

IN THE OHIO SUPREME COURT  
Case Nos. 2009-1469

ORIGINAL

STATE OF OHIO :  
 :  
 Plaintiff-Appellant : On Appeal and Notice of Certified  
 : Conflict from the Cuyahoga County  
 : Court of Appeals, Eighth District  
 vs. : Case No. 91701  
 :  
 STEVEN JOHNSON :  
 :  
 Defendant-Appellant :

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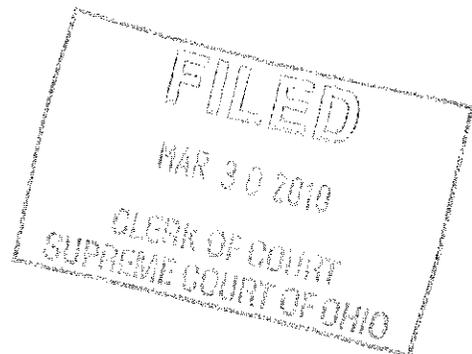
**APPELLEE'S MERIT BRIEF**

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ROBERT L. TOBIK, ESQ.  
Cuyahoga County Public Defender  
BY: JOHN T. MARTIN, ESQ. (0020606) (COUNSEL OF RECORD)  
Assistant Public Defender  
310 Lakeside Avenue, Suite 200  
Cleveland, OH 44113  
(216) 443-7583  
(216) 443-6911 FAX  
COUNSEL FOR APPELLEE STEVEN JOHNSON

WILLIAM MASON, ESQ.  
Cuyahoga County Prosecutor  
BY: THORIN O. FREEMAN (0079999)  
DANIEL VAN (0084614)  
Assistant Prosecuting Attorneys  
The Justice Center  
1200 Ontario Street, Ninth Floor  
Cleveland, OH 44113  
(216) 443-7800  
COUNSEL FOR APPELLANT STATE OF OHIO



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## SUMMARY OF ARGUMENT

In the instant case, the State of Ohio seeks to revisit a decision of this Court – *State v. Clay*, 120 Ohio St.3d 528, 2008-Ohio-6325 – that was decided by a clear majority of the Court. Nothing about this case should cause this Court to modify a decision that is so recent and which reflected a consensus of almost the entire Court.

*Clay* stands for the unremarkable proposition that, because having a weapon under disability is not a strict liability offense; one must be “reckless” with respect to the element of the disability specified in R.C. 2923.13(A)(3), which includes being under indictment or being previously convicted of certain drug offenses. In other words, it is not enough to knowingly possess a firearm; one must also be recklessly aware of their disabled condition under R.C. 2923.13(A)(3).

While *Clay* reached its holding in the context of a defendant’s awareness of a pending indictment for drug possession, nothing in the Court’s decision limited the scope of *Clay* to cases where the disability was a pending indictment as opposed to a prior conviction involving a drug of abuse. This is hardly surprising because the General Assembly included the disabilities of pending indictment and prior conviction into the same sentence that constitutes R.C. 2923.13(A)(3). Contrary to the State’s suggestion, the Eighth District did not expand *Clay*. Rather the Eighth District simply recognized that it could not limit *Clay* to only one portion of the single-sentence subsection when *Clay* had already examined the entire subsection.

The facts of the instant case demonstrate why the court of appeals in the instant case decided the matter correctly. Mr. Johnson’s two “disabilities” were such that a reasonable person would not have known of the disabling condition. The first disability was for *misdemeanor*

possession of marijuana. The second was even more innocuous and, Mr. Johnson argued,<sup>1</sup> was not even a valid disability – misdemeanor possession of a *counterfeit* controlled substance as opposed to an actual drug of abuse.

The State voices concern that the instant case has undercut the legal principle that ignorance of the law is not an excuse. But this is not true in the instant case anymore than it was true in *Clay*. Mr. Johnson is not claiming a defense on the basis of ignorance of the underlying statute, i.e. he is not saying that a person commits no crime because he or she he did not know it was illegal for persons with statutory disabilities to possess weapons. Rather, Mr. Johnson is arguing that, to be convicted, a person must be at least recklessly aware that he or she is one of those persons who has such a disability. This distinction has been endorsed at least twice by the United States Supreme Court -- in *Morrisette v. United States* (1952), 342 U.S. 246 and *Liparota v. United States* (1985), 471 U.S. 419. The instant case's holding is in keeping with this clearly established United States Supreme Court precedent.

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<sup>1</sup> This issue was never resolved in the court of appeals because it became moot in light of the holding in the Opinion Below.

