[Cite as *State v. Monroe*, 2015-Ohio-844.]

N THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 13AP-598 (C.P.C. No. 01CR-04-2118)
v.	:	(REGULAR CALENDAR)
Jonathan D. Monroe,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 10, 2015

Ron O'Brien, Prosecuting Attorney, *Steven Taylor* and *Laura Swisher*, for appellee.

Timothy Young, Ohio Public Defender, and *Kimberly S. Rigby; Laurence E. Komp*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Defendant-appellant, Jonathan D. Monroe ("appellant"), appeals from the June 14, 2013 judgment of the Franklin County Court of Common Pleas denying his motion for a final, appealable order.

{¶ 2} Appellant was indicted on April 11, 2001, on eight counts of aggravated murder arising from the killings of Deccarla Quincy and Travinna Simmons. Each aggravated murder count contained a firearm specification and four death penalty specifications, including murder in connection with an aggravated burglary, in connection with aggravated robbery, in connection with a kidnapping, and as part of a course of conduct involving the killing of two or more persons. The indictment also contained one count of aggravated burglary, two counts of aggravated robbery, and two counts of kidnapping.

{¶ 3} The facts of this case were detailed by the Supreme Court of Ohio in *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282 ("*Monroe I*") and will not be repeated here. The procedural history of this case was detailed by the United States Federal District Court, Southern District, in *Monroe v. Houk*, S.D.Ohio No. 2:07-cv-258 (Sept. 8, 2009) ("*Monroe III*"), and will only be briefly summarized below as is necessary for our review.

{¶ 4} The case proceeded to jury trial. After deliberations, the jury found appellant guilty as charged. During the penalty phase, appellant presented his own unsworn statement and only one witness on his behalf. The jury recommended death on all of the aggravated murder counts. The trial court accepted the recommendation of the jury and imposed the death penalty.

{¶ 5} On November 7, 2002, the court filed a judgment entry, and on November 21, 2002, the trial court filed an amended judgment entry and mandatory R.C. 2929.03(F) sentencing opinion. In the amended judgment entry, the court stated that "it is the sentence of the Court that the Defendant * * * be sentence[d] to DEATH with respect to Counts One, Two, Three, Four, Five, Six, Seven and Eight of the indictment." (Amended Judgment Entry, 2.) In the sentencing opinion, the court stated "[w]ith respect to Counts One, Two, Three, Four, Five, Six, Seven, and Eight, Defendant was sentenced to death." (Sentencing Opinion, 13.) The court noted that it found that the "sentence of death is appropriate for Counts One, Two, Three, Four, Five and Six, Seven, and Eight, as to all four (4) Aggravating Circumstances." (Sentencing Opinion, 18.) Finally, the court stated: "This court accepts the recommendation of the Jury and hereby imposes upon the Defendant the sentence of death for the commission of the aggravated murder with prior calculation and design of Deccarla Quincy, the aggravated murder with prior calculation and design of Travinna Simmons, the three (3) felony aggravated murders of Deccarla Quincy, and the three (3) felony aggravated murders of Travinna Simmons. Execution by lethal injection shall be carried out on November 6, 2003." (Sentencing Opinion, 20.)

Direct Appeal

{¶ 6} After the trial court filed its amended judgment entry and sentencing opinion, appellant directly appealed to the Supreme Court. *Monroe I*. Regarding the determination of guilt-phase of the trial, appellant alleged that the trial court erred by: (1) admitting gruesome photographs during both phases of trial; and (2) refusing to

instruct the jury on the lesser-included offenses of murder and involuntary manslaughter. Appellant also alleged that his trial counsel was ineffective by failing to object to the testimony of the former prosecutor, who negotiated a plea agreement with appellant's co-defendant. Appellant alleged as well that the verdicts were not supported by sufficient evidence and were against the manifest weight of the evidence.

{¶ 7} Regarding the penalty-phase of the trial, appellant alleged that the trial court erred by: (1) instructing the jury that a life imprisonment verdict must be unanimous; (2) using the term "recommendation" when referring to the jury's penalty verdict; (3) failing to merge duplicative aggravating circumstances; (4) failing to determine whether appellant was competent to waive presentation of mitigating evidence and allowing him to waive the same. Appellant also alleged that his trial counsel was ineffective by not objecting to the errors alleged for both phases of trial. Finally, appellant alleged Ohio's death penalty statute is unconstitutional.

