, the court makes the following legal and factual findings:

(a) Pursuant to Crim. R. 32(C), a judgment entry of



Page 143



conviction and sentence must contain, *inter alia*, the guilty plea, **the jury verdict** or the finding of the court upon which the conviction is based.

- (b) Defendant was convicted by a jury.
- (c) Defendant's judgment entry of conviction and sentence does not reflect that defendant was convicted by a jury.
- (d) Defendant's judgment entry of conviction is contrary to Crim. R. 32(C) and is, therefore, contrary to law.
- (e) A document that does not contain the provisions mandated by Crim. R. 32(C), as construed in Baker, supra, is not a judgment entry of conviction and sentence.
- (f) Defendant's status is that he has been found guilty by a jury and the court has pronounced sentence; however, the court has not entered a judgment of conviction and sentence on the record of the clerk of courts.

### THE ISSUE

The issue for determination is what relief the trial court may grant to defendant, **in this case**, upon a determination that his judgment entry of conviction and sentence is not in compliance with Crim. R. 32(C).

### THE LAW

#### A. Former R.C.2929.51

Former R.C.2929.51(A), provided, in relevant part, as follows:

**"At any time...between the time of sentencing...and the time at which an offender is delivered into the custody of the institution in which he is to serve his sentence, when a term of imprisonment for felony is imposed, the court may suspend the sentence and place the offender on probation pursuant to section 2951.02 of the Revised Code..."** (emphasis supplied)

Journals 1052 Page 1443





Under former R.C.2929.51, the jurisdiction of the trial court continued until the defendant's delivery to a state institution. Thus, under this statute, the trial court retained jurisdiction to reduce the sentence, or to place the defendant on probation, until the defendant was admitted to a state correctional facility to begin serving his sentence. State v. Addison (1987), 40 Ohio App. 3d 7, 8-9; State v. Roberts (1986), 33 Ohio App. 201, 202.

Former R.C.2929.51(A) was included in the statutory sentencing scheme at the time of defendant's indictment. Because this sentencing statute was in effect on the date of defendant's indictment (pre-S.B.2), it is applicable to the court's determination here. State v. Rush (1998), 83 Ohio St. 3d 53 (syllabus 2).

#### **B. Conclusions of Law: R.C.2929.51(A)**

1. The court's post-verdict jurisdiction to modify a sentence, under former R.C.2929.51(A), continues until the defendant is admitted to a state correctional facility, pursuant to a judgment entry of conviction and sentence that has been filed with the clerk of courts.
2. Defendant has not been admitted to a state correctional facility pursuant to a judgment entry of conviction and sentence that has been filed with the clerk of courts.
3. The court has jurisdiction to modify defendant's sentence under former R.C.2929.51(A).

#### **C. Crim. R. 32(C) Violation: Remedies** **Case Law**

Recent cases decided by the Ohio Supreme Court discuss the jurisdiction of the trial court in affording a remedy to cure a Crim. R. 32(C) deficiency.





In the most recent case, State ex rel. Mitchell v. Smith (2008), 119 Ohio St. 3d 163, the petitioner filed an action in the Supreme Court requesting *habeas corpus* on the ground that the trial court had failed to enter a judgment entry of conviction and sentence which complied with Crim. R. 32(C).

Upon review, the court held that because a Crim. R. 32(C) violation would not compel Mitchell's release from confinement, the writ could not issue and the petition was dismissed.

However, in *dictum*, the court stated that, "***the appropriate remedy is resentencing***," citing State ex rel. McAllister v. Smith (2008), 119 Ohio St. 3d 163. (emphasis supplied)  
The Mitchell case was decided on December 2, 2008.

In State ex rel. McCallister v. Smith (2008), 119 Ohio St. 3d 163, the petitioner filed an action in the court of appeals seeking a writ of *habeas corpus* to compel his release from incarceration, claiming that his judgment entry of conviction and sentence was not in compliance with Crim. R. 32(C). The court of appeals dismissed the petition.

The Supreme Court affirmed the judgment of the court of appeals on the ground that a Crim. R. 32(C) violation does not entitle the *habeas corpus* petitioner to immediate release.

In *dictum*, the court went on to say that,

"McCallister cites no case in which a court has held that a failure to comply with Crim. R. 32(C) entitles an inmate to immediate release from prison; instead, ***the appropriate remedy is resentencing*** instead of outright release."  
(emphasis supplied) *Id.* at 915.

