

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.)	CASE NO.
LEWIS LEROY MCINTYRE, JR.)	
)	
Relator)	
)	ORIGINAL ACTION IN
v.)	PROHIBITION, MANDAMUS,
)	AND PROCEDENDO
SUMMIT COUNTY)	
COURT OF COMMON PLEAS, et al)	
)	
Respondents)	

APPENDIX VOLUME 6 OF 7: MOTIONS AND ORDERS DENYING THEM

Stephen P. Hanudel (#0083486)
 124 Middle Avenue, Suite 900
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ATTORNEY FOR RELATOR
 LEWIS LEROY MCINTYRE, JR.

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DANIEL M. HERRIGAN
2010 FEB 22 PM 3:51
SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
FOR SUMMIT COUNTY, OHIO
CRIMINAL DIVISION

State of Ohio,)	Case NO:CR-91-01-0135
Plaintiff,)	Hon. Judge: Teodosio
v.)	
Lewis Leroy McIntyre, Jr,)	
Defendant.)	

MOTION TO VACATE THE VOID AB INITIO SENTENCING JUDGMENT JOURNAL ENTRIES, AND TO REVISE/CORRECT SENTENCING ENTRIES TO COMPLY WITH CRIMINAL RULE 32(C)

Now comes Lewis Leroy McIntyre, Jr hereinafter (Defendant) In Propria Persona, and hereby respectfully moves this Honorable Court pursuant to the Supreme Court of Ohio's decision in State ex rel Culgan v. Medina Cty Court of Common Pleas (2008), 119 Ohio St.3d 535; State of Ohio Appellee v. Michael Golightley Appellant, 2008 WL 2627646 (Ohio App.9 Dist.), 2008-Ohio-3371. To vacate the void ab initio sentencing judgment journal entries, and to issue revised/ corrected sentencing entries in the above captioned case to comply with Crim.R. 32(C), as construed in State v. Baker (2008), 119 Ohio St.3d 197.

Defendant's reasons for this motion are set forth in the attached memorandum in support specifically attached hereto

PRELIMINARY STATEMENTS Respectfully Submitted

Lewis Leroy McIntyre, Jr
Lewis Leroy McIntyre, Jr
Number: 571-710
Richland Correctional Inst.
P.O. BOX 1807
Mansfield, Ohio 44901
DEFENDANT IN PROPRIA PERSONA

PRELIMINARY STATEMENTS

A . REMEDY WHEN A SENTENCING ENTRY FAILS TO CONSTITUTE A FINAL, APPEALABLE ORDER:

The Supreme Court of Ohio has also clearly established that when a defendant alleges that his sentencing entry is not a final, appealable order because it fails to comply with Crim.R. 32 (C) the adequate available remedy is to motion the trial court for a revised/corrective sentencing entry. *McAllister v. Smith* (2008) 119 Ohio St.3d 163, at Paragraph 7 (internal citations omitted); *Dunn v. Smith*(2008), 119 Ohio St.3d 364, at Paragraph 8 (internal citations omitted).

If the trial court refuses upon request to issue a revised sentencing entry. the defendant can then seek to compel the court to act by filing an action for a writ of mandamus or a writ of procedendo. *McAllister*, at Paragraph 8(internal citations omitted); *Dunn*, at Paragraph 9 (internal citations omitted). See also, *State v. ex rel Culgan supra* (holding writs of mandamus and procedendo would issue to compel trial court to issue appropriate sentencing judgment).

B. AFFECT OF ACTIONS TAKEN IN THE APPELLATE COURT THAT LACKED SUBJECT MATTER JURISDICTION:

The Ohio Constitution restricts an appellate court's jurisdiction over trial courts decisions to the review of final orders, Ohio Const.Art.IV, Section 3(B)(2) See, *Baker*, at Paragraph 18 when an order is not final, a court of appeals lacks subject-matter jurisdiction or authority over the appeal itself. *Gehm v. Timberline Post & Post Frame* (2007), 112 Ohio st.3d 514, at Paragraph 14, quoting *Gen. Acc, Ins. Co v. Ins Co of N. Am* (1989), 44 Ohio St.3d 17,20.

What then is the affect of a judgment rendered in an appeal that was taken in a case where there originally was no final appealable order? The answer is simple-the subsequent judgment thereafter is void for lack of jurisdiction to consider the merits of the appeal itself. *Pratts v. Hurley* (2004), 102 Ohio St.3d 81, at Paragraph 11 (" if a court acts without jurisdiction, then any proclamation by that court is void"), quoting *State ex rel Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70,75.

Therefore, it is as though such proceedings had never occurred

the judgment is a mere nullity and the parties are in the same position as if there had been no judgment. *Romito v. Maxwell* (1967), 10 Ohio St.3d at 267, 68.

In *Culgan*, the Supreme Court considered whether *Culgan*, whose convictions in 2002 had been affirmed by the Ninth District Court in a direct appeal, was entitled to writs of mandamus and procedendo compelling the Medina County Court of Common Pleas to enter a judgment on his convictions that failed to comply with Crim.R. 32(C). Despite *Culgan's* direct appeal from that conviction, this court observed;

"[I]f *Culgan* is correct that appellee's sentencing entry violated Crim.R. 32(C), which would render the entry nonappealable, his claims for writs of mandamus and procedendo would have merit and the court of appeals erred in sua sponte dismissing his complaint." (Emphasis added.)

Culgan, at Paragraph 9.

The *Culgan* Court concluded that *Culgan's* sentencing entry did not, in fact comply with crim.R. 32(C) and granted the writs, thereby compelling the courts of common pleas to issue a final appealable order *Id.*, at Paragraph 10-11. The implication of the decision in *Culgan* is that regardless of whether a defendant has already appealed his conviction, if the order from which the first appeal was taken is not a final and appealable order, he is entitled to a new sentencing entry which can itself be appealed as a matter of right.

MEMORANDUM IN SUPPORT

C. ANALYSIS OF MCINTYRE'S CASE:

In the case sub judice, the attached verdict journal entry (Exhibit(A)), clearly states that McIntyre (1) was found not guilty of the Specification Two To Count One of the indictment, (2) and further, said jury being unable to reach a decision on a verdict as to the charge of Felonious Assault, as contained in Count One (1) of the supplement One to Indictment and specification

One To Count One of the Supplement Two to Indictment, the Court therefore discharges the jury without prejudice in reference to the prosecution of those charges. The attached Sentencing Journal Entry (Exhibit (b)), is completely void as to any reference as to the Defendant McIntyre being found not guilty of the Specification Two To Count One of the Indictment to which said count is the Prior Aggravated Felony Specification R.C. 2941.142 See: Attached Indictment (Exhibit (c)), and said entry is void as to any reference as to the jury being unable to reach a decision on a verdict as to the remainder offense of Felonious assault with firearm specification One to Count One of the Supplement Two To Indictment and that the trial court discharged the jury without prejudice in reference to the prosecution of those charges. And therefore the sentencing journal entry is a nonappealable order thus setting forth the above stated mandated facts therein and in order to constitute a final appealable order in conjunction with Crim. R. 32(C).

On September 9, 1991, the trial court issued an Nunc Pro Tunc Journal Sentencing Entry that stated the following:

"On 9/9/91, Ordered this journal entry be filed NUNC PRO TUNC to correct the third paragraph of the Journal Entry dated August 29, 1991 and filed September 9, 1991 to read in part as follows... "... for an indeterminate period of not more than the maximum of 15 Years and the 8 year minimum shall be a period of actual incarceration for the punishment of the crime of ..."

The above stated entry in itself was not a final appealable entry based on the facts that (1) the entry fails to state the offense as to which the Nunc Pro Tunc entry is intended for the actual incarceration and term of punishment (2) the Nunc Pro Tunc entry

fails to state the remainder of the journal entry of conviction and sentences remains unchanged, and (3) both the initial journal entry dated August 29, 1991, and the Nunc Pro Tunc journal entry dated September 9, 1991, were both appealed by counsel in the instant case See: (Exhibit (d) Notice of Appeal), the appealing of both these entries is not in compliance with Crim. R. 32(C), however, the entries in McIntyre's case remain Crim.R. 32(C) deficient because the Nunc Pro Tunc entry fails to list (1) the charges for which McIntyre was convicted, and (2) the sentence imposed Baker, at Paragraph 14. However both Defense counsel and the trial court relied upon the initial Sentencing Journal Entry filed on September 9, 1991, to set forth the charges and sentences to which was void Baker, at paragraph 14.

Moreover, relying upon its previous decision in Tripodo, the Supreme Court determined that the multiple documents cannot be read together to form a final appealable order. Specifically the Baker court determined that **"allowing multiple documents to constitute a final appealable order, is also an erroneous interpretation of the rule. Only one document can constitute a final appealable order."** Id, at Paragraph 17, citing State v. Tripodo (1977), 50 Ohio St.2d 124, 127. (Emphasis added).

The requirements set forth in Baker determine whether an order is final and appealable pursuant to R.C. Section 2505.02 and Crim.R. 32(C), regardless of whether an order was journalized before Baker was decided. see State v. Carter, 9th Dist. No 24274, 2009-Ohio-4161, at Paragraph 5 citing, State ex rel Agosto v. Cuyahoga Cty Court of Common pleas, 119 Ohio St.3d 366, 894 N.E.2d 314, 2008-4607, at Paragraph 9.

McIntyre's sentencing entries having never constituted a final, appealable order infects every subsequent action taken in his criminal case. The court of appeals acted without subject-matter jurisdiction when it rendered judgments in subsequent actions appealed to it by McIntyre. Consequently, any judgment rendered by the court of appeals thereafter

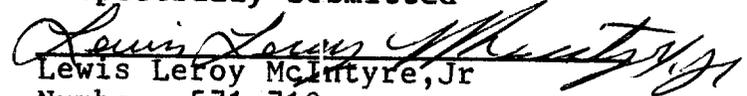
is void ab initio. Taking the Supreme Court at its word, the court of appeals would be required to re-evaluate its jurisdiction over McIntyre's previous appeal in light of the fact that his 1991 sentencing entries do not constitute a final, appealable order. Such evaluation could only result in the court of appeals vacating its own judgments accordingly. Van Deryt v. Van Deryt (1966), 6 Ohio St.2d 31,36.

McIntyre recognizes that the trial court is inferior and has no authority to vacate the court of appeals judgments. McIntyre merely directs this Court's attention to such reasoning to shed light on the fact that although he has had previous appeals, this Court would not be precluded from vacating and voiding the ab initio sentencing judgment entries and issuing a revised/corrected entry that could itself be appealed. Culgan Supra.

CONCLUSION

For the foregoing reason, McIntyre respectfully request this Court to vacate and void the sentencing judgment entries in the instant matter, and issue forthwith a single corrected entry in the above captioned case that contain all four requirements of Crim. R. 32 (C) as construed in Baker, and order the Clerk to forward a certified filed copy of the same to McIntyre and to the Richland Correctional Institution Record Department as well accordingly.

Respectfully Submitted



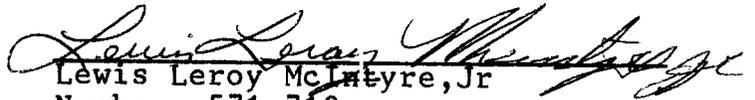
Lewis Leroy McIntyre, Jr
Number: 571-710
Richland Correctional
Institution.
P.O. BOX 8107
Mansfield, ohio 44901

DEFENDANT IN PROPRIA
PERSONA

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion has been forwarded to sherri bevan Walsh, Summit County Prosecutor at 53 University Avenue 6th Floor, Akron, ohio 44308. By regular U.S. postal service on this 17th day of Feb Year 2010.

Respectfully Submitted



Lewis Leroy McIntyre, Jr
Number: 571-710
Richland Correctional Inst.
Mansfield, Ohio 44901

DEFENDANT IN PROPRIA PERSONA

CC. FILE
LMCIJR (WRIT WRITER)
Judge Teodosio (Courtesy Mail)

COPY

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

MAY 30 12 00 PM '91 Term 19 91

THE STATE OF OHIO

vs.

LeROY L. McINTYRE
aka LeROY TYSON
PAGE ONE OF TWO
PART I OF II

NOV 30 01 01 0135

JOURNAL ENTRY

1474 666

THIS DAY, to-wit: The 29th day of August, A.D., 1991, now comes the Prosecuting Attorney on behalf of the State of Ohio, the Defendant, LeROY L. McINTYRE aka LeROY TYSON, being in Court with counsel, VINCENT MODUGNO, for sentencing; having heretofore on August 13, 1991, was found GUILTY by a Jury Trial of FELONIOUS ASSAULT, as contained in One (1) of the Indictment, with SPECIFICATION ONE TO COUNT ONE, and AGGRAVATED BURGLARY, as contained in Count One (1) of the Supplement Two to Indictment, with SPECIFICATION ONE TO COUNT ONE of the Supplement Two to Indictment.

Thereupon, the Court inquired of the said Defendant if he had anything to say why judgment should not be pronounced against him; and having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced:

IT IS, THEREFORE, ORDERED AND ADJUDGED BY THIS COURT that the Defendant, LeROY L. McINTYRE aka LeROY TYSON, be committed to the Lorain Correctional Institution at Grafton, Ohio, for an actual period of Three (3) Years mandatory sentence for possession of a firearm and for an indeterminate period of not less than Eight (8) Years and not more than the maximum of Fifteen (15) Years for punishment of the crime of FELONIOUS ASSAULT, Ohio Revised Code Section 2903.11(A)(2), an aggravated felony of the second (2nd) degree, and for an actual period of Three (3) years

I certify this to be a true copy of the original
Daniel M. Horrigan, Clerk of Courts.

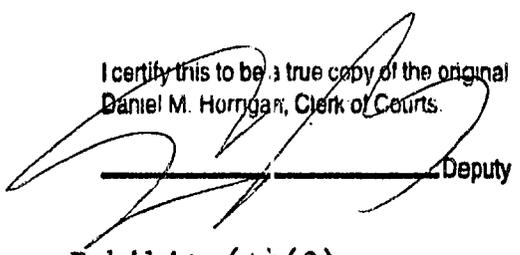

Deputy

Exhibit (A)(2)

No. _____

Journal _____ Page _____

COMMON PLEAS COURT
COUNTY OF SUMMIT

JOURNAL ENTRY

THE STATE OF OHIO

vs.

Entered _____ 19__

Hon. _____
Judge Presiding

Series _____

1474 PAGE 667

mandatory sentence for possession of a firearm and for an indeterminate period of not less than Eight (8) Years and not more than the maximum of Twenty Five (25) Years for punishment of the crime of AGGRAVATED BURGLARY, Ohio Revised Code Section 2911.11(A)(2)/(A)(3), an aggravated felony of the first (1st) degree, and that the said Defendant pay the costs of this prosecution for which execution is hereby awarded; said monies to be paid to the Summit County Clerk of Courts, Court House, Akron, Ohio 44308.

IT IS FURTHER ORDERED, pursuant to the above sentence that the Defendant be conveyed to the Lorain Correctional Institution at Grafton, Ohio, to commence the prison intake procedure.

IT IS FURTHER ORDERED that the Six (6) Year mandatory sentence imposed in this case be served CONSECUTIVELY and not concurrently with the sentence imposed in One (1) Count of the Indictment and Count One (1) of the Supplement Two to Indictment.

IT IS FURTHER ORDERED that the sentence imposed in One (1) Count of the Indictment and Count One (1) of the Supplement Two to Indictment be served CONSECUTIVELY and not concurrently with each other.

APPROVED:
September 4, 1991
jm

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

MAY

91

Term 19

THE STATE OF OHIO

vs.

LeROY L. McINTYRE

aka LeROY TYSON

PAGE TWO OF TWO

No. CR 91 01 0135

JOURNAL ENTRY

NO. 1474 PAGE 668

Mary F. Spicer
MARY F. SPICER, Judge
Court of Common Pleas
Summit County, Ohio

- cc: Prosecutor Maureen Hardy
- Attorney Vincent Modugno
- Criminal Assignment
- Grand Jury
- Booking
- SIU
- Court Convey
- Attorney Barry Ward
- Psycho-Diagnostic Clinic
- Ms. Maureen Mancuso

DIANA ZALESKI

FEB 7 2 03 PM '91

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO

SUB
CLERK

INDICTMENT TYPE: OPEN

CR. CASE NO. 91-01-0135

INDICTMENT FOR: FELONIOUS ASSAULT (1) 2903.11(A)(2) WITH FIREARM SPEC
2941.141 AND PRIOR AGGRAVATED FELONY SPEC 2941.142

1425 PAGE 153

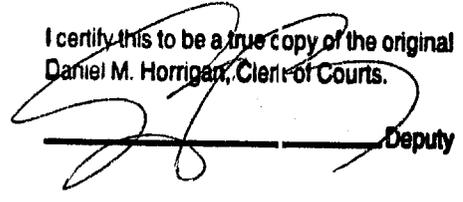
In the Common Pleas Court of Summit County, Ohio, of the term of JANUARY,
in the year of our Lord, One Thousand Nine Hundred and NINETY-ONE.

The Jurors of the Grand Jury of the State of Ohio, within and for the body
of the County aforesaid, being duly impanelled and sworn and charged to
inquire of and present all offenses whatever committed within the limits of
said County, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE
OF OHIO,

COURT ONE

DO FIND AND PRESENT, That LEROY L. MCINTYRE AKA LEROY TYSON on or about the
30th day of December, 1990, in the County of Summit and State of Ohio,
aforesaid, did commit the crime of FELONIOUS ASSAULT, in that he did
knowingly cause or attempt to cause physical harm to Galen L. Thompson, by
means of a deadly weapon, to-wit: a Shotgun, as defined in Section 2923.11
of the Revised Code, in violation of Section 2903.11(A)(2) of the Ohio
Revised Code, AN AGGRAVATED FELONY OF THE SECOND DEGREE, contrary to the
form of the statute in such case made and provided and against the peace
and dignity of the State of Ohio.

I certify this to be a true copy of the original
Daniel M. Horrigan, Clerk of Courts.


Deputy

SPECIFICATION ONE TO COUNT ONE (R.C. 2941.141)

The Grand Jurors further find and specify that **LEROY L. MCINTYRE AKA LEROY TYSON** did have a firearm as defined in Section 2923.11 of the Ohio Revised Code, on or about his person or under his control while committing the said Felonious Assault.

SPECIFICATION TWO TO COUNT ONE (R.C. 2941.142)

The Grand Jurors further find and specify that the defendant **LEROY L. MCINTYRE AKA LEROY THOMPSON** has previously been convicted of the offense of Robbery.

S/ *LYNN C. SLABY*
LYNN C. SLABY, Prosecutor RAB/clf
County of Summit, Ohio

Prosecutor, County of Summit, by

S/ *Sharon L. Long*
Assistant Prosecuting Attorney

A TRUE BILL

Katherine Keller
KATHERINE KELLER
Foreperson of the Grand Jury

NO. 1425 ME 155

153

1991 FEB 11

ORDER

TO: DAVID W. TROUTMAN, Sheriff
County of Summit, Ohio

LEROY L. MCINTYRE AKA LEROY TYSON

THAT he has been indicted by the Grand Jury of the County of Summit and that each person named in the indictment is hereby ordered to personally appear for the purpose of arraignment at 9:00 A.M. on the 13th day of February, 1991, before the Honorable Mary F. Spicer, Judge of the Court of Common Pleas in the County of Summit Courthouse at 209 South High Street, Akron, Ohio: and THAT FAILURE TO APPEAR WILL RESULT IN A WARRANT FOR ARREST, FORFEITURE OF BOND, IF ANY, OR ADDITIONAL CRIMINAL CHARGES FOR FAILURE TO APPEAR UNDER O.R.C. SEC. 2937.99.

I certify that this is a true copy of the original indictment on file in this office.

DIANA ZALESKI, Clerk
Court of Common Pleas

Deputy

DANIEL M. HERRIGAN
2010 FEB 26 AM 8:37

SUMMIT COUNTY
CLERK OF COURTS
STATE OF OHIO,

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

Plaintiff,)	CASE NO. CR 1991-01-0135
)	
vs.)	JUDGE THOMAS A. TEODOSIO
)	
LEROY L. McINTYRE,)	<u>ORDER</u>
)	
Defendant.)	

This matter came before the Court upon the Defendant's "Motion to Vacate the Void Ab Initio Sentencing Judgment Journal Entries, and to Revise/Correct Sentencing Entries to Comply with Criminal Rule 32(C)," filed on February 22, 2010. The State of Ohio filed a Memorandum in Opposition on February 25, 2010. Upon due consideration and based on the relevant law, the Court finds the Defendant's motion not well taken and DENIES the same.

The Defendant was found guilty by a jury and sentenced on September 9, 1991. The judgment was affirmed on appeal. *State v. McIntyre* (May 27, 1992), 9th Dist. No. 15348. A motion for a new trial was denied on October 1, 1991. A motion to file a declaratory judgment was denied on May 16, 2002. A motion for relief from judgment was denied on December 12, 2005. A petition to correct sentencing and a motion for leave to file a motion for a new trial were denied on March 18, 2009. A motion to correct and modify sentence was denied on June 24, 2009. A motion for plain error, motion for preparation of complete transcript, and motion for appointment of counsel were all denied on August 7, 2009.

The Supreme Court of Ohio has held that res judicata bars any claim that could have been raised at trial or on direct appeal. *State v. Steffen* (1994), 70 Ohio St.3d 399, 410, 1994-Ohio-111, 639 N.E.2d 67; *State v. Ruby*, 9th Dist. No. 23219, 2007-Ohio-244, at ¶5; *State v. Perry*

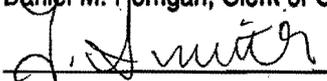
(1975), 10 Ohio St.2d 175, 226 N.E.2d 104, 39 O.O.2d 189, at paragraph nine of the syllabus. In the instant case, the Defendant's claim could have been raised on appeal.

Upon due consideration and based on the relevant law, the Court finds the Defendant's motion to be not well taken. The Defendant's "Motion to Vacate the Void Ab Initio Sentencing Judgment Journal Entries, and to Revise/Correct Sentencing Entries to Comply with Criminal Rule 32(C)" is DENIED. The motion is untimely and barred by res judicata

IT IS SO ORDERED.


JUDGE THOMAS A. TEODOSIO

I certify this to be a true copy of the original
Daniel M. Horrigan, Clerk of Courts.

 Deputy

cc: Richard S. Kasay, Assistant Prosecutor
Leroy L. McIntyre, Defendant *pro se*

DANIEL M. HOFFIGAN

2010 DEC 22 PM 1:11

SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
FOR SUMMIT COUNTY, OHIO
CRIMINAL DIVISION

STATE OF)
Plaintiff,)
v.)
LEROY L. MCINTYRE,)
Defendant.)
)

CASE NO: CR-91-01-0135
JUDGE: TEODOSIO
MOTION FOR DE NOVO RE-TRIAL UPON
CHARGES THAT THE TRIAL COURT
DISCHARGED THE JURY WITHOUT
PREJUDICE IN REFERENCE
TO THE PROSECUTION OF THOSE
CHARGES.

Now comes Leroy L. McIntyre, hereinafter ((Defendant)) In Propria Persona, and hereby moves this Court to grant the above styled motion as a matter of law, and due process right to the Defendant Pursuant to both the Fourteenth Amendment to the United states Constitution and Article I. Section 16 of the Ohio Constitution.

[THIS COURT MUST CONDUCT A DE NOVO RE-TRIAL AS THOUGH TRIAL HAD NEVER PREVIOUSLY OCCURRED.]

LAW AND ARGUMENT

61 Ohio App.3d 756, 573 N.E.2d 1150

Court of appeals of Ohio, Ninth District, Summit County
The State of Ohio, Appellee,
v.
Hague, Appellant. FN*

FN* reporters Note: A motion for leave to appeal to the Supreme Court of Ohio was overruled in (1989), 45 Ohio St.3d 704, 543 N.E.2d 810

According to State v. Hague, the Court in part as follows:

"[T]he jury was unable to reach a decision on the one count of aggravated murder with death specification and the one count of attempted murder of cadle with the firearm specification. Without objection from the defense counsel, the court declared a mistrial.

The jury was discharged without prejudice and a new trial on the counts on which the jury hung was rescheduled."

