

IN THE SUPREME COURT OF OHIO  
2007

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

DANIEL J. FUGATE,

Defendant-Appellant.

Case No. 2006-2289

On Appeal from the  
Franklin County Court  
of Appeals, Tenth  
Appellate District

Court of Appeals  
Case No. 06AP-298

**MERIT BRIEF OF PLAINTIFF-APPELLEE STATE OF OHIO**

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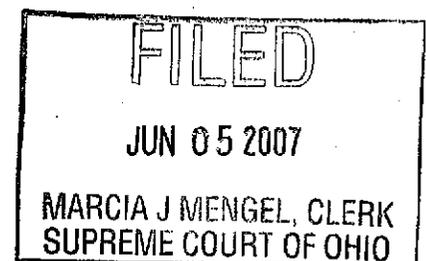
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## STATEMENT OF THE CASE

Defendant was indicted on June 30, 2005, in case number 05CR-4367. (R. 1) The indictment charged defendant with one count of burglary, a second-degree felony, and one count of theft, a fifth-degree felony. (R. 1) A jury found defendant guilty of the lesser included charge of burglary, a felony of the third-degree, and guilty of theft as indicted. (Tr. 544)

Prior to sentencing on February 9, 2006, for the burglary and theft convictions, the trial court conducted a hearing on the probation department's motion to revoke community control in case number 05CR-1414. (Tr. 548) In that case, defendant had been convicted for receiving stolen property, a felony of the fourth-degree, and defendant had received a term of community control. (Tr. 550, 552) Defendant admitted to violating the terms of his release. (Tr. 548-49) The Court asked what the accumulation of jail credit was in that case, and the probation officer stated 216 days.<sup>1</sup> (Tr. 549) The prosecutor suggested that jail credit be awarded against the sentence in 05CR-1414. (Tr. 549) On inquiry from the court, defense counsel stated that he had nothing to add regarding the probation case. (Tr. 550) The court imposed a sentence of twelve months and recognized 213 days credit. (Id.) This sentence was ordered to run concurrently with the sentence imposed in 05CR-4367. (Id.)

The court then proceeded to sentencing in case number 05CR-4367. The prosecutor noted that defendant was arrested on the burglary and theft charges less than one week after defendant was sentenced to community control in case number 05CR-1414. (Tr. 552) It was further noted that defendant's conviction for receiving stolen

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<sup>1</sup> This appears to be a typographical error in the transcript, as the court later found 213 days, and defendant has not contested that calculation.

property in 05CR-1414 occurred six months after his release from prison on an earlier felony conviction for receiving stolen property. (Tr. 551-552) The court imposed a two-year term of incarceration for the burglary conviction and recognized zero days of jail time credit. (Id.) The court ordered that the sentence would be served concurrently with the sentence for case 05CR-1414. (Id.)

On March 29, 2006, defendant was resentenced as the court failed to impose sentence for the theft conviction. (Vol. III, pg. 2) The court imposed a six-month sentence for the theft conviction to run concurrently with the two-year term for the burglary conviction. (Vol. III, 4) The court noted zero days jail time credit was awarded during the February 9<sup>th</sup> sentencing hearing. (Vol. III, 5) As defendant had been held since sentencing, the court recognized 50 days of jail time credit. (Id.)

Defendant's convictions were affirmed on appeal. *State v. Fugate*, 10<sup>th</sup> Dist. No. 06AP-298, 2006-Ohio-5748. The Tenth District Court of Appeals found that the allocation of jail time credit against the sentence in case number 05CR-1414 did not amount to plain error and did not constitute an equal protection violation. Id. at ¶¶ 19-23

### **STATEMENT OF THE FACTS**

Stephanie Hannah and defendant grew up in the same neighborhood. (Tr. 41) Stephanie and defendant had an affair in June 2005 when Stephanie's fiancé was incarcerated for domestic violence. (Tr. 39, 41) Defendant stayed with Stephanie in her apartment for several days. (Tr. 44) The affair ended when Stephanie decided to reunite with her fiancé. (Tr. 46) Stephanie ended the relationship and went to stay at her mother's residence. (Tr. 46)

When Stephanie returned to her apartment days later, she noticed that the door to the apartment had been kicked in and an interior door had also been damaged. (Tr. 52) Several items were taken from Stephanie's apartment. (Tr. 52, 61, 227; State's Ex. 4) Stephanie reported the crimes to the police. (Id. at 52)

