

**IN THE SUPREME COURT OF OHIO**

**10-1849**

**STATE OF OHIO,**

**Plaintiff-Appellee,**

**-vs-**

**TIMOTHY ALLEN,**

**Defendant-Appellant.**

:  
 :  
 :  
 : **On Appeal from the Butler**  
 : **County Court of Appeals,**  
 : **Twelfth Appellate District**  
 :  
 : **Court of Appeals**  
 : **Case No. CA2010-04-101**  
 :  
 : **Trial Court No. CR 2009-09-1623**

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**Memorandum in Support of Jurisdiction  
of Appellant Timothy Allen**

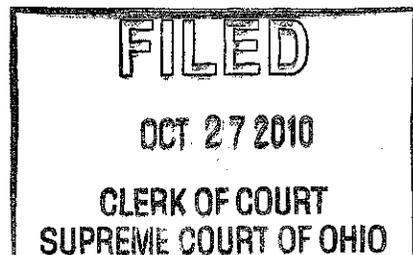
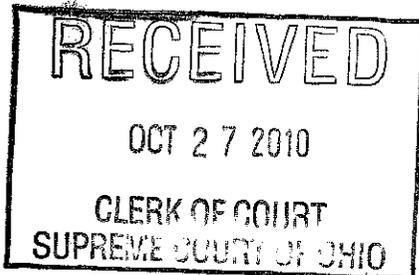
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**COUNSEL FOR APPELLANT:**

Jacob Long (0081460)  
 Counsel of Record  
 1244 Nilles Road  
 Suite 9  
 Fairfield, Ohio 45014  
 (513) 939-3300  
 Fax (513) 939-3301

**COUNSEL FOR APPELLEE:**

Lina N. Alkamdawi (0023205)  
 Robin N. Piper (0023205)  
 Butler County Prosecutor  
 315 High Street, 11<sup>th</sup> Floor  
 Hamilton, Ohio 45011  
 (513) 887-3474  
 Fax (513) 887-3489



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**THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS A  
CASE OF PUBLIC OR GREAT GENERAL INTEREST**

Appellant Timothy Allen must receive a new sentencing hearing that complies with Ohio's consecutive-sentencing laws, R.C. 2929.14(E)(4) and R.C. 2929.41(A). This Court erroneously severed those statutes as unconstitutional in *State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, *overruled in part*, *Oregon v. Ice* (2009), \_\_\_ U.S. \_\_\_, 129 S.Ct. 711. These statutes were, and remain, constitutional and enforceable.

By Entry dated February 10, 2010, in the case of *State v. Kenneth Hodge*, Case No. 2009-1997, this Court accepted for appeal the exact same Proposition of Law as the one set forth in this case. This Court should accept the present appeal for the same reasons as this Court accepted the *Hodge* appeal. This Memorandum in Support of Jurisdiction borrows heavily from the Memorandum in Support of Jurisdiction that was filed in *Hodge*.

Some members of this Court forecast the great public interest in the substantial constitutional issue in this case by calling for "repair [of] the damage done" to Ohio's sentencing law by *Foster*. *State v. Hairston* (2008), 118 Ohio St.3d 289, 297 (Moyer, C.J., Pfeiffer and Lanzinger, JJ., concurring). Part of "the damage done" by *Foster* occurred when R.C. 2929.14(E)(4) and R.C. 2929.41(A) were severed for violating the Sixth Amendment jury-trial guarantee. These statutes require specific judicial fact-finding to overcome the presumption favoring concurrent sentences before consecutive sentences may be imposed. *Foster's* sole justification for the extraordinary act of severing laws approved by Ohio's coordinate branches of government was the conclusion that such judicial fact-finding was unconstitutional under *Blakely v. Washington* (2004), 542 U.S. 296, 299. *Foster*, at ¶¶ 65-67.

In this case, Appellant received consecutive sentences that doubled his prison time from twelve months to twenty-four months. *Foster* stripped Appellant of the statutory presumption favoring concurrent sentences, and denied him the specific judicial fact-findings required to justify the stacked sentences. His case exemplifies *Foster's* damage to Ohio's sentencing plan.

