

ORIGINAL

IN THE OHIO SUPREME COURT

State of Ohio,	:	
	:	Case No. 2013- 332
Plaintiff-Appellant,	:	
v.	:	On appeal from the Butler
	:	County Court of Appeals
Donald Lee Johnson,	:	Twelfth Appellate District
	:	Case No. CA2011-11-212
Defendant-Appellee.	:	

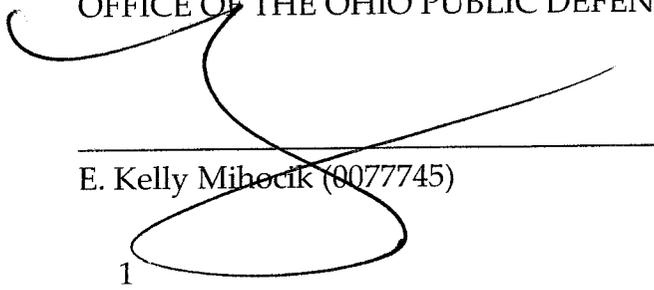
**EMERGENCY MOTION FOR STAY OF BRIEFING SCHEDULE  
IN THE COURT OF APPEALS PENDING RESOLUTION OF THE CERTIFIED  
CONFLICT FILED IN THIS COURT**

On February 25, 2013, Appellant Donald Johnson filed a notice of a certified conflict in this Court. But until this Court decides whether a conflict exists, his case remains pending in the Twelfth District Court of Appeals. As explained in the attached Memorandum in Support, because resolution of the conflict will decide which issues Mr. Johnson can investigate and present to the court of appeals for review, he asks this Court to stay the briefing schedule in the court of appeals until this Court decides whether a certified conflict exists, and if a conflict is found, he asks that the stay continue until the conflict may be resolved.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

**FILED**  
MAR 12 2013  
CLERK OF COURT  
SUPREME COURT OF OHIO

  
E. Kelly Mihock (0077745)

Assistant State Public Defender

250 East Broad Street – Suite 1400

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*Counsel for Appellant Donald Lee Johnson*

## **Memorandum in Support**

### **I. Introduction.**

The court of appeals refuses to grant newly appointed appellate counsel access to the presentence investigation report relied upon by the trial court in choosing Mr. Johnson's sentences and fines. Because the contents of that report were essential to the trial court's selection of Mr. Johnson's punishment, that report is material to his appeal.

The Fourth District Court of Appeals allows newly appointed appellate counsel to review the presentence investigation report prior to filing an appellant's brief. For that reason, on February 21, 2013, the court of appeals certified the following conflict to this Court: whether newly appointed appellate counsel could review the contents of a presentence investigation report. Attached as Exhibits A. But without granting appellate counsel access to the report, on that same day, it ordered Mr. Johnson to file his appellate brief by March 14, 2013. Attached as Exhibit B.

Mr. Johnson immediately moved the court of appeals for a stay of the briefing schedule. Alternatively, he asked for an extension of time to file his brief in the event

that the request for a stay was denied so that he could ask this Court to order a stay of the briefing schedule. Attached as Exhibits C and D. By an entry dated March 6, 2013, the court of appeals denied Mr. Johnson's request for a stay but granted him until March 27, 2013 to file his merit brief. Attached as Exhibit E. Because the contents of the presentence investigation report are vital to an effective appeal and Mr. Johnson is likely to succeed on the conflict question, he asks this Court to stay the briefing schedule in the court of appeals until this Court can determine if a conflict exists. If a conflict is found, he asks that the stay continue until the conflict has been resolved by this Court.

**II. The presentence investigation report is material to the issues on appeal, and Mr. Johnson is likely to succeed on the merits.**

**A. Access to the presentence investigation report is essential to a meaningful appeal.**

Before selecting Mr. Johnson's sentences and fines, the trial court said that it "review[ed] and consider[ed] the principles and guidelines of the sentencing statute, O.R.C. 2929.11, the factors the Court should consider in Section 2929.12 and 2929.13, and a presentence investigation report, and the defendant's record and the facts of this case," Oct. 31, 2011 Disposition Hearing Tr. 13. It then imposed an aggregate sentence of thirteen years of imprisonment and \$19,000 in fines.

If a presentence investigation report is prepared, the trial court must consider that report before imposing a defendant's sentence. R.C. 2929.19(B)(1). *State v. Ellis*, 4th

Dist. No. 06CA3071, 2007-Ohio-2177, ¶ 32 (if a PSI includes detailed financial information, it is enough to satisfy R.C. 2929.19(B)(5)<sup>1</sup>), and *State v. Mayor*, 7th Dist. No. 07 MA 177, 2008-Ohio-7011, 2008 Ohio App. LEXIS 5868, ¶¶ 18, 26 (noting that a trial court may consider the PSI in selecting the defendant's sentence). And a presentence investigation report contains information material to selecting a defendant's punishment. R.C. 2951.03(A)(1) (stating that a presentence investigation report shall include the circumstances of the offense, the present circumstances of the defendant, his or her social history, his or her criminal record, his or her juvenile record, and may include other matters specified in Crim.R. 32.2 as well as the results of any physical and mental examinations), and R.C. 2929.11 and R.C. 2929.12 (identifying the factors a court considers in selecting a defendant's sentence).

The trial court considered and relied upon the information contained in Mr. Johnson's presentence investigation report when selecting his sentences and fines; consequently, the information in that report is material to Mr. Johnson's appeal. Mr. Johnson cannot effectively investigate, evaluate, and present the assignments of error in his appeal unless and until, appellate counsel has access to the presentence investigation report, but the court of appeals refuses to grant counsel access.

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<sup>1</sup> Revised Code 2929.19(B)(5) requires that a trial court consider the defendant's present and future ability to pay a financial sanction before one may be imposed.

**B. If this Court finds that a conflict exists, Mr. Johnson is likely to succeed on the merits.**

The requested stay should be granted because Mr. Johnson is likely to succeed on the merits in this Court. A certified conflict exists, as demonstrated by the Twelfth District Court of Appeals' entry certifying a conflict. Should this Court agree, Mr. Johnson is likely to succeed on the merits of his position.

The court of appeals is forcing Mr. Johnson to pursue his appeal without access to the full record on appeal – a record to which both the prosecutor and the court have access. That is fundamentally unfair; Mr. Johnson cannot adequately investigate or present all of his potential assignments of error without access to the full record. It is a violation of due process to compel him to proceed in these circumstances. *See* Fifth and Fourteenth Amendments to the United States Constitution; Ohio Constitution, Article I, Section 16. *See generally Brady v. Maryland*, 373 U.S. 83, 887, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (recognizing that that the Due Process Clause protects a defendant's access to information that is material to either his guilt or punishment). Indeed, he may waive arguments that he does not know he has, and he may make frivolous arguments that could have been investigated. Moreover, allowing appellate counsel to see the report will not alter its confidential nature. Further, Mr. Johnson is permitted to see the report pursuant to statute.

Revised Code Section 2953.08(A) states that a defendant may appeal his sentence as a matter of right, and R.C. 2953.08(F)(1) says that any presentence investigation

report will be made a part of the record. Thus, the plain language of the statute leads to the logical conclusion that the presentence investigation report may be reviewed in determining the propriety of the punishment imposed. Indeed, the trial court is directed to transmit the report to the court of appeals as part of the appellate record. R.C. 2953.08(F)(1). And just as defense counsel is able to review the presentence investigation report prior to the imposition of a defendant's sentence, appellate counsel must be permitted to review the presentence report when investigating a challenge to the sentence that was imposed.

Furthermore, Mr. Johnson's right to a meaningful appeal and the effective assistance of appellate counsel can only be satisfied if his appellate counsel is permitted to see the report. Sixth and Fourteenth Amendments to the United States Constitution; Ohio Constitution, Article I, Section 10; *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 141-42, 538 N.E.2d 373, 379 (1989). To protect those rights, counsel must be able to adequately investigate the trial court proceedings to determine if Mr. Johnson's convictions and sentences comported with law. Appellate counsel cannot investigate the propriety of the punishment imposed if he or she is prevented from reviewing the information that was relied upon by the trial court in making its determination. Moreover, in later proceedings, counsel's failure to raise certain arguments cannot be determined to be the result of a strategic decision – counsel was simply prevented from discovering those

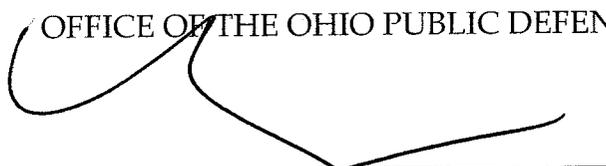
claims. And finally, it is worth noting that if this Court finds that a conflict exists, it is a waste of resources to ask Mr. Johnson to file his merit brief in the court of appeals before the conflict has been resolved because at the conclusion of the case before this Court, the action will be remanded to the court of appeals for further proceedings.

