ORIGINAL

IN THE SUPREME COURT OF OHIO

State ex rel., Christopher R. Bruggeman #A 286-466 Allen Correctional Institution P.O. 4501 Lima, Ohio 45802-4501 Relator, *pro se*,	)	Case No. 10-1808 **COMPLAINT** **PETITION FOR PEREMPTORY WRITS OF PROHIBITION; ALTERNATIVELY, MANDAMUS**
v.	)	
The Honorable Judges John R. Willamowski, Richard M. Rogers and Stephen R. Shaw of the Auglaize County, Ohio Court of Appeals Third Appellate District Court of Appeals Building, 204 North Main Street Lima, Ohio 45801, *et al.*, Respondents.	)	***(Verified)*** (S.Ct. R. Prac. 10.4(B))

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SUPREME COURT OF OHIO

I. Introduction.

1) This is a petition for peremptory writs of prohibition; alternatively, mandamus brought by the above-named Relator against the above-named Respondents. This petition asserts Respondents have exercised judicial power that is unauthorized by law, patently and unambiguously exceeding subject-matter appellate jurisdiction and, failure to grant this writ will result in further injury for which no other remedy at law exists. Alternatively, Relator has a clear legal right and, Respondents have a clear legal duty to preform the requested act as there is no plain nor adequate remedy in the ordinary course of the law. This action is mostly predicated on *State ex rel., Culgan v. Medina Cty. Court of Common Pleas* (2008), 119 Ohio St. 3d 535, 895 N.E. 2d 805.

II. Jurisdiction & Venue.

2) Jurisdiction and Venue are properly established before this Honorable Court, pursuant to Article IV § 2 of the Ohio Constitution and, Ohio Rev. Code § 2731.06; respectively, Rules 10.1-10.12 of the Rules of Practice for the Supreme Court of Ohio.

III. Statement of Facts.

3) On December 17th, 1993, Relator was ordered to serve three consecutive, indefinite prison terms of four (4) to ten (10) years, aggregated, twelve (12) to thirty (30) years. However, the *Journal Entry Orders on Sentence* **failed** to set forth the verdict or finding of the court upon which the convictions were based (Ohio Crim. R. 32(C)). See, ***Appendix Exhibit "A" pp. 1a-2a*** (*State of Ohio v. Bruggeman*, Auglaize County, Ohio Court of Common Pleas Case No. 93-C-138).

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4) On March 19th, 2010, the trial court in the Court of Common Pleas for Auglaize County, Ohio, *State of Ohio v. Bruggeman*, Case No. 93-CR-138 entered a *nunc pro tunc* order correcting the *Journal Entry Orders on Sentencing* to comply with Ohio Crim. R. 32(C), to reflect the manner of conviction. See, ***Appendix Exhibit "B" pp. 3a-4a.***

5) Noticing the fact of a lack of appellate jurisdiction on all appellate matters formally designated *State of Ohio v. Bruggeman,* 1994 WL 645957 Ohio App. 3rd Dist. 11/8/94, Case No. 2-94-1, Relator filed a timely *Notice of Appeal* on April 15th, 2010, following the corrected Sentencing Entry.

6) On April 28th, 2010, Respondents dismissed said appeal claiming a lack of appellate jurisdiction, concerning *State of Ohio v. Bruggeman,* 3rd Dist. Ct. App. Case No. 2-10-17. See, ***Appendix Exhibit "C" pp. 5a-7a.***

7) On April 22nd, 2010, Relator filed motions for Judicial Notice, Arrest of Judgment and to Vacate and/or Strike the matter of Appeal Case No. 2-94-1, for lack of appellate jurisdiction, being null and void the same.

8) On May 7th, 2010, Respondents denied those motions. See, ***Appendix Exhibit "D" pp. 8a-9a.***

9) It is based upon the facts and admissible evidence exhibited, that Relator now seeks extraordinary relief via this complaint and petition for peremptory writs of prohibition and mandamus, alternatively.

IV. Standard of Review.

(Prohibition)

Where there is total want of jurisdiction on the part of a court, writ of prohibition will be allowed to arrest the continuing effect of an order issued by such court, even though the order was entered on the journal of the court prior to application for writ of prohibition. *State ex rel., Adams v. Gusweiler* (1972), 30 Ohio St. (2d) 326, 285 N.E. 2d 22.