{¶ 8} On May 25, 2005, the Supreme Court of Ohio found no error on the part of the trial court with regard to the propositions raised by appellant. As relevant here, the Supreme Court then independently reviewed appellant's sentence. *See Monroe I* at ¶ 107-120. Noting that the victims were held at gunpoint, bound and tortured prior to being shot in the head, the Supreme Court found that the aggravating circumstances in each murder count outweighed the mitigating factors beyond a reasonable doubt. The Supreme Court found that the death penalty was both appropriate and proportionate when compared with capital cases involving the same offenses. Finally, the Supreme Court also held "[f]or purposes of reviewing the sentence, we now merge counts 1, 3, 5, and 7 into one count for the murder of Quincy, and merge counts 2, 4, 6, and 8 into one count for the murder of Simmons." *Monroe I* at ¶ 119. The Supreme Court affirmed the judgment of the trial court, including the penalty of death.

{¶ 9} On January 17, 2006, appellant filed with the Supreme Court an application to reopen his appeal to raise claims of ineffective assistance of appellate counsel. The Supreme Court summarily denied the application on May 10, 2006. *State v. Monroe*, 109 Ohio St.3d 1453, 2006-Ohio-2226.

First Petition for Postconviction Relief

{¶ 10} While his direct appeal was pending, appellant filed his first petition for postconviction relief with the trial court. *State v. Monroe*, 10th Dist. No. 04AP-658, 2005-Ohio-5242 ("*Monroe II*"). The trial court denied the same without a hearing on June 1, 2004. Appellant appealed to this court. While the appeal was pending, the Supreme Court released its decision in *Monroe I*. Appellant asserted ten assignments of error in this court alleging that the trial court erred in denying his first petition for postconviction relief. Appellant alleged that the trial court erred in introducing gruesome photographs during the penalty phase, that the trial court erred in failing to merge the four counts of murder arising out of each death when submitting the matter to the jury for the sentencing determination, that Ohio has not provided an adequate statutory framework for review of death penalty cases on proportionality grounds, and that the imposition of the death penalty in Ohio is unconstitutional. This court found that all of these claims were barred by res judicata, noting that they were raised on direct appeal before the Supreme Court. *Monroe II* at ¶ 11-13.

{¶ 11} This court also found barred by res judicata appellant's claims that he had ineffective assistance of counsel during the jury selection process and that the jury selection proceedings violated appellant's right to a fair, impartial jury, as these issues were entirely within the record. *Id.* at ¶ 22. Appellant also alleged that Ohio's postconviction relief statute provides an inadequate remedy under which to vindicate his federal and state constitutional claims that the trial court failed to grant counsel's request for appointment of an expert to assist counsel and to provide investigative assistance in the postconviction action. This court overruled the same on the bases of our prior case law, *State v. Hessler*, 10th Dist. No. 01AP-1011, 2002-Ohio-3321, ¶ 85, and because the Revised Code does not provide for the appointment of experts or investigators in postconviction proceedings. *Monroe II* at ¶ 15.

{¶ 12} Appellant alleged further that the trial court erred in not having a hearing on the question of whether the prosecution had failed to provide the defense with material exculpatory and mitigating evidence prior to trial. This court found that appellant did not present specifics regarding the evidence withheld or its exculpatory or mitigating value

and therefore did not establish error pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). *Monroe II* at ¶ 17.

{¶ 13} Finally, appellant alleged that he was not provided effective assistance of counsel at trial because counsel (1) failed to investigate appellant's family background and resulting psychosocial characteristics as possible mitigating factors which could have been presented to the jury, (2) failed to explain to appellant the purpose and impact of the penalty phase of the trial, (3) failed to request an evaluation of appellant's competence based on his decision to forego much of his opportunity to present mitigation, (4) refused to allow appellant to pursue an alibi defense, and (5) failed to adequately cross-examine prosecution witnesses to bring out factors undermining their credibility. After thorough consideration and discussion regarding each specific alleged claim of ineffective assistance of counsel, this court determined that appellant did not present sufficient evidence to establish the need for a hearing on his claims of ineffective assistance of trial counsel in his original trial and, therefore, the trial court did not err in denying the same without a hearing.[1] *Id.* at ¶ 21, 41.

{¶ 14} Appellant appealed again, but the Supreme Court of Ohio did not accept appellant's appeal. *State v. Monroe*, 108 Ohio St.3d 1509, 2006-Ohio-1329 (table). The United States Supreme Court denied the petition for writ of certiorari. *Monroe v. Ohio*, 549 U.S. 872 (2006) (memorandum). This court subsequently denied appellant's application to reopen the appeal. *State v. Monroe*, 10th Dist. No. 04AP-658 (Oct. 14, 2010).

