

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL. DANIEL J. SULLIVAN,)	Sup. Ct. No. 2009-1118
)	
Relator-Appellee,)	App. No. L-2009-1118
)	
-vs-)	On appeal from the May 7, 2009 Decision &
)	Judgment of the Court of Appeals for Lucas
JUDGE DONALD L. RAMSEY,)	County, Ohio, Sixth Appellate District
)	
Respondent-Appellant.)	Appeal of Right
)	
)	
)	

RELATOR-APPELLEE'S MOTION TO STRIKE

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Now comes Relator-Appellee, Daniel J. Sullivan, pursuant to S.Ct.R. XIV § 4(A), and moves this Court for an order striking Respondent-Appellant's Merit Brief and pages 000059-000061 of Appellant's Supplement. The bases for this motion are set forth in the accompanying memorandum in support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Appellant's Merit Brief and pages 000059-000061 of Appellant's Supplement represent Appellant's second attempt to improperly change the record in cases involving Appellee while those cases are on appeal.

In the underlying post-divorce matter, Appellant issued an Amended QDRO approximately three months after Appellee had filed a written notice of appeal from Appellant's January 9, 2009 Judgment Entry and QDRO. Appellant did so without providing any notice to Appellee either before or after that Amended QDRO was issued. On May 7, 2009, the Sixth District Court of Appeals issued a peremptory writ, vacating the Amended QDRO and ordering

Appellant to take no further action inconsistent with the appellate court's ability to affirm, modify, or reverse the two orders currently on appeal to that court.

Now, Appellant is attempting to add issues and matters to the record in this action. Appellant's conduct effectively denies Appellee of any meaningful opportunity to be heard on the merits of the matters and issues now raised for the first time by Appellant on appeal to this Court. As a matter of law, those issues and matters are not properly before this Court, and the Appellant's Merit Brief and pages 000059-000061 of his Supplement should be stricken accordingly.

II. FACTUAL & PROCEDURAL BACKGROUND

On July 29, 1997, the Lucas County Domestic Relations Court issued a consent divorce decree in the underlying case of *Janet M. Sullivan v. Daniel J. Sullivan*, Lucas County Case No. DR-1996-0989.¹ The Divorce Decree was a final order, which distributed the parties' interests in Appellee's then-current pension plan with the Civil Service Retirement System.² That Divorce Decree did not reserve jurisdiction to modify its terms,³ and neither party appealed from that order.⁴

¹ Relator-Appellee's Supplement ("Supplement"), pp. 10-25 (Final Judgment Entry of Divorce ("Divorce Decree")).

² See, Supplement, pp. 21-22 (Divorce Decree).

³ See generally, Supplement, pp. 10-25 (Divorce Decree).

⁴ Supplement, p. 3, ¶ 7 (Verified Complaint for Alternative and Permanent Writs of Prohibition, filed on April 28, 2009 in *State ex rel. Daniel J. Sullivan v. Judge Donald L. Ramsey*, Lucas App. No. L-2009-1118 ("Verified Complaint")).

Yet in July of 2006, Ms. Sullivan filed a motion for a new QDRO, attempting to obtain a distribution from Appellee's⁵ District of Columbia Police and Firefighter's Retirement Plan ("DCPFRP"),⁶ a pension plan in which Appellee had not acquired any interest until several years after the divorce. The post-divorce matter was assigned to Appellant, who serves as a visiting judge in the Lucas County Court of Common Pleas, Domestic Relations Division.⁷ On January 9, 2009, Appellant issued a Judgment Entry, granting Ms. Sullivan's motion, and shortly thereafter issued and served a Qualified Domestic Relations Order on the DCPFRP.⁸

On January 20, 2009, Appellee timely filed a written notice of appeal from both of those orders.⁹

Later, on April 7, 2009, Appellant *sua sponte* issued an Amended QDRO. No motion or matter of record prompted Appellant to do so.¹⁰ In fact, Appellee was never given notice of this action, either before or after it occurred.¹¹ At that time, Appellee's appeal of the January 9, 2009 Judgment Entry and QDRO was pending with the Sixth District Court of Appeals.¹²

⁵ Appellee is a retired Special Agent of the U.S. Secret Service. See, Supplement, p. 2, ¶ 3 (Verified Complaint).