In order for a *peremptory* writ to issue, relator must establish that: (1) respondent(s) [are] about to exercise judicial ... power; (2) exercise of that power is unauthorized by law; and (3) failure to grant the writ will result in injury for which no other adequate remedy exists. *State ex rel., Cleveland City School Dist. Bd. of Edn. v. Pokorny* (1995), 105 Ohio App. 3d 108, 663 N.E. 2d 719.

Relator advances he's met the criteria for issuance of prohibition because Respondents acted without subject-matter appellate jurisdiction in Appeal Case No. 2-94-1. Such appellate action was done without a *final appealable order*. The trial court failed to comply with Rule 32(C) of the Ohio Rules of Criminal Procedure, as presented in ***Appendix Exhibit "A" & "B" pp. 1a-4a***, being the fatally defective

Sentencing Entry and, the *nunc pro tunc* order correcting the 12/17/93 Sentencing Entry on 3/19/10.

It was held in *State ex rel., Cruzado v. Zaleski* (2006), 111 Ohio St. 3d 353, 356, 856 N.E. 2d 263, 266; citing, *State ex rel., Consumers' Counsel v. Pub. Util. Comm.,* (2004), 102 Ohio St. 3d 301, 809 N.E. 2d 1146 ¶ 11; and, *State ex rel., Brady v. Pianka* (2005), 106 Ohio St. 3d 147, 832 N.E. 2d 1202 ¶ 8... "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***." (Emphasis added); *see, also, State ex rel., Mayer v. Henson* (2002), 97 Ohio St. 3d 276, 779 N.E. 2d 223. Also, where a lower court is without jurisdiction to act, availability or adequacy of appellate remedy is immaterial to issuance of writ of prohibition. See, *State ex rel., Stern v. Mascio* (1996), 75 Ohio St. 3d 422, 662 N.E. 2d 370.

(Mandamus)

In order to be entitled to a peremptory writ of mandamus, relator must show that he has a clear legal right to the relief requested, respondents have a corresponding duty to preform the requested act as there is no plain nor adequate remedy in the ordinary course of the law. *State ex rel., Reynolds v. Basinger* (2003), 99 Ohio St. 3d 303, 791 N.E. 2d 459 ¶ 5; *State ex rel.,Grove v. Nadel* (1998), 81 Ohio St. 3d 325, 327, 691 N.E. 2d 275; quoting, *State ex rel., Kennedy v. Cleveland* (1984), 16 Ohio App. 3d 399, 401-402, 476 N.E. 2d 683; *Cleveland v. Trzebuchoski* (1999), 85 Ohio St. 3d 524, 527, 709 N.E. 2d 1148.

Relator has met the criteria for issuance of a peremptory writ of mandamus because: (1) Relator has a clear legal right to have vacated and/or stricken from the record, for want of appellate jurisdiction, the matter of Appeal Case No. 2-94-1. Such was determined without a final appealable order; and, (2) Relator has a clear legal right to file a timely Notice of Appeal (which he did) to appeal following the *nunc pro tunc* entry, correcting the Sentencing Entry on March 19th, 2010; which, rendered it a final appealable order, pursuant to Ohio Crim. R. 32(C); and, (3) Respondents have a corresponding clear legal duty to preform the requested acts, as there's no plain nor adequate remedy in the ordinary course of the law.

V. Law & Argument.

In *State v. Baker* (2008), 119 Ohio St. 3d 197, 893 N.E. 2d 163, syllabus, this Court held Crim. R. 32(C) requires a judgment of conviction set forth the following to be a final appealable order: "(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 Clerk of Court...."

Again reviewing both ***Appendix Exhibits "A" and "B" pp. 1a-4a***, Respondents acted without subject-matter appellate jurisdiction when adjudicating Appeal No. 2-94-1. Thus, acting contrary to Ohio Crim. R. 32(C) and this Court's decision in *Baker*.

When dismissing the appeal in Appeal Case No. 2-10-17, Respondents incorrectly asserted because Relator already had an appeal in Appeal Case No. 2-94-1, they had no appellate jurisdiction; including, denying Relator's motions for Judicial Notice, Arrest from Judgment and the motions to Vacate and/or Strike the matter in Appeal Case No. 2-94-1.

In *State ex rel., Culgan v. Medina Cty. Court of Common Pleas* (2008), 119 Ohio St. 3d 535, 895 N.E. 2d 805, this Court granted *Culgan's* petitions for writs of mandamus and procedendo issuing an order to the lower tribunal to comply with Ohio Crim. R. 32(C), so that *Culgan* could have a final appealable order. *Id.* at ¶¶ 9-11. This Court concluded the first sentencing entry, which didn't comply with Ohio Crim. R. 32(C), was "nonappealable." *Id.* at ¶ 9.

