

ORIGINAL

No . 2012-0216

IN THE SUPREME COURT OF OHIO

APPEAL FROM THE SUMMIT COUNTY COURT OF APPEALS
NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO
Appellate Case No. 24894

STATE OF OHIO,
Plaintiff/Appellee

v.

DAVID WILLAN,
Defendant/Appellant

State of Ohio
Memorandum Contra Motion to Remand

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SUPREME COURT OF OHIO

Now comes the Plaintiff/Appellee State of Ohio and respectfully urges this Court deny the instant Motion to Remand filed by Defendant/Appellant Willan. Contrary to Willan's position that a remand of this case, prior to a decision by this Court, would somehow "save judicial resources" a remand prior to a decision by this Court would almost certainly guarantee further appellate proceedings.

Willan was convicted of multiple felonies subsequent to his trial in this case. The felonies consisted of Engaging in a Pattern of Corrupt Activity [*RICO*], Theft, Theft from the Elderly, and five separate counts of False Representations in the Registration of Securities [False Representations]. The *Willan* Indictment on the *RICO* charge identified that the incidents of Corrupt Activity involved the crimes of Theft, Theft from the Elderly, and the five separate counts of False Representations.

The Ninth Appellate District reversed the convictions on Theft, Theft from the Elderly, and two of the five counts of False Representations, three of the convictions for False Representations and the *RICO* conviction remained intact. Under the relevant statute, *Ohio Revised Code Section 1707.99(E)*, [hereinafter *RC*] False Representations, is a first degree felony where the amount of the securities involved are one hundred thousand dollars or more. *Exhibit 1*.

The Ninth Appellate District also determined that the Ohio sentencing statute, *RC 2929.14(D)(3)(a)*, *Exhibit 2*, which establishes a ten year mandatory minimum sentence when an offender is convicted of a pattern of corrupt activity where the most serious offense in the pattern of corrupt activity is a first degree felony, was ambiguous and, therefore, could not be applied to the sentence *Willan* received for the conviction on the *RICO* count.

This Court accepted the State's appeal of the Ninth Appellate District's decision, that the State's sentencing statutes did not establish a mandatory minimum sentence for a conviction for Corrupt Activity, where the predicate crime was a first degree felony. The Ninth Appellate District was reversed on that point of law by this Court. *See State v. Willan*, 2013-Ohio-2405 (2013). The effect of that decision was to reinstate the sentence Willan originally received for his Corrupt Activity conviction. Should this Court determine that the U.S. Supreme Court case of *Alleyne v. US*, 570 US ___, 133 S.Ct. 2151 (2013) does not apply when a trial court simply recognizes that a statute makes a specific crime a first degree felony, subject to a mandatory sentence, there will be no further state appellate proceedings. Willan will simply serve out the remainder of the sentence untouched by the Ninth Appellate District subsequent to the original decision by this Court.

Here, Willan proceeds from the position that somehow it is a foregone conclusion that *Alleyne* applies in this case. However, that is the precise issue this Court was asked to consider by the U.S. Supreme Court when it remanded the case to the "Supreme Court of Ohio." Moreover, while Willan complains that his original sentence on the conviction for engaging in a pattern of corrupt activity constitutes impermissible judicial factfinding, Willan ignores that the U.S. Supreme Court also recognized that *Alleyne*:

***does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.

Id. at 2163. The exercise of [sentencing] discretion does not contravene the Sixth Amendment even if it is informed by judge-found facts. *Id.*, citing *Dillon v. United States*, 560 US 817, 130 S.Ct. 2683, 2692 (2010).

In this case, the “judicial factfinding” *Willan* decries as contrary to the *Alleyne* decision, constitutes nothing more than a judicial recognition of the fact that the legislature made the specific crime *Willan* was convicted of, a first degree felony. Moreover, the judicial recognition that a statute makes a specific crime a certain degree of felony is consistent with the US Supreme Court recognition that:

***Nothing in this history suggests that it is impermissible for judges to exercise discretion-taking into consideration various factors relating both to offense and offender-in imposing a judgment *within the range* prescribed by statute.

