

NO. 06-2148

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 86854

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STATE OF OHIO,

Plaintiff-Appellee

-vs-

REGINALD WARREN,

Defendant-Appellant

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**MERIT BRIEF OF APPELLEE**

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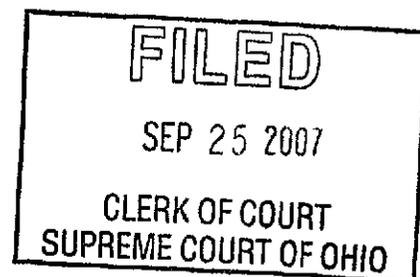
Counsel for Plaintiff-Appellee

**WILLIAM D. MASON**  
Cuyahoga County Prosecutor

**JON W. OEBKER (0064255)**  
Assistant Prosecuting Attorney  
The Justice Center  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 443-7800

Counsel for Defendant-Appellant

**ERIKA CUNLIFFE**  
310 Lakeside Avenue #200  
Cleveland, Ohio 44113



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## **STATEMENT OF THE CASE**

Appellant was indicted in a forty-eight count indictment. Counts one through twelve-charged rape, in violation of R.C. 2907.02, each carrying force and violence specifications. Counts thirteen through twenty-four charged felonious sexual penetration, in violation of R.C. 2907.12, each carrying force and violence specifications. Counts twenty-five through thirty-six charged gross sexual imposition, each carrying violence specifications. Counts thirty-seven through forty-eight charged kidnapping, each carrying violence specifications. Each charge of the indictment was governed by pre-Senate Bill 2 law. Appellant was arraigned and the case was assigned to the Honorable Peter J. Corrigan.

On June 7, 2005, Appellant waived his right to a jury and a bench trial commenced. On June 9, 2005, the court found Appellant guilty of counts one through eight as charged, counts twenty-five through twenty-eight as charged, counts twenty-nine through thirty-six without the violence specifications, and counts thirty-seven through forty-eight as charged.

On July 8, 2005, the court held a sentencing hearing. After hearing from all parties, the Honorable Peter J. Corrigan sentenced Appellant to terms of incarceration of life on each of counts one through eight; four to ten years on each of counts twenty-five through twenty-eight; two years on each of counts twenty-nine through thirty-six; and fifteen to twenty-five years on each of counts thirty-seven to forty-eight.

Appellant appealed to the Eighth District which affirmed Warren's convictions and sentences for one count of rape, four counts of gross sexual imposition, and five counts of kidnapping, but reversed the convictions and sentences for seven counts of rape,

eight other counts of gross sexual imposition, and seven counts of kidnapping. *State v. Warren*, Cuyahoga App. No. 86854, 2006-Ohio-4104. Appellant then unsuccessfully attempted to reopen his appeal. *State v. Warren*, Cuyahoga App. No. 86854, 2007-Ohio-69.

Thereafter, Appellant filed a notice of appeal and memorandum in support of jurisdiction with this Court. This Court accepted jurisdiction over one proposition of law, which states as follows:

R.C. 2907.02 AND R.C. 2151.02(C)(3) WERE UNCONSTITUTIONALLY APPLIED TO APPELLANT, WHO WAS A MINOR AT THE TIME OF THE ALLEGED CRIME; THUS APPELLANT'S RIGHT TO DUE PROCESS AN A FAIR TRIAL WAS DENIED WHEN HE WAS SENTENCED AS AN ADULT FOR CRIMES ALLEGED TO HAVE BEEN COMMITTED WHEN HE WAS ONLY FIFTEEN YEARS OLD.

## STATEMENT OF THE FACTS

Tiffany Youngblood, the victim in this matter, during the summer of 1988, was nine years old and lived with her mother Edith Logan and Tiffany's sister Alisa on East 125<sup>th</sup> Street, in Cleveland, Ohio, Cuyahoga County. (Tr. 64-65, 70). During that time period, a neighbor and family friend, James Thomas, served as a babysitter for Tiffany and her sister Alisa. (Tr. 66).

