

MEMORANDUM IN SUPPORT

On October 1, 2020, the Lorain County Grand Jury indicted Appellant, Edward Balmert (“Balmert”), with one count of Aggravated Vehicular Assault, a violation of R.C. 2903.08(A)(1)(a), a felony of the third degree; one count of Vehicular Assault, a violation of R.C. 2903.08(A)(2)(b), a felony of the fourth degree; one count of OVI of Alcohol, a Drug of Abuse or Combination of them, a violation of 4511.19(A)(1)(a), a misdemeanor of the first degree; and, one count of OVI of a Listed Controlled Substance or a Listed Metabolite of a Controlled Substance, a violation of R.C. 4511.19(A)(1)(j)(viii)(II), a misdemeanor of the first degree.

On October 15, 2020, Balmert was arraigned on the indictment and entered a plea of not guilty.

On July 11, 2022, Balmert waived his right to a jury trial and the case was tried before the Honorable Judge James Miraldi. At the close of the State’s case-in chief, Balmert moved for a judgment of acquittal with respect to all counts of the indictment pursuant to Crim. R. 29. The trial court denied Balmert’s Crim. R. 29 motion.

On July 12, 2022, the trial court returned a verdict finding Balmert guilty of Count One, Aggravated Vehicular Assault, a violation of R.C. 2903.08(A)(1)(a), and Count Four, OVI of a Listed Controlled Substance or a Listed Metabolite of a Controlled Substance, a violation of R.C. 4511.19(A)(1)(j)(viii)(II).

On September 7, 2022, Balmert appeared before the trial court for sentencing. Balmert was sentenced to two (2) years mandatory prison on Count One. On Count Two, Balmert was

sentenced to serve three (3) days at the Lorain County Correctional Facility (or DIP). All counts were ordered to run concurrent.

On October 20, 2022, Balmert filed his Notice of Appeal to the Ninth District Court of Appeals. On September 11, 2023, Balmert filed his Merit Brief and asserted three assignments of error for this Court's review. The State of Ohio responded.

On March 29, 2024, the Ninth District overruled Balmert's two assignments of error and sustained one assignment of error. The Ninth District affirmed, in part, and reversed, in part, and remanded the case to the trial court below.

On May 13, 2024, Balmert was resentenced by the trial court and taken into custody to begin serving his sentence. On that same date, Balmert filed a Notice of Appeal accompanied by a Memorandum in Support of Jurisdiction with the Ohio Supreme Court. On June 12, 2024, the State of Ohio responded in opposition. On July 23, 2024, this Court accepted the appeal.

On July 23, 2024, Balmert filed in the trial court to stay his sentence pending appeal with the trial court. On August 23, 2024, the trial court denied the motion for lack of jurisdiction.

On September 5, 2024, Balmert now has filed with this Court to stay the sentence. The State of Ohio hereby responds.

Law and Argument

The Appellant's motion should be denied as he has not demonstrated why he is entitled to bond, his motion demeans the victims in this matter, and his attorney is forum shopping based on his statements and arguments at the August 22, 2024 hearing in the trial court to stay this sentence.

While Section 9, Article 1, Ohio Constitution, grants every defendant a right to bail pending trial, a defendant no longer has a constitutional right to be released on bail pending appeal because the presumption of innocence has been rebutted by the conviction. *State v. Steffen*, 70 Ohio St.3d 399, 410, 1994- Ohio 111, 639 N.E.2d 67 (1994); *Ex parte Thorpe*, 132 Ohio St. 119, 121, 5 N.E.2d 333 (1936), paragraphs one and two of the syllabus; *Ex parte Halsey*, 124 Ohio St. 318, 10 Ohio Law Abs. 670, 178 N.E. 271 (1931) paragraphs one and two of the syllabus.

