

IN THE SUPREME COURT OF OHIO

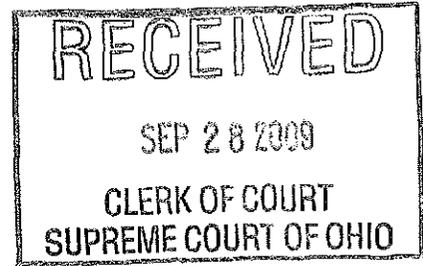
ORIGINAL

STATE OF OHIO)	SUPREME COURT CASE
)	NO. 09-1619
Appellant,)	
)	
vs.)	ON APPEAL FROM THE
)	COURT OF APPEALS,
DENNY ROSS)	NINTH APPELLATE
)	DISTRICT
Appellee.)	
)	SUMMIT COUNTY
)	COMMON PLEAS COURT
)	CASE NO. CR 1999 -05-1098A

MEMORANDUM OF *AMICUS CURIAE*, LORAIN COUNTY PROSECUTOR'S OFFICE, IN SUPPORT OF DELAYED APPEAL

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the Lorain County Prosecutor's Office, supports Appellant's Memorandum in Support of Jurisdiction and urges this Honorable Court to grant Appellant leave to file a delayed appeal. This case is of public and great general interest in that the Ninth District Court of Appeals has rendered a decision that is in contravention of the American justice system as to the necessity as to finality in judgment.

In its opinion, the Ninth District Court of Appeals declared that a Crim.R. 29(C) motion can be reconsidered at any time until a valid judgment entry of conviction and sentence is entered in the case. The appellate court determined that the order was interlocutory subject to reconsideration at any time prior to sentencing. This proclamation is in complete contravention of Crim.R. 45. The trial court's reconsideration of the previously denied Crim.R. 29(c) was nothing more than a poorly disguised granting of an illegal pre-trial summary judgment motion in a criminal case. This defies tenets of Ohio jurisprudence.

Amicus Curiae also have multiple cases pending before the Ninth District Court of Appeals involving similar matters. In Ninth District Court of Appeals case numbers 09CA009634 and 09CA009635 as well as 09CA009636, State v. Smith and State v. Allen, respectively, the Lorain County Prosecutor's Office is litigating whether the remedy for a sentencing entry that does not comply with Crim.R. 32(C) is a *de novo* sentencing hearing or a corrected sentencing entry. Due to the deficient sentencing entry, Judge James Burge of the Lorain County Court of Common Pleas determined that he could revisit any trial issues, including evidentiary rulings, prior to re-imposing sentence. Judge Burge reversed all prior evidentiary rulings made by his predecessor trial judge, excluded the State's evidence, and then *sua sponte* granted Crim.R. 29(C) motions acquitting both defendants of the charges, fifteen (15)

years post jury verdict. Both defendants had served fifteen (15) years of their lengthy prison sentences.

In the instant matter, it is clear that the Ninth District Court of Appeals violated the Ohio Criminal Rules of Procedure as well as tenets of Ohio law in its July 22, 2009 decision. This decision has the potential to directly impact the matters the Lorain County Prosecutor's Office has pending before the appellate court as well as other prosecutor's offices across the State of Ohio. The decision of the Ninth District Court of Appeals on July 22, 2009 cannot be permitted to stand. Therefore, the Lorain County Prosecutor's Office strongly urges this Honorable Court to permit Appellant leave to file a delayed appeal in this matter.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae, the OPAA would agree with the Statement of the Case and Facts as presented by Appellant, the State of Ohio, in this matter.

LAW & ARGUMENT

ARGUMENT IN FURTHER SUPPORT OF APPELLANT'S PROPOSITIONS OF LAW

I. THE NINTH DISTRICT COURT OF APPEALS IGNORED CONTROLLING LAW IN ITS DECISION OF JULY 22, 2009.

Amicus Curiae, the Lorain County Prosecutor's Office, contends that the Ninth District Court of Appeals engaged in linguistic gymnastics when it determined that the granting of the Crim.R. 29(C) motion was proper after being previously denied. The decision of the trial court to grant the motion, after previously denying the motion, amounted to an illegal pre-trial determination of summary judgment when the trial court considered evidence outside of the record in granting said motion. The Ninth District Court of Appeals also ignored controlling

case law from the United States Supreme Court in rendering its decision that merited a different result.

