

**IN THE SUPREME COURT OF OHIO**

<b>STATE OF OHIO,</b>	)	Case No.: 2009-2122
Plaintiff-Appellee,	)	C.A. Case No.: L08-1301
-vs-	)	C.P. Case No.: CR07-2498
<b>LINDA S. COOK,</b>	)	<b>APPEAL FROM THE LUCAS</b>
Defendant-Appellant.	)	<b>COUNTY COURT OF APPEALS,</b>
		<b>SIXTH APPELLATE DISTRICT</b>

**REPLY BRIEF OF DEFENDANT-APPELLANT, LINDA S. COOK**

Evy M. Jarrett (0062485)  
 Assistant Lucas County Prosecutor  
 700 Adams St. 2<sup>nd</sup> Fl  
 Toledo, OH 43604  
 Phone: (419) 213-4700  
 FAX: (419) 213-4595

John F. Potts (0033846)  
 405 Madison Ave., Ste. #1010  
 Toledo, OH 43604  
 Phone: (419) 255-2800  
 FAX: (419) 255-1105

*On Behalf of Plaintiff-Appellee*

**FILED**

*On Behalf of Defendant-Appellant*

Richard Cordray (0038034)  
 Ohio Attorney General  
 Benjamin C. Mizer (0083089)  
 Brandon J. Lester (0079884)  
 Robert Kenneth James (0078761)  
 30 East Broad Street, 17<sup>th</sup> Floor  
 Columbus, Ohio 43215  
 Phone No.: (614) 466-8980  
 Fax No.: (614) 466-5087  
 benjamin.mizer@ohioattorneygeneral.gov

JUN 14 2010  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

Peter Gaylardt (0085439)  
 Assistant State Public Defender  
 Office of the Ohio Public Defender  
 250 E. Broad Street, Suite 1400  
 Columbus, Ohio 43215  
 Phone No.: (614) 466-5394  
 Fax No.: (614) 752-5167  
 Peter.Galyardt@opd.ohio.gov

*Counsel for Amicus Curiae*  
*Ohio Attorney General Richard Cordray*

*Counsel for Amicus Curiae*  
*Ohio Public Defender*

**TABLE OF CONTENTS**

STATEMENT OF THE FACTS ..... 1

PROPOSITION OF LAW.  
R.C.2913.01(F) does not operate to toll the six year period of limitations provided for in 2901.13(A) where the corpus delecti of an offense of which an element is fraud is discovered by legal representatives of the aggrieved person within the period of limitations and more than one year prior to expiration of the limitations period. .... 5

A. THE STATUTORY SCHEME.. ..... 7

B. THE DISTINCTION BETWEEN DISCOVERY OF A COMPLETED OFFENSE AND PROSECUTION FOR A CONTINUING CRIME ..... 13

C. THE STATE OF OHIO IS NOT THE AGGRIEVED PARTY ..... 14

D. IT IS NOT NECESSARY TO OVERRULE ANY PRIOR DECISION OF THIS COURT ..... 16

CONCLUSION ..... 18

CERTIFICATION ..... 18

**TABLE OF AUTHORITIES**

**CASES**

*In re Cook*, 551 F.3d 541 (6<sup>th</sup> Cir., 2009) ..... 14

*Irvin’s Lessee vs. Smith*, 17 Ohio 226 (1848) ..... 6

*State vs. Climaco, Climaco, Semitore  
Lefkowitz & Garofoli Co., LPA*, 850 St.3d 582 (1999) ..... 6, 10, 16

*State vs. Cook*, 184 O.App.3d 382 (2009) ..... 13, 17

*State vs. Hensley*, 59 O.St.3d 136 (1991) ..... 12, 16, 17

*State vs. Rodriguez*, 8<sup>th</sup> Dist., 2007-Ohio-685 ..... 13

*State vs. Swartz*, 88 O.St.3d 131 (2000) ..... 5, 6, 13

*State vs. Yashar*, 16 F.3d 873 (7<sup>th</sup> Cir., 1996) ..... 13

*Toussie vs. United States*, 397 U.S. 112 (1970) ..... 6, 13

*United States vs. Clark*, 312 F.3d 1343 (11<sup>th</sup> Cir., 2002) ..... 13

*United States vs. Gordon*, 513 F.3d 659 (7<sup>th</sup> Cir., 2008) ..... 13, 14

