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# IN THE SUPREME COURT OF OHIO

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| STATE OF OHIO, | : | Case No. 2009-1977 |
| Plaintiff-Appellee, | : | On Appeal from the Fourth Appellate District, |
| v. | : | Lawrence County, Ohio |
| MEGAN GOFF, | : | Court of Appeals Case No. 2007 CA 17 |
| Defendant-Appellant. | : | |

## MERIT BRIEF OF AMICI CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER AND OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT MEGAN GOFF


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## TABLE OF CONTENTS

**Page No.**


TABLE OF AUTHORITIES ..... ii

STATEMENT OF THE CASE AND FACTS ..... 1

INTEREST OF AMICI CURIAE ..... 1

INTRODUCTION ..... 2

LAW AND ANALYSIS ..... 3

A. **Battered Woman Syndrome evidence and compelled psychiatric examinations of battered women in foreign state jurisdictions.** ..... 3

B. **Compelled psychological examinations in other contexts under Ohio law and the function of Battered Woman Syndrome under Ohio law.** ..... 8

CONCLUSION ..... 12

CERTIFICATE OF SERVICE ..... 13

## TABLE OF AUTHORITIES

**Page No.**

**CASES:**

*Bechtel v. State* (Okla.Crim. 1992), 840 P.2d 1 ..... 6,7

*People v. Wilson* (Mich.App. 1992), 487 N.W.2d 822 ..... 5

*State v. Briand* (N.H. 1988), 547 A.2d 235 ..... 6,7

*State v. Cooey* (1989), 46 Ohio St.3d 20, 544 N.E.2d 895 ..... 9

*State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, 860 N.E.2d 91 ..... 10,11

*State v. Hennum* (Minn. 1989), 441 N.W.2d 793 ..... 5

*State v. Hickson* (Fla. 1993), 630 So.2d 172 ..... 6,7

*State v. Koss* (1990), 49 Ohio St.3d 213, 551 N.E.2d 970 ..... 10

*State v. Myers* (N.J.App. 1990), 570 A.2d 1260 ..... 6,7

*Witt v. State* (Wyo. 1995), 892 P.2d 132 ..... 5

**CONSTITUTIONAL AUTHORITIES:**

Fifth Amendment, United States Constitution ..... 2

Section 10, Article I, Ohio Constitution ..... 2

**STATUTES:**

Ga.Code Ann. 16-3-21(d)(2) ..... 3

Ind.Code Ann. 35-41-1-10.3 ..... 3

Ky.Rev.Stat.Ann. 503.050 ..... 3

Md.Code Ann., Cts. & Jud. Proc. 10-916 ..... 3,4

Mass.Gen.Laws Ann., Chapter 233, 23F ..... 3

Mo.Ann.Stat. 563.033 ..... 3,4

Nev.Rev.Stat.Ann. 48.061 ..... 3

R.C. 2152.12 ..... 9

R.C. 2929.03 ..... 8

R.C. 2945.371 ..... 2,9,10

S.C.Code Ann. 17-23-170 ..... 3

Va.Code Ann. 19.2-270.6 ..... 3

Wyo.Stat.Ann. 6-1-203 ..... 3,4,5

**RULES:**

Cal.Evid.Code 1107 ..... 3

Juv.R. 30 ..... 9

Juv.R. 32 ..... 9

**OTHER:**

Sandler, Battered Woman's Syndrome, Setting a Standard in Florida (2007),
31 Nova L. Rev. 375 ..... 3

## STATEMENT OF THE CASE AND FACTS

Amici adopt by reference the statement of the case and facts set forth by Appellant Megan Goff.

## INTEREST OF AMICI CURIAE

The Office of the Ohio Public Defender ("OPD") is a state agency responsible for providing legal representation and other services to indigent criminal defendants convicted in state court. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect and ensure the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

The Ohio Association of Criminal Defense Lawyers ("OACDL") is a statewide association of over 600 public defenders and private attorneys who practice law primarily in the field of criminal defense. OACDL has an enduring interest in protecting the rights guaranteed to defendants in the criminal justice system under the United States and Ohio Constitutions.

As Amici Curiae, the OPD and OACDL offer this Court the perspective of experienced practitioners who routinely handle significant criminal cases in the Ohio courts. Amici Curiae collectively have an interest in this case insofar as it will shape the treatment by Ohio's courts, and mental health professionals, of victims of persistent domestic abuse. Such victims often find themselves the subject of criminal prosecution after resorting to drastic, but necessary measures, and are left to explain their actions in a system that is ill-equipped to grasp the inherent nuances of persistent domestic abuse. As such, this case raises issues of fundamental fairness regarding

persons accused of crimes under Ohio law, and in particular, the rights of criminally-accused individuals who have responded to repeated, unchecked instances of domestic abuse with violence against their abusers—a natural, reasonable, survival mechanism.