Id., citing *Apprendi v. New Jersey*, 530 US 466, 481(2000).

There is no language in *Alleyne* that eliminates a court’s capacity to recognize the limitations, or boundaries, that the Ohio Legislature established on the ability of a trial court to sentence an offender such as *Willan*. First, the Ohio Corrupt Activity statute identifies that a Pattern of Corrupt Activity means “***two or more incidents of corrupt activity,***” Ohio Revised Code Section 2923.31(E). *Exhibit 3*. The statute goes on to further specify that a violation of RC 1707.44(B), False Representations, is a Corrupt Activity. RC 2923.31(I)(2). *Exhibit 4*.

Second, the crime of False Representations, which the Ohio Legislature designated as a predicate crime forming the basis of a Pattern of Corrupt Activity, is a first degree felony where the value of the securities involved is one-hundred thousand dollars or more. *See Ohio Revised Code Section 1707.99(E). Exhibit 1*. Thus, where a jury finds a defendant committed all the elements of the offense of False Representations in the Registration of Securities, it is a first degree felony. There is no additional aggravating fact the jury must find.

Here, the jury was specifically instructed that, as an element of the offense, they must determine whether the value of the securities involved fell within the range that established a first degree felony, *i.e. one hundred thousand dollars or more. See Jury Instructions, Exhibit 5.* Moreover, the verdict forms then required the jury to identify the value of the securities involved in each Count. *Exhibits 6, 7, 8.* When the jury found the fact that the value of the securities involved in *Willan's* crimes were one hundred thousand dollars or more, and identified that on the relevant jury verdict forms, *the jury made the factual findings* that established *Willan* was guilty of a first degree felony.

Finally, as this Court recognized, Ohio's sentencing statute establishes a ten year mandatory sentence when:

the court imposing sentence finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree,***

*RC 2929.14(D)(3)(a).*¹ *Exhibit 2.*

Conclusion

Here, the contention that *Alleyne* requires a further remand of this case willfully ignores the fact that the trial court merely recognized the proper range for the penalty established by the statute, *in light of the facts found by the jury*, when *Willan* was sentenced. A remand prior to a decision by this Court on whether *Alleyne* does or does not apply essentially guarantees that which *Willan* claims would be avoided, *i.e.* an unnecessary expenditure of judicial resources. The State respectfully urges this Court deny the instant Motion to Remand.

¹ *RC 2929.14(D)(3)(a)* was renumbered as *RC 2929.14(B)(3)*.

Respectfully Submitted,

Sherri Bevan Walsh
Summit County Prosecutor



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Certificate of Service

This is to certify that the foregoing **State of Ohio Memorandum Contra Motion to Remand** was served upon the following by **US Mail**, this 6th day of August, 2014.

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Attorneys for Appellant Willan



Brad L. Tammaro (0030156)

Ohio Assistant Attorney General
Special Prosecuting Attorney

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Whoever commits any act described in division (A) of section 1707.042 or section 1707.44 of the Revised Code is guilty of a violation of sections 1707.01 to 1707.45 of the Revised Code and the following apply to the offender:

- (A) If the value of the funds or securities involved in the offense or the loss to the victim is less than five-hundred one thousand dollars, the offender is guilty of a felony of the fifth degree, and the court may impose upon the offender an additional fine of not more than two thousand five hundred dollars.
- (B) If the value of the funds or securities involved in the offense or the loss to the victim is five hundred one thousand dollars or more but less than five seven thousand five hundred dollars, the offender is guilty of a felony of the fourth degree, and the court may impose upon the offender an additional fine of not more than five thousand dollars.
- (C) If the value of the funds or securities involved in the offense or the loss to the victim is five seven thousand five hundred dollars or more but less than twenty-five thirty-seven thousand five hundred dollars, the offender is guilty of a felony of the third degree, and the court may impose upon the offender an additional fine of not more than ten thousand dollars.
- (D) If the value of the funds or securities involved in the offense or the loss to the victim is twenty-five thirty-seven thousand five hundred dollars or more but less than one hundred fifty thousand dollars, the offender is guilty of a felony of the second degree, and the court may impose upon the offender an additional fine of not more than fifteen thousand dollars.
- (E) If the value of the funds or securities involved in the offense or the loss to the victim is one hundred fifty thousand dollars or more, the offender is guilty of a felony of the first degree, and the court may impose upon the offender an additional fine of not more than twenty thousand dollars.