The aggregate harm is significant:

Consecutive prison terms are much more likely today than at any point in recent Ohio history as a result of removing the statutory cap on consecutive sentences, making stacking offenses easier without placing an offender in double jeopardy, *eliminating the presumption of concurrent terms and the findings previously required to support consecutive terms*, and reducing [the] likelihood that lengthy cumulative terms could be found to violate the 8<sup>th</sup> Amendment.

Diroll (2009), "Monitoring Sentencing Reform: Survey of Judges, Prosecutors, Defense Attorneys and Code Simplification," at p. 27 (emphasis added). ODRC also cites *Foster* as causing "substantial inflationary pressure from increased length of stay" and requiring thousands of additional prison beds. Martin (2009), "Ohio Prison Population Projections and Intake Estimates: FY 2010 - FY 2018," at pp. 8-9.

*Oregon v. Ice* repaired "the damage done" by *Foster*, at least with respect to consecutive sentencing. *Ice* held that the Sixth Amendment allows judicial fact-finding as the basis for imposing consecutive sentences. *Ice* eliminated the sole justification for *Foster's* severing R.C. 2929.14(E)(4) and R.C. 2929.41(A). *Ice* rendered that severance a nullity. The effect is not that the severance "was bad law, but that it never was the law." *Peerless Electric Co. v. Bowers* (1955), 164 Ohio St. 209, 210. The General Assembly never repealed these statutes post-*Foster*. Instead, the legislature retained them in eleven amendments, including two enacted post-*Ice*.

It is time for this Court to acknowledge that *Ice* partly overruled *Foster*, by remanding this case for resentencing under R.C. 2929.14(E)(4) and R.C. 2929.41(A). A Sixth Circuit panel

already ruled that *Ice* bars attacks on consecutive sentences that are based on judicial fact-findings. *Evans v. Hodge*, 575 F.3d 560, 566 (6<sup>th</sup> Cir. 2009). This Court conceded in *Foster* that it is “constrained by the principles of separation of powers and cannot rewrite the statutes.” 109 Ohio St.3d at 30. This Court acknowledged that *Foster* conflicted with the legislative intent of S.B. 2, “particularly with respect to reducing sentencing disparities and promoting uniformity.” *Id.* The *Hairston* concurrence also noted that the nearly “unfettered” post-*Foster* discretion in consecutive sentencing implicates prison overcrowding concerns and subjects Ohio’s elected judges to community pressure, 118 Ohio St.3d at 297 – pressure that is too often driven by victims’ socioeconomic status. *See Spohn & Hemmens, Courts: A Text/Reader* (2009), at 434.

Across Ohio, judges are waiting for this Court’s green light to enforce Ohio’s lawfully-enacted consecutive-sentencing statutes. Ohio’s appellate districts have been asked time and time again if *Ice* requires judicial fact-findings to stack sentences. Most recognize that *Ice* contradicts *Foster* on this point. But two judges were confused by *State v. Elmore* (2009), Ohio 3478, ¶ 35. In *Elmore*, this Court refused to address the constitutionality of Ohio’s consecutive sentencing laws despite the state’s urging a decision “sooner rather than later” to benefit Ohio’s “courts, prosecutors and defendants[.]” *Id.* Those two judges read *Elmore* to indicate that *Ice* did not overrule *Foster* on this point. *State v. Eatmon*, Cuyahoga App. No. 92048, 2009 Ohio 4564, ¶ 25. A dissenting judge reasoned that *Ice* binds all Ohio courts, and required a new sentencing hearing under the consecutive-sentencing statutes. *Id.* at ¶¶ 32-36 (Dyke, J., dissenting in part).

The message from Ohio judges is clear. Absent this Court’s explicit instruction, the legality of post-*Foster* consecutive sentences is in limbo. Such uncertainty may inhibit judges from imposing consecutive sentences to avoid future reversal. The “damage done” by *Foster*

continues to mount. Quick action from this Court will clear up the confusion and prevent another *Foster*-style backlog of resentencing cases. This Court should reverse this case *per curiam* under *Ice* and order resentencing pursuant to R.C. 2929.14(E)(4) and R.C. 2929.41(A) or, in the alternative, order briefing and argument on this substantial constitutional question.

