IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

-vs-

JONATHAN HAMILTON,

Appellant.

No. 08-2295

On Appeal from Cuyahoga County Court of Appeals, Eighth Judicial District

Court of Appeals Case No. 90179

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT JONATHAN HAMILTON

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COUNSEL FOR APPELLEE.

RECEIVED
DEC 01 2008
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SUPREME COURT OF OHIO

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SUPREME COURT OF OHIO

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EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case arises from the Eighth District Court of Appeals' denial of due process and equal protection of the law in matters of a new constitutional rule, announced during pendency of direct appeal.

Court of appeals disregarded principles set forth in ***State v. Evans*** (1972), 32 Ohio St.2d 185, 186 & ***State v. Lynn*** (1966), 5 Ohio St.2d 106, 108 and proceeded to gauge sufficiency of evidence by an abstract element of the crime convicted of.

In the wake of ***Colon I & II***, Appellant inherited, if you may, right to have sufficiency of evidence analyzed by absence of *mens rea* element. Interestingly, Appellant was faced with materially indistinguishable facts as Mr. Colon, coming out of the same appellate court which certified question to this Honorable Court. Therefore, court of appeals wasn't occasioned with any misconception that could be born out of novelty, but was constitutionally strictured to apply ***Colon I*** without regards of whether *mens rea* element issue was raised.

Court of appeals further condoned punishment which was clearly disproportionate to circumstances and crimes involved. In doing so, court abandoned more well-settled principles protecting against such treatment.

For all of thee reasons, this Honorable Court should accept jurisdiction of this case, so constitutional abuse may be cauterized.

STATEMENT OF CASE & FACTS

On November 1, 2005, Appellant was indicted on five counts of rape, one count of kidnapping, aggravated burglary, aggravated robbery and felonious assault. The *mens rea* wasn't included for aggravated burglary or aggravated robbery.

On May 2, 2007, a jury trial ensured, wherein Appellant was convicted of the lesser included offense of robbery, pursuant to a grant of a Crim.R. 29 motion, and a hung jury was declared on remaining eight counts. For the most part, State presented no evidence to satisfy *mens rea* element of recklessly, nor was jury ever charged in such manner.

On June 26, 2007, Appellant was set to go to retrial on hung eight counts, when he accepted an agreement to plead to the lesser included offense of sexual battery and all other counts were dismissed. On this same day, the trial court sentenced Appellant to the maximum penalty for sexual battery (F3) but, ironically, choose mid-range for robbery (F2). ***Appx. Pg. A-14.*** Trial court further erred in ordering these sentences be served consecutively, and by using a presentence investigation report that was prepared for the robbery offense. ***Id.***

Appellant timely appealed, raising three (3) errors for review. ***Appx. Pg. A-2 to A-13.*** On October 23, 2008, court of appeals affirmed trial court proceedings. ***Id.*** The journal entry & opinion was journalized, pursuant to O.App.R. 22(E), on November 3, 2008.

Appellant is now before this Honorable Court seeking discretionary review of his sustained ills.

Proposition of Law No. 1

WHERE INDICTMENT FAILS TO CONTAIN VITAL ELEMENT OF CRIME, AND STATE PRODUCES NO EVIDENCE TO SATISFY THIS ELEMENT, A CRIMINAL DEFENDANT HAS BEEN CONVICTED WITHOUT SUFFICIENT EVIDENCE IN VIOLATION OF FIFTH AMENDMENT.

Argument:

An indictment is only sufficient if it: (1) contains all elements of charged offense(s); (2) gives defendant adequate notice of charge(s); and (3) protects against double jeopardy. ***State v. Colon*** (2008), 118 Ohio St.3d 26, @ ¶¶15-17; ***Hamling v. United States***, 418 U.S. 87, 118 (1994); ***United States v. Cruikahank***, 92 U.S. 542, 558 (1875). The corollary of this true is that an indictment which fails on sufficiency, mainly because a vital or material element of the offense is not contained, also fails on sufficient evidence to support conviction(s). ***Jackson v. Virginia***, 443 U.S. 307 (1979); ***Lanzetti v. New Jersey***, 306 U.S. 451, 453 (1939). This is because what factfinder must determine to return a verdict of guilt is prescribed by Due Process Clause. ***Sullivan v. Louisiana***, 508 U.S. 275, 277 (1993).

