

ORIGINAL

IN THE SUPREME COURT OF OHIO

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| CITY OF CLEVELAND, |) | On Appeal from the Cuyahoga County |
| |) | Court of Appeals, |
| Appellee, |) | Eighth Appellate District |
| |) | |
| - vs - |) | |
| |) | Court of Appeals |
| ROBERT K. SCHMIDT, |) | Case No. CA-12-098603 |
| |) | |
| Appellant. |) | |

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MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT ROBERT K. SCHMIDT

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**EXPLANATION OF WHY THIS CASE INVOLVES SUBSTANTIAL
CONSTITUTIONAL QUESTIONS AND IS OF PUBLIC INTEREST OR GREAT
GENERAL INTEREST**

Unlawful police action by private entities gives rise to substantial constitutional questions of due process. If the people of Ohio have, through the acts of their legislature and executive officials, limited the scope of police authority of private officers, but those private officers step beyond the bounds of their authority to exercise police power without authorization, such police action is void.

The principal issue in this case, unauthorized exercise of private police power, is one of great general interest, as evidenced by prominent media coverage of such unauthorized exercise. It was twice front page news in Cleveland when a reporter discovered that a private hospital's police department issued thousands of traffic tickets and made arrests for years without legal authority. Sarah Jane Tribble, *Hospital Officers Just Kept Ticketing: MetroHealth Policing Authority Lapsed in '09*, Plain Dealer, Oct. 31, 2011, at A1; Sarah Jane Tribble, *MetroHealth Officers Lacked Legal Authority for Arrests: Kept Using Police Powers After Law Changed in '04*, Plain Dealer, Jan. 22, 2012, at A1. A few months earlier, the same newspaper reported on the front page of its Metro section that an alleged traffic violation was dismissed when a state university police department had no authority to seize the defendant. Michael K. McIntyre, *Cleveland State University Police Lacked Jurisdiction Beyond Campus for a Full Year*, Plain Dealer, May 14, 2011, at B1. In 2007 and 2008, public media detailed the lengthy battle over a controversial City plan to privatize Cleveland's airport police, highlighting the problem of lack of arrest powers by the proposed private officers, and the plan was ultimately abandoned. *See, e.g.,* John Caniglia & Henry J. Gomez, *Airport Police Plan a Mistake, Expert Says*, Plain Dealer, Sep. 26, 2007, at A1.

Police departments are traditionally understood as public governmental divisions

endowed by the people with the authority to guard the public peace, being ultimately answerable to the people through established democratic systems. However, statutory innovations have provided for the proliferation of numerous law enforcement organizations entitled to call themselves “police” under Ohio law. These include transit police (R.C. § 306.35(Y)), state university police (R.C. § 3345.04), hospital police (R.C. §§ 4973.17-.22), nonprofit corporation police (R.C. § 1702.80), and private campus police (R.C. § 1713.50).

Yet, many such police departments answer only to private masters, and not all private police are statutorily granted all of the same police powers as governmental police by default. The extents and limits of private police authority in public spaces is a concern of both public interest and great general interest. The public has privacy and freedom-of-travel interests in knowing who, among the many officers whose badges and vehicles label them as police, has lawful authority to impair individual liberty. There is also an important public interest in ensuring that the rule of law is not subverted to private interests through the unauthorized use of police power. This is especially true given that “private police have outnumbered public agents since the 1980s, and continue to grow at an exponential rate,” Alexander J. Furst, *State Regulation of Private Police and Security Agents* 1 (Master’s Thesis, Bowling Green State University, 2009), and given that Ohio is unique in allowing full arrest powers to certain non-peace officer private police, *id.* at ii and 35.

When the Appellant in the present case discovered that the private campus police who cited him with a traffic violation on a public street had no authority to do so, and promptly raised the issue with the trial court, the case against him should have been dismissed. Instead, he was convicted by a trial court that should have found that it lacked subject-matter jurisdiction to try the case. His conviction was affirmed by the Court of Appeals in a decision that cast aside the

reasoning of the trial court and substituted new reasoning, raising other fundamental constitutional issues of due process: Can the plain language of a criminal ordinance be ignored in upholding a conviction? Can a person be convicted of a crime not charged? Can the rule of lenity be cast aside in construing undefined statutory terms? If all of these questions may be resolved against the appellant in this case, then is not the ordinance under which he was charged and convicted left unconstitutionally vague?

Due process of law requires cases to be heard in courts of competent subject-matter jurisdiction, and subject-matter jurisdiction in a criminal proceeding depends upon the initiation of those proceedings with a valid charging instrument. A traffic ticket issued without the requisite traffic enforcement authority cannot be a valid charging instrument. Far from being “due process,” process that is void *ab initio* is no process at all.

Further, the Court of Appeals’ reinterpretation of the charge against the Appellant, contrary to the notice given him in the complaint and bill of particulars, prompts issues of fundamental constitutional import, including basic issues of statutory interpretation and due process, and raises the issue of whether the ordinance with which Appellant was convicted was void.

Also fundamental to our system of justice is that the nature of a charge not change between trial court and appellate court. Due process is lacking when an appellate court is permitted to reinterpret the charge against a defendant in a way that alters the definition of the charge given below. If the accusation is allowed to become a shifting target from one layer of review to the next, then the appellate process becomes a game of whack-a-mole. A charge changed at the appellate level, far from being “due process,” is inimical to justice and deserves to be addressed by this Court.

