**UNITED STATES SENATE**
**COMMITTEE ON THE JUDICIARY**

# QUESTIONNAIRE FOR JUDICIAL NOMINEES

## PUBLIC

1. **Name**: State full name (include any former names used).

   Kathleen McDonald O'Malley ("Kate O'Malley")
   (Formerly: Kathleen Patricia McDonald)

2. **Position**: State the position for which you have been nominated.

   United States Circuit Judge for the Federal Circuit

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   Office: Carl B. Stokes United States Courthouse
   801 West Superior Ave., Suite 16A
   Cleveland, Ohio 44113

   [redacted]

4. **Birthplace**: State the date and place of birth.

   1956; Drexel Hill, Pennsylvania

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   1979-1982, Case Western Reserve Univ. School of Law; J.D. (Order of the Coif), 1982

   1975-1979, Kenyon College; A.B. (dual degree magna cum laude), 1979

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

1994-Present
United States District Court for the Northern District of Ohio
Carl B. Stokes United States Courthouse
801 West Superior Ave., Suite 16A
Cleveland, Ohio 44113
United States District Judge

2006 & 2002-2004
Case Western Reserve University School of Law
11075 East Blvd.
Cleveland, Ohio 44106
Faculty (Distinguished Visiting Jurist)

1991-1994
Office of the Ohio Attorney General
30 East Broad St., 17th Floor
Columbus, Ohio 43266-0410
First Assistant Attorney General and Chief of Staff (1992-1994)
Chief Counsel (1991-1992)

1985-1991
Porter, Wright, Morris & Arthur, LLP
Huntington Building
925 Euclid Ave., 17th Floor
Cleveland, Ohio 44115
Partner (1991)
Associate (1985-1991)

1983-1984
Jones Day (Formerly Jones, Day, Reavis & Pogue)
901 Lakeside Ave.
Cleveland, Ohio 44114
Associate

1982-1983
United States Court of Appeals for the Sixth Circuit
100 East Fifth St.
Cincinnati, Ohio 45202
Law Clerk to the Honorable Nathaniel R. Jones

1982
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2595
Summer Associate

1981-1982
Case Western Reserve University School of Law
11075 East Boulevard
Cleveland, Ohio 44106
Instructor: Research, Advocacy, and Writing

1981
Shearman & Sterling
599 Lexington Ave.
New York, New York 10022
Summer Associate

1980
Kelley, McCann & Livingstone
200 Public Square, 35th Floor
Cleveland, Ohio 44114-2302
Summer Associate

1979
Hollingsworth & Hollingsworth
1440 Rockside Rd.
Independence, Ohio 44131
Summer Docket Clerk (Part-time)

1976-1978
Systems Sales, Inc.
Cleveland, Ohio 44143
Clerical Assistant (Part-time, Summers Only)

Other Affiliation (uncompensated)

1991-1994
Opera Columbus
177 E. Naghten St.
Columbus, Ohio 43215
Member, Board of Directors

7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have not served in the military. I have not registered for selective service.

8. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

Commencement Speaker, Kenyon College (1995)
Honorary Degree from Kenyon College, Doctor of Laws (1995)
Case Western Reserve University School of Law Distinguished Recent Graduate Award (1992)
International Trial Lawyers Award (1982)
Edwin G. Halter Memorial Scholarship (1980)
Order of the Coif (1982)
Phi Beta Kappa (1979)

9. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

Administrative Office of the United States Courts
    Ad Hoc Committee on Technology (approximately 2005)
American Bar Association
    Delegate, Task Force on Funding of the Civil Justice System. (1993)
    Member, Special Committee on Youth Education for Citizenship (1993-1994)
Cleveland Bar Association
Columbus Bar Association
    Civil Justice Reform Task Force (1994)
Federal Bar Association
    Convention Committee (1990-1991)
Federal Circuit Bar Association
    Chair, Judges Committee (2002-Present)
Federal Judges Association
Federal Judicial Center / National Academies of Science
    Member, Joint Committee on Development of the Third Edition of the Reference Manual on Scientific Evidence (2007-Present)
John M. Manos Inn of Court
    President (1999-2001)
Judicial Conference of the United States
    Committee on Space & Facilities (2005-Present)
Ohio Center for Law Related Education
    Case Committee (1992-1994)
Ohio Legal Assistance Implementation Committee (1992-1993)
Ohio Legal Assistance Foundation (1994)
Ohio State Bar Association
Sedona Conference
    Advisory Board (2003-Present)

Sixth Circuit Judicial Conference
Planning Committee Member (1999-2004)
District Judges Committee (1994-Present)
United States District Court for the Northern District of Ohio
Judicial Advisor, Local Patent Rules Committee (2009)
Committee on Alternative Dispute Resolution (1990-1991)

In addition, I have served on many committees relating to the administration of the United States District Court for the Northern District of Ohio.

10. **Bar and Court Admission**:

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

New York (Third Department), 1983
Ohio, 1983

I never practiced in New York and became an inactive member of its Bar shortly after admission. I became an inactive member of the Bar of Ohio when I became a judge in 1994. There has been no lapse in membership.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

United States Court of Appeals for the Sixth Circuit, 1983
United States Court of Appeals for the Eleventh Circuit, 1984
United States District Court for the Northern District of Ohio, 1985
United States District Court for the Southern District of Ohio, 1983
New York Appellate Division (Third Department), 1983
Supreme Court of Ohio, 1983

There has been no lapse in membership.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Capital Club, Columbus, Ohio (Athletic and Dinner Club) (1992-1994)

Case Western Reserve University School of Law, Dean's Advisory Board (2002-Present)
Cleveland Museum of Art (2007-Present)
Cleveland Skating Club (1995-approximately 2005)
Opera Columbus
Member, Board of Directors (1991-1994)
Shakespeare Society, Great Lakes Theatre Festival (approximately 2006-Present)
Society of the Benchers, Case Western Reserve University School of Law (approximately 1995-Present)
University of Maryland, Intellectual Property Advisory Board (2002-Present)

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

No.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

PATENT CASE MANAGEMENT GUIDE, Berkeley Center for Law & Technology (Judicial Advisory Board, 2009)

ANATOMY OF A PATENT CASE, Complex Litigation Committee, American College of Trial Lawyers (Advisory Board, 2009)

The Honorable Kathleen M. O'Malley, The Honorable Patti Saris, and The Honorable Ronald H. Whyte, *A Panel Discussion: Claim Construction from the Perspective of the District Judge*, 54 CASE W. RES. L. REV. 671 (2004)

Symposium, *A Novel Approach to Mass Tort Class Actions: The Billion Dollar Settlement in the Sulzer Artificial Hip and Knee Litigation*, 16 J.L. & HEALTH 169 (2001/2002)

Law Review Editor: I was a member of the Case Western Reserve Law Review from 1980-1982 and edited articles written by others in that capacity. I do not recall the names of the specific articles I edited.

Newspaper Articles: During college, I wrote for the *Kenyon Collegian*, the school newspaper. I do not have copies of any of the articles that I wrote, nor do I specifically recall the titles of the articles.

b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

In my capacity as First Assistant Attorney General I often spoke publicly as a surrogate for the Attorney General. These statements and/or legislative testimony generally related to the operations and initiatives of the office and/or to the status of legal matters of interest to the office. None addressed or expressed legal policy views that were personal to me, as opposed to the Office of the Attorney General. I do not have notes of any of them.

The Sedona Conference Journal, *Cooperation Proclamation*, Vol. 10 Suppl. (Fall 2009) – As a member of the Advisory Board of The Sedona Conference, I have formally endorsed the recent publication encouraging cooperation in civil discovery. The Sedona Conference regularly issues "white papers" on topics relating to complex litigation, on which I have occasionally offered informal comment to committees and drafters.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

I testified before the United States Senate Committee on the Judiciary on October 6, 1994, in connection with my nomination to be United States District Judge for the Northern District of Ohio.

In my capacity as First Assistant Attorney General of Ohio from 1993-1994, I often spoke publicly as a surrogate for the Attorney General, including before state legislative bodies. These speeches generally related to the budget, operations and initiatives of the office and/or to the status of legal matters of interest to the office. None of these speeches addressed or expressed legal policy views that were personal to me, as opposed to the Office of the Attorney General. I do not have notes of any of them.

d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

I frequently present or serve as a panelist at bar association events, continuing legal education seminars, and bar and academic conferences. I have not maintained a comprehensive, running listing of such appearances. I have, however, attempted to list below as many of my speaking engagements as possible by searching my archives, reviewing available calendars from past years, and searching my own memory of these events.

I do not always prepare written versions of my remarks or notes, and I have done so less frequently in recent years. I also have not made it a practice to keep copies of my remarks or notes.

Remarks to Participants in Take Our Daughters to Work Day, Office of Ohio Attorney General (Apr. 28, 1993)
Remarks as a New Judge, Federal Bar Association Luncheon, Cleveland, OH (Jan. 23, 1995)
Lecture on Alternative Dispute Resolution Options, Case Western Reserve University ("CWRU") Law School, Cleveland, OH (Apr. 11, 1995)
Lecturer, Practice and Procedure Clinic, Cleveland Bar Assoc. (Apr. 24, 1995)
Remarks at Dinner Honoring United States Circuit Judge Nathaniel R. Jones, Cincinnati, OH (May 20, 1995)
Commencement Address, Kenyon College, Gambier, OH (May 21, 1995)
Orientation Speaker for New Students, CWRU Law School (Aug. 25, 1995)
Speaker, People's Law School Program, Cleveland Bar Assoc. (Sept. 9, 1995)
Alternative Dispute Resolution Seminar, CWRU Law School (Apr. 12, 1996)
Dinner Speaker, Intellectual Property Law Assoc., Cleveland, OH (Oct. 16, 1996)
Perspectives on Communicating Complex Damage Testimony (Judges Panel), Price Waterhouse, LLP, Cleveland, OH (Apr. 18, 1996)
Career Day Speaker, Regina High School, Cleveland, OH (Feb. 25, 1997)
TROs & Preliminary Injunctions, Ohio CLE Inst., Columbus, OH (Apr. 24, 1997)
Women in the Law (Panel), Cleveland Bar Assoc. (May 21, 1997)
Speaker, All Ohio Annual Inst. on Intellectual Property, Cleveland, OH (Sept. 11, 1997)
"How to Try a Patent Jury Case under *Markman* and *Hilton-Davis*," Cincinnati, OH (Sept. 12, 1997)
"Trial of a Patent Case," (CLE Faculty Member), Am. Law Inst. – Am. Bar Assoc., Chicago, IL (Sept. 22-24, 1997)

"Resolving the Dispute in Federal Court," Lorman CLE Ed. Servs., Columbus, OH (Dec. 12, 1997)

"Evidence for the Trial Lawyer," Nat'l Practice Inst., Cleveland, OH (May 8, 1998)

Topics in Patent Litigation, Am. Intellectual Prop. Law Assoc., Washington, DC (Oct. 16, 1998)

Judicial Perspective on Federal Litigation, Cleveland Bar Assoc., Cleveland, OH (Dec. 16, 1998)

Hi-Tech Courtroom of the Future, Federal Courts & Practice Seminar, Cleveland, OH (May 13, 1999)

Hi-Tech Practice in the Courtroom and the Office, Cleveland Bar Assoc. Labor and Employment Law Seminar, Cleveland, OH (May 27, 1999)

Memorial Day Speech, Chagrin Falls Blossom Weekend, Chagrin Falls, OH (May 31, 1999)

Intellectual Property (Panel), Sixth Circuit Judicial Conference, Traverse City, MI (June 25, 1999)

Remarks at the Federal Criminal Practice Seminar, Federal Public Defender for the Northern District of Ohio, Cleveland, OH (Aug. 20, 1999)

Expert Witnesses, Tactics Lecture, CWRU (Sept. 20, 1999)

"Trial of a Patent Case," (CLE Faculty Member), Am. Law Inst. – Am. Bar Assoc., Chicago, IL (Sept. 23-24, 1999)

Naturalization Ceremony, United States District Court for the Northern District of Ohio, Cleveland, OH (May 5, 2000)

Presiding Judge for Mock Trial regarding Sexual Harassment, Cleveland Bar Association Labor and Employment Law Seminar (May 25, 2000)

The State of Patent Claim Construction (Panel), ABA Intellectual Prop. Seminar (June 21-24, 2000)

The Federalization of State Causes of Action (Panel Moderator), Federal Bar Annual Convention, Cleveland, OH (Sept. 22, 2000)

The High-Tech Courtroom and Use of Technology in Litigation, Ohio Academy of Trial Lawyers, Cleveland, OH (Sept. 29, 2000)

Claim Construction Post-*Markman* (Panelist and Speaker), Nat'l Inventors Hall of Fame, Akron, OH (Sept. 5, 2001)

Objections at Trial and How to Deal with the Difficult Lawyer (Panelist and Speaker), Cleveland Bar Assoc. and Nat'l Practice Inst. (Nov. 16, 2001)

Federal Court Practices (CLE Panelist and Speaker), Federal Court Training Program (Dec. 6, 2001)

Naturalization Ceremony, United States District Court for the Northern District of Ohio, Cleveland, OH (Dec. 21, 2001)

Memorial Service for Deceased Lawyers, Cleveland Bar Assoc. (Feb. 27, 2002)

Tips for Taking and Defending Depositions in a Patent Case, ABA Intellectual Prop. Seminar, Washington, DC (Apr. 12, 2002)

"Clarence Darrow—Crimes, Causes, and the Courtroom" (Panelist on theatrical presentation), Cleveland Bar Assoc. (June 26, 2002)

"Trial of a Patent Case," (CLE Faculty Member), Am. Law Inst. – Am. Bar Assoc., Chicago, IL (Sept. 26-27, 2002)

"Attorneys' Fees and Costs Considerations in Multi-District Litigation (Panel Moderator), MDL Transferee Judges' Conference, Palm Beach, FL (Oct. 21-23, 2002)

Class Actions and Mass Torts, Louisiana Bar Assoc., New Orleans, LA (Oct. 25, 2002)

*Markman* Hearings, Cleveland Intellectual Prop. Law. Assoc. (Nov. 12, 2002)

Naturalization Ceremony, United States District Court for the Northern District of Ohio, Cleveland, OH (Dec. 6, 2002)

Intellectual Property Cases as Viewed from the Bench, ABA Law Ed. Inst., Snowmass, CO (Jan. 5, 2003)

Memorial Service for Deceased Lawyers, Cleveland Bar Assoc. (Feb. 26, 2003)

Mass Torts Litigation: Where We Have Been and Where We Are Going (Mar. 7, 2003)

"White Collar Crime Prosecutions" (Speaker and Panelist), Sixth Circuit Judicial Conference, Memphis, TN (Apr. 10-12, 2003)

Symposium, "A Novel Approach to Mass Tort Class Actions: The Billion Dollar Settlement in the Sulzer Artificial Hip and Knee Litigation," (Panelist) (April 30, 2003) available at 16 J.L. & HEALTH 169 (2001/2002)

Speaker, Law Day, Cleveland, OH (May 2, 2003)

Class Actions (Panelist), Federal Bar Seminar, Cleveland, OH (May 8, 2003)

Faculty Presenter, "Intellectual Property in the New Technological Age" & "Patent Case Management," Federal Judicial Center & the Berkeley Center for Law & Technology, Berkeley, CA (May 28, 2003)

"Efficient Disposition of Cases or, At Least, How to Narrow the Issues," Fed. Cir. Bar. Assoc., Amelia Island, FL (May 22-24, 2003)

Naturalization Ceremony, United States District Court for the Northern District of Ohio, Cleveland, OH (Aug. 1, 2003)

"Trial of a Patent Case," (CLE Faculty Member), Am. Law Inst. – Am. Bar Assoc., Chicago, IL (Sept. 18-19, 2003)

"*Daubert* in Our Districts" (Panelist), Ohio Bench and Bar Conference, Columbus, OH (Oct. 3, 2003)

"Settlement Dynamics" (Keynote), MDL Transferee Judges' Conference, Palm Beach, FL (Oct. 27-29, 2003)

Advanced Jury Issues and Case Management Issues (Faculty Panelist), Sedona Conference, Sedona, AZ (Nov. 6-7, 2003)

"The Past, the Present and the Future of the Federal Circuit" (Keynote Panelist, with The Honorable Patti Saris and The Honorable Ronald H. Whyte), CWRU (Nov. 14, 2003), available at 54 CASE W. RES. L. REV. 671 (2004)

Settlement Dynamics (Speaker and Panelist), ABA Litigation Section, Philadelphia, PA (Nov. 20, 2003)

IP Litigation and Case Management (Panelist), Assoc. of Corp. Patent Counsel, Las Croabas, PR (Feb. 1-4, 2004)

"Interlocutory Appeals from *Markman* Hearings" & "Are District Judges Equipped to Resolve Patent Cases?" (Panelist), Fed. Cir. Bar Assoc. Bench and Bar Conference, Colorado Springs, CO (June 25-28, 2004)

"Trial of a Patent Case," (CLE Faculty Member), Am. Law Inst. – Am. Bar Assoc., Chicago, IL (Sept. 30-Oct. 1, 2004)

Maximizing Legal Education through Technology, Rutgers Univ., Newark, NJ (Oct. 15, 2004)

Complex Litigation: Litigating Mass Torts (Faculty Presenter), Sedona Conference, Sedona, AZ (Apr. 7-8, 2005)

"A Judge's Perspective on Electronic Discovery," Am. Intellectual Prop. Law Assoc., Philadelphia, PA (May 12-13, 2005)

Faculty Presenter, Intellectual Property Law Seminar, Federal Judicial Center & the Berkeley Center for Law & Technology, Berkeley, CA (May 25-27, 2005)

"Matters of Interest in IP Law" & "Perspectives From the Bench," Fed. Cir. Bar Assoc. Bench and Bar Conf., Kiawah, SC (June 23-25, 2005)

"Trial of a Patent Case," (CLE Faculty Member), Am. Law Inst. – Am. Bar Assoc., Chicago, IL (Sept. 29-30, 2005)

Naturalization Ceremony, United States District Court for the Northern District of Ohio, Cleveland, OH (Oct. 21, 2005)

"Damages and Remedies in IP Cases," Int'l Judges Conference on Intellectual Prop. Law, Washington, DC (Oct. 24-26, 2005)

Guest Lecturer in Professor Paul Giannelli's Criminal Procedure class, CWRU Law School, Cleveland, OH (Approximately February, 2006)

"*Markman* Mark Ten Years; Assessing Its Impact," Intellectual Prop. Law Conference, Arlington, VA (Apr. 7, 2006)

"Litigating, Settling and Insuring Mass Tort Claims," Harris Pub. Co., Las Vegas, NV (Apr. 27-28, 2006)

"Role of the Court and Counsel in the Administration of Justice in the Federal Courts of Appeal," Fed. Cir. Bench and Bar Conf., Albuquerque, NM (June 28-July 1, 2006)

