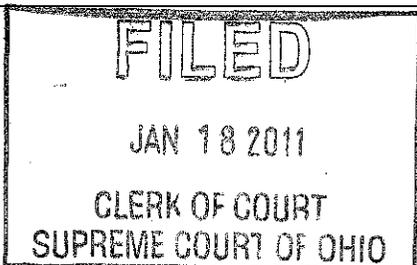


ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio, :
 Appellee, :
 v. : Case No. 09-2028
 Roland T. Davis, :
 Appellant. : Death Penalty Case

Supplemental Merit Brief of Appellant Roland T. Davis



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Argument

SUPPLEMENTAL PROPOSITION OF LAW

A COURT OF APPEALS HAS JURISDICTION TO HEAR AN APPEAL FROM THE DECISION OF A TRIAL COURT IN A CAPITAL CASE DENYING A MOTION FOR A NEW TRIAL.

On December 29, 2010, the Ohio Supreme Court asked the parties to submit supplemental briefing on the issue of “Whether the court of appeals had jurisdiction to consider the trial court’s denial of Davis’ motion for a new trial based on newly discovered evidence under § Section 2(B)(2)(c) and Section 3(B)(2), Article 1 of the Ohio Constitution.” *State v. Davis*, __ Ohio St.3d __, 2010-Ohio-6371.

For the reasons set forth herein, the answer to that question is: yes, the court of appeals had jurisdiction to hear Appellant’s appeal from the denial of the new trial motion.

A. The text of the Ohio Constitution requires an affirmative answer to the Court’s question.

On November 8, 1994, the electorate in Ohio voted to amend the Ohio Constitution to change the review procedure for capital cases. Prior to the change, the Ohio Constitution provided that a person convicted of a capital offense and sentenced to death was entitled to two direct appeals of right, one to the court of appeals, and one to the Ohio Supreme Court:

Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the court of record inferior to the court of appeals within the district

Ohio Const. art. IV, §2(B)(2)(pre 1995 version).

The amendment eliminated direct review by the court of appeals for all capital defendants sentenced to death for a crime which occurred on or after January 1, 1995:

Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the court of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal *a judgment that imposes a sentence of death.*

Ohio Constitution art. IV, §3(B)(2)(emphasis added)

The wording of the amendment is critical. The courts of appeals only lost jurisdiction as to those appeals taken from a trial court's "judgment that imposes a sentence of death." In this case, Appellant did not appeal from a decision of the trial court imposing a sentence of death. He instead appealed from a judgment that denied his motion for a new trial. Courts, when construing a statute or constitutional provision, are to be guided by the plain language of the statute. *State v. Kreischer*, 109 Ohio St.3d 391, 2006-Ohio-2706, ¶ 12. In this case, the constitutional amendment is clear; the courts of appeals only lost jurisdiction as to appeals from a judgment "that imposes a sentence of death." This appeal to the court of appeals was not from "a judgment that impose[d] a sentence of death.

On July 15, 2005, the trial court, after receiving the jury's recommendation of death, sentenced Appellant to death. The trial court's sentencing entry constituted a "judgment that impose[d] a sentence of death." The trial court's judgment entry denying Appellant's motion for a new trial left untouched the July 15, 2005 sentence of death. As such the July 15, 2005

entry did not constitute a “judgment that impose[d] as sentence of death. This Court has consistently held that post judgment motions are collateral attacks on a criminal judgment, not an appeal of the of that judgment. *State v. Steffen* (1994), 70 Ohio St.3d 399, 410, 639 N.E.2d 67; *State v. Calhoun* (1999), 86 Ohio St.3d 279, 281, 714 N.E.2d 905. As such, the trial court’s judgment appealed from herein did not involve the imposition of a death sentence and was properly appealed to the court of appeals.

B. The Ohio Appellate Courts Have Repeatedly Decided Appeals Involving Post Judgment Motions in Capital Cases

This Court has addressed the constitutionality and scope of Issue 1. *State v. Smith* (1997), 80 Ohio St.3d 89, 95 – 104, 695 N.E.2d 668. That case reached this Court on direct appeal. The Court focused on the impact of Issue 1 on direct appeals. *Id.* However, this Court noted “the state has taken other steps to expedite the resolution of criminal cases, including capital cases, such as limiting the time within which to file postconviction petitions.” *Id.* at 100.