STATEMENT OF THE CASE AND FACTS

Around 2006, Case Western Reserve University (“CWRU”), a private nonprofit corporation in Cleveland, expanded its existing security department into a police department under new Revised Code Section 1713.50, which reads in relevant part:

The board of trustees of a private . . . university may establish a campus police department and appoint members of the campus police department to act as police officers. . . . Each member of a campus police department . . . is vested, while directly in the discharge of that member’s duties as a police officer, with the same powers and authority that are vested in a police officer of a municipal corporation Except as otherwise provided in this division, members of a campus police department may exercise, concurrently with the law enforcement officers of the political subdivisions in which the private college or university is located, the powers and authority granted to them . . . in order to . . . enforce the ordinances and regulations of the political subdivisions in which the private college or university is located, *but only on the property of the private . . . university that employs them*. The board of trustees . . . may enter into an agreement with any political subdivision pursuant to which the members of the campus police department of the . . . university may exercise within that political subdivision, but outside the property of the college or university, the powers and authority granted to them under this division. A member of a campus police department has no authority to serve civil process.

R.C. § 1713.50(B) and (C) (emphasis added).

In 2007, the City of Cleveland (“City”) executed an agreement with CWRU authorizing CWRU’s private campus police officers to exercise police authority off CWRU private property and within the City. By March 1, 2011, that agreement had expired and was not renewed.

More than eight months later, on the morning of November 7, 2011, Appellant Robert Schmidt (“Schmidt”) parked his car in the drive of a CWRU residential area for about six minutes while delivering groceries to his girlfriend, a resident employee of CWRU’s campus housing department. The drive features a 20-foot-wide cut eliminating the curb and a paved ramp crossing the sidewalk from the roadway to a paved area on CWRU property. No signs marked the private-property paved area drive as a no-parking area. No laws prohibited parking on the private-property paved area. Schmidt had previously observed the drive and paved area was used

daily for parking by CWRU vehicles and various other cars and delivery vehicles.

CWRU private campus police officer Jay Hodge (“Hodge”) observed Schmidt’s car parked with its front wheels upon the private-property paved area, and the rest of the car upon the public-property portion that was part of the street. As Hodge approached Schmidt’s car, Schmidt, his delivery completed, entered his car and drove away. Hodge made no attempt to stop him. Seconds later, Hodge activated his siren and lights, and Schmidt stopped immediately on the street. While on the public street, Hodge issued Schmidt a traffic ticket charging him with three traffic violations under the City of Cleveland Code of Ordinances (“C.C.O.”): driving on a sidewalk under C.C.O. § 431.37, willfully fleeing or eluding under C.C.O. § 403.02(b), and failure to wear a safety belt under C.C.O. § 437.27(b)(1). The latter two charges were subsequently nolle.

C.C.O. § 431.37 provides in full:

(a) No person shall drive any vehicle, other than a bicycle, upon a sidewalk or sidewalk area except upon a permanent or duly authorized temporary driveway or without first obtaining a permit from the Director of Public Service.

(b) No person shall drive a vehicle on a street lawn area or the curb of a street, except upon a permanent or duly authorized temporary driveway or when otherwise lawfully authorized.

C.C.O. § 401.54 defines “sidewalk” as “that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, intended for the use of pedestrians.” Thus, a sidewalk exists only in a street, which in turn is defined by C.C.O. § 406.61(a) as “the entire width between the boundary lines of every way open to the use of the public as a thoroughfare for purposes of vehicular travel.” A sidewalk, by legal definition, cannot exist outside of a street. The street in this case was public property, not private property.

The complaint against Schmidt—the Ohio uniform traffic ticket written by Hodge—stated that Schmidt was charged with “driving on side walk” and cited to C.C.O. § 431.37.

Noting that C.C.O. § 431.37 prohibits four distinct forms of conduct, Schmidt requested a bill of particulars from the City. The City's bill of particulars confirmed that the crime Schmidt was charged with was "driving on the sidewalk," and not any of the other forms of conduct listed in the ordinance. To quote the bill of particulars:

[A]t the above date and time, at the above location, the Defendant Robert K. Schmidt, in violation of section 431.37 of the Cleveland Codified Ordinances, did drive his vehicle upon the sidewalk.

To wit: The Defendant, Robert K. Schmidt, drove his car onto the sidewalk, parked the vehicle on the sidewalk, and left the vehicle parked on the sidewalk for approximately seven minutes.

"Sidewalk" being limited by its definition to the street, Schmidt's charge involved only conduct that occurred on the street, which was not CWRU property.

When Schmidt discovered that CWRU had no agreement with the City of Cleveland pursuant to R.C. § 1713.50(C), and thus that Hodge had no traffic enforcement authority upon the public streets, Schmidt moved for dismissal on that basis. If Hodge could not lawfully write the ticket, then the proceedings against Schmidt had not been initiated by a valid charging instrument, and the court lacked subject-matter jurisdiction. The trial court denied his motion, stating that the failure of the City to renew its agreement with CWRU was of no consequence and that CWRU police had police authority on the public street.

Schmidt pleaded no contest, was found guilty of "driving on the sidewalk," and appealed.

The Court of Appeals for the Eighth Appellate District agreed with Schmidt that "Hodge's authority to enforce local ordinances was confined to CWRU property." Court of Appeals Opinion, ¶ 7. Yet, it affirmed the denial of Schmidt's motion to dismiss, and upheld his conviction. The Court of Appeals reasoned that Schmidt's driving of his front wheels upon *CWRU private property* was, in fact, the traffic crime with which he was charged and convicted. This conduct, driving on private property, was not the traffic crime with which Schmidt was

charged and was not a violation of any traffic law.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: Where the law enforcement authority of a private police officer is limited to the private property of his employer, a traffic ticket issued by that officer for an offense that, by definition, can only take place outside such limits is a void charging instrument that vests no subject-matter jurisdiction in a trial court; a conviction upon such a charge is a nullity; and an affirmance of such a charge by a court of appeals violates the constitutional guarantee of due process.

