In the Supreme Court of Ohio

STATE OF OHIO,	
Appellee	Case № 2019-0655
-vs-	On Appeal from the Mahoning County Court of Appeals, Seventh Appellate District
KYLE PATRICK,	Case № 2017 MA 0091
Appellant	

SUPPLEMENTAL BRIEF OF APPELLANT KYLE PATRICK

JOHN B. JUHASZ № 0023777
E-mail: Jbjuhasz@gmail.com
7081 West Boulevard, Suite № 4
Youngstown, Ohio 44512-4362
Telephone: 330.758.7700
Facsimile: 330.758.7757
COUNSEL FOR APPELLANT

PAUL J. GAINS, Esq. № 0020323
Mahoning County Prosecutor
RALPH M. RIVERA, Esq. № 0082063
COUNSEL OF RECORD
21 West Boardman Street
Youngstown, Ohio 44503
Telephone: 330.740.2330
Facsimile: 330.740.2008
COUNSEL FOR APPELLEE

BROOKE M. BURNS, Esq. № 0080256
Chief Counsel, Juvenile Department
Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
Telephone: (614) 466-5394
Facsimile: (614) 752-5167 (fax)
brooke.burns@opd.ohio.gov
Counsel for Amicus Curiæ
Office of the Ohio Public Defender
Cuyahoga County Public Defender's Office

MARSHA L. LEVICK, Esq. (PHV 1729-2019)
ANDREW R. KEATS, Esq. (PHV 20847-2019)
Juvenile Law Center
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107
Telephone: (215) 625-0551
Facsimile: (215) 625-2808 (fax)
mlevick@jlc.org
akeats@jlc.org
Counsel for Amici Curiæ, Juvenile Law Center
Central Juvenile Defender Center, Children's Law Center,
National Juvenile Defender Center, Schubert Center for Child Studies

DAVE YOST, Esq. 0056290
Attorney General of Ohio
BENJAMIN M. FLOWERS, Esq. № 0095284, Solicitor General
COUNSEL OF RECORD
DIANE R. BREY, Esq. № 0040328, Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Telephone: 614-466-8980
Facsimile: 614-466-5087
bflowers@ohioattorneygeneral.gov
diane.brey@ohioattorneygeneral.gov
Counsel for Amicus Curiae Ohio Attorney General Dave Yost

TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

Statement of Facts 1

Argument 1

Supplemental Proposition of Law: R.C. 2953.08 bars review of sentences imposed for murder or aggravated murder only when a defendant appeals his sentence under the separate appeal provided for by R.C. 2953.08(A), but not otherwise in appeals under other legal avenues. 1

Introduction and Summary of Argument in Supplemental Brief 1

Ohio S.B. 2 created a new, separate, and additional right to appeal a sentence that did not exist before July 1, 1996, and only under that appeal is a review of a sentence imposed for murder or aggravated murder barred by R.C. 2953.08(D)(3). 3

R.C. 2953.08(D)(3) has no application to this case because neither Patrick nor the State invoked appellate jurisdiction under R.C. 2953.08. 11

When jurisdiction under R.C. 2953.08 is invoked, it only prohibits review of a sentence imposed for aggravated murder when an appeal is brought under that section, and R.C. 2505.03 and 2953.02 permit review of what is on appeal here: the sentencing procedure employed rather than the specific sentence imposed. 20

If the Court reads R.C. 2953.08(D)(3) as precluding all review of all aggravated murder sentences, whether appealed under R.C. 2505.03 or R.C. 2953.02, then R.C. 2953.08(D)(3) is unconstitutional. 25

Conclusion 32

Certificate of Service 33

Appendix of Constitutions, Statutes, and Rules . . . . . App. 1

TABLE OF AUTHORITIES

Cases:

Belding v. State, 121 Ohio St. 393, 169 N.E. 301 (1929) 29

Campbell v. Ohio, __ U.S. __, 138 S. Ct. 1059, 200 L.Ed.2d 502 (2018) (concurring opinion) 31

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) 29

Clements v. Fashing, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982) 28

Deshaney v. Winnebago Cty. Dept. of Social Servs., 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) 30

Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) 23, 25

Griffin v. Illinois, 351 U.S. 12, 100 L.Ed. 891, 76 S. Ct. 585 (1956) (concurring opinion) 27

Halbert v. Michigan, 545 U.S. 605, 125 S.Ct. 2582, 162 L.Ed.2d 552 (2005), ... 27

Hubbell v. Xenia, 115 Ohio St.3d 77, 2007 Ohio 4839, 873 N.E.2d 87 85

In re England, 375 F.3d 1169 (D.C. Cir. 2004) 5

In re M.M., 135 Ohio St.3d 375, 2013 Ohio 1495, 987 N.E.2d 652 17

McKane v. Durston, 153 U.S. 684, 38 L.Ed. 867, 14 S.Ct. 913 (1894) 27

Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) 23, 24

Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005 . . . . .)23, 25

San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) 28

Schenley v. Kauth, 160 Ohio St. 109, 113 N.E.2d 625 (1953) 14

Shepard v. United States, 257 F.2d 293 (6th Cir. 1958) 4

Sierra Club v. E.P.A., 536 F.3d 673 (D.C. Cir. 2008) 5

State v. Alvarez, 154 Ohio App.3d 526, 2003 Ohio 5094, 797 N.E. 2d 1043 (2nd Dist.) 21

State v. Barker, 149 Ohio St.3d 1, 2016 Ohio 2708, 73 N.E.3d 365 30

State v. Brown, 6th Dist. № L-16-1181, 2018 Ohio 117, 2018 Ohio App. LEXIS 122, 2018 WL 388537 25

State v. Craig, 2020 Ohio 455, 2020 Ohio LEXIS 388, 2020 WL 717413 (slip opinion) 6

State v. Gwynne, 158 Ohio St.3d 279, 2019 Ohio 4761, 141 N.E.3d 16 917

State v. Hampton, 134 Ohio St.3d 447, 2012 Ohio 5688, 983 N.E.2d 324 14

State v. Johnson, 8th Dist. № 108661, 2020 Ohio 2826, 2020 Ohio App. LEXIS 1785 14

State v. Long, 138 Ohio St.3d 478, 2014 Ohio 849, 8 N.E.3d 890 23

State v. Marcum, 146 Ohio St.3d 516, 2016 Ohio 1002, 59 N.E.3d 1231 5

State v. Moore, 149 Ohio St.3d 557, 2016 Ohio 8288, 76 N.E.3d 1127 25

State v. Noling, 149 Ohio St.3d 327, 2016 Ohio 8252, 75 N.E.3d 141 29

State v. Porterfield, 106 Ohio St.3d 5, 2005 Ohio 3095, 829 N.E.2d 690 . . . . . 16, 18, 19

State v. Porterfield, 11th Dist. № 2002-T-0045, 2004 Ohio 520, 2004 Ohio App. LEXIS 545 16

State v. Robinson, 6th Dist. № L-02-1314, 2005 Ohio 324, 2005 Ohio App. LEXIS 291. 26

State v. Rogers, 143 Ohio St.3d 385, 2015 Ohio 2459, 38 N.E.3d 860 17

State v. Terrell, 8th Dist. № 103428, 2016 Ohio 4563, 2016 Ohio App. LEXIS 2394, 2016 WL 3442917 12

State v. Young, 62 Ohio St.2d 370, 406 N.E.2d 499 (1980) 18

State v. Zimmerman, 2nd Dist. № 2015-CA-62 & 2015-CA-63, 2016 Ohio 1475, 63 N.E.3d 641, 2016 Ohio App. LEXIS 1380, 2016 WL 1393516 12

State, ex rel. Savarese, v. Buckeye Local School Dist. Bd. of Edn., 74 Ohio St.3d 543, 1996 Ohio 291, 660 N.E.2d 463 5

Summerville v. Forest Park, 128 Ohio St.3d 221, 2010 Ohio 6280, 943 N.E.2d 522 5

United States v. Bass, 404 U.S. 336, 30 L.Ed.2d 488, 92 S.Ct. 515 (1971) 18

Williams v. Oklahoma City, 395 U.S. 458, 89 S.Ct. 1818, 1819 L.Ed.2d 440 (1969) 27