The appropriate appellate standard of review for an award of summary judgment is *de novo*. Doe v. Shaffer (2000), 90 Ohio St.3d 388, 390, citing Grafton v. Ohio Edison Co. (1996), 77 Ohio St.3d 102, 105. A *de novo* review requires an independent review of the trial court's decision without any deference to the trial court's determination. Brown v. Scioto Cty. Bd. of Commrs. (1993), 87 Ohio App.3d 704, 711.

1. The trial court erred when it relied upon lawyers' arguments as a substitute for actual evidence.

In this case, the trial court founded its pretrial decision to acquit on lawyers' arguments instead of actual evidence. The appellate court chose to characterize the trial court's reliance on legal argument as evidence as an "aside" despite the central role it played in the trial court's decision. The information in footnote 39 of the trial court's December 22, 2003 order had no evidentiary source in this case other than lawyers' arguments. The trial court had denied the very same motion three (3) previous times since the inception of this case. The only intervening factor between the three (3) prior denials and the December 22, 2003 decision to grant acquittal was defense counsel's argument of information never in evidence—a request for summary judgment in advance of trial.

"As a general rule, 'premature declarations,' such as that presented [in a pre-trial motion to dismiss], are strictly advisory and an improper exercise of judicial authority." State v. Tipton (1999), 135 Ohio App.3d 227, 229, quoting Fortner v. Thomas (1970), 22 Ohio St.3d 13, 14. "It is the function of a judgment of acquittal to protect against a decision by the jury based on speculation, surmise, bias or prejudice without evidence adequate in law to support a finding of

guilt.” United States v. Johnson (C.A.D.C., 1970), 432 F.3d 626, 635. “In passing upon a motion for judgment of acquittal, * * * the trial judge must be careful to differentiate between pure speculation and legitimate inference from proven facts.” Id. Rather than *protect* against speculation without evidence adequate in law, the trial court in this case *engaged* in pure speculation from unproven information. As explained before, the trial court overruled three (3) previous Motions for Judgment of Acquittal prior to September 11, 2003. Following September 11, 2003, Appellee used his “Supplemental Memorandum” and “Second Supplemental Memorandum,” filed November 6, 2003 and November 26, 2003, respectively, to argue “information” not adduced in evidence before this court or any other forum. Importantly, the trial court then reconsidered Appellee’s Motion for Judgment of Acquittal, and cited to the very information not yet adduced in evidence before any court or other forum.

In its December 22, 2003 order, the trial court substituted lawyers’ arguments for actual evidence. The trial court gleaned the new “information” in footnote 39 from Ross’ lawyers’ arguments. This “information’s” admissibility, relevance, weight, probity, and impeachment value have never been admitted under the Rules of Evidence in any court. Thus, the trial court violated the fundamental principle that criminal trials be open to the public. The Supreme Court of the United States has held “that the right to attend criminal trials is implicit in the guarantees of the First Amendment.” Richmond Newspapers Inc. v. Virginia (1980), 448 U.S. 555, 580. The high court “concluded there was a guaranteed right of the public under the First and Fourteenth Amendment to attend the [criminal] trial.” Id. The trial court should have allowed the parties to have a public trial in order to adduce as evidence the “information” it rested its final verdict upon. Yet the trial court did not do so.

In Reynolds v. Hazelberg (August 6, 1999), 6th Dist. No. E-98-082, the same trial court—Visiting Judge Joseph Cirigliano—was similarly appointed as a visiting judge after a trial had already taken place. In Hazelberg, Judge Cirigliano also based a substantive ruling on the arguments of attorneys without having considered the actual evidence. “It was error for Judge Cirigliano, who did not preside at the trial three years earlier, to rule on the motion for a new trial without some indication that he reviewed the trial transcript and evidence.” Id., at 2. “The briefs pertaining to appellees’ motion for new trial contained arguments, but not evidence. Arguments of counsel are not evidence.” Id., at 3, citing State v. Palmer (1997), 80 Ohio St.3d 543, 562.

Because it prejudged this information before it became evidence, the trial court denied the State of Ohio, the public, and the victim’s family a fair public trial.

