

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee,

v.

MICHAEL SHARPLESS

Appellant.

Case No. 07-0972

On Appeal From the Portage
County Court of Appeals,
Eleventh Appellate District

Court of Appeals
Case No. 2006-P-0088

**APPELLEE'S RESPONSE IN OPPOSITION TO
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION**

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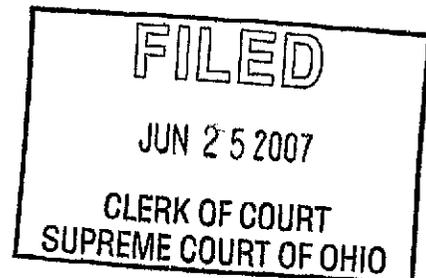


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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND WHY IT DOES NOT INVOLVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

This is not a case of public or great general interest. Defendant-appellant, Michael Sharpless (“Appellant”) merely invites this Court to disregard its prior decisions in *Woods v. Telb* (2000), 89 Ohio St.3d 504; *State v. Jordan* (2004), 104 Ohio St.3d 21, 2004-Ohio-6085; *Hernandez v. Kelly* (2006), 108 Ohio St.3d 395, 2006-Ohio-126; and *State ex rel. Cruzado v. Zaleski* (2006), 111 Ohio St.3d 353, 2006-Ohio-5795 to find R.C. 2929.191 unconstitutional. In support of his challenge to R.C. 2929.191, the Appellant fails to raise any argument that was not previously considered by this Court in the above listed cases.

In the present case, the Eleventh District Court of Appeals relied on this Court’s long line of cases regarding postrelease control prior to the legislature’s decision to amend R.C. 2967.28 and enact R.C. 2929.191 and affirmed the decision of the trial court. *State v. Sharpless* (Apr. 23, 2007), Portage App. No. 2006-P-0088, 2007-Ohio-1922, at ¶46. The Appellant fails to present any error with the decision of the Appellate Court or this Court’s decisions in *Woods*, *Jordan*, *Hernandez* and *Cruzado*. Accordingly, the Appellant has not presented any issue warranting jurisdiction from this Court.

STATEMENT OF THE CASE AND FACTS

FACTS

After his wife started spending time with another man, the Appellant confronted his wife, Leslie, and the man, Harold Ford, at gunpoint. *State v. Sharpless* (Dec. 18, 1998), Portage App. No. 97-P-0065, unreported. Leslie and her three children immediately moved out of the family home. *Id.* At trial, tape recorded conversations established that after his wife and children moved out, the Appellant first arranged for a friend to kill Ford in

exchange for \$2000 and then arranged to hire a hit man (undercover police officer) to kill Ford and provided the hit man with a rifle valued at \$1000 as a down payment. *Id.* Pursuant to their arrangement, the hit man returned with Ford's wallet, as proof that he had completed the killing. *Id.*

PROCEDURAL HISTORY

The Portage County Grand Jury indicted the Appellant on conspiracy to commit aggravated murder, a felony in the first degree, in violation of R.C. 2903.01 and 2923.01. (Transcript of the docket, journal entries and original papers hereinafter "T.d." 1). The matter proceeded to a jury trial, and On April 28, 1997, the jury returned a verdict of guilty on the charge of conspiracy to commit aggravated murder and the matter was referred to the Adult Probation Department for a presentence investigation report. (T.d. 27). On May 30, 1997, the trial court sentenced the Appellant to a term of nine years in prison. (T.d. 35). The Appellant filed a timely appeal with this Court.

On appeal, the Appellant assigned nine assignments of error including: the ineffective assistance of trial counsel, trial court's denial of search warrants of State's witnesses, prosecutorial misconduct, improper indictment and jury instructions regarding the overt act of conspiracy, admission of "bad acts" evidence without a limiting instruction, absence of Appellant during jury questions, entrapment, and sentencing issues. *State v. Sharpless* (Dec. 18, 1998), Portage App. No. 97-P-0065, unreported. The Eleventh District Court of Appeals affirmed the Appellant's conviction and sentence. *Id.* This Court declined jurisdiction. *State v. Sharpless* (1999), 85 Ohio St.3d 1547.