*United States vs. Gribe-Rios*, 558 F.3d 347 (4<sup>th</sup> Cir., 2009) ..... 13

*United States vs. Irvine*, 98 U.S. 450 (1878) ..... 13

**STATUTES**

R.C.2901.04(A) ..... 5, 12

R.C.2901.04(B) ..... 5

R.C.2901.12(A) ..... 5

R.C.2901.13(B) ..... 7, 8, 9, 10, 16, 17

R.C.2901.13(C) ..... 7, 8, 9, 11

R.C.2901.13(D) ..... 7, 8, 9

R.C.2901.13(F) ..... 7, 8, 9, 11, 13, 16, 17

R.C.2901.13(G) ..... 7, 8, 9, 10

R.C.2901.13(I) ..... 8, 9, 10

R.C.2913.01(F) ..... 5

R.C.2913.02(A)(2) ..... 3

R.C.2913.02(B)(3) ..... 3

**TABLE OF AUTHORITIES, CONT'D**

M.C.L. Section 400.106(b)(iv) ..... 15  
M.C.L. Section 400.112g(5) ..... 15  
M.C.L. Section 401.112g ..... 15  
  
42 U.S.C. Section 1396b ..... 14  
42 U.S.C. Section 1396p ..... 14, 15

**REGULATIONS**

42 CFR Section 435.403 ..... 15  
73 Federal Register, No. 220 (November 13, 2008) ..... 15

## STATEMENT OF THE FACTS

In its Merit Brief at 6 and 17-18, Appellee, State of Ohio, takes the position that the "aggrieved party" or victim of the Tampering with Records Offense charged in Count One of the Indictment is the State of Ohio, citing paragraphs 1, b and c of the Bill of Particulars filed with the Common Pleas Court on October 3, 2007. This contention represents a change in the State's theory of the case as is apparent if the cited paragraphs are considered in context with the other provisions of the Bill of Particulars.

The Bill of Particulars, in its entirety, reads as follows:

1. The Defendant, acting in concert with one or more other presently unindicted persons, knowingly obtained property of another, beyond the scope of the consent of the owner, using a deceptive chain of events sharply calculated to benefit Defendant.
  - a. The Defendant, as an attorney, with fiduciary duties to the victim, created a Living Trust into which she conveyed real estate known as the Benfer Farm, the property of Esther Benfer, the beneficiary of the said trust.
  - b. The Defendant has admitted to recording a deed in 2001, in Fulton County, which purported the transfer of real estate to have occurred in 1998 when the transaction actually occurred three years later, in the year 2001.
  - c. The Defendant has admitted that this transaction occurred with an understanding that Medicaid laws provide for a mechanism to undo real estate transfers between individuals when the grantor begins receiving Medicaid benefits sooner than three years after the real estate transfer.
  - d. The Defendant, as trustee for Esther Benfer Living Trust, then reconveyed the said real estate to herself in her personal status as a married woman.

- e. The Defendant has admitted that this subsequent transfer was not authorized by the terms of the said trust instrument.
2. The property involved real estate, owned, at the relevant time, by Esther Benfer.
3. Ms. Benfer, at the relevant time, was more than 65 years old, qualifying her as an elderly person for the purposes of the theft statute.
4. The Defendant has admitted that the value of the real estate, at the relevant time, was \$225,000.00, TWO HUNDRED TWENTY-FIVE THOUSAND DOLLARS.
  - a. The Defendant has admitted that she, after receiving title to the said real estate, transferred the Benfer Farm to the Metamora United Methodist Church.
  - b. The Defendant has admitted that, referencing her transfer of the real estate to the church, she then took, for herself personally, over the course of five years, a charitable gift tax deduction against her own personal income tax liability.
5. The Defendant appropriated the said real estate to herself with purpose to deprive the owner.
  - a. The Defendant gave no corresponding value in return for receiving the real estate valued at \$225,000.
  - b. The Defendant has admitted that she billed the victim for thousands of dollars professional services, while suggesting that she provided legal services on a *pro bono* basis.
6. The Defendant has admitted that one or more elements of these offenses occurred in Lucas County, Ohio.
7. The Defendant acting knowingly, created three falsified deeds transferring real estate and caused them to be recorded and kept by a governmental entity.
8. The Defendant committed these acts with purpose to defraud, and particularly to benefit herself by her own deceptive acts.