Naturalization Ceremony, United States District Court for the Northern District of Ohio, Cleveland, OH (Aug. 4, 2006)

"Trial of a Patent Case," (CLE Faculty Member), Am. Law Inst. – Am. Bar Assoc., Chicago, IL (Sept. 28-29, 2006)

"Evidence Issues and Jury Instructions in ADA and FMLA Litigation" (Speaker and Panelist), ALI-ABA Course of Study, Georgetown Univ. Sch. of Law (Feb. 8-9, 2007)

"Patent Injunctions," Intellectual Prop. Owners Inc., Washington, DC (Mar. 27, 2007)

Naturalization Ceremony, United States District Court for the Northern District of Ohio, Cleveland, OH (May 18, 2007)

Faculty Presenter, "Intellectual Property in the New Technological Age," Federal Judicial Center & the Berkeley Center for Law & Technology, Berkeley, CA (May 30-June 1, 2007)

"Practical Tips for Litigating Patent Cases," Patent Law Symposium, George Mason Univ., Arlington, VA (July 17, 2007)

"Drug and Medical Device On Trial" (Speaker and Panelist), Am. Conference Inst., New York, NY (July 18-19, 2007)

"Trial of a Patent Case," (CLE Faculty Member), Am. Law Inst. – Am. Bar Assoc., Scottsdale, AZ (Feb. 28-29, 2008)
"Technology in the Courtroom and Electronic Evidence," Assoc. of Defense Trial Attorneys, Charleston, SC (Apr. 9-13, 2008)
"'Hot' Topics in Intellectual Property Law," ABA Intellectual Prop. Law Seminar, Washington, DC (Apr. 12, 2008)
"A View from the Trial Court" (Panelist), Fed. Cir. Judicial Conference (May 14-15, 2008)
Faculty Presenter, "Intellectual Property in the New Technological Age" & "Patent Case Management," Federal Judicial Center & the Berkeley Center for Law & Technology, Berkeley, CA (May 21-23, 2008)
Guest Speaker, "Brown Bag Lunch," Federal Bar Association, Cleveland, OH (July 2, 2008)
"Streamlining Techniques for Complex Litigation" (Keynote), MDL Transferee Judges' Conference, Palm Beach, FL (Oct. 27-29, 2008)
"Intellectual Property Crimes," Fed. Bar Assoc., Cleveland, OH (Feb. 5, 2009)
"Constitutional Rights in the Realm of Spousal or Child Abuse Cases," Am. Coll. of Trial Lawyers, Puerto Rico (Feb. 26-Mar. 1, 2009)
"Transnational Enforcement of IP Rights" (Panelist), Int'l Judges' Conference, Washington, DC (Apr. 21, 2009)
Faculty Presenter, "Intellectual Property in the New Technological Age" & "Patent Case Management," Federal Judicial Center & the Berkeley Center for Law & Technology, Berkeley, CA (May 27-29, 2009)
"Circuit and Trial Court Dialogue Regarding IP Cases," Fed. Cir. Bench and Bar Conference, White Sulphur Springs, WV (June 18-21, 2009)
"Judicial Perspectives on How to Present Technical Information to the Judge and Jury," Am. Coll. of Trial Lawyers Annual Meeting, Boston, MA (Oct. 8, 2009)
"The Supreme Court & Federal Circuit Court: What Lies Ahead and What is the Effect on Practitioners," Am. Intellectual Prop. Law Assoc., Washington, DC (Oct. 15-16, 2009)
"Management of IP Cases" (Panelist), Ohio Bench and Bar Conference, Columbus, OH (Oct. 22-23, 2009)
"Managing Large MDLs Greater than 75 Cases" (Panel Moderator), MDL Transferee Judges' Conference, Palm Beach, FL (Oct. 26-28, 2009)

In addition to these listed presentations, I frequently have participated in programs at monthly meetings of the John M. Manos Inn of Court. I have not retained records of the specific dates or topics of these programs.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

Since my appointment to the federal bench, it has been my policy not to grant interviews to the press. On a handful of occasions, I have been profiled in publications, e.g., an alumni newsletter, local bar journal, or Federal Bar Association magazine, and have provided biographical information to that end. I specifically recall two published articles based on interviews I provided since being nominated to become a federal judge in 1994:

Spring 2002/Summer 2002 issue of *In Brief: The Magazine of Case Western Reserve University School of Law*

Mark Rollenhagen, "A Courtroom Revolution; U.S. District Judge Kathleen M. O'Malley Gives Her Space to the Future: Beaming Witnesses before a Jury and Launching Materials from Laptops," *Cleveland Plain Dealer*, Sept. 21, 1998

Cindi Leive, "A New Wave of Women Judges," *Glamour*, May 1995

Keith C. Epstein, "More Minorities, Women Named Federal Judges," *Cleveland Plain Dealer*, Sept. 25, 1994

T.C. Brown, "Just a Matter of Time: Federal Judge Appointee Awaits Robes," *Cleveland Plain Dealer*, Sept. 22, 1994

Steve Luttner, "Fisher Aid Top Choice for Federal Judgeship," *Cleveland Plain Dealer*, Aug. 17, 1994

Alan Johnson, "Attorney General's Chief Counsel 'Always Wanted to Be A Lawyer'; Job With Fisher is Very Demanding, Says Woman, 34," *Columbus Dispatch*, Aug. 19, 1991

In my capacity as First Assistant Attorney General of Ohio from 1993-1994, I often spoke publicly as a surrogate for the Attorney General. Comments I gave to the media generally related to the operations and initiatives of the office and/or to the status of legal matters of interest to the office. I made such comments to address or express the legal policy of the Office of the Attorney General, rather than my own personal views. I do not have copies of articles from those days, but they most likely would have appeared in the *Columbus Dispatch*, the *Cleveland Plain Dealer*, the *Akron-Beacon Journal*, the *Dayton Daily News*, the *Cincinnati Post*, or the *Youngstown Vindicator*.

I do not recall any other interviews and have not identified any by searching publicly-available databases.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

In 1994, I was appointed by President William Jefferson Clinton to be United States District Judge for the Northern District of Ohio.

a. Approximately how many cases have you presided over that have gone to verdict or judgment?

In my fifteen years on the bench, I have handled approximately 4,000 civil cases and 800 criminal cases. In addition, I have presided over three major multi-district litigations: one with more than 20,000 claimants, a second with more than 12,000 cases, and a third with dozens of cases.

In addition to the multi-district litigation, I have presided over at least 60 criminal trials and 45 civil trials.

i. Of these, approximately what percent were:

| | |
|---|---|
| jury trials: | 85% |
| bench trials: | 15% |
| | |
| civil proceedings: | 80% |
| criminal proceedings: | 20% |

b. Provide citations for all opinions you have written, including concurrences and dissents.

See attached list of opinions.

c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

1. *Sulzer Orthopedics Inc. Hip Prosthesis and Knee Prosthesis Liability*, Master Case No. 1:01cv9000, MDL Docket No. 1401.

By order of the Judicial Panel on Multidistrict Litigation ("MDL"), several personal injury cases were transferred to me for coordinated pretrial proceedings in 2001. Thereafter, more than 400 additional cases, including 34 putative class actions, also were made a part of the MDL. Plaintiffs alleged injuries caused by manufacturing defects in the defendant's hip and knee implants.

Ultimately, the parties reached a class action settlement and agreed to a claims administration process that put more than $1 billion into the hands of injured claimants. Further, the vast majority of these funds were delivered within three years of the inception of the MDL. In addition to issuing several substantive legal

opinions, I worked with the parties to structure an appropriate and workable settlement, conducted preliminary and final fairness hearings, determined appropriate attorneys' fee awards, and presided over the opt-out cases remaining post-settlement. A recapitulation of the entire litigation appears at *In re Sulzer Hip Prosthesis and Knee Prosthesis Liab. Litig.*, 268 F. Supp. 2d 907 (N.D. Ohio 2003).

Liaison Counsel: R. Eric Kennedy, Weisman Kennedy & Berris, 1600 Midland Building, 101 Prospect Avenue, W., Cleveland, OH 44115, (216) 781-1111. Claims Administrator: James J. McMonagle, Vorys Sater Seymour & Pease, 2100 One Cleveland Center, 1375 East Ninth Street, Cleveland, OH 44114-1739, (216) 479-6158. Counsel for Plaintiffs: Stanley M. Chesley, Waite, Schneider, Bayless & Chesley, 1513 Fourth & Vine Tower, One West Fourth Street, Cincinnati, OH 45202, (513) 621-0267. Defense Counsel: Harvey L. Kaplan & David W. Brooks, Shook, Hardy & Bacon, One Kansas City Place, 1200 Main Street, Kansas City, MO 64105-2118, (816) 474-6550; Bradley D. Honnold (formerly with Shook, Hardy & Bacon), Goza & Honnold, LLC, 11150 Overbrook Road, Ste. 250, Leawood, KS 66211, (866) 767-1486.

2. *In re Telxon Corp. Sec. Litig.*, 5:98cv2876.

The *Telxon* litigation began as a class action securities fraud complaint filed under the then newly-enacted Private Securities Litigation Reform Act ("PSLRA") asserting securities fraud claims against Telxon Corporation, certain of its officers and directors, and its auditing firm, PricewaterhouseCoopers ("PwC"). In addition to the twenty-seven securities fraud class actions consolidated under the case caption above, the litigation also included related cases *Hayman v. PricewaterhouseCoopers LLP*, Case No. 1:01cv1078 and *Wyser Pratte Mgmt. Co., Inc. v. Telxon Corp.*, 5:02cv1105. The shareholder claims arose out of a series of audit restatements. Given the passage of the PSLRA in 1995, this action required me to address a number of complicated and novel issues under that Act.

I ultimately approved a number of settlements in the case, and class distributions relating thereto. I also conducted numerous hearings and issued a number of substantive decisions during the course of the proceedings, including: *In re Telxon Corp. Sec. Litig.*, 67 F. Supp. 2d 803 (N.D. Ohio 1999) (consolidating twenty-seven putative securities fraud class actions and identifying lead plaintiffs); *In re Telxon Corp. Secs. Litig.*, 133 F. Supp. 2d 1010 (N.D. Ohio 2000) (denying motion to dismiss securities fraud class action under the PSLRA); *In re Telxon Corp. Sec. Litig.*, Case No. 5:98cv2876, slip op. 120 (N.D. Ohio Sept. 19, 2001) (granting motion for class certification); *Hayman v. PricewaterhouseCoopers LLP*, Case No. 1:01cv1078, slip. op. 38 (N.D. Ohio Aug. 26, 2002) (granting motion for class certification); *In re Telxon Corp. Sec. Litig.*, Case No. 5:98cv2876, slip ops. 386-93 (N.D. Ohio Dec. 2004-Jan. 2005) (evidentiary hearings regarding discovery and sanctions); *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, Case No. 5:02cv1105, 2003 U.S. Dist. LEXIS 27882 (N.D.

Ohio June 4, 2003) (resolving multiple motions to dismiss and certifying questions to the Ohio Supreme Court); *In re Telxon Corp. Sec. Litig.*, Case No. 5:98cv2876, slip ops. 236-40 (N.D. Ohio Feb. 13, 2004) (approving class action settlement as to certain aspects of cases, attorneys' fees, and allocation of settlement proceeds); *In re Telxon Corp. Sec. Litig.*, Case No. 5:98cv2876, slip op. 409 (N.D. Ohio Dec. 21, 2005) (final fairness hearing).

Plaintiffs' Counsel: Jeffrey C. Zwerling, Susan Salvetti & Richard A. Speirs, Zwerling, Schachter & Zwerling, 41 Madison Avenue, New York, NY 10010, (212) 223-3900; Brett S. Krantz, Kohrman, Jackson & Krantz, One Cleveland Center, 20th Floor, 1375 East Ninth Street, Cleveland OH 44114, (216) 696-8700. Defendants' Counsel: David C. Weiner, Squire, Sanders & Dempsey, 4900 Key Tower, 127 Public Square, Cleveland, OH 44115, (216) 479-8344; Arthur Kaufman, Hahn, Loeser & Parks, 2800 BP Tower, 200 Public Square, Cleveland, OH 44114, (216) 274-2263; Eric Lobenfeld, Hogan & Hartson, 875 Third Avenue, New York, NY 10022, (212) 918-8202; Jay Kelley Wright, Jeffrey L. Handwerker, and Stephen M. Sacks, Arnold & Porter, 555 Twelfth Street, NW, Washington, DC 20004, (202) 942-5000.

3. *United States v. Johnson*, Case No. 98cr98.

The defendant, a former Cleveland City Councilman and Ohio State Senator, was charged in a six-count indictment with Hobbs Act violations and wire fraud. The indictment was issued roughly one month after the defendant announced his intention to run for Congress. The defendant was alleged to have demanded $17,000 in campaign contributions and personal loans in exchange for using his position and influence to obtain liquor permits, lottery licenses, food-stamp permits, and licenses to accept food stamps for grocers between 1994 and 1996. Prior to trial, I granted defendant's motion to dismiss the wire fraud counts.

After a roughly two-week trial, a jury convicted the defendant on three of the four extortion charges. Shortly thereafter, the defendant resigned his Senate seat. I sentenced him to 15 months imprisonment with one year supervised release. The Court of Appeals affirmed. *See United States v. Johnson*, Case No. 98cr98, slip op. 98 (N.D. Ohio Feb. 19, 1999), *aff'd*, *United States v. Johnson*, Case No. 99-3259, 2000 U.S. App. LEXIS 22723 (6th Cir. Sept. 5, 2000) (affirming conviction in unpublished opinion).

This case is also significant because it was one of the first times a case was tried in a federal courthouse using high-tech equipment to facilitate the presentation of materials to the jury.

Counsel for the Government: Daniel P. Butler, Department of Justice, Public Integrity Section, P.O. Box 27518, Central Station, Washington, DC 20038, (202) 514-1412; Stephen P. Anthony (formerly with DOJ), Covington & Burling, 1201 Pennsylvania Avenue, NW, Washington, DC 20004, (202) 662-5105. Counsel

for Defendant: Gerald Arthur Messerman, Messerman & Messerman Co., L.P.A., 56 River Marsh Lane, Kiawah Island, SC 29455, (843) 768-8900; Michael R. Hamed & Philip S. Kushner, Kushner & Hamed, 3740 BP Bldg., 200 Public Square, Cleveland, OH 44114, (216) 696-6700.

4. *Weatherchem Corp. v. J.L. Clark, Inc.*, Case No. 91cv35.

In this case, Weatherchem claimed that J.L. Clark, Inc., willfully infringed two patents owned by Weatherchem: Patent No. 4,693,399 (the "'399 patent") and Patent No. 4,936,494 (the "'494 patent"). The two patents are directed toward plastic "two-flap closures," which are commonly used as caps to seal cylindrical spice containers; the caps allow the contents to be sprinkled or spooned out. The defendant asserted counterclaims for invalidity, unenforceability, and noninfringement.

The parties tried this matter to the bench and I found that both patents were invalid. With respect to the '399 patent, in a decision later echoed by the Federal Circuit in *Pfaff v. Wells Electronics, Inc.*, 124 F.3d 1429 (Fed. Cir. 1997), *aff'd* 525 U.S. 55 (1998), regarding the concept of reduction to practice in application of the "on-sale bar," I found the patent invalid due to that statutory bar. I found the '494 patent invalid because it was obvious given the prior art, which included the enclosure embodying the claims of the '399 patent. In the alternative, I found that, as to the '494 patent, if it was valid, its claims were not infringed by the defendant's closures.

Plaintiff appealed, and the Federal Circuit affirmed my holdings as to invalidity and vacated as unnecessary the alternative findings I had made. *See Weatherchem Corp. v. J.L. Clark, Inc.*, 937 F.Supp. 1262 (N.D. Ohio 1996) (bench trial opinion ruling in favor of defendants), *aff'd in part, modified in part, vacated in part*, 163 F.3d 1326 (Fed. Cir. 1998).

Counsel for Plaintiff: Robert V. Vickers, Fay, Sharpe, Beall, Fagan, Minnich & McKee, 1100 Superior Avenue, Ste. 700, Cleveland, OH 44114, (216) 861-5582; Dennis G. Terez (formerly with Squire, Sanders & Dempsey), Office of the Federal Public Defender, Northern District of Ohio, 750 Skylight Office Tower, 1660 West Second Street, Cleveland, OH 44113, (216) 522-4856. Counsel for Defendants: John W. Kozak, H. Michael Hartmann & Christopher T. Griffith, Leydig, Voit & Mayer, Ltd., Two Prudential Plaza, 180 N. Stetson Avenue, Suite 4900, Chicago, IL 60601-6731, (312) 616-5600.

5. *United States v. Waller*, Case No. 04cr13.

In this case, the two defendants carjacked at gunpoint and held for ransom a cooperating witness of the FBI's New York office. While being held captive, the witness called his FBI contact in New York via cell phone. Eventually a meeting to exchange the witness for ransom was arranged between the FBI and the

captors. When the FBI swat team arrived at the scene, a shoot-out occurred, during which the witness was shot and killed.

The defendants were charged in a nine-count indictment that included charges of carjacking and attempted murder of FBI agents engaged in official duties. I presided over a multi-week jury trial of both defendants in August 2004. The jury convicted each defendant on several counts.

I sentenced the defendants to 684 months and 552 months imprisonment, respectively. The Court of Appeals affirmed. *See United States v. Ervin, et al.*, 209 Fed. Appx. 519 (6th Cir. 2006). The Supreme Court denied certiorari. *See Waller v. United States*, 552 U.S. 907 (2007); *Ervin v. United States*, 550 U.S. 927 (2007).

Counsel for the Government: Blas E. Serrano & Kelly L. Galvin, Office of the U.S. Attorney – Cleveland, Northern District of Ohio, 801 W. Superior Avenue, Ste. 400, Cleveland, Ohio 44113, (216) 622-3873; Nancy L. Kelley, Office of the U.S. Attorney – Akron, Northern District of Ohio, 208 Federal Building, 2 South Main Street, Akron, Ohio 44308, (330) 761-0515. Counsel for Defendant Waller: Michael G. Dane (former Federal Public Defender for the Northern District of Ohio), Retired. Counsel for Defendant Ervin: Laurence A. Turbow, Laurence A. Turbow, LPA, Inc., 4403 St. Clair Avenue, Ste. 300, Cleveland, Ohio 44103, (216) 881-7939

6. *United States v. City of Euclid ("Euclid I")*, Case No. 06cv1652; *United States v. Euclid City Sch. Dist. ("Euclid II")*, Case No. 08cv2832.