A citation made without authority is void. “It is axiomatic that the filing of a valid complaint is a necessary prerequisite to a court’s acquiring [subject-matter] jurisdiction.” *City of Cleveland v. Castelli*, 8th Dist. No. 70540, 1996 Ohio App. LEXIS 5192, *4 (Nov. 21, 1996). A judgment rendered by a court lacking subject matter jurisdiction is void *ab initio*. *Patton v. Diemer*, 35 Ohio St.3d 68, 70, 518 N.E.2d 941 (1988). The issue of subject-matter jurisdiction cannot be waived or forfeited and can be raised at any time. *See, e.g., State v. Wilson*, 73 Ohio St. 3d 40, 46, 652 N.E.2d 196 (1995); *State ex rel. Jones v. Suster*, 84 Ohio St. 3d 70, 75, 701 N.E.2d 1002 (1998); Traf. R. 11(B)(1)(b). A judgment of conviction based on a faulty charging instrument is void for lack of subject-matter jurisdiction, and may be successfully attacked either on direct appeal to a reviewing court or by a collateral proceeding. *See State v. Cimpritz*, 158 Ohio St. 490, 494, 110 N.E.2d 416 (1953).

“Traffic” is defined as “pedestrians, ridden or herded animals, vehicles, streetcars, trackless trolleys, and other devices, either singly or together, while using any street or highway for purposes of travel.” C.C.O. § 401.66. Because, by definition, traffic can only take place on the street, traffic enforcement is the sole purview of police officers having authority on the street. Indeed, the Traffic Code defines “police officer” as “every officer authorized to direct or regulate traffic, or to make arrests for violations of traffic regulation.” C.C.O. § 401.41. It is the authority

that defines the title. So, too, with “law enforcement officer,” defined as being limited to one acting “within the limits of [the officer’s] statutory duty and authority.” C.C.O. § 601.01(k)(2).

CWRU private campus police officer Hodge had no traffic enforcement authority in this case. His authority was limited by statute to the private property of his employer and did not extend to the public streets because CWRU had no municipal authorization agreement.

As the Court of Appeals correctly noted, “Schmidt’s conviction . . . relates solely to driving illegally on a sidewalk.” Court of Appeals Opinion, ¶ 14. Sidewalk being defined as part of a street, C.C.O. § 401.54, the offense charged could only have taken place in a location where Hodge had no authority to cite Schmidt for it. Hodge had no authority to write a ticket to anyone for a misdemeanor traffic violation occurring off private CWRU property.

The right to due process is guaranteed under the Fourteenth Amendment to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution. Conviction upon an invalid complaint by a court lacking subject-matter jurisdiction, and affirmance of such a judgment by a court of appeals, violates a defendant’s constitutional right to procedural due process. This case thus raises a substantial constitutional due process question.

Proposition of Law No. 2: Where a criminal statute or ordinance is drawn in the alternative to proscribe more than one type of conduct, and the government elects in the complaint and bill of particulars to proceed with a charge of only one of the alternatives, convicting the defendant of an unelected alternative is a conviction of a crime not charged, violating the defendant’s constitutional right to due process.

Article I, Section 10 of the Ohio Constitution provides that “[i]n any trial, in any court, the party accused shall be allowed . . . to demand the nature and cause of the accusation against him, and to have a copy thereof.” For a traffic ticket to adequately charge an offense it must apprise the defendant of the nature of the charge and make reference to the statute or ordinance involved. *Barberton v. O’Connor*, 17 Ohio St.3d 218, 478 N.E.2d 803 (1985), ¶ 1 of the

syllabus.

Since the crime of “driving on a sidewalk” can only take place upon the street, where the charging officer had no authority, the Court of Appeals apparently held that Schmidt was not charged and convicted with “driving on a sidewalk,” but instead with “driving on a sidewalk area,” and that CWRU private property constituted a “sidewalk area.” Court of Appeals Opinion, ¶ 12.¹ Schmidt had no notice of this different charge. If, as the Court of Appeals suggests, this is actually the crime he was convicted of, then his conviction violates due process.

C.C.O. § 431.37 proscribes driving a vehicle on any of several places: a sidewalk, a sidewalk area, a street lawn area, and the curb of a street. As noted above, both the complaint (the traffic ticket) and the City’s bill of particulars specified that the charge against Schmidt was for driving on the sidewalk—and not any of the other alternatives. Schmidt’s only notice as to which of the four C.C.O. § 431.37 prohibitions he was charged with was as to “driving on a sidewalk”—not “driving on a sidewalk area.” Schmidt was never made aware of a secondary charge and had no proceeding wherein he could object.

A person cannot be convicted of a crime not charged. *Harper v. State*, 106 Ohio St. 481, 487, 140 N.E. 364 (1922). “Where a charge against an accused is drawn in the alternative, then an accused is entitled to be informed by a bill of particulars on which of the alternatives the state intends to proceed or whether it intends to proceed on both.” *State v. Fowler*, 174 Ohio St. 362, 366, 189 N.E.2d 133 (1963). *See also State v. Chaffin*, 30 Ohio St.2d 13, 282 N.E.2d 46 (1972) (holding that “[t]he purpose of a bill of particulars is to set forth specifically the nature of the offense charged . . .”). A court may not cure a defect in a charging instrument by looking

¹ Whether to emphasize or conceal this change in charge at the appellate level, the Court of Appeals’ quotation of the charged ordinance omits, without ellipsis or other indicator of excision, the very language of the crime originally charged. *See* Court of Appeals Opinion ¶ 9 (omitting the words “sidewalk or” from the quotation of C.C.O. § 431.37(a)).

outside the instrument to determine the nature of the charge. *See State v. Childs*, 88 Ohio St.3d 194, 198, 724 N.E.2d 781 (2000).

Because Schmidt had no notice that the charge against him was for “driving on a sidewalk area,” he had no opportunity to defend himself against that charge, did not plead to that charge, and his conviction violates due process rights under the U.S. and Ohio Constitutions.

