

ORIGINAL

**IN THE SUPREME COURT OF OHIO
COLUMBUS, OHIO**

STATE OF OHIO,

CASE NO. 2007-1741

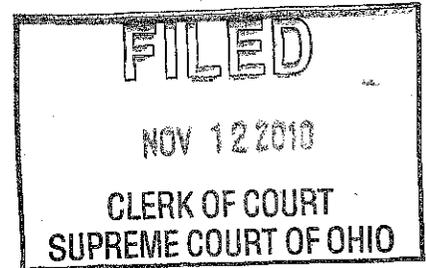
Plaintiff-Appellant,

vs.

DEATH PENALTY CASE

EDWARD LEE LANG, III,

Defendant-Appellee.



**ON APPEAL FROM
THE STARK COUNTY COURT OF COMMON PLEAS,
CASE NO. 2006-CR-1824(A)**

**SUPPLEMENTAL BRIEF
OF PLAINTIFF-APPELLANT,
STATE OF OHIO**

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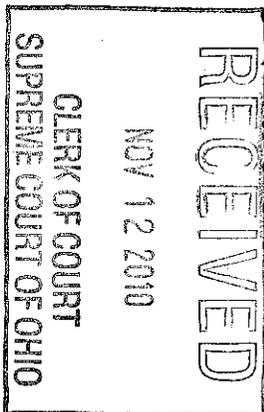


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE AND FACTS	1
ARGUMENT	
<u>PROPOSITION OF LAW</u>	
THE PROPER REMEDY IN A DEATH PENALTY CASE IN WHICH POST-RELEASE CONTROL IS NOT PROPERLY IMPOSED FOR THE NON-CAPITAL FELONY OFFENSES IS A REMAND TO THE TRIAL COURT FOR RESENTENCING PURSUANT TO R.C. 2929.191 WHEN THE ORIGINAL SENTENCING OCCURRED BEFORE JULY 11, 2006.	4
PROOF OF SERVICE	10

TABLE OF AUTHORITIES

Page

CASES

Hernandez v. Kelly, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301. 6

State ex rel. Cruzado v. Zaleski, 111 Ohio St.3d 353, 2006-Ohio-5795,
856 N.E.2d 263. 6

State v. Beasley (1984), 14 Ohio St.3d 74, 471 N.E.2d 774. 6

State v. Bezak, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961. 6

State v. Bloomer, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254. 6

State v. Boswell, 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422. 6, 7

State v. Fry, 125 Ohio St.3d 163, 2010-Ohio-1017,
926 N.E.2d 1239. 3, 9

State v. Jordan, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864. 6

State v. Ketterer, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9. 7, 8, 9

State v. Lang, Stark App. No. 2009-CA-00187, 2010-Ohio-3975,
2010 WL 3314494. 3

State v. Simpkins, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568. 6

State v. Singleton, 124 Ohio St.3d 173, 2009-Ohio-6434,
920 N.E.2d 958. 5

Woods v. Telb (2000), 89 Ohio St.3d 504, 733 N.E.2d 1103. 6

OTHER AUTHORITIES

R.C. 2903.01(B). 1

R.C. 2911.01(A)(1). 1

R.C. 2911.01(C).	4
R.C. 2929.04(A)(5).	1
R.C. 2929.04(A)(7).	1
R.C. 2929.19.	6
R.C. 2929.19(B)(3)(c).	5, 6
R.C. 2929.19(B)(3)(e).	5, 6
R.C. 2929.191.	6, 9
R.C. 2941.145.	1
R.C. 2967.28.	4, 6
R.C. 2967.28(B)(1).	4, 6
R.C. 2967.28(B)(1).	5

STATEMENT OF THE CASE AND FACTS

In 2006, Edward Lee Lang, III, was charged by indictment returned by the Stark County Grand Jury with two counts of aggravated murder,¹ with each count including attendant firearm² and death penalty specifications.³ The indictment also charged Lang with one count of aggravated robbery⁴ with a firearm specification. In the course of an armed robbery, Lang executed two people – Marnell Cheek and Jaron Burditte by shooting them in the head as they sat in the front seat of Burditte’s motor vehicle. Lang was convicted as charged in this indictment after a trial by jury, and the jury subsequently recommended a sentence of death for the execution killing of Cheek, but a sentence of life imprisonment without the possibility of parole for the slaying of Burditte. The trial court accepted these recommendations and imposed sentence accordingly for each aggravated murder, and also sentenced Lang to a term of imprisonment of ten years for the aggravated robbery; the court imposed all of these sentences consecutively to each other, as well as the mandatory three-year prison term for all of the firearm specifications (which the trial court merged).