Constitutional Provisions:

Eighth Amendment, United States Constitution 11, 21, 22, 24

Fourteenth Amendment, United States Constitution . . . 11, 21, 22, 24, 29

Ohio Constitution, Article IV, Section 2(B) 20, 32

Ohio Constitution, Article IV, Section 3(B)(2) 17

Statutes:

R.C. 2505.02 20

R.C. 2505.03 . . . . . 17, 20

R.C. 2505.04 11

R.C. 2929.02(B)(1) 9

R.C. 2953.02 20

R.C. 2953.08 . . . . . 2-4, 7, 10-12, 15, 17, 19, 26, 32

R.C. 2953.08(A) 2, 3, 6, 18, 32

R.C. 2953.08(D)(3) 1-3, 6, 11, 16, 18, 19, 21, 22, 25, 30, 32

Rules:

Crim. R. 32(B) 13

Seventh Dist. Loc. R. 3.1(B) 14

Other Authorities:

Friendly, Henry J., *Benchmarks* 202 (1967) 5

Griffin, Burt W., and Lewis R. Katz, *Ohio Felony Sentencing Law* (St. Paul, MN: West Publishing Co.: copyright © 2007) . . . 4, 8, 9, 11, 21, 22

STATEMENT OF FACTS

The facts are as stated in Appellant's merit brief. Appellant offers only this factual addition in light of the State's claim that R.C. 2953.08 requires dismissal of this appeal, and this Court's May 1, 2020 order for supplemental briefing. KYLE PATRICK was advised through the sentencing entry of his additional right to appeal the sentence under R.C. 2953.08. He did not, however, file an appeal of his sentence under that section.

ARGUMENT

> Supplemental Proposition of Law: R.C. 2953.08 bars review of sentences imposed for murder or aggravated murder only when a defendant appeals his sentence under the separate appeal provided for by R.C. 2953.08(A), but not otherwise in appeals under other legal avenues.

Introduction and Summary of Argument in Supplemental Brief.

The Court on May 1, 2020 ordered the parties to brief: (1) the effect, if any, of R.C. 2953.08(D)(3) on this Court's and the Court of Appeals' ability to review Appellant's sentence; (2) whether R.C. 2953.08(D)(3) denies either court of subject-matter jurisdiction; and, if not, whether it otherwise limits the scope of the appeal in this Court or in the court of appeals.

R.C. 2953.08(D)(3) has no effect on this case. The statute has no

effect on this Court's ability to review Appellant's sentence or the process by which it was determined. It has no impact upon this Court's jurisdiction in this case. It in no way limits the scope of this appeal in this Court or in the Court of Appeals. That is because there is before this Court no separate appeal that was taken under R.C. 2953.08(A), and R.C. 2953.08(D)(3) denies an appellate court the ability to review a sentence imposed for aggravated in such appeals and nowhere else. R.C. 2953.08(D)(3) prohibits a court of appeals or this Court from reviewing a *sentence* for murder or aggravated murder when an appeal of that sentence has been taken "under this section," *i.e.*, whenever a sentence is appealed or attempted to be appealed under R.C. 2953.08.

When the General Assembly revamped Ohio sentencing law in 1996, it created a new right to review many felony sentences by way of a separate appeal. It conferred jurisdiction on the appellate courts of this State to conduct such reviews, because such reviews were heretofore nonexistent in Ohio. By its unambiguous terms, R.C. 2953.08 created a separate right of appeal of the sentence imposed, in "addition to any other right to appeal" the final order in a criminal case. There are no words, no suggestions, no hints by the General

Assembly that in enacting R.C. 2953.08(D)(3) it intended to do anything beyond what it did: make sentences for aggravated murder not subject to review under R.C 2953.08, while leaving undisturbed the plenary rights of appellate review, what the legislature called "any other right to appeal." See, R.C. 2953.08(A). KYLE PATRICK did not file a separate appeal under R.C. 2953.08. He appealed by employing those "other right[s] to appeal." PATRICK concedes that had he appealed his sentence separately under R.C. 2953.08, there might be force to the State's claim that this Court and the Court of Appeals were without jurisdiction to review the sentence—though PATRICK is not appealing the sentence *per se*, but the *process* by which the sentence was determined. R.C. 2953.08(D)(3) has no application to this case because an appeal under R.C. 2953.08 was not taken.

Ohio S.B. 2 created a new, separate, and additional right to appeal a sentence that did not exist before July 1, 1996, and only under that appeal is a review of a sentence imposed for murder or aggravated murder barred by R.C. 2953.08(D)(3).

Until 1996, review of the actual sentences imposed by trial judges was unheard of in Ohio. The last Ohioan to serve on the United States Supreme Court, Potter Stewart, wrote for the United States Court of Appeals for the Sixth Circuit, just months before President Eisenhower elevated Stewart to the Supreme Court:

> Justice is measured in many ways, but to a convicted criminal its surest measure lies in the fairness of the sentence he receives. Whether a sentence is fair cannot, of course, be gauged simply by comparing it with the punishment imposed upon others for similar offenses. But that test, though imperfect, is hardly irrelevant. It is an anomaly that a judicial system which has developed so scrupulous a concern for the protection of a criminal defendant throughout every other stage of the proceedings against him should have so *neglected this most important dimension of fundamental justice.*

Shepard v. United States, 257 F.2d 293, 294 (6th Cir. 1958). (Emphasis added.) Most of this quote was employed by the two deans of Ohio's felony sentencing law which became effective July 1, 1996: Judge Burt Griffin and Professor Lewis Katz. See, Burt W. Griffin and Lewis R. Katz, *Ohio Felony Sentencing Law* (St. Paul, MN: West Publishing Co.: copyright © 2007), pp. 1290 *et seq.*, §10:2. Their point, illustrated by Stewart's quote, is that the actual sentence imposed by a trial judge was largely unreviewable. In preparing to re-frame Ohio's sentencing law, the Ohio Sentencing Commission had concluded that appellate review of sentences was the appropriate method for policing the exercise of judicial sentencing discretion. *Id.*, at 1291.

Part of the new law, widely known as S.B. 2, was to enact R.C. 2953.08. This statute created for the first time, a separate right of appeal of felony sentences themselves. It is interesting indeed that in an era when we so often hear about strict construction, original intent,

and judges refraining from "legislating from the bench," so many have ignored the unambiguous words of the statute, a disappointingly myopic examination of a statute seemingly designed to remove words that the General Assembly clearly placed there for a reason. The distinguished Justice Felix Frankfurter, regarded by many as a strict constructionist, when he was a Harvard law professor, instructed his students that, when attempting to divine the intent of the legislature in enacting a statute, reading the statute itself was not a prohibited exercise.[1] This Court has said that its "primary concern when construing statutes is legislative intent." See, *State v. Marcum*, 146 Ohio St.3d 516, 2016 Ohio 1002, ¶8, 59 N.E.3d 1231; *State, ex rel. Savarese, v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 545, 1996 Ohio 291, 660 N.E.2d 463; *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010 Ohio 6280, ¶18, 943 N.E.2d 522; *Hubbell v. Xenia*, 115 Ohio St.3d 77, ¶11, 2007 Ohio 4839, 873 N.E.2d 878.

Employing Frankfurter's sage advice, we see that the statute created an additional right to appeal the "sentence," a right that did

---

[1] Frankfurter's timeless advice, given to his Harvard law students, on statutory interpretation was simple as it was inspiring: "'(1) Read the statute; (2) read the statute; (3) read the statute!'" *See, Sierra Club v. E.P.A.*, 536 F.3d 673 (D.C. Cir. 2008), citing *In re England*, 375 F.3d 1169, 1182 (D.C. Cir. 2004) (ROBERTS, J.), in turn quoting the late Second Circuit Judge Henry J. Friendly's article in *Benchmarks* 202 (1967).

not supplant but was designed to co-exist with any other lawful appeal: "*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 * * * ." R.C. 2953.08(A). (Emphasis added.) R.C. 2953.08(D)(3) is just as clear: "(3) A sentence imposed for aggravated murder or murder pursuant to sections 2929.02 to 2929.06 of the Revised Code *is not subject to review under this section.*" (Emphasis added.)