Here, the vital element of recklessly was devoid mention in indictment, and subsequent amendment, and no evidence was produce in support of such. ***Colon***, *supra.* Nor was jury instructed that they must also determine that Appellant acted recklessly in committing lesser included offense of robbery.

More importantly, even though appellate counsel did not raise ***Colon*** before court of appeals, Appellant enjoyed prospective application under theory of insufficient

evidence argument. As demonstrated above, sufficiency of evidence also implicates whether every element has been charged and proven. Consequently, conviction and sentence for robbery must be vacated with prejudice.

Proposition of Law No. II

WHERE THERE EXISTS NO INTERVENING ARREST AND CRIMES CAN BE SAID TO BE OF ALLIED OFFENSES OF SIMILAR IMPORT, IT IS AN ABUSE OF DISCRETION & POWER AND UNCONSTITUTIONAL TO IMPOSE CONSECUTIVE SENTENCES.

Argument:

Absent inclination to sustain above proposition, Appellant still asserts that trial court was without discretion or power to impose consecutive sentences.

An "abuse of discretion" connotes more than an error of law or judgment; it implies that court's attitude is unreasonable, arbitrary or unconscionable. ***State v. Lowe*** (1994), 69 Ohio St.3d 527, 532, quoting ***State v. Adams*** (1980), 62 Ohio St.2d 151, 157. Here, the lesser included offenses *found* guilty of, robbery, and *pleaded* guilty to, sexual battery, were part of a continuous act. ***Newark v. Vazirani*** (1990), 48 Ohio St.3d 81, 83-84. Consequently, where trial court completely misconstrues letter and spirit of the law, it clearly has been unreasonable and has abused its discretion. ***Warner v. Waste Mgt., Inc.*** (1988), 36 Ohio St.3d 91, 99.

Because Appellant was protected from consecutive sentencing, pursuant to well-seasoned law, such nature must be vacated.

Proposition of Law No. III

WHERE A SENTENCING COURT IMPOSES MORE PUNISHMENT ON A LESSER INCLUDED OFFENSE THAT WAS CONCEDED TO, THAN THAT IMPOSED FOR AN OFFENSE FOUND GUILTY OF, IT HAS VIOLATED DOCTRINE OF DISPARITY.

Argument:

When a defendant agrees to plead to a lesser included offense, he does so under theory of "discount sentencing". ***Corbitt v. New Jersey***, 439 U.S. 272, 219 (1978); ***Brady v. United States***, 397 U.S. 743, 750-51 (1970). And where the penalty imposed is "so greatly disproportionate to offense as to shock the sense of justice", ***McDouglas v. Maxwell*** (1964), 203 N.E2d 334, 336, such is "illegal" within protections afforded under Eighth Amendment. ***Hill v. United States***, 368 U.S. 424, 430 (1962).

In case at bar, Appellant received more time on the offense for which he saved the State the expense of retrial on. Not to mention that sexual battery is a third degree felony, while robbery is a second degree felony. Ironically, Appellant received four (4) years on second degree and five (5) years on third degree offense.

Appellant asserts that the five-year prison term for sexual battery should be modified to a four-year prison term concurrent, for reasons established in above proposition, with four-year prison term imposed for robbery, should such conviction be condoned.

CONCLUSION

Wherefore, all of thee above, Appellant prays that this Honorable Court will exercise its powers to cauterize constitutional abuse in his case.

May It So Be Ordered.

Respectfully submitted,

JONATHAN HAMILTON, ***pro se.***

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of this MEMORANDUM IN SUPPORT OF JURISDICTION has been sent by regular U.S. mail to counsel of record for Appellee: Atty. Brent C. Kirvel, Asst. Pros. Atty. at 1200 Ontario Street, 9th Floor; Cleveland, Ohio 44113 on this 26TH day of November, 2008.

JONATHAN HAMILTON, ***pro se.***

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90179

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JONATHAN HAMILTON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-487302

BEFORE: Celebrezze, J., Stewart, P.J., and Dyke, J.