Mr. Thomas was a member of the Kingdom Hall of Jehovah's Witnesses, as was Edith Logan Tiffany's mother. (Tr. 67). Mr. Thomas lived on East 125<sup>th</sup> Street with a man named Mr. Murphy who was associated with Appellant, who was then fifteen years of age. (Tr. 69-72). During the late summer of 1988, Tiffany attended Louis Pasteur elementary school in Cleveland. At that time, Mr. Thomas was crippled and was not able to move freely around his home. (Tr. 76). Mr. Thomas babysat Tiffany and her sister Alisa at his home. (Tr. 66). During that summer, Appellant worked around that same home and had access to the girls when they were over. (Tr. 71-72).

On one occasion, Appellant confronted Tiffany alone in an upstairs room. Appellant began kissing Tiffany on her neck, pulled up her shirt, and began sucking on her breasts. (Tr. 77-78). When Tiffany asked Appellant to stop, he told her to be quiet. That occasion eventually escalated. (Tr. 78). On multiple occasions, Appellant approached Tiffany, laid her on the floor, pinning her hands above her head, spreading her legs apart with his lower body, and digitally penetrated her vagina. (Tr. 79). Those occasions began a matter of days after the initial occasion of sexual contact. (Tr. 82-83). On those occasions, Appellant put his hands over Tiffany's mouth and instructed her not to say anything. (Tr. 79). Appellant removed Tiffany's clothing himself on those

occasions. (Tr. 80). Tiffany estimated that Appellant digitally penetrated her eleven or twelve times. (Tr. 82).

In addition to digitally penetrating Tiffany, on numerous occasions, Appellant attempted to fully insert his penis into her vagina. (Tr. 83-85). However, Appellant was only able to insert approximately an inch and a half of his penis into Tiffany's vagina on those occasions. (Tr. 87). The first occasion of Appellant penetrating Tiffany vaginally with his penis occurred on the fifth or sixth occasion of sexual interaction between the two. (Tr. 83). On the first occasion of sexual intercourse, Appellant threatened Tiffany that if she did not stay still and be quiet, he would hurt Tiffany, Tiffany's mother, or Mr. Thomas. (Tr. 83-84).

On the occasions of sexual intercourse, Appellant would always pin Tiffany down, remove her clothing, and hold her hands above her head. (Tr. 84). Prior to inserting his penis into Tiffany's vagina, Appellant would rub his penis directly on her vagina. (Tr. 85). During each instance of sexual intercourse, Tiffany described a dirty feeling and a burning sensation during urination afterwards. (Tr. 87). Tiffany estimated that Appellant rubbed his penis directly on her vagina and then inserted his penis into her vagina eight or nine times. (Tr. 88).

On one occasion, Appellant approached Tiffany while she was sitting on the toilet and attempted to force her to perform oral sex on him by forcing her head to his exposed penis. (Tr. 89). On that occasion, Appellant forced Tiffany's lips onto his penis. However, Tiffany refused to open her mouth. (Tr. 90).

On yet another occasion, Appellant tried to force a brush into Tiffany's vagina, but was unsuccessful. (Tr. 91-93). That incident occurred in Mr. Thomas's bedroom.

(Tr. 92). Each incident of sexual activity between Tiffany and Appellant occurred during the late summer of 1988 at Mr. Thomas 's home. On each occasion, as a constant measure, Appellant secured Tiffany's silence by threatening harm to Tiffany, Tiffany's family, and Mr. Thomas. (Tr. 74). During each occasion of actual insertion, whether by digits or penis, Tiffany described physical pain. (Tr. 88).

At one point during that summer, due to her own observations of Appellant, Edith Logan, Tiffany 's mother, questioned Tiffany about Appellant. (Tr. 165). Tiffany, frightened by Appellant's threats, merely told her mother that Appellant had been "messing with her." (Tr. 97). After that confrontation, Ms. Logan took measures to separate Tiffany from Appellant, ending Appellant's access to Tiffany. (Tr. 167).

In the years following the summer of 1988, Tiffany grew distrustful of her mother and acted out delinquently. (Tr. 100-101). For a period of time during the 1990's Tiffany was married to Louis Williams. (Tr. 102). During certain moments of marital intimacy, Mr. Williams placed Tiffany's hands together over her head. (Tr. 103). At that point, Tiffany, recalling these previous instances of molestation at the hands of Appellant, began crying and explained to her husband that Appellant had molested her. (Tr. 103-104).