⁶ Supplement, p. 3, ¶ 9 (Verified Complaint).

⁷ Supplement, p. 3, ¶ 10 (Verified Complaint).

⁸ Supplement, p. 4, ¶¶ 13-14 (Verified Complaint); See, Supplement, pp. 26-29 (January 9, 2009 Judgment Entry); *Id.*, pp. 30-35 (January 9, 2009 QDRO); *Id.*, p. 70 (copy of the trial court docket in Case No. DR-1996-0989).

⁹ Supplement, p. 5, ¶ 16 (Verified Complaint); See, Supplement, pp. 36-47 (Notice of Appeal); *Id.*, pp. 48-52 (Docketing Statement); *Id.*, pp. 53-56 (Praecipe); *Id.*, pp. 57-70 (trial court docket); *Id.*, pp. 71-72 (copy of the appellate court docket in Lucas App. No. CL-2009-1022).

¹⁰ See generally, Supplement, pp. 57-70 (trial court docket).

¹¹ Supplement, p. 5, ¶ 18 (Verified Complaint); See, *Id.*, p. 5, ¶ 19 (Verified Complaint).

As a result of Appellant's action, Appellee filed with the Sixth District Court of Appeals a verified complaint for alternative and permanent writs of prohibition on April 28, 2009.¹³ The Verified Complaint was served on Appellant on May 4, 2009, and the certificate of service was filed with the appellate court on May 6, 2009. The next day, without directing Appellant to file an answer¹⁴, the appellate court issued a peremptory writ of prohibition and vacated the Amended QDRO.¹⁵

Since that time, Appellant has not filed a Civil Rule 60(B) motion for relief from that judgment with the appellate court. Instead, Appellant filed the instant appeal, and on August 7, 2009, filed his Merit Brief and Supplement with this Court.

In his Merit Brief, Appellant advances two propositions of law,¹⁶ but neither of these were ever presented to the Sixth District Court of Appeals in a Civ.R. 60(B) motion for relief from judgment, as would be proper in this case. Indeed, both these propositions of law raised by Appellant are premised, in whole or part, upon matters that are *de hors* the record on appeal to this Court. Those matters include the following:

¹² Supplement, p. 6, ¶ 23 (Verified Complaint).

¹³ Supplement, pp. 1-9 (Verified Complaint).

¹⁴ Local App. R. 6 provides, in pertinent part, “[t]he summons shall state that respondent need not file an answer until directed by the court of appeals to do so.”

¹⁵ Supplement, pp. 79-80 (May 7, 2009 Decision and Judgment).

¹⁶ Appellant's Merit Brief, p. 10-13 (Proposition of Law No. 1: “The Domestic Relations Division of Common Pleas Court retains jurisdiction to amend a Qualified Domestic Relations Order while an appeal is pending, since a QDRO is merely an order in aid of execution”); *Id.*, p. 13-15 (Proposition of Law No. 2: “Appeal of a QDRO or an amended QDRO is an adequate remedy at law.”)

1. The parties' alleged failure in the underlying divorce case to "perfect a QDRO or separate judgment in a timely fashion so as to carry out the provisions of the divorce decree[;]"¹⁷
2. Allegations regarding the timing and manner of Appellee's transition from the Civil Service Retirement System to the DCPFRP;¹⁸
3. The alleged need for Appellant to have issued an Amended QDRO;¹⁹ and
4. Allegations regarding Appellee's appeal of the Amended QDRO.²⁰

III. LAW AND ARGUMENT

A. Appellant did not have a right to file an answer in the appellate court.

Appellant's Merit Brief implies that the appellate court denied Appellant of some right to file an answer in the prohibition action.²¹ Yet, as a matter of law, Appellant had no such right.

First, Appellant had no constitutional right to do so. Article I, Section 1.16 (*Redress in courts*) of the Ohio Constitution, does not provide a due-process right to the government. The government includes Appellant, who was the respondent in the prohibition action by virtue of the trial court's governmental role. Thus, a Domestic Relations Court has no constitutional right to due process, which would otherwise have included the right to file an answer in the court below.

¹⁷ Appellant's Merit Brief, p. 2.

