

In The Supreme Court of Ohio

State of Ohio, :
Appellee, : Case No. 11-0857
-vs- : Appeal taken from Cuyahoga County
Denny Obermiller, : Court of Common Pleas
: Case No. CR 10-542119-A
Appellant. : **Capital Case**

MOTION TO SUPPLEMENT THE RECORD

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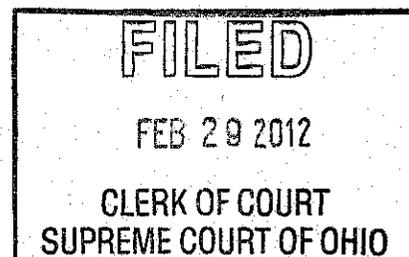
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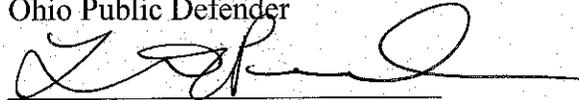
Appellant Denny Obermiller, through counsel and pursuant to Sup. Ct. R. Prac. 19.4 (D) moves this Honorable Court to order that the record be supplemented with a transcript of a hearing held on October 5, 2010.

Obermiller pled guilty to two counts of Aggravated Murder and was sentenced to death. Ohio Rev. Code Ann. § 2929.05 mandates appellate review of the entire record in his direct appeal. Supplementation of the record is therefore necessary in order to comply with this statutory mandate.

The reasons for this request are set forth in the attached memorandum.

Respectfully submitted,

Office of the
Ohio Public Defender



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Supervisor, Death Penalty Division

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COUNSEL FOR APPELLANT

MEMORANDUM IN SUPPORT

Denny Obermiller pled guilty to two counts of Aggravated Murder and was sentenced to death. He is currently before this Court on an appeal as of right. The record on appeal in Obermiller's capital case is incomplete. The transcript of a hearing held on October 5, 2010 is not a part of the record before this Court.

Upon review of this record, counsel contacted Obermiller's court reporter Maureen Povinelli, because there was no transcript of the hearing held on October 5, 2010. Ms. Povinelli contacted the other court reporters and arranged for the missing hearing to be transcribed. She subsequently provided undersigned counsel with the transcript attached to this motion.

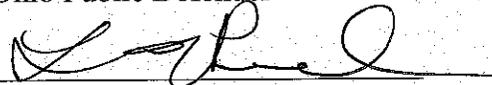
Under § 16, Article I of the Ohio Constitution, Obermiller is entitled to a "complete, full, and unabridged transcript of all proceedings against him so that he may prosecute an effective appeal." State ex. rel. Spirko v. Court of Appeals, Third Appellate Dist., 27 Ohio St. 3d 13, 18, 501 N.E.2d 625, 629 (1986). In order for appellate counsel to completely present, and for this Court to accurately determine any errors, this transcript must be added to the record. Without a complete record for review, counsel cannot provide effective representation to Obermiller on his first appeal as of right. See State v. Buell, 70 Ohio St. 3d 1211, 639 N.E.2d 110 (1994); Evitts v. Lucey, 469 U.S. 387 (1985).

Sup. Ct. R. Prac. 19.4 (D) authorizes this Court to direct supplementation of material items omitted from the record by error or accident. Further, O.R.C. § 2929.05 mandates that this Court review the entire record in a capital case.

WHEREFORE, Obermiller requests that this Court order that the transcript of the hearing held on October 5, 2010 be supplemented into the record before this Court.

Respectfully submitted,

Office of the
Ohio Public Defender



Linda E. Prucha - 0040689
Supervisor, Death Penalty Division

Jennifer A. Prillo – 0073744
Assistant State Public Defender

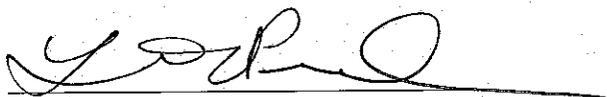
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COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the MOTION TO SUPPLEMENT THE RECORD was forwarded by regular U.S. Mail to Saleh Awadallah, Mary H. McGrath, and Margaret A. Troia, Assistant Prosecutors, Cuyahoga County, The Justice Center, 9th Floor, 1200 Ontario St., Cleveland, Ohio 44113 on this 29th day of February, 2012.



