

ORIGINAL

NO. 2010-2260

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 93854

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STATE OF OHIO,

Plaintiff-Appellee

-vs-

JAMES HOOD,

Defendant-Appellant

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**MOTION TO DISMISS AS IMPROVIDENTLY GRANTED**

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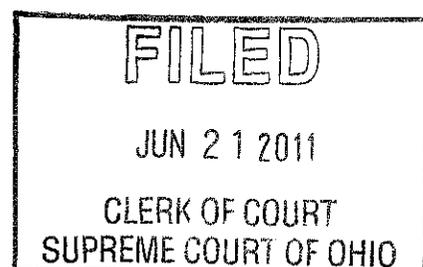
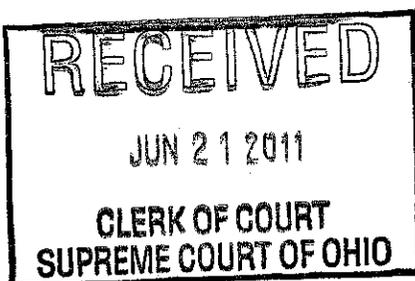
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## MOTION TO DISMISS

Now comes Cuyahoga County Prosecutor William D. Mason, by and through his undersigned assistant and on behalf of Plaintiff-Appellee the State of Ohio, to respectfully move this Court to dismiss this appeal as improvidently allowed.

This Court has accepted for review the following proposition of law:

Cell phone records are not admissible as business records without proper authentication. The admission of unauthenticated cell phone records under the business records exception violates the Confrontation Clause of the Sixth Amendment to the United States Constitution.

However this is not the point of law upon which the appellate court's decision rested. Rather, the Eighth District Court of Appeals affirmed Defendant-Appellant James D. Hood's murder, kidnapping, aggravated burglary and aggravated robbery convictions on the grounds that, even if the State's use of the cellular telephone records at trial violated Hood's rights of confrontation and cross-examination, the error was harmless beyond a reasonable doubt. *State v. Hood*, Cuyahoga App. No. 93854, 2010-Ohio-5477, ¶ 25-30. This Supreme Court has repeatedly found that harmless-beyond-a-reasonable-doubt is the correct analysis to be applied to Confrontation Clause violations. See, *State v. Moritz* (1980), 63 Ohio St.2d 150, 155-156, 407 N.E.2d 1268, *State v. Pierce* (1980), 64 Ohio St.2d 281, 290, 414 N.E.2d 1038, *State v. Madrigal* (2000), 87 Ohio St.3d 378, 388, 721 N.E. 52. As the alleged error in the admission of the telephone records has already been determined "harmless beyond a reasonable doubt," this Court's adoption of Hood's proposition of law would not render him any relief. Since any decision by this Court regarding Hood's proposition would be entirely advisory, the State respectfully requests dismissal.

## **STATEMENT OF THE CASE**

In Cuyahoga County criminal case 520967 Hood and codefendants Kareem Hill and William Sparks were indicted with the following: 10 counts of kidnapping in violation of R.C. § 2905.01; 11 counts of aggravated robbery in violation of R.C. § 2911.01; 1 count of aggravated burglary in violation of R.C. § 2911.11; and 1 count of having weapons while under disability in violation of R.C. § 2912.13.

Investigation of the case revealed that the victim of a homicide, who was found within close proximity to these aggravated robberies, was actually a co-conspirator who was killed during the defendants' commission of the offenses. Accordingly, Hood and his codefendants were re-indicted in criminal case 523219 with the original charges plus new charges relative to the death of their co-conspirator, Samuel Peet. The two additional charges were one count of murder in violation of R.C. § 2903.02(A), and one count of murder in violation of R.C. § 2903.02(B).

Hood's case proceeded to trial by jury. Prior to trial, codefendant Kareem Hill entered a plea agreement to a reduced charge of reckless homicide, and one count of aggravated robbery (which encompassed all eleven victims.) As part of Hill's plea agreement, Hill was required to testify as a State witness in Hood's trial.

In the course of Hood's trial, testimony was received from law enforcement and forensic personnel, Hood's codefendant Kareem Hill, as well as from the following victims/witnesses: Roxie Watkins, Jarell Jackson, Sharon Jackson, Rodney Jones, Deontra Jones, Brian Sanders, Lavenna Reeves, Patricia Robinson, William Davis, and Lavelle Neal. Ultimately the jury found Hood guilty of murder committed during the

commission of a felony, 11 counts of kidnapping, 11 counts of aggravated robbery, and 1 count of aggravated burglary.

