

IN THE SUPREME COURT OF OHIO

ORIGINAL

State of Ohio,  
Plaintiff-Appellant,  
v.  
Sandra Griffin,  
Defendant-Appellee.

:  
:  
: Case No. 2011-0818  
:  
:  
: On discretionary appeal from the  
: Coshocton County Court of Appeals,  
: Fifth Appellate District,  
: Case No. 2009CA21  
:  
:

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**Merit Brief of Appellee Sandra Griffin**

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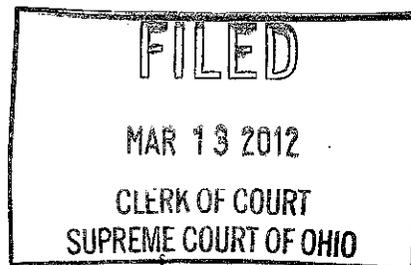
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## **Introduction**

Appellee Sandra Griffin's first three propositions of law respond to the State's first proposition of law. Appellee's fourth and fifth propositions of law respond to the State's second proposition of law. The additional propositions of law are necessary because the State's brief mixes a number of well-settled statements of law to create the appearance of novelty. But the outcome of this case is controlled by firmly established principles of law. Each issue is resolved by the text of this Court's decisions or the text of a statute.

Miss Griffin's initial judgment entry of sentence was not a final order because it did not mention the "fact of conviction," which, under *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, is a substantive requirement without which a criminal judgment cannot be final. Because the trial court had not issued a final order, the Fifth District lacked subject matter jurisdiction to hear an appeal. Because the Fifth District lacked subject matter jurisdiction, its initial decision was void ab initio. The void decision cannot be the basis for the State's affirmative defense of res judicata.

In addition, R.C. 2929.03(F) does not help the State because that section requires a trial court to issue a capital sentencing opinion only when after holding a capital sentencing hearing. Here, the trial court did not issue a capital sentencing opinion because it did not hold a capital sentencing hearing.

Because this case involves only the application of established rules to the specific facts of this case, this Court should dismiss this appeal as improvidently accepted.

## **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. Jury Waiver, Nov. 1, 1989. The State agreed that it would not “pursue” the death penalty, but the capital specification remained. *Id.* Thus, even though the case contained a capital specification, the parties followed the procedural rules and statutes governing non-capital cases, which allowed the trial court to impose the higher penalty for aggravated murder with specifications (twenty full years to life) instead of a sentence that included good time. R.C. 2929.03 (1989).

### ***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, Appellant’s Apx. A-21. 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, Appellant’s 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, 1990 journal entry. The court of appeals affirmed, holding that a single judge may preside over a capital bench trial if the prosecution promises not to seek the death

penalty. *State v. Griffin*, 73 Ohio App.3d 546 (1992), appeal dismissed, 64 Ohio St.3d 1428 (1992). Later, the Eighth District certified a conflict with Miss Griffin's case. In resolving the conflict, this Court ruled that Miss Griffin's case was wrongly decided, and that three judges must hear all bench trials in cases in which capital specifications remain. *State v. Parker*, 95 Ohio St.3d 524, 2002-Ohio-2833, 769 N.E.2d 846. Miss Griffin then unsuccessfully challenged the January 29, 1990 journal entry in federal court. *Griffin v. Andrews*, 6<sup>th</sup> Cir. No. 06-4305 (Apr. 3, 2007) (entry denying certificate of appealability). Federal litigation was protracted because the Ohio Attorney General's Office chose to litigate procedural issues for more than eight years before a federal court could address the substance of the case. *See Griffin v. Rogers*, 399 F.3d 626 (6<sup>th</sup> Cir., 2005); *Griffin v. Rogers*, 399 F.3d 647 (6<sup>th</sup> Cir., 2005).

***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, 893 N.E.2d 163, at the syllabus. Motion, Aug. 4, 2009. 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[,]" which reads, in its entirety, as follows:

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 535, 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, at p. 1.

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, 893 N.E.2d 163. *State v. Griffin*, 5<sup>th</sup> Dist. No. 09CA21, 2010-Ohio-3517, Appellee's Apx. A-1. 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, Appellee's 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. Although the Fifth District had determined that there was no sentencing opinion in the record, the State claimed that the appellate court had, in fact, held that such an opinion did exist and that the appellate court decided that it could not consider it:<sup>1</sup>

*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. . . . [T]he reasoning*

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

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 (underlining added, italics in original). 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.

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

The State's appeal was before this Court on a jurisdictional memorandum, so this Court did not have the benefit of seeing the record. As a result, this Court could not determine the truth of the State's representation that the record contained an R.C. 2929.03(F) sentencing opinion. This Court remanded the case to the court of appeals to resolve the issue. *State v. Griffin*, 127 Ohio St.3d 266, 2010-Ohio-5948, ¶ 2.<sup>2</sup>

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

And the court of appeals did exactly what this Court instructed—it applied *Ketterer* and R.C. 2929.03(F). After supplemental briefing, the court of

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<sup>2</sup> 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.

appeals concluded that Miss Griffin prevailed under the standard of *Ketterer* and R.C. 2929.03(F). Accordingly, because the record does not contain an R.C. 2929.03(F) sentencing opinion, the court reaffirmed its decision to grant Miss Griffin a new trial. Compare *State v. Griffin*, 5<sup>th</sup> Dist. No. 09CA21, 2011-Ohio-1638, at ¶ 19-21, Appellant's Apx. A-8, with *State v. Griffin*, 5<sup>th</sup> Dist. No. 09CA21, 2010-Ohio-3517, at ¶ 13-14, Appellee's Apx. A-4.

***The State again asks this Court to hear the case, but this time alleges that the court of appeals committed misconduct.***

The State then 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.

## Argument

### Proposition of Law No. I:

**“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 . . . [t]hese requirements are the *fact* of the conviction, the sentence, the judge’s signature, and the entry on the journal by the clerk. . . . Without these substantive provisions, the judgment entry of conviction cannot be a final order subject to appeal under R.C. 2505.02.”** Quoting, *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, ¶ 11 (emphasis in original).

**A. Under *Lester*, Miss Griffin’s original sentencing entry was not final because it did not include the “fact of the conviction.”**

Miss Griffin prevails under *Lester* because the original non-capital judgment entry of sentence in her case did not include any mention that she had been convicted of anything. Entry, January 30, 1990, Appellant’s Apx. A-17. Under *Lester*, the failure to include any mention of the “fact of conviction” is a “substantive” error rendering the judgment non-final (and therefore not subject to correction by a nunc pro tunc entry):

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, the sentence, the judge’s signature, and the entry on the journal by the clerk. . . .

Crim.R. 32(C) does not require a judgment entry of conviction to recite the manner of conviction as a matter of substance, but it does require the judgment entry of conviction to recite the manner of conviction as a matter of form.