## INTRODUCTION

As set forth in Ms. Goff's merit brief, this Court has agreed to consider the following propositions of law:

> First Proposition of Law: It is a violation of a defendant's right against self-incrimination under the Fifth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution to compel her to submit to a psychological examination, conducted by the State's expert, in response to the defendant raising a defense of self-defense supported by evidence of Battered Woman Syndrome.
>
> Second Proposition of Law: It is a violation of R.C. § 2945.371(J) and a defendant's right to a fair trial and due process of law under the Ohio and United States Constitutions, to permit the State's psychiatric expert to expound on inconsistencies between the statements the State's experts elicits from a defendant during a compelled psychological examination and the defendant's prior statements and other evidence gather[ed] by the prosecution.
>
> Third Proposition of Law: R.C. § 2945.371(A) does not authorize, and a court does not have inherent authority to compel a psychiatric examination of the defendant when the defendant has raised the defense of self-defense, supported by BWS expert testimony, and to order an exam to the contrary is a violation of a defendant's right to due process of law and a fair trial.

Amici Curiae urge this Court to adopt Ms. Goff's propositions of law, all of which will function to assure the endurance of the statutory and state and federal constitutional mandates guaranteed to citizens of the State of Ohio. In furtherance of that goal, Amici Curiae offer within this brief a survey of how other states treat the notion of a state-compelled psychiatric examination when the accused intends to present evidence of persistent domestic violence (i.e. "Battered Woman Syndrome") as a part of her self-defense claim.

Also addressed is the manner in which Ohio's courts deal with compelled psychiatric examinations in other circumstances, e.g., with respect to death penalty mitigations; pleas of not

guilty by reason of insanity; and pretrial competency evaluations. A brief account of the status of Ohio law regarding the admissibility of evidence of Battered Woman Syndrome ("BWS") is also presented.

While a perfect solution to the current, precarious balancing of the rights of battered women such as Ms. Goff, against the interests of the State in efficient criminal prosecutions, is difficult to procure, the system employed by the State in Ms. Goff's case was unfair and uninformed, and necessitates reversal of Ms. Goff's convictions. A system that will properly consider the State's interests, while acknowledging the rights of accused individuals who have a compelling interest in presenting their histories of abuse as a real, scientifically acknowledged component of their self-defense claims, is a laudable goal.

## LAW AND ANALYSIS

### A. Battered Woman Syndrome evidence and compelled psychiatric examinations of battered women in foreign state jurisdictions.

Since its inception, evidence of BWS has gained increased acceptance as an aid to the find of finder of fact in criminal prosecutions throughout the states.[1] Approximately a dozen states have promulgated statutes or rules of evidence that address BWS in a general manner or in the context of a self-defense claim. See, e.g., Cal.Evid.Code 1107; Ga.Code Ann. 16-3-21(d)(2); Ind.Code Ann. 35-41-1-10.3; Ky.Rev.Stat.Ann. 503.050; Md.Code Ann., Cts. & Jud. Proc. 10-916; Mass.Gen.Laws Ann., Chapter 233, 23F; Mo.Ann.Stat. 563.033; Nev.Rev.Stat.Ann. 48.061; S.C.Code Ann. 17-23-170; Va.Code Ann. 19.2-270.6; Wyo.Stat.Ann. 6-1-203. A few states make reference to the syndrome specifically, and permit evidence of the syndrome only through the testimony of qualified psychologists or psychiatrists. See, e.g., Mo.Ann.Stat. 563.033; Wyo.

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[1] For a history of the use of BWS evidence in state and federal courts, see generally Sandler, Battered Woman's Syndrome, Setting a Standard in Florida (2007), 31 Nova L. Rev. 375.

Stat.Ann. 6-1-203. Other statutes acknowledge the syndrome, but do not limit evidence of its applicability to expert testimony. See, e.g., Md.Code Ann., Cts. & Jud. Proc. 10-916; S.C.Code Ann. 17-23-170. While most of the enactments provide for the admissibility of expert testimony regarding BWS or persistent domestic violence in a general sense, some states have addressed the issue of compelled examinations in the BWS context head on. For instance, the Missouri enactment states:

