

IN THE OHIO SUPREME COURT
COLUMBUS, OHIO

ROBERT LAWRENCE, : Case No. 2008-0844
: :
Defendant-Appellant, : On appeal from the Butler Co.
: Court of Appeals, 12th Appel-
vs. : late District
: :
STATE OF OHIO :
: :
Plaintiff-Appellee. :

REPLY BRIEF OF APPELLANT ROBERT LAWRENCE

John H. Forg, III (0041972)
[Counsel of Record]
Repper, Pagan, Cook, Ltd.
1501 First Avenue
Middletown, Ohio 45044
(513) 424-1823 (tel.)
(513) 424-3135 (fax)
jhforg@cinci.rr.com

Attorney for Appellant
Robert Lawrence

Robin N. Piper (0023205)
Michael A. Oster, Jr. (0076491)
[Counsel of Record]
315 High St., 11th Floor
Hamilton, Ohio 45012
(513) 887-3474 (tel.)
(513) 887-3489 (fax)
osterm@butlercountyohio.org

Attorney for Appellee
State of Ohio

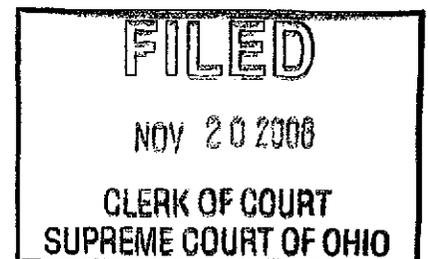


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II. STATEMENT OF THE CASE

Now comes plaintiff-appellant Robert Lawrence (“Lawrence”), by and through counsel, and hereby makes the following reply to the Merit Brief of Appellee, State of Ohio (“State” or “Government”), filed in this matter.

III. LAW AND ARGUMENT

A. PROPOSITION OF LAW No. 1:

A Complete Offense Cannot be a Lesser Included Offense of an Attempt Offense.

Appellee State of Ohio, in its merit brief, has provided a long, windy defense of the decision of the Twelfth District Court of Appeals in this matter. First, appellee extols the wisdom of prior decisions of this court in this area, particularly the decisions of this Court in State v. Deem (1988), 40 Ohio St.3d 205, 533 N.E.2d at 294, and State v. Wilkins (1980), 64 Ohio St.2d 382. (Merit Brief of Appellant at 1-9.) But then, it criticizes recent more precedent, specifically State v. Barnes (2002), 94 Ohio St.3d 21, 759 N.E.2d 1240, for strictly adhering that earlier precedent. (*Id.* at 10-11 and 13-14.) Next, appellee meanders into the law of allied offenses. (*Id.* at 11-12.) And finally, the state proffers, as a way out of this supposed morass, the “novel approach” followed by the Twelfth District in the decision below. (*Id.* at 16-22.) This tortured argument belies an attempt to give some modicum of credence to an untenable position.

1. Appellant acknowledges that test for determining the existence of a “lesser, included offense” set forth in the *Deem*, *Kidder* and *Wilkins* decisions constitutes controlling precedent.

Appellant has acknowledges that State v. Kidder (1987), 32 Ohio St.3d 279, 513 N.E.2d 311, as modified by State v. Deem, *supra*, 40 Ohio St. 3d at 204, 533 N.E.2d at 294, constitute controlling

precedent setting forth the test for determining whether a particular offense is a “lesser, included offense” of a greater offense. (See Merit Brief of Appellant at 5-6.) The state, however, denigrates Lawrence’s use of this precedent by wrongly asserting that “Appellant argues that no court in Ohio can look to the facts or evidence of a case when determining what constitutes a lesser included offense ...” (Merit Brief of Appellee at 5, lines 1-2.) That contention misconstrues both Lawrence’s argument and the very precedent that the state now commends.