Proposition of Law No. 3: Where a criminal statute or ordinance employs an undefined term that could be interpreted either narrowly or expansively, and only the expansive construction results in subject-matter jurisdiction for the court, conviction of the defendant of violating the statute or ordinance based on its expansive reading violates the rule of lenity, as codified in Revised Code Section 2901.04, violating the defendant’s constitutional right to due process.

Supposing that Schmidt was charged and tried with “driving on a sidewalk area,” then applying the rule of lenity, “sidewalk area” cannot lawfully be construed more expansively than “sidewalk,” and is limited to being on a street. This failure of statutory construction by the Court of Appeals was a constitutional deprivation that requires reversal by this Court.

Although the Traffic Code defines “sidewalk” in C.C.O. § 401.54 as being “that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, intended for the use of pedestrians,” the Traffic Code leaves “sidewalk area” undefined.

Since “sidewalk area” incorporates the word “sidewalk,” the most reasonable interpretation of “sidewalk area” is that it is no more territorially expansive than “sidewalk,” and is limited to a street area between roadway and property line. This interpretation is consistent with all other known uses of the phrase,² and also with the notion that the Traffic Code defines

² *See* C.C.O. §§ 431.11, 457.07, 698A.99; *Rowe v. Cincinnati*, 117 Ohio St. 382, 390-91, 159 N.E. 365 (1927) (“Abutting owners have no peculiar rights in sidewalk area of a street superior to those they have in any other portion of street.”); *Thien v. Belleville*, 331 Ill. App. 337, 339-40, 73 N.E.2d 452 (1947) (“while walking in the sidewalk area (no sidewalk having been constructed) . . . The sidewalk area—that is, the area between the curb and the property line—has never been improved.”).

violations upon the streets, since “traffic” is limited by definition to activity upon the streets.

The rule of lenity “ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.” *United States v. Lanier*, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997). Under the rule of lenity, penal laws must be strictly construed against the state and literally construed in favor of the accused. *See* R.C. § 2901.04(A) (codifying the common-law rule of lenity); *State v. Quisenberry*, 69 Ohio St. 3d 556, 634 N.E.2d 1009 (1994); *Liparota v. United States*, 471 U.S. 419, 427, 85 L. Ed. 2d 434, 105 S. Ct. 2084 (1985). Due process demands application of the rule of lenity in this case.

The Court of Appeals apparently proposes that a “sidewalk area” can include a private-property area outside of a street, since this is the only area where Hodge had police authority. Given that the term may be construed either narrowly or expansively, and the narrow construction would favor Schmidt by resulting in the lack of subject-matter jurisdiction for the court, the narrow construction must be adopted under the rule of lenity and due process. The failure of the Court of Appeals to apply the rule created a substantial constitutional question.

Proposition of Law No. 4: The application of a novel construction of a traffic ordinance to conduct that neither the ordinance nor any prior judicial decision has fairly disclosed to be within its scope violates the constitutional guarantee of due process.

When an “unforeseeable state court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime.” *Bouie v. Columbia*, 378 U.S. 347, 354-55, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964). The Court of Appeals’ construction thus violates Schmidt’s constitutional right to due process.

The Court of Appeals applied a novel construction of the term “sidewalk area” and found that the private-property area where the front wheels of Schmidt’s car drove constituted a

sidewalk area. The Court of Appeals found that the private-property area was a sidewalk area solely because it was “paved with bricks encircling a sculpture” and surrounded by “walkways” “paved with concrete.” Court of Appeals Opinion ¶ 12. The Court of Appeals also decided, despite Schmidt’s many photographs showing vehicles using the area for driving and parking, that the private-property area was “intended for pedestrian traffic,” *id.* but that finding is a contradiction since “traffic,” as defined, can only be upon a street, C.C.O. § 401.66, and not on a private lot.

“Sidewalk area” is a term from the Traffic Code, which body of law governs conduct on the streets. To construe “sidewalk area” as including any private-property area simply because it is paved and pedestrians may walk upon it is to apply a novel construction not found anywhere in the Traffic Code or in any case interpreting it. No fair warning could have been given to Schmidt, or anyone else, that driving on the CWRU private-property area was proscribed by any traffic law. The Court of Appeals’ construction thus presents a substantial constitutional issue.

Proposition of Law No. 5: Cleveland Municipal Code Section 431.37(a) is unconstitutionally vague, either facially or as applied, since it does not permit a person of ordinary intelligence a reasonable opportunity to know what behavior is prohibited, allows for arbitrary enforcement, and permits a court to determine, *ex post facto*, what conduct is proscribed.

C.C.O. § 431.37(a) is void for vagueness. As this Court recently held:

“A statute may be challenged as unconstitutional on the basis that it is invalid on its face or as applied to a particular set of facts. *See, e.g., United States v. Eichman* (1990), 496 U.S. 310, 312, 110 S.Ct. 2404, 110 L.Ed.2d 287. In an as-applied challenge, the challenger ‘contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, [is] unconstitutional.’ *Ada v. Guam Soc. of Obstetricians & Gynecologists* (1992), 506 U.S. 1011, 113 S.Ct. 633, 121 L.Ed.2d 564 (Scalia, J., dissenting).” *State v. Lowe*, 112 Ohio St.3d 507, 2007 Ohio 606, 861 N.E.2d 512, ¶ 17.

* * *

Due process is not satisfied if a statute is unconstitutionally vague. *Skilling v. United States* (2010), ___ U.S. ___, 130 S.Ct. 2896, 2928, 177 L.Ed.2d 619. “A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to

understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement. *Chicago v. Morales*, 527 U.S. 41, 56-57, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999).” *Hill v. Colorado* (2000), 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597.

