

**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.

**FILED**  
MAY 13 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

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**MERIT BRIEF OF APPELLEE**

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## STATEMENT OF FACTS

The Appellee, Toneisha Gunnell, was charged with one count of murder, one count of aggravated robbery, one count of involuntary manslaughter, and one count of theft for events that occurred on June 7, 2005, at the Upper Valley Mall in Springfield, Ohio. Toneisha Gunnell was tried before a jury on November 1 and 2, 2005. That jury found her guilty of all of the charges brought against her. She was sentenced to fifteen years to life in prison.

This Court reversed the trial court and remanded the case for a new trial.

A new trial was held September 24 through October 2, 2007. Entry of trial court, October 10, 2007, at the conclusion of the presentation of the evidence, and while the jury was deliberating, the trial court found juror misconduct and ordered a mistrial and ordered the matter set for a third trial.

Toneisha Gunnell filed a written petition in the United States District Court for the Southern District of Ohio for a writ of habeas corpus on federal grounds. That petition was denied. Toneisha Gunnell did not appeal to the Sixth Circuit Court of Appeals.

Toneisha's case was then tried for a third time, January 20, 2009 through February 2, 2009. At the conclusion of the trial, and while the jury was deliberating, the jury sent a note to the trial judge informing him that they had seen and reviewed a document that they did not believe that they were supposed to see. Over the objection of counsel for the Defendants (Trans. 1-20-09, pg. 1780, lns. 9 – 18) the judge allowed the deliberations to continue. The jury found Toneisha Gunnell guilty on all counts. Counsel for Toneisha Gunnell renewed the

motion to the trial court for a mistrial prior to sentencing. That motion was overruled. The trial court then proceeded to sentence Toneisha Gunnell to eighteen years to life imprisonment.

The matter was reviewed by the Court of Appeals, Second District. In writing for a unanimous court, Judge Grady found that the trial judge had abused its discretion and, in fact found that, “¶195 The trial court drove the process toward a mistrial the State had not requested, and then requested only after the prosecutors saw which way the wind was blowing. Indeed, the prosecutor, . . . saw no need to offer any grounds, confident that the State could rely on the court’s pronouncement that it could not “be convinced” otherwise.”

It was from the unanimous decision finding that the trial court had erred in granting the motion for a mistrial and ordering Toneisha Gunnell discharged that the State has appealed.

The Court of Appeals also found that the trial court erred in not granting Toneisha Gunnell’s motion for a mistrial at the end of the third jury trial, ¶51. Therefore, if this Court sustains either of the State’s assignments of error, this matter will be returned to the trial court of Clark County for a fourth jury trial.

## **RESPONSE TO APPELLANT'S PROPOSITION OF LAW NO. 1:**

**While a trial court has broad discretion to inquire whether or not juror misconduct has occurred during a criminal trial, that discretion is not unlimited and the inquiry must meet certain minimum standards of fairness and be comprehensive.**

When the trial court declared a mistrial during deliberations of the second trial, the error began when the jury asked for a definition of "perverse." After six full days of trial, the jury was instructed on the law and sent out to deliberate at 9:45 pm on October 1, 2007. At approximately 12:00 am October 2, 2007, the jury requested further instructions on the definition of the term "perverse" as used in the definition of recklessly, an element of the charge of Aggravated Robbery. The Court did not give any further instruction. This term has been a significant part of the instructions in this case each time it was tried. The trial court would not give the jury any definition. Appellee concedes that there is no definition of "perverse" in Ohio Jury Instructions nor in Ohio State Bar Association Instructions. However, the trial court left the jury, late at night, to determine on its own the meaning of that term.

Contrary to what the State asserts, the Court of Appeals did not describe a "standard script" for the trial court to inquire of a juror. The Court of Appeals only required that the trial court make a reasonable inquiry of the juror who the State claimed had engaged in misconduct.

