

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

ROBIN L. JOHNSON

Defendant-Appellant

* Case No. 2008-1477
*
* On Appeal from the
* Lucas County Court of
* Appeals, Sixth Appellate
* District, Case No. L-06-1035
*
*

APPELLEE STATE OF OHIO'S MEMORANDUM IN RESPONSE TO APPELLANT'S
MEMORANDUM IN SUPPORT OF JURISDICTION

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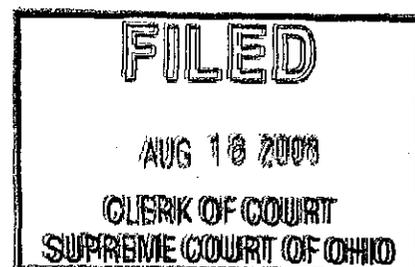


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THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

Appellant Robin L. Johnson has asked this Court to accept jurisdiction of his discretionary appeal of the Court of Appeals' denial of his *Application to Reopen Appeal* brought under *Rule 26(B), Ohio Rules of Appellate Procedure*. Johnson sought to re-open his appeal to present a claim of ineffective assistance of appellate counsel but Johnson did not file his motion within ninety days after the Court of Appeals journalized its decision that affirmed his felony drug conviction. Johnson insists that the Court of Appeals' rejection of his *Application* as untimely filed was an error that this Court should correct. In order to meet the threshold for a discretionary appeal, the issues in the case must involve a "substantial constitutional question" or must be of "public or great general interest." *S. Ct. Prac. R. III §1(B)(2)*. This case does not meet this Court's criteria because the issues of constitutional law raised in this appeal have been previously addressed by this Court and no legitimate reason has been presented for that law to be changed in any manner. Further, this appeal does not present a case of public or great general interest so as to warrant review by this Court.

First, the Court of Appeals' *Decision and Judgment Entry* follows well-established case law from this Court that held applicant's failure to establish good cause for an untimely filing of an *Application to Reopen Appeal* bars consideration of the *Application*. See, *State v. Gumm*, 103 Ohio St.3d 162, 814 N.E.2d 861 (2004); see also, *State v. Farrow*, 115 Ohio St.3d 205, 874 N.E.2d 526 (2007). This Court has also determined that a Court of Appeals must deny an *Application* where the applicant fails to show that a genuine issue exists as to whether he received the ineffective assistance of appellate

counsel. *State v. Allen*, 77 Ohio St.3d 172, 672 N.E.2d 638 (1996); see also, *State v. Tenace*, 109 Ohio St.3d 451, 849 N.E.2d 1 (2006). Johnson has made no showing that the *Gumm*, *Farrow*, *Allen*, or *Tenace* decisions should be overruled or modified. There has been no showing that these cases were wrongly decided, that, given the passage of time, they have lead to either impractical or unfair results, or that they have found to be unworkable in practice. Because this Court has already determined the constitutional issues raised by this appeal, and absent a showing that the aforementioned decisions of this Court should be overruled or modified, this appeal does not present a substantial constitutional question for this Court to resolve.

Second, because the Court of Appeals followed this Court's decisions applying *Appellate Rule 26(B)*, its ruling in this case is nothing new and should have no noticeable impact on any other Ohioan except Johnson (especially since he has been incarcerated following the conclusion of the direct appeal of his criminal conviction). In the years since the *Gumm* and/or *Allen* decisions, there has been no discernable outcry as to the effect of these decisions on an *Application* filed under *Appellate Rule 26(B)* nor has any Ohio Appellate Court asked this Court to take a fresh look at the procedures established under either decision. For these reasons, this case presents a question of interest solely to Johnson and not to the general public. Therefore, this case fails to meet the threshold issue for a discretionary appeal, since it is not a case of "public" or "great general interest" nor does it involve a "substantial" constitutional question, as required by *S. Ct. Prac. R. III §1(B)(2)*. Thus, the Court should deny Johnson's request for a discretionary appeal.