When confronted with the allegations against him, Appellant admitted that he worked for Mr. Thomas and Mr. Murphy during the summer of 1988 and that he was around Tiffany and her sister Alisa during that period of time. (Tr. 41-43). When asked why the girls would make up molestation charged against him, Appellant responded that he did not know why Tiffany would say something like that, excluding Alisa from his response. (Tr. 46).

## LAW AND ARGUMENT

This Court accepted jurisdiction over the following proposition of law:  
R.C. 2907.02 AND R.C. 2151.02(C)(3) WERE UNCONSTITUTIONALLY APPLIED TO APPELLANT, WHO WAS A MINOR AT THE TIME OF THE ALLEGED CRIME; THUS APPELLANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL WAS DENIED WHEN HE WAS SENTENCED AS AN ADULT FOR CRIMES ALLEGED TO HAVE BEEN COMMITTED WHEN HE WAS ONLY FIFTEEN YEARS OLD.

In this proposition of law Appellant argues that R.C. 2907.02 and R.C. 2151.02(C)(3) were unconstitutionally applied. R.C. 2907.02 provides for a sentence of life imprisonment for rape of a child under ten years old. (It does not appear that Appellant was sentenced to life without the possibility of parole.) R.C. 2151.02(C)(3), stated in terms of defining a child, provides for adult felony penalties for those individuals who commit crimes while juveniles but are not prosecuted until they are over twenty-one. Appellant challenges the application of these two statutes to the facts of his case.

### **A. Appellant's constitutional challenge**

In an "as applied" challenge to a statute, the challenging party bears the burden of presenting "clear and convincing evidence of a presently existing set of facts that makes the statutes unconstitutional and void when applied to those facts.", *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, ¶ 37, citing *Belden v. Union Cent. Life Ins. Co.* (1944), 143 Ohio St. 329, paragraph six of the syllabus. As explained below, Appellant cannot carry this burden as this Court has already affirmed the application of these juvenile statutes to a similar situation. See, *Walls, infra*.

### **B. Statutory Framework in Ohio**

The enactment in 1996 of Ohio House Bill 124 (1996 H.B. 124, eff. 3-31-97) changed Ohio law to provide that any child who commits a felony and who is not taken

into custody or apprehended for that act until after reaching 21 is not a "child" in relation to the act and the juvenile court does not have jurisdiction over any portion of the case. Under these circumstances, the criminal prosecution is commenced in adult court as if the juvenile had been 18 or older at the time of the offense. While Appellant only references one of these sections, these 1997 changes to Ohio law can be found in three different code sections. R.C.2151.23(I), R.C.2152.02(C)(3), and R.C. 2152.12(J).

R.C. 2152.02(C)(3), the only juvenile statute that Appellant claims was unconstitutionally applied to him states as follows:

(3) Any person who, while under eighteen years of age, commits an act that would be a felony if committed by an adult and who is not taken into custody or apprehended for that act until after the person attains twenty-one years of age is not a child in relation to that act.

Appellant fails to mention that there are two other juvenile statutes that have the effect of providing adult penalties for those individuals who commit crimes while juveniles but are not prosecuted until they are adults.

R.C. 2152.12(J) states as follows:

(J) If a person under eighteen years of age allegedly commits an act that would be a felony if committed by an adult and if the person is not taken into custody or apprehended for that act until after the person attains twenty-one years of age, the juvenile court does not have jurisdiction to hear or determine any portion of the case charging the person with committing that act. In those circumstances, divisions (A) and (B) of this section do not apply regarding the act, and the case charging the person with committing the act shall be a criminal prosecution commenced and heard in the appropriate court having jurisdiction of the offense as if the person had been eighteen years of age or older when the person committed the act. All proceedings pertaining to the act shall be within the jurisdiction of the court having jurisdiction of the offense, and that court has all the authority and duties in the case as it has in other criminal cases in that court.

R.C.2151.23(l), states as follows:

(l) If a person under eighteen years of age allegedly commits an act that would be a felony if committed by an adult and if the person is not taken into custody or apprehended for that act until after the person attains twenty-one years of age, the juvenile court does not have jurisdiction to hear or determine any portion of the case charging the person with committing that act. In those circumstances, divisions (B) and (C) of section 2151.26 of the Revised Code do not apply regarding the act, the case charging the person with committing the act shall be a criminal prosecution commenced and heard in the appropriate court having jurisdiction of the offense as if the person had been eighteen years of age or older when the person committed the act, all proceedings pertaining to the act shall be within the jurisdiction of the court having jurisdiction of the offense, and the court having jurisdiction of the offense has all the authority and duties in the case as it has in other criminal cases commenced in that court.

