

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

Case No. 2010-1216

Relators-Appellants

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

v.

HON. JAMES M. BURGE

**C.A. Nos. 09CA009723
09CA009724**

Defendant-Appellant

**MERIT BRIEF OF AMICUS CURIAE
OHIO PROSECUTING ATTORNEYS ASSOCIATION
IN SUPPORT OF RELATORS-APPELLANTS**

RICHARD CORDRAY (0038034)
Attorney General of Ohio

**THE OHIO PROSECUTING
ATTORNEYS ASSOCIATION**

BENJAMIN C. MIZER * (0083089)
Solicitor General
**Counsel of Record*

SHERRI BEVAN WALSH (0030038)
Summit County Prosecuting Attorney

DAVID M. LIEBERMAN (0086005)
Deputy Solicitor
M. SCOTT CRISS (0068105)
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980
Fax (614) 466-5087

RICHARD S. KASAY (#0013952)
Assistant Prosecuting Attorney
Appellate Division
Summit County Safety Building
53 University Avenue
Akron, Ohio 44308
(330) 643-2800
Fax (330) 643 2137
Email kasay@prosecutor.summitoh.net

*Counsel for Relator-Appellant
Richard Cordray*

*Counsel as Amicus Curiae For The
Ohio Prosecuting Attorneys Association*

DENNIS P. WILL (0038129)
Lorain County Prosecuting Attorney

JAMES M. BURGE (0004639)
Lorain County Justice Center
225 Court Street, Room 705
Elyria, Ohio 44035
(440) 329-5416
Fax (440) 329-5712

BILLIE JO BELCHER * (0072337)
Assistant Prosecuting Attorney
**Counsel of Record*
Lorain County Prosecutor's Office
225 Court Street, 3rd Floor
Elyria, Ohio 44035
(440) 329-5393
Fax (440) 328-2183

Respondent-Appellee In Pro Se

Counsel for Relator-Appellant Dennis P. Will

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FILED
SEP 15 2010
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STATEMENT OF AMICUS INTEREST

The Ohio Prosecuting Attorneys Association offers this amicus brief in support of the Merit Brief filed by the Attorney General of Ohio and the Lorain County Prosecuting Attorney. Amicus Ohio Prosecuting Attorneys Association is a private non-profit membership organization founded in 1937 for the benefit of the 88 elected county prosecutors. The mission of the association is to increase the efficiency of the prosecutors in pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies that affect the office of a prosecuting attorney, and to aid the furtherance of justice.

The proper application of Crim.R. 32(C) as interpreted in *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330 and, potentially, the proper remedy where a sentencing entry is not void but not final under *Baker* are matters of great concern to all elected prosecutors.

STATEMENT OF THE CASE AND FACTS

Amicus concurs with Relators' Introduction and Statement of the Case and Facts. Amicus concurs with the arguments made by Relators in their two Propositions of Law. Amicus will address an issue relating to the second Proposition of Law. Specifically, if a sentencing entry is not compliant with Crim.R. 32(C) that defect does not render the entry void and the sole remedy is issuance of a corrected entry.

PROPOSITION OF LAW 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.

LAW AND ARGUMENT

Assuming this Court finds the entries non-compliant with Crim.R. 32(C), what authority did Respondent Judge Burge then possess? He did not possess the authority he would possess if he were dealing with a void sentence.

In *McAllister v. Smith*, 119 Ohio St.3d 163, 2008-Ohio-3881 the defendant sought a writ of habeas corpus claiming that his sentencing entry was not final under Crim.R. 32(C). This Court found that habeas corpus was not the proper remedy. Instead, the defendant could file a motion in the trial court for a revised sentencing entry. *Id.* ¶7, citing *Garrett v. Wilson*, 5th Dist. App. No. 07-CA-60, 2007-Ohio-4853.

In *Garrett* the trial court issued a nunc pro tunc entry correcting an omission under Crim.R. 32(C) in the prior sentencing entry and the appellate court found that Garrett was not entitled to a writ of habeas corpus.