R.C. 2505.02: Defines "final order" in part as "[a]n order that affects a substantial right in an action that in affect determines the action and prevents a judgment." Pursuant to Civ.R. 41(B)(3), a dismissal for failure to prosecute operates as an adjudication on the merits, unless the court's order states otherwise. here the court. A dismissal without prejudice is not a final determination of the rights of the parties and does not constitute a judgment or a final order refiling or amending of the complaint is possible. See Central Mut. Ins , Co. v. Bradford-White Co, (1987), 35 Ohio App. 3d 26, 28, 519 N.E.2d 422.

Criminal Rule 32(C): Courts have interpreted [that requirements of Crim.R. 32(C) of the Ohio Rules of Criminal Procedure] as imposing a "mandatory duty [on the trial court] to deal with each and every charge prosecuted against a defendant," "[t]he failure of a trial court to comply renders the judgment of the trial court substantively deficient under Crim. R. 32 (C)."

MCINTYRE'S ARGUMENT:

McIntyre argues that the offenses thus contained in "Indictment Type Open: Secret Supplement One," thus charging the Defendant with Felonious Assault ((1)(A)(2) with Firearm specification, victim (Robert Taylor). is still pending and has not been RESOLVED as a matter of law, as to the adjudication of said charges. The above stated offenses were tried before a jury on August 8, 1991, however, the jury was unable to reach a decision on said offense, and the trial court discharged the jury without prejudice in reference to the prosecution of those charges. See [App.B-VERDICT ENTRY].

Defendant McIntyre is entitled to a [RETRIAL] on the charges that the Trial Court discharged the jury WITHOUT PREJUDICE. As such retrial does not violate the statutory protections provided under R.C. 2943.09 because:

*** [T]he remaining charges are not negated by the acceptance of the partial verdict, but rather continue to be unresolved, as to the unresolved charges then, the declaration of a mistrial is the appropriate procedural device to allow the matter to proceed to a final judgment. The mistrial furthers the administration of justice and enables the charges to be finally answered and the prosecution to come to an end. See STATE V. HAGUE.

By denying the trial court the power to require a retrial of the Defendant McIntyre when the jury had failed to reach a verdict would frequently frustrate the purpose of the law to protect society from those guilty of crimes. Wade v. Hunter (1949) 336 U.S. 684, 689 [69 S.Ct. 834, 837, 93 L.Ed. The doctrine of double jeopardy where the jury was found unable to answer the charges. See State v. Walker (Sept 27, 1987, Summit App. No. 13172, unreported, 1987 WL 17921, also See, State v. Bikerstaff (Nov 17, 1982) . Medina App. No. 1141, unreported, 1982 WL 2840.

CONCLUSION

Because neither DOUBLE JEOPARDY nor COLLATERAL ESTOPPEL prevents the [RETRIAL] of the Felonious Assault with accompanied Firearm Specification as contained in the Indictment Type Open: secret Supplement One. McIntyre moves this Court to issue an (ORDER) De Novo Re-Trial as though trial had never previously occurred as to the above stated charges, that "has not" been resolved by adjudication by either jury, or by this court due to this

Court's "DISCHARGEMENT OF THE JURY WITHOUT PREJUDICE IN REFERENCE TO THE PROSECUTION OF THOSE CHARGES. Defendant McIntyre also moves this Court to convey him before this Court in order for these matters to be resolved upon the official record and journalized correctly, and in the interest of justice. Justice delayed is justice denied.

Respectfully Submitted


Leroy L. McIntyre
Number: 571-710
Richland Correctional Inst.,
P.O. BOX 8107
Mansfield, Ohio 44901

Counsel For Defendant
In Propria Persona

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion has been forwarded to Mrs. Sherri Bevan Walsh, Summit County, Ohio Prosecuting Attorney, at 53 University Avenue 6th Floor Criminal Division, Akron, Ohio 44308. By regular U.S. postal service on this 20th day of December Year 2010.

Respectfully Submitted


Leroy L. McIntyre

Defendant

CC. FILE

Ohio Public Defenders Office (Columbus, Ohio)
Ohio Innocence Project (Cincinnati, Ohio)

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

MAY

SEP 2 12 08 PM '91

Term 19 91

THE STATE OF OHIO

vs.

LEROY L. McINTYRE
aka LeROY TYSON

No. CR 91 01 0135
CLE. NO. 150113

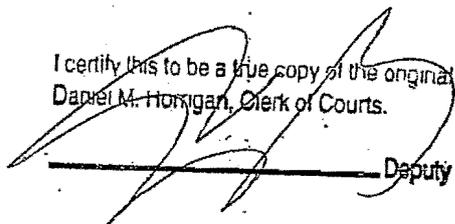
JOURNAL ENTRY

1474 PAGE 656

THIS DAY, to-wit: The 13th day of August, A.D., 1991, now comes the Prosecuting Attorney on behalf of the State of Ohio, the Defendant, LeROY L. McINTYRE aka LeROY TYSON, being in Court with counsel, VINCENT MOOGRO, for trial herein. Heretofore, on August 12, 1991, a Jury was duly empaneled and sworn and the trial commenced and not being completed, adjourned from day to day until August 12, 1991 at 1:15 O'Clock P.M., at which time the Jury having heard the testimony adduced by both parties hereto, the arguments of counsel and the charge of the Court, retired to their room for deliberation.

And thereafter, to-wit: On August 13, 1991, at 10:15 O'Clock A.M., said Jury came again into the Court and returned their verdict in writing finding said Defendant GUILTY of the crime of FELONIOUS ASSAULT, as contained in One (1) Count of the Indictment, with SPECIFICATION ONE TO COUNT ONE, NOT GUILTY of the SPECIFICATION TWO TO COUNT ONE, and GUILTY of the crime of AGGRAVATED BURGLARY, as contained in Count One (1) of the Supplement Two to Indictment, with SPECIFICATION ONE TO COUNT ONE of the Supplement Two to Indictment, and further, said Jury being unable to reach a decision on a verdict as to the charge of FELONIOUS ASSAULT, as contained in Count One (1) of the Supplement One to Indictment, with SPECIFICATION ONE TO COUNT ONE of the Supplement One to Indictment and SPECIFICATION ONE TO COUNT ONE of the Supplement Two to Indictment, the Court therefore discharges the Jury without prejudice in reference to the prosecution of those charges.

I certify this to be a true copy of the original
Daniel M. Horgan, Clerk of Courts.



Deputy

9

No. _____

Journal _____ Page _____

COMMON PLEAS COURT
COUNTY OF SUMMIT

JOURNAL ENTRY

THE STATE OF OHIO

vs.

Entered _____ 19

Hon. _____
Judge Presiding

Thereupon, due to the disappearance of said Defendant, the sentencing is hereby held in abeyance.

APPROVED:
September 4, 1991
jm

Mary F. Spicer
MARY F. SPICER, Judge
Court of Common Pleas
Summit County, Ohio

1474 FILE 657

- cc: Prosecutor Maureen Hardy
- Attorney Vincent Modugno
- Criminal Assignment
- Booking
- Attorney Barry Ward
- Ms. Maureen Mancuso
- Psycho-Diagnostic Clinic

DANIEL M. HERRIGAN
2011 JAN -3 AM 10:10

**IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO**

SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO

CASE NO. CR 91-01-0135

Plaintiff

JUDGE TEODOSIO

v.

LEROY MCINTYRE

Defendant

STATE'S MEMORANDUM

Defendant McIntyre filed a frivolous Motion for De Novo Retrial on December 22, 2010. McIntyre believes that because a charge of felonious assault with a firearm specification was dismissed without prejudice in 1991 he is now entitled to a trial on that charge. He observes that failure to do so would frustrate the purpose of the law to protect society from those guilty of crimes.

The motion is patently frivolous but if McIntyre wants to protect society he may petition to plead guilty to the charge, waive all defects in prosecution, and a bill of information will be prepared.

Otherwise the court of appeals has determined that the sentencing entry in this case is a final order. *State v. McIntyre*, 9th Dist. App. No. 25292, 2010-Ohio-4658.

And McIntyre is currently prosecuting an appeal from this Court's Order dated October 12, 2010 denying a motion for leave to file a motion for new trial, C.A. 25666. This Court is without jurisdiction to act on the motion. State v. Kase, 7th Dist. App. No. 09 BE 18, 2010-Ohio-2688, ¶11.

The State requests that the motion be denied and that costs be taxed against McIntyre.

Respectfully submitted,

SHERRI BEVAN WALSH
Prosecuting Attorney



RICHARD S. KASAY
Assistant Prosecuting Attorney
Summit County Safety Building
53 University Avenue, 6th Floor
Akron, Ohio 44308
(330) 643-2800
Reg. No. 0013952

PROOF OF SERVICE

I hereby certify that a copy of the foregoing has been mailed by regular U.S. Mail to Leroy L. McIntyre, Number 571-710, Richland Correctional Inst., P.O. Box 8107, Mansfield, OH 44901 this 3rd day of January, 2011.



RICHARD S. KASAY
Assistant Prosecuting Attorney

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

2011 JAN -7 AM 10: 27

THE STATE OF OHIO

Case No. CR 91 01 0135

vs.

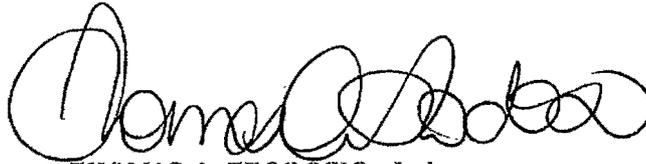
SUMMIT COUNTY
CLERK OF COURTS

JOURNAL ENTRY

LEROY L. MCINTYRE

On January 4, 2011, IT IS HEREBY ORDERED that the Pro se motion for de novo re-trial is denied.

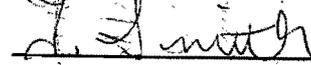
APPROVED:
January 4, 2011
pmw



THOMAS A. TEODOSIO, Judge
Court of Common Pleas
Summit County, Ohio

cc: *Prosecutor Colleen Sims*
LEROY L. MCINTYRE #571-710, Richland Correctional Institution- **CERTIFIED**

I certify this to be a true copy of the original
Daniel M. Horrigan, Clerk of Courts.

 Deputy

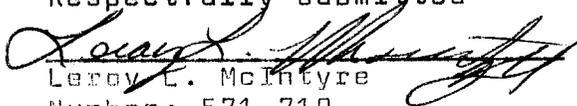
IN THE COURT OF COMMON PLEAS
FOR SUMMIT COUNTY, OHIO
CRIMINAL DIVISION

2011 AUG -4 PM 1:33

STATE OF OHIO	:	CASE NO: <u>CR-91-01-0135</u>
Plaintiff,	:	JUDGE: <u>THOMAS A. TEODOSIO</u>
v.	:	<u>MOTION TO CORRECT CLERICAL</u>
	:	<u>MISYAKE IN VERDICT JOURNAL</u>
LERoy L. MCINTYRE,	:	<u>ENTRY ARISING FROM OVERSIGHT</u>
	:	<u>OR OMISSION. PURSUANT TO</u>
Defendant.	:	<u>CRIMINAL RULE 36(A).</u>

SUMMIT COUNTY
CLERK OF COURTS

Now comes Leroy L. McIntyre, hereinafter (Defendant) In Propria Persona, and hereby respectfully moves this Honorable Court to grant the above styled motion as a matter of law supported by the below stated facts. Defendant McIntyre's current motion is not (**frivolous**), and Criminal Rule 36(A) authorize's this Court to correct the complained mistake that is evident below and as exhibited herein.

Respectfully Submitted

Leroy L. McIntyre
Number: 571-710
Grafton Corr Inst.
2500 S. Avon Belden Rd
Grafton, Ohio 44044

Counsel for Defendant In
Propria Persona

NOTICE

Notice: is hereby given to the States Plaintiff that the failure to respond to the above styled motion by affirmation within Thirty (30) days of the filing date of this motion. will be deemed as an admission of the facts presented herein and below by the defendant McIntyre.

STATE OF OHIO)
COUNTY OF LORAIN) SS. SWORN AFFIDAVIT IN SUPPORT BY:
LERoy L. MCINTYRE, DEFENDANT

I Leroy L. McIntyre, hereby state and attest that I am an adult over the age of eighteen(18) Tears and I am competent to testify to the same and as to all statements of facts contained hereinto which all statements made are true and correct to the best of my knowledge, understanding and belief. And all statements made are made under the strict penalty of perjury under the Law/Laws of the State of Ohio and I state as follows:

LAW AND ARGUMENTCRIMINAL RULE 36(A) PROVIDES:

"Clerical mistakes in judgments, orders or other parts of the record, and errors in the record arising from oversight or omission may be corrected by the court at any time."

DOCTRINE OF RES JUDICATA DOES NOT APPLY:

1.) In the instant case, the States Plaintiff may contend that this court should deny Defendant McIntyre's current motion under the Doctrine of res Judicata, however, said doctrine does not apply to the current motion before this court. Being that, Pursuant to Crim. R. 36(A), said rule is completely void of any time restraints to which a Defendant may motion the the court to correct its Journal Entry especially when an clerical mistake, errors arising from oversight or omission has been discovered. Defendant McIntyre has a clear legal right to have the proceedings and the court's announcement to be properly journalized to which he has been involved in journalized, and the court has a duty to journalize its proceedings and announcement's.

MCINTYRE'S ARGUMENT

2.) McIntyre will be clear and on point with his argument so there will be any misunderstanding on the part of the states Plaintiff. McIntyre argues, that the attached Journal Entry (Exhibit.A-Vol 1474 Page 656). Said entry clearly states Two(2) legal impossibilities that must be corrected as a matter of law. as for example, (1) the attached journal Entry specifically states that Defendant McIntyre was found (**Guilty**) of the offense of Aggravated Burglary, as in Count one of the Supplement One(1) of the supplement Two(2) to Indictment, with "SPECIFICATION ONE TO COUNT ONE OF THE SUPPLEMENT

TWO TO INDICTMENT, (2) the Journal entry further reads; said jury being unable to reach a decision on a **verdict** as to "SPECIFICATION ONE TO COUNT ONE OF THE SUPPLEMENT TWO TO INDICTMENT." The same two specifications referred above is for a **(Firearm specification)** for the exact same offense to which Aggravated Burglary.

3.) That its clear from the face of the attached Journal Entry that a clear mistake has been made in said entry, and there exists both **Vagueness and Ambiguity** that is not questionable.

4.) The States Plaintiff may contend that the passage of time may be an issue being that defendant's case is nearly Twenty One Years old, but that alone does not negate the fact that a crucial mistake has been made and needs correcting despite of the results correcting the Journal Entry may produce in this case, inasmuch, any time factor is not relevant nor applies to Crim. R.36(A).

CONCLUSION

5.) based upon the above stated facts exhibited by the attached Journal Entry as evidence. the evidence shows Two(2) legal impossibilities as to **(1)** Defendant being found guilty by the jury of the Firearm specification as to the offense of aggravated Burglary, and **(2)** the jury not being able to reach a decision as to the Firearm Specification for the offense of Aggravated Burglary as contained in SPECIFICATION ONE TO COUNT ONE OF THE SUPPLEMENT TWO TO INDICTMENT.

6.) Defendant McIntyre respectfully moves this Honorable Court to **correct its entry**, and being that there exists vagueness and ambiguity between Defendant being found guilty of the firearm specification as to the offense of **Aggravated Burglary** and the jury being unable to reach a decision as to the firearm specification to the offense of **Aggravated Burglary**. McIntyre moves this court to construe the later that "the jury was unable to reach a decision as

Page 3 of 4


Leroy L. McIntyre
Counsel For Defendant
In Propria Persona

COPY

No. _____

Journal _____ Page _____

COMMON PLEAS COURT
COUNTY OF SUMMIT

JOURNAL ENTRY

THE STATE OF OHIO

vs.

Entered _____, 19____

Hon. _____
Judge Presiding

38708

Thereupon, due to the disappearance of said Defendant, the sentencing is hereby held in abeyance.

APPROVED:
September 4, 1991
jm

Mary F. Spicer
NO. 1474 PAGE 857
MARY F. SPICER, Judge
Court of Common Pleas
Summit County, Ohio

- cc: Prosecutor Maureen Hardy
- Attorney Vincent Modugno
- Criminal Assignment
- Booking
- Attorney Barry Ward
- Ms. Maureen Mancuso
- Psycho-Diagnostic Clinic

**IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT**

2011 OCT 12 PM 12:29

THE STATE OF OHIO

Case No. CR 91 01 0135

vs.

SUMMIT COUNTY
CLERK OF COURTS

JOURNAL ENTRY

**LEROY L. MCINTYRE
AKA LEROY TYSON**

On October 11, 2011, upon due consideration of this Court, IT IS HEREBY ORDERED that the Journal Entry dated August 13, 1991 be amended to read as follows:

THIS DAY, to-wit: The 13th day of August, A.D., 1991, now comes the Prosecuting Attorney on behalf of the State of Ohio, and the Defendant, LEROY L. MCINTYRE AKA LEROY TYSON, being in court with counsel, VINCENT MODUGNO, for trial herein. Heretofore, on August 12, 1991, a Jury was duly empaneled and sworn, and the trial commenced, and not being completed, adjourned from day to day until August 12, 1991 at 1:15 p.m., at which time the Jury having heard the testimony adduced by both parties hereto, the arguments of counsel, and the charge of the Court, retired to their room for deliberation.

And thereafter, to-wit: On August 13, 1991, at 10:15 a.m., said Jury came again into the Court and returned their verdict in writing finding said Defendant GUILTY of the crime of FELONIOUS ASSAULT, as contained in Count 1 of the Indictment, with SPECIFICATION ONE TO COUNT ONE, NOT GUILTY of the SPECIFICATION TWO TO COUNT ONE, and GUILTY of the crime of AGGRAVATED BURGLARY, as contained in Count 1 of the Supplement Two to Indictment, with SPECIFICATION ONE TO COUNT ONE of the Supplement Two to Indictment; and further, said Jury being unable to reach a decision on a verdict as to the charge of FELONIOUS ASSAULT, as contained in Count 1 of the Supplement One to Indictment, with SPECIFICATION ONE TO COUNT ONE of the Supplement One to Indictment, the Court therefore discharges the Jury without prejudice in reference to the prosecution of those charges.

Thereupon, due to the disappearance of said Defendant, the sentencing is hereby held in abeyance.

APPROVED:
October 11, 2011
Pmw for jam

THOMAS A. TEODOSIO, Judge
Court of Common Pleas
Summit County, Ohio

cc: *Prosecutor Dustin Roth*
Attorney Vincent Modugno
Attorney Barry Ward

Bureau of Sentence Computation - **CERTIFIED**
LEROY L. MCINTYRE #571-710, GRAFTON Correctional Institution - **CERTIFIED**
GRAFTON Correctional Institution - **CERTIFIED**

I certify this to be a true copy of the original
Daniel M. Herrigan, Clerk of Courts.

IN THE COURT OF COMMON PLEAS
FOR SUMMIT COUNTY, OHIO
CRIMINAL DIVISION

2012 JUN 14 PM 2:17

STATE OF OHIO

Plaintiff,

Vs.

LEROY L. MCINTYRE

Defendant.

SUMMIT COUNTY
CLERK OF COURTS

CASE NO: CR-91-01-0135

JUDGE: THOMAS A. TEODOSIO

NOTICE TO PROCEED TO TRIAL

UPON RETRIAL

Now comes Leroy L. McIntyre, hereinafter [Defendant], in Propria Persona, and hereby gives his [NOTICE] of his inclination to proceed to trial as to the Supplement One to Indictment thus charging the Defendant with the alleged offense to-wit **Felonious Assault** with accompanied **Specifications** in the above captioned case.

The above stated offense is currently pending retrial before this court and until these matters are presented before a jury and a [VERDICT] being rendered by a jury either in favor of the Defendant or the State's Plaintiff, this matter of the supplement indictment will continue to be subject to disposition by a jury.

The Defendant McIntyre will not move for these pending matters to be resolved in the absence of a jury trial commencing before this court. Nor is any counsel that has been appointed to this case is permitted, or authorized by the Defendant to dispose of this matter proceeding to trial without first obtaining and in writing by the Defendant McIntyre that this case and matters at hand will be disposed of by other means other than a jury trial.

Notice as to the above is hereby given to all parties in

this matter.

Respectfully Submitted


Leroy L. McIntyre

In Propria Persona

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Notice was forwarded to Mr. Joe Fantozzi, Assistant Prosecuting Attorney for Summit County, Ohio at 53 University Ave 6th Floor Criminal Division Akron, Ohio 44308. By regular U.S. Postal Service on this 17th day of JUNE Year 2012.

Respectfully Submitted


Leroy L. McIntyre

Number: 571-710

Grafton Correctional Inst.

2500 S. Avon Belden Rd

Grafton, Ohio 44044

In Propria Persona

C.C.
Ohio Innocence Project
Adam Vanho, Attorney At Law
Mr. James a. Williams
Ms. April Thomas

DANIEL M. HORRIGAN

2012 JUN 27 AM 9:22

IN THE COURT OF COMMON PLEAS

SUMMIT COUNTY, OHIO

STATE OF OHIO
SUMMIT COUNTY
CLERK OF COURTS

CASE NO. CR 91 01 0135

Plaintiff

JUDGE TEODOSIO

v.

LEROY MCINTYRE

STATE'S MEMORANDUM

Defendant

The Defendant filed a Motion to Proceed to Trial Upon Retrial; Motion for Bill of Particulars; and Motion for Discovery on June 14, 2012.

This Memorandum should be accepted instanter as undersigned was out of the office June 21-June 22, 2012.

Defendant wants to go to trial on a supplemental count upon which the jury could not reach a verdict. See Entry dated October 12, 2011 nunc pro tunc amending entry dated August 13, 1991.

The State gives notice that it will not retry this count. The count of felonious assault with specification one, count one of supplement one should be dismissed with prejudice.

All motions are moot.

Respectfully submitted,

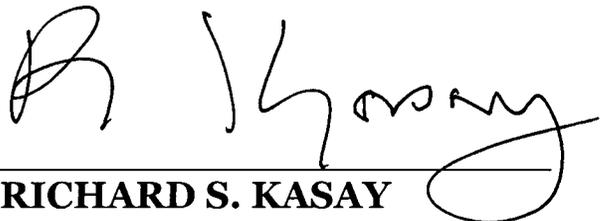
SHERRI BEVAN WALSH
Prosecuting Attorney



RICHARD S. KASAY
Assistant Prosecuting Attorney
Summit County Safety Building
53 University Avenue, 6th Floor
Akron, Ohio 44308
(330) 643-2800
Reg. No. 0013952

PROOF OF SERVICE

I hereby certify that a copy of the foregoing has been mailed by regular U.S. Mail to: Leroy McIntyre, Number 571-710, Grafton Corr. Inst., 2500 S. Avon Belden Road, Grafton, OH 44044 on this 28th day of June, 2012.



RICHARD S. KASAY
Assistant Prosecuting Attorney

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

DANIEL M. HORRIGAN

STATE OF OHIO,

Plaintiff,

vs.

LEROY L. McINTYRE,

Defendant.

) CASE NO. CR 1291-01-0135 PM 2: 21
)
)
) JUDGE THOMAS A. TEODOSIO
) SUMMIT COUNTY
) CLERK OF COURTS

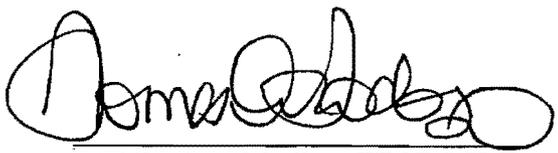
ORDER

This matter came before the Court upon the Defendant's "Notice to Proceed to Trial Upon Retrial" filed on June 14, 2012. The State of Ohio filed a Memorandum in opposition on June 27, 2012.

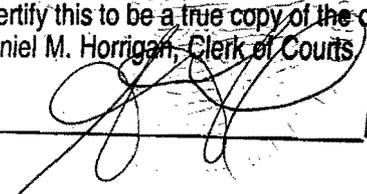
In the State's Memorandum, Assistant Prosecutor Richard Kasay states, "The State gives notice that it will not retry this count. The count of felonious assault with specification one, count one of supplement one should be dismissed with prejudice." Therefore, the Court hereby reclassifies the State's Memorandum as a "Motion to Dismiss" the aforementioned count and specification.

