

MEMORANDUM IN SUPPORT

This capital case is before this Court as a result of a resentencing ordered by the Eleventh Court of Appeals in *State v. Jackson*, 190 Ohio App. 3d 319, 2010-Ohio-5054 (*Jackson II*). That resentencing occurred August 14, 2012. Appellant was represented by two death-certified attorneys. The trial court permitted Appellant to make two uninterrupted statements prior to imposing sentence for the aggravated murder which claimed the life of Robert Fingerhut, the ex-husband of Co-Defendant, Donna Roberts. Roberts has also been twice sentenced to death for her role in Fingerhut's murder. The trial court herein essentially re-imposed the same sentence originally imposed, which sentence was unanimously affirmed by this Court in *State v. Jackson*, 107 Ohio St. 3d 300, 2006-Ohio-1 (*Jackson, I*). The trial court filed its sentencing entry and a separate, redrafted, Findings of Fact and Conclusions of Law on Aug. 14, 2012. The trial court reissued a nunc pro tunc sentencing order Aug. 16, 2012.

Without objection, without notification as to any procedural deficiencies, Appellant's counsel filed a Notice of Appeal with this Court September 28, 2012. He affixed the Findings of Fact, the original re-sentencing entry, and the nunc pro tunc sentencing entry. Now, just barely two months before a jointly agreed upon due date of July 22, 2013, for the submission of Appellant's brief, his counsel comes before this Court and argues that that the very entry *he appealed* does not constitute a final appealable order. Appellant "suggests" that this Court dismiss an appeal which he filed due to this claimed error. As a further remedy, he argues for a third sentencing hearing before the trial court. The State objects and maintains this "suggestion" is baseless and devoid of any legal authority or precedent. This filing is a stall tactic, filed solely for the purpose of delay and therefore should be stricken.

Civ.R. 12(F) provides:

“Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty-eight days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent, or scandalous matter.”

With this “suggestion,” Appellant is seeking to have this Court dismiss the very appeal he filed predicated upon a claimed procedural defect, which defect will no doubt form the basis of his appeal. To determine this “suggestion” this Court would be required to go beyond the face of the documents upon which the instant appeal has been raised. Quite simply, Appellant is seeking a preliminary ruling on his appeal. In essence, Appellant is asking this Court review the entire sentencing proceeding to determine whether the trial judge employed the proper procedure upon remand. This necessitates a complete review of the record, rather than simply a review of the trial court’s sentence. While “novel,” this approach should not be condoned by this Court and should not only be summarily denied, but should also be stricken.

This Court recently revisited the topic of the death sentence as final appealable order: “[I]n order to decide whether an order issued by a trial court in a criminal proceeding is a reviewable final order, appellate courts should apply the definitions of ‘final order’ contained in R.C. 2505.02.’ *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, ¶ 6, quoting *State v. Muncie* (2001), 91 Ohio St.3d 440, 444, 746 N.E.2d 1092, citing *State ex rel. Leis v. Kraft* (1984), 10 Ohio St.3d 34, 36, 10 OBR 237, 460 N.E.2d 1372. R.C. 2505.02(B) states: ‘An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

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

“Crim.R. 32(C) sets forth the requirements for a final, appealable order in criminal cases. It states that ‘[a] judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence.’ It further states: ‘The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk’.” *State v. Ketterer* 126 Ohio St.3d 448, 2010-Ohio-3831, at ¶8-11.

As Appellant noted in his “suggestion,” “R.C. 2929.03(F) requires that a separate sentencing opinion be filed in addition to the judgment of conviction, and the statute specifies that the court's judgment is not final until the sentencing opinion has been filed. Capital cases, in which an R.C. 2929.03(F) sentencing opinion is necessary,” *Ketterer, supra*, at ¶17.

Appellant first complains that the Findings of Fact is deficient because the court refused to consider any “new mitigating factors Jackson raised.” (Appellant’s “suggestion” at p. 4) He fails to identify what “new mitigating factors” Appellant raised at his sentencing. At his resentencing, Appellant told the court that since his incarceration, he obtained a certificate in basic computer skills and a music program and has acted as a “tutor” to unspecified tutees. He also claims to have stayed out trouble since his incarceration except for a “little minor situation.” (Re-Sentencing T.p. at p.21). He also told the court he did not want to be returned to death row. (Re-Sentencing T.p. at p. 23).