At least one death sentenced individual has instituted an appeal to this Court directly from the decision of a trial court’s denying a motion for a new trial. *State v. Jackson*, 120 Ohio St.3d 1450; 2008-Ohio-6813. The Court, with Judge Lanzinger dissenting, granted the State’s motion to dismiss. *Id.* The State, in its motion to dismiss, argued several theories. Because the Court did

not issue an opinion in *Jackson*, the basis for the granting of the motion is unclear.¹

Courts of Appeals have routinely ruled on appeals instituted by death sentenced individuals from trial court judgments denying motions for new trials in which the murder occurred subsequent to July 1, 1995. *State v. Stojetz*, 12th Dist. No. CA2002-04-006, 2002-Ohio-6520; *State v. Lindsey*, 12th Dist. No. CA2003-07-010, 2004-Ohio-4407; *State v. Keith*, 3rd Dist. No. 03-08-05, 2008-Ohio-6187; *State v. Jackson*, 11th Dist. No. 2009-T-0050, 2010-Ohio-5054; *State v. Brown*, 186 Ohio App.3d 309, 2010-Ohio-405; *State v. Bethel*, 10th Dist. No. 09AP-924, 2010-Ohio-3387.

The Trumbull County Court of Appeals in *Jackson* appears to have been the only court to address the jurisdictional issue in the context of a motion for a new trial in a capital proceeding. The State therein filed a motion to dismiss the appeal. The Court of Appeals issued a lengthy, exhaustive ruling on the motion prior to conducting oral argument. *State v. Jackson* (May 13, 2010), 11th Dist. No. 2008-T-0050 (judgment entry).² The Court concluded:

the foregoing provision [Ohio Constitution, Article IV] Section 3(B)(2)] refers expressly to a specific judgment that a court of appeals does not have the authority to review; i.e., the final sentencing judgment which sets forth the order regarding the imposition of the death penalty. Given the narrowness of the jurisdictional exception in Section 3(B)(2), logic dictates that the

¹ Because the procedure was unclear as to which court Mr. Jackson should institute his appeal, he filed notices of appeal with both the Trumbull County Court of Appeals and this Court. The Court of Appeals also dismissed Mr. Jackson's appeal. *State v. Jackson* (Dec. 31, 2009, No. 2008-T-0077). Mr. Jackson's appeal from that order is pending before this Court. *State v. Jackson*, Ohio Supreme Court Case No. 10-0302.

² Appellant has included a copy of the entry in the Appendix to this Brief.

provision was not intended to totally deprive a court of appeals of all authority to review a final judgment stemming from a case in which the death penalty was imposed. Rather the wording of Section 3(B)(2) supports the conclusion that an appellate court has the jurisdiction to review final judgments rendered in such a proceeding, except for the entry containing the weighing exercise which leads to the imposition of the "death" sentence

State v. Jackson, judgment entry, p. 4

While the issue before this Court is limited to the jurisdiction of a court of appeals to rule on a new trial motion, the Court's holding will likely affect other post judgment motions in capital cases such as post conviction petitions and motions to withdraw guilty pleas. Since the passage of Issue I, appellate courts throughout the state have continued to decide appeals from entries in capital cases denying post conviction petitions. See *i.e.* *State v. Fitzpatrick*, 1st Dist No. C-030804, 2004-Ohio-5615; *State v. Gapen*, 2nd Dist. No. 20454, 2005-Ohio-441; *State v. Jackson*, 3rd Dist. No. 1-04-31, 2004-Ohio-5350, *State v. Lang*, 5th Dist. No. 2009 CA 00187, 2010-Ohio-3975; *State v. Frazier*, 6th Dist. No. L-07-1388, 2008-Ohio-5027; *State v. Conway*, 10th Dist. No. 05AP-550, 2006-Ohio-6219; *State v. Trimble*, 11th Dist. No. 2007-P-0098, 2008-Ohio-6409.

