

In the  
**Supreme Court of Ohio**

ORIGINAL

STATE OF OHIO,	:	Case No. 2009-0330
	:	
Plaintiff-Appellant,	:	
	:	On Appeal from the
v.	:	Ottawa County Court of Appeals,
	:	Sixth Appellate District
SCOTT A. SPEER,	:	
	:	Court of Appeals Case
Defendant-Appellee.	:	No. OT-07-046
	:	

---

**MERIT BRIEF OF *AMICUS CURIAE***  
**OHIO ATTORNEY GENERAL RICHARD CORDRAY**  
**IN SUPPORT OF PLAINTIFF-APPELLANT STATE OF OHIO**

---

MARK E. MULLIGAN\* (0024891)  
Ottawa County Prosecuting Attorney

*\*Counsel of Record*

315 Madison Street, Room 205  
Port Clinton, Ohio 43452  
419-734-6845  
419-734-3862 fax

Counsel for Plaintiff-Appellant  
State of Ohio

BRADLEY DAVIS BARBIN\* (0070298)

*\*Counsel of Record*

52 W. Whittier Square  
Columbus, Ohio 43216  
614-445-8416  
614-445-9487 fax  
bbarbin@barbinlaw.com

MARK R. METERKO (0080992)

250 Civic Center Drive, Suite 500  
Columbus, Ohio 43215  
614-224-1222  
614-225-1236 fax

Counsel for Defendant-Appellee  
Scott A. Speer

RICHARD CORDRAY (0038034)  
Ohio Attorney General

BENJAMIN C. MIZER\* (0083089)  
Solicitor General

*\*Counsel of Record*

ELISABETH A. LONG (0084128)  
Deputy Solicitor

SAMUEL PETERSON (0081432)  
Assistant Solicitor

30 East Broad Street, 17th Floor  
Columbus, Ohio 43215

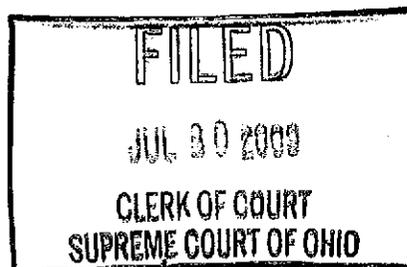
614-466-8980

614-466-5087 fax

benjamin.mizer@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*

Ohio Attorney General Richard Cordray



JANE P. PERRY (0029698)  
Ohio Legal Rights Service  
50 W. Broad Street, Suite 1400  
Columbus, Ohio 43215  
614-466-7264  
614-644-1888 fax  
jlperry@olrs.state.oh.us

Counsel for *Amicus Curiae*  
Ohio Legal Rights Service

THOMAS J. ZRAIK (0023099)  
2523 Secor Rd.  
P.O. Box 2627  
Toledo, Ohio 43606  
419-724-9811  
419-724-9812 fax  
zraiklaw@bex.net

Counsel for *Amicus Curiae*,  
Ability Center of Greater Toledo

MARC P. CHARMATZ\*  
*\*Counsel of Record*  
ROSALINE CRAWFORD  
BARBARA RAIMONDO  
MICHAEL S. STEIN  
National Association of the Deaf Law and  
Advocacy Center  
8630 Fenton Street, Suite 820  
Silver Spring, Maryland 20910  
301-587-7732  
301-587-1791 fax

Counsel for *Amicus Curiae*  
National Association of the Deaf Law and  
Advocacy Center

## TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
STATEMENT OF AMICUS INTEREST .....	2
STATEMENT OF THE CASE AND FACTS .....	3
ARGUMENT .....	4
<b><u>Amicus Curiae Attorney General’s Proposition of Law:</u></b>	
<i>A trial court does not abuse its discretion by declining to dismiss a disabled juror for cause if the court reasonably decides, in light of the challenge made and the information available to the court, that the juror can be accommodated without affecting a defendant’s right to a fair trial. ....</i>	
A. A trial court does not abuse its discretion when it reasonably evaluates a for-cause challenge of a hearing-impaired juror and decides the juror can be reasonably accommodated. ....	5
B. Courts should take steps to reasonably accommodate jurors with hearing impairments or other disabilities when doing so will not infringe upon a defendant's right to a fair trial. ....	10
CONCLUSION.....	12
CERTIFICATE OF SERVICE .....	unnumbered