Linda E. Prucha - 0040689
Counsel for Appellant

THE STATE OF OHIO,)
) SS: Saffold, J.
COUNTY OF CUYAHOGA.)

IN THE COURT OF COMMON PLEAS

CRIMINAL DIVISION

THE STATE OF OHIO,)
)
) Plaintiff,)
)
 -v-) Case No. CR 542119
) OSC No. 11-0857
)
 DENNY OBERMILLER,)
)
) Defendant.)

DEFENDANT'S TRANSCRIPT OF PROCEEDINGS
SUPPLEMENTAL TRANSCRIPT (10/5/10)

APPEARANCES:

WILLIAM D. MASON, Prosecuting Attorney, by:
Saleh Awadallah, Assistant County Prosecutor,
Mary McGrath, Assistant County Prosecutor,
Maggie Troia, Assistant County Prosecutor,

on behalf of the Plaintiff;

James McDonnell, Esq., and
Kevin Spellacy, Esq.,

on behalf of the Defendant.

Susan M. Ottogalli, RMR
Official Court Reporter
Cuyahoga County, Ohio

THE STATE OF OHIO,)
) SS: Saffold, J.
COUNTY OF CUYAHOGA.)

IN THE COURT OF COMMON PLEAS

CRIMINAL DIVISION

THE STATE OF OHIO,)
)
Plaintiff,)
)
-v-) Case No. CR 542119
) OSC No. 11-0857
)
DENNY OBERMILLER,)
)
Defendant.)

DEFENDANT'S TRANSCRIPT OF PROCEEDINGS
SUPPLEMENTAL TRANSCRIPT - 10/5/10

BE IT REMEMBERED, that at the
September, A.D., 2010 term of said Court, this
cause came on to be heard before the Honorable
Shirley Strickland Saffold, in Courtroom No.
21-B, the Justice Center, Cleveland, Ohio, on
Tuesday, October 5, 2010, upon the indictment
filed heretofore.

TUESDAY MORNING SESSION, OCTOBER 5, 2010

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THE BAILIFF: Judge, we have Mr. Obermiller this morning.

THE COURT: Mr. Prosecutor.

MR. AWADALLAH: Yes, your Honor.

THE COURT: Where are we?

MR. AWADALLAH: Your Honor, on 542119, State of Ohio versus Denny Obermiller. This is a status hearing regarding Mr. Obermiller and the setting of a trial date. We requested this hearing in order to ascertain a few of the items and make sure that discovery, you know, that defense counsel has received discovery. Discovery is ongoing.

There's also an issue regarding whether there's going to be a competency evaluation or sanity evaluation.

The State would like to have that on the record as to trial strategy as to not refer Mr. Obermiller for any competency or sanity evaluations and also maybe talk a little bit about the -- get on the same page with regards to speedy trial. There are discovery motions out there. There are some discovery motions outstanding. We responded

1 to discovery motions. There's some tolling of
2 the time. Defense motions have been filed.
3 And we have responded, again responded to the
4 multitude of defense motions that have been
5 filed. So if there's some issues, we would
6 like to get at least an agreement as to what
7 the speedy trial is, if there is one, between
8 the State and the defense counsel with regards
9 to speedy trial.

10 But first and foremost, we want to
11 make sure if there's any issue. Have they
12 received their discovery? Are they able to
13 view it on the portal? Are there any issues
14 with that?

15 We can always, of course, provide,
16 you know, written copies of them, but I
17 believe that we have sent it mostly through
18 the portal.

19 I would say, coroner's reports are
20 not ready yet. We have been asking the
21 coroner. So there are no autopsy reports.
22 Those will be ready by next week. So we would
23 just like to let the court know that as well
24 as defense counsel.

25 We do have a trial date of October

1 20th. So those are some of the issues. And
2 first and foremost is the competency and/or
3 sanity evaluations or the lack thereof.