STATEMENT OF THE CASE

On January 14, 2002, the Lucas County Grand Jury issued an Indictment against Robin L. Johnson. Johnson was indicted for Aggravated Possession of Drugs, i.e., psilocybin in an amount exceeding 100 times the bulk amount, in violation of *Ohio Revised Code* §2925.11(A) and (C)(1)(e), a felony of the first degree. The Indictment arose out of the evidence, twenty-four pounds of psilocybin mushrooms, seized by a trooper of the Ohio State Highway Patrol (OSHP) from a warrantless search of a rental car occupied by Johnson and another individual, Andrew K.S. Florey, and their arrest following a traffic stop on the Ohio Turnpike on January 3, 2002. *Indictment, Judgment Entry* Lucas County Court of Common Pleas Case No. CR02-1086 (Nov. 8, 2004).

Johnson pleaded not guilty to the indictment and filed a motion to suppress, under *Rule 12(C)(3), Ohio Rules of Criminal Procedure*, all evidence gathered by the OSHP, Trooper Alejo Romero III and Sergeant Dean Lobacher, during the January 3, 2002, traffic stop. Florey was also indicted in the same case and filed his own motion to suppress. In the motions to suppress, they argued that Trooper Romero improperly extended the duration of the January 3, 2002, traffic stop without the requisite reasonable suspicion of criminal activity so as to use his drug-detection dog, Hans, to conduct a dog sniff of their rental car. In their view, they were improperly detained in violation of their federal and state constitutional rights while Trooper Romero engaged in a "fishing expedition" for illegal drugs. Thus, they argued the trial court had a duty to exclude the evidence obtained from the rental car after Hans indicated, i.e., scratched at the car to show that he had detected the odor of at least one of four controlled substances emanating from the rental car. They

also argued that Hans was not sufficiently reliable so that his indication should not have given Trooper Romero probable cause to search the rental car and seize the psilocybin found inside. *Motions to Suppress*, Case No. CR02-1086 (Mar. 6 and Jul. 11, 2002).

The trial court held a hearing on the motions to suppress with testimony heard on November 25-26, 2002, and January 17, 2003. Trooper Romero testified on behalf of the State regarding his training and experience with Hans along with his actions and observations from the traffic stop. Johnson's only witness was Daniel J. Craig, a veterinarian who testified as a purported expert witness concerning the reliability of drug-detection dogs such as Hans. The trial court also viewed a videotape of the traffic stop taken from the camera located in Trooper Romero's car. Following the testimony and the filing of supplemental briefs, the trial court denied both motions to suppress holding that the OSHP did not unconstitutionally extend the duration of the traffic stop and that Hans was a reliable drug-detection dog whose indication gave the probable cause necessary to conduct a warrantless search of the rental car and seize the controlled substance found therein. *Judgment Entry*, Case No. CR02-1086 (May 8, 2003).

Following the denial of the motions to suppress, the trial court stayed the case pursuant to Johnson's request pending the determination of a similar case then on appeal regarding the reliability of drug-detection dogs. See, *State v. Nyugen*, 157 Ohio App.3d 482, 811 N.E.2d 1180 (Lucas Co. 2004). Johnson asked the trial court to stay his case because the *Nguyen* "case deals with the exact same issues." *Motion to Stay, Judgment Entry* Case No. CR02-1086 (Jun. 30 and Jul. 21, 2003). On June 4, 2004, the Lucas County Court of Appeals held that proof that the drug dog was trained and certified is the

only evidence material to a determination that a particular drug dog is reliable. *Nguyen*, 157 Ohio App.3d at 498, 811 N.E.2d at 1190. Accordingly, with proper training and certification, a dog's indication provides the police with the probable cause necessary to conduct a warrantless search of the automobile in question. *Id.* This Court did not accept a request for a discretionary appeal of the *Nguyen* decision. *State v. Nguyen*, 103 Ohio St.3d 480, 816 N.E.2d 255 (2004). Following *Nyugen*, the trial court removed the stay, Johnson withdrew his plea of not guilty, and entered a plea of no contest to the amended offense of Aggravated Possession of Drugs, in violation of *Ohio Revised Code* §2925.11(A) and (C)(1)(c), a felony of the second degree. The trial court accepted the plea, found Johnson guilty of that offense, sentenced Johnson to a two-year mandatory term of imprisonment, and stayed his jail time pending the outcome of his appeals. *Judgment Entries*, Case No. CR02-1086 (Nov. 14, 2005 and Jan. 6, 2006).