Following his conviction, the Appellant filed various motions in the trial court including: motion for the recusal of Judge Kainrad, August 3, 1999 (T.d. 79); motion for

consecutive postconviction petition and affidavit, August 3, 1999 (T.d. 80-81); successive petition for postconviction relief, September 7, 1999 (T.d. 87); motion to amend motion for successive postconviction petition, November 23, 1999 (T.d. 93); and a motion for the recusal of Judge Kainrad, December 2, 1999 (T.d. 96). On December 13, 1999, the trial court overruled all of Sharpless' motions filed from August 3, 1999 to December 2, 1999. (T.d. 100).

The Appellant filed a timely notice of appeal with the Eleventh District. On appeal, the Appellant raised three claims: (1) judicial misconduct; (2) prosecutorial misconduct; and (3) ineffective assistance of counsel, including (a) trial counsel's failure to move for Judge Kainrad's recusal; (b) trial counsel's failure to ask for a change of venue; (c) trial counsel's failure to file a motion for discovery; (d) trial counsel's failure to ask for a psychological exam; (e) trial counsel's allowance of perjury on the witness stand; (f) trial counsel's failure to check accuracy of audiotapes; (g) trial counsel's failure to investigate; (h) trial counsel's failure to move to suppress evidence; (i) trial counsel's promise that for \$10,000 more, the Appellant would "walk free"; (j) trial counsel's admission that he did not do a good job; (k) trial counsel's failure to go over the pre-sentence investigation report with the Appellant or provide the Appellant with a copy; (l) trial counsel's failure to notify court of certain medications that the Appellant was taking; and (m) trial counsel's failure to object to certain things at trial.

The Appellate Court affirmed the trial court's decision denying postconviction relief to the Appellant. *State v. Sharpless* (Feb. 9, 2001), Portage App. Nos. 99-P-0083 and 99-P-0121, unreported. The record reveals that the Appellant filed three motions for judicial

release on, May 29, 2001 (T.d. 119); June 13, 2002 (T.d. 123) and January 19, 2005 (T.d. 127). The trial court denied all three motions. (T.d. 122, 126, 128).

On June 29, 2006, the State moved the trial court to schedule and conduct a R.C. 2929.191 hearing to correct the post release control notification in the Appellant's case. (T.d. 129). Following the R.C. 2929.191 hearing, the trial court entered a *nunc pro tunc* order which included the following language:

The Court thereupon notified the Defendant that after release from prison, the Defendant may be supervised under post release control R.C. 2967.28.

The Court further notified the Defendant that if the Defendant violates the terms of the post-release control, the Defendant could receive an additional prison term not to exceed 50 percent of his original prison term.

(T.d. 134).

The Appellant filed a timely appeal to the Eleventh District Court of Appeals and raised six assignments of errors challenging the trial court's ability to hold a resentencing hearing to correct its failure to advise him that post release control was a part of his sentence. The Appellant was challenging the constitutionality of R.C. 2929.191. On April 23, 2007, the Court of Appeals found all six assignments of error without merit and affirmed the trial court's decision. *Sharpless*, 2007-Ohio-1922, at ¶46. This matter is now before the Supreme Court of Ohio on the Appellant's memorandum in support of jurisdiction.

ARGUMENT OPPOSING JURISDICTION

The Appellant raised six propositions of law challenging the Eleventh District Court of Appeals decision that found R.C. 2929.191 constitutional. *Sharpless*, 2007-Ohio-1922, at ¶46. In his first and fourth propositions of law, the Appellant challenged the Appellate Court's finding that the trial court's use of a *nunc pro tunc* entry as the means of

communicating his postrelease control notification was proper as the trial court also conducted a resentencing.

In his remaining propositions of law, the Appellant argued that the Eleventh District erred in relying on the precedent from this Court to find the trial court's application of R.C. 2929.191 did not unconstitutionally increase his sentence, did not violate the prohibition against ex post facto laws, did not violate the doctrine of res judicata or violate his right of allocution.

A review of R.C. 2929.191 and this Court's long line of cases regarding post release control reveals that the Appellant has failed to demonstrate any error with the Eleventh District Court of Appeals decision warranting jurisdiction from this Court.