4 THE COURT: Who wants to
5 address?

6 MR. MCDONNELL: May it please
7 the court. First of all, we filed a couple of
8 motions in this case to have an investigator
9 appointed, Mr. Shaughnessy. We've asked to
10 have a mitigation person appointed, Cici
11 McDonnell. As of this date, we had not asked
12 to have a psychologist because we needed to
13 gather some information. However, based upon
14 the conversations with our client today, we
15 will in the next day or two pick someone, a
16 psychologist, to examine him and to address
17 the issues that we feel are relevant. So with
18 respect to that issue --

19 THE COURT: Did you want to
20 have a competency evaluation done by the
21 court?

22 MR. SPELLACY: No.

23 THE COURT: Psychiatric?

24 MR. MCDONNELL: No, not by the
25 Court Psychiatric Clinic at this point.

1 THE COURT: But you want a
2 private --
3 MR. MCDONNELL: Correct.
4 THE COURT: -- evaluation?
5 MR. MCDONNELL: Yes.
6 THE COURT: That you want to
7 remain confidential?
8 MR. MCDONNELL: Yes, your Honor.
9 THE COURT: You don't want
10 the expert status where you would have to
11 share it with the government?
12 MR. MCDONNELL: At some point we
13 will address that issue, but for right now,
14 yes, you are correct.
15 THE COURT: I'm correct that
16 you don't want the expert status; you just
17 want an evaluation to assist you in your case?
18 MR. MCDONNELL: Yes, your Honor.
19 THE COURT: Okay. Now, on
20 the speedy trial, let's address that.
21 MR. MCDONNELL: Your Honor, may
22 it please the court. My client will not sign
23 a speedy trial waiver. The trial is set for
24 October 20th, I believe. I would respectfully
25 request that we set a time so that we could

1 push it past October 20th. I think that's
2 well within the -- and I didn't go date by
3 date, but my guess would be based upon case
4 law, it would be at least the middle of
5 December before the speedy trial statute would
6 run.

7 THE COURT: Mr. Prosecutor.

8 MR. AWADALLAH: Your Honor,

9 using the three for one, three for one count,
10 because he is incarcerated in our county jail,
11 the absolute conservative estimate of each day
12 counted as three days will give us until
13 November 13th, which is a Saturday, which
14 gives us, therefore, to November 15th for 90
15 days which this trial must take place if we
16 are not to have any tolling events. There are
17 tolling events in the form of discovery
18 motions and also in the form of defense
19 counsel motions and now if we are going to
20 have an evaluation. We didn't have any for an
21 evaluation yet. I believe there is time where
22 time is tolled. And we do have more time than
23 the 90 days.

24 THE COURT: I have a
25 question. They are not asking for an expert

1 by way of the psychiatric examination. What
2 they are in fact asking for is the right to
3 have a psychiatric evaluation that's
4 confidential. So, I don't know if that tolls
5 time.

6 MR. AWADALLAH: No, that does
7 not toll time the way they are asking for it.
8 We have the ability -- and I want to broach
9 that subject, because 2945.37(B) allows --

10 THE COURT: 2945.37?

11 MR. AWADALLAH: (B) which
12 addresses competency to stand trial, gives the
13 right to the court, the prosecutor, and/or
14 defense counsel to ask for a competency
15 evaluation. And so, I think we've been
16 talking about that. They have been not
17 wanting an evaluation done by our court
18 psychologist, and I just want to address that
19 issue on the record as part of their trial
20 strategy vis-à-vis the representation of their
21 client as opposed to not thinking of it and
22 not realizing that they can have a competency
23 evaluation done by our court clinic.

24 2945.37(B), your Honor, in a criminal
25 action in a court of common pleas or municipal

1 court, the court, the prosecutor or defense
2 may raise the issue of the defendant's
3 competency to stand trial. If the issue is
4 raised before the trial is commenced, it says
5 the court shall hold a hearing on the issue.
6 As provided in this section, the word shall is
7 mandatory language.

8 So, it's my reading of this section
9 that the State has the ability to ask for a
10 competency evaluation with regards to
11 Mr. Obermiller. At this time, we're not doing
12 that. I just want to make sure the record is
13 clear that there's some availability with
14 regards to an competency evaluation of our
15 court clinic that the defense may avail
16 themselves of. Obviously they're not, and I
17 want to make sure the trial strategy as
18 opposed to them not thinking of that avenue.
19 So with that --

20 MR. SPELLACY: Judge, my client
21 has a Fifth th Amendment right and he's
22 choosing to exercise that, and he would like
23 the benefit, as a private citizen would with
24 private counsel, to have a private physician
25 and psychologist examine him. That's all

1 we're asking for at this point in time.

