

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio, :  
 :  
 Plaintiff-Appellant, : Case No. 2011-0818  
 :  
 v. : On Discretionary Appeal from the  
 : Coshocton County Court of Appeals,  
 Sandra Griffin, : Fifth Appellate District, Case No.  
 : 2009CA21  
 Defendant-Appellee. :

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**Memorandum of Appellee Sandra Griffin  
Opposing the State's Motion for a Stay**

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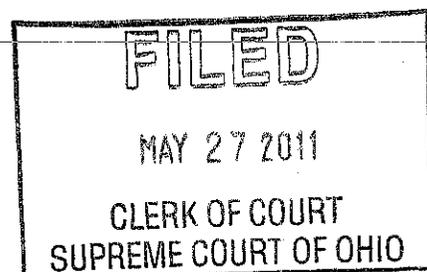
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**Memorandum of Appellee Sandra Griffin  
Opposing the State's Motion for Stay**

**I. Summary**

The State's factual allegations are simply wrong. The State wrongly accuses the court of appeals of willful misconduct. The State provides no reason to justify a stay. And Miss Griffin wins under the standard proposed by the State's amicus. This Court should deny the State's motion for a stay.

The State's appeal is premised upon factual assertions that the record contradicts. This is the second time that the State has come to this Court asserting that the record contains an R.C. 2929.03(F) sentencing opinion. This is the second time that the State has made its allegations without attaching the trial court entries and "opinions" that the State claims support its position.

As demonstrated by Exhibits A and B, Apx. A-1, A-3, the documents that the State asserts are a "judgment of conviction" and a "sentencing opinion" are actually the *bench trial verdict* and the *judgment entry of sentence*. To make matters worse, the State falsely accuses the court of appeals of having "refused to apply" this Court's mandate. The reason that the State is dissatisfied is that the Court of Appeals reviewed the record, and saw that the State's representations about the record were simply not true. By contrast, when this Court reviewed the State's previous appeal, this Court lacked a record that could have resolved the conflicting representations of counsel.

In addition, the State's conclusory motion for stay provides absolutely no reason to justify a stay. Neither Miss Griffin nor the trial court are pushing for a trial before this Court can review the State's appeal.

## **II. Procedural History**

### ***A trial that cuts procedural corners.***

Before Miss Griffin went to trial on capital charges, the parties agreed that Miss Griffin would waive her right to a speedy trial and her right to be tried by a three-judge panel or a jury. The State agreed that it would not “pursue” the death penalty, but that it would not drop the death specification either. Thus, even though the case contained a capital specification, the parties followed the procedural rules and statutes governing non-capital cases.

### ***A bench trial verdict, then a sentencing entry, but no entry compliant with Crim.R. 32(C).***

After a bench trial, the trial court entered a judgment journalizing the verdict. Entry, Dec. 21, 1989, Exhibit A, Apx. A-1. The case then proceeded to a standard, non-capital sentencing hearing, at which the trial court imposed sentence for aggravated murder with specifications, as well as the other charges. The trial court then entered a judgment of sentence that did not document the conviction. Entry, January 29, 1990, Exhibit B, Apx. A-3.

### ***On “appeal” from the non-final order, the court of appeals makes the wrong decision.***

Miss Griffin filed a “notice of appeal” of the January 29, 1989 journal entry. The court of appeals affirmed, but this Court later abrogated the decision. *State v. Griffin* (1992), 73 Ohio App.3d 546, appeal dismissed (1992), 64 Ohio St.3d 1428, abrogated in *State v. Parker*, 95 Ohio St.3d 524, 2002-Ohio-2833.

Miss Griffin then unsuccessfully challenged the January 29, 1989 journal entry in federal court. *Griffin v. Andrews* (Apr. 3, 2007), 6<sup>th</sup> Cir. No. 06-4305 (entry denying certificate of appealability); *Griffin v. Rogers* (C.A. 6, 2005), 399 F.3d 626; *Griffin v. Rogers* (C.A. 6, 2002), 399 F.3d 647.

***On appeal from the final order in this case, the Court of Appeals correctly anticipates and applies this Court's case law.***

After federal proceedings had terminated, Miss Griffin filed a motion in the trial court requesting a final appealable order under *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, at the syllabus. The State agreed that she did not have a final appealable order, and submitted “the proposed judgment entry to serve as the final appealable order.” State’s Memorandum, Aug. 12, 2009, Exhibits C and D, Apx. A-7, A-8.

Miss Griffin filed a timely appeal from that final entry. The court of appeals held that because the trial court’s 1990 judgment did not include any reference that she was convicted, it was not a final order under *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330. *State v. Griffin*, 5<sup>th</sup> Dist. No. 09CA21, 2010-Ohio-3517, Exhibit E, Apx. A-12. Apparently foreseeing this Court’s possible resolution of *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, the Court of Appeals *sua sponte* examined the record to determine whether it contained an R.C. 2929.03(F) opinion that could supplement the deficient judgment, but the Court found that no such judgment existed. *Griffin*, 2010-Ohio-3517 at ¶13, Exhibit E, Apx. A-15.

***The State claims that the record contains a sentencing opinion, but asks this Court to decide the case without a record.***

The State then appealed to this Court. The State's appeal misstated the appellate court's determination that no sentencing opinion could be found in the record. Instead, the State claimed that the appellate court had held that such an opinion did exist, but that the court determined that it could not consider it:

*In State v. Ketterer, supra, this court, a mere twenty-nine days after the lower court in the instant case said that it could not consider the entry of conviction and the opinion filed pursuant to R.C. 2929.03(F) together to be a final appealable order, held that the two documents combined constituted a final appealable order. This court's opinion in Ketterer should apply to all cases pending when this court decided Ketterer. In Ketterer, the defendant received the death penalty; Appellee received life in prison with parole eligibility in thirty years. However, the reasoning in Ketterer should apply to all cases in which R.C. 2929.03(F) requires the trial court to file two documents.*

Had the lower court had the benefit of this court's opinion in *Ketterer*, it would have decided the case differently. At paragraph 14 on page 4 of the lower court's opinion, the court said the following: "From our review of the trial court's judgment entries, we find a judgment entry of conviction filed on December 21, 1989 wherein the trial court announced its verdicts, and a separate sentencing entry filed on January 29, 1990 wherein the trial court imposed the sentence. *If we were permitted to read the two judgment entries in pari materia, there would be no Baker argument. Unfortunately, this is not the law.*"

State's Memorandum, Sept. 10, 2010, Case No. 2010-1434 at 6 (First

~~Emphasis Added, Second Emphasis in original).<sup>1</sup> By contrast, Miss Griffin~~

simply argued that the court of appeals correctly found that no R.C. 2929.03(F)

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<sup>1</sup> The State repeats the misstatement on page 10 of its current jurisdictional memorandum.

sentencing opinion existed. Memorandum in Response, Sept. 22, 2010, Case No. 2010-1434, at 6-7.

***Left without a record to resolve the conflicting claims, this Court sends the case back to the Court of Appeals.***

Deprived of the benefit of a record, this Court could not determine the truth of the State's representation that the record contained an R.C. 2929.03(F) sentencing opinion. This Court remanded the case to the Court of Appeals to resolve the issue. *State v. Griffin*, 127 Ohio St.3d 266, 2010-Ohio-5948, ¶2.<sup>2</sup>

***With the benefit of the record, the Court of Appeals applies this Court's decision in Ketterer to the facts of this case.***

The Court of Appeals did exactly what this Court instructed. The Court of Appeals applied *Ketterer* and R.C. 2929.03(F). The Court of Appeals ordered briefing, which the parties provided. Exhibits F and G, A-27, A-48. And the Court of Appeals again concluded that Miss Griffin prevailed under the standard of *Ketterer* and R.C. 2929.03(F) because this record does not contain an R.C. 2929.03(F) sentencing opinion. So the court reaffirmed its decision to grant her a new trial. Compare *State v. Griffin*, 5<sup>th</sup> Dist. No. 09CA21, 2011-Ohio-1638, at ¶19-21, Exhibit H, Apx. A-67 to A-68, with *State v. Griffin*, 5<sup>th</sup> Dist. No. 09CA21, 2010-Ohio-3517, at ¶13-14, Exhibit E, Apx. A-15.

***The State again tells this Court that the record contains a sentencing opinion, and the State again fails to produce a copy of that alleged opinion.***

The State has filed this discretionary appeal asserting that the court of appeals engaged in willful misconduct by "refus[ing]" to follow this Court's

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<sup>2</sup> Miss Griffin attaches the relevant entries to this memorandum so that this Court can avoid the need to rely on the bare representations of the parties.

mandate. State's Jurisdictional Memorandum, at p. 10.<sup>3</sup> Neither Miss Griffin nor the trial court has suggested that any proceedings will occur until this Court has had the opportunity to review this case. Nevertheless, the State sought this stay.

***Miss Griffin attaches copies of the entry journalizing her conviction, as well as the judgment entry of sentence.***

So that this Court will not have to again decide this case without reviewing the documents the trial court has issued, Miss Griffin attaches copies of the entry journalizing her bench trial conviction, as well as the judgment entry of sentence.

### **III. Discussion**

#### **A. The State gives no reason why it needs a stay because no stay is needed.**

The State's conclusory motion does not meet even the lowest burden that a moving party must satisfy to demonstrate the entitlement to a stay. The State's motion simply asserts that it has appealed and that it wants a stay. It provides no reason to grant the stay.

The State does not need a stay. Miss Griffin has not and will not push the trial court to act on the court of appeals' decision until this Court has had the opportunity to review the State's request for an appeal. And the trial court

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<sup>3</sup> This Court has condemned "[u]nfounded attacks against the integrity of the judiciary[.]" *Office of Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416, 2003-Ohio-4048 at ¶36.

has not taken any action that would interfere with this Court’s ability to decide whether to hear this case.

Should the trial court decide to pursue a retrial while this Court is reviewing the jurisdictional memoranda in this case, the State can come back to this Court and articulate the need for a stay. But currently, the State has not—and cannot—meet that burden. This Court should deny the stay.

**B. The Court of Appeals carefully applied this Court’s decision in *Ketterer* to the unique facts of this case.**

**1. The State’s accusation that the Court of Appeals “refused to apply” this Court’s precedent is false. Memorandum at p. 10.**

Despite the State’s accusation of willful misconduct, the Court of Appeals applied this Court’s *Ketterer* decision to the facts of this case, just as this Court mandated. And the State cannot prevail under *Ketterer*, because the trial court in this case never issued an R.C. 2929.03(F) opinion.

*Ketterer* enforced the statutory rule that “[t]he judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.” R.C. 2929.03(F). As a result, this Court held that the final order in “cases in which R.C. 2929.03(F) requires the court or panel to file a sentencing opinion, a final, appealable order consists of both the sentencing opinion filed pursuant to R.C. 2929.03(F) and the judgment of conviction filed pursuant to Crim.R. 32(C).” *Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, at the syllabus.

The Court of Appeals correctly started its analysis by noting that R.C. 2929.03(F), by its own terms applies only when “a sentencing hearing is held

pursuant to this section[.]” *Griffin* at ¶14, Exhibit H, Apx. A-66. The court further held that because of that language, “R.C. 2929.03(F) references subsection (D) as the predicate to the filing of a separate opinion on weighing the mitigation factors vis-à-vis the aggravating circumstances.” *Id.* at ¶20, Apx. A-67. As a result, the court held that, “[t]he threshold question is whether R.C. 2929.03(F) applies to a defendant who never had a mitigation hearing under R.C. 2929.04.” *Id.* at ¶19.

The court of appeals then applied the plain language of the statute to the unusual facts of this case. Because the parties in the initial trial proceeded as if this were not a capital case, the trial court never held a hearing under R.C. 2929.03(D) and (F) to weigh mitigating and aggravating factors. Based on the plain language of R.C. 2929.03(F), the Court of Appeals concluded that “[i]n this case, there was no need for a separate opinion pursuant to R.C. 2929.03(F) because the procedures of R.C. 2929.03(D) were not utilized.” *Id.* at ¶20.

**2. The State tells this Court that the judgment entry of sentence was a “sentencing opinion” under R.C. 2929.03(F), but the State told the court of appeals that the opposite was true.**

In its jurisdictional memorandum, the State asserts that the judgment entry of sentence in this case was actually an R.C. 2929.03(F) sentencing opinion. The State adds an accusation that the court of appeals intentionally defied this Court’s mandate when it held that because “the trial court failed to comply with one part of RC 2929.03, it was relieved from complying with the rest of the statute.” Memorandum at 10.

The Court of Appeals did not engage in misconduct—willful or not—both because the State’s theory is wrong and because the State never presented this argument to the Court of Appeals. In fact, in its brief on remand, the State appears to have conceded that the opposite was true. In that brief, the State appears to argue that an R.C. 2929.03(F) “opinion” and a sentencing “entry” are two distinct documents:

The State respectfully suggests that the holding of *Ketterer* is not that two entries are looked at as one, as stated in this court’s briefing order, but that the final appealable order is comprised of two documents: the conviction entry and the opinion filed under R.C. 2929.03. That document is not an “entry” as defined in Crim. R. 32.

The Ohio Supreme Court in *Ketterer* never calls an opinion filed under R.C. 2929.03 an entry. Throughout R.C. 2929.03, the document is called an “opinion.” Courts file many documents that are not “entries” (sic) Findings of Facts and Conclusions of Law, for example, are necessary to provide a final appealable order, but the Findings of Fact and Conclusions of Law need not be an “entry” as defined in Crim. R. 32. Some judges label the Findings and Conclusions as an entry and some judges file Findings of Fact and Conclusions of law and a separate “entry.” The two documents together comprise a final appealable order.

