

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : CASE No. _____
: :
PLAINTIFF-APPELLEE, : :
: :
V. : ON APPEAL FROM THE MONTGOMERY
: COUNTY COURT OF APPEALS
: SECOND APPELLATE DISTRICT
RICKYM ANDERSON, : :
: :
DEFENDANT-APPELLANT. : C.A. CASE No. 26525

MEMORANDUM IN SUPPORT OF JURISDICTION OF
DEFENDANT-APPELLANT RICKYM ANDERSON

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Table of Contents

Page No.

Explanation of Why This Case is One of Public or Great General Interest and Involves a Substantial Constitutional Question1

Statement of the Case and Facts.....3

Argument6

Proposition of Law 1: When one codefendant who proceeds to trial receives a sentence twice as long as a codefendant who enters a plea, an appellate court cannot dispel the possibility of an impermissible trial tax merely by referring to the disparity as a reward to the codefendant for entering a plea6

Proposition of Law 2: The mandatory sentencing statutes in R.C. 2929 are unconstitutional as applied to children because they do not permit the trial court to make an individualized determination about a child’s sentence or the attributes of youth9

Conclusion15

Certificate of Service16

Appendix:

State of Ohio v. Rickym Anderson, Montgomery County Court of Appeals Case No. 26525, Judgment Entry and Opinion (January 15, 2016) A-1

Explanation of Why This Case is One of Public or Great General Interest and Involves a Substantial Constitutional Question

Trial courts face the difficult challenge of considering a defendant's culpability and youthfulness at sentencing. But courts must not make rote decisions without considering a defendant's youth, and cannot enhance sentences based solely on a defendant's decision to exercise his rights. Yet, the trial court did both here, and the appellate court condoned those unfounded sentencing decisions.

First, despite proclaiming that the two codefendants in this case were equally culpable, the trial court still gave one a sentence over twice as long as the other. The only distinction that the court noted was that the codefendant with the longer sentence went to trial, and the other codefendant entered a plea. The Second District Court of Appeals had an opportunity to consider whether this was an impermissible trial tax, but instead wrote its own rule: if the disparity between the sentences can be described as a "plea reward" instead of a "trial tax," the sentence will stand. Jan. 15, 2016 *Opinion* at ¶ 11. This reductive linguistic reframing is at odds with the majority of Ohio courts, which have held that there has to be some sort of evidence that the disparity is not based on one codefendant's decision to proceed to trial. No such evidence exists here, and the new rule created by the Second District will insulate many possible trial-tax issues from review. This Court should act to preserve the prohibition on punishing defendants for choosing to exercise their right to a trial.

Second, “the legal lens through which we view [the sentencing of youth] has changed.” *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, ¶ 32 (O’Connor, J., concurring).

Trial courts have a duty to carefully consider how a defendant’s youth impacts his culpability and sentence. Through *Roper*, *Graham*, *J.D.B.*, *Miller*, and *Montgomery*, the U.S. Supreme Court has continued to recognize the vast differences between children and adults. The Court’s decisions highlight the unfair and unconstitutional results that occur when courts ignore a child’s age and its attendant circumstances. And, the Court in *Miller* envisioned a constitutional system wherein a child’s age and the “distinctive attributes of youth” are fully considered at sentencing. *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455, 2465, 183 L.Ed.2d 407 (2012).

The Second District held that *Miller*’s considerations only apply in life-without-parole cases. Jan. 15, 2016 *Opinion* at ¶ 34-36. But, that narrow reading ignores the reasoning behind the holdings. *See, e.g., J.D.B. v. North Carolina*, 564 U.S. 261, 131 S.Ct. 2394, 2405-2406, 180 L.Ed.2d 310 (2011) (holding that a child’s age informs the *Miranda* custody analysis). Such reading also ignores this Court’s logical extensions of *Miller*. *See, e.g., Long* at ¶ 27. And recently, this Court accepted review of a challenge to Ohio’s mandatory transfer scheme, which utilizes *Miller* in its analysis, in Case No. 2015-0677, *State v. Aalim*.

