

IN THE SUPREME COURT OF OHIO

State of Ohio,

Plaintiff-Appellee,

v.

Curtis Schleiger,

Defendant- Appellant.

* Case No. 2013-0743
 * On Appeal from the Preble County
 * Court of Appeals, Twelfth
 * Appellate District
 *
 *
 * Court of Appeals
 * Case No.: CA 2011-11-012
 *

Appellee's Memorandum in Response to Appellant's Memorandum in
 Support of Jurisdiction

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TABLE OF CONTENTS

	PAGE
Table of Contents.....	i
Explanation of Why this Court Should Decline Jurisdiction.....	1
Response to Proposition of Law No. 1.....	5
Both the Ohio Solicitor General and the Preble County Prosecuting Attorney, acting on behalf of the State, together, agreed to waive res judicata in their brief to the United States Supreme Court when they thought that they had the authority to do so.	5
Response to Proposition of Law No. 2.....	6
Pursuant to <i>Fischer</i> , res judicata may not be waived as to issues on appeal from an appellant's resentencing that were raised or could have been raised on direct appeal.....	6
Response to Proposition of Law No. 3.....	8
In a ministerial resentencing hearing held pursuant to R.C. 2929.191 limited solely to the proper imposition of post release control, a defendant does not have the right to counsel.....	8
Response to Proposition of Law No. 4.....	10
Appellant may not again argue an issue in which this Court has twice denied jurisdiction over and once denied a motion for reconsideration.....	10
Conclusion.....	14
Certificate of Service.....	15

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Explanation of Why this Court Should Decline Jurisdiction

Appellant, Curtis Schleiger, has not presented before this Court substantial constitutional questions. Moreover, this case is not one of public or great general interest.

Appellant was found guilty following a jury trial of one count of felonious assault, a second-degree felony, for which he was sentenced to eight years in prison. He was also convicted of carrying a concealed weapon, a fourth-degree felony, for which he was sentenced to 18 months in prison. The trial court ordered that the two sentences run consecutively. Appellant appealed this decision to the Twelfth District Court of Appeals. Appellate counsel appointed to aid him in his appeal filed an *Anders* brief. *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967). In appellate counsel's brief he provided two possible assignments of error with citations to cases and the record for the review of the appellate court. The appellate court, upon receiving the brief, gave Appellant 30 days to submit his own brief, which he did. In his *pro se* brief, Appellant listed seven further issues for the appellate court to consider when it reviewed the record. The appellate court did review the record and found that all issues provided by appellate counsel and Appellant had no merit as well as finding no other issues of merit, except for a sentencing issue.

Upon sentencing appellant, the trial court informed Appellant that he would be subject to a mandatory period of post-release control for five years, with the sentencing entry stating that Appellant would be subject to mandatory post-release control for up to five years. However, R.C. 2967.28 requires a mandatory

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post-release control period of three years for a second degree felony. The trial court also did not explain to Appellant the consequences for violating post-release control.

Based upon this Court's decision in *State v. Singleton*, 124 Ohio St.3d 173, 920 N.E.2d 958, 2009-Ohio-6434, the appellate court reversed and remanded the case back to the trial court for it to correct the improper imposition of post-release control pursuant to R.C. 2929.191. The appellate court granted appellate counsel's motion to be withdrawn and did not order merit briefs to be filed.

Appellant contended in *State v. Schlieger*, Supreme Court Case No. 2010-1708 in the first appeal ("*Schlieger I*") that pursuant to *Anders and Penson v. Ohio*, 109 S.Ct. 346, 488 U.S. 75 (1988) the appellate court should not have allowed counsel to withdraw and should have ordered briefs on the merits to be written. It was and remains the State's contention that a brief on the merits need not be ordered as no *arguable* meritorious issues were found by the appellate court. See *Penson*, 488 U.S. 75 at 83 and 84. The issue regarding the sentencing was one of plain error which permitted the court, pursuant to R.C. 2929.191, to rectify said sentencing issue. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434 at ¶¶12 and 35. As such, there were no arguable and thus non-frivolous issues to brief.

This Court denied jurisdiction of *Schlieger I*. Appellant then filed an App.R. 26(B) motion to reopen *Schlieger I* in the court of appeals, which the appellate court denied. Appellant also filed a motion in the appellate court asking that the court recognize a conflict in its decision regarding the motion to reopen.