Upon due consideration, the Defendant's "Notice to Proceed to Trial Upon Retrial" is DENIED. Furthermore, the State's "Motion to Dismiss" is GRANTED. The Court dismisses the charge of Felonious Assault, as contained in Count One of Supplement One to the Indictment, as well as the Specification One to Count One of Supplement One to the Indictment.

IT IS SO ORDERED.


JUDGE THOMAS A. TEODOSIO

cc: Richard S. Kasay, Assistant Prosecutor
Leroy L. McIntyre, Defendant *pro se*


I certify this to be a true copy of the original
Daniel M. Horrigan, Clerk of Courts

Deputy

IN THE COURT OF COMMON PLEAS
FOR SUMMIT COUNTY, OHIO
CRIMINAL DIVISION

DANIEL M. HOFF
2012 JUL 10 AM 7:42
SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO	:	CASE NO: CR-91-01-0135
Plaintiff,	:	JUDGE: TEODOSIO
Vs.	:	MOTION FOR DE NOVO
LERROY L. MCINTYRE	:	RETRIAL IN ORDER TO
Defendant.	:	DISPOSE OF R.C.2941.142
	:	PRIOR AGGRAVATED FELONY
	:	SPECIFICATION.
	:	

Now comes Leroy L. McIntyre, hereinafter (Defendant) in Propria Persona, and hereby moves this court to grant the above styled motion as a matter of law and due process right to the Defendant.

Currently Mr. McIntyre is pending retrial as to Indictment Type: Supplement One, however, Indictment Types: Open Felonious and Supplement Two Aggravated Burglary, both contained R.C. 2941.142 Prior Aggravated Felony Specifications that has not been disposed of in this case to which renders the underlying offense as contained in Indictment Type's: Open and Supplement Two (NON FINAL). See State v. Goodwin, Ninth District, C.A. No. 23337; also State v. Hayes, Ninth District. No.99CA007416.

At this present time, there are any appeals pending in this case to which would prevent this court from exercising its jurisdiction to grant the above styled motion and proceeding forward to trial forthwith.

The instant motion before this court is clearly an (PRETRIAL MOTION), and as such, any denial of same by this court, is not subject to Appellate review due to Trial Court's denials of pretrial motions in a criminal proceeding does not constitute a final order. See State v. McIntyre, Ninth District, C.A. No.

25800; also See (Exhibit.A-Appellate Court's Entry of Dismissal).

The facts upon which Mr. McIntyre is relying on in support of his motion, are fully developed within the attached Memorandum In Support.

Respectfully Submitted



Leroy L. McIntyre
Number: 571-710
Grafton Corr Inst.
2500 S. Avon Belden Rd
Grafton, Ohio 44044

In Propria Persona

MEMORANDUM IN SUPPORT

LAW AND ARGUMENT:

1.) Criminal Rule 31 (A) provides as follows:

"The verdict (SHALL) be unanimous if (SHALL) be in writing, signed by (ALL) jurors concurring therein, and returned by the jury to the judge to the judge in open court."

2.) In State v. Goodwin, Ninth District Court of Appeals for Summit County, Ohio, C.A. No. 23337 (Decided May 16, 2007), held in pertinent part as follows:

(Par.1) "This Court dismisses Mr. Goodwin's attempted appeal because it has concluded that a trial court's failure to dispose of any charges brought against a defendant in a (SINGLE CASE) renders its judgment non-final in regards to (ALL THE CHARGES)."

3.) In State v. Hayes, Ninth District. No. 99CA007416, 2000 WL 670672 (Decided May 24, 2000).The Appellate Court held:

"A third panel concluded that the failure to dispose of two (SPECIFICATIONS) against a defendant rendered the journal entry disposing of three charges and two (SPECIFICATIONS) against him (NON FINAL)."

4.) Mr. McIntyre argues (1) that (Exhibit.B-Verdict Entry), contains a finding of (NOT GUILTY) as to R.C. 2941.142 Prior

Aggravated Felony Specification to which said verdict was not unanimously rendered by the jury in this case and returned by the jury in writing to to the trial court Judge William H. Victor in open court pursuant to Crim. R. 31 (A)., (2) the records and files in this case, are completely void of any (JURY VERDICT FORM) remotely establishing that the jury had returned their verdict in writing. Thus, finding Mr. McIntyre (NOT GUILTY) of said specification., (3) the Indictment Type's: Open Felonious Assault, Supplement One Felonious Assault, and Supplement Two Aggravated burglary. All contained an R.C. 2941.142 Prior Aggravated Felony Specification that was required to have been disposed of in this case. And in the absence of any verdict being rendered by the jury in this case, as to said specifications, renders all of the underlying offenses as stated above in this case (NON FINAL). See STATE V. GOODWIN AND STATE V. HAYES.

5.) The trial court had usurped its authority by entering a phantom verdict of (NOT GUILTY) in the verdict entry in this case. And the actions of the trial court was erroneous and contrary to law to which the court's actions has resulted in all offenses and accompanied specifications in this case being non final and must be retried before a jury as a matter of law and right to Mr. McIntyre.

6.) This court cannot move forward now, just on the Supplement One Indictment before retrial without as well moving forward to trial upon Indictment's Type: Open Felonious Assault and Aggravated Burglary.

7.) Mr. McIntyre had elected a trial by jury upon all charges and accompanied specification's charged against him. First of all, if there is a conviction, in this case, it must be for

(1) all the underlying offenses in the Indictment's in this case, (2) with firearm specification's, and then (3) "a finding also by the jury beyond a reasonable doubt as to the (SPECIFICATION) involving prior conviction. See State v. Byrd, Eighth District, No. 49267 (Decided August 5, 1985).

8.) By the trial court placing in the verdict entry of conviction, a finding that was never made by the jury, can only be viewed as being erroneous and contrary to law. In Scott v. Volke C.A. No. 2496 (Decided December 6, 1953), Ninth District Court of Appeals. The Appellate Court held as follows:

PER CURIAM

"We have reached the conclusion that the right to amend or correct a verdict returned by a jury is governed in this state by statute. If the charge is one of substance, it must be made by the jurors before their discharge (C 11420-10, GC); if it is one of form only, it may be made by the court with the assent of the jurors before their discharge (C 11420-111, GC). See 11363, G.C., relating to power of a court as to amendments, does not apply to amendment of a verdict. James Clark and Orders v. Williams Irvin, 9 O. 131, at (C.132). The trial court committed error in ordering the amendments of the court's record which were made in this case, and it follows that the judgment of the trial court, which was not based upon a verdict rendered against the plaintiff in error was erroneous and contrary to law."

9.) This court's previous trial court Judge, in 1991, had had clearly and convincingly according to the official record in this case. Had entered a judgment of (NOT GUILTY), which was not based upon a verdict rendered in favor of the Defendant McIntyre in error, was erroneous and contrary to law. And to which had prejudiced the State's Plaintiff, and deprived the Defendant McIntyre of his due process rights guarantees to be tried upon all offenses and specifications before a jury trial and these facts cannot be disputed by the State's Plaintiff

in this case.

CONCLUSION

Based upon the above stated facts, Mr. McIntyre moves this Honorable Court to grant the foregoing motion. And in doing so, Mr. McIntyre request of this court to (1) conduct an evidentiary hearing so the facts may be fully developed upon the record of whether or not the records and files in this case, shows a verdict form returned in writing by the jury in this case. Thus, finding Mr. McIntyre (NOT GUILTY) of the R.C. 2941.142 Prior Felony Specification. In order for all the underlying offenses in this case to be final., (2) for this court to conduct a status hearing upon all untried offenses in this case pending including and not limited to all accompanied specifications, and after the facts have been established upon the record that any finding of (NOT GUILTY) was not rendered by the jury, for this court and upon its inherent power. To vacate and void the Verdict Entry, as well the Sentencing Entry in this case due to both instruments are not final appealable orders until all offenses and accompanied specifications has been disposed of STATE V. GOODWIN AND STATE V. HAYES. And any further relief this court deems just and proper and in the interest of justice. Justice delayed is justice denied.

Respectfully Submitted


Leroy J. McIntyre
In Propria Persona

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion was forwarded to Mr. Joe Fantozzi, Assistant Prosecuting Attorney for Summit County, Ohio 53 University Avenue 6th Floor Criminal Division Akron, Ohio 44308. By regular U.S. Postal Service on this 5th day of July Year 2012.

Respectfully Submitted

Leroy L. McIntyre

~~Leroy L. McIntyre #571-710~~
Grafton Corr Inst.
2500 S. Avon Belden Rd
Grafton, Ohio 44044

In Propria Persona

C.C. FILE

Ohio Innocence Project

**Mr. Phill Tresler, Personnel
of the Akron Beacon Journal Newspaper Company**

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

COURT OF APPEALS
DANIEL
IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

2011 DEC 30 PM 1:45

STATE OF OHIO

SUMMIT COUNTY
CLERK OF COURTS C.A. No. 25800

Appellee

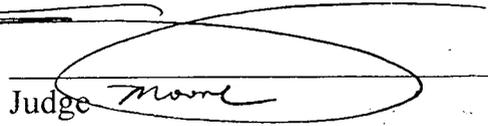
v.

LEROY L. MCINTYRE

Appellant

JOURNAL ENTRY

Appellant, Leroy L. McIntyre, has appealed from the trial court's denial of his "Motion For De Novo Re-Trial Upon Charges That the Trial Court Discharged the Jury Without Prejudice in Reference to the Prosecution of Those Charges." Essentially, his motion asked the trial court to set a trial date for an outstanding charge, and the trial court denied the motion. This is not a final order from which an appeal may be taken. See *State v. Rattray*, 8th Dist. No. 85708, 2005-Ohio-5152, citing *State v. Scott* (1984), 20 Ohio App.3d 215 (generally, the denial of pretrial motions in criminal proceedings does not constitute a final appealable order). In his brief on appeal, Mr. McIntyre argued both that the trial court should have set a trial date and that the charges should be dismissed, a claim he did not make in the trial court. If dismissal is the remedy he seeks, he may be able to file a motion to dismiss in the trial court alleging a violation of his speedy-trial rights. Upon review, the attempted appeal is dismissed for lack of a final, appealable order.

for Judge 

Concur:
Belfance, P.J.
Whitmore, J.

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

2011 OCT 12 PM 12: 29

THE STATE OF OHIO

Case No. CR 91 01 0135

vs.

SUMMIT COUNTY
CLERK OF COURTS

JOURNAL ENTRY

LEROY L. MCINTYRE
AKA LEROY TYSON

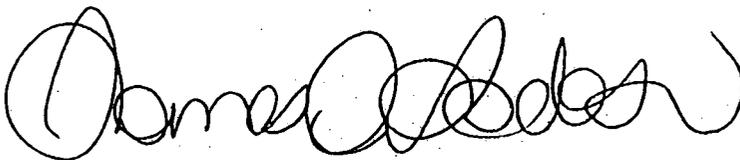
On October 11, 2011, upon due consideration of this Court, IT IS HEREBY ORDERED that the Journal Entry dated August 13, 1991 be amended to read as follows:

THIS DAY, to-wit: The 13th day of August, A.D., 1991, now comes the Prosecuting Attorney on behalf of the State of Ohio, and the Defendant, LEROY L. MCINTYRE AKA LEROY TYSON, being in court with counsel, VINCENT MODUGNO, for trial herein. Heretofore, on August 12, 1991, a Jury was duly empaneled and sworn, and the trial commenced, and not being completed, adjourned from day to day until August 12, 1991 at 1:15 p.m., at which time the Jury having heard the testimony adduced by both parties hereto, the arguments of counsel, and the charge of the Court, retired to their room for deliberation.

And thereafter, to-wit: On August 13, 1991, at 10:15 a.m., said Jury came again into the Court and returned their verdict in writing finding said Defendant GUILTY of the crime of FELONIOUS ASSAULT, as contained in Count 1 of the Indictment, with SPECIFICATION ONE TO COUNT ONE, NOT GUILTY of the SPECIFICATION TWO TO COUNT ONE, and GUILTY of the crime of AGGRAVATED BURGLARY, as contained in Count 1 of the Supplement Two to Indictment, with SPECIFICATION ONE TO COUNT ONE of the Supplement Two to Indictment; and further, said Jury being unable to reach a decision on a verdict as to the charge of FELONIOUS ASSAULT, as contained in Count 1 of the Supplement One to Indictment, with SPECIFICATION ONE TO COUNT ONE of the Supplement One to Indictment, the Court therefore discharges the Jury without prejudice in reference to the prosecution of those charges.

Thereupon, due to the disappearance of said Defendant, the sentencing is hereby held in abeyance.

APPROVED:
October 11, 2011
Pmw for jam



THOMAS A. TEODOSIO, Judge
Court of Common Pleas
Summit County, Ohio

- cc: *Prosecutor Dustin Roth*
- Attorney Vincent Modugno*
- Attorney Barry Ward*
- ~~Bureau of Sentence Computation - CERTIFIED~~
- LEROY L. MCINTYRE #571-710, GRAFTON Correctional Institution- CERTIFIED
- GRAFTON Correctional Institution- CERTIFIED

[EXHIBIT.B]

DANIEL M. HERRIGAN
JUL 10 PM 11:54

IN THE COURT OF COMMON PLEAS
FOR SUMMIT COUNTY, OHIO

SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO	:	CASE NO: <u>CH-91-01-0135</u>
Plaintiff	:	JUDGE: <u>THOMAS A, TEODOSIO</u>
Vs.	:	<u>MOTION INVOKING TRIAL COURT'S</u>
LERoy L. MCINTYRE	:	<u>INHERENT POWER TO VACATE AND</u>
Defendant.	:	<u>VOID ITS VOID SENTENCE RENDERED.</u>
	:	<u>WITH DEMAND FOR IMMEDIATE</u>
	:	<u>DISCHARGE FROM FURTHER CONFINEMENT</u>
	:	

Now comes Leroy L. McIntyre, hereinafter [Defendant] in Propria Persona, and hereby respectfully moves this Court to entertain and grant the above styled motion by this court's inherent power.

At this present time this Court has and maintains Jurisdiction over the pleadings, and that there are any pending appeals in this case that would prevent this court from addressing and ruling on the complained matters herein and below.

The above styled motion should not be recast as an Post-Conviction Petition. Said motion is specific and proper remedie. Inasmuch, the Doctrine of Res Judicata does not apply in this matter due to the judgment of sentence is void and contrary to law.

This Court's authority over the above styled motion is as follows:

INHERENT POWER OF THE COURT

The Ohio Supreme Court has "recognized the [Inherent Power] of Court's to Vacate Void Judgment's." Cincinnati Sch. Dist. Bd. of Educ. v. Hamilton County Bd. of Revision, 87 Ohio St.3d 363, 368, 721 N.E.2d. 40 [2000]. "A court has inherent power to vacate a void judgment because such an order simply recognizes the fact the judgment was always a [NULLITY]." Van DeRyt v. Van DeRyt, 6 Ohio St.2d 31, 36 , 215 N.E.2d 698 [1966].

Defendant McIntyre has attached hereto a Memorandum In Support thus developing the pertinent facts upon review by this court.

MEMORANDUM IN SUPPORTLAW AND ARGUMENT:VOID SENTENCES-DISREGARD STATUTORY REQUIREMENTS

1.) The Supreme Court turned its attention to void sentences in 1984 in an oft-cited case State v. Beasley, [1984], 14 Ohio St.3d 74. In Beasley, the Supreme Court reviewed a sentence it found void, holding:

"Any attempt by a court to disregard statutory requirements when imposing a sentence renders the attempted sentence a nullity or void. The applicable sentencing statute in this case, R.C.2929.11, mandates a two to fifteen year prison term and an optional fine for felonious assault. The trial court disregarded the statute and imposed only a fine. In doing so the trial court exceeded its authority and this sentence must be considered void." Id. at 75.

ANALYSIS OF MR.MCINTYRE'S VOID SENTENCE:

2.) Mr. McIntyre argues that his Two [2] Eight [8] Year Consecutive terms that was imposed upon him by the trial court was erroneous, void, and contrary to law.

3.) Mr. McIntyre was convicted for the offense of Aggravated Burglary, a felony of the First Degree, he was also convicted of the offense of Felonious Assault, a Felony of the Second Degree. However, Mr. McIntyre was sentenced to a term of 8-25 Years for the 1st degree offense, and to a term of 8-15 years for the 2nd degree offense. See [Exhibit.A-Sentencing Journal Entry].

4.) At the time of Mr. McIntyre's sentencing hearing, the applicable sentencing statute in this case, R.C.2929.11, as amended and effective on [November 20, 1990]. See [Exhibit.B-Penalties and sentencing/Comment, Legislative Service Commission]. The applicable sentencing guidelines and statute in this case, required/mandates a Minimum term of 4,5,6, or 7 Years and Maximum Term

of 25 Years for a First Degree Felony, and a Minimum term of 2,3,4,or 5 Years and the Maximum Term of 15 Years for a Second Degree Felony. [Exhibit.B-Penalties for Felony]. The later R.C. 2929.11 Sentencing Statute as amended was required to be harmonized on [November 20,1990],to give effect to each amendment. And that the amendment was in pursuance of section 1.52 of the Revised Code discloses that they are not substantively irreconcilable.

5.) R.C. 2929.11 [F], is clear in its specifics that Mr. McIntyre could not have been sentenced for an offense pursuant to division [B][1][b], [2][b], or [3][b] of this section because Mr. McIntyre has previously been convicted of or pleaded guilty to any aggravated felony of the First, Second, or Third Degree. Unless Mr. McIntyre's Indictment contained an R.C. 2941.142 Prior aggravated Felony Specification, and he was found guilty of such.

6.) That according to the attached Verdict Entry[Exhibit.C], Mr. McIntyre was found [NOT GUILTY] of said specification. Therefore, the Two [2] Minimum Consecutive terms of Eight [8] Years imposed upon Mr. McIntyre was erroneous, void, and contrary to law.

7.) The trial court had sentenced Mr. McIntyre to division [B][1][b], [2][b], or [3][b] to which was prohibited and was not applicable to Mr. McIntyre.

8.) Mr. McIntyre has and continued to be forced to serve out the void term of incarceration that has been imposed by this court to which said void sentence has affected Mr. McIntyre's substantial rights to have been sentenced under the applicable sentencing statute as amended.

9.) The void Minimum consecutive terms has been served in full, and as such, cannot be corrected.

10.) Mr. McIntyre is currently being detained at the Grafton Correctional Institution due to the void sentence imposed , and he has no other adequate and available remedie other than to move this court by its inherent power to vacate and void its void sentence.

CONCLUSION

Based upon the above stated facts, Mr. McIntyre moves this Honorable court to Vacate and Void the void sentenced that has been imposed on the Defendant. And for this court to discharge Mr. McIntyre from further confinement due to his void sentence forthwith. And any further relief that this Court deems just and proper and in the interest of justice. Mr. McIntyre reserves all rights to either appeal any adverse ruling, or move for Mandamus Action.

Respectfully Submitted

Leroy L. McIntyre
Leroy L. McIntyre #571-710
Grafton Correctional Inst.
2500 South Avon Belden Rd
Grafton, Ohio 44044
Counsel for Defendant
In Propria Persona

CERTIFICATE OF SERVICE

I hereby state and certify that a true copy of the foregoing was forwarded to Mr. Joe Fantozzi, Assistant Summit County Prosecuting Attorney at 53 University Avenue 6th Floor Criminal Division Akron, Ohio 44308. By regular U.S. Postal Service on this 29th day of JUNE Year 2012.

Respectfully Submitted

Leroy L. McIntyre
Leroy L. McIntyre
Counsel for Defendant
In Propria Persona

C.C. FILE
Ohio Innocence Project
Mr. Phill Tresler, Personnel
of the Akron Beacon Journal Newspaper Company

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

MAY

SEP 9 12 00 PM '91

Term 19 91

THE STATE OF OHIO

vs.

LeROY L. McINTYRE

aka LeROY TYSON

PAGE ONE OF TWO

PART I OF II

No. SCP 91 01 0135

JOURNAL ENTRY

Vol 1474 PAGE 666

THIS DAY, to-wit: The 29th day of August, A.D., 1991, now comes the Prosecuting Attorney on behalf of the State of Ohio, the Defendant, LeROY L. McINTYRE aka LeROY TYSON, being in Court with counsel, VINCENT MODUGNO, for sentencing; having heretofore on August 13, 1991, was found GUILTY by a Jury Trial of FELONIOUS ASSAULT, as contained in One (1) of the Indictment, with SPECIFICATION ONE TO COUNT ONE, and AGGRAVATED BURGLARY, as contained in Count One (1) of the Supplement Two to Indictment, with SPECIFICATION ONE TO COUNT ONE of the Supplement Two to Indictment.

Thereupon, the Court inquired of the said Defendant if he had anything to say why judgment should not be pronounced against him; and having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced:

IT IS, THEREFORE, ORDERED AND ADJUDGED BY THIS COURT that the Defendant, LeROY L. McINTYRE aka LeROY TYSON, be committed to the Lorain Correctional Institution at Grafton, Ohio, for an actual period of Three (3) Years mandatory sentence for possession of a firearm and for an indeterminate period of not less than Eight (8) Years and not more than the maximum of Fifteen (15) Years for punishment of the crime of FELONIOUS ASSAULT, Ohio Revised Code Section 2903.11(A)(2), an aggravated felony of the second (2nd) degree, and for an actual period of Three (3) years

No. _____

Journal _____ Page _____

COMMON PLEAS COURT
COUNTY OF SUMMIT

JOURNAL ENTRY

THE STATE OF OHIO

vs.

Entered _____, 19____

Hon. _____

Judge Presiding

38708

1474 PAGE 667

mandatory sentence for possession of a firearm and for an indeterminate period of not less than Eight (8) Years and not more than the maximum of Twenty Five (25) Years for punishment of the crime of AGGRAVATED BURGLARY, Ohio Revised Code Section 2911.11(A)(2)/(A)(3), an aggravated felony of the first (1st) degree, and that the said Defendant pay the costs of this prosecution for which execution is hereby awarded; said monies to be paid to the Summit County Clerk of Courts, Court House, Akron, Ohio 44308.

IT IS FURTHER ORDERED, pursuant to the above sentence that the Defendant be conveyed to the Lorain Correctional Institution at Grafton, Ohio, to commence the prison intake procedure.

IT IS FURTHER ORDERED that the Six (6) Year mandatory sentence imposed in this case be served CONSECUTIVELY and not concurrently with the sentence imposed in One (1) Count of the Indictment and Count One (1) of the Supplement Two to Indictment.

IT IS FURTHER ORDERED that the sentence imposed in One (1) Count of the Indictment and Count One (1) of the Supplement Two to Indictment be served CONSECUTIVELY and not concurrently with each other.

APPROVED:
September 4, 1991
jm

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

MAY

Term 19

91

THE STATE OF OHIO

vs.

LeROY L. McINTYRE

aka LeROY TYSON

PAGE TWO OF TWO

No. CR 91 01 0135

JOURNAL ENTRY

NO. 1474 PAGE 668

Mary F. Spicer
MARY F. SPICER, Judge
Court of Common Pleas
Summit County, Ohio

- cc: Prosecutor Maureen Hardy
- Attorney Vincent Modugno
- Criminal Assignment
- Grand Jury
- Booking
- SIU
- Court Convey
- Attorney Barry Ward
- Psycho-Diagnostic Clinic
- Ms. Maureen Mancuso

rection to serve his term of imprisonment imposed for the offense under this section, under any section contained in Chapter 2925. of the Revised Code, or under any other provision of the Revised Code, as a sentence of shock incarceration, in accordance with section 5120.031 [5120.03.1] of the Revised Code. As used in this division, "eligible offender" and "shock incarceration" have the same meanings as in section 5120.031 [5120.03.1] of the Revised Code.

HISTORY: 134 v H 511 (Eff 1-1-74); 137 v S 119 (Eff 8-30-78); 139 v S 199 (Eff 7-1-83); 140 v S 210 (Eff 7-1-83); 140 v H 265 (Eff 9-20-84); 140 v S 4 (Eff 9-26-84); 141 v H 284 (Eff 3-6-86); 143 v H 51 (Eff 11-8-90); 143 v S 258. Eff 11-20-90.