One offense may be a lesser, included offense of another offense where (i) the first offense carries a lesser penalty than the second offense, (ii) the greater offense, as statutorily defined, cannot be committed without the lesser offense, as statutorily defined, also being committed, and (iii) some element of the greater crime is not required to prove the commission of the lesser offense. State v. Deem, *supra*, 40 Ohio St. 3d at *syllabus* ¶3; 533 N.E.2d at 294; State v. Kidder (1987), 32 Ohio St.3d 279, 280, 513 N.E.2d 311, 314. As a further limitation, before charging a jury to consider a lesser, included offense, the trial court must also determine whether the evidence warrants such an instruction. State v. Kidder, 32 Ohio St.3d at 281-82, 513 N.E.2d at 315; State v. Wilkins, *supra*, 64 Ohio St.2d at 382, 415 N.E.2d at 303. The Wilkins decision — “[t]he second step of this test, giving a lesser-included-offense charge only when supported by the evidence, State v. Kidder, 32 Ohio St.3d at 281, 513 N.E.2d at 314 — therefore acts as a break on the Kidder-Deem test. But the two do not work together concurrently. Rather, Wilkins only comes into play once a court has found one offense to be a lesser, included offense of another offense.

The interplay of these different approaches may be seen in State v. Johnson (1988), 36 Ohio St.3d 224, 522 N.E.2d 1082. In that case, the defendant was charged with the rape of two young girls. The state’s case rested entirely on the testimony of the two victims, who both testified that on

at least eight occasions the defendant had placed his “bird” in their “peach” or in their “mouth.” The two victims also testified that defendant also placed his “bird,” at various times, on their back, buttocks and legs. State v. Johnson, *supra*, 36 Ohio St.3d at 227, 522 N.E.2d at 1085. Defendant denied that the alleged incidents of penetration had ever occurred, and attempted to show that the victims had fabricated their testimony. At the close of evidence, the defendant requested an instruction of the lesser, included offense of Gross Sexual Imposition, which the trial court denied. *Id.*

On appeal, the parties agreed that Gross Sexual Imposition was a lesser, included offense of Rape under the Kidder-Deem test. *Id.* at 226, 522 N.E.2d at 1085. However, the Court held that Kidder requires further consideration of the specific facts of the case. *Id.* Applying a factual analysis, the Court concluded that the trial court had properly refused to give a lesser, included offense instruction:

... [T]he jury could not consistently or reasonably disbelieve the girls’ testimony as to penetration and, at the same time, consistently and reasonably believe their testimony on the contrary theory of mere touchings specifically related to any of the charged events.

Id. at 227-28, 522 N.E.2d at 1085. The Court further opined:

... In this case, the evidence tends, at most, to prove that one or more incidents of gross sexual imposition may have occurred *in addition to* the charged rapes. Nothing in the record reasonably proves that such incidents were included within the charged events. If the evidence was deficient in proving one or more of the penetrations, the jury should not have been permitted to compromise an acquittal in favor of conviction on a lesser offense. The jury’s only reasonable choice was between a conviction of each separate rape or an acquittal thereon.

Id. at 228, 522 N.E.2d at 1086 [emphasis in original]. Thus, the Kidder-Deem test is a first step in a two-step analysis. If the two offenses at issue do not align with one another under that analysis, the court need not consider the facts of the underlying case.

The state has mistakenly telescoped this abstract analysis contained in the Kidder-Deem test, onto the entire, two-step analysis. This misunderstanding permeates the state's entire argument. For example, Lawrence has attacked the fact-based approach followed by the trial court because it failed to apply the Kidder-Deem test, not because a factual analysis is not part of that overall analysis. Since Gross Sexual Imposition, as statutorily-defined, cannot be a lesser, included offense of Attempted Rape, as statutorily-defined, there was no need to consider the facts of the case. (See Merit Brief of Appellant at 7, lines 3-19.) Applying this same logic, the state, by emphasizing, in its Merit Brief, the importance of considering the individual acts in each particular case, is merely flogging a dead horse.

2. The analysis in the *Barnes* decision accords with the test for determining the existence of a "lesser, included offense" set forth in the *Deem*, *Kidder* and *Wilkins* decisions.

Appellee's failure to understand that Kidder-Deem test is simply the first step in a two-step analysis leads it to criticize subsequent decisions applying that analysis, and in particular, State v. Barnes, *supra*, 94 Ohio St.3d at 26, 759 N.E.2d at 1244. In that case, this Court considered whether Felonious Assault was a lesser, included offense of Attempted Murder. Emphasizing the importance of the second prong of the Kidder-Deem test, the panel concluded:

... felonious assault under R.C. 2903.11(A)(2) is not a lesser included offense of attempted murder because it is possible to commit the greater offense without committing the lesser one. For example, an offender may commit an attempted murder without use of a weapon, meaning that "attempted murder can sometimes be committed without committing felonious assault ..."

Id. [citing State v. Nelson (Tuscarawas 1996), 122 Ohio App.3d 309, 315, 701 N.E.2d 747, 750].

