ORIGINAL

IN THE SUPREME COURT OF OHIO
2012

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

ARNALDO MIRANDA,

Defendant-Appellant.

Case No. 2012-1741

On Appeal from the Franklin County Court of Appeals, Tenth Appellate District

Court of Appeals Case No. 11AP-788

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

Defendant Arnaldo Miranda was indicted on one count of F1 engaging in a pattern of corrupt activity (RICO), three counts of F2 trafficking in marijuana, and three counts of F2 possession of marijuana. The trafficking and possession counts related to three separate seizures of marijuana. In all, the three marijuana seizures totaled almost 4000 pounds. Miranda would later tell officers that he was the "money man" in the drug-trafficking enterprise. When he and his girlfriend were arrested, they were carrying two suitcases containing over $900,000 cash.

Miranda ultimately pleaded guilty to F2 RICO and one of the trafficking counts, and the trial court sentenced him to consecutive prison terms totaling 14 years. Miranda appealed, and the Tenth District affirmed. Miranda now seeks discretionary review. But none of Miranda's three propositions of law seeks to overrule, modify, or extend existing law, and none seeks to resolve any conflict among lower courts. Any ruling from this Court on any of Miranda's three propositions of law would therefore have minimal impact on future cases.

* * * * *

Miranda's first proposition of law states that lower courts are required to apply *State v. Johnson*, 128 Ohio St.3d 2010-Ohio-6314, 942 N.E.2d 1061, when deciding whether counts should merge under R.C. 2941.25. It is of course true that lower courts are bound by *Johnson* (to be more accurate, lower courts are bound by the *syllabus* in *Johnson*; none of the opinions in *Johnson* garnered the necessary four votes to constitute a holding). But the merger question in this case is not governed by R.C. 2941.25. Rather, the Tenth District looked solely to R.C. 2923.32—Ohio's RICO statute—to conclude that the General Assembly intended that RICO be separately punishable from the predicate offenses. Opinion at ¶ 9, citing *State v. Schlosser*, 79 Ohio St.3d 329, 681 N.E.2d 911 (1998). The Tenth District further held that the deletion of R.C. 2923.32(D) did not negate the General Assembly's intent in this regard. Opinion at ¶¶ 10-11.

Whether multiple punishments may be imposed for the same offenses is always a question of legislative intent. While the General Assembly's intent is most frequently gleaned from R.C. 2941.25, the Tenth District correctly determined the General Assembly's intent in enacting the RICO statute was dispositive on the multiple-punishment question in this case. Several other appellate courts have reached the same conclusion.

Even if the merger question in this case were dictated by R.C. 2941.25, the result would be the same. Under any conduct-based approach, the F2 RICO count was not an allied offense of similar import to the trafficking count. Each of the three seizures of marijuana constitutes a separate incident of "corrupt activity." Miranda pleaded guilty to only one trafficking count, leaving the other two marijuana seizures to serve as the RICO predicates. In short, Miranda cannot show that the conduct associated with the trafficking count is the same conduct associated with the RICO count.

Miranda's second and third propositions of law are equally unworthy of review. The Tenth District correctly held that the trial court committed no error in relying on the prosecutor's statement that "Mexican cartels" were involved in this drug-trafficking enterprise. Opinion at ¶ 17. Notably, the defense did not object to the prosecutor's "Mexican cartels" statement, and indeed seemed to acknowledge that the prosecutor's statement was accurate. The Tenth District also correctly held that the trial court did not rely on the "Mexican cartels" statement in deciding to impose consecutive prison terms. *Id* at ¶ 19. Rather, the trial court relied on this statement only to credit Miranda with only two years for accepting responsibility. And there is no evidence in the record that the trial court's sentencing methodology was improper.

Moreover, with respect to all three propositions of law, each would be subject to at least plain-error review, because the defense raised no objections in the trial court. In fact, Miranda's

first proposition of law would be subject to the invited-error doctrine (thus precluding *any* appellate review at all), because the defense expressly asked the trial court to impose concurrent sentences, which can be achieved only if the counts do not merge.

Because this appeal presents no questions of such constitutional substance or of such great public interest as would warrant this Court's review, and because the Tenth District correctly affirmed the trial court's judgment, jurisdiction should be declined.