The effective date is set by section 15 of SB 258.

Comment, Legislative Service Commission

Section 2929.11 of the Revised Code is amended by this act Am. Sub. S.B. 258 (effective November 20, 1990) and also by Am. Sub. H.B. 51 of the 118th General Assembly (effective November 8, 1990). Comparison of these amendments in pursuance of section 1.52 of the Revised Code discloses that they are not substantively irreconcilable, so that they are required by that section to be harmonized on November 20, 1990, to give effect to each amendment.

Committee Comment to H 511

This section provides penalties for felonies other than murder. Each degree of felony carries an indeterminate penitentiary or reformatory sentence consisting of a minimum term fixed by the trial court from among four choices given in the statute, and a maximum term fixed by the statute. In addition, the trial court may impose a fine not exceeding the maximum given for each degree. Penalties for felony are as follows:

Penalties for Felony

Offense	Minimum Term	Maximum Term	Maximum Fine
Felony 1	4, 5, 6, or 7 yrs	25 yrs	\$10,000
Felony 2	2, 3, 4, or 5 yrs	15 yrs	\$ 7,500
Felony 3	1, 1 1/2, 2, or 3 yrs	10 yrs	\$ 5,000
Felony 4	1/2, 1, 1 1/2, or 2 yrs	5 yrs	\$ 2,500

§ 2929.12 Discretion of court in determining minimum term of imprisonment for felony.

(A) In determining the minimum term of imprisonment to be imposed for a felony for which an indefinite term of imprisonment is imposed, the court shall consider the risk that the offender will commit another crime and the need for protecting the public from the risk; the nature and circumstances of the offense; the victim impact statement prepared pursuant to section 2947.051 [2947.05.1] of the Revised Code, if a victim impact statement is required by that section; and the history, character, and condition of the offender and his need for correctional or rehabilitative treatment.

(B) The following do not control the court's discretion, but shall be considered in favor of imposing a longer term of imprisonment for a felony for

which an indefinite term of imprisonment is imposed:

(1) The offender is a repeat or dangerous offender;

(2) Regardless of whether the offender knew the age of the victim, the victim of the offense was sixty-five years of age or older, permanently and totally disabled, or less than eighteen years of age at the time of the commission of the offense;

(3) The victim of the offense has suffered severe social, psychological, physical, or economic injury as a result of the offense.

(C) The following do not control the court's discretion, but shall be considered in favor of imposing a shorter minimum term of imprisonment for a felony for which an indefinite term of imprisonment is imposed:

(1) The offense neither caused nor threatened serious physical harm to persons or property, or the offender did not contemplate that it would do so;

(2) The offense was the result of circumstances unlikely to recur;

(3) The victim of the offense induced or facilitated it;

(4) There are substantial grounds tending to excuse or justify the offense, though failing to establish a defense;

(5) The offender acted under strong provocation;

(6) The offender has no history of prior delinquency or criminal activity, or has led a law-abiding life for a substantial time before commission of the present offense;

(7) The offender is likely to respond quickly to correctional or rehabilitative treatment.

(D) The criteria listed in divisions (B) and (C) of this section do not limit the matters that may be considered in determining the minimum term of imprisonment to be imposed for a felony for which an indefinite term of imprisonment is imposed.

HISTORY: 134 v H 511 (Eff 1-1-74); 137 v S 119 (Eff 8-30-78); 138 v S 384 (Eff 10-22-80); 139 v S 199 (Eff 7-1-83); 143 v S 258. Eff 11-20-90.

The effective date is set by section 15 of SB 258.

Committee Comment to H 511

This section states the general factors which must be considered by the trial court in determining the sentence to be imposed for felony, and gives detailed criteria which do not control the court's discretion but which must be considered for or against severity or leniency in a given case.

The general factors which the court must consider include: (1) the risk that the offender will commit another offense and the need for public protection; (2) the nature and circumstances of the offense; (3) the history, character, and condition of the offender, and his need for correction or rehabilitation; and (4) the offender's ability and resources, and the nature of the burden that payment of a fine will place on him.

If an offender is either a repeat or a dangerous offender, it must be considered by the court in favor of imposing longer terms of imprisonment for felony. A number of criteria are specified in favor of imposing shorter terms for fel-

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

2011 OCT 12 PM 12:29

THE STATE OF OHIO

Case No. CR 91 01 0135

vs.

SUMMIT COUNTY
CLERK OF COURTS

JOURNAL ENTRY

LEROY L. MCINTYRE
AKA LEROY TYSON

On October 11, 2011, upon due consideration of this Court, IT IS HEREBY ORDERED that the Journal Entry dated August 13, 1991 be amended to read as follows:

THIS DAY, to-wit: The 13th day of August, A.D., 1991, now comes the Prosecuting Attorney on behalf of the State of Ohio, and the Defendant, LEROY L. MCINTYRE AKA LEROY TYSON, being in court with counsel, VINCENT MODUGNO, for trial herein. Heretofore, on August 12, 1991, a Jury was duly empaneled and sworn, and the trial commenced, and not being completed, adjourned from day to day until August 12, 1991 at 1:15 p.m., at which time the Jury having heard the testimony adduced by both parties hereto, the arguments of counsel, and the charge of the Court, retired to their room for deliberation.

And thereafter, to-wit: On August 13, 1991, at 10:15 a.m., said Jury came again into the Court and returned their verdict in writing finding said Defendant GUILTY of the crime of FELONIOUS ASSAULT, as contained in Count 1 of the Indictment, with SPECIFICATION ONE TO COUNT ONE, NOT GUILTY of the SPECIFICATION TWO TO COUNT ONE, and GUILTY of the crime of AGGRAVATED BURGLARY, as contained in Count 1 of the Supplement Two to Indictment, with SPECIFICATION ONE TO COUNT ONE of the Supplement Two to Indictment; and further, said Jury being unable to reach a decision on a verdict as to the charge of FELONIOUS ASSAULT, as contained in Count 1 of the Supplement One to Indictment, with SPECIFICATION ONE TO COUNT ONE of the Supplement One to Indictment, the Court therefore discharges the Jury without prejudice in reference to the prosecution of those charges.

Thereupon, due to the disappearance of said Defendant, the sentencing is hereby held in abeyance.

APPROVED:
October 11, 2011
Pmw for jam



THOMAS A. TEODOSIO, Judge
Court of Common Pleas
Summit County, Ohio

cc: *Prosecutor Dustin Roth*
Attorney Vincent Modugno
Attorney Barry Ward

Bureau of Sentence Computation - **CERTIFIED**
LEROY L. MCINTYRE #571-710, GRAFTON Correctional Institution- **CERTIFIED**
GRAFTON Correctional Institution- **CERTIFIED**

DANIEL M. HORNIGAN
2012 JUL 10 PM 1:55
SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
FOR SUMMIT COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO	:	CASE NO: CR-91-01-0135
Plaintiff,	:	JUDGE: TEODOSIO
Vs.	:	
LEROY L. MCINTYRE	:	MOTION TO CONVEY THE
Defendant.	:	DEFENDANT BEFORE THE
	:	TRIAL COURT DUE TO TRIAL
	:	COURT GRANTING STATE'S
	:	RECLASSED MEMORANDUM
	:	AS A "MOTION TO DISMISS
	:	WITH PREJUDICE" INDICTMENT
	:	TYPE: SUPPLEMENT ONE
	:	FELONIOUS ASSAULT?
	:	

Now comes Mr. Leroy L. McIntyre, hereinafter (Defendant) in Propria Persona, and hereby moves this court to grant the above styled motion as a matter of law and procedural due process right to the Defendant, in order to secure his substantial rights.

The facts in support of this motion are fully developed in the attached Memorandum In Support.

Respectfully Submitted
Leroy L. McIntyre
Leroy L. McIntyre
Number: 571-710
Grafton Correctional Inst.
2500 South Avon Belden Rd
Grafton, Ohio 44044
Counsel for Defendant
In Propria Persona

MEMORANDUM IN SUPPORT

LAW AND ARGUMENT:

CRIM.R. 48 SECTION (A) BY STATE PROVIDES AS FOLLOWS:

"The state by leave of the court and in open court file an entry of dismissal of an indictment, or complaint and the prosecution shall thereupon terminate."

1.) Mr. McIntyre argues that on June 28, 2012, this court

had reclassified the State's Memorandum In Opposition" to Defendant McIntyre's "Notice to Proceed to Trial Upon Retrial." As a "Motion To Dismiss."

2.) This Court had granted the State's reclassified Memorandum, and in doing so, this court had dismissed the charge of Felonious Assault, as contained in Count One of Supplement One to the Indictment, as well as the Specification One to Count One of the Supplement One to Indictment.

3.) That in pursuant to Crim.R.48 (A), and upon the State's requesting dismissal with prejudice. The State's Plaintiff was required by said mandated rule above to have "FILED AN ENTRY OF DISMISSAL OF THE SUPPLEMENT ONE INDICTMENT" in open court and upon the record in this case, and the Defendant McIntyre is entitled to be present in open court when said entry of dismissal is filed by the State's Plaintiff.

4.) The record in this case is completely void of the State's Plaintiff thus filing an "ENTRY OF DISMISSAL AND IN OPEN COURT" thereupon terminating the prosecution in this case as to the Supplement One Indictment Felonious Assault as is required/mandated, in order for this court to have reclassified and granted the State's Memorandum in Opposition from its inception.

5.) this Court's order granting the State's Memorandum, must be transcribed into a "Journal Entry" thus showing final disposition of "Supplement One Indictment Felonious Assault and in pursuant to the mandates to which is found in "Criminal Rule 32 (C)."

6.) That since the amendment of Crim.R.32(C). Courts have interpreted these requirements as imposing "a mandatory duty

(on the trial court) to deal with each and every charge prosecuted against a defendant." and "the failure of a trial court to comply renders the judgment of the trial court substantively deficient under Crim.R. 32(C). "State v. Brooks (May 16, 1991), Cuyahoga App. No. 58548, unreported, 1991 Ohio App LEXIS 2300, at *3, citing State v. Brown, (1989) 59 Ohio App.3d 1,2, 569 N.E. 2d 1068. Therefore, the failure of an entry to dispose of the court's ruling as to each prosecuted charge renders the order of the trial court merely interlocutory. See Brooks Spr.

7.) An entry must be filed in the instant case, thus disposing of Indictment Type: Supplement One Felonious Assault by this Court, and likewise. By the State's Plaintiff filing an entry of dismissal as to the Supplement One Indictment and in open court in the presence of the Defendant McIntyre, in order for the prosecution as to said indictment (SHALL) thereupon terminate.

CONCLUSION

Based upon the above stated facts, Mr. McIntyre moves this Court to grant the foregoing motion, and in doing so defendant request of this court the following; (1) require that the State's Plaintiff to file an entry of dismissal in open court, whereas a record of such shall be made in pursuant to Crim. R. 48 (A) and in the presence of the defendant, (2) convey the Defendant before this court upon the State's filing of said dismissal and entry therefrom in open court, and (3) that this Court enter a judgment entry thus disposing of of the Supplement One Indictment Felonious Assault and pursuant to Crim. R. 32 (C). And any further relief this court deems just and proper and in the inter-

est of justice. Defendant McIntyre further preserves all rights to Appeal and file Mandamus Action in this matter from a denial of this motion.

Respectfully Submitted
Leroy E. McIntyre
Leroy E. McIntyre
Counsel for Defendant
In Propria Persona

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion was forwarded to Mr. Joe Fantozzi, Assistant Prosecuting Attorney for Summit County, Ohio at 53 University Avenue 6th Floor Akron, Ohio 44308. By regular U.S. Postal Service on this 10th day of July Tear 2012.

Respectfully Submitted
Leroy E. McIntyre
Leroy E. McIntyre
Number: 571-710
Grafton Corr Inst.
2500 S. Avon Belden Rd
Grafton, Ohio 44044

Counsel for Defendant
In Propria Persona

C.C. FILE

Ohio Innocence Project

**Mr. Phill Tresler, Personnel
of the Akron Beacon Journa Newspaper Company.**

DANIEL M. HERRIGAN
2012 SEP 25 PM 2:16
SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE OF OHIO
Plaintiff,

vs.

LEROY L. McINTYRE,

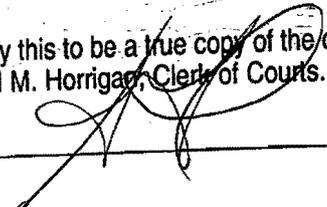
Defendant.

) CASE NO. CR 1991-01-0135
)
) JUDGE THOMAS A. TEODOSIO
)
)
)
) **ORDER**
)
)

This matter came before the Court upon numerous motions filed by the Defendant. The Defendant filed the following motions:

- (1.) "Motion for a Status Hearing on Untried Felony and Specifications," filed on July 9, 2012
- (2.) "Combined Motion for Bill [for] Bill of Particulars and Discovery," filed on July 9, 2012
- (3.) "Motion for De Novo Retrial in Order to Dispose of R.C. 2941.142 Prior Aggravated Felony Specification," filed on July 10, 2012
- (4.) "Motion Invoking Trial Court's Inherent Power to Vacate and Void Its Void Sentence Rendered with Demand for Immediate Discharge from Further Confinement," filed on July 10, 2012
- (5.) "Motion to Correct Clerical Error in Judgment Pursuant to Crim.R. 36(A) with Relief Sought," filed on July 10, 2012
- (6.) "Motion Requesting Trial Court to Dismiss with Prejudice Indictment Type: Supplement Two Aggravated Burglary with Accompanied Specification One to Count One of Supplement One and Specification One to Count One of Supplement Two," filed on July 10, 2012
- (7.) "Motion to Convey the Defendant Before the Trial Court Due to Trial Court Granting State's Reclassed Memorandum as a 'Motion to Dismiss with Prejudice' Indictment Type: Supplement One Felonious Assault?," filed on July 10, 2012
- (8.) "Motion for Leave to File Motion for New Trial Pursuant to Crim.R. 33 (B)," filed on August 1, 2012

I certify this to be a true copy of the original
Daniel M. Herrigan, Clerk of Courts.

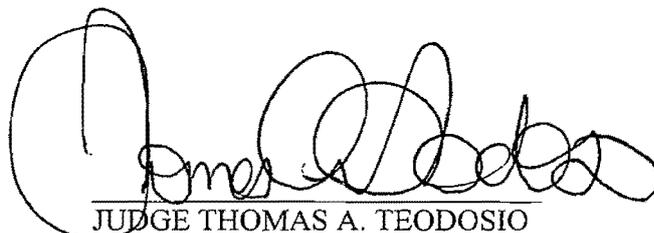

Deputy

(9.) "Motion to Strike State's Plaintiff Untimely Filed Memorandum," filed on August 13, 2012

The State of Ohio filed a Memorandum on August 6, 2012.

Upon due consideration, the Court finds all of the Defendant's motions not well taken and DENIES the same.

IT IS SO ORDERED.



JUDGE THOMAS A. TEODOSIO

cc: Rick Kasay, Assistant Prosecutor
Leroy McIntyre, Defendant *pro se*

THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO
2014 JUL 18 AM 11:37

STATE OF OHIO

CASE NO. CR-91-01-0135

SUMMIT COUNTY
CLERK OF COURTS

Plaintiff)

JUDGE THOMAS A. TEODOSIO

v.)

LEROY L. MCINTYRE)

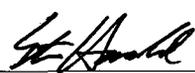
**MOTION TO DECLARE MISTRIAL
ON ALL COUNTS**

Defendant)

Defendant, Leroy L. McIntyre (true name Lewis Leroy McIntyre, Jr.), by and through undersigned counsel, moves the Court to declare a mistrial on all counts in the indictment.

A memorandum is attached.

Respectfully submitted,



Stephen P. Hanudel (#0083486)
Attorney for Defendant
124 Middle Avenue, Suite 900
Elyria, Ohio 44035
Phone: (440) 328-8973
Fax: (440) 261-4046
sph812@gmail.com

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Motion was delivered personally or by US Mail to the Summit County Prosecutor's office, 53 University Avenue, Akron, Ohio 44308 on July 18, 2014.



Stephen P. Hanudel
Attorney for Defendant

MEMORANDUM

As this Court knows, this case has a long history, mostly consisting of McIntyre fighting on his own, using his limited education and legal self-study in prison, to correct the voluminous and compounding errors that have occurred in this case. Not only has McIntyre consistently maintained his innocence, he has constantly run into institutional resistance of the State and the Court to acknowledge and rectify the grievous procedural and constitutional errors in this case.

Perhaps the most glaring and obvious error is that McIntyre has never had a valid sentence that would constitute a final appealable order under ORC 2505.02 and Crim. R. 32(C). Without a valid sentence, this case has been a pending case awaiting sentencing since 1991. Not only is the sentencing entry defective, there remain matters that have never been resolved. These matters are so defective that they cannot be resolved without declaring a mistrial.

Because this case has been pending with no final appealable order, this Court has jurisdiction to consider this Motion.

LAW

In all criminal cases in which a defendant is found guilty, the Court must craft a final appealable order to comply with the requirements of Crim. R. 32(C) and ORC 2505.02. For one, this means complying with the Ohio Supreme Court's interpretation of those provisions in *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, and *State v. Lester*, 130 Ohio St.3d 103, 2011-Ohio-5204, as to what the final judgment entry must contain. But that is not all.

The sentencing entry has to be a final disposition of all trial court matters. In criminal cases, all charges have to be disposed of, meaning there has to be a finding of guilty or not guilty on each charge. If there is a guilty finding, then a sentence must be imposed. *State v. Goodwin*, 2007-Ohio-2343 (9th Dist.); *State v. Hayes*, Lorain County App. No. 99CA007416 (9th Dist.)

(2000). The *Goodwin* case delves into a lengthy and thoughtful discussion, citing plenty of constitutional, statutory, and case law, as to how a sentencing entry must dispose of all charges to be considered final and appealable.

In *State v. Griffin*, 138 Ohio St.3d 108 (2013), the Ohio Supreme Court recently addressed the issues of final appealable orders in criminal cases. *Griffin* was different from the instant case in that it was a capital murder case and involved whether the defendant's 1990 sentence met the sentencing requirements for capital cases to be a final appealable order. Later in 2009, the defendant challenged her 1990 sentence, stating it lacked certain items required in capital cases, thus was not final and appealable. The trial court agreed and provided her a final and appealable order. The defendant then appealed to the Fifth District Court of Appeals, which allowed her to argue a brand new appeal because the Court of Appeals previously lacked jurisdiction over the 1990 sentence that was not final and appealable. Thus, *res judicata* did not apply to arguing issues that were or could have been argued before. The Fifth District then reversed her conviction and remanded for a new trial.

The Ohio Supreme Court then held, in a divided 4-3 decision, that based on the particular procedural events in the *Griffin* case, the 1990 sentence did not need to adhere to the requirements of capital cases, thus under the law at that time, it was final and appealable. The majority noted that the defendant was afforded all of her substantive rights and protections in the open court proceedings. The dissent in *Griffin* disagreed and felt that the procedural events in the case did not excuse the failure to follow the capital case requirements for sentencing, thus the sentence was not final and appealable.

While the decision in *Griffin* was based on issues not applicable to the instant case, the overall point of law gleaned from both the majority and dissent opinions is clear and applicable

to this case. If a sentence does not comply with certain requirements, it is not final and appealable. If a sentence is not final and appealable, then the case has always been and is still pending in the trial court, meaning the appellate courts lack jurisdiction to perform review.

In the addition to being a final disposition of all trial court matters, the sentencing entry must be signed by the judge presiding over the sentencing hearing. Crim. R. 32(C); See *State v. Rye*, 2013-Ohio-1774 (9th Dist.).

McIntyre's other case in Summit County Case No. CR-09-03-0647 has very similar circumstances, albeit some differences. Recently, Judge Alison McCarty ruled, based on the above cited law, that there had never been final appealable order in that case, and partially granted McIntyre's motion for mistrial. McIntyre is now in Summit County Jail awaiting a full and final disposition of all matters in that case.

Regarding the law on mistrials, a mistrial should be declared when the ends of justice so require and a fair trial is no longer possible. *State v. Garner*, 74 Ohio St. 3d 49, 59 (1995). This Court has discretion as to whether to declare a mistrial. *Id.* In exercising such discretion, the Court should look for whether "(1) [there is] a high degree of necessity for ordering the mistrial; (2) the trial judge had no reasonable alternative to declaring a mistrial; and (3) the public interest in fair trials designed to end in just judgments [is] best served by ordering a mistrial." *State v. Widner*, 68 Ohio St.2d 188, 190 (1981).

CASE HISTORY

Unlike *Griffin*, this case is not a capital case. However, like *Griffin*, it is an embarrassing and appalling display of errors and the efforts to whitewash these errors.

The Jumbled Indictment

On February 7, 1991, McIntyre was indicted for Felonious Assault with a Firearm Specification and Prior Aggravated Felony Specification. On February 27, 1991, in a supplemental indictment (Supplement One), McIntyre was indicted for another count of Felonious Assault with a Firearm Specification. This specification was labeled as “Specification One to Count One.”

On July 24, 1991, in another supplemental indictment (Supplement Two), McIntyre was indicted for a Prior Aggravated Felony Specification for the Felonious Assault charge in the second indictment (Supplement One) and for a new charge of Aggravated Burglary with a Firearm Specification. However, the third indictment (Supplement Two) labeled the Prior Aggravated Felony Specification as “Specification One to Count One of Supplement One,” which is the same title as the Firearm Specification in the second indictment (Supplement One). All three indictments related to alleged incidents taking place the same late evening of December 30, 1990.

Trial

The case proceeded to trial on this jumbled piecemeal on August 8, 1991. The elected judge assigned to the case was Judge Mary Spicer. However, because Judge Spicer was apparently on vacation that week, retired Ninth District Court of Appeals Judge William Victor filled in and presided over the trial.

Lack of Authority to Preside Over Trial

There is no indication or evidence in the record to suggest that Judge Spicer ever recused herself or was otherwise disqualified. Further, there is no indication or evidence in the record to

suggest that Judge Victor was ever assigned or given any authority by the Chief Justice of the Ohio Supreme Court to be a visiting judge and preside over the trial and sentencing in this case.

The Ohio Supreme Court Guidelines for Assignment of Judges effective May 24, 1988, which are attached, were in effect at the time of trial. Guideline 6 states that if in a multiple-judge court like this Court, the sitting judge is absent, then the presiding judge must first seek a replacement judge using another sitting judge of the court. This did not happen in this case.

Guideline 27 states that the copy of the Certificate of Assignment shall be entered into the case file under the assignment. An exhaustive search of the file for this case yields no Certificate of Assignment for Judge Victor to preside.

Based on counsel's inquiries, the Ohio Supreme Court has no record of assigning Judge Victor to his case or to Judge Spicer's docket at the time of trial. See the attached email correspondence between Counsel and Diane Hayes of the Ohio Supreme Court.

Faulty Jury Instructions, Forms, and Discharge

On August 12, 1991, closing arguments concluded and the Court instructed the jury to deliberate on all charges and firearm specifications, but not the prior aggravated felony specifications.

The Court also issued defective verdict forms to the jury. First, there were no separate verdict forms for the charges and specifications to ensure separate findings of fact for each. For each charge, the firearm specification was on the same form with one block of signatures to apply to both.

Further, on the verdict form for the Aggravated Burglary charge, the Firearm Specification refers to "Felonious Assault" as the underlying charge, not Aggravated Burglary.

The jury returned guilty verdicts on the Felonious Assault and Firearm Specification in the original indictment and Aggravated Burglary and Firearm Specification in the third indictment (Supplement Two). The jury hung on the Felonious Assault with a Firearm Specification in the second indictment (Supplement One). The Court then discharged the jury.

After the jury was discharged, the prosecutor mentioned the outstanding Prior Aggravated Felony Specification remaining on the Felonious Assault charge that McIntyre was found guilty of. Even though McIntyre never waived his right to a jury on any of the charges and specifications, the Court went ahead on its own and found McIntyre guilty of the Prior Aggravated Felony Specification in the original indictment.

