

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO : TRIAL NO. 08CR199  
Plaintiff-Appellee :  
VS. : APPEAL NO. 09CA797  
JOSHUA BALLEW : ON APPEAL FROM PIKE COUNTY  
Defendant-Appellant : COURT OF APPEALS FOURTH  
: APPELLATE DISTRICT  
:

10-0042

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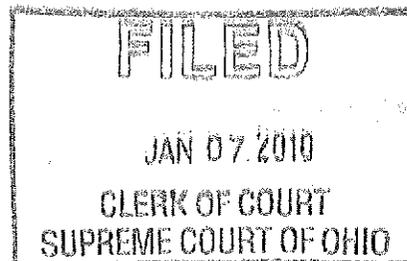
MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT JOSHUA BALLEW

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JOSHUA BALLEW  
C.G.I. P.O. 5500  
CHILLICOTHE, OHIO 45601  
APPELLANT PRO-SE

ROBERT JUNK  
PIKE COUNTY PROSECUTOR  
100 E. 2ND STREET SUITE  
100 WAVERLY, OHIO 45590

COUNSEL FOR APPELLEES, CITY OF WAVERLY  
AND PIKE COUNTY PROSECUTORS OFFICE



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with APPENDIX

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Explanation of why this is a case of public or Great General interest and involves a felony, and a Substantial Constitutional Question.

**THIS CASE PRESENTS 2 CRITICAL ISSUES FOR CONSIDERATION**

① The appellants sentence is void as a matter of law it violates the 14th amendment due process provision as Ex Post Facto "see-statement of the case." ASSERTING CLAIMS UNDER THE UNITED STATES CONSTITUTION

② The appellant Joshua Ballew is held in an illegal imprisonment in Case No. 08CR199 from the Court of Common Pleas Pike County Ohio. In my Motion For Leave to File Delayed Appeal No. 09CA797 in which was Denied December 7th, 2009 before I was Denied 12-07-09 they the Court of Appeals Fourth District Pike County Ohio sent me a Notice Of Deficiency in which they said that Notice Of Appeal not accompanied with copy of the Judgement or Order from lower court being appealed required by local rule 1, so I sent in the Judgement Entry and sentence For Filing on record with the 2 other deficiencies and than recieved on November 10th, 2009 Notice Of Correction "see appendix" so the 4th page of the Judgment Entry and Sentence Case No. 08CR199 which will show circled that prusuant to the negotiated plea agreement between the State Of Ohio and myself, count three of the indictment charging Rape in violation of section 2907.02 (A)(1)(b) of the Ohio Revised Code, a felony of the first degree be and hereby is dismissed. When they dismissed count three before or after negotiated plea agreement they also dismissed the hole indictment Case No. 08CR199 In the indictment count one, two and three are exactly the same. Indictment inclosed "see appendix" Section 2907.02 (A)(1)(b) in all three counts. And also illegal the Judge, Prosecuting Attorney and or Court Amendment Counts 1 and 2 of the indictment b y striking the see circled on PAGE 1 of The Judgment Entry and Sentence

SEE-APPENDIX → CASE NO. - 08CR199  
illegal → AMENDMENT COUNTS 1, and 2

language to try to make the count look differant and this action is also viod, because the Grand Jury can only amend the indictment and also the negotiated plea agreement is viod, because once the count 3 was dismissed this action dismissed count 1 and 2 which is the hole indictment until I came to prison and my father went to the courthouse to finally get it. Indictment No. 08CR199. Please review, reverse, and discharge me from this illegal imprisonment. And under the United States Constitution thier action in my csae is a Federal Constitutional violation. "Also see statement of the case"