2 THE COURT: Okay. He's
3 referring to 2945.37(B), and he basically read
4 it to you. And it indicates, though, that the
5 prosecutor can raise, can ask for an
6 evaluation.

7 MR. SPELLACY: He said he
8 wasn't asking for one.

9 THE COURT: At this time.

10 MR. AWADALLAH: At this time.

11 MR. SPELLACY: I guess that's
12 his trial strategy.

13 THE COURT: Okay. All
14 right. In terms of speedy trial, do you agree
15 with the time that he has indicated? My
16 information is that he was arrested on
17 August 16, 2010.

18 MR. SPELLACY: Judge, I would
19 agree.

20 MR. AWADALLAH: August 15th.

21 MR. SPELLACY: I would agree
22 the motions we filed have tolled time to some
23 degree, and I think Mr. McDonnell's
24 calculation of the general date in the middle
25 of December is probably correct. And I will

1 be happy to communicate, meet with the
2 prosecutor and figure out an exact date. I
3 don't think there is an exact date when a
4 motion tolls time. I think it becomes a
5 reasonable amount of time. And I would
6 suggest the middle of December would be
7 reasonable under the circumstances, the
8 motions that we have filed to date.

9 THE COURT: You filed
10 additional motions to date?

11 MR. SPELLACY: No. To date.
12 In all fairness to counsel, as discovery is
13 ongoing, we're just getting documentation as
14 of today. There's a number of videotapes they
15 presented to us this morning we haven't had a
16 chance to even begin to look at so --

17 THE COURT: My concern is
18 someone has asked the Department of Children
19 and Family Services to forward to the court
20 certain documents for in camera inspection,
21 and I was not sure who made that request.
22 However, when I examined those documents, with
23 reference to the first issue that you've asked
24 to be addressed, there is material in those
25 documents which may impact your first issue,

1 and I have your first issue listed as
2 competent and sanity.

3 MR. MCDONNELL: Judge, I would
4 like the record to reflect that in fact the
5 prosecutors are the ones that requested that
6 information, not the defense.

7 MR. AWADALLAH: That is correct,
8 your Honor.

9 THE COURT: Yeah, but if the
10 court does come across information that
11 could -- let me just finish with it before I
12 decide, because -- all right. First of all, I
13 will approve your motion for the inspection,
14 but it's going to have to be within the limits
15 set by the court for -- are you asking for a
16 psychologist, psychiatrist, a social worker?

17 MR. MCDONNELL: Well, we have a
18 social worker, who has attached a CV, to do
19 the mitigation and collect the records. We
20 would like a little bit more time to see
21 exactly who would be the right person to do
22 the evaluation. We can certainly within a
23 week get you the name of that person.

24 THE COURT: Okay. But there
25 are limits set.

1 MR. MCDONNELL: Yes. The amount
2 of money, the --

3 THE COURT: And it has to be
4 within the limits.

5 MR. MCDONNELL: Absolutely,
6 Judge.

7 THE COURT: I will approve
8 that. You will let us know who?

9 MR. MCDONNELL: Immediately.

10 THE COURT: Which source?

11 MR. MCDONNELL: And we will
12 attach their CV.

13 THE COURT: Now, on the
14 speedy trial issue then, we don't have a
15 problem at this point.

16 MR. AWADALLAH: Well, what I
17 would like to do is at least maybe we will, if
18 we come back next week or another date, we
19 will have an agreement between the parties as
20 to or at least some range that we both can
21 agree on that the speedy trial will take us to
22 a certain date and conservative so there's no
23 issue with regards to speedy trial.

24 MR. MCDONNELL: I would agree
25 with that. And what Mr. Spellacy said is

1 correct, the case law doesn't say a specific
2 number of days. It says a reasonable delay
3 based upon the filing of motions. But I think
4 we could come up with what's reasonable and
5 make an agreement.

6 MR. AWADALLAH: And the court
7 would be the last judge as to what's
8 reasonable or not. We would present that to
9 your Honor, and you would make that final
10 determination whether that's reasonable or
11 not. I would like that to be on the record.