¹⁸ Appellant's Merit Brief, pp. 2-3.

¹⁹ Appellant's Merit Brief, pp. 4-5, 13, 15; See, *Id.*, Appendix, pp. xiv-xli (28 U.S.C. § 414).

²⁰ Appellant's Merit Brief, pp. 5, 6, 15; *Id.*, Appendix, pp. viii-xiii (July 8, 2009 Decision and Judgment rendered in *Janet M. Sullivan v. Daniel J. Sullivan*, Lucas App. No. L-09-1123); Appellant's Supplement, pp. 000059-000061.

²¹ Appellant's Merit Brief, pp. 1-2, 5-6.

Appellant also had no statutory right to file an answer. Prohibition actions, while constitutionally recognized²², are not governed by statute in Ohio. Even so, Ohio's mandamus statutes prove to be instructive on this issue. They expressly permit an appellate court to act, and issue a peremptory writ, without even providing notice of the action to the respondent.²³ Although those statutes do not govern prohibition actions, they provide guidance to demonstrate that the appellate court acted consistently and within the authority it would have otherwise had under Ohio's mandamus statutes.

It cannot be said, therefore, that Appellant had any right to file an answer in the court below.

B. Appellant cannot use a direct appeal as a substitute for a Civ.R. 60(B) motion for relief from judgment; therefore, Appellant's Merit Brief and pages 000059-000061 of his Supplement should be stricken.

Appellant is attempting to litigate issues and matters for the first time in this appeal, which is improper. This Court has stated, "[a]s an appellate court, we are limited by the record before us."²⁴ On appeal, Appellant cannot present what is in effect a Civ.R. 60(B) motion for

²² See, Ohio Constitution, Article IV, Section 3(B)(1)(d).

²³ See, R.C. § 2731.02 (A "writ may issue on the information of the party beneficially interested."); R.C. § 2731.04 ("The court may *** allow the writ without notice."); R.C. § 2731.06 ("When the right to require the performance of an act is clear and it is apparent that no valid excuse can be given for not doing it, a court, in the first instance, may allow a peremptory mandamus."); R.C. § 2731.07 ("The allowance of the writ of mandamus, and an order that the defendant, immediately upon service, do the act required to be performed *** shall be entered on the journal.").

²⁴ *Brown v. City of Cleveland* (1981), 66 Ohio St.2d 93, 98, 20 O.O.3d 88, 420 N.E.2d 103; See, *State v. Ishmail* (1978), 54 Ohio St.2d 402, 405-406, 8 O.O.3d 405, 377 N.E.2d 500, paragraph one of the syllabus.

relief from judgment.²⁵ Such a motion is properly directed to the Sixth District Court of Appeals, which rendered the final order that Appellant has appealed to this Court.²⁶

If Appellant believes that the appellate court's May 7, 2009 Decision and Judgment was rendered in error because that court did not consider matters otherwise *de hors* the record, the Appellant has a procedural remedy. Appellant may file a motion for relief from judgment pursuant to Civil Rule 60(B) and attempt to demonstrate that a meritorious defense exists to Appellee's Verified Complaint.²⁷ Yet, Appellant has thus far chosen not to do so.

If Appellant ever chooses to file such a motion, Appellee would then have the opportunity to be heard on the merits by submitting materials in opposition to those submitted with Appellant's motion. Hence, the record could properly be perfected. And should the appellate court deny such a motion, Appellant could then appeal on a perfected record because the denial of a motion for relief from judgment is a final appealable order.²⁸

C. Appellant's Merit Brief should be stricken because the issues asserted therein have been waived by Appellant's failure to raise such issues with the appellate court through a Civ.R. 60(B) motion for relief from judgment.

This Court has consistently ruled that matters not raised in the lower court may not be raised for the first time on appeal.²⁹ In this case, the fact that the appellate court did not wait for

²⁵ *Dunfries Corp. v. Kramer* (Aug. 6, 1992), 1992 WL 193716, *2, Franklin App. No. 92AP-15.

²⁶ See, *Id.*

²⁷ See, *GTE Automatic Elec. V. ARC Industries* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus.

²⁸ *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 246, 18 O.O.3d 442, 416 N.E.2d 605.

