

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

-vs-

DONALD J. KETTERER,

Appellant.

:

: Case No. 2011-0093

: Appeal taken from Butler County  
Court of Common Pleas

: Case No. CR 2003-03-0309

: This is a death penalty case.

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REPLY BRIEF OF APPELLANT DONALD J. KETTERER

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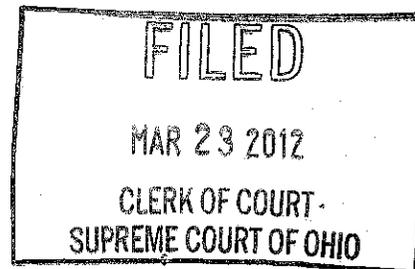
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**TABLE OF CONTENTS**

	<b>Page No.</b>
<b>TABLE OF CONTENTS</b> .....	i
<b>TABLE OF AUTHORITIES</b> .....	ii
<b>PREFACE</b> .....	iii
<b><u>PROPOSITION OF LAW NO. I</u></b> .....	1
<b>A Defendant Is Entitled To Discovery Pursuant To Crim. R. 16 When An Appellate Court Has Remanded The Case For Resentencing.</b>	
<b><u>PROPOSITION OF LAW NO. II</u></b> .....	2
<b>A Trial Court Cannot Sentence A Defendant On The Offenses of Felony Capital Murder, Aggravated Robbery, And Aggravated Burglary When The Offenses Of Aggravated Robbery And Aggravated Burglary Are Used To Elevate Aggravated Murder To Capital Murder.</b>	
<b><u>PROPOSITION OF LAW NO. III</u></b> .....	5
<b>A Trial Court Cannot Impose Consecutive Sentences of Post Release Control.</b>	
<b><u>PROPOSITION OF LAW NO. IV</u></b> .....	8
<b>A Trial Court Cannot Impose An Aggregate Fine of Five Thousand Dollars, Without Having Before It Information As To the Defendant's Present and Future Ability to Pay the Fine.</b>	
<b><u>PROPOSITION OF LAW NO. V</u></b> .....	9
<b>A Trial Court Errs When It Imposes Court Costs In Its Sentencing Entry Without Previously Having Addressed The Issue With The Defendant At The Time of Sentencing.</b>	
<b>CONCLUSION</b> .....	11
<b>CERTIFICATE OF SERVICE</b> .....	12

**TABLE OF AUTHORITIES**

**PAGE NO.**

**CASES**

*State v. Abdi*, 4th Dist. No. 09CA35, 2011-Ohio-3550.....5

*State v. Blanda*, 12th Dist. No. CA2010-03-050, 2011-Ohio-411.....5

*State v. Collins*, 8th Dist. No. 95415, 2011-Ohio-3241.....5

*State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524.....4

*State v. Johnson*, 116 Ohio St.3d 541, 2008-Ohio-69.....6

*State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314.....3, 4

*State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085.....6

*State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954.....10

*State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641.....5

*State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1.....3

*State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669.....8, 9

**RULES**

Ohio Criminal Rule 16.....1, 2

Ohio Criminal Rule 16(B)(7).....1

Ohio Criminal Rule 59(Y).....1

## **PREFACE**

Appellant Donald Ketterer stands pat on each of the arguments and authorities cited in his Merit Brief. He submits this Reply Brief solely to correct the State's mischaracterizations of the record and to rebut those arguments that the State raised in its Brief that Appellant did not already address in his Merit Brief.

The Court should not construe the lack of response by Appellant to an argument made by the State as an implied admission as to the correctness of the argument. Instead, the Court should construe the lack of response by Appellant as an indication that he already addressed the argument in his Merit Brief.

## **PROPOSITION OF LAW NO. I**

### **A Defendant Is Entitled To Discovery Pursuant To Crim. R. 16 When An Appellate Court Has Remanded His Case For Resentencing.**

The State for three separate reasons claims that Appellant was not entitled to the benefit of revised Criminal Rule 16. [Appellee's Brief, pp. 5-6]. None of the State's arguments are well taken.

