

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO,	:	Case No. 11-0202
Plaintiff-Appellee,	:	
v.	:	On Appeal from the Meigs County Court of Appeals Fourth Appellate District
ERIC A. QUALLS,	:	
Defendant-Appellant.	:	Court of Appeals Case No. 10CA8

---

**REPLY BRIEF OF APPELLANT ERIC A. QUALLS**

---

COLLEEN S. WILLIAMS #0065079  
Meigs County Prosecutor

OFFICE OF THE OHIO PUBLIC DEFENDER

AMANDA BIZUB-FRANZMANN #0085255  
Assistant Meigs County Prosecutor  
(COUNSEL OF RECORD)

KATHERINE A. SZUDY #0076729  
Assistant State Public Defender  
(COUNSEL OF RECORD)

Meigs County Prosecutor's Office  
117 W. 2<sup>nd</sup> Street  
Pomeroy, Ohio 45769  
(740) 992-6371  
(740) 992-6567 – Fax

E. KELLY MIHOCIK #0077745  
Assistant State Public Defender  
  
250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 – Fax  
E-mail: Kathy.Szudy@OPD.Ohio.gov  
E-mail: Kelly.Mihocik@OPD.Ohio.gov

COUNSEL FOR STATE OF OHIO

COUNSEL FOR ERIC A. QUALLS

<b>FILED</b>
JUN 24 2011
CLERK OF COURT SUPREME COURT OF OHIO

**TABLE OF CONTENTS**

	<u>Page No.</u>
TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE CASE AND FACTS .....	1
ARGUMENT IN SUPPORT OF PROPOSITION OF LAW .....	1
<b><u>Proposition of Law:</u> If a defendant is notified about postrelease control at the sentencing hearing, but that notification is inadvertently omitted from the sentencing entry, such omission may not be corrected by the mere issuance of a nunc pro tunc entry .....</b>	<b>1</b>
<b>I. Summary of Argument.....</b>	<b>1</b>
<b>II. The law relating to postrelease control before December 23, 2010.....</b>	<b>1</b>
<b>A. The State’s argument that the trial court lacked jurisdiction to properly resentence Mr. Qualls, and that this Court lacks jurisdiction to hear Mr. Qualls’s case, ignores this Court’s decisions in <i>State v. Simpkins</i>, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 569, and <i>State ex rel. Carnail v. McCormick</i>, 126 Ohio St.3d 124, 2010-Ohio-2671, 931 N.E.2d 110, and the mandates of R.C. 2505.02(B)(1).....</b>	<b>2</b>
<b>1. The trial court had jurisdiction to conduct a de novo resentencing hearing.....</b>	<b>2</b>
<b>2. This Court has jurisdiction to hear Mr. Qualls’s case .....</b>	<b>5</b>
<b>3. An appeal may be taken from a nunc pro tunc judgment entry .....</b>	<b>6</b>
<b>B. The State’s reference on pages five and seven of its merit brief to a sentencing transcript should be stricken, as no transcript was included in the record on appeal .....</b>	<b>7</b>
<b>III. The law relating to postrelease control after December 23, 2010.....</b>	<b>9</b>
<b>IV. <i>Fischer</i> does not alter a defendant’s right to receive a hearing in compliance with R.C. 2929.191 when a trial court fails to properly impose postrelease control .....</b>	<b>9</b>

## TABLE OF CONTENTS

	<u>Page No.</u>
A. Revised Code Section 2929.191 unambiguously states that in order to fix a trial court’s deficient imposition of postrelease control, a defendant must receive a hearing before a trial court may issue a nunc pro tunc entry .....	9
B. Revised Code Section 2929.191’s requirement that a defendant receive a hearing before postrelease control is added to his or her sentence is consistent with the Ohio and United States Constitutions, and Crim.R. 43(A).....	9
V. <i>Fischer</i> may not be applied to any defendant who, at the time of the decision, had the right to a de novo resentencing hearing .....	9
CONCLUSION.....	10
CERTIFICATE OF SERVICE .....	11
APPENDIX:	
<i>State v. Eric Qualls</i> , Case Nos. 02 CR 020 and 04CA7, Meigs County Common Pleas Court, Entry (November 17, 2004).....	A-1
<i>State v. Eric Qualls</i> , Case No. 10CA8, Meigs County Court of Appeals, Fourth Appellate District, Notice of Transmission of Record (June 7, 2010) .....	A-2
R.C. 2505.02 .....	A-3
R.C. 2907.02 .....	A-6
R.C. 2907.05 .....	A-10
Ohio S.Ct. Prac. R. 4.3.....	A-14
Ohio S.Ct. Prac. R. 6.2.....	A-15
Ohio S.Ct. Prac. R. 6.3.....	A-18
Ohio App.R. 5 .....	A-20
Ohio App.R. 9 .....	A-24

## TABLE OF AUTHORITIES

	<u>Page No.</u>
<b>CASES:</b>	
<i>Green v. United States</i> (1961), 365 U.S. 301, 82 S.Ct. 653 .....	7
<i>Hernandez v. Kelly</i> , 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301 .....	3
<i>Mempa v. Rhay</i> (1967), 389 U.S. 128, 88 S.Ct. 254.....	7
<i>State v. Beasley</i> (1984), 14 Ohio St.3d 74, 471 N.E.2d 774.....	3, 4, 5
<i>State v. Bezak</i> , 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961 .....	4, 5
<i>State v. Boradnax</i> , 10th Dist. No. 07AP-785, 2008-Ohio-1799 .....	1
<i>State ex rel. Carnail v. McCormick</i> , 126 Ohio St.3d 124, 2010-Ohio-2671, 931 N.E.2d 110 .....	2, 5
<i>State ex rel. DeWine v. Burge</i> , Slip Op. No. 2011-Ohio-1755 .....	7
<i>State ex rel Grove v. Nadel</i> (1998), 81 Ohio St.3d 325, 691 N.E.2d 275.....	6
<i>State ex rel. Reynolds v. Basinger</i> , 99 Ohio St.3d 303, 2003-Ohio-3631, 791 N.E.2d 459 .....	6
<i>State v. Fischer</i> , 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332 .....	4, 5, 9
<i>State v. Jordan</i> , 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864.....	3, 4
<i>State v. Ketterer</i> , 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9 .....	6
<i>State v. Rutherford</i> , 2d Dist. No. 06CA13, 2006-Ohio-5132 .....	3
<i>State v. Simpkins</i> , 113 Ohio St.3d 1440, 2007-Ohio-1266, 863 N.E.2d 657.....	3
<i>State v. Simpkins</i> , 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 569.....	2, 3, 4, 5
<i>State v. Simpkins</i> , 8th Dist. No. 87692, 2006-Ohio-6028 .....	3
<i>State v. Qualls</i> , 128 Ohio St.3d 1424, 2011-Ohio-1049, 943 N.E.2d 571.....	1
<i>State v. Qualls</i> , 4th Dist. No. 10CA8, 2010-Ohio-5316.....	1