McCallister was decided on August 7, 2008.

In Dunn v. Smith (2008), 119 Ohio St. 3d 364, the Supreme Court held that a petition for *habeas corpus* would not be granted for a Crim.





R. 32(C) violation, since (1) the violation would not entitle the petitioner to immediate release from confinement and (2) the petitioner had "an adequate remedy at law by way of a motion in the trial court *requesting a revised sentencing entry.*" (emphasis supplied) Id. at 365.

In *dictum* the court stated that if the trial court refused to provide an entry in compliance with Crim. R. 32(C), the appropriate remedy would be a petition for a writ of *mandamus* or *procedendo*. Id. The court further stated that "*the appropriate remedy is correcting the journal entry.*" Id. at 365-366. (emphasis supplied)

Dunn was decided on September 17, 2008.

In State ex rel. Culgan v. Medina County Court of Common Pleas (2008), 119 Ohio St. 3d 535, the Supreme Court reversed a judgment of the court of appeals and issued writs of *mandamus* and *procedendo* after the trial court denied the petitioner's motion to file a *revised sentencing entry*, in accordance with Crim. R. 32 (C).

The court held that because Culgan had exhausted his legal remedies and the trial court had a clear duty to act in accordance with Culgan's request, the extraordinary writs were appropriate. Id. at 536-537.

Culgan was decided on June 24, 2008.

#### D. Crim. R. 32(C) Violation Discussion

In McAllister and Mitchell, *supra*, the Supreme Court, in *dictum*, stated that the appropriate remedy to cure a Crim. R. 32(C) violation is "resentencing."

In Dunn and Culgan, *supra*, the Supreme Court, in *dictum*, stated that the appropriate remedy for a Crim. R. 32(C) violation is a "revised judgment entry."





### E. Conclusion of Law

The court finds that upon notice of a Crim. R. 32(C) violation, the trial court has a "clear duty" *only* to provide an amended sentencing entry. The court finds also, that upon a showing of a Crim. R. 32(C) violation, the trial court retains jurisdiction, under former R.C. 2929.51(A), to resentence defendant.

### HOLDINGS

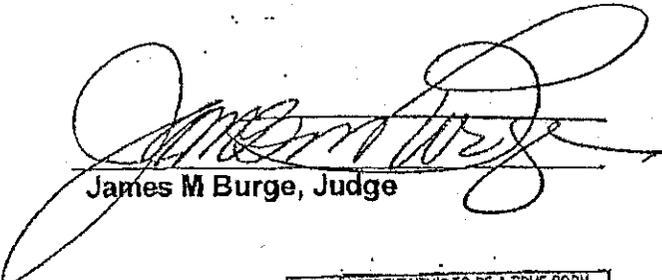
1. The court holds that the post-verdict jurisdiction of the trial court, under former R.C.2929.51(A) and the facts of this matter, extends until defendant's admission to a state correctional facility, pursuant to a judgment entry of conviction and sentence that complies with Crim. R. 32(C).
2. Though defendant's sentence was announced in open court, the court finds that no judgment entry of conviction and sentence was filed with the clerk of courts. Thus, the court holds that defendant has not been admitted to a state correctional facility, pursuant to a lawful sentencing order, filed with the clerk of courts, and hence, that the court has jurisdiction to resentence defendant.
3. When a trial court issues a sentencing judgment entry that fails to comply with Crim. R. 32(C), the only action required of the trial court is to provide an amended sentencing entry that complies with Crim. R. 32(C).
4. The Supreme Court has stated, in *dicta*, that appropriate remedies to cure a Crim. R.32(C) deficiency include a "corrected journal entry" and "a resentencing."



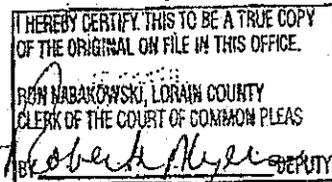


5. The court finds that the Supreme Court understands the difference between a "revised sentencing entry" and a "resentencing." The former requires only the redrafting of a judgment. The latter requires a hearing and a new sentencing entry. The court holds that either is an appropriate remedy here.
  
6. The court holds further that upon notice of the Crim. R. 32(C) violation, herein, the jurisdiction of the court includes the preparation of a corrected sentencing entry or, in the court's discretion, a resentencing.