(2)(a) If a court imposing a sentence for a felony finds that the offender is a repeat violent offender, the court shall impose a prison term under division (A) of this section that shall not be reduced pursuant to section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. The term so imposed shall be from the range of prison terms authorized for the offense pursuant to division (A) of this section unless the court finds that the repeat violent offender, in committing the offense, caused any physical harm that carried a substantial risk of death to a person or that involved substantial permanent incapacity or substantial permanent disfigurement of a person. In that case, the court shall impose the longest prison term authorized for the offense.

(b) If the court imposing a prison term on a repeat violent offender imposes the longest prison term authorized for the offense, the court may impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if the court finds that both of the following apply with respect to the prison terms imposed on the offender pursuant to division (D)(2)(a) of this section and, if applicable, divisions (D)(1) and (3) of this section:

(i) The terms so imposed are inadequate to punish the offender and protect the public from future crime, because one or more of the factors listed under section 2929.12 of the Revised Code indicating that the offender is likely to commit future crimes are present, and they outweigh the applicable factors listed under that section indicating that the offender is unlikely to commit future crimes.

(ii) The terms so imposed are demeaning to the seriousness of the offense, because one or more of the factors listed under section 2929.12 of the Revised Code indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh [sic] the applicable factors listed under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

(3)(a) Except when an offender commits a violation of section 2903.01 or 2907.02 of the Revised Code and the penalty imposed for the violation is life imprisonment or commits a violation of section 2903.02 of the Revised Code, if the offender commits a violation of section 2925.03, 2925.04, or 2925.11 of the Revised Code and that section requires the imposition of a ten-year prison term on the offender or if a court imposing a sentence upon an offender for a felony finds that the offender otherwise is a major drug offender, is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree, or is guilty of an attempted forcible violation of section 2907.02 of the Revised Code with the victim being under thirteen years of age and that attempted violation is the felony for which sentence is being imposed, the court shall impose upon the offender for the felony violation a ten-year prison term that cannot be reduced pursuant to section 2929.20 or Chapter 2967. or 5120. of the Revised Code.

(b) The court imposing a prison term on an offender under division (D)(3)(a) of this section may impose an additional prison term of one, two, three, four, five, six, seven, eight, nine, or ten years, if the court, with respect to the term imposed under division (D)(3)(a) of this section and, if applicable, divisions

2923.31 Corrupt activity definitions.

As used in sections 2923.31 to 2923.36 of the Revised Code:

(A) "Beneficial interest" means any of the following:

- (1) The interest of a person as a beneficiary under a trust in which the trustee holds title to personal or real property;
- (2) The interest of a person as a beneficiary under any other trust arrangement under which any other person holds title to personal or real property for the benefit of such person;
- (3) The interest of a person under any other form of express fiduciary arrangement under which any other person holds title to personal or real property for the benefit of such person.

"Beneficial interest" does not include the interest of a stockholder in a corporation or the interest of a partner in either a general or limited partnership.

(B) "Costs of investigation and prosecution" and "costs of investigation and litigation" mean all of the costs incurred by the state or a county or municipal corporation under sections 2923.31 to 2923.36 of the Revised Code in the prosecution and investigation of any criminal action or in the litigation and investigation of any civil action, and includes, but is not limited to, the costs of resources and personnel.

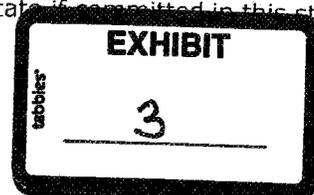
(C) "Enterprise" includes any individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, government agency, or other legal entity, or any organization, association, or group of persons associated in fact although not a legal entity. "Enterprise" includes illicit as well as licit enterprises.