Brief on Remand, Exhibit G, p. 4, Apx. A-53. The Court of Appeals cannot have engaged in willful misconduct by accepting the State’s argument that a sentencing “entry” is not a “sentencing opinion,” especially when the entry truly was not a “sentencing opinion.” The record of this case includes a judgment entry of sentence. Exhibit B, Apx. A-3. This record does not include an R.C. 2929.03(F) sentencing “opinion.”

**3. Any contrary decision would seriously damage the finality of non-death capital cases**

The State's argument is short-sighted—it might well regret “winning” the argument that R.C. 2929.03(F) applies to cases (like Miss Griffin's) in which trial courts mistakenly assumed that capital requirements did not apply.

In *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, this Court recognized that many single-judge trial courts had improperly presided over pleas and bench trials in capital cases when the prosecutor promised not to seek the death penalty. This Court concluded that state habeas relief was unavailable in such cases, and that those defendants could seek relief only on direct appeal.

*But if R.C. 2929.03(F) applies to such cases, then those convictions are not final until the trial court issues an R.C. 2929.03(F) sentencing opinion.* In such cases, single-judge trial courts acted under the misimpression that capital requirements did not apply, so it is unlikely that any trial court issued an R.C. 2929.03(F) sentencing opinion. As a result, if R.C. 2929.03(F) applies to those cases, all such cases probably lack final orders,<sup>4</sup> still can get final orders,<sup>5</sup> and would be automatically reversed on appeal from those final orders.<sup>6</sup> The State is, ironically, arguing for the very result that this Court avoided in *Pratts*.

By contrast, under the strict reading of R.C. 2929.03(F) that Miss Griffin proposes, defendants who have valid stand-alone Crim.R. 32 entries are barred

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<sup>4</sup> *Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, at the syllabus.

<sup>5</sup> *Mitchell v. Smith*, 120 Ohio St.3d 278, 2008-Ohio-6108, citing *McAllister v. Smith*, 119 Ohio St.3d 163, 2008-Ohio-388.

<sup>6</sup> *State v. Parker*, 95 Ohio St.3d 524, 2002-Ohio-2833.

from starting anew. Moreover, if this Court overrules the manner-of-conviction requirement of *Baker*, very few one-judge-capital defendants would be able to win a claim that their judgments are non-final.

**C. This Court is unlikely to hold this case for *State v. Lester*, Case No. 2010-1007, because the original judgment entry in this case did not contain any mention of a conviction, so the judgment is not a final order even if this Court holds that a final order need not include the manner of conviction.**

The amicus memorandum of the Ohio Prosecuting Attorney's Association is curious, because it advocates a standard under which Miss Griffin would prevail. The OPAA asks this Court to hold that "Crim. R. 32(C) . . . does not require a trial court to specify the 'manner of conviction'. (sic) Rather, it requires only the judgment of conviction to set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence." Memorandum, at 3-4.

But the judgment that the trial court entered in this case does not merely fail to note the "manner of conviction," it fails to note any conviction whatsoever. Exhibit B, Apx. A-3. Because Miss Griffin prevails under the OPAA's standard, the OPAA's argument provides no reason to grant a stay in this case.

Further, as the court of appeals correctly held, without a final appealable order, courts of appeals have no subject matter jurisdiction. When courts purport to make decisions without subject matter jurisdiction, those decisions are void ab initio. Under *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, at ¶25, the "fact that the sentence was illegal does not deprive the appellate

court of jurisdiction to consider and correct the error[.]” But in this case, the fact that the trial court had not issued a final appealable order *does* “deprive the appellate court of jurisdiction to consider and correct the error.” And as this Court held in *Fischer*, “[p]rinciples of res judicata, including the doctrine of the law of the case” do not apply to void judgments. *Fischer* at ¶30.

Accordingly, there is no “previous judgment” that was subject to appeal.

### **Conclusion**

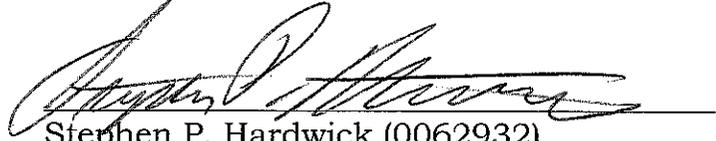
The State’s motion for stay provides no reason to justify a stay. Neither Miss Griffin nor the trial court has moved to push this case to trial until this Court has reviewed the decision below. Miss Griffin will not push this case to trial while this Court is deciding whether to hear it, and she is unaware of any effort by the trial court to act in a way that would interfere with this Court’s review.

Further, the State’s allegation of willful misconduct by the Court of Appeals is simply wrong, as is the State’s assertion that the record contains an R.C. 2929.03(F) sentencing opinion. The Court of Appeals correctly reviewed this case under the standard of R.C. 2929.03(F) and *State v. Ketterer*. Because Miss Griffin prevails under that standard, the Court of Appeals ruled in her favor.

This Court should deny the State’s motion for a stay.

Respectfully submitted,

Office of the Ohio Public Defender



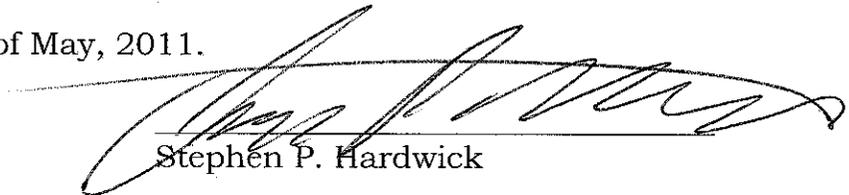
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Counsel for Appellee, Sandra Griffin

**Certificate of Service**

I certify that a copy of the foregoing was sent by regular U.S. Mail to  
Jason Given, Coshocton County Prosecutor, 318 Chestnut Street, Coshocton,  
Ohio 43812 this 27<sup>th</sup> day of May, 2011.



Stephen P. Hardwick

#343995

IN THE SUPREME COURT OF OHIO

State of Ohio, :  
 :  
 Plaintiff-Appellant, : Case No. 11-0818  
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 v. : On Discretionary Appeal from the  
 : Coshocton County Court of Appeals,  
 Sandra Griffin, : Fifth Appellate District, Case No.  
 : 2009CA21  
 Defendant-Appellee. :

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**Appendix to  
Memorandum of Appellee Sandra Griffin  
Opposing the State’s Motion for a Stay**

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Exhibit A - *State v. Griffin*, Case No. 89CR13, Coshocton County Common Pleas Court, Judgment Entry, (December 21, 1989) ..... A-1

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Exhibit H - *State v. Griffin*, Case No. 09-CA-21, Coshocton County Court of Appeals, Fifth Appellate District, Opinion, (April 1, 2011) ..... A-63

IN THE COMMON PLEAS COURT OF COSHOCTON COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

vs

SANDRA MAXWELL GRIFFIN,

Defendant.

Case No. 89 CR 13

JUDGMENT ENTRY

Dec 21 2 47 PM '89  
JUDY STEVENS, BEER  
CLERK OF COURTS  
COSHOCTON CO., OHIO

FILED

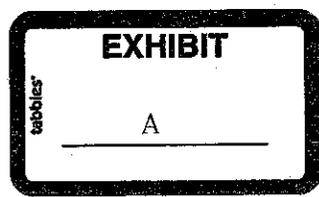
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On December 18, 1989, in open court, and in the presence of the defendant, accompanied by her attorneys, Mr. Schwert and Mr. Pateri, and in the presence of the representatives of the plaintiff, State of Ohio, Mr. Plummer and Mr. Owens, the court announced the following verdicts and findings:

(1) As to Count One, a charge of complicity in aggravated murder, the court finds the defendant guilty as charged in that count of the indictment.

(2) As to the first specification in Count One, the court finds the defendant guilty of the specification in that the defendant did commit the offense of complicity in aggravated murder while the defendant was committing, attempting to commit, or fleeing immediately after committing, or attempting to commit aggravated robbery, and the defendant while not the principal offender in the aggravated murder, did aid and abet in the commission of the aggravated murder with prior calculation and design as charged in the specification.

(3) As to the second specification, the court finds that the defendant did have a firearm as defined in Section 2923.11 of the Ohio Revised Code on or about her person or under her control while committing the offense



charged in Count One.

(4) As to Count Three, a charge of complicity in unlawful possession of dangerous ordnance, the court finds the defendant guilty as charged in Count Three of the indictment.

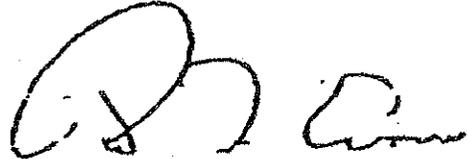
(5) As to Count Four, a charge of complicity in theft, the court finds the defendant guilty as charged in Count Four of the indictment.

(6) Further, as to Count Four, the court finds the value of the property stolen was \$5,000 or more and less than \$100,000.

(7) As to Count Five, a charge of complicity in aggravated robbery, the court finds the defendant guilty as charged in Count Five of the indictment.

(8) As to the specification to Count Five, the court finds the defendant did have a firearm, as defined in Section 2923.11 of the Ohio Revised Code on or about her person or under her control while committing the offense charged in Count Five.

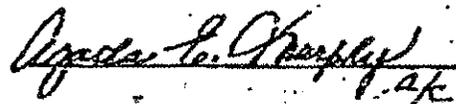
The sentencing hearing is hereby scheduled for the 17th day of January, 1990, at 9:30 o'clock A.M. Defendant is ordered held without bond, pending sentencing.



RICHARD I. EVANS, JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Judgment Entry was served upon William N. Owens, Prosecuting Attorney, 413 Main Street, Coshocton, Ohio 43817, by placing such copy in his office mail box in the Clerk of Courts' Office, and upon Mr. Dennis Fusateri and Mr. C. Jay Schwart, Attorneys for Defendant, 338 South High Street, Columbus, Ohio 43215, by regular U. S. Mail, this 8th day of December, 1989.



IN THE COMMON PLEAS COURT OF COSHOCTON COUNTY, OHIO

State of Ohio :  
Plaintiff, : Case No. 89-CR-13  
vs. : JUDGMENT ENTRY  
Sandra Maxwell Griffin : ON SENTENCING  
Defendant. :

FILED  
JAN 29 11 35 AM '90  
JUDY STEVENS REED,  
CLERK OF COURTS,  
COSHOCTON CO., OHIO

-----  
This matter came on for sentencing this 25th day of January, 1990. Present in Court were the defendant, Sandra Maxwell Griffin, represented by Attorneys Dennis Pusateri and C. Jay Schwart, and William M. Owens, Prosecuting Attorney, and Attorney C. Keith Plummer representing the State of Ohio. The defendant presented evidence for the Court's consideration.

This matter is now before the Court for final disposition. Pursuant to Criminal Rule 32(A)(1), the Court inquired whether the defendant had anything to say before the Court pronounced sentence upon her. The defendant made a statement to the Court. The Court heard the remarks and arguments of defense counsel and the Prosecuting Attorney. The Court also considered testimony presented.

Upon due consideration of the matters set forth in Section 2929.12 of the Ohio Revised Code and all other matters pertinent to the sentence to be imposed, the Court hereby sentences the defendant as for Count One (1) of the

COSHOCTON COUNTY  
CLERK OF COURTS  
JAN 29 1990  
M. Jean Clark  
29th

EXHIBIT  
B

indictment, to incarceration for life in the Ohio Reformatory for Women with parole eligibility after serving thirty (30) actual years of incarceration for the offense of complicity to aggravated murder in violation of the Ohio Revised Code Section 2903.01(A) and 2923.03(A)(2), an unclassified felony.

As and for the Firearm Specification to Count one (1), the Court hereby sentences the defendant to an incarceration for three (3) years in the Ohio Reformatory for Women with said three (3) years incarceration to be served as actual incarceration. The sentence for the Specification is to be served consecutively with all other counts herein.

Count Two (2) of the indictment was dismissed by the Court upon request of the defendant. Count six (6) was dismissed by the Court upon the request of the Prosecuting Attorney.

As and for Count five (5) of the indictment, the Court hereby sentences the defendant to an indefinite sentence in the Ohio Reformatory of Women the minimum of which shall be ten (10) years and the maximum which shall be twenty-five (25) years for the offense of complicity to aggravated robbery in violation of Ohio Revised Code Section 2911.01(A) and Section 2923.03(A)(2), an aggravated felony of the first degree. The minimum of said sentence shall be served as actual incarceration and shall be served concurrently with

all other terms of incarceration stated herein. As and for count three (3) and four (4) of the indictment, the Court finds these to be allied offenses with count five (5) of the indictment and said incarceration for said offenses shall be served concurrently with count five (5). The Court does not impose any actual sentence as for counts three (3) and four (4). As and for the Firearm Specification to count five (5) of the indictment, the Court hereby sentences the defendant to a definite term of incarceration of three (3) years in the Ohio Reformatory for Women. The three (3) years of incarceration for the Firearm Specification shall be served as actual incarceration, but shall be served only if the sentence for the Firearm Specification to Count one (1) is legally negated in any manner.

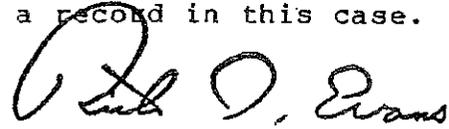
It is further ordered that the defendant pay the costs of prosecution on each count.