VOL \_\_\_\_\_ PAGE \_\_\_\_\_

  
James M Burge, Judge

cc: Pros.  
Atty. Bailey



# EXHIBIT D-3



LORAIN COUNTY COURT OF COMMON PLEAS  
LORAIN COUNTY, OHIO

RON NABAKOWSKI, Clerk  
JOURNAL ENTRY  
James M Burge, Judge

Date 6/24/09

Case No. 94CR044488  
94CR045372

STATE OF OHIO  
Plaintiff

ANTHONY CILLO  
Plaintiff's Attorney

VS

JOSEPH LEE ALLEN  
Defendant

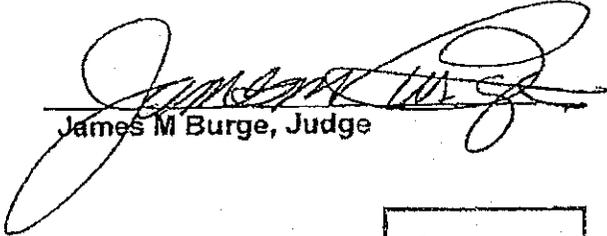
K. RONALD BAILEY  
Defendant's Attorney

Upon consideration of the record and the law applicable thereto,  
and the jury having been discharged, the court, pursuant to Ohio  
Criminal Rule 29(C), enters a judgment of acquittal, *sua sponte*.

Defendant discharged.

Bond released.

VOL \_\_\_\_\_ PAGE \_\_\_\_\_

  
James M Burge, Judge

cc: Pros. Cillo  
Atty. Bailey

COPY



EXHIBIT

4

# EXHIBIT E



1 The State of Ohio, )  
2 County of Lorain. ) SS:

3  
4 IN THE COURT OF COMMON PLEAS

5 THE STATE OF OHIO, )  
6 Plaintiff;

7 vs.  
8 JOSEPH L. ALLEN,

No. 93CR044488/94CR045372

9 THE STATE OF OHIO, )  
10 Plaintiff;

11 vs.  
12 NANCY L. SMITH,  
13 Defendant.

No. 93CR044489/94CR045368

\*\*\*

14 COMPLETE TRANSCRIPT OF PROCEEDINGS

15 WEDNESDAY, JUNE 24, 2009

16 APPEARANCES:

17 Appearing on behalf of the State of Ohio:

18 Lorain County Prosecutor's Office,  
19 Dennis P. Will, Lorain County Prosecutor, by  
20 George Koury, Assistant County Prosecutor;

21 Appearing on behalf of the Defendant, Joseph Allen:

22 K. Ronald Bailey, Esq.;

23 Appearing on behalf of the Defendant, Nancy Smith:

24 Jack W. Bradley, Esq.

25 \*\*\*

1 The State of Ohio, )  
2 County of Lorain. ) SS:

3  
4 IN THE COURT OF COMMON PLEAS

5 THE STATE OF OHIO, )  
6 Plaintiff; )

7 vs. )

8 JOSEPH L. ALLEN, )

No. 93CR044488/94CR045372

9 THE STATE OF OHIO, )  
10 Plaintiff; )

11 vs. )

12 NANCY L. SMITH, )  
13 Defendant. )

No. 93CR044489/94CR045368

14 \*\*\*

15 COMPLETE TRANSCRIPT OF PROCEEDINGS

16 WEDNESDAY, JUNE 24, 2009

17 \*\*\*

18 BE IT REMEMBERED, that on Wednesday, the 24th day of  
19 June, 2009, being one of the regular days of the April  
20 term of said court, before the Honorable James M. Burge,  
21 the presiding Judge of said court, the above-captioned  
22 cause came on for hearing.  
23  
24  
25

\*\*\*

1 MORNING SESSION, WEDNESDAY, JUNE 24, 2009

2 THE COURT: The record should reflect that we're  
3 convened today in the matter of the State of Ohio versus  
4 Nancy Smith, that would be Case Number 94CR045368, and, as  
5 well, State of Ohio versus Joseph Lee Allen, which is Case  
6 Number 94CR045372. We're here pursuant to a prior hearing  
7 wherein the Court vacated the sentence imposed upon each  
8 defendant, being a vacation of the judgment entry of  
9 conviction and sentence. The matter was appealed to the  
10 Ninth District Court of Appeals. The Ninth District Court  
11 of Appeals, in each case, ruled that the Court had the  
12 authority to vacate the sentence and the judgment entry of  
13 conviction.

