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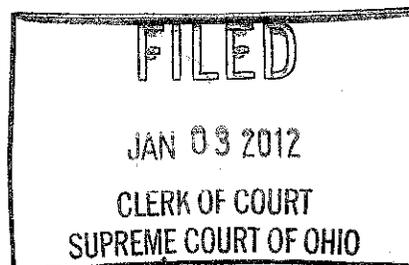
IN THE SUPREME COURT

CASE NO. 2011-1383

STATE OF OHIO
Appellee

v.

KYLE RABER
Appellant



**APPELLANT KYLE RABER'S MOTION FOR RECONSIDERATION OF
SUPREME COURT'S DECEMBER 21, 2011 ENTRY**

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**APPELLANT KYLE RABER'S MOTION RECONSIDERATION OF
SUPREME COURT'S DECEMBER 21, 2011 JUDGMENT ENTRY**

Appellant Kyle Raber hereby respectfully moves this Honorable Court to reconsider its December 21, 2011 decision pursuant to S.Ct. Prac. R. 11.2(B)(1). See Supreme Court's December 21, 2011 judgment entry.

The Appellant, Kyle Raber, respectfully claims that there are substantial constitutional questions at issue along with the fact that the Ninth District Court of Appeals' August 8, 2011 decision in this case is in direct conflict with this Court's holding in the December 22, 2011 decision regarding State of Ohio v. Carlisle, 2011-Ohio-6553.1.

In Carlisle, this Court ruled that a trial court does not have jurisdiction to re-open a case when a final order had already been previously journalized. See State v. Carlisle, 2011-Ohio-6553.1, at ¶12. In Raber case, the Ninth District Court of Appeals denied Kyle Raber's appeal and stated:

Essentially, Mr. Raber argues that the trial court did not have jurisdiction to determine whether he was a sex offender because it no longer had jurisdiction over the case after the final judgment of conviction and sentence. ... We are not convinced the trial court lacked jurisdiction to proceed as it did.

State v. Raber, (9th Dist.), 2011-Ohio-3888, ¶6-7 (Emphasis added).

The Ninth District then cited a string of cases involving sex offender classification proceedings as the basis for allowing the trial court to proceed as it did. See Raber, supra at ¶7. However, in Carlisle, this Court held that even

mistakes in a judgment entry are not a sufficient basis for a trial court to reclaim jurisdiction over a case where the judgment entry was a final order:

In [Carlisle's] case, a valid judgment of conviction was journalized on July 13, 2007, yet the trial court purported to modify Carlisle's sentence nearly two years later. The trial court's attempt to do so was improper. ... [*string cite of Supreme Court cases dating back to 1962*] (all recognizing that sentencing errors are an improper exercise of jurisdiction).

Carlisle, supra at ¶12.

The procedural facts in Carlisle and this case are identical. In Carlisle, the defendant was convicted and sentenced in June of 2007 for felonious sex offenses involving his 6-year old foster daughter. See Carlisle, supra at ¶2. On July 13, 2007, Carlisle's conviction became a final appealable order after it had been journalized by the Clerk of Courts. Id. On February 19, 2009, the trial court [*improperly*] re-opened the case after a motion was filed by the defendant and the trial court then modified its final judgment entry nineteen (19) months after the final order had been journalized. On December 22, 2011, the Ohio Supreme Court ruled that the trial court was without the jurisdiction to re-open the case as it did and it affirmed the Court of Appeals' reversal, although for different reasons. See Carlisle, supra at ¶17.

Here, in Raber, pursuant to a plea agreement, Mr. Raber was found guilty of misdemeanor sexual imposition on December 1, 2008, which was a situation involving himself, age 18, and his then 18-year old girlfriend while both were high school students. In Raber, both Kyle Raber and his girlfriend had been engaging in consensual, normal intercourse that later involved an attempt at anal

intercourse, which the victim claimed was non-consensual, resulting in Mr. Raber pleading guilty to sexual imposition, a 3rd degree misdemeanor.

On November 26, 2008, Mr. Raber was sentenced on his prior plea of guilty to this charge and, on December 1, 2008, the sentencing judgment entry became a final appealable order. See Trial Court Docket. No appeal of this entry was ever filed, timely or not. More than eleven (11) months later, on or about October 19, 2009, without a motion or any other type of procedural vehicle, the trial court re-opened the case in order to address an omission from the final judgment entry of December 1, 2008. See Trial Court Docket. The matter then proceeded through the eventual evidentiary hearing that was conducted in March of 2010 and a finding that Mr. Raber had to register as a sex offender. See Trial Court Docket. Mr. Raber then timely appealed that decision but his appeal was rejected by the Ninth District Court of Appeals. See State v. Raber, (9th Dist.), 2011-Ohio-3888.

The Ninth District's decision flies in the face of well-settled Ohio law and longstanding Supreme Court precedent regarding final orders and trial court jurisdiction as well as being in direct conflict with this Court's recent holding in Carlisle.