9. These events occurred between May 1, 2000 and December 31, 2004, and one or more elements of the offenses alleged occurred in Lucas County, Ohio.

In Count Two of the Indictment, Appellant is charged with Aggravated Theft from an elderly person in violation of R.C.2913.02(A)(2) and (B)(3). That Count is awaiting trial, pending the outcome of this appeal from the Court of Appeals' reversal of the Common Pleas Court's dismissal of Count One.

Throughout the proceedings in the Common Pleas Court, the State had contended that both offenses were part of a scheme to commit a theft of the real estate known as the "Benfer Farm" from Esther Benfer. See, Bill of Particulars, Paragraph 2: "The property involved real estate, owned, at the relevant time, by Esther Benfer." In Paragraph 1(a) of 5(b), Esther Benfer is named as the victim of the offenses charged. Now, while the case is on appeal, the State has taken the position that the victim or "aggrieved party" is not Esther Benfer, but the State of Ohio.

In the proceedings below, at the conclusion of the evidentiary hearing on Defendant's Motion to Dismiss, the State expressly asserted that Esther Benfer was the victim or "aggrieved party" with respect to the offense charged in Count One (T.165):

**ARGUMENT BY ASSISTANT PROSECUTOR NARGES:**

Prior to Climaco and standing side by side is the State versus Hensley case that's also cited in that brief. That involved a child sex victim, a special status person, someone who needs protection. There's testimony that Miss Benfer was not in the best of way in 2000, 2001 and certainly was declared incompetent in 2004. She's an elderly individual, in her late nineties at this point, and the State believes that the protections the law would afforded a sexual victim, as in State versus Hensley, ought to be extended to an elderly person.

Appellee repeatedly identified Esther Benfer as the victim of the offense charged in Count One in its written submissions to the Common Pleas Court. See, Memorandum in Opposition to Defendant's Two Motions to Dismiss filed October 23, 2007 at 3:

The State's theory of this case is that the transfer of the Benfer Farm on July 12, 2001 was merely the first link in the chain of events calculated by Defendant to provide a benefit to herself at the expense of Mrs. Benfer.

*Id.*, at 4:

The Defendant's criminal intent, clearly established in the context of her actions, was to enrich herself at the elderly Mrs. Benfer's detriment.

\* \* \*

. . . her intention from the beginning was to personally benefit herself from the chain of the transaction without Mrs. Benfer the legal slight [*sic*] of hand hidden within the structure of these deeds.

*Id.*, at 6:

The underlying facts and circumstances of this case clearly establishes that the Defendant needed all three quit claim deeds to profit her interest to steal the value of the Benfer Farm for herself and from any benefit to Mrs. Benfer.

Appellee's characterization of Esther Benfer as the victim of the offense charged in Count One permeated all of Appellee's written submissions in the trial court. See, e.g., Motion to Amend the Indictment filed July 18, 2008, second unnumbered page:

However, the recording of the deed on July 12, 2001 did not give any hint that the Defendant ultimately intended to transfer the Benfer Farm to herself personally. Rather, the re-recording of the same deed . . . encumbered only by a life estate remainder belonging to the victim Mrs. Benfer.

See also, Reply Brief filed by the State on February 15, 2008, third unnumbered page:

This case is fundamentally about the Defendant stealing the Benfer Farm for herself, when the owner of that farm intended the real estate to belong to the Benfer Trust. The deed recorded on July 12, 2001 effectuated that intent. . .

During the proceedings before the trial court, Appellee expressly and repeatedly asserted that Esther Benfer was the victim or “aggrieved party” with respect to the offense charged in Count One and this case was litigated on that basis. It is disingenuous for Appellee to disavow that contention and change its position while this case is on appeal from the trial court’s dismissal of Count One.

