

NO.

IN THE SUPREME COURT OF OHIO

12-0651

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 95851

STATE OF OHIO,

Plaintiff-Appellant

-vs-

JAMES DZELAJLIJA,

Defendant-Appellee

APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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**EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC OR
GENERAL INTEREST**

This case involves the vacation of a guilty verdict based on what amounts to nothing more than blind adherence to procedure. James Dzelajlija, Appellee, was tried twice for the same crime. Both trials resulted in guilty verdicts. However, based on a technicality, the Eighth District now requires the State to expend valuable judicial and State resources by trying him for a third time, where no error in the proceedings was found. Since the sanctity of a jury verdict should not be ignored when no error in the proceeding has been found, the State asks this Honorable Court to accept jurisdiction of this matter and adopt the following proposition of law:

An inferior court may deviate from the mandate of a reviewing court when an intervening decision from a superior court justifies such deviation.

Appellee was convicted of two counts of robbery. On appeal the Eighth District determined that the indictments were defective pursuant to this Court's decision in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169, and remanded the to vacate the convictions. Before the trial court vacated the convictions, this Court overruled *Colon* in *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26. Based on *Horner*, the trial court reimposed the original sentence. Generally, an inferior court does not have the discretion to vary from the mandate set forth by a superior court. See *State ex rel. Potain v. Mathews*, 59 Ohio St.2d 29, 391 N.E.2d 343 (1979.) However, this Court has held that such an

absolute rule “will not be applied so as to achieve unjust results.” *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984.) Therefore this Court created an exception, allowing trial courts to deviate from a reviewing court’s mandate only under “extraordinary circumstances.” *Id.*, at paragraph one of the syllabus.

After the trial court reentered the sentence to allow Appellee the ability to appeal claimed error at trial, the Eighth District, without determining whether the intervening *Horner* decision constituted an “extraordinary circumstance” which allowed the trial court to deviate from the mandate to hold a third trial, determined that the trial court abused its discretion and mandated the trial court vacate the convictions. It did so because *Horner* was released after the appellate court remanded the matter for new trial. As such, the appellate court found that it was irrelevant whether error occurred— the mandate to hold a new trial was inviolate once the case was remanded, without consideration for this Court’s decision in *Horner*.

This matter involves a question of great public and general interest because a jury’s verdict was vacated on the basis of on blind adherence to procedure. A third trial where no error was found at the second is a waste of judicial and State resources. Because of this, the State asks this Court to accept jurisdiction of this matter upon the following proposition of law:

An inferior court may deviate from the mandate of a reviewing court when an intervening decision from a superior court justifies such deviation.

STATEMENT OF THE CASE AND FACTS

On March 21, 2006 Appellee was indicted on two counts of robbery in violation of R.C. 2911.02. On September 1, 2006, after a trial by jury, the jury returned a verdict of guilty as to both counts. Appellee was subsequently sentenced to two concurrent seven-year terms of imprisonment. On Appeal, the court reversed and remanded for a new trial on the basis that the trial court improperly admitted opinion evidence. *State v. Dzelajlija*, 8th Dist. No. 88805, 2007-Ohio-4050. A second jury trial began on February 12, 2008. On February 19, 2008, Defendant was once again found guilty of both robbery charges and sentenced to concurrent five-year and seven-year prison terms.

Dzelajlija appealed his second trial, asserting two assignments of error: 1) the indictments under which he had been charged had been defective; and 2) the conviction was against the manifest weight of the evidence. The Eighth District found the indictments defective, citing *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169. *State v. Dzelajlija*, 8th Dist No. 91115, 2009-Ohio-1072. Having found the indictments defective, the Court found the assignment of error alleging the convictions to be against the manifest weight of the evidence to be moot. The appellate court vacated the convictions and remanded the matter to the trial court.