## STATEMENT OF THE CASE AND FACTS

This is an appeal from a jury trial in which the defendant was found guilty of possession of a weapon while under a disability in violation of R.C. 2923.13(A)(3). A second count, of receiving stolen property, was dismissed by the trial judge pursuant to Crim. R. 29. The sentence was not appealed.

The indictment alleged that the defendant knowingly had a firearm while under a disability, to wit: a prior conviction for the possession of drugs and a prior conviction for possession of a controlled substance. Indictment, Count One.

Evidence at trial revealed that, in the early morning hours of April 3, 2008, police responded to a reported disturbance in the 2800 block of the Cedar Estates. R. 120. Upon entering an upper-floor apartment, the police saw the defendant with a gun in his hand kneeling on the floor. (T. 124, 129). The defendant was bleeding from his head and appeared dazed. He was surrounded by three women who were fighting with him; one was on top of the defendant while the other two were behind him. (T. 124-25).

Natasha Fentress was one of the women in the apartment. She testified that the defendant and two of his male friends had accompanied Fentress, Nicole Arnold and Arnold's cousin, Lorrie Lockhart (aka "Bud" or "Bug") after an evening out at a bar. (T. 172-76). The apartment belonged to Lockhart. (T. 176). At the apartment, the three men and three women paired off and went to separate rooms. (T. 176-77).

According to Fentress, the defendant and Nicole Arnold began to argue. (T. 177). The defendant complained that Nicole Arnold had stolen his chain from him. (T. 178-80). According to Fentress, the argument escalated to where Arnold pulled a gun and then the defendant pulled a

gun out of a bag he had been carrying. (T. 181-83). One of the women responded by obtaining a pole and eventually Arnold hit the defendant over the head with it, injuring him. (T. 182-85).

The defendant's statement to the police was introduced by the State. The defendant's statement was consistent with Fentress' testimony in that it also indicated that the three men and three women were socializing in the apartment. (T. 272). According to the defendant, an argument erupted after Arnold tried to pickpocket him. (T. 272). The argument involved all three women and the defendant, his two friends having left when the altercation started to escalate. (T. 272). According to the defendant, Lockhart brought the gun into the room. The defendant lunged for the gun and was struggling with the women over the gun. (T. 272-73). During the struggle he was hit with a pole. (T. 273).

The parties stipulated that the defendant was previously convicted of misdemeanor possession of marijuana and misdemeanor possession of a counterfeit substance. (T. 346). The jury was instructed that it was required to accept stipulated facts as proven. (T. 109, 430).

During jury instructions, the court instructed the jury that, if it believed by a preponderance of the evidence that the defendant only possessed the gun in an effort to disarm Lockhart, then the defendant was not guilty. (T. 420). The trial court also instructed the jury that the jury could not find that the State had proven the elements of knowingly possessing a firearm and, at the same time, also find that the affirmative defense was proven: "You can't have both; can't have the State prove their case and affirmative defense . . . only one can be proved . . . either the State or the defense." (T. 428).

On direct appeal, the defendant raised four assignments of error:

**Assignment of Error I:** THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY THAT IT COULD NOT FIND THAT BOTH THE STATE HAD PROVEN ITS PRIMA FACIE CASE AND THE DEFENDANT HAD PROVEN HIS AFFIRMATIVE DEFENSE AND WHEN IT FURTHER SUGGESTED THAT THE AFFIRMATIVE DEFENSE IN THIS CASE PERTAINED SOLELY TO MOTIVE.

**Assignment of Error II:** THE TRIAL COURT ERRED WHEN IT PERMITTED THE JURY TO CONSIDER THE POSSESSION OF A COUNTERFEIT SUBSTANCE AS A DISABLING CONVICTION.

**Assignment of Error III:** THE TRIAL COURT PLAINLY ERRED WHEN IT PERMITTED THE INVESTIGATING DETECTIVE TO COMMENT ON THE EVIDENCE AND ON THE DEFENDANT'S TRUTHFULNESS.

**Assignment of Error IV:** THE TRIAL WAS STRUCTURALLY FLAWED BECAUSE THE INDICTMENT FAILED TO ALLEGE, AND THE JURY FAILED TO CONSIDER, WHETHER, THE DEFENDANT WAS AWARE THAT HE HAD BEEN CONVICTED OF A CRIME THAT PREVENTED HIM FROM POSSESSING A FIREARM.

The Eighth District Court of Appeals sustained the Fourth Assignment of Error on the basis of *State v. Clay*. In light of the reversal of the conviction on the basis of the Fourth Assignment, the Eighth District did not reach a decision on the first three assignments. Accordingly, any decision of this Court regarding the State's Proposition of Law in the instant case will still leave those remaining assignments unaddressed.