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Appellant then filed a memorandum in support of jurisdiction Supreme Court Case No. 2011-0460 ("*Schlieger II*"), making essentially the same arguments that were put forth to this Court in *Schleiger I*. This Court declined jurisdiction of the case.

Appellant then filed a Petition for Writ of Certiorari of this decision with the United States Supreme Court. *Schleiger v. Ohio*, U.S. Supreme Court Case No. 11-6533. The Brief in Opposition was prepared by the Ohio Solicitor General and the Preble County Prosecutor's Office. In its brief, the State agreed to waive res judicata as to any sentencing issues or any other issue. See Brief in Opposition at 25. The Court declined Certiorari.

Appellant proceeded to appear before the trial court for an R.C. 2929.191 (C) resentencing hearing in order for the court to impose the proper post-release control sanctions. Appellant was not represented by counsel, but did have stand-by counsel available if needed. Appellant's prison sentence was not changed at this hearing, but he was properly informed of the post-release control sanctions.

Appellant appealed his resentencing. His appellate counsel filed a motion with the appellate court in order to clarify the scope of the appeal, as he was unsure whether the State could in fact waive res judicata. After asking for briefs, the appellate court determined that pursuant to *State v. Fischer*, 128 Ohio St.3d 92, 942 NE.2d 332, 2010-Ohio-6238 and *State v. Perry*, 10 Ohio St. 2d 175, 226 N.E.2d 104, (1967) that res judicata was not waivable in these ministerial hearings.

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Appellant now argues in Proposition 1 and 2 that the appellate court should have allowed a waiver of res judicata. He also argues in Proposition 3 that the trial court should have provided Appellant with counsel during the resentencing hearing. Finally, he again argues in Proposition 4 that he should have been appointed appellate counsel to file a merit brief when the appellate court found an error in the trial court's imposition of post-release control. As Appellant's Constitutional rights have not been violated this appeal should be dismissed as to Propositions 1, 2 and 4. Moreover, as this case presents no question of public or great general interest, it should be dismissed as to Propositions 1, 2 and 4. The decision of the appellate court as to these issues was based upon either case law promulgated by this Court. Accordingly, Appellant's request for jurisdiction as to these propositions should be denied.

As to Proposition 3, the appellate court did certify a conflict as to this issue between it and the Third District Court of Appeal's case *State v. Peace*, 3rd Dist. No. 5-12-04, 2012-Ohio-6118, i.e. "whether a defendant is entitled to counsel when a trial court conducts a resentencing hearing for the purpose of imposing statutorily mandated post-release control." See Entry Granting Motion to Certify Conflict. As will be discussed below, *State v. Schleiger*, Supreme Court Case No. 2013-0743 ("*Schleiger III*") the case sub judice, is not as "clean" as Appellant asserts. In *Schleiger III*, Appellant had available to him stand-by counsel, if he so desired. He was not solely without the use of counsel. However, to the extent that this Court believes that these cases are similar and do in fact

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exhibit a conflict, only the limited issue provided as a conflict by the Twelfth District Court of Appeals should be briefed.

Response to Proposition of Law No. 1

Both the Ohio Solicitor General and the Preble County Prosecuting Attorney, acting on behalf of the State, together, agreed to waive res judicata in their brief to the United States Supreme Court when they thought that they had the authority to do so.

Appellant argues that the Ohio Solicitor General's "promise" to waive res judicata was broken. Appellant's attempt to characterize the State's brief to the United States Supreme Court as a sole endeavor of the Ohio General Solicitor is misguided. The brief was reviewed and submitted by both the General Solicitor and the prosecutor's office. Therefore, any allegation otherwise is incorrect. The appellate court did not in fact refuse a waiver of the General Solicitor, but one from the State, represented by the General Solicitor and the prosecutor's office. The presumption behind Appellant's first proposition of law is incorrect...the General Solicitor did not act alone in agreeing to the waiver.

Moreover, this issue was only brought before the Twelfth District Court of Appeals because Appellant's counsel requested the court to determine the scope of the appeal on the resentencing hearing as he was unsure whether res judicata could be waived. The State did not raise this issue. Appellant's counsel filed a motion with the court seeking guidance on whether he could argue any matters outside of the post-release control resentencing. Upon ordering briefs, the State, represented by the prosecutor's office alone at this juncture, researched the issue and concluded that it believed that it now in fact could not waive res judicata based upon this Court's decision in *Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238.