> Evidence that the actor was suffering from the battered spouse syndrome shall be admissible upon the issue of whether the actor lawfully acted in self-defense or defense of another.
>
> If the defendant proposes to offer evidence of the battered spouse syndrome, he shall file written notice thereof with the court in advance of trial. Thereafter, the court, upon motion of the state, shall appoint one or more private psychiatrists or psychologists, as defined in section 632.005, RSMo, or physicians with a minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals . . . to examine the accused, or shall direct the director of the department of mental health, or his designee, to have the accused so examined by one or more psychiatrists or psychologists, as defined in section 632.005, RSMo, or physicians with a minimum of one year training or experience in providing treatment or services to mentally retarded or mentally ill individuals designated by the director, or his designee, for the purpose of examining the defendant. . . . The examinations ordered shall be made at such time and place and under such conditions as the court deems proper; except that if the order directs the director of the department of mental health to have the accused examined, the director, or his designee, shall determine the reasonable time, place and conditions under which the examination shall be conducted. The order may include provisions for the interview of witnesses.

Mo.Ann.Stat. 563.033. Thus, the Missouri legislature has provided a model by which the accused can be compelled to undergo a psychiatric examination upon expressing her desire to present evidence of BWS. However, the legislature has gone further and specifically provided protection to the accused regarding the use of her statements against her:

> No statement made by the accused in the course of any such examination and no information received by any physician or other person in the course thereof, whether such examination was made with or without the consent of the accused or upon his motion or upon that of others, shall be admitted in evidence against the

> accused on the issue of whether he committed the act charged against him in any criminal proceeding then or thereafter pending in any court, state or federal.

Id.

Indeed, most state legislatures have remained silent regarding the specific issue of compelled psychiatric examinations in the BWS context. The Wyoming legislature has provided the following general guideline:

> The "battered woman syndrome" is defined as a subset under the diagnosis of Post-Traumatic Stress Disorder established in the Diagnostic and Statistical Manual of Mental Disorders III — Revised of the American Psychiatric Association.
>
> If a person is charged with a crime involving the use of force against another, and the person raises the affirmative defense of self-defense, the person may introduce expert testimony that the person suffered from the syndrome, to establish the necessary requisite belief of an imminent danger of death or great bodily harm as an element of the affirmative defense, to justify the person's use of force.

Wyo.Stat.Ann. 6-1-203. The Supreme Court of Wyoming, however, has held that the statute's plain language does not permit expert testimony on the ultimate issue of the defendant's mental state at the time of the alleged crime. *Witt v. State* (Wyo. 1995), 892 P.2d 132, 139.

Some state courts have refused to hold that an individual who wishes to present evidence of BWS could be compelled to submit to an examination by a state expert in certain cases. In *State v. Hennum* (Minn. 1989), 441 N.W.2d 793, the Supreme Court of Minnesota held that BWS testimony may be limited to a description of the phenomenon and the characteristics of a person who exhibits signs of BWS. Id. at 799. According to the *Hennum* court, when the expert does not testify to the ultimate fact of whether the accused suffers from the syndrome, there is no need for a compelled adverse medical examination of the defendant. Id.; see, also, *People v. Wilson* (Mich.App. 1992), 487 N.W.2d 822.

A handful of state courts have reached the opposite conclusion, although those cases are distinguishable from the facts of Ms. Goff's case. In *State v. Hickson* (Fla. 1993), 630 So.2d 172, the Supreme Court of Florida permitted the defendant to present expert testimony on BWS and the characteristics of a battered spouse. Id. at 175-76. The court also permitted the defense to posit hypothetical questions based on the facts of the case in an effort to assist the jury in determining whether the accused was justified in her use of force. Id. But, the court held that if a defendant opts to rely on her expert's testimony relating the BWS evidence to the facts of her case, she waives her right to refuse to submit to a compelled examination by the state's expert. Id. at 176. The court opined that the accused has a choice. She can have her expert testify directly about the specifics of her case, and the state may have her examined by a government expert, or both parties may present evidence of BWS by experts who have not examined the defendant. Id.

In *State v. Briand* (N.H. 1988), 547 A.2d 235, the Supreme Court of New Hampshire held that an accused who introduces BWS evidence in support of a self-defense claim waives her right to refuse the government's request that she submit to a psychiatric examination if she submits to a psychiatric examination by her own expert and intends to rely on her expert's testimony at trial. Id. at 237-38. The court held that the trial court had the authority to order such an examination even though the accused had not entered a plea of not guilty by reason of insanity. Id. at 238.

In *State v. Myers* (N.J.App. 1990), 570 A.2d 1260, the court of appeals held that the presence of BWS, while an appropriate subject for expert testimony, would result in the defendant's compelled examination by a government expert if the defendant intended to rely on the evidence. Id. at 169-70. And in *Bechtel v. State* (Okla.Crim. 1992), 840 P.2d 1, the court of appeals held that a defendant who has submitted herself to a psychiatric examination and wishes

to rely on BWS testimony resulting from the examination, may be ordered by the trial court to submit to examination by the state's expert if the state so wishes. Id. at 9-10. However, the defendant's expert would be allowed to be present and observe the compelled examination. Id.