It is further ordered that the defendant be remanded to the custody of the Sheriff of Coshocton County, and that a Warrant be issued to said Sheriff for conveyance of the defendant to the Ohio Reformatory for Women. Defendant is also granted credit for time already served in the Coshocton County Justice Center relating to these offenses.

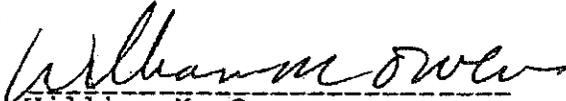
Upon inquiry of the Court, the prosecution stated that the victim's next of kin and immediate relatives, were notified of the date, time, and place of the hearing. Two

family members were present and did speak. The Court instructed the prosecuting attorney to notify the family of the deceased of the possibility of victim compensation available to them. Bond in this case is released.

The Clerk is ordered to make a record in this case.



RICHARD I. EVANS, JUDGE



William M. Owens  
Prosecuting Attorney

#### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Judgment Entry on Sentencing was served upon counsel for defendant, Attorney Dennis Pusateri and C. Jay Schwart, 338 South High Street, Columbus, Ohio 43215; C. Keith Plummer, Attorney at Law, 139 Courthouse Square, P.O. Box 640, Cambridge, Ohio 43725; and Sheriff David Corbett, c/o Sheriff's Department, 328 Chestnut Street, Coshocton, Ohio 43812, by regular deposit in the U.S. Mail this 29<sup>th</sup> day of January, 1990.



William M. Owens  
Prosecuting Attorney

IN THE COMMON PLEAS COURT  
COSHOCTON COUNTY, OHIO

STATE OF OHIO

Plaintiff,

vs.

SANDRA MAXWELL GRIFFIN

Defendant.

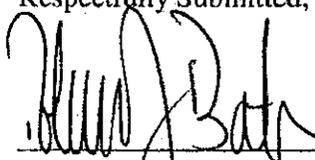
CASE NO. 89 CR 013

MEMORANDUM

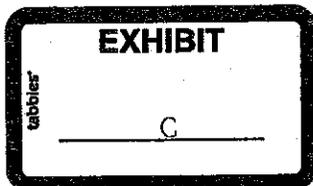
Now comes the State of Ohio, by and through the Prosecuting Attorney, and hereby provides notice of the State's position that the Court should provide the defendant/petitioner with a final appealable order as requested in her motion filed August 4, 2009. (See, State v. Baker, 119 Ohio St.3d 197, 893 N.E.2d 163; State ex rel. Culligan v. Medina County Court of Common Pleas, 119 Ohio St. 3d 535, 895 N.E.2d 805.)

Further the State submits the proposed judgment entry to serve as the final appealable order.

Respectfully Submitted,



ROBERT J. BATCHELOR (0059760)  
Prosecuting Attorney  
318 Chestnut Street  
Coshocton, OH 43812  
(740) 622-3566



IN THE COURT OF COMMON PLEAS  
COSHOCTON COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

vs.

SANDRA MAXWELL GRIFFIN,

Defendant.

Case No: 89 CR 013

Judgment Entry  
on Sentencing

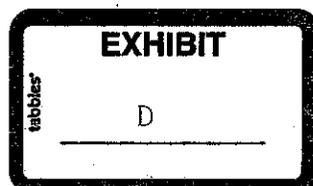
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Clerk

This judgment entry was prepared and filed at the request of the defendant pursuant to a Motion for a Final Appealable Order, filed August 4, 2009, and pursuant to the holding of State v. Baker, 119 Ohio St.3d 197, 893 N.E.2d 163. Any additions to the original Judgment Entry on Sentencing in this case, filed January 29, 1990, are in bold type.

This matter came on for sentencing this 25th day of January, 1990. Present in Court were the defendant, SANDRA MAXWELL GRIFFIN, represented by Attorneys Dennis Pusateri and C. Jay Schwart, and William M. Owens, Prosecuting Attorney, and Attorney C. Keith Plummer, representing the State of Ohio. The defendant presented evidence for the Court's consideration.

On November 1, 1989, while represented by counsel, the defendant waived her right to trial by jury and by a three judge panel and agreed to trial by a single judge in exchange for the State's agreement to not seek the death penalty.

On January 29, 1990, after trial to a single judge, the defendant was found guilty of complicity to commit aggravated murder with aggravated robbery and firearm specifications, complicity to unlawful possession of a dangerous ordnance, complicity to grand theft, and complicity to aggravated robbery with a firearm specification.



This matter is now before the Court for final disposition. Pursuant to Criminal Rule 32 (A)(1), the Court inquired whether the defendant had anything to say before the Court pronounced sentence upon her. The defendant made a statement to the Court. The Court heard the remarks and arguments of defense counsel and the Prosecuting Attorney. The Court also considered testimony presented.

Upon due consideration of the matters set forth in Section 2929.12 of the Ohio Revised Code and all other matters pertinent to the sentence to be imposed, the Court hereby sentences the defendant as for Count One (1) of the indictment, to incarceration for life in the Ohio Reformatory for Women with parole eligibility after serving thirty (30) actual years of incarceration for the offense of complicity to aggravated murder in violation of the Ohio Revised Code Section 2903.01(A) and 2923.03(A)(2), an unclassified felony.

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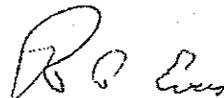
and for Count Three (3) and Four (4) of the indictment, the Court finds these to be allied offenses with Count Five (5) of the indictment and said incarceration for said offenses shall be served concurrently with Count Five (5). The Court does not impose any actual sentence as for Counts Three (3) and Four (4). As and for the Firearm Specification to Count Five (5) of the indictment, the Court hereby sentences the defendant to a definite term of incarceration of three (3) years in the Ohio Reformatory for Women. The three (3) years of incarceration for the Firearm Specification shall be served as actual incarceration, but shall be served only if the sentence for the Firearm Specification to Count One (1) is legally negated in any manner.

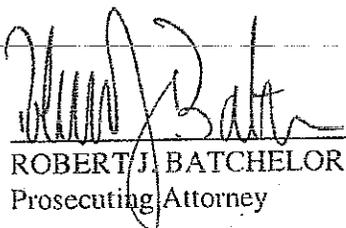
It is further ordered that the defendant pay the costs of prosecution on each count.

It is further ordered that the defendant be remanded to the custody of the Sheriff of Coshocton County, and that a Warrant be issued to said Sheriff for conveyance of the defendant to the Ohio Reformatory for Women. Defendant is also granted credit for time already served in the Coshocton County Justice Center relating to these offenses.

Upon inquiry of the Court, the prosecution stated that the victim's next of kin and immediate relatives, were notified of the date, time, and place of the hearing. Two family members were present and did speak. The Court instructed the prosecuting attorney to notify the family of the deceased of the possibility of victim compensation available to them. Bond in this case is released.

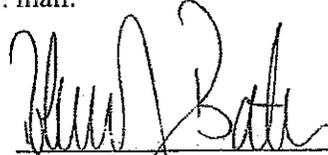
The Clerk is ordered to make a record in this case.

8/27/07   
RICHARD I. EVANS, Judge

  
ROBERT J. BATCHELOR (0059760)  
Prosecuting Attorney

### Precipe to the Clerk

Please serve a true copy of the foregoing signed Judgment Entry on Sentencing upon Robert J. Batchelor, Prosecuting Attorney, 318 Chestnut Street, Coshocton, Ohio 43812, Lt. James MacDonald, c/o Coshocton County Sheriff's Department, Coshocton, Ohio 43812, and Darin Desender, c/o Common Pleas Court by placing a copy in their mailboxes at the Clerk's Office, and also upon counsel for defendant, Stephen P. Hardwick, Assistant Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, and Doug Schiefer, Adult Parole Authority, 38 South Park Street, Mansfield, Ohio 44902, by regular U.S. mail.

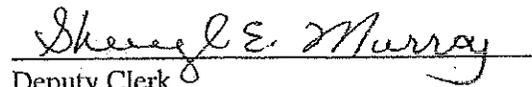


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ROBERT J. BATCHELOR (0059760)  
Prosecuting Attorney

### Certification of Service

I hereby certify that a true copy of the foregoing Judgment Entry on Sentencing was served upon Robert J. Batchelor, Prosecuting Attorney, 318 Chestnut Street, Coshocton, Ohio 43812, Lt. James MacDonald, c/o Coshocton County Sheriff's Department, Coshocton, Ohio 43812, and Darin Desender, c/o Common Pleas Court, by placing a copy in their mailboxes located at the Clerk's office, and also upon counsel for defendant, Stephen P. Hardwick, Assistant Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, and Doug Schiefer, Adult Parole Authority, 38 South Park Street, Mansfield, Ohio 44902, by regular U.S. mail this 27<sup>th</sup> day of August, 2009.



---

Deputy Clerk

COURT OF APPEALS  
COSHOCTON COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. Julie A. Edwards, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Sheila G. Farmer, J.
-vs-	:	
	:	
SANDRA GRIFFIN	:	Case No. 09CA21
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,  
Case No. 89CR13

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: July 27, 2010

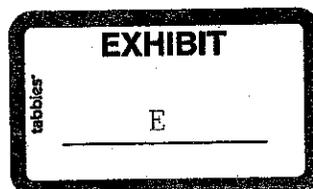
APPEARANCES:

For Plaintiff-Appellee

ROBERT J. BATCHELOR  
318 Chestnut Street  
Coshocton, OH 43812

For Defendant-Appellant

STEPHEN P. HARDWICK  
250 East Broad Street  
Suite 1400  
Columbus, OH 43215



*Farmer, J.*

{¶1} On February 27, 1989, the Coshocton County Grand Jury indicted appellant, Sandra Griffin, on one count of aggravated murder with specifications in violation of R.C. 2903.01(A), R.C. 2929.04(A)(7), and R.C. 2941.141, one count of aiding and abetting marijuana trafficking in violation of R.C. 2925.03(A)(6) and R.C. 2923.03(A)(2) or (3), one count of aiding and abetting a dangerous ordnance in violation of R.C. 2923.17 and R.C. 2923.03(A)(2) or (3), one count of aiding and abetting grand theft in violation of R.C. 2913.02(A)(1) and R.C. 2923.03(A)(2) or (3), one count of aiding and abetting aggravated robbery with a specification in violation of R.C. 2913.02(A)(1), R.C. 2923.03(A)(2) or (3), and R.C. 2941.141, and one count of abuse of a corpse in violation of R.C. 2927.01(B). Said charges arose from the death of James Steurer, Sr.

{¶2} On November 1, 1989, appellant waived her right to a speedy trial and her right to be tried by a three-judge panel or a jury. The state agreed not to pursue the death penalty, but would not dismiss the death specification.

{¶3} A trial before a single judge commenced on December 7, 1989. The trial court found appellant guilty of all counts except the trafficking in marijuana charge and the abuse of a corpse charge which were dismissed. By judgment entry on sentencing filed January 29, 1990, the trial court sentenced appellant to an aggregate term of life imprisonment with parole eligibility after thirty years, and ordered her to serve three years actual incarceration on the firearm specification, to be served consecutively.

{¶4} This court affirmed appellant's conviction. See, *State v. Griffin* (1992), 73 Ohio App.3d 546, further appeal dismissed (1992), 64 Ohio St.3d 1428.

{¶15} On August 4, 2009, appellant filed a motion for a final appealable order pursuant to *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330. On August 27, 2009, the trial court filed a new judgment entry on sentencing, once again sentencing appellant to life imprisonment with parole eligibility after thirty years plus the three years for the firearm specification.

{¶16} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶17} "THE TRIAL COURT ERRED BY PERMITTING A SINGLE JUDGE TO HEAR HER CAPITAL TRIAL AND SENTENCING HEARING."

I

{¶18} Appellant brings forth this appeal based upon a resentencing under *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330. Appellant argues she is entitled to a de novo direct appeal after resentencing.

{¶19} *Baker* involved Crim.R. 32(C) which states, "[a] judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence." The *Baker* court held the following at syllabus:

{¶110} "A judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (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 the clerk of court."

{¶11} Preliminarily, it is necessary to review whether a *Baker* resentencing was appropriate. Pursuant to R.C. 2929.03(F), applicable during appellant's original trial, a trial court is required to file a separate opinion when it imposes life imprisonment:

{¶12} "The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors."

{¶13} Despite the *Baker* error in the trial court's original judgment entry, a proper entry pursuant to R.C. 2929.03(F) could rectify the *Baker* error and render the resentencing moot. Therefore, this court searched the dockets of the Court of Appeals and the Supreme Court of Ohio as to the filing of separate findings of fact pursuant to R.C. 2929.03(F). However, the dockets did not reveal any separate findings.

{¶14} From our review of the trial court's judgment entries, we find a judgment entry of conviction filed on December 21, 1989 wherein the trial court announced its verdicts, and a separate sentencing entry filed on January 29, 1990 wherein the trial court imposed the sentence. If we were permitted to read the two judgment entries in *pari materia*, there would be no *Baker* argument. Unfortunately, this is not the law.

{¶15} On February 14, 1991, the trial court denied appellant's motion for a new trial. The judgment entry included some Crim.R. 32(C) mandates, but did not include the sentence.<sup>1</sup> We conclude a *Baker* resentencing was appropriate.

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<sup>1</sup>At the time of sentencing, Crim.R. 32(B) was applicable which is now Crim.R. 32(C).