STATEMENT OF THE CASE AND FACTS

AND ARGUEMENT IN SUPPORT OF PROPOSITION OF LAW 1 AND 2

(NO. → 2.) → On ~~January 12th~~ <sup>October 6th</sup>, 2008 a Judgment entry of Conviction was entered in Case No. 08CR199 in a three count indictment charging Rape in violation of Section 2907.02 (A)(1)(b) of the Ohio Revised Code a felony of the first degree. The Court moved to dismiss count 3 of the indictment prior to a negotiated plea agreement. They further dismissed the entire indicment in Case No. 08CR199. In the indictment counts one, two and three were exactly the same "see appendix" Section No. 2907.02 (A)(1)(b) was dismissed from all three counts of the indictment. The Judge, and Prosecuting Attorney then proceeded to amend the indictment sua-sponte which prejudiced me. State V. William, 53 Ohio App. 3d 1, 557 N.E. 2d 818 Ohio App. 10 Dist. Which asserts that there should be no prejudice to defendabt when amending an indictment. Here that was not the case my indictment was altered to appear different then the ~~counts~~ <sup>COUNT</sup> dismissed in some effort to "trick" me into entering a guilty plea when the Court knew full well that the indictment was defective from the start tainted with errors that

without a guilty plea was destined for dismissal had the State attempted to proceed to trial. I proceeded to enter a guilty plea and was sentenced to a substantial term of incarceration. I filed a Motion For Delayed Appeal and on December 7th, 2009 the Fourth Appellant District over ruled that Motion as well. FEDERAL DUE PROCESS VIOLATIONS

NO. 7/1 → The prejudiced incurred by me is that the lower Court sentenced me to a total sentence of ten (10) years, when as a matter of Constitutional Law under Ohio Revised Code 2929.14 (B) I could only lawfully have been given a minimum of three (3) years.

The disparity between the ten (10) year sentence imposed and the three (3) year sentence warranted is so great that a manifest miscarriage of Justice has occurred, *Strickland V. Washington*, 466 U.S. 668, 104 S. Ct. 2050 once I entered my guilty plea, such plea foreclosed my claim that my sentence was contrary to law. This position is "meritorious." This must be so because, Ohio Revised Code 2953.08 (B) provides in pertinent part that:

[A] In addition to any other right to appeal and except as provided in division [D] of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds: [4] the sentence is contrary to law [emphasis ours].

Accordingly, pursuant to Ohio Revised Code 2953.08 (A)(4), my sentence is subject to being appealed on direct review as long as I identify the legal error in the sentence. Compare: *U.S. V. Hayes* F. 3d 178 [6th Cir 1995]:

"Defendant may appeal his sentence even when the sentence imposed fell within the range advocated by him so long as he can identify a specific

error. U.S. V. Lavore, 19 F. 3d 1102, 1103 [6th Cir 1994]. Absent a defendant's specific identification of a specific error in the formulation of a sentence. This Court has no Jurisdiction to review within the guideline range "U.S. V. Lovines, 993 F. 2d 1244, 1245-46 [6th Cir. 1992] citing U.S. V. Fuente-Kolbensschlag, 878 F. 2d 1377, 1379 [11th Cir, 1989].

Since I have identified a specific error in my sentencing process in the lower Court to wit: a due process violation where the Court has created a Judicial enlargement of the statues that have ex post facto effect.

In 2008, the year these offenses occurred, Ohio Revised Code 2929.14 [B] provides that: "if the Court imposing sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the Court shall impose the shortest prison term authorized for the offense pursuant to division [A] of this section, unless one or more of the following applies."

Since none of the aggravated factors that would allow the sentencing Court not to follow this rebuttable presumption could be found by the Court in lieu of the U.S. Supreme Courts pronouncement in *Apprendi V. New Jersey* [2000], 542 U.S. 296 the presumption became conclusive. *Id.*

However, on February 27th, 2006 the Ohio Supreme Court handed down *State V. Foster*, [2006] 109 Ohio St. 3d 1, 845 N.E. 2d 740 which propoerts to have authorized the sentencing Court to impose the sentenc totaling ten (10) years that it did.

