

**ORIGINAL**

IN THE SUPREME COURT OF OHIO

**11-0107**

IN RE: J.V.

Appellant

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On Appeal from the Eighth District  
Court of Appeals, Case No.  
CA 94820

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**MOTION FOR DELAYED APPEAL**

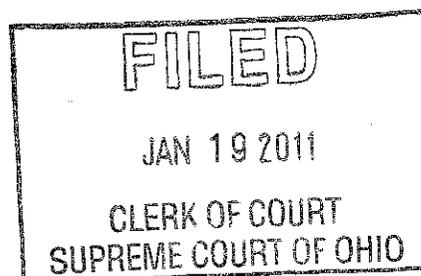
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Cuyahoga County Public Defender  
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COUNSEL FOR APPELLEE, THE STATE OF OHIO



IN THE SUPREME COURT OF OHIO

IN RE J.V.

Appellant

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**MOTION FOR DELAYED  
APPEAL**

Now comes Appellant J.V., by and through undersigned counsel, and respectfully requests that this Honorable Court grant him a delayed appeal from the judgment of the Eighth District Court of Appeals, released and journalized on November 10, 2010 and reconsideration denied on December 3, 2010, in *In re J.V.*, Cuyahoga App. No. 94820, 2009 Ohio 1066. This motion is made pursuant to S.Ct. R. II, Section 2(A)(4)(a), and is based on the reasons set forth below and the attached exhibits, including the affidavit of attorney Cullen Sweeney (attached as Exhibit C). The court of appeals opinion and the judgment entry denying reconsideration are attached as Exhibits A and B.

Respectfully Submitted,

ROBERT L. TOBIK, ESQ.  
Cuyahoga County Public Defender



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COUNSEL FOR APPELLANT

## MEMORANDUM IN SUPPORT

It is respectfully submitted that this Court should exercise its discretion to allow a delayed appeal in this case because: 1) the period of delay is a single business day; 2) because the appeal raises meritorious issues, one of which was previously accepted for briefing by this Court; and 3) because the appeal was hand-delivered to the Clerk's office timely but was not accepted for filing because it did not include a date-stamped copy of the journal entry denying reconsideration.

J.V. was adjudicated delinquent of aggravated robbery as a serious youthful offender. (Sweeney Aff. at ¶ 2). On February 12, 2010, the juvenile court invoked the adult portion of the SYO sentence, which included six years in prison and five years of post-release control. (Sweeney Aff. at ¶ 3). Undersigned counsel represented J.V. below and believes that there are important and meritorious issues to be raised in this Court. (Sweeney Aff. at ¶ 4). Indeed, J.V.'s case raises, among other things, a constitutional challenge to the SYO statute which had previously been accepted by this Court for briefing but was ultimately dismissed by the parties just prior to oral argument because of a ripeness problem. *In re T.F.*, Sup Ct. Case No. 2008-1578. (Sweeney Aff. at ¶ 5). Because of the important issues in this case, undersigned counsel agreed to file an appeal with this Court on J.V.'s behalf. (Sweeney Aff. at ¶ 4).

This Office of Cuyahoga County Public Defender, which litigates frequently in this Court, strives to meet its deadlines before this Court. The established procedures in this Office have usually worked to ensure that deadlines are met. However, errors have occurred on rare occasions. The error in this case was the result of a delay in obtaining a current indigency affidavit from J.V. and the failure to include a date-stamped copy of the Eighth District Court of Appeals judgment denying reconsideration.