   In *Euclid I*, the government filed a complaint alleging that the City of Euclid's method of electing its City Council violated Section 2 of the Voting Rights Act. In particular, the government alleged that the City of Euclid used a combination of single-member districts and slotted, at-large positions, resulting in the dilution of African-American voting strength. I conducted a bench trial and found a Section 2 violation. I ordered the City to redistrict, which resulted in the election of the first African American ever elected to the Euclid City Council. *See United States v. City of Euclid ("Euclid I")*, 580 F. Supp. 2d 584 (N.D. Ohio 2008).

   In *Euclid II*, the government filed suit against the Euclid City School District Board of Education ("the Board") and the Cuyahoga County Board of Elections alleging that the at-large method of electing members of the Board, utilizing staggered terms, violates Section 2 of the Voting Rights Act. The parties noted that *Euclid I* considered the same population at issue and agreed that the findings in *Euclid I* were probative of and meaningful to the Court's assessment of liability in this case. Accordingly, the parties stipulated that the Board violated Section 2 of the Voting Rights Act. The parties disagreed, however, as to the remedy for this past discrimination. I considered the Board's proposed remedies – limited voting or cumulative voting – and concluded that the Board's limited voting

proposal remedied the Section 2 violation and was not itself violative of Section 2. *United States v. Euclid City Sch. Bd.* ("*Euclid II*"), 632 F. Supp. 2d 740 (N.D. Ohio 2009). No appeal was taken in *Euclid I*. While the government initially filed a notice of appeal in *Euclid II*, it dismissed that appeal prior to briefing.

*Euclid I*: Counsel for Plaintiff: Abel Gomez, Sean W. O'Donnell & Sonya L. Sacks, U.S. Department of Justice – Voting Section/Civil Rights Division, Ste. 7254, 950 Pennsylvania Avenue, NW,Washington, DC 20530, (202) 305-1582. Counsel for Defendant City of Euclid: Hilary S. Taylor, Brian P Riley & John S. Kluznik, Sr., Weston Hurd, 1900 Tower at Erieview, 1301 East Ninth Street, Cleveland, OH 44114, (216) 241-6602; L. Christopher Frey, City of Euclid, Department of Law, 585 East 222 Street, Ste. 200, Euclid, OH 44123, (216) 289-2746. Counsel for Defendant Cuyahoga County Board of Elections: David G. Lambert, Office of the Prosecuting Attorney – Cuyahoga County Courts Tower, Justice Center, 8th Floor, 1200 Ontario Street, Cleveland, OH 44113, (216) 443-5869.

*Euclid II*: Counsel for Plaintiff Counsel: Sonya L. Sacks, U.S. Department of Justice – Voting Section/Civil Rights Division, Ste. 7254, 950 Pennsylvania Avenue, NW, Washington, DC 20530, (202) 305-7781; Steven H. Wright, Jr., U.S. Department of Justice – Voting Section, Ste. 7123, 1800 G Street, NW, Washington, DC 20006, (202) 305-1050. Counsel for Defendant Euclid School District Board of Education: David Kane Smith & Krista K. Keim, Britton, Smith, Peters & Kalail, 3 Summit Park Drive, Ste. 400, Independence, OH 44131, (216) 503-5055. Counsel for Defendant Cuyahoga County Board of Elections Counsel: David G. Lambert, Office of the Prosecuting Attorney – Cuyahoga County, Courts Tower, Justice Center, 8th Floor, 1200 Ontario Street, Cleveland, OH 44113, (216) 443-5869.

7. *Mid-Michigan Computer Sys., Inc. v. Marc Glassman, Inc.*, Case No. 00cv3117.

Plaintiff, a computer service provider to pharmacies, brought this suit against a pharmacy client and its technology partner. The services contract had included a "Source Code Agreement" to protect plaintiff's copyrighted software. Plaintiff brought a variety of claims in this case including breach of contract, fraud, copyright infringement, and misappropriation of trade secrets.

Plaintiff settled with the technology partner. I granted parts of several summary judgment motions filed by the pharmacy, leaving four remaining claims for trial: (1) breach of the software license agreements; (2) breach of technical support services agreements; (3) misappropriation of trade secrets; and (4) fraud.

A jury trial resulted in judgment in favor of the plaintiff, awarding compensatory and punitive damages in the amount of $7,347,795.78. Defendant filed a motion for judgment as a matter of law, new trial, or remittitur. I granted the motion for remittitur in part, finding that the jury's award of $280,000 in compensatory

damages flowing from MGI's breach of the software license agreements was excessive. I denied the remainder of the motion for remittitur and the motion for new trial.

The Sixth Circuit affirmed my decisions and the jury's verdict, including all aspects of the damages award, as revised by my remittitur order. *See Mid-Michigan Computer Sys. v. Marc Glassman, Inc.*, 416 F.3d 505 (6th Cir. 2005).

Counsel for Plaintiff: Michael K. Grace, Grace & Grace, 444 South Flower Street, Ste. 1650, Los Angeles, CA 90071, (213) 452-1224. Counsel for Defendant Marc Glassman, Inc.: Christopher B. Fagan (now deceased); Joseph D. Dreher, Fay Sharpe LLP, 1228 Euclid Avenue, 5th Floor, Cleveland, OH 44115, (216) 363-9130. Counsel for Defendant Two Point Conversions, Inc.: Joel I. Newman (formerly with Newman & Newman), 3645 Warrensville Center Road, Ste. 219, Shaker Heights, OH 44122, (216) 621-1541

8. Youngstown Mob Cases, including *United States v. Altshuler*, Case No. 4:97cr385.

Over a several-year period in the mid-to-late 1990s, I presided over a series of cases arising out of a decades-long investigation of organized crime in Youngstown, Ohio. These cases involved the prosecution of more than 60 defendants, and related to wide-scale government corruption, including of state judges, the County Prosecutor, several assistant prosecutors, the County Sheriff, the local Chief of Police, as well as numerous other law enforcement officials, local businessmen, and practicing lawyers. In total, I presided over trials in *Altshuler* and related cases nearly-continuously for an 18-month period.

In *Altshuler*, 30 co-defendants, including alleged Youngstown mob boss Lenine "Lenny" Strollo, were indicted for various charges including racketeering, illegal gambling, conspiracy, and, as to a few defendants, murder for hire. Most of the *Altshuler* defendants pled guilty (Strollo himself entered a last-minute plea while I was empanelling an anonymous jury). Because Strollo's plea agreement required extensive government cooperation, I waited until 2004, after he had satisfied these requirements, before sentencing him to 12 years and 8 months imprisonment. The information provided by Strollo to the Government was critical to several other successful mob-related corruption prosecutions of public officials. Where these defendants appealed, the Sixth Circuit affirmed.

Of the 30 co-defendants in the *Altshuler* case, only three went to jury trial (all were convicted and sentenced to life imprisonment). *United States v. Altshuler*, Case No. 4:97cr385, slip ops. 669-673 (N.D. Ohio Mar. 12, 1999). The Court of Appeals affirmed all trial proceedings, judgments, and sentences as to these three defendants. *See United States v. Riddle*, 249 F.3d 529 (6th Cir. 2001); *United States v. Riddle*, No. 99-3405, 2001 U.S. App. LEXIS 8893 (6th Cir. May 4, 2001). The Supreme Court denied certiorari. *See Turnage v. United States*, 534

U.S. 930 (2001); *Riddle v. United States*, 534 U.S. 930 (2001); *Altshuler v. United States*, 534 U.S. 930 (2001).

Counsel for the Government: Craig S. Morford (Former Assistant U.S. Attorney), Cardinal Health, Chief Compliance Officer, 7000 Cardinal Place, Dublin, OH 43017, (614) 757-5000; James Wooley (Former Assistant U.S. Attorney), Jones Day, Partner, North Point, 901 Lakeside Ave., Cleveland OH 44114, (216) 586-7345. Counsel for Lenine Strollo: Herbert L. Greenman & Paul J. Cambria , Jr., Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, 42 Delaware Avenue, Suite 300, Buffalo, NY 14202, (716) 849-1333; Orville E. Stifel, II, 5310 Franklin Boulevard, P.O. Box 602780, Cleveland, OH 44102, (216) 225-9855.

9. *In re Scrap Metal Antitrust Litig.*, Case No. 02cv844.

This was a class action suit brought against a number of defendants who operated businesses that buy residual scrap metal and resell it in Ohio and other states. The plaintiffs alleged that the defendants conspired to restrain trade, suppress and eliminate competition, and fix the price of scrap metal in Northeastern Ohio.

After years of litigation, including certain delays occasioned by deference to on-going criminal proceedings, all but three of the original defendants in this case were either dismissed by or settled with the plaintiffs. I presided over the fairness hearings on these settlements.

As to the remaining three defendants, the jury returned a split verdict after a three-week trial, finding only one of the three liable. The jury awarded an $11.5 million verdict against the liable defendant. Pursuant to 15 U.S.C. § 15(a), I trebled the jury's award to $34.5 million and then subtracted the amount received from the from other defendants' settlements. The losing defendants appealed the jury verdict and damages award and the Court of Appeals affirmed. *In re Scrap Metal Antitrust Litig*, 527 F.3d 517 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 1673 (2009)

Lead Counsel for Plaintiffs: William A. Isaacson, Boies, Schiller & Flexner, 5301 Wisconsin Avenue, NW, Washington, DC 20015, (202) 237-2727; Edmund W. Searby, McDonald Hopkins, 600 Superior Avenue, East, Suite 2100, Cleveland, OH 44114, (216) 348-5400. Primary Counsel for Trial Defendants: William D. Beyer, Wuliger, Fadel & Beyer, The Brownell Building, 1340 Sumner Court, Cleveland, OH 44115, (216) 781-7777; Leslie W. Jacobs, Thompson Hine, 3900 Key Center, 127 Public Square, Cleveland, OH 44114, (216) 566-5675.

10. *United States v. City of Parma*, Case No. 73cv439.

In 1973, the Department of Justice sued the City of Parma alleging violations of the Fair Housing Act. More specifically, the government alleged that Parma had a policy of excluding African Americans from residing within its limits and that

the City engaged in various acts and practices which operated to deny equal housing opportunity to African Americans on the basis of race.

At the time I inherited this case as part of my new docket in 1994, it had been pending for more than 20 years and the differences between the parties were great. The case had been transferred among many judicial officers prior to being assigned to me. I conducted multiple settlement conferences over several months, including a single conference that itself spanned several days. Through this process, the parties settled. In the agreement, the City of Parma agreed to establish a public-housing board, pledged to spend $1 million on marketing the City to African Americans, enacted a fair-housing ordinance, and created a panel to handle complaints about housing discrimination. *See United States v. City of Parma*, Case No. 73cv439, slip op. issued Nov. 15, 1996 (N.D. Ohio Nov. 15, 1996) (regarding settlement agreement and dismissal).

Counsel for the Government: Diane L. Houk (formerly with the Department of Justice, Civil Rights Division Housing & Civil, Enforcement Section), Fair Housing Justice Center, 5 Hanover Square, 17th Floor, New York, NY 10004, (212) 400-8280. Counsel for Defendant: The Honorable Christopher A. Boyko (formerly with the Office of the Law Director – City of Parma) District Court Judge, N.D. of Ohio, 801 West Superior Avenue, Cleveland, OH 44113, (216) 357-7151; Gregory V. Mersol, Baker & Hostetler, 3200 National City Center, 1900 East Ninth Street, Cleveland, OH 44114, (216) 621-0200.

d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

1. *United States v. City of Euclid*, 580 F. Supp. 2d 584 (N.D. Ohio 2008). Counsel for Plaintiff: Abel Gomez, Sean W. O'Donnell & Sonya L. Sacks, U.S. Department of Justice – Voting Section/Civil Rights Division, Ste. 7254, 950 Pennsylvania Avenue, NW,Washington, DC 20530, (202) 305-1582. Counsel for Defendant City of Euclid: Hilary S. Taylor, Brian P Riley & John S. Kluznik, Sr., Weston Hurd, 1900 Tower at Erieview, 1301 East Ninth Street, Cleveland, OH 44114, (216) 241-6602; L. Christopher Frey, City of Euclid, Department of Law, 585 East 222 Street, Ste. 200, Euclid, OH 44123, (216) 289-2746. Counsel for Defendant Cuyahoga County Board of Elections: David G. Lambert, Office of the Prosecuting Attorney – Cuyahoga County Courts Tower, Justice Center, 8th Floor, 1200 Ontario Street, Cleveland, OH 44113, (216) 443-5869

2. *D'Ambrosio v. Bagley*, Case No. 00cv2521, 2006 U.S. Dist. LEXIS 12794 (N.D. Ohio Mar. 24, 2006) *aff'd* 527 F.3d 489 (6th Cir. 2008). Counsel for Petitioner: John Q. Lewis & Edward J. Sebold, Jones Day – Cleveland, 901 Lakeside Avenue, Cleveland, OH 44114, (216) 586-1005; Jeffry F. Kelleher, 1540 Leader Bldg., 526 Superior Avenue, Cleveland, OH 44114, (216) 241-0520. Counsel for

Respondent: Michael L. Collyer, Office of the U.S. Attorney, Northern District of Ohio, Ste. 400, 801 Superior Avenue, W., Cleveland, OH 44113, (216) 622-3744; Stephen E. Maher, Office of the Attorney General State of Ohio, Capital Crimes Section, 30 East Broad Street, 23rd Floor, Columbus, OH, 43215-3428, (614) 728-7055.

3. *In re Commercial Money Ctr., Inc.*, Case No. 1:02cv16000, 2005 U.S. Dist. LEXIS 45490 (N.D. Ohio Aug. 19, 2005), *aff'd in part, rev'd in part, Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327 (6th Cir. 2007); *In re Commercial Money Ctr., Inc.*, Case No. 1:02cv16000, 2005 U.S. Dist. LEXIS 45488 (N.D. Ohio Aug. 19, 2005). Liaison Counsel for Bank Group: Martha Sullivan, Squire, Sanders & Dempsey, 4900 Key Tower, 127 Public Square, Cleveland, OH 44114, Phone: 216-479-8425. Liaison Counsel for Surety Group: Alan N. Hirth, Meyers Roman Friedberg & Lewis, 28601 Chagrin Blvd., Suite 500, Cleveland, OH 44122, Phone: 216-831-0542. Liaison Counsel for Third Parties: Alfred M. DeLaCruz, Manning & Marder Kass Ellrod Ramirez, 401 West A Street, Suite 1900, San Diego, CA 92101, Phone: 619-515-0269.

4. *Weatherchem Corp. v. J.L. Clark, Inc.*, 937 F.Supp. 1262 (N.D. Ohio 1996), *aff'd in part, modified in part, vacated in part*, 163 F.3d 1326 (Fed. Cir. 1998). Counsel for Plaintiff: Robert V. Vickers, Fay, Sharpe, Beall, Fagan, Minnich & McKee, 1100 Superior Avenue, Ste. 700, Cleveland, OH 44114, (216) 861-5582; Dennis G. Terez (formerly with Squire, Sanders & Dempsey), Office of the Federal Public Defender, Northern District of Ohio, 750 Skylight Office Tower, 1660 West Second Street, Cleveland, OH 44113, (216) 522-4856. Counsel for Defendants: John W. Kozak, H. Michael Hartmann & Christopher T. Griffith, Leydig, Voit & Mayer, Ltd., Two Prudential Plaza, 180 N. Stetson Avenue, Suite 4900, Chicago, IL 60601-6731, (312) 616-5600.

5. *King v. Ambs*, 519 F.3d 607 (6th Cir. 2008) (O'Malley, J., dissenting). Counsel for Plaintiff-Appellant: Mark Granzotto, 225 S. Troy Street, Ste. 120, Royal Oak, MI 48067, (248) 546-4649. Counsel for Defendant-Appellee: G. Gus Morris & D. Randall Gilmer, McGraw Morris P.C., 2075 West Big Beaver Road, Ste. 750, Troy, MI 48084, (248) 502-4000.

6. *In re Welding Fume Prods. Liab. Litig.*, Case No. 1:03cv17000, 2005 U.S. Dist. LEXIS 46164 (N.D. Ohio Aug. 8, 2005). Plaintiffs' Liaison Counsel: John R. Climaco & Lisa A. Gorshe, Climaco Lefkowitz Peca Wilcox & Garofoli, Suite 1950, 55 Public Square, Cleveland, OH 44116, (216) 621-8484. Plaintiffs' Lead Counsel: John W. (Don) Barrett & Richard R. Barrett, Barrett Law Office, PA, 404 Court Square North, P.O. Box 987, Lexington, MS 39095, (800) 889-9622. Defendants' Liaison Counsel: John H. Beisner & Stephen J. Harburg, Skadden, Arps, Slate, Meagher & Flom LLP, 1440 New York Avenue, N.W., Washington, D.C. 20005, (202) 371-7470.

7. *Avery Dennison Corp. v. Alien Tech. Corp.*, 626 F. Supp. 2d 693 (N.D. Ohio 2009). Counsel for Plaintiff: Jay R. Campbell, Joshua M. Ryland & Todd R. Tucker, Renner, Otto, Boisselle & Sklar, 19th Floor, 1621 Euclid Avenue, Cleveland, OH 44115, (216) 621-1113. Counsel for Defendant: Michael J. Garvin & Deborah A. Coleman, Hahn, Loeser & Parks – Cleveland, 2800 BP Tower, 200 Public Square, Cleveland, OH 44114, (216) 621-0150.

8. *Baran v. Med. Device Tech., Inc.*, 519 F. Supp. 2d 698 (N.D. Ohio 2007) (*Markman* opinion). Counsel for Plaintiff: Steven M. Auvil, Benesch, Friedlander, Coplan & Aronoff, 2300 BP Tower, 200 Public Square, Cleveland, OH 44114-2378, (216) 363-4686. Counsel for Defendant Medical Device Technologies, Inc.: Jude A. Fry, Fay Sharpe 5th Floor, 1228 Euclid Avenue, Cleveland, OH 44115, (216) 861-5582; R. Blake Johnston & Monica L. Thompson, DLA Piper – Chicago, 203 North LaSalle Street, Ste. 1900, Chicago, IL 60601, (312) 368-4000. Counsel for Defendants AMT Sverige, AB (*formerly known as* AMEDIC) and Ascendia AB: Douglas Q. Hahn (formerly with Ostrolenk Faber LLP), Stradling Yocca Carlson & Rauth, 660 Newport Center Drive Suite 1600, Newport Beach, CA 92660, (949) 725-4000.

9. *Biomedical Patent Mgmt. Corp. v. California Dept. of Health Servs.*, 505 F.3d 1328 (Fed. Cir. 2007). Counsel for Plaintiff/Appellant: Andrew J. Dhuey, 456 Boynton Ave., Berkeley, CA 94707, (510) 528-8200; Richard Kirk Cannon, Woods Phillips, 500 West Madison Street, Chicago, IL 6066, (312) 876-1800. Counsel for Defendant/Appellee: Susan J. King, Office of the Attorney General, Department of Justice, 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102, (415) 453-7642.