STATE V. FOSTER VIOLATES THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT U.S. CONSTITUTION AS VIOLATING THE EX POST FACTO CLAUSE OF ARTICLE I SECTION 9 CLAUSE 3, UNTIED STATES CONTITUTION.

MY CASE APPLYS TO ALL CRIMINAL DEFENDANTS

CONCLUSION

UNDER THE ACT OF CONGRESS

The State along with the Federal are charged with the duty of protecting an accused of his Constitutional rights, please protect my Constitutional rights and civil rights with giving me relief from this illegal imprisonment. Indictment and trial Case No. 08CR199 and appeal Csaе No. 09CA797 and Notice Of Deficiency and Notice Of Correction Case Appeal No. 2008CA000797. I am requesting that this Court grant Jurisdiction, and review is so prayed for, these very important issues presented in my case for reversal "on proposition Of Law No. 2 and discharge me from Chillicothe Correctional Institution. Thank you and God Bless your honorable Supreme Court Judges.

Respectfully Submitted

Joshua Ballew Pro-Se  
Joshua Ballew #588-662  
Pro-Se C.C.I. P.O. Box 5500  
Chillicothe, Ohio 45601

PROOF OF SERVICE

I, Joshua Ballew, do hereby certify that opposing Counsel, Robert Junk, Pike County Prosecuting Attorney at Pike County Courthouse 1st Floor 100 East 2nd Street Suite 100, Waverly, Ohio 45609 was served with one copy of the foregoing memorandum in support of jurisdiction on this 4<sup>th</sup> day of January 2010.

Joshua Ballew  
Joshua Ballew

"  
SEE"  
Appendix  
NEXT

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IN THE COURT OF COMMON PLEAS  
PIKE COUNTY, OHIO

STATE OF OHIO,  
Plaintiff.

VS.

JOSHUA E. BALLEW  
S.S.N.: 278-88-4159  
D.O.B.: 01-31-78  
Address: 1445 Bailey Chapel Road  
Beaver Ohio 45613

Defendant.

Case No. 08CA199

Judge Randy D. Deering

INDICTMENT

(A True Bill)

In the June Term of the Year 2008, the jurors of the Grand Jury of the State of Ohio, within and for the body of the County of Pike, on their oaths, in the name and by the authority of the State of Ohio, do find and present that:

Count One:

Joshua E. Ballew, during a period of time beginning the 20<sup>th</sup> day of June 2003 and ending the 20<sup>th</sup> day of June 2007, at the County of Pike, and in the State Of Ohio, did engage in sexual conduct with another, who is not the spouse of the offender, and, the said other person being less than thirteen (13) years of age, whether or not the offender knows the age of the other person, and the victim is less than ten (10) years of age, in violation of Section 2907.02(A)(1)(b) of the Ohio Revised Code.

(Rape, Felony 1)

Count Two:

Joshua E. Ballew, during a period of time beginning the 20<sup>th</sup> day of June 2003 and ending the 20<sup>th</sup> day of June 2007, at the County of Pike, and in the State Of Ohio, did engage in sexual conduct with another, who is not the spouse of the offender, and, the said other person being less than thirteen (13) years of age, whether or not the offender knows the age of the other person, and the victim is less than ten (10) years of age, in violation of Section 2907.02(A)(1)(b) of the Ohio Revised Code.

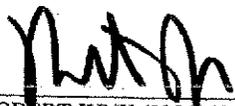
(Rape, Felony 1)

Count Three:

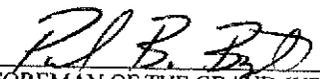
Joshua E. Ballew, during a period of time beginning the 20<sup>th</sup> day of June 2003 and ending the 20<sup>th</sup> day of June 2007, at the County of Pike, and in the State Of Ohio, did engage in sexual conduct with another, who is not the spouse of the offender, and, the said other person being less than thirteen (13) years of age, whether or not the offender knows the age of the other person, and the victim is less than ten (10) years of age, in violation of Section 2907.02(A)(1)(b) of the Ohio Revised Code.