{¶16} Before addressing this assignment, it is necessary to determine if a de novo review is mandated or if our review is limited to the resentencing only. In order to determine this, it is important to review the holding in *Baker* at ¶18:

{¶17} "We now hold that a judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (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 the clerk of court. Simply stated, a defendant is entitled to appeal an order that sets forth the manner of conviction and the sentence."

{¶18} Adopting this argument, the Supreme Court of Ohio determined that a final appealable order in a criminal conviction must have all four mandates. We therefore conclude appellant's original sentence on January 29, 1990 was not a firm or final appealable order.

{¶19} The next issue concerns the affect of this court's affirmance of appellant's conviction in 1992 and the Supreme Court of Ohio's decision dismissing appellant's appeal. See, *State v. Griffin* (1992), 73 Ohio App.3d 546; *State v. Griffin* (1992), 64 Ohio St.3d 1428.

{¶20} The issue raised in this appeal was also raised in the original appeal under Assignment of Error V:

{¶21} "The trial court erred in the sentencing of the appellant by not following the mandates of R.C. 2929.03 and 2929.04, as well as allowing victim impact evidence in violation of Evid.R. 404, the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ Nine, Ten, and Sixteen of the Ohio Constitution."

{¶22} The original direct appeal did not contain a claim of the lack of a final appealable order regarding the judgment entry appealed from. Appellant now argues the original appeal was a nullity under *Baker*:

{¶23} "A court of appeals has no jurisdiction over orders that are not final and appealable. Section 3(B)(2), Article IV, Ohio Constitution ('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\*\*\*'). See also R.C. 2953.02. We have previously determined that 'in order to decide whether an order issued by a trial court in a criminal proceeding is a reviewable final order, appellate courts should apply the definitions of "final order" contained in R.C. 2505.02.' *State v. Muncie* (2001), 91 Ohio St.3d 440, 444, 746 N.E.2d 1092, citing *State ex rel. Leis v. Kraft* (1984), 10 Ohio St.3d 34, 36, 10 OBR 237, 460 N.E.2d 1372.

{¶24} "In entering a final appealable order in a criminal case, the trial court must comply with Crim.R. 32(C), which states: 'A judgment of conviction shall set forth the plea, the verdict or findings, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.' Journalization of the judgment of conviction pursuant to Crim.R. 32(C) starts the 30-day appellate clock ticking. App.R. 4(A); see also *State v. Tripodo* (1977), 50 Ohio St.2d 124, 4 O.O.3d 280, 363 N.E.2d 719." *Baker* at ¶6 and 10.

{¶25} Therefore, this court was without jurisdiction to hear the original appeal. The next issue is what is the affect of our decision on an unchallenged non-final appealable order?

{¶26} For this analysis, we find a series of cases, one of which is now pending before the Supreme Court of Ohio, on the issue of resentencing.

{¶27} In *State v. Fischer*, 118 Ohio App.3d 758, 2009-Ohio-1491, our brethren from the Ninth District found despite a sentence being deemed void, their jurisdiction on appeal after resentencing was limited to issues raised on the resentencing and barred the appellant from raising any and all issues related to the conviction. We note this matter is currently pending in the Supreme Court of Ohio, Case No. 2009-0897, heard March 30, 2010.

{¶28} Prior to the *Fischer* decision, the Supreme Court of Ohio ruled in a writ of mandamus and/or procedendo action that a judgment entry that failed to comply with Crim.R. 32(C) was not a final appealable order and mandamus and procedendo would lie relative to an order of resentencing. *State ex rel, Culgan v. Medina County Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609.

{¶29} Seizing on the language of *Culgan*, the Ninth District revisited its decision in *Fischer* and found in a postrelease control resentencing, they may entertain all issues relative to the underlying conviction and/or trial:

{¶30} "The implication of the Supreme Court's opinion in *Culgan* is that regardless of whether a defendant has already appealed his conviction, if the order from which the first appeal was taken is not final and appealable, he is entitled to a new sentencing entry which can itself be appealed. Although the connection between

*Culgan* and cases involving postrelease control has not yet been explicitly stated, the logic inherent in recent Supreme Court cases regarding postrelease control leads to a similar result. See *Fischer*, 2009-Ohio-1491, at ¶15, 181 Ohio App.3d 758, 910 N.E.2d 1083 (Dickinson, J., concurring) (observing that two of the appellant's assignments of error, which challenged his underlying conviction and the continuing viability of this Court's earlier opinion in his direct appeal, were 'the logical extension of the Ohio Supreme Court's decisions in *State v. Simpkins*, 117 Ohio St.3d 420, 884 N.E.2d 568, 2008-Ohio-1197, and *State v. Bezak*, 114 Ohio St.3d 94, 868 N.E.2d 961, 2007-Ohio-3250.')." *State v. Harmon* (September 2, 2009), Summit App. No. 24495, 2009-Ohio-4512, ¶6.

{¶31} What the Ninth District did in *Harmon* was to find that a non-final appealable order was a void judgment. The Supreme Court of Ohio in *Baker* and *Culgan* never termed a non-final appealable order as a void judgment. The issue still remains open. Can a subsequent affirmance of a conviction and sentence by an appellate court rectify a non-final appealable order?

{¶32} In *State ex rel. Moore v. Krichbaum*, Mahoning App. No. 09 MA 201, 2010-Ohio-1541, our brethren from the Seventh District addressed this issue at ¶13:

{¶33} "In *Culgan*, the Supreme Court of Ohio considered whether a defendant was entitled to writs of mandamus and procedendo compelling the trial court to enter a judgment on his convictions that complied with Crim.R. 32(C), even though his convictions in 2002 had been previously reviewed and affirmed on a direct appeal. *Culgan* at ¶3. The Ohio Supreme Court concluded that the defendant was entitled to a new sentencing entry irrespective of prior appellate review, because the original

sentencing entry did not constitute a final appealable order. *Id.* at ¶10-11, 895 N.E.2d 805. Because the Ohio Supreme Court applied *Baker* to Culgan's petitions even though Culgan's convictions and direct appeal had been finalized prior to the decision in *Baker*, this Court can no longer hold that *Baker* may only be applied prospectively. We therefore conclude that we are obligated to apply *Baker* retrospectively."

{¶34} Reluctantly, we reach the same conclusion as our brethren from the Seventh District. We acknowledge there are valid arguments contra as the Ohio Prosecuting Attorneys Association's amicus brief to the Supreme Court of Ohio in the *Fischer* case reminds us at 6-7:

{¶35} "There is a distinction to be made between the finality of judgments for the purpose of appeal and the type of finality that is required to preclude further litigation on the issue between the parties. *Michaels Bldg. Co. v. City of Akron* (Nov. 25, 1987), Summit App. No. 13061; 18 Wright, Miller & Cooper, *Federal Practice and Procedure*, (1981), § 4434; Restatement of the Law 2d, *Judgments* (1982), Section 13. Making that distinction honors the principle of repose, maintains confidence in the rule of law, and makes certain that the courts are not burdened by rehearing appeals long before decided. At the same time, it imposes no cost on those, like Fischer, who has had the opportunity for a full direct appeal of his conviction.

{¶36} "An interlocutory decision that is non-appealable may yet be final in the preclusive sense: 'Whether a judgment, not final [for purposes of appeal under 28 U.S.C. §1291] ought nevertheless be considered 'final' in the sense of precluding further litigation of the same issue, turns upon such factors as the nature of the decision (i.e., that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for

review. "Finality" in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.' *Michaels Bldg. Co. vs. City of Akron* (Nov. 25, 1987), Summit App. No. 13061, quoting *Lummus Co. v. Commonwealth Oil Ref. Co.* (C.A.2, 1961), 297 F. 2d 80, 89, cert. denied sub nom. *Dawson v. Lummus Co.* (1962), 368 U.S. 986, certiorari denied (1962), 368 U.S. 986. With respect to collateral estoppel, it has been said that the concept of finality 'includes many dispositions which, though not final in [the sense of a final order for purposes of appeal] have nevertheless been fully litigated.' *Metromedia Corp. v. Fugazi* (1980, C.A.2), 983 F.2d 350. This principle of 'practical finality' is often applied where an appellate court has decided an appeal from a summary judgment in the absence of a Rule 54 certification. See, e.g., *O'Reilly v. Malon* (1984, C.A. 1), 747 F.2d 820."

{¶37} We are also aware of the dicta of *State ex rel., Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 97, wherein the Supreme Court of Ohio adopted a similar rule of finality regarding the affirmance of a conviction by a court of appeals:

{¶38} "However, in the instant cause, the trial court's granting of the motion to withdraw the guilty plea and the order to proceed with a new trial were inconsistent with the judgment of the Court of Appeals affirming the trial court's conviction premised upon the guilty plea. The judgment of the reviewing court is controlling upon the lower court as to all matters within the compass of the judgment. Accordingly, we find that the trial court lost its jurisdiction when the appeal was taken, and, absent a remand, it did not regain jurisdiction subsequent to the Court of Appeals' decision."

{¶39} As we emerge from the "fray" created from *Baker* and its progeny, it is important to note that the cry for finality of judgments is a valid public policy consideration. The tried and true axiom that old cases should not get the benefit of new law is still of public concern.

{¶40} Based upon our analysis, we will address appellant's sole assignment of error.

{¶41} In *State v. Parker*, 95 Ohio St.3d 524, 2002-Ohio-2833, syllabus, the Supreme Court of Ohio held the following:

{¶42} "A defendant charged with a crime punishable by death who has waived his right to trial by jury must, pursuant to R.C. 2945.06 and Crim.R. 11(C)(3), have his case heard and decided by a three-judge panel even if the state agrees that it will not seek the death penalty."<sup>2</sup>

{¶43} Appellant argues she is entitled to a reversal of her conviction because the trial court erred in not convening a three-judge panel to hear her non-jury trial when the capital specification was not dismissed.

{¶44} Based upon the *Parker* decision, we agree.

{¶45} The sole assignment of error is granted.

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<sup>2</sup>*Parker* specifically abrogated *Griffin*, *supra*.

{¶46} The judgment of the Court of Common Plea of Coshocton County, Ohio is hereby reversed and remanded.

By Farmer, J.

Edwards, P.J. concur and

Hoffman, J. dissents.

s/ Sheila G. Farmer

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s/ Julie A. Edwards

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JUDGES

SGF/sg 617

*Hoffman, J., dissenting*

{¶47} I respectfully dissent from the majority decision. While doing so, I appreciate my colleagues' effort to faithfully adhere to and apply the precedent set by various Ohio Supreme Court decisions despite the significant ramification of their doing so, not only in this case, but also potentially many others. I enter the "fray" only to suggest an alternative view.

{¶48} Unlike the majority and the Seventh and Ninth districts, I do not read *Culgan* as broadly as they do. As pointed out by the majority herein, the Ohio Supreme Court did not find the non-final appealable order in either *Baker* or *Culgan* resulted in a void judgment. The specific issue as to the effect of the grant of the writ of mandamus and procedendo on the prior appeal was not discussed in the Per Curiam opinion in *Culgan*<sup>3</sup>.

{¶49} As noted by the majority, in quoting from an amicus brief to the Ohio Supreme Court in *Fischer*, "There is a distinction to be made between the finality of judgments for the purpose of appeal and the type of finality that is required to preclude further litigation on the issue between the parties". *Michaels Bldg. Co. v. City of Akron* (Nov. 25, 1987), Summit App. No. 13061.

{¶50} Because Appellant herein previously invoked appellate review and nothing in the order as it then existed prohibited or affected her ability to address all issues relating to her previous conviction, Appellant should be judicially estopped from now asserting our previous appellate court ruling is not entitled to law of the case status. To

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<sup>3</sup> In his dissent, Justice O'Donnell, joined by Justice Lundberg Stratton, does note *Culgan* was not deprived of his opportunity to appeal his conviction.

hold otherwise violates the invited error doctrine and allows Appellant the proverbial "second bite at the apple."

{151} As does the majority and many of my brethren on appellate courts throughout the State, I anxiously await the Ohio Supreme Court's guidance in the *Fischer* case.

s / William B. Hoffman  
HON. WILLIAM B. HOFFMAN



IN THE COURT OF APPEALS  
FIFTH APPELLATE DISTRICT  
COSHOCTON COUNTY, OHIO

State of Ohio, :  
 :  
 Plaintiff-Appellee, :  
 :  
 v. : Case No. 09 CA 21  
 :  
 Sandra Griffin, : On Appeal from the Coshocton  
 : County Court of Common  
 : Pleas, Case No. 89-CR-13  
 Defendant-Appellant. :

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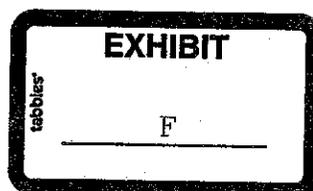
**Supplemental Brief of Appellant Sandra Griffin**

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Fifth District Court of Appeals  
State of Ohio  
County of Coshocton



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## Introduction

The Ohio Supreme Court's decision in *State v. Ketterer*, Slip Opinion No. 2010-Ohio-3831, does not change the outcome of this case. *Ketterer's* analysis of *Special Prosecutors v. Judges, Belmont County Court of Common Pleas* (1978), 55 Ohio St.3d 94, has no effect on this case because the Ohio Supreme Court has specifically ruled that a trial court must issue a new final order even if an appeal has previously been taken from a non-final order. *State ex rel. Culgan v. Medina County Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609. Further, *Ketterer's* R.C. 2929.03(F) analysis does not help the State because the trial court has never issued an R.C. 2929.03(F) opinion. Finally, *State v. Fischer*, Slip Op. No. 2010-Ohio-6238, reinforces this Court's previous decision because *Fischer* carefully distinguished postrelease control error from the lack of jurisdiction that results from a non-final order.