R.C. 2929.191

R.C. 2929.191, provides that if prior to July 11, 2006, the effective date of the statute, a trial court failed to notify an offender that he would be supervised pursuant to R.C. 2967.28 or failed to notify him of the possibility that the parole board may impose a prison term for a violation of supervision or a condition of post-release control, "at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of the conviction the statement that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison" or a statement regarding the possibility that the parole board may "impose as part of the sentence a prison term of up to one-half of the stated prison term originally imposed upon the offender" for a violation of supervision or a condition of post-release control. R.C. 2929.191(A)(1), (B)(1).

The statute further provides that, a court that wishes to prepare and issue a correction to a judgment of conviction must first hold a hearing. R.C. 2929.191(C). The court must provide notice of the date, time, place and purpose of the hearing to the offender, the prosecutor and the department of rehabilitation and corrections. R.C. 2929.191(C). “At the hearing, the offender and the prosecuting attorney may make a statement as to whether the court should issue a correction to the judgment of conviction.” R.C. 2929.191(C).

After a hearing, if the court prepares and issues a correction to the judgment of conviction, “the court shall place upon the journal of the court an entry nunc pro tunc to record the correction to the judgment of conviction[.]” R.C. 2929.191(A)(2), (B)(2).

Supreme Court Case Law on R.C. 2967.28 Postrelease Control Notification

As the Appellant’s Memorandum is completely void of this Court’s opinions regarding postrelease control prior to the legislature’s decision to amend R.C. 2967.28 and enact R.C. 2929.191, a review of this line of cases is necessary.

This Court held R.C. 2967.28 (post release control statute) was constitutional in *Woods v. Telb* (2000), 89 Ohio St.3d 504. In *Woods*, the defendant entered a plea of guilty to theft. The postrelease control notice was provided in the defendant’s written plea of guilty. The defendant received and served a prison term of ten months. The Adult Probation Department, (“APA”) released him on postrelease control for three years. While out, the defendant had multiple violations of the terms of his release and was sent back to prison for a period of 150 days, and various periods of time at halfway houses.

In *Woods*, the Court stated, “we hold that pursuant to R.C. 2967.28(B) and (C), a trial court must inform the offender at sentencing or at the time of a plea hearing that post-release control is part of the offender’s sentence.” *Id.* 89 Ohio St.3d at 512. In *Woods*, the

defendant was advised of the postrelease control in his signed plea form and the journal entry of the sentencing hearing. *Id.*

Following *Woods*, defendants started challenging their sentences on appeal if the trial court only provided the postrelease control notice in the journal entry and not at the sentencing hearing. This issue was resolved by this Court in *State v. Jordan* (2004), 104 Ohio St.3d 21, 2004-Ohio-6085. In *Jordan*, the Court was faced with conflicting courts of appeals decisions dealing with sentencing entries that contained the postrelease control advisement when nothing about the advisement was said at the sentencing hearing. One of the conflicting cases arose from a direct appeal following a jury trial and conviction and the other arose from the defendant's no contest plea.

The *Jordan* Court held that a trial court was required to provide postrelease control notification to the defendant at the sentencing hearing and in the journal entry if the trial court imposed a term of imprisonment. *Id.*, 104 Ohio St.3d at paragraph one of the syllabus, 2004-Ohio-6085. Any sentence of imprisonment without the hearing and journal entry notification was contrary to law. *Id.* The remedy was to vacate the sentence and remand to the trial court for resentencing. *Id.*, 104 Ohio St.3d at paragraph one of the syllabus, 2004-Ohio-6085.

After *Jordan*, this Court was asked to clarify the parameters of R.C. 2967.28 postrelease control. In *Hernandez v. Kelly* (2006), 108 Ohio St.3d 395, 2006-Ohio-126, the defendant sought habeas relief challenging the APA's authority to originally place him on postrelease control and then send him back to prison for violations while on post release control. (Unlike *Woods* and *Jordan*, the defendant was challenging the APA authority not the trial court's sentence).

In *Hernandez*, following a jury trial, the defendant was sentenced to 7 years in prison. No postrelease control notice was provided at the sentencing hearing or in the journal entry. The defendant served his seven years and was released on postrelease control, violated and was sent back to prison for 180 days on the violation. The defendant sought habeas relief for release from prison and further postrelease control.