After the passage of Issue 1, at least two courts expressly addressed whether they retained jurisdiction to review the denial of a post conviction petition in a capital case. Both the courts determined that they retained jurisdiction. *State v. Cowans* (Clermont App. Sept. 7, 1999), 12th Dist. No. CA98-10-090, 1999 Ohio App. LEXIS 4157, pp. *5 - *6; *State v. Carter* (Trumbull App. Dec. 15, 2000), 11th Dist. No. 99-T-0133, 2000 Ohio App.

LEXIS 5935, pp. *3 -*5. Two other courts specifically noted that after the passage of Issue 1 they no longer had jurisdiction to decide the direct appeal. This recognition constituted an implicit finding that those courts retained jurisdiction to decide the post conviction appeal. *State v. Smith* (Butler App. Aug. 31, 1998), 12th Dist. No. CA97-12-223, 1998 Ohio App. LEXIS 3968, pp. *2, n. 2; *State v. Yarbrough* (Shelby App. April 30, 2001), 3rd Dist. No. 17-2000-10, 2001-Ohio-2351, 2001 Ohio App. LEXIS 2351, p. 4, n. 1.

C. A Holding That This Court Has Exclusive Jurisdiction Would Impact Ongoing And Completed Capital Litigation.

Death sentenced individuals have proceeded, pursuant to the unanimous holdings of the lower appellate courts, to appeal the denial of post judgment motions to the courts of appeals. See, § B, *supra*. A contrary holding would render void all decisions involving post judgment motions rendered by appellate courts in capital cases in which the murder occurred after to July 1, 1995. The effect of such a ruling on ongoing and completed capital litigation would be dramatic.

All individuals who had sought and received review of post judgment appeals would be forced to seek a delayed appeal to this court. Prior to the passage of Issue 1, this Court held that delayed appeals were not available for post conviction litigants. *State v. Nichols* (1984), 11 Ohio St.3d 40, 463 N.E.2d 375, Syllabus 1. Capital litigants would no doubt challenge that decision, if this Court holds that the appellate courts lacked jurisdiction. If this Court upholds the ruling in *Nichols*, then it should reasonably be anticipated that

capital litigants will seek other remedies to litigate post judgment claims that had previously been decided, in many cases ten or more years earlier. The impact of a decision that strips courts of appeals of jurisdiction would not be limited to appeals from the denials of new trial motions which are filed infrequently in capital cases. Instead, such a holding would also impact cases in which death sentenced individuals have sought post conviction relief which occurs in literally every capital case.

The impact of a decision that strips the court of appeals of jurisdiction would not be limited to the state courts. With very few exceptions, death sentenced individuals who have not been successful in the Ohio courts have sought federal habeas review. The review of the federal courts is often limited by the factual and legal findings of the state courts. 28 U.S.C. § 2254(d)(1) and (2). Those limitations are premised upon the state courts having had jurisdiction to render the legal decisions and factual determinations at issue. *Ford v. Wainwright* (1986), 477 U.S. 399, 410; *Townsend v. Sain* (1963), 272 U.S. 293, 312-31. Habeas petitioners in which the district courts have decided their cases will ask those courts to reopen their cases. They will cite the federal courts to the fact that those courts relied upon state court legal and factual findings which the state courts had no jurisdiction to make.

D. A Holding That This Court Has Exclusive Jurisdiction Will Impact Future Capital Litigation.

In the prior section, Appellant focused on the delay that will ensue in those cases in which the state and federal courts have completed or are in the

process of completing their review. The adoption of a rule that this Court has exclusive jurisdiction will also slow the review of future cases. Again that will frustrate the reason behind the passage of Issue 1.

First and most obvious, this Court will have to conduct the review that is now shared by twelve courts of appeals. This Court will have to review the record, conduct oral argument, and issue opinions in all appeals from post judgment proceedings in all capital cases.

The courts of appeals currently entertain all the appeals from the denial of post judgment motions. Once an appellate court conducts its first review of a post judgment motion (generally a post conviction appeal), it is in the best positioned to conduct review of any subsequent filed post judgment motions. The record, in the appeal of a post judgment motion often looks much different than the direct appeal record in this Court. *State v. Davis*, 119 Ohio St.3d 422, 2008-Ohio-4608, ¶ 19. It makes sense, for the courts of appeals to continue to entertain the post judgment appeals. *State v. Murnahn* (1992), 63 Ohio St.3d 60, 65, 584 N.E.2d 1204; *State v. Davis*, 2008-Ohio-4608 at §18.