On timely appeal to this Court, the State of Ohio presented a single proposition of law, which the Court accepted for plenary consideration.

## ARGUMENT

*In Opposition to Proposition of Law I (as posited by the Appellant State of Ohio):*

**When a disability is based on a prior conviction, the State is not required to prove that a defendant is reckless in his knowledge that a prior conviction creates a disability that criminalizes knowing possession of a firearm or dangerous ordinance.**

The proposition of law should be rejected. Instead, the Court should adopt as syllabus law the following:

**“For purposes of proving the offense of having a weapon while under disability pursuant to R.C. 2923.12(A)(3), the mental state of recklessness applies in determining whether the defendant was aware that he or she:”<sup>2</sup>**

**‘has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been an offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.’<sup>3</sup>**

The syllabus in the instant case would then be consistent with the *Clay* syllabus.

### **A. Strict Liability is Inappropriate As a Matter of Statutory Construction**

The State argues that the element of having a disabling conviction should be one of strict liability. This is incorrect. Because this is a case involving statutory interpretation, this Court’s starting point is the statutory language. R.C. 2923.13 provides in pertinent part:

(A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordinance, if any of the following apply:

\* \* \*

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<sup>2</sup> *Clay*, syllabus.

<sup>3</sup> R.C. 2923.13(A)(3).

(3) The person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been an offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.

In *Clay*, this Court held that R.C. 2923.13(A)(3)'s disabling condition of being "under indictment" was not a strict-liability condition – the defendant must be at least reckless with respect to his or her awareness of that particular disabling condition. *Clay*, syllabus. While, in *Clay*, the disabling condition was a pending indictment, nothing in *Clay* suggests that the other disabling conditions contained in the same subsection should be treated any differently. The statutory analysis that the Court employed in *Clay* is equally applicable in the instant case – which is dealing with the continuation of the same sentence of Section 2923.13(A)(3) that was the subject of *Clay*.

The State attempts to distinguish, and thus limit *Clay* to the pending-indictment disability. The State argues that there are factors outside the four corners of R.C. 2923.13 that indicate the intention of the General Assembly to impose strict liability regarding the prior-conviction disability. The State's argument fails for at least two reasons.

First, R.C. 2901.21(B) plainly and unambiguously states that this Court will not look beyond the four corners of the "section defining the offense" in determining whether the section defining the offense "plainly indicates a purpose to impose strict criminal liability."

When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.

R.C. 2901.21(B).

It is not enough that the General Assembly in fact intended imposition of liability without proof of mental culpability. Rather the General Assembly must plainly indicate the intention in the language of statute.

*State v. Moody* (2004), 104 Ohio St.3d 244, 246 (emphasis added), quoting *State v. Collins* (2000), 89 Ohio St.3d 524, 530.

When R.C. 2901.21(B) is applied to R.C. 2923.13, it is evident that there is no more of indication in the “statute defining the offense.” i.e. R.C. 2923.13, that strict liability should apply to the disabling condition of a prior conviction than there was reason to find that strict liability applied to the disabling condition of being under indictment. The two disabling conditions follow each other immediately in the same sentence of R.C. 2923.13.

Even if this Court were inclined to look beyond the four corners of the statute defining the offense, it should only do so in those situations where a strict liability element is being added to conduct that is already criminal in nature and already malum in se. This explains why the Court found strict liability in cases such as *State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121 (when defendant knowingly possessed pornography, strict liability regarding interstate nature of material possessed), *State v. Wharf*, 86 Ohio St.3d 375, 1999-Ohio-112 (when defendant commits a theft offense (which has a mental element already), strict liability regarding possessing a deadly weapon during that offense), *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225 (when defendant commits a theft offense (which has a mental element already), strict liability regarding displaying or brandishing deadly weapon during that offense).

In contrast, the instant case is one where the State would have a strict liability element, i.e. the disabling condition, cause *otherwise innocent conduct* to be criminal. Indeed, Mr. Johnson’s right to possess a firearm is constitutionally protected. *Clay*, at paragraph 26

(“possessing a weapons, when the weapon is a firearm, is a constitutionally protected right subject only to limited restrictions,” citing *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35.

The State attempts to evade this distinction by suggesting that the possession of the firearm in this case was already criminal by virtue of R.C. 2923.17, which prohibits the possession of a dangerous ordnance. This is patently incorrect. A firearm is not a dangerous ordnance. Compare R.C. 2923.11(B)(1)(defining “firearm”), with R.C. 2923.11(K)(1) and R.C. 2923.11(K)(4) (collectively defining “dangerous ordnance” to include only those firearms that are automatic, sawed-off, or designed and manufactured for military purposes). Simply put, there is no dangerous ordnance in the instant case and the State’ argument is inapposite.