Stephanie suspected defendant and confronted defendant about the burglary. (Tr. 59) Defendant admitted that he had her property. (Tr. 59) Defendant also told Stephanie "you can't prove it." (Tr. 59) Stephanie's mother was present and heard defendant's statements. (Tr. 59, 229)

Amy Hannah, no relation to Stephanie, lived next door to Stephanie in the apartment complex. (Tr. 114-15) Between June 12<sup>th</sup> and June 16<sup>th</sup> of 2005, Amy saw a man and a woman take several items from Stephanie's apartment and put them in a white van. (Tr. 117, 126-129) Amy identified defendant at trial as the same man she saw moving things out of Stephanie's apartment. (Tr. 140, 144)

## ARGUMENT

### RESPONSE TO PROPOSITION OF LAW

Plain error is recognized only if the error was “plain” at the time that the trial court committed it. (*State v. Barnes* (2002), 94 Ohio St.3d 21, followed)

When an individual has been simultaneously confined for violating community control sanctions in one case and for additional charges in a subsequent case, the trial court should allocate such jail time credit only against the sentence for which community control violation was imposed, even when the sentences run concurrently.

There was no dispute during the sentencing hearings that the defendant’s jail time credit should be allocated against the sentence for the case in which community control revoked. There was likely no dispute over this issue because there is no authority that would allow a trial court to duplicate the credit for a single period of confinement against multiple unrelated sentences, even when the sentences for those cases run concurrently. An offender is entitled to jail time credit only for the period of time he is held on an offense for which he was later convicted and sentenced. R.C. 2947.08, R.C. 2967.191. When an offender is held pending the resolution of multiple cases that arise out of separate and distinct facts, jail credit may only be awarded against one case even when the sentences in the cases are concurrent. An offender should not be rewarded for committing separate offenses by allocating a single period of pre-sentence confinement against each concurrent sentence.

The trial court properly allocated jail time credit against defendant’s sentence for his first conviction under 05CR-1414. Numerous appellate decisions support the trial court’s allocation of jail credit. Defendant cannot show plain error and, as the allocation

of credit was not based on economic status, defendant cannot show an equal protection violation.

**A. Defendant has not shown the allocation of jail time credit was plain error.**

Defendant did not dispute the allocation of jail time credit at sentencing on February 9, 2006, or when he returned for resentencing on March 29, 2006. (Tr. 549-550; Vol. III, 2-5) Issues not raised in the trial court are deemed waived. *State v. Williams* (1977), 51 Ohio St.2d 112, death penalty vacated (1978), 438 U.S. 911. “The waiver rule requires that a party make a contemporaneous objection to alleged trial error in order to preserve that error for appellate review. The rule is of long standing, and it goes to the heart of an adversary system of justice.” *State v. Murphy* (2001), 91 Ohio St.3d 516, 532. The principle requiring timely objection in the trial court extends to sentencing issues. *State v. Comen* (1990), 50 Ohio St.3d 206, 211 (merger issue: “failure to raise this issue in the trial court constitutes a waiver of the error claimed.”).

An Ohio appellate court “may take notice of waived errors only if they can be characterized as ‘plain errors.’” *Murphy*, 91 Ohio St.3d at 532. For an error to be plain, it must not only be plain in the sense of being obvious, it must also be so serious as to indicate that, but for the error, the outcome clearly would have been different. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27; *State v. Long* (1978), 53 Ohio St.2d 91, paragraph two of the syllabus. “Notice of plain error under Crim. R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *Id.* at paragraph three of the syllabus. A claimed error will be “plain error” only if it was “‘plain’ at the time that the trial court committed it.” *Barnes*, 94 Ohio St.3d at 28.

Defendant cannot show that allocating the jail time credit against case number 05CR-1414 was plain error. As discussed below, the trial court complied with the applicable statutory law, and case law supports such allocation. Even if such allocation could now be deemed error, it was not plain at the time of sentencing.