Federal Habeas Corpus Action Per 28 U.S.C. 2254

{¶ 15} On March 27, 2007, appellant filed a habeas corpus petition with the federal court pursuant to 28 U.S.C. 2254. Appellant set forth 15 grounds for relief. On

[1] The Honorable Judge Peggy L. Bryant dissented in part. Judge Bryant stated she would have found that appellant presented enough to warrant a hearing on whether defense counsel was ineffective in the penalty phase of the trial. "Specifically, defendant's affidavit states that defense counsel failed to inform him of the purpose and, indeed, the opportunity that the penalty phase presented to him. Nothing in the record from defense counsel directly disputes that claim, and even if the record contained such evidence, the disputed evidence would warrant a hearing." *Monroe II* at ¶ 45. Judge Bryant would have remanded the matter to the trial court for a hearing on the same, as well as to examine defendant's contentions that he possessed a letter from Shannon Boyd, appellant's co-defendant and the state's witness, that admitted defendant's lesser role in the crimes. Judge Bryant reasoned that the nature of the death penalty "warrants a slightly more expansive approach to when a hearing should be held in postconviction relief than is usually applied [in] the non-capital case. * * * Accordingly, doubt should be resolved in favor of a hearing on a death penalty postconviction application." *Id.* at ¶ 44.

September 8, 2009, the United States Federal Court, Southern District of Ohio, dismissed ground one in part, grounds four, six, subpart (A) of ground eight, and seven as procedurally defaulted. The grounds dismissed included a claim that failure to merge the eight counts of aggravated murder and failure to merge the duplicative aggravating circumstances denied appellant of due process, a fair trial, and a fair and reliable sentencing determination, as well as effective assistance of counsel. During its discussion of procedural default, as to the failure to merge the eight counts of aggravated murder, the court noted that, "[u]nder Ohio law, aggravated murder counts involving the same victim must be merged before the trial court imposes sentence, * * * '[h]owever, sentencing an accused on each of two murder counts, involving a single victim, represents a procedural error that is harmless beyond a reasonable doubt.' " *Monroe III* at 47, quoting *State v. O'Neal*, 87 Ohio St.3d 402, 415 (2000).

{¶ 16} Motions to reconsider and numerous objections were filed to the federal court's order and the magistrate's report and recommendation upon which the order was based. The court granted reconsideration in part. However, the court overruled objections and the motion for reconsideration of the court's determination to dismiss ground six, alleging failure to merge. *Monroe v. Houk*, S.D.Ohio No. 2:07-cv-258 (Mar. 28, 2011). Discovery is now being conducted, and the remaining claims for relief are still pending in the Southern District at this time. (*See* docket for S.D.Ohio No. 2:07-cv-258).

Motion for Final, Appealable Order

{¶ 17}On August 24, 2012, appellant filed with the trial court a Motion for Final, Appealable Order. Appellant argued that the court's November 21, 2002 amended judgment entry is not a final, appealable order because it does not comply with Crim.R. 32.[2] Appellant asserts that the entry violates the standards for a judgment entry of conviction under *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, and *State v. Lester*, 130 Ohio St.3d 303, 2011-Ohio-5204. Appellant posited that the entry does not set forth upon which aggravated murder counts with specifications that Monroe's death sentences rest, and it does not delineate the treatment of the six other aggravated murder

[2] Appellant also argued that the original judgment entry entered on November 7, 2002 was not a final, appealable order. However, since that entry was subsequently amended, our discussion will focus on the amended entry only.

counts with specifications. Appellant stated: "The point is that the court never disposed of the aggravated murder counts with specifications one way or another (by, for example, merger or dismissal)." (Motion for Final Appealable Order, 2.) Appellant further stated: "In violation of [Crim.R. 32(C)], the Court's sentencing entry omits a sentence for all eight aggravated murder counts with specifications. [Appellant] was convicted of eight counts of aggravated murder, but there were only two victims; thus, as a matter of Ohio law, [appellant] could only receive two death sentences, not eight. Taking together the court's judgment entr[y] * * *, [appellant's] sentencing entry * * *, and the court's oral pronouncement of sentence, * * * it cannot be discerned upon which of the eight aggravated murder counts [appellant's] two legally allowable death sentences rest." (Motion for Final, Appealable Order, 2.)

