

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, Fifth Appellate
 Sandra Griffin, : District, Case No. 2009CA21
 :
 :
 Defendant-Appellee. :

Memorandum in Response of Sandra Griffin

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This Court Should not Take this Case

This Court should decline to hear the State's appeal because 1) the trial court did exactly what the State asked when the trial court issued the first final appealable order in this case, 2) the original "judgment entry of sentence" is not a final order even under the loosened standards urged by the Ohio Prosecuting Attorney's Association, 3) the State's representation that the record contains an R.C. 2929.03(F) sentencing opinion is simply false, 4) the State's position that courts of appeals can make binding judgments on the merits in the absence of subject matter jurisdiction would create even more confusion in the lower courts; and 5) the State does not contest that Miss Griffin is entitled to a new trial in any decision that reaches the merits.

This Court should also reject the State's request for summary reversal because the State's factual allegations are contradicted by the record and because the consequences of the State's assertions would dramatically undermine finality of capital cases from other counties. As the documents that Miss Griffin has attached to her filings in this Court show, this record does not contain an R.C. 2929.03(F) sentencing opinion as the State claims. Further, the Fifth District's decision was narrow, but the State seeks a sweeping ruling that R.C. 2929.03(F) requires a sentencing opinion before a judgment of conviction is a final order applies even when no 2929.03(F) hearing was held. By contrast, the Fifth District issued a narrow holding that followed the language of R.C. 2929.03(F), which states that the opinion is only necessary "in a case in which a sentencing hearing is held pursuant to" R.C. 2929.03.

Further, even if this Court agreed with the State that R.C. 2929.03(F) requires a sentencing opinion even when an R.C. 2929.03 hearing never happened, the remedy is dismissal of this appeal for want of a final order. If that section applies to this case, this case still lacks a final order because no such opinion exists.

This is a fact bound case with a narrow holding. The State relies on factual allegations that the record disputes, and the State has waived or invited the error it claims exists. Further, any ruling for the State would seriously undermine the finality of numerous other non-death capital cases. This Court should not accept this case.

Statement of the Case and the Facts

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-1.¹ 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

¹ Unless otherwise noted, all references to exhibits and the appendix are to the appendix to Miss Griffin’s May 27, 2011 Memorandum Opposing Stay.

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), 6th 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, 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":

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.

State's Memorandum, Aug. 12, 2009, Exhibit C, Apx. A-7.

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*, 5th 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).² By contrast, Miss Griffin pointed out that the court of appeals found that no R.C. 2929.03(F) sentencing opinion existed. Memorandum in Response, Sept. 22, 2010, Case No. 2010-1434, at 6-7.

² The State repeats the misstatement on page 10 of its current jurisdictional memorandum.

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, ¶2.³

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*, 5th Dist. No. 09CA21, 2011-Ohio-1638, at ¶19-21, Apx. A-67 to A-68, with *State v. Griffin*, 5th Dist. No. 09CA21, 2010-Ohio-3517, at ¶13-14, 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 mandate. State's Jurisdictional Memorandum, p. 10.⁴ The State asserts that the record contains a sentencing "opinion" but again does not provide this Court a copy as permitted under S.Ct. Prac. R. 3.1(D)(3).

³ Under S.Ct. Prac. R. 3.2(B), Miss Griffin was not allowed to attach any part of the record to refute the State's allegations.

⁴ 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.

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.

Argument

Appellee's Proposition of Law No. I

Because any judgment by an appellate court in the absence of a final order is void for lack of subject matter jurisdiction, “[p]rinciples of res judicata, including the doctrine of the law of the case, do not preclude” review on the merits of the first final order issued in a case. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, applied.

The lack of a final appealable order “deprive[s] the appellate court of jurisdiction to consider and correct [any] error.” 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.’”); See also *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, 2000-Ohio-260, at ¶15 (“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.”).

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)⁵, citing *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267.

In addition, this Court has cited with approval the Fifth District’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 in *McAllister v. Smith*, 119 Ohio St.3d 163, 2008-Ohio-388, ¶7.

Finally, this Court’s decision in *Fischer* underlines the distinction between a valid judgment with void portions, and a judgment that is void ab initio. This Court explained that because postrelease control error did not render an entire sentence void, a defendant with improper postrelease control cannot appeal his sentence anew. *Id.* But the Court carefully distinguished postrelease control error from failure to issue a final appealable order 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). And while sentencing error “does not deprive the appellate court of jurisdiction to consider and correct the error[.]” the lack of a

⁵ *Fischer* 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 requires a complete resentencing hearing rather than a hearing restricted to the void portion of the sentence.” *Fischer*, at ¶36.

final order does. *Gehm*, at ¶13-14; *Gen. Acc. Ins. Co.*, 44 Ohio St.3d at 20; *Threatt*, at ¶22; *Hubbard*, at ¶15.

Appellant's and Appellee's Proposition of Law No. II:

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). *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831 applied.