### STATEMENT OF THE CASE AND FACTS

On November 18, 2009, Appellant, was indicted on one count of possession of crack cocaine, a fourth degree felony, in violation of R.C. 2925.11 and one count of tampering with evidence, a third degree felony, in violation of R.C. 2921.12(A)(1). On January 13, 2010, Appellant entered a plea of guilty to possession of crack cocaine, a fourth degree felony. Appellant also entered a guilty plea to an amended charge of attempted tampering with evidence, a fourth degree felony.

On March 31, 2010, the trial court sentenced Appellant to two years in prison. Appellant was given one year in prison on the count of possession of crack cocaine and one year in prison on the count attempted tampering with evidence to be served consecutively. In sentencing Appellant to consecutive prison terms, the trial court did not apply or make any reference to R.C. 2929.14(E)(4) or R.C. 2929.41(A), which favor concurrent prison terms and require factual findings in order to run prison terms consecutively.

Appellant filed an appeal in the Twelfth District Court of Appeals, Butler County, Ohio, challenging his sentence. In affirming Appellant's sentence, the court of appeals held, among other things, that the trial court did not err when it sentenced Appellant to consecutive prison terms without making the factual findings required by R.C. 2929.14(E)(4) and R.C. 2929.41(A). The court of appeals declined to hold that *Ice* overruled *Foster* regarding the imposition of

consecutive sentences because the Twelfth District Court of Appeals “has previously found that the imposition of consecutive sentences has not been affected by the United States Supreme Court’s decision in *Oregon v. Ice* (2009), \_\_ U.S. \_\_, 129 S.Ct. 711.”

In the present appeal, Appellant requests that this Court address *Ice*’s impact on *Foster*, and hold that R.C. 2929.14(E)(4) and R.C. 2929.41(A) are constitutional and must be followed by Ohio courts.

## LAW AND ARGUMENT

**Proposition of Law: Before imposing consecutive sentences, Ohio trial courts must make the findings of fact specified by R.C. 2929.14(E)(4) to overcome the presumption favoring concurrent sentences in R.C. 2929.41(A).**

### *Ohio’s Consecutive-Sentencing Statutes Were, and Remain, Constitutional*

Appellant must receive a new sentencing hearing governed by R.C. 2929.14(E)(4) and R.C. 2929.41(A). *State v. Foster* erred in severing those statutes as unconstitutional under *Blakely v. Washington*.<sup>1</sup> *Oregon v. Ice* upheld the constitutionality of judicial fact-finding as a prerequisite to consecutive sentencing. *Ice* expressly cited *Foster* as an example of Sixth Amendment analysis that the Court rejected. *Ice* held that *Blakely* applies to individual, discrete offenses, and does not apply to consecutive sentencing. In so ruling, *Ice* deferred to the “historical practice and the authority of States over administration of their criminal justice systems.” Specifically, *Ice* deferred to state legislatures and the “salutary objectives” of sentencing statutes, like S.B. 2, including the reduction of sentence length and disparity. 129 S.Ct. at 715-719 & n.7 (internal citations omitted).

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<sup>1</sup> *Oregon v. Ice* (2009), \_\_ U.S. \_\_, 129 S.Ct. 711, 716, *overruling in part State v. Foster* (2006), 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

*Ice* binds this Court on the constitutionality of Ohio's consecutive-sentencing law under the Sixth Amendment. See *Minnesota v. National Tea Co.* (1940), 309 U.S. 551, 557 (U.S. Supreme Court rulings are dispositive on issues of federal constitutional law); *Deposit Bank v. Frankfort* (1903), 191 U.S. 499, 517 (same); see also *State v. Storch*, 66 Ohio St.3d 280, 291, 1993-Ohio-38 (this Court "ignore[s] the words of the United States Supreme Court at our peril ... we must assume that the United States Supreme Court meant what it said."). With respect to consecutive sentencing, *Ice* rendered *Foster* a nullity. See *Peerless Electric Co. v. Bowers* (1955), 164 Ohio St. 209, 210.