Initially, the State claims that it had already provided Appellant with discovery at the time of trial. [Appellee's Brief, p. 5]. That is immaterial with respect to the issue of whether the State was obligated to provide Appellant with discovery pursuant to revised Crim. R. 16 at the resentencing hearing. The Criminal Rules specifically provide that revised Criminal Rule 16 "govern[s] all proceedings in actions brought after they take effect and also in all proceedings in actions then pending . . ." Crim. R. 59(Y). The rule does not create an exception as to those "actions then pending" that the State has already provided discovery.

The State also cites to the provision of revised Crim. R. 16(B)(7) that provides that the "written or recorded statement by a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal." [Appellee's Brief, pp. 5-6]. The State extrapolates from the rule that its duty to provide discovery only extends to witnesses that it will call at a yet to be commenced trial. [*Id.*]. However, Crim. R. 59(Y) does not limit the application of the revised rule to cases that have not yet proceeded to trial. The State in support of its argument also relies upon the staff notes to the Rule that

explains, “[a]ll disclosures must be made prior to trial.” [*Id.*]. This language expresses the drafters’ desire that discovery be provided as soon as practicable and not to erect a cutoff date for the providing of discovery. To accept the State’s argument would thwart disclosure rather than promote disclosure. The State’s interpretation would only encourage prosecutors to attempt to hide the ball, knowing that once the trial commenced, they would be absolved of their duty to comply with Crim. R. 16.

Finally, the State argues that the panel unduly expanded the scope of the resentencing hearing. [Appellee’s Brief, p. 6]. The panel entertained argument on this issue and the State did not claim that the scope of the resentencing was limited. [Tr. 9-10]. The State’s silence at trial precludes it from now raising the issue.

The trial court erred when it denied Appellant’s motion for discovery pursuant to the terms of revised Crim. R. 16. This Court should vacate Appellant’s sentences and remand the matter to afford Appellant the benefits of expanded discovery prior to the panel resentencing Appellant.

**PROPOSITION OF LAW NO. II**

**A Trial Court Cannot Sentence A Defendant On The Offenses of Felony Capital Murder, Aggravated Robbery, And Aggravated Burglary When The Offenses Of Aggravated Robbery And Aggravated Burglary Are Used To Elevate Aggravated Murder To Capital Murder.**

The State initially contends that this proposition is not properly before this Court. The State argues that the panel at the re-sentencing hearing was limited to imposing post release control as to those counts on which it had

previously failed to lawfully impose the sanction. [Appellee's Brief, pp. 7-8]. The panel entertained argument as to the scope of the resentencing hearing. [Tr. 9-10]. The State did not weigh in on the issue. [*Id.*]. Therefore, the State has waived this issue.

The State offers a second procedural argument, that Appellant did not object at resentencing and therefore, he waive this issue absent plain error. [Appellee's Brief, p. 9]. However, this Court has previously held that when a trial court incorrectly imposes separate sentences as to allied offenses, the illegal sentences constitute plain error. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, ¶¶31-32.

The State next claims that this Court already decided this issue in Appellant's initial appeal to this Court. [Appellee's Brief, p. 8]. However, that argument ignores the fact that this Court, since its initial decision in this case adopted a new test for determining when two or more offenses constitute allied offenses. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶¶ 41-52. This Court should apply the revised test in this case.

The State then argues even if *Johnson* is applicable, under the revised allied offense test, the felony murder and offenses of aggravated burglary and aggravated robbery are not offenses of similar import. [Appellee's Brief, pp. 9-10]. The State's argument defies common sense. It is claiming that the aggravated burglary and aggravated robbery of the victim which occurred during the course of the murder and therefore can be used to elevate the murder of the victim to aggravated murder and capital murder are not allied

offenses as to the aggravated burglary and aggravated robbery of the victim. [*Id.*]. The offenses in question are not only allied offenses, but they are the same offenses. The State claims that because Appellant fatally stabbed the victim, then immediately removed money from the victim's pocket and then immediately walked elsewhere in the residence to steal other items, these offenses do not factually meet the allied offense test. This Court has held that under the revised test the state should not attempt to "parse" the defendant's conduct "to sustain multiple convictions for the same conduct." *Johnson*, at ¶56. That is what the State is attempting to do, parse the conduct of Appellant to obtain as many convictions from the same conduct.

