

NO. 2011-0107

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 94820

STATE OF OHIO,

Plaintiff-Appellee

-vs-

JIMMY VINSON,

Defendant-Appellant

APPELLEE'S MEMORANDUM OPPOSING JURISDICTION

Counsel for Plaintiff-Appellee

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

KRISTEN SOBIESKI (0071523)
Assistant Prosecuting Attorneys
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

Counsel for Defendant-Appellant

CULLEN SWEENEY
310 LAKESIDE AVE., 2nd FLOOR,
CLEVELAND, OHIO 44113

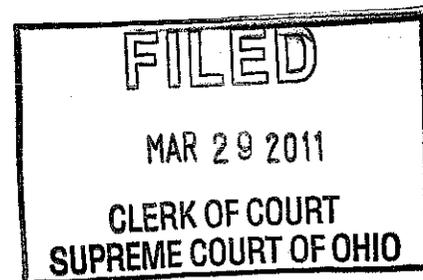
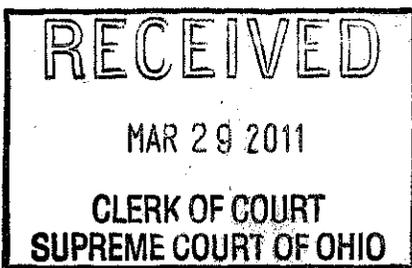


TABLE OF CONTENTS

WHY THIS COURT SHOULD NOT GRANT JURISDICTION1

STATEMENT OF THE CASE.....1

STATEMENT OF THE FACTS..... 3

LAW AND ARGUMENT 6

PROPOSITION OF LAW NO. I: R.C. § 2152.14 IS CONSTITUTIONALLY SOUND.
THIS STATUTE ALLOWS JUVENILE COURTS TO IMPOSE ADULT PRISON TERMS
UPON SERIOUS YOUTHFUL OFFENDERS WHO CONTINUE TO COMMIT
CRIMINAL CONDUCT WHILE IN JUVENILE CORRECTIONAL FACILITIES. 6

PROPOSITION OF LAW NO. I: THE JUVENILE COURT PROPERLY IMPOSED
AND LATER INVOKED THE ADULT PORTION OF APPELLANT’S SERIOUS
YOUTHFUL OFFENDER SPECIFICATION.12

CONCLUSION.....14

CERTIFICATE OF SERVICE15

WHY THIS COURT SHOULD NOT GRANT JURISDICTION

Ohio law relevant to this case is well established and was properly applied by the juvenile and appellate courts. As no substantial constitutional question and no matter of public or great general interest are presented in this matter, the State respectfully requests this Supreme Court decline jurisdiction.

STATEMENT OF THE CASE

This case originates in the Cuyahoga County Juvenile Court. The six charges against Appellant were resolved by his admissions—which were made pursuant to a negotiated agreement—on June 17, 2005. Appellant admitted to one count of Felonious Assault and one count of Aggravated Robbery, each with firearm and serious youthful offender specifications. In exchange, the remaining four counts were dismissed. A jointly proposed blended sentence (including juvenile and adult time) was imposed.

Appellant sought review in the Eighth District Court of Appeals. The appellate court “vacate[d] the appellant’s sentence * * * and remand[ed] the matter to the juvenile division to modify its journal entries to accurately reflect appellant’s disposition as articulated at the June 17, 2005 hearing.” *In re: J.V., A Minor Child*, Cuyahoga App. No. 86849, 86850, 2006-Ohio-2464, ¶ 14. Pursuant to the remand, a hearing was held on January 5, 2007 at which time Appellant’s blended sentence was again imposed.

Appellant went on to serve the juvenile portion of his term. On October 16, 2008, the State moved to invoke the adult portion of Appellant’s sentence based on Appellant’s conduct while in ODYS custody. A hearing was held in which the State’s evidence in support of the motion to invoke was received. (See, Statement of the Facts.)

In a February 5, 2009 entry 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.” Therefore the adult portion of Appellant’s sentence was ordered into execution.