On appeal to the Lucas County Court of Appeals, Johnson argued that the trial court erred in denying his motion to suppress. Johnson did not raise the issue of Hans' reliability most likely due to the *Nyugen* decision. Instead, he insisted that Trooper Romero unconstitutionally used the traffic stop, including his questions to Johnson and Florey, as a "fishing expedition" to investigate his hunch that they were involved in illegal drug activity. Johnson also insisted that, once Trooper Romero told them he was not issuing Florey a speeding citation, the traffic stop should have ended and he unconstitutionally prolonged the duration of the stop, without the requisite reasonable suspicion of criminal activity, to conduct the dog walk-around. The Court of Appeals rejected both arguments. The Court found that, with the speeding violation, Trooper

Romero had probable cause to stop them and to run background computer checks on them. The Court also held that his questioning of Johnson and Florey was not an impermissible expansion of the stop and that, because Hans indicated before the background computer checks were completed, he had probable cause to search and seize the psilocybin so that the trial court properly denied the motions to suppress. *State v. Johnson*, Case No. L-06-1035 (Aug. 3, 2007) 2007-Ohio-3961. On December 12, 2007, this Court rejected Johnson's request for a discretionary appeal. *State v. Johnson*, 116 Ohio St.3d 1441, 877 N.E.2d 991 (2007).

The trial court took note of the conclusion of Johnson's appeals and had him taken into custody on April 1, 2008, to begin serving his two-year sentence for his drug conviction. Johnson, through new counsel, filed an *Application to Reopen Appeal* under *Appellate Rule 26(B)* in the Court of Appeals on May 21, 2008, approximately nine and one-half months after the Court of Appeals affirmed his conviction. Johnson argued that his former appellate counsel provided ineffective assistance of counsel when he failed to assert on his direct appeal two assignments of error regarding the trial court's decision to overrule his motion to suppress the evidence seized by the OSHP. The *Application* contained two proposed assignments of error: (1) the trial court's judgment that the drug dog was competent and reliable was against the manifest weight of the evidence and was an abuse of discretion; and (2) the trial court erred when it refused to require the State to disclose the pre-incident real-world performance records of the drug dog Hans notwithstanding the Court of Appeals' decision in *State v. Nguyen*, 157 Ohio App.3d 482 (2002). Johnson argued that appellant counsel's failure to assert these assignments of

error was so egregious that the Court of Appeals should re-open his appeal under *Appellate Rule 26(B)*. *Application to Reopen Appeal*, Case No. L-06-1035 (May 21, 2008).

Johnson conceded that he did not file his *Application* within the ninety days required for such an *Application* under *Appellate Rule 26(B)*. However, Johnson argued that his untimely filing should be excused because: (1) Johnson's former appellate counsel continued to represent him for months after the Court of Appeals issued its decision and he should not have been expected to file an *Application* that raised his own ineffectiveness; and (2) Johnson was unaware of the ninety-day filing requirement of *Appellate Rule 26(B)*. The Court of Appeals overruled Johnson's *Application*. The Court held that Johnson's *Application* presented facts outside the appellate record so that his *Application* should have been brought as a *Petition for Post-Conviction Relief* under *Ohio Revised Code §2953.21*. The Court also held that, assuming that the facts presented by Johnson were true, those facts did not constitute the good cause required under *Appellate Rule 26(B)* for the Court to reopen his appeal. With the denial of his *Application*, Johnson filed a notice of appeal with this Court and filed a petition for *writ of certiorari* with the United States Supreme Court. See, *Johnson v. Ohio*, Case No. 08-5177 (Jun. 25, 2008).

STATEMENT OF FACTS

As to the underlying conviction, on January 3, 2002, Trooper Romero, working with Hans, stopped a rental car occupied by Johnson and co-defendant Flory for speeding on the Ohio Turnpike. At that time, Trooper Romero was a canine handler with the OSHP. Hans was trained (200 hours) and certified by the North American Police Work Dog Association (NAPWDA) and the Ohio Peace Officers training Commission (OPOTC) with

a 100% grade in drug detection with his certification on April 25, 2001, as a drug dog. Hans was trained to detect the odor of four controlled substances, marijuana, cocaine, heroin, and methamphetamines and, after his certification, Hans and Trooper Romero became a K-9 unit and participated in ongoing drug detection training on a weekly basis. As of January 3, 2002, Trooper Romero and Hans had been working together for eight months and Hans had not been found to be unreliable, as a drug detection dog, by any Court. *Transcript of Proceedings*, Case No. CR02-1086 pp. 16-18, 27-33, 36-55, 65-99 (Nov. 25, 2002).