**B. No error occurs when a trial court refuses to recognize duplicate pretrial detention credit.**

Five appellate district courts have addressed the specific issue of how to allocate jail credit when an offender is held on both a probation violation of a previous sentence and on new charges. These courts have found that jail credit may only be credited against the sentence on the probation violation case. *State v. Chafin*, 10<sup>th</sup> Dist. No 06AP-1108, 2007-Ohio-1840; *State v. Washington*, 1<sup>st</sup> Dist. No. C-050462, 2006-Ohio-4790, ¶¶ 9-10; *State v. Brooks*, 9<sup>th</sup> Dist. No. 05CA008786, 2006-Ohio-1485; *State v. Maag*, 3<sup>rd</sup> Dist. Nos. 5-03-32/33, 2005-Ohio-3761; *State v. Mitchell*, 6<sup>th</sup> Dist. No. L-05-1122/1123, 2005-Ohio-6138. “[A]fter an arrest for a community control violation, any days in confinement count only towards the sentence for the offense for which the community control violation was imposed.” *Mitchell*, 2005-Ohio-6138, ¶ 8.

The Tenth District stated that “days served following arrest on a probation violation can only be credited toward the sentence on the original charge – i.e., the one for which he was sentenced to probation.” *Chafin*, 2007-Ohio-1840, ¶ 9. The court explained that this result occurs because an offender who violates probation is typically not permitted to be released on bail; instead the court places a probation hold on the offender. *Id.* Therefore, the time between arrest and the hearing on the probation violation can only be credited against the sentence imposed for probation violation. *Id.*

Similarly, in *State v. Maag*, 3<sup>rd</sup> Dist. Nos. 5-03-32/33, 2005-Ohio-3761, the defendant was arrested on new charges and, because the new charges resulted in a violation of his probation from a previous conviction, a holder was placed on defendant. The Third District found that defendant was entitled to credit against his sentence for the new charge only for the time served before the placement of the probation holder. Once the probation holder was filed, any time spent in jail was properly credited against the probation case. *Id.* at ¶ 19.

Furthermore, four appellate district courts have found that a trial court does not err by refusing to grant duplicative jail credit when an offender has been simultaneously held on two or more unrelated offenses and sentenced to concurrent sentences. *State v. Eble*, 10<sup>th</sup> Dist. Nos. 04AP-334/335, 2004-Ohio-6721; *State v. Nagy*, 2<sup>nd</sup> Dist. No. 2003CA21, 2004-Ohio-6903; *State v. Whitaker*, 4<sup>th</sup> Dist. No. 02CA2691, 2003-Ohio-3231; *Rankin v. Adult Parole Authority*, 8<sup>th</sup> Dist. No. 81709, 2002-Ohio-6062.

For example, in *Eble*, the defendant faced charges in two separate, unrelated cases. An indictment on the second case was returned a month after defendant was indicted in the first case. *Eble*, 2004-Ohio-6721, ¶ 1. The cases were eventually consolidated for trial. *Id.* Defendant later entered pleas in both cases. Defendant was sentenced to four years in each case to be served concurrently. *Id.* at ¶ 3. The court granted jail time credit against the sentence imposed for the case that was indicted first. *Id.*

On appeal, defendant argued that jail time credit should have been allocated against each concurrent sentence. Addressing R.C. 2967.191 and OAC 5120-2-04 (F), the Tenth District found that the legislature did not intend to entitle a defendant held and

later sentenced on multiple offenses the right to multiply his single period of pre-trial confinement by the number of convictions entered against him. *Id.* at ¶ 10, quoting *State v. Fincher* (Mar. 31, 1998), 10<sup>th</sup> Dist. No. 97AP-1084; see, also, *State v. Peck*, 10<sup>th</sup> Dist. Nos. 01AP-1379, 02AP-146, 2002-Ohio-3889; *State v. Smith* (10<sup>th</sup> Dist. 1992), 71 Ohio App.3d 302; *State v. Callender* (Feb. 4, 1992), 10<sup>th</sup> Dist. No. 91AP-713.

Yet, despite the holdings of these courts, defendant relies on dicta in *State v. Gregory* (1<sup>st</sup> Dist. 1995), 108 Ohio App.3d 264. In *Gregory*, the issue presented was whether the trial court had discretion to allocate pre-trial detention credit against the charge for which defendant was acquitted. The First District held that “under the unique facts where Gregory was incarcerated under two unrelated charges, one resulting in acquittal and the other in conviction, Gregory was entitled to have this time credited to his conviction sentence in the trial court’s calculation.” *Id.* at 269.