Appellant again appealed. The Eighth District reversed and remanded finding, “At no time did the lower court ever advise J.V. of the mandatory five years of postrelease control associated with the adult portion of his sentence. Nor did the lower court properly incorporate postrelease control in its journal entry. Accordingly, J.V.’s sentence is void * * * we hereby reverse in part and remand this case to the docket of the juvenile court for a new hearing.” *In re: J.V.*, Cuyahoga App. No. 92869, 2010-Ohio-71, ¶ 23-24, *jurisdiction declined* 125 Ohio St.3d 1448, 927 N.E.2d 1128, 2010-Ohio-2510.

On remand the juvenile court found that its original decision to invoke Appellant’s adult sentence based on clear and convincing evidence remained in effect. The court imposed upon Appellant a lawful SYO sentence that included a traditional juvenile disposition and an agreed suspended six-year adult prison term to be followed by a mandatory five-year period of post release control supervision. The court specified that Appellant had not completed his term. With regard to the State’s motion invoking the adult term the court reiterated, “I found the motion to be well-taken.”

Appellant again sought review in Eighth District but the Juvenile Court’s judgment was affirmed. *In re: J.V.*, Cuyahoga App. No. 94820, 2010-Ohio-5490. On January 19, 2011 Appellant was released from the adult Ross Correctional Institution and was placed on

supervision. Presently, Appellant pursues his delayed appeal in this Honorable Court. The State's opposition to jurisdiction follows.

STATEMENT OF THE FACTS

Relevant to the imposition of Appellant's prison term, on January 13, 2009 the Juvenile Court held a hearing on the State's motion to invoke Appellant's adult sentence at which the court heard the following evidence:

Officer Kevin Lacey, a Unit Manager at the Marion Juvenile Correctional Facility ("MJCF"), testified that he is responsible for the security of his unit, managing the officers and social workers, and taking care of the needs and discipline of the youths who reside there. Lacey stated that he received daily reports regarding the behavior of youths throughout the facility. He testified that MJCF is considered a closed unit and houses the highest risk youth (in terms of their criminal conduct/offenses.) Unlike facilities that might have open dorms, Marion accommodates "youth that severely, severely act out." When youths who are placed at other juvenile facilities prove to be dangerous or unmanageable, they are often transferred to Marion.

Lacey interacted with Appellant on multiple occasions over the summer of 2008. On one occasion, Lacey was searching Appellant's cell when Appellant began using abusive language, refused to comply with directions, and hit Lacey. The incident spiraled until all available staff had to be summoned to restrain Appellant (and the other youths), whom Lacey described as being "extremely combative" and "unmanageable."

On September 25, 2008 Appellant was involved in another “major incident” of fighting. Lacey stated that Appellant had just spent time in the Severe Management Unit (“SMU”), which is an area designated for youth who “are incapable of behaving well enough in general population.” (Youths who follow the institutional rules are not placed in SMU.) After Appellant’s release from SMU, Lacey received a written alert indicating that Appellant intended to start trouble when he was returned to the regular unit.

- In the incident, a conflict occurred between two security threat groups—commonly known as gangs. Appellant, a high-ranking member of the security threat group called the “Heartless Felons” or the “Felons” was “going after the rival gang.”¹ Lacey responded to the urgent call for help. He arrived at the scene to find “mass chaos”, “There was youths on the ground getting kicked. There was youths fighting, squared-up fighting one-on-one. There was youths chasing youths around the—I mean, mass chaos.” Twenty-seven youths, including Appellant, were fighting. Appellant chased other youths around and kicked a youth (who was on the ground) in the head. Appellant’s conduct was aggressive, not defensive. Lacey’s concern with Appellant was that he was much older and stronger than the boys he attacked.