**PROPOSITION OF LAW.**

**R.C.2913.01(F) does not operate to toll the six year period of limitations provided for in 2901.13(A) where the corpus delicti of an offense of which an element is fraud is discovered by legal representatives of the aggrieved person within the period of limitations and more than one year prior to expiration of the limitations period.**

Appellee, State of Ohio, argues that a statute of limitations is a procedural provision that “should not be construed against the State and in favor of the accused pursuant to in R.C.2901.04(A)” (MERIT BRIEF OF PLAINTIFF-APPELLEE at 10, *f.n.* 4). The State’s contention in this regard is contrary to the prior holdings of this court. See, State vs. Swartz, 88 O.St.3d 131 at 133 (2000), citing the strict construction provisions of R.C.2901.04(A) as being applicable. But, as a practical matter, the result is the same if the provisions of R.C.2901.04(B) are applied. R.C. Section 2901.04(A) and (B) provide as follows:

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so

as to effect the fair, impartial, speedy, and sure administration of justice.

[emphasis supplied]

In State vs. Climaco, Climaco, Semitore, Lefkowitz and Garofoli Co., L.P.A., 85O.St.3d 582 at 586 (1999), this Court applied Section 2901.04(B) to construe and apply a statute of limitations against the State, holding that the “prevailing purpose of statutes of limitations is to limit exposure to prosecution to a certain fixed period of time following the occurrence” of a criminal offense and “to discourage inefficient or dilatory law enforcement.” So, under either Division (A) or Division (B) of R.C.2901.04, the operative legal principle is the same: Statutes of limitations must be “liberally interpreted in favor of repose.” Toussie vs. United States, 397 U.S. 112 at 115 (1970), cited with approval by this Court in State vs. Climaco, Climaco, Semitore, Lefkowitz & Garofoli Co., L.P.A., and State vs. Swartz, supra.

In analyzing the application of R.C.2901.13(B) and (F) to this case, it must be recognized that the corpus delicti of the Tampering with Records offense charged in Count One was never concealed. The allegedly fraudulent record that is the subject of Count One is a recorded deed which is a public record that constitutes “notice to the world” of its contents. Irvi’s Lessee vs. Smith, 17 Ohio 226 at 241 (1848). Thus, the corpus delicti was at all times publicly available for inspection, and capable of being observed by anyone who would examine the recorded deed. This is not a case where the corpus delicti was in any way hidden or incapable of being discovered.

Indeed, attorney Jan Stamm was able to determine the discrepancies in the deed immediately upon looking at it, (T.98):

EXAMINATION OF JAN STAMM BY ASSISTANT  
PROSECUTOR NARGES:

Q. And -

A. And it was also defective.

Q. How's that, Sir?

A. It was defective because it purports to have been executed and witnessed on May 20, 1998. The notary expired May 30, 2005. The notary, standard notary stamp is good for five years. It could not possibly have been executed on that date.

Q. So that was your first contention when you looked at the document?

A. Yes.

So the corpus delicti of the Tampering with Records offense charged in Count One was readily apparent and capable of being perceived by anyone who looked at the deed in question. It is against this background that the questions presented for review must be analyzed.

#### **A. THE STATUTORY SCHEME**

Appellee contends Division (F) of R.C.2901.13 should be read in isolation and is applicable to all criminal cases without reference to or regard for the other Divisions of R.C.2901.13. If Division (F) were to be applied in the manner Appellee advocates, various other Divisions of R.C.2901.13 would be rendered superfluous and of no effect. Such a result would be inconsistent with the requirement that a statute be applied to give effect to all of its provisions.

Divisions (B), (C), (D), (F), (G) (H) and (I) of R.C.2901.13 each contain tolling provisions. Those Divisions provide, in pertinent part, as follows:

**(B)(1)** Except as otherwise provided in division (B)(2) of this section, if the period of limitation provided in division (A)(1) or (3) of this section has expired, prosecution shall be commenced for an offense of which an element is fraud or breach of a fiduciary duty, within one year after discovery of

the offense either by an aggrieved person, or by the aggrieved person's legal representative who is not a party to the offense.

(2) If the period of limitation provided in division (A)(1) or (3) of this section has expired, prosecution for a violation of section 2913.49 [identity fraud] of the Revised Code shall be commenced within five years after discovery of the offense either by an aggrieved person or the aggrieved person's legal representative who is not a party to the offense.