**III. Conclusion.**

Based on the foregoing, Mr. Johnson asks that this Court order a stay of the briefing schedule in the Butler County Court of Appeals until this Court decides whether a conflict exists, and if a conflict is found, Mr. Johnson asks that the stay be continued until this Court resolves that conflict.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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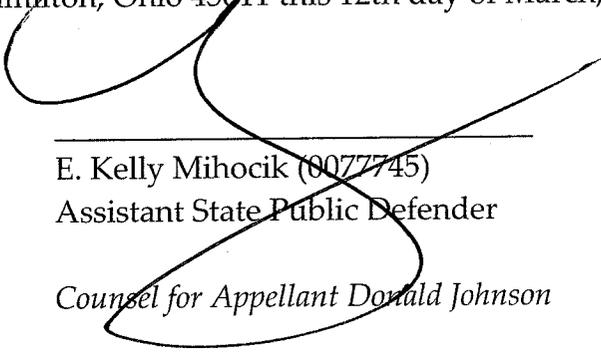
E. Kelly Mihocik (0077X45)  
Assistant State Public Defender

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kelly.mihocik@opd.ohio.gov

*Counsel for Appellant Donald Lee Johnson*

## CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was sent by regular U.S. Mail, to the office of Michael A. Oster, Jr., Assisting Prosecuting Attorney, Butler County Prosecutor's Office, 315 High Street, 11<sup>th</sup> Floor, Hamilton, Ohio 45011 this 12th day of March, 2013.



---

E. Kelly Mihocik (0077745)  
Assistant State Public Defender

*Counsel for Appellant Donald Johnson*

#388731

IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

FILED  
2013 FEB 21 PM 2:58

STATE OF OHIO,

CASE NO. CA2011-11-212

Appellee,

MARY L. SWAIN  
BUTLER COUNTY CLERK OF COURTS  
ENTRY GRANTING MOTION TO  
CERTIFY CONFLICT

vs.

FILED BUTLER CO.  
COURT OF APPEALS

DONALD LEE JOHNSON,

FEB 21 2013

Appellant.

MARY L. SWAIN  
CLERK OF COURTS

The above cause is before the court pursuant to a motion to certify conflict filed by counsel for appellant, Donald Lee Johnson, on January 25, 2013. No response to the motion has been filed. The motion seeks certification of this court's decision denying newly-appointed appellate counsel the opportunity to review the appellant's presentence investigation report as in conflict with a decision by the Fourth District Court of Appeals, *State v. Jordan*, 4th Dist. Case No. 03CA2878 (Nov. 17, 2003).

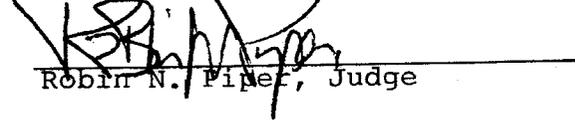
This court is authorized to certify a conflict to the Ohio Supreme Court for resolution pursuant to Section 3(B)(4), Article IV of the Ohio Constitution, which states that when the judgment or order of a district court of appeals conflicts with a judgment pronounced upon the same question by another court of appeals, the court shall certify the matter to the Supreme Court of Ohio for review and final determination.

Upon consideration, the motion is GRANTED. The issue for certification is whether, pursuant to R.C. 2951.03, newly-appointed appellate counsel is entitled to obtain a copy of the defendant's presentence investigation report.

IT IS SO ORDERED.

  
Robert P. Ringland,  
Administrative Judge

  
Michael E. Powell, Judge

  
Robin N. Piper, Judge

FILED

IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

2013 FEB 21 PM 2:59

STATE OF OHIO,

MARY L. SWAIN  
BUTLER COUNTY  
CLERK OF COURTS

CASE NO. CA2011-11-212

Appellee,

ENTRY DESIGNATING DUE DATE FOR  
APPELLANT'S BRIEF

vs.

DONALD LEE JOHNSON,

FILED BUTLER CO.  
COURT OF APPEALS

Appellant.

FEB 21 2013

MARY L. SWAIN  
CLERK OF COURTS

In accordance with the entry granting motion for extension of time filed by the court on February 16, 2013 and the court's entry granting appellant's motion to certify conflict, appellant's brief shall be filed on or before **March 14, 2013**.

IT IS SO ORDERED.

*Bennett A. Manning*  
Bennett A. Manning, Magistrate

IN THE COURT OF APPEALS  
BUTLER COUNTY, OHIO  
TWELFTH APPELLATE DISTRICT

State of Ohio,

MARY L. SWAIN  
BUTLER COUNTY  
CLERK OF COURTS

Plaintiff-Appellee,

: C.A. Case No. CA 2011-11-0212

v.

Donald Lee Johnson,

FILED BUTLER CO.  
COURT OF APPEALS

FEB 28 2013

MARY L. SWAIN  
CLERK OF COURTS

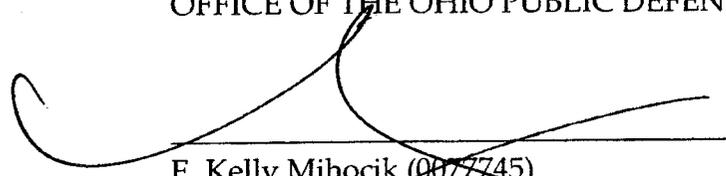
Defendant-Appellant.

MOTION FOR EXTENSION OF TIME

This motion is filed in the alternative to Appellant Donald Lee Johnson's contemporaneously filed Motion to Stay. Should this Court deny Mr. Johnson's request for a stay, he asks for a twenty-day extension of time to file his merit brief to ensure sufficient time to request a stay from the Ohio Supreme Court. App.R. 14(B).

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



E. Kelly Mihocik (0077745)  
Assistant State Public Defender  
(Counsel for Defendant)  
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kelly.mihocik@opd.ohio.gov

Counsel for Appellant Donald Lee Johnson

## Memorandum in Support

Prior to filing his merit brief, Mr. Johnson asked to view the presentence investigation report relied upon by the trial court when imposing Mr. Johnson's fines and sentences. This Court denied his requests. But on February 21, 2013, this Court certified a conflict in Mr. Johnson's case. On that same date, but in a separate entry, this Court ordered Mr. Johnson to file his merit brief on or before March 14, 2013.

Contemporaneously with the filing of this motion, Mr. Johnson filed a motion to stay the briefing schedule until the Ohio Supreme Court determines whether it will hear arguments in the certified conflict case, and if so, Mr. Johnson has also asked that the proceedings in this Court be held in abeyance until the Ohio Supreme Court has issued a merits decision. This instant motion is filed in the alternative and asks for an extension of time to file his merit brief in this Court, should this Court deny his motion to stay. Mr. Johnson would ask for this extension to ensure sufficient time in which to ask the Ohio Supreme Court for a stay of the briefing schedule in this case.

This is Mr. Johnson's fourth request for an extension of time to file his merit brief.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

---

E. Kelly Mihocik (0077745)  
Assistant State Public Defender  
(Counsel for Defendant)

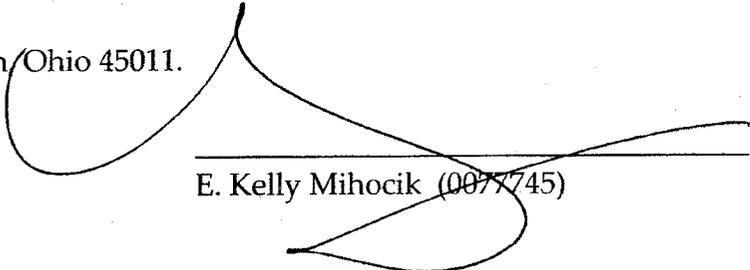
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*Counsel for Appellant Donald Lee Johnson*

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was been served this 27th day of February, 2013 by regular U.S. Mail, on the Butler County Prosecutor's Office, 315 High Street, 11<sup>th</sup> Floor, Hamilton, Ohio 45011.



---

E. Kelly Mihocik (007/745)

#388109

IN THE COURT OF APPEALS  
BUTLER COUNTY, OHIO  
2011 FEB 28 APPELLATE DISTRICT

State of Ohio,

MARY L. SWAIN  
BUTLER COUNTY  
CLERK OF COURTS

Plaintiff-Appellee,

: C.A. Case No. CA 2011-11-0212

v.

Donald Lee Johnson,

: FILED BUTLER CO.  
COURT OF APPEALS

Defendant-Appellant.

: FEB 28 2013  
: MARY L. SWAIN  
CLERK OF COURTS

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MOTION FOR STAY

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Appellant Donald Lee Johnson asks for a stay of the briefing schedule until the Ohio Supreme Court determines whether a conflict exists and if so, resolves that conflict. As set forth in the attached Memorandum in Support, Mr. Johnson can demonstrate (1) a strong probability that the Ohio Supreme Court will decide that a conflict exists, and (2) the likelihood of his success on the merits.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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*Counsel for Appellant Donald Lee Johnson*

### **Memorandum in Support**

Mr. Johnson has asked this Court if prior to the filing of his merit brief, he could see the presentence investigation report that was relied upon by the trial court when imposing his sentences and fines. *See* Nov. 29, 2012 Mot. to View and Supplement Record with Presentence Investigation Report; Dec. 17, 2012 Mot. for Reconsideration. Those requests were made, in part, because the information contained in that report (or the lack thereof) is crucial to investigating Mr. Johnson's assignments of error.