12 THE COURT: Okay. You guys
13 will accept what I find to be reasonable.

14 What about discovery? You said that
15 was the last issue that you wanted to address.

16 MR. AWADALLAH: Well, discovery
17 is still ongoing. I just want to make sure --
18 in fact, we filed notice of supplemental
19 discovery yesterday, and we have more items on
20 here, written statements, video interviews.
21 Most of this has been sent through the portal,
22 and we just wanted to make sure that they're
23 familiar with the portal. We send things
24 through the web and if they won't get it --
25 certain things cannot be sent through the

1 portal, physical items and/or large, you know,
2 videotape interviews and those I just handed
3 to Mr. McDonnell. And I think Mr. Spellacy is
4 holding in his hand a receipt for those. So
5 we have -- again, discovery is ongoing. We're
6 presenting them with that. We're still
7 anticipating DNA reports from the coroner's
8 office and a few other reports from Trace. We
9 don't have the autopsy report yet. That
10 should be next week.

11 So, more of a status, as soon as we
12 get them, we will forward them to the defense
13 counsel. We have also filed today a notice of
14 potential mitigation material that we want to
15 make sure that counsel has. We have
16 defendant's middle school report that we
17 provided through the portal, pharmacy records
18 which we provided. We have two Cuyahoga
19 County case numbers or cases which we've
20 retrieved and provided through the portal to
21 defense counsel. There's more mitigation
22 stuff that we have that we will turn over.

23 The second item on this is the
24 Cuyahoga County Department of Children and
25 Family Services records. And we know they're

1 not within our possession, but they are under
2 seal delivered to the court. And so we just
3 want to make sure everybody knows that those
4 were delivered and --

5 THE COURT: They have been.

6 MR. AWADALLAH: They are
7 available. We will ask for a review of those
8 records at some point when it comes -- if some
9 issues are raised in regards to those records.
10 But we will be making our motion at a later
11 time. So those are the issues.

12 Your Honor, are you suggesting that
13 you are going to further review those records
14 and determine on your own whether you are
15 going to order a competency evaluation
16 pursuant to 2945.37?

17 THE COURT: I already have
18 issues with reference to some of the material
19 that I had the opportunity to review. I
20 suppose there's no secret that he's seen
21 psychiatrists before. That's not a secret.

22 MR. MCDONNELL: I would rather
23 not address that question.

24 THE COURT: Okay. Well, let
25 me complete it. The material raises a lot of

1 issues.

2 MR. AWADALLAH: And our goal
3 here is to get as much material out as is
4 possible so we have and we can address those
5 issues at trial as opposed to post trial or,
6 you know, if we get to that point. So that's
7 why I tried to make as broad a sweep as
8 possible to try to gather as much information
9 so that defense counsel knows it and we can
10 deal with those issues at trial and not have
11 issues linger on afterwards.

12 THE COURT: You asked for
13 the court to address that at a later time.
14 Let me just say this: When I do address that
15 issue with reference to his records, I will do
16 it on the record, but I'm not going to do it
17 in front of the cameras. And I will do it
18 with counsel, but I will not address it in
19 front of the cameras. I don't think that that
20 would be fair.

21 MR. SPELLACY: Maybe
22 privileged, Judge.

23 THE COURT: Very.

24 MR. SPELLACY: Right.

25 THE COURT: But --

1 MR. SPELLACY: Which leads to
2 another question. If they subpoenaed
3 privileged information, otherwise privileged
4 information, I think they should have to do
5 that with the court's signature.

6 THE COURT: But I think
7 these were.

8 MR. AWADALLAH: Yep.

9 MR. SPELLACY: I'm just --

10 THE COURT: Because they
11 weren't forwarded to them. I think these came
12 immediately to us. And they were under seal
13 when we received them with directions and
14 instructions that they were only to be opened
15 by the court. So my staff didn't even open
16 it. I just opened them, and I've begun to go
17 through them.

18 MR. SPELLACY: Judge, just for
19 the record, I guess, we would allege the
20 receipts of several CDs today which I place it
21 on the record.