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The appellate court agreed with this analysis. No promise was broken as is asserted by Appellant; the appellate court requested briefs on the subject, and they were provided.

Any issue with the waiver can be addressed in Proposition of Law No. 2. Accordingly, the first proposition of law does not set forth a substantial constitutional question, nor is it one of public or great general interest.

Response to Proposition of Law No. 2

Pursuant to *Fischer*, res judicata may not be waived as to issues on appeal from an appellant's resentencing that were raised or could have been raised on direct appeal.

Appellant maintains that the State can waive res judicata as to sentencing issues. However, this Court's decisions in *Fischer* and *Perry*, 10 Ohio St. 2d 175, hold otherwise. Moreover, there are no definitive cases which hold that the State can ever waive res judicata in criminal matters.

In civil matters, it is clear that res judicata should be plead and may be waived as it is an affirmative defense. Civ. R. 8(C); *Nelson v. Tubbs Jones*, 104 Ohio App.3d 823 (4th Dist. 1995). However, in criminal matters, the application of res judicata is not as clear. Appellee has found no precedence for the State to waive res judicata in a criminal matter. Appellant has cited to a case, *State ex re. Deiter v. McGuire*, 119 Ohio St.3d 384, 2008-Ohio-4536, stating otherwise; however, *McGuire* is a civil case. As such, the Court should look to those decisions that address res judicata in criminal cases.

In 1967, this Court stated at number nine of its syllabus in *Perry*:

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Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment. *Perry*, 10 Ohio St. 2d at 176.

Therefore, as to criminal matters, res judicata bars a criminal defendant from raising issues that could have been raised at an initial appeal. This Court then went further to state that res judicata applies to other aspects of a final judgment of conviction, such as where an appeal issues from a resentencing hearing required due to improper imposition of post-release control. *Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238 syllabus paragraphs 3 and 4. Specifically, syllabus 3, states “Although the doctrine of res judicata does not preclude review of a void sentence, res judicata still applies to other aspects of the merits of a conviction, including the determination of guilt and the lawful elements of the ensuing sentence.” *Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238 syllabus paragraph 3.

In *Fischer*, the Court grappled with a resentencing error where, as here, the trial court failed to properly relate post-release control. In *Fischer*, the initial sentencing occurred prior to July 11, 2006 wherein case law rather than R.C. 2929.191 applies. However, the same issue still remains for both of these types of cases...what scope any appeal should encompass from the resentencing. Whether a case goes back for resentencing for post-release control pursuant to case law or pursuant to R.C. 2929.191, the scope of the appeal does not change, and should not change. In both instances, the cases are remanded back for a limited ministerial purpose, i.e. to correct the sentencing. Therefore, the two types of

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cases should not be treated differently. In fact, courts have relied upon *Fischer* to limit the scope of an appeal based upon res judicata for those whose initial sentencing occurred after July 11, 2006. *State v. Wrenn*, 9th Dist. No. 25616, 2011-Ohio-5640; *State v. Thomas*, 1st Dist. Nos. C-100411, C-100412, 2011-Ohio-1331.

A reading of *Fischer* and *Perry* suggest that res judicata may not be waived, as res judicata acts as a bar to any further litigation of any issue outside of the resentencing hearing. Unlike civil cases, case law suggests that no waiver or raising of res judicata is necessary- it applies as a matter of law in criminal cases. *Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238 at ¶ 30. This makes sense as well, as it provides for a finality of judgment.

This Court was clear, that the scope does not exceed those limited issues that were brought back for resentencing. This issue is an original issue, which is likely not to occur again. It does not bring forth a substantial constitutional question. Moreover, as this issue is likely not to occur again, it is not one of public or great general interest.

Response to Proposition of Law No. 3

In a ministerial resentencing hearing held pursuant to R.C. 2929.191 limited solely to the proper imposition of post release control, a defendant does not have the right to counsel.

Appellant maintains that the Twelfth Appellate District incorrectly found that he did not have the right to counsel during his limited ministerial resentencing hearing. He maintains that the Third Appellate District correctly

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handles these cases by providing a defendant with counsel during these limited hearings.