The Ohio Revised Code lists possible mitigating factors a death sentencing trial court must consider in R.C. 2929.04(B). This Court has previously analyzed that section in conjunction with the evidence introduced at Appellant’s trial and held as follows:

“Although Jackson claimed that Fingerhut pulled a gun on him, thus forcing him to kill Fingerhut in self-defense, the factor of victim-inducement under (B)(1) is not implicated because the claim of self-defense lacks any credibility under the evidence. Likewise, there is no credible evidence of the factor of victim provocation under (B)(2). Jackson's mitigation expert dispelled any claim that he suffers from a mental disease or defect, the factor under (B)(3). Since Jackson was 29 years old at the time of the homicide, the youthful-offender factor under (B)(4) does not apply. There is no mitigation in the factor of a clean record under (B)(5), for Jackson had a history of prior criminal convictions. Finally, since Jackson was the principal offender in the murder, the factor of being an accomplice rather than the principal offender under (B)(6) does not apply.

“Under R.C. 2929.04(B)(7), Jackson's ADHD and antisocial personality disorder deserve some weight in mitigation, as well as his ability to overcome his ADHD and adaption to the structured setting of prison. See *State v. Scott*, 101 Ohio St.3d 31, 2004-Ohio-10, 800 N.E.2d 1133, ¶ 106.

“On the other hand, Jackson's expression of remorse ‘for what happened to the victim’ deserves little weight in mitigation. See *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶ 226.

“Upon independent weighing, we find that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. Jackson murdered Fingerhut during a burglary and stole his car. These were the aggravating circumstances that merit imposition of the capital penalty. Those were weighed against the mitigating evidence found in the nature and circumstances of the offense, Jackson's history, character, and background, and the statutory

factors of R.C. 2929.04(B). We find that the aggravating circumstances of this case outweigh the minimal mitigating factors.” *Jackson I*, at ¶180-183.

None of Appellant’s “evidence” presented at his resentencing qualifies as a mitigating factor pursuant to R.C. 2929.04(B)(1)-(6). As for the necessarily subjective R.C. 2929.04(B)(7), the so-called “catch all” mitigating factor, this Court has already held that previously introduced evidence concerning Appellant’s adaptation to a structured prison environment does not outweigh the aggravating circumstances introduced by the State. *Jackson*, supra, at ¶181. Therefore, the fact that the trial court did not make special mention of this “evidence” does not render the Findings of Fact a non-final or non-appealable order as defined by R.C. 2505.02.

Appellant also argues that the trial court’s mere preparation of the sentencing entry prior to the actual sentencing renders the document non-final, and non-appealable. It should be noted that the commentary by the court quoted at page 4 of Appellant’s “suggestion” makes clear that the Findings of Fact had not been filed at the time of the oral hearing leaving open the possibility of modification in the event the trial court opted for a life sentence after hearing Appellant’s allocution. Moreover, this Court has found no prejudicial error even when the trial court *filed* the Findings of Fact *prior* to the sentencing hearing. “We agree that the trial court should have waited until the sentencing hearing was completed to file its sentencing order. However, it is apparent to us that Reynolds was not prejudiced by the court’s premature filing.*** Had new evidence or information been presented during the sentencing hearing, the trial court could have modified its sentencing order. We conclude that the premature filing was not prejudicial error.” *State v. Reynolds*, 80 Ohio St.3d 670, 683-684 (1998). If Reynolds suffered no prejudice by his trial court’s premature filing of sentencing opinion, Appellant suffers no prejudice in the trial court’s preparation of a document prior to sentencing. It is axiomatic that the pre-hearing drafting

would not render the ultimate death sentence non-final or non-appealable. If Appellant or his counsel had said anything of substance to persuade the court that life was the appropriate sentence, the document could have been redrafted.

Finally, Appellant argues that his sentence is non-final because he was not permitted to introduce additional evidence at the hearing. This argument is meritless. The Eleventh District Court of Appeals ordered in *Jackson II* that Appellant be resentenced as a result of this Court's decision in *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665.

By way of review, this Court ordered that Roberts be re-sentenced because the trial court permitted the prosecutor's office to type out the Findings of Fact which sentenced her to death for her role in Fingerhut's murder. This Court issued this very narrow mandate regarding Roberts' re-sentencing: "On remand, the trial judge will afford Roberts her right to allocute, and the trial court shall personally review and evaluate the evidence, weigh the aggravating circumstances against any relevant mitigating evidence, and determine anew the appropriateness of the death penalty as required by R.C. 2929.03. The trial court will then personally prepare an entirely new penalty opinion as required by R.C. 2929.03(F) and conduct whatever other proceedings are required by law and consistent with this opinion." *Roberts, supra*, at ¶167. Note: This Court decidedly did not order a new evidentiary hearing wherein Roberts could supplement the record with mitigation evidence not previously considered by the trial court.