The revised allied offense test asks: 1) whether the offenses can be committed by the same conduct and 2) if the answer is in the affirmative, whether the offenses were committed by the same conduct. *Johnson* at ¶¶46-49. Since the aggravated burglary employed to elevate the murder to capital murder in Count One was the same aggravated burglary contained in Count Three, the single aggravated burglary contained in both counts constitutes an allied offense. Similarly, the aggravated robbery used to elevate the aggravated murder to capital murder in Count One was the same aggravated robbery contained in Count Two. Consequently the answer to both of the *Johnson* criteria must in the affirmative.

The State cites this Court to two of its prior capital decisions, *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641 and *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524. [Appellee's Brief, pp. 10-11]. In neither case did the

appellant raise the allied offense issue, nor did this Court address the issue. This is to be contrasted with the three cases that Appellant cited in his merit brief, in which the courts held that the defendant, pursuant to *Johnson*, could not be convicted of both felony murder and the felony employed to elevate the murder. *State v. Blanda*, 12th Dist. No. CA2010-03-050, 2011-Ohio-411, ¶19; *State v. Collins*, 8th Dist. No. 95415, 2011-Ohio-3241, ¶45; *State v. Abdi*, 4th Dist. No. 09CA35, 2011-Ohio-3550 ¶42. The State, in its brief, did not attempt to distinguish those cases or claim that they were incorrectly decided. [Appellee's Brief, pp. 7-12].

The trial court erred when it failed to merge the offenses of capital murder, aggravated robbery, and aggravated burglary. This Court should remand the matter for the State to elect as to which of the offenses it wishes to proceed.

### **PROPOSITION OF LAW NO. III**

#### **A Trial Court Cannot Impose Consecutive Sentences of Post Release Control.**

The State initially argues that whether the trial court erred in imposing post release control does not matter. [Appellee's Brief, p. 12]. The State reasons that because Appellant is under a sentence of death, post release control will only become effective if the death sentence is vacated. [*Id.*]. However, if that was the law, this Court would not have remanded Appellant's case for purposes of properly imposing post release control. When this Court remanded this case, it was certainly cognizant that Appellant was under a sentence of death.

The State then adopts another version of its argument that it does not matter what the panel stated in open court. The State claims that the sentencing entry is the only relevant factor as to this proposition. [Appellee's Brief, pp. 13-14]. That is incorrect. This Court has held that a trial court must properly inform a defendant as to post release control both in open court and its sentencing entry. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, ¶ 27 ("when a trial court fails to notify an offender about postrelease control at the sentencing hearing but incorporates that notice into its journal entry imposing sentence, it fails to comply with the mandatory provision of R.C. 2929.19(B)(3)(c) and (d), and, therefore the sentence must be vacated . . .");

The State after arguing that it does not make a difference, claims that the trial court did not impose consecutive sentences as to post release control. [Appellee's Brief, pp. 15-16]. It relies upon this Court's decision in *State v. Johnson*, 116 Ohio St.3d 541, 2008-Ohio-69. [*Id.*]. This Court therein applied the rules of statutory construction to determine if a trial court was required to impose consecutive sentences. *Johnson*, at ¶¶ 12-17]. This Court's interpretation of the trial court's sentencing entry does not involve the same principles. Furthermore, this Court in *Johnson* interpreted different statutory sections, which is analogous to separate documents. In this case the Court was interpreting a single document which contained the following successive paragraphs:

Therefore, the sentences as to Counts Two, Three and Five are to be served **consecutively** to each other and Counts Two, Three, Four, and Five are to be served **consecutively** Count ONE.

This Court has notified the Defendant about the terms of post release control as previously indicated, and the Court also advised the Defendant of the consequences of post release control imposed by the parole Board under Revised Code Section 2967.28, and the Parole Board may impose a prison terms of up to one-half of the prison term originally imposed on the offender if he violates supervision or a condition of post release control. The Defendant is Ordered to serve as part of this sentence any term of post release control imposed by the Parole Board, and any prison term for violation of that post release control.

