

ORIGINAL

CASE No. 2014-2050

IN THE SUPREME COURT OF OHIO  
COLUMBUS, OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

ALAN J. AESCHLIMANN,

Defendant-Appellant.

FILED  
DEC 24 2014  
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SUPREME COURT OF OHIO

ON MOTION FOR LEAVE TO APPEAL FROM  
THE OHIO COURT OF APPEALS FOR STARK COUNTY,  
FIFTH APPELLATE DISTRICT,  
CASE NO. 2013-CA-00192

MEMORANDUM IN RESPONSE  
OF PLAINTIFF-APPELLEE,  
STATE OF OHIO

JOHN D. FERRERO,  
PROSECUTING ATTORNEY,  
STARK COUNTY, OHIO

By: RONALD MARK CALDWELL  
Ohio Sup. Ct. Reg. No. 0030663  
Assistant Prosecuting Attorney  
110 Central Plaza, South  
Suite 510  
Canton, Ohio 44702-1413  
(330) 451-7897  
(330) 451-7965 (FAX)

Counsel of Record for Plaintiff-Appellee

JAMES L. BURDON  
Ohio Sup. Ct. Reg. No. 0015435  
137 South Main Street  
Suite 201  
Akron, Ohio 44308  
(330) 253-7171

Counsel of Record for  
Defendant-Appellant

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## **WHY THIS CASE SHOULD NOT BE ACCEPTED FOR REVIEW**

Alan J. Aeschlimann was convicted of felony murder and child endangering for the death of two-year-old Bri'Sean T. Gamble on October 19, 2011. His convictions and sentences were upheld by the court of appeals, and now Aeschlimann appeals from that decision, seeking to invoke this Court's discretionary jurisdiction. This Court should decline to accept the case.

First, Aeschlimann's main argument deals with the evidence in the case. Despite his claims, the trial court and the court of appeals applied longstanding evidentiary standards at trial and on appeal to review the evidence presented at trial. Aeschlimann continues to paint his case as one in which the only evidence concerning Bri'Sean's death was that his mortal injuries were inflicted when either Aeschlimann or Bri'Sean's mother was with the child alone. This portrayal of the evidence conveniently ignores the conduct of Aeschlimann and Bri'Sean's mother, Brittany Boitnott, afterward the child's lifeless body was found. All of this evidence, as outlined in the court of appeals' decision, points to a clear consciousness of guilt on Aeschlimann's part, whereas Brittany's conduct and words were consistent with a distraught mother who had just inexplicably lost her only child. Given the nature of Aeschlimann's challenge in this appeal, therefore, the Court should decline the invitation to review the same evidence, which would involve a highly fact specific review.

Second, the appeal does not involve any novel legal questions. Instead, all of Aeschlimann's issues involve the application of longstanding precedent and legal standards in reviewing these claims. Aeschlimann simply does not agree with the conclusions reached by the trial court and the court of appeals. As this Court has noted many times, it is not a court of error correction (assuming there was even error committed by either the trial court or the court of appeals).

The death of a young child is always tragic. But this case was carefully investigated by law enforcement, and was dispassionately tried before the trial court and jury. Given the fact-specific nature of Aeschlimann's appeal and the lack of any novel or misapplied legal standards or issues, the appeal lacks a substantial constitutional question, and is not of public or great general interest. Accordingly, the Court should dismiss the appeal.

### **STATEMENT OF THE CASE AND FACTS**

In March 2013, the Stark County Grand Jury returned an indictment that charged Alan J. Aeschlimann, defendant-appellant, with the charges of felony murder<sup>1</sup> and child endangering<sup>2</sup> for the death of two-year-old Bri' Sean T. Gamble on October 19, 2011. Aeschlimann pleaded not guilty to these charges, and the case proceeded to trial by jury in the Stark County Court of Common Pleas (Judge Taryn L. Heath). This jury found him guilty of these charges, and the trial court sentenced him to an indeterminate prison term of 15 years to life.<sup>3</sup>

Aeschlimann appealed his convictions and sentences to the Court of Appeals for Stark County (Fifth Appellate District), raising the five claims raised herein. The court of appeals rejected the validity of these claims, and affirmed the convictions and sentences. *State v. Aeschlimann*, 5th

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<sup>1</sup>R.C. 2903.02(B) (committing the crime of child endangering against Gamble that proximately resulted in Gamble's death).