Clearly, the Ohio Legislature in enacting these statutory changes, was attempting to address the result where an individual would be forever under the jurisdiction of the Juvenile Court for acts committed when that person was legally a child. Herein, a man, like Appellant who is over thirty years old, has no vested right in the procedures designed for determining, in Juvenile Court, whether he is a delinquent child and whether he is amenable to rehabilitation as a child.

**B. This Court has already found that it is not unconstitutional for a statute to mandate adult penalties for individuals who commit crimes as juveniles but are not prosecuted until they are over twenty-one.**

Previously, this Court rejected a constitutional challenge to statutory sections that provide for adult for individuals who commit crimes as juveniles but are not prosecuted until they are over 21. In *State v. Walls*, 96 Ohio St.3d 437, 442, 2002-Ohio-5059 (Justice Pfeifer dissenting), this Court reviewed the constitutionality of one of the two statutes that provides for adult penalties for those individuals who commit crimes while juveniles but are not prosecuted until they are adults. This Court rejected an *ex post*

*facto* argument to the “statutory scheme [which] effectively removed anyone over 21 years of age from juvenile-court jurisdiction, regardless of the date on which the person allegedly committed the offense. In other words, the statutory amendments made the age of the offender upon apprehension the touchstone of determining juvenile-court jurisdiction without regard to whether the alleged offense occurred prior to the amendments’ effective date.” *Id.*

In *Walls*, the defendant committed a murder in 1985 while he was still a minor, but he was not indicted until November of 1998, when he was 29 years old. The defendant moved to dismiss the indictment against him, arguing that, under the statutes in effect in 1985, he could not be tried as an adult until a juvenile court had first bound him over for trial to the general division of the court of common pleas. After the trial court denied his motion, the defendant was tried and convicted of aggravated murder and sentenced to life imprisonment. On appeal to this Court, Walls raised issues including retroactive application of the law and preindictment delay.

This Court rejected Walls’ constitutional challenge. The Court specifically rejected Walls *ex post facto* challenge. The Court found that the 1997 changes to R.C. Chapter 2151 did not impair any of the defendant’s vested rights. While this Court, in *Walls*, did not specifically address whether trying the defendant as an adult for a crime committed when he was a juvenile violated the constitutional guarantee of fundamental fairness and/or the protections afforded under the due process and equal protection clauses of the Fourteenth Amendment, this Court did conclude by stating that it “found *no* constitutional violations” in trying the defendant as an adult for an offense committed while he was a juvenile. *Id.* at 454. (Emphasis added). This Court, in *Walls*, further

noted that even if the Juvenile Court retained jurisdiction over a delinquency complaint against an individual over 21 years of age, “it would find its dispositional options profoundly limited.” *Id.* At 449. The Court pointed out that, because of his age, the defendant, in *Walls*, had “virtually no chance of being kept in the juvenile system” and that the law in effect in both 1985 and 1997 would have prevented a juvenile court from imposing any type of institutionalization or confinement on the defendant.

Moreover, other state and federal courts considering the issue have also rejected the argument that juveniles have a due process right to be adjudicated in the juvenile system. See, e.g., *Woodard v. Wainwright*, (5<sup>th</sup> Cir. 1977), 556 F.2d 781, 787; *Manduley v. Superior Court* (2002), 117 Cal.Rptr.2d 168, 41 P.3d 3, 22; *State v. Angel C.* (1998), 245 Conn. 93, 715 A.2d 652, 662; *Hansen v. State* (Wyo. 1995), 904 P.2d 811, 822.

