

ORIGINAL

IN THE SUPREME OF OHIO

MEGAN GOFF,

APPELLANT/DEFENDANT,

V.

STATE OF OHIO,

APPELLEE/PLAINTIFF.

Case No. 09-1977

On Appeal from the Lawrence
County Court of Appeals
Fourth Appellate District

Court of Appeals
Case No. 07 AP 070039

BRIEF OF *AMICI CURIAE* IN SUPPORT OF BRIEF OF APPELLANT-DEFENDANT
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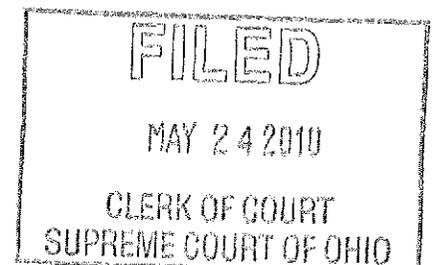


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STATEMENT OF INTEREST OF AMICI CURIAE

The Justice League of Ohio and The Capital University Law School Family Advocacy Clinic contend that both the trial court and the Court of Appeals, in the case of Megan Goff, adhered to out-dated notions regarding Battered Woman's Syndrome and relied on a wrongfully compelled examination by the state.

The Justice League of Ohio

The Justice League of Ohio is a 501(c) (3) nonprofit organization founded to help ensure that the constitutional, statutory, and inherent rights of victims of violent crime are upheld throughout the criminal justice process. The goal of The Justice League is to restore faith and balance in the criminal justice process. The Justice League opened a legal clinic in 2007 and currently staffs two attorneys who work to uphold victims' rights across the state of Ohio. The Justice League also does outreach across the Ohio community to raise awareness about the prevalence of victim rights violations and the need for proper criminal justice responses. The Justice League assists all victims of violent crime including victims of homicide, rape, sexual assault, domestic violence, assault and stalking.

Capital University Family Advocacy Clinic
(Funded by The Columbus Coalition Against Family Violence)

The Family Advocacy Clinic is funded by The Columbus Coalition Against Family Violence, a 501 (c) (3) organization, and is managed by Capital University Law School. It was formed in 2001 for the primary purpose of providing legal representation to victims of intimate partner violence who cannot afford to hire private counsel. Additionally, the Clinic seeks to provide the bar, the judiciary, and the legislature with information and insight concerning the impact of domestic violence on families. The Clinic and The Columbus Coalition Against Family Violence have an enduring interest in protecting the rights of victims of family violence.

Both the Justice League of Ohio and the Family Advocacy Clinic have an interest in protecting the rights guaranteed to victims under the United States and Ohio Constitutions.

Both the Justice League of Ohio and The Family Advocacy submit this *Amici* brief with the intention of educating the Ohio Supreme Court on issues of battering and its effects. Both organizations contend that Battered Woman's Syndrome is not a mental illness or condition and therefore, the trial court's ordering of a compelled examination was inappropriate. Both *Amici* are of the opinion that due, in part, to the acceptance of out-dated notions of Battered Woman's Syndrome that were advanced in the case of Megan Goff, she did not receive a fair trial.

STATEMENT OF FACTS AND CASE

Amicus Curiae hereby adopt and incorporate the Statement of the Facts and Case contained in the Merit Brief of Appellant Megan Goff.

ARGUMENT IN SUPPORT OF APPELLANT'S BRIEF

“BATTERED WOMAN SYNDROME” IS NEITHER A MENTAL ILLNESS, MENTAL DEFECT, NOR A DISTINCT DEFENSE TO A CRIME.

I. Explanation of Battered Woman Syndrome

As originally conceptualized, beginning in the early 1970s, Battered Woman Syndrome ("BWS") described a pattern of learned behavior and reactions exhibited by victims of severe, long-term, repeated patterns of domestic abuse. Robert F. Schopp, Barbara J. Sturgis, and Megan Sullivan, *Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse*, U. Ill. L. Rev. 45, 53. (1994). Battered women include those who have been the victims of physical, sexual, and/or psychological abuse by a partner. John W. Roberts, *Between the Heat of Passion and Cold Blood: Battered Woman's Syndrome as an Excuse for Self-Defense in Non-Confrontational Homicides*, 27 Law & Psychol. Rev. 135, 138 (2003).

According to Lenore Walker, who conducted some of the earliest studies on domestic violence, the battered woman had to go through a “cycle” of violence that consisted of specific distinct phases: 1) Tension building; 2) Acute violence; and, 3) Loving contrition. Donald L. Faigman & Amy J. Wright *The Battered Woman Syndrome in the Age of Science*, 39 Ariz. L. Rev. 67, 72 (1997). Lenore Walker hypothesized that BWS is created from experiences of a cyclical pattern of violence resulting in learned helplessness in the victim. Walker, Lenore, *Terrifying Love: Why Battered Women Kill and How Society Responds*, (1989). The more recent thought is that that not all battering relationships will necessarily include phases/cycles of abuse. Schopp, *supra* at 53.

The scientific literature does not support a universal “cycle-of-violence” pattern in battering relationships, although this pattern is recognized in some relationships *Id* at 45. Perhaps

most importantly, a cycle of violence is not necessary to define a battering relationship or explain why a battered woman remains within it.

Women who suffer from BWS show similar characteristics including, but not limited to: (1) The woman believes that the violence was her fault; (2) The woman is unable to place the blame for the violence anywhere else; (3) The woman fears for her life and/or her children's lives; and, (4) The woman has an irrational belief that the abuser is omnipresent and omniscient. Roberts, *supra* at 139.

II. Battered Woman Syndrome is neither a mental illness or defect but a cognitive and behavioral response of a terrified woman to repeated traumatic abuse incidents.

It is important to understand that the behavior of battered women who kill their abusers is arguably reasonable, in light of the circumstances. Sue Osthoff & Holly Maguigan Current Controversies on Family Violence *Explaining Without Pathologizing: Testimony of Battering and Its Effects* (2005). Lenore Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds*, 169 (1989). The battered woman is unable to predict when the next violent act will occur and thus her sense of safety is undermined by her inability to feel as if the threat has ever fully subsided. Roberts, *supra* at 140. The victimized woman is forced to live in a constant state of fear.

More recently, "battered woman syndrome" has been construed as indicating that a battered woman suffers from PTSD as a reaction to her experience of physical violence. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th Ed.) Washington D.C. at 427 (1994). However, there is no "type" of PTSD called BWS and the Diagnostic and Statistical Manual of Mental Disorders has not recognized battered woman syndrome as a distinct mental illness. Walker, *supra*. and Paula Finley Mangum,

Reconceptualizing Battered Woman Syndrome Evidence: Prosecution Use of Expert Testimony on Battering, 19 B.C. Third World L.J. 593, 601 (1999). “Despite the connotations of the term syndrome, battered woman syndrome is not a diagnosable mental disorder; it is a descriptive label that refers to the effects of abuse on women.” Mangum, Paula Finley, *Reconceptualizing Battered Woman Syndrome Evidence: Prosecution Use of Expert Testimony on Battering*, 19 B.C. Third World L.J. 593 (1999).