14 When I first commenced my review of these  
15 matters, the object of the exercise was for the Court to  
16 determine what would be an appropriate sentence. The  
17 Court gave a presumption of validity to the original  
18 sentence, but thought that it would be prudent, if I were  
19 to consider a resentencing, to know as much about the case  
20 as did my predecessor when this sentence was imposed, so I  
21 decided to review the file. In that regard I read the  
22 transcript of the trial, paying close attention to the  
23 testimony of the complaining witnesses in this case, but,  
24 as well, reviewing the balance of the testimony. In  
25 addition, I was able to review evidence that had been

1 furnished to the defense during the course of the trial,  
2 which consisted of tape recordings of pretrial interviews  
3 with the complaining witnesses in the case.

4           Before I commence that analysis, I want to make  
5 clear for the record that each detective, each law  
6 enforcement officer who investigated this case, is a  
7 personal friend of mine, and for each of them I have the  
8 highest degree of respect.

9           The matter was prosecuted by the Lorain County  
10 Prosecutor's Office, and by an assistant with whom I did  
11 battle for over 20 years. In reviewing his presentation  
12 of the case, it was clear to me that his motive was to do  
13 the best he could for the State of Ohio and for these  
14 witnesses who testified. He took advantage of every break  
15 he could get, as did the defense, as do all lawyers who  
16 are worthy to walk into a courtroom. I don't think in the  
17 course of my law practice I ever received a ruling from a  
18 Court favorable to me that I failed to accept, and that is  
19 all the assistant prosecutor did.

20           I think we should be mindful that this case was  
21 commenced in 1993 and it was tried in 1994, and it was  
22 done under the circumstances that existed at that time, in  
23 terms of interviewing witnesses as best they could, and  
24 the presentation of the case. The advantage that this  
25 Court has is that I'm able to review the case with eyes

1 that have had an additional 16 years of experience, both  
2 in trying cases such as this and, as well, reviewing the  
3 applicable law that has applied over the years.

4 In 1994, testimony of witnesses of tender age  
5 could be presented to a jury either by having the witness  
6 on the stand or by not having the witness on the stand  
7 under certain circumstances, and under the authority of  
8 Evidence Rule 807. As a result of that, a great deal of  
9 the testimony presented consisted of out-of-court  
10 statements made by the child witnesses in this case, but  
11 presented by others. Evidence Rule 807 allowed other  
12 witnesses to testify on out-of-court statements by  
13 children if the trial court found that those out-of-court  
14 statements being brought to court carried with them a  
15 circumstantial guarantee of trustworthiness.

16 Subsequently, however, in the case of Gaston  
17 versus Brigano, that's cited at 2000 Westlaw -- 2004  
18 Westlaw 5349214, this case was decided at approximately  
19 the same time that this case was being tried, November of  
20 2004, and in Gaston, the Federal District Court for the  
21 Northern District -- or, for the Southern District of  
22 Ohio, ruled that essentially Evidence Rule 807 obviated  
23 the defendant's right to confront the witnesses against  
24 them. Given that ruling, this Court cannot find that the  
25 testimony of witnesses besides the children, as to the

1 children's out-of-court statements, would be admissible  
2 under any reasonable theory.

3           Reviewing the statements, the Court does not find  
4 that these statements would have been admissible under  
5 Evidence Rule 803, which would be statements made for the  
6 purpose of diagnosis and treatment, or Evidence Rule 804,  
7 which I believe is, if I can recall it, it should be the  
8 excited utterance exception; hence, that if Gaston is the  
9 law and this case has not been reversed, then that  
10 testimony should not have been admissible, and would not  
11 be admissible in a retrial.

12           In addition, the Court, having spent countless  
13 hours listening to the interview tapes of the children,  
14 and taking extensive notes and evaluating these  
15 interviews, the Court would find, upon review, that the  
16 pretrial interviews, though the parties were doing their  
17 best -- and I'm talking capable social workers, capable  
18 and honest detectives and parents -- even though all doing  
19 their best to seek justice for these children, caused  
20 these interviews to be conducted in such a way that, this  
21 Court, at least, would find the interview process so  
22 suggestive that the children's in-court testimony would be  
23 inadmissible.

24           The Court also paid close attention to the  
25 in-court testimony of the witnesses and the manner in

1 which it was presented, and find that -- I find that the  
 2 elicitation of that testimony, and the limitation on  
 3 counsel with respect to its -- their opportunity to  
 4 prepare for cross-examination, even in light of the fact  
 5 that the counsel were not prepared for cross-examination,  
 6 would have rendered the testimony not credible.

