

**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,  
v. : Ninth Appellate District,  
 : Case Nos. 09CA9723 and  
Honorable James M. Burge, : 09CA009724  
 :  
Respondent-Appellee. :

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**Office of the Ohio Public Defender's Brief Amicus Curiae  
In Support of Respondent-Appellee's Merit Brief**

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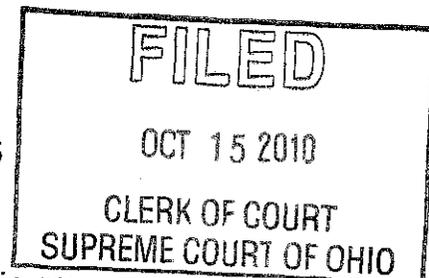
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## **I. Statement of Amicus Curiae's Interests**

The Office of the Ohio Public Defender, as amicus curiae, files this Brief in support of the Merit Brief of the Honorable James M. Burge, the Respondent. The Ohio Public Defender is a state agency responsible for providing legal representation and other services to indigent criminal defendants in state court. The Office provides legal representation in the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. As such, the Ohio Public Defender has an interest in the interpretation and application of Ohio Criminal Rule 32(C), as well as the remedies available when that rule has not been satisfied.

## **II. Introduction**

Relators seek a writ of prohibition, claiming that Judge Burge lacked jurisdiction to set aside the jury's verdicts and enter judgments of acquittal for Defendants Nancy Smith and Joseph Allen. Because Judge Burge did not patently and unambiguously lack jurisdiction to enter those judgments, Relators' request for relief must be denied.

A writ of prohibition is an extraordinary remedy, and it will only be granted if the inferior court patently and unambiguously lacked jurisdiction to take the challenged action. *State ex. rel. White v. Junkin*, 80 Ohio St.3d 335, 336-37, 1997-Ohio-340, 686 N.E.2d 267, 268. Until Judge Burge's June 24, 2009 judgments of acquittal were journalized, there were no final appealable orders. And the trial court was never divested of subject-matter jurisdiction. Nor did the court of appeals acquire subject-matter

jurisdiction. As a result, the trial court retained jurisdiction to rule on all matters before it.

### III. Analysis

#### A. Amicus Curiae's Response to Proposition of Law Number I: A Final Appealable Order Must State the Manner of Conviction.

As Judge Burge's Merit Brief explains, the 1994 entries did not satisfy Criminal Rule 32(C), as those entries did not specify the manner of conviction. *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, at ¶18 (an entry that does not contain the manner of conviction is not a final appealable order); *State ex rel. Culgan v. Medina County Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609, 895 N.E.2d 805, at ¶10 (same). See, also, *State ex rel. Barr v. Sutula*, 126 Ohio St.3d 193, 2010-Ohio-3213, 931 N.E.2d 1078, at ¶2. It is of no consequence that each Defendant's manner of conviction can be determined by reviewing the trial court's record. *Baker* at ¶17; *State v. Clutter*, 3rd Dist. No. 3-08-27, 2008-Ohio-6576, at ¶12. As *Baker* made clear, the manner of conviction; the sentence; and the signature of the judge must be contained in a single document. *Baker* at ¶17. And that single document must be journalized by the court. *Id.* Otherwise, the document is not a final appealable order. *Id.* at ¶8, 10; *Culgan* at ¶9.

**B. Amicus Curiae's Response to Proposition of Law Number II: Until a Trial Court Issues a Final Appealable Order it Cannot be Divested of Subject-Matter Jurisdiction.**

**1. The court of appeals did not have jurisdiction to issue a mandate.**

The trial court did not issue final appealable orders until 2009. Until then, the court of appeals could not acquire subject-matter jurisdiction. Section 3(B)(2), Article IV, Ohio Constitution; *State ex rel. A & D Ltd. P'ship v. Keefe*, 77 Ohio St.3d 50, 51, 1996-Ohio-95, 671 N.E.2d 13, 15; *Heinz v. Riffle*, 5th Dist. No. CT2002-0047, 2003-Ohio-6358, at ¶11. Subject-matter jurisdiction is a necessary precondition to the court of appeals' issuance of a binding mandate. See *Grupo Dataflux v. Atlas Global Group* (2004), 541 U.S. 567, 575, 124 S.Ct. 1920, 1926, 158 L.Ed.2d 866, 875. *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, at ¶11. Because final appealable orders were not issued until 2009, jurisdiction remained with the trial court. As a result, the court of appeals' mandates were a nullity. The trial court retained subject-matter jurisdiction to take any actions ordinarily available to a trial court prior to the entry of a final appealable order.