(Rape, Felony 1)

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

  
ROBERT JUNK (0056250)  
Prosecuting Attorney

A True Bill:

  
FOREMAN OF THE GRAND JURY

FILED  
COMMON PLEAS COURT  
SEP - 2 2008  
JOHN E. WILLIAMS  
PIKE CO. CLERK



Concurrently with the filing of the motion, the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by App.R. 3 and shall file a copy of the notice of appeal in the court of appeals. \* \* \*

In support of his motion for leave to appeal, Ballew contends that he was "never advised by trial counsel that he had a [sic] appeal of right. In fact he was advised that since he entered into a plea of guilty he had forfeited his right to appeal his sentence and/or conviction." On appeal, Ballew argues that the sentence imposed by the trial court is void because "it violates the 14<sup>th</sup> Amendment Due Process provision as being ex post facto."

A guilty plea waives most of a defendant's constitutional rights and most errors on appeal. *State v. Spates*, 64 Ohio St.3d 269, 272, 1992-Ohio-130, 595 N.E.2d 351. However, a defendant retains a limited right to appeal his sentence. R.C. 2953.08.

Here, the trial court informed Ballew of his right to appeal his sentence.

The sentencing entry states:

The Court indicated to the Defendant that he had the right to appeal any maximum sentence, and if the charge were a serious offense, to appeal or seek leave to appeal the sentence imposed. The Court further indicated to the Defendant that if the Defendant were unable to pay the cost of such appeal, the Defendant had the right to appeal without payment; that if the Defendant were unable to obtain counsel for such appeal, counsel would be appointed without cost; that if the Defendant were unable to pay the costs of documents necessary to appeal, the documents would be provided without cost; and that the Defendant had a right to have a notice of appeal timely filed on the Defendant's behalf.

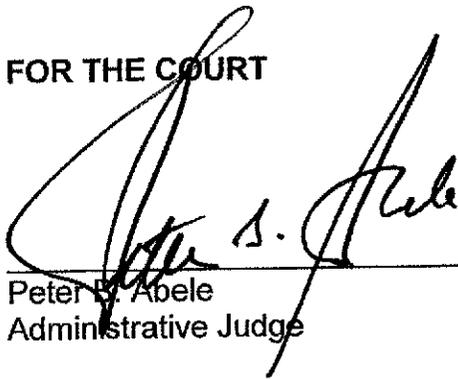
The sentencing entry contradicts Ballew's claim that he did not know he had the

right to file an appeal.

Therefore, based on the foregoing, we **DENY** Ballew's motion for leave to file delayed appeal, motion for transcript of complete proceedings at State expense, and motion for appointment of counsel. The clerk is **ORDERED** to serve by ordinary mail a copy of this order to all counsel of record and to all unrepresented parties at their last known addresses. **COSTS TO APPELLANT. IT IS SO ORDERED.**

Kline, P.J. & McFarland, J.: Concur.

FOR THE COURT

A handwritten signature in black ink, appearing to read "Peter B. Abele", is written over a horizontal line. The signature is stylized and cursive.

Peter B. Abele  
Administrative Judge

COURT OF COMMON PLEAS, PIKE COUNTY, OHIO

STATE OF OHIO

CASE # 08CR199

PLAINTIFF

-vs-

JUDGMENT ENTRY OF SENTENCE

JOSHUA E. BALLEW

DEFENDANT (IMPOSING TERM OF IMPRISONMENT)

This matter came on for hearing on the 6<sup>th</sup> day of October, 2008 for purposes of Sentencing. The State of Ohio was present and represented by the Prosecuting Attorney, **ROBERT JUNK** and the Defendant was present represented by Attorney **PAUL PRICE**.