Appellee agrees with the Twelfth Appellate District. R.C. 2929.191 (C) requires that the offender, prosecutor and department of rehabilitation and correction be provided notice by the court of the date, time, place and purpose of the hearing. It also states that the offender is to be present unless the court, offender, or prosecutor move the court for the offender appear at the hearing by video conferencing equipment. *Id.* This hearing is for the limited ministerial purpose of providing the proper imposition of post release control, for fixing a “clerical error.” *Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, ¶ 62 (*Lanzinger*, concurrence). It is a statutory mechanism to correct the post-release control sentencing errors. See *Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, ¶ 33. No other portion of the sentence or matters are open for argument or discussion. *Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238 syllabus paragraph 3. In fact, this Court has found that in some circumstances, this hearing need not occur and the corrected resentencing can occur by *nunc pro tunc* entry. *State v. Qualls*, 131 Ohio St.3d 499, 967 NE.2d 718, 2012-Ohio-1111.

Finally, it is notable that Appellant did have stand-by counsel available to him if he had any questions. This is different from the Third District Case where the defendant had no counsel with whom to confer. Therefore, this is not such a “clean” case as Appellant asserts. However, to the extent that this Court believes that these cases are similar and do in fact exhibit a conflict, only this limited issue should be briefed.

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Response to Proposition of Law No. 4

Appellant may not again argue an issue in which this Court has twice denied jurisdiction over and once denied a motion for reconsideration.

Appellant is attempting to relitigate the issue of whether he was denied counsel on his first appeal as of right. This issue has been appealed to the appellate court and denied. *Schleiger I*. It was then denied again on a motion for reopening. *Schleiger II*. Appellant also tried to certify a conflict as it relates to this issue. *Schleiger II*. Appellant's initial appeal as of right was brought to this Court, and this Court denied both jurisdiction and a motion for reconsideration of its decision. *Schleiger II*. Appellant also sought jurisdiction from this Court on the denial of his motion to reopen the case and the denial of his motion to certify conflict. *Schleiger II*. This Court denied jurisdiction as to this as well. This Court has heard this argument two times on motions in support of jurisdiction and once on a motion for reconsideration. Appellant should not be permitted to continue its iteration.

In *Anders*, the United States Supreme Court held that if an appellate court "finds any of the legal points arguable on the merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." *Anders*, 386 U.S. 738 at 744. The United States Supreme Court has been consistent in holding that if a non-frivolous issue has been found that merit briefs should be filed. However, they have also used synonymously with the term non-frivolous, the term "arguable" or the phrase "arguable on the merits." *Id.*;

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Robbins, 528 U.S. 259 at 280; *Penson v. Ohio*, 488 U.S. 75, 84, 109 S.Ct. 346, 351 (1988).

Appellant maintains correctly that counsel should be appointed to an appellant where a court finds any non-frivolous issue after an ‘*Anders*’ brief has been filed. An appellant has a right to be represented by counsel and receive a merits brief for a non-frivolous or arguable appeal. *Smith v. Robbins*, 528 U.S. 259, 280, 120 S.Ct. 746, 761 (2000). However, the Twelfth District Court of Appeals did not violate any of these holdings, as there were no *arguable* issues present in appellant’s case. Instead, it was merely a ministerial action of correcting a non-arguable sentencing error.

Pursuant to the Court’s decision in *Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 30, this Court stated:

“Correcting the defect without remanding for resentencing can provide an equitable, economical, and efficient remedy for a void sentence. Here we adopt that remedy in one narrow area: in cases in which a trial judge does not impose post-release control in accordance with statutorily mandated terms. In such a case, the sentence is void. Principles of res judicata, including the doctrine of the law of the case, do not preclude appellate review. *The sentence may be reviewed at any time, on direct appeal or by collateral attack.*” *Emphasis added.*

In a case where the sentencing occurred after July 11, 2006, the post-release control sanction may be properly given to a defendant pursuant to R.C. 2929.191, where a trial court failed to correctly give post-release control sanctions initially. See *State v. Conway*, 2nd Dist. No. 2010-CA-50, 2011-Ohio-24, ¶ 26. As the decision can be reviewed at any time, it is a non-arguable sentencing error which has caused that portion of the sentence to become void and must be remedied. R.C. 2929.191(C) is a ministerial function of the court to correct the

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sentence by the court. The void sentence is not a substantive error which requires briefing. This is true in that it may be corrected at any time, direct appeal or collateral attack which further exhibits that this error is not an arguable *Anders* error for which meritorious briefs should issue. There is a mechanism in the Ohio Revised Code to handle these issues, R.C. 2929.191.