## TABLE OF AUTHORITIES

Cases	Page
<i>Batson v. Kentucky</i> (1986), 476 U.S. 79 .....	6
<i>Berk v. Matthews</i> (1990), 53 Ohio St. 3d 161 .....	5, 6
<i>Caudill v. Caudill</i> (6th Dist.), 2006 Ohio App. Lexis 1017, 2006-Ohio-1116 .....	11
<i>Fendrick v. PPL Servs. Corp.</i> (3d Cir. 2006), 193 Fed. Appx. 138.....	7
<i>Galloway v. Superior Court</i> (D.D.C. 1993), 816 F. Supp. 12.....	11
<i>Irvin v. Dowd</i> (1961), 366 U.S. 717 .....	5
<i>Nakoff v. Fairview Gen. Hosp.</i> , 75 Ohio St. 3d 254, 1996-Ohio-159 .....	5
<i>Powers v. Ohio</i> (1991), 499 U.S. 400 .....	10
<i>State v. Allard</i> (1996), 75 Ohio St. 3d 482 .....	6
<i>State v. Howard</i> (2d Dist.), 2005 Ohio App. Lexis 3399, 2005-Ohio-3702 .....	6
<i>State v. Jackson</i> , 107 Ohio St. 3d 53, 2005-Ohio-5981 .....	5
<i>State v. Long</i> (1978), 53 Ohio St. 2d 91 .....	10
<i>State v. Sanders</i> , 92 Ohio St. 3d 245, 2001-Ohio-189 .....	7, 10
<i>State v. Speer</i> , 180 Ohio App. 3d 230, 2008-Ohio-6947 .....	<i>passim</i>

<i>State v. White</i> , 82 Ohio St. 3d 16, 1998-Ohio-363 .....	6
<i>State v. Wilson</i> (1972), 29 Ohio St. 2d 203 .....	5
<i>Tennessee v. Lane</i> (2004), 541 U.S. 509 .....	11
<i>Thiel v. S. Pac. Co.</i> (1946), 328 U.S. 217 .....	6, 10
<i>United States v. Dempsey</i> (10th Cir. 1987), 830 F.2d 1084 .....	8, 11

**Constitutional Provisions, Statutes, and Rules**

Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 et seq. ....	2, 11, 12
Crim. R. 24(C) .....	5
R.C. 109.02 .....	2
R.C. 2945.25 .....	5
R.C. 2945.25(D).....	9
R.C. 2945.25(O).....	5
R.C. 2945.29 .....	10
Rules of Superintendence of the Courts of Ohio (“Sup. R.”) .....	10
Sup. R., App. B, Standard 1 .....	11
Sup. R., Preface.....	11

## INTRODUCTION

This case turns on a trial court's reasonable decision to accommodate a hearing-impaired juror, rather than to dismiss her for cause. When a juror with a hearing impairment or other disability is challenged for cause during voir dire, a trial court should determine whether the juror can be reasonably accommodated. If the evidence available indicates that a juror can be accommodated, then a court does not abuse its discretion by denying the challenge and allowing the juror to serve.

During voir dire, juror Linda Leow-Johannsen explained that, although she could hear, she needed to read lips to understand what was being said. She further testified that she would be able to understand any tape-recorded evidence introduced at trial by reading a transcript of the recording. Defendant-appellee Scott Speer challenged Leow-Johannsen for cause, expressing concern that she would miss evidence whenever a witness or attorney turned his or her head. Speer speculated that "she misses about five percent of everything in her life and fills the rest in." Trial Transcript ("Tr.") 176. At no point during voir dire (or later during the trial) did Speer raise concern about the juror's ability fully to perceive or evaluate a tape-recorded 911 call that was introduced as evidence. The trial court evaluated Speer's objections in light of the information available and reasonably decided to accommodate Leow-Johannsen.

The Sixth District identified the proper standard of review—abuse of discretion—but then erroneously applied that standard to reverse the trial court's decision to accommodate Leow-Johannsen. Trial courts have broad discretion when deciding the merits of a challenge for cause, and the trial court did not exceed the bounds of that discretion here. Instead of deferring to the trial court's judgment, however, the appeals court improperly ignored the challenge that Speer actually raised, expanded its inquiry beyond the facts known at voir dire, and substituted its own independent judgment for that of the trial court. In sweeping language, the Sixth District held:

If any doubt exists that a juror can adequately and completely perceive and evaluate all the evidence, whether because of a physical impairment, mental capabilities, or other reason that would interfere with the performance of a juror's duties, the trial court must excuse that juror for cause.