2. The trial court impermissibly granted pretrial summary judgment in a criminal case.

The trial court erroneously based its pretrial decision to grant judgment of acquittal on information the parties had not admitted as evidence in a trial. In essence the trial court granted defendant summary judgment on information that had not been admitted as evidence in a trial. “Where a defendant in a criminal action files a motion for acquittal pursuant to Crim. R. 29 during pretrial and which goes beyond the face of the indictment, he is essentially moving for summary judgment.” State v. Khalaf (June 7, 2000), 9th Dist. No. 19839, at 1. “A motion for acquittal, pursuant to Crim. R. 29(A), can be made only ‘after the evidence on either side is closed.’ Moreover, ‘the Ohio Rules of Criminal Procedure do not allow for ‘summary judgment’ on an indictment prior to trial.” Id., quoting State v. Varner (1991), 81 Ohio App.3d 85, 86. “A motion to dismiss or other pretrial motion should not entail a determination of the sufficiency of the evidence to support an indictment.” State v. Tejada, 9th Dist. No. 20947, 2002-Ohio-5777, at

¶ 23. Where a trial court went beyond the face of the indictment to consider evidence prior to a trial, the trial court erred in granting a pretrial motion for acquittal. Khalaf, supra, at 2. If courts recognized pretrial motions for summary judgment, “trial courts would soon be flooded with pretrial motions to dismiss alleging factual predicates in criminal cases.” State v. Tipton (1999), 135 Ohio App.3d 227, 229. Thus, in granting a pretrial motion to dismiss, the trial court must not “look[] to the quantum of evidence that the state may be able to present * * * at trial.” Id. “There is no equivalent to a motion for summary judgment in the criminal law because, normally, if the evidence is insufficient, or the facts do not support the charge, prosecutorial discretion is used.” Cincinnati v. Northern Liberties Co. (Nov. 15, 1995), 1st Dist. No. C-950200. “Even though it is otherwise * * * capable of determination without trial, the legal sufficiency of evidence is a function of the trial and cannot be properly raised in a pretrial motion.” Id., citing State v. McNamee (1984), 17 Ohio App.3d 175.

The December 22, 2003 order functioned as an improper pretrial ruling on a motion for summary judgment. While the trial court did refer to the actual trial testimony from 2000, this was not the dispositive factor. As stated above, the trial court had denied judgment of acquittal three (3) times previously—most recently on September 10, 2003. The only intervening factor between the previous denials and the December 22, 2003 reversal was defense counsel’s assertion of new information that had never been admitted as evidence in a trial. There can be no serious argument that defense counsel’s motions were not “pretrial motions.” The appellate court remanded the case for trial in Ross I, supra. On September 10, 2003, the trial court set a final pretrial and a trial date. Trial counsel raised this “new information” in order to obtain a factual resolution of the case before trial—in essence, summary judgment. On its face, the trial court’s December 22, 2003 order contains a factual analysis of the evidence expected to be

introduced in a trial. See December 22, 2003 order at footnote 39. Therefore, the trial court erroneously and improperly granted pretrial summary judgment in a criminal case before the relevant evidence had been admitted, affording Appellee the privilege of arguing this new information, yet denying Appellant the opportunity to introduce it as evidence in a public trial.

The trial court also believed it possessed the authority to take such action despite such motion being denied several years earlier and in direct contravention of Crim.R. 29(C) and Crim.R. 45(B)¹.

Crim.R. 45(B) specifically prohibits the action taken by the trial court and states as follows:

[w]hen an act is required or allowed to be performed at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefore is made before expiration of that period originally prescribed or as extended by a previous order; or (2) upon motion permit the act to be done after expiration of the specified period, if the failure to act on time was the result of excusable neglect or would result in injustice to the defendant. *The court may not extend the time for taking any action under Rule 23, **Rule 29**, Rule 33, and Rule 34 except to the extent and under the conditions stated in them.* (Emphasis added).

The appellate court in its decision excised the final sentence in Crim.R. 45 with its July 22, 2009 decision. It is clear that this language was added to the text of the Rule by this Court for a reason. It is likewise clear that this text was added to the Rule to prevent the instant situation from occurring; yet both the trial court and the appellate court chose to ignore this critical portion of the Rule.