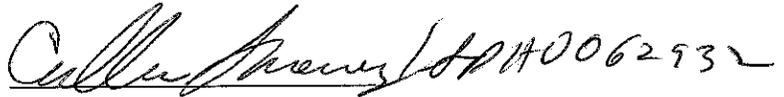
Undersigned counsel was aware that J.V.'s appeal was due with this Court by January 18, 2011. (Sweeney Aff. at ¶ 6). By Monday of last week, he had completed the memorandum in support of jurisdiction and intended to mail the appeal. (Sweeney Aff. at ¶ 7). However, as undersigned counsel was preparing to file the appeal last week, he realized that he only had an outdated affidavit of indigency for J.V. (Sweeney Aff. at ¶ 8). Because J.V. was incarcerated, undersigned counsel made arrangements with the warden to obtain an updated indigency affidavit. (Sweeney Aff. at ¶ 9). Unfortunately, the affidavit that undersigned counsel received on January 14, 2011 did not comply with Sup Ct. R. 15.3 because it did not include specific reasons for J.V.'s inability to pay the filing fee. (Sweeney Aff. at ¶ 10). Undersigned counsel immediately contacted the warden's office to get a complete affidavit. (Sweeney Aff. at ¶ 11). By the time undersigned counsel received the affidavit, it was too late to mail J.V.'s appeal. (Sweeney Aff. at ¶ 12).

Accordingly, undersigned counsel made arrangements to have the Office of the Ohio Public Defender hand deliver his appeal on January 18, 2011. (Sweeney Aff. at ¶ 13). The Ohio Public Defender did hand deliver the appeal; however, the clerk's office did not accept it for filing because it did not include a date-stamped copy of the Eighth District's judgment entry denying reconsideration. (Sweeney Aff. at ¶ 14). Undersigned counsel had never received a journalized copy of the Eighth District's reconsideration decision, but had received a postcard notifying him that reconsideration had been denied on December 3, 2010. (Sweeney Aff. at ¶ 15). Because the Eighth District's clerk's office had closed by the time undersigned counsel was notified of the deficiency with the appeal, he could not obtain a copy of the date-stamped journal entry denying reconsideration. (Sweeney Aff. at ¶ 16). He did submit a copy of the postcard notification which demonstrated that reconsideration was denied on December 3, 2010 (Exhibit

D), but the Clerk's office determined that was not adequate and did not file the appeal. (Sweeney Aff. at ¶ 17).

While any delay in meeting a deadline is unacceptable, it is respectfully submitted that the minor delay in this case will not adversely impact the administration of justice and the reasons given for the delay justify accepting J.V.'s appeal. This appeal is of great importance to J.V. as it is his only opportunity to present to this Court significant issues raised on appeal. J.V. therefore respectfully prays that his motion for delayed appeal be granted.

Respectfully submitted,



CULLEN SWEENEY, ESQ.  
Assistant Public Defender  
Cuyahoga County

**CERTIFICATE OF SERVICE**

A copy of the foregoing Motion for Delayed Appeal was hand delivered upon William Mason, Cuyahoga County Prosecutor and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 19<sup>th</sup> day of January, 2011.



CULLEN SWEENEY, ESQ.

**EXHIBIT A**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 94820

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**IN RE: J.V.**  
**A Minor Child**

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**JUDGMENT:**  
**AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Juvenile Division  
Case No. DL 05103008

**BEFORE:** Gallagher, A.J., Kilbane, J., and Jones, J.

**RELEASED AND JOURNALIZED:** November 10, 2010

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**ATTORNEYS FOR APPELLEE, STATE OF OHIO**

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FILED AND JOURNALIZED  
PER APP.R. 22(C)

NOV 10 2010  
GERALD M. FURST  
CLERK OF THE COURT OF APPEALS  
BY \_\_\_\_\_ DEP

SEAN C. GALLAGHER, A.J.:

Appellant, J.V.,<sup>1</sup> appeals the judgment of the Cuyahoga County Court of Common Pleas, Juvenile Court Division, that invoked the adult portion of a serious youthful offender sentence. For the reasons stated herein, we affirm the judgment of the juvenile court.

J.V. initially had three cases pending before the juvenile division: DL 01105053, DL 04102103, and DL 05103008. Pursuant to a negotiated agreement, J.V. entered an admission to felonious assault and aggravated robbery charges, as well as attendant firearm and serious youthful offender specifications. J.V. was found to have been 17 years of age at the time of the offenses. After accepting J.V.'s admissions, the juvenile court proceeded to disposition.