The Court finds that on the 6<sup>th</sup> day of October, 2008, the Defendant entered a plea of "GUILTY" and was found "GUILTY" by this Court to the "Amended" First Count of the Indictment, charging "Rape," (amended by striking the language stating that the victim is less than ten (10) years of age) in violation of Section 2907.02 (A)(1)(b), a Felony of the First Degree; and to the "Amended" Second Count of the Indictment, charging "Rape," (amended by striking the language stating that the victim is less than ten (10) years of age) in violation of Section 2907.02 (A)(1)(b), a Felony of the First Degree.

The Court further finds that at the time the Defendant entered his plea, the Prosecuting Attorney and Counsel for the Defendant had expressed to the Court that such plea was being entered in conformity to a *negotiated plea settlement* between the Defendant and the State of Ohio, as more particularly expressed on the record and set forth in the written "Plea of Guilty" filed October 6, 2008.

The Court further finds that the Defendant, through his attorney and in open court, orally withdrew the "Motion To Dismiss For Failure Of Speedy Trial Under R.C. 2945.71" filed by the Defendant on October 6, 2008, and such motion to dismiss is withdrawn.

The Court further finds that it was the agreement and request of the State of Ohio and the Defendant that the Court proceed immediately to conduct a sentencing hearing in this action and that the Court impose judgment and sentence immediately.

A Statement of Facts was given by the Prosecuting Attorney and after said statement, the Defendant and Defendant's counsel were each given an

opportunity to make additions, objections, amendments, or corrections to said statement as given by the Prosecuting Attorney.

Prior to imposing sentence, the Court also afforded the Defendant and the Prosecuting Attorney an opportunity to present information, in addition to the negotiated plea settlement, relevant to the imposition of sentence in this action.

Before imposing sentence, the Court considered the record, any information presented at the hearing relevant to sentence, including any oral statements of the Prosecuting Attorney, the Defendant and Counsel for the Defendant, and any victim impact statement. Before imposing sentence, the Court has also considered the purposes and principles of sentencing under Section 2929.11 R.C., including, without limitation, those "*overriding purposes*" set out in the statute, that is, to protect the public from future crime by the offender and others, and to punish the offender. Prior to imposing sentencing, the Court has also considered and weighed the seriousness and recidivism factors relevant to the offense and to the offender pursuant to Section 2929.12 R.C., and the Court has also considered the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victims of the offense, the public, or both.

Prior to imposing sentence, the Court has also considered that the sentence to be imposed should be reasonably calculated to achieve the two overriding purposes of felony sentencing commensurate with and not demeaning the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders, and that the sentence to be imposed should not place an unnecessary burden on government resources.

The Court has considered and weighed the factors as set forth in the applicable provisions of Section 2929.14 R.C.

The Court further finds that the imposition of a prison term for each offense to which the Defendant entered a plea of "Guilty" is mandatory pursuant to Section 2929.13(F)(2) R.C.; and that the imposition of a prison term for each such offense to which the Defendant entered a plea of "Guilty" is necessary in order to comply with the purposes and principles of sentencing under section 2929.11 R.C.

The Court then indicated that it had considered the record, oral statements, any victim impact statement, the purposes and principles of sentencing under R.C. 2929.11, the seriousness and recidivism factors, relevant to the offense and offender pursuant to R.C. 2929.12, and the need for deterrence, incapacitation, rehabilitation, and restitution.

It is, therefore, the **JUDGMENT, ORDER and SENTENCE** of this Court that the Defendant serve a **MANDATORY PRISON TERM of TEN (10) YEARS** in regard to the "*Amended*" First Count of the Indictment charging "**RAPE,**" (*amended by striking the language stating that the victim is less than ten (10) years of age*) in violation of Section 2907.02 (A)(1)(b) of the Ohio Revised Code, a **Felony of the First Degree**; and it is the further **JUDGMENT, ORDER and SENTENCE** of this Court that the Defendant serve a **MANDATORY PRISON TERM of TEN (10) YEARS** in regard to the "*Amended*" Second Count of the Indictment, charging "**RAPE,**" (*amended by striking the language stating that the victim is less than ten (10) years of age*) in violation of Section 2907.02 (A)(1)(b) of the Ohio Revised Code, a **Felony of the First Degree**. It is further **ORDERED** that the prison terms heretofore imposed shall run **CONCURRENTLY** with each other, for a **MANDATORY** aggregate prison term of **ten (10) years**. Defendant was informed by the Court that the sentence heretofore imposed could **NOT** be reduced by Judicial Release pursuant to Section 2929.20 R.C. or earned ("good time") credit pursuant to Section 2967.193 R.C.