The Ninth District Court of Appeals also opted to ignore controlling United States Supreme Court precedent. In United States v. Carlisle (1996), 517 U.S. 416, the United States Supreme Court affirmed a lower appellate court that reviewed and reversed the trial court's

¹ This Court is clearly cognizant of the various deadlines established by various Rules of Criminal Procedure. See e.g. Crim.R. 12(time frame for filing motions to suppress); Crim.R. 12.1(time frame for filing notice of alibi);

improper judgment of acquittal under Fed. Crim R. 29, a rule that is virtually identical to Crim.R. 29, as determined by this Court. State v. Bridgeman (1978), 55 Ohio St. 2d 261; State v. Ross, 9th Dist. No. 21906, 2009 Ohio 3561. In Carlisle, reversal was proper because the trial court lacked jurisdiction to act outside the confines of Rule 29. Like Carlisle, the trial court in this case acted well outside the confines of Ohio Crim R. 29. Because Carlisle controls the outcome of this case, this case demands review and reversal. Id.

3. Under United States v. Carlisle, this Court has both the authority and the mandate to reverse the trial court's improper Crim R. 29(C) ruling.

In a general sense, the State cannot challenge validly entered acquittals. However, Appellant appeals the unlawful procedure used in this case—not the facts of the verdict or acquittal. This case has no validly entered acquittal. Because the trial court had no jurisdiction to acquit, any attempt to do so is both reviewable and reversible. In Carlisle, *supra*, the Supreme Court ruled that a trial court had no jurisdiction to grant a Fed. Crim R. 29(C) motion where the defendant filed an untimely 29(C) motion. In Carlisle, the trial court denied a motion for judgment of acquittal filed one (1) day later than permitted by rule. At sentencing a month later, the trial court reconsidered the motion and reversed, granting judgment of acquittal. The Sixth Circuit Court of Appeals reversed the trial court's decision, holding that the trial court had no jurisdiction outside of Fed Crim R. 29 to reconsider acquittal. Id., at 517 U.S. 419, 116 S.Ct 1460. “A rule permitting a party to submit and prevail on an untimely motion for judgment of acquittal is ‘inconsistent’ (or not ‘consistent’) with Rule 29’s 7-day filing limit; and the question of when a motion for judgment of acquittal may be granted does not present a case ‘not provided for’ by Rule 29; and Rule 29 is the ‘controlling law’ governing this question.” Id., at 517 U.S.

425, 116 S.Ct. 1460. The high court upheld the reversal of the improper judgment of acquittal. Carlisle therefore controls the outcome of this case.

Applied to this case, the trial court could not reconsider a properly denied 29(C) motion outside of the time limits of the rule—particularly when (1) the reconsideration came several years after the mistrial declaration, (2) was made by a judge who did not actually hear the evidence in the first place, and (3) despite Judge Dickinson’s characterization of Judge Cirigliano’s footnote as an aside, the *ex parte* conversation regarding evidence that was never submitted during the trial of this matter was the foundation for the sudden granting of the previously denied motion. In Re Cirigliano, 105 Ohio St. 3d 1223, 2004 Ohio 7352; Judge Cirigliano’s subsequent voluntary recusal on June 4, 2004 in State v. Ross, Ohio Supreme Court case number 04-AP-029. Appellee has not been re-tried since the original declaration of the mistrial and has no opportunity to present any evidence to the trial court. It is clear from Judge Cirigliano’s opinion, from which Appellant appealed, that this “evidence” improperly supported his decision to reconsider the motion for acquittal several years later.

a. The trial court did not have the inherent power to disregard the controlling procedural rules.

Carlisle also held that “the case law of [the Supreme Court] * * * does not establish any ‘inherent power’ to act in contravention of the applicable Rules,” and likewise explained that “we are not at liberty to ignore the mandate of Rule 29 in order to obtain ‘optimal policy results.’” Id., at 517 U.S. 428, 430, 116 S.Ct. 1460. “Courts cannot invoke inherent powers to circumvent or disregard constitutional or statutory procedure.” State v. Hoegh (Iowa, 2001), 632 N.W.2d 885, citing Carlisle, *supra*. In a concurring opinion in Carlisle, Justice Souter explained that the court’s “inherent authority” to act may be limited or proscribed by Crim. R. 29(C). Id., at 517