**TABLE OF AUTHORITIES**

	<u>Page No.</u>
<b>CASES: (cont'd)</b>	
<i>Westfield Ins. Co. v. Galatis</i> , 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256 .....	5
<b>STATUTES:</b>	
R.C. 2505.02 .....	2
R.C. 2907.02 .....	2
R.C. 2907.05 .....	2
R.C. 2929.14 .....	3
R.C. 2929.191 .....	9
R.C. 2967.28 .....	3, 4
<b>RULES:</b>	
Ohio S.Ct. Prac. R. 4.3 .....	1
Ohio S.Ct. Prac. R. 6.2 .....	1
Ohio S.Ct. Prac. R. 6.3 .....	1
Ohio App.R. 5 .....	2
Ohio App.R. 9 .....	8
Ohio Crim.R. 43 .....	9

## STATEMENT OF THE CASE AND FACTS

Mr. Qualls relies upon the Statement of the Case and Facts contained in his merit brief.<sup>1</sup>

### ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

#### PROPOSITION OF LAW

**If a defendant is notified about postrelease control at the sentencing hearing, but that notification is inadvertently omitted from the sentencing entry, such omission may not be corrected by the mere issuance of a nunc pro tunc entry.<sup>2</sup>**

#### **I. Summary of Argument.**

Mr. Qualls relies upon the arguments made in his merit brief for this section.

#### **II. The law relating to postrelease control before December 23, 2010.<sup>3</sup>**

---

<sup>1</sup>It should be noted that on page one, paragraph two of its merit brief, the State recites the underlying facts of the case sub judice. However, the State fails to provide any citations to the record. (State's Merit Brief, p. 1). S.Ct. Prac. R. 6.2(B)(3), S.Ct. Prac. R. 6.3(B).

<sup>2</sup>On pages seven through eight of its merit brief, the State argues against a "Second Assignment of Error." (State's Merit Brief, pp. 7-8). The argument pertains to an issue that Mr. Qualls raised in his merit brief to the Fourth District Court of Appeals, but was not accepted for review by this Court. Therefore, this Court should strike that portion of the State's merit brief. (See *State v. Qualls*, 128 Ohio St.3d 1424, 2011-Ohio-1049, 943 N.E.2d 571 ("The parties shall brief the issue stated at page 6 of the court of appeals' Entry filed January 13, 2011: 'If a defendant is notified about postrelease control at the sentencing hearing, but that notification is inadvertently omitted from the sentencing entry, can that omission be corrected with a nunc pro tunc entry?"). S.Ct. Prac. R. 4.3. See, also, *State v. Qualls*, 4th Dist. No. 10CA8, 2010-Ohio-5316.

<sup>3</sup> On page six of its merit brief, the State erroneously attempts to argue that Mr. Qualls "point[ed] to an unreported case from the 10th District to say that a nunc pro tunc entry is improper." (State's Merit Brief, p. 6). In a footnote, the State cites to that "unreported case" as being *State v. Boradnax*, 10th Dist. No. 07AP-785, 2008-Ohio-1799. (State's Merit Brief, p. 6, fn. 23). However, that case is nowhere in Mr. Qualls's merit brief. (See Qualls's Merit Brief, Table of Authorities, pp. iv-vii). In addition to the Ohio Revised Code, the legal authority to which Mr. Qualls cites to in explaining the law relating to postrelease control before December 23, 2010 were all cases that had been decided by this Court. (Qualls's Merit Brief, pp. 6-13).

- A. The State’s argument that the trial court lacked jurisdiction to properly resentence Mr. Qualls, and that this Court lacks jurisdiction to hear Mr. Qualls’s case, ignores this Court’s decisions in *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 569, and *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671, 931 N.E.2d 110, and the mandates of R.C. 2505.02(B)(1).**

The State attempts to subvert the substantive issues in Mr. Qualls’s case by making a “jurisdictional” argument. (State’s Merit Brief, pp. 3-5). The State erroneously asserts that the trial court lacked jurisdiction to conduct a de novo resentencing hearing, and that this Court now lacks jurisdiction to hear Mr. Qualls’s appeal. The State argues that Mr. Qualls did not file a notice of appeal within 30 days after his criminal conviction became final, and therefore, he has not “filed for leave to appeal under App.R. 5.” (State’s Merit Brief, pp. 3-5). But for the reasons stated below, both of the State’s arguments fail.

- 1. The trial court had jurisdiction to conduct a de novo resentencing hearing.<sup>4</sup>**

In *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, this Court ruled that a trial court has jurisdiction to conduct a resentencing hearing when the purpose of that hearing is to add a statutorily mandated portion of the defendant’s sentence. In making that ruling, this Court rejected the argument the State now makes: that the trial court lacked jurisdiction to conduct a de novo resentencing.

The procedural and factual history of *Simpkins* was explained by this Court as follows:

On May 21, 1998, appellant, Curtis Simpkins, pleaded guilty to two counts of rape in violation of R.C. 2907.02, felonies of the first degree, and to one count of gross sexual imposition in violation of R.C. 2907.05, a felony of the third degree. The trial court sentenced Simpkins on June 11, 1998, to a term of eight years’ incarceration

---

<sup>4</sup> On page seven of its merit brief, the State actually rebuts its own argument: “While a trial court’s jurisdiction over a criminal case is limited after it renders judgment, the trial court will retain jurisdiction to correct a sentence and is authorized to do so.” (State’s Merit Brief, p. 7).

for each count of rape and to three years' incarceration for the single count of gross sexual imposition, to be served concurrently. Although postrelease control was required, see R.C. 2929.14(F) and 2967.28, the journal entry on sentencing did not indicate that Simpkins was subject to postrelease control. *That error went uncorrected for more than seven years.*

In December 2005, however, the [S]tate moved to resentence Simpkins prior to his release from prison. The [S]tate asserted that the sentence imposed initially was void because it had not included postrelease control. The trial court held a hearing on the motion while Simpkins was still in custody and agreed that the initial sentence was void. The court resentenced Simpkins to the same sentence of incarceration imposed previously, but added a period of five years' postrelease control. The journal entry for the resentencing hearing reflects the imposition of postrelease control. Simpkins appealed, arguing that [this Court's] decision in *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301, d[id] not support the after-the-fact resentencing of a defendant who has nearly completed his sentence. The court of appeals rejected his claim.

Relying on *State v. Rutherford*, Champaign App. No. 06CA13, 2006-Ohio-5132, the court of appeals explained, "The trial court retained its jurisdiction to resentence appellant. R.C. 2967.28 mandates that a trial court impose a term of postrelease control for the offenses to which appellant pleaded guilty; therefore, the trial court must impose postrelease control orally at the sentencing hearing and transcribe such imposition in the court's journal entry. Failure to do so renders the sentence void. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864. Because appellant's 1998 sentence was void, resentencing was a proper remedy to correct the trial court's original error of omission. *Id.*; *State v. Beasley* (1984), 14 Ohio St.3d 74 [14 OBR 511], 471 N.E.2d 774." *State v. Simpkins*, Cuyahoga App. No. 87692, 2006-Ohio-6028, [at] ¶11.