In short, BWS is not a mental illness, even though the term syndrome serves to stigmatize battered women and create the false impression that they suffer from a mental disease or defect. *Id* at 609. To avoid this stigmatization, many jurisdictions do not use the phrase “battered woman syndrome” any longer, but instead, refer to it as it is -- “battering and its effects.” Kathleen J. Ferraro and Noel Bridget Busch-Armendariz, *The Use of Expert Testimony on Intimate Partner Violence*, (August 2009) VAW.net: The National Online Resource Center on Violence Against Women.

Reverting to the stereotype of battered women as damaged human beings can be particularly problematic for women who kill their abusers, because reasonableness is central to their self defense claim. Sue Ostoff and Holly Maguigan, *Explaining Without Pathologizing*, *Current Controversies on Family Violence* 225, 226 (2005). The behavior of a battered woman in killing her abuser should not be pathologized, despite the connotations carried by the word “syndrome.” Battered women learn to recognize cues and signs in their abuser that are not evident to a layperson and they react based on their past experiences.

III. Battered Woman Syndrome is not a distinct defense, but goes to the imminence element of self defense. A woman who has been battered can introduce expert testimony that she suffered from the syndrome and had a requisite belief of an imminent danger of death or great bodily harm.

The Ohio General Assembly permits the introduction of expert testimony of BWS by a defendant who raises the affirmative defense of self-defense. (Ohio Rev. Code 2901.06) The purpose of BWS testimony in such cases is to assist the judge and/or jury in understanding the reasonableness of the battered woman defendant's reactions to her batterer's threats and how they may differ from a non-battered woman's reactions.

Ohio permits the affirmative defense of self-defense and requires three elements: (1) the defendant was not at fault in creating the violent situation; (2) the defendant had a bona fide belief that she was in imminent danger of death or great bodily harm and that her only means of escape was the use of force; and, (3) that the defendant did not violate any duty to retreat or avoid the danger. *State v. Thomas* (1997), 77 Ohio St.3d 323, 326 citing to *State v. Williford* (1990), 49 Ohio St.3d 247, 249, 551 N.E.2d 1279, 1281, citing *State v. Robbins* (1979), 58 Ohio St.2d 74, 12 O.O.3d 84, 388 N.E.2d 755, paragraph two of the syllabus. The holding in the case of *State v. Koss* (1990), 49 Ohio St. 3d 213, 217 was codified at O.R.C. 2901.06. *Koss* and 2901.06 held that characteristics of BWS are admissible to "assist the trier of fact to determine whether the defendant acted out of an *honest* belief that she is in imminent danger of death or great bodily harm and that the use of such force was her only means of escape." *State v. Koss* (1990), 49 Ohio St.3d 213 (1990). BWS thus serves to support the defendant's argument that she *honestly* believed that she was in imminent danger at the time of her actions and does not attempt to establish a new, independent defense. *Thomas*, 58 Ohio St.2d at 330.

To determine whether the defendant believed she was honestly in imminent danger at the time of her actions, the court must use both an objective and subjective approach. *Id* at 330. The objective part of the test requires the fact finder to determine "whether the Defendant has *reasonable* grounds for an *honest* belief that she was in danger" (emphasis in original) *Id* at 330.

The *Thomas* Court suggests that in order to do this, the fact finder “must put yourself in the position of the Defendant * * *.” You must consider the conduct of [the assailant] and determine if such acts and words caused the Defendant to *reasonably* and *honestly* believe that she was about to be killed or to receive great bodily harm” (emphasis in original) *Id* at 330. *Thomas* then instructs: “. . . [I]f the objective standard is met, the jury must determine if, subjectively, this *particular* defendant had an *honest* belief she was in imminent danger” (emphasis added) *Id* at 331.

In the case at bar, the fact finder (in this case, a judge) must first determine that, objectively, Megan had reasonable grounds for an honest belief that she and her children were in imminent danger. The Judge must consider details of Megan’s past experiences with, and the past conduct of, the assailant, Bill Goff, (hereinafter, “Goff”).

Megan’s life had been controlled by Goff from the time they met when she was only fifteen years old. At the time he was forty. (Tr. 1678-79, 1688). They married after Megan finished high school. This age difference created a huge power imbalance between the young, vulnerable Megan and the older, controlling Goff. Throughout their years together, Goff exercised control and psychological abuse over Megan in various ways. In the beginning of their relationship he ordered Megan to keep her curtains open in her parents’ home so he could watch her shower. (Tr. 1711) He had Megan call him “Dad” and gave her gifts she wasn’t allowed to tell her parents about. (Resnick’s Rpt. p. 8) Prior to the marriage, Goff did not want Megan to spend time with people her own age. He would later pressure Megan to skip classes in college and she eventually left without finishing. (Resnick’s Rpt. pp. 5-6). Per Goff’s desire, she quit her job as a preschool teacher to stay home with the children and he forbade her from attending church even though religion was very important to her. (Resnick Rpt. p. 6) Within a few months

of the marriage Megan was no longer allowed to see any of her own friends or even talk to people when Goff was not present. *Id* at 9.

As the marriage progressed, Goff's emotional and psychological abuse of Megan escalated as well – to torment and terrorism, and to physical abuse and threats to kill her. When Megan didn't behave as Goff wanted her to Goff would threaten her with a gun (Tr. 1877-88.) He would point a gun at her and scream, telling her that if she ever left, he would kill her. *Id*. He wanted her to lie completely still during sex and keep her eyes closed. *Id*. He began to point a gun at her on a nightly basis and instructed her that he would not be responsible for his actions if she woke him up that night. *Id*. Megan would try to stay awake all night to keep from moving and waking Goff. *Id* at 10. He would scream in her face and shake her and on at least one occasion shoved her to the ground. *Id* at 11-2.

Megan testified that the things she had “worked really, really hard at doing” in order to calm Goff weren't working anymore (Tr. 1992.) Megan testified that “usually I could say I was sorry, or just be quiet, and he would say okay, but things were making him mad that I hadn't even made noise and he was getting mad and saying I had.” (Tr. 1991.) Just prior to Megan leaving Goff, the abuse had further escalated and Goff began telling Megan that he was going to kill her and the children (Tr. 1990, 2074, 2088.) He told her that divorce meant he would kill them all. *Id*. Around this same time, Goff became physically violent with the children as well. Megan then took her children and left, moving from shelter to shelter to keep them safe.

Goff then stalked Megan as she moved from shelter to shelter in an effort to keep safe. Documents admitted at trial show that Goff knew the location of every place that had filled Megan's prescriptions for an entire month (Tr. 2653). Goff was seen outside at least one of the

shelters where Megan stayed. Goff had also discovered the name of the moving company that moved Megan out of the marital residence and into her own apartment (Tr. 3099-3103).