This Court benefits from the courts of appeals conducting the initial review. First, it permits this Court to focus its time on those cases involving post judgment motions that merit this Court's attention. Secondly, when the Court accepts review of a post judgment case, it will have the benefit of the lower appellate court's review and distilling of the issue(s).

CONCLUSION

The trial court had jurisdiction to decide Appellant's motion for new trial. The court of appeals had jurisdiction to hear the appeal from the denial of that motion. This Court should reverse the decision of the court of appeals and remand this case to that court to determine whether the trial court properly denied the motion.

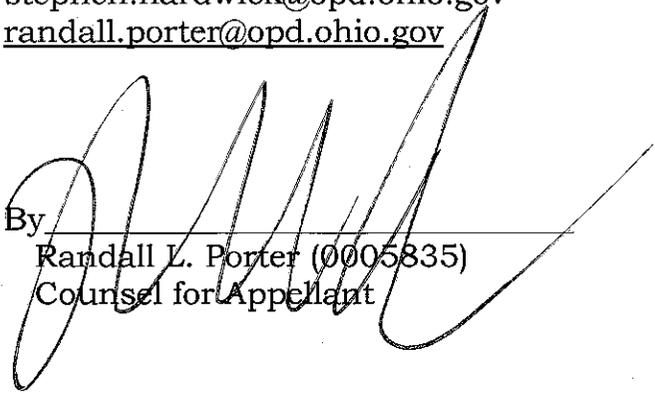
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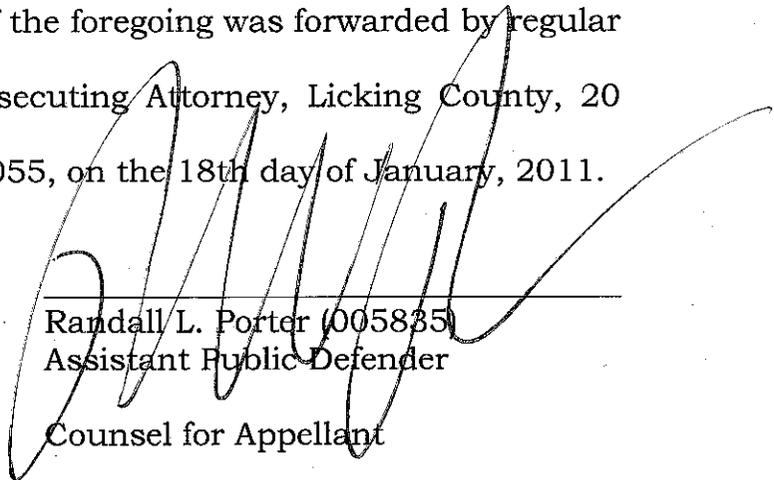
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was forwarded by regular U.S. mail to Kenneth W. Oswalt, Prosecuting Attorney, Licking County, 20 South Second Street, Newark, Ohio 43055, on the 18th day of January, 2011.



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IN THE SUPREME COURT OF OHIO

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**Appendix to Supplemental Merit Brief of
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Oh. Const. Art. I, § 2 (2011)

§ 2. Right to alter, reform, or abolish government, and repeal special privileges

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

Oh. Const. Art. I, § 3 (2011)

§ 3. Right to assemble together

The people have the right to assemble together, in a peaceable manner, to consult for their common good; to instruct their representatives; and to petition the general assembly for the redress of grievances.

Oh. Const. Art. IV, § 2 (2011)

§ 2. The supreme court

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B) (1) The supreme court shall have original jurisdiction in the following:

- (a) Quo warranto;
- (b) Mandamus;
- (c) Habeas corpus;
- (d) Prohibition;
- (e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

- (i) Cases originating in the courts of appeals;
- (ii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained,

(c) In direct appeals from the courts of common pleas or other courts of record inferior to the court of appeals as a matter of right in cases in which the death penalty has been imposed;

(d) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(e) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(f) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor.