The court of appeals has not required the trial court to go beyond the standards already established by the federal courts and Ohio courts. See, *Smith v.*

*Phillips* (1982), 455 U.S. 209, 102 S.Ct. 940; *State v Phillips*, 1995-Ohio-171 74 Ohio St3d. 72 at 88.

Only after the trial court conducts this inquiry can a reviewing court determine if there was a “manifest necessity” to declare a mistrial.

The Supreme Court first enunciated the “manifest necessity” doctrine in *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). The United States Supreme Court held that a trial judge may declare a mistrial and discharge a jury when “taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.” *Id.* at 580.

There was not a “manifest necessity” in this case for 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.

The Appellant would require that the defendant in this case have justified not declaring a mistrial. The cases cited by Appellant in support of their first

proposition of law were requests for mistrial made by the defendants. The court of appeals found, correctly, that because the defendants did not request the mistrial in this case, and the State of Ohio did, the burden should be on the State to prove the grounds for the mistrial.

## **RESPONSE TO APPELLANT'S PROPOSITION OF LAW NO. 2:**

**The State would have this Court shift the burden of proof in any case where a motion for a mistrial is made to the party responding to the motion, not the party making the motion.**

Defense counsel all concurred with the State's original position that a curative instruction and strong admonition to both the offending juror and the entire panel would remedy the matter. It was, in the end, the trial court who reiterated its misgivings about successfully correcting the matter with curative instructions and suggested to the State that it may wish to request a mistrial.

After a brief recess, and without any discussion about the double jeopardy implications of a mistrial, the State asked for the mistrial, which was, of course, immediately granted.

Under its proposition of law the Appellant would have this Court make one of two findings. Either every motion for juror misconduct, whether made by the defendant or by the State, requires the defendant to bear the burden of proving the prejudicial nature of the misconduct; or, the burden of proving the misconduct was not prejudicial falls to the party responding to the motion for a mistrial. Either alternative deprives both the State and the defendant of a fair trial.

The case quoted from the State's own brief supports Appellee's position. The Appellant quoted *State v King*, 10 Ohio App.3d 161 (Hamilton, 1983), at 165. That case goes on to describe the law as it would apply to the instant case and was

applied in that case citing This procedure is set forth in *Remmer v. United States* (1954), 347 U.S. 227, 229, 74 S.Ct. 450, 451, as follows:

"In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending Before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, *but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.*" (emphasis added)

Also, contrary to what Appellant would have this Court rule, *King, supra*, did require that the trial court conduct a thorough investigation into alleged misconduct. The trial court inquired of the juror, then it inquired of the entire jury panel to see if the defendant had been prejudiced. After this extensive inquiry, the trial court found that the defendant was not prejudiced, *King, supra*, at 164-65.

In *Johnson v. Karnes*, the Sixth Circuit held that the trial court did not exercise sound discretion in declaring a mistrial. 198 F.3d 589 (6<sup>th</sup> Cir. 1999). The court relied on *United States v. Simpson* (1991), 922 F.2d 842 to demonstrate that sound discretion was exercised when a trial judge "held an extensive hearing on the effects of the evidentiary errors" and took a night to deliberate over the question of whether a mistrial was necessary." *Id* 842. In *Johnson*, the Sixth Circuit held, "the care taken by the state trial judge here falls well below that exercised in the aforementioned cases. The judge made his decision after granting

only a short recess and listening to brief arguments by both parties. . .” 198 F.3d at 596.

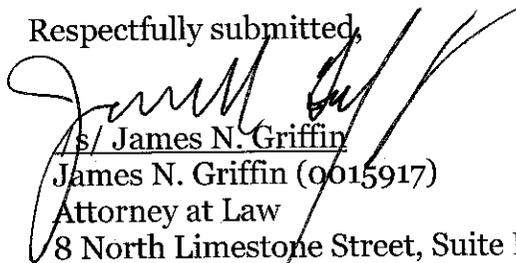
Here, both parties were initially in agreement that the matter could be cured with a clear instruction to the juror. The court appeared to be predisposed to declare a mistrial and, in essence, appeared to talk the prosecutor into requesting one. After a brief recess, minimal argument, and no discussion of double jeopardy implication, the court declared the mistrial. Thus, the issue was given even less deliberation than the state trial court in *Johnson*.