STATEMENT OF THE CASE AND FACTS

In February 2011, Miranda, his brother Luis, and Hector Martinez were each indicted on one count of F1 RICO, three counts of F2 trafficking in marijuana, and three counts of F2 possession of marijuana. Jermaine Howell was also included as a co-defendant on the RICO count, one of the trafficking counts, and one of the possession counts. Miranda ultimately pleaded guilty to F2 RICO as a stipulated lesser-included offense to count one, as well as to one of the trafficking counts. At the plea hearing, the prosecutor recited the following facts:

In December 2010, an HIDTA ("High Intensity Drug Trafficking Areas") task force identified Howell as a "fairly high-level" drug trafficker. While conducting surveillance on Howell, officers saw a van drop off approximately 1200 pounds of marijuana at Howell's residence. Howell was then apprehended and agreed to cooperate with the task force. He identified Miranda as his supplier. While wearing a wire, Howell met with Miranda and convinced him that he (Howell) had not been arrested as a result of the drug bust and persuaded Miranda to continue serving as his supplier. Miranda then convinced his "superior" over the phone to keep Howell as a customer.

Howell provided the task force with another key piece of information: He identified an address on Carbondale Avenue as the location where he was to deliver the money he owed Miranda. A GPS tracking device placed on a vehicle at the Carbondale address led the task force

to a warehouse on South 7th Street. While conducting surveillance at the warehouse, the officers saw a van deliver a shipment of suspected drugs. After the delivery, the officers stopped two vehicles leaving the warehouse—one driven by Martinez, the other by Luis—and seized additional marijuana.

Shortly thereafter, Miranda and his girlfriend were apprehended while leaving the Carbondale address in a "hurried manner" and carrying two suitcases; inside the suitcases was over $900,000 cash. At that point, Miranda confessed that he was the "money man" in the drug-trafficking enterprise. The officers' investigation then took them to yet another address on Fishinger Road, where they seized about 800 pounds of marijuana.

In all, the marijuana seized at Howell's residence, the 7th Street warehouse, and the Fishinger Road address totaled almost 4000 pounds.

Prior to the sentencing hearing, the defense filed a sentencing memorandum requesting concurrent prison terms. Defense counsel renewed this request at the sentencing hearing. The trial court ultimately sentenced defendant to the mandatory eight years on the trafficking count, see R.C. 2925.03(C)(3)(g), to be served consecutively to six years on the RICO count, for a total of 14 years. Miranda appealed, and the Tenth District affirmed. Miranda now seeks discretionary review.

ARGUMENT

Response to First Proposition of Law: Whether a trial court may impose multiple punishments for the same offense is a question of legislative intent.

Miranda's first proposition of law claims that the trial court erred by not merging the RICO and drug-trafficking counts. But the invited error doctrine precludes any appellate review of this issue. "The doctrine of invited error holds that a litigant may not 'take advantage of an error which he himself invited or induced.'" *State v. Campbell*, 90 Ohio St.3d 320, 324, 738

N.E.2d 1188 (2000), quoting *Hal Artz Lincoln–Mercury, Inc. v. Ford Motor Co.*, 28 Ohio St.3d 20, 502 N.E.2d 590 (1986), paragraph one of the syllabus. The invited error doctrine precludes *any* appellate review, including plain-error review under Crim.R. 52(B). *State v. Rohrbaugh*, 126 Ohio St.3d 421, 2010-Ohio-3286, 934 N.E.2d 920, ¶ 10.

Here, the defense not only failed to object to multiple sentences below, but it *affirmatively requested* that the trial court impose concurrent prison terms, which could be achieved only by not merging the counts. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-670, 922 N.E.2d 229, ¶ 31. Miranda is therefore precluded from arguing merger on appeal, because the defense was "actively responsible" for the trial court not merging the counts. *State v. Murphy*, 91 Ohio St.3d 516, 535, 747 N.E.2d 765 (2001), quoting *State v. Kollar*, 93 Ohio St. 89, 91, 112 N.E. 196 (1915). Although the Tenth District did not rely on the invited error doctrine below, this is reason enough not to review Miranda's first proposition of law.