{¶ 18} The state filed a memorandum contra and urged the court to deny the motion for several reasons. The state argued that appellate review has already resulted in the affirmance of the convictions, and that appellant's arguments ultimately lack merit. The state further argued that appellant was sentenced to death on all of the aggravated murder counts, and that complaints about such sentencing are not "jurisdictional" and do not justify the entering of another judgment. Finally, the state argued that the motion was an untimely and successive petition for postconviction relief.

{¶ 19} On June 14, 2013, the trial court filed its decision and entry denying appellant's motion for a final, appealable order.[3] The court found appellant's arguments to be without merit and noted that the sentencing entry and opinion "clearly indicate[d] the sentence and disposition of each of the eight (8) aggravated murder counts, wherein the Court imposed death respective to each of those counts." (Entry, 2.) Accordingly, the court found that appellant already had his final, appealable order and his direct appeal review. Appellant's appeal of this decision is now before us.

{¶ 20} Appellant asserts the following two assignments of error:

> I. THE TRIAL COURT ERRED IN NOT GRANTING APPELLANT JONATHAN MONROE'S MOTION TO

[3] The court's decision was originally filed on March 22, 2013; however, appellant moved for relief from judgment due to lack of service upon appellant's counsel. The state did not object to appellant's motion. The court refiled its decision on June 14, 2013. On March 22, 2013, the court also filed an entry denying appellant's successive postconviction petition and/or motion for new trial, which appellant filed on June 17, 2010. The court did not refile this entry on June 14, 2013, and appellant did not appeal the same.

> VACATE[4] BECAUSE THE PURPORTED JUDGMENT OF CONVICTION DOES NOT COMPLY WITH CRIM. R. 32(C) AND *STATE V. BAKER*, 119 OHIO ST.3D 197 (2008) AND *STATE V. LESTER*, 130 OHIO ST.3D 303 (2011).
>
> II. THE TRIAL COURT ERRED WHEN IT SENTENCED APPELLANT JONATHAN MONROE TO DEATH EIGHT SEPARATE TIMES ON EIGHT SEPARATE COUNTS OF AGGRAVATED MURDER WHEN A TOTAL OF ONLY TWO DEATH SENTENCES WERE ALLOWABLE PURSUANT TO OHIO LAW. *STATE V. HUERTAS*, 51 OHIO ST.3D 22, 28 (1990).

First Assignment of Error

{¶ 21} In his first assignment of error, appellant argues that this case lacks a final, appealable order. Appellant asserts that the trial court failed to properly record all the formalities required by Crim.R. 32(C) and, therefore, the November 21, 2002 judgment entry is not yet final and appealable. Appellant argues that the proper remedy would be to remand the case to the trial court to journalize a final order, "from which a first appeal with proper jurisdiction may be taken." (Appellant's brief, 5.) In support, appellant points to the Supreme Court of Ohio's decisions in *Lester* and *Baker*.

{¶ 22} Crim.R. 32(C)[5] states in relevant part:

> 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

---

[4] Appellant refers to "Motion to Vacate" in this assignment of error. The notice of appeal indicates that the appellant is appealing the "judgment entry of conviction, entered in this Court on the 14 [sic] day of June, 2013." On June 14, 2013, the trial court refiled its Decision and Entry Denying Defendant's Motion for Final, Appealable Order. Therefore, consistent with the assignments of error and arguments in support thereof, we construe appellant's reference to a "Motion to Vacate" as his "Motion for Final, Appealable Order."

[5] The Staff Notes to Crim.R. 32 indicate, with regard to amendment of the rule effective July 1, 2013, that "[r]ule 32(C) sets forth the four essential elements required for a judgment of conviction as defined by the Supreme Court of Ohio. *See State v. Lester*, 2011-Ohio-5204. The previous rule arguably required the judgment to specify the specific manner of conviction, e.g., plea, verdict, or findings upon which the conviction is based. The amendment to the rule allows, but does not require, the judgment to specify the specific manner of conviction. When a judgment of conviction reflects the four substantive provisions, as set forth in the Supreme Court of Ohio, it is a final order subject to appeal."

> judgment is effective only when entered on the journal by the clerk.