In addition, the trial court notified Lang of his post-release control obligations if he should ever be released from prison (given that Lang will die in prison either by execution or by serving his life sentence without the eligibility of parole). At the sentencing hearing in 2007, the trial court

¹R.C. 2903.01(B) (felony murder based on the predicate offense of aggravated robbery).

²R.C. 2941.145 (firearm specification).

³Each count of aggravated murder had two death penalty specifications: R.C. 2929.04(A)(5) (multiple murder specification), and R.C. 2929.04(A)(7) (felony-murder specification).

⁴R.C. 2911.01(A)(1) (aggravated robbery – having a deadly weapon on or about the offender's person or under the offender's control while in the course of committing a theft offense).

specifically notified Lang as follows:

On the aggravated robbery charge, he will be sentenced to a term of ten years in an appropriate state correctional facility, plus an additional three years consecutive on the gun specification. All of this will also be consecutive to the other counts that have been issued by the Court. And in addition the Court must impose five years of post-release control which is mandatory under Ohio law on that respective count.

Transcript of Sentencing (July 25, 2007), at 35.

The trial court memorialized Lang's sentences by judgment entry, filed July 26, 2007. In addition to the prison terms and death sentence, the court included a recitation of its notification of Lang's post-release control obligations.

The Court has further notified the defendant that post release control is mandatory in this case on Count Three [aggravated robbery] up to a maximum of five (5) years, as well as the consequences for violating conditions of post release control imposed by the Parole Board under Revised Code Section 2967.28. The defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of post-release control.

State v. Lang, Stark County Court of Common Pleas Case No. 2006-CR-1824(A), Judgment Entry – Prison Sentence Imposed (filed July 26, 2007), at 5.

Lang thereafter filed his direct appeal of his convictions, as well as his death sentence and prison terms, to this Court. Briefing was completed by the parties by the end of 2008, and the appeal is currently pending oral argument before the Ohio Supreme Court. While the appeal was pending, Lang sought leave from this Court to file a supplemental brief on the issue of the proper imposition

of Lang's post-release control obligations. The Court granted leave, and this supplemental brief is in response to Lang's supplemental brief.

In the meantime, Lang has also pursued his post-conviction relief remedies under R.C. 2953.21 during the pendency of the direct appeal. The trial court – the same trial judge who presided over Lang's capital trial – dismissed Lang's post-conviction relief petition, rejecting all of the claims he raised. Lang appealed this decision to the Court of Appeals for Stark County (Fifth Appellate District), which rejected Lang's assignments of error and affirmed the trial court's dismissal of the petition.⁵ Lang has filed an appeal to this Court from the decision of the court of appeals, which is currently pending before this Court on Lang's motion for leave to appeal.⁶

This supplemental brief is therefore limited to the issue of whether the trial court properly imposed Lang's post-release control obligations as part of his sentence for aggravated robbery, i.e., the so-called *Fry* issue.⁷

⁵*State v. Lang*, Stark App. No. 2009-CA-00187, 2010-Ohio-3975, 2010 WL 3314494.

⁶*State v. Lang*, Ohio Sup. Ct. Case No. 2010-1735.

⁷*State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239.

ARGUMENT

PROPOSITION OF LAW

THE PROPER REMEDY IN A DEATH PENALTY CASE IN WHICH POST-RELEASE CONTROL IS NOT PROPERLY IMPOSED FOR THE NON-CAPITAL FELONY OFFENSES IS A REMAND TO THE TRIAL COURT FOR RESENTENCING PURSUANT TO R.C. 2929.191 WHEN THE ORIGINAL SENTENCING OCCURRED BEFORE JULY 11, 2006.