This Court should re-issue its previous opinion with only slight modifications to expressly apply the *Ketterer* decision.

## Statement of the Case and the Facts

Sandra Maxwell Griffin was indicted by a Coshocton County Grand Jury as follows:

Ct.	Rev. Code Section	Description
1	2903.01(A)	Purposefully aide and abet aggravated murder with prior calculation and design
Sp.c.1	2929.04(A)(7)	Felony-murder, aggravated robbery
Sp.c.2	2941.141	Firearm specification
2	2925.03(A)(6) 2923.03(A)(2) or (3)	Marijuana trafficking, F-3 (aid and abet/conspiracy)
3	2923.17 2923.03(A)(2) or (3)	Dangerous ordnance (aid and abet/conspiracy), F-4
4	2913.02(A)(1) 2923.03(A)(2) or (3)	Grand theft (aid and abet/conspiracy), F-3
5	2913.02(A)(1) 2923.03(A)(2) or (3)	Aggravated robbery (aid and abet/conspiracy), Aggravated F-1
Sp.c.1	2941.141	Firearm specification
6	2927.01(B)	Abuse of a corpse (aid and abet/conspiracy), F-3

Indictment, Feb. 27, 1989, as amended Nov. 1, 1989.

Before Miss Griffin went to trial, the parties agreed that Miss Griffin would waive her right to a speedy trial and her right to be tried by a three-judge panel or a jury. Jury Waiver and Time Waiver, Nov. 1, 1989. The State agreed that it would not "pursue" the death penalty, but that it would not drop the death specification either. Id. Thus, the case continued as a capital matter and the trial and sentencing proceeded in front of a single trial judge. T.p. (trial) 1-1114, Journal Entry, Jan. 29, 1989.

Miss Griffin was convicted of all the charges except the charges of trafficking in marijuana, which was dismissed at the end of the State's case pursuant to Crim.R. 29, T.p. 1045, and abuse of a corpse which the State dismissed at the trial judge's request. Entry, Aug. 27, 2009. The trial court

issued an entry journalizing its verdict. Entry, Dec. 21, 1989. Exhibit 2.

Nowhere in the verdict did the court find or weigh aggravating or mitigating factors.

After sentencing, the trial court issued a journal entry that stated that Miss Griffin was sentenced as follows:

Ct.	Description	Sentence
1	Aggravated murder	30 to life full
Spc.1	Felony-murder, aggravated robbery	(above)
Spc.2	Firearm specification	3 years
2	Marijuana trafficking, F-3 (aid and abet/conspiracy)	Rule 29
3	Dangerous ordnance (aid and abet/conspiracy), F-4	Merged
4	Grand theft (aid and abet/conspiracy), F-3	Merged
5	Aggravated robbery (aid and abet/conspiracy), Aggravated F-1	10 to 25, concurrent
Spc.1	Firearm specification	Merged
6	Abuse of a corpse (aid and abet/conspiracy), F-3	Nolle Prosequi

Miss Griffin filed a "notice of appeal" of the January 29, 1989 journal entry. This Court then issued *State v. Griffin* (1992), 73 Ohio App.3d 546, appeal dismissed (1992), 64 Ohio St.3d 1428.

Miss Griffin then unsuccessfully challenged the January 29, 1989 journal entry in federal court. *Griffin v. Andrews* (Apr. 3, 2007), 6<sup>th</sup> Cir. No. 06-4305 (entry denying certificate of appealability); *Griffin v. Rogers* (C.A. 6, 2005), 399 F.3d 626; *Griffin v. Rogers* (C.A. 6, 2002), 399 F.3d 647.

Miss Griffin then filed a motion in the trial court requesting a final appealable order under *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, at the syllabus. The State agreed that that she did not have a final appealable

order and submitted "the proposed judgment entry to serve as the final appealable order." State's "Memorandum," Aug. 12, 2009. A timely appeal proceeded from that entry. This Court determined that the original sentencing entry did not comply with *Baker*. This Court also reviewed the record and determined that the record did not contain a sentencing opinion pursuant to R.C. 2929.03(F) that might supplement that sentencing entry. Opinion at ¶ 13.

Accordingly, this Court found that the previous entry was not a final order, so this Court reviewed this case on the merits, reversed the decision of the trial court, and remanded the case for trial.

The State filed an appeal to the Ohio Supreme Court suggesting, without quite asserting, that the trial court's verdict was also an R.C. 2929.03(F) sentencing opinion:

If this court makes it irrefutable that a final order in a capital case is an entry filed under 2929.03(C), combined with a judgment of conviction, whether the sentence is life or death, much litigation will be avoided. \* \* \*

In *State v. Ketterer*, supra, this court, a mere twenty-nine days after the lower court in the instant case said that it could not consider the entry of conviction and the opinion filed pursuant to R.C. 2929.03(F) together to be a final appealable order, held that the two documents combined constituted a final appealable order. This court's opinion in *Ketterer* should apply to all cases pending when this court decided *Ketterer*. In *Ketterer*, the defendant received the death penalty; Appellee received life in prison with parole eligibility in thirty years. However, the reasoning in *Ketterer* should apply to all cases in which R.C. 2929.03(F) requires the trial court to file two documents.

Had the lower court had the benefit of this court's opinion in *Ketterer*, it would have decided the case differently. At paragraph

14 on page 4 of the lower court's opinion, the court said the following: "From our review of the trial court's judgment entries, we find a judgment entry of conviction filed on December 21, 1989 wherein the trial court announced its verdicts, and a separate sentencing entry filed on January 29, 1990 wherein the trial court imposed the sentence. *If we were permitted to read the two judgment entries in pari materia, there would be no Baker argument. Unfortunately, this is not the law.*"

State's Memorandum at 2, 6. Emphasis supplied by the State.

Miss Griffin argued that this Court correctly found that no R.C. 2929.03(F) sentencing opinion existed. Memorandum in Response, 6-7.

Without the benefit of a record, the Ohio Supreme Court could not determine which of the conflicting claims was correct. Accordingly, the Court remanded the case to this Court to resolve.

## Argument

### Question from this Court:

**“What part of *Ketterer* applies to the *Griffin* case: two judgment entries to be looked at as one or *State ex rel. Special Prosecutors v. Judges, Belmont County Court of Common Pleas* (1978), 55 Ohio St.3d 94? Also, include an analysis on the Supreme Court of Ohio’s decision in *State v. Fischer*, \_\_ Ohio St.3d \_\_, 2010-Ohio-6238, as it relates to the *Griffin* case.”**

### Answer:

The Ohio Supreme Court likely intended for this Court to review this case under the final appealable order provisions of *Ketterer*, not the portion that referenced *Special Prosecutors* because the State’s appeal never mentioned *Special Prosecutors*.

I. ***Special Prosecutors* does not help the State.**

A. ***Special Prosecutors* cannot affect the outcome of this case.**

The issue in this case is whether this Court had jurisdiction to decide the first appeal despite the lack of a final appealable order. If this Court had jurisdiction, then Ms. Griffin loses this case based on the standard application of the doctrines of law of the case and res judicata. If this Court did not have jurisdiction, then no appellate mandate bound the trial court. *Special Prosecutors* does not change either result.

B. **Under *State ex rel. Culgan v. Medina County Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609, the trial court had a duty to issue a new final appealable order even though an appeal had previously been attempted.**

In *Culgan*, the Ohio Supreme Court issued a writ of mandamus ordering a trial court to issue a new final appealable order despite a

previous appeal from a non-final order. *Culgan*, ¶3, 11, cited with approval, *State ex rel. Dewine v. Burge*, Slip Op. No. 2011-Ohio-235, ¶18. That is exactly what the trial court did in this case.<sup>1</sup> Under *Culgan*, the trial court had a clear duty to issue the final order despite the prior appeal.

The trial court took no other substantive action that could have conflicted with the prior appellate judgment, even if valid. The trial court did not grant a new trial. Cf. *Burge*, at ¶21. The trial court did not order Miss Griffin's release. The trial court simply did what the Ohio Supreme Court has said it must—it issued the first final appealable order. The consequences of that order are now for this Court to decide.

## **II. *Ketterer* does not help the State.**

### **A. The Ohio Supreme Court likely sent this case back to resolve a factual dispute between the parties.**

In its appeal to the Ohio Supreme Court, the State asserted that the trial court had issued a judgment that complied with R.C. 2929.03(F). State's Memorandum, 2, 6. This Court held that the record did not contain an R.C. 2929.03(F) opinion. *State v. Griffin*, Coshocton App. No.

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<sup>1</sup> In a concurring opinion, Justice Lanzinger states that the Court "eventually will need to determine what effect an appellate decision has when the appellate court's jurisdiction was premised upon a sentencing entry that violated Crim.R. 32(C) and was thus nonappealable." *Burge*, at ¶24. As explained below and in Miss Griffin's original reply brief, the Ohio Supreme Court's previous holdings lead only to the conclusion that any appellate judgment based on a non-final order is void ab initio for want of subject matter jurisdiction.

09CA21, 2010-Ohio-3517, at ¶13. Ms. Griffin also argued that the record did not contain such an opinion. Memorandum, 6-7.

In its summary proceedings, the Ohio Supreme Court decided the case without the ability to review the record. So the Court had no way to resolve the competing representations of the State on one side and Miss Griffin and this Court on the other.

By contrast, this Court has the record and a mandate to apply the *Ketterer* decision. A review of that record proves that the State's representation to the Ohio Supreme Court was incorrect. No trial court judgment or opinion complies with R.C. 2929.03(F), and the verdict form the State referenced in its Ohio Supreme Court filing certainly does not. Accordingly, *Ketterer* does not transform the 1992 non-final judgment into a final appealable order.

- B. Under *Ketterer*, if R.C. 2929.03(F) applies to this case, the trial court has not yet issued a final appealable order.**
  - 1. Under this Court's *Griffin* decision, an opinion issued pursuant to R.C. 2929.03(F) can "rectify" an otherwise deficient judgment of conviction, but under *Ketterer* no capital judgment entry is final until the R.C. 2929.03(F) opinion is filed.**

At first look, this Court's *Griffin* decision looks almost identical to the holding in *Ketterer*. Both cases state that in a capital case, a court can look to both the Crim.R. 32(C) sentencing judgment and to the R.C. 2929.03(F) sentencing opinion to create a final appealable order:

<b><i>Ketterer</i> at the Syllabus</b>	<b><i>Griffin</i> at ¶ 13</b>
In cases in which R.C. 2929.03(F) requires the court or panel to file a sentencing opinion, a final, appealable order consists of both the sentencing opinion filed pursuant to R.C. 2929.03(F) and the judgment of conviction filed pursuant to Crim.R. 32(C).	Despite the <i>Baker</i> error in the trial court's original judgment entry, a proper entry pursuant to R.C. 2929.03(F) could rectify the <i>Baker</i> error. . . .

But a closed a closer look reveals a critical difference between the *Ketterer* and this Court's *Griffin* holding. This Court held that an R.C. 2929.03(F) opinion "could rectify" *Baker* error, while *Ketterer* held that such an opinion "is necessary" to create a final appealable order:

<b><i>Ketterer</i> at ¶ 17</b>	<b><i>Griffin</i> at ¶ 13</b>
R.C. 2929.03(F) requires that a separate sentencing opinion be filed in addition to the judgment of conviction, and the statute specifies that the court's judgment is not final until the sentencing opinion has been filed. Capital cases, <i>in which an R.C. 2929.03(F) sentencing opinion is necessary</i> , are clear exceptions to <i>Baker's</i> "one document" rule.	Despite the <i>Baker</i> error in the trial court's original judgment entry, <i>a proper entry pursuant to R.C. 2929.03(F) could rectify the Baker error.</i> . . . .

Emphasis supplied. Accordingly, under this Court's *Griffin* decision, a valid capital Crim.R. 32(C) judgment would be a final order without an R.C. 2929.03(F) opinion, but under *Ketterer*, a valid capital Crim.R. 32(C) judgment is not a final appealable order until the R.C. 2929.03(F) opinion is filed.

2. **This case does not contain an opinion issued pursuant to R.C. 2929.03(F) because the trial court never found or weighed mitigating factors.**

As this Court correctly found, this case does not contain an opinion issued pursuant to R.C. 2929.03(F). *Griffin*, at ¶13. Such an opinion must include, among other items, the trial court's "specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors."

The trial court never issued any opinion or judgment that found or weighed statutory mitigating factors, so if R.C. 2929.03(F) applies, this case still does not contain a final appealable order, and this Court should dismiss this appeal with directions to enter a final appealable order.

- C. **R.C. 2929.03(F) does not affect the finality of the judgment in this case because the trial court never held a hearing pursuant to that section.**

1. **By its own terms, R.C. 2929.03(F) does not apply to this case.**

By its express terms, R.C. 2929.03(F) affects the finality of the sentencing judgments only when the trial court holds a hearing pursuant to that section. "In a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed."

The trial court never held such a hearing because the trial court acted under the mistaken impression that the case was not a capital case once the

State had agreed not to seek the death penalty. T.p (sentencing) 144. ("Now, the defendant's life is not, per se, an issue here today. This is not a capital case.") Nowhere in the sentencing transcript or in any entry did the trial court ever weigh any statutory mitigating factors. And the defense failed to present evidence as to mitigating factors or the required waiver of such evidence. *State v. Ashworth* (1999), 85 Ohio St.3d 56, paragraphs one and two of the syllabus.