Similarly, Ohio’s mandatory sentencing scheme, which includes a mandatory minimum three-year sentence for first-degree felonies, a mandatory three-year sentence for firearm specifications, and states that certain sentences are required to be served

consecutively, runs afoul of *Miller's* vision. Children are different from adults for all time and in all occasions. But, Ohio's sentencing scheme mandates that a court ignore those differences and instead treat children as if they were adults. The proposition of law in this case is a natural extension of *Miller*. Therefore, Rickym asks this Court to accept review and hold that Ohio's trial courts must be permitted to consider a child's age and the mitigating factors of youth; the child's family and home environment; the "circumstances relating to youth that may have played a role in the commission of the crime"; the challenges that the child faces when navigating the criminal justice system; and, the possibility of rehabilitation and the child's capacity for change. See *Iowa v. Lyle*, 854 N.W.2d 378, 404, fn. 10 (Iowa 2014), citing *Miller* at 2468; see also *Montgomery v. Louisiana*, 136 S.Ct. 758, 193 L.Ed.2d 599, 618 (2016) (acknowledging that "*Miller* took as its starting premise the principle * * * that 'children are constitutionally different from adults for purposes of sentencing'").

This Court should accept jurisdiction of this case and direct Ohio's courts to give full consideration before sentencing to a defendant's status as a child who committed the offense before sentencing.

Statement of the Case and Facts

When he was 16 years old, Rickym Anderson was charged with the following offenses in Montgomery County Juvenile Court:

Yale Ave. incident	Two counts each of aggravated robbery, kidnapping, and felonious assault	Rickym did not possess a firearm, but he was present during the incident.
West Grand Ave. incident	Aggravated robbery	Rickym possessed a firearm.

The first robbery occurred in a garage behind Yale Avenue, where Dylan Boyd had reportedly shot Brian Williams, locked Tiesha Preston in the trunk of a car, and directed two other young men to search the cars in the garage for valuables. Jan. 15, 2016 *Opinion* at ¶ 2. Rickym was present, but he did not hurt or threaten Ms. Preston or Mr. Williams. *Id.* The second robbery occurred behind a house on West Grand Avenue, where Rickym reportedly held Ms. McGowan at gunpoint and took her cellular phone while Dylan was present. *Id.*

After finding probable cause, the juvenile court transferred Rickym's case to criminal court, pursuant to the mandatory transfer provisions in R.C. 2152.10(A)(2)(b). *Id.* Rickym and Dylan proceeded in criminal court on nearly identical charges. On October 24, 2012, Dylan entered a guilty plea to three felonies, one of them arising from the shooting of Mr. Williams, and was sentenced to nine years in prison. *Id.*

Rickym exercised his right to a jury trial. On January 30, 2013, the jury found Rickym guilty of three counts of aggravated robbery and one count of kidnapping; but, the jury found him not guilty of felonious assault. *Id.* The trial court sentenced Rickym to 28 years of incarceration, approximately three times the sentence imposed on Dylan. *Id.* A timely appeal followed. *Id.* at ¶ 3. On September 26, 2014, the appellate court reversed and remanded the sentence because the trial court did not make the necessary findings before imposing consecutive sentences. *Id.* at ¶ 3-4.

On remand, Rickym filed a detailed sentencing memorandum. *Id.* at ¶ 5. In that memorandum, Rickym argued that his sentence should be the same length as, or shorter than, Dylan's sentence; that the record did not support his consecutive

sentences; and that the mandatory minimums associated with the adult felony sentencing scheme were unconstitutional as applied to juveniles. *Id.* At the sentencing hearing, the court sentenced Rickym to 11 years for each of the three aggravated-robbery counts, to run concurrently with each other, and five years for the kidnapping charge, to run consecutively to the 11-year sentence. *Id.* The court also merged all of Rickym's firearm specifications and sentenced him to three additional years, for a total of 19 years of incarceration. *Id.* This 19-year sentence is still ten years longer than his more-culpable codefendant's sentence. *Id.*