The facts show that Megan had reasonable grounds to believe that she and her children were in imminent danger. After determining that Megan had reason to honestly and reasonably believe that she and the children were in imminent danger, the judge must then look to whether Megan subjectively believed it. At the time of the incident, Megan had left Goff, something she had not previously done, and relocated to a women's shelter and later to an apartment. (Tr. 1155, 1164) While Megan was staying at the shelter, the staff reported seeing a man that fit Goff's description. (Tr. 1161, 1159) He even told Megan that he knew where she and the children were staying, even though, in her effort to stay hidden from Goff, she had told only the director of the women's shelter. (Tr. 1164) Goff then informed her that he was going to kill her and the children on March 20, 2006, the anniversary of their first sexual encounter and Megan's mother's birthday. (Tr.1753, 2244) Finally, Megan also knew that Goff still had guns in the home despite the confiscation of guns after the CPO was issued. (Resnick evaluation, pp. 15-16) It is reasonable to believe that Megan believed that Goff would kill her or he would kill her AND her children, unless she could somehow calm him and get him to change his mind. Megan exhibited a rational survival response to Goff's constant threats of domestic violence.

Immediately before Megan shot Goff, Goff told her that she was a "dead woman" and that he knew where the children were. (Tr. 2295.) Even after Megan had shot Goff, she couldn't escape his perceived control and omniscience over her: she called 911 and, for over ten minutes, she screamed that she thought Goff was going to get up and kill her and her children. "...He's going to kill me if he gets up...he said... he was going to kill the babies." "He told me he was gonna kill me." (Tr. of 911 call (App. At A-136-A-140).)

According to Dutton, “[T]he battered woman’s perception of viable options for stopping the violence and abuse by any means is not only shaped by her own prior experience with violence, but also influences her future actions in response to violence. The perception or understanding of whether there are options available that would end the violence is based largely on what has actually been learned through experience.” Mary Ann Dutton, *Redefining Battered Woman Syndrome*, 21 Hofstra L. Rev. 1215, 1219 (1992-1993).

In the past, Megan had been able to minimize and often avoid physical violence against her by submitting to Goff’s demands, staying out of his way, or by instigating laughter or making a joke (Tr. p. 2921). The trade off for avoiding physical abuse was enduring psychological and emotional abuse. However, this time the situation was different: Megan had left Goff. He had indicated that on a specific date, there was going to be a violent and deadly act, and that act would involve violence toward not only Goff and Megan, but also their children (Tr. p. 2930). Dr. Miller testified that he had never heard anything like the screams that he had heard on the 911 call. (Tr. 2952.) According to Dr. Miller, [Megan] “had reason to believe and reasonably believed that she and her children were in imminent danger of death or serious physical injury.” (Tr. p. 2941). Megan’s shooting of Goff was her survival response to what she perceived to be a very credible threat of domestic violence against herself and her children. And, according to Dr. Miller, Megan’s behavior was consistent with BWS. (Tr. 2831.)

Of course, there is an array of other coping strategies that battered women use in an attempt to resist or reduce the violence from their partners. Not all of these strategies will necessarily make sense to laypersons. For example, a battered woman may comply with the batterer’s demands (or anticipated demands) in order to “keep the peace,” attempt to talk with the batterer about stopping the violence, or temporarily escape from the batterer’s presence, Dutton

at 1227-1228. Megan had employed all of these coping mechanisms to survive the battering up to that point. Unfortunately, escaping from Goff had resulted in an escalation in violence. In order for Megan and her children to survive, she had to defend herself.

IV. DOMESTIC VIOLENCE MYTHS WERE PERPETUATED THROUGHOUT THE TRIAL BY THE JUDGE, PROSECUTOR AND THE STATE'S EXPERT WITNESS.

“These myths include the belief that battered women are masochistic, that they stay with their mates because they like beatings, that the violence fulfills a deep-seated need within each partner, or that they are free to leave such relationships if that is what they really want.” David L. Faigman, *The Battered Woman Syndrome in the Age of Science*, 39 Ariz. L. Rev. 67, 74 (1997). However, according to Herman, “This is rarely true . . . More commonly, repeated abuse is not actively sought but rather passively experienced as a dreaded but unavoidable fate and is accepted as the inevitable price of relationship.” Judith Lewis Herman, *Trauma and Recovery*, New York: Basic Books (1992). In the case at bar, it is clear that Judge Crow, who served as the fact finder, held some of these out-dated myths himself during Megan’s trial. For example, during Megan’s sentencing, Judge Crow said: “If he [Goff] would’ve been half as bad as he was made out to be, I don’t know how anybody would’ve stood to be around him” (Sentencing Tr. P. 16).

- a. **It is easier to accept a battered woman as one with physical injuries. In reality, was just as battered by Goff’s constant psychological and coercive control.**

Domestic violence is defined as a pattern of behavior in a relationship by which the batterer attempts to control his victim through an array of tactics including physical, sexual or psychological abuse and manipulation. Margaret E. Johnson, *Redefining Harm, Reimagining*

Remedies and Reclaiming Domestic Violence Law, 42 U.C. Davis L. Rev. 1107, 1116 (2009).

Most domestic violence consists of a systematic oppression through the exertion of power and control over one's partner. *Id* at 1107. According to Evan Stark: "[P]hysical violence may not be the most significant factor about battering relationships. In all probability, the clinical profile revealed by battered women reflects the fact that they have been subjected to an ongoing strategy of intimidation, isolation, and control that extends to all areas of a woman's life, including sexuality; material necessities; relations with family, children and friends; and work . . . the unique profile of 'the battered woman' arises as much from the deprivation of liberty implied by coercion and control as it does from violence-induced trauma." Evan Stark, *Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, Albany L. Rev. 973, 986. (1995).

Psychological abuse is used as a method of coercion to ensure that the abused partner remains within the batterer's control. Types of coercion can include threatening negative consequences if the abused spouse does not comply with the abuser's wishes. *Id* at 1117-18. A woman in a relationship with a serious imbalance in power is subject to continuing strategies of intimidation and control that reach to all areas of the woman's life including; family relations, education, employment, religion, children and the couple's sex life. *Id* at 1121.

Despite this evidence that psychological abuse can be just as damaging, if not more so, than physical abuse, the state's expert appears to discount the evidence and effect of psychological abuse. The testimony regarding psychological abuse was substantial, yet Dr. Resnick seems to dismiss Megan as a "battered woman" because she did not suffer at least two violent altercations with her husband that "at least leave bruises." (Tr. p. 3213) Dr. Resnick cites to an antiquated misconception that has never been the standard. Modern domestic violence advocates note that

power and control can be exercised not only by a pattern of physical abuse, but also by a pattern of psychological, economical or sexual abuse. Johnson, *supra* at 1121. Further, Herman notes that “[A]lthough violence is a universal method of terror, the perpetrator may use violence infrequently or as a last resort. It is not necessary to use violence often to keep the victim in a constant state of fear. The threat of death or serious harm is much more frequent than the actual resort to violence.” Herman, *supra* at 77.