Sentencing

On August 29, 1991, McIntyre appeared in Court before Judge Victor for sentencing on the Felonious Assault and Aggravated Burglary counts he was found guilty of. As for the Felonious Assault charge that the jury hung on, this was never addressed. The State did not move to dismiss the charge. McIntyre was never retried. This was left floating in the wind as the Court ordered McIntyre serve the maximum prison terms for the other charges.

On the Felonious Assault, McIntyre was ordered, under the repeat aggravated second degree felony guideline to serve a minimum 8 to 15 years for Felonious Assault plus three years for the Firearm Specification. Judge Victor based the enhancement on a prior offense of violence specification under the old ORC 2941.143(B), which was not part of the indictment. Judge Victor made no mention of the Prior Aggravated Felony Specification under old ORC 2941.142 that he found McIntyre guilty of, despite overriding McIntyre's right to a jury.

On the Aggravated Burglary, McIntyre was ordered, under the standard aggravated first degree felony guideline, to serve 8 to 25 years plus three years for the Firearm Specification. All

terms were to run consecutive for a 22 to 46 year composite sentence. McIntyre is still serving this sentence today.

The Journal Entry

On September 9, 1991, the Court filed a journal entry memorializing the events of trial. This entry was not signed by the purported visiting Judge William Victor, who presided over the trial, but instead signed by the assigned Judge Mary Spicer, who did not preside over the trial.

The entry correctly stated that McIntyre was found guilty of the Felonious Assault and Firearm Specification in the original indictment. However, the entry then said that McIntyre was found not guilty of the Prior Aggravated Felony Specification, which was not correct. The Court knew this was not correct because it had found him guilty of the specification via bench, even though McIntyre never waived a jury, and ordered him to serve a prison sentence enhanced by the specification.

This was nothing more than an attempt to whitewash the serious errors of not instructing the jury on the specification, then discharging the jury, then overriding McIntyre's right to a jury trial by conducting a bench trial on the specification, then pronouncing an enhanced sentence based on the specification. By stating that McIntyre was not guilty of the specification, the Court attempted to moot the errors so they would not be spotted, highlighted, and subject to appellate review.

The journal entry went on to recite that McIntyre was found guilty of Aggravated Burglary with a Firearm Specification, which was referred to as "Specification One to Count One of Supplement Two to Indictment."

The entry then correctly stated that the jury hung on the Felonious Assault in the second indictment (Supplement One). However, the entry then states that the jury hung on

“Specification One to Count One of the Supplement One to Indictment,” but which specification? The Firearm Specification or Prior Aggravated Felony Specification? The Prior Aggravated Felony Specification in the third indictment (Supplement Two) was labeled as the same specification as the Firearm Specification. The indictment was never amended. Lastly, the entry then states that the jury hung on “Specification One to Count One of the Supplement Two to Indictment,” which is the Firearm Specification to the Aggravated Burglary that the entry said the jury found him guilty of.

The Sentencing Entry

On the same day, September 9, 1991, the Court filed the written sentencing entry. Like the journal entry, this sentencing entry was not signed by the purported visiting Judge William Victor, who presided over the sentencing, but instead signed by the assigned Judge Mary Spicer, who did not preside over the sentencing.

Like the journal entry, the sentencing entry correctly stated that McIntyre was found guilty of the Felonious Assault and Firearm Specification in the original indictment. However, the sentencing entry makes no mention of the Prior Aggravated Felony Specification that the Court used to enhance McIntyre’s sentence in the hearing.

The sentencing entry then correctly stated that McIntyre was found guilty of Aggravated Burglary with the Firearm Specification in the third indictment (Supplement Two).

The sentencing entry made no mention of the Felonious Assault charge and Firearm Specification in the second indictment (Supplement One) and the Prior Aggravated Felony Specification in the third indictment (Supplement Two). The jury hung on this Felonious Assault charge, but the State never dismissed this charge and McIntyre was never retried on it. The

sentencing entry does not mention what ultimately happened to the charge. Of course, nothing happened to it because it is still pending.

Two days later, the Court issued a nunc pro tunc amendment to the sentencing entry. This amendment was to make sure that McIntyre's sentence on the Felonious Assault in the original indictment reflected the enhancement of serving the minimum eight years. Of course, this was based on the Prior Aggravated Felony Specification, but the amendment makes no mention of that.

Subsequent Correction Attempts

On August 4, 2011, McIntyre, acting pro se, brought to the Court's attention the September 9, 1991 journal entry's double reference to the "Specification One to Count One of Supplement Two to Indictment." McIntyre pointed out how the entry stated he was found guilty of the specification, but then the jury hung on it.

On October 12, 2011, the Court issued an amended journal entry. First, the Court erroneously stated it was amending the journal entry dated August 13, 1991. No such journal entry exists on that date. In substance, the Court sought to amend the September 9, 1991 journal entry.

The Court recited the original entry word for word, but excised the second reference to "Specification One to Count One of Supplement Two to Indictment." This now created more confusion because now the entry only addresses one of the two specifications attached to the hung Felonious Assault charge.

On June 14, 2012, McIntyre brought to the Court's attention of the Felonious Assault charge in the second indictment (Supplement One) that has still been pending. The State responded on June 27th saying it had no intention of retrying McIntyre on the charge and sought

a dismissal. On the next day, the Court then issued an entry purporting to dismiss the Felonious Assault charge. However, this purported dismissal is void because it did not comply with Crim. R. 48(A), which requires any dismissal by the State to be done in open court. Therefore, the Felonious Assault charge is still pending.

ARGUMENT

To consider this Motion to Declare Mistrial, a presentence motion in nature, this Court must have jurisdiction to do so. Because there is no final appealable order in this case, this Court has jurisdiction to consider the motion. The doctrine of res judicata does not apply. *State v. Horton*, 2013-Ohio-848 (9th Dist.), ¶13.

No Final Appealable Order

There are five major reasons why the September 9, 1991 sentencing entry is not a final appealable order. McIntyre will recap them in numerical listing to help ease the discussion.

1. Lack of authority of Judge Victor to preside over the trial and sentencing.
2. The sentencing entry was not signed by Judge Victor, who presided over sentencing. Instead, it was signed by Judge Spicer, who did not preside over sentencing.
3. Not all charges and specifications were resolved at the time of sentencing and there still remains a pending charge.
4. McIntyre received an enhanced sentence based on a prior offense of violence specification that he was not indicted for. No mention was made of the Prior Aggravated Felony Specification that was not sent to the jury, but adjudicated in a subsequent bench proceeding without McIntyre's consent and then later labeled as dismissed in a journal entry. The enhanced sentence is contrary to law and void.

5. The Court's October 12, 2011 amendment of the September 9, 1991 journal entry is an acknowledgment of the lack of a final appealable order.

For Judge Victor to have authority, he needed to be assigned by the Chief Justice of the Ohio Supreme Court. For that to happen, there needed to be a recusal and/or disqualification of the assigned elected judge and then a request from this Court to the Chief Justice to assign a retired judge. The recusal and/or disqualification is necessary because it divests the authority of the assigned elected judge and clears the way for the visiting judge to be granted sole authority. *State v. Keith*, 2002-Ohio-7250 (8th Dist.).

Once the Chief Justice grants a retired judge the authority to preside over an active case or docket, the Chief Justice issues a Certificate of Assignment to be permanently placed in the records of the local court. If it is a case assignment, the Certificate goes into the Court's case file. If it is a docket assignment, the Certificate goes into the Court's general file. The Supreme Court does not permanently store records of judge assignments.

In this case, there is no evidence that Judge Victor was ever assigned by Chief Justice Thomas Moyer to preside over this case. The Ohio Supreme Court has no record of it. More importantly, there is no record of it in this Court's file of this case. If Judge Victor were actually assigned by Chief Justice Moyer, then one would expect to see a Certificate of Assignment in this Court's file of this case. Further, there is no evidence that Judge Spicer recused herself, was disqualified, or otherwise removed from the case.

If Judge Victor truly had authority over this case, then why did he not sign the journal entry filed September 9, 1991? Why did he not sign the sentencing entry filed the same day? Or the nunc pro tunc two days later? The answer is simple. He had no authority. Judge Spicer was

the one who had authority. In addition, Judge Spicer signed for herself. She did not sign for Judge Victor. See *Rye*, supra.

The Ninth District Court of Appeals has held that even though a Certificate of Assignment is not in the trial court file, regularity can still be presumed, especially if the Ohio Supreme Court has a record of the assignment. *Spragling v. Oriana House, Inc.*, 2007-Ohio-3245 (9th Dist.).

In this case, however, regularity cannot be presumed. Not only does this Court and the Ohio Supreme Court lack a record of assignment of Judge Victor, two different judges presided over the case at the same time. Judge Victor presided over open court, but Judge Spicer signed the entries. There is nothing regular about this. A trial court can only have one judge presiding over a case at a particular time to handle all open court matter and written entries. There is no such thing a “judge by committee” in Ohio trial courts.

Assuming Judge Victor’s authority was valid, the September 9, 1991 sentencing entry is still not final and appealable because Judge Victor, who presided over the sentencing hearing, did not sign the sentencing entry. *State v. Anderson*, 2006-Ohio-3905 (8th Dist.); *Lungaro v. Lungaro*, 2009-Ohio-6372 (9th Dist.).

The sentencing entry is also not final and appealable because it did not resolve all matters of the case. At the time of sentencing, the Felonious Assault charge and Firearm Specification in the second indictment (Supplement One) and the Prior Aggravated Felony Specification in the third indictment (Supplement Two), which the jury hung on, had not been resolved. McIntyre was not retried. These were not dismissed in open court. Therefore, they were still pending.

The State and the Court purported to dismiss the straggling Felonious Assault charge by written pleadings in October 2011, but that is not valid.

A dismissal of an indictment sought by the State is governed by ORC 2941.33 and Crim. R. 48(A), which **requires the dismissal to be done in open court**. Therefore, the attempt to dismiss the charge purely by written pleadings is void. The only way it can be dismissed is for McIntyre to be brought into the Court and the State orally announce the dismissal. *State v. Davis*, 2008-Ohio-6741 (9th Dist.).

Because the purported dismissal did not comply with ORC 2941.33 and Crim. R. 48(A), the Felonious Assault charge in the second indictment (Supplement One) is still pending for trial.

In addition, the Prior Aggravated Felony Specification in the original indictment was still pending at the time of sentencing. It was never sent back to the jury, but instead improperly adjudicated by the Court in a bench proceeding. Even worse, it was then purportedly dismissed in a journal entry, which was not the case in open court.

With these unresolved matters, this case is still pending. There has never been a final appealable order. *Goodwin; Hayes*, supra.

Further, McIntyre's sentence, even if it did resolve all matters, was contrary to law. On the Felonious Assault in the original indictment, Judge Victor announced that he enhanced McIntyre's sentence to that of a repeat aggravated F-2, requiring a minimum 8 to 15 years, based on a prior offense of violence. However, McIntyre was never indicted for a prior offense of violence specification under the old ORC 2941.143(B), which only applied to third and fourth degree felonies. Instead, he was indicted for a prior aggravated felony specification under the old ORC 2941.142.

Judge Victor did not instruct the jury on the Prior Aggravated Felony Specification, but then found McIntyre guilty of it in a bench proceeding, and then purports to acquit of him in a journal entry. The sentencing entry makes no mention of the specification. Nothing in the

sentencing entry explains why McIntyre must serve an enhanced minimum 8 to 15 year sentence instead of the standard 3, 4, 5, 6, 7, 8 to 15 years for a plain aggravated felony. To this end, the sentence is contrary to law and void. *State v. Starks*, 2013-Ohio-4496 (8th Dist.).

Lastly, on October 12, 2011, when this Court filed an entry to amend the September 9, 1991 journal entry, a presentence document, the Court opened this case into presentence mode. This was an implicit acknowledgment that not all presentence matters had been properly addressed and disposed, thus no final appealable order.

There are more than enough reasons to why there has never been a final appealable order this case. Thus, this case has been pending for over 23 years. It has been stuck in post-trial and presentence mode since August 13, 1991. Therefore, the Court has jurisdiction to consider this post-trial and presentence motion to declare a mistrial.

Mistrial

The first reason a mistrial should be declared is that Judge Victor lacked authority to preside over the trial in the first place for the reasons previously explained. There is no record anywhere to indicate that he was ever vested authority by the Chief Justice of the Ohio Supreme Court. Besides, if he truly had such authority, he would have signed the journal and sentencing entries instead leaving it to Judge Spicer to sign the entries. This situation naturally begs the question as to who is the judge on the case. Because Victor lacked the authority, the trial was a giant sham and nullity. It is void as a matter of law.

As noted earlier, there were no separate verdict forms for the charges and specifications to ensure separate findings of fact for each. Instead, on each count, the same form was used to determine guilty or not guilty of both the charge and specification using one set of signatures of

the jurors. This means the verdict forms were defective. *State v. Tyson*, 19 Ohio App.3d 90, 94 (Ohio App. 1 Dist. 1984).

The *Tyson* case was based on the old ORC 2929.71, which spoke of how a specification requires a separate conviction and/or guilty plea. This statutory language is still alive and well today under ORC 2929.14(B). Therefore, it follows that a separate jury finding must be made on the specification apart from the underlying charge. This was not done in this case. With the jury long discharged, the only way to undo this grave error is to declare a mistrial.

Further, on the verdict form for the Aggravated Burglary charge, the Firearm Specification refers to “Felonious Assault” as the underlying charge, not Aggravated Burglary. This is another defect that can only be remedied through a mistrial because the jury has long been discharged. For sure, the specification verdict is void because it refers to the wrong charge. This then makes the entire verdict void because the specification and underlying charge were tied together with one juror signature block.

Unfortunately, this is not all. The jury never heard the Prior Aggravated Felony Specification in the original indictment. Instead, the Court found McIntyre guilty of it even though he never waived a jury.

In *State v. Miller*, 122 Ohio App.3d 111, 123-124 (Ohio App. 3 Dist. 1997), 701 N.E.2d 390, the defendant never requested the court to hear the prior offense of violence specification instead of the jury. However, the court did not instruct the jury on the specification and then conducted a bench proceeding to find the defendant guilty of the specification. The Third District Court of Appeals found that because the defendant never waived a jury, the trial court was without jurisdiction to find the defendant guilty of the specification. More pointedly, the Third District stated, “The trial judge had no authority to take the issue from the jury without Miller’s

request, and exert jurisdiction to hear the specification issue during the sentencing hearing.” *Id.* at 124.

As in *Miller*, Judge Victor, who had no authority to conduct the trial to begin with, did not have authority to take the prior aggravated felony specification issue away from the jury and decide it himself. This alone mandates a mistrial and entitles McIntyre to a brand new trial. Perhaps the Court knew this at the time, which might explain its attempts to falsely state that McIntyre was acquitted of the specification in the September 9, 1991 journal entry. That way, nobody would question an acquittal, making the issue not reviewable on appeal, thus ensuring the guilty verdicts would stand.

The last key prong to declaring a mistrial is serving the public interest. If the errors in this case are ignored and the Court does not follow the law, the public can have no confidence in the criminal justice system to care and do what is right. The errors in this case are an absolute embarrassment to the criminal justice system and all who participate in it. The Court must act to preserve the integrity of the system. Sometimes, that means openly admitting to making mistakes, but then doing everything possible to correct those errors and ensure the public that such errors will never be tolerated.

CONCLUSION

There is the well-known idiom, “The chickens have come home to roost.” This often means that the errors of the past have come to cause problems and haunt the present. This case fits this meaning very well.

It is well past time for this case to be acknowledged for the colossal blunder that it is and for corrective action to be taken. The only corrective action that can be taken is for a mistrial to be declared on all counts and a wipe a clean slate.

Amidst all the arguments in this Motion, it should not be forgotten that McIntyre did not commit the offenses in this case. A key witness, Galen Thompson, has independently retracted his trial testimony and others who testified against McIntyre have since accumulated criminal records of dishonesty. Thus, if it makes the Court feel any better, this Motion is ultimately for a good cause, which is to bring finality to this case once and for all – not the finality of conviction, but the finality of McIntyre’s innocence and his right to be a free man.



Stephen P. Hanudel
Attorney for Defendant

APPENDIX

1. Guidelines for Assignment of Judges – May 24, 1988.....Exhibit A
2. Email correspondence between counsel and Diane Hayes.....Exhibit B
3. Jury verdict form for Aggravated Burglary charge.....Exhibit C
4. Journal Entry filed September 9, 1991.....Exhibit D
5. Sentencing Entry filed September 9, 1991.....Exhibit E
6. Journal Entry – Nunc Pro Tunc filed September 11, 1991.....Exhibit F
7. Amended Journal Entry filed October 12, 2011.....Exhibit G
8. Transcript of jury instructions (pages 220-236).....Exhibit H
9. Transcript of return of jury verdicts and post-verdict matters (pages 245-258).....Exhibit I
10. Transcript of sentencing, including specification hearing (pages 359-382).....Exhibit J



THE SUPREME COURT *of* OHIO

65 South Front Street Columbus, Ohio 43215-3431

614.387.9449 FAX

Facsimile Transmission Sheet

To:	Stephen Hanudel, Esq.	Fax:	440.261.4046
From:	Diane Hayes	Phone:	614.387.9415
Date:	3/25/2014	Pages:	6
Re:	Guidelines for Assignment of Judges – May 24, 1988		

Dear Mr. Hanudel,

Please find a copy of the Guidelines for Assignment of Judges announced on May 24, 1988. These were found in *Ohio Official Reports*, Vol. 37.

Have a nice day!

Sincerely,

A handwritten signature in cursive script that reads 'Diane Hayes'.

Diane Hayes
Judicial Assignment Specialist

EXHIBIT A

GUIDELINES FOR ASSIGNMENT OF JUDGES*

The Guidelines for Assignment of Judges were announced by Chief Justice Moyer on May 24, 1988. The Guidelines have not been adopted as rules pursuant to Section 5, Article IV of the Ohio Constitution.

General Guidelines.

1. The Ohio Constitution and the Ohio Revised Code vest the Chief Justice with the authority to make assignments in whatever circumstances he or she deems appropriate. While these Guidelines may impose specific duties upon other persons, the Chief Justice may waive compliance with any Guideline to assist the exercise of that discretion.

2. These Guidelines are designed to provide an efficient and effective method for the temporary assignment of judges to serve in any court in Ohio established by law. They should be construed to effect those purposes.

3. The following definitions govern the meanings of terms used in the Guidelines:

a. Unless otherwise limited by its context, the unmodified term "judge" includes: (1) any person holding office by reason of appointment or election on the Supreme Court of Ohio, the Courts of Appeals of Ohio, the Courts of Common Pleas of Ohio, the Municipal Courts of Ohio, the County Courts of Ohio, and (2) any "retired judge" who formerly held office by reason of appointment or election to any of those Ohio courts.

b. The term "retired judge" means any person who voluntarily retired from judicial service on any Ohio court, including: (1) any person who served until he or she was ineligible to seek continued service by reason of constitutional or statutory age limitations, and (2) any person who was elected to and served on an Ohio court without being defeated in an election for new service or continued service on that court.

No person is a "retired judge" who: (1) has been defeated in an election for new or continued service on a court, (2) has been removed or suspended without reinstatement from service on any Ohio court pursuant to the Supreme Court Rules for the Government of the Judiciary, or who has resigned or retired from service while a complaint was pending under those Rules, and (3) has resigned his or her office between the date of defeat in an election for further service on that court and the end of his or her term.

c. The term "assigned judge" means any judge whom the Chief Justice assigns to serve temporarily on any Ohio court.

d. The term "Chief Justice" means the Chief Justice of the Supreme Court of Ohio, or his or her authorized designee.

e. The term "acting" judge means an acting municipal court judge appointed by a single-judge or two-judge municipal court pursuant to R.C. 1901.10

* Reporter's Note: The Guidelines for Assignment of Judges appear in 37 Ohio St. 3d.

or R.C. 1901.12, or a judge whom the common pleas court designates to replace a disqualified municipal or county court judge pursuant to R.C. 2937.20.

Guidelines for Justifying Assignments of Judges.

4. The administrative judge of any court, or any division of a court, may request the Chief Justice to assign one or more judges because that court or division has an overburdened docket or anticipates an extended trial that will disrupt the court's docket.

5. The administrative judge of any court, or any division of a court, may request the Chief Justice to assign a judge to replace a sitting judge of that court for the following reasons:

a. The sitting judge is ill or unable to attend to judicial duties.

b. The sitting judge experiences a personal or family emergency which interferes with the performance of his or her judicial duties.

c. The sitting judge plans to take a reasonable vacation or attend a continuing legal education program, and the judge cannot reasonably schedule his or her docket to eliminate the need for a replacement during that absence.

d. The sitting judge recuses himself or herself from one or more specific cases for a conflict of interest involving a litigant, counsel, or the subject of the case. The fact that a local attorney is a litigant should not routinely cause the sitting judge to recuse himself or herself, unless the judge's relationship with that particular lawyer justifies recusal.

e. Any extraordinary circumstance which satisfies the Chief Justice that the requesting court needs the assistance of an assigned judge.

6. Before requesting an assigned judge to replace a temporarily absent judge or a recused judge, the administrative judge of a multiple-judge court or multiple-judge division shall proceed as follows:

a. The administrative judge for any multiple-judge court or multiple-judge division shall attempt to arrange for another judge of that court or division to accomplish the duties of the temporarily absent judge or the recused judge.

b. The administrative judge for one division of a multiple-division court shall request the presiding judge for that multiple-division court to seek a judge from another division of that court to accomplish any unanticipated emergency duties of a temporarily absent judge, if the temporarily absent judge has no hearings or trials scheduled for the time of that absence.

c. The administrative judge who requests the assignment of a judge may cause the judge who requests a temporary replacement to satisfy this Guideline, but the administrative judge shall certify that it has been satisfied.

7. If the judge of a multiple-judge common pleas court or division of that court is disqualified pursuant to an affidavit of disqualification, the administrative judge of that court or division shall assign a replacement judge (R.C. 2311.10 and 2701.03). In other situations, the Chief Justice who disqualifies a judge from a case pursuant to an affidavit of disqualification shall forthwith assign a replacement judge.

GUIDELINES FOR ASSIGNMENT OF JUDGES

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Guidelines for the Duration of Service by Assigned Judges.

8. The administrative judge of any court may request the Chief Justice to assign a judge to that court: (a) for one or more specific cases, or (b) for a specified interval of time.

9. Ordinarily, the Chief Justice will not assign a judge for a specified interval which exceeds three months.

10. Ordinarily, the Chief Justice will not assign the same judge for continued service in the same court, or extend a judge's assignment beyond the original term, without the agreement of the administrative judge of that court.

11. When the Chief Justice assigns a judge to a court for a specific case, the assignment shall continue until the conclusion of that case, including any post-judgment proceedings, unless or until the case is reassigned.

12. When the Chief Justice assigns a judge to a court for a specified interval, the assignment shall continue until the judge concludes any proceedings in progress at the end of that interval but shall not continue for any other matters without further assignment.

13. After an assigned judge arrives at a court for an assignment of a specific case, that judge may exercise other judicial duties for that court during the remainder of the day that the assigned case concludes, if he or she is willing to do so.

Guidelines for Selecting Judges for Assignment.

14. The Chief Justice may assign any active judge to serve as an assigned judge. However, any active or retired judge who wishes to receive assignments shall annually file a report provided by the Administrative Director of the Supreme Court, which shall include the number of years of judicial experience in each court where the judge has served.

The judge may also supply the following additional information:

a. Any areas of special expertise by reason of judicial experience, legal practice, education, or training.

b. Any infirmities that might affect the ability to accept an assignment.

c. Any court or courts where the judge prefers or disfavors assignments.

15. In deciding whether to assign a judge to serve, the Chief Justice may consider the following factors:

a. The status of the judge's docket, including a comparison of the judge's docket with the docket of other judges in that court and other courts, the number of cases pending in the judge's court and the number of cases pending beyond the indicated time provided by the Rules of Superintendence, and the extent to which

~~the judge has requested assigned judges for his or her court.~~

b. The judge's competence for the prospective duties.

c. The judge's infirmities, if any.

d. The judge's prior experience on courts of that level. Ordinarily, the Chief Justice will not assign any judge who has not completed at least one full year of judicial service as a judge.

16. The Chief Justice may assign any sitting judge to serve in another court, subject to constitutional and statutory limitations.