The relevance of *Culgan* to this case, *sub judice*, is that this Court in *Culgan* ***made no mention of the fact Culgan had already taken an appeal, which was affirmed....*** Therefore, Respondents adjudications against Relator are incorrect and, contrary to *Baker's* and *Culgan's* precedent. *See, also, State ex rel., Carnail v. McCormick* (2010), 126 Ohio St. 3d 124, 931 N.E. 2d 110.

VI. Injury suffered if writs are not granted.

Relator avers if the writs are not granted, he will be denied the right to have a meaningful, 14th Amendment U.S. Constitutional due process right to a first and direct appeal ***being predicated on a "final appealable order."*** Moreover, prejudicial trial errors occurred when Relator was involuntarily

denied the right to be present at critical stages of his trial. Relator did not become aware of these prejudicial, and, subject-matter jurisdictional errors until he obtained the transcript of trial, some three (3) years after his sentencing and long after the null and void appeal had been affirmed.

VII. Conclusion & Requested Relief.

WHEREFORE, based upon the foregoing, Relator requests the following relief:

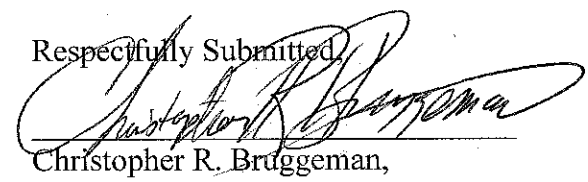
a) For this Court to grant the peremptory writs of prohibition and alternatively, mandamus in favor of Relator and against Respondents.

b) For this Court to order Respondents to take Judicial Notice, Arrest, Vacate and/or Strike the matters of Appeal Case No. 2-94-1 for want of subject-matter appellate jurisdiction.

c) For this Court to order Respondents to reinstate the matter of Appeal Case No. 2-10-17, and allow briefing on the merits.

d) Relator requests any additional relief this Court determines appropriate.

Respectfully Submitted,



Christopher R. Bruggeman,

Relator, *pro se*.

The State of Ohio)
) ss:
County of Allen)

Affidavit of Verity: (S. Ct. R. 10.4(B))

I, Christopher R. Bruggeman, being duly cautioned and sworn hereby deposes, states and solemnly swears to the following that:

1) The details of the claims are that Respondents lacked subject-matter appellate jurisdiction to adjudicate the matter of appeal in *State of Ohio v. Bruggeman*, (Appeal Case No. 2-94-1) 1994 WL 645957 (Ohio App. 3rd Dist. 11/8/94) due to a lack of a final appealable order resulting from the trial court's non compliance with Ohio Crim. Rule 32(C). The Journal Entry Orders on Sentencing in *State v. Bruggeman*, Auglaize Case No. 93-C-138 failed to set forth the manner of conviction.

2) Once the trial court, *sua sponte*, corrected the Sentencing Entry on March 19th, 2010, *nunc pro tunc*, to comply with Ohio Crim. R. 32(C), Relator filed a timely Notice of Appeal on April 15th, 2010. Said Appeal being designated as Appeal Case No. 2-10-17.

3) Relator also filed motions to take Judicial Notice, Arrest from Judgment and/or to Vacate and Strike the matters of Appeal Case No. 2-94-1 for lack of appellate jurisdiction on April 22, 2010.

4) On April 28th, 2010, Respondents dismissed the matter of Appeal Case No. 2-10-17 for want of appellate jurisdiction. Relator disagrees with their decision, for the reasons asserted in this complaint.

5) On May 7th, 2010, Respondents denied Relator's April 22nd, 2010, motions to vacate the matter of Appeal Case No. 2-94-1. Also, the case authorities Respondents relied on to deny the motions in no way stated what they said they stated, nor does such even come close to supporting their contentions.

6) It is for these reasons Relator files this complaint seeking extraordinary relief via prohibition and/or mandamus.

7) All of the information contained herein and the exhibits affixed hereto, are admissible, true and correct to the best of my personal knowledge and beliefs. I am competent to testify to the truth of the same, as if testifying under oath in a court of law.

Further Affiant Sayeth Naught.

NOTARY ATTEST:

Sworn and subscribed before my presence on this 14 day of October, 2010.