{¶ 23} Interpreting Crim.R. 32(C), the court in *Lester* defined the threshold issue before the court as "whether a judgment entry of conviction that states the fact of defendant's conviction *but does not state how the conviction was effected* [whether through a guilty plea, a no-contest plea upon which the court made a finding of guilt, a finding of guilt based upon a bench trial, or a guilty verdict resulting from a jury trial] is nevertheless a final order from which an appeal may be taken." (Emphasis sic.) *Id.* at ¶ 7. As to this issue, the court sought to clarify its decision in *Baker*. In *Baker*, the court held:

> A judgment of conviction is a final appealable order under R.C. 2505.02 when it sets forth (1) the guilty plea, the jury verdict, or the finding of the court upon which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court. (Crim.R. 32(C) explained.)
>
> * * *
>
> A more logical interpretation of Crim.R. 32(C)'s phrase "the plea, the verdict or findings, and the sentence" is that a trial court is required to sign and journalize a document memorializing the sentence and the manner of the conviction: a guilty plea, a no contest plea upon which the court has made a finding of guilt, a finding of guilt based upon a bench trial, or a guilty verdict resulting from a jury trial.

Baker at syllabus and ¶ 14. In the syllabus of *Lester*, the Supreme Court held:

> A judgment of conviction is a final order subject to appeal under R.C. 2505.02 when it sets forth (1) the fact of the conviction, (2) the sentence, (3) the judge's signature, and (4) the time stamp indicating the entry upon the journal by the clerk. (Crim.R. 32(C) explained; *State v.Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, modified.)

{¶ 24} Appellant does not argue that the manner in which the conviction was effected is lacking. Rather, appellant argues specifically that a sentence for six of the eight aggravated murder charges is lacking in the November 21, 2002 amended judgment entry. Nevertheless, *Lester* sheds light on the question before us.

{¶ 25} Appellant argues that the court sentenced him to "nothing on six of the eight counts for which the sentencing entry is silent" and that "the court never disposed of the aggravated murder counts with specifications one way or another (by, for example, merger or dismissal." (Appellant's brief, 7.) He further argues that, because there were only two victims in this case, as a matter of Ohio law, he could only receive two death sentences, not eight. (Appellant's brief, 8.)[6] As noted above, appellant is concerned that "it cannot be discerned [from the amended judgment] upon which of the eight aggravated murder counts Monroe's two legally allowable death sentences rest." (Motion for Final, Appealable Order, 2.)

{¶ 26} "The purpose of Crim.R. 32(C) is to ensure that a defendant is on notice concerning when a final judgment has been entered and the time for filing an appeal has begun to run." *Lester* at ¶ 10, citing *State v. Tripodo*, 50 Ohio St.2d 124, 127 (1977). Considering that appellant timely filed his direct appeal of the November 21, 2002 amended judgment entry, and the Supreme Court considered and ruled on the same, appellant cannot credibly argue that he was not on notice regarding when a final judgment was entered. To this point, appellant suggests that the Supreme Court lacked subject-matter jurisdiction to consider the direct appeal in *Monroe I* because the judgment entry was not final and appealable. Therefore, according to appellant, the court's decision in *Monroe I* was void ab initio. (Appellant's brief, 11.) For the same reason, appellant argues that all subsequent courts considering the amended judgment entry, including this court in *Monroe II*, also lacked subject-matter jurisdiction, rendering our judgments void ab initio. We reject appellant's arguments for several reasons.

{¶ 27} First, if the trial court, or this court, were to determine that the amended judgment entry is lacking as suggested by appellant, this court could not reverse the Supreme Court's determination that it had subject-matter jurisdiction to determine the direct appeal as it did in *Monroe I*. Only the Supreme Court can reverse that determination. This court has held that: "Before we can address the assignments of

---

[6] With this latter argument, appellant argues that the trial court failed to merge the sentences. To the extent merger is the issue, appellant does not point us to, and we are not aware of, any authority from the Supreme Court or this court holding that failing to merge or error in merging constitutes a violation of Crim.R. 32(C) such that the entry in which the failure or error is contained is not a final, appealable order. The issue of merger is the subject of the second assignment of error and will be addressed in more detail below.

error, we must determine whether the trial court's entry constitutes a final, appealable order. As an appellate court, we are permitted to review judgments only when we are presented with an order that is both final and appealable, as defined by R.C. 2505.02. * * * If the parties themselves fail to raise the issue of whether or not a judgment constitutes a final, appealable order, we must raise the issue sua sponte." *In re Adoption of S.R.A.*, 189 Ohio App.3d 363, 2010-Ohio-4435, ¶ 11 (10th Dist.), citing *Whitaker–Merrell Co. v. Geupel Constr. Co.*, 29 Ohio St.2d 184, 186 (1972). R.C. 2505.02(B) states that "[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it [meets one of the criteria outlined in (B)(1) through (B)(7)]."