Even if the invited error doctrine does not bar Miranda's merger argument, the defense's failure to raise any objection below requires that Miranda show plain error. Crim.R. 52(B). But he cannot show plain error, because it was far from plain at the time of sentencing that the RICO count merged with the drug-trafficking count. *State v. Barnes*, 94 Ohio St.3d 21, 28, 759 N.E.2d 1240 (2002).

The Double Jeopardy Clause prohibits multiple punishments for the same offense. *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, ¶ 10. But "[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983); see, also, *State v. Moss*, 69 Ohio St.2d 515, 519, 433 N.E.2d 181 (1982).

True, the General Assembly's intent regarding whether a trial court may impose multiple sentences is most frequently gleaned from R.C. 2941.25. But the General Assembly's intent in enacting R.C. 2923.32 is dispositive in this case, because in enacting that statute the General Assembly intended that RICO be separately punishable from the predicate offenses. Ohio courts have consistently held that the General Assembly's intent in enacting R.C. 2923.32 was the same as Congress's in enacting the federal RICO statute, which includes "providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." *Schlosser* at 332, citing Organized Crime Control Act of 1970, Statement of Findings and Purpose, 84 Stat. 922, reprinted in 1970 U.S.Code Cong. & Admin. News at 1073; see, also, *State v. Moulton*, 8th Dist. No. 93726, 2010-Ohio-4484, ¶¶ 35-38; *State v. Dudas*, 11th Dist. No. 2008-L-109, 2008-L-110, 2009-Ohio-1001, ¶ 47; *State v. Lemaster*, 4th Dist. No. 96CA 18 (1998); *State v. Nieves*, 9th Dist. No. 96CA6379 (1997); *State v. Conley*, 12th Dist. No. CA90-11-023 (1991); *State v. Thrower*, 62 Ohio App.3d 359, 377, 575 N.E.2d 863 (9th Dist.1989).

"R.C. 2923.32 was enacted to criminalize the 'pattern of criminal activity' and not the underlying predicate acts." *State v. Hughes*, 2nd Dist. No. 90-CA-54 (1992), citing *State v. Hill*, 5th Dist. No. CA-8094 (1990). "[T]he clear legislative intent expressed concurrently with the enactment of RICO is to permit, perhaps even to encourage, courts to impose cumulative sentences for a RICO offense and the underlying crimes." *Hill*, quoting *United States v. Sutton*, 700 F.2d 1078, 1080-1081 (6th Cir.1983). If a trial court could not impose separate sentences for RICO and any of the predicate offenses, "then the RICO statute would not satisfy its purpose of providing enhanced sanctions." *Lemaster*. Given the "purpose of RICO and principles of double jeopardy," a trial court may sentence a defendant for both RICO and the predicate offenses. *Dudas* at ¶ 48 (citing federal cases).

Indeed, "if cumulative convictions and sentences were disallowed by courts, [the General Assembly's] purpose to eradicate organized crime would be thwarted because the RICO penalties are in many cases lighter than penalties for underlying offenses." *C.f.*, *Sutton* at 1081. For example, RICO is a first-degree felony when at least one of the predicates is aggravated murder or murder. R.C. 2923.32(B)(1). Disallowing multiple sentences in such a case would essentially mean that a defendant who commits aggravated murder or murder while participating in an enterprise would be punishable no more severely than a defendant who commits these crimes unassociated with any enterprise. Simply put, in such a case, the RICO offense would go entirely unpunished. This is not what the General Assembly intended.

The General Assembly's intent in this regard is further expressed in the definition of "pattern of corrupt activity," which means "two or more incidents of corrupt activity, *whether or not there has been a prior conviction* * * *." R.C. 2923.32(E) (emphasis added). Because a "conviction" consists of a guilty verdict *and* a sentence, *Whitfield* at ¶ 12, this reference to "prior conviction" shows that the General Assembly specifically contemplated that a defendant may be sentenced for on a RICO count even though sentence has already been imposed on the predicate offenses. There is no reason to believe that the General Assembly intended that the result be any different when the defendant is found guilty of RICO and the predicate offenses during the same proceeding.