Appellee now characterizes that analysis as "mechanical" "impractical" and "wrought with guesswork" because it fails to account for the specific facts in the record before the Court. (Merit

Brief of Appellee at 10, lines 15-16.) In fact, such a result follows logically from application of the very precedent touted by appellee.

Much of this displaced anger derives from the states failure to grasp the constitutional concerns underlying the Barnes decision. The Ohio Constitution mandates that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless upon presentment or indictment of a grand jury.” SEC. 10, ART. I, OHIO CONST. This provision enforces the due process requirement of the Fourteenth Amendment that a criminal defendant must be given “fair notice” of the charge or charges against him in order to permit him to prepare a defense. AMEND. XIV, U.S. CONST.; In re Oliver (1948), 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed.2d 682. Ostensibly, the giving of an instruction on a lesser, included offense violates this principle, since the defendant would be called upon to answer for a charge not contained in the original indictment. The Kidder-Deem test addresses that very concern.

The rationale underlying the entire concept of a lesser, included offense is that where a Grand Jury finds “probable cause” to charge a defendant with a particular crime, the ensuing indictment puts the defendant on notice, not only of that crime, but of attempt crimes, inferior degrees of the same crime, and lesser, included offenses, *i.e.* crimes have identical elements as the charged offense. State v. Deem, *supra*, 40 Ohio St.3d at 208, 533 N.E.2d at 297. An instruction on a lesser, included offense satisfies this constitutional requirement because of the synchronicity of essential elements in the greater and lesser offenses, so that when a criminal defendant is given notice of the greater offense, he is also given notice of the lesser offense. This scheme satisfies Due Process. *Id.* at 210, 533 N.E.2d at 298.

In Barnes, the Court confronted this constitutional roadblock. Comparison of the statutory elements of the lesser offense at issue, Felonious Assault under R.C. §2903.11, and the greater offense, Attempted Murder under R.C. §§2903.02(A) and 2923.02(A), revealed that the two do not squarely align. Felonious assault contains the additional requirement that the defendant attempt to cause physical harm “by means of a deadly weapon or dangerous ordinance.” R.C. §2903.11(A)(2). State v. Barnes, *supra*, 94 Ohio St.3d at 26, 759 N.E.2d at 1244. Consequently, an indictment for Attempted Murder alone would not put a defendant on “fair notice” that he could be held accountable for using a deadly weapon or dangerous ordinance.

Moreover, the specific facts of a particular case are immaterial at this stage of the analysis. The Kidder-Deem test addresses the sufficiency of notice — necessarily an abstract concept — not the sufficiency of proof. An instruction as to a crime deemed to be a lesser, included offense of a greater, charged offense under the Kidder-Deem test is constitutionally sound because the defendant has already received “fair notice” of every element of that lesser offense. Only then may a court consider the propriety of giving such an instruction in light of the facts of that particular case.

3. The analysis in the *Cabrales* decision is inapposite to any analysis of lesser, included offenses.

Appellee next attempts to draw an analogy with this Court’s analysis of “allied offenses of similar import” set forth in State v. Cabrales (2008), 119 Ohio St.3d 54, 2008-Ohio-1625. In Cabrales, this Court rejected a “strict textual comparison” as to whether two particular offenses were allied offenses, and therefore merged together for purpose of punishment, in favor of a more flexible approach. *Id.* at 58, 2008-Ohio-1625 at ¶26. Yet the constitutional concerns invoked by Cabrales are entirely different from those at issue herein.

The issue of allied offenses invokes double jeopardy protections against cumulative punishment for the same offense. State v. Rance (1999), 85 Ohio St.3d 632, 634, 710 N.E.2d 699, 701. Such protections are not rigid. “Double Jeopardy ... does not more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” Missouri v. Hunter (1983), 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d 535, 542. The Cabrales decision merely holds that the “strict textual comparison” of earlier precedent conflicts with the legislative intent under R.C. 2941.25, the codification of the doctrine of judicial merger. State v. Cabrales (2008), 119 Ohio St.3d 54, 58, 2008-Ohio-1625 at ¶27.

In contrast, the issue of lesser, included offenses invokes constitutional “fair notice.” “Fair notice” requires, at a minimum,

... [first] the elements of the offense charged and fairly inform[] a defendant of the charge against which he must defend, and second, enable[] him to plead an acquittal or conviction in bar of future prosecutions for the same offense ...

