

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO.,  
PLAINTIFF-APPELLANT,

S.C. CASE NO. 10 - 1636

On Appeal from the Clark  
County Court of Appeals  
Second Appellate District

VS.

Court of Appeals Case  
No 09 CA 0013

TONEISHA GUNNELL,  
DEFENDANT-APPELLEE.

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**RESPONSE TO MEMORANDUM IN SUPPORT OF JURISDICTION**

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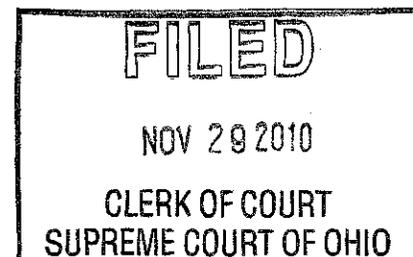
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**EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A  
SUBSTANTIAL CONSTITUTIONAL QUESTION, NOR A QUESTION OF  
PUBLIC OR GREAT GENERAL INTEREST**

On September 17, 2010, the Second District Court of Appeals issued a unanimous decision in *State of Ohio v Toneisha Gunnell*, C.A. Case No. 09-CA-0013. In *State v Gunnell* the appellate court properly rejected all of Appellant's arguments pertaining to the matter of double jeopardy. In addition, the Court of Appeals found that there were errors by the trial court that required the matter be sent back to the trial court for a new trial. The Appellant has not appealed that finding to this Court.

Appellant sets forth two propositions of law challenging one-half of the rulings by the appellate court. Those propositions of law are nearly identical to the arguments that Appellant raised in the appellate court. Far from being a case of great public interest or raising a constitutional question, the appellate court carefully followed established Ohio law and Ohio cases and did not impose any new task on the trial court.

Appellant was afforded a fair process in the appellate court and lost that appeal after an extensive review by the Second District Court of Appeals. The decision in the Court of Appeals was 56 pages long, 55 of which carefully reviewed the applicable law and facts of this case.

An appeal to this Court should not be used because the Appellant disagrees with the court of appeal's analysis of established law. Nor should this Court

review a case that was reversed on two separate grounds, one of which this Court is not being asked to review.

The court of appeals, in this case, conducted the same careful, detailed review of the conduct of the trial court that this Court recently conducted in *State v Dean*, Slip Opinion 2010-Ohio-5070.

If this Court grants the review requested by Appellant, this matter will be returned to the trial court for a fourth trial. The people of the State of Ohio have an interest in this matter being finally adjudicated and closed.

The Appellant's suggestion that this Court should review rarely cited, but well-established legal precedents is not warranted. The appellate court's decision was carefully reasoned and is error free.

#### STATEMENT OF FACTS AND THE CASE

The State of Ohio, Appellant, is asking this Court to review the decision of the Second District Court of Appeals that found that the trial court improperly declared a mistrial in the second of the three jury trials in this matter. All three previous trials have been complete trials.

On June 7, 2005, the four girls, Alicia McAlmont, Toneisha Gunnell, Ronada Manns, and Mahogany Patterson, met and traveled to Polaris Mall in Franklin County, Ohio, to shoplift some clothes for their children. They were in a car obtained by Alicia McAlmont from her sister, Georgjette McAlmont, without her sister's knowledge.

After stealing some clothes at the Children's Store at Polaris Mall, the four went to Old Navy in Hillard, Ohio, and stole more children's clothes. They brought those to the Upper Valley Mall in Springfield, Ohio, to exchange at the Old Navy Store there for the sizes that would fit children of relatives.

Ronada Manns then drove the car to curb outside of the Macy's Store while the three other girls went into Macy's and shoplifted a number of items from the Men's Department. While in the Men's Department the three did not encounter any clerks or security from Macy's nor any mall security.

The three left the store, getting into the car parked at the curb. As the car pulled away from the curb, John Deselem stepped in front of the car and was struck. Mr. Deselem never recovered from his injuries and was pronounced dead at the hospital. The State's expert on speed testified the car was traveling at 25 to 34 miles per hour when it struck Mr. Deselem.

The girls abandoned the car a few miles from the Upper Valley Mall and hitched a ride back to Columbus, Ohio, where all four resided. The next day Toneisha Gunnell turned herself in to the Columbus, Ohio Police Department.

At the third trial Toneisha Gunnell and Mahogany Patterson testified.

While the jury was deliberating they sent a note to the trial judge stating that they had come across a document that they did not believe they were supposed to see. There were over 350 exhibits.

The exhibit in question was a written statement by an inmate in the Clark County Jail who did not testify at the third trial, but did testify at the second trial.

The trial judge asked counsel for each of the parties what they believed should happen, because he agreed the jury should not have seen the document. The trial judge stated, "As I indicated, the exhibit that went back to the jury that wasn't supposed to go back was the exhibit marked in the previous trial, #227B."

Then, the trial court brought the jurors into the courtroom one at a time and inquired of each what they had seen and, with statements like, "And you can put this out of your mind and with the understanding that it's simply not reliable; that it can't be something in the back of your mind that you're thinking, but what about that, because it's simply not reliable. "

Counsel for the defendants unanimously agreed that the court should declare a mistrial and start over.

At the end of the second trial a juror had looked up a definition of a word that the court could not define,

Counsel for the State wavered, at first, and then declared that the court should allow the jury to proceed with deliberations.

The transcript of the trial court's questioning of the juror at the end of the second trial is included in the decision of the Second District Court of Appeals.