{¶ 28} In *Monroe I*, the Supreme Court did not expressly address the issue of whether the November 21, 2002 amended judgment entry was a final, appealable order. The Supreme Court did, however, review the judgment, affirm the judgment, and modify[7] the judgment, thereby implicitly determining that the amended judgment entry was a final, appealable order. *See State v. Coffman*, 91 Ohio St.3d 125, 129 (2001) (noting that "once [an] appellate court agrees to conduct this review, it has already treated the trial court's decision as a final appealable order. * * * Thus, the appellate court has implicitly determined that the trial court's decision is a final appealable order before it even begins to review the decision for constitutional and statutory violations"); *In re Murray*, 52 Ohio St.3d 155, 159 (1990) (commenting that, "[w]hile a jurisdictional issue was not raised in [certain] appeals by the parties, given the admonition of this court in *Whitaker–Merrell* * * * that courts of appeals should sua sponte dismiss appeals which are not from appealable judgments or orders, [by reviewing the case on the merits] these courts implicitly concluded that their jurisdiction had been properly invoked by appeals from final orders"); *State v. Nelson*, 10th Dist. No. 11AP-720, 2012-Ohio-1918, ¶ 9 ("[b]y concluding that claims of failure to comply with R .C. 2945.05 or 2945.06 were subject to direct appeal, the Supreme Court of Ohio implicitly recognized that they were also final appealable orders.").

[7] The court modified the judgment by "merg[ing] counts 1, 3, 5 and 7 into one count for the murder of Quincy, and merg[ing] counts 2, 4, 6, and 8 into one count for the murder of Simmons." *Monroe I* at ¶ 119.

{¶ 29} Pursuant to the doctrine of law of the case, we cannot reverse the Supreme Court's determination in *Monroe I* that the amended judgment entry was a final, appealable order. The law of the case is a longstanding doctrine in Ohio jurisprudence. "[T]he doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan,* 11 Ohio St.3d 1, 3 (1984). "The doctrine is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution." *State ex rel. Potain v. Mathews,* 59 Ohio St.2d 29, 32 (1979). Thus, "[a]bsent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case." *Nolan* at syllabus. In this proceeding, and all other proceedings subsequent to *Monroe I,* the implicit determination that the trial court's order was final and appealable remains the law of the case. Only the Supreme Court can reverse that determination.

{¶ 30} We recognize that the law-of-the-case doctrine is considered a rule of practice, not a binding rule of substantive law. *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 404 (1996). Accordingly, there are exceptions. In *Jones v. Harmon*, 122 Ohio St. 420 (1930), and *Hopkins v. Dyer*, 104 Ohio St.3d 461, 464 (2004), the Supreme Court recognized an exception to law of the case where an intervening decision from the Supreme Court case—i.e., a superior appellate court—was inconsistent with the law of the case determined by an intermediate appellate court. In such "extraordinary circumstance," the Supreme Court stated that the inferior court, whether a trial or intermediate appellate court, was bound to follow the superior appellate court's holding. *Jones* at 424; *Hopkins* at ¶ 19. While it could be argued that *Lester* and *Baker* are intervening cases, this exception is not applicable because the law of the case at issue here was not determined by this court, an intermediate appellate court. Rather, it was determined by the Supreme Court, the superior appellate court, and, therefore, it is appropriate to defer to the Supreme Court to determine whether *Lester* and *Baker* are inconsistent with the law of the case that court decided. Another exception which this court has recognized is that " '[a]n Appellate Court may choose to re-examine the law of

the case *it has itself previously created*, if that is the only means to avoid injustice.' " (Emphasis added.) *Koss v. Kroger Co.*, 10th Dist. No. 07AP-450, 2008-Ohio-2696, ¶ 19, quoting *Paulides v. Niles Gun Show, Inc.*, 112 Ohio App.3d 609, 615 (5th Dist.1996). As noted above, this court did not previously create the law of the case at issue here. The Supreme Court did. Thus, we defer to the Supreme Court to determine whether to reexamine the same.