10. *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 268 F. Supp. 2d 907 (N.D. Ohio 2003). Liaison Counsel: R. Eric Kennedy, Weisman Kennedy & Berris, 1600 Midland Building, 101 Prospect Avenue, W., Cleveland, OH 44115, (216) 781-1111. Claims Administrator: James J. McMonagle, Vorys Sater Seymour & Pease, 2100 One Cleveland Center, 1375 East Ninth Street, Cleveland, OH 44114-1739, (216) 479-6158. Counsel for Plaintiffs: Stanley M. Chesley, Waite, Schneider, Bayless & Chesley, 1513 Fourth & Vine Tower, One West Fourth Street, Cincinnati, OH 45202, (513) 621-0267. Defense Counsel: Harvey L. Kaplan & David W. Brooks, Shook, Hardy & Bacon, One Kansas City Place, 1200 Main Street, Kansas City, MO 64105-2118, (816) 474-6550; Bradley D. Honnold (formerly with Shook, Hardy & Bacon), Goza & Honnold, LLC, 11150 Overbrook Road, Ste. 250, Leawood, KS 66211, (866) 767-1486.

e. Provide a list of all cases in which certiorari was requested or granted.

The Supreme Court of the United States has granted certiorari in two cases over which I presided:

*Cleveland Indians Baseball Co. v. United States*, Case No. 1:96cv2240, 1999 U.S. Dist. LEXIS 1043 (N.D. Ohio Jan. 25, 1999), *aff'd,* 215 F.3d 1325 (6th Cir. 2000), *rev'd,* 532 U.S. 200 (2001)

*Esparza v. Mitchell*, Case No. 3:96cv7434, slip op. 133 (N.D. Ohio Oct. 13, 2000), *aff'd,* 310 F.3d 414 (6th Cir. 2002), *rev'd,* 540 U.S. 12 (2003)

See attached list of cases in which certiorari was denied.

f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

*Chappell v. City of Cleveland*, 584 F. Supp. 2d 974 (N.D. Ohio 2008), *rev'd*, 585 F.3d 901 (6th Cir. 2009). The Court of Appeals ordered summary judgment in a case where I had found a genuine issue of material fact.

*RFF Family P'ship, LP v. Wasserman*, Case No. 1:07cv1617, 2008 U.S. Dist. LEXIS 16603 (N.D. Ohio March 4, 2008), *rev'd*, 316 Fed. Appx. 410 (6th Cir. 2009). The Court of Appeals reversed my order remanding a case to state court, finding that plaintiff had waived its objection to removal.

*Lentz v. City of Cleveland*, Case No. 04cv0669, slip op. 195 (N.D. Ohio Sept. 21, 2007), *aff'd in part, rev'd in part*, 333 Fed. Appx. 42 (6th Cir. 2009). The Court of Appeals affirmed most aspects of a jury verdict but remanded for reconsideration of the propriety of remittitur of the damages award.

*Gordon v. Dadante*, Case No. 1:05cv2726, 2007 U.S. Dist. LEXIS 22926 (N.D. Ohio March 29, 2007), *rev'd*, 294 Fed. Appx. 235 (6th Cir. 2008). My order concluded that a financial brokerage had waived its right to enforce an arbitration clause. The Court of Appeals reversed, holding that the brokerage's conduct was not "completely inconsistent" with asserting its right to arbitration.

*Erico Int'l Corp. v. Doc's Mktg.*, Case No. 1:05cv2924, 2006 U.S. Dist. LEXIS 98234 (N.D. Ohio May 3, 2006), *vacated*, 516 F.3d 1350 (Fed. Cir. 2008). I preliminarily enjoined the defendant in this patent case from selling any of its products until the resolution of this action. Applying all four of the traditional preliminary injunction factors, I found that, on balance, an injunction should issue. A divided panel vacated my injunction, employing the "substantial question" test rather than the traditional four factor test. Judge Pauline Newman dissented, disagreeing with the test employed by the majority. The Federal Circuit has since adopted the four-factor approach. *See Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372 (Fed. Cir. 2009).

*In re Commercial Money Center, Inc. Equip. Lease Litig.*, Case No. 1:02cv16000, 2006 U.S. Dist. LEXIS 21392 (N.D. Ohio Apr. 20, 2006), *aff'd in part, rev'd in part*, 508 F.3d 327 (6th Cir. 2007). The Court of Appeals reversed a portion of my damages calculation, but otherwise affirmed.

*Oatey Co. v. IPS Corp.*, Case No. 1:03cv1231, 2006 U.S. Dist. LEXIS 9060 (N.D. Ohio Mar. 8, 2006), *vacated*, 514 F.3d 1271 (Fed. Cir. 2008). The Federal Circuit affirmed my claim construction but held that I erred in excluding a single embodiment disclosed in the specifications.

*Girts v. Yanai*, No. 1:02cv0264, 2005 U.S. Dist. LEXIS 45611 (N.D. Ohio July 12, 2005), *rev'd*, 501 F.3d 743 (6th Cir. 2007), *cert. denied,* 129 S. Ct. 92 (U.S. 2008). A divided panel of the Court of Appeals held that I had given an inappropriate degree of deference to the state court in finding that a habeas petitioner had not been denied the effective assistance of counsel.

*Lott v. Bagley*, Case No. 1:04cv822, 2005 U.S. Dist. LEXIS 21227 (N.D. Ohio March 29, 2005), *rev'd*, 424 F.3d 446 (6th Cir. 2005), *cert. denied,* 547 U.S. 1092 (2006). I concluded that the petitioner implicitly waived his attorney-client and work product privileges to the extent necessary for the respondent to defend against petitioner's claim of actual innocence. A divided panel disagreed. Chief Judge Danny J. Boggs dissented, recommending that my decision be affirmed.

*United States v. Montanez*, Case No. 1:04cr138, slip op. 59 (N.D. Ohio Nov. 17, 2004), *vacated*, 442 F.3d 485 (6th Cir. 2006). The Court of Appeals overruled its prior binding precedent on which I relied to conclude that a particular Ohio Code violation qualified as a controlled substance offense for purposes of career offender classification under the United States Sentencing Guidelines.

*Davis v. United Auto., Aerospace & Agric. Implement Workers of Am.*, Case No. 1:03cv1311, slip op. Doc. 19 (N.D. Ohio Dec. 31, 2003), *rev'd*, 392 F.3d 834 (6th Cir. 2004), *cert. denied*, 549 U.S. 1204 (2007). The Court of Appeals reversed my decision to remand a state-law age discrimination case, holding that the plaintiff's claims were preempted by the Labor Management Reporting and Disclosure Act ("LMRDA").

*CSX Transp., Inc. v. United Transp. Union*, Case No. 1:02cv2394 (N.D. Ohio Aug. 28, 2003), *rev'd,* 395 F.3d 365 (6th Cir. 2005). A divided panel of the Court of Appeals found that the dispute at issue was a "minor" dispute under the Railway Labor Act where I had found it to be a "major" dispute.

*Hodge v. Hurley*, Case No. 01cv1773, slip op. 25 (N.D. Ohio Jan. 14, 2003), *rev'd*, 426 F.3d 368 (6th Cir. 2005). A divided panel of the Court of Appeals held that I had given an inappropriate degree of deference to the state court in finding that a habeas petitioner had not been denied the effective assistance of counsel. Judge Eugene Siler dissented, recommending that my decision be affirmed.

*United States v. Saadey*, Case No. 4:00cr488, slip op. 166 (N.D. Ohio May 9, 2002), *aff'd in part, rev'd in part*, 393 F.3d 669 (6th Cir. 2005). Addressing an issue of first impression, the Court of Appeals reversed the defendant's conviction under the Hobbs Act, finding that "a private citizen who is not in the process of becoming a public official may be convicted of Hobbs Act extortion under the 'color of official right' theory only if that private citizen either conspires with, or aids and abets, a public official in the act of extortion." The Court affirmed all other convictions and the defendant's sentence was unaffected.

*United Church of Christ v. Gateway Econ. Dev. Corp. of Greater Cleveland*, Case No. 00cv661, slip op. 40 (N.D. Ohio Mar. 22, 2001), *aff'd in part, rev'd in part, and remanded*, 383 F.3d 839 (6th Cir. 2004). The Court of Appeals affirmed most of my opinion in this First Amendment case, but reversed and remanded for further findings on the reasonableness of speech restrictions on a portion of the sidewalk ringing a sports stadium near downtown Cleveland.

*Esparza v. Anderson*, Case No. 3:96cv7434, slip op. 132 (N.D. Ohio Oct. 13, 2000), *aff'd sub nom. Esparza v. Mitchell*, 310 F.3d 414 (6th Cir. 2002), *rev'd*, 540 U.S. 12 (2003). I granted the petition for a writ of habeas corpus on the sentencing phase of this state death penalty case. I found that the state court had failed to adhere to state statutory law regarding how and when the death penalty can be imposed, and that this failure rendered the sentence unconstitutional. I concluded that the state court's error was a "structural" error not susceptible to "harmless error" review. In so holding, I acknowledged that my analysis depended on reconciling two arguably inconsistent Supreme Court decisions – *Neder v. United States*, 527 U.S. 1 (1999) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Court of Appeals affirmed in all respects. In a per curiam opinion, the Supreme Court reversed, holding that the sentencing error at issue was susceptible to harmless error review.

*Keller v. Cent. Bank of Nig.*, Case No. 1:98cv1270, 2000 U.S. Dist. LEXIS 21879 (N.D. Ohio Feb. 28, 2000), *aff'd in part, vacated in part*, 277 F.3d 811 (6th Cir. 2002). The Court of Appeals held that the Foreign Sovereign Immunities Act precluded civil RICO claims because the foreign sovereigns would not be indictable for the criminal acts that are necessary predicates to those claims. The Sixth Circuit's opinion created a circuit split, *see United States v. Campa*, 529 F.3d 980, 1000–01 (11th Cir. 2008) (noting this split).

*United States v. Chance*, Case No. 4:99cr22, slip op. 94 (N.D. Ohio Nov. 24, 1999), *aff'd in part and rev'd in part*, 306 F.3d 356 (6th Cir. 2002). The Court of Appeals reversed for additional justification of my upward departure from the sentencing range recommended by the United States Sentencing Guidelines. On remand, I imposed the same sentence with further justification and that sentence was not appealed.

*Ross v. Campbell Soup Co.*, Case No. 98cv196, 1999 U.S. Dist. LEXIS 23288 (N.D. Ohio Aug. 26, 1999), *rev'd*, 237 F.3d 701 (6th Cir. 2001). The Court of Appeals reversed my grant of summary judgment for the defendant in an ADA case, finding a genuine issue of material fact as to whether the company "regarded" the Plaintiff as having a disability. Two other circuits later disagreed, *see Nese v. Julian Nordic Constr. Co.*, 405 F.3d 638, 642 (7th Cir. 2005) (citing *Rakity v. Dillon Companies, Inc.*, 302 F.3d 1152, 1165 (10th Cir. 2002)).

*Cleveland Indians Baseball Co. v. United States*, Case No. 1:96cv2240, 1999 U.S. Dist. LEXIS 1043 (N.D. Ohio Jan. 25, 1999), *aff'd*, 215 F.3d 1325 (6th Cir. 2000), *rev'd*, 532 U.S. 200 (2001). In this tax case, I granted summary judgment in favor of the plaintiff based on binding Sixth Circuit precedent, which required that "a settlement for back wages should not be allocated to the period when the employer finally pays but should be allocated to the periods when the regular wages were not paid as usual." I noted that, had I not been bound by Sixth Circuit precedent, my decision may well have been different. The Court of Appeals affirmed my application of its precedent, but the Supreme Court reversed that precedent.

*NAACP v. City of Parma*, Case No. 1:90cv1404, slip op. 176 (N.D. Ohio Mar. 30, 1998), *rev'd*, 263 F.3d 513 (6th Cir. 2001), *cert. denied*, 535 U.S. 971 (2002). A divided Court of Appeals reversed my standing-based dismissal of this municipal employment discrimination action, finding that one of seven individual plaintiffs had standing.

*Scott v. Anderson*, 58 F. Supp. 2d 767 (N.D. Ohio 1998), *aff'd in part, rev'd in part*, 209 F.3d 854 (6th Cir. 2000), *cert. denied,* 531 U.S. 1021 (2000). In *Scott*, I granted the petition for writ of habeas corpus on the basis that the state trial court's imposition of the death penalty was unconstitutional given the trial judge's improper instruction that the jurors had to unanimously recommend a life sentence. I denied the petition on all other grounds. The Court of Appeals affirmed my treatment of all but the unanimity issue, which it found to have been procedurally defaulted.

*LSJ Inv. Co. v. O.L.D., Inc.*, Case No. 96cv1527, slip op. 45 (N.D. Ohio Aug. 11, 1997), *aff'd in part, rev'd in part*, 167 F.3d 320 (6th Cir. 1999). The Court of Appeals affirmed my entry of default judgment in this civil RICO case on all grounds except as to one individual defendant, finding that a lack of proper service prohibited judgment by default as to that defendant.

*Ohio Hosp. Ass'n v. Shalala*, 978 F. Supp. 735 (N.D. Ohio 1997), *aff'd in part, rev'd in part*, 201 F.3d 418 (6th Cir. 1999), *cert. denied,* 531 U.S. 1071 (2001). The Court of Appeals reversed in part my dismissal for lack of federal question jurisdiction, finding that a different interpretation of the Medicare Act gave rise to jurisdiction on some of the claims asserted.

*Cehrs v. Ne. Ohio Alzheimer Research Ctr.*, 959 F. Supp. 441 (N.D. Ohio 1997), *aff'd in part, rev'd in part*, 155 F.3d 775 (6th Cir. 1998). The Court of Appeals reversed in part my grant of summary judgment to the defendant in this employment case, agreeing that summary judgment was appropriate on certain of plaintiff's claims, but finding that there was a genuine issue of fact as to whether the plaintiff's requested accommodation was reasonable under the ADA.

*Blake v. Wright*, Case No. 1:96cv2337, slip op. 19 (N.D. Ohio July 16, 1997), *aff'd in part, rev'd in part*, 179 F.3d 1003 (6th Cir. 1999), *cert. denied,* 528 U.S. 1136 (2000). The Court of Appeals affirmed in part and reversed in part my denial of qualified immunity to an ex-police chief who had used concealed equipment to eavesdrop on and had wiretapped his employees' conversations.

*Weatherchem Corp. v. J.L. Clark*, 937 F. Supp. 1262 (N.D. Ohio 1996), *aff'd in part, vacated in part*, 163 F.3d 1326 (Fed. Cir. 1998). The Federal Circuit affirmed my disposition of this patent infringement case in full but found that alternative findings I had made were unnecessary and should be vacated.

*Ferro Corp. v. Garrison Indus.*, 927 F. Supp. 234 (N.D. Ohio 1996), *rev'd*, 142 F.3d 926 (6th Cir. 1998). The Court of Appeals reversed my order vacating an arbitrator's award, finding that a general choice of law clause was insufficient to establish that the parties intended to employ Ohio law with respect to the scope of an arbitrator's authority.

*Douglas v. Argo-Tech Corp.*, Case No. 91cv1481, slip op. 55 (N.D. Ohio June 15, 1995), *rev'd*, 113 F.3d 67 (6th Cir. 1997). The Court of Appeals reversed my determination of whether plaintiff was an employee entitled to overtime wages under the Fair Labor Standards Act.

*Avenue Grille v. Rootstown Twp.*, Case No. 5:94cv67, 1995 U.S. Dist. LEXIS 22132 (N.D. Ohio April 19, 1995), *vacated*, Case No. 95-3936, 1997 U.S. App. LEXIS 9689 (6th Cir. Apr. 30, 1997). The Court of Appeals ordered my post-judgment award of attorneys' fees reduced.

It has not been my practice to keep a list of opinions in which I was reversed. I generated my response to this question by reviewing the appellate history of my decisions included in the Lexis database. In addition to shepherdizing the subsequent history of my reported opinions, I searched for opinions from the Court of Appeals for the Sixth Circuit that mentioned my name as the district judge, thereby capturing reversals of certain unpublished slip opinions. Beyond this list, I do not recall any other reversals.

g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

I resolve most significant and/or dispositive motions via written opinion and order. Occasionally, in the interest of judicial efficiency in time-sensitive matters, I resolve such motions by oral rulings from the bench. I use non-document orders or short unpublished orders to address procedural issues, scheduling, discovery disputes and other administrative issues and motions. All orders are docketed when issued. Since approximately 2002, individual case dockets are available through the Court's Electronic Case Filing system. For cases that predate 2002, the dockets and copies of all orders entered in those cases are located in an off-site storage facility located in Chicago, Illinois.

It is my understanding that, in recent years, the Westlaw and Lexis databases identify and make available most substantive decisions from most federal courts. Before that, I sent opinions to be published only where I felt a significant legal issue had been addressed and decided, or where a party or interested organization requested publication.

h. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.