*State v. Speer*, 180 Ohio App. 3d 230, 2008-Ohio-6947, ¶ 34.

The Sixth District's broad holding will lead courts to dismiss virtually all jurors with disabilities for cause—even when a court believes it can reasonably accommodate a juror—because there will never be a guarantee that a disabled juror “can adequately perceive and evaluate *all* the evidence.” *Id.* (emphasis added). Consequently, the appeals court's decision undermines clearly established state and federal policy by discouraging trial courts from attempting reasonably to accommodate jurors with hearing impairments or other disabilities. Ohio's Rules of Superintendence for Courts direct courts to take steps to ensure that disabled persons can serve on juries whenever possible, and the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 et seq., strives to ensure that persons with disabilities have the same opportunities as everyone else, including the opportunity to serve on a jury.

Here, the trial court's decision to accommodate Leow-Johannsen not only was reasonable, but it also furthered state and federal policy encouraging reasonable accommodations. Accordingly, the Court should reverse the Sixth District's decision and remand for further proceedings.

#### **STATEMENT OF AMICUS INTEREST**

Ohio Attorney General Richard Cordray acts as Ohio's chief law enforcement officer. R.C. 109.02. Accordingly, he has a strong interest in ensuring the proper interpretation and enforcement of Ohio's criminal procedures, and in ensuring that the State's interest in the finality of criminal judgments is protected by the proper application of standards of review on appeal. Moreover, the Attorney General has a strong interest in ensuring that all aspects of Ohio's legal

system, including the ability to serve on a jury, remain open to all qualified citizens. If upheld, the Sixth District's decision below will likely result in fully qualified jurors being erroneously dismissed for cause. The Attorney General therefore joins the State of Ohio in urging this Court to reverse the Sixth District's judgment and remand for further proceedings.

### STATEMENT OF THE CASE AND FACTS

On August 6, 2002, Jim Barnett drowned during an evening boating trip from Put-in-Bay to the mainland. *Speer*, 2008-Ohio-6947 at ¶ 4. At the time, Barnett was a passenger on a boat owned and operated by Scott Speer.

A grand jury indicted Speer for one count of involuntary manslaughter and one count of aggravated vehicular manslaughter. *Id.* at ¶ 2. After evidence came to light indicating that Speer had pushed Barnett from the boat, the grand jury also indicted Speer for murder and aggravated murder. *Id.*

During voir dire, Speer challenged a juror, Linda Leow-Johannsen, for cause on the basis of her hearing impairment. Tr. 176-77. Leow-Johannsen was not completely deaf; she could hear voices, but needed to read lips to understand what was being said. Tr. 154 ("I can hear you, but I have to read the lips."). Leow-Johannsen testified that her hearing impairment would not prevent her from participating as a member of the jury, Tr. 66, and she explained that she did not require a sign language interpreter because of her residual hearing, Tr. 145. Speer, on the other hand, argued that Leow-Johannsen "misses about five percent of everything in her life and fills the rest in." Tr. 176.

The trial court denied Speer's challenge, finding that Leow-Johannsen's disability could be accommodated and that "courts have made accommodation for persons with various kinds of impairment." Tr. 177. Speer did not use any of his four available peremptory challenges to remove Leow-Johannsen. Tr. 181-82.

During trial, the court seated Leow-Johannsen in the front of the jury box, Tr. 186, 197, and instructed her to say something if the witnesses or lawyers turned their heads and she was unable to read their lips, Tr. 66. When a tape recording of Speer's 911 call was played at trial, Leow-Johannsen sat next to the court reporter and observed a real-time transcript of the recording. Tr. 197, 230. Speer did not specifically challenge the adequacy of these accommodations or raise any concerns at trial regarding Leow-Johannsen's ability to perceive or evaluate the 911 tape.