Oh. Const. Art. IV, § 3 (2011)

§ 3. Court of appeals

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B) (1) The courts of appeals shall have original jurisdiction in the following:

- (a) Quo warranto;
- (b) Mandamus;
- (c) Habeas corpus;
- (d) Prohibition;
- (e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B) (2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals

28 U.S.C. § 2254. STATE CUSTODY; REMEDIES IN FEDERAL COURTS

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 [28 USCS § 2254].

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

STATE OF OHIO,
Plaintiff-Appellee,

JUDGMENT ENTRY

CASE NO. 2009-T-0050

- vs -

NATHANIEL JACKSON,
Defendant-Appellant.

FILED
COURT OF APPEALS
MAY 13 2010

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

Appellee, the State of Ohio, has now moved this court to dismiss this appeal for lack of jurisdiction. As the foundation for its motion, appellee notes the following two facts: (1) the underlying criminal action before the trial court involved the imposition of the death penalty for the offense of aggravated murder; and (2) the instant appeal stems from the trial court's decision to deny a Crim.R. 33 motion for a new trial as to the penalty phase of the proceeding. Based upon this, appellee submits that a court of appeals does not have the authority to hear this matter because such a decision in a death penalty proceeding can only be appealed directly to the Supreme Court of Ohio.

In support of its jurisdictional argument, appellee relies primarily upon specific provisions contained in S.Ct. Prac. R. XIX. Our review of Section 1 of the Supreme Court rule readily indicates that it sets forth the procedure that a criminal defendant must follow to maintain a "death penalty" appeal before that tribunal. For example, Section 1(A)(1) of the rule provides that, in order to "perfect an appeal of a case in which the death penalty has been imposed ***, "the defendant is required to file his

notice of appeal within forty-five days of the date of the trial court's final judgment. Section 1(A)(2) of the rule then states:

"If the [defendant] timely files in the trial court a motion for a new trial, or for arrest of judgment, the time for filing a notice of appeal begins to run after the order denying the motion is entered. However, a motion for a new trial on the ground of newly discovered evidence extends the time for filing the notice of appeal only if the motion is made before the expiration of the time for filing a motion for a new trial on grounds other than newly discovered evidence."

In trying to interpret the quoted language, appellee contends that the provisions of Section 1(A)(2) basically dictate that an appeal of an order disposing of a Crim.R. 33 motion in a death penalty proceeding can only be taken directly to the Supreme Court itself. But, after considering the quoted language in light of the limited purpose of Section 1(A)(1), this court concludes that the provisions of Section 1(A)(2) were not intended to delineate the type of judgments in a death penalty case which could be appealed solely to the Supreme Court. Rather, Section 1(A)(2) was only meant to indicate how the submission of a motion for a new trial would affect the running of the forty-five-day time limit for instituting an appeal in the context of a capital murder action.

That is, if the "new trial" motion is filed in a timely manner and asserts an issue other than a question of newly discovered evidence, the running of the "appeal" time limit does not begin until the trial court has ruled on the motion. On the other hand, if the "new trial" motion is based solely upon the ground of newly discovered evidence, the running of the time limit will be delayed or extended only when such a motion is

filed in compliance with the separate fourteen-day time requirement under Crim.R. 33. To this extent, Section 1(A)(2) of S.Ct. Prac. R. XIX governs purely procedural matters, and does not attempt to depict or explain the scope of the Supreme Court's jurisdiction to hear direct appeals arising from a death penalty proceeding.

As appellant, Nathaniel Jackson, correctly notes in his response to appellee's present motion, the range of the Ohio Supreme Court's appellate authority is actually dictated by a constitutional provision. Specifically, Section 2(B)(2), Article IV of the Ohio Constitution provides that the Supreme Court has appellate jurisdiction under the following circumstance:

"(c) In direct appeals from courts of common pleas or other courts of record inferior to the court of appeals as a matter of right in cases in which the death penalty has been imposed; ***."