The trial court received the case from the appellate court on May 21, 2009. Pretrial conferences were held on August 4, 2010 and on September 8, 2010, with trial set for September 14, 2010. On August 27, 2010, before the third trial

commenced, this Court decided *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26. *Horner* overruled *Colon*, holding that, “when an indictment fails to charge a mens rea element of the crime, but tracks the language of the criminal statute describing the offense, the indictment provides the defendant with adequate notice of the charges against him and is, therefore, not defective.” *Id.* at ¶45.

On September 14, 2010, the date set for trial, the trial court heard argument regarding the effect the *Horner* decision had upon the case. The trial court journalized the following decision:

THE COURT CONDUCTS A HEARING BASED UPON EXTRAORDINARY CIRCUMSTANCES. ON MARCH 12, 2009 DEFENDANTS CONVICTION WAS REVERSED BASED SOLELY UPON AN INDICTMENT FOUND TO BE DEFECTIVE UNDER COLON 1 AND COLON 2 PRIOR TO TRIAL COURTS DECISION TO CONDUCT RE-TRIAL ON 9/14/2010 THE OHIO SUPREME COURT ISSUES HORNER DECISION EFFECTIVELY REVERSING COLON 1 AND 2. STATE AVERS PREJUDICE AS A RESULT OF TIME PASSAGE AND MOVES COURT TO RE-INSTATE ORIGINAL SENTENCE DEFENSE OBJECTS. TRIAL COURT DETERMINES THAT EXTRAORDINARY CIRCUMSTANCES EXIST, DEFENDANT HAS SUFFERED NO PREJUDICE FROM THE TIME WHICH HAS PASSED SINCE INITIAL REVERSAL AND NEW TRIAL DATE [DEFENDANT IS CURRENTLY SERVING A 10 YEAR SENTENCE ON UNRELATED CHARGES CASE # 475938] IN THE INTEREST OF JUSTICE THE TRIAL COURT RE-IMPOSES THE ORIGINAL SENTENCE OF 7 YEARS ON COUNT 1, 5 YEARS ON COUNT 2. COUNTS TO RUN CONCURRENT TO EACH OTHER, BUT CONSECUTIVE TO CASE # 475938. POST RELEASE CONTROL IS PART OF THIS SENTENCE FOR 3 YEARS FOR THE ABOVE FELONYS UNDER R.C.2967.28. TO BE REVIEWED IN LIGHT OF HORNER. COSTS AND FEES SUSPENDED. THIS IS A FINAL APPEALABLE ORDER.

On Appellee's appeal, the Eighth District found that its prior mandate barred the trial court from considering the effect of *Horner*. It held that, "because the matter was no longer a pending case [at the time the *Horner* decision was announced] . . . the trial court committed reversible error in failing to follow the mandate ordering the convictions vacated." *State v. Dzelajlija*, 8th Dist. No. 95851, 2012-Ohio-913, at ¶15.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: An inferior court may deviate from the mandate of a reviewing court when an intervening decision from a superior court justifies such deviation.

No error has been found in Dzelajlija's second trial in light of the *Horner* decision. Despite the fact no error occurred at the second trial, the appellate court insists that a third trial be held. Instead of expending State and judicial resources by conducting a third trial in this matter, the trial court determined that the *Horner* decision constituted an "extraordinary circumstance." It re-imposed the original sentence without another trial in order for the appellate court to determine Appellee's prior mooted claim of trial error. The Eighth District's holding, that the trial court abused its discretion in this matter results in nothing more than vacating a jury verdict for the sake of vacating a jury verdict. This result is untenable.

The doctrine of the "law of the case" provides "that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing level." *Nolan v.*

Nolan, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984.) “[T]he doctrine functions to compel trial courts to follow the mandates of reviewing courts.” *Id.* at 3. However, it is not to “be applied so as to achieve unjust results.” *Id.* Therefore, “[a] lower court has no discretion, *absent extraordinary circumstances*, to disregard the mandate of a superior court in a prior appeal in the same case.” (Emphasis added.) *State ex rel. Potain v. Mathews*, 59 Ohio St.2d 29, 32, 391 N.E.2d 343 (1979.)