MJCF social worker Lee Hayes testified that Appellant was involved in a higher than average number of behavioral incidents; that although he was expected to attend group sessions with her, he frequently did not; that Appellant told her he did not need help; that

¹ Activity of security threat groups at MJCF is monitored including who is involved, what the youths say about themselves, whether they brag about being in a gang, and whether they are observed displaying their gang’s signs. There is a hierarchy to the Felons and Appellant’s position in the gang allowed him “to call shots.” Youths attain status in the security threat groups by gaining contraband, or committing physical violence. Appellant had a history of testing positive for THC.

she believed Appellant could control his behavior but that he chose not to control it; and, that she was concerned about Appellant's release into the community due to his history of violent behavior and fighting.

On his own behalf, Appellant testified that he completed a number of programs in ODYS. Appellant denied hitting Lacey. With regard to the September 25, 2008 incident, he testified that he was first hit from a blind spot and that he then "got to hitting." Appellant admitted, "I was kicking him." He acknowledged the existence of gangs including the Bloods, Crypts, and the Felons but he denied being a gang member. In response to the judge's inquiries as to why Appellant involved himself in fighting, Appellant testified, "I blanked out of the situation", "I blanked out."

In her dialogue with Appellant, the judge inquired, "Mr. Vinson, how many more times are you going to blank out if you get released? Because the same people that you met on the way down to Marion is the same people you're going to meet right out there in that street." The court stated, "I don't care what the kids do. I'm trying to assess what you do, and you're still blanking out like a kid." The court found Appellant was "20 years of age and plenty of time to keep it together." The court noted the escalation of criminal conduct that landed Appellant in MJCF to begin with—including the firearm. The court indicated that she did not find the incident involving the assault Officer Lacey to be the most persuasive; rather the court was primarily concerned with Appellant's admitted conduct in the September 2008 fight and his gang association. The court ordered into execution the adult portion of Appellant's serious youthful offender sentence.

Upon remand from the Eighth District for imposition of post release control, the juvenile court noted that her decision to invoke the adult portion of Appellant's sentence

was not reversed on appeal and, as such, remained in effect. Thus, the court properly sentenced Appellant to an adult prison term, to be followed by a mandatory period of post release control. This judgment by the Juvenile Court was affirmed by the Eighth District in *In re: J.V.*, Cuyahoga App. No. 94820, 2010-Ohio-5490. Appellant now seeks further review via a delayed appeal in this Supreme Court.

LAW AND ARGUMENT

PROPOSITION OF LAW NO. I: R.C. § 2152.14 IS CONSTITUTIONALLY SOUND. THIS STATUTE ALLOWS JUVENILE COURTS TO IMPOSE ADULT PRISON TERMS UPON SERIOUS YOUTHFUL OFFENDERS WHO CONTINUE TO COMMIT CRIMINAL CONDUCT WHILE IN JUVENILE CORRECTIONAL FACILITIES.

Appellant alleges that R.C. § 2152.14 is constitutionally deficient. This statute provides:

(E)(1) 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.

Although the juvenile court procedure and burden of proof is clearly delineated in this statute, Appellant contends that it violates his constitutional right to due process and equal protection and that he is entitled to have a jury make the above findings based on proof

beyond a reasonable doubt. For the following reasons, Appellant's arguments fail.

In this case, the conduct and acts that Appellant was charged with under subsection (A) was that he committed (1) an act that was a violation of the rules of the institution and that could be charged as any felony or as a first degree misdemeanor offense of violence if committed by an adult, and (2) that he engaged in conduct that created a substantial risk to the safety or security of the institution, the community, or the victim. See, R.C. § 2152.14(A)(2)(a) & (b).

The clear and convincing evidence that the State submitted to support its position was that between July and September of 2008 Appellant engaged in frequent fighting while housed at MJCF. Specifically: Appellant continued to engage in fights at the age of 19 and 20; he was a known "high-ranking" gang member; in July of 2008 he engaged in an incident during which he struck Officer Lacey; on September 25, 2008 Appellant engaged in a "mass chaos" group fight; and, with regard to the September incident, Appellant admitted that he "blanked out", "got to hitting," and that he kicked another juvenile. Moreover, Appellant acknowledged that he was transferred six times from the general population area to the SMU—although, according to him, only one of those transfers was justified.