Importantly, this Court in *Walls* found that, just as in the case at bar, the defendant was still subject to being bound over to adult court under the statutes that existed at the time of the offense. *Walls, supra* at ¶ 17. This Court stated, “Even under the law in effect in 1985, Walls was subject to criminal prosecution in the general division of a court of common pleas if the juvenile court made certain determinations specified by statute. See former R.C. 2151.26(A) and (E), 140 Ohio Laws, Part I, 585-586. Thus, under either the 1985 law or the 1997 law, Walls was on notice that the offense he allegedly committed could subject him to criminal prosecution as an adult in the general division of the court of common pleas. The 1997 law merely removed the procedural prerequisite of a juvenile-court proceeding.” *Id.* Thus, contrary to the tenor of Appellant’s argument, this is not a situation where Appellant would not have faced life

imprisonment but for the statutes that mandate adult prosecution if the offender is apprehended after they are twenty-one. Rather, because of the possibility of Appellant being bound over, his potential sentence did not change.

In sum, the statutory juvenile amendments in *Walls* were applied to a defendant who was a juvenile at the time of the crime and an adult at the time of apprehension. This Court found nothing unconstitutional about the application of these amendments in *Walls*. These same statutory amendments were applied in the same manner to Appellant. Thus, given this Court's recent, favorable constitutional review of application these statutory amendments in *Walls*, it cannot be said that these same statutory amendments were unconstitutionally applied to Appellant.

**C. The United States Supreme Court, in *Roper v. Simmons*, infra, found no constitutional prohibition to the imposition of life imprisonment for an offender who committed a crime prior to eighteen.**

Appellant's brief relies heavily on the United States Supreme Court decision in *Roper v. Simmons* (2005) 543 U.S. 551, in which the Court held that the Eighth Amendment prohibited imposition of the death penalty for crimes committed when the offender was under 18. In citing to *Roper*, Appellant states that the United States Supreme Court "made it plain" that "when an offender is child at the time he commits an offense, the court must consider the offender's youthful status as a factor that mitigates his sentence." Appellant's brief at 5. The State respectfully disagrees with this overly broad reading of *Roper*. *Roper* dealt solely with the application of the death penalty. More importantly, contrary to Appellant's argument, *Roper* does not constitutionally mandate any consideration of youth for a non-death sentence. In holding that the Constitution prohibited the execution of youthful offenders, the Court made it plain that

there is no constitutional prohibition to life imprisonment as the *Roper* Court affirmed a life imprisonment sentence for *Roper*.

In *Roper*, the Court overruled its prior decision in *Stanford v. Kentucky* (1989) 492 U.S. 361, which had held that the Eighth Amendment did not proscribe the execution of juvenile offenders over 15 but under 18. (*Roper, supra*, 543 U.S. at p. 562.) The reasoning of the Court in *Roper, supra*, 543 U.S. 551 does not extend to the present case. First, *Roper* was a death penalty case. Although life without parole is a severe penalty, “the penalty of death is different in kind from any other punishment imposed under our system of criminal justice.” (*Gregg v. Georgia* (1976) 428 U.S. 153, 188 (lead opn. of Stewart, J.)) Justice Kennedy’s majority opinion in *Roper* implicitly recognizes the distinction between the death penalty and life without parole when applied to youthful offenders. The judgment of the Missouri Supreme Court affirmed in *Roper* had “set aside Simmons’ death sentence and resentenced him to ‘life imprisonment without eligibility for probation, parole, or release except by act of the Governor.’ “ (*Roper, supra*, 543 U.S. at p. 560)

Of particular importance to this case is the fact that there is no suggestion in *Roper* that the sentence of life without parole might itself be unconstitutional. Further, the Court indicated that the death penalty is unconstitutionally disproportionate when applied to juveniles, at least in part, because whatever deterrent effect it had could be achieved by imposing life without parole instead. The Court said, “To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.” ( *Id.* at p. 572.) Thus, *Roper* actually

supports application of R.C.2151.23(I), R.C.2152.02(C)(3), and R.C. 2152.12(J) to the facts of this case.

**D. Courts throughout Ohio and the rest of the country have refused to extend *Roper* to juvenile offenders who are sentenced to life imprisonment.**

Appellant has cited no authority extending the reasoning of *Roper, supra*, to life imprisonment cases. Indeed a number of cases have rejected this argument.

