

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Case No. 2016-0317

Plaintiff-Appellee,

vs.

RICKYM ANDERSON

Defendant-Appellant,

**On Appeal From The
Montgomery County
Court Of Appeals,
Second Appellate District**

**Court of Appeals
Case No. 26525**

MEMORANDUM IN RESPONSE

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Why This Appeal Should Not Be Allowed

Appellant Rickym Anderson asks this Court to accept jurisdiction of his first proposition of law to review the “new rule created by the Second District [Court of Appeals].” (Memorandum in Support of Jurisdiction, p. 1) However, the Second District did not create a new rule. It considered the unique facts of this case in the context of whether a “trial tax” was imposed against Anderson and determined that Anderson and his co-defendant Dylan Boyd received different sentences because their situations were different. The Second District found that “[a]mong other things, the fact that Boyd entered into a plea deal and agreed to testify against Anderson in exchange for an agreed sentence of nine years adequately distinguishes the two cases and provides a valid reason for the different sentences imposed. In essence, Boyd was rewarded for pleading guilty and agreeing to testify against Anderson.” (Opinion, at ¶11)

The fact that defendants receive benefits for pleading is not a new concept. Moreover, simply because one co-defendant receives a lesser sentence as part of a negotiated plea agreement does not mean that the co-defendant who opts to take his case to trial is subjected to a “trial tax” when he receives a higher sentence. “There is no requirement that co-defendants receive equal sentences.” *State v. Kosak*, 2nd Dist. Greene No. 2013 CA 67, 2014-Ohio-2310, at ¶21. “Each defendant is different and nothing prohibits a trial court from imposing two different sentences upon individuals convicted of similar crimes.” *Id.* Although Boyd and Anderson were equally culpable co-defendants, they were not similarly situated. The differences in their sentences were the result of the differences in their situations.

Anderson also asks this Court to accept review of his second proposition of law 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.” (Memorandum in Support of Jurisdiction, p. 3) However, this Court has already held that Ohio’s sentencing scheme requires courts to consider a juvenile defendant’s age and its attending circumstances as a mitigating factor before imposing sentence. *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, at ¶19. The mere fact that a juvenile is subjected to a mandatory minimum sentence within a range for the felony level applicable to his particular offense or a mandatory, consecutive prison term for a firearm specification does not prevent the court from considering his age or from making an individualized determination of the appropriate sentence for the offense. It does not make the sentence “cruel and unusual.”

The Second District did not misapply a rule of law; it did not create new law; nor did it change existing law. Rather, it correctly applied the law to the facts of Anderson’s case. This case is not of public or great general interest and does not involve a substantial constitutional question. This Court should decline jurisdiction over both propositions of law and dismiss this appeal.

STATEMENT OF THE CASE

Anderson was charged in juvenile court with a complaint alleging that he was delinquent as a result of his commission of two counts of robbery, kidnapping, felonious assault, and a firearm specification. The juvenile court, on the State’s motion and after a hearing, relinquished jurisdiction to the general division of the court of common pleas so that Anderson could be tried as an adult. Anderson was subsequently indicted with three counts of aggravated robbery, felonious assault, and kidnapping, all with firearm specifications. After a jury trial, Anderson was found guilty of the three counts of aggravated robbery, the kidnapping, and the firearm

specifications attached to those counts, but not guilty of felonious assault. The trial court sentenced Anderson to a total of 28 years in prison.

Anderson appealed his convictions and sentence in *State v. Anderson*, 2nd Dist. Montgomery No. 25689, 2014-Ohio-4245. The Second District affirmed in part and reversed in part. *Id.* at ¶6. It found an error in the sentence, vacated the sentence, and remanded for a new sentencing hearing. *Id.* at ¶51.

At the re-sentencing hearing, the trial court modified Anderson's sentence so that he would serve a total of 19 years in prison as opposed to the 28 years originally imposed. Anderson appealed. The Second District Court of Appeals affirmed on January 15, 2016. (Opinion, at ¶45) On February 29, 2016, Anderson filed a notice of appeal and a memorandum in support of jurisdiction in this Court. The State now responds.