The trial court heard testimony from two sources that Appellant was involved in a higher than average number of behavioral incidents. Further, the court heard that the number of fighting disturbances decreased after Appellant was transferred out of MJCF to county jail.

After hearing this evidence, the court was clear in its message. The Juvenile court did not hinge its findings based on that evidence regarding the assault on Lacey. Rather, the court was persuaded that Appellant "committed an act that is violation of the rules of

the institution and that could be charged as a felony or a first degree misdemeanor offense of violence if committed by an adult” and that Appellant “engaged in conduct that created a substantial risk to the safety or security of the institution, the community, or the victim” based on Appellant’s own testimony that he “blanked out” and “got to fighting” and was “kicking” another youth on September 25, 2008. These findings were made at the time of the hearing on the State’s motion to invoke adult sentence and were reiterated by the court in the February 12, 2010 hearing on remand. These findings constitute full compliance with R.C. § 2152.14.

The juvenile court fully complied with R.C. § 2152.14 in finding Appellant’s conduct to have violated 2152.14(A)(2)(a) & (b). Moreover, the lower court fully complied with R.C. § 2152.14 when it concluded that Appellant was at least fourteen years old, that he was in the custody of the institution and was “serving the juvenile portion of the serious youthful offender dispositional sentence” at the time the conduct was committed. The lower court’s findings pursuant to subsection (E) were substantiated by the record which demonstrated that Appellant was committed to ODYS custody based on his admissions to Felonious Assault and Aggravated Robbery—each with firearm and serious youthful offender specifications. Appellant was in the custody of ODYS and was housed at MJCF for a period of time including the months of July through September of 2008. The witnesses testified and the court acknowledge that Appellant was well beyond fourteen years old.

Appellant now argues to this Court, as he did to the Eighth District, that the State was required to prove beyond a reasonable doubt that Appellant’s conduct at MJCF constituted the offenses Aggravated Riot or Assault. However, proof beyond a reasonable

doubt simply is not the standard required by statute. See, R.C. § 2152.14(E). The State's burden under the statute is "clear and convincing evidence."

This Supreme Court has defined clear and convincing evidence as "that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt'"; it is that "which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, 53 O.O. 361, 120 N.E.2d 118, at paragraph three of the syllabus. Clear and convincing evidence is a reasonable certainty of the truth of the matter.

Upon remand from the Eighth District, the juvenile court reiterated (with regard to the State's motion to invoke Appellant's adult sentence) that, "I found the motion to be well-taken, and I invoked the sentence. * * * In my opinion, my findings, as it relates to the motion, stand." The juvenile court then imposed a lawful adult sentence against Appellant, including the mandatory period of post release control.

Applying the clear and convincing standard, the juvenile court properly determined that Appellant's conduct while in the custody of ODYS justified invoking the adult portion of his sentence. The court's findings were proper and were supported by sufficient evidence. In reviewing this ruling in the most recent appeal, the Eighth District held:

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.

In re: J.V., Cuyahoga App. No. 94820, 2010-Ohio-5490, ¶ 14.

Appellant alleges that invoking the adult portion of a serious youthful offender sentence calls for impermissible judicial fact-finding in violation of his constitutionally guaranteed rights to due process and equal protection. However Ohio appellate courts, including this Supreme Court, have considered this issue and have upheld the SYO specification as constitutional. When a juvenile court invokes adult sentences against serious youthful offenders in accordance with R.C. § 2152.14, the right to a trial by jury is not implicated, nor is the right to due process violated.

This Supreme Court has held “the Sixth Amendment prohibits a judge from imposing a greater sentence than that allowed by the jury verdict or by the defendant’s admissions at a plea hearing.” *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at ¶ 7. However, contrary to Appellant’s arguments, this holding is inapplicable to serious youthful offenders.