- Ohio, *In re J.B.*, Butler App. No. CA 2004-09-226, 2005 -Ohio-7029, at ¶ 133
- Ohio, *State v. Schaar*, Fifth App.No. 2003CA00129, 2004-Ohio-1631
- Ohio, *In re Sturm*, Fourth App. No. 05CA35, 2006-Ohio-7101
- Kentucky, *Gussler v. Commonwealth* (July 20, 2007), \_\_\_\_\_ S.W.3d \_\_\_\_\_, No. 2006-CA-000754-MR, WL 2069509 (Ky.App.);
- Vermont, *State v. Rideout* (Vt.2007) --- A.2d ---- [2007 Vt. LEXIS 164];
- Arizona, *State v. Eggers* (Ariz.App.2007) 160 P.3d 1230, 1247-1249;
- Louisiana, *State v. Craig* (La.App.2006) 944 So.2d 660, 662;
- Florida, *Culpepper v. McDonough*, 2007 WL 2050970 (M.D.Fla. July 13, 2007) (citing *United States v. Feemster*, 483 F.3d 583 (8<sup>th</sup> Cir.2007) "Although the execution of a juvenile is impermissible under the Eighth and Fourteenth Amendments, sentencing a juvenile to life imprisonment is not."
- Texas, *Thomas v. State* (Aug. 7, 2007), Texas App. No. 14-06-00066-CR, Not Reported in S.W.3d, 2007 WL 2238890, "Moreover, the *Simmons* Court affirmed the seventeen-year-old offender's sentence of life imprisonment without parole. *Simmons*, 543 U.S. at 560, 125 S.Ct. at 1189. Thus, to the extent *Simmons* has any bearing on this issue at all, it suggests that life imprisonment of a seventeen-year-old capital offender,

such as appellant, does not contravene the constitutional prohibitions against cruel and unusual punishment

- South Dakota, *Owens v. Russell* (2007), 726 N.W.2d 610, 2007 SD 3
- Federal Court, *Miller v. Martin* (N.D. Georgia, Feb. 26, 2007), No. 1:04-cv-1120-WSD-JFK. 2007 WL 639737 Fn. 7 The Supreme Court, however, has so far limited its consideration of juvenile Eighth Amendment rights to capital cases. In the absence of authority to the contrary, this Court must do the same.
- Federal Court, *United States v. Feemster*, 483 F.3d 583 (8<sup>th</sup> Cir.2007).
- Federal Court, *Douma v. Workman* (N.D. Okla, August 13, 2007), No. 06-CV-0462-CVE-FHM, 2007 WL 2331883

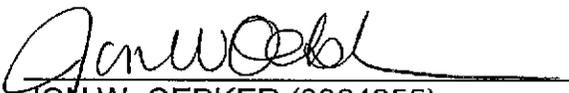
Moreover, to the extent that *Roper* Court found relevant the fact that there is a national trend away from allowing the death penalty for juvenile offenders, it is worth noting that there appears to be a national trend in favor of allowing life penalties for juvenile offenders. As of September 2006, 42 of the 50 states *permitted* the imposition of life without parole on juvenile offenders. *People v. Galvez* (August 22, 2007), Cal.App. 2 Dist.No. B194868, 2007 WL 2377339 In 27 of those states, the sentence was mandatory for certain enumerated crimes. *Id.* Further, other states do not limit imposition of LWOP for youthful offenders to crimes as severe as special-circumstance murder: some states impose life without parole on youthful offenders for crimes such as robbery, aggravated assault and rape. *Id.*

**CONCLUSION**

Accordingly, for the foregoing reasons, the State of Ohio respectfully asks that this Court affirm the judgment of the Court below.

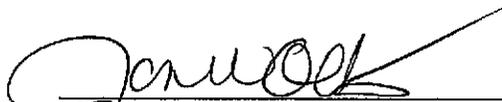
Respectfully submitted,

WILLIAM D. MASON  
CUYAHOGA COUNTY PROSECUTOR

BY:   
JON W. OEBKER (0064255)  
Assistant Prosecuting Attorney  
1200 Ontario Street, 8<sup>th</sup> Floor  
Cleveland, Ohio 44113  
216.443.7800

**SERVICE**

A copy of the foregoing Merit Brief of Appellee has been mailed this 24<sup>th</sup> day of September, 2007, to Erika Cunliffe, 310 Lakeside Avenue #200, Cleveland, Ohio 44113.

  
Assistant Prosecuting Attorney