Further, as a result of the Defendant's pleas of "Guilty" in this action, the Defendant is classified for the remainder of his lifetime as a **TIER III SEX OFFENDER**, and the Defendant was so informed in open Court at sentencing of such classification, and the Defendant was informed of the Defendant's duties pursuant to Sections 2950.04, 2950.05 and 2950.06 of the Revised Code and of the Defendant's duties to similarly register, provide notice of a change and verify addresses in another state if the Defendant resides, is temporarily domiciled, attends a school or institution or higher education, or is employed in a state other than the State of Ohio.

It is further **ORDERED** that the Defendant pay the costs of this action and further **ORDERS and IMPOSES** that the Defendant stay away from and have no contact with the victim **TERESA MAYES** or any member of her family.

The Court further informed the Defendant at the time of imposing sentence at the aforesaid hearing that, upon the Defendant serving the prison terms imposed as a part of the sentence in this action, the Defendant would be released from prison on post-release control for a mandatory period of five (5) years; and that if the Defendant violated any of the terms and conditions of post-release control, then the parole board could return the Defendant to prison for up to nine (9) months for each violation, provided, however, that the maximum cumulative prison term for all violations could not exceed one-half of the stated prison term originally imposed; and that, if the violation of post-release control was for the commission of a new felony, then, in addition to any prison term for the new

felony, the sentencing court could impose a prison term for the violation of post-release control, and that the maximum prison term for the violation of post-release control would be the greater of twelve (12) months or the time remaining on post-release control.

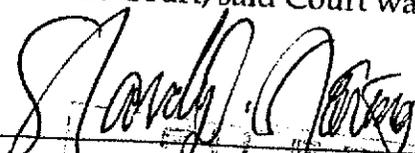
The Court further informed the Defendant at the sentencing hearing that, as a result of the Defendant's pleas of "Guilty" to Count One and Count Two of the Indictment in this action, the Defendant may not have, acquire, carry or use, a firearm or dangerous ordnance for the remainder of the Defendant's life, and that violation of this prohibition constitutes "Having weapons while under disability," a felony of the third degree.

The Court indicated to the Defendant that he had the right to appeal any maximum sentence, and if the charge were a serious offense, to appeal or seek leave to appeal the sentence imposed. The Court further indicated to the Defendant that if the Defendant were unable to pay the cost of such appeal, the Defendant had the right to appeal without payment; that if the Defendant were unable to obtain counsel for such appeal, counsel would be appointed without cost; that if the Defendant were unable to pay the costs of documents necessary to appeal, the documents would be provided without cost; and that the Defendant had a right to have a notice of appeal timely filed on the Defendant's behalf.

Pursuant to the negotiated plea agreement between the State of Ohio and the Defendant, Count Three of the Indictment, charging "Rape," in violation of Section 2907.02 (A)(1)(b) of the Ohio Revised Code, a Felony of the First Degree be and hereby is **DISMISSED**.

It is further **ORDERED** that the Defendant be conveyed forthwith into the custody of the Ohio Department of Rehabilitation and Correction. The Defendant is granted credit for twenty-one (21) days previously served as of the date of the sentencing hearing (October 6, 2008), and shall receive credit for any additional days served while awaiting transportation to the appropriate state institution to begin serving his sentence of imprisonment. Any motions that are outstanding are hereby withdrawn by the party who filed them. Defendant's bond is hereby **DISCHARGED** and any outstanding warrants are recalled.