In entries dated December 7, 2012 and January 16, 2013, this Court denied Mr. Johnson's requests. On January 25, 2013, Mr. Johnson filed a motion to certify a conflict on this issue, because this Court's orders were contrary to the orders of the Fourth District Court of Appeals. Contemporaneously with the filing of his requests to view that report, Mr. Johnson filed for two extensions of time so that this issue could be resolved before filing his brief.<sup>1</sup> Dec. 18, 2012 and Jan. 31, 2013 Mots. for Ext. Those motions were granted; most recently, on February 6, 2013, this Court granted his request for an extension but specifically denied his request to stay briefing of this case should this Court grant his motion to certify a conflict. Feb. 6, 2012 Entry Granting Ext. of Time, attached.

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<sup>1</sup> In total, Mr. Johnson has asked for three extensions of time to file his merit brief. The first request was made on November 19, 2011, prior to filing his motion to view the presentence investigation report.

On February 21, 2013, this Court granted Mr. Johnson's motion to certify a conflict to the Ohio Supreme Court. As a result, on February 25, 2013, Mr. Johnson filed a notice of a certified conflict in the Ohio Supreme Court. Attached. The Ohio Supreme Court has not yet ruled on whether a conflict exists. But nevertheless, on February 21, 2013, this Court ordered Mr. Johnson to file his merit brief on or before Thursday, March 14, 2013.

This Court should stay the briefing of Mr. Johnson's merit brief because the Ohio Supreme Court is likely to find that a conflict exists, Mr. Johnson is likely to succeed on the certified question, and Mr. Johnson's access to the presentence investigation report will impact the issues raised in Mr. Johnson's merit brief.

It is likely that the Ohio Supreme Court will determine that a conflict exists because this Court has already certified a conflict. Consequently, the Ohio Supreme Court is likely to order briefing. S.Ct. Prac. R. 4.2(D).

Mr. Johnson is also likely to succeed on the merits. The resolution of the certified question is fundamental to the investigation and presentation of Mr. Johnson's assignments of error. As explained in Mr. Johnson's December 17, 2012 Application for Reconsideration (attached), Mr. Johnson was ordered to pay a \$19,000 fine. Pursuant to R.C. 2929.19(B)(5), prior to imposing a fine, the trial court must consider the defendant's present and future ability to pay. In making this determination, the court of appeals will review the presentence investigation report. *State v. Ellis*, 4th Dist. No. 06CA3071, 2007-Ohio-2177, ¶ 32. Disposition Hearing Tr. 13. Moreover, pursuant to R.C. 2929.11,

2929.12, and 2929.13, a trial court must consider certain factors before imposing a sentence. Information relevant to those factors should be found in the presentence investigation report. For this reason, the Ohio Supreme Court regularly allows both parties access to the presentence investigation report when a case is on appeal. *See, e.g.,* The Sup. Ct. of Ohio Case Announcements, 2013-Ohio-659 (Feb. 26, 2013) (ruling in *State v. Long*, Ohio Sup. Ct. Case No. 2012-1410, that appellant's attorney shall have access to the presentence investigation report).

Here, the trial court specifically stated that it was considering the presentence investigation report before it imposed Mr. Johnson's sentence. It is obviously impossible for appellate counsel to know what is in that report and how that information (or lack thereof) impacts the potential assignments of error without access to the information. Because it violates Mr. Johnson's due process rights to force him to proceed in his appeal without access to the full trial court record – particularly when the court and the prosecutor have access to that information – Mr. Johnson is likely to succeed on the merits. *See* Fifth and Fourteenth Amendments to the United States Constitution; Ohio Constitution, Article I, Section 16; *Brady v. Maryland*, 373 U.S. 83, 887, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (recognizing that the Due Process Clause protects a defendant's access to information that is material to either his guilt or punishment).

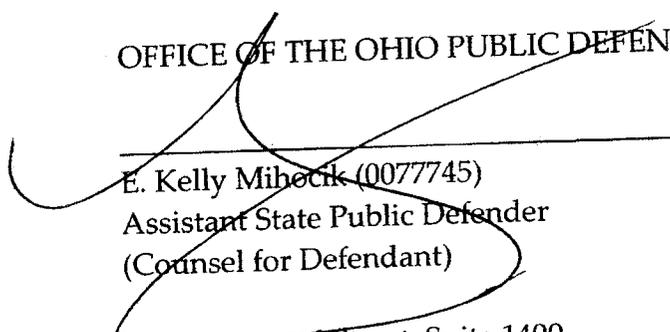
Finally, because Mr. Johnson's review of the presentence investigation report will influence the manner in which Mr. Johnson proceeds on appeal, it is logical to stay these proceedings until the Ohio Supreme Court has resolved the conflict. It is a waste of this

Court's resources to order Mr. Johnson to file a brief in this Court in March 2013, because it is likely that once the conflict has been resolved by the Ohio Supreme Court that it will remand this case to this Court for additional briefing. Unless a stay is imposed, this Court will review two sets of briefs, hear two oral arguments, and write two judicial opinions. Instead, all of the issues should be resolved in a single proceeding, which should take place after the Ohio Supreme Court has resolved the conflict.

Based upon the foregoing, Mr. Johnson asks this Court to stay the briefing of this case until the Ohio Supreme Court determines whether a conflict exists and if so, resolves that conflict.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

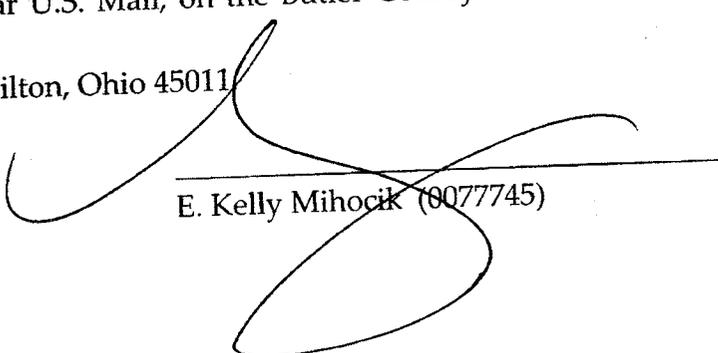
  
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*Counsel for Appellant Donald Lee  
Johnson*

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was been served this 27th day of February, 2013 by regular U.S. Mail, on the Butler County Prosecutor's Office, 315 High Street, 11<sup>th</sup> Floor, Hamilton, Ohio 45011



---

E. Kelly Mihocik (8077745)

#388012

IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

**FILED**

2013 FEB -6 PM 3:14

STATE OF OHIO,

Appellee,

vs.

DONALD LEE JOHNSON,

Appellant.

MARY L. SWAIN CASE NO. CA2011-11-212  
BUTLER COUNTY  
CLERK OF COURTS

ENTRY GRANTING MOTION FOR  
EXTENSION OF TIME

FILED BUTLER CO.  
COURT OF APPEALS

FEB 06 2013

MARY L. SWAIN  
CLERK OF COURTS

The above cause is before the court pursuant to a motion for extension of time filed by counsel for appellant, Donald Lee Johnson, on January 31, 2013. The motion requests additional time to file the appellant's brief, 20 days after the court rules on a motion to certify conflict filed on January 25, 2013.

Upon consideration, the motion is GRANTED. The motion to stay this case pending resolution of the conflict by the Ohio Supreme Court in the event the motion to certify conflict is granted is DENIED.

IT IS SO ORDERED.

  
Robert P. Ringland, Administrative Judge



ORIGINAL

IN THE OHIO SUPREME COURT

13-0332

State of Ohio,

Case No.

Plaintiff-Appellant,

On appeal from the Butler  
County Court of Appeals  
Twelfth Appellate District  
Case No. CA2011-11-212

v.

Donald Lee Johnson,

Defendant-Appellee.

NOTICE OF CERTIFIED CONFLICT

Michael Gmoser (0002132)  
Butler County Prosecutor

Michael A. Oster, Jr. (0076491)  
Assistant Prosecuting Attorney  
(Counsel of Record)

Butler County Prosecutor's Office  
Government Services Center  
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*Counsel for Appellee State of Ohio*

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*Counsel for Appellant Donald Lee Johnson*

FILED  
FEB 25 2013  
CLERK OF COURT  
SUPREME COURT OF OHIO

EXHIBIT  
B

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## NOTICE OF CERTIFIED CONFLICT

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In accordance with S.Ct. Prac. R. 4.1, Appellant Donald Johnson files notice that the Twelfth Appellate District has certified a conflict between its December 7, 2012 and January 16, 2013 orders in *State v. Johnson*, CA2011-11-212, which prohibit appellate counsel from reviewing a presentence investigation report prior to filing an appellate brief, and the Fourth District Court of Appeals' order in with *State v. Jordan*, 4th Dist. Case No. 03CA2878 (Nov. 17, 2003), which allows appellate counsel to have access to the presentence investigation report prepared in a case. The Entry Granting Motion to Certify Conflict and the conflicting court of appeals' orders are attached.