**(C)(1)** If the period of limitation provided in division (A)(1) or (3) of this section has expired, prosecution shall be commenced for the following offenses during the following specified periods of time:

(a) For an offense involving misconduct in office by a public servant, at any time while the accused remains a public servant, or within two years thereafter;

(b) For an offense by a person who is not a public servant but whose offense is directly related to the misconduct in office of a public servant, at any time while that public servant remains a public servant, or within two years thereafter.

\* \* \*

**(D)** An offense is committed when every element of the offense occurs. In the case of an offense of which an element is a continuing course of conduct, the period of limitation does not begin to run until such course of conduct or the accused's accountability for it terminates, whichever occurs first.

\* \* \*

**(F)** The period of limitation shall not run during any time when the corpus delicti remains undiscovered.

**(G)** The period of limitation shall not run during any time when the accused purposely avoids prosecution. Proof that the accused departed this state or concealed the accused's identity or whereabouts is a prima-facie evidence of the accused's purpose to avoid prosecution.

**(H)** The period of limitation shall not run during any time a prosecution against the accused based on the same conduct is pending in this state, even though the indictment, information, or process that commenced the prosecution is quashed or the proceedings on the indictment, information, or process are set aside or reversed on appeal.

**(I)** The period of limitation for a violation of any provision of

Title XXIX of the Revised Code that involves a physical or mental wound, injury, disability or condition of a nature that reasonably indicates abuse or neglect of a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired child under twenty-one years of age shall not begin to run until either of the following occurs: (1) The victim of the offense reaches the age of majority. (2) A public children services agency, or a municipal or county peace officer that is not the parent or guardian of the child, in the county in which the child resides or in which the abuse or neglect is occurring or has occurred has been notified that abuse or neglect is known, suspected, or believed to have occurred.

Division (F) operates independently of Divisions (C), (D), (G) and (H) and applies in situations where Divisions (C), (D), (G) and (H) may also be applicable. This is so because Divisions (C), (D), (G) and (H) are not provisions that relate to "discovery" of the offense. Since Division (F) is such a "discovery" provision, its application is not limited or supplanted by Divisions (C), (D), (G) and (H).

However, Divisions (B) and (I), like Division (F), are discovery provisions. If Division (F) were held to be applicable to circumstances covered by Divisions (B) and (I), there would be no need for the legislature to have enacted Divisions (B) and (I).<sup>1</sup> Accordingly, the only way to harmonize Divisions (B) and (I) with Division (F) in order to give effect to all language of the statute is to hold that Division (F) applies only in those situations not covered by the more specific provisions set forth in Divisions (B) and (I). To hold otherwise would be to render the provisions of R.C.2901.13(B) and (I) superfluous.

In R.C. 2901.13(B) and (I), the legislature has provided how the period of

---

1

Division (I) addresses the situations that were considered by this Court in State vs. Hensley, 59 O.St.3d 136 (1991), to which this Court applied R.C.2901.13(F). Division (I) had not been enacted at the time Hensley was decided.

limitation is calculated in the circumstances specified in those provisions. The language of those provisions may not be disregarded if all provisions of R.C.2901.13 are to be given effect. To apply Division (F) to those situations described in Divisions (B) and (I) would render Divisions (B) and (I) of no effect and would operate to expand the periods of limitations provided for in Section 2901.13 beyond what is specified in Division (B) and (I) of that statute. This is inconsistent with the well established principle that statutes of limitations must be interpreted in favor of repose. If Divisions (B) and (I) do not limit the operation of Division (F), Divisions (B) and (I) are meaningless. If Division (F) is intended to apply to all cases, there would have been no reason for the legislature to have included Division (B) and (I) in the statutory scheme. Accordingly, the inescapable conclusion is that Division (F) does not apply in those circumstances which are specified in Divisions (B) and (I). Any other reading of R.C. 2901.13 would fail to give effect to all language of the statute. That the legislature did not intend Division (F) to apply in all circumstances where the corpus delicti is discovered within the period limitations is implicit in the uncodified law enacted as 2008 S.219 Section 3, eff. 7-21-108:

In amending section 2901.13 of the Revised Code, it is the intent of the General Assembly to supersede the effect of the holding of the Ohio Supreme Court in State v. Climaco, Climaco, Seminatore, Lefkowitz & Garofoli Co., L.P.A., (1999), 85 Ohio St.3d 582, with respect to the running of the criminal statute of limitations for certain offenses having a direct relation to certain public servants, whether or not the discovery of the corpus delicti of those offenses occurs within or outside of the otherwise generally applicable period of limitation for criminal prosecution under section 2901.13 of the Revised Code.