In this matter, the intervening *Horner* decision did constitute an “extraordinary circumstance” allowing for the trial court to deviate from the Eighth District’s original mandate. This Court has never defined the term “extraordinary circumstances,” but some appellate courts have interpreted this term to mean “something exceptional in character, amount, extent, or degree.” *State v. Carlisle*, 8th Dist. No. 93266, 2010-Ohio-3407. This Court has even stated that an example of an “extraordinary circumstance” would be an intervening decision by the Ohio Supreme Court. *Mathews*, 59 Ohio St.2d 29, at 32. That is exactly what occurred in this case; an intervening decision by this Court.

The Eighth District’s original mandate to the trial court was based on a finding that the indictments were defective under the now-overruled decision in *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169. *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26 came out after the Eighth District’s mandate and overruled *Colon*, setting a new standard in determining whether an indictment is sufficient. In light of this Court’s intervening decision in *Horner*, which overruled the basis of the Eighth District’s mandate, the

trial court deviated from the Eighth District's mandate to hold a third trial and determined that the indictments were sufficient under the standard set forth in *Horner* and reimposed the sentences.

On appeal, the Eighth District held that "because this matter was no longer a pending case . . . the trial court committed reversible error in failing to follow the mandate ordering the convictions vacated." *State v. Dzelajlija*, 8th Dist. No. 95851, 2012-Ohio-913 at ¶15. However, the instant case was open and the third trial had not begun. In interpreting *Nolan*, the Second District Court of Appeals determined that is the relevant procedural posture, not whether the case is pending on appeal. *Wright v. Cincinnati Ins. Co.*, 159 Ohio App.3d 154, 823 N.E.2d 465, 2004-Ohio-5932, at ¶ 29 ("The Supreme Court intended that its holding in *Galatis* be applied to open cases. See *Jordan*, supra, 2004-Ohio-261, at ¶ 15. We see no rational basis to perpetuate the unintended benefits of *Scott-Pontzer* and *Ezawa* when the trial court had the benefit of *Galatis* upon remand.") Whether or not the case is still pending on appeal would be an unreasonable interpretation of when a trial court could deviate from a mandate. If that was true, then the trial court could never deviate from a mandate.

Whether this Court's decision in *Horner* constituted an "extraordinary circumstance" which had allowed for the trial court to deviate from original mandate is the issue; not whether a case is pending rather than open. That *Horner* was released and was applied to prevent a third trial where no error was determined is the issue. However, the Eighth District never addressed this issue.

By avoiding this issue, the Eighth District's adherence to its mandate amounted to an improper invasion of the jury's verdict based on a mere technicality, especially in light of its admission that there was no error in the indictments. The trial court's decision to reimpose the sentences and respect the jury's verdict based on the intervening *Horner* decision, avoided an unjust result. The appellate decision does not.

The State contends that based on this Court's prior precedents, in conjunction with the inappropriate invasion of a jury verdict based on a technicality, this Court's decision that overruled the basis of the mandate to conduct a third trial constituted an extraordinary circumstance. Such extraordinary circumstance did allow the trial court to deviate from reviewing court's mandate, and in so doing, avoided an unjust result.

