[Cite as *State v. Jackson*, 2010-Ohio-1270.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-T-0024**
- vs -	:	
NATHANIEL JACKSON,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2001 CR 794.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Timothy Young, Ohio Public Defender, and *Randall L. Porter*, Assistant State Public Defender, 250 East Broad Street, Suite 1400, Columbus, OH 43215-9308, and *John P. Parker*, 988 East 185th Street, Cleveland, OH 44119 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Nathaniel Jackson, appeals the judgment entered by the Trumbull County Court of Common Pleas. The trial court denied Jackson's Civ.R. 60(B) motion for relief from judgment.

{¶2} Jackson was charged with various crimes, including aggravated murder, for the shooting death of Robert Fingerhut. At the time of his death in 2001, Fingerhut was residing with his former wife, Donna Roberts. Roberts was also charged with

murder for her role in Fingerhut's death. During the months prior to the incident, Jackson and Roberts exchanged letters while he was serving a prison term for an unrelated offense. In the letters, Roberts and Jackson discussed a plan for Jackson to murder Fingerhut so that Roberts could collect the proceeds from Fingerhut's life insurance policies.

{¶3} In November 2002, Jackson was found guilty of two counts of aggravated murder, one count of aggravated burglary, and one count of aggravated robbery. Under both of the aggravated murder counts, the jury recommended the death penalty. After independently weighing the aggravating circumstances and the mitigating facts, the trial court concluded the death penalty was appropriate. In addition, the trial court imposed separate sentences on the charges of aggravated burglary, aggravated robbery, and the merged firearm specifications. In January 2003, Jackson filed a direct appeal from his conviction and sentence to the Supreme Court of Ohio. The Supreme Court affirmed Jackson's convictions and the imposition of the death penalty. *State v. Jackson*, 107 Ohio St.3d 300, 2006-Ohio-1.

{¶4} In 2004, Jackson filed his original petition for postconviction relief under R.C. 2953.21. Thereafter, Jackson submitted an amended petition for postconviction relief. Under the amended petition, he asserted 15 separate claims for relief. In the majority of these claims, Jackson argued that he had been denied effective assistance of trial counsel during the penalty phase of his trial. For example, he contended that the performance of his trial counsel was deficient because they had not obtained the services of a specialist in mitigation. Four of Jackson's remaining claims raised issues of possible discrimination in the manner in which the grand jury proceedings and the petit trial had been conducted. Finally, Jackson also challenged the constitutionality of

Ohio's execution procedure and the statutory procedure for postconviction relief. In support of his various claims, he submitted two volumes of exhibits.

{¶5} In responding to Jackson's petition, the state moved to dismiss each of the claims without a hearing on the basis that Jackson had not made a prima facie showing that his constitutional rights were violated during his trial. In June 2004, the trial court rendered a 33-page judgment entry in which it dismissed each of the claims raised by Jackson. As to all of the claims, the trial court held that Jackson had failed to establish substantive grounds to warrant postconviction relief. Also, the trial court held that many of the claims were barred under the doctrine of res judicata because the issues either were, or could have been, raised in his direct appeal from his conviction.

{¶6} Jackson appealed the trial court's judgment entry denying his petition for postconviction relief to this court. This court affirmed the judgment of the trial court. *State v. Jackson*, 11th Dist. No. 2004-T-0089, 2006-Ohio-2651, at ¶155. Jackson appealed this court's judgment to the Supreme Court of Ohio, which declined jurisdiction. *State v. Jackson*, 111 Ohio St.3d 1469, 2006-Ohio-5625.

{¶7} On August 2, 2006, the Supreme Court of Ohio released its decision in Roberts' direct appeal. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665. The trial court in the instant matter presided over the underlying trials of both Jackson and Roberts. Between the penalty-phase hearing of Roberts' trial and the sentencing hearing, the trial court engaged in ex parte communications with an assistant county prosecutor about the sentencing opinion in Roberts' case. Id. at ¶155. The trial court utilized the assistant prosecutor to draft the sentencing entry but failed to include defense counsel in the process. Id. In *Roberts*, the Supreme Court of Ohio vacated the death sentence and remanded the case with instructions for the trial court to personally

review and evaluate the appropriateness of the death penalty. Id. at ¶164. The Supreme Court also observed that the ex parte collaboration between the trial court and the prosecution to prepare the court's sentencing opinion was "wholly inconsistent" with the ethical constraints of Canon 3(B)(7) of the Code of Judicial Conduct and DR 7-110(B). Id. at ¶161.