RELEASED: October 23, 2008

JOURNALIZED:

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ATTORNEYS FOR APPELLEE

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BY: Brent C. Kirvel
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ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

OCT 23 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY_____DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

Appellant, Jonathan Hamilton, brings this appeal challenging his conviction and sentence. After a thorough review of the record, and for the reasons set forth below, we affirm.

On November 1, 2005, appellant was indicted by the Cuyahoga County Grand Jury on five counts of rape, and one count each of kidnapping, aggravated burglary, aggravated robbery, and felonious assault. On May 2, 2007, the case proceeded to a jury trial.

The state presented seven witnesses, including the victim and the investigating detective. At trial, the following testimony was elicited from the victim. At approximately 6:00 a.m. on September 25, 2006, appellant, who is the victim's former boyfriend, accosted her outside her apartment building when she was leaving for work. He grabbed her by the throat, dragged her back into her apartment, and forced her into her bedroom. He then forced her to take off her clothes and raped her several times by placing his mouth on her vagina, as well as inserting his finger into her vagina. She started to cry, and appellant stopped what he was doing and told her to get dressed. Appellant then pushed her down the hallway into her living room, and they both left the apartment. When they were standing outside the apartment building, appellant tried to kiss her, then reached into her purse and removed her cell phone, state ID, and credit card

before leaving. She went immediately to the police to file a report and then went to Hillcrest Hospital for sexual assault care.

Detective Harry Edwards testified to the following facts surrounding the alleged robbery. He stated that after appellant was arrested, he made an oral statement to Det. Edwards that he took the victim's cell phone to prevent her from calling the police. Appellant's written statement did not contain a similar admission, but instead only contained an admission that appellant took the victim's phone because she and appellant were angry with each other.

At the close of the state's case, appellant moved for a Crim.R. 29 dismissal of the charges. The court granted the motion as to the aggravated robbery charge and instead proceeded on a charge of robbery, in violation of R.C. 2911.02(A)(3). The defense then presented its case, and appellant testified to the following.

Appellant claimed that he and the victim engaged in a consensual sexual encounter on the morning of September 25, 2006 in her apartment. When he and the victim left the apartment, he took her cell phone in order to listen for messages she may have received from other men. He also testified that he intended to return the cell phone to the victim, but that he had not done so because he was instructed by the police and the court to not have any further

contact with her. Appellant testified that he had not taken the victim's state ID or credit card.

At the conclusion of the trial, the jury returned a verdict of guilty on Count Eight, robbery, but was deadlocked on Counts One through Seven and Count Nine. The trial court declared a hung jury on all but Count Eight and dismissed the jurors.

On July 3, 2007, appellant returned to court at which time he pleaded guilty to an amended Count One of sexual battery, in violation of R.C. 2907.03(A)(1), a third degree felony. Counts Two through Seven and Nine were nolled. The court proceeded directly to sentencing on both the robbery and sexual battery charges. Both the victim and appellant were heard by the court.

The victim spoke as well as wrote a letter to the court expressing how she has suffered since the incident. She recounted how she had trusted appellant before this incident, but now she was frightened that he would show up at her home or place of work. She wrote that she has withdrawn from her family and friends, and she was forced to move because she was afraid appellant would find her and hurt her again.

Appellant spoke at sentencing and told the court that he felt the victim was being overly dramatic and that she made these accusations because she felt

jilted. He said he never meant to hurt anyone; however, his statements were tempered by the fact that he claimed the victim was lying to the court.

The trial court then stated that it had considered their statements, the presentence report, and the circumstances surrounding the crimes. The trial court sentenced appellant to five years for sexual battery and four years for robbery, to run consecutively.

Review and Analysis

Appellant timely appealed both his conviction for robbery and his sentences. He cites three assignments of error for our review. For ease of discussion, we will address appellant's assignments of error out of order.

Sufficiency and Manifest Weight

"II. Jonathan Hamilton's conviction for robbery should be reversed due to insufficiency of evidence and a failure of the state to carry the manifest weight of the evidence burden."

In his second assignment of error, appellant argues that his robbery conviction was based on insufficient evidence and was against the manifest weight of the evidence. He specifically argues that the state failed to present evidence of force in order to sustain a robbery conviction, even if the victim's testimony is believed. We find no merit in this argument.

An appellate court's function in reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 124 N.E.2d 148. A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the state has met its burden of production at trial. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.