*Lester* at ¶ 11-12 (underline added, italics in original). This Court has also contrasted the “fact of conviction” (which is “substantive”) with the “manner of conviction” (which is “clerical”). Compare *id.* at ¶ 11 (the “fact of conviction. . . relate[s] to the essence of the act of entering a judgment of conviction [is] a matter of substance”), with *id.* at ¶ 20 (fact that “conviction was based on a jury verdict” was a “clerical omission”).

**B. *Lester* resolves this case.**

A simple application of *Lester* to the facts of this case completely resolves it—without a mention of the “fact of conviction,” the original sentencing entry in this case was not a final order. Appellant’s Apx. at A-17.

**Proposition of Law No. II:**

**“[A] court of appeals patently and unambiguously lacks jurisdiction to proceed in [an] appeal when the [lower court] order does not constitute a final, appealable order[.]”** Quoting, *State ex rel. Bates v. Court of Appeals for the Sixth Appellate Dist.*, 130 Ohio St.3d 326, 2011-Ohio-5456, 958 N.E.2d 162, ¶ 1.

**A. Because the lack of a final order deprived the court of appeals of subject matter jurisdiction, the 1992 opinion is void ab initio.**

Based on the standard in *Lester*, this case did not have a final order until 2009. And because the trial court had not issued a final order, the court of appeals lacked subject matter jurisdiction to hear her initial appeal in 1992.

An order issued by a court without subject matter jurisdiction is void ab initio. See *State v. Upshaw*, 110 Ohio St.3d 189, 2006-Ohio-4253, 852 N.E.2d 711, ¶ 7 (a court of appeals must have a final order in order to have subject

matter jurisdiction over a cause); *Hubbard v. Canton City Sch. Bd. of Educ.*, 88 Ohio St.3d 14, 2000-Ohio-260, 722 N.E.2d 1025, 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”); *Noble v. Colwell*, 44 Ohio St.3d 92, 94 and 97, 540 N.E.2d 1381 (1989) (neither this Court nor the court of appeals had subject-matter jurisdiction because the “appeal did not emanate from a final appealable order”). Accordingly, the 1992 court of appeals opinion was void ab initio for lack of subject-matter jurisdiction. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 6 (“a void judgment is one that has been imposed by a court that lacks subject-matter jurisdiction”).

**B. *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, concerned the consequences of improperly imposed postrelease control, not the consequences of the lack of a final order.**

The State’s citations to *Fischer* indicate the State’s confusion as to what this Court held in that case. Brief, pp. 5-6. *Fischer* resolved the question of whether a partially void sentence could trigger new appellate rights. But this Court also specifically held that the holding in *Fischer* was distinct from final appealable order issue because “[n]othing in *Baker* discusses void or voidable sentences.” *Fischer*, at ¶ 39. Further, in contrast to Miss Griffin’s case, Mr. Fischer’s original entry *was* a final order, *id.*, so the decision does not overrule the longstanding principle that, without a final order, a court of appeals lacks subject matter jurisdiction.

**Proposition of Law No. III:**

**“A nunc pro tunc judgment entry issued for the sole purpose of complying with Crim.R. 32(C) to correct” a substantive omission in a non-final judgment entry creates a final order “from which an appeal may be taken.” Quoting and applying, *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204, 958 N.E.2d 142, paragraph two of the syllabus.**

**A. This Court should reject the State’s invitation to overrule the bright-line rule this Court adopted in *Lester*.**

This Court should not accept the State’s invitation to overrule the bright-line this Court drew in *Lester*. Under *Lester*, non-substantive errors do not render an order non-final, and can be corrected by a nunc pro tunc entry. But an order is not final until it includes all “substantive” elements. *Lester* at ¶ 11 (“substantive requirements . . . must be included within a judgment entry of conviction to make it final for purposes of appeal”).

*Lester* enunciated a long-established and straightforward bright—line rule—an order is either final or not final, and it is not final until it includes all substantive elements. The State asks this Court to adopt a third category that would be unprecedented and unique to Ohio, and would produce unpredictable and chaotic effects. The State asks this Court to find that there are non-final orders that are close enough to being final that courts should treat them as such. The State’s theory appears to be that if, based on other parts of the record, litigators can figure out that the judge meant to make the non-final entry final, the order is final regardless of the text of the entry.

The State’s theory, quite clearly, conflicts with Crim.R. 32 and long-settled law. Under the State’s theory, nothing in particular would have to be in

the final order—if a trial judge properly imposed a sentence in open court and subsequently filed any entry that alluded to one of the requirements of Crim.R. 32, the order would be final and appealable. But the words between the case header and the judge’s signature matter. That is why this Court has repeatedly held that “[i]t is axiomatic that ‘[i]n Ohio a court speaks through its journal.’” *E.g.*, *State v. King*, 70 Ohio St.3d 158, 162 (1994) (quoting *State ex rel. Worcester v. Donnellon*, 49 Ohio St.3d 117, 118, 551 N.E.2d 183 (1990)). The State’s theory directly conflicts with *King*, with *Donnellon*, with *Lester*, and—literally—with hundreds of other opinions.

**B. Courts, litigators, and litigants need bright-line rules that conclusively determine when an order is final.**

Because the finality of an order determines deadlines for challenging that order, courts, litigators, and litigants need to know when an order is final and when it is not. Without certainty, cautious attorneys will justifiably file many more premature notices of appeal. Other attorneys will discover that an order that is non-final on its face is actually final because of documents in other parts of the record.

The purpose of Crim.R. 32(C) is not to put a defendant on notice of what the trial court did or meant to do to her. Rather, as this Court held in *Lester*, “the purpose of Crim.R. 32(C) is to ensure that a defendant is on notice concerning when a final judgment has been entered and the time for filing an

appeal has begun to run.” *Lester* at ¶ 10, citing *State v. Tripodo*, 50 Ohio St.2d 124, 127, (1977).<sup>3</sup>

**C. Both this Court and courts outside Ohio do not retroactively apply a nunc pro tunc entry that changes a non-final order into a final order.**

Courts outside of Ohio have long followed the black-letter substantive/clerical distinction that this Court followed in *Lester*, especially when the substantive change turned a non-final order into a final order. The California Supreme Court clearly explained the issue more than a century ago:

The time allowed for an appeal commences to run from the time of the actual entry of the judgment. The order amending the record shows that judgment was not actually entered against the petitioner until May 29, 1901. *It hardly requires argument or authority to establish the proposition that a court cannot by antedating an order, or the entry of it, cut off the right of a party to move for a new trial, to move to set the judgment aside, or to appeal.* These rights, given by the Code of Civil Procedure, cannot be lost to a party by such action, whether the effect was designed or not. The test as to whether the period in which the party must act in order to get relief from an order or judgment against him must be, whether he could have obtained the desired relief (on a proper showing) before the nunc pro tunc order was made. Could he have made his application as the judgment, order, or record was[?]