[This Court] accepted appellant's discretionary appeal, *State v. Simpkins*, 113 Ohio St.3d 1440, 2007-Ohio-1266, 863 N.E.2d 657, which present[ed] a discrete proposition of law: "A defendant who has been sentenced to a term of imprisonment that does not include postrelease control may not be sentenced anew in order to add postrelease control unless the State has challenged the failure to include postrelease control in a timely direct appeal."

(Emphasis added.) *Simpkins* at ¶1-5.

This Court reaffirmed that a trial court must notify the defendant of postrelease control at his or her sentencing hearing and include that term of postrelease control in the judgment entry. Moreover, this duty is the “same as any other statutorily mandated term of a sentence.” *Simpkins* at ¶15, quoting *State v. Jordan*, 2004-Ohio-6085, at ¶26. Because “a trial court has a statutory duty to provide notice of postrelease control at the sentencing hearing, any sentence imposed without such notification is contrary to law’ and void.” *Simpkins* at ¶15, quoting *Jordan* at ¶23. This Court further noted that, “[t]he underpinning of [this Court’s] decisions from [*State v.*] *Beasley* [(1984, 14 Ohio St.3d 74] to [*State v.*] *Bezak* [114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961] is the fundamental understanding that no court has the authority to substitute a different sentence for that which is required by law. Because no judge has the authority to disregard the law, a sentence that clearly does so is void.” (Internal citations omitted.) *Simpkins* at ¶20. Moreover, “[a] trial court’s jurisdiction over a criminal case is limited after it renders judgment, *but it retains jurisdiction to correct a void sentence and is authorized to do so . . . .* Indeed, it has an obligation to do so when its error is apparent.” (Emphasis added, citations omitted.) *Id.* at ¶22. See also R.C. 2967.28.

Mr. Qualls filed a motion in the trial court requesting that he receive a de novo resentencing hearing. (Qualls’s Jan. 15, 2010 Mot. for De Novo Resentencing Hearing). As argued in Mr. Qualls’s merit brief, this Court has repeatedly addressed the consequences of a trial court’s failure to adhere to the mandatory requirements of the postrelease-control sentencing statutes. (See Qualls’s Merit Brief, pp. 6-12). Included within this Court’s postrelease-control precedent is the holding that a trial court always retains jurisdiction to correct a void sentence. *State v. Simpkins*, 2008-Ohio-1197. And even after this Court’s decision in *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, a trial court still retains jurisdiction to correct

the invalid imposition of postrelease control. *Fischer*, at paragraph two of the syllabus (“The new sentencing hearing to which an offender is entitled under *State v. Bezak* is limited to proper imposition of postrelease control.”). Thus, this Court has already reviewed, and rejected, the State’s argument that a trial court may not revisit an invalid imposition of postrelease control after the time for a direct appeal has lapsed. And the State has provided absolutely no authority or argument as to why this Court’s decision in *Simpkins* should be overruled. Cf. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, paragraph one of the syllabus (describing circumstances that justify the overruling of precedent).

**2. This Court has jurisdiction to hear Mr. Qualls’s case.**

Not only did the trial court have jurisdiction to resentence Mr. Qualls de novo, but this Court has jurisdiction over Mr. Qualls’s appeal. Mr. Qualls’s August 15, 2002 Judgment Entry did not include any language regarding the imposition of postrelease control. (Aug. 15, 2002 Judgment Entry). Thus, Mr. Qualls could not appeal any issues relating to that portion of his sentence until the trial court made that section of his sentence final and appealable. The State erroneously categorizes Mr. Qualls’s 2002 entry as the final, appealable order relating to postrelease-control issues. (State’s Merit Brief, p. 4). But this Court’s decisions hold the exact opposite—i.e., that a trial court’s failure to include postrelease control in a sentencing entry makes that entry both non-final and non-appealable. See *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671, 931 N.E.2d 110, ¶36 (“Ohio appellate courts have uniformly recognized that void judgments do not constitute final, appealable orders. The 1999 sentencing entry was not a final, appealable order, because it was void for failing to include the statutorily required mandatory term of postrelease control.”). (Internal citations omitted.)

Moreover, Mr. Qualls could not request a writ of mandamus or procedendo after the trial court denied his request for a de novo resentencing hearing. Extraordinary writs may issue only “if the trial court *refuses upon request or motion* to journalize its decision . . . .” (Emphasis added.) *State ex rel Grove v. Nadel* (1998), 81 Ohio St.3d 325, 326, 691 N.E.2d 275. At that point, “either party may compel the court to act by filing a writ of mandamus or a writ of procedendo” because “[a]bsent journalization of the judgment, [a party] cannot appeal it.” (Emphasis added.) *Id.* at 326-27. See also *State ex rel. Reynolds v. Basinger*, 99 Ohio St.3d 303, 2003-Ohio-3631, 791 N.E.2d 459, ¶5.

In this case, Mr. Qualls requested a resentencing hearing, and the trial court denied that request. Instead, it issued a nunc pro tunc entry, which for the first time included Mr. Qualls’s postrelease-control mandates. (Mar. 29, 2010 Nunc Pro Tunc Entry). Therefore, it was not until March 29, 2010 that the trial court journalized a final, appealable order relating to postrelease control. *Id.* Contrary to the cases involving extraordinary writs, Mr. Qualls did receive a journal entry reflecting his statutorily mandated sentence. But Mr. Qualls disagrees with the *remedy* that the trial court provided: Mr. Qualls submits that he should have received a de novo resentencing hearing rather than a nunc pro tunc entry. And the appropriate procedural vehicle to challenge the March 29, 2010 nunc pro tunc entry is through a timely direct appeal, which is exactly what Mr. Qualls did. (Qualls’s Apr. 26, 2010 Notice of Appeal).

**3. An appeal may be taken from a nunc pro tunc judgment entry.**

Furthermore, despite the State’s contrary position, a defendant may appeal from a nunc pro tunc judgment entry. See, e.g., *State v. Ketterer*, 126 Ohio St.3d 448, 2010-Ohio-3831, 935 N.E.2d 9, ¶5 (allowing appeal from a nunc pro tunc judgment entry). As stated in Sections II(A)(1) and II(A)(2), *supra*, when a nunc pro tunc entry alters the judgment imposed on a

defendant, he or she must be permitted to appeal from that entry. See *State ex rel. DeWine v. Burge*, Slip Op. No. 2011-Ohio-1755, O'Donnell, Pfeifer, Lanzinger, JJ., dissenting (recognizing that this is an open question in Ohio). Otherwise, the defendant's right to meaningful appellate review has been denied.