The chart below demonstrates that *Ice*, which dealt with an Oregon sentencing statute, effectively overruled *Foster*, which of course concerned Ohio statutes, with respect to consecutive sentencing:

<i>Point of Comparison</i>	<i>Ice</i>	<i>Foster</i>
Statute requires guided discretion in consecutive sentencing	✓	✓
Statute favors concurrent sentences	✓	✓
Statute requires judicial fact-finding to impose consecutive sentences	✓	✓
Statute specifies fact-finding related to course of conduct	✓	✓
Statute specifies fact-finding related to risk of recidivism	✓	✓
Statute specifies fact-finding related to harm caused	✓	✓
State Supreme Court rejects "discrete offense" limitation on <i>Blakely</i>	✓	✓
State Supreme Court finds judicial fact-finding violates 6 <sup>th</sup> Amendment under <i>Blakely</i>	✓	✓
U.S. Supreme Court grants certiorari, reverses State Supreme Court	✓	

Oregon provides for guided discretion in consecutive sentencing. So does Ohio. Oregon has a presumption favoring concurrent sentences. So does Ohio. Oregon's presumption must be overcome by specified judicial fact-finding. So must Ohio's. Oregon allows consecutive

sentences even when the offenses arise from a continuous course of conduct. So does Ohio. Oregon's fact-findings relate to victim harm and the risk of recidivism. So do Ohio's. Compare Ore. Rev. Stat. § 137.123(1)-(5) (2007) with R.C. 2929.14(E)(4) and R.C. 2929.41(A). Oregon's Supreme Court rejected the concept that *Blakely* applied only to discrete offenses and not to cumulative sentencing. So did this Court. Oregon's Supreme Court then held the state's consecutive-sentencing statute unconstitutional under the Sixth Amendment. This Court did the same with respect to Ohio law. Both Courts were mistaken. *Ice*, 129 S.Ct. at 716-719 & n.7.

*Foster* erred in severing statutes that remained constitutional, were never repealed, and were retained in eleven separate post-*Foster* amendments by the General Assembly.<sup>2</sup> *Foster* interfered with the General Assembly's intent to reduce sentencing length and to conserve scarce resources for incarcerating Ohio's worst offenders. Finally, *Foster* interfered with the General Assembly's intent to promote consistency and proportionality in sentencing. Because the trial court never found the facts required to justify Appellant's consecutive sentences, he must receive a new sentencing hearing in which the presumption of concurrent sentences applies, R.C. 2929.41(A), unless and until that presumption is overcome by the statutorily-specified, prerequisite fact-findings. R.C. 2929.14(E)(4). See *Hicks v. Oklahoma* (1980), 447 U.S. 343, 346 (due process protects liberty interest in state compliance with prescribed sentencing procedures).

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<sup>2</sup> Am.Sub.H.B. 95 (effective August 3, 2006), Am.Sub.H.B. 137 (effective July 11, 2006), Am.Sub.H.B. 137 (effective August 3, 2006), Am.Sub.S.B. 260 (effective January 2, 2007), Sub.S.B. 281 (effective January 4, 2007), Am.Sub.H.B. 461 (effective April 4, 2007), Am.Sub.S.B. 10 (effective January 1, 2008), Sub.S.B. 184 (effective September 9, 2008), Sub.S.B. 220 (effective September 30, 2008), Am.Sub.H.B. 280 (effective April 7, 2009), Am.Sub.H.B. 130 (effective April 7, 2009).

*Foster Conflicted with the General Assembly's Legislative Intent in S.B. 2*

*Ice* lauded the “salutary objectives” of promoting proportional sentencing and “reducing disparities in sentence length[.]” 129 S. Ct. at 719 (internal citations omitted). This was precisely the General Assembly’s intent in S.B. 2: “creating consistency among judges and conserving correctional resources[.]” Griffin & Katz, Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan (2002), 53 Case W. Res. L. Rev. 1, 30.

*Foster* wreaked havoc with the legislature’s “salutary objectives.” The January 2009 assessment of the Ohio Sentencing Commission bluntly blamed *Foster*’s “eliminating the presumption of concurrent terms and the findings previously required to support consecutive terms” for the fact that “[c]onsecutive prison terms are much more likely today than at any point in recent Ohio history[.]” Diroll (2009), “Monitoring Sentencing Reform: Survey of Judges, Prosecutors, Defense Attorneys and Code Simplification,” at p. 27. ODRC concurs that “The data continue to point to an emerging upward trend overall in average sentence length” and that *Foster* caused a “substantial inflationary pressure from increased length of stay. The upward shift in sentencing patterns has so far grown steadily over time.” Average sentences increased from one to seven months post-*Foster*, “with greater increases among the higher felony levels.” This shift “translates to a prison population increase of about 6,700 beds.” The data indicate that this increased burden on ODRC, which is directly attributable to *Foster*, will likely escalate with the rising population of F1-F3 felons. Martin (2009), “Ohio Prison Population Projections and Intake Estimates: FY 2010 - FY 2018,” at pp. 8-9.