*Spencer v. Troutt*, 133 Cal. 605, 607, 65 P. 1083 (1901) (emphasis added). In *Spencer*, as in this case, the litigant had previously appealed from a non-final

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<sup>3</sup> Arguably, Crim.R. 4(C) applies to this case. That rule provides that a notice of appeal filed after the announcement of a decision, order, or sentence but before entry of the judgment or order that begins the running of the appeal time period is treated as filed immediately after the entry.” If that rule applies, then this Court should dismiss this appeal for lack of jurisdiction and order the court of appeals to issue a decision in Coshocton App. No. 90-CA-2, the initial appeal. Because the Fifth District lacked jurisdiction to decide the appeal until the final order was issued in 2009, the initial Fifth District opinion remains void ab initio. But the record and briefs were properly filed, and the court of appeals could hold argument and issue a ruling on the merits.

order. But the state supreme court found that he was entitled to appeal from the nunc pro tunc order because, “the want of jurisdiction in this court over a premature appeal is absolute, and as consent cannot confer jurisdiction, the defect cannot be waived.” *Id.*

The United States Supreme Court, interpreting federal law, has made the same distinction: *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12, 73 S.Ct. 245, 97 L.Ed. 245 (1952) (“when the lower court changes matters of substance . . . the period within which an appeal must be taken . . . begin[s] to run anew[,]” but where the changes were “immaterial,” the time for appeal begins to run from the first judgment). The supreme courts of Idaho, New Mexico, Nebraska, New Jersey, and North Dakota have also made identical holdings. *Simon v. El Paso & S.W. Co.*, 22 NM 211, 160 P. 352 (1916) (“It is urged by appellant, we think correctly, that the time within which an appeal may be taken to this court in a case of this kind commences to run from the date of the entry of the nunc pro tunc judgment, and not from the date of the original judgment”); *Rosslow v. Janssen*, 136 Cal App 467, 29 P.2d 287 (1934) (“A court cannot, by antedating an order or the entry of it, cut off the right of a party to an appeal”); *In re Heart Irrigation Dist.*, 78 N.D. 302, 313-314, 49 N.W.2d 217 (1951) (quoting *Rosslow*); *Blaine County Inv. Co. v. Mays*, 52 Idaho 381, 385-386, 15 P.2d 734 (1932) (“It hardly requires argument or authority to establish the proposition that a court cannot, by antedating an order or the entry of it, cut off the right of a party to move for a new trial, to move to set aside the judgment, or to appeal”); *Newark v. Fischer*, 3 N.J. 488, 492-493, 70

A.2d 733 (1950) (“The general rule is that where a judgment is amended in a material and substantial respect the time within which an appeal from such determination may be taken begins to run from the date of the amendment, but where an amendment relates solely to the correction of a clerical or formal error in a judgment it does not toll the time for appeal”).

There is no need for this Court to depart into the State’s uncharted waters, particularly not given that Ohio has followed that same rule for almost a hundred years. *Perfection Stove Co. v. Scherer*, 120 Ohio St. 445, 448-449, 166 N.E. 376 (1929) (“this court will not permit a nunc pro tunc entry to so operate as to deprive a litigant of a right to appeal or prosecute error”).

**D. This Court should decline the State’s request to create a muddled middle between final and non-final orders.**

Litigants, lawyers and judges need bright-lines as to what is and is not a final order. The State asks this Court to create a muddled middle where the parties must infer the intent of the trial judge.

Appellee knows of no court that has adopted such an uncertain rule—a judgment is either final or it is not. There is no in between. This Court noted this clear line in *Lester*, and the State provides no compelling reason why this Court should abandon *Lester* so soon after it was issued.

**Proposition of Law No. IV:**

**“Principles of res judicata, including the doctrine of the law of the case, do not preclude appellate review” of a void judgment. Quoting *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 30.**

Under *Fischer*, a void judgment cannot serve as the basis for the affirmative defense of res judicata. *Fischer* at ¶ 30 (void judgments “may be reviewed at any time, on direct appeal or by collateral attack”). Because the initial court of appeals’ decision in this case was void ab initio, the State cannot use the opinion to establish the affirmative defense of res judicata.

**Proposition of Law No. V:**

**R.C. 2929.03(F) applies only when “a sentencing hearing is held pursuant to [the] section[.]” Quoting, R.C. 2929.03(F).**

**A. R.C. 2929.03(F) does not require a trial court to file an opinion journalizing a decision it did not make at a hearing that did not happen.**

Most statutory interpretation cases before this Court are close calls—this case is not. Ohio Revised Code Section 2929.03(F) states 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.” (Emphasis added). The statute does not say that the sentencing opinion must be filed “in a case in which a sentencing hearing *should be* held pursuant to this section.”

Applying this simple language, this Court has correctly 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. But R.C. 2929.03(F) does not “require[] the court or panel to file a sentencing opinion” in the absence of a sentencing hearing under that section.

The State’s citation to *State v. Parker* is accurate, but is irrelevant to the State’s argument. The State is almost entirely correct that one “holding of *State v. Parker*, 95 Ohio St.3d 524, 2002-Ohio-2833 . . . is that a case in which an indictment contains death penalty specifications remains a capital case.” Brief at 4. Miss Griffin agrees that because the State never dismissed the capital indictment, Miss Griffin’s case remained a capital case. In fact, *that is exactly why* this Court held that the 1992 appellate decision in Miss Griffin’s case was wrongly decided. *Parker* at ¶ 9.

*Parker* correctly held that the three-judge panel requirement of R.C. 2945.06 applies to any case with capital specifications, not just to cases where death is a possibility. But the issue in this case turns on R.C. 2929.03(F), not R.C. 2945.06. And the last sentence of R.C. 2929.03(F), by its own terms, applies only “in a case in which a sentencing hearing is held pursuant to this section[.]”

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

The State’s argument is short-sighted—it would likely 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, 806 N.E.2d 992, 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. In fact, the State concedes that it is unlikely that cases that followed the *Griffin* one-judge rule have sentencing opinions under R.C. 2929.03(F). Brief at 4 (“Appellant feels confident that the original entries in *State v. Parker* also failed to weigh aggravating circumstances against mitigating factors. As the purpose of the single judge procedure was to avoid even the possibility of the death penalty, it would have been pointless for the single judge to have engaged in the weighing process.”)

The entries in *Parker* validate the State’s “feel[ing]” of “confidence” because none of them indicate that that trial court weigh aggravating or mitigating factors. *See State v. Parker*, Cuyahoga C.P. No. CR-95-320034 (June 30, 1995) (Entry).

The State has it exactly backwards when it asserts that under the Fifth District’s decision in this case, “the original entry in *Parker* would suffer the same error, rendering the order appealed from in *Parker* non-appealable and the decision, under the Coshocton court’s reasoning, invalid.” Brief at 9.