(D) "Innocent person" includes any bona fide purchaser of property that is allegedly involved in a violation of section 2923.32 of the Revised Code, including any person who establishes a valid claim to or interest in the property in accordance with division (E) of section 2981.04 of the Revised Code, and any victim of an alleged violation of that section or of any underlying offense involved in an alleged violation of that section.

(E) "Pattern of corrupt activity" means two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event.

At least one of the incidents forming the pattern shall occur on or after January 1, 1986. Unless any incident was an aggravated murder or murder, the last of the incidents forming the pattern shall occur within six years after the commission of any prior incident forming the pattern, excluding any period of imprisonment served by any person engaging in the corrupt activity.

For the purposes of the criminal penalties that may be imposed pursuant to section 2923.32 of the Revised Code, at least one of the incidents forming the pattern shall constitute a felony under the laws of this state in existence at the time it was committed or, if committed in violation of the laws of the United States or of any other state, shall constitute a felony under the law of the United States or the other state and would be a criminal offense under the law of this state if committed in this state.



(F) "Pecuniary value" means money, a negotiable instrument, a commercial interest, or anything of value, as defined in section 1.03 of the Revised Code, or any other property or service that has a value in excess of one hundred dollars.

(G) "Person" means any person, as defined in section 1.59 of the Revised Code, and any governmental officer, employee, or entity.

(H) "Personal property" means any personal property, any interest in personal property, or any right, including, but not limited to, bank accounts, debts, corporate stocks, patents, or copyrights. Personal property and any beneficial interest in personal property are deemed to be located where the trustee of the property, the personal property, or the instrument evidencing the right is located.

(I) "Corrupt activity" means engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person to engage in any of the following:

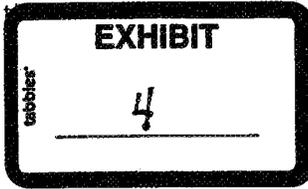
(1) Conduct defined as "racketeering activity" under the "Organized Crime Control Act of 1970," 84 Stat. 941, 18 U.S.C. 1961(1)(B), (1)(C), (1)(D), and (1)(E), as amended;

(2) Conduct constituting any of the following:

(a) A violation of section 1315.55, 1322.02, 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2905.01, 2905.02, 2905.11, 2905.22, 2905.32 as specified in division (I)(2)(g) of this section, 2907.321, 2907.322, 2907.323, 2909.02, 2909.03, 2909.22, 2909.23, 2909.24, 2909.26, 2909.27, 2909.28, 2909.29, 2911.01, 2911.02, 2911.11, 2911.12, 2911.13, 2911.31, 2913.05, 2913.06, 2921.02, 2921.03, 2921.04, 2921.11, 2921.12, 2921.32, 2921.41, 2921.42, 2921.43, 2923.12, or 2923.17; division (F)(1)(a), (b), or (c) of section 1315.53; division (A)(1) or (2) of section 1707.042; division (B), (C)(4), (D), (E), or (F) of section 1707.44; division (A)(1) or (2) of section 2923.20; division (E) or (G) of section 3772.99; division (J)(1) of section 4712.02; section 4719.02, 4719.05, or 4719.06; division (C), (D), or (E) of section 4719.07; section 4719.08; or division (A) of section 4719.09 of the Revised Code.

(b) Any violation of section 3769.11, 3769.15, 3769.16, or 3769.19 of the Revised Code as it existed prior to July 1, 1996, any violation of section 2915.02 of the Revised Code that occurs on or after July 1, 1996, and that, had it occurred prior to that date, would have been a violation of section 3769.11 of the Revised Code as it existed prior to that date, or any violation of section 2915.05 of the Revised Code that occurs on or after July 1, 1996, and that, had it occurred prior to that date, would have been a violation of section 3769.15, 3769.16, or 3769.19 of the Revised Code as it existed prior to that date.