**2. The trial court did not "wrongly reopen the merits" because the matter was never closed.**

Relators argue that the failure to include the manner of conviction in each Defendant's judgment entry was a clerical mistake. And that the only way to fix the mistake is by issuing a nunc pro tunc judgment entry.

A nunc pro tunc entry can be used to correct a deficient judgment entry. *Jacks v. Adamson* (1897), 56 Ohio St. 397, 402 47 N.E. 48. The nunc pro tunc entry may issue to reflect what actually occurred in the trial court. *Id.* But in order for the appellate court to have jurisdiction, the nunc pro tunc entry must be journalized prior to the instigation of the appeal. *City of Cleveland v. Trzebuckowski*, 85 Ohio St.3d 524, 526, 1999-Ohio-285, 709 N.E.2d 1148, 1150-51. See *Grupo Dataflux* at 575 (stating that subject-matter jurisdiction is determined as of the time of filing and that a subsequent effort to cure the jurisdictional defect does not create jurisdiction); *State ex rel. Cordray v. Marshall*, 123 Ohio St.3d 229, 2009-Ohio-4986, 915 N.E.2d 633, at ¶39 (stating that subject-matter jurisdiction cannot be waived). Because the nunc pro tunc entries in this case were not issued until the completion of the appeal, the court of appeals did not have jurisdiction to act when it did.

Amicus curiae, the Ohio Prosecuting Attorneys Association, cites cases discussing the remedy available when a court has issued a void judgment entry that improperly imposes postrelease control. Amicus claims that the only remedy available to a court when it has not issued a final appealable order is to issue a nunc pro tunc entry. But that makes no sense. Until a court issues a final appealable order, the trial court retains jurisdiction. This includes, but is not limited to, the court's power to reconsider interlocutory orders and motions for a new trial. *State v. Ross* (2009), 184 Ohio App.3d 174, 2009-Ohio-3561, 920 N.E.2d 162, at ¶14, 25. See, also, *State v. Boswell*,

121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422, at ¶10 (treating the defendant's motion to withdraw his guilty plea as a presentence motion). As illustrated in *Boswell*, a case that lacks a final appealable order remains in the same posture that it was in at the time the invalid appeal was attempted. *Id.* *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961, at ¶12; *State v. Harmon*, 9th Dist. No. 24495, 2009-Ohio-4512, at ¶9 (ruling that the judgment was void, that the defendant must be resentenced, and then considering evidentiary issues four years after conviction).

**C. The Trial Court Did Not Exceed its Jurisdiction by Sua Sponte Ordering the Acquittal of Joseph Allen.**

Relators argue that Judge Burge patently and unambiguously lacked jurisdiction to grant the defendants' Criminal Rule 29(C) motions. And, therefore, this Court may issue a writ of prohibition. Relators are mistaken. There were two defendants in this action: Nancy Smith and Joseph Allen. It is undisputed that Ms. Smith's attorney filed a timely motion for acquittal under Criminal Rule 29(C). Mr. Allen's attorney did not.

Because the trial court retained subject-matter jurisdiction over this action, Judge Burge had jurisdiction to act. Prior to the entry of a final appealable order, a trial court may reconsider its prior rulings because those rulings are interlocutory. Judge Burge had jurisdiction over the subject-matter and the parties, and acted in accordance with the Ohio Rules of Criminal Procedure when he reconsidered his interlocutory ruling on Ms. Smith's motion for acquittal. There is some question, however, regarding whether Judge Burge could, under the rules, sua sponte rule that Mr. Allen should be acquitted

as well. Before addressing whether Judge Burge could sua sponte acquit Mr. Allen, an important distinction between a court's erroneous exercise of power and a court's lack of power must be drawn.