J.V. filed a direct appeal from the disposition and argued that the juvenile disposition as it was reflected in the journal entries differed from the disposition imposed at the recorded disposition hearing. *In re J.V.*, Cuyahoga App. Nos. 86849 and 86850, 2006-Ohio-2464. Finding merit to the appeal, we vacated his sentence and remanded the matter to the juvenile court to modify its journal entries to accurately reflect the disposition as articulated at the June 17, 2005,

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<sup>1</sup> Appellant is referred to herein by his initials in accordance with this court's established policy regarding nondisclosure of identities in juvenile cases.

hearing. On January 5, 2007, the juvenile court imposed a sentence that included both juvenile and adult portions.

On October 16, 2008, while J.V. was serving the juvenile portion of his sentence, the state filed a motion to invoke the adult sentence because of J.V.'s conduct while he was in the custody of the Ohio Department of Youth Services. Following a hearing, the juvenile court found "by clear and convincing evidence that the child has been admitted to a Department of Youth Services facility, and the child's conduct demonstrates that the child is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction." On February 5, 2009, the court ordered the adult portion of J.V.'s sentence into execution.

J.V. filed his second appeal to this court challenging the juvenile court's decision to invoke the adult sentence. *In re J.V.*, Cuyahoga App. No. 92869, 2010-Ohio-71. We determined that the sentence was void on account of the juvenile court's failure to advise J.V. of the mandatory five years of postrelease control associated with the adult portion of his sentence and failure to include postrelease control in the journal entry. *Id.* The matter was remanded to the juvenile court for a new hearing.

On remand, the juvenile court found that its original findings would stand on the motion to invoke the adult portion of the sentence. The court proceeded to hold a sentencing hearing on February 12, 2010, at which the court included

the juvenile disposition and stayed adult sentence of six years, and properly advised J.V. of postrelease control. The court proceeded to impose the adult portion of the sentence, which included six years in prison and five years of postrelease control.

J.V. now appeals this ruling. He raises four assignments of error for our review. His first assignment of error provides as follows: "I: The state failed to present sufficient evidence with respect to the findings necessary to invoke the appellant's suspended adult sentence."

R.C. 2152.14 governs the circumstances under which a juvenile court may invoke the adult portion of a serious youthful offender ("SYO") sentence. *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, ¶ 31. The statute provides that upon a proper motion and after a hearing has been held, the court may invoke the adult portion of the SYO sentence if certain factors are shown by clear and convincing evidence. R.C. 2152.14(E) states as follows:

**"The juvenile court may invoke the adult portion of a person's serious youthful offender dispositional sentence if the juvenile court finds all of the following on the record by clear and convincing evidence:**

**"(a) The person is serving the juvenile portion of a serious youthful offender dispositional sentence.**

**"(b) The person is at least fourteen years of age and has been admitted to a department of youth services facility, or criminal charges are pending against the person.**

“(c) The person engaged in the conduct or acts charged under division (A), (B), or (C) of this section, and the person’s conduct demonstrates that the person is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction.”

“The conduct that can result in the enforcement of an adult sentence includes committing, while in custody or on parole, an act that is a violation of the rules of the institution or the conditions of supervision and that could be charged as any felony or as a first-degree misdemeanor offense of violence if committed by an adult, R.C. 2152.14(A)(2)(a) and (B)(1), or engaging in conduct that creates a substantial risk to the safety or security of the institution, the community, or the victim. R.C. 2152.14(A)(2)(b) and (B)(2).” *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, ¶ 36.

J.V. argues that the state failed to present sufficient evidence for the court to make several of the necessary findings by clear and convincing evidence. “Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. \* \* \* Where the degree of proof required to sustain an issue must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof.” *Cross v. Ledford* (1954), 161 Ohio St. 469, 477, 120 N.E.2d 118.

