ORIGINAL

# IN THE SUPREME COURT OF OHIO

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| State ex rel., Christopher R. Bruggeman,<br><br>Petitioner-Relator, *pro se*,<br><br>v.<br><br>The Honorable Judges Willamowski, Rogers & Shaw of the Auglaize County, Ohio Court of Appeals, Third Appellate District.<br><br>Respondents. | :<br>:<br><br>:<br>:<br>:<br><br>:<br><br>: | Case No. 2010-1808<br><br>(On an original action for Prohibition and alternatively, Mandamus) |

## PETITIONER-RELATOR'S SECOND MOTION FOR RELIEF FROM JUDGMENT


Christopher R. Bruggeman #A 286-466
Oakwood Correctional Facility
3200 North West Street
Lima, Ohio 45801

Petitioner-Relator, *pro se*.



FILED
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CLERK OF COURT
SUPREME COURT OF OHIO



Damian Sikora, Esq.,
Assistant Ohio Attorney General
150 Gay Street, 16th Floor
Columbus, Ohio 43215

Counsel for Respondents.

## I. Introduction.

Petitioner-Relator ("Bruggeman") brings this second motion for relief from judgment pursuant to Civ. R. 60(B)(4) & (5), from the dismissal of his original action to Petition for Peremptory Writs of Prohibition and alternatively, Mandamus on 2/2/11, 127 Ohio St. 3d 1530, 940 N.E. 2d 985. The first motion for relief from judgment was denied on 8/24/11, 129 Ohio St. 3d 1446, 951 N.E. 2d 1043 (PFEIFER, J. dissents). This motion relies on a new decision handed down by this Honorable Court on 10/13/11.

## II. Statement of Facts.

This Court rendered decision in *State v. Lester*, ____ Ohio St. 3d ____, ____ N.E. 2d ____, 2011 WL 4862414, on 10/13/11, explaining Crim. R. 32(C) and modifying *State v. Baker* (1998), 119 Ohio St. 3d 197, 893 N.E. 2d 163. *Lester* sets forth facts and law favorable to granting the petition for writ of prohibition and alternatively, mandamus that were previously undecided and unavailable.

This Court stated in *Lester*, regarding the context of *Lester's* initial Conviction and Sentencing Order in the trial court, being the order prior to the *nunc pro tunc* order, " * * * [T]he [trial court found] the Defendant has been <u>convicted</u> of [abduction, theft, attempted felonious assault, and aggravated menacing]..." *Id.*, at *1 {¶ 2}.

If this Court would review ***Exhibit "A"*** of this motion or, ***Appendix Exhibit "A" pp. 1a-2a*** of the petition, being Bruggeman's <u>original</u> Sentencing Order in Auglaize Common Pleas Case No. 93-C-138, dated 12/23/93, the trial court found Bruggeman guilty of <u>only</u> the *violence specification*, pursuant to former Ohio Rev. Code § 2941.143 (repealed). <u>NOWHERE</u> in the context of the 1993 Sentencing Order is there any reference to "*the fact of the conviction*" nor, any finding of "*guilt to the charged offenses*." The Sentencing Order's context only references the violence specification sentence enhancement and sentence. Nothing more.

**III. Law & Argument.**

This Court ruled in *Lester* that " * * * [We] further observe that Crim R. 32(C) clearly specifies the substantive requirements that must be included within a judgment entry of conviction to make it *final* for purposes of appeal and that the rule states that those requirements '*shall*' be included in the judgment entry of conviction. These requirements are the *fact of the conviction*..." *Id.,* at *4 {¶ 11} citing, *State v. Tripodo* (1977), 50 Ohio St. (2d) 124, 127, 363 N.E. 2d 719; App. R. 4(A). (Emphasis added).

While *Lester* modified *Baker*, the modification has no impact upon the facts and arguments in the petition. Courts of Appeals still lack subject-matter appellate jurisdiction over orders that are not final. *Baker*, 119 Ohio St. 3d 197.