Postrelease control may only be imposed when the trial court advises the defendant of postrelease control at his or her sentencing hearing and includes that term of postrelease control in the sentencing entry. (Qualls's Merit Brief, pp. 6-15). Here, the nunc pro tunc entry altered Mr. Qualls' sentence—it was increased to include postrelease control. A defendant is entitled to challenge each and every aspect of his or sentence. See *Green v. United States* (1961), 365 U.S. 301, 309-310, 81 S.Ct. 653, 5 L.Ed.2d 670, Black, J., Douglas, C.J., and Brennan, J., concurring in part and dissenting in part (“Bad men, like good men, are entitled to be tried and sentenced in accordance with law, and when it is shown to us that a person is serving an illegal sentence our obligation is to direct that proper steps be taken to correct the wrong done, without regard to the character of a particular defendant or to the possible effect on others who might also want to challenge the legality of their sentences as they have the right to do ‘at any time.’”); *Mempa v. Rhay* (1967), 389 U.S. 128, 134, 88 S. Ct. 254, 19 L.Ed.2d 336 (sentencing is a critical stage of the proceedings). And consequently, when a trial court calls a judgment entry nunc pro tunc, it is still subject to appeal if it substantively alters the defendant's sentence that was contained in the original judgment entry.

**B. The State's reference on pages five and seven of its merit brief to a sentencing transcript should be stricken, as no transcript was included in the record on appeal.**

On page five of its merit brief, the State asserts that “[Mr.] Qualls was not only informed of the PRC, but the presiding judge clarified that PRC applied to the kidnapping charge only and

had counsel explain this to their client.” (State’s Merit Brief, p. 5). In support of this statement, the State cites to an August 15, 2002 sentencing hearing transcript. (State’s Merit Brief, p. 5, fn. 16). And on page seven of its merit brief, the State again requests that this Court “review the transcript” as a means to validate the trial court’s “proper” imposition of postrelease control. (State’s Merit Brief, p. 7). But no transcript of Mr. Qualls’s plea or sentencing hearing was filed with the court of appeals, and is therefore not in his record before this Court.

The first reference to a transcript came in the form of an entry by the trial court denying a pro se motion that was filed by Mr. Qualls. The entry stated, “Now comes the Court and finds that *there are no transcribed proceedings herein* and there is no date for the same; therefore, said motion should be and hereby is denied at Petitioner/Appellant’s cost.” (Emphasis added.) (Nov. 17, 2004 Entry). The next reference to a transcript occurs in the State’s response to Mr. Qualls’s motion for a de novo resentencing hearing. In the State’s response, it cited to a transcript of Mr. Qualls’s August 15, 2002 sentencing hearing. (State’s Feb. 8, 2010 Response to Defendant’s Motion for a De Novo Resentencing Hearing, p. 2, fn. 6). But no such transcript was presented or filed in the case.

Subsequently, despite not having an actual transcript on file, the trial court incorporated the State’s references of the August 15, 2002 sentencing-hearing transcript in its March 29, 2010 Entry denying Mr. Qualls’s request for a de novo resentencing hearing. (Mar. 29, 2010 Entry to Defendant’s Motion for a De Novo Resentencing Hearing). The lack of a transcript of proceedings was noted in Mr. Qualls’s 11(B), in which the clerk stated that Mr. Qualls’s record “*does not include a transcript of proceedings.*” (Emphasis added.) (Jun. 7, 2010 Notice of Transmission of Record in Appeal Case No. 10CA8). The State has never filed an App.R. 9(E) motion, and has never attached a copy of the August 15, 2002 transcript to any of its pleadings.

Accordingly, the State may not reference a transcript which is not a part of Mr. Qualls's record. And any such citation to material outside of the record must be stricken.

**III. The law relating to postrelease control after December 23, 2010.**

Mr. Qualls relies on the argument presented in his merit brief for this section.

**IV. *Fischer* does not alter a defendant's right to receive a hearing in compliance with R.C. 2929.191 when a trial court fails to properly impose postrelease control.**

**A. Revised Code Section 2929.191 unambiguously states that in order to fix a trial court's deficient imposition of postrelease control, a defendant must receive a hearing before a trial court may issue a nunc pro tunc entry.**

While the State is generally correct that a nunc pro tunc entry may be used to replace a nonconforming judgment entry so that it reflects what actually occurred at the sentencing hearing (State's Merit Brief, pp. 6-7), the law requires that postrelease control must be treated differently. R.C. 2929.191. (See Qualls's Merit Brief, pp. 10-13, 15-18). The General Assembly has specifically mandated the procedure for correcting judgment entries that do not properly impose postrelease control: the trial court must hold a new sentencing hearing. R.C. 2929.191(C). (See Qualls's Merit Brief, pp. 15-16). The State's argument that a trial court's issuance of a nunc pro tunc entry without a hearing may remedy an invalid imposition of postrelease control is a request that this Court disregard the legislature's duly enacted legislation.

**B. Revised Code Section 2929.191's requirement that a defendant receive a hearing before postrelease control is added to his or her sentence is consistent with the Ohio and United States Constitutions, and Crim.R. 43(A).**

Mr. Qualls relies on the argument presented in his merit brief for this section.

**V. *Fischer* may not be applied to any defendant who, at the time of the decision, had the right to a de novo resentencing hearing.**

Mr. Qualls relies on the argument presented in his merit brief for this section.

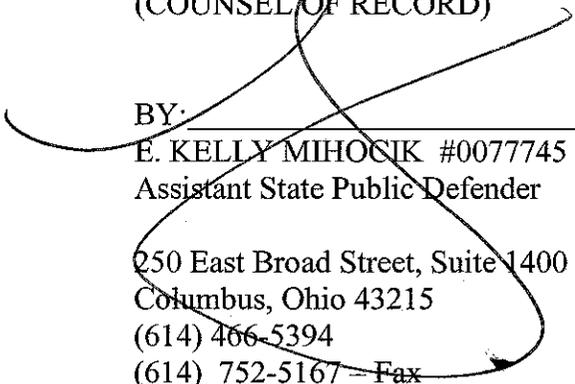
**CONCLUSION**

For the reasons stated in his Merit Brief and in this Reply Brief, Mr. Qualls asks this Court to adopt the proposition of law put forth by Mr. Qualls, reverse the judgment of the Fourth District Court of Appeals, and order that the Meigs County Court of Common Pleas resentence Mr. Qualls de novo.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

BY:   
KATHERINE A. SZUDY #0076729  
Assistant State Public Defender  
(COUNSEL OF RECORD)

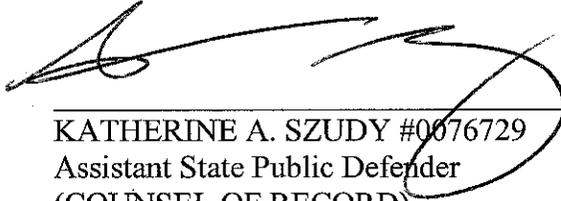
BY:   
E. KELLY MIHOSIK #0077745  
Assistant State Public Defender

250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 - Fax  
E-mail: Kathy.Szudy@OPD.Ohio.gov  
E-mail: Kelly.Mihocik@OPD.Ohio.gov

COUNSEL FOR ERIC A. QUALLS

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **Reply Brief of Appellant Eric A. Qualls** has been sent by regular U.S. mail, postage prepaid, to Amanda Bizub-Franzmann, Meigs County Assistant Prosecutor, Meigs County Prosecutor's Office, 117 W. 2<sup>nd</sup> Street, Pomeroy, Ohio 45769, on this 24th day of June, 2011.