J.V. first contends that he was not serving the juvenile portion of his SYO sentence at the time the juvenile court invoked his adult sentence. He erroneously attempts to rely upon the February 12, 2010, hearing as the date for which his adult sentence was invoked. However, as we discuss later, the February 12, 2010, hearing was held upon remand for the purpose of imposing postrelease control. The imposition of the adult portion of the SYO sentence occurred following a hearing held on January 13, 2009, and remained intact. At the time the court ordered the adult portion of J.V.'s sentence into execution, J.V. was serving the juvenile portion of his SYO sentence. Thus, there was sufficient evidence to support this finding.

J.V. next argues that there was insufficient evidence that he engaged in conduct or acts that can result in the enforcement of an adult sentence.

At the January 13, 2009, hearing, it was established that there was a culture of fighting at the Marion Juvenile Correctional Facility. The state presented evidence that J.V. engaged in fighting between July and September 2008, at the age of 20. Although the trial court found that some of the allegations were not supported by clear and convincing evidence, the court found there was sufficient evidence to show that J.V. was involved in an incident on September 25, 2008, in which he engaged in a large group fight and hit another individual, that he associated with the wrong individuals, that he had a

reputation of being a part of the problem, and that he did not have control of himself. With regard to the September 25, 2008, incident, J.V. admitted he was engaged in the fight. He claimed he was hit by another individual and his reaction was "to get up and fight back." He stated he "blanked out of the situation," that he "got to hitting," and that he was kicking another juvenile. Although he claimed he did not belong to a gang, he admitted that he associated with gang members.

The trial court found by clear and convincing evidence that J.V. had engaged in either of the following misconduct: "1) The child committed an act that is a violation of the rules of the institution and that could be charged as a felony or as a first degree misdemeanor offense of violence if committed by an adult; 2) the child engaged in conduct that created a substantial risk to the safety or security of the institution, the community, or the victim." The court further found by clear and convincing evidence that "the child's conduct demonstrates that the child is unlikely to be rehabilitated during the remaining period of juvenile jurisdiction." We find there was sufficient evidence to support these findings as well as the other required factors under R.C. 2152.14. Accordingly, J.V.'s first assignment of error is overruled.

J.V.'s second and third assignments of error provide as follows:

“II: The juvenile court lacked the authority to invoke the suspended portion of a serious youthful offender sentence based on conduct that occurred before the suspended sentence was actually imposed.”

“III: The juvenile court lacked the authority to impose and invoke the stayed adult portion of a serious youthful offender sentence because J.V. was over the age of 21.”

Under these assignments of error, J.V. claims that the trial court did not issue a valid SYO sentence until February 12, 2010, which was the sentencing hearing held on remand to properly include postrelease control. At that time, the trial court recognized that the state’s motion to invoke the adult portion of the SYO sentence was heard and submitted on January 13, 2009, and that the court ordered the adult portion of the sentence into execution on February 5, 2009.

Although this court previously determined that the failure of the juvenile court to properly include postrelease control resulted in a void sentence, *In re J.V.*, Cuyahoga App. No. 92869, 2010-Ohio-71, the effect of this decision on the juvenile court’s judgment was governed by the Ohio Supreme Court case of *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958. At the time this court remanded the case for a proper sentencing that included the mandatory postrelease control, the Ohio Supreme Court had held that for

“sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191.” *Id.* at paragraph two of the syllabus. Notably, in *Singleton*, the court specifically recognized that R.C. 2929.191 does not afford a defendant a de novo sentencing hearing: “The hearing contemplated by R.C. 2929.191(C) and the correction contemplated by R.C. 2929.191(A) and (B) pertain only to the flawed imposition of postrelease control. R.C. 2929.191 does not address the remainder of an offender’s sentence. Thus, the General Assembly appears to have intended to leave undisturbed the sanctions imposed upon the offender that are unaffected by the court’s failure to properly impose postrelease control at the original sentencing.” *Id.* at ¶ 24.

Consistent with this authority, the determination by the juvenile court to invoke the adult portion of the SYO sentence on February 5, 2009, was not impacted by the subsequent decision from this court to remand the case for a new hearing to properly incorporate postrelease control in J.V.’s dispositional sentence. Therefore, we overrule J.V.’s second and third assignments of error.