7           In addition, I reviewed the disputes over the  
 8 evidence that occurred during trial, especially the late  
 9 delivery of the tapes of the pretrial interviews. The  
 10 Court finds that the tapes of these pretrial interviews  
 11 should have been presented to the defense for  
 12 transcription and cross-examination -- for transcription  
 13 for the purpose of cross-examination, but for an even  
 14 higher purpose. Each one of these pretrial statements  
 15 could have been presented on behalf of the defense as  
 16 exculpatory evidence. It would not have to have been used  
 17 simply to refresh a witness's recollection, or to cross-  
 18 examine a witness with respect to a prior statement.  
 19 These pretrial interviews could have been presented as  
 20 substantive evidence, because they are part -- not only  
 21 because they are exculpatory, but because they are a part  
 22 of the overall police report, which a defendant may  
 23 present in his own defense as substantive evidence; that  
 24 is, evidence offered to prove a fact, not simply to  
 25 refresh recollection, or to confront a witness with a

1 prior inconsistent statement.

2           The Court also reviewed other evidence that was  
3 furnished to the defense but not presented at trial, which  
4 included attendance records at the -- at the preschool  
5 that these children attended.

6           Now, under the case of the City of Cleveland  
7 versus Trzbuckowski -- that's a 1999 case -- pursuant to  
8 that case, the Supreme Court ruled that once it's been  
9 determined that the judgment entry of conviction and  
10 sentence is vacated, or if there is no final appealable  
11 order, the trial court can review any ruling that's been  
12 made up to that point, and Trzbuckowski was cited by the  
13 Ninth District Court of Appeals and remanded this matter  
14 back, as well as State ex rel. Hansen versus Reed.  
15 Trzbuckowski was cited for that authority by the Ninth  
16 District, as well as State ex rel. Hansen versus Reed,  
17 found at 63 Ohio St., it should be 3d, 597 599.

18           So that's what this Court is going to do.

19           And again, I don't believe that there was a human  
20 being in that courtroom in 1994 that was not there to do  
21 the best for his client, both defense counsel and counsel  
22 for the State of Ohio. Notwithstanding that, I have  
23 absolutely no confidence that these verdicts are correct,  
24 and therefore -- I hope I'm getting these cases right --  
25 in Case Number 9 -- in the case of State of Ohio versus

1 Joseph Lee Allen, Case Number 94CR045372, and in the case  
2 of Nancy Lee Smith, and I believe that is Case Number  
3 94CR045368 --

4 MR. BRADLEY: Judge, she has two case numbers.

5 THE COURT: Didn't this go to trial under one  
6 case number, though?

7 MR. BRADLEY: I think both case numbers we went  
8 to trial on, Judge; I think, also, 93CR044489.

9 THE COURT: Let me -- thank you, Attorney  
10 Bradley. Let me be overly cautious here, and I will  
11 recite all case numbers. I believe the State of Ohio  
12 versus Nancy Smith should be 93CR044489, and 94CR045368.  
13 The State of Ohio versus Joseph Lee Allen should be  
14 94CR045372, and 94CR044488. That covers all case numbers,  
15 although my impression was that these matters were  
16 consolidated only under two case numbers.

17 Nevertheless, the Court has absolutely no  
18 confidence that these verdicts are a correct statement,  
19 and pursuant to Criminal Rule 29(C), the Court will sua  
20 sponte, the jury having been discharged, enter a judgment  
21 of acquittal on behalf of the Defendant Smith and the  
22 Defendant Allen, and this matter has an end.

23 The defendants are each discharged, and their  
24 bonds will be ordered released.

25 Attorney Koury.

1 MR. KOURY: Your Honor, on behalf of the State,  
2 we'd object to the ruling of the Court and its finding.

3 THE COURT: Thank you, Attorney Koury. The State  
4 of Ohio's objections have been noted.

5 We're in recess.

6 \*\*\*

7 (Recess had.)