Accordingly, few states have answered directly the question of whether an individual who wishes to bring forth evidence of BWS in support of her self-defense claim may be subjected to a compelled examination by a state expert. Amici Curiae respectfully disagree with the holding of the courts in *Hickson*, *Briand*, *Myers*, and *Bechtel*. The decisions in those case were announced between eighteen and twenty-two years ago, when the courts were without the benefit of modern knowledge reflecting the true nature of BWS—that it is not a traditional "mental defect," but a rational reaction to persistent abuse, and should not give rise to the same sort of treatment by the courts that an individual would face if she were arguing incompetence to stand trial or entering a plea of not guilty by reason of insanity. The decisions were rendered on the statutory or traditional constructs of incompetence to stand trial or pleas of not guilty by reason of insanity. For that reason, the analyses in those cases are misguided. And as discussed *infra*, while the General Assembly has provided for a compelled examination when an individual wishes to raise issues of BWS regarding an insanity plea, the General Assembly has not done so when an individual wishes to present evidence of BWS in support of her self-defense claim. The courts in *Hickson*, *Briand*, *Myers*, and *Bechtel* were without the benefit of an instruction regarding BWS from their respective legislatures. Further, the compelled examination by the state of an individual who wishes to use such evidence is wrought with potentially unconstitutional pitfalls. As demonstrated by the facts of Ms. Goff's case, the improper use of the results of the government's compelled examination can fly in the face of the defendant's state and federal rights against self-incrimination, rights to due process, and rights to a fair trial.

## B. Compelled psychological examinations in other contexts under Ohio law and the function of Battered Woman Syndrome under Ohio law.

The Ohio General Assembly and Ohio's courts have considered the issue of compelled psychiatric examinations in the criminal justice system in a number of genres. In the context of death-penalty prosecutions, only the defendant can force the court to order the defendant's mental examination:

> When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death. . . .

R.C. 2929.03(D)(1). In this specific scenario, only the defendant can place his mental state at issue and risk the potential adverse affect of the trier of fact's knowledge of aggravating information. And unlike in Ms. Goff's case, the order of such an examination, although required to be initiated by the defendant, has been authorized by statute.

Regarding the issue of a defendant's competency to stand trial or of a defendant's intention to proceed with a plea of not guilty by reason of insanity, the General Assembly has

specifically provided for compelled psychiatric examinations. See R.C. 2945.371.[2] However, the legislature has provided the defendants in those circumstances with protections against the improper usage of their statements:

> No statement that a defendant makes in an evaluation or hearing under divisions (A) to (H) of this section relating to the defendant's competence to stand trial or to the defendant's mental condition at the time of the offense charged shall be used against the defendant on the issue of guilt in any criminal action or proceeding, but, in a criminal action or proceeding, the prosecutor or defense counsel may call as a witness any person who evaluated the defendant or prepared a report pursuant to a referral under this section. Neither the appointment nor the testimony of an examiner appointed under this section precludes the prosecutor or defense counsel from calling other witnesses or presenting other evidence on competency or insanity issues.

R.C. 2945.371(J).

As this Court has recognized: "a defendant's statements made in the course of a court-ordered psychological examination may be used to refute his assertion of mental incapacity, but may not be used to show that he committed the acts constituting the offense." *State v. Cooey* (1989), 46 Ohio St.3d 20, 544 N.E.2d 895. Meanwhile, R.C. 2945.371(F) speaks of BWS only in the context of a plea of not guilty by reason of insanity:

> **In conducting an evaluation of a defendant's mental condition at the time of the offense charged, the examiner shall consider all relevant evidence.** If the offense charged involves the use of force against another person, **the relevant evidence to be considered includes, but is not limited to, any evidence that the defendant suffered, at the time of the commission of the offense, from the "battered woman syndrome."**

Id. (emphasis added). This reading of the statute makes sense. Under R.C. 2945.371(A):

> If the issue of a defendant's competence to stand trial is raised or if a defendant enters a plea of not guilty by reason of insanity, the court may order one or more evaluations of the defendant's present mental condition or, **in the case of a plea**

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[2] Likewise, statements made during compelled juvenile amenability mental examinations cannot be used against the accused at later stages of the proceedings. See R.C. 2152.12; Juv.R. 30; Juv.R. 32.

> **of not guilty by reason of insanity, of the defendant's mental condition at the time of the offense charged.** An examiner shall conduct the evaluation.