J.V.’s fourth assignment of error provides as follows: “IV: The trial court erred in invoking the adult portion of appellant’s SYO sentence based on judicial fact-finding and based on a relaxed burden of proof \* \* \* .”

J.V. asserts that the imposition of an adult prison sentence predicated on judicial fact-finding and based on a relaxed burden of proof violated his rights under the Sixth and Fourteenth Amendments of the United States Constitution and Ohio's constitutional counterparts. He argues that R.C. 2152.14 is unconstitutional insofar as it does not afford SYO juveniles the same constitutional protections as adults facing the imposition of an adult prison sentence. He further argues that a juvenile should have the right to have a jury determine, beyond a reasonable doubt, all the facts necessary for the imposition of an adult prison sentence.

In *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, paragraph two of the syllabus, the Ohio Supreme Court held that “[c]onstitutional jury trial rights do not apply, in a pre-*Foster* sentencing, to findings that a juvenile court has made under Ohio's adult felony sentencing statutes when the juvenile court imposes the stayed adult portion of a serious-youthful-offender dispositional sentence pursuant to R.C. 2152.13.” Because the adult portion of D.H.'s sentence was not being invoked, the court did not address the constitutional ramifications of invoking the adult sentence under R.C. 2152.14. *Id.* at ¶ 37. However, the court recognized: “We need not transform juvenile proceedings into full-blown adult trials and dispositions to preserve a juvenile's due process rights. \* \* \* If the formalities of the criminal

adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence.” (Citation omitted.) Id. at ¶ 60.

Until the Ohio Supreme Court declares otherwise, we find no constitutional violation. See *In re D.F.*, Summit App. No. 25026, 2010-Ohio-2999. J.V.’s fourth assignment of error is overruled.

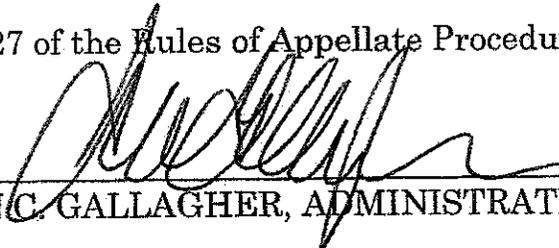
Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, juvenile division, to carry this judgment into execution. The finding of delinquency having been affirmed, any bail or stay of execution pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

  
SEANC. GALLAGHER, ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and  
LARRY A. JONES, J., CONCUR

**EXHIBIT B**

# Court of Appeals of Ohio, Eighth District

County of Cuyahoga  
Gerald E. Fuerst, Clerk of Courts

IN RE: J V

Appellant                      COA NO                      LOWER COURT NO  
   94820                      DL 05103008  
  
   JUVENILE COURT DIVISION

MOTION NO. 439521

Date 12/03/2010

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Journal Entry

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MOTION BY APPELLANT FOR RECONSIDERATION IS DENIED

RECEIVED FOR FILING

DEC 03 2010

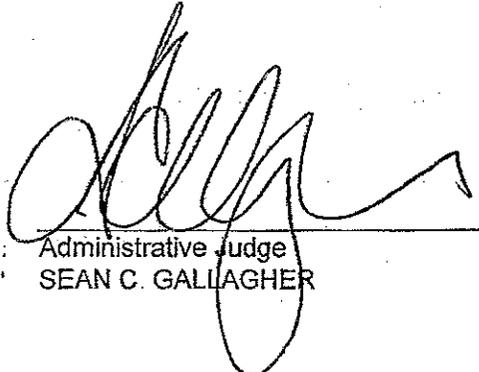
GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY *G. Fuerst* DEP

Judge MARY EILEEN KILBANE, Concur

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Judge LARRY A. JONES, Concur

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Administrative Judge  
SEAN C. GALLAGHER