STATEMENT OF FACTS

The relevant facts were summarized by the Second District Court of Appeals in *State v. Anderson*, 2nd Dist. Montgomery No. 25689, 2014-Ohio-4245 as follows:

“This case arises from two separate incidents that occurred on April 20, 2012. On the morning of that day, Rickym Anderson and two high school friends, Dylan Boyd and M.H., met at the RTA hub in downtown Dayton.¹ At the time, Anderson was sixteen years old. Because the three teenagers had smoked marijuana, they were late for school. Instead of going to school, they began walking, and walked around most of the day.

At around 3:00 p.m., the three teens went down an alley next to 615 Yale Avenue in Dayton, Ohio, and passed a garage with an overhead door that was partially up. At the time,

¹ The full names of Anderson and Boyd are being used because they were bound over for trial as adults. Initials are being used for the third teenager, as there is no indication in the record that he was tried as an adult.

Boyd was carrying a 38 caliber Smith and Wesson revolver that was black in color, with a wooden handle grip.

Brian Williams and his girlfriend, Tiesha Preston, were in the garage, smoking marijuana and talking. Almost immediately after Williams saw three people walk by the door, Boyd came back. Boyd said, 'Don't move,' and when Williams tried to run out the back door of the garage, Boyd opened fire. Boyd fired one bullet, which hit Williams in the back and exited through his abdomen.

Williams ran across the street to a neighbor's house. When he got to the porch, he could see Boyd gesturing for Preston to get into the trunk of a gray Impala automobile that was parked in the driveway of 615 Yale. The keys to the Impala had been left on the trunk of another car that was sitting in the garage. However, the trunk of the Impala could be opened by using a release button located inside the Impala.

The first neighbors that Williams approached shut the door and refused to help him, but Williams was eventually able to get help from a neighbor up the street. That neighbor took Williams to the hospital, where surgeons removed major parts of his small and large intestines. At the time of the trial, which was held nearly a year after the incident, Williams was still wearing a colostomy bag.

After shooting Williams, Boyd first asked Preston where the keys to the Impala were. When she said she did not know, he told M.H. to search the Impala. When M.H. could not find the keys, Boyd told Anderson to search. Boyd also told Anderson and M.H. to get whatever they could find. Boyd then said to Preston, 'Bitch, come on. Get in the trunk.' Transcript of Proceedings, Volume II, p. 288. After Preston got into the trunk, she could hear the teenagers rummaging around in the car, and also heard Boyd tell the others to grab her purse. After about

25 to 30 minutes, Preston heard neighbors talking, and began beating on the trunk. She was then released from the trunk.

Following the robbery at 615 Yale, Boyd, Anderson, and M.H. went to an abandoned house on Windsor Avenue, which was about a block and a half away from where Williams had been shot. There was no money in Preston's purse; instead, the purse contained only credit cards, identification, a food stamp card, and some cigarettes.

After smoking the cigarettes, they left the purse in the abandoned house. M.H. then went home, and Boyd and Anderson continued walking. After meeting another high school student, the three teenagers saw a young woman (Star MacGowan) at an apartment building taking out her trash. At that point, Anderson was carrying the gun. Anderson asked MacGowan if she had any money, and threatened her. He told her he was going to 'pop her.' Transcript of Proceedings, Volume II, p. 351. MacGowan handed over her purse, which contained a lime-green cell phone.

Just then, another resident of the apartment building came by and heard MacGowan yelling that her purse had been taken. Anderson took the phone out of the purse, dropped the purse, and ran off. The three teenagers ran in different directions.

The police were called, and were given a description of the three suspects, including their race, type of clothing, weight, and height. Shortly thereafter, Dayton Police Officer, Jeff Hieber, saw Boyd and Anderson walking in the vicinity, wearing clothing that matched the descriptions he had been given. After slowing down to get a better look, Hieber turned his car around and made a left onto Yale Avenue, where the suspects had been heading. When Hieber caught up to Boyd and Anderson, he detained them and ultimately patted them down. Hieber found a lime-green cell phone in Anderson's pocket, and the police subsequently located a gun about 30 to 40

feet away from where Boyd and Anderson were apprehended. None of the witnesses were able to identify Anderson from a photo spread, but they all later identified him at trial.