*D'Ambrosio v. Bagley*, Case No. 00cv2521, 2009 U.S. Dist. LEXIS 125483 (N.D. Ohio March 3, 2010)
*Waller v. United States*, Case No. 1:08cv936 2010 U.S. Dist. LEXIS 17269 (N.D. Ohio Feb. 26, 2010)
*Balaban v. City of Cleveland*, Case No. 1:07cv1366, 2010 U.S. Dist. LEXIS 10227 (N.D. Ohio Feb. 5, 2010)
*Martinez v. Cuyahoga County Recorder's Office,* Case No. 1:08cv2904, slip op. 36 (N.D. Ohio Sept. 16, 2009)
*United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740 (N.D. Ohio 2009)
*D'Ambrosio v. Bagley*, 619 F. Supp. 2d 428 (N.D. Ohio 2009)
*United States v. City of Euclid*, 580 F. Supp. 2d 584 (N.D. Ohio 2008)
*Project Vote v. Blackwell*, 455 F. Supp. 2d 694 (N.D. Ohio 2008)
*King v. Ambs*, 519 F.3d 607 (6th Cir. 2008) (O'Malley, J., dissenting)
*ACLU v. Brunner*, Case No. 1:08cv145, slip op. 30 (N.D. Ohio Feb. 5, 2008)
*Biomedical Patent Mgmt. Corp. v. State of California, Dept. of Health Servs.*, 505 F.3d 1328 (Fed. Cir. 2007)
*United States v. Spry*, 238 Fed. Appx. 142 (6th Cir. 2007)
*United States v. Davis*, Case No. 4:06cr386, slip op. 19 (N.D. Ohio Feb. 8, 2007)
*D'Ambrosio v. Bagley*, Case No. 1:00cv2521, 2006 U.S. Dist. LEXIS 12794 (N.D. Ohio Mar. 24, 2006)
*Zerman v. City of Strongsville*, Case No. 1:04cv2493, 2006 U.S. Dist. LEXIS 70503 (N.D. Ohio Sept. 28, 2006)
*Girts v. Yanai*, Case No. 1:02cv264, 2005 U.S. Dist. LEXIS 45611 (N.D. Ohio July 12, 2005), *rev'd*, 501 F.3d 743 (6th Cir. 2007), *cert. denied,* 129 S. Ct. 92 (U.S. 2008)
*Parkwood Place Inc., Ltd. v. City of Brecksville*, Case No. 1:03cv1744, ECF Doc. 25 (N.D. Ohio Apr. 28, 2004)

*Am. Family Life Ins. Co. v. Hagan*, 266 F. Supp. 2d 682 (N.D. Ohio 2002)
*ACLU v. Ashbrook*, 211 F. Supp. 2d 873 (N.D. Ohio 2002)
*Williams v. City of Cleveland*, Case No. 1:01cv1999, slip op. 16 (N.D. Ohio May 15, 2002)
*United Church of Christ v. Gateway Economic Dev. Corp. of Greater Cleveland*, Case No. 1:00cv661, slip op. 40 (N.D. Ohio Mar. 22, 2001)
*Esparza v. Anderson*, Case No. 3:96cv7434, slip op. 132 (N.D. Ohio Oct. 13, 2000), *aff'd sub nom. Esparza v. Mitchell*, 310 F.3d 414 (6th Cir. 2002), *rev'd*, 540 U.S. 12 (2003)
*Threesome Entertainment v. Strittmather*, 4 F. Supp. 2d 710 (N.D. Ohio 1998)
*United States v. Allen*, 106 F.3d 695 (6th Cir. 1997)
*Rose v. Village of Peninsula*, 875 F. Supp. 442 (N.D. Ohio 1995)
*Schwitzgebel v. City of Strongsville*, 898 F. Supp. 1208 (N.D. Ohio 1995)
*Valot v. Southeast Local Sch. Dist.*, 957 F. Supp. 991 (N.D. Ohio 1995)

i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

Opinions Authored, U.S. Court of Appeals for the Federal Circuit

*Biomedical Patent Mgmt. Corp. v. California Dept. of Health Servs.*, 505 F.3d 1328 (Fed. Cir. 2007) (dismissing lawsuit on sovereign immunity grounds and analyzing novel issue of Eleventh Amendment interpretation)
*Ormco Corp. v. Align Tech., Inc.*, 498 F.3d 1307 (Fed. Cir. 2007) (O'Malley, J. dissenting) (emphasizing the importance of construing claim language in the patents at issue)

Opinions Authored, U.S. Court of Appeals for the Sixth Circuit

*King v. Ambs*, 519 F.3d 607 (6th Cir. 2008) (O'Malley, J., dissenting) (disagreeing with the majority on First Amendment grounds and emphasizing the appropriate standard of review)
*Air Prods. & Controls, Inc. v. Safetech Int'l, Inc.*, 503 F.3d 544 (6th Cir. 2007) (reversing dismissal for lack of personal jurisdiction by finding that jurisdiction was authorized by state law and consistent with due process)
*Jones v. Johanns*, 264 Fed. Appx. 463 (6th Cir. 2007) (affirming summary judgment against Title VII retaliation plaintiff based on Supreme Court's *Burlington Northern* standard)
*United States v. Spry*, 238 Fed. Appx. 142 (6th Cir. 2007) (affirming criminal conviction and analyzing standard for delayed disclosure of *Brady* materials)
*Renfro v. Ind. Mich. Power Co.*, 497 F.3d 573 (6th Cir. 2007) (dissenting, deferring to the District Court's careful determination that the plaintiff technical writers were not exempt from FLSA overtime regulations)
*United States v. Leprich*, 169 Fed. Appx. 926 (6th Cir. 2005) (affirming denial of defendant's motion to vacate order revoking his citizenship, denial of petition

for writ of habeas corpus, and BIA decision that he was removable from the U.S.)

*Gale v. City of Tecumseh*, 156 Fed. Appx. 801 (6th Cir. 2005) (affirming judgment on the verdict and denial of new trial against whistleblower retaliation plaintiff – finding no abuse of discretion and no judicial bias)

*Stilley v. Bell*, 155 Fed. Appx. 217 (6th Cir. 2005) (affirming denial of attorney's admission to Western District of Michigan Bar based on past violations of Arkansas Rules of Professional Conduct)

*Diallo v. Gonzales*, 140 Fed. Appx. 612 (6th Cir. 2005) (O'Malley, J., dissenting) (finding that review of final order should be granted because the State Department Country Report did not contain sufficient evidence of changed country conditions to overcome statutory presumption of future persecution)

*Calvert v. Firstar Fin., Inc.*, 409 F.3d 286 (6th Cir. 2005) (reversing judgment against plaintiff, finding that the defendant acted arbitrarily in denying disability benefits in violation of ERISA)

*Wheaton v. N. Oakland Med. Ctr.*, 130 Fed. Appx. 773 (6th Cir. 2005) (affirming in part, reversing in part, and remanding for new trial in an employment discrimination case)

*Westfield Ins. Co. v. Appleton*, 132 Fed. Appx. 567 (6th Cir. 2005) (affirming summary judgment that plaintiff insurance company was not liable under defendant's homeowners insurance policy)

*Wausau Underwriters Ins. Co. v. Vulcan Dev., Inc.*, 323 F.3d 396 (6th Cir. 2003) (affirming summary judgment for plaintiff on breach of contract claim and dismissal of defendant's tortious interference claim)

*Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 276 F.3d 876 (6th Cir. 2002) (O'Malley, J., dissenting) (assessing the constitutionality of a Detroit ordinance governing casino gambling licenses)

*Comstock v. McCrary*, 273 F.3d 693 (6th Cir. 2001) (O'Malley, J., dissenting) (finding a lack of jurisdiction and that the District Court correctly concluded that material facts relevant to qualified immunity were in dispute)

*United States v. Crozier*, 259 F.3d 503 (6th Cir. 2001) (O'Malley, J., concurring) (disagreeing with the majority's assessment that the defendant's request for continuance did not waive his speedy trial rights)

*Ceckitti v. City of Columbus*, 14 Fed. Appx. 512 (6th Cir. 2001) (affirming summary judgment that plaintiff failed to establish *prima facie* case of retaliation harassment)

*Miller v. Alldata Corp.*, 14 Fed. Appx. 457 (6th Cir. 2001) (affirming District Court's resolution in favor of gender discrimination plaintiff)

*United States v. Pettygrue*, 11 Fed. Appx. 493 (6th Cir. 2001) (affirming denial of defendant's motion to withdraw plea based on lack of jurisdiction)

*Curry v. Scott*, 249 F.3d 493 (6th Cir. 2001)

*United States v. Hicks*, Case No. 99-1212, 2000 U.S. App. LEXIS 27627 (6th Cir. Oct. 26, 2000) (affirming denial of defendant's motion to withdraw plea)

*Stupak-Thrall v. Glickman*, 226 F.3d 467 (6th Cir. 2000) (narrowing the circumstances in the Sixth Circuit where intervention as of right will be allowed)
*Atchley v. RK Co.*, 224 F.3d 537 (6th Cir. 2000) (examining the contours of a claim of procurement of breach of contract)
*United States v. Rich*, Case No. 98-1032 2000 U.S. App. LEXIS 15807 (6th Cir. June 29, 2000) (affirming defendant's jury trial conviction)
*UPS v. NLRB*, 228 F.3d 772 (6th Cir. 2000) (affirming NLRB's decision that defendant's conduct constituted unfair labor practices)
*Hughes v. Vanderbilt Univ.*, 215 F.3d 543 (6th Cir. 2000) (concurring, that under the narrow circumstances presented, publicity gave plaintiff constructive knowledge of cause of action to trigger statute of limitations)
*United States v. Waldon*, 206 F.3d 597 (6th Cir. 2000) (delineating when a mistrial must be declared if a juror views the criminal defendant wearing shackles)
*United States v. Arnett*, Case No. 97-6092, 1999 U.S. App. LEXIS 27415 (6th Cir. Oct. 22, 1999) (affirming conviction, but vacating sentence based on Supreme Court's *Jones v. United States* opinion)
*United States v. Gantley*, 172 F.3d 422 (6th Cir. 1999) (discussing, in the context of double jeopardy, when a criminal defendant's consent to a mistrial may be implied)
*United States v. Sanchez-Mendoza*, Case No. 97-6084, 1999 U.S. App. LEXIS 5267 (6th Cir. 1999)
*United States v. Allen*, 106 F.3d 695 (6th Cir. 1997) (upholding the warrantless search of a hotel room under specific circumstances)

Opinions Joined, U.S. Court of Appeals for the Federal Circuit

*Monsanto Co. v. Syngenta Seeds, Inc.*, 503 F.3d 1352 (Fed. Cir. 2007)
*Byrne v. Black & Decker Corp.*, 235 Fed. Appx. 741 (Fed. Cir. 2007)
*Pods, Inc. v. Porta Stor, Inc.*, 484 F.3d 1359 (Fed. Cir. 2007)
*Simmons v. SBA*, 475 F.3d 1372 (Fed. Cir. 2007)
*Patterson v. United States*, 218 Fed. Appx. 987 (Fed. Cir. 2007)
*In re Levine*, 217 Fed. Appx. 957 (Fed. Cir. 2007)

Opinions Joined, U.S. Court of Appeals for the Sixth Circuit

*United States v. Choate*, Case No. 06-5213, 2007 U.S. App. LEXIS 22935 (6th Cir. Sept. 25, 2007)
*United States v. Burns*, 498 F.3d 578 (6th Cir. 2007)
*Speedy Mulch LLC v. Gadd*, 243 Fed. Appx. 81 (6th Cir. 2007)
*Beard v. Whitmore Lake Sch. Dist.*, 244 Fed. Appx. 607 (6th Cir. 2007)
*Ka v. Gonzales*, 236 Fed. Appx. 189 (6th Cir. 2007)
*Potter v. Comm'r of Soc. Sec.*, 223 Fed. Appx. 458 (6th Cir. 2007)
*Craig v. White*, 227 Fed. Appx. 480 (6th Cir. 2007)
*Extendicare Health Servs. v. NLRB*, 182 Fed. Appx. 412 (6th Cir. 2006)

*Cain v. Wells Fargo Bank, N.A.*, 423 F.3d 617 (6th Cir. 2005)
*United States v. Namer*, 149 Fed. Appx. 385 (6th Cir. 2005)
*Atria v. Vanderbilt Univ.*, 142 Fed. Appx. 246 (6th Cir. 2005)
*Lane v. Metro. Police Dep't*, 134 Fed. Appx. 919 (6th Cir. 2005)
*United States v. Henderson*, 135 Fed. Appx. 858 (6th Cir. 2005)
*United States v. Canon*, 141 Fed. Appx. 398 (6th Cir. 2005)
*Frazier Indus., LLC v. General Fasteners Co.*, 137 Fed. Appx. 723 (6th Cir. 2005)
*Carroll v. United Compucred Collections, Inc.*, 399 F.3d 620 (6th Cir. 2005)
*United States v. Holz*, 118 Fed. Appx. 928 (6th Cir. 2004)
*Walker v. Carlton*, 114 Fed. Appx. 687 (6th Cir. 2004)
*Johnson v. UPS*, Case No. 03-5620, 2004 U.S. App. LEXIS 23795 (6th Cir. 2004)
*Hernandez v. Ashcroft*, 114 Fed. Appx. 183 (6th Cir. 2004)
*United States v. Foley*, 111 Fed. Appx. 840 (6th Cir. 2004)
*Valentine-Johnson v. Roche*, 386 F.3d 800 (6th Cir. 2004)
*Ormanci v. Ashcroft*, 110 Fed. Appx. 486 (6th Cir. 2004)
*Amaral v. Am. Sch. of Correspondence*, 107 Fed. Appx. 497 (6th Cir. 2004)
*United States v. Coomes*, 106 Fed. Appx. 967 (6th Cir. 2004)
*Pasho v. Ashcroft*, 104 Fed. Appx. 560 (6th Cir. 2004)
*Okoro v. Hemingway*, 104 Fed. Appx. 558 (6th Cir. 2004)
*United States v. Tribble*, 106 Fed. Appx. 392 (6th Cir. 2004)
*Jones v. Douglas*, 108 Fed. Appx. 254 (6th Cir. 2004)
*United States v. Patterson*, Case No. 03-6051, 2004 U.S. App. LEXIS 16343 (6th Cir. Aug. 5, 2004), *vacated*, 107 Fed. Appx. 600 (6th Cir. 2004)
*Jones v. Bock*, 107 Fed. Appx. 480 (6th Cir. 2004)
*Banner v. City of Flint*, 99 Fed. Appx. 29 (6th Cir. 2004)
*United States v. Westenfelder*, 70 Fed. Appx. 302 (6th Cir. 2003)
*United States v. Foster*, 65 Fed. Appx. 41 (6th Cir. 2003)
*United States v. Lockhart*, Case No. 01-6445, 2003 U.S. App. LEXIS 7424 (6th Cir. April 16, 2003)
*In re Smothers*, 322 F.3d 438 (6th Cir. 2003)
*United States v. Willis*, 59 Fed. Appx. 40 (6th Cir. 2003)
*Ziemba v. Consol. Coal Co.*, 56 Fed. Appx. 232 (6th Cir. 2003)
*United States v. Christian*, 59 Fed. Appx. 44 (6th Cir. 2003)
*Americorp Fin., Inc. v. Zelch*, 61 Fed. Appx. 925 (6th Cir. 2003)
*Sec'y of Labor v. 3RE.com*, 317 F.3d 534 (6th Cir. 2003)
*United States v. Gregory*, 315 F.3d 637 (6th Cir. 2003)
*Wash. v. McGinnis*, 53 Fed. Appx. 355 (6th Cir. 2002)
*Hoffman v. Jones*, 53 Fed. Appx. 342 (6th Cir. 2002)
*United States v. Booth*, 53 Fed. Appx. 756 (6th Cir. 2002)
*Rodgers v. Johnson*, 56 Fed. Appx. 633 (6th Cir. 2002)
*Smith v. Caruso*, 53 Fed. Appx. 335 (6th Cir. 2002)
*United States v. McCoy*, 53 Fed. Appx. 753 (6th Cir. 2002)
*United States v. Raines*, 54 Fed. Appx. 598 (6th Cir. 2002)
*Stephens v. DaimlerChrysler Corp.*, 52 Fed. Appx. 817 (6th Cir. 2002)
*Denham v. McQuillan*, 52 Fed. Appx. 815 (6th Cir. 2002)

*Turner v. United States*, 53 Fed. Appx. 327 (6th Cir. 2002)
*McMahon v. Rebound Care*, 54 Fed. Appx. 187 (6th Cir. 2002)
*Clemons v. Cook*, 52 Fed. Appx. 762 (6th Cir. 2002)
*Lamb v. Bumpus*, 52 Fed. Appx. 740 (6th Cir. 2002)
*United States v. Affini*, 52 Fed. Appx. 754 (6th Cir. 2002)
*Bulls v. Jones*, 274 F.3d 329 (6th Cir. 2001)
*Magana v. Hofbauer*, 263 F.3d 542 (6th Cir. 2001)
*Ken-N.K., Inc. v. Vernon Twp.*, 18 Fed. Appx. 319 (6th Cir. 2001)
*Hampshire v. Henderson*, 14 Fed. Appx. 397 (6th Cir. 2001)
*United States v. Hagen*, 11 Fed. Appx. 578 (6th Cir. 2001)
*United States v. Underwood*, 11 Fed. Appx. 581 (6th Cir. 2001)
*Coal Creek Mining & Mfg. Co. v. James River Coal Serv. Co.*, 11 Fed. Appx. 548 (6th Cir. 2001)
*Merritt v. Beth Energy Mines, Inc.*, 16 Fed. Appx. 300 (6th Cir. 2001)
*United States v. Rankin*, 11 Fed. Appx. 496 (6th Cir. 2001)
*United States v. Jewell*, 16 Fed. Appx. 295 (6th Cir. 2001)
*Jones v. Seabold*, 11 Fed. Appx. 486 (6th Cir. 2001)
*Anthony v. United Methodist Publ. House*, 8 Fed. Appx. 480 (6th Cir. 2001)
*United States v. Buchanan*, 8 Fed. Appx. 468 (6th Cir. 2001)
*Turner v. Dewitt*, 16 Fed. Appx. 291 (6th Cir. 2001)
*Ousley v. Dir., OWCP*, 8 Fed. Appx. 447 (6th Cir. 2001)
*Partee v. Stegall*, 8 Fed. Appx. 466 (6th Cir. 2001)
*Bass v. Runyon*, Case No. 98-5785, 2000 U.S. App. LEXIS 26773 (6th Cir. Oct. 17, 2000)
*Thompson v. Williamson County*, 219 F.3d 555 (6th Cir. 2000)
*Rockwell v. Yukins*, 217 F.3d 421 (6th Cir. 2000)
*Duffy v. Ford Motor Co.*, 218 F.3d 623 (6th Cir. 2000)
*Burress v. Michigan Dep't of Corr.*, Case No. 99-1422, 2000 U.S. App. LEXIS 14082 (6th Cir. June 6, 2000)
*United States v. Adams*, 214 F.3d 724 (6th Cir. 2000)
*Fair v. Franklin County*, Case No. 98-4237, 2000 U.S. App. LEXIS 11627 (6th Cir. May 11, 2000)
*United States v. Trobaugh*, Case No. 98-6277, 2000 U.S. App. LEXIS 11695 (6th Cir. May 11, 2000)
*Crown Serv. Plaza Partners v. City of Rochester Hills*, Case No. 98-1581, 2000 U.S. App. LEXIS 9935 (6th Cir. May 8, 2000)
*United States v. Real Prop. 35555 Little Mack*, Case No. 98-1069, 2000 U.S. App. LEXIS 9930 (6th Cir. May 5, 2000)
*United States v. Whitman*, 209 F.3d 619 (6th Cir. 2000)
*Valentine v. Roff*, Case No. 99-5287, 2000 U.S. App. LEXIS 4964 (6th Cir. March 20, 2000)
*United States v. Anderson*, Case No. 99-5241, 2000 U.S. App. LEXIS 4898 (6th Cir. March 17, 2000)
*Sanders v. Numberger*, No. 98-4427, 2000 U.S. App. LEXIS 4897 (6th Cir. March 17, 2000)

