

IN THE SUPREME COURT OF OHIO

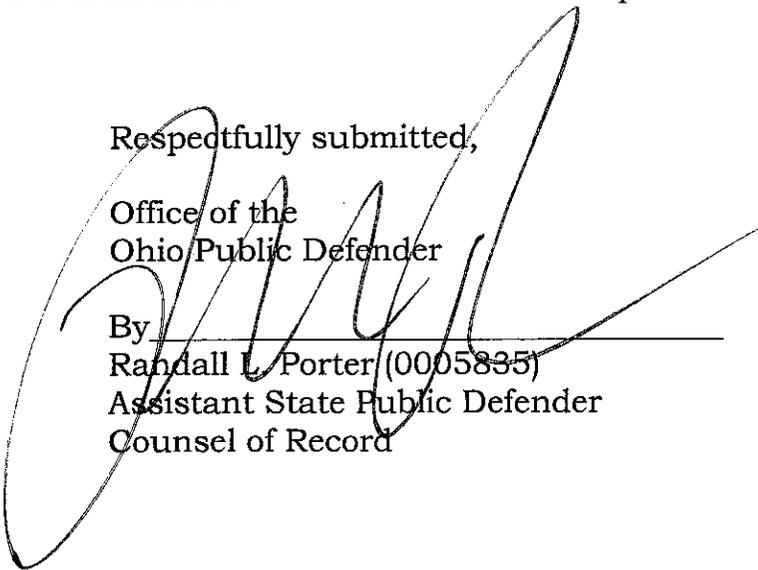
STATE OF OHIO, :
Appellee, : **Case Nos. 2007-1261**
 : **2007-2425**
-vs- : **Appeal taken from Butler County**
 : **Court of Common Pleas**
DONALD J. KETTERER, : **Case No. CR 2003-03-0309**
Appellant. :

**APPELLANT DONALD J. KETTERER'S
MOTION FOR RECONSIDERATION**

Appellant Donald Ketterer pursuant to S. Ct. Prac. R. 11.2 moves this Court to rehear this case. Appellant asks this Court to reconsider the remedy that this Court imposed with respect to the trial court's errors when it imposed post release control. This Court imposed the remedy contained in R.C. §2929.191. Appellant asserts that the proper remedy is contained in R.C. §2953.08. Appellant has attached a memorandum of law that he incorporates in this motion.

Respectfully submitted,

Office of the
Ohio Public Defender

By 
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COUNSEL FOR DONALD KETTERER

MEMORANDUM IN SUPPORT

This case presents an issue that will not only affect the remedy imposed in this case, but all cases in which the trial court improperly imposed post-release control. The issue concerns the manner in which this Court's splintered 2-3-2 decision in *State v. Singleton*, 124 Ohio St. 3d 173, 2009-Ohio-6434 applies to cases on direct appeal. This case is the proper vehicle to resolve this issue because Mr. Ketterer is before this Court on direct appeal and this Court has already determined, that the three judge panel erred when it imposed post release control.

I. The trial court erred when it imposed post-release control.

The three judge panel re-sentenced Appellant on the offenses of aggravated robbery (Count Two), aggravated burglary (Count Three), grand theft (Count Four), and burglary (Count Five). The trial court orally imposed post release control "in regards to Count Two and Five, if you are released after serving that sentence, the Ohio Department of Rehabilitation and Control will put you on post-release control, mandatory for a period of five years." [5/24/07 Transcript, p. 24]. The panel erred when it failed to impose post release control

as to Count Three, the offense of aggravated burglary.

The panel compounded this error when it placed its sentencing entry of record. The panel provided therein "As to Count(s) Two, Three, Four and Five: The Court [sic] has notified the defendant that post release control is in this case up to a maximum of [sic] years, as well as the consequences for violating the conditions of post release control imposed by the Parole Board under Ohio Revised Code Section 2967.28." The panel's entry was incorrect because 1) the panel incorrectly imposed post release control as to Count Four which charged a felony of the fourth degree, and 2) the panel did not advise Appellant as to post-release control as to Count Three. More importantly, the panel, in its sentencing entry, did not identify the number of years that Appellant would be subject to post release control. [*Id.*].

II. This Court determined that the trial court erred.

This Court found that the three judge panel made three errors when it imposed post release control: it 1) failed to impose post-release control as to Count III in which Appellant had been convicted of aggravated burglary, 2) in the nunc pro tunc entry the panel imposed mandatory post release control as to Count IV when in fact the panel should not have imposed any post-release control because the count charged the offense of Grand Theft, and 3) the nunc pro tunc entry failed to notify Appellant that if he violated his supervision or conditions of post-release control, the parole board could impose a maximum term up to one-half of the prison term originally imposed which was an

aggregate of eleven years. *State v. Ketterer*, __ Ohio St. 3d __, 2010-Ohio-3831 ¶¶ 68-82.