Hood appealed his convictions to the Eighth District Court of Appeals and assigned four errors—including the trial court’s admission of cellular telephone records allegedly “without being properly authenticated in violation of the Confrontation Clause.” However the Eighth District Court concluded:

Appellant has failed to demonstrate, and the record fails to show, that appellant’s substantial rights were affected by his inability to cross-examine the custodian of records for the various cell phone companies at issue. See *Moton*, supra. In fact, appellant’s counsel rigorously cross-examined Detective Veverka, the detective who introduced the cell phone records. Through this cross-examination, appellant’s counsel was able to point out various loopholes in Detective Veverka’s analysis of these cell phone records and what they purported to prove. In fact, appellant’s counsel proved that, at the time when Hill testified that he and appellant were driving around together, appellant’s cell phone was inexplicably placing phone calls to Hill’s cell phone.

Unfortunately for appellant, this rigorous cross-examination had little effect in light of the considerable evidence against him. Considering Hill’s devastating testimony against appellant, we cannot find that the admission of the cell phone records contributed to appellant’s conviction. See *State v. Swaby*, Summit App. No. 24528, 2009-Ohio-3690 (finding an error in admitting evidence violative of the Confrontation Clause to be harmless in light of the evidence against the defendant).

\* \* \*

[A]ny error in admitting the cell phone records without the testimony of the custodian of records was harmless at best.

*State v. Hood*, Cuyahoga App. No. 93854, 2010-Ohio-5477, ¶ 29-30, 46.

Hood applied to this Supreme Court for jurisdiction and on March 2, 2011 this Court accepted the following proposition of law:

Cell phone records are not admissible as business records without proper authentication. The admission of unauthenticated cell

phone records under the business records exception violates the Confrontation Clause of the Sixth Amendment to the United States Constitution.

As Hood's proposition of law fails to consider the fact that the appellate court found the admission of the phone records harmless beyond a reasonable doubt, the State moves this Court to dismiss his appeal.

### **LAW AND ARGUMENT**

***HOOD'S PROPOSITION OF LAW: Cell phone records are not admissible as business records without proper authentication. The admission of unauthenticated cell phone records under the business records exception violates the Confrontation Clause of the Sixth Amendment to the United States Constitution.***

This appeal should be dismissed as improvidently granted because Hood's proposition of law fails to acknowledge that no relief would be available to him, even if this Court were to adopt his proposition. Hood's arguments concerning the admission of the allegedly unauthenticated cell phone records at his trial are rendered moot by the appellate court's finding that such error, if true, was harmless beyond a reasonable doubt. Since it is not a duty of the court to resolve moot questions, the State now requests dismissal.

This Supreme Court has explained the bar against advisory opinions:

In determining whether a case is moot, "[t]he duty of this court, as of every judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant

him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. \* \* \* ’”

*State ex rel. Eliza Jennigs, Inc. v. Noble* (1990), 49 Ohio St.3d 71, 74, 551 N.E.2d 128, citing *Miner v. Witt* (1910), 82 Ohio St. 237, 238-239, 92 N.E. 21, *Mills v. Green* (1895), 159 U.S. 651, 653, 16 S.Ct. 132. Further, a cause becomes moot when it is impossible for the reviewing court to grant meaningful relief, even if it were to rule in favor of the party seeking relief. *Joys v. University of Toledo* (April 29, 1997), Franklin App. No. 96AP08-1040, 1997 WL 217581, at \*3.

Applied herein, even if this Court adopts Hood’s proposition of law (i.e., that his constitutional right to confrontation was violated by the admission of allegedly unauthenticated cellular telephone records), Hood cannot overcome the appellate court’s determination that such error was harmless. Hood has not appealed to this Court the issues of whether the Eighth District erred in its application of the harmless error analysis, or whether the Eighth District erred in its ultimate conclusion. Consequently, an opinion from this Court adopting Hood’s proposition of law would be rendered entirely advisory.

**The Confrontation Clause.**

“The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” *Maryland v. Craig* (1990), 497 U.S. 836, 845, 110 S.Ct. 3157.

**Harmless error analysis is applied to alleged confrontation violations.**

The United States Supreme Court and this Court have agreed that the appropriate analysis for an appellate court to apply to a claimed Confrontation Clause

violation (such as Hood's) is whether the admission of the evidence was harmless beyond a reasonable doubt. *Chapman v. California* (1967), 386 U.S. 18, 22-24, 87 S.Ct. 824, *Schneble v. Florida* (1972), 405 U.S. 427, 430, 92 S.Ct. 1056, *Coy v. Iowa* (1988), 487 U.S. 1012, 1020-1022, 108 S.Ct. 2798; *State v. Moritz* (1980), 63 Ohio St.2d 150, 155-156, 407 N.E.2d 1268, *State v. Pierce* (1980), 64 Ohio St.2d 281, 290, 414 N.E.2d 1038, *State v. Madrigal* (2000), 87 Ohio St.3d 378, 388, 721 N.E. 52.