During the stop, Trooper Romero decided to conduct a walk-around of the rental car. During the walk-around Hans indicated, i.e., scratched at the driver's side door of the car to show that Hans had detected at least one of the four controlled substances emanating from the car. There was a dog traveling with Johnson and Flory but that dog did not have an effect on Hans because he had been trained in the presence of other dogs, had been used in other car searches with other dogs present without distraction, and walked around the rental car twice without revealing any distraction. With Hans' indication, Trooper Romero and Sergeant Lobacher searched the car and discovered, in the trunk, twenty-four pounds of a controlled substance-psilocybin mushrooms. The search also revealed a small amount (.515 grams) one of the controlled substances (marijuana in the form of marijuana seeds) that Hans was trained to detect along with drug paraphernalia (cigarette rolling papers) and \$800.00 in cash.. *Transcript of Proceedings*, pp .16-30.

ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW

Appellant's Proposition of Law No. 1: A Court of Appeals must consider factual allegations referring to matters outside the case record in determining the presence or absence of "good cause" for late filing of an App. R. 26(B) application and may not deny such application on grounds that outside-the-record allegations of good cause leave post-conviction relief, O.R.C. 2953.21, as an appellant's exclusive remedy.

Appellee's Response: Neither the continued representation of the applicant by former appellate counsel nor the applicant's ignorance of the filing requirements constitute good cause to excuse an untimely filing of an *Application to Reopen Appeal* brought under *Appellate Rule 26(B)*. *State v. Gumm*, 103 Ohio St.3d 162, 814 N.E.2d 861 (2004).

An Application to Reopen an Appeal is governed by *Appellate Rule 26(B)*.

Appellate Rule 26(b)(1)-(5) requires the applicant produce, among other things, a sworn statement from him as to the basis for his claim that appellate counsel's representation was deficient, a showing of good cause for an untimely filing if the application was filed more than ninety days after journalization of the appellate judgment in question, one or more assignments of error or arguments in support of assignments of error that were previously not considered on the merits in the case by any appellate court, and a showing that a genuine issue exists as to whether he was denied the effective assistance of counsel on appeal. *Morgan v. Eads*, 104 Ohio St.3d 142, 818 N.E.2d 1157 (2004); *State v. Lechner*, 72 Ohio St.3d 374, 650 N.E.2d 449 (1995). Thus Johnson had to satisfy all of the above for the Court of Appeals to consider reopening his appeal. *Id.*

In this case, Johnson did not file his *Application* within ninety days after the journalization of the Court of Appeals' *Decision and Judgment Entry* that affirmed his conviction and sentence. This Court has held that "[c]onsistent enforcement of the rule's deadline by the appellate courts in Ohio protects on the one hand the State's legitimate

interest in the finality of its judgments and ensures on the other hand that any claims of ineffective assistance of appellate counsel are promptly examined and resolved." *State v. Gumm*, 103 Ohio St.3d 162, 814 N.E.2d 861 (2004). In *Gumm*, this Court examined the reasons given by the defendant for the untimely filing of his Application--that his attorneys continued to represent him long after the ninety day deadline so that they could not be required to argue, in his *Application*, their own ineffectiveness and that he did not have the legal expertise or financial resources to file the *Application* on his own. *Gumm*, 103 Ohio St.3d at 162-163, 814 N.E.2d at 862.