On January 25, 2013, Mr. Johnson filed a timely motion to certify a conflict in the Twelfth Appellate District in case number CA2011-11-212. On February 21, 2013, well within the sixty day period set forth in App.R. 25(C), the Twelfth Appellate District certified the following question: whether newly appointed appellate counsel should have the opportunity to review the appellant's presentence investigation report.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

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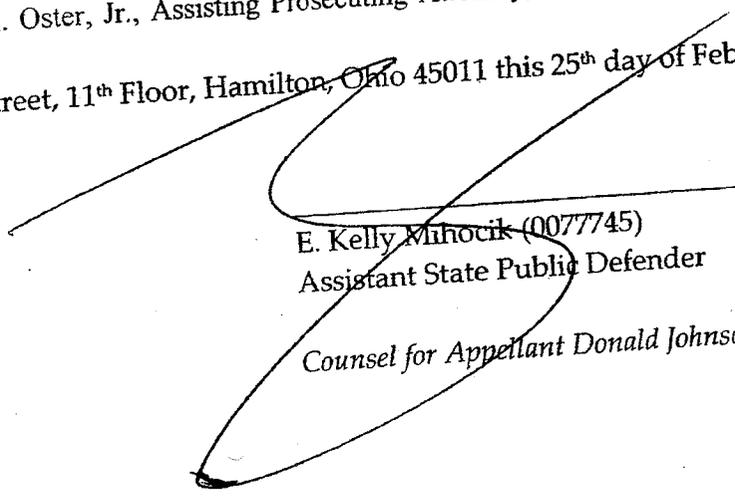
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kelly.mihocik@opd.ohio.gov

*Counsel for Appellant Donald Lee Johnson*

**CERTIFICATE OF SERVICE**

I certify that a true copy of the foregoing was sent by regular U.S. Mail, to the office of Michael A. Oster, Jr., Assisting Prosecuting Attorney, Butler County Prosecutor's Office, 315 High Street, 11<sup>th</sup> Floor, Hamilton, Ohio 45011 this 25<sup>th</sup> day of February, 2013.

  
E. Kelly Mihocik (0077745)  
Assistant State Public Defender

*Counsel for Appellant Donald Johnson*

#387872

IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

2013 FEB 21 PM 2:58 CASE NO. CA2011-11-212

STATE OF OHIO,

Appellee,

vs.

DONALD LEE JOHNSON,

Appellant.

MARY L. SWAIN  
BUTLER COUNTY CLERK OF COURTS  
ENTRY GRANTING MOTION TO CERTIFY CONFLICT

FILED BUTLER CO.  
COURT OF APPEALS

FEB 21 2013

MARY L. SWAIN  
CLERK OF COURTS

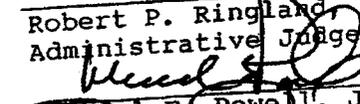
The above cause is before the court pursuant to a motion to certify conflict filed by counsel for appellant, Donald Lee Johnson, on January 25, 2013. No response to the motion has been filed. The motion seeks certification of this court's decision denying newly-appointed appellate counsel the opportunity to review the appellant's presentence investigation report as in conflict with a decision by the Fourth District Court of Appeals, *State v. Jordan*, 4th Dist. Case No. 03CA2878 (Nov. 17, 2003).

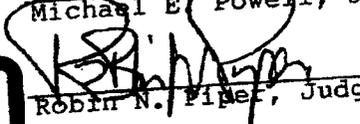
This court is authorized to certify a conflict to the Ohio Supreme Court for resolution pursuant to Section 3(B)(4), Article IV of the Ohio Constitution, which states that when the judgment or order of a district court of appeals conflicts with a judgment pronounced upon the same question by another court of appeals, the court shall certify the matter to the Supreme Court of Ohio for review and final determination.

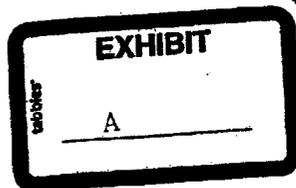
Upon consideration, the motion is GRANTED. The issue for certification is whether, pursuant to R.C. 2951.03, newly-appointed appellate counsel is entitled to obtain a copy of the defendant's presentence investigation report.

IT IS SO ORDERED.

  
Robert P. Ringland,  
Administrative Judge

  
Michael E. Powell, Judge

  
Robin N. Piper, Judge



SCIOTO COUNTY  
OHIO  
FILED

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
SCIOTO COUNTY

2003 NOV 17 AM 8:29

State of Ohio,

Appellee,

v.

Stephanie Jordan,

Appellant.

CLERK OF COURTS  
Case No. 03CA2878

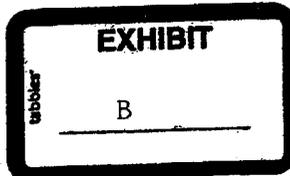
ENTRY

Appellant filed a motion to view the presentence investigation report ("PSI"), based on the right to effective assistance of appellate counsel under the Sixth Amendment to the Constitution of the United States, as accorded by *Evitts v. Lucey* (1985), 469 U.S. 387, 105 S.Ct. 830, 83 L.E.2d 821. We stayed briefing in this case until resolution of this issue.

STATUTORY BACKGROUND

R.C. 2951.03(B)(1) requires the trial court to permit the defendant or counsel to view a PSI before sentencing, except for certain, specified contents:

- (a) recommendations as to sentence;
- (b) diagnostic opinions that the court believes might seriously disrupt the defendant's rehabilitation, if disclosed;
- (c) sources of information obtained upon a promise of confidentiality;



33/54

- (d) any other information that the court believes might result in physical harm or some other type of harm to the defendant or any other person, if disclosed.

R.C. 2951.03(B)(2) requires the trial court to permit the defendant or counsel to comment on the PSI and permits challenges to the factual accuracy of the PSI. However, under R.C. 2951.03(B)(3), if the trial court believes that any information is subject to any of the four criteria for nondisclosure, instead of releasing the PSI to the defendant or counsel, the court may provide an oral or written summary of the information it will use in sentencing. If it uses this procedure, the trial court must also permit the defendant or counsel to comment on the summary.

Under R.C. 2951.03(B)(4), if the trial court discloses any material to the defendant or counsel, the trial court must also disclose it to the prosecutor.

Under R.C. 2951.03(B)(5), if the defendant or counsel challenges the accuracy of the PSI or any summary, the trial court must either (a) make a finding as to the allegation, or (b) make a determination that no finding is necessary because the matter challenged will not be taken into account in determining sentence.

R.C. 2951.03(D)(2) requires the defendant or counsel and the prosecutor to return all copies of a PSI or summary made available to them and prohibits them from making other copies.

The statute also addresses the availability of the report after sentencing. R.C. 2951.03(D)(1) states that a PSI and summary are confidential and not public records. The section directs an appellate court to receive and use a PSI or summary only as authorized by R.C. 2953.08(F)(1). Further, R.C. 2951.03(D)(3) states that the appellate court shall retain the PSI or summary under seal, except when being used as authorized by R.C. 2953.08(F)(1).

R.C. 2953.08(F)(1) requires the trial court to make the PSI a part of the record on appeal. It also states a court of appeals that reviews a PSI in connection with an appeal shall comply with R.C. 2951.03(D)(3) - i.e., shall keep it under seal - when the court is not using it. The section further states that an appellate court's use of the PSI does not cause the PSI to become a public record after the appellate court's use of the report.

To summarize: The statutes require the trial court to provide a PSI to the defendant or counsel before sentencing. After sentencing, the parties must return any copies and not make others. The PSI is placed under seal, is not a public record, and may be used on appeal only by the appellate court,

which must preserve its confidentiality when not using it. There are other provisions for use by other authorized personnel, including personnel of the Department of Rehabilitation and Correction. However, we find no express authorization to make the PSI available to an appellant or to the prosecutor after sentencing and thus on appeal. Likewise, no special provision is made for newly appointed counsel on appeal.

ANALYSIS

Many Ohio cases hold that a convicted defendant is not entitled to view the PSI after sentencing. See, e.g., *State ex rel. Normand v. Wilkinson* (Nov. 28, 1995), Franklin App. No. APB05-563 (prisoner could not compel disclosure by writ of mandamus after sentencing); *State ex rel. Sharpless v. Gierke* (2000), 137 Ohio App.3d 821, 739 N.E.2d 1231 (writ of mandamus seeking to compel access to PSI for purposes of seeking postconviction relief); *State v. Fisher*, Butler App. No. 98-09-190, 2002-Ohio-2069, and *State v. Hicks*, Butler App. No. CA2002-07-162, 2003-Ohio-506 (appellate counsel not de facto ineffective because unable to view PSI after sentencing); and *State v. Roberson* (2001), 141 Ohio App.3d 626, 752 N.E.2d 984 [trial counsel not ineffective because unable to view parts of PSI restricted under R.C. 2951.03(B)(1)]

Roberson, supra, cited *Williams v. New York* (1949), 337 U.S. 241, 69 S.Ct. 1069, 93 L.Ed.2d 1337, which held that due process did not require disclosure of information available to the trial court for sentencing. This was true even though the court did not reveal it to the defendant or counsel prior to sentencing and thus the defendant had no opportunity to deny or explain it. 141 Ohio App.3d at 629; 337 U.S. at 250-251. The *Williams* court based this conclusion on the historically wide latitude trial courts had to consider additional information in order to promote the modern trend in crafting individualized sentences. 337 U.S. at 246-250.