Based upon this Court's core decision in *Lester*, as compared and applied to Bruggeman's Sentencing Order of 12/17/93, and prior to the *nunc pro tunc* entry dated 3/19/10, nowhere in the context is the *fact of conviction* stated nor, any finding of *guilt* to the indicted offenses. The only conclusion that can be drawn is that respondents *patently and unambiguously* lacked subject-matter *appellate* jurisdiction of Appeal Case No. 2-94-1, 1994 WL 645957, for want of a final order.

It is axiomatic that without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and *dismissing* the cause. On every writ of error *or appeal*, the first and fundamental question is that of jurisdiction, first, of the court of appeals, and then of the the trial court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." See, *e.g., Steel Co. v. Citizens for a Better Environment* (1998), 523 U.S. 83, 94.

Respondents acknowledged this legal principle when ruling in *State v. Williams,* 2011 WL 775909, on 3/7/11, in relevant part:

> "Appellate jurisdiction is limited to review of the lower court's final judgment. Section 3(B)(2), Article IV of the Ohio Constitution. To be a final appealable order, a judgment entry must meet the requirements of R.C. 2505.02 and, if applicable, Crim. R. 32(C). *Chef Italiano Corp v. Kent State University* (1989), 44 Ohio St. 3d 86, 88, 541 N.E. 2d 64... Additionally, the issue of whether a judgment is a final appealable order is a jurisdictional question, which an appellate court may raise sua sponte. *Chef Italiano Corp.*, 44 Ohio St. 3d 87..." *Id.*, at {¶ 11}.
>
> In a criminal case, " '[t]he necessity of journalizing an entry in accordance with Crim.R. 32(C) is jurisdictional. Without a properly journalized judgment of conviction, *this court has no power to hear [an] appeal.*' " *State v. Moore,* 3d Dist. No. 14–06–53, 2007–Ohio–4941, ¶ 7. *Id.*, at {¶ 12}.

The result of Bruggeman's 12/17/93 Sentencing Order being non final, means the 3/19/10 *nunc pro tunc* amendment of that Sentencing Order, for the first time setting forth the fact of conviction (not just the manner), is when Bruggeman's "conviction to the charged offenses" truly became final as a matter of law. Thus, Bruggeman's timely filed 4/15/10 Notice of Appeal in Appeal Case No. 2-10-17, is the only Notice of Appeal that had invoked the jurisdiction of the Court of Appeals. Furthermore, establishing that Bruggeman was not appealing a *nunc pro tunc order*, but rather, appealing the fact of his conviction in a first and direct fashion. All matters involving Appeal Case No. 2-94-1, 1994 WL 645967, are void *ab initio* regardless of what Bruggeman did or didn't do between 12/17/93 and 3/19/10.

One of the elements for a peremptory writ to issue is whether an injury will result absent granting the writ. See, *e.g., State ex rel., Cleveland City School Dist. Bd. of Edn. v. Pokorny* (1995), 105 Ohio App. 3d 108, 110, 663 N.E. 2d 719. In comparative contrast to this, Ohio Rev. Code § 2505.02(A)(1) allows Bruggeman the substantial right to *enforce and protect* his due process and equal protection rights on a first and direct appeal as of right.

Bruggeman set forth in the petition that he did not obtain his transcript of trial from his public defender until some 3 years or more, after the void appeal was affirmed. It was not until then that Bruggeman discovered he was denied his due process and equal protection rights to be present when his hung/deadlocked jury was given a supplemental instruction via *State v. Howard* (1989), 42 Ohio St. 3d 18, 537 N.E. 2d 188, while being involuntarily detained in the County Jail. (Tr. pp. 859-860). See, Section IV pp. 4-5 of the petition.

If a defendant is not present when new, different or substantial instructions are given to the jury, he is unable to review the context, and thereby loses his opportunity to object or cure the error. See, *Fillippon v. Albion Vein State Co.* (1919), 250 U.S. 76; and, *Shields v. United States* (1927), 273 U.S. 583; *State v. Grisafulli* (1939), 135 Ohio St. 87, 92, 19 N.E. 2d 645 (" * * * The right of the accused to be present on such a case cannot be waived by counsel..."); *State v. Abrams* (1974), 39 Ohio St. (2d) 53, 56, 313 N.E. 2d 823 (" * * * Harmless error statute cannot be applied because it is a situation which discloses the clear disregard of a constitutional prerogative..."). See also, Crim. R. 43.