First and foremost, unlike adults, juveniles do not have a constitutional right to a by jury. *In re: Alger* (1969), 19 Ohio St.2d 70, 249 N.E.2d 808. With regard to juveniles, jury trials are generally considered to be neither constitutionally guaranteed, nor sound public policy. *State v. D.H.*, 120 Ohio St.3d 540, 901 N.E.2d 209, 2009-Ohio-9, ¶ 42. Thus, juvenile offenders are expressly and deliberately treated differently (not equally) under Ohio law as compared to adult criminal offenders.

In *D.H.* the Court determined that R.C. § 2952.13 (which allows a serious youthful offender to have an adult sentence imposed against them) does not implicate the juvenile’s

due process rights, nor does it violate the adult right to a trial by jury. *Id.* at ¶ 61. The decision reasoned,

We need not transform juvenile proceedings into full-blown adult trials and dispositions to preserve a juvenile's due process rights. As the court related in *McKeiver*, 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.

Id. at ¶ 60, quoting *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 551, 91 S.Ct. 1976, 29 L.Ed.2d 647. Applying this same rationale to the very next statute in the Ohio Revised Code, R.C. § 2952.14 (which allows the adult portion of the imposed sentence to be invoked), it follows that R.C. § 2952.14 likewise does not violate due process rights or implicate the right to trial by jury. This Supreme Court's position has already been made clear—the serious youthful offender specification is lawful and to be administered in the juvenile court system.

To adopt Appellant's first proposition of law would be to transform juvenile dispositional proceedings into full-blown adult trials, which is something that this Supreme Court has declined to do as recently as January 28, 2009. The decision of whether or not to invoke the adult portion of a serious youthful offender's sentence is a decision that is best left to the expertise of the juvenile judge—who is familiar not only with the facts of each case, but is also familiar with the juvenile justice system. *Id.* at ¶ 60. Moreover, the ability to order a suspended sentence into execution is a power that is traditionally held by the court—and is not a function of a jury. *Id.* at ¶ 58-59, see also *Weber v. State* (1898), 58 Ohio St. 616, 618-619, 51 N.E. 116.

R.C. § 2152.14 is not inconsistent with this Supreme Court's holding in *Foster*. A serious youthful offender does not have a right to have his adult sentence imposed by a jury

under R.C. § 2152.13 (see, *State v. D.H.*, *supra*), nor does the juvenile have the right to have his adult sentence invoked by a jury under R.C. § 2152.14. Due process does not dictate that invoking the adult portion of a serious youthful offender sentence requires a full-blown jury trial. For these reasons, the State of Ohio respectfully requests this Court decline jurisdiction and dismiss this appeal.

PROPOSITION OF LAW NO. 1: THE JUVENILE COURT PROPERLY IMPOSED AND LATER INVOKED THE ADULT PORTION OF APPELLANT'S SERIOUS YOUTHFUL OFFENDER SPECIFICATION.

Appellant contends that, upon remand from this appellate Court, the juvenile court lacked jurisdiction to impose and invoke the adult portion of his SYO sentence based on Appellant's age. However, the Eighth District Court of Appeals' unanimous decision and order of remand to the juvenile Court was clear. With regard to jurisdiction the appellate court specified:

J.V. was born on March 11, 1988, and therefore, under the age of 18 at the time of the offense. J.V. received a blended juvenile and adult sentence. He was confined to a juvenile institution until he obtained the age of 21, and given a *potential* six-year adult sentence. The potential adult sentence was based on a two-year sentence for felonious assault and a three-year sentence for aggravated robbery. The felonious assault and aggravated robbery sentences were to be served concurrent to each other but consecutive to a single three-year firearm specification sentence of one year.

J.V.'s alleged fighting and bad behavior occurred when he was 20 years old and in the custody of the juvenile court. J.V. was under the jurisdiction of the juvenile court at that time and had not yet reached the age of 21. The juvenile court had jurisdiction at the time of the alleged misbehavior of J.V. and that case is still active, through this appeal. The fact that J.V. is now 21 does not automatically transfer venue to the common pleas court in this particular situation. Jurisdiction remains with the juvenile court for the *limited* purpose of conducting a new hearing; making any and all, required notifications to J.V.; and conducting any resentencing issues that become necessary.

