ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO		
	:	**S.C. Case No. 2010-1636**
Appellant,		
	:	**On Appeal from the Clark County Court of Appeals Second Appellate District**
vs.		
TONEISHA GUNNELL	:	
Appellee.	:	**Court of Appeals Case No. 09-CA-0013**

MEMORANDUM OF AMICUS CURIAE, ALICIA MCALMONT, IN OPPOSITION OF JURISDICTION

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STATEMENT OF INTEREST OF AMICUS CURIAE

Alicia McAlmont is a co-defendant of Appellee, Toneisha Gunnell. Alicia McAlmont's appeal from her third trial is currently pending before the Second District Court of Appeals. Whether this court accepts jurisdiction directly affects what happens to Alicia McAlmont.

This is not a case of great public interest because the Court of Appeals simply found that Judge Rastatter abused his discretion. Admittedly the Second District goes into great detail in analyzing the law and facts in State v. Gunnell, Clark App. No. 09-CA-0013, 2010-Ohio-4415. This analysis has nothing to do with creating a standardized script for trial courts, but everything to do with how and why the trial court abused its discretion in this case.

The State's primary complaint is that the "Second District requires the trial court to conduct a lengthy inquiry before crediting the trial court with sufficient knowledge to make a determination on whether a mistrial is warranted." This lengthy inquiry is called a hearing. A hearing is exactly what this Court requires when a juror has been exposed to information not presented at trial. State v. Phillips, 74 Ohio St.3d 72, 88. Because the Second District was required to conduct a de novo review, a lengthy analysis of the record and how the Trial Court could have properly conducted a hearing was spelled out in its decision.

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STATEMENT OF THE CASE AND FACTS

The Appellee adopts the statement of facts by the Appellant, State of Ohio, except to clarify that a video of the shoplifting, admitted into evidence at the trial, shows that the Appellee and the other co-defendants did not run from the store but walked. The testimony of the Appellee and her co-defendant, Mahoganey Patterson, verifies that they walked quickly from the store.

The evidence and testimony at the trial also established that the driver of the vehicle was not looking at the pedestrian standing in the road when she pulled away, but had her head turned looking at the security officer who was running out of the store. The Driver did not have time to stop the vehicle or respond to the pleas of her passengers to stop the car before it struck and killed Mr. Deselem.

All four defendants were tried and convicted in 2005 of murder, aggravated robbery, involuntary manslaughter, and theft and were given various life sentences. Appellee and McAlmont who were passengers in the motor vehicle, were each given a sentence of eighteen (18) years to life. Those conviction were reversed on Batson grounds.

Over the objections of all four defendants, the trial court declared a mistrial during juror deliberations in the second trial in 2007. Defendants sought habeas corpus relief at the District Court for the Southern District of Ohio. Attached to their habeas petition were affidavits of 10 of the 12 jurors who were deliberating favorably for the defendants. The

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District Court denied habeas corpus relief, and the defendants were tried a third time in January 2009.

During the third trial, Judge Rastatter allowed an exhibit to go back to the jury that was neither mentioned or admitted into evidence. The exhibit, acknowledged as false by the State, was a handwritten "Official Statement," that two of the defendants were laughing about hitting and killing Mr. Deselem. Because of the obvious prejudicial nature of the exhibit and the fact that all of the jurors acknowledged reviewing and discussing the exhibit, all of the defendants requested a mistrial. The Court denied that request and the three passengers were convicted on all counts. The Second District Court of Appeals sustained Appellee's first and second assignments of error. In vacating her conviction on double jeopardy grounds the Second District Court of Appeals held that "the trial court did not exercise sound discretion in declaring a mistrial."

ARGUMENT

Appellant's Proposition of Law No. 1:

> **When addressing a motion for a mistrial based on juror misconduct, a trial court has broad discretion and flexibility as to the manner and length of inquiry that must be conducted with any juror as to the misconduct, and a reviewing court may not impinge upon that discretion with a standard script.**

Appellee agrees with Appellant that a reviewing may not impinge upon the discretion of the Trial Court with a standard script. What a reviewing Court must determine, however, is

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whether the Trial Court abused its discretion. A de novo review clearly indicates that Judge Rastatter abused his discretion by failing to conduct a hearing in which the Court and the parties inquired of Juror No. 6 what if any affect the exteranous material had on her. Instead the Judge, made up his mind that the material was "very prejudicial" to the State of Ohio and all but told the Prosecutor to ask for a mistrial.