Clearly, the above-quoted uncodified law concerns the 2008 amendments to Division (C) of R.C.2901.13, which were enacted after Defendant was indicted in the instant case. But, if the legislature had considered 2901.13(F) to be applicable to all cases including those where the corpus delicti of an offense is discovered within the time period specified in the statute of limitations (such as in the instant case), there would have been no need for the above-quoted provision. Thus, it must be concluded that the General Assembly did not intend 2901.13(F) to have the sort of expansive application advocated by Appellee and its Amicus.

In its Merit Brief at 16, Appellee's Amicus Curiae postulates a hypothetical based on a factual scenario that, as a practical matter, is improbable in the real world. As a practical matter, title attorneys do not ordinarily inspect deeds in which they have no interest. Deeds are ordinarily reviewed by attorneys on behalf of parties who have an interest in the subject matter.

The real world implications of the contentions of Appellee and Appellee's Amicus are illustrated by postulating a different hypothetical. Let us suppose a wealthy bank customer keeps valuable jewelry in a safe deposit box at his local bank. A criminal, disguised as the wealthy bank customer and possessing fraudulent identification, presents himself at the bank, obtains access to the safe deposit box and takes the jewelry. Two years later, bank security officers discovered the fraud and attempt to notify the victim. Upon trying to contact the wealthy bank customer they learn he is out of the country on a spiritual retreat in a monastery at an unknown location somewhere in Tibet, and is not expected to return for six years. In the view of Appellee and Appellee's Amicus, the statute of limitations would not begin to run until the wealthy bank customer - the aggrieved party - returns from Tibet and discovers the offense.

This would be an absurd result since the corpus delicti of the offense became known well within the six (6) year period of limitations generally applicable to felony prosecutions.

So it is in the case at bar. The discrepancies in the deed recorded on July 12, 2001 were noticed by Attorney Stamm in early 2004, well within the six year period of limitations. Attorney disciplinary proceedings were filed against Defendant in April of 2005. There was absolutely no impediment to commencing a criminal prosecution against Defendant well before expiration of six (6) years from the date upon which the offense conduct occurred.

That the Lucas County Prosecutor's Office may have been unaware of the attorney disciplinary proceedings against Defendant does not toll the statute of limitations. In *State vs. Hensley*, 59 O.St.3d 136 at 139 (1991), this Court expressly rejected the notion that a statute of limitations does not begin to run until "the prosecutor or other law enforcement agencies discover the corpus delicti of a crime. Such a rule of law could subject a person to criminal liability indefinitely with virtually no time limit, and thus frustrate the legislative intent of a statute of limitations on criminal prosecutions." The running of a statute of limitations is not dependent upon whether there was media coverage of the offense conduct or how well law enforcement agencies were paying attention to observable events.

R.C. 2901.13(A)(1)(a) provides that a felony prosecution must be commenced within six (6) years after the felony offense has been "committed," not within six (6) years after it has been "discovered." R.C.2901.13 includes specific provisions that provide for prosecution after discovery of an offense in certain situations. Those provisions would be meaningless if Division (F) were held to be applicable in every

case.

It is well established that no language in a statute should be disregarded and every word, phrase and sentence should be given significance and effect. To apply 2901.13(F) in the very expansive manner advocated by the State would be in derogation of those well established principles contrary to legislative intent.

**B. THE DISTINCTION BETWEEN DISCOVERY  
OF A COMPLETED OFFENSE AND  
PROSECUTION FOR A CONTINUING CRIME**

A statute of limitations begins to run when the crime is complete. United States vs. Irvine, 98 U.S. 450 (1878); Toussie vs. United States, *supra*. The concept of a continuing crime is not one of general application and applies only to an offense "of which an element is a continuing course of conduct" within the meaning of R.C.2901.13(D). Tampering with Records is not such a continuing crime. State vs. Rodriguez, 8<sup>th</sup> District, 2007-Ohio-685. In the instant case, the offense of Tampering with Records was complete when the deed was recorded on July 12, 2001, as recognized by the Court of Appeals in its decision below. State vs. Cook, 184 O.App.3d 382 at 391 (2009).