In recounting its reasons for Rickym's sentence, the trial court discussed Rickym's culpability as compared to Dylan's. *Id.* The court found that Dylan deserved a shorter sentence than Rickym because "Mr. Boyd admitted what he did and Mr. Boyd agreed to testify against this Defendant if required." *Id.* The trial court indicated that "it's my belief that all three people involved in these were equally culpable," despite the record showing that Rickym merely stood by while Dylan took the lead at the more serious Yale Avenue incident. *Id.* The trial court also recounted Rickym's prior involvement with the juvenile system *Id.* Finally, the trial court overruled Rickym's objections to Ohio's mandatory sentencing scheme as applied to juveniles. In sentencing Rickym, the trial court specifically noted that Rickym was "not a kid" during the incidents that led to his arrest, even though he was a juvenile at the time.

On appeal, Rickym challenged, among other things, both the impermissible tax levied against him for exercising his right to a trial and the constitutionality of Ohio's mandatory-sentencing scheme as applied to juveniles. *Id.* at ¶ 6. The Second District

held that Rickym's increased sentence was the result of a "reward" given to Dylan for pleading guilty. *Id.* at ¶ 11. The court reasoned that a plea "reward" was permissible, even though a trial tax was not. *Id.* The court adduced no other reasons for the disparate sentences. The court also determined that the *Miller* line of reasoning was inapplicable to Rickym's case, because he was not charged with a homicide offense and he was not sentenced to life in prison. Jan. 15, 2016 *Opinion* at ¶ 34-36. It is from these decisions that Rickym now appeals.

Argument

Proposition of Law I

When one codefendant who proceeds to trial receives a sentence twice as long as a codefendant who enters a plea, an appellate court cannot dispel the possibility of an impermissible trial tax merely by referring to the disparity as a reward to the codefendant for entering a plea.

Both the U.S. Constitution and the Ohio Constitution guaranteed Rickym Anderson the right to a trial by jury. Sixth Amendment to the U.S. Constitution; Article I, Section 10, Ohio Constitution. And, this Court has held that defendants like Rickym are "guaranteed the right to a trial and should never be punished for exercising that right." *State v. O'Dell*, 45 Ohio St.3d 140, 147, 543 N.E.2d 1220 (1989). The Second District agreed, noting that this fundamental protection is "beyond dispute." Jan. 15, 2016 *Opinion* at ¶ 7. Yet, the appellate court rested its decision that Rickym was not subjected to an impermissible trial tax on a semantic distinction: in fact, Rickym's codefendant, Dylan Boyd, received a sentence *reduction* for pleading guilty, which resulted in the disparity between the two sentences. This linguistic flip side, the

disparity remains unexplained, and this Court should act to direct Ohio courts that such a disparity must be supported by an actual difference between two codefendants, not just one codefendant's decision to proceed to trial.

Rickym and Dylan were charged with engaging in nearly identical behavior. While Rickym was convicted of one additional felony, Dylan's crimes were more severe: he shot someone during a robbery. In fact, the trial court held, and the appellate court agreed, that Rickym and his codefendant were equally culpable. Yet, Rickym was given a total sentence of 19 years, while Dylan received a sentence of nine years.

Many Ohio courts have recognized that, in sentencing two similarly situated codefendants like Dylan and Rickym, a trial court must be careful not to punish one of those codefendants for exercising his right to go to trial. *See, e.g., State v. Beverly*, 2d Dist. Clark No. 2011 CA 64, 2013-Ohio-1365, ¶ 57; *State v. Henry*, 9th Dist. Summit No. 27392, 2015-Ohio-5095, ¶ 19; *State v. Noble*, 12th Dist. Warren No. CA2014-06-080, 2015-Ohio-652, ¶ 12. Courts have characterized this kind of disparate sentencing as a "trial tax." *Beverly* at ¶ 57; *Henry* at ¶ 18; *Noble* at ¶ 12. However, the court below drew a distinction between an impermissible trial tax and what it called a "reward" for entering a plea. Jan. 15, 2016 *Opinion* at ¶ 11. Offering a sentencing benefit to Dylan for pleading guilty instead of going to trial, the Second District reasoned, was not punishing Rickym for going to trial, but rewarding Dylan for *not* doing so. *Id.* This characterization is a distinction without a difference: rewarding one person or punishing another, any mechanism for handing a longer sentence to an equally culpable codefendant who

chooses to exercise his right to trial by jury, without another explanation for the longer sentence, is an impermissible trial tax.