The two paragraphs must be read in *pari materia*. In the first paragraph the panel imposed consecutive sentences. This would have led Appellant to reasonably assume, unless notified otherwise, that the sentences of post release control that were attached to the consecutive sentences, would similarly be served consecutively. The panel's use of the phrases "terms" and "any prison term" would have furthered the notion that violations of the conditions of post release control would have resulted in the sanctions being served consecutively and not concurrently.

That the sentencing entry is subject to two interpretations is compelling. At some point the officials at the Department of Correction and Rehabilitation may have to resolve issues surrounding Appellant's post release control. The panel's entry should provide the officials with a definitive, unambiguous statement as to Appellant's sentences including post release control. The entry does not provide the Department with a clear and unambiguous statement.

The trial court erred when it imposed consecutive terms of post release control. This Court should vacate Appellant's sentences and remand the matter to the trial court to impose the appropriate periods of post release control.

**PROPOSITION OF LAW NO. IV**  
**A Trial Court Cannot Impose An Aggregate Fine of Five Thousand Dollars, Without Having Before It Information As To Defendant's Present and Future Ability to Pay the Fine.**

The State initially contends that this proposition is not properly before this Court. The State argues that the panel at the re-sentencing hearing was limited to imposing post release control as to those counts on which it had previously failed to lawfully impose the sanction. [Appellee's Brief, pp. 17-18]. The panel entertained argument as to the scope of the resentencing hearing. [Tr. 9-10]. The State did not weigh in on the issue. [*Id.*]. Therefore, the State has waived this issue.

The State raises an alternative procedural argument. It claims that the doctrine of res judicata precludes Appellant from arguing this issue. It asserts that Appellant could have raised this proposition in his previous direct appeals to this Court. [Appellee's Brief, p. 18]. It further notes that the panel imposed the same fine as it had imposed at the earlier sentencing hearings. [*Id.*]. This Court has rejected this argument. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669. This Court therein held that a defendant is not barred by res judicata from raising issues on appeal that arose at a resentencing hearing, even if similar issues arose and were not objected to at the original sentencing hearing. *Id.* at ¶ 30. Because the defendant in the later appeal is taking an appeal from the judgment entered at the new sentencing hearing, res judicata is inapplicable. *Id.* The defendant has not previously taken an appeal from that judgment.

The State has not offered any arguments as to the merits of the panel's imposition of a fine. [Appellee's Brief, pp. 17-19]. Thus, the merits of this Proposition are unchallenged.

The trial court erred. This Court should either vacate Appellant's fine in its entirety or remand the case for the trial court to develop a factual record as to Appellant's ability to presently and in the future pay a fine.

**PROPOSITION OF LAW NO. V**  
**A Trial Court Errs When It Imposes Court Costs In Its Sentencing Entry Without Previously Having Addressed The Issue With The Defendant At The Time of Sentencing.**

Therefore, the State initially contends that this proposition is not properly before this Court. The State argues that the panel at the re-sentencing hearing was limited to imposing post release control as to those counts on which it had previously failed to lawfully impose the sanction. [Appellee's Brief, pp. 20-21]. The panel entertained argument as to the scope of the resentencing hearing. [Tr. 9-10]. The State did not weigh in on the issue. [*Id.*]. The State has waived this issue.

The State raises an alternative procedural argument. It claims that Appellant could have raised this proposition in his previous direct appeals to this Court. [Appellee's Brief, p. 21, n. 1]. This Court has rejected this argument. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669. This Court held therein that a defendant is not barred by res judicata from raising on appeal issues that arise in a resentencing hearing, even if similar issues arose and were not raised on appeal from the original sentencing hearing. *Id.* at ¶ 30.