In fact, every appellate district in the State of Ohio has applied the harmless-beyond-a-reasonable-doubt analysis to claimed Confrontation Clause violations.

*State v. Hart*, Hamilton App. No. C-060686, 2007-Ohio-5740, ¶ 37-40 (1<sup>st</sup> District)  
*In re: J.S.*, Montgomery App. No. 22063, 2007-Ohio-4551, ¶ 46, (2<sup>nd</sup> District); *State v. McNeal*, Allen App. No. 1-01-158, 2002-Ohio-2981, ¶ 50 (3<sup>rd</sup> District); *State v. Reinhart*, Ross App. No. 07CA2983, 2008-Ohio-5570, ¶ 32 (4<sup>th</sup> District); *State v. McBride*, Stark App. No. 2008-CA-00076, 2008-Ohio-5888, ¶ 26 (5<sup>th</sup> District); *State v. Price* (March 29, 1996), Lucas App. No. L-95-071, unreported at \*9 (6<sup>th</sup> District); *State v. Peeples*, Mahoning App. No. 07 MA 212, 2009-Ohio-1198, ¶ 56 (7<sup>th</sup> District); *State v. Carter*, Cuyahoga App. No. 84036, 2004-Ohio-6861, ¶ 38-40 (8<sup>th</sup> District); *State v. Hill*, 160 Ohio App.3d 324, 827 N.E.2d 351, ¶ 31-41 (8<sup>th</sup> District); *State v. Jenkins*, Cuyahoga App. No. 87606, 2006-Ohio-6421, ¶ 27-28, (8<sup>th</sup> District); *State v. Swaby*, Summit App. No. 24528, 2009-Ohio-3690, ¶ 7 (9<sup>th</sup> District); *State v. Jennings*, Franklin App. Nos. 09AP-70, 09AP-75, 2009-Ohio-6840, (10<sup>th</sup> District); *State v. Jenkins*, Lake App. No. 2003-L-173, 2005-Ohio-3092, ¶ 37-38, (11<sup>th</sup> District); and *State v. Wynn*, Butler App. No. CA2009-04-120, 2009-Ohio-6744, ¶ 17 (12<sup>th</sup> District).

Specifically with regard to allegedly unauthenticated records, the Eighth District has previously affirmed convictions (even in light of erroneously admitted evidence) if

the confrontation violation was harmless beyond a reasonable doubt. *State v. Jordan* (June 1, 1989), Cuyahoga App. No. 55450, 1989 WL 59258, \*7-8; *State v. Moton* (Mar. 18, 1993), Cuyahoga app. No. 62097, 1993 WL 76904, \*5.

“Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. ‘A defendant is entitled to a fair trial but not a perfect one.’” *Bruton v. U.S.* (1968), 391 U.S. 123, 135, 88 S.Ct. 1620, quoting *Lutwak v. United States* (1953), 344 U.S. 604, 619, 73 S.Ct. 481.

**Harmless error analysis was appropriate and was properly applied.**

Ohio law relevant to appellate review of claimed Confrontation Clause violations is settled. In the instant case, the appellate court reviewed Hood’s claim and determined the error (if any) was harmless beyond a reasonable doubt based on the “considerable evidence” against him. *State v. Hood*, Cuyahoga App. No. 93854, 2010-Ohio-5477, ¶ 29-30, 46. Consequently, Hood’s proposition to this Court regarding whether the trial court erred in admitting the allegedly unauthenticated cellular telephone records as evidence in Hood’s trial is irrelevant to the appellate decision to affirm his convictions.

The Eighth District’s application and ultimate determination of harmlessness is not on appeal before this Court. In light of the Eighth District’s finding, any determination by this Supreme Court with respect to the Defendant’s proposition of law is rendered moot. The mootness doctrine precludes this Court’s consideration of issues when the circumstances prevent the court from granting effectual relief. Accordingly,

the State of Ohio respectfully requests this appeal be dismissed as improvidently allowed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

A copy of the foregoing Motion to Dismiss has been mailed this 20<sup>th</sup> day of June, 2011 to the following counsel for Defendant-Appellant James D. Hood:

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