GUIDELINES FOR ASSIGNMENT OF JUDGES

- a. A county court judge may serve on another county court.
- b. A municipal court judge may serve on another municipal court.
- c. A common pleas court judge may serve on another common pleas court, the Court of Claims, or a court of appeals.
- d. A court of appeals judge may serve on a common pleas court, the Court of Claims, another court of appeals, or the Supreme Court.
- e. A Supreme Court justice may serve on the Court of Claims, or a court of appeals.

17. The Chief Justice may assign any retired judge who wishes to serve, subject to constitutional and statutory limitations:

- a. A retired judge may be assigned to the court where he or she served before retirement, to any other court to which the judge could have been assigned while a sitting judge, and to any court provided by constitutional and statutory authority.
- b. A retired judge shall not be assigned while he or she is engaged in the full-time or part-time practice of law. For this purpose, the practice of law does not include, among other activities, service with or without compensation as an adjudicator for submissions or referrals pursuant to R.C. 2701.10.
- c. A retired judge shall not be assigned unless he or she has completed and reported the judicial education required by the Rules for the Government of the Judiciary.
- d. The judge shall not be assigned unless he or she is a resident or elector of Ohio.
- e. The judge shall not be assigned unless he or she has paid all current registration fees and otherwise has good standing as a member of the bar.

Guidelines for Assignment Procedures.

18. The following procedures shall apply to all requests for an assigned judge:

- a. The administrative judge shall make any request on behalf of that court or division or any of its judges.
- b. The request shall be written and addressed to the Chief Justice. If unexpected circumstances preclude a written request, the administrative judge may request an assigned judge by telephone or otherwise, provided that he or she promptly confirms that request in writing.
- c. The request shall state the reason why the court requires the assistance of an assigned judge.
- d. The request shall state whether the assignment should be for one or more specific cases, or for a specified interval.
- e. If the court is a multiple-judge or multiple-division court, the request shall certify compliance with Guideline 6.

19. The administrative judge who requests the Chief Justice to assign a judge may suggest one or more active or retired judges who have expressed a willingness to perform that service.

20. Each court shall report the following information to the Administrative

GUIDELINES FOR ASSIGNMENT OF JUDGES

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Director of the Supreme Court, on a form provided by the Administrative Director, for each assigned or acting judge appointed to the court:

- a. The number of days spent.
- b. The number of case dispositions for which they were responsible, and the case number of any specifically assigned case.
- c. The number of jury and non-jury trials they conducted.
- d. The case number of any case pending beyond the indicated time provided by the Rules of Superintendence.

21. No sitting judge shall report that he or she disposed of any case or conducted any jury or non-jury trial, if that activity was handled by an assigned judge.

Guidelines for Efficient Use of Assigned Judges.

22. Unless special circumstances justify a ~~different assignment~~, the sitting judge for that court shall retain responsibility for cases in which he or she has resolved or presided over substantial preliminary matters. The assigned judge shall assume responsibility for cases in which the sitting judge has had the least involvement when the assignment occurs.

23. Whenever feasible, a judge from a nearby county shall be utilized for assignment in order to economize on travel time as well as to minimize, if not eliminate, overnight expenses.

24. A court that requests the assignment of a judge shall provide sufficient physical facilities and support personnel to enable the judge to carry out assigned responsibilities properly and expeditiously. Support personnel shall include the services of a bailiff, court reporter, secretary, or law clerk, as may be necessary and appropriate.

25. A court that requests the assignment of a judge shall notify counsel of the assignment upon receipt of the Certificate of Assignment. If the parties are not represented by counsel, the parties shall be notified.

26. A court that requests the assignment of a judge shall contact the assigned judge upon receipt of the ~~Certificate of Assignment~~ to initiate case proceedings.

27. A copy of the Certificate of Assignment shall be entered into each case file managed under the assignment.

Note: Guidelines 14, 20, and 21 will become effective upon further notice of the Chief Justice.

COPY



Stephen Hanudel <sph812@gmail.com>

1991 Judicial Assignment

Hayes, Diane <Diane.Hayes@sc.ohio.gov>
To: Stephen Hanudel <sph812@gmail.com>

Mon, Jul 7, 2014 at 4:33 PM

Dear Steve,

The earliest assignment that my application database shows for Judge William Victor had an effective date of 6/9/1993. Unfortunately, what you see on the Judge Assignment Search on the Supreme Court's website is the same data that I have. To the extent that there are any records relating to the assignment of Judge Victor to the Summit County Court of Common Pleas prior to those reflected on the Judge Assignment Search, those records may exist at the local level.

Sincerely,

Diane



Diane E. Hayes | Judicial Assignment Specialist | Supreme Court of Ohio

65 South Front Street ■ Columbus, Ohio 43215-3431

614.387.9415 (telephone) ■ 614.387.9449 (fax)

diane.hayes@sc.ohio.gov

www.supremecourt.ohio.gov

From: Stephen Hanudel [mailto:sph812@gmail.com]
Sent: Sunday, July 06, 2014 11:55 PM
To: Hayes, Diane
Subject: 1991 Judicial Assignment

Hi Diane,

I was in correspondence with you earlier this year regarding whether if retired Judge William Victor was assigned by the Chief Justice to preside over the matter of State of Ohio v. Leroy McIntyre, Jr., Summit County Case No. CR-91-01-0135 for trial and sentencing in August 1991. If I recall correctly, you stated there were no records with the Supreme Court regarding the purported assignment and that any such record would permanently exist with the Summit County Clerk of Court. If it were a case assignment, the record would be in the case file. If were a docket assignment, then the record would be in the clerk's general file.

On March 25th of this year, you were kind enough to fax me the Guidelines for Assignment of Judges effective May 24, 1988.

I searched the judge assignments on the Supreme Court's website. However, they only go back to 1993.

Can you please let me know if there is any record or database of the judge assignments in 1991 and if William Victor comes up in those assignments? If he does, can you please provide me the list of assignments he had pertaining to Summit County? Thank you.

Steve Hanudel

Stephen P. Hanudel
Attorney at Law
124 Middle Avenue, Suite 900
Elyria, Ohio 44035
Phone: (440) 328-8973
Fax: (440) 261-4046

EXHIBIT B

64 DIANA ZALESKI

AUG 14 10 23 AM '91

J. COUNTY CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

REL. 1468 PAGE 977

STATE OF OHIO

CASE NO. CR 91 01 135

Plaintiff

JUDGE WILLIAM H. VICTOR

-vs-

INDICTMENT FOR:

LEROY L. McINTYRE

AGGRAVATED BURGLARY

Defendant

VERDICT FORM

- - -

We, the jury in this case being duly impaneled and sworn to well and truly try and true deliverance make between the State of Ohio and the Defendant, LEROY L. McINTYRE, do find the Defendant * GUILTY of the offense of Aggravated Burglary.

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

We further find that Leroy L. McIntyre ** DID have a firearm on or about his person or under his control while committing the said felonious assault.

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

EXHIBIT C

64

And we do so render our verdict upon the concurrence of 12 members of said jury. Each of us said jurors concurring in said verdict signs his name hereto this 13th day of AUGUST, 1991.

- | | |
|---------------------------|----------------------------|
| 1. <u>Marilyn L Moore</u> | 7. <u>Barbara Pasaturo</u> |
| 2. <u>Kay Fern</u> | 8. <u>Donald Beal</u> |
| 3. <u>Gary J. Sanders</u> | 9. <u>Kenneth L. Loker</u> |
| 4. <u>Stacy P. Simon</u> | 10. <u>Sally R. Fink</u> |
| 5. <u>Charles White</u> | 11. <u>Beverly Hurst</u> |
| 6. <u>Terence Snyder</u> | 12. <u>Lerra M. Hill</u> |

EXHIBIT D

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT SKI

MAY

SEP 9 12 08 PM '91

Term 19 91

THE STATE OF OHIO

vs.

LeROY L. McINTYRE
aka LeROY TYSON

No. CP 91 01 0135
CLEVELAND COUNTY

JOURNAL ENTRY

1474 PAGE 656

THIS DAY, to-wit: The 13th day of August, A.D., 1991, now comes the Prosecuting Attorney on behalf of the State of Ohio, the Defendant, LeROY L. McINTYRE aka LeROY TYSON, being in Court with counsel, VINCENT MODUGNO, for trial herein. Heretefore, on August 12, 1991, a Jury was duly empaneled and sworn and the trial commenced and not being completed, adjourned from day to day until August 12, 1991 at 1:15 O'Clock P.M., at which time the Jury having heard the testimony adduced by both parties hereto, the arguments of counsel and the charge of the Court, retired to their room for deliberation.

And thereafter, to-wit: On August 13, 1991, at 10:15 O'Clock A.M., said Jury came again into the Court and returned their verdict in writing finding said Defendant GUILTY of the crime of FELONIOUS ASSAULT, as contained in One (1) Count of the Indictment, with SPECIFICATION ONE TO COUNT ONE, NOT GUILTY of the SPECIFICATION TWO TO COUNT ONE, and GUILTY of the crime of AGGRAVATED BURGLARY, as contained in Count One (1) of the Supplement Two to Indictment, with SPECIFICATION ONE TO COUNT ONE of the Supplement Two to Indictment, and further, said Jury being unable to reach a decision on a verdict as to the charge of FELONIOUS ASSAULT, as contained in Count One (1) of the Supplement One to Indictment, with SPECIFICATION ONE TO COUNT ONE of the Supplement One to Indictment and SPECIFICATION ONE TO COUNT ONE of the Supplement Two to Indictment, the Court therefore discharges the Jury without prejudice in reference to the prosecution of those charges.

No. _____

Journal _____ Page _____

COMMON PLEAS COURT

OF COUNTY OF SUMMIT

JOURNAL ENTRY

THE STATE OF OHIO

vs.

Entered _____, 19__

Hon. _____ Judge Presiding

58708

Thereupon, due to the disappearance of said Defendant, the sentencing is hereby held in abeyance.

APPROVED:
September 4, 1991
jm

Mary F. Spicer
MARY F. SPICER, Judge
Court of Common Pleas
Summit County, Ohio

1474 PAGE 657

- cc: Prosecutor Maureen Hardy
- Attorney Vincent Modugno
- Criminal Assignment
- Booking
- Attorney Barry Ward
- Ms. Maureen Mancuso
- Psycho-Diagnostic Clinic

EXHIBIT E

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

MAY

SEP 9 12:00 PM '91

Term 19 91

THE STATE OF OHIO

vs.

LeROY L. McINTYRE

aka LeROY TYSON

PAGE ONE OF TWO

PART I OF II

No. SCP 91 01 0135

JOURNAL ENTRY

VOL 1474 PAGE 666

THIS DAY, to-wit: The 29th day of August, A.D., 1991, now comes the Prosecuting Attorney on behalf of the State of Ohio, the Defendant, LeROY L. McINTYRE aka LeROY TYSON, being in Court with counsel, VINCENT MODUGNO, for sentencing; having heretofore on August 13, 1991, was found GUILTY by a Jury Trial of FELONIOUS ASSAULT, as contained in One (1) of the Indictment, with SPECIFICATION ONE TO COUNT ONE, and AGGRAVATED BURGLARY, as contained in Count One (1) of the Supplement Two to Indictment, with SPECIFICATION ONE TO COUNT ONE of the Supplement Two to Indictment.

Thereupon, the Court inquired of the said Defendant if he had anything to say why judgment should not be pronounced against him; and having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced:

IT IS, THEREFORE, ORDERED AND ADJUDGED BY THIS COURT that the Defendant, LeROY L. McINTYRE aka LeROY TYSON, be committed to the Lorain Correctional Institution at Grafton, Ohio, for an actual period of Three (3) Years mandatory sentence for possession of a firearm and for an indeterminate period of not less than Eight (8) Years and not more than the maximum of Fifteen (15) Years for punishment of the crime of FELONIOUS ASSAULT, Ohio Revised Code Section 2903.11(A)(2), an aggravated felony of the second (2nd) degree, and for an actual period of Three (3) years

No. _____

Journal _____ Page _____

COMMON PLEAS COURT

COUNTY OF SUMMIT

JOURNAL ENTRY

THE STATE OF OHIO

vs.

Entered _____, 19__

Hon. _____

Judge Presiding

38708

1474 PAGE 667

mandatory sentence for possession of a firearm and for an indeterminate period of not less than Eight (8) Years and not more than the maximum of Twenty Five (25) Years for punishment of the crime of AGGRAVATED BURGLARY, Ohio Revised Code Section 2911.11(A)(2)/(A)(3), an aggravated felony of the first (1st) degree, and that the said Defendant pay the costs of this prosecution for which execution is hereby awarded; said monies to be paid to the Summit County Clerk of Courts, Court House, Akron, Ohio 44308.

IT IS FURTHER ORDERED, pursuant to the above sentence that the Defendant be conveyed to the Lorain Correctional Institution at Grafton, Ohio, to commence the prison intake procedure.

IT IS FURTHER ORDERED that the Six (6) Year mandatory sentence imposed in this case be served CONSECUTIVELY and not concurrently with the sentence imposed in One (1) Count of the Indictment and Count One (1) of the Supplement Two to Indictment.

IT IS FURTHER ORDERED that the sentence imposed in One (1) Count of the Indictment and Count One (1) of the Supplement Two to Indictment be served CONSECUTIVELY and not concurrently with each other.

APPROVED:
September 4, 1991
jm

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

MAY

Term 19

91

THE STATE OF OHIO

vs.

LeROY L. McINTYRE

aka LeROY TYSON

PAGE TWO OF TWO

No. CR 91 01 0135

JOURNAL ENTRY

VOL 1474 PAGE 668

Mary F. Spicer
MARY F. SPICER, Judge
Court of Common Pleas
Summit County, Ohio

- cc: Prosecutor Maureen Hardy
- Attorney Vincent Modugno
- Criminal Assignment
- Grand Jury
- Booking
- SIU
- Court Convey
- Attorney Barry Ward
- Psycho-Diagnostic Clinic
- Ms. Maureen Mancuso

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT
DIANA ZALESKI

80

MAY _____ Term 19 91

SEP 11 2 37 PM '91

THE STATE OF OHIO
vs.

No. CR 91 01 0135

SUMMIT COUNTY
CLERK OF COURTS

JOURNAL ENTRY

LeROY L. McINTYRE
aka LeROY TYSON

VOL 1475 PAGE 158

THIS DAY, to-wit: The 9th day of September, A.D., 1991, upon due consideration of this Court, IT IS HEREBY ORDERED that this Journal Entry be filed NUNC PRO TUNC to correct the third (3rd)) paragraph of the Journal Entry dated August 29, 1991 and filed September 9, 1991 to read in part as follows . . .

" . . . for an indeterminate period of not less than Eight (8) Years and not more than the maximum of Fifteen (15) Years, and the eight (8) year minimum shall be a period of actual incarceration, for punishment of the crime of . . . "

APPROVED:
September 11, 1991
jm

Mary F. Spicer
MARY F. SPICER, Judge
Court of Common Pleas
Summit County, Ohio

cc: Prosecutor Maureen Hardy
Attorney Vincent Modugno
Criminal Assignment
Court Convey
Booking
SIU
Attorney Barry Ward
Psycho-Diagnostic Clinic
Ms. Maureen Mancuso

EXHIBIT F

80

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

2011 OCT 12 PM 12:29

THE STATE OF OHIO

Case No. CR 91 01 0135

vs.

SUMMIT COUNTY
CLERK OF COURTS

JOURNAL ENTRY

LEROY L. MCINTYRE
AKA LEROY TYSON

On October 11, 2011, upon due consideration of this Court, IT IS HEREBY ORDERED that the Journal Entry dated August 13, 1991 be amended to read as follows:

THIS DAY, to-wit: The 13th day of August, A.D., 1991, now comes the Prosecuting Attorney on behalf of the State of Ohio, and the Defendant, LEROY L. MCINTYRE AKA LEROY TYSON, being in court with counsel, VINCENT MODUGNO, for trial herein. Heretofore, on August 12, 1991, a Jury was duly empaneled and sworn, and the trial commenced, and not being completed, adjourned from day to day until August 12, 1991 at 1:15 p.m., at which time the Jury having heard the testimony adduced by both parties hereto, the arguments of counsel, and the charge of the Court, retired to their room for deliberation.

And thereafter, to-wit: On August 13, 1991, at 10:15 a.m., said Jury came again into the Court and returned their verdict in writing finding said Defendant GUILTY of the crime of FELONIOUS ASSAULT, as contained in Count 1 of the Indictment, with SPECIFICATION ONE TO COUNT ONE, NOT GUILTY of the SPECIFICATION TWO TO COUNT ONE, and GUILTY of the crime of AGGRAVATED BURGLARY, as contained in Count 1 of the Supplement Two to Indictment, with SPECIFICATION ONE TO COUNT ONE of the Supplement Two to Indictment; and further, said Jury being unable to reach a decision on a verdict as to the charge of FELONIOUS ASSAULT, as contained in Count 1 of the Supplement One to Indictment, with SPECIFICATION ONE TO COUNT ONE of the Supplement One to Indictment, the Court therefore discharges the Jury without prejudice in reference to the prosecution of those charges.

Thereupon, due to the disappearance of said Defendant, the sentencing is hereby held in abeyance.

APPROVED:
October 11, 2011
Pmw for jam



THOMAS A. TEODOSIO, Judge
Court of Common Pleas
Summit County, Ohio

cc: *Prosecutor Dustin Roth*
Attorney Vincent Modugno
Attorney Barry Ward

Bureau of Sentence Computation - **CERTIFIED**
LEROY L. MCINTYRE #571-710, GRAFTON Correctional Institution- **CERTIFIED**
GRAFTON Correctional Institution- **CERTIFIED**

1 THE COURT: Where are they?

2 MS. HARDY: They are certified copies
3 that would come in pursuant to 2317.42.

4 MR. MODUGNO: I would indicate for the
5 record, Your Honor, that I would oppose the motion
6 to amend.

7 THE COURT: Yes. Your objection is
8 overruled.

9 MR. MODUGNO: Note my continuing
10 objection to that amendment.

11 I'd move for a defense verdict.

12 THE COURT: It's overruled.

13 (Whereupon, a recess was taken.)

14 THE COURT: Please be seated.

15 Well, folks, you have heard the evidence in
16 this case and what the lawyers had to say. Now it
17 becomes my function to tell you what I think the
18 law is in this case which you must accept as I give
19 it to you, regardless of what you think the law is
20 or what it ought to be.

21 In any case there are two parts: the facts
22 and the law. It's my job to tell you what I think
23 the law is. It's your job to determine what the
24 facts are from all of the evidence in the light of
25 these instructions that I am about to give you.

1 Now, this case was started, as I indicated
2 to you at the beginning, by an indictment, these
3 sheets of paper. The Grand Jury heard some
4 testimony about this incident and they returned
5 charges against him: felonious assault, attempted
6 felonious assault and aggravated burglary.

7 Now, to the charges, the three charges
8 contained in this indictment, the defendant has
9 entered a plea of not guilty and he thereby denies
10 each of those charges.

11 Now, I said to you before, and I repeat it
12 once more, that this indictment is not any evidence
13 against this defendant, it's not to be considered
14 by you as evidence, and it in no way reflects upon
15 the guilt or the innocence of this defendant. That
16 is for to you determine. This is only the formal
17 means whereby this case is brought before you
18 ladies and gentlemen for trial.

19 I think I told you at the outset that this
20 defendant, Leroy McIntyre, when he came into this
21 court and throughout this trial, under our system
22 of law is presumed innocent and not guilty of any
23 offense, not one of the three charges contained in
24 this indictment, until such time as the State of
25 Ohio proves each and every essential element of the

1 crime charged by proof beyond a reasonable doubt.

2 If as to any element of any one of the three
3 charges the State has failed to prove that element
4 by proof beyond a reasonable doubt, it's your sworn
5 duty to acquit the defendant of that particular
6 offense.

7 By the same token, if the State of Ohio
8 proves by proof beyond a reasonable doubt -- and
9 they have the burden. If they have proved each and
10 every element of each of the crimes charged, then
11 with respect to that particular crime, it's your
12 sworn duty to find the defendant guilty of the
13 offense of which the State of Ohio has sustained
14 its burden of proof.

15 Now, what do I mean by reasonable doubt.
16 Well, reasonable doubt is present when the jurors,
17 after they have carefully compared and considered
18 all of the evidence, cannot say that they are
19 firmly convinced of the truth of the charge.

20 Reasonable doubt is a doubt based upon
21 reason and common sense. It is not a mere possible
22 doubt because everything which relate to human
23 affairs or depends upon moral evidence is open to
24 some possible or imaginary doubt. Proof beyond a
25 reasonable doubt is proof of such character that an

1 ordinary person, an ordinary person, would be
2 willing to rely and to act upon it in the most
3 important of his own affairs.

4 So, once again, if the State fails to prove
5 what they are obligated to prove by proof beyond a
6 reasonable doubt as to that charge, you must find
7 the defendant not guilty. If the State sustains
8 the burden of proof with respect to any one of the
9 charges, or all of the charges, then it's your
10 sworn duty to find the defendant guilty of that
11 charge or those charges.

12 Now, I said that you must determine the
13 facts in this case from the evidence in the light
14 of these instructions.

15 What do I mean by evidence. Well, very
16 simply, it's the sworn oral testimony which came to
17 you from the witness stand and the exhibits which
18 the Court admitted into evidence that you will have
19 with you in the jury room, which includes, in
20 addition to those statements that have been
21 testified to, the hospital records of Galen
22 Thompson which the lawyers have agreed should be
23 admitted into evidence and which you will have with
24 you in your jury room.

25 But the evidence is the sworn testimony, the

1 exhibits and all of the logical inferences that
2 follow there from.

3 AS I said, it does not include the
4 indictment and it does not include the arguments of
5 counsel. Also, you will not consider the question
6 of punishment in making a determination of guilt or
7 innocence.

8 During the course of the trial the lawyers
9 would object from time to time. Sometimes the
10 objections were overruled, sometimes they were
11 sustained. Where an objection was sustained, you
12 will draw no inference as to what the answer to
13 that question might have been. That was simply a
14 matter of law that you are not concerned with and
15 you will make no effort to speculate as to what the
16 answer might be.

17 Now, in determining what the facts are, you
18 have got to weigh the testimony of all the
19 witnesses who testified in this case and give their
20 testimony such weight as you feel that their
21 testimony is entitled to receive.

22 How do you do that? Well, the lawyers and
23 the law, so to say, the law, actually, over the
24 course of time has used some standards which it has
25 felt will assist any jury in weighing the testimony

1 of the various witnesses who testified in this
2 case.

3 How do you do that? Well, you saw all of
4 them testify. You may you consider the witness'
5 demeanor on the stand; his manner of testifying; is
6 he or she interested in the outcome of this case;
7 was the witness frank and candid with you or not;
8 was the witness biased and prejudiced; did the
9 witness have the means of knowing and observing the
10 things concerning which he or she testified; and,
11 if so, what about the accuracy or the correctness
12 of the witness' memory at the time he or she took
13 the stand; and I want to say to you that for good
14 cause shown, you may believe or you may disbelieve
15 all or any part of the testimony of any witness who
16 testified in this particular case.

17 Now, one other thing I want to mention. The
18 defendant didn't testify in this case. He is not
19 required to testify. As a matter of fact, he has a
20 constitutional right not to testify and the fact
21 that the defendant did not testify in this case
22 must not be considered by you for any purpose
23 whatsoever.

24 Well, let's take up now the charges that
25 have been filed against this defendant.

1 In the first count here the defendant is
2 charged with the felonious assault upon one Galen
3 L. Thompson on or about the 30th day of December,
4 1990 in Summit County, Ohio, and further it's
5 charged in the count that the felonious assault,
6 there was a deadly weapon used in the course of
7 that act.

8 The second charge is directly related to the
9 first one in which the Grand Jury charges that on
10 or about that date, the 30th day of December 1990,
11 in Summit County, Ohio, that the defendant, Leroy
12 McIntyre, attempted to physically assault Robert
13 Taylor and Denise Harrison with a deadly weapon,
14 and that he also is charged with having a firearm
15 specification; namely, that the attempted felonious
16 assault was carried out with a deadly weapon.