Speer was convicted of involuntary manslaughter and aggravated vehicular homicide, but was acquitted of the murder charges. He appealed to the Sixth District Court of Appeals, raising three assignments of error. *Speer*, 2008-Ohio-6947 at ¶¶ 11-14. The appeals court held that the trial court abused its discretion by denying Speer's for-cause challenge, and that the court's error prejudiced Speer's ability to receive a fair trial. Specifically, the court reasoned:

[T]he nature of the charges and evidence in this case required that all jurors be able to actually hear appellant's statements in order to fully evaluate that evidence. If any doubt exists that a juror can adequately and completely perceive and evaluate all the evidence, whether because of a physical impairment, mental capabilities, or other reason that would interfere with the performance of a juror's duties, the trial court must excuse that juror for cause.

*Id.* at ¶ 34. Concluding that Speer's other assignments of error were moot, the Sixth District reversed Speer's conviction and remanded the case to the trial court. *Id.* at ¶¶ 35-36.

The State now appeals the Sixth District's decision.

## ARGUMENT

### **Amicus Curiae Attorney General's Proposition of Law:**

*A trial court does not abuse its discretion by declining to dismiss a disabled juror for cause if the court reasonably decides, in light of the challenge made and the information available to the court, that the juror can be accommodated without affecting a defendant's right to a fair trial.*

**A. A trial court does not abuse its discretion when it reasonably evaluates a for-cause challenge of a hearing-impaired juror and decides the juror can be reasonably accommodated.**

A trial court's decision to deny a for-cause challenge to a juror is reviewed for an abuse of discretion. *State v. Wilson* (1972), 29 Ohio St. 2d 203, 211. "An abuse of discretion connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Jackson*, 107 Ohio St. 3d 53, 2005-Ohio-5981, ¶ 181 (internal quotation and citation omitted). Abuse of discretion requires a result that is "so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias." *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St. 3d 254, 256, 1996-Ohio-159. "[W]hen applying this standard, an appellate court is not free to substitute its judgment for that of the trial judge." *Berk v. Matthews* (1990), 53 Ohio St. 3d 161, 169. The Sixth District below identified the proper standard of review, but then improperly substituted its own judgment for that of the trial court by considering information not available to the trial court when it decided not to dismiss the juror for cause.

A court's primary objective during jury selection is to ensure that the defendant receives a fair trial. *Irvin v. Dowd* (1961), 366 U.S. 717, 722. To protect the right to a fair trial, defendants may challenge any juror for cause if they believe the juror would be unable to be fair and impartial. R.C. 2945.25 identifies specific grounds on which a juror may be challenged for cause and also includes a catch-all provision allowing a challenge for cause if a person "otherwise is unsuitable for any other cause to serve as a juror." R.C. 2945.25(O); see also Crim. R. 24(C) (same standard). Ultimately, the trial court has authority to evaluate the validity of a for-cause challenge. Accordingly, this Court has long recognized that the decision to remove a juror is "a discretionary function of the trial court." See *Berk*, 53 Ohio St. 3d at 168.

When evaluating a challenge for cause, a trial court must consider the individual characteristics of the challenged juror and determine whether the challenge, as it relates to that specific juror, has merit. “Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial.” *Batson v. Kentucky* (1986), 476 U.S. 79, 87; see *Thiel v. S. Pac. Co.* (1946), 328 U.S. 217, 220 (“Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.”). For example, when evaluating a juror’s potential bias, courts consider whether the juror’s past experiences make it unlikely that the juror will be able to weigh the evidence presented at trial in a fair and impartial manner. See, e.g., *State v. White*, 82 Ohio St. 3d 16, 20, 1998-Ohio-363. But even when a court has reason to believe that a juror may have difficulty being impartial, the court may rehabilitate and accommodate that juror by determining that he or she is nevertheless able to follow the law as written, and to weigh the evidence presented at trial in a fair and unbiased manner. See *State v. Allard* (1996), 75 Ohio St. 3d 482, 494-5; *Berk*, 53 Ohio St. 3d at 169; *State v. Howard* (2d Dist.), 2005 Ohio App. Lexis 3399, 2005-Ohio-3702, ¶¶ 61-103.