The Roberson court also noted that *Williams* has been distinguished in capital cases by *Gardner v. Florida* (1977), 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393. The *Gardner* court found that the trial court in *Williams* "had stated the facts of the report on the record", 141 Ohio App.3d at 630; 430 U.S. at 355. *Gardner* then held that due process required full disclosure of the PSI. 430 U.S. 362

Roberson then concluded that *Gardner* was limited to capital cases, 141 Ohio App.3d at 631-632. While we agree that *Gardner* appears to be limited to capital cases, we find, independently, that due process requires a PSI to be shown to newly appointed appellate counsel.

We believe the statute's failure to allow newly appointed appellate counsel to view the PSI is a serious omission that violates an appellant's right to due process of law under the Sixth Amendment to the Constitution of the United States. In *Evitts v. Lucey*, supra, the Supreme Court stated:

\* \* \* if a State has created appellate courts "as an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois*, 351 U.S. at 18, 76 S.Ct. at 590, the procedures used must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution. 469 U.S. at 393; 105 S.Ct. at 834.

This state has, of course, created a system of appellate courts, and it has granted to every litigant a first appeal as of right. R.C. 2505.03. Moreover, R.C. 2953.08(A) provides in part:

In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:

\* \* \*

- (4) The sentence is contrary to law.

\* \* \*

Given these rights to appeal and to challenge the lawfulness of the sentence, we believe that fundamental fairness and due process require newly appointed appellate

counsel have access to the PSI. However, we deem this due process right to extend only to permitting newly appointed appellate counsel to view that part of the summary that was available to trial counsel, and not to include parts of the PSI restricted under R.C. 2953.01(B)(1). *Roberson, supra*; *State v. Gonzales* (June 15, 2001), Wood App. No. WD-00-077.

Moreover, we emphasize that our decision is based on due process, as extended through the right to effective assistance of appellate counsel by *Evitts, supra*, and not on the standard announced in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, of "deficient performance and resulting prejudice".<sup>1</sup> Rather, the statutory prohibition preventing newly appointed counsel from viewing the unrestricted parts of the PSI or a summary violate the due process guarantee that underlies the right to effective assistance of appellate counsel on an appeal as of right, as announced in *Evitts*.<sup>2</sup> Thus, we view this right to access akin to the right to a transcript accorded by *Griffin v. Illinois* (1956), 351 U.S. 12, 78 S.Ct. 585, 100 L.Ed 891. Without the

<sup>1</sup> "Deficient performance means performance falling below an objective standard of reasonable representation. 'Prejudice' means a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-688 \* \* \*." (Additional citation omitted.) *State v. Hutton*, 100 Ohio St.3d 176, {¶ 44}, \_\_ N.E.2d \_\_, 2003-Ohio-5607.

<sup>2</sup> "In this case, we must decide whether the Due Process Clause of the Fourteenth Amendment guarantees the criminal defendant the effective assistance of counsel on such appeal [as of right]." 469 U.S. at 388-389.

PSI, newly appointed counsel is prevented from being effective, rather than being deemed ineffective under the *Strickland* standard.

We have examined the record in this case, including the PSI. It appears that the trial court did not redact the PSI or use a summary in lieu of the PSI. We find no diagnostic opinions subject to restriction under R.C. 2951.03(B)(1)(b), no sources of information obtained on promises of confidentiality subject to restriction under R.C. 2951.03(B)(1)(c), and no information indicating danger to appellant or others subject to restriction under R.C. 2951.03(B)(1)(d). We do note, however, that the final page of the report, entitled "RECOMMENDATION", contains the sentencing recommendation of the officer who compiled the report. Access to this recommendation is restricted under R.C. 2951.03(B)(1)(a). *Roberson and Gonzales supra.*

ORDER

Accordingly, we instruct the clerk of the court of appeals, upon application of counsel for the appellant or the appellee, to permit counsel to inspect and copy the presentence investigation report contained in the record, except for the last page entitled "RECOMMENDATION". Counsel may retain and use the redacted copies of the report during the pendency of this appeal. Upon the journalization of our

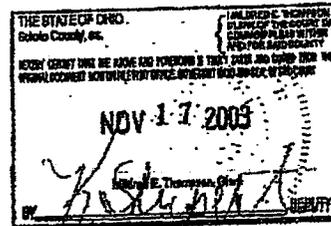
final decision and judgment entry, counsel shall return all copies to the clerk and not make others. The clerk shall accept such copies and file them with the presentence investigation report, which is then under continued seal.

Appellant shall file her brief within twenty days after this entry is filed. Thereafter, further briefing shall be conducted under App.R. 18(A). SO ORDERED.

Evans, P.J.: Concur  
Kline, J.: Dissents

FOR THE COURT

  
\_\_\_\_\_  
William H. Harsha, Administrative Judge



IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

FILED

STATE OF OHIO, 2013 JAN 16 PM 2:17

CASE NO. CA2011-11-212

Appellee,

MARY L. SWAIN  
BUTLER COUNTY  
CLERK OF COURTS

ENTRY DENYING APPLICATION  
FOR RECONSIDERATION

vs.

FILED BUTLER CO.  
COURT OF APPEALS

DONALD LEE JOHNSON,

JAN 16 2013

Appellant.

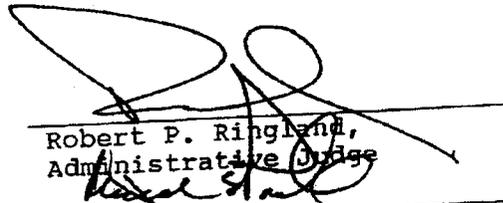
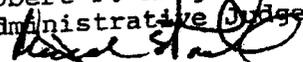
MARY L. SWAIN  
CLERK OF COURTS

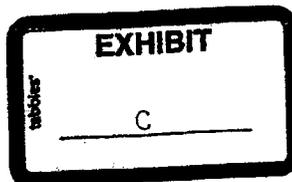
The above cause is before the court pursuant to an application for reconsideration filed by counsel for appellant, Donald Lee Johnson, on December 17, 2012. Appellant seeks reconsideration of this court's December 7, 2012 decision denying his counsel's request to review the presentence investigation report.

Upon consideration of the foregoing, the application for reconsideration is DENIED. The application does not call the court's attention to an obvious error in its decision, or raise an issue for consideration that was not fully considered by the court when it should have been. *Grabill v. Worthington Industries, Inc.*, 91 Ohio App.3d 469 (1993).

Appellant's brief shall be filed within 20 days of the date of this entry or on or before February 4, 2013.

IT IS SO ORDERED.

  
Robert P. Ringland,  
Administrative Judge  
  
Michael E. Powell, Judge



IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

FILED

STATE OF OHIO,

2012 DEC -7 PM 1:41

CASE NO. CA2011-11-212

Appellee,

MARY L. SWAIN  
BUTLER COUNTY  
CLERK OF COURTS

vs.

DONALD LEE JOHNSON

FILED BUTLER CO.  
COURT OF APPEALS

Appellant.

DEC 07 2012

MARY L. SWAIN  
CLERK OF COURTS

ENTRY GRANTING MOTION TO  
SUPPLEMENT RECORD ON APPEAL  
WITH PRESENCE INVESTIGATION  
REPORT AND DENYING MOTION  
BY APPELLANT'S COUNSEL TO VIEW  
THE REPORT

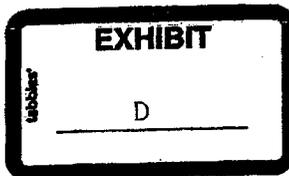
The above cause is before the court pursuant to a motion to view and supplement record with presentence investigation report filed by counsel for appellant, Donald Lee Johnson, on November 29, 2012, and a memorandum in opposition filed by counsel for appellee, the state of Ohio, on December 4, 2012.

R.C. 2951.03 addresses presentence investigation reports in felony cases. R.C. 2951.03(D)(1) addresses disclosure of a presentence investigation report. No provision of that section permits disclosure of a presentence investigation report to counsel after the defendant has been sentenced. Accordingly, the motion to disclose the presentence investigation report to appellate counsel is DENIED.

Pursuant to R.C. 2953.08(F)(1), the record on appeal shall include "any presentence, psychiatric, or other investigative report that was submitted to the court in writing before the sentence was imposed." Accordingly, the motion to supplement the record on appeal with the presentence investigation report is GRANTED.

IT IS SO ORDERED.

  
Bennett A. Manning, Magistrate



IN THE COURT OF APPEALS  
BUTLER COUNTY, OHIO  
TWELFTH APPELLATE DISTRICT

State of Ohio,

Plaintiff-Appellee,

v.

Donald Lee Johnson,

Defendant-Appellant.