17 The third charge is that on the 30th day of
18 December, 1990, in Summit County, Ohio, this
19 defendant, Leroy McIntyre, trespassed -- I will
20 define these terms for you in a minute --
21 trespassed in 680 Bellevue Avenue, an occupied
22 structure, and that he had a deadly weapon when he
23 entered in that house and that he entered by force
24 and that it was an occupied structure, at which
25 time it is alleged that Robert Taylor and/or

1 Theresa Johnson were present or likely to be
2 present. Of course, that charge also contains
3 therein a specification that that act was committed
4 while the Defendant McIntyre had on or about his
5 person a firearm.

6 Okay. Let's take up first the felonious
7 assault. What is felonious assault? Felonious
8 assault is simply knowingly causing physical harm
9 to another by means of a deadly weapon.

10 In order to convict in the first count with
11 reference to felonious assault on Galen Thompson,
12 you must find beyond a reasonable doubt that on or
13 about the 30th day of December, 1990, and in Summit
14 County, Ohio, the defendant knowingly, one, caused
15 physical harm to Galen Thompson by means of a
16 deadly weapon.

15

17 Now, there are some terms here we've got to
18 talk about for a moment.

19 What do we mean by "knowingly"? A person
20 acts knowingly when he is aware that his conduct
21 will probably cause a certain result and that he is
22 aware of the existence of all the facts and
23 circumstances pertaining thereto, and that
24 knowledge must be gained and is determined from all
25 the facts and circumstances in evidence.

1 You will determine whether there existed in
2 the mind of the Defendant McIntyre that his acts
3 would cause or result in physical harm to Galen
4 Thompson.

5 I used the term "cause." I think you know
6 what cause is, but let me define it. It's an act
7 which in the natural and continuous sequence
8 directly produces the jury and physical harm and
9 without which it would not have occurred. Cause
10 occurs when the injury or physical harm is the
11 natural and foreseeable result of the act.

12 "Physical harm" means any injury, regardless
13 of its gravity or its duration.

14 Deadly weapon. What is a deadly weapon?
15 Well, it's any device capable of inflicting death
16 and designed for use as a weapon or possessed and
17 used as a weapon. A shotgun is a deadly weapon.

18 Now, if the State has proven by proof beyond
19 a reasonable doubt that on or about the 30th day of
20 December, 1990, in Summit County, Ohio, that the
21 Defendant McIntyre knowingly caused physical harm
22 to Galen Thompson by means of a deadly weapon, it's
23 your sworn duty to find the defendant guilty of
24 that offense. If the State of Ohio has failed to
25 prove that offense by proof beyond a reasonable

1 doubt, it's your sworn duty to acquit.

2 Now, the next count with reference to
3 attempt. In that count the State simply claims
4 that on or about that same date, in Summit County,
5 Ohio, that the defendant attempted to inflict
6 physical harm upon Robert Taylor and Denise
7 Harrison. All the elements actually are the same
8 except that the act did not actually culminate in
9 physical harm to those people but that an attempt
10 was made to do it.

11 And what do I mean by a criminal attempt? A
12 criminal attempt is where one purposely does any
13 act constituting a substantial step in the course
14 of conduct which is planned to culminate in that
15 person's commission of the actual crime, namely,
16 felonious assault.

17 To constitute a substantial step, the
18 conduct must be strongly corroborative of the
19 actor's criminal purpose.

20 Now, did the state prove by proof beyond a
21 reasonable doubt that on that date, in Summit
22 County, Ohio, the Defendant McIntyre by his actions
23 at 680 Bellevue attempt to inflict physical harm
24 upon Robert Taylor and Denise Harrison. If he did,
25 you so find by proof beyond a reasonable doubt,

1 it's your sworn duty to find him guilty of that
2 offense. If they haven't proved it by proof beyond
3 a reasonable doubt, why, it's your sworn duty to
4 acquit the defendant of that charge.

5 Now, the last charge is aggravated burglary.
6 What are the essential elements of the offense of
7 aggravated burglary?

8 In that case you must find by proof beyond a
9 reasonable doubt that on December the 30th, 1990,
10 the Defendant McIntyre by force trespassed in an
11 occupied structure with the purpose to obtain
12 property owned by another without that person's
13 consent and to deprive that person of that
14 property, and that at that time the Defendant
15 McIntyre had a deadly weapon on or about his person
16 and the occupied structure was the permanent or
17 temporary habitation or residence of another in
18 which at the time any person was present or likely
19 to be present.

20 Force. Force means any violence used by any
21 means upon or against any person or thing to gain
22 entrance.

23 Trespass. Any entrance knowingly made in
24 the dwelling of another without that person's
25 consent is a trespass and is unlawful.

1 Knowingly means that the person was aware of
2 what he was doing and his lack of authority to do
3 so.

4 I have already defined the term "deadly
5 weapon" to you. It's the same for purposes of the
6 offense of aggravated burglary.

7 Purpose. A person acts purposely when it is
8 his specific intention to cause a certain result.
9 It must be established that at the time in question
10 there was present in the mind of the defendant the
11 intent to obtain property owned by someone on that
12 premises without that person's consent. To act
13 purposely is to act intentionally.

14 Deprive simply means to withhold property of
15 another permanently or for a period to appropriate
16 a substantial part of the things obtained to the
17 person's own use. Owner is one who owns or who
18 has the right or possession or control of property.

19 If the State has proved all the essential
20 elements of that offense, you must find the
21 defendant guilty of the offense of aggravated
22 burglary. If the State has failed to prove any one
23 of the essential elements of the offense, then,
24 likewise, it's your sworn duty to acquit the
25 defendant of the offense of aggravated burglary.

16

1 Now, this is a criminal case and it takes
2 all 12 of your members to arrive at a verdict.
3 Verdicts in criminal cases must be unanimous,
4 whether they are for guilty or for not guilty.

5 Only the 12 of you will deliberate. At the
6 conclusion of the Court's charge Mr. Weiss and Mr.
7 Montowski may be excused.

8 I'm going to read the verdict forms to you
9 in the order in which they are in the indictment.
10 This is an indictment for felonious assault
11 relative to Galen Thompson.

12 "We the jury in this case being duly
13 impaneled and sworn to well and truly try and true
14 deliverance make between the State of Ohio and the
15 defendant, Leroy McIntyre, do find the
16 Defendant..." then there is blank line in which you
17 will insert the word "guilty" or the words "not
18 guilty" according to your findings "...of the
19 offense of felonious assault."

20 Then right underneath that, "We further find
21 that Leroy McIntyre..." and you insert the word
22 "did" or the words "did not" "...have a firearm on
23 or about his person or under his control while
24 committing the said felonious assault."

25 Then on the back there is room for the

1 signatures of those agreeing. All 12 of you must
2 agree upon a verdict.

3 "And we do so render our verdict upon the
4 concurrence of 12 members of said jury. Each of us
5 said jurors concurring in said verdict signs his
6 name hereto this blank day of 1991."

7 The next one is an indictment for attempted
8 felonious assault.

9 "We the jury in this case being duly
10 impaneled and sworn to well and truly try and true
11 deliverance make between the State of Ohio and the
12 defendant, Leroy McIntyre, do find the
13 defendant..." and there is a blank line to insert
14 either the word "guilty" or the words "not guilty"
15 "...of the offense of attempted felonious assault."
16 That pertains to Robert Taylor and Denise Harrison.

17 "We further find that Leroy McIntyre did or
18 did not have firearm on or about his person or
19 under his control while committing the said
20 attempted felonious assault."

21 Remember, it's attempted felonious assault
22 And the words "Robert Taylor" and "Denise Harrison"
23 are above so there is no question about. On the
24 back are signature lines for all 12 of your
25 members.

1 The last form is indictment for aggravated
2 burglary.

3 "We the jury in this case being duly
4 impaneled and sworn to well and truly try and true
5 deliverance make between the State of Ohio the
6 Defendant, Leroy McIntyre, do find the
7 defendant..." blank line, "guilty or not guilty,"
8 you will insert according to your findings "...of
9 the offense of aggravated burglary."

10 "We further find that Leroy McIntyre did or
11 did not..." according to your findings "...have
12 firearm on or about his person or under his control
13 while committing the said felonious assault." And
14 then on the back again the signature lines for your
15 signature.

16 You will have with you in the jury room the
17 exhibits which the Court has admitted into
18 evidence.

19 Your first business in the jury room is to
20 select a foreman. That is a gender neutral word,
21 and the forman is either a man or a woman selected
22 to preside over your deliberations in the jury room
23 and has no more power than any of the rest of you,
24 but is selected to control the deliberations, I
25 guess, to see that everybody gets a chance to speak

1 his peace and to discuss the opinions of all of
2 you. That is what these are, jury deliberations.

3 Maybe some of you are going to walk into the
4 jury room already convinced of what you want to do.
5 Listen to the opinions of the others and then
6 determine whether or not your first-formed opinions
7 were accurate or not accurate, correct or
8 incorrect. That is the function of jury
9 deliberations.

10 If during the course of your deliberations
11 you have a question, write the question out. I
12 will take it up with the lawyers. If the lawyers
13 say that it can be answered, I will inform you of
14 the answer. If the law does not permit me to
15 answer it, I will inform you of that fact.

16 When you have arrived at a verdict you will
17 be returned to the courtroom and we will accept
18 your verdict.

19 Now, if you have not arrived at a verdict or
20 verdicts by, of course, the noon hour, we will
21 recess for the noon hour and resume deliberations
22 after the noon hour.

23 I'm going to ask you to return to the jury
24 room. I know that the lawyers have carefully
25 listened to what I have said and I know that on

1 occasions such as this the judge has sometimes an
2 occasion to misspeak, either say something that he
3 should not have said or not said something which he
4 ought to have said, and I'm sure that if I have
5 done that the lawyers have noted that and will
6 bring that to my attention, but that must be done
7 in your absence and not in your presence.

8 However, if there is some changes to be
9 made, I will be back with Tom here and we will make
10 the necessary corrections for you on the record.

11 Okay. You may follow Mr. Wellemeyer into
12 the jury room.

13 (Whereupon, the jury was excused to commence
14 deliberations.)

15 THE COURT: Anything you want to put on
16 the record?

17 MS. HARDY: I don't have anything, Your
18 Honor.

19 Do all three verdict forms have the firearm
20 specification? The last form, I think you referred
21 to it at the end as felonious assault. I think you
22 meant to say the aggravated burglary. That was my
23 only question.

24 MR. MODUGNO: I don't have anything. I
25 have no problem with the charge.

1 10:30 a.m., Tuesday, August 13, 1991

2 P R O C E E D I N G S

3 (Whereupon, the following proceedings were
4 had out of the presence of the jury.)

5 MS. HARDY: We are here on State of
6 Ohio versus Leroy McIntyre, Case 91-01-0135.

7 This is the second day of the jury
8 deliberations. The jury has indicated that they
9 are are hung on the third count of felonious
10 assault. I believe that they do have two verdicts
11 on the first two counts.

12 The State would indicate for the record that
13 at this time the State would request that the
14 instructions be reread to the jury with respect to
15 felonious assault and attempt and that the jury
16 continue deliberating on the third count.

17 THE COURT: Anything further? Anything
18 from you?

19 MR. MODUGNO: Not on this matter, but on
20 the other matter.

21 THE COURT: Go ahead.

22 MR. MODUGNO: If it please the Court,
23 Your Honor, I would indicate for the record that
24 yesterday, at approximately 20 after 11, after the
25 jury had been charged and I exited the court, my

1 alibi witness, Towanda Toles, was present in court.

2 I talked with her. She indicated to me she
3 had some confusion about when she was due in court.
4 Apparently, it was her birthday over the weekend
5 and she had been partying a little bit. At any
6 rate, she was there and available, ready, willing
7 and able to testify as to the defendant's presence
8 with her at the time.

9 THE COURT: Now, that was after the
10 jury had been charged and they were on their way to
11 the jury room.

12 MR. MODUGNO: That's correct, Your Honor.
13 And I would move at this time for a mistrial. I
14 think it's highly prejudicial that a jury not hear
15 from an alibi witness when it's a key piece of
16 evidence in the case.

17 I tried desperately to get her earlier. She
18 was never actually served a subpoena. There was
19 confusion and I would request at this time a
20 mistrial or, in the alternative, some other relief.

21 THE COURT: Overruled.

22 (Whereupon, the following proceedings were
23 had in the presence of the jury.)

24 THE COURT: Now, ladies and gentlemen,
25 as I understand it, you have not been able to agree

1 upon the count of felonious assault which pertains
2 to the attempted infliction of physical harm or the
3 weapon; is that correct?

4 JUROR FISHER: That is correct, Your
5 Honor.

6 THE COURT: And you have, as I
7 understand it, reached a decision on two counts,
8 the other two counts. I don't want you to tell me
9 what they are, but you have?

10 JUROR FISHER: That is correct.

11 THE COURT: All right. Now, do you
12 think that further deliberations would be of any
13 value as far as the count on which you have not
14 been able to agree?

15 JUROR FISHER: Right now we are at six-six
16 on the attempted felonious assault. They don't
17 understand that there was felonious and attempt.
18 You said that was the same, didn't you, so long as
19 the deadly weapon was used?

20 THE COURT: Yes. But you are --

21 JUROR FISHER: They were confused about
22 the gun, attempted felonious assault.

23 THE COURT: Well, in any event, I
24 realize, apparently, there is some confusion.

25 Now, do you feel that further deliberations

1 would be of any value as far as that count is
2 concerned?

3 How many think further deliberations would
4 be of some value? Hold up your hand.

5 How many feel that further deliberations
6 would be of no value? Hold up your hand.

7 Very well. Mr. Wellemeier, the Court will
8 accept the jury's indication that apparently it's
9 overwhelming that further deliberations as far as
10 that count is concerned would be of no value, so
11 the Court will accept the verdicts that you have
12 arrived at.

13 "State of Ohio versus Leroy McIntyre,
14 indictment for felonious assault, in violation of
15 Revised Code Section 2903.11(A)(2) with reference
16 to Galen Thompson.

17 "We the jury in this case being duly
18 impaneled and sworn to well and truly try and true
19 deliverance make between the State of Ohio and the
20 defendant, Leroy McIntyre, do find the defendant
21 guilty of the offense of felonious assault.

22 "We further find that Leroy L. McIntyre did
23 have a firearm on or about his person or under his
24 control while committing the said felonious
25 assault, and we do so render our verdict upon the

1 concurrence of 12 members of said jury, each of us
 2 said jurors concurring in said verdict signs his
 3 name hereto this 13th day of August, 1991." And 12
 4 signatures appear on the verdict.

5 Ladies and gentlemen, is this your verdict?

6 JUROR FISHER: Yes, it is.

7 THE COURT: All right.

8 "Indictment for aggravated burglary. State
 9 of Ohio vs. Leroy McIntyre.

10 "We the jury in this case being duly
 11 impaneled and sworn to well and truly try and true
 12 deliverance make between the State of Ohio and the
 13 defendant, Leroy L McIntyre, do find the defendant
 14 guilty of the offense of aggravated burglary.

15 "We further find that Leroy L. McIntyre did
 16 have a firearm on or about his person or under his
 17 control while committing the said felonious
 18 assault, and we do render our verdict upon the
 19 concurrence of 12 members of said jury, each of us
 20 said jurors concurring in said verdict signs his
 21 name hereto this 13th day of August, 1991." And
 22 again I see 12 signatures to that verdict form.

23 Ladies and gentlemen, is this your verdict?

24 JUROR FISHER: Yes.

25 THE COURT: Do you wish to have the

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jury polled?

MR. MODUGNO: Yes, Your Honor.

THE COURT: Very well. I will go to the indictment relative to felonious assault of Galen Thompson.

Miss Moore, is this your verdict?

JUROR MOORE: Yes.

THE COURT: Miss Kern, is this your verdict?

JUROR KERN: I'm sorry?

THE COURT: Is this your verdict?

JUROR KERN: Yes.

THE COURT: And your name escapes me.

JUROR PERKINS: Perkins.

THE COURT: Yes. Mr. Perkins, is this your verdict?

JUROR PERKINS: Yes.

THE COURT: Miss Simon, is this your verdict?

JUROR SIMON: Yes.

THE COURT: Mr. White, is this your verdict?

JUROR WHITE: Yes.

THE COURT: Mr. Snyder, is this your verdict?

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JUROR SNYDER: Yes.

THE COURT: Mrs. Posatiere, is this your verdict?

JUROR POSATIÈRE: Yes.

THE COURT: Mr. Zarle, is this your verdict?

JUROR ZARLE: Yes.

THE COURT: Mr. Fisher, is this your verdict?

JUROR FISHER: Yes.

THE COURT: Miss Fink, is this your verdict?

JUROR FINK: Yes.

THE COURT: Mrs. Hurst, is this your verdict?

JUROR FINK: Yes.

THE COURT: Miss Hill, is this your verdict?

JUROR HILL: Yes.

THE COURT: All right.

Now we will go to the indictment relative to aggravated burglary.

Miss Moore, is this your verdict?

JUROR MOORE: Yes.

THE COURT: Miss Kern, is this your

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verdict?

JUROR KERN: Yes.

THE COURT: Mr. Perkins, is this your
verdict?

JUROR PERKINS: Yes.

THE COURT: Miss Simon, is this your
verdict?

JUROR SIMON: Yes.

THE COURT: Mr. White, is this your
verdict?

JUROR WHITE: Yes.

THE COURT: Mr. Snyder, is this your
verdict?

JUROR SNYDER: Yes.

THE COURT: Miss Posatiere, is this
your verdict?

JUROR POSATIÈRE: Yes.

THE COURT: Mr. Zarle, is this your
verdict?

JUROR ZARLE: Yes.

THE COURT: Mr. Fisher, this your
verdict?

JUROR FISHER: Yes.

THE COURT: Miss Pink, is this your
verdict?

1 JUROR PINK: Yes.

2 THE COURT: Miss Hurst, is this your
3 verdict?

4 JUROR HURST: Yes.

5 THE COURT: And, Mrs. Hill, is this
6 your verdict?

7 JUROR HILL: Yes.

8 THE COURT: Very well. The Court will
9 accept those verdict forms.

10 Now, off the record, for a minute.

11 (Whereupon, a discussion was held off the
12 record.)

13 THE COURT: I thank you and you may be
14 excused.

15 (Whereupon, the jury was excused.)

16 MS. HARDY: The jury has returned
17 verdicts in State of Ohio versus Leroy McIntyre.

18 THE COURT: Yes. We know that.

19 MS. HARDY: Count One relative to Galen
20 Thompson contained a prior aggravated felony
21 specification. The State of Ohio has a stipulated
22 copy of the defendant, Leroy McIntyre's, prior
23 aggravated felony conviction for one count of
24 robbery.

25 THE COURT: Have you examined it?

1 MR. MODUGNO: I have examined it, Your
2 Honor.

3 THE COURT: May I examine it, please?

4 The journal entry reads, "This day, to wit:
5 The 21st day of June, 1985, now comes the
6 prosecuting attorney..." He was found guilty by a
7 jury of robbery as contained in count three of the
8 indictment and sentence was pronounced. He was
9 ordered imprisoned and confined to the Ohio State
10 Reformatory at Mansfield for three to 15 years and
11 the three-year minimum shall be a period of actual
12 incarceration for the punishment of robbery, an
13 aggravated felony of the second degree, and that's
14 about it.

15 The case was heard apparently by Judge Fred
16 Skok from Lake County who was sitting for Judge
17 Glen B. Morgan, the Court of Common Pleas of Summit
18 County.

19 Now, let me ask you, how do we know that
20 Leroy McIntyre in Case No. 85-02-0171 is the Leroy
21 McIntyre who was here today?

22 MS. HARDY: Well, Your Honor, if it
23 please the Court, I can call an officer from the
24 Akron Police Department, Bureau of Identification,
25 if we get to such time. I believe the Court,

1 though, does have before it the stipulated copy of
2 the felony conviction and I am indicating to this
3 Court as an officer of the court that, as a matter
4 of fact, that is the same Leroy L. McIntyre who has
5 been tried in this particular case.

6 THE COURT: I will accept that.

7 MR. MODUGNO: Object for the record, Your
8 Honor.

9 THE COURT: All right.

10 MR. MODUGNO: Your Honor, if it please
11 the Court, at this time I would reiterate all of
12 the objections that have been noted previously. In
13 particular, the fact that the alibi witness was
14 here late yesterday and that she didn't testify.
15 This could have made a difference in this trial.

16 Again, I would ask at this point that the
17 Court find the defendant not guilty based on the
18 facts not being enough to convict.

19 THE COURT: I didn't get that.

20 MR. MODUGNO: Based on the facts
21 presented were not enough to convict the defendant.
22 Simply moving for a directed verdict.

23 THE COURT: I see. Well, the Court is
24 cognizant of all your objections and I shall
25 overrule the same.

1 MR. MODUGNO: In particular, his absence
2 and its prejudice, I believe, was demonstrated
3 somewhat in court this morning when I believe the
4 jurors were making smiles at each other when they
5 heard that he had absconded. I would just note
6 that for the record.

7 I think it appeared to me they may have
8 discussed this fact and it may have been a factor
9 in their deliberations.

10 THE COURT: Well, it wasn't the jury's
11 fault that he took off. But, anyway, that's
12 neither here nor there.

13 As I say, I'm cognizant of all your
14 objections and shall overrule them, and I find that
15 he has been convicted of a prior offense of
16 violence based upon the journal entry presented to
17 the Court, properly certified and counsel's
18 statement that this Leroy McIntyre noted in the
19 journal entry is the Leroy McIntyre who is the
20 defendant in this case.

21 If and when he has been apprehended -- and,
22 of course, we should issue a capias.

23 MS. HARDY: I believe it's been issued.

24 THE COURT: Why, then, the Court will
25 impose sentence.

1 MR. MODUGNO: I have one further matter,
2 Your Honor.

3 THE COURT: Let me put on for the
4 record that the defendant, while he is not here,
5 counsel knows that he has the right of appeal and
6 I'm so instructing counsel, and he apparently was
7 indigent to be indigent and I assume he is still
8 indigent now, at least I would accept that, and I
9 will appoint you.

10 MR. MODUGNO: Your Honor, I would request
11 that another attorney be appointed on the appeal
12 for several reasons.

13 THE COURT: All right. Well, we don't
14 need to go into this, but I will see that that's
15 done, but Judge Spicer can handle that.

16 Off the record.

17 (Whereupon, a discussion was held off the
18 record.)

19 MS. HARDY: Just one thing I wanted to
20 clear up for the record, Your Honor.

21 You indicated that you found him guilty of
22 the prior crime of violence. I believe it's a
23 prior aggravated felony specification. I just want
24 to clear that up.

25 MR. MODUGNO: Your Honor, following up on

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the appointment of counsel for his appeal, and I don't have a law book in front of me -- quite frankly, perhaps Your Honor knows as to whether or not his appeal time is now running or not running until he is sentenced.

THE COURT: It doesn't run until the journal entry would go on.

(Whereupon court was adjourned.)

1 9:00 a.m., Thursday, August 29, 1991

2 P R O C E E D I N G S

3 THE COURT: Please be seated.

4 Are you ready, Mr. Modugno?

5 MR. MODUGNO: Ready to proceed, Your
6 Honor.

7 THE COURT: You may proceed, Ms. Hardy.

8 MS. HARDY: Thank you, Your Honor.

9 May it please the Court, this is State of
10 Ohio versus Leroy McIntyre, Case No. 91-1-135. We
11 are here this morning for sentencing.

12 Previously, the defendant was found guilty
13 of one count of felonious assault, one count of
14 aggravated burglary and an accompanying firearm
15 specification for both counts.

16 At this time, the State of Ohio would like
17 to call Detective Robert Apley to the stand for
18 purposes of establishing the prior aggravated
19 felony specification.

20 THE COURT: Mr. Modugno, any comments
21 or anything?

22 MR. MODUGNO: No, Your Honor.

23 THE COURT: All right. Come forward,
24 please. You have been sworn, sir, and you are
25 still under oath.

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ROBERT EDWARD APLEY

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a witness herein, called by the State of Ohio, being
previously duly sworn, was examined and testified as
follows:

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6

DIRECT EXAMINATION

7

BY MS. HARDY:

8

Q. Will you please state your name for the record?

9

A. Robert Edward Apley.

10

Q. Where are you employed, Detective Apley?

11

A. Akron Police Department, Detective Bureau.

12

Q. Are you familiar with the case of State of Ohio
versus Leroy McIntyre, Case No. 91-1-135?

13

14

A. Yes, I am.

15

Q. Pursuant to your involvement in this case, did you
have the opportunity to check the defendant's
record in the Akron Police Department

16

17

18

Identification Bureau?