Pursuant to R.C. 2953.10, this Court is within its jurisdiction to grant Balmert a stay pending his appeal to this Court. R.C. 2953.10. Balmert in his brief does not cite to any authority that grants a stay. The lack of citing to statutory authority is concerning given Balmert did the same when he filed in the trial court to stay the sentence. The trial court held a hearing on August 22, 2024 for Balmert's motion to stay his sentence. At that hearing Balmert did not cite to any statutory authority, possibly in the hopes that the trial court would grant the motion to stay the sentence.

As Balmert's attorney argued:

MR HANUDEL: I am aware of the fact that I can file a motion with the Supreme Court, too, but my thought is it's a lot easier if it's one person versus four, and being mindful of the fact that it was a four to three vote, and also , I'm also being mindful of the politics; there is an election coming up in November, there's three Supreme Court justice seats that are up for election. And given that the victim in this case was a state trooper, she was

acting in her line of duty when she was struck -- you know, when it comes to, you know, with elections, I mean, as far as whether someone's for or against law enforcement, those issues have just had a lot more sensitivity in the last several years, and, you know, it just -- you're not up for election, because you're done at the end of the year.

- (State's Exhibit 1, August 22, 2024 Hearing on Motion to Stay Sentence, pg 6-7)

Balmert, through his attorney, openly admitted to forum shopping in the trial court. He stated that he felt he had a better chance with a retiring judge than he does with this. Now, it could be argued that Balmert has now filed to stay his sentence here because he failed in the trial court, which would be a reasonable thing to do. However, Balmert's attorney's statements at the August hearing show that would not be correct. He would then double down on the argument later in the hearing.

JUDGE: And I think you were wise, Mr. Hanudel to, at the same time, file a motion with the Supreme Court on the issue of bond, or to stay the execution.

MR. HANUDEL: I have not yet, like I said, we're close to an election time --

- (State's Exhibit 1, August 22, 2024 Hearing on Motion to Stay Sentence, pg 20-21)

This Court has a judicial policy against forum shopping. *Crown Servs. v. Miami Valley Paper Tube Co.*, 162 Ohio St. 3d 564, 45 (Kennedy's Dissent) This judicial policy is not unique to this Court and is the general rule of the American legal system. Balmert is not attempting to get two bites at the same apple, this is gamesmanship, and it should not be rewarded.

As in this brief and at the prior sentencing hearings, Balmert has not taken responsibility for his actions and attacked the victim and claimed it was her fault, he hit her with his car.

In Balmert's recent motion, this behavior continues as he says that the victim deserves much sympathy, but this is just a negligence case. Balmert was convicted of Agg. Vehicular

Assault, a felony of the third degree. He was sentenced to a twenty-four-month prison term and that conviction and sentence were affirmed in the Ninth District Court of Appeals. He is no longer presumed innocent and is currently convicted of this offense. This attitude is ultimately demeaning to the victim in this matter who lost her career as a State Trooper and is permanently disabled. But as Balmert tells this Court, it was just an accident and it's a negligence case.

From the gamesmanship to the lack of taking accountability, to the continual demeaning of the victim in this matter, the State of Ohio respectfully requests that this Honorable Court to deny this motion.

Respectfully submitted,

J.D. TOMLINSON, #0081796
Lorain County Prosecuting Attorney

BY: /s/ Mark Anthony Koza
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PROOF OF SERVICE

This is to certify that a copy of the foregoing APPELLEE'S RESPONSE TO APPELLANT'S MOTION TO STAY SENTENCE was sent by e-mail to Stephen P. Hanudel, Counsel for Appellant, by electronic mail on September 16, 2024, to the following e-mail address: sph12@gmail.com.

/s/ Mark Anthony Koza
MARK ANTHONY KOZA
Assistant Prosecuting Attorney

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PROCEEDINGS, THURSDAY, AUGUST 22, 2024

THE COURT: Are you able to hear us? Please raise your hand if you can hear me.

THE DEFENDANT: (Indicating).

THE COURT: There we go. Okay. There we go. I can see we have Mr. Balmert available.

This is actually two motions, in a sense. The defendant filed a motion to stay his sentence pending appeal in the Ohio Supreme Court, filed by Mr. Hanudel on behalf of Mr. Balmert, and then the State filed a motion to strike the motion to stay the sentence.