Then this Court in *McAllister* stated, apparently at odds with the earlier statement that a revised sentencing entry could be sought, that the “appropriate remedy” where the entry did not comply with Crim.R. 32(C) is resentencing. *McAllister*, 2008-Ohio-3881, ¶9.

The Third District Court of Appeals interpreted *McAllister*, *supra* as envisioning resentencing; “the trial court should grant a motion for resentencing and issue a revised sentencing entry.” *State v. Clutter*, 3rd Dist. App. No. 3-08-27, 2008-Ohio-6576, ¶13. Amicus submits that this view of *McAllister* is correct. A motion for resentencing (or

say a motion for a final order) only requires issuance of a new entry; that new entry is the resentencing.

In *Dunn v. Smith*, 119 Ohio St.3d 364, 2008-Ohio-4565 the sentencing entry did not comply with Crim.R. 32(C) and was not a final, appealable order. *Id.* ¶7. The remedy was not a writ of habeas corpus but a motion in the trial court for a revised sentencing entry. ¶8.

In *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671, the defendant was sentenced in November 1999. The sentence was void because of failure to impose post-release control. *Id.* ¶35 (Citations omitted). Carnail sought a writ of mandamus but did not seek a de novo sentencing. *Id.* ¶1. Because the sentence was void there was no final appealable order. *Id.* ¶36. This Court held that Carnail was entitled to a writ of mandamus requiring the trial court to issue a new sentencing entry complying with R.C. 2967.28(B)(1) (the statute requiring mandatory post-release control of five years on first degree felonies). *Id.* ¶37, citing *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609. In *Culgan* the entry did not comply with Crim.R. 32(C) and the defendant was entitled to a writ of mandamus to obtain a new sentencing entry.

In *State ex rel. Alicea v. Krichbaum*, 126 Ohio St.3d 194, 2010-Ohio-3234 the defendant sought a writ of mandamus to compel the trial court to hold a new sentencing hearing based on the defendant's belief that his sentencing entry was not final under Crim.R. 32(C). This Court found that the entry fully complied with Crim.R. 32(C). Further, this Court found that "the remedy for a failure to comply with Crim.R. 32(C) is a revised sentencing entry rather than a new hearing." *Id.* ¶2, citing *Culgan*, *supra*.

In *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434 this Court held that where a sentence is imposed prior to July 11, 2006 and post-release control is not properly imposed the sentence is void and de novo sentencing is required. *Id.* paragraph one of the syllabus; ¶17-¶18 (Citations omitted).

Where a sentence is void “It is as though such proceedings had never occurred; 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, ¶12, quoting *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, *267-*268.

Much of void sentence jurisprudence flows from *State v. Beasley* (1984), 14 Ohio St.3d 74 where this Court held that “Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void.” *Id.* *75; See *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, ¶26 (the failure to notify a defendant at sentencing about post-release control renders the sentence void based on *Beasley*).

It should be clear that a sentencing entry that does not comply with Crim.R. 32(C) entitles the defendant to only a revised sentencing entry that complies with the rule. But in a case post-*Culgan*, *Dunn*, and *McAllister* the Sixth District Court of Appeals found that a sentencing entry that does not comply with Crim.R. 32(C) is void and not voidable. *Id.* ¶18. The court stated” [w]e find no discernible difference between the trial court’s failure to comply with its mandatory duty to provide a judgment of conviction that complies with Crim.R. 32, and the failure to provide the requisite notice of postrelease control specifically addressed in [*State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197].” *State v. Mitchell*, 6th Dist. App. No. L-10-1047, 2010-Ohio-1766, ¶23.

In this case Respondent Judge Burge determined that he has jurisdiction upon a showing of a Crim.R. 32(C) violation to resentence the defendant and further that resentencing required a hearing and a new entry. Opinion dated February 13, 2009, 6-7, Exhibit C-2 to Relators' Merit Brief.