{¶8} Presumably based on the *Roberts* decision, Jackson filed a Civ.R. 60(B) motion for relief from the trial court's judgment entry denying his petition for postconviction relief. The state filed an answer to Jackson's motion for relief from judgment, wherein it argued the motion lacked merit and should be denied. In response, Jackson filed a reply brief in support of his motion for relief from judgment.

{¶9} In October 2006, Attorney Randall L. Porter, counsel for Jackson, filed an application and affidavit seeking the disqualification of the trial court in the instant matter, citing a statement by the trial court at a hearing in *Roberts* that it had similarly relied on the prosecuting attorney to prepare paperwork for it in other criminal cases. See *In re Disqualification of Stuard*, 113 Ohio St.3d 1236, 2006-Ohio-7233, at ¶1, 3. The trial court responded to the affidavit, acknowledging that it held similar ex parte communications with the prosecuting attorney's office in both *Roberts* and *Jackson* before sentencing each of them to death. Id. at ¶4. Upon consideration, the Chief Justice declined to disqualify the trial court from further participation in this matter. Id. at ¶10.

{¶10} The trial court denied Jackson's Civ.R. 60(B) motion. It is from that judgment that Jackson filed the present appeal, asserting the following assignment of error for our review:

{¶11} "The trial court erred when it denied appellant's motion for relief from judgment and an evidentiary hearing."

{¶12} In his sole assignment of error, Jackson argues that the trial court erred by denying his motion for relief from judgment without a hearing.

{¶13} Ohio's postconviction proceedings are civil in nature, and a Civ.R. 60(B) motion is a proper vehicle to challenge the trial court's findings. See *State v. Jones*, 11th Dist. No. 2001-A-0072, 2002-Ohio-6914, at ¶10.

{¶14} "A reviewing court reviews a trial court's decision on a motion for relief from judgment to determine if the trial court abused its discretion." (Citations omitted.) *Bank One, NA v. SKRL Tool and Die, Inc.*, 11th Dist. No. 2003-L-048, 2004-Ohio-2602, at ¶15. See, also, *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, 150. "'The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" (Citations omitted.) *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶15} Relief from judgment may be granted pursuant to Civ.R. 60(B), which states, in part:

{¶16} "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Civ.R. 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment

should have prospective application; or (5) any other reason justifying relief from the judgment."

{¶17} A party must comply with the following requirements when filing a motion for relief from judgment:

{¶18} "To prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Electric v. ARC Industries*, 47 Ohio St.2d 146, paragraph two of the syllabus.

{¶19} Initially, it is important to specify what is, and what is not, before this court. Jackson has filed a motion for relief from the trial court's judgment entry denying his petition for postconviction relief. In addition, Jackson has filed a separate motion, in which he asks the trial court to conduct a new sentencing hearing due to the trial court's presumed use of the prosecutor to assist it in preparing the underlying sentencing entry. However, the trial court's denial of Jackson's Civ.R. 60(B) motion is the only issue before this court at this time.

{¶20} In its judgment entry denying Jackson's motion for relief from judgment, the trial court essentially acknowledged that it used the prosecution's assistance in drafting the judgment entry denying Jackson's petition for postconviction relief, stating, "Ohio law permits the prosecution to draft findings of fact and conclusions of law dismissing a post-conviction petition even in death cases."