So, I will let Mr. Hanudel go first to describe anything that you'd like to place on the record, beyond what was already in the briefs, anything you'd like to say.

MR. HANUDEL: Did you want me to just, just stick with the authority argument for now or do you want me to get into that and the substantive argument?

THE COURT: Anything you wish to

1 put on the record.

2 MR. HANUDEL: All right.

3 THE COURT: I had read the briefs,
4 and, but I figured because this has gotten
5 so much kind of, had such a long procedural
6 history, and a lot of twists and turns
7 here, I thought it would be appropriate to
8 have a hearing so that all the parties
9 could be represented and know what's going
10 on.

11 So, you go ahead first.

12 MR. HANUDEL: I'll just sort of
13 start from the beginning as far as, you
14 know, what he was charged with as far as --

15 THE COURT: Sure. And pull the
16 mic close to you so that your client can
17 hear you.

18 THE DEFENDANT: Yes.

19 - - - -

20 (Thereupon, a discussion was had off the record.)

21 - - - -

22 THE COURT: Go ahead, Mr. Hanudel,
23 you have the floor.

24 MR. HANUDEL: Okay. So, just to
25 give the basic facts of the case, in June

1 2020, Mr. Balmert was exiting Route 2, I
2 believe, eastbound and then making a left
3 turn.

4 THE COURT: You don't have to go
5 into the facts; we had a trial on it.

6 MR. HANUDEL: But the Court, the
7 four charges he was charged with, the bench
8 trial before you, the Court found him
9 guilty of per se OVI based on marijuana
10 metabolites. He was acquitted of OVI based
11 on actual impairment, and also acquitted of
12 vehicular assault, but found guilty of
13 aggravated vehicular assault, which is an
14 F3 that carries a mandatory two-year prison
15 sentence.

16 I was appointed to the appeal
17 after that. I argued before the Ninth
18 District that there was no evidence of the
19 State presenting proof of proximate cause,
20 which the statute requires that the serious
21 physical harm suffered by the victim has to
22 be a proximate result of the OVI violation,
23 and my argument before the Ninth District
24 was that there was no such proof presented
25 by the State.

1 those documents to the Ohio Supreme Court
2 and had not been processed yet, and so
3 therefore the Court went ahead with
4 sentencing, and then he was remanded to
5 custody that day.

6 THE COURT: Right.

7 MR. HANUDEL: I figured well,
8 despite that mishap I was going to just
9 wait to see what the Ohio Supreme Court
10 decides because if they were --
11 statistically speaking, it is difficult to
12 get a case accepted by them, it doesn't
13 happen often, so, I was more or less
14 thinking well, I'll just wait to see what
15 they do, because if they decline, then the
16 case is over, and he just does his time.
17 But on July 23rd, they, four to three vote,
18 they accepted it. So, that's on the same
19 day I filed a motion to this Court.

20 I am aware of the fact that I can
21 file a motion with the Supreme Court, too,
22 but my thought is it's a lot easier if it's
23 one person versus four, and being mindful
24 of the fact that it was a four to three
25 vote, and also, I'm also being mindful of

1 the politics; there is an election coming
2 up in November, there's three Supreme Court
3 justice seats that are up for election.
4 And given that the victim in this case was
5 a state trooper, she was acting in her line
6 of duty when she was struck --

7 THE COURT: Right.

8 MR. HANUDEL: -- you know, when it
9 comes to, you know, with elections, I mean,
10 as far as whether someone's for or against
11 law enforcement, those issues have just had
12 a lot more sensitivity in the last several
13 years, and, you know, it just -- you're not
14 up for election, because you're done at the
15 end of the year. So, I just don't want
16 politics to play into, you know, for or
17 against --

18 THE COURT: Sure. No, I
19 understand that.

20 MR. HANUDEL: -- decision-making.

21 THE COURT: Let's talk about the
22 legal arguments --

23 MR. HANUDEL: So now getting into
24 the legal argument as far as, I do think
25 that you have the authority to issue a stay

1 because, we're still in the direct
2 appellate process, and, you know, the
3 Supreme Court, you know, if they were to
4 agree with me on the issue of proximate
5 cause and whether the State presented
6 sufficient evidence of proximate cause,
7 they got a couple options: they could
8 either, they can go ahead and just decide
9 it themselves as to whether the State
10 presented sufficient evidence, or they can
11 say we'll send it back to the Ninth
12 District and they can do the analysis and
13 issue another decision. Those options are
14 at their disposal.