The Ninth District Court of Appeals post-*Carnail* held that, after finding that the sentencing entries did not comply with Crim.R. 32(C), upon proper motion a trial court can reconsider the non-final order and grant a motion for judgment of acquittal. *State ex rel. Cordray v. Hon. James M. Burge*, 2010-Ohio-3009, ¶28. Where a proper motion is not filed a trial court can still resentence the defendant. *Id.* ¶31. The court of appeals stated that "The Supreme Court has not been clear whether a full resentencing hearing is required under these circumstances." *Id.* ¶35. Apparently the Ninth District Court of Appeals equates a "full resentencing hearing" with a de novo sentencing hearing.

Based on 1) the holding in *Mitchell*, supra that a sentencing entry that does not comply with Crim.R. 32(C) is void; 2) Respondent Judge Burge's finding that he has authority to resentence a defendant where the sentencing entry is not final; and 3) the finding by the Ninth District Court of Appeals that the trial court can both reconsider a non-final sentencing entry and resentence the defendant where there is such an entry, it is important that this Court hold unequivocally that if a sentencing entry does not comply with Crim.R. 32(C) the entry is not void and the sole remedy is issuance of a sentencing entry that complies with the rule.

A void sentencing entry is not a final order. *Carnail*, supra. But the great weight of this Court's opinions makes clear that non-compliance with Crim.R. 32(C) does not result in a void order because the remedy for such an entry is a revised entry. *State ex*

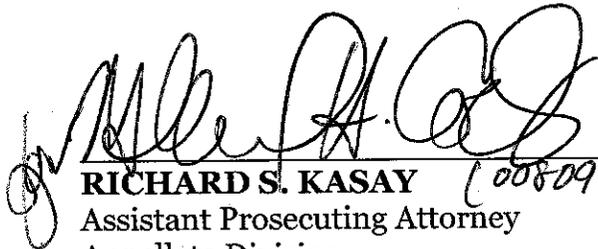
rel. Cruzado v. Zaleski, 111 Ohio St.3d 353, 2006-Ohio-5795, ¶19. Any ambiguity in *McAllister*, supra is cleared up by *Dunn*, supra, *Culgan*, supra, *Carnail*, supra, and *Krichbaum*, supra.

CONCLUSION

The Ohio Prosecuting Attorneys Association respectfully asks this Court to reverse the Ninth District's decision below and issue a writ of prohibition ordering Respondent Judge Burge to vacate Smith's judgment of acquittal and deny the motions for resentencing.

Respectfully submitted,

SHERRI BEVAN WALSH
Prosecuting Attorney

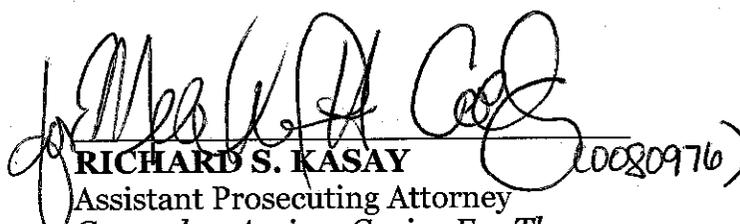


RICHARD S. KASAY (0080976)

Assistant Prosecuting Attorney
Appellate Division
Summit County Safety Building
53 University Avenue
Akron, Ohio 44308
(330) 643-2800
Reg. No. 0013952
*Counsel as Amicus Curiae For The
Ohio Prosecuting Attorneys Association*

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* was forwarded by regular U.S. First Class Mail to: The Honorable James M. Burge, Lorain County Justice Center, 225 Court Street, Room 705, Elyria, Ohio 44035, Respondent-Appellee Pro Se; to Benjamin C. Mizer, Solicitor General, David M. Lieberman, Deputy Solicitor, and M. Scott Criss, Assistant Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215 Counsel for Relator-Appellant Richard Cordray; and to Billie Jo Belcher, Assistant Prosecuting Attorney, Lorain County Prosecutor's Office, 225 Court Street, 3rd Floor, Elyria, Ohio 44035 Counsel for Relator-Appellant Dennis P. Will, on this 14th day of September, 2010.


RICHARD S. KASAY (0020976)
Assistant Prosecuting Attorney
Counsel as *Amicus Curiae* For The
Ohio Prosecuting Attorneys Association