Accordingly, the mens rea of recklessness should be applied as a matter of statutory construction.

#### **B. Strict Liability Denies Mr. Johnson Due Process of Law**

Due process of law, as guaranteed by the Fourteenth Amendment and Article I, Section 10 of the Ohio Constitution, will be violated if the State’s strict liability argument prevails. Due Process under the Fourteenth Amendment requires the State to prove the predicate facts necessary to establish criminal intent or scienter. *Morissette v. United States* (1951), 342 U.S. 246, 271 and 275-76 (explaining that the defendant should not be precluded from arguing that he did not “knowingly convert[]” because he believed the property was abandoned); *see also Liparota* (1985), 471 U.S. 419, 420-21 and 433-34 (explaining that the government must prove that the defendant “knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulation” to convict him or her of food stamp fraud).

It is well-established that “existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.” *Staples v. United States* (1994),

511 U.S. 600, 605 (quoting *United States v. Gypsum* (1978), 438 U.S. 422, 436). As explained by the United States Supreme Court:

The law condemns the imposition of criminal punishment, particularly imprisonment, on the basis of strict liability. ‘The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.’

*Liparota*, 471 U.S. at 425-26 (quoting *Morissette*, 342 U.S. at 250). When, as here, intent of the accused “is an ingredient of the crime charged, its existence is a question of fact” which must be proved by the State and found by a trier of fact. *Morissette*, 342 U.S. at 274. A conclusive presumption which effectively eliminates criminal intent necessarily conflicts “with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.” *Id.* at 275. As explained by the United States Supreme Court:

The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries.

*Id.* at 263. By relieving the State of its burden of proving that appellant was aware of the pending indictment, the trial court established a conclusive presumption offensive to due process.

### **C. Defining the Extent to Which Recklessness Must Apply**

If this Court agrees that the State’s strict liability argument fails, the scope of “recklessness” must still be determined. Simply put, is it enough that Mr. Johnson be recklessly aware about the fact that he was previously convicted of misdemeanor marijuana possession, or must he also be recklessly aware that a misdemeanor marijuana conviction is an “offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse” under R.C. 2923.13?

First, because the trial court in this case treated the entire question of the prior conviction as a strict liability element, it is not necessary for this Court to answer this question. Under either application of “recklessness,” Mr. Johnson’s conviction must be reversed. The instant case is not the best vehicle to parse a distinction that was not made by the trial court, and was accordingly not addressed by the Eighth District.

However, if the Court does address this question, it should conclude that the defendant must be recklessly aware both that:

1. He has been convicted of the possession of marijuana, and
2. His misdemeanor marijuana conviction is an “offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse” under R.C. 2923.13.

It is the second of these two “facts” – the fact that a misdemeanor marijuana conviction” is a disabling offense – that the State finds particularly objectionable, because the State contends that this violates the maxim that ignorance of the law is not excuse. However, the State is incorrect in this regard.

The United States Supreme Court has addressed this issue in *Liparotta*, which is on point. In *Liparotta*, the defendant was convicted of violating a federal statute that provided that

“whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or regulations” is subject to a fine and imprisonment.

*Liparotta*, 471 U.S. at 420 quoting 78 Stat. 708, as amended, 7 U.S.C. 2024(b)(1) (bracketed material appears as such in *Liparotta*). The defendant in *Liparotta* had purchased food stamps from an undercover federal agent at substantially less than their face value. The Supreme Court reversed the conviction because of improper jury instructions relating to the meaning of

“knowingly.” The Court held that the defendant must (1) know that he was acquiring or possessing food stamps, and (2) know that the acquisition or possession of the food stamps was in a manner forbidden by statute or regulation. The Court specifically rejected the government’s argument that, so long as the government proved that Mr. Liparota knew he was acquiring or possessing food stamps, the government did not have to prove that Mr. Liparota was aware that he possessed the stamps in a manner contrary to statute or regulations.