{¶ 31} Second, the amended judgment entry states that "it is the sentence of the Court that * * * the Defendant be sentence[d] to DEATH with respect to Counts One, Two, Three, Four, Five, Six, Seven and Eight of the indictment; the Court imposes actual incarceration of three (3) years for the firearm specification with respect to Count One to be served consecutively with and prior to the sentence for Aggravated Murder." (Amended Judgment Entry, 2.) Whether sentencing appellant to death on each of these counts was error is the subject of appellant's second assignment of error and will be addressed later in this decision. Nevertheless, it is clear from the amended judgment entry that the trial court disposed of each of the counts one through eight. The court also disposed of the specifications for counts two through eight by stating: "For purposes of sentencing, the Court finds that the three (3) years actual incarceration for the firearm specification in Counts Two through Thirteen shall be merged with the firearm specification in Count One." (Amended judgment entry, 1.) The court also sentenced appellant on count nine, aggravated burglary with firearm specification; counts ten and eleven, aggravated robbery with firearm specification; and counts twelve and thirteen, kidnapping with firearm specification.[8] Finally, in its sentencing opinion, pursuant to R.C. 2929.03(F), the court began by summarizing the jury's recommendations with respect to counts one through eight:

> With respect to Count One, * * * the Jury recommended a sentence of death * * * (page 1)
>
> With respect to Count Two, * * * the Jury recommended a sentence of death * * * (page 2)

[8] "[I]n aggravated murder cases subject to R.C. 2929.03(F), the final, appealable order consists of the combination of the judgment entry and the sentencing opinion." *State v. Ketterer*, 126 Ohio St.3d 448 2010-Ohio-3831, ¶ 17.

> With respect to Count Three,* * * the Jury recommended a sentence of death * * * (page 3)
>
> With respect to Count Four, * * * the Jury recommended a sentence of death * * * (page 4)
>
> With respect to Count Five, * * * the Jury recommended a sentence of death * * * (page 4)
>
> With respect to Count Six,* * * the Jury recommended a sentence of death * * * (page 5)
>
> With respect to Count Seven,* * * the Jury recommended a sentence of death * * * (page 6)
>
> With respect to Count Eight, * * * the Jury recommended a sentence of death * * * (page 6)

The court also noted that, at the sentencing hearing, "[w]ith respect to Counts One, Two, Three, Four, Five, Six, Seven, and Eight, Defendant was sentenced to death." (Sentencing Opinion, 13.) The trial court stated that it "found that the sentence of death is appropriate for Counts One, Two, Three, Four, Five and Six, Seven, and Eight, as to all four (4) Aggravating Circumstances." (Sentencing Opinion, 18.) Further, the court stated:

> Accordingly, when the tremendous weight of each Aggravating Circumstance of Counts One through Eight is weighed separately against the slight weight of the mitigating factors, this Court finds that the State of Ohio proved beyond a reasonable doubt that the Aggravating Circumstances that the Defendant was found Guilty of committing out weigh the mitigating factors. Thus, this Court determines that the Jury's recommendation of the death sentence on all eight (8) Aggravated Murder Counts is well-taken. Accordingly, this Court upholds and affirms the Jury's recommendation.

(Sentencing Opinion, 20.)

{¶ 32} Accordingly, for the reasons stated above, we overrule appellant's first assignment of error.

Second Assignment of Error

{¶ 33} In his second assignment of error, appellant alleges that the trial court erred in sentencing him to eight separate death sentences on eight separate counts when only two death sentences were allowable pursuant to Ohio law. Appellant points to *State v.*

Huertas, 51 Ohio St.3d 22 (1990), in support of his argument that the eight death sentences violated the R.C. 2941.25 requirement of merger, as well as the Double Jeopardy Clause of the Ohio Constitution. In *Huertas*, the Supreme Court of Ohio noted that the prosecution in the case had conceded that appellant cannot be convicted twice for a single offense and accordingly held that "appellant should be given only a single life sentence for the aggravated murder offense" where there were two aggravated murder charges[9] but one victim. *Id.* at 28-29. We reject appellant's claims of error for several reasons.

{¶ 34} R.C. 2941.25(A) states: "Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution states: " No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb." Similarly, Article I, Section 10 of the Ohio Constitution, reads: "No person shall be twice put in jeopardy for the same offense."

{¶ 35} First, as noted above, although the trial court may not have applied merger to counts one through eight, the Supreme Court did. In *Monroe I*, the Supreme Court modified the judgment by "merg[ing] counts 1, 3, 5, and 7 into one count for the murder of Quincy, and merg[ing] counts 2, 4, 6 and 8 into one count for the murder of Simmons." *Monroe I* at ¶ 119.