In summary, the trial court did not conduct an R.C. 2929.03 hearing, so the judgment in this case was final and appealable when the trial court issued a Crim.R. 32(C) judgment in 2009.

**2. A contrary ruling would render irrelevant the limits in *Pratts v. Hurley*, 102 Ohio St. 3d 81, 2004-Ohio-1980.**

The State might regret "winning" the argument that R.C. 2929.03(F) applies to cases, like Miss Griffin's, in which trial courts mistakenly assumed that capital requirements did not apply.

In *Pratts v. Hurley*, the Ohio Supreme Court recognized that many single-judge trial courts had improperly presided over pleas and bench trials in capital cases when the prosecutor promised not to seek the death penalty. The Court held that habeas relief was unavailable in such cases and that those defendants could seek relief only on direct appeal. But if R.C. 2929.03(F) applies to such cases, then those convictions are not final until the trial court issues an R.C. 2929.03(F) sentencing opinion. In such cases, trial courts acted under the misimpression that capital requirements did not apply, so it is unlikely that any trial court issued an R.C. 2929.03(F) sentencing opinion. As

a result, if R.C. 2929.03(F) applies to those cases, all such cases probably lack final orders,<sup>2</sup> still can get final orders,<sup>3</sup> and would be automatically reversed on appeal from those final orders.<sup>4</sup> By contrast, under the strict reading of R.C. 2929.03(F) that Miss Griffin proposes, defendants who have valid stand-alone Crim.R. 32 entries are barred from starting anew.

**3. If R.C. 2929.03(F) applies to this case, only the Crim.R. 32(C) judgment and the R.C. 2929.03(F) opinion can complete a final order.**

The State may assert that this Court should look at the verdict form to complete the deficient Crim.R. 32(C) judgment, but neither R.C. 2929.03(F) nor *Ketterer* allows verdict form to rectify a deficient Crim.R. 32(C) entry. *Ketterer* requires reviewing courts to look at two specific documents in capital cases in which R.C. 2929.03(F) applies, not to any two documents in the file.

Specifically, instead of requiring that all required information appear in a “single document[,]” *Ketterer* requires that the elements of a final appealable be in either judgment entry of sentence or the R.C. 2929.03(F) opinion:

[W]hile the final, appealable order must satisfy the four requirements enumerated in [*State v. Baker*, [119 Ohio St.3d 197, 2008-Ohio-3330,] the first requirement -- that the final, appealable order include the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based -- will be satisfied if either the judgment of conviction or the sentencing opinion includes the guilty plea, jury verdict, or finding of the court upon which the conviction is based.

*Ketterer*, at ¶18 (emphasis supplied).

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<sup>2</sup> *Ketterer*, at the syllabus.

<sup>3</sup> *Mitchell v. Smith*, 120 Ohio St.3d 278, 2008-Ohio-6108, citing *McAllister v. Smith*, 119 Ohio St.3d 163, 2008-Ohio-388.

<sup>4</sup> *State v. Parker*, 95 Ohio St.3d 524, 2002-Ohio-2833.

The verdict form in this case does not come close to being a sentencing opinion under R.C. 2929.03(F). *State v. Griffin*, Coshocton Common Pleas Case No. 89 CR 13, Judgment Entry (Dec. 21, 1989). Apx., A-1. The entry merely documents that the court found Miss Griffin guilty of numerous offenses and specifications. The entry contains no mention of aggravating or mitigating factors, let alone the findings and weighing that R.C. 2929.03(F) requires. The verdict entry is just that—an entry setting forth the single judge’s finding of guilt as to the charges and specifications. It is not a sentencing entry or opinion. It does not satisfy Crim.R. 32(C), R.C. 2929.03(F), *Ketterer*, or *Baker*.

**III. *State v. Fischer*, \_\_ Ohio St.3d \_\_, 2010-Ohio-6238, reinforces this Court’s *Griffin* decision**

In *Fischer*, the Ohio Supreme Court held that postrelease control error did not render an entire sentence void. *Fischer*, at ¶27. As a result, a defendant with improper postrelease control cannot appeal his sentence anew. *Id.* But the Court carefully distinguished postrelease control error from *Baker* error:

Nothing in *Baker* discusses void or voidable sentences. Rather, the syllabus speaks only to the requirement that the judgment of conviction set forth “the sentence” in addition to the other necessary aspects of the judgment. The judgment in this case did set forth the sentence. *The fact that the sentence was illegal does not “deprive the appellate court of jurisdiction to consider and correct the error.*

*State v. Fischer*, 2010-Ohio-6238, ¶39 (emphasis supplied).

In contrast to an improper sentence, the lack of a final appealable order does “deprive the appellate court of jurisdiction to consider and correct [any]

error.” See, e.g., See, *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007-Ohio-607, at ¶13-14, citing Section 3(B)(2), Article IV of the Ohio Constitution and *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20 (“As a result, “[i]t is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction.”); *State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, at ¶22 (“If there is no final judgment or other type of final order, then there is no reviewable decision over which an appellate court can exercise jurisdiction”) (citation omitted); and *Hubbard v. Canton City Sch. Bd. of Educ.*, 88 Ohio St. 3d 14, 15, 2000-Ohio-260 (“The opinion of the court of appeals is vacated for the reason that the court of appeals lacked subject-matter jurisdiction for lack of a final appealable order.”). This Court reinforced the lack of jurisdiction when it posted a notice on its web site stating that if a case lacks a final appealable order, litigants “will need to file a new notice of appeal after the trial court issues a new, final judgment entry.”<sup>5</sup>

As this Court correctly held, “[a]n order entered without jurisdiction is null and void.” *Gordon v. Gordon*, 5<sup>th</sup> Dist No. Case Nos. CT2007-0072 and CT2007-0081, 2009-Ohio-177, ¶30-31. A void judgment “place[s] the parties in the same place as if there had been no” judgment. *State v. Bezak*, 114 Ohio St.3d 94; 2007-Ohio-3250 (discussing void sentencing judgments),<sup>6</sup> citing

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<sup>5</sup>“*Baker Dismissals*,” << <http://www.fifthdist.org/FAQ%20-%20BAKER.html>>>, viewed October 5, 2009.

<sup>6</sup> The Ohio Supreme Court’s *Fischer* decision left this part of the *Bezak* holding undisturbed: “Instead, our decision today revisits only one component of the holding in *Bezak*, and we overrule only that portion of the syllabus that

*Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267. The State has previously asserted that *Gordon* should be limited to cases involving trial courts that lack jurisdiction to decide motions under Civ.R. 60(B) when an appeal is pending, but no language in the opinion supports that limitation.

Finally, the Ohio Supreme Court has cited with approval this Court's holding that after a defendant successfully sought a final appealable order under Crim.R. 32(C), he is "free to pursue an appeal from the trial court's sentencing entry[.]" *Garrett v. Wilson*, Richland App. No. 07-CA-60, 2007-Ohio-4853, ¶10, cited with approval in *McAllister v. Smith*, 119 Ohio St.3d 163, 2008-Ohio-388, ¶7.

Miss Griffin did exactly what this Court and the Ohio Supreme Court have held she should. She filed a motion for a final appealable order and timely appealed from that order. This Court should decide her case on the merits, and reinstate its prior judgment based on *State v. Parker*, 95 Ohio St.3d 524, 2002-Ohio-2833.

### **Conclusion**

Under *Ketterer*, *Baker*, and R.C. 2929.03(F), this Court has only two options: either Miss Griffin still does not have a final appealable order, or the first final appealable order was the judgment Miss Griffin timely appealed in this case. This Court should find that the 2009 judgment was the first final order in this case, and then this Court should reverse and remand under

*Parker*.

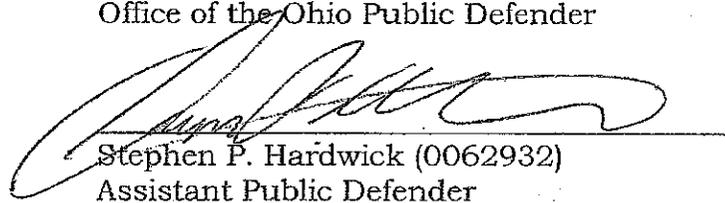
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requires a complete resentencing hearing rather than a hearing restricted to the void portion of the sentence." *Fischer*, at ¶36.

In the alternative, if this Court finds that R.C. 2929.03(F) applies to this case, this Court should dismiss this appeal with directions to the trial court to issue a final appealable order.

Respectfully submitted,

Office of the Ohio Public Defender



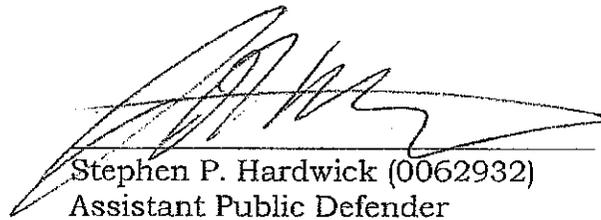
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**Certificate of Service**

I certify that a copy of the foregoing **Supplemental Brief of Appellant Sandra Griffin** was sent by regular U.S. Mail to Jason W. Given, Coshocton County Prosecutor, 318 Chestnut Street, Coshocton, Ohio 43812 this 10<sup>th</sup> day of February, 2011.



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IN THE COURT OF APPEALS, FIFTH APPELLATE DISTRICT,  
COSHOCTON COUNTY, OHIO

State of Ohio

Case No. 09 CA 21

Appellee,

v.

On Appeal from the Coshocton  
County Common Pleas Court  
No. 89 CR 13

Sandra Griffin

Appellant

---

BRIEF OF APPELLEE, STATE OF OHIO, AFTER REMAND FROM THE OHIO  
SUPREME COURT

---

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**FILED**  
DATE FEB 10 2011  
TIME \_\_\_\_\_  
Fifth District Court of Appeals  
State of Ohio  
County of Coshocton

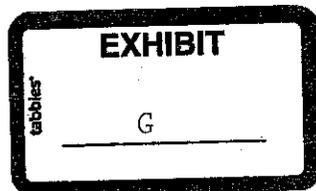


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## STATEMENT OF THE CASE AND FACTS

During November and December of 1988, Sandra Griffin, Carl Steven Lewis, and James Steurer Jr. plotted to rob and kill James Steurer Sr. On January 4, 1989, while Appellant packed the victim's collection of firearms and searched his house for cash, Carl Steven Lewis shot James Steurer Sr. in the head, killing him.

The Coshocton County Grand Jury indicted Appellant for complicity (R.C. 2923.03) to commit aggravated murder, R.C. 2929.04(A), with an accompanying specification pursuant to R.C. 2929.04(A)(7), that the murder was committed during the course of an aggravated robbery; aggravated robbery, 2911.01; unlawful possession of dangerous ordnance, 2923, 17; and grand theft, 2913.02(A)(1). The indictment also contained firearm specifications (R.C. 2929.71), to the charges of aggravated murder and aggravated robbery.

To render imposition of the death penalty impossible, Appellant waived her right to a jury trial and the parties agreed that a single judge would conduct a bench trial.

After a complete bench trial, the judge found Appellant guilty of all charges, and specifications. On December 21, 1989, the court filed an entry of conviction recording "[t]he court finds the defendant guilty..." on all charges and the death penalty specification. On January 29, 1990, the court filed a sentencing entry, imposing a sentence of life with parole eligibility in thirty years on the aggravated murder charge; a consecutive three-year term on the firearm specification; a concurrent 10 to 25 year term for aggravated robbery; and a three year term on the firearm specification attached to the aggravated robbery, to be served only if the sentence for the firearm specification attached to the aggravated murder charge subsequently be negated.

The Coshocton County Court of Appeals affirmed in *State v. Griffin* (1992), 73 Ohio App. 3d 1428. The Ohio Supreme Court dismissed the appeal in *State v. Griffin* (1992), 64 Ohio St.3d 1428.

Appellant filed a federal petition for a writ of habeas corpus, which was denied on September 30, 1998. In May 1999, Appellant filed an application to reopen her appeal pursuant to *State v. Murnahan*, (1992), 63 Ohio St.3d 60. The trial court denied that application on May 24, 1999 and the Ohio Supreme Court affirmed.

On August 4, 2009, Appellant filed a motion for a final appealable order, relying on *State v. Baker* 119 Ohio St.3d 197, 2008-Ohio-3330. The trial court journalized a "judgment on sentencing entry" on August 27, 2009. Appellant filed a notice of appeal.

On September 24, 2009, The State filed a motion to dismiss. The State observed that Appellant had raised the "single judge" issue in her appeal in 1992 and in her application to reopen in 1999. The State asserted the new appeal was barred by the doctrine of res judicata.

On July 27, 2010, in a 2-1 opinion, the Coshocton County Court of Appeals vacated Appellant's conviction, because of the single judge issue, and remanded the case for proceedings consistent with the opinion. The State filed a motion for stay in the trial court. On August 13, 2010, The State filed a notice of appeal and a motion for stay in the Ohio Supreme Court.