Under the Fifth District's ruling in this case, the trial court's decision in *Palmer* would have been a final order, from which an appeal must be timely taken. By contrast, under the State's theory that R.C. 2929.03(F) requires a sentencing opinion even in the absence of a sentencing hearing, the entry in *Parker* still would not be final because the trial court has never issued a sentencing opinion. As a result, under the State's theory, all such cases probably lack final orders,<sup>4</sup> still can get final orders,<sup>5</sup> and would be automatically reversed on appeal from those final orders.<sup>6</sup> The State is, ironically, arguing for the very result that this Court avoided in *Pratts*.

By contrast, under the strict reading of R.C. 2929.03(F) that Miss Griffin proposes, defendants who have valid stand-alone Crim.R. 32 entries are barred from starting anew. Given this Court's holding in *State v. Lester*, very few one-judge-capital defendants would be able to win a claim that their judgments are non-final.

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

<sup>5</sup> *Mitchell v. Smith*, 120 Ohio St.3d 278, 2008-Ohio-6108, 898 N.E.2d 47, citing *McAllister v. Smith*, 119 Ohio St.3d 163, 2008-Ohio-388, 892 N.E.2d 914.

<sup>6</sup> *State v. Parker*, 95 Ohio St.3d 524, 2002-Ohio-2833, 769 N.E.2d 846.

**Proposition of Law No. VI:**

**An entry journalizing the bench trial verdict in this case is not a “judgment of conviction filed pursuant to Crim.R. 32(C)[,]” and the deficient judgment entry of conviction is not an R.C. 2929.03 “sentencing opinion.”**

- A. The bench trial verdict in this case is a bench trial verdict, not an “imperfect” judgment entry of conviction. The non-capital sentencing entry in this case is a non-capital sentencing entry, not an “imperfect” capital sentencing opinion.**

The State now asserts that the bench trial verdict in this case was somehow an “imperfect” Crim.R. 32(B) judgment of conviction and that the judgment entry of sentence was, despite the trial court’s intention to the contrary, an R.C. 2929.03(F) death penalty sentencing opinion.

By definition, a “conviction’ includes *both* the guilt determination and the penalty imposition.” *State v. Poindexter*, 36 Ohio St.3d 1, 5, 520 N.E.2d 568 (1988). The journalization of a verdict, filed well before the sentencing hearing, cannot be an “imperfect” judgment entry of conviction because *there is no sentence*, which is an essential element of a “conviction” under Crim.R. 32(B). The trial court could not have intended to journalize something that had not yet happened.

As to the judgment entry of sentence, the State concedes that the trial court did not even attempt to weigh aggravating and mitigating circumstances before it issued the sentencing entry. Brief at 7. And the trial judge could not have weighed the circumstances because, like the parties, the trial court assumed that the capital rules did not apply. *Griffin* at 553 (“although this is a ‘capital offense,’ it is no longer a case within the ambit of the sentencing

provisions of R.C. 2929.03 et seq.”) It would be absurd to suggest that the trial court filed an opinion describing a decision it did not make at a hearing that did not happen.

The bench trial verdict is a bench trial verdict, not an “imperfect” judgment entry of conviction. The non-capital sentencing entry is a non-capital sentencing entry, not an “imperfect” capital sentencing opinion. If it walks like a duck and quacks like a duck, it’s a duck—not an “imperfect” swan.

**B. The State tells this Court that the judgment entry of sentence was a “sentencing opinion” under R.C. 2929.03(F), but the State told the court of appeals that entry was *not* a “sentencing opinion.”**

The State never explained to the court of appeals how the verdict could be a judgment entry of sentence or how the sentencing entry could be an R.C. 2929.03(F) sentencing opinion. As a result, this Court should decline to entertain it. *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.” 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.

State’s Brief on Remand, Feb. 10, 2011, p. 4. The court of appeals did not err by rejecting 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, Jan. 29, 1990, Appellant’s, Apx. A-17. This record does not include an R.C. 2929.03(F) sentencing “opinion.”

**C. Res Judicata can be forfeited or waived.**

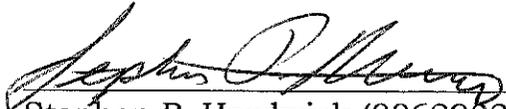
In its merit brief, the State asserts that waiver does not apply to this case because its arguments invoke subject matter jurisdiction. Brief at 8. But the State bases its claims on res judicata, which is an affirmative defense that is waived if not asserted. No rule denies an appellate court subject matter jurisdiction to decide issues that were or could have been raised in a prior appeal.

**Conclusion**

The facts of this case are clear. The law is clear. Miss Griffin prevails under both *Ketterer* and *Lester*. This Court should dismiss the State’s appeal as improvidently granted. In the alternative, this Court should affirm the decision of the court of appeals.

Respectfully submitted,

Office of the Ohio Public Defender



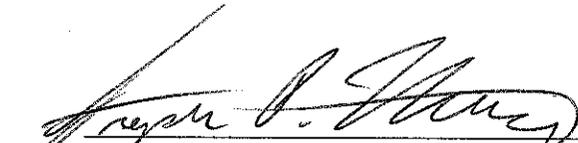
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### **Certificate of Service**

I certify that a copy of the foregoing **Merit Brief of Appellee Sandra Griffin** was sent by regular U.S. Mail to Jason Given, Coshocton County Prosecutor, 318 Chestnut Street, Coshocton, Ohio 43812 this 13th day of March, 2012.



Stephen P. Hardwick (0062932)  
Assistant Public Defender

Counsel for Appellee, Sandra Griffin

IN THE SUPREME COURT OF OHIO

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

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**Appendix to  
Merit Brief of Appellee Sandra Griffin**

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COURT OF APPEALS  
COSHOCTON COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

SANDRA GRIFFIN

Defendant-Appellant

JUDGES:

Hon. Julie A. Edwards, P.J.  
Hon. William B. Hoffman, J.  
Hon. Sheila G. Farmer, J.

Case No. 09CA21

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,  
Case No. 89CR13

JUDGMENT:

Reversed and Remanded

DATE OF JUDGMENT ENTRY:

FILED  
JUL 27 2010

DATE \_\_\_\_\_  
TIME \_\_\_\_\_

Fifth District Court of Appeals  
State of Ohio  
County of Coshocton

APPEARANCES:

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*Farmer, J.*

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

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

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

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

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

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

I

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

I

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

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

{¶10} "A judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court."

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

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

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

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

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

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

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

{¶17} "We now hold that a judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court. Simply stated, a defendant is entitled to appeal an order that sets forth the manner of conviction and the sentence."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

By Farmer, J.

Edwards, P.J. concur and

Hoffman, J. dissents.