By comparison, in a case involving a continuing crime (an element of which is a continuing course of conduct) the statute of limitations does not begin to run so long as the offense continues. R.C.2601.13(D); State vs. Swartz, *supra*. See also, United States vs. Yashar, 16 F.3d 873 (7<sup>th</sup> Cir., 1996).

In its Merit Brief at 14, Appellee cites the following federal cases for the proposition that "the statute of limitations does not begin to run until the State has actual notice of the crime." United States vs. Gordon, 513 F.3d 659 (7<sup>th</sup> Cir., 2008); United States vs. Gripe-Rios, 558 F.3d 347 (4<sup>th</sup> Cir., 2009); United States vs. Clark, 312

F.3d 1343 (11<sup>th</sup> Cir., 2002). However, each of those cases involved the prosecution of a deported alien found to have unlawfully re-entered the United States, which is by its nature a continuing offense. See, United States vs. Gordon, 513 F.3d at 655: "Being 'found in' in the United States at any time is a continuing offense."

The State has confused and conflated the question of when an offense is discovered with the question of whether a particular offense constitutes a continuing crime. The offense of Tampering with Records is not a continuing crime. Since the Federal cases relied upon by the State are cases which each involve a continuing offense, those cases are inapposite and do not support the State's argument regarding when a statute of limitations begins to run once the offense in question has been committed.

**C. THE STATE OF OHIO IS NOT THE AGGRIEVED PARTY**

As explained in the STATEMENT OF THE FACTS, *supra*, during the litigation before the Common Pleas Court on Defendant's Motion to Dismiss, it was Appellee's contention that the elderly Ms. Benfer was the aggrieved party or victim of the Tampering with Records offense charged in Count One. On appeal, Appellee has taken a different position and contends that the State of Ohio is the victim or aggrieved party with respect to Count One. In support of this contention, Appellee claims that the inaccurate date on the deed recorded July 12, 2001 would potentially "remove the value of the property from Mrs. Benfer's Medicaid eligibility determination," citing In re Cook, 551 F.3d 542 at 545 (6<sup>th</sup> Cir., 2009) and 42 U.S.C. Section 1396p. See also, 42 U.S.C. Section 1396b regarding asset recovery from the estate of a Medicaid recipient.

At the hearing held on Defendant's Motion to Dismiss Count One, it was established that Esther Benfer had been placed in an assisted living facility known as

Lynwood Manor, located in Adrian, Michigan (T.88). Pursuant to the regulations promulgated under 42 U.S.C. Section 1396p, specifically 42 CFR Section 435.403 (h)(3), (4) and (j), the State of Michigan (not the State of Ohio) was responsible for providing Medicaid coverage to Mrs. Benfer.

Under the Michigan statutes (which are known as the Michigan Compiled Laws or "M.C.L."), the value of a Medicaid recipient's "homestead" is not considered in determining financial eligibility for Medicaid benefits. M.C.L. Section 400.106(b)(iv). So, the value of Mrs. Benfer's farm would not have restricted her Medicaid eligibility. Nor does Michigan have any provision for recovery of the cost of care from the estate of a Medicaid recipient. M.C.L. Section 401.112g provides for federal implementation of such an estate recovery plan, but only "upon approval by the federal government." See, M.C.L. Section 400.112g(5). However, the only plan ever promulgated by the State of Michigan did not receive federal approval. See, 73 Federal Register, No. 220 (November 13, 2008) at 67182.

Thus, as a matter of law, the State of Ohio would not be the aggrieved party or victim of the offense charged in Count One because Mrs. Benfer was never a recipient of Medicaid benefits in the State of Ohio. Mrs. Benfer was a recipient of Medicaid benefits in the State of Michigan where her eligibility to receive such benefits was unaffected by her ownership of the real estate, and where there is no provision for recovery of assets to recoup Medicaid expenditures. The State of Michigan is not an aggrieved party because the ownership of Benfer farm would not adversely affect Medicaid eligibility under Michigan law and the State of Ohio is not an aggrieved party because Mrs. Benfer was never a Medicaid recipient in the State of Ohio.