In rejecting the defendant's arguments, this Court stated that the defendant "could have retained new attorneys after the court of appeals issued its decision in 1994 or he could have filed the application on his own. What he could not do was ignore the rule's filing deadline." *Gumm*, 103 Ohio St.3d at 163, 814 N.E.2d at 864. While this Court observed that attorney cannot be expected to argue his own ineffectiveness, other attorneys, or the defendant himself, could have pursued the filing of the an *Application*. *Id.* Moreover, this Court stated that "the lack of effort or imagination, and ignorance of the law *** do not automatically establish good cause for failure to seek timely relief" under *Appellate Rule 26(B)(2)*. *Id.* Since the *Gumm* decision, this Court has followed that decision's holding on several occasions. *State v. Farrow*, 115 Ohio St.3d 215, 874 N.E.2d 526 (2007); *State v. Hoffner*, 112 Ohio St.3d 467, 860 N.E.2d 1021 (2007); *State v. Hancock*, 108 Ohio St.3d 194, 842 N.E.2d 497 (2006).

In this case, Johnson concedes that he did not timely file his *Application* under *Appellate Rule 26(B)*. However, Johnson claims that he had the requisite good cause for

a late filing because his former appellate counsel continued to represent him for months after the Court of Appeals' decision that affirmed his conviction and that he was not aware of the requirements of *Appellate Rule 26(B)*. Assuming these facts to be true, this Court has consistently held that these facts do not establish the good cause needed permit a late filing of the Application. *Gumm, supra; Farrow, supra; Hoffner, supra; Hancock, supra.*

The State is unsure of the recommendation by the Court of Appeals, in its *Decision and Judgment Entry*, that Johnson's claim was "more properly a subject for a *Petition for Post-Conviction Relief*" brought under *Ohio Revised Code §2953.21* regarding his *Application*. In the State's view, such a *Petition* is limited to litigating claims of ineffective assistance of counsel that occurred in the trial court. *Morgan, supra; State v. Murnahan*, 63 Ohio St.3d 60, 584 N.E.2d 1204 (1992). With his *Application*, Johnson did not raise any claims as to the ineffective assistance of trial counsel; instead he asserted that former appellate counsel provided ineffective assistance of counsel on, and perhaps after, his direct appeal to the Court of Appeals and to this Court of his criminal conviction. In addition, in the State's view, an *Application*, such as that filed by Johnson in the Court of Appeals, is specifically designed to address a defendant's claim of ineffective assistance of appellate counsel and, under *Appellate Rule 26(B)(2)(d)*, the defendant is required to file evidence--a sworn statement--with his *Application* that supports his claim. However, the Court of Appeals' reference to §2953.21 does not mean that it erred in denying Johnson's *Application*. As noted above, the Court of Appeals held, in the alternative, that the facts Johnson placed in the record were insufficient to permit him to file his *Application* after the ninety-day period set forth in *Appellate Rule 26(B)(1)* had run. Therefore, notwithstanding

any reference to §2953.21, the Court of Appeals properly denied Johnson's *Application* pursuant to *Appellate Rule 26(B)(2)*. See, *State v. Allen*, 77 Ohio St.3d 172, 672 N.E.2d 638 (1996) (where the judgment below is correct, a reviewing court is not authorized to reverse such judgment merely because erroneous reasons were given as the basis thereof). Accordingly, this Court should reject Johnson's request for a discretionary appeal and, if necessary under *S. Ct. Prac. R. III §6(B)(2)*, this Court should summarily affirm the judgment of the Court of Appeals.

Appellant's Proposition of Law No. 2: The behavior of an otherwise trained and certified "drug dog" at the precise time and place at which he allegedly "alerts" is of critical importance in determining the reliability of the dog.

Appellant's Proposition of Law No. 3: The real world performance records of a drug dog, both pre- and post-incident, are relevant to a determination of the dog's reliability and are subject to disclosure by the State prior to hearing on a motion to suppress.

Appellee's Response: Where the applicant does not establish that a genuine issue exists as to whether he received ineffective assistance of appellate counsel, the *Application to Reopen Appeal* under *Appellate Rule 26(B)* must be overruled. *State v. Allen*, 77 Ohio St.3d 172, 672 N.E.2d 638 (1996).