Both Boyd and Anderson were detained and were questioned that night by the police. After waiving his *Miranda* rights, Anderson admitted to his involvement in both robberies, and led police to the abandoned house where Preston's purse had been hidden."

Id., at ¶7-17.

ARGUMENT

Appellee's First Proposition of Law:

There is no requirement that co-defendants receive equal sentences. Each defendant is different and nothing prohibits a trial court from imposing two different sentences upon individuals convicted of similar crimes. A defendant who opts to take his case to trial is not subjected to a "trial tax" simply because his co-defendant receives a lesser sentence as a result of a negotiated plea agreement.

"It is beyond dispute that 'a defendant is guaranteed the right to a trial and should never be punished for exercising that right.' Accordingly, when imposing a sentence, a trial court may not be influenced by the fact that a defendant exercised his right to put the government to its proof rather than pleading guilty." (Internal citations omitted.) *State v. Blanton*, 2nd Dist. Montgomery No. 18923, 2002-Ohio-1794, at *2.

A defendant's sentence must be vacated if the record creates an unrebutted inference that his sentence was enhanced because he elected to take his case to trial. *Id.* at *3. If an inference of sentencing impropriety exists, the reviewing court "must determine whether the record contains an unequivocal statement as to whether the decision to go to trial was or was not considered in fashioning the sentence." *Id.*, quoting *State v. Scalf*, 126 Ohio App.3d 614, 710 N.E.2d 1206 (8th Dist. 1998). "Absent such an unequivocal statement, the sentence will be reversed and the matter remanded for resentencing." *Id.*

In *Blanton*, the trial court addressed the defendant at sentencing and commented that the defendant “confessed twice to the police. You knew your guilt and yet you want to drag us all through this and make sure that we all got fifty citizens in here that had to try your case[.]” *Id.* In determining whether the trial court’s statement created an “unrebutted inference” that his sentence was enhanced because he elected to go to trial, the *Blanton* court stated as follows:

In the present case, we believe that the trial court’s challenged remarks, standing alone, do support an inference that the judge may have considered Blanton’s refusal to plead guilty when denying probation and imposing a term of incarceration. When read as a whole, however, the foregoing remarks by the trial court persuade us that he would not have granted probation, even if Blanton had pleaded guilty. Stated differently, although we disapprove of the challenged remarks, we harbor no doubt that Blanton’s decision to put the government to its proof was not a factor in the trial court’s sentencing decision. In reaching this conclusion, we note that after making the remarks challenged by Blanton, the trial court expressly identified the factors that did weigh in its sentencing decision[.]

Id. at *3. Those factors included that Blanton had an extensive criminal record, he was on probation when he committed the current offense, he was not amenable to community control sanctions, and he posed the greatest likelihood of committing future crimes. *Id.*

In this case, there was no statement from the sentencing judge, like the one in *Blanton*, creating an inference that Anderson was sentenced more severely for going to trial. In fact, there was just the opposite. The judge made it very clear that Anderson’s election to go to trial did not play any part in the sentence that she imposed. The judge stated, “It’s not a penalty. In fact, people go to trial and get on community control. That has nothing to do with it.” (Transcript of

Re-sentencing, p. 16) Absent a statement from the judge that created an un rebutted inference that Anderson received a 19-year prison sentence because he chose to take his case to trial, and in light of the judge's statement that his election to go to trial had nothing to do with the sentence he got, Anderson fails to establish that his sentence was a "trial tax."

Nor does he establish that his sentence was directly disproportionate to the sentence received by Boyd. "There is no requirement that co-defendants receive equal sentences." *State v. Kosak*, 2nd Dist. Greene No. 2013 CA 67, 2014-Ohio-2310, at ¶21. "Each defendant is different and nothing prohibits a trial court from imposing two different sentences upon individuals convicted of similar crimes." *Id.* Anderson and Boyd received different sentences because they were in different situations.