The Second District has held that a marked difference between the sentences for two codefendants gives rise to trial-tax concerns. *Beverly* at ¶ 57. The court held that if no other evidence appeared on the record to justify the large disparity between the codefendants' sentences, beyond that one went to trial and one did not, then the disparity created the appearance of a trial tax and should be reversed. *Id.* Here, the Second District has abandoned this well-reasoned approach, instead declaring that when Rickym "stood on his rights and went to trial," he lost the "reward" of a sentence reduction for pleading guilty. Jan. 15, 2016 *Opinion* at ¶ 11. This declaration is simple and dangerous: according to the court below, if an Ohio citizen stands on her rights, she gets a longer sentence. That the longer sentence is the result of losing a "reward" does not diminish the danger of this statement. Such a declaration could do incalculable damage to criminal defendants and the perception of fairness in Ohio's criminal justice system. *See Noble* at ¶ 12 ("The appearance of a trial tax is impermissible as it creates a chilling effect on one's constitutional right to trial.").

There are numerous reasons a trial court could give for disproportionate sentences for two codefendants, including prior criminal activity, indications of their danger to society, or, most simply, different levels of culpability. The Second District made no attempt to list any permissible reasons for the sentencing disparity here, instead saying only that Rickym's sentence was longer because Dylan "entered into a plea deal." Jan. 15, 2016 *Opinion* at ¶ 11. The court asserted that this reason was "among

other” reasons, but it did not provide a single reason for the disparity beyond that Dylan entered a guilty plea and Rickym did not. *Id.*

The syntactic gymnastics of reframing a “trial tax” into a “plea reward” ignores the simple reality: at no point did either the trial court or the appellate court determine that Rickym was more culpable or deserved a longer sentence based on the facts adduced at trial or sentencing. The disparity between the two was entirely based on Dylan’s decision to enter a plea and, in turn, Rickym’s decision to go to trial. In every case where one codefendant receives a trial tax, the other codefendant inherently receives a “plea reward.” Viewing the sentencing disparity from a different angle does not make the concern of a trial tax go away. The Second District’s decision below will allow other Ohio courts to reframe even clearly impermissible trial taxes into “plea rewards,” insulating trial-tax issues from review. This Court must therefore accept Rickym’s case and restore meaning to its proclamation that “a defendant is guaranteed the right to a trial and should never be punished for exercising that right.” *O’Dell*, 45 Ohio St.3d at 147, 543 N.E.2d 1220.

Proposition of Law II

The mandatory sentencing statutes in R.C. 2929 are unconstitutional as applied to children because they do not permit the trial court to make an individualized determination about a child’s sentence or the attributes of youth.

The U.S. Supreme Court has recognized that “a child’s age is far ‘more than a chronological fact.’” *J.D.B.*, 564 U.S. 261, 131 S.Ct. at 2394, 2403, 180 L.Ed.2d 310. “It is a fact that generates commonsense conclusions about behavior and perception.” *Id.* The

Court also recognized that children are different from adults—even those whose cases are transferred for prosecution in criminal court—as follows:

1) “[C]hildren have a ‘lack of maturity and an underdeveloped sense of responsibility’ leading to recklessness, impulsivity, and heedless risk-taking.” *Miller*, 132 S.Ct. at 2464, 183 L.Ed.2d 407, quoting *Roper v. Simmons*, 543 U.S. 551, 569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

2) “[C]hildren ‘are more vulnerable * * * to negative influences and outside pressures,’ including from their family and peers; they have limited ‘contro[l] over their own environment’ and lack the ability to extricate themselves from horrific, crime-producing settings.” *Miller* at 2464; see also Jason Chein, et al. *Peers increase adolescent risk taking by enhancing activity in the brain’s reward circuitry* 14 *Dev.Sci.* F1, F1 (2011), available at <http://www.ncbi.nlm.nih.gov/pubmed/21499511> (“One of the hallmarks of adolescent risk taking is that it is much more likely than that of adults to occur in the presence of peers * * *.”).