Despite Appellee's changing position on who it considers to be the aggrieved

party or victim with respect to the offense charged in Count One, the unescapable objective reality is that the only alleged victim or aggrieved party for the offense charged in Count One is Esther Benfer, as was the State's contention throughout the litigation before the Common Pleas Court on Defendant's Motion to Dismiss Count One.

**D. IT IS NOT NECESSARY TO OVERRULE  
ANY PRIOR DECISION OF THIS COURT**

The expansive application of R.C.2901.13(F) advocated by the State is inconsistent with legislative intent and would be in derogation of the principles and policies which are furthered by statutes of limitations. In this case, there was no impediment to the State's commencing prosecution of Defendant within six (6) years of July 12, 2001 had the State acted with diligence.

The corpus delicti in this case was discovered well with the six year general period of limitations applicable to felony prosecutions. The corpus delicti was not hidden or concealed in any way. There is no reason the State could not have sought and obtained a timely Indictment of Defendant for the offense charged in Count One.

It is not necessary to overrule State vs. Climaco, Climaco, Semitore, Lefkowitz & Garofoli, L.P.A. Co., supra, any more than it is necessary to overrule State vs. Hensley, supra. This case presents a situation different from that presented in either of those cases.

Count One of the Indictment in the case at bar alleges an offense of which fraud is an element. In such a case, there is a specific discovery provision set forth in R.C.2901.13(B)(1) that is applicable to extend the generally applicable six year statute of limitations under the circumstances specified in Section 2901.13(B)(1). Those circumstances are not present in the instant case. But since the discovery provisions

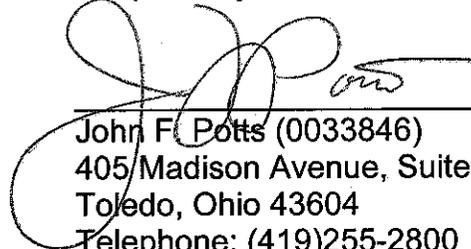
set forth in R.C.2901.13(B)(1) are potentially be applicable to this case, the provisions of R.C.2901.13(F) are not. If it were otherwise, there would have been no need for the legislature to have enacted R.C.2901.13(B)(1).

Neither Hensley nor Climaco involved a case in which fraud was an element of the offense charged, to which the provisions of R.C.2901.13(B)(1) would be applicable. Accordingly, the case *sub judice* does not present an appropriate vehicle for disturbing the holding in either of these cases.

**CONCLUSION**

For these reasons, and the reasons set forth in the Merit Brief of Defendant Appellant and of Amicus Curiae the Office of the Ohio Public Defender, the decision appealed from must be reversed and Defendant discharged as to Count One, and the case remanded for trial on Count Two.

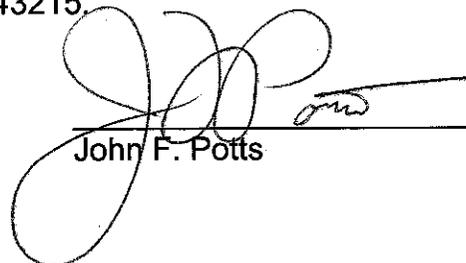
Respectfully submitted,



John F. Potts (0033846)  
405 Madison Avenue, Suite 1010  
Toledo, Ohio 43604  
Telephone: (419)255-2800  
Facsimile: (419)255-1105  
*Attorney for Defendant-Appellant*

**CERTIFICATION**

This is to certify that a copy of the foregoing was served by ordinary U.S. mail this 14<sup>th</sup> day of June, 2010, upon: Evy M. Jarrett, Assistant Lucas County Prosecutor, 700 Adams Street, 2<sup>nd</sup> Floor, Toledo, OH 43604; Benjamin C. Mizer, Ohio Attorney General, 30 East Broad Street, 17<sup>th</sup> Floor, Columbus, OH 43215; and Peter Gaylardt, Assistant State Public Defender, Office of the Ohio Public Defender, 250 E. Broad Street, Suite 1400, Columbus, OH 43215.



John F. Potts