Megan was subjected to years of psychological abuse by Goff. He exercised coercive control over Megan in various ways. Goff systematically isolated her from her family and friends. He made her quit her job and forbade her from attending church. Within a few months of marriage, Megan was not allowed to see her friends or talk to others when he was not present (Resnick report at p. 9).

Over time, Goff’s emotional and psychological abuse intensified and he began to terrorize her with the use of guns on a daily basis, and began to threaten to kill her if she ever left him. When she finally did leave the marital home, Goff began to stalk her. Ultimately, he threatened to kill her and the children on a specific date and time.

- b. It is a common misconception that by remaining with or returning to the batterer, the battered woman is somehow at fault or incredible. However, Megan behaved and reacted as might be expected for a battered woman in this situation.**

The most common question asked with regard to a battered woman is, “why doesn’t she just leave?” Mary Ann Dutton, *Redefining Battered Woman Syndrome*, 21 Hofstra L. Rev. 1192, 1226 (1992-1993). The question assumes that the battered woman is somehow “deviant, odd or blameworthy” and that there were viable alternatives she should have employed. *Id.* More than one-third of those surveyed seem to believe that a battered woman is at least partially responsible

for the battering she suffers and that if she remains in a battering relationship, she is at least somewhat masochistic, and probably emotionally disturbed. Moreover, nearly two-thirds of those surveyed apparently believe that a battered woman can 'simply leave' her batterer. Tracy Bennett Herbert, Roxane Cohen Silver & John H. Ellard, *Coping with an Abusive Relationship: How and Why do Women Stay?* 53 *Journal of Marriage and the Family* 311 (1991).

Battered woman stay in abusive relationships for a variety of reasons including financial instability, low self esteem, lack of family support, embarrassment or fear of retaliation from her abuser. Schopp, *supra* at 87. Perhaps the most critical reason a battered woman stays is that her leaving increases the likelihood of violence against her. "Increased violence directed at a battered person when she attempts to leave her abuser is a well-documented phenomenon termed "separation assault," which occurs because the batterer feels he is losing control. Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, in Martha A. Fineman & Roxanne Mykitiuk, *The Public Nature of Private Violence: The Discovery of Domestic Abuse* 59, 79 (1994).

According to Davies, Lyon, and Monti-Catania, "[L]eaving does not always reduce or prevent the risk of physical violence. If a woman has left and gone into hiding, her partner may find her. If she's left and her partner knows where she is, he may continue to attack her and may even escalate the violence to try to force her to return. For some women, the 'separation violence' is worse than the violence they experience while in the relationship, and for some it is lethal." Davies, J., Lyon, E., & Monti-Catania, *Safety Planning with Battered Women: Complex Lives/Difficult Choices* Thousand Oaks, CA: Sage Publications (1998). "Some batterers have made it clear to their partners that if they leave, they will find them and really hurt them or even try to kill them. For some, this is a threat they may or may not have tested..." *Id* at 23. In fact,

the woman is often in the greatest amount of danger when she leaves. Carol Jacobsen, Kammy Mizga, and Lynn D'Orion, *Battered Women, Homicide Convictions and Sentencing: The Case for Clemency*, 18 Hastings L.J. 31, 37 (2007).

Closely related to the issue of leaving, is the question of why battered women often return to the batterer. According to Becker, “[W]omen often stay with their abusers and love them because they have not yet given up on their relationship. They continue to hope that the violence and abuse will end and that they will have the family that they have always dreamed of.” *Becker* at 80. In other words, many battered women believe that they can change the minds of their abusers. The battered woman believes that if she takes the initiative, she can remain in control. Dr. Miller explains it this way in his testimony: “It’s much better if you take the initiative, after all the myth is control. If you take the initiative and present yourself, and you go back to that circumstance and see whether or not you can regain control again. So some people would say, ‘What sense does it make for her to come back’ and the answer is ‘it makes perfect sense.’ It was a way of her [Megan] preventing what she feared (Tr. 2894).

c. Purported inconsistencies in Megan’s recall during her exam with Dr. Resnick do not mean that Megan is not credible.

Trauma victims often struggle with recalling events and times exactly and battered woman are not significantly different from trauma victims. It is not unusual for trauma victims to recall more than one version of the same event. According to Dutton, battered woman may suffer psychological distress that leads to amnesia and/or dissociation. Dutton, *supra.* at 1221.

Dr. Resnick testified to his concerns about inconsistencies in Megan’s account of events, such as when certain phone calls took place and also regarding the actual shooting of Goff. However, Dr. Miller testified that “during heightened periods of emotional distress . . . the adrenaline and norepinephrine that’s pumped out actually prevents the accumulation of

memories in an area of the brain called the hippocampus. “(Tr. 2953). Given the chemical reactions that go on in the brain during an emotionally distressing episode such as the one Megan experienced with Goff, it is not surprising that she gave various accounts of the actual shooting to Dr. Resnick and the police, as Dr. Resnick discusses in pp. 3154-3156 of his testimony. Megan may have remembered Goff’s death threats from another phone call or another discussion in their relationship.

d. Other misconceptions

By interviewing their wives, Dr. Donald Dutton found that “[M]any of their partners describe their [batterer’s] recurring metamorphosis: they transform from a kindly Dr. Jekyll personality to a terrifying Mr. Hyde. Although they are frequently buddies with men and unlikely to display any anger with them, their predominant rage is with the woman to whom they’re emotionally connected.” Donald G. Dutton Ph.D. & Susan K. Golant, *The Batterer: A Psychological Profile* 24 (1995).

This same description appears to be true for Goff. For example, Megan told Dr. Miller that Goff was “a wonderful father” (Tr. p. 2881), “protective” (Tr. p. 2896), and “an honest man” (Tr. p. 2911). Further, Megan also said that Goff “acts nice in public” (Resnick evaluation, p. 13), and Dr. Miller testified that Goff was “welcome in the family and thought to be a good guy” when Megan and Goff first met (Tr. p. 2874). It is not unusual for Goff to appear to be a peaceful man to the public and still be severely abusive to his wife at home.

Dr. Resnick himself had several misconceptions about domestic violence and battering that affected his psychiatric opinions. For example, Dr. Resnick testified at trial that certain actions by Megan suggested that she was not “intensely fearful of her husband.” (Tr. p. 3156). Dr. Resnick refers to certain events leading up to the day on which Megan actually shot Goff,

such as when Megan went to see Goff in person to try and talk him out of killing her and their children. Dr. Resnick suggests that the act of going alone to see Goff after such a threat is “[in]consistent with being terrified of him.” (Tr. p. 3157). Dr. Resnick also testified that it is “quite unusual to come back if they [battered women] are, indeed, genuinely fearful.” (Tr. p. 3181). However, as Becker found in her research, it is a popular (but untrue) prosecutorial argument that a “defendant is not truly a battered woman because she loved her abuser and was enmeshed in the relationship.” *Becker* at 80. However, Becker rightly notes that because a defendant loves her batterer does not mean that she was not afraid of him.” *Id* at 81.