{¶21} Next, we turn our analysis to the *GTE* factors. *GTE Automatic Electric v. ARC Industries*, supra. First, we address the timeliness of Jackson's Civ.R. 60(B) motion. The trial court's judgment entry denying Jackson's petition for postconviction relief was filed in June 2004. Jackson filed his motion for relief from judgment in September 2006. Jackson was aware that the state drafted the findings and conclusions of law in June 2004, when he filed a motion "requesting the court not delegate its judicial function to the prevailing party in drafting findings of fact and conclusions of law." Moreover, the fact that he filed the motion indicates that Jackson was concerned about this issue at that time. However, he did not file his Civ.R. 60(B) motion until September 2006, over two years later. Thus, Jackson's Civ.R. 60(B) motion was not filed within a reasonable time.

{¶22} It could be argued that Jackson's Civ.R. 60(B) motion was filed within a reasonable time since it was filed only one month after the Supreme Court of Ohio announced its decision in *State v. Roberts*. However, for the reasons stated below, the *Roberts* decision is distinguishable since it concerned the trial court asking the prosecution to prepare its judgment entry that imposed the death sentence, while the instant matter concerns the trial court asking the prosecution to prepare its judgment entry that overruled a petition for postconviction relief, which is civil in nature.

{¶23} Second, Jackson does not assert a meritorious claim to present if relief were granted. The trial court overruled the arguments raised in his underlying petition for postconviction relief. Then, on appeal, this court affirmed the trial court's judgment entry denying his petition for postconviction relief. *State v. Jackson*, 2006-Ohio-2651, at ¶155. Thereafter, the Supreme Court of Ohio declined jurisdiction to hear the appeal. *State v. Jackson*, 111 Ohio St.3d 1469, 2006-Ohio-5625.

{¶24} "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 the reviewing levels.' *** 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. ***" *Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004-Ohio-6769, at ¶15. (Internal citations omitted.) See, also, *State v. Payne*, 11th Dist. No. 2006-L-272, 2007-Ohio-6740, at ¶24, citing *Weller v. Weller*, 11th Dist. No. 2004-G-2599, 2005-Ohio-6892, ¶14-15.

{¶25} In his appellate brief, Jackson makes several individual claims relating to the meritorious claim prong. Jackson claims that the judges in Trumbull County use race as a factor in selecting grand jury forepersons. This court considered and rejected several race-related arguments in its opinion affirming the trial court's denial of Jackson's petition for postconviction relief. *State v. Jackson*, 2006-Ohio-2651, at ¶50, 65-73, 90-95, 104-116, & 124. Further, this court rejected Jackson's specific contention regarding the alleged improper selection of a grand jury foreperson based on race. Id. at ¶67-68.

{¶26} Jackson asserts that the trial court erred in the underlying trial by failing to conduct a hearing on his letter in which he allegedly requested substitute counsel. This court has considered this argument and found it lacks merit. Id. at ¶30-47 and 100-101.

{¶27} Jackson argues that the trial court's entry contains an incorrect finding regarding the amount of preparation necessary to conduct a mitigation investigation. However, this court has considered and rejected his claimed error regarding the trial

court's findings pertaining to the alleged ineffectiveness of his trial counsel as it relates to mitigation. Id. at ¶51-53, 77-80, & 102-103.

{¶28} Finally, Jackson alleges error in regard to the trial court's finding regarding IQ testing. This court addressed several similar arguments in its prior decision and concluded they all lacked merit. Id. at ¶28-29, 123, 125, &142-146.

{¶29} Since this court has already addressed and rejected Jackson's alleged meritorious claims, these claims lack merit at this time under the law of the case doctrine.

{¶30} In his Civ.R. 60(B) motion, Jackson argues that the trial court erred in adopting the findings of fact and conclusions of law that were submitted by the state when it ruled on his petition for postconviction relief. Jackson claims he should be granted relief from judgment pursuant to Civ.R. 60(B)(5), the "any other reason" factor.

{¶31} First, this argument is barred by the doctrine of res judicata. The Supreme Court of Ohio has held:

{¶32} "Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at trial, which resulted in that judgment of conviction, or on an appeal from that judgment." *State v. Szefcyk* (1996), 77 Ohio St.3d 93, syllabus.