718 00634

COPIES MAILED TO COURSE FOR

**EXHIBIT C**

IN THE STATE OF OHIO :  
 : SS  
COUNTY OF CUYAHOGA :

**AFFIDAVIT OF CULLEN SWEENEY, ESQ.**

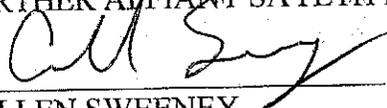
Cullen Sweeney, being first duly sworn according to law, states the following:

1. I am a licensed attorney in good standing in the State of Ohio. My registration number is 0077187.
2. J.V. was adjudicated delinquent of aggravated robbery as a serious youthful offender
3. On February 12, 2010, the juvenile court invoked the adult portion of the SYO sentence, which included six years in prison and five years of post-release control.
4. I represented J.V. in his appeal to the Eighth District in *In re J.V.*, Cuyahoga App. No. 94820 and have agreed to represent J.V. in an appeal because of the important issues involved in the case.
5. J.V.'s case raises, among other things, a constitutional challenge to the SYO statute which had previously been accepted by this Court for briefing but was ultimately dismissed by the parties just prior to oral argument because of a ripeness problem. *In re T.F.*, Sup Ct Case No. 2008-1578
6. I was aware that J.V.'s appeal was due with this Court by January 18, 2011.
7. By January 10, 2011, I had completed the memorandum in support of jurisdiction and intended to mail the appeal.
8. As I was preparing to file the appeal, I realized that J.V.'s indigency affidavit was out of date.
9. Because J.V. was incarcerated, I made arrangements with the warden to obtain an updated indigency affidavit.
10. I received an affidavit on January 14, 2011 that did not comply with Sup Ct. R. 15.3 because it did not include specific reasons for J.V.'s inability to pay the filing fee.
11. I immediately contacted the warden's office to get a complete affidavit.
12. By the time I received the second affidavit, it was too late to mail J.V.'s

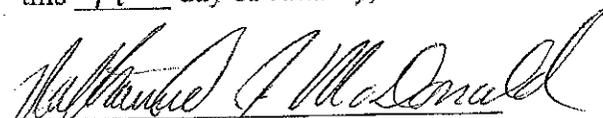
appeal

13. I arranged to have the Office of the Ohio Public Defender hand deliver J.V.'s appeal on January 18, 2010.
14. The Ohio Public Defender did hand deliver the appeal; however, the clerk's office did not accept it for filing because it did not include a date-stamped copy of the Eighth District's judgment entry denying reconsideration.
15. I had never received a journalized copy of the Eighth District's reconsideration decision, but had received a postcard notifying him that reconsideration had been denied on December 3, 2010.
16. Because the Eighth District's clerk's office had closed by the time undersigned counsel was notified of the deficiency with the appeal, I could not obtain a copy of the date-stamped journal entry denying reconsideration.
17. I did submit a copy of the postcard notification which demonstrated that reconsideration was denied on December 3, 2010, but the Clerk's office determined that was not adequate and did not file the appeal.

FURTHER AFFIANT SAYETH NAUGHT.

  
CULLEN SWEENEY

SWORN TO AND SUBSCRIBED before me  
this 19<sup>th</sup> day of January, 2011.

  
NOTARY PUBLIC

**NATHANIEL J. McDONALD, Esq.**  
NOTARY PUBLIC • STATE OF OHIO  
My commission has no expiration date  
Section 147.03 O.R.C.

**Case No: 94820**

IN RE: J.V.

MOTION BY APPELLANT FOR  
RECONSIDERATION IS  
DENIED.

KILBANE, M., J., CONCUR  
JONES, L., J., CONCUR  
GALLAGHER, S., P. J.

**FROM:**

Court of Appeals of Ohio

Eighth Appellate District

One Lakeside Ave.

Cleveland, Ohio 44113

Date: 12/03/2010

**TO:**

CULLEN SWEENEY

ASSISTANT PUBLIC DEFENDER

310 LAKESIDE AVENUE

SUITE 200

CLEVELAND, OH 44113