8 \*\*\*

9 THE COURT: Okay. I wanted to correct one thing  
10 I said in the State of Ohio versus Nancy Smith and State  
11 of Ohio versus Joseph Allen. What I should have said is  
12 that the evidence would not be admissible under Evidence  
13 Rule 807, because essentially that evidence rule has been  
14 declared unconstitutional, nor do I find that the evidence  
15 would have been admissible -- I was correct -- under  
16 either 803(4), statements for purposes of medical  
17 diagnosis and treatment, because they were not -- or,  
18 under Evidence Rule 803(3) -- excuse me, Evidence Rule  
19 803(2), excited utterance, because I find that the  
20 statements that were related through the testimony of the  
21 children's parents would not be excited utterances, but  
22 rather statements made during the course of a discussion.

23 And they would not be admissible under Evidence  
24 Rule 804, because the declarants were not unavailable, and  
25 they were found at the time to be competent to testify by

1 the Court.

2 That would conclude it.

3 \*\*\*

4 (Hearing concluded.)

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## C E R T I F I C A T E

1  
2 The State of Ohio, )

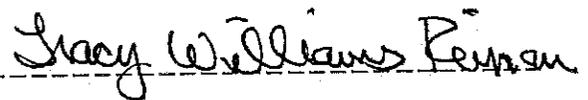
3 ) SS:

4 County of Lorain. )  
5

6 I, Tracy L. Williams, nka Tracy L. Reiman, Official  
7 Court Reporter in the Court of Common Pleas, Lorain  
8 County, Ohio, duly appointed therein, do hereby certify  
9 that this is a correct transcript of the proceedings in  
10 this case.

11 I further certify that this is a complete  
12 transcript of the testimony.

13 IN WITNESS WHEREOF, I have subscribed my name this  
14 30th day of June, 2009.  
15

16   
17

18 Tracy L. Williams, nka  
19 Tracy L. Reiman, RPR  
20 Official Court Reporter  
21 Lorain County, Ohio  
22

23 My Commission expires July 27, 2009  
24  
25

# EXHIBIT F



LEXSTAT OHIO CRIM R 32

OHIO RULES OF COURT SERVICE  
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\*\*\* RULES CURRENT THROUGH JUNE 8, 2010 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH APRIL 1, 2010 \*\*\*

Ohio Rules Of Criminal Procedure

*Ohio Crim. R. 32 (2010)*

Review Court Orders which may amend this Rule.

**Rule 32. Sentence**

**(A) Imposition of sentence.**

Sentence shall be imposed without unnecessary delay. Pending sentence, the court may commit the defendant or continue or alter the bail. At the time of imposing sentence, the court shall do all of the following:

- (1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.
- (2) Afford the prosecuting attorney an opportunity to speak;
- (3) Afford the victim the rights provided by law;
- (4) In serious offenses, state its statutory findings and give reasons supporting those findings, if appropriate.

**(B) Notification of right to appeal.**

(1) After imposing sentence in a serious offense that has gone to trial, the court shall advise the defendant that the defendant has a right to appeal the conviction.

(2) After imposing sentence in a serious offense, the court shall advise the defendant of the defendant's right, where applicable, to appeal or to seek leave to appeal the sentence imposed.

(3) If a right to appeal or a right to seek leave to appeal applies under division (B)(1) or (B)(2) of this rule, the court shall also advise the defendant of all of the following:

(a) That if the defendant is unable to pay the cost of an appeal, the defendant has the right to appeal without payment;

## Ohio Crim. R. 32

(b) That if the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost;

(c) That if the defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost;

(d) That the defendant has a right to have a notice of appeal timely filed on his or her behalf.

Upon defendant's request, the court shall forthwith appoint counsel for appeal.

**(C) Judgment.**

A judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence. Multiple judgments of conviction may be addressed in one judgment entry. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.

**HISTORY:** Amended, eff 7-1-92; 7-1-98; 7-1-04; 7-1-09.

**NOTES:**

**Staff Notes**

**7-1-04 AMENDMENT**

**Rule 32(A) Imposition of sentence.**

*Criminal Rule 32(A)* was amended to conform with the Supreme Court of Ohio's decision in *State v. Comer*, 99 Ohio St. 3d 463, 2003-Ohio 4165. The *Comer* decision mandates that a trial court must make specific statutory findings and the reasons supporting those findings when a trial court, in serious offenses, imposes consecutive sentences or nonminimum sentences on a first offender pursuant to *R.C. 2929.14(B)*, *2929.14(E)(4)* and *2929.19(B)(2)*. *Crim. R. 32(A)* was modified to ensure there was no discrepancy in the criminal rules and the Court's holding in *Comer*.