Sufficiency of the evidence is subjected to a different standard than is manifest weight of the evidence. Article IV, Section 3(B)(3) of the Ohio Constitution authorizes appellate courts to assess the weight of the evidence independently of the fact-finder. "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717.

Appellant was found guilty of robbery, in violation of R.C. 2911.02(A)(3). This statute provides: "No person, in attempting or committing a theft offense or fleeing immediately after the attempt or offense, shall do any of the following: ***, (3) Use or threaten immediate use of force against another." R.C. 2901. The term "force" is defined in R.C. 2901.01(A) as "any violence, compulsion, or constraint physically exerted by any means upon a person or thing."

In *State v. Furlow* (1992), 80 Ohio App.3d 146, 608 N.E.2d 1112, the court noted that "the definition of 'force' in R.C. 2901.01(A), without more, does not serve to sufficiently distinguish the offenses of theft and robbery, which carry very different penalties. *** [R]equiring that the force necessary to elevate a theft to a robbery involve actual or potential harm provides a meaningful distinction between the two offenses." Id.

"The test for the force or threat of force element in a robbery prosecution is objective. The element is satisfied if the accused's conduct 'in reason and common experience is likely to induce a person to part with property against his will and temporarily suspend his power to exercise his will by virtue of the influence of the terror impressed.'" *State v. Foster*, Cuyahoga App. No. 90109, 2008-Ohio-2933.

We find that the state produced sufficient evidence of force to support a robbery conviction. We do not accept appellant's narrow view of whether he

exerted force against the victim only outside her apartment when he took her phone. Instead, we consider all the evidence presented at trial, and we conclude there was evidence that the sum total of appellant's conduct that morning was likely to induce the victim to part with her cell phone by virtue of the terror impressed upon her by appellant both inside and outside the apartment.

Furthermore, we do not find that the robbery conviction was against the manifest weight of the evidence. Both the victim and appellant testified as to the events that occurred that morning. Based on their testimony, the jury was deadlocked on eight of the nine counts of the indictment. Clearly, the jury engaged in lengthy deliberations, as demonstrated by its struggle to reach consensus on all but the robbery charge. We do not find that the jury lost its way in finding appellant guilty of robbery. Appellant's second assignment of error is overruled.

Sentence

"I. The trial court abused its discretion in imposing consecutive sentences for sexual battery and robbery."

"III. Jonathan Hamilton is entitled to a presumptive minimum concurrent sentence because a greater sentence would violate the Ex Post Facto and Due Process Clauses of the United States Constitution."

Appellant's first and third assignments of error relate to his sentence, so we address them together. In his first assignment of error, appellant argues that he should not have received consecutive sentences on the sexual battery and robbery convictions. In his third assignment of error, he argues that he should have received the minimum sentence on both convictions. Based on the Ohio Supreme Court's decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, we find no merit in either of appellant's arguments.

The Ohio Supreme Court has held that "trial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Foster* supra, paragraph seven of the syllabus; *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, paragraph three of the syllabus.[1]

Appellant was sentenced to five years for sexual battery and four years for robbery, both of which are terms of imprisonment within the statutory range. Therefore, we consider whether the trial court's decision to run the five- and four-year terms consecutively was an abuse of discretion. To constitute an

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[1]We acknowledge that the Ohio Supreme Court's recent decision in *State v. Kalish*, Slip Opinion No. 2008-Ohio-4912, sets forth a two-prong test for review of sentences. We note that *Kalish* is a plurality opinion; therefore, it is merely persuasive.

abuse of discretion, the ruling must be more than legal error; it must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

Our review of a felony sentence includes a review of: 1) the presentence investigation report; 2) the trial court record in the case in which the sentence was imposed; and 3) any oral or written statements made to or by the court at the sentencing hearing at which the sentence was imposed. *State v. Kingrey*, Delaware App. No. 04CAA04029, 2004-Ohio-4605, ¶14.

Implicit in the court's sentencing colloquy was its belief that appellant needed to be punished and society needed to be protected from him. It addressed the policy considerations stated in R.C. 2929.11 and 2929.12. Specifically, the court considered the harm done by appellant's conduct to the victim's psychological and physical well-being in light of the victim's statement to the court at sentencing.