  
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JUDGES

SGF/sg 617

*Hoffman, J., dissenting*

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

{¶148} Unlike the majority and the Seventh and Ninth districts, I do not read *Culgan* as broadly as they do. As pointed out by the majority herein, the Ohio Supreme Court did not find the non-final appealable order in either *Baker* or *Culgan* resulted in a void judgment. The specific issue as to the effect of the grant of the writ of mandamus and procedendo on the prior appeal was not discussed in the Per Curiam opinion in *Culgan*<sup>1</sup>.

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

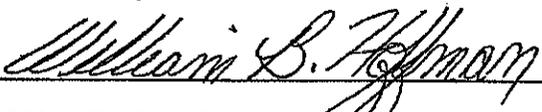
{¶150} Because Appellant herein previously invoked appellate review and nothing in the order as it then existed prohibited or affected her ability to address all issues relating to her previous conviction, Appellant should be judicially estopped from now asserting our previous appellate court ruling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

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<sup>1</sup> In his dissent, Justice O'Donnell, joined by Justice Lundberg Stratton, does note *Culgan* was not deprived of his opportunity to appeal his conviction.

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

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

  
HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR COSHOCTON COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

SANDRA GRIFFIN

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 09CA21

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Plea of Coshocton County, Ohio is reversed and the matter is remanded to said court for further proceedings consistent with this opinion. Costs to appellee.

FILED  
JUL 27 2010

DATE \_\_\_\_\_

TIME \_\_\_\_\_

Fifth District Court of Appeals  
State of Ohio  
County of Coshocton

*[Signature]*

*[Signature]*

JUDGES

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Current through Legislation passed by the 129th Ohio General Assembly  
and filed with the Secretary of State through files 1-69 and 71.

\*\*\* Annotations current through January 9, 2012 \*\*\*

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

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*ORC Ann. 2505.02 (2012)*

§ 2505.02. Final order

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, 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 limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression 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, 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, and the enactment of *sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code* 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, 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.

(a) Hold a sentencing hearing pursuant to division (B) of this section, unless required to do otherwise under division (A)(2)(b) of this section;

(b) If the offender raises the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and is not found at trial to have been eighteen years of age or older at the time of the commission of the offense, conduct a hearing to determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt. After conducting the hearing, the panel or judge shall proceed as follows:

(i) If that aggravating circumstance is proven beyond a reasonable doubt or if the defendant at trial was convicted of any other specification of an aggravating circumstance, the panel or judge shall impose sentence according to division (E) of section 2929.03 of the Revised Code;

(ii) If that aggravating circumstance is not proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance, the panel or judge shall impose sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(B) At the sentencing hearing, the panel of judges, if the defendant was tried by a panel of three judges, or the trial judge, if the defendant was tried by jury, shall, when required pursuant to division (A)(2) of this section, first determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt. If the panel of judges or the trial judge determines that the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt or if they do not determine that the specification is proven beyond a reasonable doubt but the defendant at trial was convicted of a specification of any other aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, the panel of judges or the trial judge and trial jury shall impose sentence on the offender pursuant to division (D) of section 2929.03 and section 2929.04 of the Revised Code. If the panel of judges or the trial judge does not determine that the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, the panel of judges or the trial judge shall terminate the sentencing hearing and impose a sentence of life imprisonment with parole eligibility

after serving twenty years of imprisonment on the offender.

HISTORY: 139 v S 1. Eff 10-19-81.

**[§ 2929.02.3] § 2929.023** [Defendant may raise matter of age.]

A person charged with aggravated murder and one or more specifications of an aggravating circumstance may, at trial, raise the matter of his age at the time of the alleged commission of the offense and may present evidence at trial that he was not eighteen years of age or older at the time of the alleged commission of the offense. The burdens of raising the matter of age, and of going forward with the evidence relating to the matter of age, are upon the defendant. After a defendant has raised the matter of age at trial, the prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the defendant was eighteen years of age or older at the time of the alleged commission of the offense.

HISTORY: 139 v S 1. Eff 10-19-81.

**[§ 2929.02.4] § 2929.024** [Investigation services and experts for indigent.]

If the court determines that the defendant is indigent and that investigation services, experts, or other services are reasonably necessary for the proper representation of a defendant charged with aggravated murder at trial or at the sentencing hearing, the court shall authorize the defendant's counsel to obtain the necessary services for the defendant, and shall order that payment of the fees and expenses for the necessary services be made in the same manner that payment for appointed counsel is made pursuant to Chapter 120. of the Revised Code. If the court determines that the necessary services had to be obtained prior to court authorization for payment of the fees and expenses for the necessary services, the court may, after the services have been obtained, authorize the defendant's counsel to obtain the necessary services and order that payment of the fees and expenses for the necessary services be made as provided in this section.

HISTORY: 139 v S 1. Eff 10-19-81.

**§ 2929.03** Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with

parole eligibility after serving twenty years of imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 [2929.02.3] of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, shall be determined pursuant to divisions (D) and (E) of this section, and shall be determined by one of the following:

(a) By the panel of three judges that tried the offender upon his waiver of the right to trial by jury;

(b) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated

murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or his counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to divi-

sion (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Life imprisonment with parole eligibility after

serving twenty full years of imprisonment;

(2) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

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

(C) Whenever the court or a panel of three judges imposes sentence of death, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 1. Eff 10-19-81.

#### Committee Comment to H 511

This section specifies the procedure to be followed in determining whether the sentence for aggravated murder is to be life imprisonment or death.

The death penalty is precluded unless the indictment contains a specification of one or more of the aggravating circumstances listed in section 2929.04. In the absence of such specifications, life imprisonment must be imposed. If the indictment specifies an aggravating circumstance, it must be proved beyond a reasonable doubt, and the jury must return separate verdicts on the charge and specification. If the verdict is guilty of the charge but not guilty of the specification, the penalty is life imprisonment.

If the verdict is guilty of both the charge and the specification, the jury is discharged and the trial begins a second phase designed to determine the presence or absence of one or more mitigating circumstances. If one of the three mitigating factors listed in section 2929.04 is established by a preponderance of the evidence, the penalty is life imprisonment. If none of such factors is established, the penalty is death. The procedure is essentially the same in the first phase of an aggravated murder trial whether the case is tried by a jury or by a three-judge panel on a waiver of a jury. The burden of proof still rests on the state, the same rules of evidence apply, the specification must be proved beyond a

reasonable doubt, and the panel's verdict must be unanimous.