Addressing the same “ignorance of the law” arguments posited by the State in the instant case, the Supreme Court rejected the notion that its holding was creating a “mistake of law” defense:

Our holding today no more creates a “mistake of law” defense than does a statute making knowing receipt of stolen goods unlawful. . . . In both cases, there is a legal element in the definition of the offense. In the case of receipt-of-stolen-goods statute, the legal element is that the goods were stolen; in this case, the legal element is that the “use, transfer, acquisition,” etc. were in a manner not authorized by statute or regulations. It is not a defense to a charge of receipt of stolen goods that one did not know that such receipt was illegal, and it is not a defense to a charge of a [7 U.S.C.] 2024(b)(1) violation that one did not know that possessing food stamps in a manner unauthorized by statute or regulations was illegal. It *is*, however a defense to a charge of knowing receipt of stolen goods that one did not know that the goods were stolen, just as it is a defense to a charge of a [7 U.S.C.] 2024(b)(1) violation that one did not know that one’s possession was unauthorized. See ALI Model Penal Code [Section] 2.02, Comment 11, p. 131 (Tent. Draft No. 4, 1955), *United States v. Freed* [(1971), 401 U.S. 601, 614-15 (Brennan, J. concurring)]. Cf. *Morrisette v. United States* [(1952), 342 U.S. 246] (holding that it is a defense to a charge of “knowingly converting” federal property that one did not know that what one was doing was a conversion).

*Liparota*, 471 U.S. at 425 n.9.

The Court noted that its construction of “knowingly” “is particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently

innocent activity.” *Id.* at 426. “In addition, requiring *mens rea* is in keeping with our longstanding recognition of the principle that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.’” *Id.* at 427. In Ohio, this rule of lenity has been codified by R.C. 2901.04(A).

Requiring “reckless” to apply to the disabling consequences of the marijuana misdemeanor conviction in this case is particularly required by due process considerations. “Living under a rule of law entails various suppositions, one of which is that ‘[all persons] are entitled to be informed as to what the State commands or forbids.’” *Papachristou v. City of Jacksonville* (1972), 405 U.S. 156, 162. Because our system of criminal justice is based on the assumption that individuals are capable of choosing between lawful and unlawful conduct, due process requires that “laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Grayned v. Rockford* (1972), 408 U.S. 104, 108-109. Basic fairness requires that an individual not be held criminally responsible for conduct (possession of weapon) that is constitutionally protected by the Second Amendment of the United States Constitution and Article I, Section 4 of the Ohio Constitution and that would have been perfectly legal except for circumstance, i.e. the disabling effect of a marijuana misdemeanor, of which he was unaware.

As discussed at length in the Brief of Amicus Ohio Association of Criminal Defense Lawyers, the fact that a misdemeanor marijuana is disabling under R.C. 2923.13 is not made known to criminal defendants who are convicted of marijuana misdemeanors. Defendants are not being told of this consequence by the court, by their lawyers (if they have a lawyer) or by probation officers (in the minority of cases where active supervision is part of a sentence). Indeed, a number of persons who are currently ineligible to possess firearms are minor

misdemeanants who never even came to court, having simply mailed a check along with their citation for possession of less than 100 grams of marijuana.

#### **D. The Structural Nature of the Error**

Finally, the error in this case must be analyzed with respect to its structural nature. The combination of a defective indictment (which made no mention of recklessness) and similarly defective jury instructions should cause this Court to conclude that the error in this regard is structural, requiring reversal of the conviction and dismissal of the defective indictment. *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, clarified by 2008-Ohio-3749.

Nor can it be argued that the error in this case was harmless. First, as a structural error, no prejudice need be shown. *Id.* However, in this case, there is a real danger of prejudice. The defendant's two prior convictions were each for misdemeanors. One involved a small amount of marijuana and the other did not even involve a drug of abuse. State's Exhibits 13 and 14. Yet the jury was instructed as a matter of law that these convictions satisfied the prior-conviction element of the offense charged, without any consideration as to mens rea. (T. 412).

Moreover, in this case, there is the distinct possibility that the jury convicted the defendant on the basis of possession of a counterfeit substance. Compare Exhibit 13 with Exhibit 14. Because a counterfeit substance is not a "drug of abuse," it could not be a disabling offense. It should be noted that this argument, which was contained in Assignment of Error III, below, was never addressed by the Eighth District because the Eighth District already determined that a structural error occurred.

**CONCLUSION**

Wherefore, this Court should affirm the decision of the Eighth District Court of Appeals.

Respectfully submitted,

  
JOHN T. MARTIN, ESQ.  
Assistant Public Defender

by James Foley  
0069895  
per telephone  
authorization  
3/30/10

**SERVICE**

A copy of the foregoing Appellee's Merit Brief was sent via U.S. mail to William D. Mason, Cuyahoga County Prosecutor, The Justice Center, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113 on this 30<sup>th</sup> day of March, 2010.

Respectfully submitted,

  
JOHN T. MARTIN, ESQ.  
Assistant Public Defender

by James Foley  
0069895  
per telephone  
authorization  
3/30/10