How do we know that an appeal under R.C. 2953.08 is separate and apart from other appeals? Before we look to Griffin and Katz, let us again follow Justice Frankfurter's advice and read the statute itself. By its own terms, the appeal of a sentence is in addition to other appellate rights, none of which were intended to be tamped down or extinguished by the enactment of R.C. 2953.08. See, generally, *State v. Craig*, 2020 Ohio 455, ¶9, 2020 Ohio LEXIS 388, 2020 WL 717413 (slip opinion). The statute says in pertinent part:

> (A) * * *.
> * * *.
> (E) * * * . A *sentence appeal under this section* shall be consolidated with any other appeal in the case. If no other appeal is filed, the court of appeals may review only the portions of the trial record that pertain to sentencing.
> (F) On the appeal of a sentence under this section,

> the record to be reviewed shall include all of the following, as applicable:
>
> (1) Any presentence, psychiatric, or other investigative report that was submitted to the court in writing before the sentence was imposed. * * * .
>
> (2) The trial record in the case in which the sentence was imposed;
>
> (3) Any oral or written statements made to or by the court at the sentencing hearing at which the sentence was imposed;
>
> (4) * * * .
>
> (G) * * * .
>
> (2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.
>
> The appellate court may increase, reduce, or otherwise modify a sentence that is *appealed under this section* or may vacate the sentence and remand the matter to the sentencing court for resentencing. * * * .
>
> (H) A judgment or final order of a court of appeals *under this section* may be appealed, by leave of court, to the supreme court.

(Emphasis added.) R.C. 2953.08 was intended to supplement the rights of appeal that already existed. It was not intended to supplant those appeal rights. Sentence review by appellate courts was added because it had been missing in American law.

> Historically, in America, criminal sentences have been subject to very little or no appellate review. Great discretion is granted to trial judges to make the right sentencing decisions. The courts make better sentencing decisions through the wise and thoughtful application of that discretion, rather than through the inflexible and mechanical application of standards. Notwithstanding the critical nature of sentencing decisions, until the passage of the sentencing reform legislation of 1995, these decisions were virtually immune from meaningful appellate review, even though this is the most important decision trial judges make. Virtually every other decision is subject to appellate

review.

* * *

> The absence of appellate review of sentencing is nothing more than an historical anomaly. When the United States won its independence and adopted the existing common law of England as its own, no system for appellate review of criminal sentences existed. Under English law at the time, sentencing review would have served little purpose: the sentencing judge had little discretion, and sentences of death or transportation to the penal colonies were mandatory. In the nineteenth and twentieth centuries both the United States and England limited the death penalty and adopted broad discretionary sentencing. Along with the grant of broad discretion, England developed a system for appellate review of sentences. In the United States, however, this grant of broad discretion was not accompanied by the development of similar appellate jurisdiction. The sentencing reform legislation of 1995 remedies this historic anomaly.

Griffin and Katz, *supra*, (2007 ed.), p. 1292, §10:3. With this effort to cure the historical anomaly, why, one might ask, would the most serious crimes be left out of the equation? Why could a sentence for aggravated burglary be subject to review but not a sentence for aggravated murder?

Why does the statute exclude murder and aggravated murder? Judge Griffin and Professor Katz offer one reason:

> The provisions of this section [R.C. 2953.08], as well as the 1995 statutes governing sentencing, are not applicable to sentences imposed for aggravated murder and murder. [Footnote citing R.C. 2953.08(D).] These offenses are governed by separate statutory provisions. [Footnote RC 2929.02 and RC 2929.03.] Where a death sentence is imposed, an appeal is automatic under RC 2929.05. Where a defendant is convicted of (1) aggravated murder but a death sentence is not imposed or (2) murder, an appeal will lie only on traditional grounds independent of those set

forth in this section.

See, Griffin and Katz, *supra,* (2001 ed.), p. 865, §10:16; (2007 ed.), p. 1311, §10:17. Additionally, the original sentences for aggravated murder and murder were mandatory and there was only one sentence for each crime. The sentence for murder, absent a specification involving sexual conduct, is and has been "an indefinite term of fifteen years to life." R.C. 2929.02(B)(1). As to aggravated murder, detailed more than ably by the *amici* in the *Kinney* case is the history of the statute. See, *State v. David Kinney*, Case № 2019-1103, Brief of Amicus Curiae, Office of the Ohio Public Defender In Support of Appellant, David C. Kinney, Jr., pp. 5-7. From 1996 until 2005, there was no need for appellate review of sentences for aggravated murder. This is for the simple reason that a trial judge, whether upon a plea or a guilty verdict by a jury could sentence a defendant for aggravated murder to one sentence only: "life imprisonment with parole eligibility after serving twenty years of imprisonment". That was the case from at least S.B. 4 in 1995, through S.B. 2 in 1996, through S.B. 269 in 1996, through H.B. 180 in 1997, and until H.B. 184, effective March 23, 2005. It was only then that judges were given discretion in imposing sentence for aggravated murder to impose life imprisonment without parole, life imprisonment with parole eligibility after serving

twenty years of imprisonment; life imprisonment with parole eligibility after serving twenty-five full years of imprisonment; and life imprisonment with parole eligibility after serving thirty full years of imprisonment. It was not until 2006, 10 years after the statute was first enacted, that the General Assembly addressed division (D). That seems not to have accounted for the fact that sentences for aggravated murder were no longer a sole mandatory sentence. Still, there is a right of appeal for Defendants convicted of aggravated murder.

Judge Griffin and Professor Katz thought it significant that the new appellate mechanism authorized both the State and the defendant to appeal a sentence, extolling a view of the Sentencing Commission that the community, as well as a criminal defendant, required the added protection of appellate oversight to rein in judicial sentencing discretion within the framework of the new sentencing law. Griffin and Katz, *supra*, at 1293. An appeal under R.C. 2953.08 is different from an appeal from the final judgment in the case. The record on appeal under a R.C. 2953.08 appeal is different, consisting of the pre-sentence report, or any other written reports submitted to the court prior to sentence; the trial record pertaining to the sentencing; and, statements made to the court at the time of sentencing. See, Griffin and Katz,

supra, at 1311, §10:18.

R.C. 2953.08(D)(3) has no application to this case because neither Patrick nor the State invoked appellate jurisdiction under R.C. 2953.08.

As with any other appeal, a sentence appeal is perfected by filing a notice of appeal. See, R.C. 2505.04. Neither Patrick nor the State of Ohio invoked the jurisdiction of the Court of Appeals by filing a notice of appeal to challenge the sentence under R.C. 2953.08. Perhaps Patrick's trial counsel knew that R.C. 2953.08(D)(3) prohibited that type of sentence appeal—or perhaps he did not. Either way, it matters not. No jurisdiction to review Patrick's sentence was invoked, an entirely separate question from whether the process that resulted in the sentence violated the Eighth and Fourteenth Amendments to the United States Constitution. The Appellee's amicus chides PATRICK for not bringing to the Court's attention that the Court might not have jurisdiction under R.C. 2953.08. Like any number of other statutes which PATRICK admits he did not bring to the Court's attention, those statutes, like R.C. 2953.08, have absolutely nothing to do with this case. Neither PATRICK nor the State, both of whom have a right of appeal under R.C. 2953.08, appealed under that section. The State now claims that the statute bars this appeal, a peculiar position in light of the fact that the State waived the issue in the Court of

Appeals; the Court of Appeals itself made no mention of the statute; and the State, did not invoke appellate jurisdiction under R.C. 2953.08.