We find that appellant's sentence is consistent with convictions for sexual battery and robbery; therefore, we overrule appellant's first and third assignments of error.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

MELODY J. STEWART, P.J., CONCURS;
ANN DYKE, J., CONCURS IN JUDGMENT ONLY.

46216893

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED
2007 JUL -3 A 8: 40
GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

THE STATE OF OHIO
Plaintiff

JONATHAN HAMILTON
Defendant

Case No: CR-06-487302-A

Judge: JANET R BURNSIDE

INDICT: 2907.02 RAPE
2907.02 RAPE
2907.02 RAPE
ADDITIONAL COUNTS...

JOURNAL ENTRY

DEFENDANT IN COURT WITH COUNSEL JAMES ALEXANDER (FOR STANLEY E TOLLIVER). PROSECUTING ATTORNEY BRENT C. KIRVEL PRESENT.
COURT REPORTER PRESENT.
DEFENDANT WAIVES ANY AND ALL DEFECTS IN NOTICE AND SERVICE INCURRED IN THE INDICTMENT AMENDMENT PROCESS
DEFENDANT FULLY ADVISED IN OPEN COURT OF HIS/HER CONSTITUTIONAL RIGHTS AND PENALTIES.
ON A FORMER DAY THE JURY RETURNED A VERDICT OF GUILTY OF ROBBERY 2911.02 A(3) F3 UNDER COUNT(S) 8 OF THE INDICTMENT.
ON RECOMMENDATION OF PROSECUTOR COUNT(S) 1 IS/ARE AMENDED TO SEXUAL BATTERY 2907.03 A(1) F3.
DEFENDANT RETRACTS FORMER PLEA OF NOT GUILTY AND ENTERS A PLEA OF GUILTY TO SEXUAL BATTERY 2907.03 A(1) F3 AS AMENDED IN COUNT(S) 1 OF THE INDICTMENT.
COUNT(S) 2, 3, 4, 5, 6, 7, 9 IS/ARE NOLLED.
COURT ACCEPTS DEFENDANT'S GUILTY PLEA.
DEFENDANT WAIVES PSI.
COURT ELECTS TO USE PSI PREPARED IN THIS CASE NUMBER AS TO VERDICT ON COUNT 8 AND PROCEEDS TO SENTENCING
DEFENDANT ADDRESSES THE COURT, PROSECUTOR BRENT KIRVEL AND VICTIM SIMONE SCOTT ADDRESSES THE COURT
THE COURT CONSIDERED ALL REQUIRED FACTORS OF THE LAW.
THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSE OF R. C. 2929.11.
THE COURT IMPOSES A PRISON SENTENCE AT THE LORAIN CORRECTIONAL INSTITUTION OF 9 YEAR(S).
SENTENCED TO 5 YEARS ON COUNT 1; 4 YEARS ON COUNT 8. COUNTS TO RUN CONSECUTIVE TO EACH OTHER.
NOTE TO WARDEN: DEFENDANT IS TROUBLED PERSON, ENGAGED IN STALKING BEHAVIOR, SEEMS EMOTIONALLY WEAK
(PRC IS MANDATORY)
POST RELEASE CONTROL IS PART OF THIS PRISON SENTENCE FOR 5 YEARS FOR THE ABOVE FELONY(S) UNDER R.C.2967.28.
DEFENDANT TO RECEIVE JAIL TIME CREDIT FOR 14 DAY(S), TO DATE.
DEFENDANT ADVISED OF APPEAL RIGHTS.
DEFENDANT INDIGENT, COURT APPOINTS BRIAN R MCGRAW AS APPELLATE COUNSEL.
TRANSCRIPT AT STATE'S EXPENSE.
******APPELLATE RIGHTS ON COUNT 8 VERDICT ONLY******
DEFENDANT IS TO PAY COURT COSTS.
DEFENDANT REMANDED.
SHERIFF ORDERED TO TRANSPORT DEFENDANT JONATHAN HAMILTON, DOB: 07/26/1960, GENDER: MALE, RACE: BLACK.

Lori a Cook

A-14

SENT
06/26/2007

Sheriff Signature MJ 7-5-07

CR 487302-A

JONATHAN HAMILTON

46216893

06/26/2007
CPSAM 06/28/2007 14:38:22

Judge Signature Date

SENT
06/26/2007

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