The United States Supreme Court has identified the second reason as the primary concern of the vagueness doctrine: “[T]he more important aspect of vagueness doctrine ‘is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.’ *Smith [v. Goguen]* (1974), 415 U.S. [566, 574, 94 S.Ct. 1242, 39 L.Ed.2d 605]. * * * Where the legislature fails to provide such minimal guidelines, a criminal statute may permit ‘a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.’ *Id.*, at 575, 94 S.Ct. at 1248.” *Kolender v. Lawson* (1983), 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903. This prong of the vagueness doctrine not only upholds due process, but also serves to protect the separation of powers: “It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.” *United States v. Reese* (1876), 92 U.S. 214, 221, 23 L.Ed. 563.

In re D.B., 129 Ohio St.3d 104, 2011-Ohio-2671, 950 N.E.2d 528, ¶¶ 12, 22-23.

C.C.O. § 431.37(a) proscribes two different kinds of conduct: driving on a “sidewalk” or a “sidewalk area” with a vehicle other than a bicycle. “Sidewalk area” being undefined by the code, one is left to guess at its meaning. The Court of Appeals construed “sidewalk area” to include any non-street, private-property paved area upon which pedestrians may tread. Under this construction, if a property owner paves a garden walkway on his property, and then drives his riding mower upon it, he could be charged and convicted of driving upon a “sidewalk area.” One might think that such conduct could not possibly be what is included as criminal by the ordinance, but driving upon a private-property walkway is precisely the conduct that Schmidt was convicted of in the instant case, according to the Court of Appeals.

Although the ordinance provides an exception for being on a driveway, one is also left to guess at the meaning of “driveway.” The only definition of “driveway” is provided in C.C.O. § 401.41 as “every way or place in private ownership used for vehicular travel by the owner and

those having express or implied permission from the owner, but not by other persons.” If that is the only applicable definition of “driveway,” then the driveway exception, being limited to a private property area, could never have any applicability to the violation of “driving on the sidewalk,” since “sidewalk” is defined as being part of the public street. Without a more expansive definition of “driveway,” every motorist whose home driveway intersects with a public sidewalk commits a criminal act each time he or she pulls in or out of his or her driveway, crosses the property line, and drives over the sidewalk. The crime is repeated on returning home, when pulling back in. The exception is thus inoperative to keep from criminalizing necessary everyday behavior, and as such, the ordinance allows for arbitrary enforcement. Ohioans would be astonished to learn that police could cite them simply for using their driveways to access the street from their homes, or their homes from the street.³

Contrary to the Court of Appeals finding, the paved area met the definition of driveway. Undisputed photographic evidence of record showed that CWRU vehicles and other vehicles frequently used the private-property paved area for travel, entering and exiting using the same driveway Schmidt used. See Court of Appeals Opinion, ¶ 29. The *ex post facto* expansive application of the Court of Appeals definition of “sidewalk area” unconstitutionally denied Schmidt due process.

Proposition of Law No. 6: Discriminatory enforcement of the traffic laws by a private police department for the benefit of a private employer violates the constitutional guarantee of equal protection.

Just as equal protection demands there not be one set of laws for the poor and another for the rich, private police should not be permitted to arbitrarily enforce the traffic laws for the private benefit of their employer and to the detriment of the public.

³ Although Schmidt was charged with, and this memorandum has cited to, the ordinances of the Cleveland Traffic Code, identical (or nearly-identical) counterpart provisions may be found in the Traffic Code of the Ohio Revised Code, R.C. § 4511 *et seq.* See, e.g., R.C. § 4511.711.

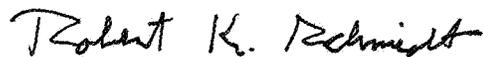
Undisputed evidence of record proved that CWRU private police refused to ticket CWRU vehicles that drove and parked in the very same area where Schmidt did. The Court of Appeals ignored or mischaracterized the evidence to find that Schmidt failed to meet his evidentiary burden to prove selective enforcement. *See* Court of Appeals Opinion ¶ 29.

The Supreme Court should assume jurisdiction to clarify the level of evidentiary burden imposed upon a defendant claiming selective prosecution, and to clarify whether certain arbitrary enforcement is evidence of bad faith *per se*, as this Court appeared to hold in *City of Cleveland v. Trzebuckowski*, 85 Ohio St. 3d 524, 709 N.E.2d 1148 (1999).

CONCLUSION

This case involves an area of law that concerns potentially every Ohio motorist. Private police officers should not be permitted to make stops and issue citations on public streets outside the scope of their statutory authority, absent an express public grant of expanded authority. Except by law, the public does not cede police powers to private entities. Moreover, municipal courts must not be permitted to exceed their subject-matter jurisdiction to protect wayward private police. A court's re-inventing legislative intent to protect unauthorized police actions is legally unacceptable. This court should accept jurisdiction not only to protect Ohioans, but to explicitly define the relevant statutory law and the limits of subject-matter jurisdiction.

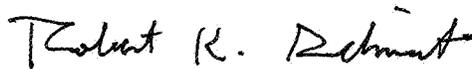
Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum was duly served upon Angela Rodriguez, Assistant City Prosecutor, at 1200 Ontario Street, 8th Floor, Cleveland OH 44113, via regular U.S. mail this 28th day of August, 2013.



Robert K. Schmidt
pro se

APR 18 2013

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 98603

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

ROBERT K. SCHMIDT

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2011 TRD 062659

BEFORE: E.T. Gallagher, J., Stewart, A.J., and Kilbane, J.

RELEASED AND JOURNALIZED: April 18, 2013

VOE0770 PB0887



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

APR 18 2013

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EILEEN T. GALLAGHER, J.:

{¶1} Robert Schmidt ("Schmidt") appeals a judgment from the Cleveland Municipal Court finding him guilty of driving on sidewalks. He also appeals the denial of his motion to dismiss. We find no merit to the appeal and affirm.