In its discussion of the allocation of jail credit under these facts, the court stated that if defendant were convicted for the trafficking charge he would have been entitled to credit against both the trafficking and sentence for the probation violation if the sentences were concurrent. *Id.* The court’s statement is not controlling and has not been adopted by any other district, including the First District itself.

In fact, the First District essentially rejected its dicta in *Gregory* when it held that a defendant is not entitled to jail-time credit for periods of incarceration that arise from facts separate and apart from the facts on which the current sentence is based. *State v. Washington*, 1<sup>st</sup> Dist. No. C-050462, 2006-Ohio-4790, ¶ 4. In *Washington*, the defendant was held on a violation of community control and new charges. The trial court imposed sentences in each case to be served concurrently. *Id.* at ¶ 4. The court distinguished

*Gregory* without recognizing the dicta set forth in that case. See *id.* at ¶ 12, n. 11. After discussing case law from various districts on this issue, the court held that any days following the arrest for a community control violation may only be credited against the offense for which community control had been imposed and that the defendant was “not entitled to double credit in this case.” *Id.* at ¶ 13.

Defendant’s reliance on *Kent* and *Carroll* is also misplaced. In *State v. Kent* (June 14, 1999), 12<sup>th</sup> Dist. Nos. CA98-08-094/10-140/12-152, the defendant sought jail time credit against his sentence in Warren County for time he spent pending trial even though he was serving a sentence in Montgomery County on a separate offense. The court found that defendant was not entitled to double credit. *Id.*, citing *State ex. rel. Moss v. Subora* (1987), 29 Ohio St.3d 66.

The court found that the issue was not whether defendant was entitled to double credit, but rather whether defendant was entitled to concurrent sentences as the credit against the Montgomery sentence had the effect of terminating that sentence. *Kent*, *supra*. The court held defendant was not entitled to concurrent sentences. *Id.*

In *State v. Carroll*, 5<sup>th</sup> Dist. No. 01 CA 48, the court addressed whether time spent at CBCF as a condition of two concurrent community control sentences should be allocated against each sentence. The defendant had separate cases in Ross, Franklin and Fairfield counties. The case before the appellate court was the Fairfield County case. Defendant was on community control for her convictions in Ross and Franklin Counties. *Id.* When defendant picked up new charges in Fairfield County, Ross County filed to revoke her community control but, instead of imprisonment, renewed probation and required that defendant complete the CBCF program. Fairfield County also placed

defendant on community control with the condition that defendant complete CBCF. The sentence in the Fairfield County case was ordered to be served concurrently to the Ross County sentence. *Id.* Defendant spent some time in CBCF before community control was revoked in both counties. Defendant then sought jail credit for the time she served in CBCF to be applied to her Fairfield County sentence. The trial court denied the motion as CBCF time had been credited against the Ross sentence. The appellate court reversed, finding that the defendant was entitled to receive credit for time in CBCF against each concurrent sentence. *Id.*

It is well settled that placement at CBCF constitutes confinement. But the allocation of time served as a condition of probation is not equivalent to pre-trial detention. When courts adjudicating two factually distinct offenses in separate cases, and both require completion of a CBCF program as a condition of community control, that offender is entitled to have that time counted against each sentence should community control be revoked. By entering CBCF, the defendant is simultaneously satisfying the same condition imposed by two courts. To hold otherwise would mean that confinement at CBCF would only satisfy one judgment. Because it was a condition of release in both cases, confinement time was properly allocated against each sentence.

Pre-trial detention cannot be allocated against multiple sentences for cases arising out of separate facts. When an offender is denied bond because he has been held on multiple cases or because he is held on a probation violation and new charges, jail time credit is properly allocated against one sentence even if the other sentences run concurrently. Essentially, what occurs is that the credit is taken against the case in which

bond was denied. Because the offender is denied bond on one case, defendant may not be released in the other case or cases.