The deletion of R.C. 2923.32(D)—which stated that the RICO penalties under R.C. 2923.32 are not mutually exclusive do not preclude any other criminal or civil remedy—does not negate the General Assembly's intent that RICO be separately punishable from the predicate offenses. As the Tenth District recognized, the deletion of R.C. 2923.32(D) was "part of the general revisions related to the creation of [the new asset forfeiture provisions in] Chapter 2981,"

Opinion at ¶ 11. Even after this deletion, courts have reaffirmed that the General Assembly's intent in enacting R.C. 2923.32 was to provide for enhanced sanctions to deal with organized crime and that "this purpose is furthered by not merging trafficking in marijuana and engaging in a pattern of corrupt activity in order to provide an enhanced sanction." *State v. Dodson*, 12th Dist. No. CA2010-08-191, 2011-Ohio-6222, ¶ 68; see, also, *Moulton* at ¶¶ 35-38.

Even under R.C. 2941.25, merger was not appropriate in this case. In *Johnson*, this Court overruled its prior decision in *State v. Rance*, 85 Ohio St.3d 632, 710 N.E.2d 699 (1999), which had held that courts must compare the elements of the offenses in the abstract in determining whether offenses are allied offenses of similar import. Although each of the divided opinions in *Johnson* lacked the votes necessary to create binding authority, *Kraly v. Vannewirk*, 69 Ohio St.3d 627, 633, 635 N.E.2d 323 (1994), the unanimously approved syllabus contains the following controlling law: "When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." *Johnson* at syllabus.[1]

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[1] The State wishes to preserve its argument that the plain language of R.C. 2941.25(A) requires that the conduct and similar-import inquiries be separate. *State v. Cooper*, 104 Ohio St.3d 293, 2004-Ohio-6553, 819 N.E.2d 657, ¶ 17 ("[A] court need only engage in the allied-offense analysis when the same conduct, or single act, results in multiple convictions."). Thus, there must be some test to determine similar import beyond just "consider[ing] the "conduct of the accused." The State maintains that the abstract-comparison approach should be used. While the *Johnson* syllabus overruled *Rance*, the abstract-comparison approach existed long before *Rance*. *See, e.g.*, *State v. Blankenship*, 38 Ohio St.3d 116, 118, 526 N.E.2d 816 (1988) ("[W]e do not find that the elements correspond to such a degree that the commission of kidnapping necessarily results in the commission of felonious assault."). The abstract-comparison approach also is consistent with the judicial doctrine of merger, which focuses on whether the "component elements" of one crime includes as "inherent therein" the elements of another crime. *State v. Botta*, 27 Ohio St.2d 196, 201, 271 N.E.2d 776 (1971). To the extent *Johnson* forecloses application of the abstract-comparison approach in determining similar import, the State respectfully requests that *Johnson* be overruled.

Even after considering defendant's conduct as required by *Johnson*, the RICO and drug-trafficking counts do not share a similar import. Miranda was indicted on three counts of drug trafficking and three counts of drug possession stemming from three separate seizures of marijuana—one from Howell's residence, one from the 7th Street warehouse, and one from the Fishinger Road address. Each drug-trafficking and drug-possession count qualifies as corrupt activity. R.C. 2923.32(I)(2)(c).

Only two incidents of corrupt activity are needed to support a RICO count. R.C. 2923.31(E). True, the incidents of corrupt activity must not be "so closely related to each other and connected in time and place that they constitute a single event." *Id.* Thus, each of the three seizures of marijuana may be considered as only one incident of corrupt activity. But Miranda pleaded guilty to only one drug-trafficking count, which corresponded to the seizure at the Fishinger Road address. This leaves the incidents of corrupt activity associated with the other two seizures of marijuana to serve as the RICO predicates.

It is Miranda's burden to prove entitlement to the merger of offenses under R.C. 2941.25. *State v. Mughni*, 33 Ohio St.3d 65, 67, 514 N.E.2d 870 (1987). Miranda has failed to satisfy this burden, because nothing in the record suggests that the conduct supporting the drug-trafficking count to which he pleaded guilty was the same conduct supporting the RICO predicates.