Notary of the Public

Signed by my hand under the penalty of perjury as true,

Christopher R. Bruggeman,
Affiant-in-Fact.

CYNTHIA M. ZWIEBEL
Notary Public, State of Ohio
My Commission Expires
May 23, 2012

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IN THE COURT OF COMMON PLEAS OF AUGLAIZE COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO Plaintiff	Case No. 93-C-138
vs.	JOURNAL ENTRY -- ORDERS ON SENTENCE
CHRISTOPHER BRUGGEMAN Defendant	

The Defendant appeared, this December 17, 1993, before the Court for the imposition of Sentence. The Defendant was present represented by Attorney John A. Poppe and the State of Ohio was represented by Attorney Garrett T.Gall of the Auglaize County Prosecuting Attorney's Office.

The Court, after evidence, testimony and arguments, finds Defendant Guilty of the specifications.

The Court inquired of the Defendant and Defendant's attorney as to whether either of them had any reason why Sentence should not be imposed, both answering in the negative.

Prior to imposing Sentence, the Court asked the Defendant and Defendant's attorney if they wished to address the Court in mitigation of punishment.

It is the Sentence of the Court that the Defendant be incarcerated with the Department of Rehabilitation and Correction, Orient, Ohio, on the charge of:

Count I - the charge of GROSS SEXUAL IMPOSITION, in violation of Ohio Revised Code §2907.05(A)(4), a FELONY of the 3RD Degree with specifications, for aN INdefinite term of NOT LESS THAN FOUR (4) YEARS NOR MORE THAN TEN (10) YEARS and assessed the costs.

Count II - the charge of GROSS SEXUAL IMPOSITION, in violation of Ohio Revised Code §2907.05(A)(4), a FELONY of the 3RD Degree with specifications, for aN INdefinite term of NOT LESS THAN FOUR (4) NOR MORE THAN TEN (10) YEARS and assessed the costs.

Count III - the charge of GROSS SEXUAL IMPOSITION, in violation of Ohio Revised Code §2907.05(A)(4), a FELONY of the 3RD Degree with specifications, for aN INdefinite term of NOT LESS THAN FOUR (4) NOR MORE THAN TEN (10) YEARS and assessed the costs.

Jail time credit of 94 days is hereby credited against the above sentence for jail time served.

The Court ORDERS the above sentences shall be served Consecutively.

The Court further ORDERS that the Defendant pay court costs through the office of the Clerk of Courts.

The Defendant did move the Court to suspend the execution of the sentence and requested that he be placed on probation with the Ohio Adult Parole Authority. The Court finds said motion not well taken and the same is hereby DENIED.

The Defendant is remanded to the custody of the Auglaize County Sheriff for transport to the Department of Rehabilitation and Correction, Orient, Ohio.

The Court APPOINTS the Public Defender as defense counsel for the purposes of appeal.

The Clerk of Courts shall cause a copy of this Journal Entry to be served on Attorney John A. Poppe by Regular U.S. Mail, and a copy on the Auglaize County Sheriff, S. Mark Weller, Ohio Adult Parole Authority and Prosecuting Attorney by hand delivering the same.

IT IS SO ORDERED.

JUDGE FREDERICK D. PEPPLE

AUGLAIZE COUNTY
COMMON PLEAS COURT
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2010 MAR 19 AM 9:47
SUE ELLEN KOHLER
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
AUGLAIZE COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO	*	CASE NO: 1993-CR-138
Plaintiff,	*	
-VS-	*	NUNC PRO TUNC-- JOURNAL ENTRY—ORDERS ON SENTENCE
CHRISTOPHER BRUGGEMAN	*	
Defendant.	*	

The Defendant appeared, this December 17, 1993, before the Court for the imposition of Sentence. The Defendant was present represented by Attorney John A. Poppe and the State of Ohio was represented by Attorney Garrett T. Gall of the Auglaize County Prosecuting Attorney's Office.

The Court, after evidence, testimony and arguments, finds Defendant Guilty of the specifications.

The Court inquired of the Defendant and Defendant's attorney as to whether either of them had any reason why Sentence should not be imposed, both answering in the negative.

Prior to imposing Sentence, the Court asked the Defendant and Defendant's attorney if they wished to address the Court in mitigation of punishment.