With respect to the mitigation phase of the trial, the procedure is somewhat different depending on whether the case is tried by a jury or a three-judge panel. A jury tries only the charge and specification, and the judge in a jury trial determines mitigation. If a jury is waived, the same three-judge panel tries not only the charge and specification, but also determines the presence or absence of mitigation. Also, the statute expressly provides that the panel's finding that no mitigating circumstance is established must be unanimous, or the death penalty is precluded. In other respects, the procedure for determining mitigation is similar whether the trial judge or a three-judge panel tries the issue. Mitigation must be established by a preponderance of the evidence, and the rules of evidence also apply in this phase of the trial (the requirement for a pre-sentence investigation and report, the requirement for a psychiatric examination and report, and the provision for an unsworn statement by the defendant, represent partial exceptions to the rules of evidence).

### § 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of

the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue

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Current through Legislation passed by the 129th Ohio General Assembly  
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\*\*\* Annotations current through January 9, 2012 \*\*\*

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2929. PENALTIES AND SENTENCING  
PENALTIES FOR MURDER

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*ORC Ann. 2929.03 (2012)*

§ 2929.03. Imposing sentence for aggravated murder

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of *section 2929.04 of the Revised Code*, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose sentence on the offender as follows:

(1) Except as provided in division (A)(2) of this section, the trial court shall impose one of the following sentences on the offender:

(a) Life imprisonment without parole;

(b) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;

(c) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(d) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(e) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (A)(1)(a) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of *section 2971.03 of the Revised Code* to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be served pursuant to that section.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to *section 2971.03 of the Revised Code*.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of *section 2929.04 of the Revised Code*, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to *section 2929.023 [2929.02.3] of the Revised Code*, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard. The instruction to the jury shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but the instruction shall not mention the penalty that may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) (1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of *section 2929.04 of the Revised Code*, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to *section 2929.023 [2929.02.3] of the Revised Code*, the trial court shall impose sentence on the offender as follows:

(a) Except as provided in division (C)(1)(b) of this section, the trial court shall impose one of the following sentences on the offender:

(i) Life imprisonment without parole;

(ii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;

(iii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iv) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(v) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (C)(1)(a)(i) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of *section 2971.03 of the Revised Code* to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to *section 2971.03 of the Revised Code*.

(2) (a) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of *section 2929.04 of the Revised Code* and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be one of the following:

(i) Except as provided in division (C)(2)(a)(ii) or (iii) of this section, the penalty to be imposed on the offender shall be death, life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(ii) Except as provided in division (C)(2)(a)(iii) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of death or life imprisonment without parole on the offender pursuant to division (C)(2)(a)(i) of this section, the penalty to be imposed on the offender shall be an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be imposed pursuant to division (B)(3) of *section 2971.03 of the Revised Code* and served pursuant to that section.

(iii) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the penalty to be imposed on the offender shall be death or life imprisonment without parole that shall be served pursuant to *section 2971.03 of the Revised Code*.

(b) A penalty imposed pursuant to division (C)(2)(a)(i), (ii), or (iii) of this section shall be determined pursuant to divisions (D) and (E) of this section and shall be determined by one of the following:

- (i) By the panel of three judges that tried the offender upon the offender's waiver of the right to trial by jury;
- (ii) By the trial jury and the trial judge, if the offender was tried by jury.

(D) (1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to *section 2929.023 [2929.02.3] of the Revised Code* and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to *section 2947.06 of the Revised Code*. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of *section 2929.04 of the Revised Code*, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of *section 2929.04 of the Revised Code* and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the

trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to one of the following:

(a) Except as provided in division (D)(2)(b) or (c) of this section, to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(b) Except as provided in division (D)(2)(c) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the jury does not recommend a sentence of life imprisonment without parole pursuant to division (D)(2)(a) of this section, to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of *section 2971.03 of the Revised Code* and served pursuant to that section.

(c) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, to life imprisonment without parole.

If the trial jury recommends that the offender be sentenced to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, life imprisonment with parole eligibility after serving thirty full years of imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of *section 2971.03 of the Revised Code*, the court shall impose the sentence recommended by the jury upon the offender. If the sentence is an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment imposed as described in division (D)(2)(b) of this section or a sentence of life imprisonment without parole imposed under division (D)(2)(c) of this section, the sentence shall be served pursuant to *section 2971.03 of the Revised Code*. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Except as provided in division (D)(3)(b) of this section, one of the following:

(i) Life imprisonment without parole;

(ii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(iv) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted

of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (D)(3)(a)(i) of this section, the court or panel shall sentence the offender pursuant to division (B)(3) of *section 2971.03 of the Revised Code* to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to *section 2971.03 of the Revised Code*.

(E) If the offender raised the matter of age at trial pursuant to *section 2929.023 [2929.02.3] of the Revised Code*, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of *section 2929.04 of the Revised Code*, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Except as provided in division (E)(2) of this section, one of the following:

(a) Life imprisonment without parole;

(b) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(c) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(d) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (E)(2)(a) of this section, the court or panel shall sentence the offender pursuant to division (B)(3) of *section 2971.03 of the Revised Code* to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to *section 2971.03 of the Revised Code*.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of *section 2929.04 of the Revised Code*, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of *section 2929.04 of the Revised Code* it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. For cases in which a sentence of death is imposed for an offense committed before January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. For cases in which a sentence of death is imposed for an

offense committed on or after January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G) (1) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed before January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

(2) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed on or after January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the supreme court.

**HISTORY:**

134 v H 511 (Eff 1-1-74); 139 v S 1 (Eff 10-19-81); 146 v S 4 (Eff 9-21-95); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 180. Eff 1-1-97; 150 v H 184, § 1, eff. 3-23-05; 152 v S 10, § 1, eff. 1-1-08.

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Current through Legislation passed by the 129th Ohio General Assembly  
and filed with the Secretary of State through files 1-69 and 71.

\*\*\* Annotations current through January 9, 2012 \*\*\*

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2945. TRIAL  
TRIAL BY COURT

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2945.06 (2012)*

§ 2945.06. Jurisdiction of judge when jury trial is waived; three-judge court

In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under *section 2945.05 of the Revised Code*, any judge of the court in which the cause is pending shall proceed to hear, try, and determine the cause in accordance with the rules and in like manner as if the cause were being tried before a jury. If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of that court, and in case there is neither a presiding judge nor a chief justice, by the chief justice of the supreme court. The judges or a majority of them may decide all questions of fact and law arising upon the trial; however the accused shall not be found guilty or not guilty of any offense unless the judges unanimously find the accused guilty or not guilty. If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly. The court shall follow the procedures contained in *sections 2929.03 and 2929.04 of the Revised Code* in all cases in which the accused is charged with an offense punishable by death. If in the composition of the court it is necessary that a judge from another county be assigned by the chief justice, the judge from another county shall be compensated for his services as provided by *section 141.07 of the Revised Code*.

**HISTORY:**

GC § 13442-5; 113 v 123(179), ch 21, § 5; 115 v 531; Bureau of Code Revision, 10-1-53; 139 v S 1. Eff 10-19-81.