That court granted the stay and ultimately, vacated this court's judgment and remanded the case to this court "for application of *State v. Ketterer*, 126 Ohio St. 3d 448, 2010-Ohio3831." *State v. Griffin* 127 Ohio St.3d 266, 2010-Ohio-5948. On January 7, 2011, this court requested the parties to simultaneously file briefs by February 10, 2011 addressing the following: "What part of *Ketterer* applies to the *Griffin* case: two judgment entries to be looked at as one or *State ex rel. Special Prosecutors v. Judges, Belmont County Court of Common Pleas* (1978), 55 Ohio St.2d

94?" The court also asked for an analysis of *State v. Fischer*, \_\_\_\_\_ Ohio St.3d\_\_\_\_, 2010 Ohio 6238, "as it relates to the Griffin case."

## ARGUMENT

### THE OHIO SUPREME COURT INTENDED THE STATE TO PREVAIL ON BOTH PROPOSITIONS OF LAW.

If The State is interpreting this court's briefing instructions correctly, The State believes that the Ohio Supreme Court intended the concepts behind both of this court's above- referenced options to apply, albeit, The State respectfully asserts, in a broader sense than referred to in the entry of January 7, 2011

As the State prevailed in the Ohio Supreme Court, the State believes it reasonable to infer that the court intended to grant the relief the State requested. If the court intended the State to prevail on one issue only, the State respectfully suggests, the court would have said so.

The State presented the issues to the Ohio Supreme Court as follows:

"This case presents two issues important to the future of criminal law: whether this court's decision in *State v. Ketterer* Slip Opinion, 2010 Ohio 3831, 2010 Ohio LEXIS 1996 applies to those who were not sentenced to death and whether Appellants can use a motion for resentencing pursuant to *State v. Baker* 119 Ohio St.3d 197, 2008 Ohio 3330 to circumvent the doctrine of res judicata."

The State filed two propositions of law: the first asked the court to apply the holding of *Ketterer*, that capital cases are an exception to the final-order-one-document rule of *State v. Baker*, to the *Griffin* case and the second asked the court to find that Griffin's most recent appeal was barred by the doctrine of res judicata. (The memoranda of both parties may be read on the

Ohio Supreme Court's online docket in *State v. Griffin*, docket number 10-1434.). Neither party cited *State ex rel Special Prosecutors v. Judge , Belmont County Court of Common Pleas* because the facts were different from the instant case, although both sides argued the underlying issue in *Judges*, to wit: res judicata.

In its memorandum supporting jurisdiction, the State relied most heavily on the argument that the one document rule of *State v. Baker* is inapplicable to capital cases and that the holding of *Ketterer* should apply to *Griffin* also. The State respectfully suggests that the holding of *Ketterer* is not that two entries are looked at as one, as Stated in this court's briefing order, but that the final appealable order is comprised of two documents: the conviction entry and the opinion filed under R.C. 2929.03. That document is not an "entry" as defined in Crim. R. 32.

The Ohio Supreme Court in *Ketterer* never calls an opinion filed under R.C. 2929.03 an entry. Throughout R.C. 2929.03, the document is called an "opinion." Courts file many documents that are not "entries" Findings of Facts and Conclusions of Law, for example, are necessary to provide a final appealable order, but the Findings of Fact and Conclusions of Law need not be an "entry" as defined in Crim. R. 32. Some judges label the Findings and Conclusions as an entry and some judges file Findings of Fact and Conclusions of law and a separate "entry." The two documents together comprise a final appealable order.

The State urged the Ohio Supreme Court to apply the holding of *Ketterer* to *Griffin* to avoid a deluge of re-litigation. To decide what the Ohio Supreme Court intended, the State suggests, it is helpful to look at the argument that persuaded the court to vacate and remand the case. Therefore, the State quotes the following from the State's Memorandum in Support of Jurisdiction:

Before this court decided *State v. Parker* 95 Ohio St.3d 524, 2002-Ohio-2833, it was common practice for capital defendants to waive juries and appear before a single judge. Defendants knew they would receive life sentences; prosecutors and courts saved time. Everybody won, or so it seemed.

Unlike the instant case, in which the defendant entered a not guilty plea and went to trial before a single judge, most capital defendants who chose single judges entered guilty pleas. Also unlike the instant case, in which The State fully litigated the single judge issue on direct appeal in 1992 and in a Murnahan motion in 1999, most of those defendants did not appeal the single judge procedure. Surprisingly few of these defendants even filed postconviction petitions.

After *Parker*, a few defendants who received life sentences under the single judge procedure filed motions to withdraw guilty pleas, (*State v. Mitchell*, 5<sup>th</sup> Dist. App. No. 07-CA-17, 2008-Ohio-101, 2008 Ohio App. LEXIS 80) or State habeas corpus petitions (*Pratts v. Hurley*, 102 Ohio St. 3d 81, 2004-Ohio-1980). This court held that the single judge issue failed to entitle a defendant to collateral relief. The court said that a sentence imposed by a single judge was not void but voidable. That decision no doubt stemmed the tide of State habeas petitions and requests for other kinds of collateral relief from this group of prisoners. After this court's decision in *State v. Baker*, however, another possible avenue of relief beckons.\*\*\*

. This court's opinion in *Ketterer* might deter those who received the death penalty from flooding courts with requests for new sentencing entries. However, defendants who avoided even the possibility of the death penalty by suggesting the single judge procedure, who have time on their hands and nothing to lose, will flood trial courts with requests for resentencing entries. These prisoners will argue that *Ketterer* does not apply to them.

If this court, relying on *Ketterer*, summarily reverses the instant case, it will discourage those in The State's position from requesting new sentencing entries and attempting to relitigate issues already decided against them. If this court makes it irrefutable that a final order in a capital case is an entry filed under 2929.03(C), combined with a judgment of conviction, whether the sentence is life or death, much litigation will be avoided.

RES JUDICTA

The State of Ohio questions whether it has properly understood the second prong of the court's instructions of January 7, 2011, in which the court asks whether *State ex rel. Special Prosecutors v. Judges, Belmont County Court of Common Pleas* (1978), 55 Ohio St.2d 94

applies. While counsel for The State hesitates to presume the court's intent it occurs to the State that the court may have cited *Judges* as a short-hand for raising the issue of res judicata.

In *Ketterer*, the Ohio Supreme Court had affirmed the conviction and death penalty but allowed the defendant to reopen his appeal to address *Foster* sentencing errors. The court remanded to the trial court for the purpose of correcting those *Foster* sentencing errors only. On remand, the defendant filed a motion to withdraw his guilty plea, which the trial court denied on the ground that the issue of the validity of the guilty pleas was barred by the doctrine of res judicata. The Ohio Supreme Court held that res judicata was an appropriate ground for denying the motion. As a second ground for affirming the trial court's denying the motion to withdraw the guilty plea, the Ohio Supreme Court quoted the holding of *Judges* as follows: "Crim. R. 32.1 does not vest jurisdiction in the trial court to maintain and determine a motion to withdraw the guilty plea subsequent to an appeal and affirmance by the appellate court." *Ketterer* at 460, Para. 61.

In *Judges*, Ronald Asher entered a guilty plea to murder. He appealed and the Belmont County Court of Appeals affirmed. Asher filed in the trial court a motion to withdraw his guilty plea. The trial court granted the motion and set a date for retrial. The State did not appeal but subsequently special prosecutors filed for a writ of prohibition. The appellate court denied the writ but the Ohio Supreme Court reversed. The Ohio Supreme Court held that the trial court lacked jurisdiction to grant the motion to withdraw the guilty plea because the appellate court's decision on the voluntariness of the guilty plea became the law of the case and the trial court was bound to follow it.

The State of Ohio is aware of at least three cases in which this court relied on *Judges* to hold that trial courts, when cases are remanded to impose post release control, lack jurisdiction to exceed the mandate on remand to entertain other motions for other relief.

In the instant case, the Appellant neither requested nor received relief beyond a new entry imposing the original sentence. The only possible way that *Judges* would apply is if the trial court should have declined to issue a new entry in the first place, on the ground that the Appellant had already had her direct appeal. As the parties did not brief that issue and neither party cited *Judges*, it seems unlikely that the Ohio Supreme Court vacated and remanded *Griffin* for the purpose of applying *Judges*.

If, however, the briefing instructions of January 7, 2011 cite *Judges* to refer to the broader issue of res judicata, then Appellee, the State of Ohio, strongly suggests that the Ohio Supreme Court intended to apply *Ketterer* to *Griffin* to bar Appellant from relitigating the issue of the single judge.

The State of Ohio's second proposition of law argued that this court had erred by declining to apply the doctrine of res judicata to bar the Appellant from relitigating the single judge issue when a different panel of this court had already decided that issue against her. The broader discussion of res judicata in *Ketterer* supports the State's argument. The dissent in *State v. Griffin* would have decided *Griffin* in the State's favor on the ground of res judicata. The logical conclusion, the State suggests, is that the Ohio Supreme Court intended that the Appellant be barred by the doctrine of res judicata from obtaining relief that the Ohio Supreme Court has already said cannot be raised in habeas proceedings. *State ex rel Rash v. Jackson* 102 Ohio St. 3d 145, 2004 Ohio 2053.

Although the parties in *Griffin* never argued *Judges* nor cited *Judges*, each party rigorously argued its position on the doctrine of res judicata. The State's second proposition of law was as follows:

**Proposition of Law II:** Res Judicata precludes a litigant from using a resentencing entry issued pursuant to *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330 to relitigate an issue when that defendant has already litigated the same issue on direct appeal *State v. Fischer* \_\_\_\_ Ohio St.3d \_\_\_\_, 2010 Ohio 6238,

The Ohio Supreme Court in *Fischer* eschews the argument that a defendant who has fully litigated his conviction on appeal is entitled to another appeal if there was a *Baker* error in the first entry. On page 14 of that opinion, para.38, the court calls that argument "creative," before rejecting it. The court remarks that *Baker* has nothing to do with void or voidable sentences

The question the court accepted in *Fischer* is "whether a direct appeal from a resentencing ordered pursuant to *State v. Bezak* is a first appeal as of right." Id. Para 5. The court holds it is not. An appeal from a resentencing necessitated by a court's omitting a sentence of post release control is limited to issues about the post release control only; issues that have already been litigated remain barred by the doctrine of res judicata.

*Fischer* "is limited to a discrete vein of cases: those in which a court does not properly impose a statutorily mandated period of post release control." Id at para 32, p. 12. When a court fails to impose post release control, that issue may be raised at any time. However, the court rejected the argument that an entry deficient under *Baker* entitles a defendant to relitigate issues already decided. In her Memorandum on Remand, Appellant essentially makes the same argument that *Fischer* did.

There is a difference between a sentencing opinion that contains errors and a sentencing opinion that fails to impose part of a sentence. The Ohio Supreme Court has said that post

release control is part of the sentence. A comparable issue with a sentencing entry under R.C. 2929.03 might be if the court sentenced a defendant to life, but left out the period after which the defendant would be eligible for parole. The Ohio Supreme Court in *Fischer* recognized at para 39, the irony that would prevent a reviewing court from correcting sentencing errors if every sentencing entry that was contrary to law failed to be a final order subject to review.

Although *Fischer* is limited to post release control cases, dicta about res judicata, illegal sentences, and sentences that are only partly void, deflates the theory that a *Baker* error renders an entry a non-final order and an appeal therefrom "invalid." The court rejected that argument.

If a court fails to impose post release control, that issue may be raised at any time. *Fischer*. However, it is not the entire sentence that is void but only the court's failing to impose post relief control. At a resentencing, and on appeal from a resentencing, a defendant is barred by the doctrine of res judicata from raising any other issue, except the post release control. If a defendant in a capital case goes to trial before a single judge and fails to raise the issue on appeal or, as did Sandra Griffin, fully litigates the issue on appeal and in post conviction petition, that defendant is barred by the doctrine of res judicata from raising that issue again.

A majority of this court in *Griffin* remarked that the Ohio Supreme Court had never decided whether an appeal acts as a bar to relitigating the same issues after a resentencing entry. The court settled that question in *Fischer*.

The Ohio Supreme Court in *State ex rel Rash v. Jackson* 102 Ohio St. 3d 145, 2004 Ohio 2053, held that a conviction based on a guilty plea before a single judge was not void but voidable. Defendant Rash had litigated the single judge issue on direct appeal after the appellate court had granted him leave to reopen his appeal. The court had not decided *State v. Parker*, 95

Ohio St.3d 524, 2002 Ohio 2833, at that time. The appellate court overruled Rash's assignment of error raising the single judge *Parker* issue. After the court decided *Parker*, Rash filed for a writ of habeas corpus. The court said "Rash may not use habeas corpus to gain successive appellate reviews of the same issue." The court in *Rash* said that a *Parker* error rendered a judgment not void but voidable. Therefore, the rule of finality should apply.

In the instant case, Appellant actually litigated, in 1992, the exact issue that she won reversal on in 2010. There was nothing new, except that the Ohio Supreme Court had decided *State v. Parker*, after Appellant's conviction had already become final. Finality matters. Even when a change in the law would have benefitted a defendant at trial or on appeal, if all appeals have been pursued and decided against the defendant, the defendant is unentitled to the benefit of the new law.

In the instant case, the old law benefitted Appellant. The single judge procedure precluded even the possibility of the death penalty. Under the facts of the instant case, the death penalty was a real possibility. This defendant was not a getaway driver with a bad boyfriend. She planned the murder for months, spent the night before the murder in the victim's bed, and gathered the victim's gun collection and cash while her accomplice shot the victim in the head.