(c) Any violation of section 2907.21, 2907.22, 2907.31, 2913.02, 2913.11, 2913.21, 2913.31, 2913.32, 2913.34, 2913.42, 2913.47, 2913.51, 2915.03, 2925.03, 2925.04, 2925.05, or 2925.37 of the Revised Code, any violation of section 2925.11 of the Revised Code that is a felony of the first, second, third, or fourth degree and that occurs on or after July 1, 1996, any violation of section 2915.02 of the Revised Code that occurred prior to July 1, 1996, any violation of section 2915.02 of the Revised Code that occurs on or after July 1, 1996, and that, had it occurred prior to that date, would not have been a violation of section 3769.11 of the Revised Code as it existed prior to that date, any violation of section 2915.06 of the Revised Code as it existed prior to July 1, 1996, or any violation of division (B) of section 2915.05 of the Revised Code as it exists on and after July 1, 1996, when the proceeds of the violation, the payments made in the violation, the amount of a claim for payment or for any other benefit that is false or deceptive and the violation, or



or about June 10, 2005, and in Summit County, Ohio, this Defendant did knowingly make or cause to be made any false representation concerning a material and relevant fact, in any oral statement or in any prospectus, circular, description, application, or written statement, for registering securities or transactions, or exempting securities or transactions from registration.

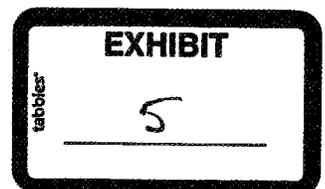
The Defendant is also charged with False Representation in the Registering of Securities on or about July 25, 2005. Before you can find the Defendant guilty of this offense, you must find beyond a reasonable doubt that on or about July 25, 2005, and in Summit County, Ohio, this Defendant did knowingly make or cause to be made any false representation concerning a material and relevant fact, in any oral statement or in any prospectus, circular, description, application, or written statement, for registering securities or transactions, or exempting securities or transactions from registration.

The law that applies and all of the elements and definitions are the same as previously stated to you except for the dates of the alleged incidents.

If you find the Defendant not guilty, this ends your consideration of these counts. If you find the Defendant guilty of one or more of the counts, you will go on to find, beyond a reasonable doubt, the amount of the registration and determine if the amount of the registration is less than five hundred dollars; if the amount of the registration is five hundred dollars or more but less than five thousand dollars; if the amount of the registration is five thousand dollars or more but less than twenty-five thousand dollars; if the amount of the registration is twenty-five thousand dollars or more but less than one hundred thousand dollars; or if the amount of the registration is one hundred thousand dollars or more.

UNLICENSED DEALER

The law of Ohio provides as follows:



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DANIEL M. HERRIGAN

2008 DEC -5 PM 12:10

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

SUMMIT COUNTY
STATE OF OHIO,
CLERK OF COURTS

Plaintiff,

vs.

DAVID B. WILLAN,

Defendant.

CASE NUMBER CR 2007 12 4233(A)

JUDGE MURPHY

CRIMINAL VERDICT-COUNT THREE

INDICTMENT FOR FALSE
REPRESENTATION IN THE
REGISTERING OF SECURITIES-
NOVEMBER 24, 2004

We, the Jury, being duly impaneled and sworn do hereby find the Defendant, DAVID B. WILLAN, * Guilty of the offense of False Representation in the Registering of Securities.

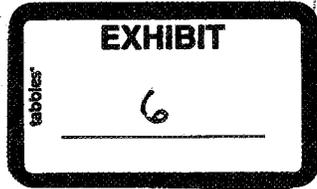
We further find the amount of the registration to be: (select one)

- less than five hundred dollars
- five hundred dollars or more but less than five thousand dollars
- five thousand dollars or more but less than twenty-five thousand dollars
- twenty-five thousand dollars or more but less than one hundred thousand dollars
- one hundred thousand dollars or more

We do so render our verdict upon the concurrence of twelve members of our said Jury. Each of us said Jurors concurring in said verdict signs his/her name hereto this 4 day of Dec., 2008.