There being no further matters before the Court, said Court was adjourned.

  
\_\_\_\_\_  
JUDGE, RANDY D. DEERING

OCT 9 2008  
PIKE COUNTY CLERK

10/9/08

SUBMITTED:

*Robert Junk*

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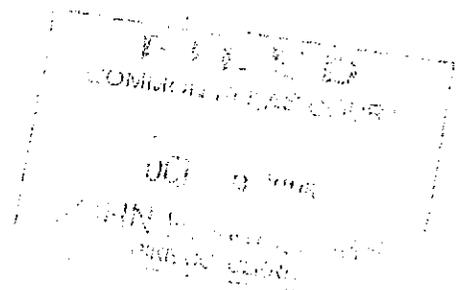
**ROBERT JUNK (0056250)**  
**PROSECUTING ATTORNEY**  
100 E. Second Street  
Waverly, Ohio 45690  
(740) 947-4323  
(740) 947-7617 (fax)

APPROVED:

*Paul Price*

---

**PAUL PRICE**  
**PRICE & ROSENBERGER**  
112 W. Third Street, P. O. Box 26  
Waverly, Ohio 45690  
(740) 947-2176



IN THE COURT OF APPEALS  
FOURTH DISTRICT  
PIKE COUNTY, OHIO

STATE OF OHIO  
Plaintiff

VS.

CASE NO. 2009CA000797

JOSHUA E BALLEW  
Defendant

NOTICE OF DEFICIENCY

Please be advised the Court of Appeals has directed that you be advised that your appeal is not property perfected for the reason or reasons checked below.

Notice of Appeal not accompanied by costs deposit required by Local Rule 2 of the Fourth Appellate District.

Notice of Appeal not accompanied with a copy of the Judgment or Order from the lower court being appealed required by Local Rule 1.

Notice to Appeal not accompanied by written order from you to the Court Reporter, not the Clerk of Courts, that a complete or partial transcript of proceedings has been requested as required by Ohio Appellate Rule 9.  
(or)

Notice of Appeal not accompanied by a designation setting forth proposed assignments of error, if partial transcript has been ordered, no transcript is required or an alternative no transcript will be filed as required by Ohio Appellate Rule 9.

Notice of Appeal not accompanied by a Docket Statement, either Civil or Criminal as required by Local Rule 15 of the Fourth Appellate District.

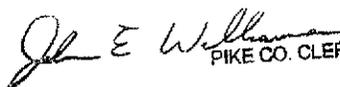
Notice of Appeal not accompanied with the correct number of copies. (4 copies needed for Court of Appeals plus the original.)

Unless the above deficiencies are remedied forthwith, the Court will dismiss the appeal.

JOHN E. WILLIAMS, CLERK

COURT OF APPEALS  
FILED  
OCT 22 2009

  
DARLA J. SMITH, DEPUTY CLERK

  
PIKE CO. CLERK

**IN THE COURT OF APPEALS  
FOURTH DISTRICT  
PIKE COUNTY, OHIO**

**STATE OF OHIO  
Plaintiff**

**VS.**

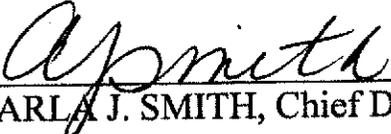
**CASE NO. 2009CA000797**

**JOSHUA E BALLEW  
Defendant**

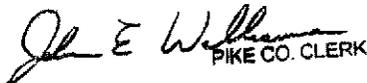
**NOTICE OF CORRECTION**

The previously issued deficiency has been corrected in the above referenced case.

JOHN E. WILLIAMS, CLERK

  
DARLA J. SMITH, Chief Deputy

Copies mailed to all attorneys of record, and to the Court of Appeals.

COURT OF APPEALS  
**F I L E D**  
NOV 10 2009  
  
PIKE CO. CLERK