State v. Childs (2000), 88 Ohio St.3d 558, 565, 728 N.E.2d 379 [citing Hamling v. United States (1974), 418 U.S. 87, 117-18, 94 S.Ct. 2887, 41 L.Ed.2d 590]. Consequently, an instruction on a lesser included offense is proper only where the elements in the greater and lesser offenses align, so that when a criminal defendant is given notice of the greater offense, he is also given notice of the lesser offense. State v. Deem, *supra*, 40 Ohio St.3d at 210, 533 N.E.2d at 298. This necessarily requires a strict comparison of the elements of the two offenses. Any less rigid approach would not pass constitutional muster. The holding in Cabrales is therefore inapposite to this case, and the state’s invocation of that holding impertinent.

4. The approach followed by the Twelfth District, in Which Allows an Instruction on a Lesser, Included Offense of the Inchoate Crime with Which Lawrence was Charged, but of a Choate Crime with Which he was Not Charged, Violated Due Process.

Finally, the state leads us to its final proposition: that this Court overrule Barnes and adopt the “novel approach” set forth by the Twelfth District Court of Appeals in the decision below. That court, in applying the Kidder-Deem test to determine whether Gross Sexual Imposition was a lesser, included offense of Attempted Rape looked, not to the greater offense of Attempted Rape, but to that of Rape itself. State v. Lawrence (Butler 2008), CA08-01-0017, 2008-Ohio-1354 at ¶¶25-26. This approach allowed the appellate court to focus on the offense of Rape, rather than Attempted Rape, and to circumvent the constitutional protections embodied in the second prong of the Kidder-Deem test completely. The court unsurprisingly held that because Gross Sexual Imposition was a lesser, included offense of Rape, it was also a lesser, included offense of Attempted Rape. *Id.* at ¶27. The state now expressly argues that this Court overrule Barnes, and implicitly with it the entire Kidder-Deem line of cases, and instead adopt this approach as the law of the land.

Yet that approach is clearly wrong. The distinction between Rape and Gross Sexual Imposition is essentially that between “sexual conduct” and “sexual contact.” Compare R.C. §§2907.02(A) [Rape] and 2907.05(A) [Gross Sexual Imposition]. Sexual conduct is defined to include vaginal or anal intercourse, cunnilingus, fellatio, or digital penetration, see R.C. §2907.01(A), while sexual contact is the touching of an “erogenous zone.” R.C. §2907.01(B). The distinction between sexual conduct and sexual contact is the element of penetration. Gross Sexual Imposition is therefore a lesser, included offense of Rape, *see State v. Johnson* (1988), 36 Ohio St.3d 224, 226, 522 N.E.2d 1082, 1084, because one could never engage in vaginal or anal intercourse, cunnilingus, fellatio, or digital penetration without also touching an erogenous zone.

An attempt crime is defined as one where a person , purposely or knowingly, “engage[s] in conduct that, if successful, would constitute or result in the offense.” R.C. §2923.02(A). Therefore, the offense of Attempted Rape must be defined as engaging in conduct which, if successful, would result in vaginal or anal intercourse, cunnilingus, fellatio, or digital penetration. R.C. §§2907.02(A); 2923.02(A). Such conduct need not include the touching of an erogenous zone. Consequently, a person could commit the crime of attempted rape without committing the crime of gross sexual imposition, for example, where a man may attempt to force himself upon a woman without ever touching an erogenous zone. Thus, the two offenses are not so closely aligned that the commission of attempted rape necessarily results in the commission of gross sexual imposition.

More importantly, the analysis followed by the Twelfth District deprives a criminal defendant of “fair notice,” and hence, Due Process. This Court has explained the rationale in promulgating the Kidder-Deem test:

... Our adoption of a test which looks to both the statutory elements of the offenses involved and the evidence supporting such lesser offenses as presented at trial is grounded primarily in the need for clarity in meeting the constitutional requirements that an accuse have notice of the offenses charged against him.

State v. Deem, *supra*, 40 Ohio St.3d at 210, 533 N.E.2d at 298. The analysis applied by the Twelfth District, and now advocated by the state, completely abrogates that rationale. Instead, this approach allows a court to compare a lesser offense to a greater offense with which the defendant was never charged.