Lang argues in his supplemental brief in the direct appeal of his convictions and sentences (death penalty as well as prison terms) that the trial court improperly imposed his post-release control obligations, as set forth in R.C. 2967.28, which renders his criminal sentences void. As a result, Lang asserts that his case should be remanded to the trial court for resentencing. Lang's specific challenges to his post-release control sentence is that the trial court did not notify him at the sentencing hearing of the possible penalties for violating the terms and conditions of any post-release control, and to the sentencing judgment entry's lack of specificity of those consequences.

Lang's only conviction that triggers post-release control obligations is the aggravated robbery conviction. Since the offense is a felony of the first degree per R.C. 2911.01(C), Lang's sentence thus includes a mandatory period of post-release control of five years.⁸ The trial court is required by statute and precedent of this Court to notify the criminal defendant of the proper term of post-release control, as well as the consequences of violating post-release control. This Court has succinctly outlined these requirements in its *Singleton* decision.

R.C. 2967.28(B) (see Appendix for July 11, 2006 version of R.C. 2967.28) requires a sentencing court imposing a prison term on a

⁸R.C. 2967.28(B)(1).

first- or second-degree-felony offender or certain other offenders to include in the sentence a term of mandatory postrelease control to be imposed by the parole board on the offender's release from prison. In addition, R.C. 2929.19 mandates that a court, when imposing sentence, notify the offender at the hearing that he will be supervised pursuant to R.C. 2967.28 and that the parole board may impose a prison term of up to one-half of the prison term originally imposed on the offender if he violates supervision or a condition of post release control. R.C. 2929.19(B)(3)(c) and (e). And the imposed post release-control sanctions are to be included in the judgment entry journalized by the court.

State v. Singleton, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶ 11.

At the sentencing hearing, the trial court imposed a term of post-release control of five years, as required by law; the court, however, did not notify Lang of the consequences of violating his post-release control.⁹ In the sentencing judgment entry, the trial court recited that Lang's post-release control was for a period of time "up to a maximum" of five years, and that Lang shall "serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of post-release control." The trial court's use of the "up to" language in its sentencing entry can imply that the period of post-release control is discretionary as opposed to mandatory, and the trial court's notification of sanctions for a violation of a condition of post-release control did not include the obligatory passage that Lang would be subjected to a prison term up to one-half of the prison term originally imposed upon the offender.

⁹See R.C. 2967.28(B)(1) (period of post-release control for a first degree felony is five years); R.C. 2929.19(B)(3)(c) (trial court shall notify offender at sentencing hearing of period of post-release control) and R.C. 2929.19(B)(3)(e) (trial court shall notify offender that "if the offender violates that supervision or a condition of post-release control imposed under division (B) of section 2967.131 of the Revised Code, the parole board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed upon the offender").

Under current law governing post-release control, the trial court failed to fully comply with the requirements of R.C. 2967.28(B)(1), R.C. 2929.19(B)(3)(c), and R.C. 2929.19(B)(3)(e). And as this Court has made abundantly clear, such violations render the criminal sentence void and requires a resentencing in compliance with the applicable sentencing provisions of R.C. 2967.28, and of R.C. 2929.19 or R.C. 2929.191 (depending on which is applicable given the date of sentencing).¹⁰

This consequence that the sentencing judgment entry is void as a result of a violation of imposing post-release control is not as broad in its scope in death penalty cases. Instead of invalidating and voiding the entire sentence, this Court has held that the only sentences voided are the non-capital sentences. Thus, in the context of a death penalty case, this Court has upheld the convictions and the death sentences in such cases, but remanded the case to the trial court for resentencing solely on the post-release control aspects of that sentence (given the applicability of R.C. 2929.191 to those cases).