**7-1-98 AMENDMENT**

**RULE 32 SENTENCE**

The 1998 amendment to *Crim. R. 32* was made in light of changes in Ohio's scheme of victim's rights as well as the changes in the criminal law of Ohio effective July 1, 1996. *Crim. R. 32(A)* was amended to reflect the requirements of *section 2929.19 of the Revised Code* that both prosecutor and the victim, if present, be provided an opportunity to speak prior to the sentence being imposed. The victim provisions are intended as an acknowledgment of, rather than a substitution for, victim rights provided for by the Constitution of Ohio or by statute. (No additional right to notice beyond that created by Chapter 2930 of the Revised Code is intended.)

What was formerly division (A)(2), notification of right to appeal, became division (B), and was amended to reflect that a defendant should be informed, if applicable, of his or her right to appeal or to seek leave to the appeal certain sentences pursuant to *section 2953.08 of the Revised Code* whether the sentence was the result of a conviction or a plea. In the event of a right to appeal or seek leave to appeal a sentence or in the event of conviction, the court must advise the defendant of the applicable rights to appeal without payment, to have appointed counsel, to have documents provided without cost, and to have notice of appeal timely filed as provided under the previous rule.

**Cross-References to Related Statutes**

# EXHIBIT G

STATE OF OHIO

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

COUNTY OF LORAIN

COURT OF APPEALS

FILED  
LORAIN COUNTY

STATE OF OHIO EX REL. BENSON  
DAVIS

C.A. No. 10CA009828

2010 AUG -9 A 11: 25

Relator

CLERK OF COMMON PLEAS  
RON NABARZEWSKI

v.

9th

RAYMOND J. EWERS, JUDGE

JOURNAL ENTRY

Respondent

Benson Davis petitioned this Court for a writ of mandamus to compel Judge Ewers of the Lorain County Common Pleas Court to resentence him. Judge Ewers moved to dismiss. Because this Court concludes that Mr. Davis's sentencing entry was final and appealable, this Court dismisses the complaint.

**Background**

According to the complaint, in 1994, Mr. Davis was tried by a jury for the offense of aggravated murder. Following the jury trial, the trial court judge who preceded Judge Ewers sentenced Mr. Davis to life in prison. He appealed, and this Court affirmed the trial court's judgment. *State v. Davis*, 9th Dist. No. 94CA005989, 1996 WL 121998 (Mar. 20, 1996). The trial court denied his motion for a new trial, and this Court affirmed that decision. *State v. Davis*, 9th Dist. No. 98CA007062, 1999 WL 194473 (Mar. 31, 1999).

A decade later, Mr. Davis moved to be resentedenced. He argued that his original sentencing entry failed to comply with Rule 32(C) of the Ohio Rules of Criminal Procedure. After briefing by the parties, Judge Ewers issued a nunc pro tunc entry to add that the finding of guilt was made by a jury.

Mr. Davis then filed his petition for writ of mandamus in this Court. He has argued that his 1994 sentencing entry is not final and appealable and, pursuant to *State ex rel. Culgan v. Medina County Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609, the trial court is required to issue a new judgment that complies with Rule 32(C).

#### Analysis

"For a writ of mandamus to issue, a relator must demonstrate that (1) the relator has a clear legal right to the relief prayed for, (2) respondent is under a corresponding clear legal duty to perform the requested acts, and (3) relator has no plain and adequate legal remedy." *State ex rel. Serv. Emp. Internatl. Union, Dist. 925 v. State Emp. Relations Bd.*, 81 Ohio St.3d 173, 176 (1998). Because this Court concludes that the 1994 sentencing entry was final and appealable, Mr. Davis cannot demonstrate that he has a clear legal right to the relief prayed for.

After reviewing the 1994 sentencing entry, and the Ohio Supreme Court's most recent decision on this question, this Court concludes that the sentencing entry was a final and appealable judgment under Rule 32(C) and *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, syllabus. According to *Baker*, 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."

The entry at issue in this case stated that "Defendant appeared in Court for sentencing after having been found guilty of the following charges: Count 1: Aggravated Murder. . . ." This case is almost identical to a recent case in which the Ohio Supreme Court held that "[t]he judge was not required to add language that the court

found the defendant guilty of the offenses after a bench trial; that additional language would have been superfluous." *State ex rel. Barr v. Sutula*, 2010-Ohio-3213, ¶2. The language that appeared in Mr. Barr's sentencing entry – "the court found the defendant guilty of robbery" – is similar to the language used in Mr. Davis' sentencing entry. If adding "bench trial" would have been superfluous in Mr. Barr's sentencing entry, this Court must reach the same result in this case.