That the RICO and drug-trafficking counts do not share a similar import and were committed by separate conduct defeat Miranda's merger argument. But there is yet another reason why the two counts do not merge under R.C. 2941.25: Miranda committed them with a separate animus. R.C. 2941.25(B). In *Dodson*, the Twelfth District held that the defendant in that case committed the RICO and drug-trafficking offenses with a separate animus, because "[e]ngaging in a pattern of corrupt activity requires an additional state of mind from trafficking

in marijuana to form an enterprise." *Dodson* at ¶ 67. The defendant in *Dodson* not only "possessed the intent to traffic in drugs, which does not require him to form an enterprise," he also "intentionally formed relationships" and "maintained these relationships" to transport marijuana from Arizona to Ohio. *Id.*

The same is true here. In addition to trafficking drugs, Miranda formed an enterprise by entering into and maintaining relationships with Howell, Luis, and Martinez. Also, as defense counsel stated at sentencing, the money from the enterprise gets shipped back to Arizona. So Miranda has cultivated relationships in Arizona as well, including an individual referred to as "Big Dog," the person Miranda convinced to continue supplying Howell with marijuana. According to the prosecutor, the enterprise also ships drugs to the Bronx, New York; Birmingham, Alabama; and Norfork, Virginia.

All told, the General Assembly, both through its enactment of R.C. 2923.32 and through R.C. 2941.25, intended that RICO be separately punishable from the predicate offenses—a point the defense itself recognized by requesting concurrent prison terms. Miranda's first proposition of law warrants no further review.

> **Response to Second and Third Propositions of Law:** At sentencing, the parties may present—and the trial court must consider—any information relevant to the imposition of sentence. And a trial court's reliance on relevant information in determining the length of a prison term does not render the sentence unlawful.

At sentencing, the prosecutor stated that "given the size of this organization, this is, clearly, coming from Mexico, involving Mexican cartels, because of the many involved as well as the information that the State has gotten from the investigation." In imposing a 14-year prison term, the trial court later stated: "The involvement with the Mexican cartels is probably inviting the most dangerous folks on the face of the planet, or just about, next to the Taliban, to have

dealings with Columbus, and I can't give any more than two years less than the maximum for accepting responsibility on this thing."

Miranda's second and third propositions of law both pertain to the trial court's reliance on the prosecutor's "Mexican cartels" statement. His second proposition of law claims that the trial court failed to comply with the requirement in R.C. 2929.11(A) that it impose the "minimum sanctions" that the court determines will accomplish the purposes of felony sentencing. His third proposition of law claims that there was no evidence supporting the prosecutor's "Mexican cartels" statement, and that the trial court could not rely on this statement in deciding to impose consecutive sentences. But the defense raised no objection to these issues in the trial court, thereby waiving all but plain error. Crim.R. 52(B). Miranda cannot show plain error.

Regarding Miranda's second proposition of law, nothing in the trial court's comments at sentencing suggests that it imposed any longer sentence than it though was necessary to protect the public and punish Miranda. Given the size of this drug-trafficking enterprise—again, almost 4000 pounds of marijuana were seized and Miranda was apprehended with over $900,000 cash—the trial court reasonably concluded that a 14-year prison sentence was necessary to achieve the purposes of felony sentencing under R.C. 2929.11(A). Moreover, the prosecutor's reliance on the "Mexican cartels" statements does not reveal any improper methodology.

As for Miranda's third proposition of law, Ohio's sentencing statutes specifically state that "the prosecuting attorney * * * may present information relevant to the imposition of sentence in the case." R.C. 2929.19(A). And the trial court "before imposing sentence, shall consider * * * any information presented at the hearing by any person pursuant to [R.C. 2929.19(A)] * * *." R.C. 2929.19(B)(1).

Thus, the prosecutor may present—and the trial court must consider—any "information" relevant to sentencing. "Information" is not the same as "evidence." In fact, if Miranda is correct that the trial court could not consider the prosecutor's statement because it was not evidence, then the trial court would have been precluded from considering a large portion of the defense's sentencing memorandum, which consisted of unsworn statements by Miranda's attorney regarding Miranda's background and how he came to be a drug trafficker. Nor could the trial court consider many of defense counsel's statements at the sentencing hearing. And the letter from Father Michael Christiana attached to the sentencing memorandum would also be improper.