Anderson and Boyd were not convicted and sentenced for similar crimes. Anderson was convicted of four first-degree felony offenses, all with firearm specifications. He was acquitted of the second-degree felonious assault committed against Brian Williams. In contrast, Boyd was convicted of three felonies, one of them arising from the shooting of Mr. Williams. Consequently, the lesser sentence Boyd received is consistent with the fact that Boyd was convicted of fewer offenses and at least one lesser degree offense than Anderson.

Moreover, Anderson did not present any evidence of whether or not Boyd had a prior criminal record at the time he was sentenced. In comparison, Anderson had a juvenile record, which included a prior robbery and a theft, and a series of violations of his supervision, which weighed heavily in the court's sentencing decision. (Transcript of Re-sentencing, p. 18-19)

Anderson makes much of the fact that Boyd's crimes were "more severe: he shot someone during a robbery." (Memorandum in Support of Jurisdiction, p. 7) He argues, therefore, that he was less culpable and should have received a lesser sentence than Boyd.

However, Anderson was not punished for shooting Williams – the jury acquitted him of felonious assault. He was sentenced for the aggravated robberies and kidnapping at 615 Yale Avenue, in which he participated with Boyd, and the aggravated robbery at 645 West Grand Avenue, in which he wielded the gun, demanded money from Star MacGowan, threatened to “pop” her if she didn’t comply, and made off with her purse, keys, and cell phone. (Transcript of Proceedings, p. 282-92, 346-55) The trial court flatly rejected his claim that he was “merely present” during the aggravated robberies and kidnapping at the Yale Avenue address and was not as culpable as Boyd. The court stated, “In presiding over the case and reading the presentence investigation report, it’s my belief that all three people involved in these were equally culpable. Mr. Anderson and Mr. Boyd were apparently supposed to be going to school that day, and instead decided to go smoke some marijuana and rob some people to get bus fare. While Mr. Anderson did not hold the gun in the first case, he clearly was totally involved in that situation.” (Transcript of Re-sentencing, p. 16) Concerning the kidnapping, the court said, “This woman was placed in the trunk of a car and all three people were looking for the keys. Had they found the keys and driven her off, who knows what would’ve happened. Luckily, they couldn’t find the keys, ran away. Now Mr. Anderson, did he say, ‘Oh my gosh, I shouldn’t have done that. Let me go back to school. Let me go back home?’ No. He was the one with the gun at the next offense.” (*Id.* at p. 17)

Not only did the court consider Anderson a full active participant in the offenses at Yale Avenue and West Grand Avenue, the court gave other reasons for why Anderson’s and Boyd’s sentences were different. The court explained that Boyd had negotiated a plea agreement with the State. (*Id.* at pp. 15-16) Boyd took full responsibility for what he did and cooperated with the State by agreeing to testify against Anderson. (*Id.* at pp. 13, 15-16) As part of their

negotiations, the State and Boyd agreed to a prison sentence of nine years. (*Id.* at p. 13) The court adhered to the plea deal and imposed the sentence that Boyd had negotiated. (*Id.* at p. 16)

Anderson challenges the Second District's citation to Boyd's plea as a valid reason why Boyd received a lesser sentence. But Boyd negotiated the plea agreement, waived his constitutional rights, admitted his involvement, and agreed to testify at Anderson's trial to obtain a benefit, in this case, the benefit of a reduced sentence. Indeed, obtaining a benefit is generally the motivation for any plea.

In contrast, Anderson did not negotiate with the State for a lesser sentence. (*Id.* at p. 13) The court would select his sentence from the range applicable to his offenses after considering the facts presented at trial, the seriousness of his conduct, his individual characteristics, and his likelihood of recidivism. Directly relevant to the likelihood that he would commit crimes in the future, and unlike Boyd, Anderson did not take responsibility for his participation in the aggravated robberies and kidnapping. (*Id.* at p. 13) Rather than take responsibility for his actions, he told the police that "he was with some people who decided to rob some people." (*Id.* at p. 17) "[H]e stated he personally did not comm[i]t any offense but was hanging around with people who did and that he was not under the control of himself as the drugs had taken over his mind, apparently smoking some marijuana earlier in the day and taking a couple of Xanax." (*Id.* at p. 18) Anderson's failure to accept responsibility for what he had done made it apparent to the court that he was not at all amenable to treatment. (*Id.* at p. 19)

Anderson and Boyd were not similarly-situated. The differences in their sentences is due to the differences in the amount and type of charges they were convicted of, their criminal background, and how their cases proceeded through the criminal justice system.