---

KATHERINE A. SZUDY #0076729  
Assistant State Public Defender  
(COUNSEL OF RECORD)

COUNSEL FOR ERIC A. QUALLS

#345792

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO,	:	Case No. 11-0202
Plaintiff-Appellee,	:	On Appeal from the Meigs
v.	:	County Court of Appeals
ERIC A. QUALLS,	:	Fourth Appellate District
Defendant-Appellant.	:	Court of Appeals
	:	Case No. 10CA8

---

**APPENDIX TO REPLY BRIEF OF APPELLANT ERIC A. QUALLS**

---

IN THE COMMON PLEAS COURT OF MEIGS COUNTY OHIO

FILED  
MARLENE HARRISON  
CLERK OF COURTS  
MEIGS COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

-vs-

ERIC QUALLS,

Defendant.

V-154  
P-41

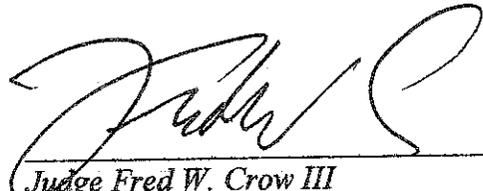
Case No. 02 CR 020  
04CA7

NOV 17 2004

COMMON PLEAS COURT

ENTRY

Now comes the Court and finds that there are no transcribed proceedings herein and there is no date for same; therefore, said motion should be and hereby is denied at Petitioner/Appellant's cost.

  
\_\_\_\_\_  
Judge Fred W. Crow III

cc: Judge/Corrections  
Prosecutor ✓  
Defendant ✓  
Defense Counsel  
APA ✓  
Judge Harsha 4 copies

sdm 11.19.04 mh

COMMON PLEAS COURT

COURT OF APPEALS

2010 JUN -7 PM 4:05

2010 JUN -7 PM 4:05

FILED

*Diane Lynch*  
CLERK OF COURTS  
MEIGS COUNTY, OHIO

FILED

*Diane Lynch*  
CLERK OF COURTS  
MEIGS COUNTY, OHIO

IN THE COURT OF APPEALS, MEIGS COUNTY, OH

STATE OF OHIO

NOTICE OF TRANSMISSION OF  
RECORD

PLAINTIFF-APPELLEE

VS

APPEAL CASE NO. 10CA8

ERIC QUALLS

DEFENDANT-APPELLANT

Pursuant to Appellate Rule 11-B you hereby notified that the record in the above captioned case was transmitted and filed in this court on June 7, 2010. It does not include a transcript of proceedings.

*Diane Lynch*  
DIANE LYNCH, CLERK  
Court of Appeals of  
Meigs County

June 7, 2010  
cc: Colleen Williams  
Eric Qualls  
4 copies Judge William Harshbarger

*DL*

PAGE'S OHIO REVISED CODE ANNOTATED  
Copyright (c) 2011 by Matthew Bender & Company, Inc  
a member of the LexisNexis Group  
All rights reserved.

\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 129TH OHIO GENERAL AS-  
SEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH FILE 18 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 \*\*\*

TITLE 25. COURTS -- APPELLATE  
CHAPTER 2505. PROCEDURE ON APPEAL

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2505.02 (2011)*

§ 2505.02. Final order

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitu-  
tion, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute  
and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not lim-  
ited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, sup-  
pression of evidence, a prima-facie showing pursuant to *section 2307.85 or 2307.86 of the Revised  
Code*, a prima-facie showing pursuant to *section 2307.92 of the Revised Code*, or a finding made  
pursuant to division (A)(3) of *section 2307.93 of the Revised Code*.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or  
without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234 [2305.23.4], 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018 [5111.01.8], and the enactment of *sections 2305.113 [2305.11.3], 2323.41, 2323.43, and 2323.55 of the Revised Code* or or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of *sections 2125.02, 2305.10, 2305.131 [2305.13.1], 2315.18, 2315.19, and 2315.21 of the Revised Code.*

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of *section 163.09 of the Revised Code.*

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

**HISTORY:**

GC § 12223-2; 116 v 104; 117 v 615; 122 v 754; Bureau of Code Revision, 10-1-53; 141 v H 412 (Eff 3-17-87); 147 v H 394. Eff 7-22-98; 150 v H 342, § 1, eff. 9-1-04; 150 v H 292, § 1, eff. 9-2-04; 150 v S 187, § 1, eff. 9-13-04; 150 v H 516, § 1, eff. 12-30-04; 150 v S 80, § 1, eff. 4-7-05; 152 v S 7, § 1, eff. 10-10-07.

PAGE'S OHIO REVISED CODE ANNOTATED  
Copyright (c) 2011 by Matthew Bender & Company, Inc  
a member of the LexisNexis Group  
All rights reserved.

\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 129TH OHIO GENERAL AS-  
SEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH FILE 18 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 \*\*\*

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2907. SEX OFFENSES  
SEXUAL ASSAULTS

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2907.02 (2011)*

§ 2907.02. Rape

(A) (1) No person shall engage in sexual conduct with another who is not the spouse of the of-  
fender or who is the spouse of the offender but is living separate and apart from the offender, when  
any of the following applies:

(a) For the purpose of preventing resistance, the offender substantially impairs the other  
person's judgment or control by administering any drug, intoxicant, or controlled substance to the  
other person surreptitiously or by force, threat of force, or deception.

(b) The other person is less than thirteen years of age, whether or not the offender knows  
the age of the other person.

(c) The other person's ability to resist or consent is substantially impaired because of a  
mental or physical condition or because of advanced age, and the offender knows or has reasonable

cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

(B) Whoever violates this section is guilty of rape, a felony of the first degree. If the offender under division (A)(1)(a) of this section substantially impairs the other person's judgment or control by administering any controlled substance described in *section 3719.41 of the Revised Code* to the other person surreptitiously or by force, threat of force, or deception, the prison term imposed upon the offender shall be one of the prison terms prescribed for a felony of the first degree in *section 2929.14 of the Revised Code* that is not less than five years. Except as otherwise provided in this division, notwithstanding *sections 2929.11 to 2929.14 of the Revised Code*, an offender under division (A)(1)(b) of this section shall be sentenced to a prison term or term of life imprisonment pursuant to *section 2971.03 of the Revised Code*. If an offender is convicted of or pleads guilty to a violation of division (A)(1)(b) of this section, if the offender was less than sixteen years of age at the time the offender committed the violation of that division, and if the offender during or immediately after the commission of the offense did not cause serious physical harm to the victim, the victim was ten years of age or older at the time of the commission of the violation, and the offender has not previously been convicted of or pleaded guilty to a violation of this section or a substantially similar existing or former law of this state, another state, or the United States, the court shall not sentence the offender to a prison term or term of life imprisonment pursuant to *section 2971.03 of the Revised Code*, and instead the court shall sentence the offender as otherwise provided in this division. If an offender under division (A)(1)(b) of this section previously has been convicted of or pleaded guilty to violating division (A)(1)(b) of this section or to violating an existing or former law of this

state, another state, or the United States that is substantially similar to division (A)(1)(b) of this section, if the offender during or immediately after the commission of the offense caused serious physical harm to the victim, or if the victim under division (A)(1)(b) of this section is less than ten years of age, in lieu of sentencing the offender to a prison term or term of life imprisonment pursuant to *section 2971.03 of the Revised Code*, the court may impose upon the offender a term of life without parole. If the court imposes a term of life without parole pursuant to this division, division (F) of *section 2971.03 of the Revised Code* applies, and the offender automatically is classified a tier III sex offender/child-victim offender, as described in that division.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under *section 2945.59 of the Revised Code*, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

(G) It is not a defense to a charge under division (A)(2) of this section that the offender and the victim were married or were cohabiting at the time of the commission of the offense.