<sup>2</sup>R.C. 2919.22(B)(1) (recklessly abusing Gamble that resulted in serious physical harm to Gamble).

<sup>3</sup>The 15-to-life sentence was imposed for the felony murder conviction, whereas the trial court merged the child endangering conviction with the felony murder conviction.

The appeal is from a jury verdict that found Alan J. Aeschlimann guilty of causing the death of the two-year-old son of his live-in girlfriend during the night of October 19, 2011. Aeschlimann was living with Brittany Boitnott and her son, Bri'Sean Gamble, along with his four-year-old daughter, Hannah, from another woman. Aeschlimann participated in professional mixed-martial-arts competitions, where he met Boitnott, who worked as a card girl at the fights. At the time of Bri'Sean's death, Aeschlimann was working as a corrections officer at the Ohio Department of Youth Services at the Indian River Correctional Facility.

Crucial to this case, from an evidentiary point of view, is the time frame in which Bri'Sean's fatal injuries were inflicted. The toddler died as a result of blunt-force trauma to his head, which would have immediately incapacitated him, setting into motion the physiological processes that would have resulted in death from this injury. The child was not found until the morning hours of the next day, around 10:30 a.m. The experts opined that child's injuries, based in part on the nature of the injuries and the condition of the body when it was found by Brittany and Aeschlimann and the responding paramedics, were caused between 8:30 p.m and somewhere between 5:00 a.m. and 7:00 a.m. Brittany had been alone with the children from 8:30 p.m. (when Aeschlimann's parents left after dropping off some groceries) until 10:10 p.m., when Aeschlimann came home from work. Brittany had put her toddler son to bed, after a bath, at approximately 10:00 p.m. and waited until her boyfriend came home from work. She then left to do some needed shopping at Wal-Mart at roughly 10:15 p.m., and returned 40 minutes later. Aeschlimann put his daughter to bed, and the

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<sup>4</sup>Aeschlimann's name has been spelled as both "Aeschlimann" and "Aeschilmann." This memorandum will refer to him with the former designation, since this is how he refers to himself in his memorandum.

couple went to sleep until the next morning. Aeschlimann awoke and took his daughter Hannah to preschool and then returned by 10:00 a.m. Brittany was still asleep, but awoke upon his return, and the two then discovered Bri'Sean's lifeless body.

Based upon this time line, Aeschlimann argued that Brittany must have inflicted the severe blunt force trauma during the time period between 8:30 p.m. and 10:10 p.m. when Aeschlimann returned home. The prosecution argued that the injuries were inflicted by Aeschlimann during the 40-minute window when he was alone with Bri'Sean and his daughter Hannah while Brittany was away at Wal-Mart.

Crucial to the proof in this case was the actions of the two adults after Bri'Sean's body was found.

The two went to the Stark County Sheriff's Office to be interviewed about what had happened. Aeschlimann did not bring his daughter, claiming he dropped Hannah off at her grandparents. The four-year-old had in fact been dropped off someplace else, not with Aeschlimann's parents. The inference from this lie was that he did not want his daughter interviewed by the authorities about what she witnessed that night. In addition, Aeschlimann gave his personal effects to his mother before the interview, telling her that he had better give them to her just in case, because you never know. At trial, Aeschlimann testified that he was told to do this by police, but Deputy John Von Spiegel that he never told Aeschlimann this, and in fact never tells any person whom he is going to interview to do this.

During the interview, the couple were placed in an interview room that was equipped with a camera for recording purposes. Aeschlimann testified that he did not know of the existence of the camera in the room, despite being a corrections officer at a juvenile detention facility. Yet, he was

seen on the recording to be looking directly at the camera. One significant time that he did was when Von Spiegel temporarily left the interview room. Brittany asked Aeschlimann to tell her what had happened when she left him with the children. Aeschlimann looked at the camera, then told her that they would talk later about that.