Additionally, in the Raber decision, the Ninth District Court of Appeals asked for guidance from this Court given the complexities of this case and recent Supreme Court rulings on Ohio's Adam Walsh Act ("S.B. 10"):

Thus, Mr. Raber's argument that a trial court is impermissibly modifying a defendant's final judgment of conviction and sentence when it classifies a

defendant as a sex offender post-sentence is not well taken.

Accordingly, until the Supreme Court directs this Court otherwise, we will continue to rely on our precedent and Clayborn. ...

State v. Raber, (9th Dist. 2011), 10 CA 0020 at ¶¶7, 8.

Now, especially in light of this Court's decision in Carlisle, it is imperative this Court reconcile the recent case law concerning Ohio's Adam Walsh Act ("S.B.10") with Raber because this is where the Ninth District Court of Appeals got it wrong:

- State v. Clayborn 2010-Ohio-2123 (*the criminal case controls the sex offender civil proceedings therein*);
- State v. Bodyke 2010-Ohio-2424 (*S.B. 10 violates Separation of Powers Clause of Ohio Constitution*);
- State v. Williams 2011-Ohio-3374 (*S.B. 10 is punitive and violates Retroactive Clause of Ohio Constitution*)

If the trial court did not have jurisdiction to re-open Carlisle 19 months later to modify the final judgment entry, then, in Raber, 11 months after the final judgment entry, the trial court had no jurisdiction to do so either! The Ninth District Court of Appeals also relied on old precedent from the Megan's law era to justify the legal fiction that occurred. See State v. Raber, (9th Dist. 2011), 10 CA 0020.

In light of the Supreme Court's ruling in State v. Williams, ("*S.B. 10 is punitive*"); the reliance by the Ninth District on State v. Cook and State v. Ferguson is as unsound as Carlisle's reliance on State v. Addison and State v. Lambert. Moreover, Clayborn made clear that the criminal case controls the sex

offender proceedings within it regarding deadlines and rules of procedure. However, the Ninth District simply got it wrong.

Given the glaring similarities from a procedural standpoint, there are clear substantial constitutional questions at issue in this case and this Court must at least hear Mr. Raber's appeal.

For example, the similarities of these cases are as follows:

- Both Raber and Carlisle involved sex offenses although it is clear that Mr. Carlisle's felony offenses were far more heinous;
- Both cases involved final judgment entries that had been properly journalized and finalized, Raber on December 1, 2008 and Carlisle on July 13, 2007;
- Both cases involved trial court's re-opening each case several months later to modify the final sentencing entry, without jurisdiction to do so.

It is impossible to look at the procedural facts of both Carlisle and Raber and come up with different outcomes. To do so is an egregious miscarriage of justice and uneven application of longstanding Supreme Court precedent, well-settled law, and the Rules of Criminal Procedure. The Ninth District Court of Appeals simply got it wrong and, quite frankly; it ducked the main issues in Raber's appeal. Justice must be blind and without prejudice. The legal procedural fiction involved in Kyle Raber's case is no different than what this Court found in Carlisle. There was simply no authority or jurisdiction for the trial court to do what it did, in either Carlisle or Raber. And yet in Raber, it has occurred.

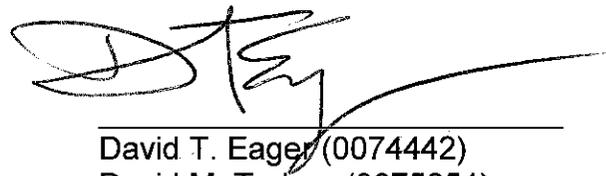
This Court must address this as it did in Carlisle.

Furthermore, the clear violation of well-settled Ohio law, Supreme Court precedent governing final orders, and trial courts exercising jurisdiction when they had no legal authority to do so gives rise to clear violations of Kyle Raber's constitutional rights of Due Process and Double Jeopardy, both guaranteed by the Ohio and U.S. Constitutions.

Given that the Ninth District Court of Appeals' decision in Raber is in direct conflict with this Court's holding in Carlisle, this Court must hear his case. Because of the very recent timing of Carlisle on December 22, 2011, the failure of this Court to reconsider and hear Raber's case will leave him in a state of legal purgatory with no means of redress.

This case must be heard.

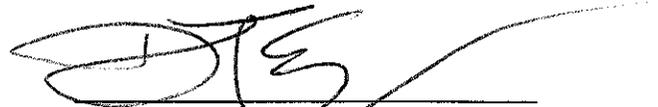
Respectfully submitted,



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CERTIFICATE OF SERVICE

A true and accurate copy of the Appellant's Motion Reconsideration was delivered via intra-office mail through the Wayne County Clerk of Courts to Latecia Wiles, Esq., of the Wayne County Prosecutor's Office on this 3rd day of January 2012.

A handwritten signature in black ink, appearing to read 'DTE', is written over a horizontal line. The signature is stylized and extends to the right of the line.

David T. Eager, Esq.
Attorney for Appellant
Kyle Raber