There are two passing points of interest. While there certainly is no effort here to create an exhaustive catalog, there are cases in Ohio where the sentence for murder or aggravated murder has been reviewed on appeal without so much as a mention of R.C. 2953.08(D)(3). See, e.g., *State v. Zimmerman*, 2nd Dist. № 2015-CA-62 & 2015-CA-63, 2016 Ohio 1475, 63 N.E.3d 641, 2016 Ohio App. LEXIS 1380, 2016 WL 1393516, discretionary appeal allowed by *State v. Zimmerman*, 146 Ohio St.3d 1502, 2016 Ohio 5792, 58 N.E.3d 1173, appeal dismissed as improvidently granted, 152 Ohio St.3d 160, 2018 Ohio 249, 93 N.E.3d 982; *State v. Terrell*, 8th Dist. № 103428, 2016 Ohio 4563, 2016 Ohio App. LEXIS 2394, 2016 WL 3442917, appeal not accepted, 147 Ohio St.3d 1445, 2016 Ohio 7854, 63 N.E.3d 1215, motion for reconsideration granted, 2016 Ohio 8458, 2016 Ohio LEXIS 3150, appeal dismissed as improvidently granted, 152 Ohio St.3d 160, 2018 Ohio 258, 93 N.E.3d 982, 2018 Ohio LEXIS 289, cert. denied, *Terrell v. Ohio*, ___U.S.___, 139 S.Ct. 240, 202 L.Ed.2d 161 (2018). Like the Seventh District in this case, it appears that there are courts

not applying the statute, or perhaps unaware of what the State claims is an absolute bar to review. It is not possible to tell whether any or all of these appeals did or did not seek sentence review by the separate appeal mechanism of R.C. 2953.08(A).

The trial court, interestingly, advised PATRICK of his right to appeal the sentencing under R.C. 2953.08 (which he ostensibly did not have), but the court did not inform him of the right to appeal the final order of conviction. The last sentence of the judgment entry imposing sentence reads: "Defendant has been given notice of his *appellate rights under R.C. 2953.08.*" (Docket, 106.) (Emphasis added.) According to the State, PATRICK has no appeal rights under R.C. 2953.08; yet, according to the sentencing entry, that was the only right to appeal of which PATRICK was advised. See, Crim. R. 32(B) ("After imposing sentence in a serious offense that has gone to trial, the court *shall advise* the defendant that the defendant has a right to appeal *the conviction.*") (Emphasis added.)

To be fair and accurate, that's what the sentencing entry says. And while "[a] court of record speaks only through its journal and not by oral pronouncement or mere written minute or memorandum," the trial judge actually told PATRICK at sentencing: "From the verdict and

from this sentence you have a right to an appeal, and if you could not afford a lawyer, one would be appointed for you to represent you in that appeal, and I will ask Attorney Lavelle to take all steps relative to filing that notice and request." (T.p., Sentencing hearing, 17-18.) See, *Schenley v. Kauth*, 160 Ohio St. 109, 113 N.E.2d 625 (1953), syl. 1; *State v. Hampton*, 134 Ohio St.3d 447, 2012 Ohio 5688, ¶15, 983 N.E.2d 324. There is, just to be clear, no claim of prejudice here, as PATRICK timely appealed. See, *State v. Johnson*, 8th Dist. № 108661, 2020 Ohio 2826, 2020 Ohio App. LEXIS 1785 (holding that any error in the trial court's failure to inform defendant of his appellate rights at his sentencing hearing was harmless because he was able to effectuate a timely appeal.)

The appeal that PATRICK perfected, however, was not the appeal that the State now tries to claim that it is. PATRICK'S trial counsel, who filed the Notice of Appeal pursuant to the trial court's directive, was required by Seventh District Court of Appeals Local Rule to complete a docketing statement, listing, *inter alia*, a summary of probable issues for review on appeal. See, Seventh Dist. Loc. R. 3.1(B), Appendix, *post*. Trial counsel did not list the sentence as one of those issues. He listed instead ineffective assistance of counsel and failure of the trial court

to instruct on a lesser offense. Asked in the Court's prescribed form if the appeal turned on any particular case or sentence, counsel did not cite R.C. 2953.08. (Docket 107.)

Had Patrick appealed under R.C. 2953.08, this Court and the Court of Appeals, under the statute as written, would be unable to review the sentence "*under this section.*" (Emphasis added.) R.C. 2953.08(A) says that the right to appeal the sentence is "[i]n addition to any other right to appeal * * * ." That language would not have been placed in the statute if there were not other avenues of appeal. There is a wide gulf between a sentence that "is not subject to review" and a sentence that "is not subject to review under this section." The General Assembly did not say that a sentence for aggravated murder is *never* reviewable, but the General Assembly said that a sentence imposed for aggravated murder reviewable "under this section." The Eleventh District Court of Appeals interpreted "section" to mean part of a statute rather than the entire statute:

> Accordingly, we will interpret the second sentence as referring to and *creating an exception to the first sentence* of R.C. 2953.08(D). In other words, when a defendant pleads guilty or is convicted of aggravated murder, the trial court is required to state its findings, despite the existence of a jointly-recommended sentence, authorized by law, and imposed by the judge.

State v. Porterfield, 11th Dist. № 2002-T-0045, 2004 Ohio 520, ¶74, 2004 Ohio App. LEXIS 545. (Emphasis added.) On appeal to this Court from that decision, this Court in *State v. Porterfield*, 106 Ohio St.3d 5, 2005 Ohio 3095, 829 N.E.2d 690, made clear that "section" means the entire statute, and not a division of the statute. "As used in the Ohio Revised Code, the word 'section' unambiguously refers to a decimal-numbered statute only." See, *State v. Porterfield, supra*, ¶16.

The Appellee's amicus, with due deference, conflates issues by suggesting, first, that there is interplay between R.C. 2953.02 and 2953.08. There is not. They are two separate sections enabling two distinctly different appeals. When the General Assembly said that a "sentence imposed for aggravated murder or murder pursuant to sections 2929.02 to 2929.06 of the Revised Code is not subject to review *under this section*" it meant just that: under section 2953.08. Any suggestion that the disabling language of R.C. 2953.08(D)(3) applies to R.C. 2953.02 is sorely misplaced. The State of Ohio in its merit brief, is more direct in its conclusion, but it, too, lacks any authority to transfer R.C. 2953.08(D)(3)'s disabling provision to other statutes. The State simply concludes that because of R.C. 2953.08(D)(3), PATRICK's "sentence for Aggravated Murder is

unreviewable, and review need not proceed any further. See *State v. Castagnola*, 145 Ohio St.3d 1, 16-17, 2015 Ohio 1565, 46 N.E.3d 638." Appellee's Brief, at 8.[2]

Because jurisdiction under R.C. 2953.08 was not invoked, the Seventh District Court of Appeals enjoyed in this case "such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district * * * ." See, Ohio Constitution, Article IV, Section 3(B)(2); *State v. Gwynne*, 158 Ohio St.3d 279, 2019 Ohio 4761, ¶8, 141 N.E.3d 169, citing *In re M.M.*, 135 Ohio St.3d 375, 2013 Ohio 1495, ¶21, 987 N.E.2d 652. To the extent that *Porterfield* holds that a sentence imposed for aggravated murder or murder pursuant to R.C. 2929.02 to 2929.06 is not reviewable at all, it paints with too broad a brush. Because PATRICK did not appeal under R.C. 2953.08, the final order could be "reviewed on appeal by * * * a court of appeals * * *" and also by this Court. See, R.C. 2505.03(A).

If the Court reads and applies the statute as it was written,

---

[2] *Castagnola* is a case that does not cite or have anything to do with R.C. 2953.08. Rather it is a case that addresses waiver of an issue by failing to raise it below, which of course is what occurred here. An argument is forfeited when it is not timely asserted. See, *State v. Gwynne*, 158 Ohio St.3d 279, 2019 Ohio 4761, ¶10, 141 N.E.3d 169, citing *State v. Rogers*, 143 Ohio St.3d 385, 2015 Ohio 2459, ¶21, 38 N.E.3d 860.

there is no issue of jurisdiction, no issue of the appeal in any way being limited. R.C 2953.08(D)(3) divests a court of authority to review a sentence for aggravated murder, but only a sentence appealed under R.C. 2953.08. *Section* means *section*, not the entire Ohio Revised Code. These words are "unambiguous." "[N]ot subject to review under this section" does not mean "cannot be reviewed," *State v. Porterfield*, *supra*, ¶17, or cannot be reviewed under any section or under any authority. It means "not subject to review *under this section*." (Emphasis added.) Though there should be no doubt, if there is some doubt, "doubts are resolved in favor of the defendant." See, *State v. Young*, 62 Ohio St.2d 370, 374, 406 N.E.2d 499 (1980), quoting *United States v. Bass*, 404 U.S. 336, 348, 30 L.Ed.2d 488, 92 S.Ct. 515 (1971). Here, that would mean that R.C. 2953.08(D)(3) disentitles a defendant to have his sentence reviewed (because the appellate courts lack jurisdiction) *only* if he appeals the sentence under R.C. 2953.08(A). There is nothing in the disabling language of "not subject to review under this section" that bars a review of a sentence for aggravated murder in cases where an appeal is brought under "any other right to appeal." R.C. 2953.08(A).