Here, the trial court inadvertently provided appellant with the wrong post-release control information. Again, R.C. 2929.191 serves as a mere “corrective mechanism” to ensure that an appellant knows of his post-release control. See generally, *Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434 at ¶32. The prison sentence itself will not change, however now, Appellant will know the correct post-release control to which he will be subjected. It is arguable, that the claimed “error” by Appellant is in fact not an error, but is a void portion of the sentence that may be easily corrected by holding a R.C. 2929.191 hearing, allowing a conclusion that where there is no error, there is no argument for the necessity of an *Anders* merit brief. See generally *Id.* at ¶ 26. Moreover, the appellate court must grant this relief and correct this error.

The United States Supreme Court has set out a general framework to be complied with in the case where an indigent appellant’s counsel sees no merit in the appeal. In this situation, appellate counsel must make a conscientious examination of the case, and advise the court that he has done so and request to withdraw. *Robbins*, 528 U.S. 259 at 271. The request must “be accompanied by a brief referring to anything in the record that might arguably support the appeal.” *Id.* The brief is sent to the appellant and time given to him to raise any points he

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chooses; and, then after fully examining the record, the court decides whether the case is frivolous, i.e. there are no arguable issue. *Id.* If it finds it to be frivolous, it may dismiss the appeal or proceed to a decision on the merits. *Id.* If it finds “any of the points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal. *Id.*

In the instant case, the Twelfth District Court followed this procedure. It reviewed the *Anders* brief, it granted time for appellant to raise any points, and reviewed those issues. It also examined the entire record and found no arguable issue. It did find one non-arguable issue, a sentencing error, for which it remanded the case back to the trial court to correct. As there were no arguable issues, the Twelfth District Court followed *Anders* and its progeny properly. There was no error, let alone harmless error, committed by the appellate court when it remanded the case back to the trial court to correct the sentencing order without ordering a merit brief wherein there were no arguable issues.

Moreover, there were no arguable issues as the only error was a non-arguable issue of plain error. The trial court failed to properly inform Appellant of his mandatory post-release control, as well as the consequences for violating post-release control. This Court has found this type of sentencing failure curable by a trial court conducting a R.C. 2929.191 corrective hearing. *Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, ¶¶ 12 and 35; *State v. Fuller*, 124 Ohio St.3d 543, 925 N.E.2d 123, 2010-Ohio-726. As such, the appellate court properly did

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not order merit briefs to be filed for this issue to be briefed, as it was not an arguable issue.

To the extent that he wishes to have another bite at the apple and open up a new appeal as to any issues with his original trial and sentencing, this issue should be dealt with under Proposition of Law No. 2. This proposition of law is not the proper forum as has been determined by this Court on two other occasions. Moreover, it is notable that Appellant has failed to state what he will argue. He iterates his plea for a new appeal, but provides no proposed errors. Thus, he has failed to show how this case is a question of public or great general interest. He has also failed to present a substantial constitutional question.

CONCLUSION

Appellant's claimed appeal of right should be denied as to Propositions 1, 2 and 4. These propositions of law fail to present a substantial constitutional question or a question of public or great general interest. The General Solicitor did not act alone in agreeing to waive res judicata in the State's Brief in Opposition filed with the United States Supreme Court. The appellate court decided that the State could not waive res judicata pursuant to *Fischer and Perry*. This issue does not present a constitutional question or a question of great general interest. There were no arguable issues found by the appellate court, so pursuant to *Anders*, the appellate court properly did not order briefs on the merits, therefore jurisdiction for Proposition 4 should be declined. Finally, to the extent that this Court finds that this case is "clean" to use as a conflict case on the issue of providing counsel to a defendant during resentencing for proper imposition of

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post-release control, jurisdiction should be limited to only the issue provided as a conflict by the Twelfth District Court of Appeals. Accordingly, this Court should decline jurisdiction of this case and dismiss Appellant's appeal.

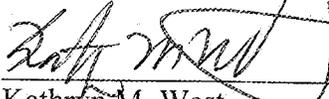
Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and exact copy of the foregoing Brief for Appellee was delivered to the following Defendant/Appellant's counsel of record, Stephen P. Hardwick, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, OH, 43215 by regular U.S. Mail Service, postage pre-paid, this 26th day of July, 2013.


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