CONCLUSION

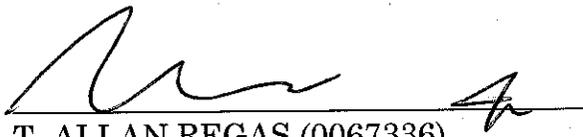
The Eighth District's determination now forces the trial court to hold a third trial despite the fact there was no legal error found in the second trial. The appellate court has dictated that blind adherence to procedure mandates a waste of judicial resources, but; more importantly, it disregards the sanctity of a jury verdict. It is unjust to disregard a jury verdict based upon a technicality in timing of appellate court procedure. This case exemplifies the necessity to define under what circumstances an inferior court may deviate from a mandate; the State posits that such action is to do so where justice so requires. Because of this, the State asks that this Court accept its proposition of law and demonstrate the importance a jury

verdict has in our criminal justice system. The verdict is sacrosanct and should not be ignored where there is no error found in the proceedings. As such, this Court should accept this matter, adopt its proposition of law, and find that the trial court properly entered sentence despite the remand from the Eighth District Court of Appeals to hold a third trial. Such result not only preserves justice in this case, but assures the public that the court system respects decisions of a jury under our system of justice.

Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

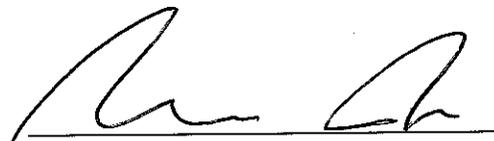
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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction has been mailed this the 17th day of April, 2012 to:

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[Cite as *State v. Dzelajlija*, 2012-Ohio-913.]

[Please see original opinion at 2011-Ohio-6445.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95851

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

JAMES DZELAJLIJA

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED; CONVICTIONS AND SENTENCE VACATED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-478630

BEFORE: Kilbane, P.J., Boyle, J., and Rocco, J.

RELEASED AND JOURNALIZED: March 8, 2012

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ON RECONSIDERATION

MARY EILEEN KILBANE, P.J.:

{¶1} The plaintiff-appellee, the state of Ohio has asked this court to reconsider its December 15, 2011 decision in which we concluded that due to recent changes in the controlling case law, defendant-appellant, James Dzelajlija, was not entitled to a new trial due to structural error caused by his indictment. That opinion recognized, however, that in defendant's prior appeal on the merits, his challenge to the manifest weight of the evidence supporting his robbery convictions was deemed moot and was not addressed. Consequently, this court determined that the trial court committed reversible error and acted beyond its mandate in reinstating Dzelajlija's sentences for those convictions.

{¶2} Since the release of the December 15, 2011 opinion, the panel that heard defendant's prior appeal has denied the State's motion to reopen the appeal in order to weigh the evidence supporting defendant's 2008 robbery convictions.¹ Therefore, upon reconsideration, we note that despite the change in controlling case law, the record of this particular matter compels us to apply the structural error analysis herein. Under that structural error analysis, defendant's 2008 robbery conviction and sentence must be vacated due to defective indictments.²

¹In this connection, we note that App.R. 26(B) states that "A *defendant* in a criminal case may apply for reopening[.]" (Emphasis added.)

²The original decision in this appeal, *State v. Dzelajlija*, 8th Dist. No. 95851, 2011-Ohio-6445, 2011 WL 6314200, released December 15, 2011, is hereby vacated.

{¶3} On March 23, 2006, defendant was indicted on two counts of robbery and receiving stolen property, in connection with the September 30, 2005 robbery of a furniture store employee who was making a night deposit. Defendant was convicted of the robbery charges and sentenced to concurrent seven-year terms of imprisonment, plus five years of postrelease control. This court determined that the trial court admitted inadmissible and prejudicial opinion evidence as to a witness's truthfulness and reversed and remanded for a new trial. *State v. Dzelajlija*, Cuyahoga App. No. 88805, 2007-Ohio-4050, 2007 WL 2269464 ("*Dzelajlija I*").

{¶4} Defendant was again convicted of both robbery charges following the retrial, and on February 21, 2008, he was sentenced to a seven-year term of imprisonment and a concurrent five-year term of imprisonment, plus three years of postrelease control. The court additionally ordered this sentence to be served consecutively to an unrelated conviction in Case No. CR-475938.