Appellee's Second Proposition of Law:

Ohio sentencing law requires a judge to consider a juvenile defendant's youth and its attendant circumstances as a mitigating factor before imposing sentence. The fact that the juvenile may be subjected to a mandatory minimum sentence within a range for a particular felony level or a mandatory, consecutive prison term for a firearm specification does not prevent the court from making an individualized determination of the appropriate sentence for the offense, nor does it make the sentence "cruel and unusual."

"Eighth Amendment violations are rare, and instances of cruel and unusual punishment are limited to those punishments, which, under the circumstances, would be considered shocking to any reasonable person." *State v. Mayberry*, -- Ohio App.3d --, 2014-Ohio-4706, 22 N.E.3d 222 (2nd Dist.), at ¶38. "[A]s a general rule, a sentence that falls within the terms of a valid statute cannot amount to cruel and unusual punishment." *Id.*, quoting *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, at ¶21.

As applied to juveniles, the United States Supreme Court has held that the Eighth Amendment prohibits the imposition of the death penalty and the imposition of life without the possibility of parole for nonhomicide offenders. *State v. Long*, 138 Ohio St.3d 478, 2014-Ohio-849, 8 N.E.3d 890, at ¶8, citing *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed. 2d 825 (2010). Recently, the United States Supreme Court found that the Eighth Amendment prohibits the imposition of mandatory life-without-parole sentences on juveniles. *Long*, at ¶8, citing *Miller v. Alabama*, -- U.S. --, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). The Court in *Miller* explained that an offender's age "'is relevant to the Eighth Amendment' and so 'criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.'" *Long*, at ¶13, quoting *Miller*, at 2465-66. The Court, however, clarified that its decision "does not categorically bar a penalty for a class of offenders or type of crime -- as, for example, we did in *Roper* or *Graham*."

Instead, it mandates only that a sentencer follow a certain process – considering an offender’s youth and attendant characteristics – before imposing a particular penalty.” *Long*, at ¶14, quoting *Miller*, at 2471.

Ohio’s sentencing scheme satisfies that process. As this Court described in *Long*, at ¶17-18:

In Ohio, two statutory sections serve as a general guide for every sentencing. First, R.C. 2929.11(A) provides that the overriding purposes of felony sentencing “are to protect the public from future crime by the offender and others and to punish the offender.” To achieve these purposes, the trial court “shall consider the need for incapacitating the offender, deterring the offender and others from future crimes, rehabilitating the offender, and making restitution.” *Id.* The sentence must be “commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.” R.C. 2929.11(B). Thus, both the nature of the offender and the possibility of the offender’s rehabilitation are already points for the court’s sentencing deliberation.

Second, R.C. 2929.12 specifically provides that in exercising its discretion, a trial court must consider certain factors that make the offense more or less serious and that indicate whether the offender is more or less likely to commit future offenses. Although youth is not individually mentioned in the statute, an offender’s conduct is considered less serious when there are “substantial grounds to mitigate the offender’s conduct, although the grounds are not enough to constitute a defense.” R.C. 2929.12(C)(4). R.C. 2929.12(C) and

(E) also permit a trial court to consider “any other relevant factors” to determine that an offense is less serious or that an offender is less likely to recidivate. An offender’s youth and the attendant circumstances of youth may be considered under either of these provisions pursuant to *Miller* before the court imposes a sentence on a juvenile. R.C. 2929.11 and 2929.12 do not prevent a court from considering youth as a factor that makes an offense less serious or makes an offender less likely to commit future crimes.