In re: J.V., Cuyahoga App. No. 92869, 2010-Ohio-71, ¶ 17-18. As such, the juvenile court had jurisdiction and properly carried out the Eighth District's order of remand in its February 2010 hearing.

Further, Appellant is correct that his initial suspended adult sentence was void for lack of post release control. *In re: J.V.*, Cuyahoga App. No. 92869, 2010-Ohio-71, ¶ 23. Therefore, when the juvenile court first heard evidence of Appellant's conduct while at MJCF, the court was using such conduct to invoke what was later found to be a void adult sentence.

However, upon Appellant's prior appeal, his case was remanded to the juvenile court for proper imposition of the suspended adult sentence (to include the mandatory five-year period of post release control.) *Id.* at ¶ 24. Once the valid suspended sentence was imposed by the juvenile court pursuant to the order of remand, the juvenile court had the ability to lawfully invoke that adult sentence—regardless of the fact that Appellant's offending conduct had actually taken place on an earlier date.

The fact remains that Appellant committed acts while at MJCF that not only constituted violations of the rules of the institution and which could be charged as felonies, but moreover, that Appellant's conduct created a substantial risk to the safety and security of the institution and the victim. R.C. § 2152.14(A)(2). Furthermore, Appellant committed this conduct while serving a lawful juvenile disposition. Although Appellant's suspended adult sentence was void for lack of post release control, the juvenile dispositional sentence under which he was in custody at Marion was lawful at the time he committed the conduct that is discussed in this appeal.

In the decision below, the Eighth District essentially agreed that R.C. § 2152.14 should not be contorted to create the windfall of no adult sentence for this serious youthful offender simply because post release control was not included in the initial suspended adult portion of his blended sentence. Such an interpretation of this statute would lead to an absurd result. Adult criminal defendants do not receive the boon of no prison term at all where their original sentences do not include post release control. Rather, their cases are remanded for re-sentencing. See, R.C. § 2929.191, and *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, ¶ 26. Similarly, juveniles such as Appellant should not be precluded from serving a lawful adult sentence simply because the juvenile court made a post release control error at an initial sentencing. *In re: J.V.*, Cuyahoga App. No. 94820, 2010-Ohio-5490, ¶ 18-20.

Appellant was serving a lawful juvenile disposition at MJCF when he committed the conduct that would later be used to invoke the suspended adult portion of his SYO sentence. At the time that Appellant committed the conduct, Appellant was aware that he had the possibility of serving an adult prison term if he failed to satisfactorily complete the traditional juvenile disposition imposed. The juvenile court had both the authority and the duty to impose and invoke Appellant's adult sentence. For these reasons, the State of Ohio respectfully requests this Court decline jurisdiction and dismiss the instant delayed appeal.

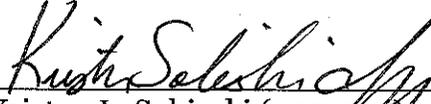
CONCLUSION

Ohio law relevant to this case is well established and was properly applied by the juvenile and appellate courts. With no substantial constitutional question having been raised and no matter of public or great general interest presented, the State of Ohio respectfully requests this Supreme Court decline jurisdiction and dismiss this appeal.

Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

BY:

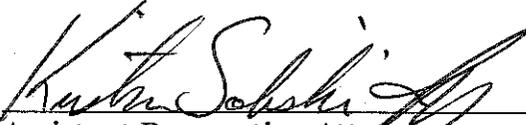


Kristen L. Sobieski (0071823)
Assistant Prosecuting Attorney
1200 Ontario Street, 9th Floor
Cleveland, Ohio 44113
216.443.7800

CERTIFICATE OF SERVICE

A copy of the foregoing memorandum opposing jurisdiction has been sent by regular
United States mail on this 24th day of March 2011, to

**CULLEN SWEENEY
310 LAKESIDE AVE., 2nd FLOOR,
CLEVELAND, OHIO 44113**



Assistant Prosecuting Attorney