The *Hernandez* Court held that unless a trial court included the postrelease control notice at the sentencing hearing and in the journal entry, the Adult Parole Authority was without authority to impose postrelease control. *Id.*, 108 Ohio St.3d at 398, 2006-Ohio-126, at ¶20. *Hernandez* stated that, “where no such notification was supplied, and the offender appeals after a prison term is imposed under R.C. 2929.15(B), the matter must be remanded to the trial court for a resentencing under that provision with a prison sentence not an option.” *Id.*, 108 Ohio St.3d at 400, 2006-Ohio-126, at ¶29.

However, the *Jordan* remedy of remanding for a resentencing hearing was not effective in *Hernandez*’s situation because he had already served his journalized sentence (that did not include the appropriate notification of postrelease control.) This Court held that *Hernandez* was entitled to release from prison and from further postrelease control. *Id.*, 108 Ohio St.3d at 401, 2006-Ohio-126, at ¶32.

Since the enactment of R.C. 2929.191, the Supreme Court has continued to review postrelease control issues in original actions filed with the Court. In October 2006, this Court was faced with the issue whether a sentencing entry that referred to the discretionary rather than mandatory nature of the terms of postrelease control invalidated the notice. *Watkins v. Collins* (2006), 111 Ohio St.3d 425, 2006-Ohio-5082. The Court held that the sentencing entries at issue were sufficient to afford notice to a reasonable person that the trial

courts were authorizing postrelease control as part of each offender's sentence. *Id.*, 2006-Ohio-5082, at ¶51. Accordingly, the habeas petitioners were not entitled to release from prison.

In November 2006, a criminal defendant petitioned the Court seeking a writ of prohibition to vacate an entry resentencing him. *State ex rel. Cruzado v. Zaleski* (2006), 111 Ohio St.3d 353, 2006-Ohio-5795. While the defendant was serving his original prison term, the trial court entered a *nunc pro tunc* sentencing entry that included a statutorily mandated period of postrelease control that was not present in the original sentencing entry.¹ The Court held that the trial court retained jurisdiction to correct the defendant's sentence because the original sentence was void for failing to include the requisite statutory notification. *Id.* 2006-Ohio-5795, at ¶19. Pursuant to *Jordan*, the proper remedy was to resentence the defendant. *Id.* 2006-Ohio-5795, at ¶20.

In *Cruzado*, the criminal defendant was still serving his sentence, unlike the situation in *Hernandez* where the trial court attempted to cure the original sentencing with a resentencing after Hernandez's journalized prison term had expired. The *Cruzado* Court further stated:

[f]ollowing our decision in *Hernandez*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301, the General Assembly amended R.C. 2967.28 to provide that when a trial court imposes a sentence that should include a mandatory term of postrelease control after the July 11, 2006 effective date of the amendment, "the failure of a sentencing court to notify the offender * * * of this requirement or to include in the judgment of conviction entered on the journal a statement that the offender's sentence includes this requirement does not negate, limit, or otherwise affect the mandatory period of supervision that is

¹ The record revealed that the defendant had received some notification regarding postrelease control at his plea and original sentencing hearings, however, the notification incorrectly informed him that his postrelease control would be three rather than five years. The parties stipulated that Cruzado's original sentencing entry did not contain a written statement concerning postrelease control. *Id.*, 2006-Ohio-5795, at ¶7-8.

required for the offender under this division.” R.C. 2967.28(B). See Am.Sub.H.B. No. 137. For those cases in which an offender was sentenced before the July 11, 2006 amendment and was not notified of mandatory postrelease control or in which there was not a statement regarding postrelease control in the court’s journal or sentence, R.C. 2929.191 authorizes the sentencing court-before the offender is released from prison-to “prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison.”

(Emphasis added) *Id.* 2006-Ohio-5795, at ¶29. This Court held, the *Cruzado* trial court “did not lack jurisdiction, much less *patently and unambiguously* lack jurisdiction, to correct *Cruzado*’s sentencing entry *before his journalized sentence had expired.*” *Id.* 2006-Ohio-5795, at ¶32. The trial court followed the procedure now provided in R.C. 2929.191. *Id.* 2006-Ohio-5795, at ¶29.