C.A. Case No. CA 2011-11-0212

FILED BUTLER CO.  
COURT OF APPEALS

DEC 17 2012

MARY L SWAIN  
CLERK OF COURTS

FILED  
BUTLER CO. CLERK OF COURTS  
DEC 17 11 59 AM '12

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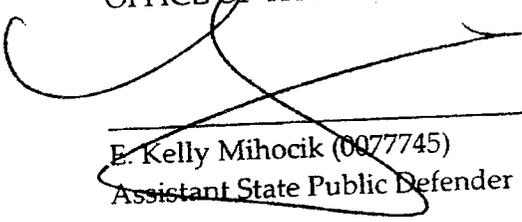
APPLICATION FOR RECONSIDERATION

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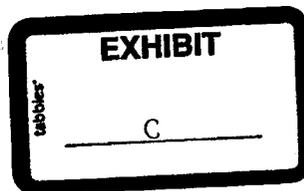
Pursuant to Appellate Rule 26(A), Appellant Donald Johnson asks this Court to reconsider its December 7, 2012 decision, which denies appellate counsel's request to view the presentence investigation report. As will be explained in the attached memorandum in support, that decision fails to fully consider the implications of that decision, conflicts with authority from the Fourth District, and is clearly erroneous.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

  
E. Kelly Mihocik (0077745)  
Assistant State Public Defender

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Columbus, Ohio 43215  
(614) 466-5394



(614) 752-5167 (Fax)  
kelly.mihocik@opd.ohio.gov

*Counsel for Appellant Donald Johnson*

## **MEMORANDUM IN SUPPORT**

### **I. Introduction.**

This Court should reconsider its December 7, 2012 Entry, as the contents of the presentence investigation report are necessary for an effective appeal of Mr. Johnson's sentence. Because Mr. Johnson's financial information is not discussed on the record, absent a review of the presentence investigation report, it is impossible to know if the trial court considered Mr. Johnson's present and future ability to pay before it imposed \$19,000 in fines.

### **II. Analysis.**

#### **A. Standard of Review**

Appellate Rule 26(A) permits a party to file an application for reconsideration of an appellate court's decision. A court may properly reconsider its decision when it contains an obvious error, reaches a conclusion that is not supported by the record, or does not fully consider an issue. *City of Columbus v. Peoples*, 10th Dist. No. 05AP-247, 2006-Ohio-2607, ¶2.

**B. The December 7 Entry Does Not Fully Consider the Issues.**

- 1. The contents of the presentence investigation report are necessary to Mr. Johnson's appeal.**

This Court's ruling, that denies counsel's request to view the presentence investigation report, is draconian. And while counsel should not have to establish why the contents of the presentence investigation report are integral to an ineffective appeal in order to review the report, in this case, counsel can establish a manifest necessity for reviewing it.

Before a court may impose a fine, it must consider the defendant's present and future ability to pay:

Before imposing a financial sanction under section 2929.18 of the Revised Code or a fine under section 2929.32 of the Revised Code, the court shall consider the offender's present and future ability to pay the amount of the sanction or fine.

R.C. 2929.19(B)(5). And even if a fine purports to be mandatory, the court may waive it upon finding the defendant is indigent:

If an offender alleges in an affidavit filed with the court prior to sentencing that the offender is indigent and unable to pay the mandatory fine and if the court determines that the offender is an indigent person and is unable to pay the mandatory fine described in this division, the court shall not impose the mandatory fine upon the offender.

R.C. 2929.18(B)(1).

These provisions require a trial court to evaluate a defendant's current and prospective financial status before a fine may be imposed. *State v. Ellis*, 4th Dist. No.

06CA3071, 2007-Ohio-2177, ¶ 31. And there must be some evidence that the court made that inquiry. *Id.* at ¶ 32. Accord *State v. Willis*, 2d Dist. No. 24477, 2012-Ohio-294, ¶ 10 (trial court's statement that the defendant's future income was "speculative" was an indication that the court did not find that the defendant had the future ability to pay; and therefore, the imposition of the fine was vacated); *State v. Rose*, 2d Dist. No. 24196, 2011-Ohio-3616, at ¶ 19 (reversing a restitution order and stating that absent evidence that the court considered the defendant's present and future ability to pay, the order was contrary to law); *State v. Burns*, 8th Dist. No. 95465, 2011-Ohio-4230, ¶ 42; *State v. Siler*, 11th Dist. No. 2010-A-0025, 2011-Ohio-2326, ¶ 57. Reviewing courts will look at the totality of the circumstances to decide if proper consideration was given to the defendant's financial status. And that inquiry may be satisfied if the trial court considered a presentence investigation report that contained detailed financial information about the defendant before imposing the fine. *Ellis* at ¶ 32, citing *State v. Slater*, 4th Dist. No. 01CA2806, 2002-Ohio-5343, ¶ 8. In this case, the trial court never inquired into Mr. Johnson's ability to pay. Thus, the only possible evidence of the defendant's financial status is contained in the presentence investigation report. Because the contents of that report are pertinent to Mr. Johnson's appeal, counsel should be permitted to review it.

2. Appellate counsel should be entitled to review presentence investigation reports.

- i. *Allowing appellate counsel to review the presentence investigation report will not make it a public record or otherwise alter its confidential nature.*

Allowing undersigned counsel to review the report will not alter the confidential nature of it or otherwise make it a public record.<sup>1</sup> See R.C. 2953.08(F)(1) (stating that an appellate court's review of a presentence investigation report does not alter its confidential nature or cause it to become a public record). Indeed, this Court may direct undersigned counsel to review it in the Clerk of Courts' office after any necessary redactions have been made. This procedure will ensure that undersigned counsel has access to the same information that the prosecutor has already reviewed.

- ii. *Denying counsel access to the report is fundamentally unfair and a violation of due process.*

As this Court knows, undersigned counsel did not represent Mr. Johnson in the trial court. Consequently, undersigned counsel did not have the opportunity to review the presentence report pursuant to Crim.R. 32.2. Allowing undersigned counsel to review that report will level the playing field and protect Mr. Johnson's due process rights. Fifth and Fourteenth Amendments to the United States Constitution; Ohio Constitution, Article I, Section 16.

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<sup>1</sup> Mr. Johnson is not asking to review that information that is excluded from disclosure pursuant to R.C. 2951.03(B)(1)(a)-(d).

Pursuant to R.C. 2951.03(A)(1), a presentence investigation report includes an investigation into the circumstances surrounding the offense, the defendant's criminal history, his social history, and his present condition, including his mental health and whether he is chemically dependent. Each category is relevant to the sentence that the trial court imposed. See R.C. 2929.12. Because Mr. Johnson is entitled to appeal that sentence, he is entitled to review the information that the court purportedly considered in making that determination. See *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124 (stating that a sentence may be reversed if it is contrary to law or an abuse of discretion). See generally *Brady v. Maryland*, 373 U.S. 83, 887, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (recognizing that that the Due Process Clause protects a defendant's access to information that is material to either his guilt or punishment).

The information contained in the presentence investigation report may be material to the punishment imposed. Appellate counsel cannot effectively investigate the propriety of the punishment that was imposed without having access to the information.

*iii. Under statute, Mr. Johnson is entitled to review the presentence investigation report.*

Revised Code 2951.03(D)(1) says that a presentence investigation report may "only [be used] for the purposes of or only as authorized by Criminal Rule 32.2 or this section, division (F)(1) of section 2953.08, section 2947.06, or another section of the Revised Code." (Emphasis added.) Revised Code Section 2953.08(A) states that a

defendant may appeal his sentence as a matter of right, and R.C. 2953.08(F)(1) says that any presentence investigation report will be made a part of the record. Thus, the plain language of the statute leads to the logical conclusion that the presentence investigation report may be reviewed in determining the propriety of the punishment imposed. Indeed, the trial court is directed to transmit the report to the court of appeals as part of the appeal. R.C. 2953.08(F)(1). And just as defense counsel is able to review the presentence investigation report prior to the imposition of a defendant's sentence, appellate counsel must be permitted to review the presentence report when investigating a challenge to the sentence that was imposed. *See* Exhibit A; Entry, *State v. Jordan*, 4th Dist. No. 03CA2878 at 6-7 (Nov. 17, 2003), attached to Def.'s Mot as Exhibit B; and Magistrate's Order, *State v. Doss*, 4th Dist. No 09CA20 (June 7, 2010), attached to Def.'s Mot. as Exhibit C. Undersigned counsel should be permitted to review the presentence investigation report because investigating the punishment imposed is an authorized purpose identified by statute.

*iv. Mr. Johnson will be denied the effective assistance of counsel if undersigned counsel is not permitted to investigate arguments that relate to the punishment imposed.*

Counsel cannot provide effective assistance of counsel absent the ability to review the presentence investigation report. Mr. Johnson has a constitutional right to the effective assistance of appellate counsel. Sixth and Fourteenth Amendments to the United States Constitution; Ohio Constitution, Article I, Section 10; *Strickland v.*

*Washington*, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 141-42, 538 N.E.2d 373, 379 (1989). To protect that right, undersigned counsel must adequately investigate the trial court proceedings to determine if Mr. Johnson's conviction and sentence comported with law. Undersigned counsel cannot investigate the propriety of the punishment imposed if she is prevented from reviewing the information that was purportedly used by the trial court to make that determination. And in later proceedings, counsel's failure to raise certain arguments cannot be determined to be the result of a strategic decision – counsel was simply prevented from discovering those claims.<sup>2</sup> To ensure that Mr. Johnson receives the effective assistance of counsel, undersigned counsel should be permitted to review the presentence investigation report.

