

NO. 2012-0252

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 96653

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STATE OF OHIO  
Plaintiff-Appellant

-vs-

MATTHEW LINDSTROM  
Defendant-Appellee

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BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL AS BEING FRIVOLOUS  
AND MOTION TO DISMISS APPEAL AS BEING IMPROVIDENTLY GRANTED

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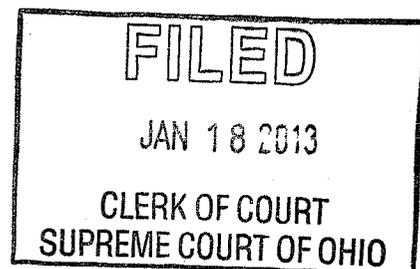
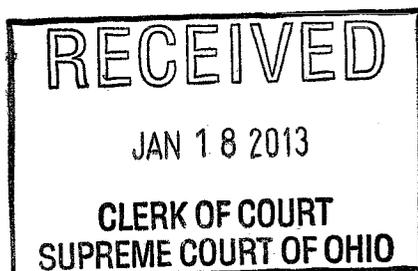
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**BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL AS BEING FRIVOLOUS AND AS BEING IMPROVIDENTLY GRANTED**

**I. Summary**

The State would ask that the motion to dismiss be denied as this appeal determines which court, the juvenile court or the general division, has proper subject matter jurisdiction over Appellee. Remanding this matter to the juvenile court for determination of the merits does not resolve whether the juvenile court has subject matter jurisdiction to even determine the merits. Appellee cites the victim's alleged recantation as his primary reason in support of dismissal of the instant case.

The court with proper jurisdiction would have the appropriate authority to determine the merits or consider any motion to dismiss the charges with prejudice. A court cannot act where it does not have jurisdiction. See *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, 855 N.E.2d 851, at ¶¶10, 15. Juvenile courts have jurisdiction over persons considered a "child" in delinquency cases. Whether Appellee is a "child" for purposes of juvenile court jurisdiction rests upon whether he was "apprehended" a day prior to his 21<sup>st</sup> birthday when a summons was issued.

The issue of victim recantation on the other hand, is a matter of credibility, unrelated to the issue of jurisdiction. Therefore, the motion to dismiss should be denied.

## **II. Procedural Background**

The procedural background has been briefed and explained in the State's merit brief. In summary this case involves the dismissal of an indictment based on a determination that the case was subject to the juvenile court's exclusive jurisdiction. The issue focuses on whether Appellee was apprehended prior to turning 21. Subsequent to acceptance of this case and filing of its merit brief, the State was informed the alleged victim recanted and Appellee requested dismissal of all cases with prejudice. The State was subsequently informed by Appellee's counsel that if the State did not voluntarily dismiss, it would seek dismissal from this Court. After consideration of the legal issues pending before this Court and the procedural posture of this case as well as case law regarding recantation, the undersigned notified Appellee's counsel that the State would not dismiss the cases with prejudice. Appellee has now filed a motion to dismiss.

## **III. Law and Argument**

### **A. The Requested Remedy**

The State begins its analysis by discussing the requested remedy, because that is critical to whether dismissal is appropriate. Appellant asks that the instant jurisdictional appeal be dismissed as improvidently granted because it "only addresses the question of proper jurisdiction of either the juvenile or adult division. This matter should be directed back to the Juvenile Court for disposition on the merits." Motion to

Dismiss, pg. 13. The remedy is problematic because Appellee assumes that the State's proposition of law is incorrect and that jurisdiction is appropriate in juvenile court. Moreover Appellee seeks action from a lower court on the merits. Whether the juvenile court has jurisdiction, to consider the merits, is the central issue in this case.

**B. Victim Recantation Is A Matter of Credibility To Be Determined By The Fact Finder and in Ordinary Circumstances Does Not Require Dismissal of and Indictment**

Procedurally, Appellee has only been charged with offenses and has not been convicted or adjudicated delinquent on any charges. The original juvenile complaint has been dismissed and the indictment has been dismissed. The order dismissing the indictment that also transfers the case to the juvenile court is the subject of this appeal.

Appellee broadly relies on *Williamson v. Rubich*, 171 Ohio St. 253, 168 N.E.2d 876 (1960), to argue this is an appropriate case for dismissal because the case on the merits is not the same as originally presented. Appellee argues that this Court can dismiss this case as improvidently granted, because the victim's alleged recantation makes this case different from when originally accepted. This case is distinguishable from *Rubich*. In *Rubich*, a party asked this Court to accept a case based on due process of law; however, on briefs and during arguments, the party argued extensively on the issue of res judicata (one that this Court had previously rejected), that same party made minimal references to the actual issue accepted for review. Under those circumstances, this Court found dismissal of the case appropriate, given that a different legal issue was

argued on the merits than the issue accepted for review. The facts of *Rubich* is more akin to a situation in which a party asks this Court to accept for review one proposition of law, but then on the merits, present a different one in its entirety. The issue presented by the State on the merits is the same issue presented in its jurisdictional memoranda. The factual issue Appellee now presents, is different from the jurisdictional issue that was accepted for review and not properly before this Court.

The alleged victim's recantation constitutes new facts but do not alter the facts which affect the jurisdictional question. In other words the recantation does not affect the timeline of when Appellee was charged in juvenile court and then indicted.