#### I. RESPONSE TO APPELLANT'S FIRST PROPOSITION OF LAW

THE TRIAL COURT ERRED AT THE END OF THE SECOND JURY TRIAL WHEN IT DECLARED A MISTRIAL WITHOUT CONDUCTING THE STATUTORILY REQUIRED REVIEW, OHIO REV. CODE §2945.36 AND WHEN THERE WAS NO "CORRUPTION OF A JUROR" FOUND OR CITED BY THE TRIAL COURT.

There was not a “manifest necessity” during the second jury trial of this case that would have allowed the judge to declare a mistrial. Absent a manifest necessity for a mistrial, retrial following a mistrial violates the defendant’s Fifth Amendment right not to be put in jeopardy twice for the same offense. *Arizona v. Washington*, (1978) 434 U.S. 497, 98 S.Ct. 824. The court in *Arizona* recognized a criminal defendant’s “valued right” to have a trial completed by a particular tribunal. *Id.* at 503.

This “valued right” of the defendant is weighed against the public’s interest in affording the prosecutor on full and fair opportunity to present his evidence to an impartial jury. However, in light of the importance of the defendant’s right, the prosecutor bears a “heavy burden” of demonstrating manifest necessity for a mistrial. There must be a “high degree” of necessity present before a mistrial is appropriate. *Id.* at 506.

A trial court considering a motion for a mistrial must consider, “. . . the true importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.” *Id.* at 514 (quoting *U.S. v. Jorn*, 400 U.S. 470, 91 S.Ct. 547 (1971)).

The Court of Appeals carefully considered the fact that this right of the defendant is not absolute, See page 17, Decision of the Court of Appeals, where they stated:

This right, nonetheless, is not absolute “because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably

create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury.” citing *Arizona v Washington* 434 U.S. 497, at 505

The Court of Appeals continued at page 18 to require that Defendant Gunnell prove high degree of manifest necessity before they would grant a finding that she was once put in jeopardy and that a retrial be prohibited.

Gunnell will admit that the analysis of the trial court’s actions by the Court of Appeals was very detailed. However, their analysis was no more detailed than the analysis this Court engaged in its recent decision, *State v Dean*, Slip Opinion 2010-Ohio-5070.

RESPONSE TO APPELLANT’S SECOND PROPOSITION OF LAW

THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE BURDEN IS ON THE STATE OF OHIO, NOT THE DEFENDANT NOR THE TRIAL COURT TO PROVE THAT IT WAS MANIFESTLY NECESSARY TO DECLARE A MISTRIAL.

Not every instance of juror misconduct requires a mistrial, the alleged misconduct must be prejudicial to the party requesting the mistrial, *State v. King*, Lucas App No. L-08-1126, 2010-Ohio-290, at ¶23, See also Criminal Rule 33(A)(2), which reiterates the same standard.

If the rule requested by Appellant is analyzed, it would do away with any review of juror’s conduct and establish a rule that any action by a juror that could

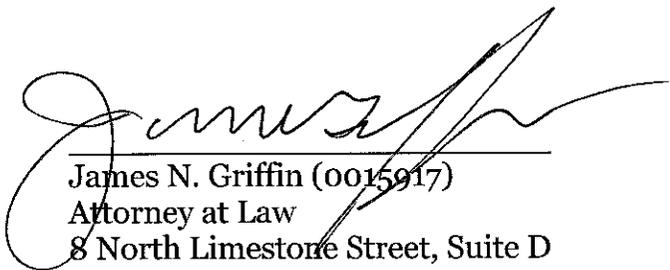
be considered “misconduct” would per se grounds for a mistrial. Such a rule would be unworkable both from the view of the State and from the defense bar.

In its first proposition of law Appellant states that the appellate court established a “standard script” for determining whether or not there are grounds to declare a mistrial. However, in its second proposition of law, the Appellant is asking this Court to establish a new set of rules and to reallocate the burden of proof when a trial court is determining if the granting of a mistrial is appropriate.

Because the trial court did not conduct a proper review of the conduct of the juror in question, the Court of Appeals was forced to conduct that review. When it did that review, it found that it was not shown that it was necessary to declare a mistrial in this case.

#### CONCLUSION

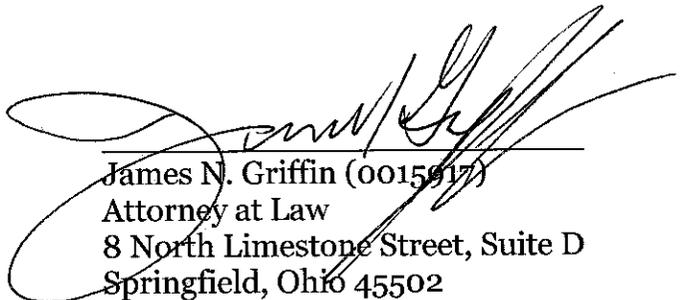
The request by Appellant that this Court revisit and rewrite well-established legal principals is not warranted by the record in this. The appellate court’s decision was well considered, unanimous, and error free.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was delivered by hand delivering a copy by regular U.S. Mail to Amy Smith, Assistant to the Clark County Prosecutor, P O Box 1608, Springfield OH 45501 and to Billie Jo Belcher, Assistant to Prosecutor, 225 Court Street 3<sup>rd</sup> Floor, Elyria OH 44035, this 27<sup>th</sup> day of November, 2010.



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