{¶5} Defendant appealed to this court. This court concluded that the indictments were defective under *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917 ("*Colon I*") and *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169 ("*Colon II*"), for failing to charge defendant with the requisite mens rea of recklessness. This court therefore again reversed defendant's convictions, stated that they were "vacated," and remanded the matter to the trial court. This court additionally

This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. See App.R. 22(C); see also S.Ct.Prac.R. 2.2(A)(1).

determined that since the defective indictments constituted structural error, defendant's additional challenge to the weight of the evidence supporting his convictions was moot. *State v. Dzelajlija*, 8th Dist. No. 91115, 2009-Ohio-1072, 2009 WL 626326 ("*Dzelajlija II*").

{¶6} On May 20, 2009, the matter was returned to the docket of the trial judge. At this time, however, defendant was imprisoned in connection with Case No. CR-475938. Retrial was scheduled for September 14, 2010. On August 27, 2010, however, the Ohio Supreme Court decided *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26. In *Horner*, the court overruled *Colon I* and *Colon II*, and held that where an indictment charges an offense by tracking the language of the criminal statute, it is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state.

{¶7} On September 14, 2010, the trial court held a hearing in this matter to determine the effect of the *Horner* decision in relation to our prior mandate in *Dzelajlija II*. Thereafter, the trial court concluded that defendant was not prejudiced by the delay in scheduling a retrial, and that the *Horner* decision constituted extraordinary circumstances that justified the reimposition of the sentence that had been imposed on February 21, 2008, without holding another trial. The court then reimposed two concurrent seven-year sentences.

{¶8} On appeal to this court, defendant maintained that this court's prior mandate and principles of res judicata barred further proceedings on the original indictment, and

that the trial court acted without jurisdiction and in derogation of his right to due process in reimposing sentence without a valid finding of guilt. This court concluded that due to recent changes in the controlling case law, the original indictment could no longer be deemed structurally defective, but because the challenge to the manifest weight of the evidence supporting his conviction had not been decided, the trial court committed reversible error and acted beyond its mandate in reinstating Dzelajlija's sentences.

{¶9} Our opinion therefore reflected that the failure to include a mens rea in an indictment is no longer deemed to create structural error where it tracks the language language of the criminal statute, but also reflected that we were without authority and lacked the record to determine the manifest weight of the evidence issue raised *Dzelajlija II*. Following release of our December 15, 2011 opinion, the panel that heard *Dzelajlija II* declined to reopen the appeal for consideration of that issue.

{¶10} Moreover, indictments that track the relevant statutory provisions are now generally reviewed for plain error, rather than structural error. *State v. Andera*, 8th Dist. No. 92306, 2010-Ohio-3304, 2010 WL 2783688; *State v. Segines*, 191 Ohio App.3d 60, 2010-Ohio-5112, 944 N.E.2d 1186 (8th Dist.); *State v. Dunlap*, 129 Ohio St.3d 461, 2011-Ohio-4111, 953 N.E.2d 816. However, we believe that the unresolved issue regarding the evidentiary support for defendant's convictions renders the plain error analysis inappropriate to this matter. Therefore, due to the unique procedural posture of this matter, we again apply the structural error analysis set forth in *Colon I*, in order to address defendant's assignments of error.

{¶11} Defendant's second, third, and fourth assignments of error are interrelated

and state:

- II. The trial court lacked jurisdiction to affect this court's judgment in *Dzelajlija II*.
- III. Res judicata and collateral estoppel preclude the State from relitigating the validity of Dzelajlija's indictment when it failed to appeal that issue to the Ohio Supreme Court.
- IV. The state failed to present extraordinary circumstances to justify the trial court's deviation from the mandate of *Dzelajlija II*.

{¶12} In *Hedgpeth v. Pulido*, 555 U.S. 57, 129 S.Ct. 530, 172 L.Ed.2d 388 (2008), the United States Supreme Court noted that where error is structural, the verdict must be set aside without regard as to whether it prejudiced the defendant.