22 THE COURT: Certainly.

23 MR. SPELLACY: We received a CD
24 of an interview of Flagg, of a Muzic, Stacy
25 Muzic, of Denny Lykins, I believe, and of a

1 Gina Mikluscak. Thank you.

2 MR. AWADALLAH: Is there another
3 one? While she's doing that, these are
4 delivered under "for counsel only" and they're
5 at this point in time --

6 MR. SPELLACY: Maxine Muzic as
7 well.

8 THE COURT: Okay.

9 MR. AWADALLAH: Thank you.

10 THE COURT: Any additional
11 issues?

12 MR. MCDONNELL: Not at this
13 point, your Honor.

14 MR. SPELLACY: No.

15 THE COURT: The trial date
16 can remain, as I understand it, with -- we
17 understand we have some room -- at the end
18 of -- maybe to take us into December perhaps.

19 MR. MCDONNELL: Yes.

20 THE COURT: Competency,
21 you're not willing to go that far yet, but you
22 want someone to be doing an evaluation?

23 MR. MCDONNELL: Yes, your Honor.

24 THE COURT: Confidential
25 evaluation?

1 MR. MCDONNELL: Yes, your Honor.
2 THE COURT: And discovery is
3 still ongoing.
4 MR. AWADALLAH: That is correct,
5 your Honor.
6 MR. MCDONNELL: Yes, your Honor.
7 THE COURT: Okay. Anything
8 else?
9 MR. AWADALLAH: We have a
10 hearing date or a pretrial date prior to our
11 next scheduled trial date. I don't want to
12 send out tons of subpoenas for witnesses to
13 come in if we're not --
14 THE BAILIFF: This is for
15 hearing.
16 MR. AWADALLAH: October 20th is
17 our trial.
18 THE BAILIFF: October 13th.
19 MR. AWADALLAH: Well, is it
20 possible to make that trial date a pretrial
21 meeting? We have an understanding we're into
22 December.
23 THE BAILIFF: All parties have
24 to agree that time is going to run into
25 December now?

1 MR. AWADALLAH: Well, we will
2 have a calculation -- we will present a
3 calculation for review of the court.

4 THE COURT: If you give me
5 that today signed, if you give me a signed
6 calculation today with both sides signing that
7 and attesting we have until December in order
8 to proceed, then fine.

9 MR. AWADALLAH: We can provide
10 at least an initial one. Because, again,
11 motions are still out there. So we can always
12 buy more time later. We can give you a
13 conservative estimate of what we think is a
14 span of time.

15 THE COURT: As long as we
16 get that agreement.

17 THE BAILIFF: October 20th for
18 a hearing date. October 20th, 9:00.

19 THE COURT: Do we have any
20 motions we need to address on that day?

21 MR. AWADALLAH: There are a
22 multitude of motions, your Honor. I suppose
23 at some point we will have to have a motion
24 hearing date to address all the motions. I
25 don't know if there's anything pressing.

1 MR. MCDONNELL: There's nothing
2 pressing right now.

3 MR. AWADALLAH: You got your two
4 motions that you wanted granted.

5 MR. MCDONNELL: And now based
6 upon the discovery that's been given, there
7 will be additional motions, but most of them
8 have been filed before in other cases. I
9 don't think it will take that long to rule on
10 most of them.

11 THE COURT: Okay.

12 THE BAILIFF: October 20th at
13 9:00.

14 THE COURT: Okay.

15 MR. AWADALLAH: Thank you.

16 MR. MCDONNELL: Thank you.

17 - - - -

18 (The proceedings were adjourned.)

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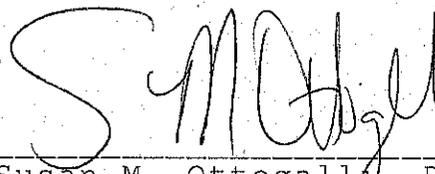
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C E R T I F I C A T E

I, Susan M. Ottogalli, Official Court Reporter for the Court of Common Pleas, Cuyahoga County, Ohio, do hereby certify that as such reporter I took down in stenotype all of the proceedings had in said Court of Common Pleas in the above-entitled cause; that I have transcribed my said stenotype notes into typewritten form, as appears in the foregoing Transcript of Proceedings; that said transcript is a complete record of the proceedings had in the trial of said cause and constitutes a true and correct Transcript of Proceedings had therein.



Susan M. Ottogalli, RMR
Official Court Reporter
Cuyahoga County, Ohio