The Court finds the Defendant has been convicted, pursuant to a verdict at Jury Trial returned November 10, 1993, of COUNT I—a charge of GROSS SEXUAL IMPOSITION, a violation of Ohio Revised Code §2907.05(A)(4), a FELONY of the 3RD degree; COUNT II—a charge of GROSS SEXUAL IMPOSITION, a violation of Ohio Revised Code §2907.05(A)(4), a FELONY of the 3RD degree; COUNT III—a charge of GROSS SEXUAL IMPOSITION, a violation of Ohio Revised Code §2907.05(A)(4), a FELONY of the 3RD degree.

It is the Sentence of the Court that the Defendant be incarcerated with the Department of Rehabilitation and Correction, Orient, Ohio, on the charge of:

COUNT I – the charge of GROSS SEXUAL IMPOSITION, in violation of Ohio Revised Code §2907.05(A)(4), a FELONY of the 3RD Degree with specifications, for aN INdefinite term of NOT LESS THAN FOUR (4) YEARS NOR MORE THAN TEN (10) YEARS, and assessed the costs.

COUNT II -- the charge of GROSS SEXUAL IMPOSITION, in violation of Ohio Revised Code §2907.05(A)(4), a FELONY of the 3RD Degree with specifications, for aN INdefinite term of NOT LESS THAN FOUR (4) YEARS NOR MORE THAN TEN (10) YEARS, and assessed the costs.

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Jail time credit of 94 days is hereby credited against the above sentence for jail time served.

The Court ORDERS the above sentences shall be served CONSECUTIVELY.

The Court further ORDERS that the Defendant pay court costs through the office of the Clerk of Courts.

The Defendant did move the Court to suspend the execution of the sentence and requested that he be placed on probation with the Ohio Adult Parole Authority. The Court finds said motion not well taken and the same is hereby DENIED.

The Defendant is REMANDED to the custody of the Auglaize County Sheriff for transport to the Department of Rehabilitation and Correction, Orient, Ohio.

The Court APPOINTS the Public Defender as defense counsel for the purposes of appeal.

The Clerk of Courts shall cause a copy of this Journal Entry to be served on the Warden and the Defendant Christopher Bruggeman #286466, Madison Correctional Institution, P.O. Box 740, London, Ohio 43140-0740 by Regular U.S. Mail; to Attorney John A. Poppe, 1100 West Auglaize Street, Wapakoneta, Ohio 45895 by Regular U.S. Mail and the Prosecuting Attorney by hand delivering same.

IT IS SO ORDERED.

JUDGE FREDERICK D. PEPPLE

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
AUGLAIZE COUNTY

STATE OF OHIO, **CASE NO. 2-10-17**

PLAINTIFF-APPELLEE,

v.

CHRISTOPHER R. BRUGGEMAN, **JUDGMENT ENTRY**

DEFENDANT-APPELLANT.

This cause comes before the Court *sua sponte* for determination as to whether the appeal should be dismissed for want of jurisdiction.

The record reflects that a jury returned guilty verdicts in November 1993 to three counts of gross sexual imposition and, in December 1993, the trial court issued a judgment imposing sentence. Appellant's convictions and sentences were then affirmed on appeal. *State v. Bruggeman* (Nov. 8, 1994), 3rd Dist.No. 2-94-1, unreported. Thereafter, Appellant filed numerous unsuccessful post-conviction petitions, appeals and original actions. See *State v. Bruggeman*, 3rd Dist.No. 2-04-26, 2005-Ohio-956, appeal not accepted for review *State v. Bruggeman*, 106 Ohio St.3d 1483, 2005-Ohio-1483.

AUGLAIZE COUNTY COURT OF APPEALS FILED
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On March 19, 2010, apparently on its own motion, the trial court caused a *Nunc Pro Tunc* Judgment of Sentence to be filed which corrected the original sentencing entry by adding a paragraph which reflects the fact that the convictions were pursuant to a verdict at jury trial. Although not stated as such, the purpose was apparently to correct a clerical omission in the December 1993 judgment of sentence to reflect that Appellant was convicted at jury trial. See *State v. Baker*, 119 Ohio St.3d 197, 2008 Ohio-3330, requiring that sentencing judgments include the "means of conviction." Appellant filed the instant appeal on April 15, 2010.

A *nunc pro tunc* judgment applies retrospectively to the judgment which it corrects. A *nunc pro tunc* judgment is not properly subject to appeal and does not act to extend the time in which a party can appeal the actual judgment of sentence. *Gold Touch, Inc. v. TJS Lab, Inc.* (1998), 138 Ohio App.3d 106; *Roth v. Roth* (1989), 65 Ohio App.3d 768; *Kuehn v. Kuehn* (1988), 55 Ohio App.3d 245.