15 If they were to -- I mean this
16 thing can go up and down that direct
17 appellate ladder before anything ever comes
18 back here, or if it ever does. And so it
19 all depends on what they decide to do in
20 Columbus, and if they do decide to send it
21 back to the Ninth District for further
22 analysis and other decision, you're still
23 in the same appellate case number, so I
24 think just based on that we're still in the
25 same appellate chain, the same appellate

1 ladder. This is not a collateral action,
2 this is not a post conviction petition,
3 this is not some, you know, this is not
4 anything outside of that direct appellate
5 chain.

6 And under 2949.02 of the Revised
7 Code, you do have the authority to issue,
8 to suspend the sentence pending appeal for,
9 quote, "any," the statute is for "any fixed
10 time," and so I do think that gives you the
11 broad authority to issue a stay.

12 And I'm aware of the other
13 statutes that talk about what's before the
14 Supreme Court, and also, and then this is
15 where it gets messy, because where I think
16 the legislature has left some things unkept
17 or unmaintained over the years, because the
18 one statute that talks about the 30-day
19 limit for the Supreme Court, that was last
20 amended in 1987 back when the timeframe to
21 file an appeal to the Ohio Supreme Court
22 was 30 days, which it has since been
23 expanded to 45, at least probably some time
24 before I began practicing law, and so that
25 statute has never been updated.

1 But then there's another statute
2 which I could not find any case law on this
3 whatsoever, but this is 2959.09(A)(1), and
4 it says, I quote, "Upon filing an appeal in
5 the Supreme Court, the execution of the
6 sentence or judgment imposed in cases of
7 felony is suspended."

8 As far as I can tell, it goes back
9 at least to the 1960s, if not before that,
10 back when it was called the General Code,
11 not the Ohio Revised Code, that same
12 language goes way, way back, but it has
13 just never been litigated in the courts.

14 And so it's really, I just see
15 this as sort of a, this is messy
16 statutorily, I think this is, I wish the
17 legislature would give a more straight
18 answer on this, but I'm going with, you
19 know, with 2949.02, because this is all
20 still part of the same direct appellate
21 process.

22 This is an appeal from the Ninth
23 District case, and based on how the Supreme
24 Court decides, this could very well just go
25 right back to the Ninth District under that

1 same appellate case number for more
2 analysis.

3 Again, I don't know what the
4 Columbus 7 will do, but they have a lot of
5 things at their disposal, but then, and in
6 the meantime, he had a two-year sentence,
7 you know, based on -- I've had one, this is
8 my second time in my career that I've
9 gotten a case accepted by the Supreme
10 Court. The last time was six years ago,
11 and that was in summer of 2018, and the
12 oral, the briefing was in the fall of '18,
13 the oral argument was in June of '19, and a
14 decision wasn't issued until March of 2020.

15 So, this could very well go, this
16 will go well into the year 2025, and maybe
17 spill into 2026 depending on how long the
18 Supreme Court wants to take, especially if
19 they get new justices on the court starting
20 in January, depending on how the election
21 goes.

22 And so given, but given that, if
23 Mr. Balmert's in prison, he'll end up,
24 he'll end up doing all this time, and if he
25 were to win the appeal, and if it were to

1 be found that he shouldn't do this time,
2 then, you know, this is all time served for
3 nothing, it might set up a wrongful
4 imprisonment action potentially if it's
5 found that the State's evidence was
6 insufficient and he should have never been
7 charged or ever found guilty of the
8 aggravated vehicular assault.