As an initial point, this court would emphasize that the foregoing provision does not refer to any particular *judgment* of a trial court which can be directly appealed to the Supreme Court; instead, it only states that such a direct appeal can be brought in "cases" in which the trial court has imposed the death penalty. Given the inexact nature of this language, it can only be said that Section 2(B)(2)(c) of Article IV, in and of itself, does not provide any actual guidance as to which specific judgments in a death penalty proceeding can be subject to a direct appeal to the Supreme Court.¹

1. As an aside, this court would further note that, in upholding the general constitutionality of Section 2(B)(2)(c) immediately after its passage, the Supreme Court of Ohio held that the term "cases" had been employed in the provision to indicate that a direct appeal to that tribunal would not only encompass the decision to impose the death penalty, but would also cover the defendant's separate conviction on any noncapital charges; i.e., the entire "case" would be appealable to the Supreme Court. See *State v. Smith* (1997), 80 Ohio St.3d 89,104. However, in discussing the meaning of the term "cases" for purposes of that particular provision, the *Smith* court never considered the separate question of what particular type of judgment was covered by the language of the provision.

Fortunately, Section 2(B)(2)(c) is not the sole provision in the Ohio Constitution that addresses the issue of the authority of a court to review the merits of a decision rendered in a capital murder case. In delineating the scope of an appellate court's authority, Section 3(B)(2) of Article IV states:

"Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of courts of record inferior to the court of appeals within its district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death."

Unlike the inexact language in Section 2(B)(2)(c), the foregoing provision refers expressly to a specific judgment that a court of appeals does not have the authority to review; i.e., the final sentencing judgment which sets forth the order regarding the imposition of the death penalty. Given the narrowness of the jurisdictional exception in Section 3(B)(2), logic dictates that the provision was not intended to totally deprive a court of appeals of all authority to review a final judgment stemming from a case in which the death penalty was imposed. Rather, the wording of Section 3(B)(2) supports the conclusion that an appellate court has the jurisdiction to review final judgments rendered in such a proceeding, except for the entry containing the weighing exercise which leads to the imposition of the "death" sentence.

As a general proposition, when two provisions of our state constitution address the same basic subject matter, Ohio courts are required to read the provisions *in pari material* and must attempt to harmonize them whenever possible. *Toledo Electric Co. v. City of Bryan* (2000), 90 Ohio St.3d 288, 292. As was previously discussed,

the provision governing the appellate jurisdiction of the Supreme Court of Ohio over direct appeals in death penalty cases, Section 2(B)(2)(c) of Article IV, does not have any specific language indicating what particular judgments in such a case can only be the subject of a direct appeal to that court. In the absence of any clear guidance in that provision, it must be interpreted consistently with Section 3(B)(2) of Article IV, which only provides that a court of appeals does not have the jurisdiction to hear an appeal from a judgment in which the death penalty was imposed.

As a result, this court concludes that, under both of the applicable constitutional provisions, the *exclusive* appellate jurisdiction of the Supreme Court is limited to those judgments in which the actual sentence of death is imposed. As to all other post-judgment final orders which can be rendered in a death penalty proceeding, the Supreme Court also has appellate jurisdiction to immediately review such orders, but that particular aspect of its authority is non-exclusive. That is, the Supreme Court's authority over such final orders is concurrent with the courts of appeals, which also have retained the jurisdiction under Section 3(B)(2) to hear appeals from such final orders.

In conjunction with the foregoing discussion, it should also be noted that R.C. 2953.02 sets forth a list of criminal judgments which can be appealed to either an appellate court or the Supreme Court of Ohio. In regard to death penalty appeals, R.C. 2953.02 contains the following sentence:

"In a capital case in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the judgment or final order may be appealed from the trial court directly to the supreme court as a matter of right."

Obviously, the quoted statutory sentence was intended to restate the scope of the Supreme Court's power in accordance with Section 2(B)(2)(c) of Article IV. Yet, to the extent that the quoted sentence refers to a "judgment" in which a sentence of death has been imposed, the language of R.C. 2953.02 is more consistent with the wording of Section 3(B)(2). Therefore, the statutory provision lends greater support to our conclusion that an appellate court has the jurisdiction to proceed in relation to a judgment stemming from a capital murder action, unless that judgment is the final sentencing entry which sets forth the "death penalty" determination.