PATRICK concedes that R.C. 2953.08(D)(3) precludes review of a

sentence for aggravated murder when an Appellant asks, pursuant to R.C. 2953.08 to have that sentence reviewed under that section. The proposition that the State and its amicus want the Court to adopt is that R.C. 2953.08(D)(3) precludes review of a sentence for aggravated murder under all circumstances and under all avenues of appeal. The fallaciousness of that premise is exposed by the "unambiguous" language of the statute itself. To be sure, while "no clear standard has evolved to determine the level of lucidity necessary for a writing to be unambiguous," it is beyond peradventure that "R.C. 2953.08(D) *is* unambiguous." *State v. Porterfield, supra,* ¶¶11, 17. (Emphasis added.)

The Court, with due deference, left out the key words "under this section." What should have been said in *Porterfield,* and the flock of cases cited by the State that appear to be *Porterfield's* progeny, is what the statute unambiguously says. A sentence for aggravated murder "is not subject to review *under this section,*" leaving the conclusion that the sentence cannot be reviewed under R.C. 2953.08, but can be reviewed elsewhere. We must extend the General Assembly the courtesy of assuming that if it had intended to say that sentences for aggravated murder and murder were not reviewable, it would have

said so. PATRICK has done nothing in the Court of Appeals or this Court to challenge the *sentence* under that section. He has instead challenged the sentencing *procedure* as being contrary to what the United States Supreme Court has said is required under the Eighth and Fourteenth Amendment to the United States Constitution. Nothing in R.C. 2505.03 or 2953.02 limits the authority of the court of appeals to review an order that affects a substantial right— a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect—in an action that in effect determines the action and prevents a judgment. See, R.C. 2505.02. Nothing in R.C. 2505.03 or 2953.02 limits the power of this Court to review "[c]ases involving questions arising under the constitution of the United States or of this state," "appeals from the courts of appeals in cases of felony on leave first obtained," or "cases of public or great general interest." See, Ohio Constitution, Article IV, Section 2(B).

When jurisdiction under R.C. 2953.08 is invoked, it only prohibits review of a sentence imposed for aggravated murder when an appeal is brought under that section, and R.C. 2505.03 and 2953.02 permit review of what is on appeal here: the sentencing procedure employed rather than the specific sentence imposed.

KYLE PATRICK is not before this Court because he received a

sentence of 33 years to life. He is before this Court because the *process* by which that particular sentence was selected by the trial court from among the 4 available sentences violates the Eighth and Fourteenth Amendments. The clearest evidence about why the case is here is in the proposition of law that was accepted for review, the proposition that imposition of any life imprisonment sentence upon a juvenile offender without taking into consideration factors commanded by the Eighth and Fourteenth Amendments to the United States Constitution violates those provisions. The actual *sentence* selected on the one hand, and the *process* by which that sentence was selected on the other hand, are two distinct matters. The latter is why the case is here. R.C. 2953.08(D)(3) prohibits review of only the former in sentence appeals brought under that section. As Judge Griffin and Professor Katz said: "RC 2953.08 does not provide a general right to appeal. Parties must frame the claim for error within the grounds enumerated for appeal." Griffin and Katz (2007 ed.), p. 1294, §10:5, citing *State v. Alvarez*, 154 Ohio App.3d 526, 2003 Ohio 5094, 797 N.E. 2d 1043 (2nd Dist.). PATRICK did none of these things, highlighting once again that R.C. 2953.08 has nothing to do with this appeal. The sentence imposed by the trial judge here is on review not in and of

itself, but only to the extent that it is the product of what PATRICK has shown in his merit brief is a *process* deficient under, and violative of, the United States Constitution's Eighth and Fourteenth Amendments.

What the State and its amicus claim is blocked from review by R.C. 2953.08(D)(3)—the sentence—is a far cry from a review of the *procedure* by which a sentence is determined. Griffin and Katz had this to say:

> The provisions of this section, as well as the 1995 statutes governing sentencing, are not applicable to sentences imposed for aggravated murder and murder. [Footnote citing R.C. 2953.08(D).] These offenses are governed by separate statutory provisions. [Footnote citing R.C. 2929.02 and RC 2929.033.] Where a death sentence is imposed, an appeal is automatic under RC 2929.05. Where a defendant is convicted of (1) aggravated murder but a death sentence is not imposed or (2) murder, an appeal will lie only on traditional grounds independent of those set forth in this section.

(Emphasis added.) See, Griffin and Katz, (2007 ed.), p. 1311, §10:17. A sentence imposed upon a juvenile tried as an adult must contain a *consideration* not of just age, as the State and its amicus try to claim was considered, without any help from the record to support them. The procedure is that, whatever sentence is selected, it must be selected after the sentencing court considers the factors that have been briefed by Appellant and amici urging reversal, and discussed at oral argument, but which the trial judge failed to take into account when

declaring the imposition of the sentence here "easy" because the crime was so senseless. The factors are the child's diminished culpability, heightened capacity for change, and the age at which he might be fit to re-enter society. See, e.g., *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); *State v. Long*, 138 Ohio St.3d 478, 2014 Ohio 849, 8 N.E.3d 890. Some of the cases, like *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), prohibit certain sentences, such as death or life without parole for a non-homicide. Beyond that, the cases do not ordain a formulaic catechism to impose a certain term. But the cases do demand that the sentencing court give the factors particular to youth earnest consideration before imposing whatever sentence it imposes. Thus, the *sentence* of 33 years to life here is not so much under review as is the *process* by which the sentencing judge arrived there. And how the trial judge arrived there was by making "an easy call for me given what I now know from the evidence introduced at trial and given the verdict of the Jury." (Sentencing transcript, 16.) But he did so without so much as a whisper or a hint of considering the factors that the Eighth and Fourteenth Amendments required him to consider: KYLE PATRICK was

17 when these crimes were committed. The process by which the judge arrived at the sentence, instead of considering how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison; instead of considering immaturity, impetuosity, failure to appreciate risks and consequences, reduced culpability and capacity for change; instead considered the facts of the crime. *That's* what is being challenged here, not the particular sentence of 33 years to life. The process is constitutionally flawed because what we know of the proceedings, the judge emphasized the facts of the crime and failed to consider mitigators. The fact-laden sentencing process, which is under review here, was evident:

> Many times a defense attorney encourages a client given the facts of the case to accept the plea because, quite frankly, the judge at the time of sentence wouldn't have an opportunity to hear all the facts of the case, but I did have that opportunity now.

(Sentencing transcript, 16.) And so what is under review here is not the sentence of 33 years to life, but the fact that the judge arrived at that sentence by considering the facts of the crime but without considering the mitigation factors. This sentence violates the Eighth and Fourteenth Amendments, not in its face but because the *process* commanded by those Amendments was not followed.

To be sure, neither *Miller* nor this Court's decisions preclude life

without parole, or preclude the sentence here: life without parole until 33 years have been served. See, e.g., *State v. Brown*, 6th Dist. № L-16-1181, 2018 Ohio 117, 2018 Ohio App. LEXIS 122, 2018 WL 388537, *discretionary appeal not allowed*, *State v. Brown*, 152 Ohio St.3d 1482, 2018 Ohio 1990, 98 N.E.3d 295, *certiorari denied*, *Brown v. Ohio*, __U.S.__, 139 S.Ct. 342, 202 L.Ed.2d 240 (2018). The State did not establish that KYLE PATRICK is "the rare juvenile offender whose crime reflects irreparable corruption," *State v. Moore*, 149 Ohio St.3d 557, 566, 2016 Ohio 8288, ¶38, 76 N.E.3d 1127, quoting *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), in turn quoting *Roper v. Simmons*, 543 U.S. 551, 573, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

If the Court reads R.C. 2953.08(D)(3) as precluding all review of all aggravated murder sentences, whether appealed under R.C. 2505.03 or R.C. 2953.02, then R.C. 2953.08(D)(3) is unconstitutional.