9 So, I just think just for judicial
10 economy sake, it makes a lot of sense to
11 stay the sentence, see what the high court
12 does, and I think I should add that when he
13 was out on appellate bond, there have been
14 no violations to my knowledge. So, I think
15 the Court can trust him to be a law-abiding
16 citizen.

17 And if I may, you know, I did, the
18 prosecutor forwarded me the transcript of
19 the May 13th hearing, and I had opportunity
20 to read it, and I wish I was there,
21 because, again, the fact that he -- to me
22 is just, I just don't know why, as an
23 attorney, I would never let the client
24 speak for anything, you know, because the
25 appeal's pending, that's just not a good

1 practice. You don't do that.

2 THE COURT: You don't have to -- I
3 get it. You apologized for some of the
4 statements in your brief. I want to, let's
5 -- I've got a couple other matters.

6 You've made good arguments, I
7 think I understand them, that in the
8 interest of judicial economy, you'd like to
9 see the trial judge suspend the execution
10 of the sentence --

11 MR. HANUDEL: Correct.

12 THE COURT: -- while the appeal
13 was pending. I'd like to hear from the
14 State as to whether or not I have the
15 authority to do that now that it's --

16 MR. KOZA: Your Honor, arguments
17 aside of forum shopping, regardless of
18 that, Your Honor, I'm -- my point is is
19 that Section 9, Article I of the Ohio
20 Constitution grants every defendant a right
21 to bail pending a trial.

22 A defendant no longer has a
23 Constitutional right to be released on bail
24 pending appeal because the presumption of
25 innocence is rebutted by the conviction.

1 And, Your Honor, I believe
2 2949.02, which I cited in my brief, plainly
3 says that the trial court has the right to
4 grant bail during the direct appeal which
5 was to the Ninth District.

6 We are beyond that now, and I
7 think 2949.03 kicks in. And I understand,
8 and that says that you can continue to give
9 him bail while pending appeal to the Ohio
10 Supreme Court.

11 I understand that 30 days, Mr.
12 Hanudel saying it's an older statute, there
13 isn't much case law on it, and now you have
14 45 days to file your appeal to the Ohio
15 Supreme Court.

16 But regardless of that, Your
17 Honor, we have statutory authority that
18 says to you, Your Honor, that you can
19 suspend but for 30 days for the purpose of
20 them filing the appeal. It doesn't say
21 anything else.

22 And I've provided counsel, and I
23 should have put it in my brief, and I can
24 provide it to you, 2953.10, Power and
25 authority to suspend execution of the

1 sentence: "When an appeal is taken from a
2 court of appeals," which has happened here,
3 from the Ninth to the Ohio Supreme Court,
4 the Ohio Supreme Court has the same
5 authority to suspend execution of the
6 sentence during the pendency of appeal and
7 admit the defendant to bail as does the
8 court of appeals unless otherwise says.

9 So I know that doesn't
10 specifically say, Your Honor, you can't do
11 this, but I think this is saying this is
12 where you do it. You file in the Ohio
13 Supreme Court.

14 Your Honor, so based on my brief,
15 based on those arguments, I would say that
16 this Court, I don't believe, has
17 jurisdiction to do it.

18 If the Court does disagree with
19 me, Your Honor -- I appreciate Mr.
20 Hanudel's arguments, this could go both
21 ways, maybe we lose the appeal, but maybe
22 we don't, Your Honor.

23 And the forum shopping argument,
24 I'd rather put it in your hands because
25 you're getting out the door so it doesn't

1 matter what happens to you, don't really
2 appreciate that argument because we have
3 the victim here and she's forever living
4 with the actions of Mr. Balmert.

5 So, although the State does
6 recognize, Your Honor, believes that you do
7 not have the authority, jurisdiction was
8 divested of you when the appeal was filed
9 with the Ohio Supreme Court.