²⁹ See, *State ex rel. Zollner v. Industrial Commission of Ohio* (1993), 66 Ohio St.3d 276, 278, 1993-Ohio-49, 611 N.E.2d 830 ("A party who fails to raise an argument in the court below waives his or her right to raise it here."); *Abraham v. National City Bank Corp.* (1990), 50 Ohio

Appellant to file an answer to the Verified Complaint before it issued its May 7, 2009 Decision and Judgment is immaterial. The appellate court was well within its power to issue the decisive action it did, and it should not prevent this Court from applying the waiver rule in this case.

Appellant still has the procedural ability to raise the issues and matters that are now asserted for the first time in his Merit Brief in the present appeal in the lower court. Appellant can file a motion for relief from judgment pursuant to Civ.R. 60(B). That Appellant has chosen not to do so would counsel in favor of applying the waiver rule here.

By choosing not to file a Civ.R. 60(B) motion, Appellant has prevented Appellee from responding—on the merits—to the issues and matters that Appellant has injected into this appeal for the first time here. Appellee cannot submit opposing evidence otherwise *de hors* the record on appeal³⁰, and, therefore, has no meaningful opportunity to be heard on the merits. This Court has stated that the waiver rule exists to promote the fair administration of justice and to prevent the deprivation of due process:

These rules are deeply embedded in a just regard to the fair administration of justice. They are designed to afford the opposing party a meaningful opportunity to respond to issues or errors that may affect or vitiate his or her cause. Thus, they do not permit a party to sit idly by until he or she loses on one ground only to avail himself or herself of another on appeal. In addition, they protect the role of the courts and the dignity of the proceedings before them by imposing upon counsel the duty to exercise diligence in his or her own cause and to aid the court rather than silently mislead it into the commission of error.

St.3d 175, fn. 1, 553 N.E.2d 619 (Failure to raise a constitutional issue in the trial court precludes consideration of that issue on appeal.); *State ex rel. Gibson v. Industrial Commission of Ohio* (1988), 39 Ohio St.3d 319, 320, 530 N.E.2d 916 (“We hold that this issue [right to due process] was not raised previously, and therefore has been waived.”); *Blausey v. Stein* (1980), 61 Ohio St.2d 264, 266-267, 15 O.O.3d 268, 400 N.E.2d 408 (“Without passing upon the validity of this contention, we note that it was not raised in the courts below. The issue is not, therefore, properly before us.”); *Thompson v. Preferred Risk Mutual Ins. Co.* (1987), 32 Ohio St.3d 340, 342, 513 N.E.2d 733 (“[W]here an issue presented for review by the appellate court was not briefed and argued below, the issue is waived for purposes of consideration on appeal.”).

³⁰ See, *Ishmail*, 54 Ohio St.2d at 405-406, paragraph one of the syllabus.

State ex rel. Quarto Mining Co. v. Foreman (1997), 79 Ohio St.3d 78, 81, 1997-Ohio-71, 679 N.E.2d 706 (internal citations omitted).

This Court should enforce the waiver rule here and strike Appellant's Merit Brief.³¹ Afterwards, Appellant may choose to file a Civ.R. 60(B) motion with the appellate court. In that event, Appellee will have his day in Court as guaranteed by our state and federal constitutions,³² and he can be heard on the merits of the matters and issues that Appellant believes warrant relief from the appellate court's May 7, 2009 Decision and Judgment.

D. Appellant's Merit Brief and pages 000059-000061 of his Supplement should be stricken because they improperly inject alleged factual matters that were not presented to, considered by, or determined by the appellate court in its May 7, 2009 Decision and Judgment.

It is well-established that a reviewing court cannot add matter to the record before it, which was not a part of the lower court's proceedings, and then decide the appeal on the basis of that new matter.³³ Yet, despite this, Appellant has improperly submitted and relied upon matters in his Merit Brief and supplement that are *de hors* the record as transmitted by the Sixth District Court of Appeals to this Court. This Court should, therefore, strike Appellant's Merit Brief and pages 0000-59-000061 of his Supplement.