The same individualized assessment is required when a court considers a for-cause challenge on the basis of a juror’s hearing impairment or other disability. Accordingly, a court should first consider whether there is reason to question a specific juror’s ability to serve. If there is, the court should determine whether steps can be taken to rehabilitate the juror and thereby render moot any concerns that the juror’s disability would prevent the defendant from receiving a fair trial. The court is not required to dismiss the juror for cause on the basis of a hearing impairment unless it determines that no possible accommodation would be adequate to

protect the defendant's rights. See *Fendrick v. PPL Servs. Corp.* (3d Cir. 2006), 193 Fed. Appx. 138, 140 (holding it proper for a court to exclude a juror on account of her disability "when the disability is of a sort that renders the juror unable to perform satisfactory jury service"). A defendant's right to a fair trial is not violated per se even where a juror may have missed portions of a trial. *State v. Sanders*, 92 Ohio St. 3d 245, 253, 2001-Ohio-189 (defendant's rights not violated where a juror closed his eyes for 75 minutes and remained motionless for 30 minutes during trial).

Here, Speer sought to have Leow-Johannsen dismissed for cause because she allegedly "misses about five percent of everything in her life and fills the rest in." Tr. 176. As explained to the trial court, the primary basis for Speer's challenge was his concern that witnesses would turn away from Leow-Johannsen and she would miss portions of their testimony because she could not see and read their lips. *Id.* Speer did not voice concern about Leow-Johannsen's ability to perceive non-verbal aspects of recorded conversations. In fact, the defense remained silent even when the court itself raised the subject of tape-recorded conversations. Tr. 145-46, 155. During voir dire, Leow-Johannsen testified that she would "have a problem" if recorded conversations were presented as evidence at trial, Tr. 145-46, but then clarified that she could fully participate if she were provided with a written transcript of any recorded conversations that might be introduced into evidence, Tr. 155. Speer did not challenge that assertion at any time during the trial.

The trial court rejected Speer's for-cause challenge because it decided that reasonable accommodations would answer Speer's objection that Leow-Johannsen might miss portions of the trial: The court seated Leow-Johannsen in the front of the jury box, Tr. 186, 197; the court instructed Leow-Johannsen to notify the court if she could not see the lips of the person who was

speaking, Tr. 66; and Leow-Johannsen sat next to the court reporter to observe a real-time transcript as a 911 tape was played during trial, Tr. 197. Nothing suggested that these accommodations were insufficient or otherwise unreasonable when the court denied Speer's for-cause challenge. Accordingly, the trial court's decision to seat Leow-Johannsen was not an abuse of discretion.

The Sixth District cited three, equally unconvincing, reasons to support its finding that the trial court abused its discretion by declining to dismiss Leow-Johannsen. First, the appeals court erroneously concluded that, without a sign language interpreter, Leow-Johannsen would not be on alert every time someone spoke. *Speer*, 2008-Ohio-6947 at ¶ 30. But the trial court reasonably decided an interpreter was unnecessary. Leow-Johannsen expressly told the trial court during voir dire that an interpreter would be of no use to her. Tr. 145. Moreover, the Sixth District's concern that Leow-Johannsen would not be on notice when someone was speaking was unfounded because, although she needed to read lips to understand what was being said, Tr. 145, she specifically said she could hear, Tr. 154, and therefore would have known when someone was speaking.

Second, the appeals court observed that no amount of accommodation could ensure that Leow-Johannsen would not miss anything said at trial. *Speer*, 2008-Ohio-6947 at ¶¶ 30, 34. This reasoning suggests that a trial court should dismiss for cause every juror who fails to perceive 100 percent of what happens at trial. But there is no way to ensure that *any* juror, even one who is not hearing impaired, will be aware of everything that happens at trial. "Many jurors have somewhat less than perfect hearing or vision, or have other limitations on their abilities to assimilate or evaluate testimony and evidence." *United States v. Dempsey* (10th Cir. 1987), 830 F.2d 1084, 1088 (finding that defendant's trial was fair although trial court allowed a hearing-

impaired person, with an interpreter, to consider evidence at trial). And any juror may temporarily be distracted or let his or her mind wander. To permit an appeals court to reverse a trial court simply because there is a possibility that a juror was not aware of everything that happened at trial would essentially allow an appeals court to reverse any conviction with only the barest pretense of a reason for doing so.