Even the Court of Appeals appears to have had misunderstandings about the early relationship between a forty-one year old Goff and a sixteen year old Megan. There is an inherent disparity in power in a relationship where one of the parties is an adult and one of the parties is a minor. Dr. Miller testified that early in their relationship, Megan would call Goff “dad,” which Miller felt indicates the distortion of that relationship (Tr. p. 2874). Dr. Resnick’s report also indicates a “father-daughter” type of relationship in the beginning, which later became sexual (Tr. p. 2874). In short, this was not a purely “romantic relationship,” as the Court of Appeals suggests.

e. The Importance of Accurate Expert Testimony in Dispelling Myths About Battering and It’s Effects

According to Becker, “[T]he judge and jury need to hear from someone who can explain the dynamics of abusive relationships and the likelihood of violence escalating when a woman attempts to leave. Mary Becker, *Access to Justice for Battered Women*, 12 Wash. U. J. L. & Pol’y 63, 73 (2003). Evidence concerning a battered woman’s perceptions and the relevant circumstances in a situation in which she has been charged with a crime can be introduced

through expert testimony. “Expert testimony in criminal cases involving battered women was developed initially to explain ‘the common experiences of and the impact of repeated abuse on, battered women.’” Schneider, E.M., (1996) Describing and Changing: Women’s self-defense work and the problem of expert testimony on battering. *Women’s Rights Law Reporter*, 9 (3/4), 195-226.

Megan met with Goff in an effort to talk him out of killing her and the children or in the alternative, to sacrifice herself for the lives of her children. The trial court seemed to believe that she could have used a better strategy. However, Megan was behaving reasonably for a battered woman hoping to change the likely behavior of her batterer. Megan indicated to Dr. Miller that she thought she could “make it right” by going to see Goff on that fateful day. (Tr. 2932). According to Dr. Miller, Megan felt that “she could find a way to come to some resolution... if she could just talk to Goff and “look into his eyes.” (Tr. 2932-33). Dr. Miller testified: “Right up to the very end, she would talk about her belief that if she could look into his eyes, that she would be able to either know what’s going to happen, predict what was going to happen or change what was going to happen.” (Tr. p. 2890).

Dr. Miller does an excellent job of articulating just how firmly Megan believed that her leaving of the marital home would result in the death of not only her, but also her children. Megan conveyed to both Drs. Resnick and Miller that, “he said he would only shoot me if I would leave, and I would never leave.” (Tr. 2880, 2884). Both doctors agreed that “people will perpetuate the circumstance with the belief that leaving is the trigger. So you say, ‘Why don’t you just leave?’ Because leaving is the trigger. ‘Why don’t you pull the trigger?’ You wouldn’t” (Tr. 2901). Once Megan requested a divorce and moved out, she became “absolutely confident” that a murder-suicide was a “reasonable scenario in his [Goff’s] mind.” (Tr. 2885).

The “resolution” could have been a whole host of things, but none of those things would result in her children being killed. (Tr. 2933) It is the professional opinion of Dr. Miller that at the meeting, “Goff announced that he knew where the children were” (Tr. 2944), and that set off a chain reaction of events. In Dr. Miller’s estimation: “It was her instantaneous conclusion that there was going to be a large tragedy, it would be a massacre.” (Tr. 2945) In that fateful moment, Megan did not see any other way out of her situation, and she defended herself against Goff.

CONCLUSION

For the reasons discussed above, this case has potentially far-reaching affects for victims of domestic violence, in particular, battered women criminal defendants. Accordingly, *Amici Curiae* The Justice League of Ohio and The Family Advocacy Clinic of Capital University Law School, under the auspices of The Columbus Coalition Against Family Violence, respectfully request this Court to adopt the Appellant's Propositions of Law and to reverse the judgment of the Lawrence County Court of Appeals Fourth Appellate District.

Respectfully submitted,



Mellissia Fuhrmann
Legal Clinic Director
The Justice League of Ohio



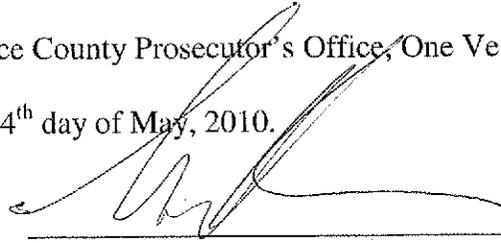
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Amici Curiae

In Support of Appellant Megan Goff

CERTIFICATE OF SERVICE

I certify that a copy of this *Amici Brief* was sent by ordinary U.S. Mail to Robert C. Anderson, counsel of record for Appellees, Lawrence County Prosecutor's Office, One Veterans Square, First Floor, Ironton, Ohio 45638 on this 24th day of May, 2010.



Lorie L. McCaughan
Counsel for *Amici Curiae*

ORIGINAL

IN THE SUPREME COURT OF OHIO

SUSAN GWINN, ET AL., :
 Plaintiff-Appellee, : Case No. 10-0928
 vs. :
 OHIO ELECTIONS COMMISSION, : On appeal from the Franklin County
 Defendant-Appellant. : Court of Appeals, Tenth Appellate
 District, Case No. 09 AP 000792

MEMORANDUM IN SUPPORT OF JURISDICTION
 OF APPELLANT OHIO ELECTIONS COMMISSION

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 SUPREME COURT OF OHIO

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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR
GREAT GENERAL INTEREST**

This case involves two important questions of law. The first is procedural. A party must be adversely affected by an adjudication of an administrative agency in order to have a right of appeal pursuant to Ohio Revised Code Section (ORC) 119.12. There is no duty upon the Ohio Elections Commission to certify and file a record unless the party has a right to appeal. The second is constitutional. The act of finding a violation of law and referring the case to an appropriate prosecutor for further proceedings is executive in nature. It is not an adjudication. Thus, it is not subject to judicial review.

The reason this case is of great public concern is that the appellate court effectively changed the statutory right to appeal. If a court must have and review the record to decide if an order is an adjudication, effectively every order is appealable. Further, this court should state that as a matter of statewide constitutional law, when the Ohio Elections Commission reviews a complaint for a violation of law and refers the complaint to the appropriate prosecutor for further proceedings, that act is executive in nature and not subject to judicial review.

STATEMENT OF THE CASE AND FACTS

This cause began with the Ohio Elections Commission (OEC) finding a violation of Ohio Revised Code Section (ORC) 3517.13 (G). The OEC referred the case to the Athens County Prosecutor for further proceedings. Appellee Susan Gwinn appealed the referral to the Franklin County Common Pleas Court, which dismissed the case as not involving a final order or adjudication. The Tenth District Court of Appeals (10th District) reversed, finding that the common pleas court needed a factual record in order to make a legal determination. The 10th District did not rule on the issue of whether the OEC referral to an appropriate prosecutor is an adjudication.