When Aeschlimann returned home from work that night, he was unaware of Brittany's planned trip to Wal-Mart. Bri'Sean was in bed, however, so the trip should not have interfered with his quality time with his daughter. While away, Brittany nonetheless tried to communicate with Aeschlimann via her cell phone. Aeschlimann, however, did not answer her calls. At trial, he explained that he was busy on the phone with his ex-wife, yet phone records indicated that this call ended well before Brittany's attempts to reach Aeschlimann. The prosecution's theory was that Bri'Sean was either not asleep or woke up upon his mother leaving, and interfered with Aeschlimann's quality time with his daughter, and that he did not respond to Brittany's calls because he was busy tending to Bri'Sean and either did not want Brittany to hear what was going on or he was too busy to answer.

Crucial to the jury's determination as to which version of events was the truth was the testimony of the diminutive Brittany and of the professional mixed-martial-arts fighter who worked as a corrections officer at a juvenile detention facility. Aeschlimann ignores the fact that he testified at trial and put his credibility on the line. The jury, from its verdict, did not find him credible (and conversely found Brittany to be credible). Aeschlimann's conduct after the child's lifeless body was found was consistent with a person who wanted to hide something, indicating a consciousness of guilt. Brittany's, on the other hand, did not. Despite Aeschlimann's continued efforts to cast the shadow of guilt on Brittany, his conduct and words on the stand pointed to him as the person who

inflicted the fatal injuries on a helpless and defenseless toddler.

## ARGUMENT

### PROPOSITION OF LAW NO. I

**“Proof that appellant and the mother of an infant child were the only caregivers during a time period when the child suffered traumatic injuries resulting in his death, without any evidence of when, how, or by whom the injuries were inflicted, is insufficient circumstantial evidence to establish guilt beyond a reasonable doubt.”**

Aeschlimann’s first proposition of law challenges the sufficiency of the evidence of his guilt, arguing that the evidence pointed exclusively to Brittany as the murderer in this case. While the time frame for Bri’Sean’s injuries included two time periods when the two adults were separately alone with the children, Aeschlimann argues that the evidence did not prove beyond a reasonable doubt that he inflicted Bri’Sean’s fatal injuries when he was alone with the boy, but that instead it showed that Brittany did it when she was alone with them. Aeschlimann’s argument, however, ignores all of his conduct and words after the child’s corpse was found, as well as his disingenuous trial testimony. These conduct and words and trial testimony were matched against those of Brittany, and in doing so, the jury reasonable found proof beyond a reasonable that Aeschlimann kill Bri’Sean.

Aeschlimann argues that the evidence was insufficient and that jury’s verdict was against the manifest weight of the evidence. Each claim involves a different legal standard or review. The first challenge attacks the sufficiency of the evidence presented at trial against him. Under this standard, the reviewing court is to examine the evidence admitted at trial to determine whether this evidence, if believed, would convince the average juror of the defendant’s guilt beyond a reasonable doubt.

“The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. Under this standard, furthermore, “[c]ircumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof.” *Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph one of the syllabus.

Under the manifest-weight standard, the reviewing court assesses all of the evidence admitted at trial to determine whether it agrees with the factfinder’s resolution of conflicting evidence, sitting as a kind of “thirteenth juror.” *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541, 546-547. This “thirteenth juror,” however, is not unbridled (much as a juror’s discretion is constricted by jury instructions). Instead, the reviewing court whether the jury lost its way in assessing the evidence, creating a manifest miscarriage of justice. As the Court of Appeals for Hamilton County explained thirty years ago (and was approved by the Ohio Supreme Court more than fifteen years ago in *Thompkins*):

The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.

*State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720–721 (1983).

Aeschlimann was charged with and convicted of the crimes of felony murder and child endangering. He does not contend that the evidence does not prove the crimes; he instead argues that

the evidence does not prove that he committed them (as opposed to Brittany having committed them). Thus, the focal point of the evidentiary review hinges on the circumstantial evidence of Aeschlimann's guilt.