{¶2} Schmidt was charged by Case Western Reserve University campus police with three violations: willfully fleeing and eluding, driving on sidewalks, and driving without a seatbelt. At a hearing on his motion to dismiss, Schmidt testified that he parked his car on the southeast corner of Parcel 94, which is Case Western Reserve University ("CWRU") property. The front end of his car passed over the sidewalk so that the front half of his car was on CWRU property and the rest of his car was on the city of Cleveland sidewalk. He had parked there for approximately six minutes while he dropped off groceries at a nearby dormitory where his girlfriend lived.

{¶3} Sergeant Jay Hodge ("Hodge") of the CWRU police department testified that as he was patrolling Juniper Drive, a residential street that runs through the CWRU campus, he observed Schmidt's car parked on the sidewalk with the hazard lights flashing. The wheels of the car were resting on bricks that surround a sculpture. Behind the sculpture, there was a fence with an opening to pedestrian walkways that lead to several dormitories. Hodge testified that this was not a parking area. As Hodge approached the car, Schmidt sprinted out of a dorm, got into the car, and drove away. Hodge activated his

siren and lights, Schmidt stopped, and Hodge issued two traffic citations and the fleeing and eluding citation.

{¶4} A jury trial began in the Cleveland Municipal Court on May 22, 2012. However, after completing voir dire and opening statements, the parties reached a plea agreement, and Schmidt pleaded no contest to the charge of driving on sidewalks, a minor misdemeanor. The other two charges were dismissed. Schmidt now appeals and raises seven assignments of error.

CWRU Police Jurisdiction

{¶5} In the first assignment of error, Schmidt argues that his conviction is void because Hodge, who was acting as a private campus police officer, did not have authority to issue the traffic citations against him. In his third assignment of error, he argues the trial court erred in denying his motion to dismiss for lack of jurisdiction. We discuss these assigned errors together because they are closely related.

{¶6} R.C. 1713.50(C), which governs the jurisdiction of private campus police, provides:

Each member of a campus police department appointed under division (B) of this section is vested, while directly in the discharge of that member's duties as a police officer, with the same powers and authority that are vested in a police officer of a municipal corporation or a county sheriff under Title XXIX of the Revised Code and the Rules of Criminal Procedure, including the same powers and authority relating to the operation of a public safety vehicle that are vested in a police officer of a municipal corporation or a county sheriff under Chapter 4511 of the Revised Code. * * * The board

of trustees of a private college or university may enter into an agreement with any political subdivision pursuant to which the members of the campus police department of the college or university may exercise within that political subdivision, *but outside the property of the college or university*, the powers and authority granted to them under this division. A member of a campus police department has no authority to serve civil process. (Emphasis added.)

{¶7} Thus, R.C. 1713.50 grants campus police officers the powers and authority to enforce the ordinances of the political subdivisions in which the private college or university is located on campus property. It may also authorize campus police to enforce local ordinances on city streets, sidewalks, and areas "outside the property of the college or university" as long as the campus police act pursuant to a valid mutual aid agreement. In this case, the mutual aid agreement between CWRU and the city of Cleveland was expired at the time Schmidt received his citations. In the absence of such an agreement, Hodge's authority to enforce local ordinances was confined to CWRU property.

{¶8} Schmidt contends the CWRU police did not have authority to issue a traffic citation because, under R.C. 1713.50, they have no authority to serve civil process. In support of his argument, Schmidt relies on Cleveland Codified Ordinances ("CCO") 459.02, which states that parking infractions are not criminal offenses. Therefore, Schmidt claims, the issuance of traffic tickets constitutes the illegal service of process. We disagree.

{¶9} Schmidt was convicted of violating CCO 431.37, which states: “No person shall drive any vehicle, other than a bicycle, upon a sidewalk area except upon a permanent or duly authorized temporary driveway.” (Emphasis added.) The ordinance proscribes driving on sidewalk areas. Therefore, CCO 459.02, which governs civil liability for parking infractions, is inapplicable.

{¶10} Further, in *Warren v. Hill*, 11th Dist. No. 2003-T-0069, 2004-Ohio-6946, the court noted that, although an ordinance may state that parking infractions “shall not be considered a criminal offense for any purpose,” such infractions are not actually decriminalized if they constitute minor misdemeanors. *Id.* at ¶ 21. In reaching its holding, the *Hill* court noted that the ordinance specifically stated that a violation of the ordinance is a minor misdemeanor.

{¶11} Violation of CCO 431.37 is not a parking violation, but is a minor misdemeanor. It is a criminal offense, and the issuance of the traffic ticket did not constitute service of civil process. Therefore, CWRU police had authority to issue traffic tickets.

{¶12} Schmidt admitted that the front end of his car was parked on CWRU property. The CWRU property was not “a permanent or duly authorized temporary driveway.” According to Hodge, parking was prohibited in this area. Photographs of the scene show that the area is intended for pedestrian traffic. It is a sidewalk area paved with bricks encircling a sculpture. The walkways

around the sculpture are paved with concrete. The front end of Schmidt's car was parked on the bricked sidewalk area and the back end of his car was blocking the entrance to a crosswalk.

{¶13} Schmidt contends, as he did in his motion to dismiss, that the area was "a permanent or duly authorized temporary driveway." In support of his argument, he offered into evidence numerous photographs of cars parked in the area. However, these photographs depict cars parked haphazardly. None of the cars are parked in the same spot twice, and there are no painted lines to inform drivers how or where to park. The photographs tend to show that cars often park on the sidewalk area illegally rather than proving that the bricked area with a sculpture was a "duly authorized temporary driveway." Furthermore, Schmidt left his hazard lights flashing, which suggests he knew that driving and parking in this area was illegal. Therefore, despite Schmidt's statements to the contrary, this was neither a driveway nor a parking area.