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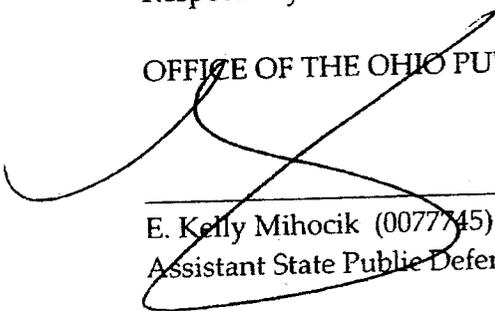
<sup>2</sup> The State cited *State v. Fisher*, 12th Dist. No. CA98-09-190, 2002-Ohio-2069, and *State v. Hicks*, 12th Dist. No. CA2002-07-162, 2003-Ohio-506, in its memorandum in opposition to appellant's request to view the presentence investigation report. Those cases are poorly reasoned – as those decisions assume that a court will identify all errors that appellate counsel would have raised if given the opportunity to review the presentence investigation report. Further, those decisions conflict with the more recent decisions issued by the Fourth District Court of Appeals, including the April 26, 2011 Magistrate's Order from *State v. Sims*, 4th Dist. No. 10CA17, attached as Exhibit A.

**III. Conclusion.**

Based on the foregoing, this Court should reconsider its December 7, 2012 Entry and allow Mr. Johnson's appellate counsel to view the presentence investigation report.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

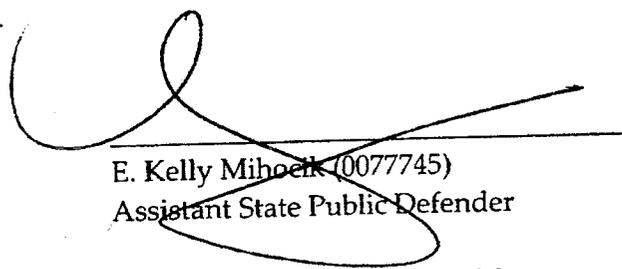
  
E. Kelly Mihocik (0077745)  
Assistant State Public Defender

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Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 (Fax)  
kelly.mihocik@opd.ohio.gov

*Counsel for Appellant Donald Johnson*

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was sent by regular U.S. Mail, to the office of the Butler County Prosecutor's Office, 315 High Street, 11<sup>th</sup> Floor, Hamilton, Ohio 45011, this 14<sup>th</sup> day of December, 2012.

  
E. Kelly Mihocik (0077745)  
Assistant State Public Defender

*Counsel for Appellant Donald Johnson*

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
GALLIA COUNTY

State of Ohio, : Case No. 10CA17  
Plaintiff-Appellee, : **MAGISTRATE'S ORDER**  
v. :  
Travis Wade Sims, :  
Defendant-Appellant. :

FILED  
11 APR 26 PM 3:35  
CLERK OF COURT  
GALLIA COUNTY, OHIO

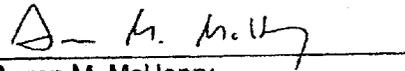
COURT OF APPEALS

Appellant, Travis Wade Sims, has filed a motion to permit his appellate counsel to review his presentence investigation report ("PSI"). In *State v. Jordan*, (Nov. 17, 2003), Scioto App. No. 03CA2878, this court determined that due process required a newly appointed appellate counsel be permitted to inspect and copy only those parts of a PSI that are relevant to the trial court's sentencing decision. R.C. 2951.03(B)(3) requires that the trial court only redact those parts of the PSI that are not relevant to the trial court's sentencing decision. We will then review the PSI and only those parts of the record in camera to determine if the trial court redacted or should have redacted any parts of the PSI pursuant to R.C. 2951.03(B)(1), or if the court withheld the PSI and

offered a summary of the information relied on for sentencing under R.C. 2951.03(B)(3). We then will determine what information counsel should have the opportunity to review.

The clerk is **ORDERED** to serve by ordinary mail a copy of this order to all counsel of record and to all unrepresented parties at their last known addresses. **IT IS SO ORDERED.**

**FOR THE COURT**



**Aaron M. McHenry**  
**Magistrate**

IN THE COURT OF APPEALS OF OHIO  
 FOURTH APPELLATE DISTRICT  
 GALLIA COUNTY

State of Ohio, : Case No. 09CA20  
 Plaintiff-Appellee, : **MAGISTRATE'S ORDER**  
 v. :  
 Shelena Marie Doss, :  
 Defendant-Appellant. :

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 FILED  
 CLERK OF COURTS  
 GALLIA COUNTY, OHIO

COURT OF APPEALS

Appellant, Shelena Marie Doss, has filed a motion to permit her appellate counsel to review her presentence investigation report ("PSI"). In *State v. Jordan*, (Nov. 17, 2003), Scioto App. No. 03CA2878, this court determined that due process required a newly appointed appellate counsel be permitted to inspect and copy only those parts of a PSI not redacted under R.C. 2951.03(B)(1). We further determined that if the trial court presented a summary and withheld a PSI, as required by R.C. 2951.03(B)(3) when material restricted by R.C. 2951.03(B)(1) is present, then due process only required appellate counsel to be permitted to inspect and copy the summary of the redacted PSI.

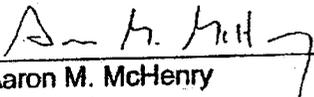
Because appellant's counsel on appeal is different from that during the proceedings below, appellant's motion for access to the PSI is **GRANTED** to the following extent. Upon receipt of this entry, the Gallia County Adult Probation Department is **ORDERED** to provide the clerk of courts with appellant's PSI. The clerk is then **ORDERED** to send this court appellant's PSI. We will then review the PSI and any other pertinent parts of the record in camera to determine if the trial court redacted

**EXHIBIT**  
 B

or should have redacted any parts of the PSI pursuant to R.C. 2951.03(B)(1), or if the court withheld the PSI and offered a summary of the information relied on for sentencing under R.C. 2951.03(B)(3). We then will determine what information counsel should have the opportunity to review.

The clerk is **ORDERED** to serve by ordinary mail a copy of this order to all counsel of record and to all unrepresented parties at their last known addresses. The clerk is further **ORDERED** to serve the Gallia County Adult Probation Department with a copy of this order. **IT IS SO ORDERED.**

**FOR THE COURT**

  
\_\_\_\_\_  
Aaron M. McHenry  
Magistrate

PSI

THE COURT OF APPEALS OF OHIO

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
SCIOTO COUNTY

SCIOTO COUNTY  
OHIO  
FILED

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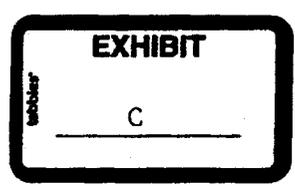
State of Ohio, :  
 Appellee, : Case No. 03CA2878  
 v. :  
 Stephanie Jordan, : ENTRY  
 Appellant. :

Appellant filed a motion to view the presentence investigation report ("PSI"), based on the right to effective assistance of appellate counsel under the Sixth Amendment to the Constitution of the United States, as accorded by *Evitts v. Lucey* (1985), 469 U.S. 387, 105 S.Ct. 830, 83 L.E.2d 821. We stayed briefing in this case until resolution of this issue.

STATUTORY BACKGROUND

R.C. 2951.03(B)(1) requires the trial court to permit the defendant or counsel to view a PSI before sentencing, except for certain, specified contents:

- (a) recommendations as to sentence;
- (b) diagnostic opinions that the court believes might seriously disrupt the defendant's rehabilitation, if disclosed;
- (c) sources of information obtained upon a promise of confidentiality;



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- (d) any other information that the court believes might result in physical harm or some other type of harm to the defendant, or any other person, if disclosed.

R.C. 2951.03(B)(2) requires the trial court to permit the defendant or counsel to comment on the PSI and permits challenges to the factual accuracy of the PSI. However, under R.C. 2951.03(B)(3), if the trial court believes that any information is subject to any of the four criteria for nondisclosure, instead of releasing the PSI to the defendant or counsel, the court may provide an oral or written summary of the information it will use in sentencing. If it uses this procedure, the trial court must also permit the defendant or counsel to comment on the summary.

Under R.C. 2951.03(B)(4), if the trial court discloses any material to the defendant or counsel, the trial court must also disclose it to the prosecutor.

Under R.C. 2951.03(B)(5), if the defendant or counsel challenges the accuracy of the PSI or any summary, the trial court must either (a) make a finding as to the allegation, or (b) make a determination that no finding is necessary because the matter challenged will not be taken into account in determining sentence.

R.C. 2951.03(D)(2) requires the defendant or counsel and the prosecutor to return all copies of a PSI or summary made available to them and prohibits them from making other copies.