3) “[A] child’s character is not as ‘well formed’ as an adult’s; his traits are ‘less fixed’ and his actions less likely to be ‘evidence of irretrievabl[e] deprav[ity].’” *Miller* at 2464, citing *Roper* at 570.

The studies cited in *Miller* demonstrate that children’s “transient rashness, proclivity for risk, and inability to assess consequences” not only lessen a child’s “moral culpability,” but also “enhance[] the prospect that as the years go by and neurological development occurs, [the] ‘deficiencies will be reformed.’” (Citations omitted). *Miller* at 2464-2465. Thus, the passage of time, coupled with appropriate services, significantly decreases the likelihood of recidivism for children. It is imperative that a child’s prospect for change be considered at sentencing. See *Montgomery*, 136 S.Ct. 758, 193 L.Ed.2d at 618 (acknowledging that “*Miller* took as its starting premise the principle * * * that ‘children are constitutionally different from adults for purposes of sentencing’”).

The Second District Court of Appeals determined that the *Miller* line of reasoning was inapplicable to Rickym's case because he was not charged with a homicide offense and he was not sentenced to life in prison. Jan. 15, 2016 *Opinion* at ¶ 34-36. However, as Chief Justice O'Connor noted in 2014, "the legal lens through which we view [the sentencing of youth] has changed." *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, ¶ 32 (O'Connor, J., concurring).

Ohio's mandatory minimum sentencing scheme provides no opportunity for the sentencing court to consider the child's age and the mitigating factors of youth; the child's family and home environment; the "circumstances relating to youth that may have played a role in the commission of the crime"; the challenges that the child faces when navigating the adult, criminal justice system; and, the possibility of rehabilitation and the child's capacity for change. *See Lyle*, 854 N.W.2d at 404, fn. 10, citing *Miller* at 2468. Without these considerations, Ohio's sentencing scheme is unconstitutional as applied to children.

A. The Eighth Amendment requires an individualized determination about a child's sentence.

The Eighth Amendment to the U.S. Constitution prohibits the imposition of cruel and unusual punishment. *See Furman v. Georgia*, 408 U.S. 238, 239, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (per curiam); Article I, Section 9, Ohio Constitution. This right "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense." *Miller*, 132 S.Ct. at 2463, 183 L.Ed.2d 407, citing *Roper*, 543 U.S. at 560, 125 S.Ct. 1183, 161 L.Ed.2d 1. To evaluate a law

under Eighth Amendment standards, a court must first consider whether there is a community consensus against a practice and then conduct an independent review to determine “whether the punishment in question violates the Constitution.” *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 29. In *Miller*, the Supreme Court determined that the Eighth Amendment requires an individualized determination about the appropriate punishment for children. *Miller* at 2465-2466. And, contrary to the Second District’s determination, the Court’s decision was not applicable only to life-without-parole sentences. Jan. 15, 2016 *Opinion* at ¶ 34-36, 40.

B. Community consensus is not dispositive in an Eighth Amendment analysis.

“Community consensus, while ‘entitled to great weight,’ is not itself determinative of whether a punishment is cruel and unusual.” *Graham v. Florida*, 560 U.S. 48, 67, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), quoting *Kennedy v. Louisiana*, 554 U.S. 407, 434, 128 S.Ct. 2641, 171 L.Ed.2d 525. The Iowa Supreme Court has held that while most jurisdictions in the U.S. “permit or require” mandatory minimum sentences for juvenile offenders, the national consensus was not determinative; rather, the court recognized that it could not “ignore that over the last decade, juvenile justice has seen remarkable, perhaps watershed change.” *Lyle*, 854 N.W.2d at 386-387, 390. In finding its statute unconstitutional, Iowa looked at U.S. Supreme Court precedent, but also at its own shift in legislation, which signaled a concern with how juveniles were treated. *Id.* at 381, 387 (finding that “juvenile offenders cannot be mandatorily sentenced under a mandatory minimum sentencing scheme” because the scheme failed to permit the trial court to consider any circumstances based on the attributes of youth); *see also*

Neb.Rev.Stat. 29-2204(5) (providing that in certain situations, when the defendant was under 18 when he committed the offense, “the court may, in its discretion, instead of imposing the penalty provided for the crime, make such disposition of the defendant as the court deems proper under the Nebraska Juvenile Code”).