As pointed out in the statement of facts, Aeschlimann's conduct and words after the body was discovered convicted him. He, not Brittany, acted as a person who wanted to conceal things and deceive the authorities. In addition, he lied a number of times on the witness stand, unlike Brittany, further adding to his consciousness of guilt. But this evidence was crucial to the prosecution's case and to the jury's verdict. Construing all of this evidence in favor of the State, which is required by the *Jenks* standard and which Aeschlimann fails to do (instead construing them in his favor), the prosecution presented sufficient evidence at trial to meet this standard. And with regard to the manifest-weight standard, Aeschlimann has failed to demonstrate how the jury lost its way in disbelieving him and in believing Brittany (and the rest of the State's case). The jury concluded that Aeschlimann was not truthful after he killed Bri'Sean, and he was not truthful when he testified. Simply disagreeing with this assessment of his credibility does not satisfy the manifest-weight standard.

Accordingly, sufficient evidence of Aeschlimann's guilt was presented at trial to allow a reasonable jury to find him guilty beyond a reasonable doubt (which all inferences from the evidence being made in favor of the State and not in favor of Aeschlimann). In addition, the jury's verdict is not against the manifest weight of the evidence, especially since Aeschlimann has not shown that the jury lost its way in weighing and accessing the evidence, especially witnesses and their testimony (and especially his own). The first proposition of law should be rejected.

## PROPOSITION OF LAW NO. II

**“The trial court denied appellant his constitutional right to due process and a fair trial by permitting evidence that he had engaged in professional mixed marital [*sic*] arts fighting.”**

The second proposition of law challenges the very limited evidence admitted at trial that Aeschlimann had engaged in professional mixed martial arts fighting. Aeschlimann argues that this limited evidence, which was admitted to show how he and Brittany met as well as the relative strength and power of the two, constituted inadmissible other acts evidence. There was no evidence admitted as to his specific fights or skills, and no argument was made that since he was a fighter that he, as opposed to Brittany, was the person who inflicted the blows because of his training and experience. The evidence that Aeschlimann worked as a corrections officer at a juvenile detention facility where he admittedly resort to violence as part of his job simply corroborated this evidence, and in fact could have stood alone to prove that State’s case that Aeschlimann was capable of inflicting the deadly trauma. Finally, given that the crux of this case is time and not manner, this evidence did not change the outcome of the trial. Aeschlimann never contended that he was not capable of inflicting the deadly trauma, only that Brittany had when she was alone with the children.

The admission of evidence at trial is left to the sound discretion of the trial court. *See, e.g., State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus (1987). The trial court’s evidentiary rulings, therefore, will not be disturb on appeal but for an abuse of that discretion. An abuse of discretion, as the Ohio Supreme Court has noted, “connotes more than an error of law or of judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *State v. Adams*, 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 173, 404 N.E.2d 144, 149 (1980).

Much of Aeschlimann’s challenge to the admission of limited evidence that he was a fighter

who met Brittany as she worked as a card girl at the fights is based upon Evid. R. 404(B). The rule provides as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this rule shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Contrary to Aeschlimann's assertions, there were no acts admitted at trial. The challenged evidence was that he and Brittany met at the fights where he was one of the fighters and she was a card girl. Yet, Aeschlimann himself testified about his job as a corrections officer and his use of force in this context, which was perhaps more illuminating since he had come home from the job right before Bri'Sean's injuries were inflicted. Furthermore, the case was about time, not manner, of death.

Aeschlimann also raises a Evid. R. 404(A) challenge to the admission of this limited evidence. In other words, he argues that the evidence constituted inadmissible character evidence. Aeschlimann, however, cites to only part of this portion of the rule in support of this arguments; he significantly omits the exclusions to the general proposition. The rule recites relevantly:\

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, subject to the following exceptions:

(1) *Character of accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions

provided by statute enacted by the General Assembly are applicable.