{¶33} On June 14, 2004 – only four days after the trial court issued its judgment entry denying Jackson's petition for postconviction relief – Jackson filed a motion "requesting the court not delegate its judicial function to the prevailing party in drafting findings of fact and conclusions of law." That same day, Jackson filed his notice of

appeal of the trial court's denial of his petition for postconviction relief. In that appeal, Jackson did not argue that the trial court erred by adopting findings of fact and conclusions of law that were prepared by the state. *State v. Jackson*, 11th Dist. No. 2004-T-0089, 2006-Ohio-2651. Accordingly, his similar argument in his Civ.R. 60(B) motion is barred by the doctrine of res judicata, since Jackson *could have* raised this argument in his prior appeal to this court. See *State v. Szefcyk*, supra, syllabus.

{¶34} Moreover, for the following reasons, we conclude the trial court did not err by allowing the prosecution to draft its judgment entry denying Jackson's petition for postconviction relief.

{¶35} Jackson cites the Supreme Court of Ohio's opinion in Roberts' direct appeal as support of his argument. *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665. Again, the instant appeal does not deal with the trial court's presumed use of the prosecutor to assist it in preparing the underlying *sentencing* entry, as Jackson notes in his brief; the instant appeal only concerns the trial court's use of the procedure when drafting the judgment entry denying Jackson's motion for postconviction relief. In *State v. Roberts*, the Supreme Court of Ohio found error in the trial court's sentencing entry due to the fact the prosecution assisted in the drafting of the document. Id. at ¶153-164. One of the court's significant concerns was the fact that the resulting judgment entry did not comply with R.C. 2929.03(F), which requires in a *death-sentence opinion* the trial court to state its findings in support of the death sentence. Id. at ¶156 & 160. Since the underlying judgment entry in this matter was the postconviction entry, the Supreme Court's concerns with R.C. 2929.03(F) do not apply.

{¶36} Further, this court has previously held, in *State v. Lorraine* (Feb. 23, 1996), 11th Dist. No. 95-T-5196, 1996 Ohio App. LEXIS 642, that a trial court did not err

by adopting the state's proposed findings of fact and conclusions of law in a postconviction relief proceeding. Id. at *11-12. Further, after *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665 was decided by the Supreme Court of Ohio, the Seventh Appellate District held that the *Roberts* holding does not apply to judgment entries denying petitions for postconviction relief. *State v. Ahmed*, 7th Dist. No. 05-BE-15, 2006-Ohio-7069, at ¶65-73.

{¶37} Jackson argues the postconviction statute requires the court to make findings. R.C. 2953.21(G) provides, in part: "[i]f the court does not find grounds for granting [postconviction] relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition." Jackson compares this statute with the requirements contained in R.C. 2929.03(F). While at first glance the language of the two statutes appears to be similar, we note R.C. 2953.21(G) requires the trial court to "make and file findings of fact and conclusions of law." Conversely, R.C. 2929.03(F) requires the trial court to "'*state* in a separate opinion *its* specific findings.'" *State v. Roberts*, supra, at ¶156, quoting R.C. 2929.03(F). (Emphasis added by Supreme Court of Ohio.) The Supreme Court of Ohio clearly focused on the fact that R.C. 2929.03(F) required the trial court to make its own findings. Id. R.C. 2953.21(G) does not contain similar language mandating the trial court to make its own findings. Therefore, we conclude the language of R.C. 2953.21(G) does not impose the same mandate precluding assistance in drafting the judgment entry as the Supreme Court of Ohio found R.C. 2929.03(F) does. This conclusion is further supported by the proposition that postconviction proceedings are civil in nature.

{¶38} Jackson also cites to the Supreme Court of Ohio's opinion in *State v. Roberts* in support of his argument that the trial court violated his constitutional rights by

delegating the responsibility of drafting the judgment entry to the prosecution. In *State v. Roberts*, the Supreme Court of Ohio was rightly concerned about the constitutional implications of the prosecution drafting a judgment entry that sentenced a criminal defendant to death. *State v. Roberts*, supra, at ¶163. However, in denying Jackson's petition for postconviction relief, the trial court did not impose the death penalty. The death penalty in the criminal case had already been imposed. The review in this case is civil in nature, with much more confined constitutional implications.