*Foster* also interfered with S.B. 2’s efforts to ameliorate racial disparities in Ohio’s incarceration patterns. See Wooldredge, *et al.* (2003), The Impact of S.B. 2 on Sentencing Disparities, at p. 2. While incarceration rates dropped significantly post-S.B. 2, *id.* at 2,

sentencing reforms gutted by *Foster* also appeared to reduce some aspects of racial disparities in criminal case outcomes for Ohioans. *Id.* at 91-92. These disparities have deep roots in Ohio's history. Emblematic is Ohio's first major legislative act following statehood: Passage of the infamous Black Code, which was replicated in other states in the Jim Crow era. *See* Berwanger (1967), *The Frontier Against Slavery: Western Anti-Negro Prejudice and the Slavery Extension Controversy* at pp. 18-32, 118-119.

More than a century later, this Court's 1999 *Report of the Commission on Racial Fairness*, produced in cooperation with the state Bar Association, revealed the continued perception of racial bias in the state's criminal justice system:

... many of Ohio's citizens, particularly its minority citizens, harbor serious reservations about the ability of Ohio's current legal system to be fair and even-handed in its treatment of all of the state's residents regardless of race ... *The disparity in the sentences handed down was a consistent criticism directed toward judges.*

*Id.* at pp. 2, 8, 54 (emphasis added).

Predictable racial disparities in sentencing, which are well-documented in empirical studies that control for offense severity, criminal history, and other salient factors, include the following:

- Young, black and Latino males (especially if unemployed) are subject to particularly harsh sentencing compared to other offender populations;
- Black and Latino defendants are disadvantaged compared to whites with regard to legal-process related factors such as the "trial penalty," sentence reductions for substantial assistance, criminal history, pretrial detention, and type of attorney;
- Black defendants convicted of harming white victims suffer harsher penalties than blacks who commit crimes against other blacks or white defendants who harm whites;
- Black and Latino defendants tend to be sentenced more severely than comparably situated white defendants for less serious crimes, especially drug and property crimes.

The Sentencing Project (2005), *Racial Disparities in Sentencing: A Review of the Literature*, at p. 2 (citing Spohn (2000), "Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process," *Criminal Justice* Vol. 3, at p. 453).

Significantly, victim status – including race and socioeconomic status – appears consistently as an extralegal influence in sentencing outcomes. Spohn & Hemmens (2009), *Courts: A Text/Reader* at p. 434. Overall, race is a powerful indirect or interactive factor in sentencing outcomes:

Racial minorities are sentenced more harshly than whites if they are young, male, and unemployed, have relatively low incomes, and have limited education. Clearly, defendants' race, in conjunction with these other factors, influences judges' perceptions of which offenders are most threatening, most likely to offend again, and most in need of formal control by the criminal justice system. The race or ethnicity of the offender also interacts with that of the victim; racial minorities who victimize whites are sentenced more harshly than defendants in other combinations of offender race and victim race.

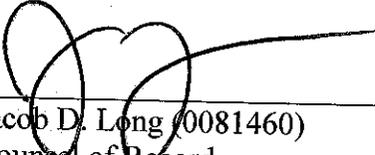
Pew Center on the States (2009), "One in 31: The Long Reach of American Corrections," at pp. 12-13.

Article II of the Ohio Constitution gives the General Assembly the authority to address such disparities by promoting consistency and proportionality in criminal sentencing. This Court presumes that "an entire statute is intended to be effective." *Foster*, 109 Ohio St.3d 1, at 28; *see also* R.C. 1.47. Ohio's consecutive sentencing law survived *Foster*, as overruled by *Ice*, and must be enforced in Ohio's courts. Had R.C. 2929.41(A) and 2929.14(E)(4) been enforced in this case, Appellant would have benefitted from a presumption that his sentences be served concurrently, and a corresponding potential sentence reduction from fourteen years to seven. The judgment of the Twelfth District Court of Appeals must be reversed, and Appellant must receive a sentence in compliance with Ohio's consecutive-sentencing law.