The argument, even in its totality, does not warrant relief since the limited evidence was not admitted as character evidence. It was not argued that Aeschlimann is a violent man who resorts to violence to solve his problems (such as a complaining toddler during quality time with the daughter). The evidence was offered as background evidence. And the evidence certainly pales in comparison to the admitted evidence through Aeschlimann's own trial testimony about his activities as a corrections officer.

Under either theory, this evidence was not improperly admitted. The trial court did not abuse its discretion in admitting very limited evidence about Aeschlimann being a professional fighter when he met Brittany. Accordingly, the second proposition of law should be rejected.

### **PROPOSITION OF LAW NO. III**

**“The coroner rendered false trial testimony under oath, on critical subjects, that was conflicting and irreconcilable, which prejudiced appellant and denied him due process under the constitutional of the United States.”**

Aeschlimann's third proposition of law challenges the testimony of Dr. Murthy at trial. His argument is that since Dr. Murthy's trial testimony was allegedly inconsistent, if not untruthful, he was denied a fair trial. Under Aeschlimann's novel theory, if a criminal defendant can get a prosecution's witness to seemingly contradict himself via effective cross-examination, he has bought himself an insurance policy against a guilty verdict. The engine of cross-examination is to test the strength or veracity of offered evidence; it is not a device to secure a new trial as a result of an adverse verdict. The jury, as the trier of fact, heard all of Dr. Murthy's testimony, and were thus able

to assess its weight and credibility. Furthermore, as outlined in the statement of facts and the State's response to the first assignment of error, the evidentiary crux of this case does not have to do with the experts. All of the experts for the time frame for Bri'Sean's fatal injuries within a window of time when Brittany was alone with the children, as well as when Aeschlimann was alone with the children. The inconsistent testimony about the blows to Bri'Sean's head was immaterial since either adult could have caused them. The crux of the case was when, not how, the fatal blow or blows were inflicted.

Furthermore, Aeschlimann did not complain of this so-called due-process violation at trial. There was no motion to strike his testimony, no motion for a jury instruction relative to Dr. Murthy's testimony, and no motion for mistrial. Instead, Aeschlimann hoped that the jury would discredit Dr. Murthy's testimony relative to hypothetical causes of Bri'Sean's injuries. And the jury may have. The problem is that the case revolved around the timing of those injuries, not the specific causes.

Aeschlimann cites to no authority for his novel proposition, other than a decision from the Eighth Appellate District. Aeschlimann gives the clear impression that his case is a criminal case by his naming the case "*State v. Collins*." The case is in fact a civil case, and involved the appellate court rejecting the evidentiary challenge of the losing party in a civil case. See *Ward-Sugar v. Collins*, 8th Dist. Cuyahoga No. 87546, 2006-Ohio-5589, 2006 WL 3030981. The case provides Aeschlimann with little, if any, comfort or support for his challenge to Dr. Murthy's testimony.

Accordingly, the third proposition of law should be rejected.

#### **PROPOSITION OF LAW NO. IV**

**"The trial court's order prohibiting appellant's counsel from reading, arguing or referring to the bill of particulars denied**

**appellant his constitutional rights to a fair trial under the Sixth Amendment of the Constitution of the United States.”**

Aeschlimann argues in his fourth proposition of law that he was denied a fair trial by the trial court’s ruling that prevented the reading of the State’s bill of particulars to the jury. Aeschlimann concedes that the law general prohibits this practice because of its inherent dangers of misleading the jury, but nonetheless that he should have been allowed in order to obtain a fair trial. The argument is without merit. A bill of particulars is a document filed by the prosecution to provide the defense a general outline of the factual allegations against him. It is not a statement of the evidence to be presented (much less of the evidence that is presented). The bill of particulars is not evidence at trial, any more so than the argument of counsel. For these reasons, the trial court did not err or abuse its discretion in not allowing Aeschlimann to read the bill of particulars to the jury.