When it came to light that the same trial judge- John Stuard - had also used the prosecutor's office to type the Appellant's entry, the Eleventh District order a new sentencing hearing for him even though this Court had already affirmed his conviction and death sentence in *Jackson I*. The Eleventh District held as follows: "Based on the Supreme Court of Ohio's holding in *Roberts*, appellant is entitled to the same relief afforded to his co-defendant. Thus, the

trial judge must personally review and evaluate the appropriateness of the death penalty, prepare an entirely new sentencing entry as required by R.C. 2929.03(F), and conduct whatever other proceedings are required by law and consistent with this opinion. Id. at ¶ 167.” *State v. Jackson*, 190 Ohio App. 3d. 319, 2010-Ohio-5054, at ¶20. The “same relief” as referenced by the Eleventh District consisted of Judge Stuard permitting Appellant to allocute, reviewing and evaluating the evidence, weighing aggravating circumstances against mitigating factors, determining anew the appropriateness of a death sentence, and personally drafting the opinion. No more. No less. This was all accomplished on August 14, 2012, without the introduction of additional evidence not previously considered by Judge Stuard or the Appellant’s jury.

The State would note that Judge Stuard re-sentenced Donna Roberts in 2007. Her appeal on the re-sentencing is pending before this Court under Case No. 2007-2288. Both sides have submitted their briefs and this Court conducted oral arguments May 7, 2013. As Appellant correctly notes in his “suggestion” at page 7, Roberts raised the identical issue of the trial court’s refusal to permit the introduction of additional testimonial evidence at re-sentencing. This Court has before it a plethora of proffered documents which were likewise excluded from her resentencing. However, Roberts never challenged the appealability of her death sentence at the pre-briefing stage. Like Roberts, Appellant is free to raise what he perceives to be procedural deficiencies in his re-sentencing. A dismissal of the entire appeal for a third sentencing is a preposterous “suggestion” to remedy a non-existent deficiency.

Finally, the State maintains that even if the Findings of Fact and two sentencing entry constitute is “non-final” order, Appellant has waived any such error by filing an appeal thereof. If Appellant had a good faith belief that one or any of these three entries were non-compliant with R.C. 2505.02 or Crim. R. 32(C), it was incumbent upon him to object at the trial court. The

“invited error doctrine” holds that a party will not be permitted to take advantage of an error which he himself invited or induced the court to make. See *State ex rel. O’Beirne v. Geauga Cty. Bd. of Elections*, 80 Ohio St.3d 176, 181, (1997); *State ex rel. Bitter v. Missig*, 72 Ohio St.3d 249, 254 (1995). By filing the instant Notice of Appeal with this Court, he vouched for the final and appealable nature of his death sentence. If there was error in this Court accepting the instant appeal, Appellant invited it by filing the appeal.

CONCLUSION

The State submits that the documents affixed to Appellant’s Notice of Appeal comprise a final appealable order which is compliant with R.C. 2505.02, Crim. R. 32(C), and *Ketterer, supra*. Appellant’s “suggestion” is wholly disingenuous and amounts to nothing more than a thinly veiled stall tactic. The State moves this Court to strike Appellant’s “suggestion” from the docket, or in the alternative, to deny forthwith his “suggestion” to remand to the trial court for a third sentencing which would now occur before a new judge due to the retirement and death of Judge Stuard. Moreover, this Court should be offended at Appellant’s insinuation that it would accept for filing a document which is neither final nor appealable.

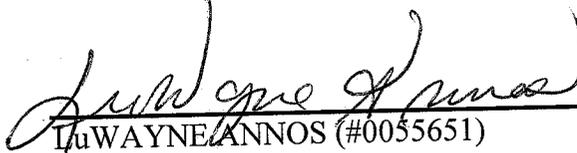
Ordering a remand for resentencing at this juncture sets dangerous precedent, and quite frankly, encourages underhanded tactics by would-be litigants. Particularly in capital cases, it opens additional avenues for unnecessary delays and gamesmanship which are readily discouraged by this Court and others in non-capital cases. Appellant is asking this Court to pre-judge this case on his Notice of Appeal, rather than on arguments appropriately reserved for the briefing phase of this appeal. This Court should be wholly dismissive of Appellant’s “suggestion” by either striking it from the docket, or denying it outright.

Respectfully Submitted,

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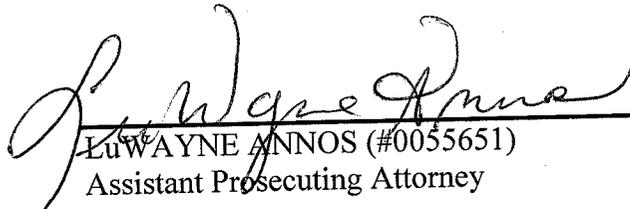


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PROOF OF SERVICE

I do hereby certify that a copy of the foregoing response was sent by ordinary U.S. Mail to Atty. Randall L. Porter, Assistant Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio, 43215, and Atty. Dennis L. Sipe, 322 Third St., Marietta, Ohio, 45750, Counsel for Appellant Nathaniel Jackson, on this 30th Day of May, 2013.



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