The Second District correctly noted that, like Iowa, Ohio has a mandatory sentencing scheme: Ohio law mandates a three-year sentence for a firearm specification, at least a three-year sentence for first-degree felonies, and that certain sentences must be served consecutively to others. Jan. 15, 2016 *Opinion* at ¶ 39; R.C. 2929.14(A)(1); 2929.14(B)(1)(a); 2929.14(C)(1)(a). Because of this scheme, the trial court was not permitted to make an individualized determination for Rickym and depart from the mandatory minimums. Also like Iowa, Ohio’s legislation has marked a shift in how juveniles are treated. For example, in 2011, the General Assembly enacted a “reverse waiver” statute to provide a mechanism for certain youth whose cases are required to be transferred to the adult system to return to the juvenile system after conviction in adult court. *See* R.C. 2152.121.

In declining to follow Iowa’s example, the Second District surmised that U.S. and Ohio Supreme Court precedent does not prohibit mandatory sentences outside of the life-without-parole context. Jan. 15, 2016 *Opinion* at ¶ 37. But, to read the cases with such a narrow view renders the precedent about children and their differences from adults meaningless. The decisions in *Miller*, and the cases before it, reflect an ultimate conclusion: the same harsh penalties that are appropriate for adults should not be mandated for children. *Miller*, 132 S.Ct. at 2469, 183 L.Ed.2d 407 (requiring a court “to

take into account how children are different”); *Graham* at syllabus; *Roper*, 543 U.S. at 568-569, 125 S.Ct. 1183, 161 L.Ed.2d 1.

The second part of an analysis under the Eighth Amendment is to examine the practice independently and look at the evolution of the process. This step focuses on the changing nature of how children are treated in the adult criminal justice system. *See Lyle* at 390; *see also Miller* at 2463 (looking “beyond historical conceptions to ‘the evolving standards of decency that mark the progress of a maturing society’”).

C. Children are not miniature adults.

“A sentencing rule permissible for adults may not be so for children.” *Miller* at 2470. Further, those sentencing decisions recognize that “children cannot be viewed simply as miniature adults.” *Id.* “The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question, * * * [and] whether the challenged sentencing practice serves legitimate penological goals.” *C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, at ¶ 38.

Therefore, “a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.” *Miller*, 132 S.Ct. at 2475, 183 L.Ed.2d 407. But, the Supreme Court’s rationale in *Miller* is not limited to analyzing lengthy prison sentences for children; rather, it applies to all instances in which a court must ignore a child’s youthfulness when determining a sentence. *See Lyle*, 854 N.W.2d at 381, 387. *Miller* mandates that “a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a

particular penalty.” *Miller* at 2471. Ohio’s mandatory minimum sentencing scheme requires the trial court to miss too much when it is forbidden from considering the mitigating characteristics of youth and when it is required to treat a child, like Rickym, as though he were an adult. *See id.* at 2468. Therefore, this Court should accept jurisdiction of this case and find that the mandatory sentencing statutes in R.C. 2929 are unconstitutional as applied to children because they do not permit the trial court to make an individualized determination about a child’s sentence or the attributes of youth.

Conclusion

This Court should accept this appeal because it raises a substantial constitutional question, concerns felony-level offenses, and is of great general interest.

Respectfully submitted,

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Certificate of Service

This is to certify that a copy of the foregoing **Memorandum in Support of Jurisdiction of Appellant Rickym Anderson** was forwarded by regular U.S. Mail this 29th Day of February, 2016 to the office of Mathias H. Heck, Jr., Montgomery County Prosecutor, Montgomery County Prosecutor's Office, 301 West Third Street, 5th Floor, Courts Building, P.O. Box 972, Dayton, Ohio 45402.

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APPENDIX TO MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT RICKYM ANDERSON