It has been shown here that R.C. 2953.08(D)(3) in no way limits the jurisdiction or scope of review of this appeal. This is of course because Patrick appealed not under R.C. 2953.08, but under other avenues. If there were no other avenues, or, if the Court employs the reading of R.C. 2953.08 that the State and its amicus urge—that R.C. 2953.08 prohibits review of any aggravated murder sentence under

any avenue, then Ohio's appellate review scheme would contain a flaw so serious that the Due Process and Equal Protection Clauses of the Fourteenth Amendment (and the corresponding provisions of Ohio Constitution, Article I, Sections 2 and 16) could not countenance. Under such a scheme, death sentences would be reviewable, as they should be; maximum sentences for many felonies would be reviewable; sentences imposed for felonies would be reviewable for a determination of whether the sentence is otherwise contrary to law. See, R.C. 2953.08; and e.g., *State v. Robinson*, 6th Dist. № L-02-1314, 2005 Ohio 324, ¶¶58-59, 2005 Ohio App. LEXIS 291. But for the most serious offenses in our criminal law, aggravated murder and murder, the sentence could be reviewed only if death were imposed? We need not, indeed should not, don blinders and blithely say, if that's what the General Assembly says, then that's what the General Assembly says. As shown above, it is *not* what the General Assembly has to say about this matter.

The amici in *State v. Kinney* argue that Ohio is the only state in the country that categorically prohibits appellate review of aggravated murder sentences. See, Brief of Amicus Curiae, Office of the Ohio Public Defender and National Association of Criminal Defense

Lawyers in Support of Appellant, David C. Kinney, Jr., Case № 2019-1103, at 1. If that is true, it can only be because of reading more into R.C. 2953.08(D)(3) than the General Assembly intended. And we know what the legislature not by palm reading or reading tea leaves, but from the legislature's own words, as Justice Frankfurter said we should do.

Equal Protection. If a State establishes the right to direct appeal, as Ohio does in its Constitution, then that right "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." See, *Williams v. Oklahoma City*, 395 U.S. 458, 459, 89 S.Ct. 1818, 1819 L.Ed.2d 440 (1969); *Halbert v. Michigan*, 545 U.S. 605, 610, 125 S.Ct. 2582, 162 L.Ed.2d 552 (2005), citing *McKane v. Durston*, 153 U.S. 684, 687, 38 L.Ed. 867, 14 S.Ct. 913 (1894). Once, however, a state institutes such a system, as Ohio has done, then the appellate system must be fairly and evenly applied. The State may not "bolt the door to equal justice" to indigent defendants. See, *Griffin v. Illinois*, 351 U.S. 12, 24, 100 L.Ed. 891, 76 S.Ct. 585 (1956) (FRANKFURTER, J., concurring in judgment). Nor may it bolt the door to allow those who are sentenced to the most serious crimes from any meaningful appeal of the sentence imposed, or the procedure by which it is

imposed. To read R.C. 2953.08(D)(3) as barring review of all non-capital aggravated murder and all murder sentences is arbitrary: not justified by the words of the statute, not justified by the nature of the separate appeal that R.C. 2953.08 affords. Griffin and Katz tell us that the exclusion in R.C 2953.08(D), now R.C. 2953.08(D)(3) is because there were other avenues of appeal open to those defendants. The State would now have the Court read the statute in a way it was not written: to deny non-capital aggravated murder and murder defendants rights that virtually all other defendants have, and without any principled basis for the distinction. This is the very type of disparate treatment that Equal Protection prohibits.

"The Equal Protection Clause allows the states considerable leeway to enact legislation that may appear to affect similarly situated people differently." "Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them." See, *Clements v. Fashing*, 457 U.S. 957, 962-963, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982). If, however, a challenged statute places burdens upon a constitutional right that is deemed to be fundamental, close scruitny is required. *Id.*, citing *San Antonio Indep. School Dist. v. Rodriguez,*

411 U.S. 1, 17, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). This Court in *State v. Noling*, 149 Ohio St.3d 327, 2016 Ohio 8252, 75 N.E.3d 141, held that R.C. 2943.73 illicitly distinguished between the appellate rights of capital and non-capital offenders, without a rational basis to support the legislative determination that noncapital defendants enjoyed an appeal as of right while capital defendants were permitted discretionary review. The Court held that this "two-track appellate process" violated "both state and federal principles of equal protection." *Id.*, at ¶31. That is exactly what we have here if the reading of R.C. 2953.08 continues with what appears to have been the practice in Ohio. Those convicted of non-capital murder and aggravated murder cannot have their sentences reviewed, while low level felons can.

Due Process. The Due Process Clause of the Fourteenth Amendment is designed to protect against arbitrary actions by the government. Where fundamental rights are involved, rules and statutes may not be mechanistically employed to defeat the ends of justice. See, e.g., *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Belding v. State*, 121 Ohio St. 393, 396, 169 N.E. 301 (1929). The Due Process Clause is a limitation on the State's power to act. It forbids the State itself to deprive individuals of life,

liberty, or property without "due process of law." The Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression." *Deshaney v. Winnebago Cty. Dept. of Social Servs.*, 489 U.S. 189, 195-196, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989).

Here, the statute, not as written but as it is being read, denies defendants convicted of murder or aggravated murder the plenary review to which other defendants are entitled. It is difficult to conceive of something more oppressive. This Court in *State v. Barker*, 149 Ohio St.3d 1, 2016 Ohio 2708, 73 N.E.3d 365, held that the General Assembly may not supersede the constitutional rule announced in *Miranda*, and held that the legislature lacked the authority to enact R.C. 2933.81(B) to the extent that the statute lessened the protections announced in *Miranda* and relieved the State of its constitutional burden. Here, though it is Appellant's position that the legislature has not done so, to the extent that the Courts of this State read R.C. 2953.08(D)(3) to block sentence review of *any* murder or aggravated murder, it relieves the State of the obligation created by Ohio's Constitution to afford every citizen meaningful appellate review. If there is no review at all, as the State appears to now claim, this poses

a huge constitutional problem, outlined by United States Supreme Court Justice Sonia Sotomayor. See, *Campbell v. Ohio*, __ U.S. __, 138 S.Ct. 1059, 200 L.Ed.2d 502, 503 (2018) (SOTOMAYOR, J., concurring in the denial of certiorari).

> Trial judges making the determination whether a defendant should be condemned to die in prison have a grave responsibility, and the fact that Ohio has set up a scheme under which those determinations "cannot be reviewed" is deeply concerning.

The Appellant in *Kinney* appears to argue that the statute is unconstitutional because it only precludes review of life without parole (LWOP) sentences, the sentence that Kinney received in that case. See, Merit Brief of Appellant David Kinney, State v. Kinney, Case № 2019-1103, p. 10. With due deference to Kinney's learned counsel, that misses the mark to the extent that Kinney's brief suggests that review by the Ohio Parole Board 20, 25, or 30 years after the sentence is imposed is a meaningful substitute for an appeal, that, too misses the mark of guaranteeing every Ohio citizen, murderer or not, a meaningful appeal. To be sure, the statute is unconstitutional as applied to Kinney, because it denies him effective appellate review. But Kinney's argument can be correct as to inmates like PATRICK who are sentenced to life in prison with parole eligibility after 20, 25, or 30 years only if we consider an appeal delayed by that many years an effective appeal,

and only if we consider the Ohio Parole Board an adequate substitute for the Court of Appeals or this Court. That is a triumph of faith over experience. The Parole Board does not look for legal or constitutional errors, and even if it did, it could do nothing about them 20, 25, or 30 years after conviction. Parole and an appellate reversal are as different as chalk and cheese.