But because R.C. 2929.19(B)(1) requires the trial court to consider "information" relevant to sentencing, nothing prohibited the trial court from considering these materials offered by the defense. Likewise, the trial court committed no error by considering the prosecutor's statement that Mexican cartels were involved in this drug-trafficking enterprise.

Moreover, Miranda's reliance on *State v. Sanchez-Martinez*, 6th Dist. No. E-08-033, 2009-Ohio-775, is misplaced. In that case, the Court reversed because the defense objected to the trial court's reliance on a police report that even the State had admitted was inaccurate. *See, also*, *Townsend v. Burke*, 334 U.S. 735, 740-741, 68 S.Ct. 1252, 92 L.E. 1690 (1948) (finding due process violation when uncounseled defendant was sentenced based on court's misreading of the defendant's record). But in the present case, Miranda was represented by counsel, the defense did not object to the prosecutor's "Mexican cartels" statement, and there is no indication that the statement lacked a factual basis. The prosecutor stated that this information was derived from "the investigation," which—as described at the sentencing hearing—was an extensive investigation involving numerous state and federal agencies. Before the prosecutor even made

the "Mexican cartels" statement, defense counsel seemed to acknowledge the Mexican connection, stating that "we can only surmise" that after defendant ships the cash to Arizona it eventually goes to Mexico.

Miranda further argues that, even assuming the accuracy of the prosecutor's "Mexican cartels" statement, it was unfair for the trial court to rely on this fact in imposing a 14-year sentence. To the extent Miranda argues that the trial court relied on the "Mexican cartels" statement in deciding to impose consecutive sentences, that contention is mistaken. Rather, the trial court referenced Mexican cartels to explain why it was *crediting* defendant with only two years for his acceptance of responsibility. From all indications, the trial court would have imposed consecutive sentences whether Mexican cartels were involved or not. In any event, regardless of the nature of the trial court's reliance on the "Mexican cartels" statement, defendant's argument is without merit.

Contrary to Miranda's assertion, *United States v. Aguilar-Pena*, 887 F.2d 347 (1st Cir.1989), is inapposite. In that case, the Court held that the trial court improperly departed from the federal sentencing guidelines based on a fact that was already incorporated into the elements of the offense—i.e., "the grounds for departure derived their essence from the offense itself." Id. at 351. Miranda, however, cites no evidence for his assertion that "[i]n most trafficking cases, the supply of drugs originates from elsewhere" (MSJ, 12), let alone that all drug-trafficking cases in Ohio involve Mexican cartels. The trial court's reference to Mexican cartels thus would not be applicable to "*any* violation" of drug trafficking under R.C. 2925.03 committed by "*any* person." *Aguilar-Pena* at 351.

While Miranda does not appear to dispute the dangerous propensities of Mexican cartels, he maintains that there is no evidence that he "advocated or supported its policies." (MSJ, 12)

But whether Miranda subjectively agreed with the Mexican cartels' policies misses the point, as does whether the task force recovered any firearms or uncovered any evidence linking defendant to any specific acts of violence. The bottom line is that Miranda *did* "support" the Mexican cartels by serving as the "money man" in the enterprise. The trial court was therefore entirely correct to observe that the involvement of Mexican cartels invited some of the planet's most "dangerous folks * * * to have dealings with Columbus."

Miranda's second and third propositions of law warrant no further review.

CONCLUSION

For the foregoing reasons, the State respectfully submits that jurisdiction should be declined.

Respectfully submitted,

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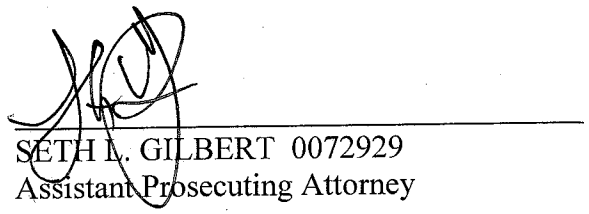
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, November 13th, 2012, to DAVID P. REISER, Two Miranova Place, Suite 710, Columbus, Ohio 43215; Counsel for Defendant-Appellant.



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