{¶ 36} Second, even if the Supreme Court had not merged the counts in *Monroe I*, appellant's claim would not be grounds for postconviction relief due to to res judicata. Appellant did not specifically argue *Huertas* in his motion before the trial court. However, underlying his request for a final, appealable order was an argument that the trial court failed to merge the eight aggravated murder counts. In this regard, we would consider the motion to be a request for postconviction relief. R.C. 2953.21 states in relevant part:

> (A)(1)(a) Any person who has been convicted of a criminal offense * * * and who claims that there was such a denial or infringement of the person's rights as to render the judgment

[9] Huertas was charged with, inter alia, one count of aggravated murder with prior calculation and design and one count of aggravated murder in the course of committing an aggravated burglary.

> void or voidable under the Ohio Constitution or the Constitution of the United States * * *, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

{¶ 37} The postconviction relief process is a civil collateral attack on a criminal judgment, not an appeal of that judgment. *State v. Davis*, 10th Dist. No. 13AP-98, 2014-Ohio-90, ¶ 17, citing *State v. Calhoun*, 86 Ohio St.3d 279, 281 (1999). Postconviction relief is a means by which the petitioner may present constitutional issues to the court that would otherwise be impossible to review because the evidence supporting those issues is not contained in the record of the petitioner's criminal conviction. *State v. Carter*, 10th Dist. No. 13AP-4, 2013-Ohio-4058, ¶ 15, citing *State v. Murphy*, 10th Dist. No. 00AP-233 (Dec. 26, 2000). Postconviction review is not a constitutional right but, rather, is a narrow remedy which affords a petitioner no rights beyond those granted by statute. *Calhoun* at 281–82. A postconviction relief petition does not provide a petitioner a second opportunity to litigate his or her conviction. *Hessler*, 2002-Ohio-3321, at ¶ 32; *Murphy*, citing *State v. Szefcyk*, 77 Ohio St.3d 93 (1996), syllabus. "*Res judicata* is applicable in all postconviction relief proceedings." *Szefcyk* at 95. It also applies to any claim that could have been raised by a defendant in the trial court before a conviction or on direct appeal thereafter. *State v. Perry*, 10 Ohio St.2d 175 (1967).

{¶ 38} Res judicata applies to bar the raising of merger issues. *State v. Ayala*, 10th Dist. No. 12AP-1071, 2013-Ohio-1875, ¶ 13-14. "[T]he res judicata bar applies to any post-judgment proceeding other than the direct appeal challenging a conviction including motions to 'modify' a sentence. Since appellant could have raised merger issues at the time of sentencing or thereafter on direct appeal, those issues are barred." *Id.* at ¶ 13. A claim of error and failing to merge counts for sentencing purposes is not a "void sentence" issue. *State v. Greenberg*, 10th Dist. No. 12AP-11, 2012-Ohio-3975, ¶ 12. Merger claims are non-jurisdictional and barred by res judicata. *Smith v. Voorhies*, 119 Ohio St.3d 345, 2008-Ohio-4479.

{¶ 39} Appellant failed to raise this issue on direct appeal.[10] *Huertas* was decided prior to the direct appeal and, therefore, appellant could have, but did not, raise it. While he did raise the issue in his first petition for postconviction relief, we declined to address it for reasons of res judicata. Pursuant to res judicata, he is now barred from raising the same.

{¶ 40} Finally, to the extent appellant's motion is a petition for postconviction relief, it is untimely and successive. A petition for postconviction relief "shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court." R.C. 2953.21(A)(2). R.C. 2953.23 provides in part:

> (A) * * * A court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:
>
> (1) Both of the following apply:
>
> (a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.
>
> (b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

[10] Appellant did raise, and the Supreme Court of Ohio addressed, the alleged error that the trial court failed to merge duplicative aggravating circumstances. However, he did not raise the specific merger issue he raises now.

Appellant filed his motion for a final, appealable order well beyond the deadline for filing the same, and he does not aver that the two mandatory criteria for an exception to the deadline apply. Therefore, his petition is untimely and successive.

{¶ 41} Accordingly, for the reasons stated above, we overrule appellant's second assignment of error.

Conclusion

{¶ 42} For the foregoing reasons, both of appellant's assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TYACK and McCORMAC, JJ., concur.

McCORMAC, J., retired, of the Tenth Appellate District, assigned to active duty under the authority of the Ohio Constitution, Article IV, Section 6(C).