III. The trial court should conduct de novo resentencing.

This Court ordered with respect to the post-release errors that “the case is remanded so that Ketterer may be give the proper terms of postrelease control pursuant to R.C. 2929.191.” *State v. Ketterer*, __ Ohio St. 3d __, 2010-Ohio-3831 ¶ 82. Prior to entering its remand order, this Court correctly recognized that “[n]either of the parties had addressed the application of R.C. 2929.191 as a remedy in this case.” *Id.* at ¶ 72. This Court should grant this motion to permit the parties the opportunity to brief the applicability of R.C. § 2929.191.

This Court has yet to address the issue of whether the resentencing procedure contained in R.C. 2929.191 is applicable to cases in which the error is identified during the direct appeal process. This Court herein when it ordered that the remand proceedings be conducted pursuant to R.C. § 2929.191 cited only to *State v. Fry*, 125 Ohio St. 3d 163, 2010-Ohio-1017. *State v. Ketterer*, __ Ohio St. 3d __, 2010-Ohio-3831 ¶ 72. However, this Court in *Fry* did not resolve the applicability of R.C. § 2929.191 to cases on direct appeal. Instead, this Court assumed the applicability of R.C. § 2929.191 to cases on direct appeal. *Fry*, at ¶ 214. The Court did cite to *State v. Singleton*, 124 Ohio St. 3d 173, 2009-Ohio-6434. *Fry* at ¶ 214, n. 5, but only regard to the temporal issue, the defendant was sentenced on the date R.C. § 2929.191

became effective.

This Court in *Singleton* did not address the applicability of R.C. § 2919.191 to cases on direct appeal. In that case the trial court had sentenced the defendant on December 21, 2000. *Singleton*. at ¶ 4. Thus *Singleton* was before this court on collateral review as opposed to direct appeal. This Court only addressed the R.C. § 2929.191 remedy in the context of a sentence imposed prior to the enactment of the statute. The Court had no reason to address the interplay between R.C. § 2929.191 and R.C. § 2953.08 which creates the applicable sentencing remedy for cases decided on direct appeal.

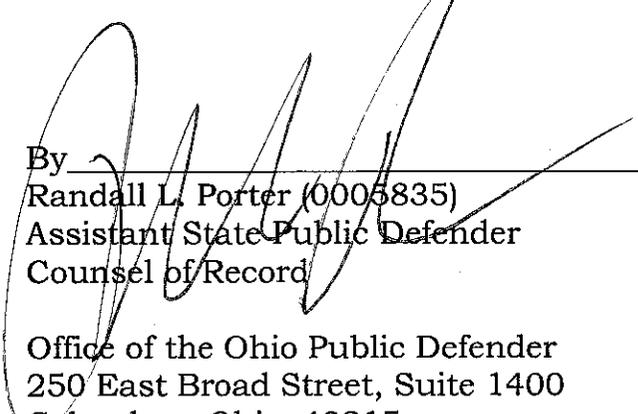
The distinction of which statute applies does make a difference. Under R.C. § 2929.191, a defendant is entitled only to an abbreviated sentencing hearing upon remand. Under R.C. § 2953.08 the defendant is entitled to de novo sentencing.

Conclusion

This Court should grant this motion for purposes of addressing R.C. 2929.191 in the context of direct appeal proceedings. If the issue is not resolved, then it will become an issue on Mr. Ketterer's appeal from the trial court's third resentencing hearing. In addition, the applicability of the statute will be an issue in all of the direct appeal cases in which the appellate courts have found that the trial courts incorrectly imposed post release control.

Respectfully submitted,

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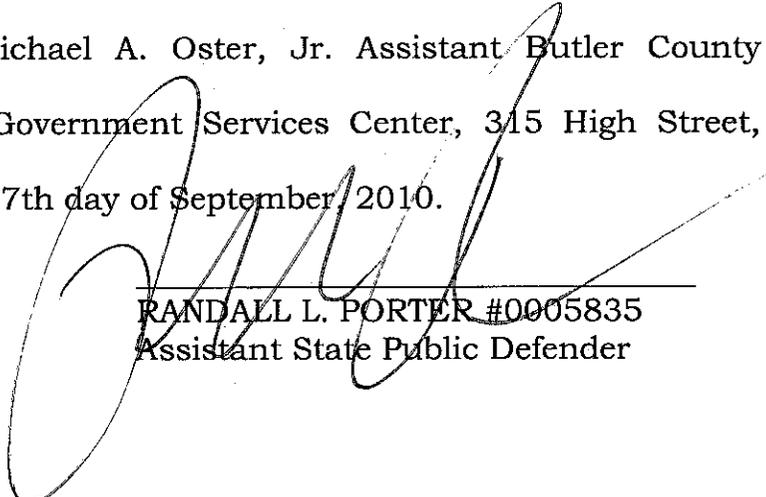
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Appellant Donald J. Ketterer's Motion for Reconsideration was forwarded by electronic and first-class U.S. Mail, postage prepaid to Lina N. Alkamdawi, Assistant Butler County Prosecuting Attorney, and Michael A. Oster, Jr. Assistant Butler County Prosecuting Attorney at the Government Services Center, 315 High Street, Hamilton, Ohio 45011 on this 7th day of September, 2010.



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