10 If you still believe you do have
11 that authority, Your Honor, I would say
12 that for the sake of the victims,
13 especially Mr. Balmert's actions at both
14 sentencing hearings where he could not take
15 any responsibility for any of his own
16 actions, Your Honor, I believe that he
17 should continue to stay in prison, his
18 sentence not be stayed pending if you do
19 believe you have the authority to stay the
20 sentence.

21 THE COURT: Okay.

22 MR. HANUDEL: May I have a quick
23 opportunity to respond?

24 THE COURT: You may.

25 MR. HANUDEL: I think 2953.10, it

1 know he was, he was speaking from his own
2 experience from doing it when he, I
3 believe, he either worked for a tow truck
4 company or a construction company, I can't
5 remember which one he told me, but that he
6 had prior experience in Cleveland that he
7 received training for, from Cleveland
8 Police on how to direct traffic.

9 I mean in any event, it shouldn't
10 have been said from the standpoint that,
11 you know, that issue was not raised in
12 trial, and so, like I said, if I were here
13 I would have, I would have had him -- well,
14 first of all, I would not have had him say
15 anything, but have him stay far away from
16 that, because regardless of whether that
17 issue is an issue or not, it was never
18 raised in trial, it's not an issue on
19 appeal, the only issue that is left right
20 now that's in the Supreme Court is the
21 proximate cause issue.

22 THE COURT: I understand.

23 MR. HANUDEL: So I just, you know,
24 I think if he had been better counseled, I
25 think he was -- I don't think he meant

1 poorly by it or meant bad by it, it's just,
2 I think it was one of those things where
3 he's asked to say something, he felt like
4 he had to say something, and it just was
5 very poorly articulated and not very well
6 counseled.

7 THE COURT: Just so you know, I'm
8 not making the decision based upon his
9 statement at the time of the resentencing,
10 so you don't have to worry.

11 MR. HANUDEL: Okay.

12 THE COURT: That will not enter
13 into my thought process. My thought
14 process is going -- I'm not going to decide
15 it at this moment, because I don't know the
16 answer whether I have jurisdiction or not
17 to even grant the appeal --

18 MR. HANUDEL: Understood.

19 THE COURT: -- or not grant the
20 appeal, grant the request to stay the
21 sentence.

22 I have strong feeling that I don't
23 have that authority now that it's up with
24 the Supreme Court.

25 And I think you were wise, Mr.

1 Hanudel to, at the same time, file a motion
2 with the Supreme Court on the issue of
3 bond, or to stay the execution.

4 MR. HANUDEL: I have not yet, like
5 I said, we're close to an election time --

6 THE COURT: Well -- I'll let you
7 make the decision, but -- belts and
8 suspenders is usually better than just
9 belts.

10 So with that, thank you for being
11 here. I always apologize to the victims in
12 cases when they have to come back and kind
13 of relive the problems that they were faced
14 with because of the underlying events that
15 bring us here, but because of -- we also
16 want to be respectful under Marsy's Law
17 that you have the, you have that option to
18 be here, and the right to be, not just an
19 option, a right to be here and see what's
20 going on, so you can hear the arguments
21 that I'm struggling with right now, how to
22 handle this, and be able to participate.

23 So, thank you for being here.

24 Again, I'm sorry for any inconvenience and
25 also any of the kind of relived trauma that

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it brings about, but thank you for being here.

All right. I'll take it under advisement. Thank you all.

MR. HANUDEL: Thank you.

THE COURT: All right. Very good. Very interesting issues. I'll say that.

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(Thereupon, the hearing was concluded.)

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C E R T I F I C A T E

The State of Ohio,)
) SS:
County of Lorain.)

I, Aneta I. Fine, Official Court Reporter of the Court of Common Pleas, Lorain County, Ohio, do hereby certify that this is a correct transcript of the proceedings in this case on August 22, 2024.

I further certify that this is a complete transcript of the proceedings on that date.

IN WITNESS WHEREOF, I have subscribed my name this _____ day of _____, 2024.

Aneta I. Fine, RMR
Official Court Reporter
Court of Common Pleas
Lorain County Courthouse
Elyria, OH 44035
(440) 328-2392
My commission expires 3-1-26