*Erdman v. Michigan*, Case No. 98-2366, 2000 U.S. App. LEXIS 4894 (6th Cir. March 17, 2000)
*Avery v. Nicol*, Case No. 99-3423, 2000 U.S. App. LEXIS 4127 (6th Cir. March 10, 2000)
*Jacobs v. Wilkinson*, Case No. 99-3520, 2000 U.S. App. LEXIS 4028 (6th Cir. March 9, 2000)
*Williamson v. Beeler*, Case No. 98-5466, 2000 U.S. App. LEXIS 4026 (6th Cir. March 9, 2000)
*Covington v. Knox County Sch. Sys.*, 205 F.3d 912 (6th Cir. 2000)
*United States v. Miller*, Case No. 98-6559, 2000 U.S. App. LEXIS 3561 (6th Cir. March 3, 2000)
*United States v. Johnson*, Case No. 98-2212, 2000 U.S. App. LEXIS 2475 (6th Cir. Feb 16, 2000)
*Shepherd v. Dana Corp.*, Case No. 98-1770, 2000 U.S. App. LEXIS 2269 (6th Cir. Feb. 10, 2000)
*Nowicki v. Bruff*, Case No. 98-2127, 1999 U.S. App. LEXIS 34009 (6th Cir. Dec. 17, 1999)
*Hale v. Schaefer*, Case No. 99-1100, 1999 U.S. App. LEXIS 34065 (6th Cir. Dec. 19, 1999)
*Abdullah v. Kennedy*, Case No. 98-6699, 1999 U.S. App. LEXIS 34029 (6th Cir. Dec. 16, 1999)
*Helfrich v. Metal Container Corp.*, Case No. 99-3315, 1999 U.S. App. LEXIS 34023 (6th Cir. Dec. 16, 1999)
*Jones v. Schmaker*, Case No. 99-1187, 1999 U.S. App. LEXIS 34454 (6th Cir. Dec. 15, 1999)
*Collins v. G/H Contr. Co.*, Case No. 99-1260, 1999 U.S. App. LEXIS 32810 (6th Cir. Dec. 14, 1999)
*Aldridge v. Cont'l Gen. Tire, Inc.*, Case No. 98-6658, 1999 U.S. App. LEXIS 32756 (6th Cir. Dec. 14, 1999)
*Crutchfield v. Aerospace Ctr. Support*, Case No. 98-6105, 1999 U.S. App. LEXIS 32765 (6th Cir. Dec. 14, 1999)
*United States v. Self*, Case No. 99-5333, 1999 U.S. App. LEXIS 32808 (6th Cir. Dec. 14, 1999)
*Thomasville Furniture Indus. v. Elder-Beerman Stores Corp.*, Case No. 99-4126, 1999 U.S. App. LEXIS 32812 (6th Cir. Dec. 14, 1999)
*Wright v. United States*, 182 F.3d 458 (6th Cir. 1999)
*Roeder v. Am. Postal Workers Union*, 180 F.3d 733 (6th Cir. 1999)
*Sparton Engineered Prods., Inc. v. Cable Control Techs., Inc.*, Case No. 97-1995, 1999 U.S. App. LEXIS 2283 (6th Cir. Feb. 10, 1999)
*United States v. Thomas*, 167 F.3d 299 (6th Cir. 1999)
*United States v. McClellan*, 164 F.3d 308 (6th Cir. 1999)
*Quigley v. United States*, Case No. 97-1364, 1998 U.S. App. LEXIS 33149 (6th Cir. Dec. 29, 1998)
*Lombardo v. Airelect, Inc.*, Case No. 97-1586, 1998 U.S. App. LEXIS 33132 (6th Cir. Dec. 29, 1998)

*United States v. Riggins*, Case No. 95-5552, 1997 U.S. App. LEXIS 2752 (6th Cir. Feb. 13, 1997)
*Hunt v. Applegate*, Case No. 95-1062, 1996 U.S. App. LEXIS 34348 (6th Cir. Dec. 31, 1996)
*United States v. Thompson*, Case No. 95-5881, 1996 U.S. App. LEXIS 22287 (6th Cir. July 30, 1996)
*USACO Coal Co. v. Carbomin Energy*, Case No. 95-5390, 1996 U.S. App. LEXIS 14467 (6th Cir. May 8, 1996)
*Grasso Prod. v. BMO Fin.*, 83 F.3d 140 (6th Cir. 1996)
*Leaphart v. Peterson*, Case No. 95-1925, 1996 U.S. App. LEXIS 12434 (6th Cir. April 17, 1996)
*United States v. Little*, Case No. 95-5753, 1996 U.S. App. LEXIS 11625 (6th Cir. April 17, 1996)
*Mason v. United States*, Case No. 95-6122, 1996 U.S. App. LEXIS 12436 (6th Cir. April 11, 1996)
*Anderson v. United States*, Case No. 95-3905, 1996 U.S. App. LEXIS 12441 (6th Cir. 1996)
*White v. Arch on the N. Fork, Inc.*, Case No. 95-4062, 1996 U.S. App. LEXIS 12440 (6th Cir. April 11, 1996)
*McCown v. Harmon*, Case No. 95-6081, 1996 U.S. App. LEXIS 12437 (6th Cir. April 11, 1996)
*Lacey v. Michigan Dep't of Corr.*, Case No. 95-1625, 1996 U.S. App. LEXIS 12178 (6th Cir. April 11, 1996)
*United States v. Brigance*, Case No: 95-6067, 1996 U.S. App. LEXIS 12180 (6th Cir. April 10, 1996)

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

    a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

    b. a brief description of the asserted conflict of interest or other ground for recusal;

    c. the procedure you followed in determining whether or not to recuse yourself;

    d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

I assess the propriety of recusal in all cases by reference to governing statutory and ethical rules or canons, including advisory opinions relating thereto. Where I have been unclear as to the obligations imposed by the governing criteria, I have sought guidance from the General Counsel of the Administrative Office of the United States Courts and/or the United States Judicial Conference Committee on Codes of Conduct for United States Judges.

Our Court's automatic recusal system assists judges in their effort to comply with these governing standards. Under that system, the Clerk's Office and my individual courtroom deputy maintain lists of persons and entities whose involvement in a case triggers my recusal without action on my part. The lists, which I update regularly, include entities in which my spouse and I have a financial interest and attorneys with whom I have a familial or other disqualifying personal relationship. Earlier in my service as a judge, it also included my former law firm.

Criminal defendants occasionally have requested via a letter addressed directly to the Court that I recuse myself. I read these letters and consider the asserted bases for recusal. I have never, however, recused myself from a case based on this sort of request from a criminal defendant. I have not retained any list of such cases.

In addition, based on my recollection and search of my files, I have identified the following cases in which I recused or ruled on a motion or request to recuse:

*Hines v. Chandra*, 06cv2233 (2009): Plaintiff *pro se* questioned my fairness and asserted that I was biased against him after I issued an order granting summary judgment against him in which I noted that he had been disbarred. I denied his recusal motion based on the applicable legal standard.

*United States v. Zaidi*, 5:08cr187 (N.D. Ohio 2009): The *pro se* Defendant questioned my fairness and accused me of conspiring against him with the Government. Although I ultimately transferred the case to another Judge for trial for administrative reasons, I found the Defendant's allegations to be baseless and did not recuse myself.

*ACLU v. Ashbrook*, 211 F. Supp. 2d 873 (N.D. Ohio 2008): A Defendant serving as a state court judge filed a motion to disqualify based on the contention that, in the process of inquiring about scheduling issues, my then-law clerk had an *ex parte* conversation with a party. I denied the motion and retained the case, finding that the communications at issue related to purely procedural matters. Later, the defendant judge sent me a letter discussing his motives. Thereafter, when a renewed action was filed against the same parties, I recused myself *sua sponte* because of the out-of-court communication initiated by the state court judge. *See ACLU v. DeWeese*, Case No. 08cv2372 (N.D. Ohio 2008).

*Miller v. Simone*, 03cv2357, slip op. 129 (Oct. 30, 2006): In a written opinion, I granted defendant's motion to recuse on the grounds that she had retained counsel from Jones Day, where my brother is a partner.

*United States v. Goist*, 4:03cv1048 (2005): I recused myself *sua sponte* in a civil suit when the plaintiff had been a criminal defendant who had appeared before me, and his civil suit attempted to place a lien on my property and asserted claims against the prosecutor in his criminal case.

*DirectTV, Inc. v. Katakos*, 03cv2403 (2003): I recused myself *sua sponte* because a relative of one of my staff members was a named defendant in a related case.

*United States v. Millhouse*, 96cr294 (1998): I recused myself post-verdict after receiving a credible threat to my physical well-being from the Defendant. Another judicial officer handled the sentencing proceeding.

15. **Public Office, Political Activities and Affiliations**:

    a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

       I have not held public office other than judicial office. I have not had unsuccessful candidacies for elective office or unsuccessful nominations for appointed office.

    b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

       I provided a limited amount of volunteer policy support to Lee Fisher's reelection campaign for Attorney General of Ohio in 1994.

16. **Legal Career:** Answer each part separately.

    a. Describe chronologically your law practice and legal experience after graduation from law school including:

       i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

          From 1982 to 1983 I served as a law clerk to the Honorable Nathaniel R. Jones, United States Court of Appeals for the Sixth Circuit.

ii. whether you practiced alone, and if so, the addresses and dates;

I never practiced alone.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

1982
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2595
Summer Associate

1983-1984
Jones Day (Formerly Jones, Day, Reavis & Pogue)
901 Lakeside Ave.
Cleveland, Ohio 44114
Associate

1985-1991
Porter, Wright, Morris & Arthur, LLP
Huntington Building
925 Euclid Ave., 17th Floor
Cleveland, Ohio 44115
Partner (1991)
Associate (1985-1991)

1991-1994
Office of the Ohio Attorney General
30 East Broad St., 17th Floor
Columbus, Ohio 43266-0410
First Assistant Attorney General and Chief of Staff (1992-1994)
Chief Counsel (1991-1992)

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

Other than my role in facilitating alternative paths toward resolution of matters that come before me as a district court judge, I cannot recall serving as a mediator or arbitrator.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

From 1982 to 1983, I was a judicial law clerk, during which time I conducted legal research and drafted materials for Judge Jones.

From 1983 to 1991, I was a civil litigator in private practice.

From 1991 to 1993, I was Chief Counsel to the Ohio Attorney General. I personally litigated major cases on federal and state constitutional questions in both federal and state court, at the trial and appellate levels. I supervised all matters litigated by the 350 lawyers in the Office, including on questions relating to sovereign immunity, reapportionment, election law, environmental law, administrative law, criminal law, eminent domain, the state's constitutional spending and taxing authority, and state court jurisdictional issues, among others.

From 1993 to 1994, I was First Assistant and Chief of Staff to the Ohio Attorney General. I was responsible for oversight of all aspects of the office, including the legal, law enforcement, legislative, communications, and collections operations and the human resources and administrative aspects of the office, which employed in excess of 1,100 persons. I spent a significant amount of time in this role spearheading law enforcement-related initiatives and concentrating on improving the management and professionalism of the office.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

While in private practice (1983-1991), my typical clients were large corporations (including several Fortune 500 companies) as well as medium and small businesses. My early work was primarily in complex corporate litigation and particularly intellectual property litigation. For several years, I spent a substantial amount of my time as special counsel to the State of Ohio in connection with the Savings and Loans (S&L) Collapse. After resolution of the S&L cases, in addition to my work for large corporations, I also began representing small and mid-sized businesses, specifically in connection with shareholder disputes and cases involving trade secrets, trademarks, restrictive covenants, and covenants not to compete. I also did some First Amendment and products liability litigation. Beginning in 1990, I spent most of my time on a complex securities fraud case. My last major case in private practice was as co-counsel representing Lee Fisher in an election contest filed in connection with his 1990 election to Attorney General of the State of Ohio.

While serving in the Office of the Ohio Attorney General, my clients were the State of Ohio and its agencies and officers, including the Governor and other elected public officials.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

During my time as a practicing attorney, I tried a number of cases and otherwise appeared in court occasionally.

i. Indicate the percentage of your practice in:
   1. federal courts: 65%
   2. state courts of record: 35%
   3. other courts:
   4. administrative agencies:

ii. Indicate the percentage of your practice in:
   1. civil proceedings: 95%
   2. criminal proceedings: 5%

d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I estimate that I was counsel in 15-20 cases tried to verdict or judgment. In approximately six to eight of those cases I functioned as either sole or lead counsel, and in the others I participated either as co-counsel or associate counsel.

i. What percentage of these trials were:
   1. jury: 15%
   2. non-jury: 85%

e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

During my tenure at the Ohio Attorney General's Office, I participated in and supervised the petition for certiorari filed in the Supreme Court of the United States in connection with Ohio's Ethnic Intimidation/Penalty Enhancement Law. I also helped to draft the amicus brief filed on behalf of all states in support of the State of Wisconsin's successful effort to have its ethnic intimidation statute declared constitutional. While in private practice, I participated in drafting oppositions to petitions for certiorari in a handful of cases.

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

    a. the date of representation;

    b. the name of the court and the name of the judge or judges before whom the case was litigated; and

    c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *In re Election of November 6, 1990 for the Office of Attorney General of Ohio*, 62 Ohio St. 3d 1 (1991).

Paul E. Pfeiffer, Attorney General Lee Fisher's opponent in the 1990 election for the office of the Attorney General in the State of Ohio, challenged the election of Attorney General Fisher, claiming that alleged irregularities existed in the election process that rendered the election defective.

Because election contests in Ohio are direct actions before the Supreme Court of Ohio, the matter was litigated in a unique fashion. The parties submitted all factual evidence to the court through trial depositions, affidavits, exhibits and/or stipulations of fact. The depositions of more than forty witnesses were taken and submitted to the court and those depositions generated more than 150 exhibits for the court's consideration. A lengthy brief synthesized and summarized this evidence for the court, and delineated how those facts, as applied to controlling law, supported Lee Fisher's election. The election contest commenced during the last week of December 1990 and the Supreme Court heard oral argument on all of the parties' submissions on February 20, 1990. This compressed schedule necessitated expedited and sometimes around the clock trial preparation.

In this matter, I sat second chair to Richard M. Markus, representing Attorney General Lee Fisher. I conducted all of the research and drafted the briefs. I also assembled the factual record for submission to the court and played a significant role in devising and implementing litigation strategy decisions. I participated in outlining and preparing the argument to the Ohio Supreme Court, which Richard Markus made. The Court ruled in favor of Attorney General Fisher.

Co-counsel: Judge Richard M. Markus, 3903 North Valley Drive, Fairview Park, OH 44126, (440) 356-2728; Steven Kaufman, Thompson Hine LLP, 3900 Key Center, 127 Public Square, Cleveland OH 44114, (216) 566-5528. Opposing counsel: William C. Wilkinson, Thompson Hine LLP, 41 South High Street, Suite 1700, Columbus OH 43215, (614) 469-3266

2. *Gordon Square Restaurant & Lounge, Inc. v. Sergeant Roger Dennerll, et al.*, Case No. C86-1883, N.D. Ohio, August, 1990 (Judge Alvin I. Krenzler)

I represented plaintiffs *pro bono* in their action against two police officers and the City of Cleveland, under 42 U.S.C. § 1983. A jury heard the evidence for approximately ten days in the Honorable Alvin I. Krenzler's courtroom.

The trial involved allegations that two City of Cleveland vice officers who arrested the two plaintiffs for prostitution and testified against them in a criminal trial on those charges, had (1) arrested plaintiffs without probable cause to do so; (2) engaged in excessive use of force; (3) failed to provide sufficient medical attention to the plaintiffs when needed; and (4) intentionally inflicted emotional distress upon the plaintiffs by perjuring themselves in the course of the plaintiffs' criminal trial. The jury returned a verdict on all counts against the two police officers, crediting my clients' claims and finding the defendants liable under all theories of liability. Prior to subsequent trial phases on municipal liability and on damages, the case settled on terms favorable to the plaintiffs. I served as the lead lawyer for plaintiffs. An associate from my former law firm assisted.

Co-counsel: Robert Mann, Last known phone number: (216) 766-5081. Opposing counsel: Kathleen Martin, Last known phone number: (216) 664-2800

3. *Newman v. Voinovich*, Case No. C2-92-248, S.D. Ohio (Judge George Smith); Appeal Case No. CA92-3345, United States Court of Appeals for the Sixth Circuit.

As primary counsel, I represented then-Governor George V. Voinovich in connection with plaintiff's challenge to the constitutionality of Governor Voinovich's system for appointing persons to fill in-term judicial vacancies in the State of Ohio. The plaintiff claimed that the trilogy of cases issued by the Supreme Court of the United States addressing the propriety of patronage hiring and discharges (*Elrod, Branti, and Rutan*) mandated the conclusion that the Governor's appointment practices violated the plaintiff's and other would-be candidates' First Amendment rights of expression and association. Plaintiff also asserted violations of the Voting Rights Act.

The court ordered expedited discovery, followed by a hearing, on plaintiff's request for a preliminary injunction. The plaintiff sought to prohibit the Governor from making further judicial appointments in the State of Ohio unless and until the Governor instituted a bipartisan screening process for purposes of choosing judicial candidates.

Following the hearing, which included testimony of numerous fact and expert witnesses, the court entered judgment in favor of Governor Voinovich and dismissed plaintiff's complaint on the merits *sua sponte*. Plaintiff appealed. I argued the appeal in the Sixth Circuit, again representing Governor Voinovich as the appellee. The Court of Appeals ruled in the Governor's favor and the Supreme Court of the United States denied certiorari.

Co-counsel: Patrick A. Devine, Schottenstein, Zox & Dunn, 250 West Street, Columbus, OH 43215, (614) 462-2238. Opposing counsel: Bruce Inglis Petrie, 2787 Walsh Rd., Cincinnati, OH 45208-3428.

4. *Preterm Cleveland v. Voinovich,* Common Pleas Case No. 92CV-01-528 (Judge Guy Reese); Ohio Tenth District Court of Appeals Case No. 92-AP 791

In this matter, I represented defendants then-Governor George V. Voinovich, the Ohio Department of Health, and then-Attorney General Lee Fisher. Plaintiffs challenged the constitutionality of House Bill 108, the Ohio Law requiring physician-driven informed consent and a 24-hour waiting period prior to the performance of an abortion in the State of Ohio. The trial court conducted a hearing on plaintiffs' request for a preliminary injunction and received evidence regarding plaintiffs' claim that House Bill 108 violated the plaintiff's privacy and First Amendment rights under the United States Constitution. In response, the State argued that the statutes were constitutional under the standard adopted by the Third Circuit in *Planned Parenthood v. Casey*, 947 F.2d 682 (3d Cir. 1991). The court consolidated plaintiffs' federal claims with the trial on the merits of plaintiffs' state law claims. After trial, the trial court declared House Bill 108 unconstitutional under both the United States and Ohio Constitutions.

The state appealed the matter to the Tenth District Court of Appeals and in October 1992, I argued the appeal on behalf of the State. The Tenth District reversed the trial court and ruled in the State's favor, relying on the undue burden standard, which had then been adopted by the Supreme Court of the United States in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The Supreme Court of Ohio thereafter refused to hear the matter.