Bruggeman argues that the while the record discloses the act was done, the <u>context</u> of the *Howard* charge is void the record; denying Bruggeman the due process and equal protection right to have the charge reviewed by the Court of Appeals for coercion. See, ***Exhibit "B" pp. 3a-4a*** of this motion. Also, see *e.g., Jenkins v. United States* (1965), 380 U.S. 445; *State v. Andricks* (1996), 111 Ohio App. 3d 93, 675 N.E. 2d 872; and, Crim. R. 22.

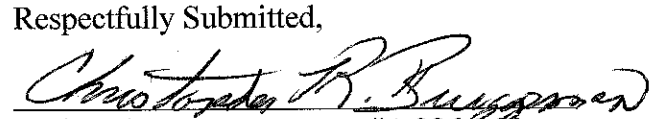
Neither doctrines of *res judicata* nor *collateral estoppel* can be applied to a claim of a lack of subject-matter jurisdiction. See, *e.g., State v. Simpkins* (2008), 117 Ohio St. 3d 420, 884 N.E. 2d 568; and, *State v. Mitchell* (2010), 187 Ohio App. 3d 315, 931 N.E. 2d 115 (doctrines of *res judicata* and collateral *estoppel* cannot be invoked when there is no final order).

It was the Court of Appeals that failed to abide by the law when deciding the appeal. While the Sentencing Order in the trial court may only be voidable, the Opinion and Judgment Entry of the Court of Appeals in Appeal Case No. 2-94-1, is void *ab initio* for want of a final order. Some Courts of Appeals are not setting forth this distinction in some of their rulings. See, e.g., *State v. Triplett*, 2011 WL 1344577 (Ohio App. 6 Dist., 2011). See, again, *Steel Co.*, 523 U.S. 94.

**IV. Conclusion.**

Wherefore, for the reasons stated herein, Bruggeman prays this Court will grant this motion, issue the writ to order Appeal Case No. 2-94-1 vacated, and to reinstate Appeal Case No. 2-10-17 for briefing on the merits. Bruggeman requests any additional relief this Court deems proper.

Respectfully Submitted,



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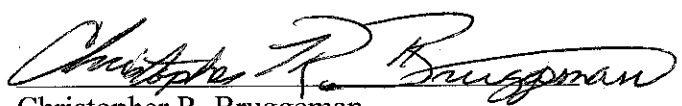
**Proof of Service**

A foregoing copy of this 2nd motion for relief from judgment has been remitted forthwith, to the Office of Counsel for the Defendants; being sent via U.S. Mail on this 27th day of October, 2011.



Christopher R. Bruggeman,

Petitioner-Relator, *pro se*,

AUGLAIZE COUNT
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IN THE COURT OF COMMON PLEAS OF AUGLAIZE COUNTY, OHIO
CRIMINAL DIVISION

| | |
|---|---|
| STATE OF OHIO<br>Plaintiff | Case No. 93-C-138 |
| vs. | JOURNAL ENTRY -- ORDERS ON SENTENCE |
| CHRISTOPHER BRUGGEMAN<br>Defendant | |

The Defendant appeared, this December 17, 1993, before the Court for the imposition of Sentence. The Defendant was present represented by Attorney John A. Poppe and the State of Ohio was represented by Attorney Garrett T.Gall of the Auglaize County Prosecuting Attorney's Office.

The Court, after evidence, testimony and arguments, finds Defendant Guilty of the specifications.

The Court inquired of the Defendant and Defendant's attorney as to whether either of them had any reason why Sentence should not be imposed, both answering in the negative.

Prior to imposing Sentence, the Court asked the Defendant and Defendant's attorney if they wished to address the Court in mitigation of punishment.

It is the Sentence of the Court that the Defendant be incarcerated with the Department of Rehabilitation and Correction, Orient, Ohio, on the charge of:

Count I - the charge of GROSS SEXUAL IMPOSITION, in violation of Ohio Revised Code §2907.05(A)(4), a FELONY of the 3RD Degree with specifications, for aN INdefinite term of NOT LESS THAN FOUR (4) YEARS NOR MORE THAN TEN (10) YEARS and assessed the costs.