19

A. Yes, I did.

20

(Whereupon, State's Exhibit 11 was marked

21

for identification.)

22

BY MS. HARDY:

23

Q. Handing you what has been marked for identification
purposes as State's Exhibit 11, I would like you to
look at that, please, and ask you if you can

24

25

1 identify that for us?

2 A. Yes. It's a copy of the journal entry. It's from
3 1985 where Leroy McIntyre was sentenced on the 21st
4 of June, 1985 on a conviction of robbery.

5 Q. What was the case number in that journal entry?

6 A. CR 85-02-0171.

7 Q. When you went to the Identification Bureau and
8 checked Leroy McIntyre's record, was the person who
9 was found guilty in case number 91-1-135, the case
10 that we are in court today on, the same person who
11 was convicted in this journal entry you have before
12 you?

13 A. Correct, yes.

14 Q. I would like you to tell the Court how you verified
15 that, in fact, it was the same person?

16 A. Through social security number, date of birth and
17 also from ID photographs.

18 Q. Did you then compare the social security number,
19 the date of birth and mug shots that was contained
20 in that case, in the journal entry you have before
21 you, and the current case before this court?

22 A. Yes, I did.

23 Q. Is the person who was convicted of robbery in Case
24 No. 85-02-0171 present in this courtroom today?

25 A. Yes, he is.

1 Q. I would like you to please point him out and
2 describe where he is seated in this courtroom and
3 what he is wearing?

4 A. He is sitting back here, the second individual,
5 with the orange and black jail coveralls on.

6 Q. Who is that person?

7 A. Leroy McIntyre.

8 Q. Is the journal entry you have before you a
9 certified copy of that journal entry?

10 A. Yes, it is.

11 MS. HARDY: Nothing further, Your
12 Honor.

13 THE COURT: Mr. Modugno.

14 MR. MODUGNO: I would simply state for
15 the record my continuing objection, Your Honor, to
16 this matter going forward pursuant to my previous
17 objections to the trial going forward after Mr.
18 McIntyre was not here for the second day of trial,
19 all the various objections I made.

20 THE COURT: Of course, the statute not
21 only permits that to be done but, I guess, requires
22 that it be done. So I would have to overrule the
23 objection.

24 You may step down, sir.

25 (Whereupon, the witness was excused.)

1 THE COURT: Ms. Hardy.

2 MS. HARDY: At this time, Your Honor,
3 if the Court would find the defendant guilty of the
4 prior aggravated felony specification, the State
5 would just make its recommendation with respect to
6 sentencing in this case.

7 Your Honor, you have heard the facts and
8 circumstances of this case. I believe the Court is
9 well aware of the circumstances. As the Court
10 knows, on the second day of trial the defendant,
11 Leroy McIntyre, absconded, and while absconding and
12 fleeing from justice the defendant was subsequently
13 arrested and charged with a felonious assault
14 involving an individual by the name of Tyrone
15 Howard. The defendant allegedly slashed his throat
16 while fleeing from this trial.

17 I think these crimes were very serious, the
18 circumstances surrounding them were very serious.
19 The State would seek that this Court impose the
20 maximum sentences allowable under law and that the
21 sentences be served consecutively with each other.

22 THE COURT: Well, I find, of course,
23 that is the defendant in the case which we are now
24 present in court, that that individual is the same
25 individual shown in the journal entry which was

1 admitted into evidence as an exhibit in this case.

2 Now, I would like to have you for purposes
3 of the record inform the defendant of the statutory
4 requirements pertaining to the penalties to be
5 imposed in the case of felonious assault where it's
6 committed with a firearm and where there has been a
7 prior offense of violence and also what has been
8 provided with reference to the penalties for
9 aggravated burglary when that offense is committed
10 with a firearm.

11 MS. HARDY: Yes, Your Honor.

12 With respect to the felonious assault
13 conviction, there was a firearm specification which
14 the defendant was found guilty of. The defendant
15 can be sentenced to a mandatory three years on
16 that.

17 With respect to the underlying charge of
18 felonious assault, it's an aggravated felony of the
19 second degree. With the Court having found the
20 defendant guilty of the prior aggravated felony
21 specification, the potential penalties for that is
22 a sentence of 8, 9, 10, 11, 12 to 15 years in the
23 Ohio State Penal System, with the 8 years being a
24 period of actual incarceration.

25 With respect to the conviction for

1 aggravated burglary; it's an aggravated felony of
2 the first degree. This Court can impose a sentence
3 of 5, 6, 7, 8, 9, 10 to 25 years. There is also an
4 accompanying firearm specification and the Court
5 can impose a mandatory three-year actual
6 incarceration to that charge.

7 THE COURT: Mr. Modugno.

8 MR. MODUGNO: Please the Court, Your
9 Honor.

10 First of all, I would like to indicate my
11 continuing objections and I would like to indicate
12 for the Court, since it's been brought up, I think
13 the Court needs to be edified that Mr. McIntyre has
14 already been arraigned on a charge of failure to
15 appear, and my understanding of reading that
16 indictment is that occurred on or about the 8th day
17 of August, the second day of his trial that we are
18 here discussing this morning.

19 He has also been indicted and is to be
20 arraigned on a charge of felonious assault, which I
21 believe dates to the 14th, I believe. It talks
22 about the 14th day of August, 1991.

23 For the record, Your Honor, I would indicate
24 that as to the charge of failure to appear which
25 relates to the second day of his trial here, in

1 fact, he was absent that day. A plea of not guilty
2 and not guilty by reason of insanity has been made.
3 There is still going to be a written motion put in
4 as to that charge, it's been reserved, and there
5 has been a competency evaluation ordered by this
6 Court and there will be an evaluation for the not
7 guilty by reason of insanity relating to the very
8 second day of trial.

9 Additionally, I anticipate later this
10 morning entering a similar plea to the felonious
11 assault charge which is only six days after this
12 event.

13 The rules mandate that this Court have the
14 competency of this defendant checked prior to
15 trial. That was done in this case and a report was
16 issued. The report which is part and parcel of
17 this case and part and parcel of the record in this
18 case --

19 THE COURT: He was found to be
20 competent.

21 MR. MODUGNO: He was found to be
22 competent on the day when that report was issued.
23 I would indicate to the Court that now his sanity
24 on that very day when he was missing is now in
25 question as well as his competency currently.

1 We are only talking about really days and
2 weeks from this incident. The Court has the
3 discretion to order a determination as to
4 competency after trial begins and for several
5 reasons I think that justice requires that in this
6 particular case that be ordered at this point in
7 time before this case goes any further as to his
8 competency on that day when he was no longer
9 sitting next to me and when I was forced to proceed
10 without a client, that we should hold this in
11 abeyance until such time as we get some evidence.

12 For one thing, I will indicate for the
13 record that I had some opportunity to speak to the
14 jurors after this incident and both Mr. McIntyre's
15 shooting in April and the fact that he was not
16 present for the last couple days of trial was
17 discussed, in fact, by the jurors and in their
18 deliberations. One of the jurors made the comment
19 to me, "Of course we considered his absence."

5
20 I believe from dealing with Mr. McIntyre in
21 attempting to prepare for trial, I think I
22 previously indicated to this Court some of the
23 problems I had just prior to the trial beginning in
24 communicating with my client. I think that that
25 deteriorated rapidly. I don't believe he

1 understood the nature of what he did. I don't
2 believe that his intention was to "flee the court"
3 and I think we need a professional to analyze that.

4 We've got a trial here. The evidence took
5 four or five hours, the prosecutor's evidence. He
6 has the new charges facing him. I fail to see
7 where justice would be harmed if there has to be a
8 rehearing of those other charges along with the new
9 charges. I mean, I just don't see where any
10 justice would be harmed. In fact, I think Mr.
11 McIntrye's rights would be seriously harmed if we
12 were to proceed at this point in time to sentence
13 him.

14 I'm not prepared this morning with a brief,
15 Your Honor, but if time would be given, I think
16 that perhaps there is some law. I know there has
17 been other incidents in Summit County where
18 situations have arisen in the courtroom that have
19 resulted -- I don't have the case name today, but I
20 know there is at least one a few years ago.

21 THE COURT: Well, of course, the
22 statute provides -- and I'm reading from Revised
23 Code Section 2945.37. It's in the supplement, the
24 statute having been amended and the amended section
25 having become effective July 1, 1989.

1 "In a criminal action in a court of common
2 pleas or municipal court, the court, prosecutor, or
3 defense may raise the issue of the defendant's
4 competence to stand trial. If the issue is raised
5 before trial, the court shall hold a hearing on the
6 issue as provided in this case. If the issue is
7 raised after trial has begun, the court shall hold
8 a hearing on the issue only for good cause shown."

9 The fact that the defendant left during the
10 trial of the case, during the process of the trial,
11 in and of itself doesn't seem to me to be
12 sufficient reason or showing of good cause, and
13 what other items that you mentioned, that you were
14 having a little difficulty in communicating with
15 him and so forth and so on prior to trial, doesn't
16 seem to me in and of itself sufficient
17 establishment of good cause to interrupt the trial
18 and to have a competency hearing at that time.

19 The statute goes on to say that, "Defendant
20 is presumed competent to stand trial, unless it is
21 proved by a preponderance of the evidence in a
22 hearing under this section that because of his
23 present mental condition he is incapable of
24 understanding the nature and objective of the
25 proceedings against him or of presently assisting

1 in his defense."

2 And the statute goes on to say that, "The
3 court shall not find the defendant incompetent to
4 stand trial solely because he is receiving or has
5 received treatment as a voluntary or involuntary
6 mentally ill patient or mentally retarded
7 resident," so forth and so on.

8 Certainly didn't seem to me on the basis of
9 what was raised and what you have indicated to the
10 Court and the fact that he left the case during the
11 trial that that would be sufficient to require a
12 competency hearing, but I can understand your --

13 MR. MODUGNO: If I might add a few other
14 points.

15 The psychological report or the evaluation
16 that was done that is part of the record of this
17 case does indicate that he has had severe
18 behavioral outbursts in the past and it documents
19 those outbursts.

20 I'm not a psychologist, but I think the fact
21 that he has now been charged with two other crimes
22 shortly after he left this courtroom, the fact I
23 hadn't even started my part of case, he was, for
24 all intents and purposes, deprived of that.

25 I would also indicate for the record, and I

1 think the Court is aware, that Towanda Toles, the
2 alibi witness, was present in the hallway of the
3 court after the jury was charged. She apparently
4 got here about 15 minutes prior to the jury
5 beginning deliberations.

6 I have had an opportunity to speak with her.
7 She indicated to me that her reason for getting
8 here late or for more or less hiding from you,
9 which she indicated she had, it was related to the
10 fact that she was arguing with Mr. McIntyre
11 regarding their relationship and had nothing to do
12 with what she had to say. She has stated in the
13 past and she continues to tell me that he was with
14 her at the time of these alleged incidents.

15 I would also indicate that we were subjected
16 to the testimony, and it's on the record, from a
17 witness after nine months of hearing, one,
18 testimony that she did not have any idea who those
19 people were that had ski masks on, suddenly in
20 court, apparently even to the surprise of the
21 prosecutor, suddenly testifies in court that
22 somebody that she said she knows from the
23 neighborhood, Leroy McIntyre, who she sees in the
24 dark from some hundred feet away or 200 feet away,
25 that she recognizes this man. She changes this

1 testimony and she is sitting on the witness stand
2 without even the benefit of looking at Mr.
3 McIntyre's face when she is saying it was the same
4 person.

5 When coupled with all these other factors,
6 it just seems to me, given the fact that apparently
7 there is going to be other trials in this case,
8 that it's unnecessary to go forward without at
9 least a hearing as to whether or not he may have
10 reached a point where I could not adequately
11 represent him, he could not adequately fathom what
12 he was doing, because after her testimony, of
13 course, I had the decision to make as to whether to
14 put him on the stand or not. He may well have also
15 taken the stand to let that jury judge his
16 truthfulness in this matter.

17 Given all of those facts, it just seems to
18 me that a competency evaluation at this time is
19 essential, or, in the alternative, a mistrial, Your
20 Honor, an opportunity for Mr. McIntyre's rights to
21 be protected to the fullest.

22 The prosecutor apparently believes they have
23 an ironclad case and I don't see how the State of
24 Ohio would be prejudiced by giving Mr. McIntyre a
25 fair hearing where he is present sitting here in

1 front of everyone with perhaps an opportunity to
2 testify and to have his alibi witness be heard.

3 These are serious allegations. As a matter
4 of fact, the prison times that are discussed here
5 for those charges are extremely long, I believe
6 comparable or in excess to those for murder and --

7 THE COURT: Not quite.

8 MR. MODUGNO: Not quite, but at the lower
9 end. So I would simply make all of those motions
10 and ask for an opportunity to be heard after he is
11 evaluated.

12 THE COURT: Well, I would overrule your
13 motion.

14 MR. MODUGNO: Thank you.

15 THE COURT: Stand up, please, Mr.
16 McIntyre.

17 Sir, is there anything that you wish to say
18 before the Court pronounces sentence in your case?

19 THE DEFENDANT: Yes, a couple things I want
20 to say.

21 THE COURT: I'm sorry?

22 THE DEFENDANT: Couple things I want to
23 say.

24 THE COURT: Okay.

25 THE DEFENDANT: Your Honor, I see everybody

1 in the courtroom and I see you and you represent
2 justice. The prosecutor, Attorney Modugno -- which
3 he did a good job defending me. The witnesses that
4 stood up against me at trial, months ago the same
5 witness who stood up here shot me five times at
6 point-blank range at 2:45 in the morning.

7 My leg was paralyzed. They told me I
8 wouldn't be able to fight no more. Every time I
9 hear a loud noise my nerves jump.

10 They say this is justified. This witness
11 right here, the detective would not arrest this
12 witness against me due to the fact that he was
13 testifying against me in this trial.

14 I went to the prosecutor's office several
15 times trying to get this guy arrested and the two
16 other guys that was in the car when they shot me
17 with an Uzi, a machine gun. They told me they
18 could not arrest none of the people that shot me
19 because they was investigating the case.

20 I tried to go to the prosecutor's office.
21 When I went down, they told me I couldn't file a
22 warrant because they was investigating the case.

23 These guys who are running around the
24 streets, dope dealers, shot me in a driveway on
25 Winton, not even a drug related area, at a

1 girlfriend's house of mine. In a driveway. Nobody
2 gets arrested.

3 Then this case I come in on, the guy said I
4 cut his throat. They arrested me just for what he
5 says about me. I've been shot five times with an
6 Uzi, the second time I got shot in a year, second
7 time in nine months. Nobody been arrested.

8 The first time I got shot I pressed charges,
9 went to preliminary, nobody gets arrested. Seems
10 like anybody could do anything to Leroy McIntyre in
11 the streets and get away with it, but if I try to
12 rebel, try to protect myself, you know, they want
13 to convict me and condemn me.

14 I got shot with an Uzi. I bought a .38, I
15 bought a gun. I carried a gun with me everywhere I
16 went just because of them people right here. But
17 this guy sitting on the stand, knowing that he shot
18 me five times with an Uzi, they convict me on his
19 testimony.

20 Just like the girl. Nine months ago she
21 said she didn't see who went in the house, who did
22 the crime, they just heard a gunshot from inside
23 the house. She changed her testimony. She said
24 she seen me going in the house.

25 This thing ain't justice. They say I'm a

1 monster, I threatened witnesses. I've been on the
2 streets for nine months, come to court every day.
3 Even when I left the courtroom, I had just cause to
4 leave.

5 I only had one witness in this case, which
6 was to Towanda Toles. I left the courtroom, didn't
7 know I was breaking any kind of law whatsoever. I
8 went to Canton, Ohio, tried to find her. Even when
9 I did find her on Saturday, which was her birthday,
10 I brought her to court Monday for her to testify
11 for me, but apparently she couldn't because the
12 jury deliberated, whatever. I didn't know.

13 I wasn't outside the courtroom, but I was in
14 this building. I dropped her off for her to
15 testify for me and they wouldn't allow it. I don't
16 think I was breaking any law by leaving the
17 courtroom. I didn't leave the State, I didn't
18 leave Akron, Ohio.

19 They picked me up. I was at a house. I was
20 not planning to leave, but these guys, every day
21 they sell dope and different things like that and
22 they gun me down and no one gets arrested
23 whatsoever.

24 And Attorney Modugno even went to the
25 Detective Bureau, asked them about the case, and

1 the detectives said we didn't arrest nobody on the
2 case. We went by the guy's house and left word for
3 him to get in contact with us. He said he shot me,
4 but this is what I face, justice.

5 If anybody been hurt in the case it's me.
6 I've been shot twice, in the back twice, 9 mm.
7 round in the legs, both legs, broken the bone,
8 paralyzed my left leg. It's a miracle I can walk
9 again. But I have to sit in front of the guy where
10 he testified I shot him. I did not shoot him.

11 He gave three descriptions of the car. He
12 said the car was white, the car was blue, it was
13 black. If he can't describe a car, how could he
14 see me in a car with a ski mask on, a big object
15 like that, and he sat there and lied.

16 You all be arresting him again. They have
17 already been arrested, but the criminal record --
18 juvenile record can't be put up in the courtroom
19 here.

20 I'm trying to make a living, trying to box,
21 getting ready to sign a contract with Tyson with
22 Rick Giachetti in Cleveland. I can't train in the
23 streets. Every time I hear a loud noise -- my
24 nerves are shot.

25 If you feel this is justice, the only thing

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I can say is I can come back on appeal, hopefully that I can get an appeal, but like I said --

THE COURT: You are entitled to an appeal. I have appointed Mr. Modugno to handle the appeal. He indicated that he didn't wish to do that, but then he has changed his mind and he is going to handle the appeal. He shall be appointed to handle that.

THE DEFENDANT: From my understanding, Apley stated he don't care who did the crime as long as he shot somebody. I believe that was stated to my lawyer.

I have been to Lucasville, I have done my time, been home for two and a half years. Not too many people leave Lucasville, make it on the street for six months unless they got something on your mind.

Apparently I had something on my mind as far as my career in boxing to come back from gunshot wounds and pursue my career, not to come in court when the guy shot who shot me, him and his buddies, they should go to jail. This case should have been investigated more thoroughly, the whole case, I feel.

And as far as any sentence of this case, I

1 didn't know that I was breaking any laws by leaving
2 the courtroom. I left the courtroom when Mr.
3 Modugno said, "Where is your witness at?" I said,
4 "She was supposed to be here." I looked around,
5 she wasn't here.

6 I went down to Edgewood looking for her,
7 drove to Canton looking for her. I couldn't find
8 her until Saturday morning. Monday or Tuesday I
9 brought her down to the courtroom. I wasn't trying
10 to run.

11 I called Mr. Modugno after the court was
12 over with. I told him I found Towanda Toles, I
13 will bring her down Monday. And Mr. Modugno went
14 by her house, but she wasn't there. I went by
15 there hours later, she was there. I brought her
16 down and dropped her off at court and went back
17 home and sat and called Mr. Modugno after court,
18 and he said some girl came in and she seen me and
19 all this other stuff nine months later.

20 This Richard -- I don't know his last name.
21 Mr. Modugno knows. He is apparently with this girl
22 on the night of this incident and he says he don't
23 want to go to court, have nothing to do with court,
24 but at the time the incident took place across the
25 street, he stated that him and this girl was in the

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house and heard a gunshot from across the street which came from the inside of the house. He didn't see anybody enter the house or leave the house. He told the girl to go about her business. She left then and she was supposed to have called the police.

This girl that stated this, she lied. She didn't see me go in the house or come out of any kind of house. And this man that won't come to court, he was there with her and said that is not true.

THE COURT: I wish you could have been here to tell the jury all of this. Of course, you weren't.

THE DEFENDANT: Some things I can't. Things that I say to you now would have been objected to. And this guy's record, he shot me and all this, been objections if I had been in court.

Only thing that I can say about the rules without being objected for this testimony to be heard, Attorney Modugno can't say this is a juvenile, he was selling drugs, such and such. You can't say these things, but these things should have been brought out, but they can't be brought out like that. Only thing that could be brought

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out is what I'm saying now, but this case should be investigated more thoroughly by the detectives.

And as far as this case, I was set up. The evidence -- they have shotgun shells, fingerprints. They said they found no fingerprints. They said they found no fingerprints. There was fingerprints on there, probably. They knew there probably was. Found no ski mask. They could take DNA samples, hair samples. They wouldn't do it, they wouldn't take no samples, anything.

This is a total railroad. That is how I feel. That's all. I have nothing more further to say as far as the case. I hope that I could bring it back on appeal.

THE COURT: Thank you.

Of course, you heard the prosecutor indicate what the penalty is for felonious assault when the felonious assault is committed with the use of a firearm and for one who has been convicted previously of an offense of violence. There is a minimum of 11 years of actual incarceration.

So, on the charge of felonious assault to which the jury found you guilty, it's the sentence of the law and judgment of the Court that you serve a period of actual incarceration of 8 years and not

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to exceed a term of 15 years, and that in addition to that you serve for the use of the firearm in that offense an actual incarceration of three years and pay the costs of prosecution for that offense.

For the offense of aggravated burglary, which is an aggravated felony of the first degree and for one who has committed that offense with a firearm, there first must be imposed for that offense a term of three years of actual incarceration; and then for the main offense of aggravated burglary, it's the sentence of the law and judgment of the Court that you serve a period of not less than 8 nor more than 25 years, pay the costs of prosecution, and the sentences are to be served consecutively and not concurrently.

Thank you.

THE DEFENDANT: Thank you

COPY

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

Daniel M. Horrigan

STATE OF OHIO, 2014 DEC -2 PM 3:12

Plaintiff, SUMMIT COUNTY
CLERK OF COURTS

vs.

LEROY L. McINTYRE,

Defendant.

) CASE NO. CR 1991-01-0135
)
) JUDGE THOMAS A. TEODOSIO
)
)
)
) **ORDER**
)
)

This matter came before the Court upon the Defendant's "Motion to Declare Mistrial on All Counts" on July 18, 2014. The State filed a Memorandum on August 15, 2014, and the Defendant filed a Response on August 21, 2014.

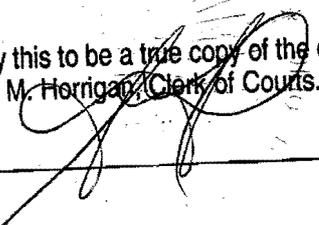
The Defendant claims that there is no final appealable order in this case. The Court disagrees. The Ninth District Court of Appeals has held that there is a final appealable order in this case. *State v. McIntyre*, 9th Dist. No. 25899, 2012-Ohio-1026, at ¶4-8.

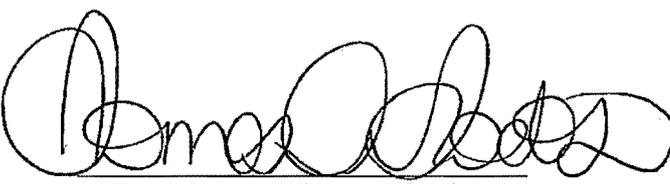
The Defendant further claims that Judge Victor was never assigned to the case or had any authority to preside over the case. The Court disagrees. The Supreme Court of Ohio has held that res judicata bars any claim that could have been raised at trial or on direct appeal. *State v. Steffen* (1994), 70 Ohio St.3d 399, 410, 1994-Ohio-111, 639 N.E.2d 67. The Court finds the Defendant's claims are barred by the doctrine of res judicata. The Defendant "has had ample opportunity to raise any alleged error in his sentence." *State v. McIntyre*, 9th Dist. No. 26677, 2013-Ohio-2077, at ¶11.

Upon due consideration, the Court finds all of the Defendant's motion not well taken and **DENIES** the same.

IT IS SO ORDERED.

I certify this to be a true copy of the original
Daniel M. Horrigan, Clerk of Courts.


Deputy


JUDGE THOMAS A. TEODOSIO