{¶14} Schmidt's conviction, which relates solely to driving illegally on a sidewalk, was within both the officer's authority and the court's jurisdiction. The front end of his car was resting on CWRU property, which was not an authorized driveway. R.C. 1713.50(C) authorizes campus police officers to issue citations for local ordinance violations that occur on campus property even in the absence of a mutual aid agreement. Therefore, the court properly denied Schmidt's motion to dismiss the charge for lack of jurisdiction.

{¶15} Therefore, the first and third assignments of error are overruled.

Finding of Guilt

{¶16} In the second assignment of error, Schmidt argues the trial court erred in finding him guilty. He contends the trial court breached its duty to find him not guilty where it was apparent that he was innocent.

{¶17} Pursuant to R.C. 2937.07, a judge may make a guilty or not guilty finding from the explanation of the circumstances of the offense. For a plea to a minor misdemeanor, a judge is not required to call for an explanation of the circumstances of the offense and may base a finding on the facts alleged in the complaint. R.C. 2937.07.

{¶18} By the time Schmidt entered his no contest plea, the trial court had already reviewed photographs of the area and heard testimony regarding the events giving rise to this case. As previously explained, the evidence presented at the hearing demonstrated that Schmidt illegally drove his car on a sidewalk area. When he parked, the front end of his car was resting on the bricked sidewalk area, which was CWRU property. Under these circumstances, the court was justified in finding Schmidt guilty of driving on a sidewalk.

{¶19} Therefore, the second assignment of error is overruled.

Discovery

{¶20} In the fourth assignment of error, Schmidt argues the trial court erred when it denied his motion for discovery of particular material and his

renewed motion for discovery of particular material. He contends the prosecution willfully withheld evidence from him, claiming it could not be obtained from CWRU, which was a private corporation not subject to public record laws.

{¶21} Crim.R. 16(B)(1)(f) requires the prosecutor to disclose "all evidence * * * favorable to the defendant and material either to guilt or punishment." The rule's language, "favorable to the defendant and material to guilt or punishment," comes directly from *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed 2d 215 (1963), which held that the state must disclose "evidence favorable to an accused * * * where the evidence is material either to guilt or to punishment." Therefore, the terms "favorable" and "material" in Crim.R. 16(B)(1)(f) have the same meaning as they do in *Brady* and its progeny. *State v. Keene*, 81 Ohio St.3d 646, 1998-Ohio-342, 693 N.E.2d 246.

{¶22} While *Brady* recognizes that the state may not withhold "material, exculpatory evidence," the prosecutor is not required to produce the entire file to the defense. He or she is only required to produce evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Favorable evidence under *Brady* includes both exculpatory and impeachment evidence, but the evidence must be both favorable and material before disclosure is required. *Id.*, citing *Bagley*, 473 U.S. at 674. Evidence is material under *Brady* only if

there exists a "reasonable probability" that the result of the trial would have been different had the evidence been disclosed to the defense. *Id.*, citing *Kyles v. Whitley*, 514 U.S. 419, 433, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), quoting *Bagley* at 682.

{¶23} In the instant case, Schmidt claims the prosecution should have produced additional audio and video recordings of the incident as well as additional written and/or electronic documents generated by CWRU police as a result of Schmidt's citations. He claims this evidence could have been used to impeach Hodge's testimony. However, Hodge's testimony and the photographs taken at the scene demonstrate that Schmidt's car was straddling the sidewalk and resting on CWRU property. The property was neither a driveway nor a parking lot, and driving in that location was prohibited. Therefore, Schmidt fails to establish that the result of the trial would have been different had the requested discovery been produced.

{¶24} Accordingly, the fourth assignment of error is overruled.

Selective Prosecution

{¶25} In the fifth assignment of error, Schmidt argues the trial court erred in denying his motion to dismiss on the basis of selective prosecution. He contends the driving on sidewalks charge should have been dismissed because the prosecutor singled him out for prosecution in bad faith. He asserts that he

was charged and prosecuted solely because he was not a CWRU student or faculty member.

{¶26} The decision whether to prosecute a criminal offense is generally within the prosecutor's discretion. *United States v. Armstrong*, 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). That discretion is, however, subject to constitutional equal-protection principles, which prohibit prosecutors from selectively prosecuting individuals based on "an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.*, quoting *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). Although a selective-prosecution claim is not a defense on the merits to the criminal charge itself, a defendant may raise it as an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution. *Armstrong*, 517 U.S. at 463.

{¶27} To establish a selective prosecution defense, a criminal defendant must make a prima facie showing:

(1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

State v. Flynt, 63 Ohio St.2d 132, 134, 407 N.E.2d 15 (1980).

{¶28} The defendant's burden of establishing discriminatory prosecution is a heavy one. *State v. Freeman*, 20 Ohio St.3d 55, 58, 485 N.E.2d 1043 (1985). "The mere failure to prosecute other violators of the statute which appellants were charged with violating does not establish the defense of selective prosecution." *Id.* Selectivity in enforcement does not constitute a constitutional violation unless the discrimination is "intentional or purposeful." *Flynt* at 134, quoting *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397, 88 L.Ed. 497 (1944). Moreover, the mere existence of a potential discriminatory purpose does not, by itself, show that such purpose motivated a particular defendant's prosecution. *Freeman* at 58.

{¶29} Schmidt fails to meet his burden of proving selective prosecution. In support of this defense, he provided several photographs of vehicles, purportedly owned and operated by CWRU personnel and students, that were parked on the sidewalk without being ticketed. However, he did not provide any evidence to establish that these vehicles were not, in fact, ticketed. He also failed to provide any evidence of bad faith. There is simply no evidence that the law was exclusively enforced against a particular class of persons such that the enforcement constituted a violation of Schmidt's right to equal protection of the law. Therefore, the trial court properly denied Schmidt's motion to dismiss.

{¶30} The fifth assignment of error is overruled.