The statute also addresses the availability of the report after sentencing. R.C. 2951.03(D)(1) states that a PSI and summary are confidential and not public records. The section directs an appellate court to receive and use a PSI or summary only as authorized by R.C. 2953.08(F)(1). Further, R.C. 2951.03(D)(3) states that the appellate court shall retain the PSI or summary under seal, except when being used as authorized by R.C. 2953.08(F)(1).

R.C. 2953.08(F)(1) requires the trial court to make the PSI a part of the record on appeal. It also states a court of appeals that reviews a PSI in connection with an appeal shall comply with R.C. 2951.03(D)(3) - i.e., shall keep it under seal - when the court is not using it. The section further states that an appellate court's use of the PSI does not cause the PSI to become a public record after the appellate court's use of the report.

To summarize: The statutes require the trial court to provide a PSI to the defendant or counsel before sentencing. After sentencing, the parties must return any copies and not make others. The PSI is placed under seal, is not a public record, and may be used on appeal only by the appellate court,

which must preserve its confidentiality when not using it. There are other provisions for use by other authorized personnel, including personnel of the Department of Rehabilitation and Correction. However, we find no express authorization to make the PSI available to an appellant or to the prosecutor after sentencing and thus on appeal. Likewise, no special provision is made for newly appointed counsel on appeal.

#### ANALYSIS

Many Ohio cases hold that a convicted defendant is not entitled to view the PSI after sentencing. See, e.g., *State ex rel. Normand v. Wilkinson* (Nov. 28, 1995), Franklin App. No. APE05-563 (prisoner could not compel disclosure by writ of mandamus after sentencing); *State ex rel. Sharpless v. Gierke* (2000), 137 Ohio App.3d 821, 739 N.E.2d 1231 (writ of mandamus seeking to compel access to PSI for purposes of seeking postconviction relief); *State v. Fisher*, Butler App. No. 98-09-190, 2002-Ohio-2069, and *State v. Hicks*, Butler App. No. CA2002-07-162, 2003-Ohio-506 (appellate counsel not de facto ineffective because unable to view PSI after sentencing); and *State v. Roberson* (2001), 141 Ohio App.3d 626, 752 N.E.2d 984 [trial counsel not ineffective because unable to view parts of PSI restricted under R.C. 2951.03(B)(1)]

*Roberson*, supra, cited *Williams v. New York* (1949), 337 U.S. 241, 69 S.Ct. 1069, 93 L.Ed.2d 1337, which held that due process did not require disclosure of information available to the trial court for sentencing. This was true even though the court did not reveal it to the defendant or counsel prior to sentencing and thus the defendant had no opportunity to deny or explain it. 141 Ohio App.3d at 629; 337 U.S. at 250-251. The *Williams* court based this conclusion on the historically wide latitude trial courts had to consider additional information in order to promote the modern trend in crafting individualized sentences. 337 U.S. at 246-250.

The *Roberson* court also noted that *Williams* has been distinguished in capital cases by *Gardner v. Florida* (1977), 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393. The *Gardner* court found that the trial court in *Williams* "had stated the facts of the report on the record", 141 Ohio App.3d at 630; 430 U.S. at 355. *Gardner* then held that due process required full disclosure of the PSI. 430 U.S. 362

*Roberson* then concluded that *Gardner* was limited to capital cases, 141 Ohio App.3d at 631-632. While we agree that *Gardner* appears to be limited to capital cases, we find, independently, that due process requires a PSI to be shown to newly appointed appellate counsel.

We believe the statute's failure to allow newly appointed appellate counsel to view the PSI is a serious omission that violates an appellant's right to due process of law under the Sixth Amendment to the Constitution of the United States. In *Evitts v. Lucey*, supra, the Supreme Court stated:

\* \* \* if a State has created appellate courts "as an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant, *Griffin v. Illinois*, 351 U.S. at 18, 76 S.Ct. at 590, the procedures used must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution. 469 U.S. at 393; 105 S.Ct. at 834.

This state has, of course, created a system of appellate courts, and it has granted to every litigant a first appeal as of right. R.C. 2505.03. Moreover, R.C. 2953.08(A) provides in part:

In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:

\* \* \*

(4) The sentence is contrary to law.

\* \* \*

Given these rights to appeal and to challenge the lawfulness of the sentence, we believe that fundamental fairness and due process require newly appointed appellate

counsel have access to the PSI. However, we deem this due process right to extend only to permitting newly appointed appellate counsel to view that part of the summary that was available to trial counsel, and not to include parts of the PSI restricted under R.C. 2953.01(B)(1). *Roberson, supra*; *State v. Gonzales* (June 15, 2001), Wood App. No. WD-00-077.

Moreover, we emphasize that our decision is based on due process, as extended through the right to effective assistance of appellate counsel by *Evitts, supra*, and not on the standard announced in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, of "deficient performance and resulting prejudice".<sup>1</sup> Rather, the statutory prohibition preventing newly appointed counsel from viewing the unrestricted parts of the PSI or a summary violate the due process guarantee that underlies the right to effective assistance of appellate counsel on an appeal as of right, as announced in *Evitts*.<sup>2</sup> Thus, we view this right to access akin to the right to a transcript accorded by *Griffin v. Illinois* (1956), 351 U.S. 12, 78 S.Ct. 585, 100 L.Ed 891. Without the

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<sup>1</sup> "Deficient performance means performance falling below an objective standard of reasonable representation. 'Prejudice' means a reasonably probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-688 \* \* \*." (Additional citation omitted.) *State v. Rutton*, 100 Ohio St.3d 176, {¶ 44}, \_\_ N.E.2d \_\_, 2003-Ohio-5607.

<sup>2</sup> "In this case, we must decide whether the Due Process Clause of the Fourteenth Amendment guarantees the criminal defendant the effective assistance of counsel on such appeal [as of right]." 469 U.S. at 388-389.

PSI, newly appointed counsel is prevented from being effective, rather than being deemed ineffective under the *Strickland* standard.

We have examined the record in this case, including the PSI. It appears that the trial court did not redact the PSI or use a summary in lieu of the PSI. We find no diagnostic opinions subject to restriction under R.C. 2951.03(B)(1)(b), no sources of information obtained on promises of confidentiality subject to restriction under R.C. 2951.03(B)(1)(c), and no information indicating danger to appellant or others subject to restriction under R.C. 2951.03(B)(1)(d). We do note, however, that the final page of the report, entitled "RECOMMENDATION", contains the sentencing recommendation of the officer who compiled the report. Access to this recommendation is restricted under R.C. 2951.03(B)(1)(a). *Roberson and Gonzales supra.*

ORDER

Accordingly, we instruct the clerk of the court of appeals, upon application of counsel for the appellant or the appellee, to permit counsel to inspect and copy the presentence investigation report contained in the record, except for the last page entitled "RECOMMENDATION". Counsel may retain and use the redacted copies of the report during the pendency of this appeal. Upon the journalization of our

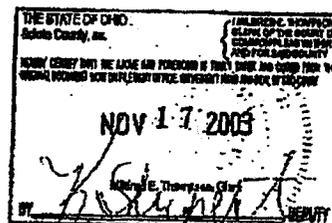
final decision and judgment entry, counsel shall return all copies to the clerk and not make others. The clerk shall accept such copies and file them with the presentence investigation report, which is then under continued seal.

Appellant shall file her brief within twenty days after this entry is filed. Thereafter, further briefing shall be conducted under App.R. 18(A). SO ORDERED.

Evans, P.J.: Concur  
Kline, J.: Dissents

FOR THE COURT

  
\_\_\_\_\_  
William H. Harsha, Administrative Judge



IN THE COURT OF APPEALS OF BUTLER COUNTY, OHIO

FILED

2013 MAR -6 PM 3:25

STATE OF OHIO, MARY L. SWAIN :  
Appellee, BUTLER COUNTY :  
CLERK OF COURTS :

CASE NO. CA2011-11-212

vs.

ENTRY DENYING MOTION FOR  
STAY AND GRANTING ADDITIONAL  
TIME TO FILE APPELLANT'S BRIEF  
TO AND INCLUDING  
MARCH 27, 2013

DONALD LEE JOHNSON, :  
Appellant. FILED BUTLER CO. :  
COURT OF APPEALS :

FILED BUTLER CO.  
COURT OF APPEALS

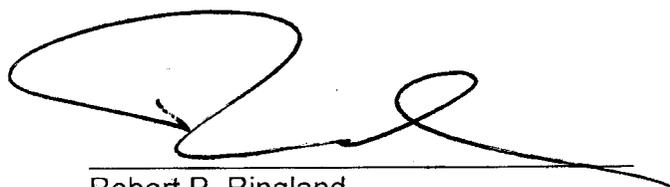
MAR 06 2013

MARY L. SWAIN  
CLERK OF COURTS

The above cause is before the court pursuant to a motion for stay and motion for extension of time, both filed by counsel for appellant, Donald Lee Johnson, on February 28, 2013.

Upon consideration, the motions are ruled upon as follows: The motion for stay is DENIED. The motion for extension of time to file the appellant's brief is GRANTED to and including **March 27, 2013**.

IT IS SO ORDERED.



Robert P. Ringland,  
Administrative Judge