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\*\*\* Annotations current through November 7, 2011 \*\*\*

Ohio Rules Of Criminal Procedure

*Ohio Crim. R. 4 (2012)*

Review Court Orders which may amend this Rule.

**Rule 4. Warrant or Summons; Arrest**

**(A) Issuance.**

**(1) Upon complaint.**

If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed, and that the defendant has committed it, a warrant for the arrest of the defendant, or a summons in lieu of a warrant, shall be issued by a judge, magistrate, clerk of court, or officer of the court designated by the judge, to any law enforcement officer authorized by law to execute or serve it.

The finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a warrant, the issuing authority may require the complainant to appear personally and may examine under oath the complainant and any witnesses. The testimony shall be admissible at a hearing on a motion to suppress, if it was taken down by a court reporter or recording equipment.

The issuing authority shall issue a summons instead of a warrant upon the request of the prosecuting attorney, or when issuance of a summons appears reasonably calculated to ensure the defendant's appearance.

**(2) By law enforcement officer with warrant.**

In misdemeanor cases where a warrant has been issued to a law enforcement officer, the officer, unless the issuing authority includes a prohibition against it in the warrant, may issue a summons in lieu of executing the warrant by arrest, when issuance of a summons appears reasonably calculated to ensure the defendant's appearance. The officer issuing the summons shall note on the warrant and the return that the warrant was executed by issuing summons, and shall also note the time and place the defendant shall appear. No alias warrant shall be issued unless the defendant fails to appear in response to the summons, or unless subsequent to the issuance of summons it appears improbable that the defendant will appear in response to the summons.

**(3) By law enforcement officer without a warrant.**

In misdemeanor cases where a law enforcement officer is empowered to arrest without a warrant, the officer may issue a summons in lieu of making an arrest, when issuance of a summons appears reasonably calculated to assure the defendant's appearance. The officer issuing the summons shall file, or cause to be filed, a complaint describing the offense. No warrant shall be issued unless the defendant fails to appear in response to the summons, or unless

subsequent to the issuance of summons it appears improbable that the defendant will appear in response to the summons.

**(B) Multiple issuance; sanction.**

More than one warrant or summons may issue on the same complaint. If the defendant fails to appear in response to summons, a warrant or alias warrant shall issue.

**(C) Warrant and summons: form.**

**(1) Warrant.**

The warrant shall contain the name of the defendant or, if that is unknown, any name or description by which the defendant can be identified with reasonable certainty, a description of the offense charged in the complaint, whether the warrant is being issued before the defendant has appeared or was scheduled to appear, and the numerical designation of the applicable statute or ordinance. A copy of the complaint shall be attached to the warrant.

(a) If the warrant is issued after the defendant has made an initial appearance or has failed to appear at an initial appearance, the warrant shall command that the defendant be arrested and either of the following:

(i) That the defendant shall be required to post a sum of cash or secured bail bond with the condition that the defendant appear before the issuing court at a time and date certain;

(ii) That the defendant shall be held without bail until brought before the issuing court without unnecessary delay.

(b) If the warrant is issued before the defendant has appeared or is scheduled to appear, the warrant shall so indicate and the bail provisions of *Crim. R. 46* shall apply.

**(2) Summons.**

The summons shall be in the same form as the warrant, except that it shall not command that the defendant be arrested, but shall order the defendant to appear at a stated time and place and inform the defendant that he or she may be arrested if he or she fails to appear at the time and place stated in the summons. A copy of the complaint shall be attached to the summons, except where an officer issues summons in lieu of making an arrest without a warrant, or where an officer issues summons after arrest without a warrant.

**(D) Warrant and summons: execution or service; return.**

**(1) By whom.**

Warrants shall be executed and summons served by any officer authorized by law.

**(2) Territorial limits.**

Warrants may be executed or summons may be served at any place within this state.

**(3) Manner.**

Except as provided in division (A)(2) of this rule, warrants shall be executed by the arrest of the defendant. The officer need not have the warrant in the officer's possession at the time of the arrest. In such case, the officer shall inform the defendant of the offense charged and of the fact that the warrant has been issued. A copy of the warrant shall be given to the defendant as soon as possible.

Summons may be served upon a defendant by delivering a copy to the defendant personally, or by leaving it at the defendant's usual place of residence with some person of suitable age and discretion then residing therein, or, except when the summons is issued in lieu of executing a warrant by arrest, by mailing it to the defendant's last known address by certified mail with a return receipt requested. When service of summons is made by certified mail it shall be served by the clerk in the manner prescribed by *Civil Rule 4.1(1)*. A summons to a corporation shall be served in the manner provided for service upon corporations in *Civil Rules 4* through *4.2* and *4.6(A)* and (B), except that the waiver provisions of *Civil Rule 4(D)* shall not apply. Summons issued under division (A)(2) of this rule in lieu of executing a warrant by arrest shall be served by personal or residence service. Summons issued under division (A)(3) of this rule in lieu of arrest and summons issued after arrest under division (F) of this rule shall be served by personal service only.

**(4) Return.**

The officer executing a warrant shall make return of the warrant to the issuing court before whom the defendant is brought pursuant to *Crim. R. 5*. At the request of the prosecuting attorney, any unexecuted warrant shall be returned to the issuing court and cancelled by a judge of that court.

When the copy of the summons has been served, the person serving summons shall endorse that fact on the summons and return it to the clerk, who shall make the appropriate entry on the appearance docket.

When the person serving summons is unable to serve a copy of the summons within twenty-eight days of the date of issuance, the person serving summons shall endorse that fact and the reasons for the failure of service on the summons and return the summons and copies to the clerk, who shall make the appropriate entry on the appearance docket.

At the request of the prosecuting attorney, made while the complaint is pending, a warrant returned unexecuted and not cancelled, or a summons returned unserved, or a copy of either, may be delivered by the court to an authorized officer for execution or service.

**(E) Arrest.**

**(1) Arrest upon warrant.**

(a) Where a person is arrested upon a warrant that states it was issued before a scheduled initial appearance, or the warrant is silent as to when it was issued, the judicial officer before whom the person is brought shall apply *Crim. R. 46*.

(b) Where a person is arrested upon a warrant that states it was issued after an initial appearance or the failure to appear at an initial appearance and the arrest occurs either in the county from which the warrant issued or in an adjoining county, the arresting officer shall, except as provided in division (F) of this rule, where the warrant provides for the posting of bail, permit the arrested person to post a sum of cash or secured bail bond as contained in the warrant with the requirement that the arrested person appear before the warrant issuing court at a time and date certain, or bring the arrested person without unnecessary delay before the court that issued the warrant.

(c) Where a person is arrested upon a warrant that states it was issued after an initial appearance or the failure to appear at an initial appearance and the arrest occurs in any county other than the county from which the warrant was issued or in an adjoining county, the following sequence of procedures shall be followed:

(i) Where the warrant provides for the posting of bail, the arrested person shall be permitted to post a sum of cash or secured bail bond as contained in the warrant with the requirement that the arrested person appear before the warrant issuing court at a time and date certain.