In criminal cases or delinquency cases it is not uncommon to have a victim recant. See for example, *Westlake v. Zidan*, 8<sup>th</sup> Dist. No. 93084, 2010-Ohio-1577 (domestic violence victim recantation). "A conviction is not based on insufficient evidence simply because the witness recants before the trial." *State v. Brown*, 9<sup>th</sup> Dist. No. 25287, 2011-Ohio-1041, ¶14. See also *State v. Byrd*, 2<sup>nd</sup> Dist. No. 24534, 2012-Ohio-1849, ¶10. Nor does a victim recantation at trial mean that any conviction will be found to be against the manifest weight of the evidence. See *State v. Garcia*, 8<sup>th</sup> Dist. No. 81609, 2003-Ohio-1352, ¶6-12. The manifest weight analysis, one that reviews factual issues, considers credibility of witnesses and ordinarily trial courts are given deference as they are in the best position to evaluate the credibility of witnesses. Recantations need not be believed, but in the context of motions for new trial, recantations have been described as being

viewed with suspicion as the person either lied at trial (or the prior statement) or lied in the current testimony. *State v. Gray*, 8<sup>th</sup> Dist. No. 92646, 2010-Ohio-11, ¶29. Whether the alleged victim's recantation is genuine remains an issue of fact that has yet to be determined and is unrelated to whether the juvenile court has jurisdiction. While at one time, trial courts had the discretion to dismiss indictments over the objection of the State, based on victim request, that is no longer the case. See *Akron v. Hockman*, 144 Ohio App.3d 262, 759 N.E.2d 1286 (9<sup>th</sup> Dist. 2001) recognizing abrogation of *State v. Busch*, 76 Ohio St.3d 613, 669 N.E.2d 1125 (1996). See also R.C. 2931.03.

Appellee questions whether the State can now prove their case in light of the alleged victim's recantation under the circumstances where Appellee has not been convicted or adjudicated delinquent of any crime. The answer to that question, which implicates sufficiency of the evidence, requires a resolution of the general issue to be determined at trial or in an adjudicatory hearing. Appellant's motion is the functional equivalent to a pre-trial motion to dismiss the indictment on factual issues to be determined at trial. It is well-settled that a motion to dismiss an indictment cannot require the determination of the general issue to be adjudicated at trial. See *State v. Palmer*, 131 Ohio St.3d 278, 2012-Ohio-580, 964 N.E.2d 406, ¶22 (explaining Crim. R. 12). Granting a motion to dismiss based on the issue of recantation would require a court to determine the general issue to be adjudicated at trial (that the accused did not commit the offense as charged). A similar rule exists under Juv. R. 22(D), which states that,

“any defense, objection or request which is capable of determination without *hearing on the allegations of the complaint may be raised before the adjudicatory hearing by motion.*” Juv. R. 22(D) (emphasis added).

The genuineness of the alleged victim’s recantation is one that inevitably will be addressed. The factual circumstances leading up to the victim’s recantation is one that should be dealt with at the trial level, whether it be jury trial, bench trial or adjudicatory hearing. The fundamental question the State seeks an answer to is which court has jurisdiction over Appellee. This Court needs to determine which court has jurisdiction to address any issue to be determined at trial, including issues of victim recantation.

**C. Issue in this Appeal Arising in the Future is not Unforeseeable**

Appellee argues that this purely jurisdictional question is unlikely ever to reoccur in this State within the next fifty years. It would not be unheard of for a juvenile to commit acts such as forcible rape. According to the U.S. Department of Justice, there were a reported total number of 15,586 arrests for forcible rape in 2010. Of that number 2,198 were under the age of 18. 7 were under the age of 10 and 195 were between the ages of 10 and 12. *Sourcebook of Criminal Justice Statistics Online*, <http://www.albany.edu/sourcebook/pdf/t472010.pdf>. Source: U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States, 2010*, Table 38 [Online]. Available: <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl38.xls> [Nov. 3, 2011]. In 2002, there were a reported 20,162

arrests for forcible rape. Of that number 3,361 were under the age of 18. 42 were under the age of 10 and 336 were between the age of 10 and 12. *Sourcebook of Criminal Justice Statistics*, pages 354, 355 relying on U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States*, 2002 (Washington, DC: USGPO, 2003), pp. 244, 245. Forcible rape can go unreported, especially in cases of young victims in which delayed disclosure can exist; therefore, an apprehension may not immediately occur.

#### IV. Conclusion

Victim recantation that arose after this case had been accepted for review should not serve as a basis to summarily affirm the Eighth District's decision below. The issue of victim recantation is a factual issue that involves credibility and should be addressed in the appropriate court. Resolution of the proposition of law will resolve which court has proper jurisdiction, whether it is the General Division or the Juvenile Division. Therefore, the State asks this Court to deny the Appellee's motion to dismiss.

Respectfully Submitted,

TIMOTHY J. McGINTY (0024626)  
Cuyahoga County Prosecutor

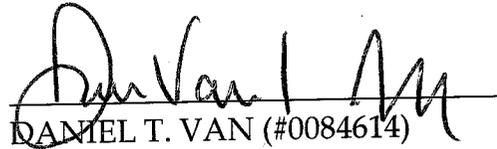
By:   
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**NOTICE OF ELECTRONIC SERVICE**

Pursuant to S.Ct.Prac.R. 3.11(B)(1), a copy of the foregoing Brief in Opposition to Motion to Dismiss Appeal As Being Frivolous and Motion to Dismiss Appeal as Being Improvidently Granted has been sent via electronic mail on this 17<sup>th</sup> day of January, 2013 to John Gibbons at [jgibbons4@sbcglobal.net](mailto:jgibbons4@sbcglobal.net).

  
DANIEL T. VAN (#0084614)