Third, and of greatest concern to the appeals court, the Sixth District concluded that Leow-Johannsen's hearing impairment made it impossible for her to properly evaluate the tape recording of a 911 call. *Speer*, 2008-Ohio-6947 at ¶¶ 31-33. During closing arguments, the prosecutor asked the jury to consider, among other things, Speer's "demeanor on the 911 tape." Tr. 1215. The appeals court reasoned that, to evaluate the tape, "the jury had to listen to appellant's speech patterns, the inflections in his voice, the pauses in the conversation, and many other audio clues that would only be meaningful if actually heard." *Speer*, 2008-Ohio-6947 at ¶ 33. But a trial court evaluating a for-cause challenge can only be reasonably expected to examine the juror's ability to serve in light of the specific challenge raised. For example, if a party challenges a juror pursuant to R.C. 2945.25(D) on the basis that he or she is related in a specific manner to the person alleged to be injured, it would be unreasonable to require that a court also conduct a complete genealogical inquiry to determine whether the juror is related in some alternate way as well. A trial court need not anticipate every possible reason that might support dismissal for cause; that burden falls on the challenger. Here, Speer did not even mention the tape, or tape-recorded evidence generally, when challenging Leow-Johannsen for cause. The tape was played and the prosecutor's comments were made well *after* voir dire

ended. The prosecutor's comments are therefore not relevant to analyzing the trial court's denial of Speer's for-cause challenge during voir dire.<sup>1</sup>

None of the Sixth District's arguments supporting reversal amounts to an abuse of discretion. Accordingly, because the trial court reasonably evaluated the basis of Speer's for-cause challenge in light of the information available to the court at voir dire, it was well within the bounds of the court's broad discretion to reasonably accommodate Leow-Johannsen as a juror.

**B. Courts should take steps to reasonably accommodate jurors with hearing impairments or other disabilities when doing so will not infringe upon a defendant's right to a fair trial.**

Although the Sixth District attempted to limit its decision to the facts of this case, the decision has broad implications: It will discourage trial courts from allowing persons with disabilities to serve on a jury. Jury service is regarded "as a privilege of citizenship," *Thiel*, 328 U.S. at 224, and access to jury service is one of the most basic democratic elements of law, *Powers v. Ohio* (1991), 499 U.S. 400, 407. By discouraging trial courts from seating jurors with disabilities, the Sixth District's decision contravenes clearly established state and federal public policy that favors accommodating jurors with disabilities.

This Court has long recognized the importance of allowing disabled jurors to serve. The Rules of Superintendence of the Courts of Ohio ("Sup. R.") specifically state that no juror should

---

<sup>1</sup> The Sixth District's focus on what happened after voir dire would be appropriate only in the context of evaluating whether the trial court erred by not removing Leow-Johannsen from the jury *during* trial. See R.C. 2945.29 (giving courts discretion to remove a juror after voir dire is completed, but before the conclusion of a trial). Even if this issue were before the Court, and it is not, Speer would not be able to prevail by arguing that the trial court erred by failing to dismiss Leow-Johannsen during trial. Speer did not renew or expand his initial objections about Leow-Johannsen's ability to serve at any point during the trial, even when the 911 tape was played or, later, when prosecutor commented on the tape during closing arguments. Accordingly, the court's decision not to remove Leow-Johannsen would be subject to plain error review. *Sanders*, 92 Ohio St. 3d at 253 (reviewing the decision to allow a sleeping juror to remain on a jury for plain error where a defendant failed to preserve his objection). Plain error did not occur here because there is absolutely no indication that the "outcome of [Speer's] trial clearly would have been otherwise," *State v. Long* (1978), 53 Ohio St. 2d 91, 96-97, had Leow-Johannsen been replaced with a fully hearing juror.

be denied the ability to serve on a jury because of a disability. Sup. R., App. B, Standard 1; see *id.* at Preface (explaining that the rules were adopted to ensure the “fair, impartial, and speedy resolution of cases” and safeguard the rights of litigants in Ohio); *Caudill v. Caudill* (6th Dist.), 2006 Ohio App. Lexis 1017, 2006-Ohio-1116, ¶ 5 (describing the rules as “guidelines for judges”). Ohio courts are thus encouraged to accommodate a juror’s disability, not to excuse the juror for cause “[i]f any doubt exists that a juror can adequately and completely perceive and evaluate all the evidence, whether because of a physical impairment, mental capabilities, or other reason that would interfere with the performance of a juror's duties,” as the Sixth District stated. *Speer*, 2008-Ohio-6947, ¶ 34.