Parallel to the case proceedings in the Franklin County courts, the case was criminally prosecuted in Athens County. Appellee was indicted by a grand jury, tried, and convicted of two

counts of falsification, for the conduct which violated ORC 3517.13 (G). That conviction is currently on direct appeal in the Fourth District Court of Appeals.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I : The determination of whether an order is an adjudication is a legal question and preliminary to the duty to certify and file the record.

The Tenth District Court of Appeals ruled that the Franklin County Common Pleas Court erred by ruling that the referral by the Ohio Elections Commission (OEC) was not appealable. It held that a review of the record was necessary to make such determination. It further ruled that the OEC automatically should be reversed for failure to provide a record. By holding that the court must review the record in order to determine whether an administrative order is appealable, the lower court put the cart before the horse.

The law of Ohio is well settled as to a party's appellate rights. An appellant's right to appeal arises either constitutionally or statutorily. This case implicates the latter. ORC Section 3517.157 (D) allows a party to appeal a final determination of the commission under ORC 119.12. ORC 119.12 governs administrative appeals. ORC Section 119.12 states in pertinent part, "Any party adversely affected by any order of an agency issued pursuant to any other *adjudication* may appeal to the court of common pleas of Franklin county (emphasis added)."

The appellate court ruled that the common pleas court could not decide whether the order was appealable without the filing of a record. However, ORC 119.12 only allows an appeal by a party adversely affected by an order issued pursuant to an adjudication. If an order of an agency does not involve an adjudication, there is no right to appeal. The question then turns upon whether the OEC's referral to the appropriate prosecutor is an adjudication.

Proposition of Law No. II : When the Ohio Elections Commission reviews a complaint for a violation of law and refers the complaint to the appropriate prosecutor for further proceedings, that act is executive in nature and not subject to judicial review.

The Ohio Elections Commission has exclusive original jurisdiction over certain campaign law violations under Ohio Revised Code §3517.151. Certain non-criminal violations of

campaign finance law may also violate other criminal statutes. For example, it is a violation of campaign finance law to file a false campaign finance report, subject to a fine. The false campaign finance report may also be a misdemeanor violation of the falsification statute.

The Ohio Elections Commission may impose a fine for a violation of a law under its jurisdiction, or it may refer the matter to a prosecutor for consideration of charges. A referral to a prosecutor has no effect whatsoever -- a prosecutor may file a charge, seek an indictment, or do nothing at all. When it makes a referral, the Commission is essentially acting only as a gatekeeper. A prosecution cannot be commenced by merely filing a complaint with the court; rather, there must first be a preliminary determination by the Ohio Elections Commission as to whether a violation has occurred. The reason for this is accurately stated in *Dewine v. Ohio Elections Commission*, 61 Ohio App.2d 25 (1978),

The purpose of this provision is to prevent the promiscuous filing of criminal charges in court during the heat of a political campaign, requiring instead that a preliminary determination be made by the Ohio Elections Commission prior to the commencement of any prosecution.

While the statutory scheme creating the Ohio Elections Commission was altered after the *Dewine* decision, the Tenth District Court of Appeals applied it in *Billis v. Ohio Elections Commission*, 146 Ohio App.3d 360 (2001), holding, “The general lack of any appeal from commission decisions makes sense because, by and large, the commission acts in an investigatory capacity, much like a prosecutor or grand jury.”

Appeals are heard only on final, appealable orders. This sound public policy prevents multiple “bites at the apple” and promotes judicial efficiency. The policy includes an appeal taken under Ohio Revised Code §119.12 – the route taken here. *Freeman v. Ohio Dept. of Human Services* (10th District Court of Appeals, unreported) WL 183538 (1994.)

An adjudication is a determination of the rights, duties, privileges, benefits, or legal relationships of a specified person. ORC 119.01. A referral to an appropriate prosecutor does not determine the duties, privileges, benefits, or legal relationships of a specified person. Likewise there is no right, substantial or otherwise, to avoid a prosecutor's *consideration* of criminal charges. All the vast panoply of rights appurtenant to the American criminal justice system remains in place to protect the party referred.

The referral is analogous to a "right to sue" letter from the Ohio Civil Rights Commission. This Court held that such a letter is not a final appealable order, reasoning:

" * * * No such finality exists with respect to the EEOC's determination of reasonable cause. Standing alone, it is lifeless, and can fix no obligation nor impose any liability on the plaintiff. It is merely preparatory to further proceedings. If and when the EEOC or the charging party files suit in district court, the issue of discrimination will come to life, and the plaintiff will have the opportunity to refute the charges. * * * "

Ohio Historical Society v. State Employment Relations Board
(1990) 48 Ohio St. 3d 45, at 47.

The reasoning is perfectly applicable to the situation at hand. The referral fixes no obligation, nor does it impose any liability.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The Appellant requests that this Court grant jurisdiction and hear this case so that the important issues presented in this case can be reviewed on the merits.

Respectfully submitted,
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Proof of Service

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COURT OF APPEALS

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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CLERK OF COURTS

Susan Gwinn et al.

Appellants-Appellants,

v.

Ohio Elections Commission et al.,

Appellees-Appellees.

C. D. A.

No. 09AP-792

(C.P.C. No. 09CVF-07-9846)

(REGULAR CALENDAR)

DECISION

Rendered on April 8, 2010

*McTigue & McGinnis, Donald J. McTigue, Mark A. McGinnis
and John C. Columbo; Dennis W. McNamara, for appellants.*

David A. Yost, Special Prosecutor, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

(¶1) Appellants, Susan Gwinn and the Committee to Elect Susan Gwinn, appeal from a Franklin County Court of Common Pleas judgment that dismissed their administrative appeal from proceedings of the Ohio Elections Commission ("elections commission") conducted on allegations that appellants violated a campaign finance statute. Because the common pleas court erred in dismissing appellants' appeal for lack

of a final appealable order without a certified record and transcript of the administrative proceedings ever having been filed with the court, we reverse the court's judgment.

L. Procedural Overview

{[2]} Pursuant to R.C. 3517.157(D) and 119.12, appellants on July 2, 2009 filed an administrative appeal with the common pleas court from a "decision" of the elections commission that determined appellants violated R.C. 3517.13(G)(1) and referred the matter for criminal prosecution. Appellants' alleged violation of a campaign finance statute, which prohibits persons from knowingly concealing or misrepresenting campaign contributions, allegedly occurred during Gwinn's unsuccessful 2008 campaign for the office of Athens County Prosecutor. The complainant in the elections commission proceedings was David Yost, Delaware County Prosecutor, who was appointed to serve as special prosecutor for Athens County in the matter.