U.S. 434, 116 S.Ct. 1460, Souter, J. concurring. "The United States Supreme Court has stated repeatedly that a trial court's inherent powers do not give it discretion to circumvent the applicable rules of procedure." Rosado v. Bridgeport Roman Catholic Diocesan Corp. (Conn.App., 2003), 825 A.2d 153, 186, 77 Conn.App. 690, citing Carlisle, supra and United States v. Smith (1947), 331 U.S. 469, 473-74, 67 S.Ct. 1330. In United States v. Patel (N.D. Ill, 2002), 2002 WL 31236298, the court held:

Under the plain language of Rule 29(c), a court may not extend the time for filing a motion to acquit unless the extension is granted *within* the 7-day period. See Carlisle v. United States, 517 U.S. 416, 421, 116 S.Ct. 1460, 134 L.Ed.2d 613 (1996) (stating that "[t]here is simply no room in the text of Rules 29 and 45(b) for the granting of an untimely postverdict motion for judgment of acquittal, regardless of whether the motion is accompanied by a claim of legal innocence, is filed before sentencing, or was filed late because of attorney error"); United States v. Boyd, 172 F.R.D. 363, 365 (N.D.Ill.1997) ("**[i]f the seven days pass, the district court may not grant an extension of time**").

Here, on July 30, 2002, this Court declared a mistrial and discharged the jury. Patel, however, did not file the instant motion until August 30, 2002. Accordingly, because Patel filed her motion beyond the stringent 7 day period, this Court is without jurisdiction to hear her motion * * *.

Id., at 1-2. (Emphasis added). Under Carlisle, the trial court cannot summarily dispense with the Rules of Criminal Procedure by granting judgment of acquittal outside of the constraints imposed by Crim R. 29(C); any attempt to do so is unenforceable and void.

The mandatory time requirements of Ohio Crim R. 29 are not ambiguous or controversial. Criminal Rule 29 states:

(C) Motion after verdict or discharge of jury

If a jury returns a verdict of guilty or is discharged without having returned a verdict, **a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period.** If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It

shall not be a prerequisite to the making of such motion that a similar motion has been made prior to the submission of the case to the jury.

(Emphasis added). Ohio Crim. R. 45(B) clearly states that “the court may not extend the time for taking any action under * * * Rule 29 * * * except to the extent and under the conditions stated in them.” Ohio cases have held that the fourteen (14) day time limit in Crim. R. 29(C) is a mandatory procedure. In State v. Freeman (December 9, 1981), 1st Dist. No. C-810102, 1981, the court held that Crim. R. 29(C) motions, like Crim R. 34 motions, must be filed within the time limits prescribed by the rule. “[The defendant’s] motion for acquittal, pursuant to Crim R. 29(C), was not filed until September 29, 1990, well beyond the fourteen-day standard established in Crim.R.29(C).” State v. Trischler (Feb. 21, 1991), 10th Dist. No. 90AP-92, at 3. “Crim.R. 29(C) requires that such a motion be made within fourteen days, or such further time as the court may fix within the fourteen-day period.” State v. Wohlmeyer (1985), 27 Ohio App.3d 192, 193, Baird, J. dissenting. “Here, the verdict was returned on December 11, 1984, and a notice of appeal to this court was filed December 31, 1984. Since the motion was not filed until January 3, 1985, and there is nothing in the record to indicate that the court fixed any further time beyond the fourteen-day period, the motion was properly overruled.” Id.

In Carlisle, the United States Supreme Court specifically approved of the time limits in 29(C). “The only evident ‘rationale’ behind Rule 29(c)’s 7-day time limit is that a motion for judgment of acquittal filed eight days after trial is a motion filed one day later than justice and equity demand.” Carlisle, supra, at 517 U.S. 430, 116 S.Ct. 1460. In State v. Bridgeman (1978), 55 Ohio St. 2d 261, the Ohio Supreme Court found Crim. R. 29(A) to be virtually identical to Fed. Crim. R. 29, holding that the standard for sending a question to the jury under Federal law is the same standard that is applied under Ohio law. Id., at 264. The operative provisions of Fed. Crim. R. 29(C) and Ohio Crim. R. 29(C) are likewise virtually identical. Both rules allow

defendants to move for judgment of acquittal, or renew the motion within seven days (Federal) or fourteen days (Ohio) of the jury's verdict of guilty or discharge without having reached a guilty verdict.

b. Criminal Rule 29(C) bars the untimely reconsideration of the prior motion several years after the mistrial was declared.