**HISTORY:**

134 v H 511 (Eff 1-1-74); 136 v S 144 (Eff 8-27-75); 139 v S 199 (Eff 7-1-83); 141 v H 475 (Eff 3-7-86); 145 v S 31 (Eff 9-27-93); 146 v S 2 (Eff 7-1-96); 147 v H 32 (Eff 3-10-98); 149 v H 485. Eff 6-13-2002; 151 v S 260, § 1, eff. 1-2-07; 152 v S 10, § 1, eff. 1-1-08.

PAGE'S OHIO REVISED CODE ANNOTATED  
Copyright (c) 2011 by Matthew Bender & Company, Inc  
a member of the LexisNexis Group  
All rights reserved.

\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 129TH OHIO GENERAL AS-  
SEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH FILE 18 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 \*\*\*

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2907. SEX OFFENSES  
SEXUAL ASSAULTS

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2907.05 (2011)*

§ 2907.05. Gross sexual imposition

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

- (1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force.
- (2) For the purpose of preventing resistance, the offender substantially impairs the judgment or control of the other person or of one of the other persons by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.
- (3) The offender knows that the judgment or control of the other person or of one of the other persons is substantially impaired as a result of the influence of any drug or intoxicant administered

to the other person with the other person's consent for the purpose of any kind of medical or dental examination, treatment, or surgery.

(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

(5) The ability of the other person to resist or consent or the ability of one of the other persons to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the ability to resist or consent of the other person or of one of the other persons is substantially impaired because of a mental or physical condition or because of advanced age.

(B) No person shall knowingly touch the genitalia of another, when the touching is not through clothing, the other person is less than twelve years of age, whether or not the offender knows the age of that person, and the touching is done with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(C) Whoever violates this section is guilty of gross sexual imposition.

(1) Except as otherwise provided in this section, gross sexual imposition committed in violation of division (A)(1), (2), (3), or (5) of this section is a felony of the fourth degree. If the offender under division (A)(2) of this section substantially impairs the judgment or control of the other person or one of the other persons by administering any controlled substance described in *section 3719.41 of the Revised Code* to the person surreptitiously or by force, threat of force, or deception, gross sexual imposition committed in violation of division (A)(2) of this section is a felony of the third degree.

(2) Gross sexual imposition committed in violation of division (A)(4) or (B) of this section is a felony of the third degree. Except as otherwise provided in this division, for gross sexual imposi-

tion committed in violation of division (A)(4) or (B) of this section there is a presumption that a prison term shall be imposed for the offense. The court shall impose on an offender convicted of gross sexual imposition in violation of division (A)(4) or (B) of this section a mandatory prison term equal to one of the prison terms prescribed in *section 2929.14 of the Revised Code* for a felony of the third degree if either of the following applies:

(a) Evidence other than the testimony of the victim was admitted in the case corroborating the violation;

(b) The offender previously was convicted of or pleaded guilty to a violation of this section, rape, the former offense of felonious sexual penetration, or sexual battery, and the victim of the previous offense was less than thirteen years of age.

(D) A victim need not prove physical resistance to the offender in prosecutions under this section.

(E) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under *section 2945.59 of the Revised Code*, and only to the extent that the court finds that the evidence is

material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(F) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(G) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

**HISTORY:**

134 v H 511 (Eff 1-1-74); 136 v S 144 (Eff 8-27-75); 137 v H 134 (Eff 8-8-77); 143 v H 208 (Eff 4-11-90); 145 v S 31 (Eff 9-27-93); 147 v H 32. Eff 3-10-98; 151 v H 95, § 1, eff. 8-3-06; 152 v S 10, § 1, eff. 1-1-08.

*Ohio S. Ct. Prac. SECTION 4*

OHIO RULES OF COURT SERVICE  
Copyright © 2011 by Matthew Bender & Company, Inc.  
a member of the LexisNexis Group.  
All rights reserved.

\*\*\* RULES CURRENT THROUGH APRIL 1, 2011 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH JULY 1, 2010 \*\*\*

Rules Of Practice Of The Supreme Court Of Ohio

Ohio S. Ct. Prac. SECTION 4 (2011)

Review Court Orders which may amend this Rule.

**SECTION 4. CERTIFICATION OF CONFLICT BY COURT OF APPEALS**

**S.Ct. Prac. R. 4.3. Briefs; Supplement to the Briefs.**

If the Supreme Court determines that a conflict exists, the parties shall file their merit briefs in conformance with S.Ct. Prac. R. 6.1 through 6.8 and, if applicable, supplements in conformance with S.Ct. Prac. R. 7.1 and 7.2. The parties shall brief only the issues identified in the order of the Supreme Court as issues to be considered on appeal, and those issues shall be clearly identified in the table of contents, in accordance with S.Ct. Prac. R. 6.2(B)(1). In cases where an appeal from an order certifying a conflict has been consolidated with an appeal under S.Ct. Prac. R. 4.4(C), the brief shall identify the issues that have been found by the Supreme Court to be in conflict and shall distinguish those issues from any other issues being briefed in the consolidated appeal.

*Ohio S. Ct. Prac. SECTION 6*

OHIO RULES OF COURT SERVICE  
Copyright © 2011 by Matthew Bender & Company, Inc.  
a member of the LexisNexis Group.  
All rights reserved.

\*\*\* RULES CURRENT THROUGH APRIL 1, 2011 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH JULY 1, 2010 \*\*\*

Rules Of Practice Of The Supreme Court Of Ohio

Ohio S. Ct. Prac. SECTION 6 (2011)

Review Court Orders which may amend this Rule.

**SECTION 6. BRIEFS ON THE MERITS IN APPEALS**

**S.Ct. Prac. R. 6.2. Appellant's Brief.**

*[See Appendix D following these rules for a sample brief.]*

**(A) Time to file**

(1) In every appeal involving termination of parental rights or adoption of a minor child, or both, the appellant shall file a merit brief with the Supreme Court within twenty days from the date the Clerk of the Supreme Court files the record from the court of appeals.

(2) In every other appeal, the appellant shall file a merit brief within forty days from the date the Clerk files the record from the court of appeals or the administrative agency. In any case, the appellant shall not file a merit brief prior to the filing of the record by the Clerk.

**(B) Contents**

The appellant's brief shall contain all of the following:

(1) A table of contents listing the table of authorities cited, the statement of facts, the argument with proposition or propositions of law, and the appendix, with references to the pages of the brief where each appears.