Co-counsel: Andrew I. Sutter, Assistant General Counsel, JP Morgan Chase & Co., 1111 Polaris Parkway, Columbus, OH 43240, (614) 248-6478; Andrew Steven Bergman, Deputy Dir. for Legal Affairs, State of Ohio, Ohio EPA, Lazarus Government Center, 50 W Town St., Columbus, OH 43215, (614) 644-2782. Opposing Counsel: Kevin F. O'Neill, Associate Professor of Law, Cleveland - Marshall College of Law, Cleveland State University, 1801 Euclid Avenue, Cleveland, OH 44115-2223, (216) 687-5282.

5. *State ex rel, Cincinnati Post v. the Second & Sixth District Courts of Appeal*, Case No. 91-2552, decided December 14, 1992, 65 Ohio St. 3d 378 (before the Ohio Supreme Court)

This was a direct action in the Supreme Court of Ohio seeking a writ of mandamus against the Second and Sixth District Courts of Appeals. The *Cincinnati Post* sought the production of records relating to the Courts' consideration of minors' requests to bypass the statutory obligation to inform their parents or guardians prior to obtaining an abortion in the State of Ohio. I was lead counsel representing the Courts of Appeals. I argued to the Supreme Court that the importance of protecting the anonymity of minors involved in the judicial bypass proceedings outweighed petitioner's claimed right to the documents.

The Supreme Court of Ohio ruled in favor of the newspaper, concluding that the State's interest in protecting the anonymity of the minor was not sufficient to override the First Amendment interest in free access to the Courts. The Supreme Court further found that the State should attempt to protect the anonymity of the minor through more narrowly drawn means.

Co-counsel: Andrew I. Sutter, Assistant General Counsel, JP Morgan Chase & Co., 1111 Polaris Parkway, Columbus, OH 43240, (614) 248-6478. Opposing counsel: David L. Marburger, Partner, Baker & Hostetler LLP, 3200 National City Center, Cleveland, OH 44114, (216) 621-0200.

6. *Diamond Co. v. Gentry Acquistion Corp.,* Case No. 137875, Cuy. Cty. Common Pleas, 48 Ohio Misc. 2d 1, 531 N.E.2d 777 (1988) (Judge James J. McMonagle)

In this case, I was the lead lawyer defending Gentry Clothiers. Diamonds Men's Stores claimed that Gentry engaged in false advertising by asserting that it sold top quality clothing at "about half" the price of regular-priced men's retailers. The court conducted a several day trial on plaintiff's request for a preliminary injunction.

After the preliminary injunction hearing, the court found that the plaintiff: (1) was not entitled to a preliminary injunction; and (2) had very little likelihood of ever succeeding on the merits of its underlying claims against Gentry. Judge James J. McMonagle issued a written opinion delineating his findings. Sometime following the court's ruling on the preliminary injunction, the parties settled their dispute.

Co-counsel: Hugh E. McKay, Partner, Porter, Wright, Morris & Arthur, LLP, 925 Euclid Ave., Suite 1700, Cleveland, OH 44115, (216) 443-2580. Opposing counsel: Jeffrey H. Friedman, Partner, Friedman, Domiano & Smith Co., L.P.A., 55 Public Square, Suite 1055, Cleveland, OH 44113, (216) 586-5520.

7. *Pumper v. Kawasaki,* Case No. 75730, Cuy. Cty. Common Pleas (Judge George McMonagle)

In this products liability case, I sat second chair in the defense of a manufacturer. Plaintiff claimed that a three-wheeled all-terrain vehicle produced by Kawasaki was defectively and/or negligently designed, that it was negligently manufactured, and that Kawasaki had failed properly to warn plaintiff regarding the use of the vehicle. In April 1988, following approximately eight days of trial, the jury returned a verdict in favor of the defendant Kawasaki.

Co-Counsel: Terrance M. Miller, Huntington Center, 41 South High Street, Columbus, OH 43215-6194, (614) 227-2142. Opposing Counsel: Andrew P. Krembs, Owner, Andrew P. Krembs & Associates Co. LPA, 55 Public Square, Suite 1700, Cleveland, OH 44113, (216) 875-7500.

8. *Harris v. Arthur Andersen & Co.*, Ohio Ct. of Claims

This action against Arthur Andersen & Co. was one of the most substantial aspects of the *Home State* litigation in which my firm, Porter, Wright, Morris & Arthur, acted as special counsel to the Superintendent of Savings & Loans and the State of Ohio. The State alleged, in the name of the Superintendent of Banks and on behalf of the depositors and creditors of Home State Savings Bank, that Arthur Andersen negligently discharged its professional functions as the auditors of Home State Savings Bank, thus contributing to its collapse. Specifically, the State alleged that Arthur Andersen failed to address the dangers inherent in the extensive reverse repurchase transactions in which Home State had engaged with ESM Securities, and had given Home State the equivalent of an auditing clean bill of health, despite its precarious financial position and its failure to maintain a sufficient net worth to cover its potential losses.

The matter went to trial in the Ohio Court of Claims before a visiting judge. Since the matter presented some questions triable to a jury and some that were not, the court began jury trial in February 1988. Following six full weeks of trial, the plaintiff completed the submission of its case in chief to the jury. Before the defendant began its case, the parties settled, and the trial ended without deliberation by the jury. Under the settlement, Arthur Andersen's insurers paid a significant sum of money to the State.

I was one of six lawyers who participated in the trial in the Court of Claims.

Lead co-counsel: Robert W. Trafford, Huntington Center, 41 South High Street, Columbus, OH 43215-6194, (614) 227-2149. Opposing counsel: James R. Adams, Frost Brown Todd LLC, 2500 PNC Center, 201 East 5th Street, Cincinnati, OH 45202, (513) 651-6947.

9. *Celebrezze v. Dayton Daily News*, Case No. 88-127, Cuy. Cty. Common Pleas; on appeal, 41 Ohio App. 3d 343 (Judge Terrence O'Donnell)

In this matter, I was one of three counsel of record representing the *Dayton Daily News* in a defamation action filed by former Supreme Court of Ohio Justice James J. Celebrezze against the newspaper and its editorial cartoonist. On the opening day of trial, the court entered judgment in favor of the newspaper and cartoonist. Plaintiff appealed the matter to the Eighth District Court of Appeals in Cuyahoga County and, again, the newspaper prevailed. This was the first case in Ohio in which a court declared that an editorial cartoon, as a matter of law, constitutes an expression of opinion protected by the First Amendment and the Ohio Constitution.

Lead co-counsel: James Pohlman (Deceased). Opposing counsel: Don C. Iler, Iler & Iler Co., LPA, 101 W. Prospect Ave., 1650 Midland Building, Cleveland, OH 44115, (216) 696-5700.

10. *The Ivy Med. Group, Inc. v. Hummer, M.D.*, Case No. 141572, Cuy. Cty. Common Pleas (Judge James J. McMonagle)

In this matter, I served as lead counsel to entrepreneurs who pioneered the provision of emergency care services through urgent care centers in the State of Ohio. Their business initially was successful and highly profitable. The entrepreneurs sold shares to a large out-of-state interest that, in partnership with a number of other investors, gained majority control of the shares in the corporation. I successfully defended against a claim brought by the corporation that sought a temporary restraining order and preliminary and permanent injunctions against one of the entrepreneurs who was also head of the medical staff for the urgent care centers. After the court refused to enter injunctive relief against my client, I instituted an action on his behalf (and that of the second entrepreneur) in which we asserted that the majority shareholders of the corporation had engaged in an effort to "squeeze out" my clients, and had violated the securities laws and the corporation's own shareholder agreements. After extensive discovery and on the eve of the scheduled hearing on my clients' request for the appointment of a receiver and the dissolution of the corporation, the matter settled, resulting in a buy out of the entrepreneurs' shares.

Co-counsel: William R. Weir, 925 Euclid Ave., Suite 1700, Cleveland, OH 44115-1483, (216) 443-2540. Opposing counsel: Ira Kaplan, Benesch Friedland Coplan & Aronoff LLP, 200 Public Square, Suite 2300, Cleveland, OH 44114-2378, (216) 363-4567.

18. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

During my time in private practice, I was a full-time litigator. In addition to my courtroom work, I was involved in several substantial representations that did not proceed to trial during my involvement with them. For example, during my first several years in practice, I worked on a number of patent and intellectual property disputes relating to oil additives. From 1985 to 1988, most of my practice related to the Savings and Loan collapse, in which I was part of a team representing the State of Ohio and was engaged in constant motion practice and other pre-trial proceedings on the State's behalf in various courts of Ohio and of other states. In 1990, I spent a substantial portion of my year representing a rental car company in a civil Racketeer Influenced and Corrupt Organizations Act (RICO) case in which I was one of two lead attorneys and won a substantial victory freezing defendants' assets.

While Chief Counsel and later First Assistant Attorney of Ohio, I supervised all litigation in the Office and counseled senior government officers on legal questions. I coordinated state-wide law enforcement initiatives, such as boarding up of drug houses, I helped coordinate legislative efforts to strengthen the authority of the Attorney General's Office in areas such as Medicaid fraud and environmental enforcement, and had supervisory

authority over the Ohio Bureau of Criminal Identification and Investigation and the Ohio Police Officers Training Academy. I directly managed special legal situations, such as representations for the reapportionment and congressional redistricting in the State of Ohio in 1991-92. In that matter, special counsel represented the majority and minority members of the Reapportionment Board, but both groups of special counsel reported to me (necessitating a unique and delicate conflicts treatment). In addition, I personally represented the interests of the State of Ohio in the reapportionment litigation filed in the United States District Court for the Southern District of Ohio and the Supreme Court of Ohio, and I argued on behalf of the State in the United States Court of Appeals for the Sixth Circuit.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

"Handling Patent, Copyright, and Trademark Cases" (2003, 2005 & 2007-Present)—Berkeley Center for Law and Technology. I am a faculty member at an annual three-day intensive program to educate Federal Judges regarding the handling of patent, copyright, and trademark matters including as to substantive, procedural, and case management issues in all three fields.

Patent Litigation (2002, 2003, 2004 & 2006)—Case Western Reserve University School of Law ("CWRU"). Three credit hour course addressing matters relating to case management, jurisdiction, procedure, claim construction, trial tactics, client management, counsel's role in the litigation process, the use of technology in patent cases, and key substantive areas of patent law such as obviousness, infringement, damages, and *Daubert*.

From 1998 to 2006, I have been a periodic *pro bono* visiting lecturer at CWRU, conducting presentations in advanced criminal procedure (including one for Prof. Paul Giannelli's class in roughly February of 2006), trial tactics, and the use of technology in the courtroom.

ALI-ABA Course of Study: In 1999, 2002 to 2006, and 2008, I served as a faculty member for "Trial of a Patent Case," an annual, multi-day program to train lawyers on best practices for the handling of patent matters. Judicial officers, practitioners, in-house counsel, and experts present, preside over, and critique a mock patent trial, and give presentations on substance, procedure and tactics.

Research, Advocacy, and Writing (1981-1982)—CWRU.

20. **Deferred Income/ Future Benefits**: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or

customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

I have no such arrangements.

21. **Outside Commitments During Court Service**: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

While I may consider teaching again at some point in the future, I would not do so soon after taking the appellate bench. I would hope, however, to continue participating in the development of the law through lectures, law-related advisory boards and panels, and similar activities undertaken without compensation. I would ensure strict adherence to all ethical rules in any such activity. I have no other plans, nor any commitments or agreements, to pursue outside employment.

22. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

See attached Financial Disclosure Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

My spouse is a partner at Covington & Burling and my brother is a partner at Jones Day. Both firms have practices that may cause them to appear before the Federal Circuit. I always have recused myself from all matters involving either firm and will continue to do so, if confirmed to a new court. I also will recuse myself with respect to the clients of either of these firms to the extent appropriate under all governing statutes, canons, and rules of ethics or with respect to entities in which I or my spouse have a financial interest that would require recusal (though I do not anticipate this would occur on other than rare occasions). I know of no other potential conflicts of interest.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

In my present position and if confirmed as a Circuit Judge, I will continue to adhere to all statutory and ethical obligations regarding recusal and will disclose any circumstances where any conflict or potential appearance of conflict arises, even where recusal is not mandated. I will follow all guidelines provided for the judiciary in all relevant statutes, canons, or advisory opinions. When necessary, I will also seek guidance from the General Counsel of the Administrative Office of United States Courts and the Committee on Codes of Conduct for United States Judges.

25. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

Prior to taking the bench in 1994, I was actively engaged in *pro bono* representations:

*Gordon Square Restaurant & Lounge, Inc. v. Sergeant Roger Dennerll*, Case No. C86-1883, N.D. Ohio, August, 1990 (Judge Alvin I. Krenzler): I devoted significant amounts of time over a two-year period to the representation of the plaintiffs in this action. The action involved two women falsely accused of prostitution and solicitation, who had been physically abused by certain police officers in the process. These women had no money to sue the City and no access to lawyers. My firm allowed me, with the help of another associate in the firm, to conduct extensive discovery in this case and spend a full two weeks trying the matter in Federal District Court on a *pro bono* basis.

I was appointed both by the Southern District of New York (as an intern during law school) and by the Court of Appeals for the Sixth Circuit (soon after completing my clerkship) to act as counsel for indigent defendants and appellants, respectively. In connection with the Sixth Circuit matter, I received compensation at the statutory rate and, in fact, was given a compensation enhancement based on the amount of work performed in the matter, but was paid at a rate far below my normal private practice rates. Again, these efforts were made possible by the willingness of the law firms with which I was affiliated to allow me to participate in these court-sponsored programs.

Assistant Attorney General Patrick Devine and I drafted an amicus brief for the State of Ohio to file in support of the State of Massachusetts' defense of its IOLTA Program (the program by which lawyers are required to place certain funds into a pooled trust so that the interest generated may be used to help provided civil legal services to the indigent). We were successful in getting 22 other states to join our effort in support of Massachusetts, even though we filed the amicus brief at the Court of Appeals level, which is unusual for a state to do.

In addition, prior to taking the bench I was involved in a number of charitable activities in the legal community:

I was a founding Board Member of the Ohio Legal Assistance Foundation, whose mission is to help provide funding for and determine the appropriate distribution of funds to Ohio's Legal Aid community. I was on the Committee appointed by Ohio Chief Justice Thomas Moyer to create (via legislation and otherwise), fund and staff this Foundation.

I conceived and spearheaded "Project A.G.", or "Project Above Ground," in which employees of the Attorney General's Office worked on their own time to raise money for victims of the Mid-West floods in 1993. We challenged all other State Attorney General offices to follow our lead and donated all funds to the Red Cross.

I supervised and participated yearly in another Attorney General Office project – "Project Wish List" – which provides goods and funds to domestic violence shelters across the State of Ohio.

Since taking the bench, my ability to continue in *pro bono* and charitable activities has been limited by the ethical restrictions placed upon judicial officers. As a judicial officer, I have attempted to encourage *pro bono* legal activity in a number of ways. I am a member of the court committee that proposed use of court admission fees to repay volunteer lawyers for the costs of expenses incurred when accepting *pro bono* assignments in civil cases. The system proposed by the Committee has since been adopted by the full court and is used regularly. I also have spoken to law firms and bar association gatherings about this new program and the importance of accepting *pro bono* civil appointments generally.

I have committed a substantial amount of time to educating students and lawyers on best practices in the litigation process. Among other things, I have been an active member of the John M. Manos Inn of Court and was its president for over three years. The Inn's purpose, in addition to fostering professionalism and ethics in the profession, is to encourage established lawyers to mentor young lawyers who have less access to older practitioners (i.e., who do not have the luxury of a large law firm practice).

I regularly teach and lecture at law schools for little or no salary, preside over moot court competitions, welcome new students, sponsor externships and often welcome students of all ages and from all communities to my courtroom in an effort to foster an understanding of the legal system. I regularly agree to speak at functions and programs designed to foster a better understanding of the law and the various players in the judicial system, always with no remuneration.

I was among the first judges in the country to spearhead the addition of technology to federal courtrooms, in large measure to level the playing field with respect to the use of persuasive technology between the government and indigent defendants and between the

well-heeled and the less financially fortunate. I organized a free on-going CLE program to familiarize the bar with the new technology.

Finally, I have volunteered many hours to my local community and schools. Among other things, I have served as a coach in the Chagrin Falls Community Soccer League and as a coach for the Chagrin Falls Middle School girl's lacrosse team.

26. **Selection Process**:

a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

There is no selection commission for the Federal Circuit.

Early in 2009, I spoke with Senator Sherrod Brown and with staff members of Senator George Voinovich about my interest in a court appointment in the Washington, D.C., area, where my husband resides and works. I contacted the White House Counsel's Office in writing in February 2009 to request consideration for any future vacancy on the United States Court of Appeals for the Federal Circuit. In May 2009, I met with attorneys from the White House Counsel's office to reiterate my interest in the Federal Circuit. In September 2009, the Honorable Alvin Schall took senior status, creating an opening on the Court of Appeals for the Federal Circuit. I interviewed with White House Counsel Gregory Craig on October 12, 2009. Since January 2010, I have been in contact with pre-nomination officials at the Department of Justice. I interviewed again with attorneys from the White House Counsel's Office and the Department of Justice on February 12, 2010. On March 10, 2010, the President submitted my nomination to the Senate.

b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.

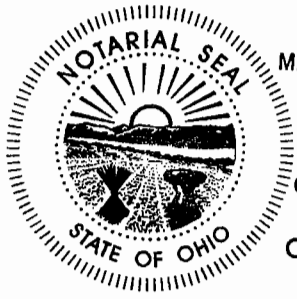
AFFIDAVIT

I, **KATHLEEN McDONALD O'MALLEY**, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

March 9, 2010
(DATE)

Kathleen M. O'Malley
(NAME)

Madeline M Bitzan Powell
(NOTARY)




MADELINE M BITZAN-POWELL
NOTARY PUBLIC
STATE OF OHIO
Comm. Expires
October 07, 2012
Recorded in
Cuyahoga County

**Kathleen McDonald O'Malley**
**Judge, United States District Court**
**Northern District of Ohio**
**Carl B. Stokes United States Courthouse**
**801 West Superior Avenue**
**Cleveland, Ohio 44113-1838**

April 15, 2010

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This letter is to supplement my response to the U.S. Senate Judiciary Committee questionnaire. Despite multiple thorough searches (and likely because of the common nature of my name and its variations), I missed a few items while conducting my initial research. In addition, when doing my original research to prepare the questionnaire, I did not realize that I needed to include interviews I gave in my capacity as an employee of the Ohio Attorney General's Office and relating to the operations or policies of that office, and I only referenced such interviews in summary. As a result, my initial submission was incomplete. I apologize for missing certain items in my initial review and for not fully understanding the instructions with respect to other items. After conducting as comprehensive a search as I could, I have identified the following additional items. I regret any difficulties this has created for the Committee.

**Q. 9. <u>Bar Associations</u>: List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.**

In 1995, I served on a joint committee of Federal, State and Local judges in Ohio, intended to study ways to speed up death penalty appeals. The committee met once and did not produce any written product or announce any results.