The trial court made several rulings on the Appellant’s Motion for a Mistrial and the court’s granting that motion. Never did the trial court refer to the statutory guidelines set forth in Ohio Rev. Code §2945.36.

By not considering the statute directed at this situation, this Court could find that the trial court erred in granting a mistrial. The legislature has the opportunity to draft legislation that reflects thoughtful consideration of all of the matters inherent in a given situation and has told the court how it believes the courts should address those situations.

The State argues that when the trial court, in a criminal case, considers a motion for a mistrial, the burden of proof should be on the party who prevails. That shifting of the burden of proof as it now exists, is unworkable. Having the burden of proof requires a party to go forward. This Court should not establish a burden of proof that is determined after the fact. That will provide no guidance for trial courts.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'James N. Griffin', is written over the typed name and extends upwards and to the right.

/s/ James N. Griffin

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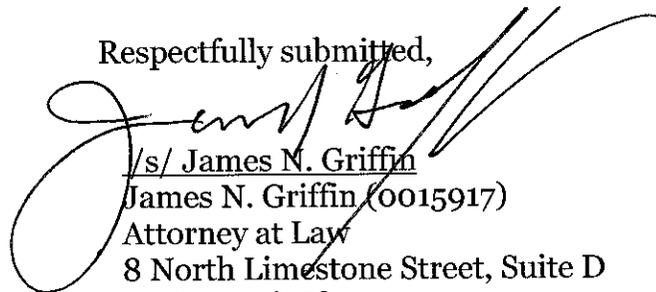
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## CONCLUSION

If this Court agrees with the Second District Court of Appeals on the issues presented herein, then it must find that there was no manifest necessity to declare a mistrial at the end of the second trial, thus finding that the defendant's constitutional rights were violated and declare that the defendant is entitled to be discharged.

If this Court agrees that the trial court acted properly on the issues presented herein, then this Court must declare new law, that the burden of proof is on the party opposing a motion for a mistrial, be that the State or the defendant.

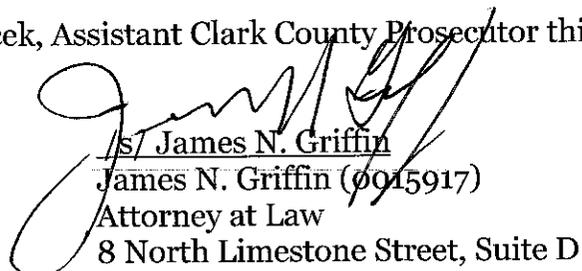
Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was delivered by hand delivering a copy to Andrew R. Picek, Assistant Clark County Prosecutor this 11<sup>th</sup> day of May, 2011.



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APPENDIX - APPELLEE 1

Applying Appellant's reasoning and quote from State v King (1983, Hamilton County),  
10 Ohio App.3d 161, page 16 Appellant's Brief on the Merits

<b>PARTY MOVING FOR MISTRIAL</b>	<b>OPPOSING PARTY</b>	<b>COURT'S RULING ON THE MOTION</b>	<b>WHO HAS THE BURDEN OF PROOF</b>
Defendant	State	Sustained	Defendant
Defendant	State	Overruled	State
State	Defendant	Sustained	State
State	Defendant	Overruled	Defendant
State and Defendant jointly	none	Mistrial Declared	Both parties
Suggestion of trial court	Defendant	Mistrial Declared	State
Suggestion of trial court	Defendant	Mistrial Not Declared	Defendant
Suggestion of trial court	State	Mistrial Declared	Defendant
Suggestion of trial court	State	Mistrial Not Declared	State