Analysis

In the present case, following a motion from the State, the trial court scheduled a R.C. 2929.191(C) hearing prior to the completion of the Appellant’s prison term to provide the Appellant with the requisite R.C. 2967.28 statutory notifications.

The Eighth and Second District Courts of Appeals agree with the Eleventh District Court of Appeals that a postrelease control notification correction, “must be made while the term of imprisonment continues and post-release sanctions are yet available.” *State v. Rutherford* (Sept. 29, 2006), Champaign App. No. 06CA13, 2006-Ohio-5132, at ¶11; *State v. Simpkins* (Nov. 16, 2006), Cuyahoga App. No. 87692, 2006-Ohio-6028, at ¶12-13. “The Franklin County Court of Common Pleas, Criminal Division, reached a similar conclusion in resentencing a criminal defendant to include the mandatory postrelease-control period that the court failed to include in an earlier sentencing entry, when the defendant had not yet completed his original sentence.” *Cruzado*, 111 Ohio St.3d at 358-359, 2006-Ohio-5795, at

¶28, citing *State v. Ramey* (Feb. 16, 2006), 136 Ohio Misc.2d 24, 2006-Ohio-885. The trial court in the present case resentenced the Appellant prior to his release from prison. Accordingly, the correction was made while the term of the Appellant's imprisonment continued and postrelease control sanctions were still available. R.C. 2929.191 is the vehicle by which a trial court may correct its failure to impose postrelease control at sentencing by resentencing the Appellant.

Contrary to the Appellant's argument that this is an improper "after-the-fact" sanction, the Appellate Court correctly found that this Court has clearly held in *Hernandez* that imposing postrelease control notifications at a resentencing are only improper after the defendant has completed his term of imprisonment. *Hernandez*, 108 Ohio St.3d at 400, 2006-Ohio-126, at ¶29. The *Hernandez* Court held that resentencing after completion of the offender's term, "would totally frustrate the purpose behind [statutory] notification, which is to make the offender aware before a violation of the specific prison term that he or she will face for a violation." *Hernandez*, 108 Ohio St.3d at 400, 2006-Ohio-126, at ¶29. Unlike *Hernandez*, the Appellant in the present case was still serving his sentence when the trial court resentenced him pursuant to R.C. 2929.191, to provide the postrelease control notifications.

On appeal, the Appellant characterized the trial court's notification of postrelease control and the application of R.C. 2929.191 as an increase or addition to his sentence. Rather than imposing an additional sanction or an increased sentence, the trial court in the present case was dealing with a void sentence. Specifically, the trial court's failure to provide the Appellant with the postrelease control notification at either his original sentencing hearing or first resentencing hearing resulted in a void sentence. R.C. 2967.28

mandates that a trial court impose a term of postrelease control for the offenses the Appellant was found guilty; therefore, the trial court was required to orally impose postrelease control at a sentencing hearing and transcribe it in the journal entry. *Jordan*, 104 Ohio St.3d at paragraph one of the syllabus, 2004-Ohio-6085. The remedy for the Appellant's void sentence was a resentencing to correct the trial court's original error of omission. *Id.*; *Cruzado*, 111 Ohio St.3d at 358, 2006-Ohio-5795, at ¶19; *Simpkins*, 2006-Ohio-6028, at ¶11; *Rutherford*, 2006-Ohio-5132, at ¶8. As the Appellate Court did not err in finding that the trial court did not impose an additional sentence, the Appellant's right of allocution was not involved at the resentencing.

The Appellant raised concerns regarding the issue of *res judicata*. Despite the procedural history of the present case, the doctrine of *res judicata* does not act as a bar to the trial court's resentencing pursuant to R.C. 2929.191. "[C]ourts can correct legally improper sentences, even if they thereby impose greater penalties. Re-sentencing to impose an omitted mandatory penalty does not violate double jeopardy restraints." *Brook Park v. Necak* (1986), 30 Ohio App.3d 118, 119-120.