Such is the case here. The Grand Jury, by returning an indictment for attempted rape, had already determined that probable cause did not exist to charge Lawrence with the completed crime of rape. As the Twelfth District conceded “[o]ne cannot logically align the elements of a completed offense, such as gross sexual imposition, with the elements of an inchoate offense, such as attempted

rape.” State v. Lawrence, *supra*, 2008-Ohio-1354 at ¶27. Looking one step backwards, an indictment charging a criminal defendant with an inchoate offense, such as attempted rape, could never provide “fair notice” of a choate defense, such as gross sexual imposition. The very logic espoused by the appellate court below, and presumably the state now, completely undermines the constitutional basis for giving a lesser, included offense instruction in this case.

This leads inexorably to the conclusion that a complete offense cannot be a lesser, included offense of an attempt offense. As a consequence, the giving of an instruction on Gross Sexual Imposition in the trial below violated Due Process. Lawrence’s conviction for that crime must be vacated and the charges against him dismissed.

B. PROPOSITION OF LAW No. 2:

A Criminal Defendant May Not be Convicted on the Basis of Facts neither Presented to a Grand Jury nor Charged in an Indictment.

The State of Ohio, in its Merit Brief, gives short shrift to Lawrence’s argument that the trial court’s instruction on Gross Sexual Imposition, and more particularly, the trial judge’s clarification of that instruction allowing the petit jury to consider a male breast as an “erogenous zone” under R.C. §2907.01(B), opened the door for that jury to convict Lawrence of a crime not charged in the Indictment, dismissing it as mere “conjecture.” (Merit Brief at 23-24.) The issue, however, is again one of “fair notice,” and once again, the state completely ignores that constitutional issue.

The Ohio Constitution mandates that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless upon presentment or indictment of a grand jury.” SEC. 10, ART. I, OHIO CONST. This provision enforces the due process requirement of the Fourteenth Amendment that a criminal defendant must be given “fair notice” of the charge or charges against him in order to

permit him to prepare a defense. AMEND. XIV, U.S. CONST.; In re Oliver (1948), 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed.2d 682. In practice, this constitutional provision guarantees

[t]he material and essential facts constituting such an offense are found by the presentment of the grand jury; and if one of the vital and material elements identifying and characterizing the crime has been omitted from the indictment such defective indictment is insufficient to charge an offense, and cannot be cured by the court, as such a procedure would not only violate the constitutional rights of the accused, but would allow the court to convict him on an indictment essentially different from that found by the grand jury.

State v. Harris (1932), 125 Ohio St. 257, 264, 181 N.E. 104; State v. Headley (1983), 6 Ohio St.3d 475, 478-79, 453 N.E.2d 716.

Assuming, *arguendo*, that the instruction on Gross Sexual Imposition was itself proper, Lawrence asserts that the Indictment herein did not state an essential element of the crime of Gross Sexual Imposition, as defined by the trial court and presented to the petit jury, to wit: sexual contact by touching a breast. The Indictment in this case charges Lawrence with a single count of Attempted Rape, and reads, in pertinent part, as follows:

On or about June 26, 2006, at Butler County, Ohio, Robert Lawrence did purposely or knowingly ... engage in conduct which if successful would constitute or result in the offense of RAPE, O.R.C. §2907.02(A)(1)(b), to wit: engage in *sexual conduct* with another who is not the spouse of the offender ... when the other person is less than thirteen years of age ...

(Indictment, T.d. at 2 [emphasis added].) “Sexual conduct” is defined as vaginal or anal intercourse, cunnilingus, fellatio, or digital penetration. R.C. §2907.01(A). Thus, the Indictment put Lawrence on notice that he engaged in a course of conduct which, if successful, would have resulted in vaginal or anal intercourse, cunnilingus, fellatio, or digital penetration. More importantly, the Indictment gives no indication that the Grand Jury ever considered the touching of a male breast as part of that course of conduct.

At trial, the court gave an instruction of Gross Sexual Imposition on the theory that such a crime was a “lesser offense” of the charged crime of Attempted Rape. (*See* T.d. at 218, line 9, to 219, line 4.) The elements of the crime of Gross Sexual Imposition are: (i) sexual contact (ii) with another not the spouse of the first person, (iii) where that other person is under thirteen years of age. R.C. §2907.05(A)(4). “Sexual contact” is the touching of an erogenous zone, defined as, without limitation, the thigh, genitals, buttocks, pubic region or, in the case of a female, the breasts. R.C. §2907.01(B). To the extent that Gross Sexual Imposition may be a lesser, included offense of Attempted Rape, the Indictment in this case properly put Lawrence on notice of any sexual contact that might be incidental to any sexual conduct: the touching of genitals, pubic area, anus, thighs or buttocks during anal or vaginal intercourse; the touching of genitals, pubic area, or mouth during fellatio or cunnilingus; and the touching of the anus or vagina during digital penetration.