{¶13} In addition, a trial court must follow a mandate from a reviewing court. *State v. Gates*, 8th Dist. No. 82385, 2004-Ohio-1453, 2004 WL 584004. In *State v. Carlisle*, 8th Dist. No. 93266, 2010-Ohio-3407, 2010 WL 2857806, we explained the appellate mandate as follows:

An appellate mandate works in two ways: it vests the lower court on remand with jurisdiction and it gives the lower court on remand the authority to render judgment consistent with the appellate court's judgment.

Under the "mandate rule," a lower court must "carry the mandate of the upper court into execution and not consider the questions which the mandate laid at rest."

{¶14} New judicial rulings may be applied to cases if they are pending on the announcement date. *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, 819 N.E.2d 687; *State v. Lynn*, 5 Ohio St.2d 106, 108, 214 N.E.2d 226 (1966). However, there is no

authority to extend or vary the mandate of the appellate court. *State v. Bell*, 8th Dist. No. 92037, 2009-Ohio-2138, 2009 WL 1243769.

{¶15} In this matter, the court in *Dzelajlija II* determined that the robbery charges were structurally defective and it vacated the convictions. The mandate from this court ordered that the matter be remanded to the trial court “for the limited purpose of vacating the convictions.” The State did not appeal this decision and it became final. The matter was not reindicted and the matter was no longer a pending case at the time the *Horner* decision was announced. Therefore, we conclude that the trial court erred in considering the matter as pending under the original indictment and in applying *Horner* rather than *Colon* herein. Moreover, because the matter was no longer a pending case, given *Dzelajlija II*'s reversal and remand for vacation of the convictions, we further conclude that the trial court committed reversible error in failing to follow the mandate ordering the convictions vacated.

{¶16} The second, third, and fourth assignments of error are well taken.

{¶17} Defendant's first assignment of error states:

I. The trial court erred and violated Dzelajlija's state and federal due process rights when it imposed a sentence without a valid finding of guilt.

{¶18} Within this assignment of error, defendant asserts that the trial court erred in reimposing the February 21, 2008 sentence in the absence of a determination that defendant was guilty of robbery.

{¶19} The mandate in *Dzelajlija II* ordered that the matter be remanded to the trial court “for the limited purpose of vacating the convictions.” This court did not authorize the trial court to resentence defendant on those charges. The prior appeal of this matter did not address the manifest weight argument raised by defendant, so this challenge has not been resolved and the conviction has not become final. Therefore, the trial court erred in reimposing the sentence announced on February 21, 2008.

{¶20} The first assignment of error is well taken.

{¶21} The matter is reversed; convictions and sentence are vacated.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

MARY J. BOYLE, J., CONCURS

KENNETH A. ROCCO, J., CONCURS (SEE SEPARATE CONCURRING OPINION)

KENNETH A. ROCCO, J., CONCURRING:

{¶22} Although I fully concur with the majority, I write separately to state once again that based upon *Horner* and this court's inherent authority, I believe that the panel of *Dzelajlija II*, 8th Dist. No. 91115, 2009-Ohio-1072, should sua sponte reconsider its decision in order to review the appellant's manifest weight of the evidence issue.

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.
96851

LOWER COURT NO.
CP CR-478630

COMMON PLEAS COURT

-vs-

JAMES DZELAJLIJA

Appellant

MOTION NO. 450699

Date 03/08/12

Journal Entry

Motion by Appellee for reconsideration is granted. The Journal Entry and Opinion released on December 15, 2011 (2011-Ohio-6445) is hereby vacated and substituted with the Journal Entry and Opinion issued March 8, 2012.

FILED AND JOURNALIZED
PER APP.R. 22(C)

MAR X 8 2012

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

Judge MARY J. BOYLE, Concur

Judge KENNETH A. ROCCO, Concur

[Signature: Mary Eileen Kilbane]
Presiding Judge
MARY EILEEN KILBANE

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ALL PARTIES.-COPIES TAKEN



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