## CONCLUSION

For the foregoing reasons, Appellant respectfully asks this Court to reverse the decision below *per curiam* based on *Oregon v. Ice*, and remand for resentencing pursuant to R.C. 2929.14(E)(4) and 2929.41.(A). In the alternative, Appellant asks this Court to order briefing and oral argument on the issue of *Ice's* overruling *Foster* with respect to Ohio's consecutive-sentencing statutes.

Respectfully submitted,

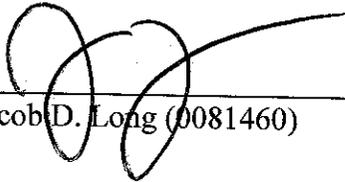


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Jacob D. Long (0081460)  
Counsel of Record  
1244 Nilles Road  
Suite 9  
Fairfield, Ohio 45014  
(513) 939-3300  
Fax (513) 939-3301

**CERTIFICATE OF SERVICE**

I certify a copy of this document was served on Lina N. Alkawahwi of the office of the Butler County Prosecuting Attorney this 18th day of October, 2010.

  
\_\_\_\_\_  
Jacob D. Long (0081460)

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

FILED  
2010 SEP 20 PM 3:36  
CINDY CARPENTER  
BUTLER COUNTY  
CLERK OF COURTS

STATE OF OHIO,  
Plaintiff-Appellee,

- vs -

TIMOTHY ALLEN,  
Defendant-Appellant.

FILED BUTLER CO.  
COURT OF APPEALS  
SEP 20 2010  
CINDY CARPENTER  
CLERK OF COURTS

CASE NO. CA2010-04-101  
(Accelerated Calendar)

JUDGMENT ENTRY

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
Case No. 2009-09-1623

{¶1} This is an accelerated appeal in which appellant, Timothy Allen, appeals the two-year sentence imposed by the Butler County Court of Common Pleas, after he pled guilty to possession of crack cocaine and attempted tampering with evidence.<sup>1</sup>

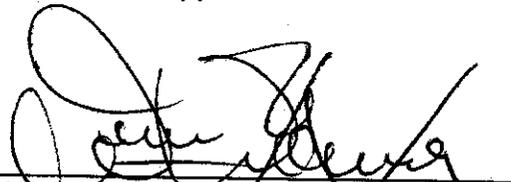
{¶2} Appellant's sole assignment of error is overruled on the basis of *State v. Lewis*, Warren App. Nos. CA2009-02-012, CA2009-02-016, 2009-Ohio-4684, ¶¶3-10. See, also, *State v. McGraw*, Fayette App. No. CA2009-10-020, 2010-Ohio-3949, ¶26; *State v. Raleigh*, Clermont App. Nos. CA2009-08-046, CA2009-05-047, 2010-Ohio-2966, ¶100. This court has previously found that the imposition of consecutive sentences has not been affected by the United States Supreme Court's decision in *Oregon v. Ice* (2009), \_\_\_ U.S. \_\_\_, 129 St.Ct. 711. *Raleigh* at ¶100, citing *Lewis* at ¶3-10.

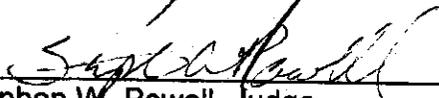
1. Pursuant to Loc.R. 6(A), we have sua sponte assigned this appeal to the accelerated calendar.

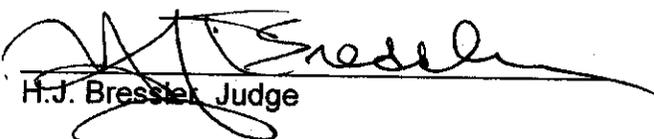
{13} Judgment affirmed.

{14} Pursuant to App.R. 11.1(E), this entry shall not be relied upon as authority and will not be published in any form. A certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

{15} Costs to be taxed in compliance with App.R. 24.

  
\_\_\_\_\_  
William W. Young, Presiding Judge

  
\_\_\_\_\_  
Stephen W. Powell, Judge

  
\_\_\_\_\_  
H.J. Bressler, Judge