{¶39} Jackson argues the trial court erred by conducting ex parte communications with the prosecution. Jackson has not presented any evidence that ex parte communications in fact occurred. We acknowledge that the trial court has admitted that it engaged in ex parte communications when it prepared the underlying sentencing entry in this matter. See *In re Disqualification of Stuard*, 113 Ohio St.3d 1236, 2006-Ohio-7233, at ¶4. In response to an affidavit of disqualification filed by Jackson's attorney, the trial court submitted a written submission to the Chief Justice of the Supreme Court of Ohio. However, we note the letter relied on by the Chief Justice is not in the record before this court. Second, even if it was in our record, it would only establish that the trial court used the prosecution's assistance in drafting the *sentencing* entry. There is no evidence of a similar admission regarding the drafting of the *postconviction* entry.

{¶40} Jackson contends he was not served with a copy of the proposed judgment entry as required by Loc.R. 15 of the Trumbull County Court of Common Pleas. If Jackson's assertion that he did not receive a copy of the proposed judgment entry is correct, this issue is barred by the doctrine of res judicata. Jackson should have

objected to this at the trial court level and then raised the issue in his initial postconviction appeal.[1]

{¶41} Thus, Jackson has not demonstrated that one of the Civ.R. 60(B) factors applies.

{¶42} Jackson argues the trial court should have conducted a hearing on his Civ.R. 60(B) motion for relief from judgment. "'If the movant files a motion for relief from judgment and it contains allegations of operative facts which would warrant relief under Civil Rule 60(B), the trial court should grant a hearing to take evidence and verify these facts before it rules on the motion.'" *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 19. (Citations omitted.) For the reasons set forth above, Jackson did not set forth specific allegations of operative facts that would warrant relief. Thus, the trial court did not err by failing to conduct a hearing on Jackson's Civ.R. 60(B) motion.

{¶43} Finally, Jackson seeks reversal of the trial court's judgment under the doctrine of cumulative error. The cumulative error doctrine provides that while certain errors, individually, may not be prejudicial, when those errors are combined the aggregate effect denies the defendant a fair trial. See *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus. We have not found any of Jackson's individual alleged errors to be meritorious. When viewing Jackson's claims in the aggregate, we likewise find them to lack merit.

{¶44} The trial court did not abuse its discretion by denying Jackson's motion for relief from judgment. The trial court was permitted to seek the prosecutor's assistance

1. We again note that Jackson filed a motion asking the trial court not to delegate its duties to draft the postconviction judgment entry only days after the judgment entry was filed. Thus, he was aware that the judgment entry was likely drafted by the prosecution.

in drafting the postconviction entry. See *State v. Lorraine*, 1996 Ohio App. LEXIS 642 and *State v. Ahmed*, 2006-Ohio-7069, supra.

{¶45} Jackson's assignment of error is without merit.

{¶46} The judgment of the Trumbull County Court of Common Pleas is affirmed.

MARY JANE TRAPP, P.J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

{¶47} I respectfully dissent.

{¶48} In his sole assignment of error, appellant argues that the trial court erred by denying his motion for relief from judgment without a hearing. I agree.

{¶49} Ohio's postconviction proceedings are civil in nature and a Civ.R. 60(B) motion is a proper vehicle to challenge the trial court's findings. See *Jones*, supra, at ¶10. To prevail on a motion brought pursuant to Civ.R. 60(B), the movant must show:

{¶50} "*** (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE*, supra, at paragraph two of the syllabus. If any of the elements are not met, the motion should be overruled. *Thrasher v. Thrasher* (June 15, 2001), 11th Dist. No. 99-P-0103, 2001 Ohio App. LEXIS 2720, at 6.

{¶51} The decision to grant or deny a motion for relief from judgment is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. An abuse of discretion connotes more than an error of law or of judgment; it implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore*, supra, at 219. Therefore, "abuse of discretion" describes a judgment neither comporting with the record, nor reason. See, e.g., *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678.