Finally, the State relies upon a third procedural argument, Appellant waived this issue by not objecting to the imposition of court costs at the time of sentencing. [Appellee's Brief, p. 20]. However, the State's argument is not well taken. The panel, when it sentenced Appellant, did not impose court costs. [12.2.10 Tr. 12-17]. Thus, Appellant had no reason to object to an order to which he could not have objected. This distinguishes both cases upon which the State relies. [Appellee's Brief, p. 20]. In both of the cases, the courts imposed court costs in open court at the time of sentencing. Thus, the defendants in those cases were on notice at the time of sentencing that the trial courts had imposed court costs and could have objected at that point.

This Court recently addressed the identical issue. *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954. In *Joseph*, the trial court, like the panel in this case, imposed court costs in the sentencing entry, but not at the time of sentencing. *Id.* at ¶ 6. In *Joseph*, the defendant, like Appellant, did not object at the time of sentencing as to the imposition of court costs because there was no order to which to object. This Court did not hold that Joseph should have objected to the lack of an order as to court costs and therefore he had waived the issue. Instead, this Court ordered that the case be remanded to permit Joseph to address the issue of costs, "Joseph was harmed here. He was denied the opportunity to claim indigency and to seek a waiver of the payment of court costs before the trial court. He should have had that chance." *Id.* at ¶ 22.

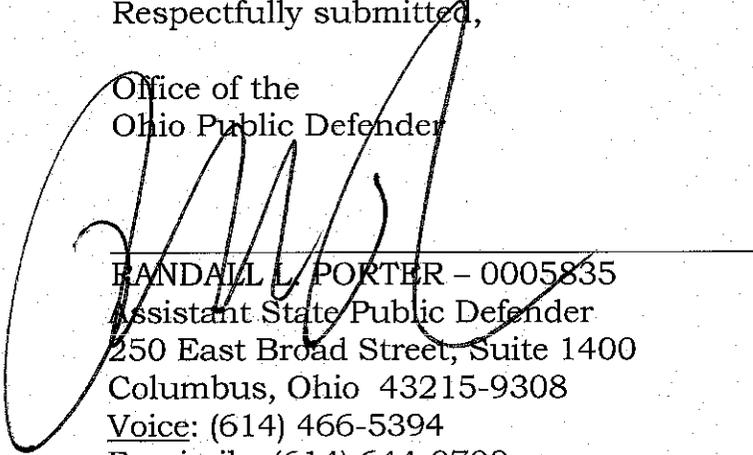
This Court, as it did in *Joseph*, should remand the matter to the trial court to afford Appellant an opportunity to seek a waiver of the payment of court costs.

**CONCLUSION**

The State, in its merit brief, did not effectively rebut any of the factual or legal arguments that Appellant raised in his merit brief. For the reasons set forth in this reply brief, Appellant's merit brief, and any other reasons that may be apparent on the face of the record, this Court should vacate Appellant's non capital sentences. It should remand the matter for the trial court to resentence Appellant

Respectfully submitted,

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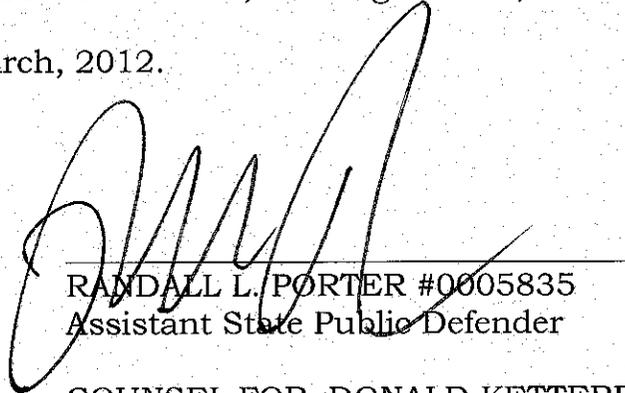
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing *Reply Brief of Appellant Donald Ketterer* was forwarded both electronically and by first-class U.S. Mail, postage prepaid to Lina N. Alkawahwi, Assistant Prosecuting Attorney and Michael A. Oster, Jr. Chief, Appellate Division, Office of the Butler County Prosecuting Attorney, Government Services Center, 315 High Street, Hamilton, Ohio 45011 on this 23rd day of March, 2012.



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