{[3]} In their notice of appeal, appellants challenged the elections commission's decision on numerous grounds, including specific claims that the elections commission committed factual and legal errors, as well as general claims that not only does the record lack reliable, probative and substantial evidence to support the elections commission's decision but the decision is not in accordance with law. Appellants attached to the notice of appeal copies of the elections commission's "decision" subject of their appeal: a letter dated July 2, 2009 from "Phillip C. Richter," "Staff Attorney," advising appellants that on "8/11/2009 after careful consideration of the evidence [in Case No. 2009G-002], * * * the commission found a violation of R.C. §3517.13(G)(1) and referred the matter to the Athens County prosecutor for further prosecution." The letters, ostensibly from the

elections commission, are not on the elections commission's letterhead, are not signed, are not certified as true copies of the elections commission's decision, and do not identify Richter as speaking on the elections commission's behalf, either as its staff attorney or in some other capacity.

{14} According to the common pleas court's record, both Yost and the elections commission, as the "appellees" in the administrative appeal, were served with notice of appellants' appeal. The court clerk's briefing schedule, filed the same date as appellants' appeal, required the record of the underlying proceedings to be filed with the common pleas court by July 30, 2009, or no later than August 27, 2009 if the court granted an extension for that purpose.

{15} On August 17, 2009, without a hearing on the matter, the common pleas court entered judgment granting Yost's motion to dismiss appellants' appeal for lack of a final appealable order. Explaining its rationale for the dismissal, the court stated in the judgment entry that "[t]he referral letter issued by the Ohio Elections Commission did not determine the action, but merely moved the matter to a different forum" and, as such, failed "to meet the requirements of a final order under Ohio Revised Code §2505.02." (Aug. 17, 2009 Judgment Entry.)

{16} The elections commission never certified to the common pleas court a record of the administrative proceedings in the case nor sought an extension of time for that purpose. Consequently, a record of the elections commission's administrative proceedings is also not before this court.

II. Assignments of Error

{17} Appellants assign three errors:

1. The Trial Court Erred By Not Reversing the Decision of the Commission on July 30, 2009.
2. The Trial Court Erred By Prematurely Dismissing the Administrative Appeal Before the Record and Transcript of Proceedings Had First Been Filed With the Court.
3. The Trial Court Erred in Holding that the Decision by the Commission is Not a Final Appealable Order.

III. Elections Commission's Failure to Certify Administrative Record to the Court

{18} Appellants' assignments of error are interrelated and will be discussed together. Appellants contend the common pleas court erred in prematurely dismissing their administrative appeal when the elections commission did not file a record and transcript of the administrative proceedings in this case. Appellants assert the common pleas court had no way, absent reviewing the administrative record, to properly determine whether the elections commission issued a final appealable order in this case and, in turn, to decide whether the court had jurisdiction to hear appellants' administrative appeal. Appellants argue the common pleas court instead should have entered judgment in their favor, because the elections commission failed to comply with R.C. 119.12's requirement that it timely certify to the court a complete record of the administrative proceedings appealed in this case.

{19} Appellees respond that the common pleas court correctly determined the elections commission's decision was not the "final determination" in the matter, as the elections commission merely referred the matter for further prosecution and a final

judgment in the case. Appellees argue that because the elections commission's decision does not "determine the action" and "prevent a judgment," it does not qualify under R.C. 2505.02 as a final appealable order. See *Cleveland v. Trzebuckowski* (1998), 85 Ohio St.3d 524, 526 (stating an order is final and appealable under R.C. 2505.02 if it (1) affects a substantial right, (2) in effect determines the action, and (3) prevents a judgment). Appellees assert that because courts have jurisdiction to hear appeals only from final orders of an administrative agency, the issue before the common pleas court was solely jurisdictional, eliminating the need for a record of the administrative proceedings in this case.

{¶10} An appeal from the elections commission's proceedings is governed by R.C. 3517.157(D) and R.C. 119.12. R.C. 3517.157(D) provides that a party "adversely affected" by a "final determination" of the elections commission has a right of appeal pursuant to R.C. 119.12. R.C. 119.12, in turn, allows an appeal to the common pleas court for a party "adversely affected" by an order of an administrative agency or commission issued pursuant to an "adjudication." "[T]o constitute an 'adjudication' for purposes of R.C. 119.12, a determination must be (1) that of the highest or ultimate authority of an agency which (2) determines the rights, privileges, benefits, or other legal relationships of a person." *Russell v. Harrison Twp.* (1991), 75 Ohio App.3d 843, 848. See also R.C. 119.01(D) (defining "adjudication").

{¶11} R.C. 119.12 sets forth the procedures that must be followed in administrative appeals. The statute provides that the common pleas court "shall conduct a hearing on the appeal." (Emphasis added.) R.C. 119.12. The word "shall" in a statute

makes such provision mandatory. *State ex rel. Ohio Democratic Party v. Blackwell*, 111 Ohio St.3d 248, 2006-Ohio-5202, ¶15. Ohio courts consistently have held that, although the statute mandates the common pleas court to hold a hearing in an administrative appeal, the court has the discretion to do as much as hold a full hearing and accept briefs, oral argument and newly discovered evidence, or as little as review the record of the proceedings before the administrative agency. *Medcorp, Inc. v. Ohio Dept. of Job & Family Servs.*, 121 Ohio St.3d 622, 2009-Ohio-2058, ¶18; *Greager v. Dept. of Agriculture*, 10th Dist. No. 04AP-142, 2004-Ohio-6068, ¶10, citing *Ohio Motor Vehicle Dealers Bd. v. Cent. Cadillac Co.* (1984), 14 Ohio St.3d 84, 87; *Geroc v. Ohio Veterinary Med. Bd.* (1987), 37 Ohio App.3d 192, 197. In reviewing the record of the administrative proceedings, "the court is confined to the record as certified to it by the agency." R.C. 119.12.

{¶12} Within those parameters, the common pleas court's judgment presents at least two issues. Initially, the court lacked a record to review because the elections commission failed to certify the record to the common pleas court, as required under R.C. 119.12. Secondly, because the court lacked any record from the elections commission, the court could not know what was in the elections commission's record and whether some aspect of the unseen record indicated the commission issued a final order.

A. Elections Commission's Duty to Certify the Record

{¶13} Pursuant to R.C. 119.12, administrative agencies have the responsibility to furnish the record of appealed administrative proceedings to the common pleas court for its review. Indeed, the Ohio Supreme Court has observed that R.C. 119.12 sets forth a

"stringent requirement" for the transmittal of administrative records. *Arlow v. Ohio Rehab. Servs. Comm.* (1988), 24 Ohio St.3d 153, 155. Specifically, R.C. 119.12 provides, in pertinent part that "[w]ithin thirty days after receipt of notice of appeal from an order in any case in which a hearing is required " " the agency shall prepare and certify to the court a complete record of the proceedings in the case." Should the agency fail "to comply within the time allowed," such failure, "upon motion, [shall] cause the court to enter a finding in favor of the party adversely affected." The statute, however, provides "[a]dditional time " " may be granted by the court, not to exceed thirty days, when it is shown that the agency has made substantial effort to comply." *Id.*

(¶14) Applying R.C. 119.12, the Supreme Court of Ohio in *Arlow* noted the court previously "held, and affirm[s] today, that '[w]here an appeal from an order of an administrative agency has been duly made to the Common Pleas Court' " pursuant to R.C. 119.12, "the agency has not prepared and certified to the court a complete record of the proceedings within twenty [now thirty] days after a receipt of the notice of appeal," and "the court has granted the agency no additional time to do so, the court must, upon motion of the appellant, enter a finding in favor of the appellant and render a judgment for the appellant. *Matash v. State* (1964), 177 Ohio St. 55, syllabus. See also *State ex rel. Crockett, v. Robinson* (1981), 67 Ohio St.2d 363." *Id.* at 155. (Parallel citations omitted.)