Despite the fact that the present constitutional scheme concerning the appeal of death penalty judgments has been in effect for over fifteen years, our research on this point has failed to reveal any Supreme Court opinion that has discussed the issue of which type of judgment in a death penalty proceeding can be reviewed by an appellate court. Furthermore, our research shows that this issue has rarely been fully addressed by the various appellate courts. Moreover, in those instances in which Section 2(B)(2)(c) has been referenced, the appellate courts have typically concluded that a trial court's ruling on a post-judgment motion can be reviewed at the appellate level.

For example, in *State v. Carter* (Dec. 15, 2000), 11th Dist. No. 99-T-0133, 2000 Ohio App. LEXIS 5935, this court specifically held that we had the authority to review the denial of a petition for postconviction relief in a death penalty case. As the main basis for our holding, this court emphasized that, even though the statute governing postconviction relief had been amended after the passage of Section 2(B)(2)(c), the statute did not contain any new provision stating that a "postconviction" ruling could

only be appealed to the Supreme Court. In addition, our *Carter* opinion noted that other appellate districts had already reviewed the merits of a "postconviction" ruling in the death penalty context, and that the Supreme Court had reviewed the decision of the appellate court without questioning its jurisdiction to proceed.

Consistent with the second point in *Carter*, this court would further indicate that our research establishes that most appellate districts have addressed the merits of post-judgment rulings in death penalty cases without first considering the preliminary issue of whether it has the proper jurisdiction over such an appeal. See, e.g., *State v. Stojetz*, 12th Dist. No. CA2002-04-006, 2002-Ohio-6520, which involved an appeal from the trial court's denial of the defendant's motion for a new trial under Crim.R. 33(A)(6).

On the other hand, our research further shows that, without any discussion of the jurisdictional issue, the Supreme Court has gone forward on the final merits of appeals which do not stem from the judgment in which the death penalty was first imposed. In *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, the imposition of the death penalty was upheld in the first appeal before the Supreme Court; however, the defendant's sentence on the noncapital offenses was reversed under *State v. Foster*, 109 Ohio St.3d. 1, 2006-Ohio-856. After the trial court had resentenced the *Elmore* defendant on the noncapital offenses, he again appealed directly to the Supreme Court, and the merits of the second appeal were fully addressed despite the fact that no issue regarding the death penalty was involved. Therefore, as a practical matter, both the Supreme Court and the appellate courts have been exercising concurrent jurisdiction over any post-judgment final order which does not

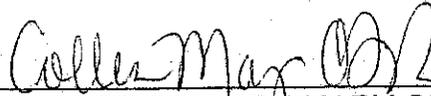
pertain to the "death penalty" decision.

In light of the foregoing analysis, this court ultimately concludes that, once the trial court in a death penalty proceeding has issued its final sentencing judgment, and the determination to impose the death penalty has been directly appealed to the Supreme Court under Section 2(B)(2)(c) of Article IV, an appellate court then has the authority under Section 3(B)(2) to review any subsequent ruling by the trial court on a post-judgment motion. In the present matter, our review of the trial record shows that appellant's motion for a new trial was filed approximately six years after the trial court's imposition of the death penalty had been appealed to the Supreme Court. Thus, since this appeal will not entail a review of the weighing exercise, we have the jurisdiction to proceed on the merits of this matter.

As a separate basis for its motion to dismiss, appellee submits that this appeal cannot go forward because this court has previously held that Crim.R. 33 is not the proper procedural mechanism for obtaining a new sentencing hearing. In support of this contention, appellee cites our prior decision in *State v. Davie*, 11th Dist. No. 2007-T-0069, 2007-Ohio-6940. As to this point, we would merely indicate that, even though appellee's argument could potentially be a viable reason for affirming the trial court's denial of the motion for a new trial, it is simply irrelevant to the question of our jurisdiction to review the substance of the trial court's determination.

Since the jurisdiction of this court has been properly invoked under Section 3(B)(2), Article IV of the Ohio Constitution, it is hereby ordered that appellee's

motion to dismiss the instant appeal is hereby overruled. This appeal shall now go forward in accordance with the Ohio Rules of Appellate Procedure.



JUDGE COLLEEN MARY O'TOOLE

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.

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