CONCLUSION

The jurisdiction of this Court to hear this case is beyond question. The Court may end up agreeing, or not agreeing, with the Appellant's position on the merits, but there is no doubt that this case presents an appeal "from the courts of appeals as a matter of right" involving a question "arising under the constitution of the United States or of this state." Ohio Constitution, Art. IV, Section 2(a)(ii). It also involves an appeal from the courts of appeals concerning a felony where leave was first obtained. Ohio Constitution, Art. IV, Section 2(-b). The case also involves public or great general interest. Ohio Constitution, Art. IV, Section 2(e). R.C. 2953.08 bars review of a sentence imposed for aggravated murder only when a criminal defendant appeals his sentence separately under R.C. 2953.08(A). That did not occur here. Accordingly, R.C. 2953.08(D)(3) has no effect on this

Court's and the court of appeals' ability to review Appellant's sentence. Nor does R.C. 2953.08 deny either this Court or the court of appeals subject-matter jurisdiction and it does not otherwise limit the scope of the appeal in this Court or in the court of appeals.

Respectfully submitted,

JOHN B. JUHASZ № 0023777
E-mail: Jbjuhasz@gmail.com
7081 West Boulevard, Suite № 4
Youngstown, Ohio 44512-4362
Telephone: 330.758.7700
Facsimile: 330.758.7757
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent by electronic mail on the 20th day of May, 2020 to: Mr. Ralph M. Rivera, Esq., 21 West Boardman Street, Youngstown, Ohio 44503; to Brooke M. Burns, Esq. Chief Counsel, Juvenile Department, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, Counsel for Amicus Curiae, Office of the Ohio Public Defender; and to Marsha L. Levick, Esq., and Andrew R. Keats, Esq., Juvenile Law Center, 1315 Walnut Street, 4th Floor, Philadelphia, Pennsylvania 19107, Counsel for Amici Curiae, Juvenile Law Center, *et al.*; and, to Dave Yost, Esq., Attorney General of Ohio, Benjamin M. Flowers, Esq., Solicitor General, and, Diane R. Brey, Esq. Deputy Solicitor General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215.

JOHN B. JUHASZ
COUNSEL FOR APPELLANT

G:\Patrick Kyle\Supplmental brf dr 15.wpd •Wed 20 May 2020 • 1021 am
G:\Patrick Kyle\Supplmental brf dr 15.wpd

United States Constitution, Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Fourteenth Amendment:

> Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Sec. 2. [Representatives—Power to reduce apportionment.] Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty--one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.
>
> Sec. 3. [Disqualification to hold office.] No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. [Public debt not to be questioned—Debts of the Confederacy and claims not to be paid.] The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.] The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Ohio Constitution, Art. IV, §2

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B)

(1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained,

(c) In direct appeals from the courts of common pleas or other courts of record inferior to the court of appeals as a matter of right in cases in which the death penalty has been imposed;

(d) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(e) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(f) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B) (4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor.

Ohio Constitution, Art. IV, §3

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B)

(1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B) (2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

R.C. 2505.02

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.-

86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

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

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018 (renumbered as 5164.07 by H.B. 59 of the 130th general assembly), and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code;

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order

the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

R.C. 2505.03

(A) Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction.

(B) Unless, in the case of an administrative-related appeal, Chapter 119. or other sections of the Revised Code apply, such an appeal is governed by this chapter and, to the extent this chapter does not contain a relevant provision, the Rules of Appellate Procedure. When an administrative-related appeal is so governed, if it is necessary in applying the Rules of Appellate Procedure to such an appeal, the administrative officer, agency, board, department, tribunal, commission, or other instrumentality shall be treated as if it were a trial court whose final order, judgment, or decree is the subject of an appeal to a court of appeals or as if it were a clerk of such a trial court.

(C) An appeal of a final order, judgment, or decree of a court shall be governed by the Rules of Appellate Procedure or by the Rules of Practice of the Supreme Court, whichever are applicable, and, to the extent not in conflict with those rules, this chapter.

R.C. 2505.04

An appeal is perfected when a written notice of appeal is filed, in the case of an appeal of a final order, judgment, or decree of a court, in accordance with the Rules of Appellate Procedure or the Rules of Practice of the Supreme Court, or, in the case of an administrative-related appeal, with the administrative officer, agency, board, department, tribunal, commission, or other instrumentality involved. If a leave to appeal from a court first must be obtained, a notice of appeal also shall be

filed in the appellate court. After being perfected, an appeal shall not be dismissed without notice to the appellant, and no step required to be taken subsequent to the perfection of the appeal is jurisdictional.

R.C. 2929.02

(A) Whoever is convicted of or pleads guilty to aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022, 2929.03, and 2929.04 of the Revised Code, except that no person who raises the matter of age pursuant to section 2929.023 of the Revised Code and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B)

(1) Except as otherwise provided in division (B)(2) or (3) of this section, whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life.

(2) Except as otherwise provided in division (B)(3) of this section, if a person is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code, the victim of the offense was less than thirteen years of age, and the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, the court shall impose an indefinite prison term of thirty years to life pursuant to division (B)(3) of section 2971.03 of the Revised Code.

(3) If a person is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code and also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information that charged the murder, the court shall impose upon the offender a term of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(4) In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to the offender or to the dependents of the offender, or will prevent the offender from making reparation for the victim's wrongful death.

(D)

(1) In addition to any other sanctions imposed for a violation of section 2903.01 or 2903.02 of the Revised Code, if the offender used a motor vehicle as the means to commit the violation, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(2) As used in division (D) of this section, "motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

R.C. 2953.02

In a capital case in which a sentence of death is imposed for an offense committed before January 1, 1995, and in any other criminal case, including a conviction for the violation of an ordinance of a municipal corporation, the judgment or final order of a court of record inferior to the court of appeals may be reviewed in the court of appeals. A final order of an administrative officer or agency may be reviewed in the court of common pleas. A judgment or final order of the court of appeals involving a question arising under the Constitution of the United States or of this state may be appealed to the supreme court as a matter of right. This right of appeal from judgments and final orders of the court of appeals shall extend to cases in which a sentence of death is imposed for an offense committed before January 1, 1995, and in which the death penalty has been affirmed, felony cases in which the supreme court has directed the court of appeals to certify its record, and in all other criminal cases of public or general interest wherein the supreme court has granted a motion to certify the record of the court of appeals. In a capital case in which a sentence of death is imposed for an offense committed on or after

January 1, 1995, the judgment or final order may be appealed from the trial court directly to the supreme court as a matter of right. The supreme court in criminal cases shall not be required to determine as to the weight of the evidence, except that, in cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, and in which the question of the weight of the evidence to support the judgment has been raised on appeal, the supreme court shall determine as to the weight of the evidence to support the judgment and shall determine as to the weight of the evidence to support the sentence of death as provided in section 2929.05 of the Revised Code.

R.C. 2953.08

(A) 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:

(1) The sentence consisted of or included the maximum definite prison term allowed for the offense by division (A) of section 2929.14 or section 2929.142 of the Revised Code or, with respect to a non-life felony indefinite prison term, the longest minimum prison term allowed for the offense by division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code, the maximum definite prison term or longest minimum prison term was not required for the offense pursuant to Chapter 2925. or 8 any other provision of the Revised Code, and the court imposed the sentence under one of the following circumstances:

(a) The sentence was imposed for only one offense.

(b) The sentence was imposed for two or more offenses arising out of a single incident, and the court imposed the maximum definite prison term or longest minimum prison term for the offense of the highest degree.

(2) The sentence consisted of or included a prison term and the offense for which it was imposed is a felony of the fourth or fifth degree or is a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is specified as being subject to division (B) of section 2929.13 of the Revised Code for purposes of sentencing. If the court specifies that it found

one or more of the factors in division (B)(1)(b) of section 2929.13 of the Revised Code to apply relative to the defendant, the defendant is not entitled under this division to appeal as a matter of right the sentence imposed upon the offender.