The ADA similarly stands for the proposition that courts should make every effort to accommodate persons with disabilities. As the United States Supreme Court recognized in *Tennessee v. Lane* (2004), 541 U.S. 509, the ADA was enacted “against a backdrop of pervasive unequal treatment of persons with disabilities in the administration of state services and programs.” *Id.* at 524. *Lane* specifically recognized that jury service is a common area where discrimination against persons with disabilities occurs, stating that Congress intended Title II of the ADA to address this type of discrimination. *Id.* (“[A] number of States have prohibited and continue to prohibit persons with disabilities from engaging in activities such as . . . serving as jurors.”). Numerous courts have interpreted the ADA to prohibit the categorical exclusion of persons with disabilities from juries and to require reasonable accommodations of a juror’s disability. See, e.g., *Dempsey*, 830 F.2d at 1087-89; *Galloway v. Superior Court* (D.D.C. 1993), 816 F. Supp. 12, 20 (“The Rehabilitation Act and the ADA were enacted to prevent old-fashioned and unfounded prejudices against disabled persons from interfering with those individuals’ rights to enjoy the same privileges and duties afforded to all United States

citizens.”). Just as the Sixth District’s decision contradicts state public policy, it undermines the spirit and intent of the ADA by effectively making it more difficult for persons with disabilities to serve on a jury.

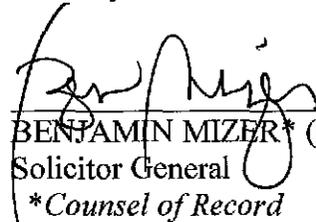
If a juror with a hearing impairment or other disability can be reasonably accommodated without violating a defendant’s right to a fair trial, a trial court should use its considerable discretion at voir dire to further state and federal policy in support of accommodating persons with disabilities.

**CONCLUSION**

For the foregoing reasons, this court should reverse the decision of the Sixth District Court of Appeals and remand for further proceedings consistent with that holding.

Respectfully submitted,

RICHARD CORDRAY (0038034)  
Attorney General of Ohio



BENJAMIN MIZER\* (0083089)  
Solicitor General  
*\*Counsel of Record*

ELISABETH A. LONG (0084128)  
Deputy Solicitor

SAMUEL PETERSON (0081432)  
Assistant Solicitor

30 East Broad Street, 17th Floor  
Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

[benjamin.mizer@ohioattorneygeneral.gov](mailto:benjamin.mizer@ohioattorneygeneral.gov)

Counsel for *Amicus Curiae*

Ohio Attorney General Richard Cordray

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Richard Cordray in Support of Plaintiff-Appellant State of Ohio was served by U.S. mail this 30th day of July, 2009, upon the following counsel:

Mark E. Mulligan  
Ottawa County Prosecuting Attorney  
315 Madison Street – Room 205  
Port Clinton, Ohio 43452

Counsel for Plaintiff-Appellant  
State of Ohio

Bradley Davis Barbin  
52 W. Whittier Square  
Columbus, Ohio 43216

Mark R. Meterko  
250 Civic Center Drive, Suite 500  
Columbus, Ohio 43215

Counsel for Defendant-Appellee  
Scott A. Speer

Jane P. Perry  
Ohio Legal Rights Service  
50 W. Broad Street, Suite 1400  
Columbus, Ohio 43215

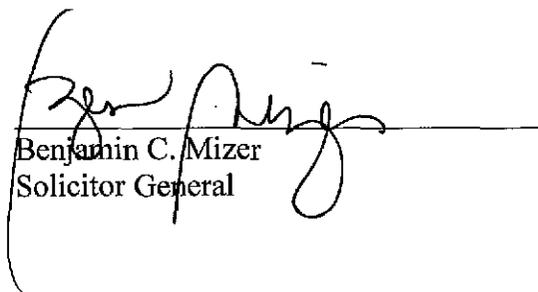
Counsel for *Amicus Curiae*  
Ohio Legal Rights Service

Marc P. Charmatz  
National Association of the Deaf Law and  
Advocacy Center  
8630 Fenton Street, Suite 820  
Silver Spring, MD 20910

Counsel for *Amicus Curiae*  
National Association of the Deaf Law and  
Advocacy Center

Thomas J. Zraik  
2523 Secor Rd.  
P.O. Box 2627  
Toledo, Ohio 43606

Counsel for *Amicus Curiae*  
Ability Center of Greater Toledo



Benjamin C. Mizer  
Solicitor General