Count II - the charge of GROSS SEXUAL IMPOSITION, in violation of Ohio Revised Code §2907.05(A)(4), a FELONY of the 3RD Degree with specifications, for aN INdefinite term of NOT LESS THAN FOUR (4) NOR MORE THAN TEN (10) YEARS and assessed the costs.

Count III - the charge of GROSS SEXUAL IMPOSITION, in violation of Ohio Revised Code §2907.05(A)(4), a FELONY of the 3RD Degree with specifications, for aN INdefinite term of NOT LESS THAN FOUR (4) NOR MORE THAN TEN (10) YEARS and assessed the costs.

Jail time credit of 94 days is hereby credited against the above sentence for jail time served.

The Court ORDERS the above sentences shall be served Consecutively.

The Court further ORDERS that the Defendant pay court costs through the office of the Clerk of Courts.

The Defendant did move the Court to suspend the execution of the sentence and requested that he be placed on probation with the Ohio Adult Parole Authority. The Court finds said motion not well taken and the same is hereby DENIED.

The Defendant is remanded to the custody of the Auglaize County Sheriff for transport to the Department of Rehabilitation and Correction, Orient, Ohio.

The Court APPOINTS the Public Defender as defense counsel for the purposes of appeal.

The Clerk of Courts shall cause a copy of this Journal Entry, to be served on Attorney John A. Poppe by Regular U.S. Mail, and a copy on the Auglaize County Sheriff, S. Mark Weller, Ohio Adult Parole Authority and Prosecuting Attorney by hand delivering the same.

IT IS SO ORDERED.

JUDGE FREDERICK D. PEPPLE

1 RECONVENE:

2 THE COURT: Okay. We are on record in Case 93-C-138,
3 State of Ohio vs. Christopher Bruggeman. We have received
4 a question from the Jury. The question will be marked and
5 kept as an Exhibit. Each of the Counsel have been given an
6 opportunity to read the question. The question deals with
7 what happens if the Jury is not in agreement on all Counts.
8 The Court has discussed the matter with Counsel and
9 invited research. Mr. Poppe provided the Court with O.J.I.
10 and Mr. Gall provided the Court with State v. Howard, all
11 of which we,- I think we were all discovering at the same
12 time, and it is the Court's understanding that we are in
13 agreement to provide the supplemental instruction found in
14 the 2d syllabus, State of Ohio vs. Howard, found at 42 Ohio
15 State 3d, 18, a 1989 case in the Supreme Court of Ohio.
16 Mr. Gall, do you concur?
17 MR. GALL: Yes.
18 THE COURT: Mr. Poppe, do you concur?
19 MR. POPPE: Yes.
20 THE COURT: Mr. Poppe, you had indicated prior to going on
21 record that you are on behalf of your client waiving his
22 appearance for purposes of making this record so we can get
23 the answer to the Jury. Is that correct?
24 MR. POPPE: Yes, Your Honor. We believe it is in his best
25 interest to get the Jury answered as quickly as possible



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1 and since the answer is coming straight from the Ohio
2 Supreme Court it certainly appears the prudent thing to do.
3 THE COURT: Do you have anything further for the record,
4 Mr. Gall?
5 MR. GALL: No.
6 THE COURT: Mr. Poppe?
7 MR. POPPE: No, Your Honor.
8 THE COURT: Very well. We will send it in in writing.
9 OFF RECORD.
10 RECONVENE:
11 THE JURY HAS NOW REACHED A VERDICT AND THEY HAVE BEEN
12 BROUGHT BACK INTO THE COURTROOM:
13 THE COURT: We are reconvening in Case Number 93-C-138,
14 State of Ohio vs. Christopher Bruggeman. The Court is
15 looking as to who is holding the paper; Mr. Knapke. The
16 Court is under the understanding that the Jury has reached
17 a verdict. The record should reflect the Defendant is
18 present with Counsel. State of Ohio present through
19 Counsel, and the Jurors are present.
20 Mr. Knapke, has the Jury reached a verdict on each of
21 the four (4) Counts?
22 MR. KNAPKE: Yes we have, Your Honor.
23 THE COURT: Would the Bailiff please obtain the Verdict
24 Forms from the Foreman and would the Bailiff please provide
25 those to the Clerk of Courts.



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