Judicial Notice of Statutory Laws

{¶31} In the sixth assignment of error, Schmidt argues the trial court erred in denying his request that the court take judicial notice of applicable municipal ordinances and statutes.

{¶32} Evid.R. 201 governs the trial court's ability to take judicial notice of adjudicative facts, or the facts of the case. Civ.R. 44.1(A)(1) governs the court's ability to take judicial notice of law. It states, "[j]udicial notice shall be taken of the rules of the supreme court of this state and of the decisional, constitutional, and public statutory law of this state."

{¶33} In this case, Schmidt requested that the court take judicial notice of the following proposed statements of law:

(1) A private university campus police officer has no authority to serve a City of Cleveland municipal parking ticket.

(2) Absent authorization by an effective agreement with the City of Cleveland, a private university campus police officer has no authority to make stops or arrests for misdemeanors occurring on Cleveland municipal streets or sidewalks. (See Defendant's notice of reliance on municipal ordinances and state statutes and request for judicial notice to be taken thereof p. 1.)

{¶34} It is well established that a trial court is presumed to know the applicable law and apply it accordingly. *Bush v. Signals Power & Grounding Specialists, Inc.*, 5th Dist. No. 08 CA 88, 2009-Ohio-5095, ¶ 17. The trial court denied Schmidt's request to take judicial notice of the two statements of law, but stated it would consider his arguments and apply the law accordingly.

{¶35} Furthermore, the first proposed statement is not an accurate interpretation of the law. As previously stated, R.C. 1713.50 authorizes campus police officers to enforce municipal ordinances on campus property. Enforcement mechanisms include the issuance of traffic tickets, if the traffic infraction occurs on campus property. By Schmidt's own admission, he drove the front end of his car onto CWRU property, and therefore into the jurisdiction of the CWRU campus police. Therefore, we find no error in the trial court's decision denying the motion to take judicial notice.

{¶36} The sixth assignment of error is overruled.

Prosecutorial Misconduct

{¶37} In the seventh assignment of error, Schmidt argues the trial court erred in denying his motion to dismiss on the basis of prosecutorial misconduct. He contends the prosecutor's offer to dismiss the charges against him in exchange for release of claims against CWRU police for any civil liability arising out of Schmidt's arrest constituted misconduct and warranted dismissal of the complaint.

{¶38} The United States Supreme Court has held that a prosecutor may appropriately negotiate an agreement whereby criminal charges are dropped in exchange for a release of 42 U.S.C. 1983 claims against a city and municipal officials. *Newton v. Rumery*, 480 U.S. 386, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987). As the court noted, "[i]n many cases a defendant's choice to enter into a

release-dismissal agreement will reflect a highly rational judgment that the certain benefits of escaping criminal prosecution exceed the speculative benefits of prevailing in a civil action." *Id.* at 394. As to the prosecutor's motivation, the court refused to assume that a prosecutor would bring frivolous charges or dismiss meritorious charges. *Id.* at 396.

{¶39} Dismissal-release agreements are not per se invalid. The *Newton* court acknowledged that such agreements may further legitimate public interests. *Id.* at 397. Where photographs and testimony establish that Schmidt's car was parked illegally on a sidewalk and CWRU property, the prosecution had probable cause to pursue the charges against him. Under these circumstances, we find that the prosecutor did not commit any misconduct in offering Schmidt the opportunity to sign a release of civil liability in return for a dismissal of his case.

{¶40} Accordingly, the seventh assignment of error is overruled.

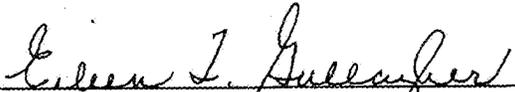
{¶41} Judgment affirmed.

It is ordered that appellee recover from appellant 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 Cleveland Municipal Court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

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


EILEEN T. GALLAGHER, JUDGE

MELODY J. STEWART, A.J., and
MARY EILEEN KILBANE, J., CONCUR

The State of Ohio, } ss.
Cuyahoga County.

I, [redacted] Clerk of the Court of

Appeals within and for said County, and in whose custody the files, Journals and records of said Court are

required by the laws of the State of Ohio, to be kept, hereby certify that the foregoing is taken and copied

from the Journal entry, volume 170 page 997 dated: 4/19/13 CA 99403

of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing

copy has been compared by me with the original entry on said Journal entry, vol. 170 pg. 997

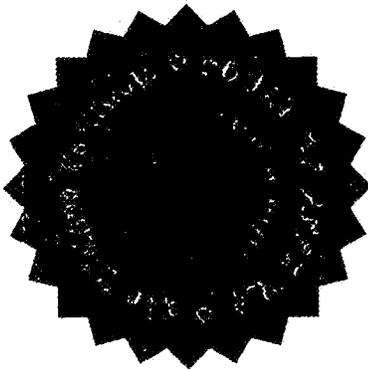
dated: 4/19/13 and that the same is correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially,
and affix the seal of said court, at the Court House in the City of
Cleveland, in said County, this

day of April A.D. 20 13

[redacted] Clerk of Courts

By [signature] Deputy Clerk



Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

CITY OF CLEVELAND

Appellee

COA NO.
98603

LOWER COURT NO.
2011 TRD 062659

CLEVELAND MUNI.

-vs-

ROBERT K. SCHMIDT

Appellant

MOTION NO. 464472

Date 07/15/13

Journal Entry

Motion by appellant, pro se, for reconsideration is denied.

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ALL PARTIES.-COSTS TAXED

RECEIVED FOR FILING

JUL 15 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By [Signature] Deputy

PROCESSED

JUL 16 2013

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
RECORDS DEPARTMENT

Adm. Judge, MELODY J. STEWART, Concur

Judge MARY EILEEN KILBANE, Concur

[Signature]
EILEEN T. GALLAGHER
Judge