Similarly, courts have found that a defendant held simultaneously on cases pending in multiple jurisdictions may not receive jail credit against the concurrent sentences imposed in each jurisdiction. *State v. Struble*, 11<sup>th</sup> Dist. No. 2005-L-115, 2006-Ohio-3417; *State v. Eaton*, 3<sup>rd</sup> Dist. No. 14-04-53, 2005-Ohio-3238; *Moss v. State* (Feb. 17, 1986), 4<sup>th</sup> Dist. No. 1135, *aff'd State Ex. Rel. Moss v. Subora* (1987), 29 Ohio St.3d 66. And it is well settled that an offender may not receive credit against both state and federal sentences even when those sentences are concurrent. See, *United States v. Wilson* (1992), 503 U.S. 329, 333. Again, the rationale underlying these cases is that a defendant may not multiply a single period of confinement against sentences for unrelated offenses in multiple cases.

In the case at bar, defendant was held on two unrelated cases. There was no dispute in the proceedings below that defendant was being held on a probation holder from an earlier case and the charges in the instant case. Each case arose out of a distinct set of facts. As such, jail credit was properly allocated against the sentence in his first case. Defendant did not dispute that allocation at sentencing, and he has failed to show plain error on this record.

**C. Under the Ohio Revised Code and the Ohio Administrative Code, jail time credit cannot be multiplied to reduce concurrent sentences for unrelated offenses.**

Trial courts are required to calculate the number of days an individual has been held on the offense pending conviction and sentencing. R.C. 2949.08; Crim. R. 32.2(D). The administrative rules governing the Department of Rehabilitation and Corrections

(DRC) similarly provide that the sentencing court must determine the amount of time the offender served before being sentenced. OAC 5120-2-04(B). This rule specifies that the trial court must make the factual determination of the number of days credit to award an offender and that the court must include that information in the journal entry imposing sentence. *Id.*; see also, Crim. R.32.2(D).

After the trial court has made the factual determination and specified the credit in the judgment entry, R.C. 2967.191 authorizes the DRC to reduce the prisoner's term by the number of days the prisoner was confined. R.C. 2967.191 provides in relevant part that the DRC must reduce an offender's stated term, minimum or maximum term or parole eligibility date by "the total number of days that the prisoner was confined for any reason arising out of the offense for which the prisoner was convicted and sentenced." OAC 5120-2-04(A) mirrors the language in R.C. 2967.191 and authorizes the DRC to reduce an offender's sentence by authorized jail time credit.

When an offender has been sentenced to two or more concurrent sentences, "the adult parole authority shall independently reduce each sentence or stated prison term for the number of days confined for that offense. Release of the offender shall be based upon the longest definite, minimum and/or maximum sentence or stated prison term after reduction for jail time credit." OAC 5120-2-04(F).

Defendant relies on this section to support his conclusion that the trial court should have awarded jail time credit against each concurrent sentence. As a preliminary matter, the administrative rule is a guideline for the APA; it is not a directive to the trial court mandating that an offender receive double credit against concurrent sentences for unrelated offenses. Defendant's interpretation of this section would contradict section

(A) that specifies that the trial court makes the factual determination of the amount of time an offender served on an offense before sentencing. In fact, the APA may modify jail credit only when the trial court journalizes such a modification in an entry. OAC 5120-2-04(H). Furthermore, the language in section (F) shows that, like R.C. 2967.191, jail time credit is offense specific. As such, jail time credit for confinement in one offense cannot be applied to a separate offense even if the sentences are concurrent. There are no provisions in the administrative rules that authorize granting double credit.

**D. Equal protection claims**

Equal protection rights are implicated when an indigent offender, who is unable to post bond, is required to serve a greater sentence than an equally situated offender who has the means to post bond pending trial. *White v. Gilligan* (S.D. Ohio, 1972) 351 F. Supp. 1012; *Workman v. Cardwell* (N.D. Ohio, 1972), 338 F. Supp. 893. Under Ohio's previous statutory scheme, trial courts had discretion of whether to credit pre-trial confinement against the sentence imposed. This scheme was found to be discriminatory as it resulted in indigent defendants serving a longer sentence than those with the means to post bond. *Id.* With the amendment of R.C. 2967.191, jail time credit is now mandatory.

*White* and *Workman* each dealt with an offender seeking credit against a single sentence. Defendant seeks to extend the principle set forth in these cases to require that offenders receive multiple credit for a single period of confinement against multiple unrelated offenses despite the plain language of R.C. 2967.191. Such a result is contrary to the principles of equal protection. Although offenders are entitled to credit for pre-

trial detention for a specific offense under R.C. 2967.191, they are not entitled to multiply a single period of pre-trial confinement by the number of cases pending.