(2) A table of the authorities cited, listing the citations for all cases or other authorities, arranged alphabetically; constitutional provisions; statutes; ordinances; and administrative rules or regulations upon which appellant relies, with references to the pages of the brief where each citation appears.

(3) A statement of the facts with page references, in parentheses, to supporting portions of both the original transcript of testimony and any supplement filed in the case pursuant to S.Ct. Prac. R. 7.1 through 7.2.

(4) An argument, headed by the proposition of law that appellant contends is applicable to the facts of the case and that could serve as a syllabus for the case if appellant prevails. If several propositions of law are presented, the argument shall be divided with each proposition set forth as a subheading.

(5) An appendix, numbered separately from the body of the brief, containing copies of all of the following:

(a) The date-stamped notice of appeal to the Supreme Court, the notice of certified conflict, or the federal court certification order, whichever is applicable;

(b) The judgment or order from which the appeal is taken;

(c) The opinion, if any, relating to the judgment or order being appealed;

(d) All judgments, orders, and opinions rendered by any court or agency in the case, if relevant to the issues on appeal;

(e) Any relevant rules or regulations of any department, board, commission, or any other agency, upon which appellant relies;

(f) Any constitutional provision, statute, or ordinance upon which appellant relies, to be construed, or otherwise involved in the case;

(g) In appeals from the Public Utilities Commission, the appellant's application for rehearing.

**(C) Page limit**

Except in death penalty appeals of right, the appellant's brief shall not exceed fifty numbered pages, exclusive of the table of contents, the table of authorities cited, the certificate of service, and the appendix.

*Ohio S. Ct. Prac. SECTION 6*

OHIO RULES OF COURT SERVICE  
Copyright © 2011 by Matthew Bender & Company, Inc.  
a member of the LexisNexis Group.  
All rights reserved.

\*\*\* RULES CURRENT THROUGH APRIL 1, 2011 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH JULY 1, 2010 \*\*\*

Rules Of Practice Of The Supreme Court Of Ohio

Ohio S. Ct. Prac. SECTION 6 (2011)

Review Court Orders which may amend this Rule.

**SECTION 6. BRIEFS ON THE MERITS IN APPEALS**

**S.Ct. Prac. R. 6.3. Appellee's Brief.**

**(A) Time to file**

(1) In every appeal involving termination of parental rights or adoption of a minor child, or both, within twenty days after the filing of appellant's brief the appellee shall file a merit brief.

(2) In every other appeal, the appellee shall file a merit brief within thirty days after the filing of appellant's brief.

(3) If the case involves multiple appellants who file separate merit briefs, the appellee shall file only one merit brief responding to all of the appellants' merit briefs. The time for filing the appellee's brief shall be calculated from the date the last brief in support of appellant is filed.

**(B) Contents**

The appellee's brief shall comply with the provisions in S.Ct. Prac. R. 6.2(B), answer the appellant's contentions, and make any other appropriate contentions as reasons for affirmance of the order or judgment from which the appeal is taken. A statement of facts may be omitted from the appellee's brief if the appellee agrees with the statement of facts given in the appellant's merit

brief. The appendix need not duplicate any materials provided in the appendix of the appellant's brief.

**(C) Page limit**

Except in death penalty appeals of right, the appellee's brief shall not exceed fifty numbered pages, exclusive of the table of contents, the table of authorities cited, the certificate of service, and any appendix.

OHIO RULES OF COURT SERVICE  
Copyright © 2011 by Matthew Bender & Company, Inc.  
a member of the LexisNexis Group.  
All rights reserved.

\*\*\* RULES CURRENT THROUGH APRIL 1, 2011 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH JULY 1, 2010 \*\*\*

Ohio Rules Of Appellate Procedure  
Title II Appeals From Judgments And Orders Of Court Of Record

*Ohio App. Rule 5* (2011)

Review Court Orders which may amend this Rule.

**Rule 5. Appeals by leave of court**

**(A) Motion by defendant for delayed appeal.**

(1) After the expiration of the thirty day period provided by *App. R. 4(A)* for the filing of a notice of appeal as of right, an appeal may be taken by a defendant with leave of the court to which the appeal is taken in the following classes of cases:

- (a) Criminal proceedings;
- (b) Delinquency proceedings; and
- (c) Serious youthful offender proceedings.

(2) A motion for leave to appeal shall be filed with the court of appeals and shall set forth the reasons for the failure of the appellant to perfect an appeal as of right. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by *App. R. 3* and shall file a copy of the notice of the appeal in the court of appeals. The movant also shall furnish an additional copy of the notice of appeal and a copy of the motion for leave to appeal to the clerk of the court of appeals who shall serve the notice of appeal and the motions upon the prosecuting attorney.

**(B) Motion to reopen appellate proceedings.**

If a federal court grants a conditional writ of habeas corpus upon a claim that a defendant's constitutional rights were violated during state appellate proceedings terminated by a final judgment, a motion filed by the defendant or on behalf of the state to reopen the appellate proceedings may be granted by leave of the court of appeals that entered the judgment. The motion shall be filed with the clerk of the court of appeals within forty-five days after the conditional writ is granted. A certified copy of the conditional writ and any supporting opinion shall be filed with the motion. The clerk shall serve a copy of a defendant's motion on the prosecuting attorney.

**(C) Motion by prosecution for leave to appeal.**

When leave is sought by the prosecution from the court of appeals to appeal a judgment or order of the trial court, a motion for leave to appeal shall be filed with the court of appeals within thirty days from the entry of the judgment and order sought to be appealed and shall set forth the errors that the movant claims occurred in the proceedings of the trial court. The motion shall be accompanied by affidavits, or by the parts of the record upon which the movant relies, to show the probability that the errors claimed did in fact occur, and by a brief or memorandum of law in support of the movant's claims. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by *App. R. 3* and file a copy of the notice of appeal in the court of appeals. The movant also shall furnish a copy of the motion and a copy of the notice of appeal to the clerk of the court of appeals who shall serve the notice of appeal and a copy of the motion for leave to appeal upon the attorney for the defendant who, within thirty days from the filing of the motion, may file affidavits, parts of the record, and brief or memorandum of law to refute the claims of the movant.

**(D) Motion by defendant for leave to appeal consecutive sentences pursuant to R.C.****2953.08(C).**

(1) When leave is sought from the court of appeals for leave to appeal consecutive sentences pursuant to *R.C. 2953.08(C)*, a motion for leave to appeal shall be filed with the court of appeals within thirty days from the entry of the judgment and order sought to be appealed and shall set forth the reason why the consecutive sentences exceed the maximum prison term allowed. The motion shall be accompanied by a copy of the judgment and order stating the sentences imposed and stating the offense of which movant was found guilty or to which movant pled guilty. Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by *App.R. 3* and file a copy of the notice of appeal in the court of appeals. The movant also shall furnish a copy of the notice of appeal and a copy of the motion to the clerk of the court of appeals who shall serve the notice of appeal and the motion upon the prosecuting attorney.