Significantly, the Indictment did not and could not put Lawrence on notice of any sexual contact involving the touching of breasts, which is not incidental to sexual conduct of any kind. The Indictment further gives no notice that the charge of attempting to engage in anal intercourse with Kincer also involved groping Kincer’s breast. And most importantly, there is nothing in the record indicating that the Grand Jury ever considered such evidence as constituting part of the offense of Attempted Rape with which it charged Lawrence. In the “context of this case” then, the touching of a male breast cannot be considered sexual contact because such conduct lies outside the scope of the Indictment.

As a result, the trial judge’s answer to the jury’s question constitutes a *de facto* amendment of the Indictment to include an entirely new offense, to wit: Gross Sexual Imposition by groping Kincer’s breast. While the criminal rules permit a trial court to amend an Indictment, they flatly

prohibit an amendment that changes the substance or identity of the crime. RULE 7, OHIO R. CRIM. PROC.; State v. O'Brien (1987), 30 Ohio St.3d 122, 126, 508 N.E.2d 144. A trial court commits reversible error where it amends an indictment to change the substance or identity of the offense charged, regardless of whether the defendant is prejudiced by said amendment. State v. Plaster (Richland 2005), 164 Ohio St.3d 750, 757, 843 N.E.2d 1261, 1266, 2005-Ohio-6770; State v. Jackson (Clark 1992), 78 Ohio App.3d 479, 605 N.E.2d 426.

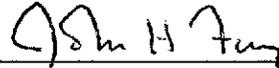
Appellee now claims that Lawrence failed to object to that instruction during the trial proceedings, but that argument is completely disingenuous. At trial, counsel for Lawrence specifically objected to the trial court's affirmative answer to the question of whether the jury could consider a male breast to be an erogenous zone on the grounds it allowed the jury to consider facts, and a theory of culpability, not set forth in the Indictment or subsequent papers provided to the defendant. (T.p. at 223, line 24, to 224, line 20.) Further, counsel raised this very same issue in a motion for post-conviction relief (*see* Motion for Post-Conviction Relief, or Alternatively, for a New Trial, T.d. at 55), which the trial court also denied. (See Order Denying Motion for Post-Conviction Relief, or Alternatively, for a New trial, T.d. at 63.)

In essence, the trial court gave the jury free rein to convict Lawrence on a crime not charged in the Indictment. Such a result deprived him of his right to fair notice guaranteed by the Fourteenth Amendment of the U.S. Constitution and Sec. 10, Art. I of the Ohio Constitution. Even allowing the jury to consider such evidence deprived him of his right to defend against such evidence. As a consequence, his conviction was unconstitutional and must be vacated.

IV. CONCLUSION

For all the reasons set forth more completely above, Lawrence asserts that his conviction on the charge of Gross Sexual Imposition was unconstitutional and must be vacated *en grosse*. In the alternative, he asserts that his conviction should be reversed and this case remanded for a new trial.

Respectfully submitted,

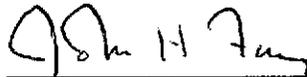


John H. Forg (0041972)
REPPER, PAGAN, COOK, Ltd.
1501 First Avenue
Middletown, Ohio 45044
(513) 424-1823

Attorney for Appellant
Robert Lawrence

CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Appellant was served upon Robin Piper, Butler County Prosecuting Attorney, at 315 High St., 11th Floor, Hamilton, Ohio 4502, by hand delivery, on this 20th day of November, 2008.



John H. Forg (0041972)

Attorney for Appellant
Robert Lawrence

Appendix "A"
OHIO CONSTITUTION, SEC. 10, ART. I

§ 10**CONSTITUTION OF THE STATE OF OHIO****Article I - Bill of Rights****§ 10 Trial for crimes; witness****§ 10 Trial for crimes; witness**

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

(As amended September 3, 1912.)

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Appendix "B"
U.S. CONSTITUTION, AMEND. XIV

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any

United States and of the State wherein they reside. No State

office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.