Defendant alleges that he is subject to a greater amount of time than an “equally situated” offender who makes bail. This comparison fails at the threshold. Defendant committed the crimes in this case within a week of being placed on community control for his previous conviction, and defendant had a history of other criminal convictions. A “similarly situated” offender, with an identical history, would not have been released due to the probation holder. See *Chafin*, 2007-Ohio-1840, ¶ 9. Defendant simply is not similarly situated to those defendants who would have been able to gain release on bail.

The Tenth District rejected the equal protection argument:

Here, appellant has not alleged any intentional or purposeful discrimination in the application of R.C. 2967.191 or Ohio Adm.Code 5120-2-04(F), nor is there any evidence in the record. Because there is no evidence as to the vital element of intentional or purposeful discrimination, appellant's equal protection challenge to R.C. 2967.191 and Ohio Adm.Code 5120-2-04(F) is without merit. We reiterate our statement in *Callender* that to award the defendant multiple pretrial detention credit when he is held and sentenced on more than one offense would discriminate in his favor, over the defendant charged with only one offense.

*Eble*, 2004-Ohio-335, ¶ 17; see also, *State v. Lemaster*, 4<sup>th</sup> Dist. No. 01CA10, 2001-Ohio-2639.

The Fourth District has also rejected the equal protection argument. *Moss v. State* (Feb. 17, 1986), 4<sup>th</sup> Dist. No. 1135. In *Moss*, the defendant was held on multiple charges from a crime spree encompassing two counties. Defendant sought jail time credit to be awarded against the concurrent sentences imposed in both counties. The court found that duplicating jail credit would discriminate against an offender who only committed one

offense. This Court affirmed, holding that the offender could not duplicate jail credit by applying that credit to concurrent sentences from different counties. *Moss v. Subora* (1987) 29 Ohio St.3d 66.

Defendant received credit for the period of confinement pending the probation violation hearing in 05CR-1414 and sentencing in 05CR-4367. Had defendant acknowledged the probation violation prior to trial in 05CR-4367, there is no question that defendant would not be entitled to additional credit in 05CR-4367 as he would have been held on the sentence in 05CR-1414. Defendant cannot now claim that because he continued the disposition of the community control case, he is somehow entitled to twice the credit.

**E. The rate of prison population growth does not affect the allocation of jail credit.**

Amicus argues that jail credit should be awarded against each concurrent sentence because of the “looming prison population crises.” Amicus brief at pg. 3. This argument has no merit. There are specific statutory provisions governing release of prisoners based on overcrowding. R.C. 2967.18. Furthermore, the theory asserted by the amicus would be discriminatory because the allocation of jail time credit against an offender’s sentence would depend on prison population at any given point in time. Offenders should not benefit from an increased crime rate.

Based on the foregoing, defendant has not shown plain error occurred in the allocation of jail time credit, and he has not shown such allocation constitutes an equal protection violation. Defendant’s proposition of law should be overruled.

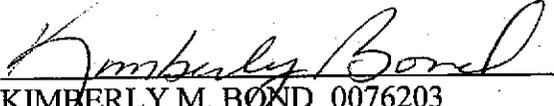
## CONCLUSION

Defendant has not shown error, plain or otherwise, in the trial court's allocation of jailtime credit. The trial court complied with the statutory provisions of R.C. 2947.08, and defendant has not shown such allocation is an equal protection violation. For the foregoing reasons, plaintiff-appellee requests that this Court affirm the judgment of the Tenth District Court of Appeals. <sup>2</sup>

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Respectfully submitted,

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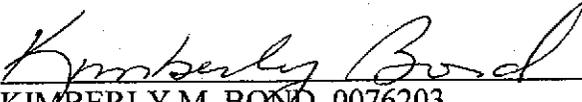
Counsel for Plaintiff-Appellee

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<sup>2</sup> If this Court sua sponte contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St.2d 298, 301 & n. 3; *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 170.

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was hand-delivered this day, June 5, 2007, to PAUL SKENDELAS, 373 South High Street-12th Fl., Columbus, Ohio 43215; Counsel for Defendant-Appellant.

  
KIMBERLY M. BOND 0076203  
Assistant Prosecuting Attorney

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