In *Fry*, the Court reviewed the defendant's convictions and sentences, most importantly his death sentence. The Court upheld these convictions for capital murder and the death sentence, but remanded the case to the trial court for proper imposition of post-release control on the non-capital

¹⁰See, e.g., *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254; *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, 906 N.E.2d 422; *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568; *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961; *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263; *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301; *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864; *Woods v. Telb* (2000), 89 Ohio St.3d 504, 733 N.E.2d 1103; *State v. Beasley* (1984), 14 Ohio St.3d 74, 471 N.E.2d 774.

felony offenses.¹¹ In so ruling, the Court specifically held:

In addition to his capital crimes, Fry was convicted of third-degree domestic violence, tampering with evidence, intimidation of a crime victim or witness, and menacing by stalking. Based on his convictions, he is subject to postrelease control for a mandatory term of three years. R.C. 2967.28(B)(3). Fry's sentencing entry, however, imposed ten years of postrelease control, in the event that he is released from prison. This notification failed to comply with the mandate of R.C. 2967.28(B)(3). Accordingly, Fry must be resentenced pursuant to R.C. 2929.191 to the correct term of postrelease control.

Fry, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, at ¶ 214 (footnote omitted).

This Court recently reaffirmed the *Fry* remedy with regard to post-release control sentencing components in a death penalty case in *Ketterer*.¹² The Court once again affirmed the defendant's convictions and death sentence, but remanded the case to the trial court for proper imposition of post-release control for the non-capital felony sentences: "Because mandatory postrelease control was not properly imposed, however, we remand the case for the trial court to conduct a hearing under R.C. 2929.191."¹³ The particular post-release control violations in *Ketterer* included that the trial court did not specifically notify the capital defendant at the sentencing hearing or in the sentencing

¹¹*State v. Fry*, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239, at ¶ 6 ("We affirm the convictions and sentence of death, but remand for imposition of postrelease control pursuant to R.C. 2929.191 on the sentences for domestic violence, tampering with evidence, intimidation of a crime victim or witness, and menacing by stalking.").

¹²*State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9.

¹³*Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, at ¶ 1. See also *Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, at ¶ 79 ("Because the trial court failed to properly impose postrelease control, the case is remanded so that Ketterer may be given the proper terms of postrelease control pursuant to R.C. 2929.191.").

judgment entry that he could be subjected to a prison term of up to one-half of the prison term originally imposed if the defendant violated his supervision or a condition of his post-release control. This Court especially noted that the language in the sentencing entry that broadly notified the defendant of the consequences of violating his post-release control was improper. This language – “The defendant is ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and *any prison term* for violation of that post release control.” – is the same language used in the sentencing judgment entry for Lang.¹⁴

The *Ketterer* court did address the harmless error argument – that post-release control will be precluded by the defendant’s death sentence (and subsequent life sentence if that death sentence is vacated), and thus any error in the imposition of post-release control is harmless.¹⁵ The court specifically noted that the effective preclusion of post-release control for a death row defendant does not render those defects or errors in the imposition of post-release control harmless.

Accordingly, while the dissent is correct that it is highly unlikely that *Ketterer* will ever be subject to postrelease control, trial courts in capital cases must scrupulously comply with the applicable statutes and rules, even those involving postrelease control.

Ketterer, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, at ¶ 78.

Notwithstanding this holding, Lang will never be subjected to post-release control, assuming that his convictions are upheld on direct appeal. Putting the death sentence aside, Lang is still

¹⁴See *Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, at ¶ 77.

¹⁵See *Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, at ¶¶ 84-85 (Lundberg Stratton, J., dissenting).

...serving a consecutive life sentence without the possibility of parole. Simply put, Lang is never seeing the outside of a prison (assuming again his convictions are upheld and the governor does not commute his sentence or pardon Lang). The holdings of *Fry* and *Ketterer*, however, are clear, and errors or defects in the imposition of post-release control for the non-capital offenses of a death row defendant trigger a remand to the trial court for the proper imposition of those post-release control sanctions.

In the instant case, the proper remedy for any error or defect in this imposition is a remand for proper sentencing pursuant to R.C. 2929.191, as in *Fry* and *Ketterer*.¹⁶

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¹⁶Lang was sentenced on July 25, 2007, after the effective date of July 11, 2006 for R.C. 2929.191.

PROOF OF SERVICE

A copy of the foregoing Supplemental Brief of the State of Ohio was sent by ordinary U.S. mail this 10th day of November, 2010, to JENNIFER A. PRILLO, RACHEL TROUTMAN and BENJAMIN D. ZOBBER, co-counsel for petitioner-appellant, at Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.

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