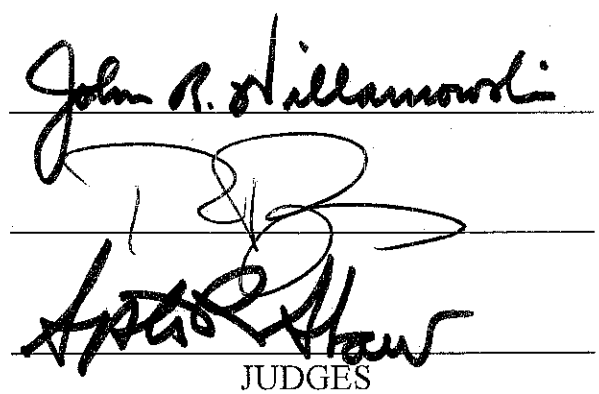
In the instant case, the court finds that the trial court issued a *Nunc Pro Tunc* Judgment for the sole purpose of retrospectively correcting a clerical omission in the prior sentencing judgment to comply with Crim.R. 32. No new or substantial right was affected under R.C. 2505.02(A)(1) by correction of the sentencing judgment to reflect what actually occurred and what clearly was evident throughout the record and to Appellant. Appellant exhausted the appellate process when the judgment of sentence was reviewed and affirmed on appeal.

Case No. 2-10-17

See, also, *State v. Hall* (Jan. 8, 2009), 3rd Dis.No. 12-08-09, unreported Judgment, dismissing appeal from *Nunc Pro Tunc* Judgment correcting omission in 2004 Sentencing Judgment; *State v. Lyles* (Aug. 13, 2009), 3rd Dist.No. 1-09-40, unreported Judgment, dismissing appeal from *Nunc Pro Tunc* Judgment correcting omission in 1999 Sentencing Judgment, discretionary appeal denied *State v. Lyles*, 123 Ohio St.3d 1523, 2009-Ohio-6487.

Accordingly, we find that the trial court's March 19, 2010 *Nunc Pro Tunc* Judgment is not a "final order" subject to appeal, and the instant appeal must be dismissed for lack of jurisdiction.

It is therefore **ORDERED, ADJUDGED** and **DECREED** that the appeal be, and the same hereby is, **DISMISSED** at the costs of the Appellant for which judgment is hereby rendered and that the cause be, and the same hereby is, remanded to the trial court for execution of the judgment for costs.



JUDGES

DATED: April 28, 2010
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IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
AUGLAIZE COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

v.

CHRISTOPHER BRUGGEMAN,

DEFENDANT-APPELLANT.

CASE NO. 2-94-1

JUDGMENT ENTRY

This cause comes on for determination of Appellant's motion to vacate and/or strike the appeal that he filed in 1993 for want of appellate jurisdiction, pursuant to App.R. 15.

Upon consideration the court finds that this Court's opinion and final judgment were issued on Nov. 8, 1994, and no further appeal was filed. Appellant filed instead numerous post-judgment motions, appeals and original actions. Appellant's current argument is without merit because the 1993 sentencing judgment, as corrected *nunc pro tunc*, was a final order. Furthermore, App.R. 15 provides neither the procedure nor the authority for an appellate judgment to be vacated, as Appellant requests. Accordingly, the motion is not well taken.

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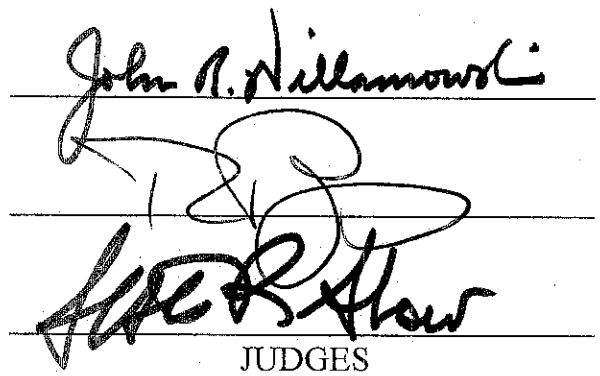
Case No. 2-94-1

It is therefore **ORDERED** that Appellant's motion to vacate and/or strike the appeal be, and the same hereby is, denied.



JUDGES

DATED: May 5, 2010
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