A criminal defendant has a constitutional right to the effective assistance of counsel, including counsel on appeal. *State v. Tenace*, 109 Ohio St.3d 451, 849 N.E.2d 1 (2006); *Allen*, 77 Ohio St.3d at 173, 672 N.E.2d at 639. The two-step analysis of *Strickland v. Washington*, 466 U.S. 668 (1986), is the appropriate standard to determine whether an applicant has satisfied his burden to show that a genuine issue exists as to the ineffectiveness of appellate counsel. *Id.* The applicant must first establish that appellate counsel's performance was deficient (fell below an objective standard of reasonableness)

for failing to raise the issues he now presents. *Id.* If so, the applicant must then show that there was a reasonable probability that, but for counsel's unprofessional errors, the result of his appeal would have been different. *Id.*; see also, *State v. Palmer*, 92 Ohio St.3d 241, 749 N.E.2d 749 (2001)

Even if Johnson's late filing of his *Application* may be excused, the Court of Appeals properly rejected the *Application*. Johnson asserts propositions of law two and three as though this case is a direct appeal of his criminal conviction. However, Johnson must show that the law and the facts supporting these two propositions were so overwhelming in his favor that his former appellate counsel's failure to raise them in the Court of Appeals constituted the ineffective assistance of appellate counsel. *Tenace, supra*; *Allen, supra*; *Palmer, supra*. As will be established below, Johnson did not show that former appellate counsel's failure to raise the issues of the drug dog's credibility or the scope of the discovery provided by the State was unreasonably unsound appellate strategy nor did Johnson show that, had former appellate counsel raised these issues, there was a reasonable probability that his conviction would have been reversed.

First, the Sixth District Court of Appeals determined, prior to Johnson's case, that all the State must show to prove the drug dog's reliability is to provide proof that the dog was trained and certified and that the training and certification may be shown by testimony or by documentary proof. *Nguyen*, 157 Ohio App.3d at 500, 814 N.E.2d at 1194. In this case, it was undisputed that Hans was trained and certified as a drug detection dog. Thus, former appellate counsel did not provide ineffective assistance of counsel by ignoring an issue during Johnson's appeal that the Court of Appeals had previously decided adversely

to him. See, *Jones v. Barnes*, 463 U.S. 745, 750 (1983) (experienced advocates since time beyond memory have emphasized the importance of winnowing out the weaker arguments on appeal and focusing on one central issue); *Allen, supra* (*Jones, supra*, followed).

Second, there was evidence, apart from the training/certification documentation, as to Hans' reliability from the testimony of Trooper Romero. With these facts in the record, the trial court had a more than sufficient basis to conclude that Hans was a reliable drug detection dog so that its conclusion that his indication provided the probable cause necessary for the search of the rental car was not clearly erroneous. Because there was no showing that the trial court's conclusion as to Hans' reliability was clearly erroneous, former appellate counsel did not provide ineffective assistance of counsel by choosing not to assert such a losing argument on Johnson's direct appeal. See, *Barnes, supra*; *Allen, supra*

Third, while the videotape of the stop speaks for itself, all of the evidence presented at the hearing (testimony and videotape) demonstrated that the dog located in the back seat played no role as to Hans' indication that a controlled substance was present in the rental car so that former appellate counsel had no duty to raise this issue on appeal. Fourth, former appellate counsel was not ineffective for failing to challenge the drug detection dog documents withheld by the State given the *Nguyen* decision that barred the production of these documents. *Nguyen*, 157 Ohio App.3d at 811 N.E.2d at 497, 811 N.E.2d at 1490. Thus, Johnson has not shown that former appellate counsel's representation was deficient so that the Court of Appeals properly overruled his *Application*. *Tenace, supra*; *Allen supra*.

CONCLUSION

Based on the foregoing, Johnson has not satisfied the standard for a discretionary appeal under this Court's Rules of Practice. Johnson has not shown that this case presents a substantial constitutional question that has not been previously addressed by this Court nor has he showed that this case involves a question of public or great general interest. Therefore, the State asks this Court to reject Johnson's request for a discretionary appeal.

Respectfully submitted,

**JULIA R. BATES
LUCAS COUNTY PROSECUTING ATTORNEY**

By  _____

Kevin A. Pituch
Assistant Prosecuting Attorney

CERTIFICATION OF SERVICE

This is to certify that a copy of the foregoing Memorandum of Appellee State of Ohio was sent by Ordinary U.S. mail this 12th day of August 2008 to Paul Dennis Pusateri Esq., 492 City Park Ave., Columbus, Ohio 43215, Counsel for Appellant.

 _____

Kevin A. Pituch
Assistant Prosecuting Attorney