**(2) Leave to appeal consecutive sentences incorporated into appeal as of right.**

When a criminal defendant has filed a notice of appeal pursuant to *App. R. 4*, the defendant may elect to incorporate in defendant's initial appellate brief an assignment of error pursuant to *R.C. 2953.08(C)*, and the assignment of error shall be deemed to constitute a timely motion for leave to appeal pursuant to *R.C. 2953.08(C)*.

**(E) Determination of the motion.**

Except when required by the court the motion shall be determined by the court of appeals on the documents filed without formal hearing or oral argument.

**(F) Order and procedure following determination.**

Upon determination of the motion, the court shall journalize its order and the order shall be filed with the clerk of the court of appeals, who shall certify a copy of the order and mail or otherwise

forward the copy to the clerk of the trial court. If the motion for leave to appeal is overruled, except as to motions for leave to appeal filed by the prosecution, the clerk of the trial court shall collect the costs pertaining to the motion, in both the court of appeals and the trial court, from the movant. If the motion is sustained and leave to appeal is granted, the further procedure shall be the same as for appeals as of right in criminal cases, except as otherwise specifically provided in these rules.

**HISTORY:** Amended, eff 7-1-88; 7-1-92; 7-1-94; 7-1-96; 7-1-03.

OHIO RULES OF COURT SERVICE  
Copyright © 2011 by Matthew Bender & Company, Inc.  
a member of the LexisNexis Group.  
All rights reserved.

\*\*\* RULES CURRENT THROUGH APRIL 1, 2011 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH JULY 1, 2010 \*\*\*

Ohio Rules Of Appellate Procedure  
Title II Appeals From Judgments And Orders Of Court Of Record

*Ohio App. Rule 9* (2011)

Review Court Orders which may amend this Rule.

**Rule 9. The record on appeal**

**(A) Composition of the record on appeal.**

The original papers and exhibits thereto filed in the trial court, the transcript of proceedings, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court shall constitute the record on appeal in all cases. A videotape recording of the proceedings constitutes the transcript of proceedings other than hereinafter provided, and, for purposes of filing, need not be transcribed into written form. Proceedings recorded by means other than videotape must be transcribed into written form. When the written form is certified by the reporter in accordance with *App. R. 9(B)*, such written form shall then constitute the transcript of proceedings. When the transcript of proceedings is in the videotape medium, counsel shall type or print those portions of such transcript necessary for the court to determine the questions presented, certify their accuracy, and append such copy of the portions of the transcripts to their briefs.

In all capital cases the trial proceedings shall include a written transcript of the record made during the trial by stenographic means.

**(B) The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.**

At the time of filing the notice of appeal the appellant, in writing, shall order from the reporter a complete transcript or a transcript of the parts of the proceedings not already on file as the appellant considers necessary for inclusion in the record and file a copy of the order with the clerk. The reporter is the person appointed by the court to transcribe the proceedings for the trial court whether by stenographic, phonographic, or photographic means, by the use of audio electronic recording devices, or by the use of video recording systems. If there is no officially appointed reporter, *App.R. 9(C)* or *9(D)* may be utilized. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence, the appellant shall include in the record a transcript of all evidence relevant to the findings or conclusion.

Unless the entire transcript is to be included, the appellant, with the notice of appeal, shall file with the clerk of the trial court and serve on the appellee a description of the parts of the transcript that the appellant intends to include in the record, a statement that no transcript is necessary, or a statement that a statement pursuant to either *App.R. 9(C)* or *9(D)* will be submitted, and a statement of the assignments of error the appellant intends to present on the appeal. If the appellee considers a transcript of other parts of the proceedings necessary, the appellee, within ten days after the service of the statement of the appellant, shall file and serve on the appellant a designation of additional parts to be included. The clerk of the trial court shall forward a copy of this designation to the clerk of the court of appeals.

If the appellant refuses or fails, within ten days after service on the appellant of appellee's designation, to order the additional parts, the appellee, within five days thereafter, shall either order the parts in writing from the reporter or apply to the court of appeals for an order requiring the appellant

to do so. At the time of ordering, the party ordering the transcript shall arrange for the payment to the reporter of the cost of the transcript.

A transcript prepared by a reporter under this rule shall be in the following form:

- (1) The transcript shall include a front and back cover; the front cover shall bear the title and number of the case and the name of the court in which the proceedings occurred;
- (2) The transcript shall be firmly bound on the left side;
- (3) The first page inside the front cover shall set forth the nature of the proceedings, the date or dates of the proceedings, and the judge or judges who presided;
- (4) The transcript shall be prepared on white paper eight and one-half inches by eleven inches in size with the lines of each page numbered and the pages sequentially numbered;
- (5) An index of witnesses shall be included in the front of the transcript and shall contain page and line references to direct, cross, re-direct, and re-cross examination;
- (6) An index to exhibits, whether admitted or rejected, briefly identifying each exhibit, shall be included following the index to witnesses reflecting the page and line references where the exhibit was identified and offered into evidence, was admitted or rejected, and if any objection was interposed;
- (7) Exhibits such as papers, maps, photographs, and similar items that were admitted shall be firmly attached, either directly or in an envelope to the inside rear cover, except as to exhibits whose size or bulk makes attachment impractical; documentary exhibits offered at trial whose admission was denied shall be included in a separate envelope with a notation that they were not admitted and also attached to the inside rear cover unless attachment is impractical;
- (8) No volume of a transcript shall exceed two hundred and fifty pages in length, except it may be enlarged to three hundred pages, if necessary, to complete a part of the voir dire, opening state-

ments, closing arguments, or jury instructions; when it is necessary to prepare more than one volume, each volume shall contain the number and name of the case and be sequentially numbered, and the separate volumes shall be approximately equal in length.

The reporter shall certify the transcript as correct, whether in written or videotape form, and state whether it is a complete or partial transcript, and, if partial, indicate the parts included and the parts excluded.

If the proceedings were recorded in part by videotape and in part by other media, the appellant shall order the respective parts from the proper reporter. The record is complete for the purposes of appeal when the last part of the record is filed with the clerk of the trial court.

**(C) Statement of the evidence or proceedings when no report was made or when the transcript is unavailable.**

If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee no later than twenty days prior to the time for transmission of the record pursuant to *App.R. 10*, who may serve objections or propose amendments to the statement within ten days after service. The statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act prior to the time for transmission of the record pursuant to *App.R. 10*, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal.

**(D) Agreed statement as the record on appeal.**

In lieu of the record on appeal as defined in division (A) of this rule, the parties, no later than ten days prior to the time for transmission of the record pursuant to *App.R. 10*, may prepare and sign

a statement of the case showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with additions as the trial court may consider necessary to present fully the issues raised by the appeal, shall be approved by the trial court prior to the time for transmission of the record pursuant to *App.R. 10* and shall then be certified to the court of appeals as the record on appeal and transmitted to the court of appeals by the clerk of the trial court within the time provided by *App.R. 10*.

**(E) Correction or modification of the record.**

If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

**HISTORY:** Amended, eff 7-1-77; 7-1-78; 7-1-88; 7-1-92.