Ultimately, the question before us involves the interplay among Rule 32(C), *Baker*, and *State ex rel. Culgan v. Medina County Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609. In *Culgan*, the Ohio Supreme Court held that Mr. Culgan's sentencing entry was not final and appealable. Mr. Culgan's sentencing "entry merely mentions that Culgan 'has been convicted' of the specified offenses and declares his sentence for the convictions." *Id.* at ¶2. The Supreme Court concluded that the "sentencing entry did not constitute a final appealable order because it did not contain a guilty plea, a jury verdict, or the finding of the court upon which Culgan's convictions were based." *Id.* at ¶10. The Court took this language directly from the *Baker* syllabus, and *Baker* interpreted Rule 32(C) to require this information in order for a sentencing entry to be final and appealable.

Earlier this month, however, the Supreme Court considered different language in a sentencing entry and reached a different result. In *State ex rel. Barr v. Sutula*, Slip Opinion No. 2010-Ohio-3213, the Court considered an appeal from the denial of a writ of mandamus. Mr. Barr petitioned the Eighth District Court of Appeals for a writ of mandamus to order the trial court judge to resentence him. *Id.* at ¶1. After quoting the requirements set forth in *Baker*, the Supreme Court reviewed the sentencing entry. In

Mr. Barr's sentencing entry, the trial court wrote that "the court found the defendant guilty of robbery . . . ." *Id.* at ¶2. The Supreme Court concluded that the sentencing entry "sufficiently set forth the findings upon which Barr's bench conviction is based." *Id.*

The Eighth District quoted more of the sentencing entry in its decision, but the additional quoted language did not reflect that the conviction followed a bench trial. Nevertheless, the Supreme Court concluded that the "judge was not required to add language that the court found the defendant guilty of the offenses after a bench trial; that additional language would have been superfluous." *Id.* at ¶2.

A strict reading of *Baker* would not suggest that the trial court's finding of guilt following a bench trial would be superfluous. The Court described four ways a defendant can be convicted of a criminal offense:

A defendant may plead guilty either at the arraignment or after withdrawing an initial plea of not guilty or not guilty by reason of insanity. A defendant may enter a plea of no contest and be convicted upon a finding of guilt by the court. A defendant may be found guilty based upon a jury verdict. A defendant also may be found guilty by the court after a bench trial. Any one of these events leads to a sentence.

*Baker* at ¶12. *Baker* concluded its analysis this way: "Simply stated, a defendant is entitled to appeal an order that sets forth the manner of conviction and the sentence." *Id.* at ¶18. This Court, and others, read this conclusion, coupled with the syllabus, as creating a requirement that the "manner of conviction" – one of the ways a defendant can be convicted of a criminal offense – be included in the sentencing entry in order for it to be final and appealable. Following *Barr*, this Court must conclude that the precise "manner of conviction" need not be included.

Of the four ways a defendant can be convicted, there are two that require the trial court to make the finding of guilt – a no contest plea and a bench trial. *Baker* at ¶12. Mr. Barr's sentencing entry stated that "the court found the defendant guilty of robbery. . . ." *Barr* at ¶2. The Supreme Court's recitation of the sentencing entry did not indicate whether the trial court found the defendant guilty after he entered a no contest plea or after a bench trial. Although *Baker* would seem to require this manner of conviction to be included in the journal entry, *Barr* concludes that this "additional language would have been superfluous." *Id.* at 2.

This Court can only conclude that *Barr* has clarified what *Baker* required. According to *Barr*, a sentencing entry is sufficient to satisfy the first *Baker* requirement if it sets forth the trial court's finding of guilt, without reference to the manner of conviction. This is the only logical explanation for the Supreme Court's conclusion that including the manner of conviction in the sentencing entry "would have been superfluous." It is also consistent with much of the discussion in *Baker*, except for the last sentence of its analysis.

Accordingly, this Court concludes that Mr. Davis's 1994 sentencing entry was final and appealable. Mr. Davis cannot demonstrate that he has a clear legal right to the relief requested. The complaint is dismissed.

Costs taxed to Mr. Davis. 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

Concur:  
Whitmore, J.  
Moore, J.