Juror No. 6 was initially brought into the courtroom to find out what she did. All six attorneys passed on questioning her because the Court's questions revealed what happened and why it happened. The Court then had Juror No. 6 removed from the courtroom. After learning what she did, the lawyers were not allowed to question her further on what if any affect the extreranous material had on her. In fact all the lawyers, including the Prosecuting Attorney, believed that a curative instruction would remedy the situation. It was at this point that the Court became quite adament that what Juror No. 6 was exposed to was extremely prejudicial to the State of Ohio. At this point, The State changed its position and requested a mistrial, which was granted. There was no further opportunity to question Juror No. 6 because the Court took the position that:

> "So I guess my point is: We can bring her in, and we can all ask her and try to rehabilitate her; and I'm sure she's going to say all the right things because, again, I think she's a nice person. And she's going to want to try to be accommodating and pleasing, and I know or I'm certain she doesn't want to be responsible for a mistrial. So she's going to try to appease us and say what she needs to say; but, you know, I just - - I feel like that may be an exercised in futitlity. I don't know that I can be convinced that she's going to be able to put this out of her mind."

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In relying upon this Court's hold in State v. Phillips, 74 Ohio St.3d 72, and the Supreme Court's decision in Remmer v. United States (1982), 455 U.S. 209, and a plethora of other cases, the Second District correctly found that the Trial Court's abused its discretion in declaring a mistrial over the objections of the Defendants. There is no standard script suggested by the Second District Court of Appeals but what is required of a trial court is that it engage in a scrupulous search for alternatives to deal with the problem, including and especially the questioning of a Juror on what if any affect the material had on her.

Appellant's Proposition of Law No. 2:

> **When extrajudicial material contrary to the State's case is obtained through juror misconduct, the situation is presumpively prejudicial and the burden shifts to the defendants to establish that the juror was not prejudiced by her research.**

Appellant's opening citation provides the exact reason why this Court should deny jurisdiction. "When a trial court learns of an improper outside communication with a juror, it must hold a hearing to determine whether the communication biased the juror." State v. Phillips, 74 Ohio St.3d 72, 88. Instead of holding a hearing to determine whether the communication biased the juror, the Trial Court found that such a hearing would be an "exercise in futility." The Court's refusal to hold this hearing was an abuse of discretion.

The State correctly points out that the District Court for the Southern District of Ohio denied the Defendant's petition for habeaus corpus relief. The Second District's decision

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explains how its analysis differs from that of the District Court. In addition, it is important to note that the two courts have different Standards of Review, and the Second District also had the advantage of reviewing the record from the third trial. After the third trial it became abundantly clear that when material prejudicial to the Defendants was reviewed by all twelve jurors, the Court was willing to examine each juror individually and extensively in order to rehabilitate them. Compare that with the second trial where the Court refused to ask any questions of Juror No. 6, because the Court though what she was exposed to was prejudicial to the State.

CONCLUSION

This is not a case of great public and general interest because the Court correctly determined that the Trial Court abused its discretion. The Second District did not create a standard script for all trial court's but instead engaged in a thorough legal analysis of what the Trial Court failed to do in this case. Amicus Curiae respectfully requests that this Court deny jurisdiction.

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Respectfully Submitted,

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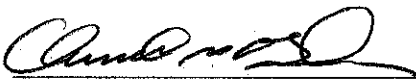
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was delivered by regular U.S. Mail to Amy Smith, Assistant Clark County Prosecutor, PO Box 1608, Springfield Ohio 45501, and to Billie Jo Belcher, Lorain County Prosecuting Attorney, 225 Court Street, 3rd Floor, Elyria, Ohio 44035, and to James Griffin, Attorney for Toneisha Gunnell, 4 West Main Street, Suite 526, Springfield, Ohio 45501.



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