The State of Ohio respectfully submits that the Ohio Supreme Court decided *Griffin* as it did to prevent the deluge suggested by *State v. Mitchell* 187 Ohio App.3d 3154, 2010-Ohio-1766. In that case, the Lucas County Court of Appeals said there is no difference between an entry that fails to mention post release control and an entry that omits the words that the defendant was found guilty after a bench trial (saying instead that the defendant was convicted). The Lucas County Court said such a judgment was void. Res judicata, the court said, cannot

apply when the order appealed from is void. Therefore, the court held, a direct appeal was not a bar to a new sentencing entry and a new appeal from that new sentencing entry. After *Fischer*, *Mitchell* is of questionable worth.

If every entry that suffers a *Baker* problem be void, nothing would prevent prosecutors (except arguably in the case of convictions reversed on insufficient evidence) from requesting final judgments and relitigating reversed convictions. If the Ohio Supreme Court had not reaffirmed that res judicata bars a second appeal, most defendants [as entries before *Baker* seldom included all information necessary under Crim. R. 32(C)] would have relitigated every case, even if there has been no change in the law.

The State of Ohio suggests that the Ohio Supreme Court decided *Griffin* and *Fischer* as it did to avoid opening the prison doors. The State has no statistics on how many persons used the single judge procedure before *Parker*. The State suggests, however, that it is many times the number of persons on death row.

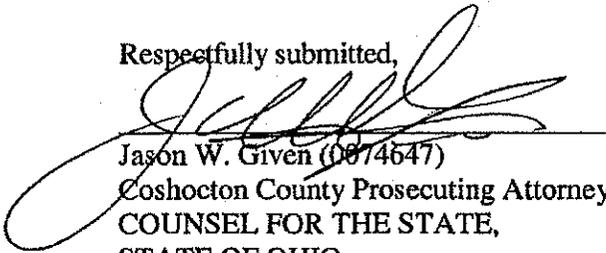
#### CONCLUSION

The Ohio Supreme Court remanded the case not for reconsideration in light of *State v. Ketterer* but to apply *Ketterer*. The State respectfully suggests that if the Ohio Supreme Court intended to grant the State only partial relief, it would have said so. However, under dicta in *State v. Fischer*, even if the State's first proposition of law, that a final order is the combination of an entry and an opinion under R.C. 2929.03, regardless of whether death is a possibility, be rejected, Appellant's conviction should still be affirmed. Res judicata bars relitigating issues already litigated; a *Baker* error fails to invalidate an appeal actually decided and fails to give a defendant another chance. *Ketterer*; *Fischer*.

In her Memorandum Regarding Remand, the Appellant argues that this court should still reverse her conviction. If the Ohio Supreme Court had intended that result, it had only to do nothing.

The State, the State of Ohio, respectfully requests that this court either affirm Appellant's conviction or dismiss the appeal on the ground that Appellant already had her direct appeal in 1992. If the court decides to dismiss the appeal, The State respectfully requests that the court state clearly that the appeal is being dismissed because the issues are barred by the doctrine of res judicata.

Respectfully submitted,

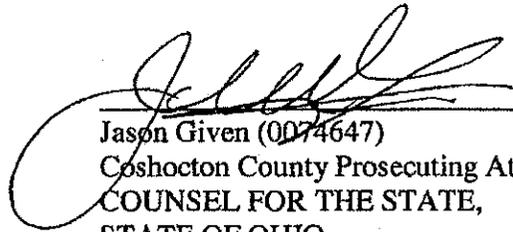


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Proof of Service

I certify that a copy of this Brief was sent by ordinary U.S. mail to counsel for Appellant, Stephen Hardwick, Assistant State Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215 on February 10, 2011.



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FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff

-vs-

SANDRA GRIFFIN

Defendant

JUDGES:

Hon. William B. Hoffman, P.J.

Hon. Sheila G. Farmer, J.

Hon. Julie A. Edwards, J.

Case No. 09-CA-21

O P I N I O N

CHARACTER OF PROCEEDING:

On Remand from the Supreme Court of  
Ohio, Case No. 2010-1434

JUDGMENT:

Original Reversal & Remand Reimposed

DATE OF JUDGMENT ENTRY:

April 1, 2011

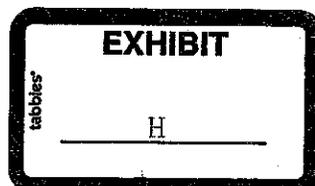
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{¶1} On February 27, 1989, the Coshocton County Grand Jury indicted Sandra Griffin on several counts, including one count of aggravated murder with death and firearm specifications in violation of R.C. 2903.01(A), R.C. 2929.04(A)(7), and R.C. 2941.141.

{¶2} On November 1, 1989, Ms. Griffin waived her right to a speedy trial and her right to be tried by a three-judge panel or a jury. The state agreed not to pursue the death penalty, but did not dismiss the death specification.

{¶3} A trial before a single judge commenced on December 7, 1989. The trial court found Ms. Griffin guilty of all counts except two. By judgment entry on sentencing filed January 29, 1990, the trial court sentenced Ms. Griffin to an aggregate term of life imprisonment with parole eligibility after thirty years, and ordered her to serve three years actual incarceration on the firearm specification, to be served consecutively.

{¶4} This court affirmed the conviction. See, *State v. Griffin* (1992), 73 Ohio App.3d 546, further appeal dismissed (1992), 64 Ohio St.3d 1428.

{¶5} On August 4, 2009, Ms. Griffin filed a motion for a final appealable order pursuant to *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330. On August 27, 2009, the trial court filed a new judgment entry on sentencing, once again sentencing Ms. Griffin to life imprisonment with parole eligibility after thirty years plus the three years for the firearm specification.

{¶6} Ms. Griffin filed an appeal, challenging the fact that a single judge heard her capital trial and sentencing hearing. This court, after lengthy analysis on several issues, including the application of *Baker*, R.C. 2929.03(F), prior direct appeal, non-final

orders, and finality of judgments, reversed and remanded the case for new trial. *State v. Griffin*, Coshocton App. No. 09CA21, 2010-Ohio-3517.

{¶7} The state of Ohio filed an appeal with the Supreme Court of Ohio. On December 9, 2010, the Supreme Court of Ohio entered the following decision:

{¶8} "The judgment of the court of appeals is vacated, and the cause is remanded to the court of appeals for application of *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9." *State v. Griffin*, 127 Ohio St.3d 266, 2010-Ohio-5948, ¶2.

{¶9} This matter is now before this court for determination in light of the Supreme Court of Ohio's remand.

{¶10} In *Ketterer* at ¶17, the Supreme Court of Ohio specifically found, in aggravated murder cases, R.C. 2929.03(F) determines the nature of "a final appealable order":

{¶11} "We distinguish the present case from *Baker* and agree with the state that in aggravated-murder cases subject to R.C. 2929.03(F), the final, appealable order consists of the combination of the judgment entry and the sentencing opinion. Because R.C. 2929.03(F) requires the court to file a sentencing opinion, *Baker* does not control this case, because *Baker* addressed only noncapital criminal cases, in which a judgment of conviction alone constitutes a final, appealable order. R.C. 2929.03(F) requires that a separate sentencing opinion be filed in addition to the judgment of conviction, and the statute specifies that the court's judgment is not final until the sentencing opinion has been filed. Capital cases, in which an R.C. 2929.03(F) sentencing opinion is necessary, are clear exceptions to *Baker*'s 'one document' rule."

{¶12} In *Ketterer*, the defendant pled guilty to aggravated murder and was sentenced to death by a three-judge panel. A sentencing opinion pursuant to R.C. 2929.03(F) was filed. In the case sub judice, Ms. Griffin was tried and found guilty of aggravated murder by a single judge. Ms. Griffin had waived her right to a three-judge panel because the state had agreed not to pursue the death penalty, although the state did not dismiss the death specification. She was sentenced to life imprisonment with parole eligibility after thirty years.

{¶13} During the time of appellant's case, R.C. 2929.03(F) read as follows:

{¶14} "\*\*\*\* The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. The court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed."

{¶15} R.C.2929.03(D)(3), applicable during appellant's case, stated the following:

{¶16} "Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after

receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

{¶17} "(a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

{¶18} "(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment."

{¶19} The threshold question is whether R.C. 2929.03(F) applies to a defendant who never had a mitigation hearing under R.C. 2929.04. Clearly, the record sub judice establishes the imposition of the death penalty was never to be considered. Ms. Griffin was sentenced to life imprisonment with parole eligibility after thirty years pursuant to R.C. 2929.03(D)(3)(b). There was never a finding on the question of aggravating circumstances outweighing mitigating factors in Ms. Griffin's case. By not having a mitigation hearing, it is as if the procedures set forth in R.C. 2929.03(D) are bypassed.

{¶20} R.C. 2929.03(F) references subsection (D) as the predicate to the filing of a separate opinion on weighing the mitigation factors vis-à-vis the aggravating circumstances. In this case, there was no need for a separate opinion pursuant to R.C. 2929.03(F) because the procedures of R.C. 2929.03(D) were not utilized.

{¶21} We therefore conclude that the holding in *Ketterer* as it applies to the issue of a final appealable order does not apply in this case. There was no final

appealable order until the August 27, 2009 judgment entry on sentencing. The holding of our previous decision in this case applies. There was no need for a mitigation entry under R.C. 2929.03(F).

{¶22} In *State ex rel. DeWine v. Burge*, \_\_\_ Ohio St.3d \_\_\_, 2011-Ohio-235, Justice Lanzinger, in a concurring opinion at ¶24, discussed whether new appellate rights emerge from a *Baker* violation:

{¶23} "I concur in the court's opinion, but write separately to note that our decision today leaves open the question whether new appellate rights arise from a new sentencing entry issued in order to comply with Crim.R. 32(C).<sup>FN2</sup> We have held that a sentencing entry that violates Crim.R. 32(C) renders that entry nonappealable. *State ex rel. Culgan v. Medina Cty. Court of Common Pleas*, 119 Ohio St.3d 535, 2008-Ohio-4609, 895 N.E.2d 805, ¶9. In light of the facts of the present case, we eventually will need to determine what effect an appellate decision has when the appellate court's jurisdiction was premised upon a sentencing entry that violated Crim.R. 32(C) and was thus nonappealable.

{¶24} "FN2. The state has raised this issue in its second proposition of law in *State v. Allen*, case No. 2010-1342, 126 Ohio St.3d 1615, 2010-Ohio-5101, 935 N.E.2d 854, and *State v. Smith*, case No. 2010-1345, 126 Ohio St.3d 1615, 2010-Ohio-5101, 935 N.E.2d 854, both of which we accepted for review and held for our decision in the case. The issue is also pending in *State v. Lester*, which we agreed to review on order of a certified conflict and on a discretionary appeal, case Nos. 2010-1007, 126 Ohio

St.3d 1581, 2010-Ohio-4542, 934 N.E.2d 354 and 2010-1372, 126 Ohio St.3d 1579, 2010-Ohio-4542, 934 N.E.2d 353."<sup>1</sup>

{¶25} In *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, paragraphs three and four of the syllabus, a case involving the failure to properly sentence on postrelease control, the Supreme Court of Ohio held the scope of an appeal from a resentencing hearing is limited to issues arising during the resentencing hearing:

{¶26} "Although the doctrine of res judicata does not preclude review of a void sentence, res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence.

{¶27} "The scope of an appeal from a resentencing hearing in which a mandatory term of postrelease control is imposed is limited to issues arising at the resentencing hearing."

{¶28} On the issue of res judicata and postrelease control resentences, the *Fischer* court explained the following at ¶¶30-31:

{¶29} "Correcting the defect without remanding for resentencing can provide an equitable, economical, and efficient remedy for a void sentence. Here, we adopt that remedy in one narrow area: in cases in which a trial judge does not impose postrelease control in accordance with statutorily mandated terms. In such a case, the sentence is void. Principles of res judicata, including the doctrine of the law of the case, do not preclude appellate review. The sentence may be reviewed at any time, on direct appeal or by collateral attack.

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<sup>1</sup>We note as of March 23, 2011, the *Allen* and *Smith* cases are still stayed, and *Lester* is currently set for oral argument on April 6, 2011.

{¶30} "Our decision today is limited to a discrete vein of cases: those in which a court does not properly impose a statutorily mandated period of postrelease control. In cases involving postrelease control, we will continue to adhere to our narrow, discrete line of cases addressing the unique problems that have arisen in the application of that law and the underlying statute. In light of the General Assembly's enactment of R.C. 2929.191, it is likely that our work in this regard is drawing to a close, at least for purposes of void sentences. Even if that is not the case, however, we would be ill-served by the approach advocated by the dissent, which is premised on an unpalatable and unpersuasive foundation."

{¶31} We therefore conclude there has been no guidance provided to the appellate courts on the applicability of res judicata to a non-final order pursuant to *Baker*.

{¶32} Faced with this open issue, we are forced to conclude that under *Baker*, Ms. Griffin's assignment of error in raising *State v. Parker*, 95 Ohio St.3d 524, 2002-Ohio-2833, is valid. Our original reversal and remand are unaffected by *Ketterer*, and are hereby reimposed. See, *State v. Griffin*, Coshocton App. No. 09CA21, 2010-Ohio-3517.

By Farmer, J.

Edwards, J. concur and

Hoffman, P.J. dissents.

s/ Sheila G. Farmer

s/ Julie A. Edwards

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*Hoffman, P.J., dissenting*

{¶33} I respectfully dissent for the reasons set forth in my dissent in *State v. Griffin*, Coshocton App. No. 09CA21, 2010-Ohio-3517.

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HON. WILLIAM B. HOFFMAN