(¶15) The general rule of *Matash* and its progeny is absolute: an administrative agency's failure to certify to the common pleas court a complete record of appealed administrative proceedings within the R.C. 119.12 time limit requires the common pleas court, upon motion, to enter a finding in favor of and a judgment for the appellant. See

Lorns v. Dept. of Commerce (1976), 48 Ohio St.2d 153, 155 (stating "R.C. 119.12 * * * mandates a finding for the party 'adversely affected' by an agency's failure to certify a 'complete record' within the prescribed time"); *Crockett* at 385 (stating "[t]he language of the statute is clear; if the agency [totally] fails to comply, then the court must enter a finding in favor of the party adversely affected); *Geroc*, supra (determining agency's total failure to certify record in timely manner as required by R.C. 119.12 placed mandatory duty on court to enter judgment for appellant).

(¶16) Where, by contrast, an administrative agency timely certified to the court of common pleas the record of its administrative proceedings but with an unintentional error or omission in an otherwise complete record, the party appealing the administrative action pursuant to R.C. 119.12 is not entitled to a judgment in his or her favor absent a showing of prejudice. *Arlow*; *Lorns*, at syllabus. See also *State ex rel. Williams Ford Sales, Inc. v. Connor* (1995), 72 Ohio St.3d 111, 114. Even though the Supreme Court of Ohio so modified its *Matash* holding in *Arlow*, the court nonetheless declared that "[s]uch an exception does not vitiate the basic premise of R.C. 119.12 where *no* action has been taken to certify an administrative record." (Emphasis sic.) *Arlow* at 156.

(¶17) Here, the record of the common pleas court indicates the elections commission received notice on July 13, 2008 of appellants' administrative appeal to the common pleas court in this matter. Contrary to R.C. 119.12's mandate, the elections commission did not comply with the R.C. 119.12 requirements to certify the record. The elections commission did not file the record and did not seek an extension of time to comply with R.C. 119.12's certification requirement. Moreover, nothing in the common

pleas court's record suggests the elections commission made any effort to comply, much less a "substantial effort to comply." R.C. 119.12 (authorizing an extension "when it is shown that the agency has made substantial effort to comply").

B. No Basis to Determine Whether Order is Final and Appealable

{¶18} Like a court, the elections commission speaks through its record. *Simmons v. Ind. Comm. of Ohio* (1936), 134 Ohio St. 458, 457; *State ex rel. Cole v. Laumann* (1980), 69 Ohio App.3d 484, 487. See also *State ex rel. Hanley v. Roberts* (1985), 17 Ohio St.3d 1 (holding the decision of an administrative agency must be journalized in the written minutes of meeting at which decision was rendered); *McKenzie v. Ohio State Racing Comm.* (1958), 5 Ohio St.2d 229 (determining the commission can comply with R.C. 119.12's certification requirement by providing certified copies, such as a certified copy of commission's minutes which constitute its final order, rather than the original documents contained in the administrative record). See also R.C. 119.09 and Ohio Adm.Code 3517-1-11 and 3517-1-12 (requiring a stenographic record of all elections commission proceedings, and the journalization of commission decisions by written entry in the minutes of commission hearings).

{¶19} A review of the record of administrative proceedings is essential to the integrity of judicial review of an administrative action. In this case, the common pleas court could not determine properly whether the elections commission's "decision" was a final appealable order and, in turn, whether the court had jurisdiction to hear the administrative appeal. The common pleas court lacked such ability because the court had no administrative record of the proceedings, no journalized entry of the elections

commission's decision, and no other agency materials that may be relevant to determining whether the elections commission issued a final order for R.C. 119.12 review in the common pleas court. The absence of an administrative record made the court's review impossible.

{¶20} In the final analysis, the common pleas court erred in dismissing appellants' administrative appeal to the court for lack of a final appealable order where the elections commission completely defaulted on its responsibility under R.C. 119.12 to timely certify to the court a complete record of the proceedings from which the court could determine whether the elections commission issued a final order in this case. Appellants' assignments of error are sustained to the extent indicated.

IV. Appellants' Motion to Dismiss

{¶21} Appellants filed a motion requesting that this court reverse the decision of the elections commission or remand this matter to the common pleas court with instructions that it dismiss the elections commission's decision because the elections commission failed to file the administrative record in this case.

{¶22} Appellants did not file such a motion with the common pleas court, as R.C. 119.12 contemplates. Had appellants done so, the court would have been required to grant it. *Crockett* at 385 (determining a court is required to enter a finding and judgment for an appellant when the administrative agency wholly fails to file a record in accordance with the time limits of R.C. 119.12); *Sinha v. Dept. of Agriculture* (Mar. 5, 1996), 10th Dist. No. 95APE09-1239 (deciding appellant is entitled to judgment under R.C. 119.12 where agency certified record to the court 31 days after notice of appeal). The common pleas

court, however, is the appropriate forum to entertain appellants' motion. Accordingly, we deny the motion as not yet ripe in this court in favor of permitting the common pleas court first to address it.

(¶23) Having sustained appellants' assignments of error to the extent indicated, we reverse the judgment of the common pleas court and remand this cause with instructions to the common pleas court (1) to determine appellants' motion for judgment in their favor due to the elections commission's failure to certify the record in accordance with R.C. 119.12, and (2) to consider any other issues emanating from the court's determination of that motion.

*Motion denied;
judgment reversed and cause
remanded with instructions.*

BROWN and McGRATH, JJ., concur.

lvx

FILED
COURT OF APPEALS
NOV 13 2010
COLUMBUS

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Susan Gwinn et al.,	:	
	:	
Appellants-Appellants,	:	
	:	No. 09AP-792
v.	:	(C.P.C. No. 09CVF-07-8945)
	:	
Ohio Elections Commission et al.,	:	(REGULAR CALENDAR)
	:	
Appellees-Appellees.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on April 8, 2010, and having sustained appellants' assignments of error to the extent indicated, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court with instructions (1) to determine appellants' motion for judgment in their favor due to the elections commission's failure to certify the record in accordance with R.C. 119.12, and (2) to consider any other issues emanating from the court's determination of that motion. Costs assessed to appellees.

BRYANT, BROWN & McGRATH, J.J.

By 
Judge Peggy Bryant