{¶52} "'A movant is entitled to a hearing on a motion for relief from judgment if "the motion and affidavits contain allegations of operative facts which would warrant relief under the rule."'" *Lewis v. Lewis*, 11th Dist. No. 2007-P-0056, 2008-Ohio-730, at ¶21, quoting *Mamula v. Mamula,* 11th Dist. No. 2005-T-0148, 2006-Ohio-4176, at ¶26.

{¶53} In the present matter, Judge Stuard presided over the instant case as well as the case involving appellant's co-defendant, Donna Roberts. Judge Stuard is a fine jurist committed to public service. However, a review of the record reveals that in October of 2006, Attorney Randall L. Porter, counsel for appellant, filed an application and affidavit seeking the disqualification of Judge Stuard, citing a statement made by Judge Stuard at a hearing in *Roberts* that he had similarly relied on the prosecuting attorney to prepare paperwork for him in other criminal cases. See *In re Disqualification of Stuard*, supra, at ¶1, 3. Attorney Porter set forth competent and relevant material evidence dehors the record that Judge Stuard responded in writing to the affidavit, acknowledging that he held the same kind of ex parte communications with the prosecuting attorney's office in both *Roberts* and the instant capital cases before sentencing each of them to death. See Id. at ¶3-4; *State v. Delmonico*, 11th Dist. No.

2004-A-0033, 2005-Ohio-2882, at ¶14, citing *State v. Burgess*, 11th Dist. No. 2003-L-069, 2004-Ohio-4395, at ¶11.

{¶54} Judge Stuard also conceded to misconduct and was publicly reprimanded for his violations of Canons 2 and 3(B)(7). *Disciplinary Counsel v. Stuard*, 121 Ohio St.3d 29, 2009-Ohio-261, at ¶10, 16.

{¶55} By way of a brief background, in May and June of 2003, Judge Stuard presided over the capital murder trial of Roberts. A jury found Roberts guilty of two counts of aggravated murder, among other crimes, and recommended a sentence of death. Between the penalty-phase hearing of Roberts' trial in early June and the sentencing hearing later that month, Judge Stuard engaged in ex parte communications four times with an assistant county prosecutor about the sentencing opinion in Roberts' case. Judge Stuard had had an informal practice of enlisting prosecutorial assistance in drafting judgment entries in criminal cases. He employed that practice in preparing the sentencing entry in the *Roberts* case but failed to include defense counsel in the process. In *Roberts*, the Supreme Court of Ohio vacated the death sentence and remanded the cause with instructions for Judge Stuard to personally review and evaluate the appropriateness of the death penalty. *Roberts*, supra, at ¶167. The Supreme Court also observed that the ex parte collaboration between Judge Stuard and the prosecution to prepare the court's sentencing opinion was "wholly inconsistent" with the ethical constraints of Canon 3(B)(7) and DR 7-110(B). Id. at ¶161.

{¶56} In light of the acknowledged behavior of Judge Stuard in both the present and companion cases, as well as his public reprimand in *Disciplinary Counsel v. Stuard*, supra, I believe the evidence establishes that the present matter was handled in a similar manner as that of his co-defendant. This writer is by no means calling in

question all of Judge Stuard's prior rulings. However, due to the facts of this case and the fact that it is a companion case to *Roberts* as well as the heightened scrutiny given to death penalty cases, in an effort to avoid reversible error, I believe that appellant has put forth adequate operative facts and as such was entitled to a hearing on his Civ.R. 60(B) motion.

{¶57} The record establishes that appellant presented operative facts warranting relief to the trial court. Thus, I believe the trial court abused its discretion in failing to hold an evidentiary hearing on his Civ.R. 60(B) motion. Therefore, this writer believes appellant's other issues set forth in his brief are not presently ripe for review.

{¶58} For the foregoing reasons, I believe appellant's sole assignment of error is well-taken, and the judgment of the trial court should be vacated and remanded.

{¶59} Accordingly, I respectfully dissent.