The Ohio Supreme Court has noted that the purpose of the bill of particulars is to “elucidate and to particularize the conduct of the accused to constitute the charged offense.” *State v. Sellards*, 17 Ohio St.3d 169, 171, 478 N.E.2d 781, 784 (1985). The bill of particulars is not designed to “provide the accused with specifications of evidence to serve as a substitute for discovery.” *Sellards*, 17 Ohio St.3d at 171, 478 N.E.2d at 784. Therefore, any variance between the allegations in the bill of particulars and the evidence presented at trial does not deny a defendant a fair trial, as long as he was not prejudiced or misled by that variance. *State v. Gingell*, 7 Ohio App.3d 364, 368, 455 N.E.2d 1066, 1071 (1982). Even in the later case, it is not a question of whether a defendant may argue to the jury that there exists a variance, but is instead whether a defendant has been prevented from preparing and presenting a defense at trial.

In addition, as alluded to above, a bill of particulars (or any other document or pleading filed

by a party during the court of pretrial proceedings) is not evidence. It is not evidence any more than statements and arguments of counsel at trial. Aeschlimann was therefore not prejudiced or denied a fair trial because the trial court precluded him from presenting to the jury any variance between the bill of particulars' allegations and the evidence presented at trial.

**PROPOSITION OF LAW NO. V**

**'The trial court denied appellant his constitutional right to due process and a fair trial by prohibiting the defense from the presentment of relevant evidence regarding an alternative subject.'**

Aeschlimann's final proposition of law challenges the trial court's ruling that allegedly prevented him from introducing evidence of an alternative suspect for Bri'Sean's death. The evidence related to why Brittany was sad, or upset, the night that Bri'Sean was fatally injured. Aeschlimann wanted to introduce evidence that Brittany had been convicted of driving while under the influence, and was going to Wal-Mart in order to obtain personal items for her upcoming three-day attendance at the Driver Intervention Program. Aeschlimann also wanted to present evidence that Brittany was therefore driving while under suspension when he went to Wal-Mart. The trial court precluded this evidence, finding it to be inadmissible other acts evidence. The trial court did not abuse its discretion in so ruling.

The crux of Aeschlimann's argument is that he want to admit this evidence in order to show why Brittany was sad, or upset, on the night in question. Evidence that she was sad, or upset, was admitted, not why she was. The fact that Brittany had a recent OVI conviction and drove that night under suspension did not relate to any of the elements of the case. The evidence was offered simply

to besmirch Brittany's character. Its lack of relevance and its highly prejudicial nature, without offering anything material.

Aeschlimann did seek to introduce the evidence for the alleged purpose of showing Brittany's state of mind that night. She was apparently so upset that she drove while under suspension despite being recent convicted of OVI. If, however, Brittany has seriously injured her child, the prosecution offered, why would she leave that child alone with Aeschlimann as opposed to having him make the trip to Wal-Mart to pick up personal items. Aeschlimann nonetheless was able to introduce the evidence of Brittany's emotional state, but not his offered reason for it (as opposed to Brittany being away from her child for three days). Under these facts and circumstances, the trial court did not abuse its discretion in not admitting this evidence. Accordingly, the fifth proposition of law should be rejected.

**JOHN D. FERRERO,  
PROSECUTING ATTORNEY,  
STARK COUNTY, OHIO**

By: *Ronald Mark Caldwell*  
RONALD MARK CALDWELL  
Ohio Sup. Ct. Reg. No. 0030663  
Assistant Prosecuting Attorney  
110 Central Plaza, South  
Suite 510  
Canton, Ohio 44702-1413  
(330) 451-7897  
FAX: (330) 451-7965

Counsel for Plaintiff-Appellee

**PROOF OF SERVICE**

A copy of the foregoing MEMORANDUM IN RESPONSE was sent by ordinary U.S. mail this 23rd day of December, 2014, to JAMES L. BURDON, counsel for defendant-appellant, at 137 South Main Street, Suite 201, Akron, Ohio 44308.

*Ronald Mark Caldwell*

RONALD MARK CALDWELL

Ohio Sup. Ct. Reg. No. 0030663

Assistant Prosecuting Attorney

110 Central Plaza, South

Suite 510

Canton, Ohio 44702-1413

(330) 451-7897

FAX: (330) 451-7965

Counsel for Plaintiff-Appellee