Appellant's Merit Brief and Supplement improperly include matters that were never presented to, considered by, or determined by the appellate court in the prohibition action. Those new matters fall into two categories: (1) those which have no basis whatsoever in the record as it

³¹ See, *Robson v. AllState Insurance Co.* (Sept. 18, 2001), 2001 WL 1096212, *3, Delaware App. No. 01CAE03007 (granting a motion to strike issues not raised in the lower court), appeal allowed (2002) 94 Ohio St.3d 1451, 762 N.E.2d 370, cause dismissed (2002) 97 Ohio St.3d 1405, 2002-Ohio-5557.

³² Ohio Constitution, Article I, Section 1.16; United States Constitution, Fourteenth Amendment.

³³ *Ishmail*, 54 Ohio St.2d at 405-406, paragraph one of the syllabus.

exists; and (2) those which have some basis in the limited record as it exists, but which Appellee can only oppose by referencing matters otherwise outside the record as it currently exists.

For instance, the following matters have no basis in the record in this appeal as it currently exists:

Merit Brief	New Matters
Brief at p. 3	“The QDRO was prepared * * * by the Appellant on January 9, 2009 (Supp. 33, Appx. ix.)”
Brief at p. 4	“The Amended QDRO was necessary to comply with the requirements of P & FRP’s Plan Administrator. (Appx. x.)”
Brief at p. 5	<p>“ * * * to comply with the requirements of P & FRP’s Plan Administrator. (Supp. 28; Appx. x.)</p> <p>Appellee filed a timely notice of appeal from this Amended QDRO. (Appx. x.) The second appeal was assigned case number L-09-1123 (Appx. x.)”</p>
Brief at p. 6	<p>“On May 13, 2009, the Sixth District Court of Appeals sua sponte dismissed Appellee’s second appeal (Case No. L-09-1123) which challenged the vacated Amended QDRO. (Appx. vi, x.) The dismissal was based solely on the issuance of the peremptory writ that vacated the Amended QDRO.[FN: A motion to reconsider the dismissal was denied. (Appx. xiii.)] (Appx. vi.)”</p>
Brief at p. 13	<p>“The Amended QDRO was necessary to comply with the requirements of P & FRP’s Plan Administrator. (Appx. x.) * * * to comply with the requirements of P & FRP’s Plan Administrator. (Supp. 28, 51; Appx. x.)</p> <p>Thus, the Amended QDRO was necessary to enforce the pension rights created by the divorce decree and the Appellant retained jurisdiction to do so during the appeal, since the Amended QDRO was merely an order in aid of execution and no stay had been issued.”</p>

Brief at p. 14	Reference to Appx. x.
Brief at p. 15	<p>“Interestingly, the Appellee actually filed a notice of appeal from the Amended QDRO. (Appx. x.) This appeal was assigned case number L-09-1123. (Appx. x.) The Sixth District Court of Appeals sua sponte dismissed Appellee’s second appeal. (Appx. vi, x.) The dismissal was based solely on the issuance of the peremptory writ that vacated the Amended QDRO (Appx. vi).</p> <p>* * *</p> <p>Therefore, since the Amended QDRO was merely an order in aid of execution, no stay had been issued, and the Relator had an adequate remedy at law, ***.”</p>
Appendix at viii-xiii	July 6, 2009 Decision and Judgment of the Lucas County Court of Appeals filed in <i>Janet M. Sullivan v. Daniel J. Sullivan</i> , Lucas App. No. L-2009-1123 (direct appeal of Appellant’s April 7, 2009 Amended QDRO).
Supplement	New Matter
Bates pages 000059-000061	Online docket report for <i>Janet M. Sullivan v. Daniel J. Sullivan</i> , Lucas App. No. L-2009-1123 (direct appeal of Appellants’ April 7, 2009 Amended QDRO).

Similarly, Appellant has referenced matters (while having some basis in the limited record as it currently exists) that can only be opposed by referencing matters that are outside that record. For instance, Appellant claims that the parties to the underlying divorce case did not timely file a QDRO or other separate judgment entry to effectuate the divorce decree’s pension-distribution terms.³⁴ Yet the copy of the trial court’s docket shows that a pension distribution

³⁴ Appellant’s Merit Brief, p. 2.

decree was in fact filed on September 11, 1997, served to the Office of Personnel Management, and received by that agency.³⁵ The record regarding the 1997 pension distribution decree,³⁶ however, is not a part of the record in this appeal because Appellee's Verified Complaint was very narrowly drafted on a singular jurisdictional issue: Did Appellant patently and unambiguously lack jurisdiction to modify an order (the January 9, 2009 QDRO) that was pending appeal?