Further guidance is provided by decisions of this Court. In addition to *Jordan's* approval of a resentencing hearing to correct any omission of necessary references to postrelease control, this Court has approved the use of resentencing hearings to correct another common oversight, failing to notify the defendant of a specific prison term that would be faced in the event that a defendant being placed on community control violated the terms of his community control. *State v. Fraley* (2004), 105 Ohio St.3d 13, 2004-Ohio-7110. As this Court has found multiple sentencing hearings lawful in *Jordan* and *Fraley*, the resentencing of the Appellant pursuant to R.C. 2929.191 was the proper means to correct the

omission from his original sentencing. *Hernandez* demonstrates that this Court's approach to multiple sentencing hearings has limitations, specifically once the defendant has completed the prison term.

The Appellant also raised arguments regarding the prohibition of *ex post facto* laws and the retroactive application of R.C. 2929.191. Ohio courts have long recognized that there is a crucial distinction between statutes that merely apply retroactively (or retrospectively) and those that do so in a manner that offends the Constitution. This Court has articulated the procedure that a court should follow to determine when a law is unconstitutionally retroactive. *State v. Cook* (1998), 83 Ohio St.3d 404, 410, citing *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100.

The test for unconstitutional retroactivity requires the court first to determine whether the General Assembly expressly intended the statute to apply retroactively. R.C. 1.48; *Cook*, 83 Ohio St.3d at 410. If so, the court moves on to the question of whether the statute is substantive, rendering it unconstitutionally retroactive, as opposed to merely remedial. *Cook*, 83 Ohio St.3d at 410-411.

A review of R.C. 2929.191, reveals that the General Assembly expressly intended the statute to reach back in time and apply to convictions prior to the effective date of the statute. The second critical inquiry of the constitutional analysis is to determine whether the retroactive statute is remedial or substantive. A purely remedial statute does not violate Section 28, Article II of the Ohio Constitution, even when applied retroactively. *Id.* at 411. R.C. 2929.191 constitutes a remedial provision because it merely substitutes a new or more appropriate remedy for the enforcement of an existing right. *Van Fossen*, 36 Ohio St.3d at

107. As R.C. 2929.191 is a curative statute that provides a framework by which the trial court may correct an omission that rendered an original sentence void, the statute is remedial.

This Court's decision in *Cruzado* offers guidance on the Appellant's arguments regarding the trial court's use of a *nunc pro tunc* entry pursuant to R.C. 2929.191. Although the Court did not have to reach several issues presented in Cruzado's original action to deny his writ of prohibition, the Court did approve of the procedures provided in R.C. 2929.191 and trial court's use of a *nunc pro tunc* entry, modifying Cruzado's original sentencing entry to include postrelease control. *Cruzado*, 111 Ohio St.3d at 359, 2006-Ohio-5795, at ¶29.

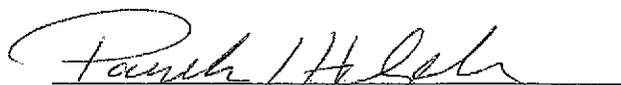
A review of R.C. 2929.191 and this Court's decisions regarding the application of R.C. 2967.28 reveals that the Appellant's six propositions of law are without merit. Faced with a void sentence, the trial court (following R.C. 2929.191) scheduled, conducted a resentencing hearing and then filed a *nunc pro tunc* entry to correct its omission of the postrelease control notification in the present case. The Appellant was still serving his original sentence at the time of the R.C. 2929.191 resentencing hearing. The statute provided a framework to correct the original sentence. This is a remedial statute that does not violate the prohibition against ex post facto laws. The retroactive application of R.C. 2929.191 to the Appellant's case was constitutional. As no additional sentence was imposed at the resentencing hearing, the Appellant's right of allocution was not involved. And finally, the doctrine of res judicata does not act as a bar to the Appellant's resentencing pursuant to R.C. 2929.191 in the present case.

CONCLUSION

The Appellee, State of Ohio, respectfully moves this Court to refuse jurisdiction to hear this discretionary appeal.

Respectfully submitted,

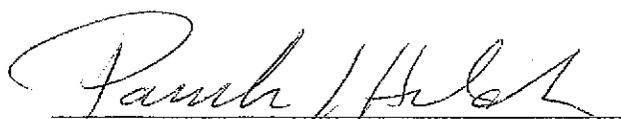
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response in Opposition to Memorandum in Support of Jurisdiction has been sent to Paul Mancino, Jr. at 75 Public Square, Suite 1016, Cleveland, Ohio 44113-2098, this 22nd day of June 2007.



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