For Relators to be entitled to a writ of prohibition, they must establish that Judge Burge was without subject-matter jurisdiction to act. *Junkin* at 336-37. If Judge Burge had subject-matter jurisdiction, but erred in an exercise of that jurisdiction, Relators may only seek relief by way of a direct appeal. *State ex rel. Hansen v. Reed*, 63 Ohio St.3d 597, 600, 589 N.E.2d 1324, 1327. A court has subject-matter jurisdiction to act if the case was properly commenced within that court. *Pratts* at ¶21. It is only when the action is not properly before a court, that the court lacks subject-matter jurisdiction to act. *Id.*

Relators challenge Judge Burge's actions under Ohio Criminal Rule 29(C). This is a challenge to Judge Burge's exercise or use of jurisdiction – not a challenge to the court's subject-matter jurisdiction. For this reason, this Court should deny Relators' request for a writ of prohibition.

Nevertheless, Relators argue that the United States Supreme Court's decision in *Carlisle v. United States* (1996), 517 U.S. 416, 116 S.Ct. 1460, 134 L.Ed. 613, stands for the proposition that Judge Burge's use, or misuse, of Rule 29(C) was jurisdictional error. Once again, Relators are wrong. In *Arguauagh v. Y & H Corp.* (2006), 546 U.S. 500, 510, 126 S.Ct. 1235, 1242, 163 L.Ed.2d 1097, 1107, the Court clarified that a court's failure to abide by the time requirement in Federal Criminal Rule 29(c) is not a jurisdictional

error. But a misuse of the rule may be reversible error. It does not, however, render the court's jurisdiction invalid. See, also, *State ex rel. Pizza v. Rayford*, 62 Ohio St.3d 382, 384-85, 582 N.E.2d 992, 994.

Finally, as Judge Burge touches on in his Merit Brief, Ohio Criminal Rule 29(C) and Federal Criminal Rule 29(c) are materially different when applied in this instance. Ohio Criminal Rule 29 does not limit when a court may, on its own motion, move for acquittal.

<b>Ohio Criminal Rule 29</b>	<b>Federal Criminal Rule 29</b>
<p><b>(A) Motion for judgment of acquittal</b>            The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.</p>	<p><b>(a) Before Submission to the Jury.</b> After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.</p>

There is a crucial distinction in the headings to these two rules. Section (a) of the Federal Rule is specifically limited to Rule 29 motions made before the matter has been submitted to the jury. The Ohio rule is not. A plain reading of the Ohio rule permits

the court to make a Rule 29 motion at any time. Section (C) of the Ohio rule limits the time in which a defendant may file a Rule 29 motion. But Rule 29, including Section (C), does not limit when the court may, on its own motion, acquit a defendant:

If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed 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. If no verdict is returned, the court may enter judgment of acquittal. It shall not be a prerequisite to the making of such motion that a similar motion has been made prior to the submission of the case to the jury.

Crim.R. 29(C). Nothing in Criminal Rule 29(C) places a limit on when a court may sua sponte enter a judgment of acquittal.

Judge Burge had jurisdiction to acquit Defendants Smith and Allen. Judge Burge complied with Rule 29 when he granted Ms. Smith's motion for acquittal and sua sponte acquitted Mr. Allen. Even if this Court were to determine that Judge Burge could not enter a judgment of acquittal for Mr. Allen, Judge Burge's actions may constitute reversible error, which must be reviewed on direct appeal. His actions are not subject to challenge by way of extraordinary writ because there is an adequate remedy at law.

#### **IV. Conclusion**

Based on the foregoing, Relators' request for a writ of prohibition should be denied and this matter should be dismissed.

Respectfully submitted,

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## Certificate of Service

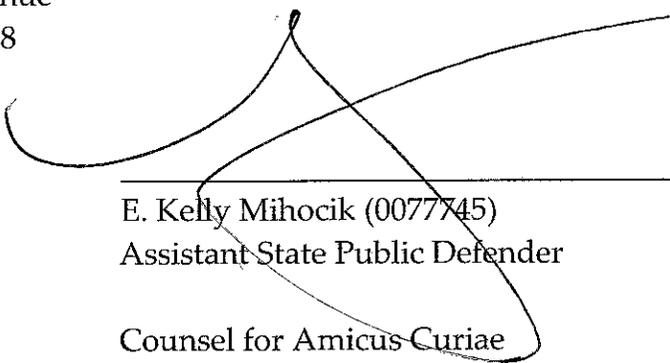
I certify that on this 15<sup>th</sup> day October 2010, a copy of the foregoing Brief Amicus Curiae was sent by regular U.S. mail, postage-prepaid, on the following:

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