Appellee initially complied with the time provisions 29(C) by filing a judgment of acquittal motion on November 9, 2000. Because Appellee timely filed his Crim R. 29(C) motion, as the mistrial was declared on October 28, 2000, the provision allowing the trial court to fix further time has no bearing here. Appellee filed a reply to his original motion on May 8, 2001 and May 11, 2001. This motion was last denied on September 10, 2003. A supplement to the motion for acquittal was filed on November 7, 2003 as well as November 26, 2003. It was not until December 22, 2003 that the trial court granted a partial judgment of acquittal. By this time, the trial court had already divested itself of jurisdiction as Crim. R. 29(C) does not authorize "renewed" or "supplemental" motions after the fourteen-day window from verdict or jury discharge, nor did the trial court ever file an order fixing time for "renewed" or "supplemental" acquittal motions during the fourteen-day window, at any time during the pendency of this case. As previously mentioned, Appellee initially complied with the time provisions of 29(C) by filing a renewed judgment of acquittal motion on November 9, 2000. Nowhere does Crim. R. 29(C) provide for a reconsideration of the decision when the trial court denied the actual 29(C) motion previously.

Nor can the supplemental pleadings relate back to the original, timely filed 29(C) motion to defeat the time limits of the rule. "Inasmuch as the district court * * * construed [defendant's] memorandum as a renewal of the first, timely motion for a new trial, it impermissibly granted an extension outside the seven-day period prescribed by Rule 33. A district court may not disregard

the jurisdiction limitations imposed by the Federal Rules of Criminal Procedure in this manner.” United States v. Bramlett (C.A.11, 1997), 116 F.3d 1403, 1405. In United States v. Gupta (C.A.11, 2004), 363 F.3d 1169, the court held that “motions to reconsider or renew Rule 29 or 33 motions are not permissible if they are filed outside the seven-day post-verdict period or outside an extension granted during that seven-day period.” Id. The holding of Gupta plainly applies to this case. “Supplemental” or “renewed” motions for judgment of acquittal filed outside the fourteen day window of Crim. R. 29(C) cannot relate back to timely filed motions in an attempt to defeat the rule.

Following Carlisle, this Court must exercise its authority to both review and reverse the lower appellate court’s as well as the trial court’s erroneous contention of law in entering judgment of acquittal. The trial court denied Appellee’s 29(C) motion on September 10, 2003. Then on December 22, 2003, several years following the declaration of the mistrial, the trial court impermissibly granted the previously denied acquittal in violation of Crim. R. 29 and Crim.R. 45.

The trial court had no jurisdiction to disregard the time limits of Crim. R. 29 or Crim.R.45. Following the logic of the trial court’s argument, a trial court could conceivably grant acquittal at any point in a criminal case—even after a defendant has spent several years in prison following sentencing and completed the process of appellate review. Criminal Rule 29 does not authorize such improper acquittals and Crim.R. 45 strictly prohibit such action. Consequently, Appellant respectfully requests that this Honorable Court reverse the appellate court’s decision of July 22, 2009 and remand this case with an order to reinstate the capital specification and Rape charge.

CONCLUSION

For the foregoing reasons, respectfully requests that this Honorable Court permit Appellant to file a delayed appeal in the instant matter.

Respectfully Submitted,

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PROOF OF SERVICE

A copy of the foregoing Brief of Amicus Curiae was sent by regular U.S. Mail to Shelley Pratt, Esq., Ashtabula County Prosecutor's Office, 25 W. Jefferson Street, Jefferson, Ohio 44047, Counsel for *Amicus Curiae* Ohio Prosecuting Attorneys Association; John Mitchell, Esq. and Matthew Meyer, Esq., Counsel for Appellant, Cuyahoga County Prosecutor's Office, Justice Center, Courts Tower, 1200 Ontario Street, Cleveland, Ohio 44113, and to Lawrence Whitney, Esq., 137 S. Main Street, Suite 201, Akron, Ohio 44308, Counsel for Appellee, this 28th day of September, 2009.



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