Notwithstanding that the sentencing scheme in Ohio allows judges to consider a defendant’s youth as a mitigating factor before imposing sentence, this Court made clear in *Long* that “youth is a mitigating factor for a court to consider when sentencing a juvenile.” *Id.* at ¶19. *See, also, Long*, at ¶31 (O’Connor, C.J., concurring)(“a trial court must consider youth as a mitigating factor when formulating a sentence for a crime committed by a juvenile”).

This Court also made clear that the fact that the court must consider youth as a mitigating factor before sentencing a juvenile does not mean that a juvenile may only receive the minimum term. *Long*, at ¶19. Rather, the court “retains its broad discretion to determine how much weight to give that factor” in its consideration of the seriousness and recidivism factors and the purposes and principles of sentencing. *Id.* at ¶31 (O’Connor, C.J., concurring).

Anderson cites *Roper*, *Graham*, and *Miller* for the proposition that the three-year mandatory, consecutive sentence he received for the firearm specification and the mandatory minimum sentences that he was subjected to for the aggravated robberies and kidnapping amounts to cruel and unusual punishment. Although mandatory and required to be served consecutively, the three years that Anderson received for the single firearm specification attached to Count 3 can hardly be compared to a death penalty sentence or mandatory life

without parole. That sentence was an enhancement to aggravated robbery because a gun was displayed, brandished, indicated, or used to facilitate the offense. R.C. 2941.145(A). Significantly, the trial court had discretion to determine the most effective way to comply with the purposes and principles of sentencing for the underlying aggravated robbery in Count 3 and for the aggravated robberies in Counts 1 and 2 and the kidnapping in Count 5.

Furthermore, although Anderson was subject to a mandatory minimum of three years by virtue of his commission of first-degree felony offenses in Counts 1, 2, 3, and 5, the fact that the legislature has created ranges of sentences for differing felony levels, from which judges may not depart when imposing a sentence of prison, did not prevent the court from considering Anderson's youth as a mitigating factor.

Indeed, in exercising its discretion with regard to Counts 1, 2, 3, and 5, the court could choose a sentence of three, four, five, six, seven, eight, nine, ten, or eleven years. R.C. 2929.14(A)(1). It could decide to run the sentences for those counts concurrently or consecutively. R.C. 2929.14(C)(4); R.C. 2929.41(A). Its sentencing decision would necessarily be guided by R.C. 2929.11, which includes consideration of the nature of the defendant and the possibility of the defendant's rehabilitation, and would also necessarily be guided by the seriousness and recidivism factors of R.C. 2929.12, which include consideration of the defendant's youth.

In sentencing Anderson, the court determined the most effective way to achieve the overriding purposes of felony sentencing. The court explained the sentence it imposed by referencing the facts of the case that showed that Anderson's conduct was more serious than conduct normally constituting the offense, and by citing characteristics of Anderson that indicated that he was not amenable to treatment.

The maximum sentence that Anderson could have received was fifty years. The court sentenced him to nineteen years. While the court imposed maximum sentences for the aggravated robberies, the court ran them concurrently. For kidnapping, the court selected a sentence near the bottom of the range. The total aggregate sentence that Anderson received on remand was nine years less than what was originally imposed.

Moreover, none of the sentences for the underlying first-degree felony offenses was mandatory. Accordingly, Anderson could apply for and receive judicial release after serving eight years. R.C. 2929.20(C)(4) & (5). The possibility of judicial release is another factor which distinguishes this case from *Roper*, *Graham*, and *Miller* and confirms that Anderson's sentence was not cruel and unusual.

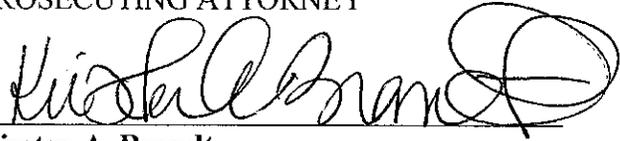
CONCLUSION

For the reasons set forth above, the State of Ohio, Appellee herein, respectfully asks this Court to decline jurisdiction and dismiss Anderson's appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Response was sent by first class mail on this 30th day of March, 2016 to: Stephen Goldmeier and Charlyn Bohland, 250 East Broad Street, Suite 1400, Columbus, OH 43215.

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