Likewise, Appellant has asserted that Appellee's actions in acquiring a new pension plan after the divorce "was in derogation of Janet's rights in and to the [Civil Service Retirement System] pension plan."³⁷ That, too, is a matter that Appellee can only oppose by referencing matters outside the record in this appeal; indeed, Appellee would need to reference matters that are currently part of the record in Appellee's appeal of the January 9, 2009 Judgment Entry and QDRO now pending with the Sixth District Court of Appeals.

As a matter of law, the appropriate remedy is for this Court to issue an order striking Appellant's Merit Brief and pages 000059-000061 of his Supplement.³⁸

³⁵ See, Supplement, pp. 57-70 (trial court docket).

³⁶ The validity and enforcement of the 1997 pension distribution decree was litigated extensively in the trial court, both in pretrial motion and at trial. See, Supplement, pp. 57-70 (motion to vacate the pension distribution decree, filed November 21, 2007); *Id.* (February 7, 2008 judgment entry denying Appellee's motion to vacate). The trial transcript is not a part of the record in this appeal; rather, it is a part of the record in Appellee's appeal of the January 9, 2009 Judgment Entry and QDRO which is currently pending with the appellate court.

³⁷ Appellant's Merit Brief, pp. 2-3.

³⁸ See, *State v. Addison* (Jan. 22, 2009), 2009-Ohio-221, ¶ 57, Cuyahoga App. No. 90642; *State v. Henes* (Nov. 2, 2001), 2001 WL 1346116, *2, Lucas App. No. L-01-1222; *State v. Wombold* (Jan. 26, 2001), 2001 WL 62579, *10, Montgomery App. No. 18428 (Matters which are part of the lower court's record, but which were not considered by that court when making its decision, are properly stricken from appellant's reply brief.); *Pritchett, Dlusky & Saxe v. Pingue* (Sept. 16, 1997), 1997 WL 578952, *2, Franklin App. No. 96APE11-1598 (An appellate court

IV. CONCLUSION

This Court should strike Appellant's Merit Brief and pages 000059-000061 of his Supplement. If Appellant wants to be heard on the issues and matters advanced for the first time in his appeal to this Court, his remedy is to file a Civ.R. 60(B) motion with the Sixth District Court of Appeals. If that motion proves unsuccessful, Appellant can appeal the appellate court's denial of that motion to this Court. By doing so, Appellant can present a properly perfected record for this Court's review.

If this Court does not strike Appellee's merit brief, then Appellee will remain in the untenable position of opposing issues and matters that are improperly before this Court, and doing so on an incomplete record that cannot be lawfully supplemented. Simply put, Appellee would be denied due process of law because there would be no meaningful opportunity to be heard on the merits.

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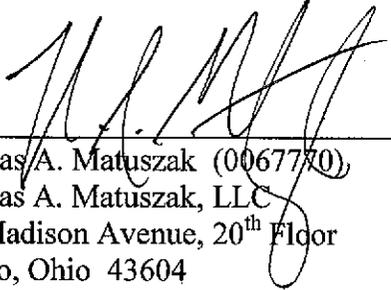
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cannot consider arguments based on improperly submitted materials.); *Walsh v. Industrial Powder Coatings, Inc.* (Aug. 30, 1996), 1996 WL 493176, *1, Huron App. No. H-95-073; *State v. Eskridge* (Oct. 13, 1994), 1994 WL 568405, *1, Cuyahoga App. No. 65620; *Olah v. Mejias* (Aug. 17, 1989), 1989 WL 95761, *1, Cuyahoga App. No. 55848; *Wagner v. Galipo* (Mar. 27, 1986), 1986 WL 3728, *2 (fn. 1), *5, Cuyahoga App. No. 51129.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing was hand-delivered to counsel for the Respondent-Appellant, Assistant Prosecutor John A. Borell, Lucas County Prosecutor's Office, 700 Adams Street, Suite 250, Toledo, Ohio 43604.

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