I. The State's version of the facts and the law keeps changing.

The State provided accurate information to the trial judge who had tried the case, but the State provided less accurate information to the court of appeals which reviewed the paper record, and has provided false information to this Court, which did not have direct access to the record:

- The State told the trial judge that there was no final order.
- The State told the court of appeals that an “entry” and “opinion” are two distinct documents.
- The State told this Court that the Court of appeals “refused” to follow the law because the “sentencing entry” in this case was really a “sentencing opinion[,]” even though the State never articulated that theory in the court of appeals.

II. The trial court never held an R.C. 2929.03 sentencing hearing, and the trial court never issued an R.C. 2929.03(F) sentencing opinion.

The State's appeal is premised upon factual assertions that the record contradicts. 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*. Exhibits A and B, Apx., A-1, A-3. To make matters worse, the State falsely accuses the court of appeals of having “refused to apply” this Court's mandate. State's Memorandum at 10. 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.

III. Contrary to the State's allegations of willful misconduct, the Court of Appeals carefully applied this Court's decision in *Ketterer* to the unique facts of this case.

A. R.C. 2929.03(F) requires a sentencing opinion only when the trial court has held a hearing under that section.

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 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 unique 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 Fifth District 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.

B. 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,⁶ still can get final orders,⁷ and would be automatically reversed on appeal from those final orders.⁸ The State is, ironically, arguing for the very result that this Court avoided in *Pratts*.

⁶ *Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, at the syllabus.

⁷ *Mitchell v. Smith*, 120 Ohio St.3d 278, 2008-Ohio-6108, citing *McAllister v. Smith*, 119 Ohio St.3d 163, 2008-Ohio-388.

⁸ *State v. Parker*, 95 Ohio St.3d 524, 2002-Ohio-2833.

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. Moreover, especially if this Court overrules the manner-of-conviction requirement of *Baker*,⁹ very few one-judge-capital defendants would be able to win a claim that their judgments are non-final.

C. The State waived the argument it presents to this Court, because although State now asserts that the judgment entry of sentence was a “sentencing opinion” under R.C. 2929.03(F), 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. See, *State v. Martello*, 97 Ohio St. 3d 398; 2002 Ohio 6661 at ¶41, n.2 (declining to decide an issue raised for the first time in this Court). In fact, in its brief on remand, the State appears to have conceded that the opposite was true. In that brief, the State argued 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.”

⁹ *State v. Lester*, Case Nos. 2010-1007, 1372, Oral Argument, April 6, 2011.

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. Entry, Dec. 21, 1989, Exhibit A, Apx. A-3. This record does not include an R.C. 2929.03(F) sentencing “opinion.”

D. The State invited any error by agreeing in the trial court that Miss Griffin was entitled to a final appealable order.

The State invited any error in the issuance of the final order by filing a memorandum agreeing that Miss Griffin was entitled to a final order in the trial court. See, State’s Memorandum, Aug. 12, 2009, Exhibit C, Apx. A-7, *State ex rel. Dewine v. Burge*, 128 Ohio St.3d 236. 2011-Ohio-235 (“Appellants themselves, in their complaint for extraordinary relief in prohibition, requested that Judge Burge ‘issue a corrected sentence pursuant to *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330.’ Again, appellants thus invited any error by the court of appeals in holding that Smith’s sentencing entry did not comply with Crim.R. 32(C) and *Baker*.”).

E. 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." Amicus 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. Entry, January 29, 1990, Exhibit B, Apx. A-3. Because Miss Griffin prevails even under the OPAA's standard, the OPAA's argument provides no reason accept this case.

Conclusion

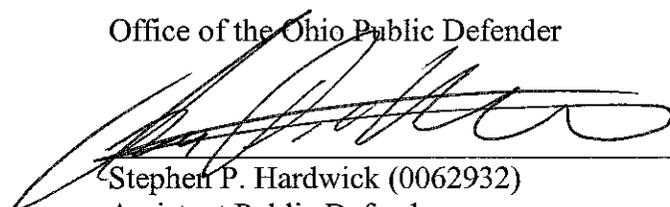
Miss Griffin did exactly what this Court has held she should. She filed a motion for a final appealable order and timely appealed from that order. The court of appeals issued a narrow ruling that is unlikely to affect any other case.

By contrast, the State's arguments are incorrect and are based on facts contradicted by the record. The doctrines of waiver and invited error further complicate the State's theory. Finally, adopting the State's theory would seriously undermine the finality of other non-death capital cases.

This Court should decline to hear the State's appeal. Because of the disputes over the record and the implications of how adopting the State's theory would affect other cases, this case is ill-suited for summary resolution. So if this Court decides to hear the State's appeal, it should decide the case only after full briefing and argument.

Respectfully submitted,

Office of the Ohio Public Defender



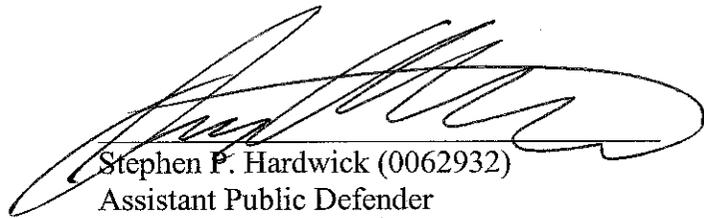
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Certificate of Service

I certify that a copy of the foregoing was sent by regular U.S. Mail to Jason Given,
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