(3) The person was convicted of or pleaded guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, was adjudicated a sexually violent predator in relation to that offense, and was sentenced pursuant to division (A)(3) of section 2971.03 of the Revised Code, if the minimum term of the indefinite term imposed pursuant to division (A)(3) of section 2971.03 of the Revised Code is the longest term available for the offense from among the range of definite terms listed in section 2929.14 of the Revised Code or, with respect to a non-life felony indefinite prison term, the longest minimum prison term allowed for the offense by division (A)(1) (a) or (2)(a) of section 2929.14 of the Revised Code. As used in this division, "designated homicide, assault, or kidnapping offense" and "violent sex offense" have the same meanings as in section 2971.01 of the Revised Code. As used in this division, "adjudicated a sexually violent predator" has the same meaning as in section 2929.01 of the Revised Code, and a person is "adjudicated a sexually violent predator" in the same manner and the same circumstances as are described in that section.

(4) The sentence is contrary to law.

(5) The sentence consisted of an additional prison term of ten years imposed pursuant to division (B)(2)(a) of section 2929.14 of the Revised Code.

(B) In addition to any other right to appeal and except as provided in division (D) of this section, a prosecuting attorney, a city director of law, village solicitor, or similar chief legal officer of a municipal corporation, or the attorney general, if one of those persons prosecuted the case, may appeal as a matter of right a sentence imposed upon a defendant who is convicted of or pleads guilty to a felony or, in the circumstances described in division (B)(3) of this section the modification of a sentence imposed upon such a defendant, on any of the following grounds:

(1) The sentence did not include a prison term despite a presumption favoring a prison term for the offense for which it was imposed, as set forth in section 2929.13 or Chapter 2925. of the Revised Code.

(2) The sentence is contrary to law.

(3) The sentence is a modification under section 2929.20 of the Revised Code of a sentence that was imposed for a felony of the first or second degree.

(C)

(1) In addition to the right to appeal a sentence granted under division (A) or (B) of this section, a defendant who is convicted of or pleads guilty to a felony may seek leave to appeal a 9 sentence imposed upon the defendant on the basis that the sentencing judge has imposed consecutive sentences under division (C)(3) of section 2929.14 of the Revised Code and that the consecutive sentences exceed the maximum definite prison term allowed by division (A) of that section for the most serious offense of which the defendant was convicted or, with respect to a non-life felony indefinite prison term, exceed the longest minimum prison term allowed by division (A)(1)(a) or (2) (a) of that section for the most serious such offense. Upon the filing of a motion under this division, the court of appeals may grant leave to appeal the sentence if the court determines that the allegation included as the basis of the motion is true.

(2) A defendant may seek leave to appeal an additional sentence imposed upon the defendant pursuant to division (B)(2)(a) or (b) of section 2929.14 of the Revised Code if the additional sentence is for a definite prison term that is longer than five years.

(D)

(1) A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.

(2) Except as provided in division (C)(2) of this section, a sentence imposed upon a defendant is not subject to review under this section if the sentence is imposed pursuant to division (B)(2)(b) of section 2929.14 of the Revised Code. Except as otherwise provided in this division, a defendant retains all rights to appeal as provided under this chapter or any other provision of the Revised Code. A defendant has the right to appeal under this chapter or any other provision of the Revised Code the court's application of division (B)(2)(c) of section 2929.14 of the Revised Code.

(3) A sentence imposed for aggravated murder or murder pursuant to sections 2929.02 to 2929.06 of the Revised Code is not subject to review under this section.

(E) A defendant, prosecuting attorney, city director of law, village solicitor, or chief municipal legal officer shall file an appeal of a sentence under this section to a court of appeals within the time limits specified in Rule 4(B) of the Rules of Appellate Procedure, provided that if the appeal is pursuant to division (B)(3) of this section, the time limits specified in that rule shall not commence running until the court grants the motion that makes the sentence modification in question. A sentence appeal under this section shall be consolidated with any other appeal in the case. If no other appeal is filed, the court of appeals may review only the portions of the trial record that pertain to sentencing.

(F) On the appeal of a sentence under this section, the record to be reviewed shall include all of the following, as applicable:

(1) Any presentence, psychiatric, or other investigative report that was submitted to the court in writing before the sentence was imposed. An appellate court that reviews a presentence investigation report prepared pursuant to section 2947.06 or 2951.03 of the Revised Code or Criminal Rule 32.2 in connection with the appeal of a sentence under this section shall comply with division (D)(3) of section 2951.03 of the Revised Code when the appellate court is not using the presentence investigation report, and the appellate court's use of a presentence investigation report of that nature in connection with the appeal of a sentence under this section does not affect the otherwise confidential character of the contents of that report as described in division (D)(1) of section 2951.03 of the Revised Code and does not cause that report to become a public record, as defined in section 149.43 of the Revised Code, following the appellate court's use of the report.

(2) The trial record in the case in which the sentence was imposed;

(3) Any oral or written statements made to or by the court at the sentencing hearing at which the sentence was imposed;

(4) Any written findings that the court was required to make in connection with the modification of the sentence pursuant to a judicial release under division (I) of section 2929.20 of the Revised Code.

(G)

(1) If the sentencing court was required to make the findings required by division (B) or (D) of section

2929.13 or division (I) of section 2929.20 of the Revised Code, or to state the findings of the trier of fact required by division (B)(2)(e) of section 2929.14 of the Revised Code, relative to the imposition or modification of the sentence, and if the sentencing court failed to state the required findings on the record, the court hearing an appeal under division (A), (B), or (C) of this section shall remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings.

(2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law.

(H) A judgment or final order of a court of appeals under this section may be appealed, by leave of court, to the supreme court.

(I) As used in this section, "non-life felony indefinite prison term" has the same meaning as in section 2929.01 of the Revised Code.

Crim. R. 32

(A)Imposition of sentence.

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

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

in mitigation of punishment.

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

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

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

(B)Notification of right to appeal.

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

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

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

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

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

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

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

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

(C)Judgment.

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

Seventh Dist. Loc. R. 3.1

Rule 3.1 Docketing Statement
A. Civil Appeals

1. In a civil appeal, each appellant and cross-appellant shall file with the clerk, along with the notice of appeal, two fully completed copies of this Court's civil docketing statement. Current copies of the docketing statement can be found on this Court's website. A docketing statement is not fully completed unless a time-stamped copy of the judgment entry being appealed is attached. The party prosecuting the appeal or cross-appeal shall serve a copy of the completed docketing statement, together with the notice of appeal, on the opposing party. Docketing statements in a form other than the one contained on this Court's website will not be allowed. The clerk shall send a copy of the docketing statement to the Court of Appeals along with a copy of the notice of appeal.

a. If the appellant fails to file the civil docketing statement as required by this rule, this Court shall order the appellant to either file the fully completed docketing statement within seven days or show cause why the appeal should not be dismissed. If the appellant fails to comply with this Court's order, this Court may dismiss the appeal.

B. Criminal Appeals

1. In a criminal appeal, in an appeal from the denial of postconviction relief, and in an appeal in a juvenile delinquency case, the appellant shall file with the clerk of the trial court, along with the notice of appeal, two fully completed copies of this Court's criminal docketing statement. A docketing statement is not fully completed unless a time-stamped copy of the judgment entry of sentence being appealed is attached. The party filing the appeal shall serve a copy of the completed docketing statement, together with the notice of appeal, on the opposing party. Current copies of the docketing statement can be found on this Court's website. Docketing statements in a form other than the one contained on this Court's website will not be allowed. The clerk of the trial court shall send a copy of the docketing statement to the Court of Appeals along with a copy of the notice of appeal.

C. Failure to file a docketing statement: If the appellant or cross-appellant fails to file the docketing statement as required by this rule, this Court shall order the appellant or cross-appellant to either file the fully completed docketing statement within seven days or show cause why the appeal or cross-appeal should not be dismissed. If the appellant or cross-appellant fails to comply with this Court's order, this Court may dismiss the appeal or cross-appeal.

D. A docketing statement e-filed pursuant to Loc.R. 13.1 or any other related local rule shall be filed according to the rules set forth by the trial court for e-filing a docketing statement.