(ii) The arrested person may in writing waive the procedures in division (E)(1)(c)(iii) of this rule after having

been informed in writing and orally by a law enforcement officer of those procedures, and consenting to being removed to the warrant issuing court without further delay. This waiver shall contain a representation by a law enforcement officer that the waiver was read to the arrested person and that the arrested person signed the waiver in the officer's presence.

(iii) Where the warrant is silent as to the posting of bail, requires that the arrested person be held without bail, the arrested person chooses not to post bail, or the arrested person chooses not to waive the procedures contained in division (E) (1) of this rule, the arrested person shall, except as provided in division (F) of this rule, be brought without unnecessary delay before a court of record therein, having jurisdiction over such an offense, and the arrested person shall not be removed from that county until the arrested person has been given a reasonable opportunity to consult with an attorney, or individual of the arrested person's choice, and to post bail to be determined by the judge or magistrate of that court not inconsistent with the directions of the issuing court as contained in the warrant or after consultation with the issuing court. If the warrant is silent as to the posting of bail or holding the arrested person without bail, the court may permit the arrested person to post bail, hold the arrested person without bail, or consult with the warrant issuing court on the issue of bail.

(d) If the arrested person is not released, the arrested person shall then be removed from the county and brought before the court issuing the warrant, without unnecessary delay. If the arrested person is released, the release shall be on condition that the arrested person appear in the issuing court at a time and date certain.

**(2) Arrest without warrant.**

Where a person is arrested without a warrant the arresting officer shall, except as provided in division (F), bring the arrested person without unnecessary delay before a court having jurisdiction of the offense, and shall file or cause to be filed a complaint describing the offense for which the person was arrested. Thereafter the court shall proceed in accordance with *Crim. R. 5*.

**(F) Release after arrest.**

In misdemeanor cases where a person has been arrested with or without a warrant, the arresting officer, the officer in charge of the detention facility to which the person is brought or the superior of either officer, without unnecessary delay, may release the arrested person by issuing a summons when issuance of a summons appears reasonably calculated to assure the person's appearance. The officer issuing such summons shall note on the summons the time and place the person must appear and, if the person was arrested without a warrant, shall file or cause to be filed a complaint describing the offense. No warrant or alias warrant shall be issued unless the person fails to appear in response to the summons.

**HISTORY:** Amended, eff 7-1-75; 7-1-90; 7-1-98.

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Ohio Rules Of Criminal Procedure

*Ohio Crim. R. 32 (2012)*

Review Court Orders which may amend this Rule.

**Rule 32. Sentence**

**(A) Imposition of sentence.**

Sentence shall be imposed without unnecessary delay. Pending sentence, the court may commit the defendant or continue or alter the bail. At the time of imposing sentence, the court shall do all of the following:

(1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.

(2) Afford the prosecuting attorney an opportunity to speak;

(3) Afford the victim the rights provided by law;

(4) In serious offenses, state its statutory findings and give reasons supporting those findings, if appropriate.

**(B) Notification of right to appeal.**

(1) After imposing sentence in a serious offense that has gone to trial, the court shall advise the defendant that the defendant has a right to appeal the conviction.

(2) After imposing sentence in a serious offense, the court shall advise the defendant of the defendant's right, where applicable, to appeal or to seek leave to appeal the sentence imposed.

(3) If a right to appeal or a right to seek leave to appeal applies under division (B)(1) or (B)(2) of this rule, the court shall also advise the defendant of all of the following:

(a) That if the defendant is unable to pay the cost of an appeal, the defendant has the right to appeal without payment;

(b) That if the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost;

(c) That if the defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost;

(d) That the defendant has a right to have a notice of appeal timely filed on his or her behalf.

Upon defendant's request, the court shall forthwith appoint counsel for appeal.

**(C) Judgment.**

A judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence. Multiple judgments of conviction may be addressed in one judgment entry. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.

**HISTORY:** Amended, eff 7-1-92; 7-1-98; 7-1-04; 7-1-09.

*Ohio S. Ct. Prac. SECTION 3*

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\*\*\* Annotations current through November 7, 2011 \*\*\*

Rules Of Practice Of The Supreme Court Of Ohio

Ohio S. Ct. Prac. SECTION 3 (2012)

Review Court Orders which may amend this Rule.

**SECTION 3. DETERMINATION OF JURISDICTION ON CLAIMED APPEALS OF RIGHT AND DISCRETIONARY APPEALS**

**S.Ct. Prac. R. 3.2. Memorandum in Response.**

**(A)** Within thirty days after the appellant's memorandum in support of jurisdiction is filed, the appellee may file a memorandum in response. If the appeal involves termination of parental rights or adoption of a minor child, or both, any memorandum in response shall be filed within twenty days after the memorandum in support of jurisdiction is filed.

**(B)** Except in postconviction death penalty cases, the memorandum in response shall not exceed fifteen numbered pages, exclusive of the certificate of service; shall not include any attachments; and shall contain the following:

**(1)** A statement of appellee's position as to whether a substantial constitutional question is involved, whether leave to appeal in a felony case should be granted, or whether the case is of public or great general interest;

**(2)** A brief and concise argument in support of the appellee's position regarding each proposition of law raised in the memorandum in support of jurisdiction.

**(C)** The appellee shall include the Supreme Court case number on the cover page of the memorandum in response.

**(D)** If two or more memoranda in support of jurisdiction are filed in a case, the appellee shall file only one memorandum in response. The time specified in division (A) of this rule for filing the memorandum in response shall be calculated from the date the last memorandum in support of jurisdiction was filed in the case.

**(E)** The appellee may waive the filing of a memorandum in response. A waiver shall be on a form prescribed by the Clerk and shall be filed within twenty days after the memorandum in support of jurisdiction is filed.

**HISTORY:** Eff 6-1-94. Amended, eff 4-1-96; 4-1-00; 4-1-02; 7-1-04; 1-1-08; 1-1-10. Eff 6-1-94. Amended, eff 4-1-96; 4-1-00; 4-1-02; 7-1-04; 1-1-08; 1-1-10. Eff 6-1-94. Amended, eff 4-1-96; 4-1-00; 4-1-02; 7-1-04; 1-1-08; 1-1-10. Eff 6-1-94. Amended, eff 4-1-96; 4-1-00; 4-1-02; 7-1-04; 1-1-08; 1-1-10. Eff 6-1-94. Amended, eff 4-1-96; 4-1-00; 4-1-02; 7-1-04; 1-1-08; 1-1-10. Eff 6-1-94. Amended, eff 4-1-96; 4-1-00; 4-1-02; 7-1-04; 1-1-08; 1-1-10.