- | | |
|-----------------------------|-----------------------------------|
| 1. <u>Christina Gye</u> | 7. <u>Andy B. West</u> |
| 2. <u>M. H.</u> | 8. <u>Kathleen Engler Barrett</u> |
| 3. <u>Alex Bridges</u> | 9. <u>Jacqueline A. Martin</u> |
| 4. <u>Sherron Brumbaugh</u> | 10. <u>Menora P. Duley</u> |
| 5. <u>John Wiley</u> | 11. <u>John J. Mincik</u> |
| 6. <u>Blaine J. Dwyer</u> | 12. <u>Carla Hill</u> |

* Insert in ink "guilty" or "not guilty."



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DANIEL M. HOFFRIGAN

2008 DEC -5 PM 12:10

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

SUMMIT COUNTY
THE STATE OF OHIO,
CLERK OF COURTS,

Plaintiff,

vs.

DAVID B. WILLAN,

Defendant.

CASE NUMBER CR 2007 12 4233(A)

JUDGE MURPHY

CRIMINAL VERDICT-COUNT FOUR

INDICTMENT FOR FALSE
REPRESENTATION IN THE
REGISTERING OF SECURITIES-
APRIL 29, 2005

We, the Jury, being duly impaneled and sworn do hereby find the
Defendant, DAVID B. WILLAN, * Guilty of the offense of False
Representation in the Registering of Securities.

We further find the amount of the registration to be: (select one)

- less than five hundred dollars
- five hundred dollars or more but less than five thousand dollars
- five thousand dollars or more but less than twenty-five thousand dollars
- twenty-five thousand dollars or more but less than one hundred thousand dollars
- one hundred thousand dollars or more

We do so render our verdict upon the concurrence of twelve members of our
said Jury. Each of us said Jurors concurring in said verdict signs his/her name hereto this

4 day of Dec., 2008.

- | | |
|------------------------------|---------------------------------|
| 1. <u>Christina Gode</u> | 7. <u>Rocky D. Howard</u> |
| 2. <u>M. J. H.</u> | 8. <u>Kathleen Egan-Bonetto</u> |
| 3. <u>Alex Bridges</u> | 9. <u>Joyshine A. Martin</u> |
| 4. <u>Cherissa Drumboagh</u> | 10. <u>Aleneva V. Dole</u> |
| 5. <u>Cathy Willy</u> | 11. <u>Lou R. Muncik</u> |
| 6. <u>Shirley Dugan</u> | 12. <u>Wanda Hahn</u> |

* Insert in ink "guilty" or "not guilty."

EXHIBIT
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DANIEL M. HERRIGAN

2008 DEC -5 PM 12: 10

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

SUMMIT COUNTY
THE STATE OF OHIO,
CLERK OF COURTS

Plaintiff,

vs.

DAVID B. WILLAN,

Defendant.

CASE NUMBER CR 2007 12 4233(A)

JUDGE MURPHY

CRIMINAL VERDICT-COUNT SIX

INDICTMENT FOR FALSE
REPRESENTATION IN THE
REGISTERING OF SECURITIES-
JULY 25, 2005

We, the Jury, being duly impaneled and sworn do hereby find the Defendant, DAVID B. WILLAN, * Guilty of the offense of False Representation in the Registering of Securities.

We further find the amount of the registration to be: (select one)

- less than five hundred dollars
- five hundred dollars or more but less than five thousand dollars
- five thousand dollars or more but less than twenty-five thousand dollars
- twenty-five thousand dollars or more but less than one hundred thousand dollars
- one hundred thousand dollars or more

We do so render our verdict upon the concurrence of twelve members of our said Jury. Each of us said Jurors concurring in said verdict signs his/her name hereto this

4 day of Dec, 2008.

- | | |
|----------------------------|-----------------------------|
| 1. <u>Christina Ope</u> | 7. <u>Jody R. W...</u> |
| 2. <u>M. H.</u> | 8. <u>Karen E. B...</u> |
| 3. <u>Alex Bridges</u> | 9. <u>Josephine A. M...</u> |
| 4. <u>Thomas Brumbaugh</u> | 10. <u>Genevra P. D...</u> |
| 5. <u>Paul W...</u> | 11. <u>John J. M...</u> |
| 6. <u>Gloria J. D...</u> | 12. <u>Carol W...</u> |

* Insert in ink "guilty" or "not guilty."