Id. (emphasis added). Accordingly, when the section pertaining to BWS is read in the context of the entire statute, it is clear that the legislature has merely authorized the court to compel a psychiatric examination when BWS is to be considered regarding a plea of not guilty by reason of insanity. The language regarding "the defendant's mental condition at the time of the offense charged," id., only appears in relation to the provision pertaining to a plea of not guilty by reason of insanity. Indeed, the General Assembly has not authorized the compelled psychiatric examination of an individual who intends to present a self-defense claim supported by evidence of BWS.

Further, this Court's prior decisions regarding evidence of BWS support the adoption of Ms. Goff's propositions of law. In *State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, 860 N.E.2d 91, this Court discussed the importance of the proper allowance of BWS testimony in cases such as Ms. Goff's. This Court noted:

> In *State v. Koss* (1990), 49 Ohio St.3d 213, 551 N.E.2d 970, this court first recognized the admissibility of expert testimony regarding battered woman syndrome. In that case, the defendant had killed her husband, and the testimony regarding battered woman syndrome was offered by the defendant in support of her affirmative defense of self-defense. Today's certified question asks whether that holding should be extended to allow expert testimony concerning battered woman syndrome in the state's case-in-chief to help a jury understand a victim's reaction to abuse in relation to her credibility. We find that such testimony is admissible.

*Haines* at ¶29. The adoption of Ms. Goff's propositions of law would function to further assure the proper use of BWS testimony in Ohio's courts. While this Court's decision in *Haines* was specific to that case's own facts, it is consistent with the General Assembly's intent in promulgating R.C. 2945.371(J):

> The rule in most jurisdictions is that general testimony regarding battered-woman syndrome may aid a jury in evaluating evidence and that if the expert expresses

> no opinion as to whether the victim suffers from battered-woman syndrome or does not opine on which of her conflicting statements is more credible, such testimony does not interfere with or impinge upon the jury's role in determining the credibility of witnesses.

*Haines* at ¶56. Thus, this Court recognized that limitations must be placed on expert testimony regarding BWS. That is, the expert must not become the trier of fact and unduly comment upon the credibility of the accused in relation to the elements of the crime charged. Ms. Goff offered BWS evidence in support of her claim of self-defense. As detailed in Ms. Goff's merit brief, the State's expert, through compelled examination, used his time in court to highlight in detail the purported inconsistencies of Ms. Goff's statements. The State's expert thus exceeded the scope of testimony authorized by the General Assembly and this Court. In essence, the State's expert, who had no opinion regarding the applicability of BWS to Ms. Goff's case, provided his opinion that Ms. Goff was a liar.

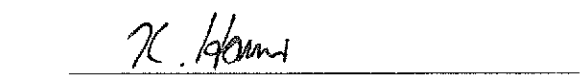
There is no need to extend the scope of this Court's BWS jurisprudence, or the allowances of the General Assembly, to force individuals who wish to present evidence of their histories of abuse in defense of the State's allegations to submit to compelled examinations. Certainly, a compelled examination, and the fruits thereof, cannot be used in the manner that was employed by the State in securing Ms. Goff's conviction. Evidence of BWS has been rightfully acknowledged as a proper tool in the aid of an individual who wishes to raise a claim of self-defense following a history of domestic violence. If the State's actions are permitted to stand, one can imagine the attempted use of compelled examinations, not provided for by statute or rule, so long as the State can argue that it would be unfair for it to forego its shot at examining the accused. In Ms. Goff's case, the State abused that opportunity. This Court should not affirmatively sanction the trial court's violation of Ms. Goff's statutory protections and rights under the United States and Ohio Constitutions.

## CONCLUSION

For the foregoing reasons, and for the reasons stated in Appellant's merit brief, this Court should adopt Appellant's propositions of law and reverse the decision of the Fourth District Court of Appeals, Lawrence County, Ohio.

Respectfully Submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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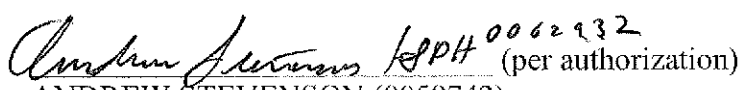

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## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MERIT BRIEF OF AMICI CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER AND OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT MEGAN GOFF was served by regular U.S. mail, this 24th day of May, 2010, upon J.B. Collier, Jr., Lawrence County Prosecuting Attorney, 1 Veterans Square, Ironton, Ohio 45638, and also to Paula Brown, Kravitz, Brown & Dortch, LLC, 65 East State Street, Suite 200, Columbus, Ohio 43215.

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