**<u>Q. 12. Published Writings and Public Statements</u>:**

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or

edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

"Memorial Resolution in Honor of John M. Manos, 1922-2006," Sixth Circuit Judicial Conference, 2007 Annual Report and Roster of Judges. (copy supplied)

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

John Caniglia, "Federal Judge John Manos, Is Dead at 83," *Cleveland Plain Dealer*, July 7, 2006 (copy supplied)

David Horrigan, "Videoconferencing Is Focus in Asylum Appeal," 228 N.Y.L.J. 5 (December 24, 2002) (copy supplied)

Karl Turner, "Call Me Kate," *Cleveland Plain Dealer*, January 9, 2000 (copy supplied)

Mark Rollenhagen, "A Courtroom Revolution: U.S. District Judge Kathleen M. O'Malley Gives Her Space to the Future: Beaming Witness Before a Jury and Launching Materials from Laptops," *Cleveland Plain Dealer*, September 21, 1998 (copy supplied)

"2 in Ohio Get Nod from Senators for Federal Judgeships Vacancies Filled in Cleveland, Toledo," *Columbus Dispatch*, October 9, 1994 (copy supplied)

"Just a Matter of Time: Federal Judge Appointee Awaits Robes," *Cleveland Plain Dealer*, September 22, 1994 (copy supplied)

Laura R. Hamburg, "Cleveland Attorney Recommended for Federal Bench," *States News Service*, Aug. 24, 1994 (copy supplied)

"O'Malley Nominated for Federal Court Seat," *Akron Beacon Journal*, August 18, 1994 (copy supplied)

Alan Johnson, "Fisher Counsel May Get Judgeship," *Columbus Dispatch*, August 18, 1994 (copy supplied)

Steve Luttner, "Fisher Aide Top Choice for Federal Judgeship," *Cleveland Plain Dealer*, August 17, 1994 (copy supplied)

In addition to these items, the following is a list of newspaper articles including public statements made in my capacity as First Assistant and Chief Counsel to the Attorney General for the State of Ohio between 1991 and 1994. While the fact and likely sources of these statements were disclosed in my original response to Question 12(e), they were not catalogued because, as I noted, they "relate to the operations and initiatives of the office and/or to the status of legal matters of interest to the office" and expressed "the legal policy of the Office of the Attorney General," and I did not know they were responsive. Searches of multiple databases reveal the following items in this category:

"Trial Alternatives," *The Miami Herald*, Nov. 10, 1994 (copy supplied)

"A Traitor to the Cause," *Cleveland Plain Dealer*, September 25, 1994 (copy supplied)

Jonathan Riskind, "State Lawyers to Argue Both Sides of Issue," *Columbus Dispatch*, September 14, 1994 (copy supplied)

Tom Diemer, "Personal Injury Liability Bill Dead for Now," *Cleveland Plain Dealer*, June 30, 1994 (copy supplied)

"State Reduces Payments to Tax Collector," *Columbus Dispatch*, June 1, 1994 (copy supplied)

"Collections Work Not Put Out for Bid," *Cleveland Plain Dealer*, April 3, 1994 (copy supplied)

"Fisher Opponent Hammers on No-Bid Work," *Columbus Dispatch*, April 3, 1994 (copy supplied)

"Competition Can Cut Costs for Taxpayers," *Columbus Dispatch*, March 30, 1994 (copy supplied)

Robert Ruth, "No-Bid Process 'Unusual'," *Columbus Dispatch*, March 27, 1994 (copy supplied)

"Pollution Bill Blasted; Limo Firms Feel Taken for Ride," *The Wall Street Journal*, March 25, 1994 (copy supplied)

"Unbid State Pact was Proper, Senator Says . . . ," *Columbus Dispatch*, March 18, 1994 (copy supplied)

Robert Ruth, "Lawmaker Launches Probe into Unbid Contract for Debt Collector," *Columbus Dispatch*, March 10, 1994 (copy supplied)

"$37 Million Paid by State for Job Workers Do Cheaper," *Columbus Dispatch*, March 6, 1994 (copy supplied)

"Theft Conviction May Derail Nominee," *Cleveland Plain Dealer*, February 3, 1994 (copy supplied)

"Counsel Hired to Investigate Ferguson Case: New Evidence Prompts Probe of Alleged Campaign Contribution Shakedown," *Akron Beacon Journal*, October 30, 1993 (copy supplied)

"Attorney General Taps Counsel to Probe Ferguson Donations," *Columbus Dispatch*, October 30, 1993 (copy supplied)

"Lawsuit Abuse: Inmates Inundate State Lawyers, Jack Up Costs," *Columbus Dispatch*, October 21, 1993 (copy supplied)

"Taking the State to Court is Prisoners' Strong Suit," *Columbus Dispatch*, October 11, 1993 (copy supplied)

"Ex-Legislator Cordray Named State Solicitor," *Columbus Dispatch*, September 18, 1993 (copy supplied)

"Counsel with Clout: John Climaco Succeeds on Grit, Connections," *Cleveland Plain Dealer*, August 22, 1993 (copy supplied)

"Lee Fisher Fires Assistant Over Congressional Run," *Columbus Dispatch*, August 5, 1993 (copy supplied)

"Court Upholds Law on Abortion Wait Ruling that Declared Law Unconstitutional Overturned on Appeal," *Akron Beacon Journal*, July 28, 1993 (copy supplied)

"Political Posturing Overshadows Fraud Case," *Cleveland Plain Dealer*, April 11, 1993 (copy supplied)

"Fraud Case Becomes a Battleground for Politicians," *Cleveland Plain Dealer*, April 8, 1993 (copy supplied)

"Compuserve Says Clinton's [sic] Unplugged," *Cleveland Plain Dealer*, March 14, 1993 (copy supplied)

"Cleveland Lawyer in Spotlight as Special Counsel," *Columbus Dispatch*, January 31, 1993 (copy supplied)

"Court Looks at Teen Abortions," *Cleveland Plain Dealer*, December 15, 1992 (copy supplied)

"Library Project Turns to Conflict Over Contracting: Black Business Alleges Improprieties," *Columbus Dispatch*, November 8, 1992 (copy supplied)

"Abortion Wait Law Validity Argued," *Cleveland Plain Dealer*, October 28, 1992 (copy supplied)

Roger Snell, "Juvenile Abortions Sealed in Secrecy Cincinnati Post Seeks Open Records on Judges' Rulings, with Identification of All Minors Omitted," *Akron Beacon Journal*, October 14, 1992 (copy supplied)

"McDonald's, Wendy's and Coke Won't be at State Fair," *Associated Press*, July 3, 1992 (copy supplied)

"Fair Told 150-Plus Workers Illegally Hired," *Cleveland Plain Dealer*, July 2, 1992 (copy supplied)

"Ohio High Court to Rule on Law," *Akron Beacon Journal*, June 30, 1992 (copy supplied)

Cheryl Curry, "State Attorneys Defend a Law They Don't Like, At Least One Isn't Sad that She Failed to Rescue Abortion Restrictions," *Akron Beacon Journal*, June 10, 1992 (copy supplied)

"Stay of Abortion Ruling Mulled: If Granted, State Could Enforce New Law While it Appeals," *Columbus Dispatch*, May 29, 1992 (copy supplied)

Catherine Candisky and Mary Yost, "Judge Throws Out Ohio Abortion Law," *Columbus Dispatch*, May 28, 1992 (copy supplied)

"Judge Rules Ohio Abortion Law Unconstitutional," *United Press International*, May 27, 1992 (copy supplied)

"Ohio Judge Promises Ruling on Pre-Abortion Information," *Chicago Tribune*, May 27, 1992 (copy supplied)

"Ohio Judge Promises Abortion Decision Before Thursday," *Associated Press*, May 26, 1992 (copy supplied)

"Abortion Ruling Due Soon: ACLU Fights Counseling Law," *Associated Press*, May 18, 1992 (copy supplied)

"Abortion Hearings to Resume: ACLU Challenges Law to Take Effect at End of Month," *Columbus Dispatch*, May 17, 1992 (copy supplied)2

"Panel Ponders Naming Names in News Media," *Cleveland Plain Dealer*, March 31, 1992 (copy supplied)

"ACLU Asks for Delay in State's New Abortion Law," *Columbus Dispatch*, March 29, 1992 (copy supplied)

"Voinovich's Naming of Judges Defended," *Cleveland Plain Dealer*, March 27, 1992 (copy supplied)

"Lawyer Denied Clemency Records," *Cleveland Plain Dealer*, January 31, 1992 (copy supplied)

"Parole Board Denies Attorney's Speculation," *Columbus Dispatch*, January 31, 1992 (copy supplied)

"Celeste Didn't Follow Clemency Rules, Judge Told," *Columbus Dispatch*, January 30, 1992 (copy supplied)

"State Says it Has Proved Case Against Celeste," *Cleveland Plain Dealer*, January 29, 1992 (copy supplied)

"Celeste's Pardon Process Assailed as Trial Starts," *Columbus Dispatch*, January 29, 1992 (copy supplied)

"Wright's Vote Saves the Day for GOP Friend: Crucial Vote by Justice Favors Lawyer Who Holds Wright's Campaign Stash," *Akron Beacon Journal*, December 4, 1991 (copy supplied)

"Ruling Cited in Lawsuit: Steiner Could be Liable for Statements," *Cleveland Plain Dealer*, November 8, 1991 (copy supplied)

Roger Snell, "Split on Union Wages Gov. Voinovich Is Unhappy with Attorney General for Trying to Win Rehearing in Supreme Court of Pay Issue in Construction of Hospitals and Nursing Homes," *Akron Beacon Journal*, November 6, 1991 (copy supplied)

Vindu P. Goel, "TRW Credit Unit Close to Settling Suit," *Cleveland Plain Dealer*, October 30, 1991 (copy supplied)

Lee Leonard, "Panel Asked to Hold Off on Fee Cuts Out-Of-State Trash," *Columbus Dispatch*, October 25, 1991 (copy supplied)

"Attorney General's Chief Counsel 'Always Wanted to be a Lawyer,'" *Columbus Dispatch*, August 19, 1991 (copy supplied)

"Appeal of TCI Ruling Up in the Air," *Akron Beacon Journal*, July 19, 1991 (copy supplied)

Thank you again for your consideration.

Very truly yours,

Kathleen M. O'Malley

Kathleen M. O'Malley

cc:
The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

United States Senate
Committee on the Judiciary

Questionnaire for Judicial Nominees

# Attachments to Letter of April 15, 2010

Kathleen M. O'Malley
Nominee to be United States Circuit Judge
For the Federal Circuit

# Sixth Circuit Judicial Conference

# 2007

# Annual Report

# and

# Roster of Judges

May 9-12, 2007
The Grove Park Inn
Asheville, North Carolina

Danny J. Boggs
Chief Judge

# A Message From the Chief Judge

## Welcome

I take great pleasure in welcoming you to the sixth judges-only conference of the Sixth Circuit. As many of you know, the Court of Appeals adopted Rule 205 in 1999 to be effective beginning with the 2000 conference. That rule calls for the regular rotation between conferences that are open to all attorneys admitted to practice in the federal courts of our circuit and judges-only conferences.

Our open conference in Detroit last year was highly successful and we look forward to an excellent open conference next year in Chattanooga. Thanks, as always, is owed to our Standing Committee on Conference Planning, chaired by Chief District Judge James G. Carr of the Northern District of Ohio.

Judge Carr and his committee of judges and lawyers, with the assistance and support of the Federal Judicial Center, has given us another outstanding group of topics and speakers. Their efforts will ensure another stimulating and enjoyable conference.

### COMMITTEES AND APPOINTMENTS

The Sixth Circuit continues to be well represented by the many judges who serve on the committees of the Judicial Conference of the United States and other special assignments for the administration of justice. The complete roster of committee members from the Sixth Circuit is as follows:

Hon. Sandra S. Beckwith
Southern District of Ohio
Committee on Defender Services

Hon. Paul D. Borman

Eastern District of Michigan
Committee on Court Administration
and Case Management

Hon. R. Guy Cole, Jr.
Sixth Circuit
Advisory Committee on Bankruptcy Rules

Hon. Jennifer B. Coffman
Eastern and Western Districts
of Kentucky
Committee on Judicial Resources

Hon. Robert L. Echols
Middle District of Tennessee
Committee on the Judicial Branch

Hon. Richard Alan Enslen
Western District of Michigan
Committee on Criminal Law

Hon. Julia Smith Gibbons
Sixth Circuit
Chair, Committee on the Budget

Hon. Ronald Lee Gilman
Sixth Circuit
Committee on Federal-State Jurisdiction

Hon. James S. Gwin
Northern District of Ohio
Committee on Information Technology

Hon. David A. Katz
Northern District of Ohio
Committee on the Administrative Office

Hon. Damon J. Keith
Sixth Circuit
Committee on the Judicial Branch
Hon. David W. McKeague
Sixth Circuit
Committee on the Budget

Hon. Joseph H. McKinley, Jr.
Western District of Kentucky
Committee on Financial Disclosure

Hon. James D. Moyer
Western District of Kentucky
Committee on Federal-State Jurisdiction

Hon. Kathleen M. O'Malley
Northern District of Ohio
Committee on Space and Facilities

Hon. Dan A. Polster
Northern District of Ohio
Committee on the Administration of the
Magistrate Judge System

Hon. Gordon J. Quist
Western District of Michigan
Chair, Committee on Codes of Conduct

Hon. Edmund A. Sargus, Jr.
Southern District of Ohio
Committee on Space and Facilities

Hon. Charles R. Simpson III
Western District of Kentucky
Committee on International Judicial
Relations

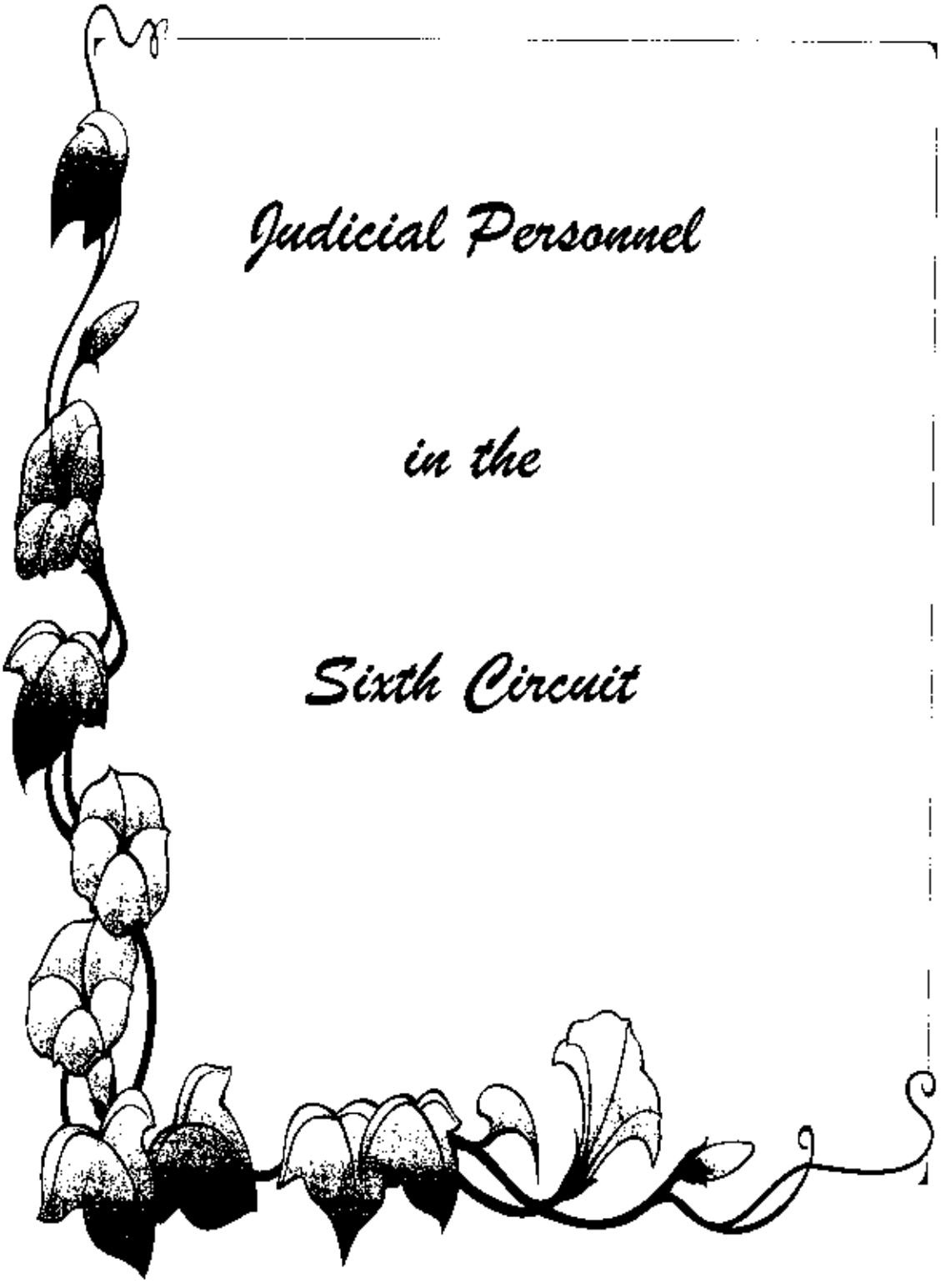
Hon. David T. Stosberg
Western District of Kentucky
Committee on the Administration of the
Bankruptcy System

Hon. Jeffrey S. Sutton
Sixth Circuit
Advisory Committee on Appellate Rules

**CONCLUSION**

I want to take this opportunity to express my appreciation once again to the many District Judges of this circuit who have responded to my requests for assistance by agreeing to sit with the Court of Appeals this year. The Court could not have functioned effectively without your continuing help.

Again, I welcome each of you to this Conference and thank the many judges and staff who have worked so hard to make this a great Conference.



# Judicial Personnel

# in the

# Sixth Circuit

## *Deaths*

***John M. Manos.*** The Honorable John M. Manos, Senior District Judge for the Northern District of Ohio, passed away on July 6, 2006 at the age of 84. A lifelong Cleveland resident, Judge Manos attended Case Institute of Technology at Case Western Reserve University where he received a B.S. in Metallurgy. During World War II he was on active duty with the U.S. Navy. After the war, Judge Manos attended Cleveland Marshall Law School. He served as a Judge of the Court of Common Pleas for Cuyahoga County and a Judge of the Ohio Court of Appeals for the Eighth Appellate District. Judge Manos was appointed to the United States District Court in 1976 and took senior status on April 1st, 1991. Judge Manos continued to serve the Court until his passing. Active in professional and community organizations, he held memberships in the Federal, American, Cuyahoga County, and Greater Cleveland Bar Associations and was a founding member of the Celebrezze Cleveland Inns of Court. He was the recipient of numerous awards including the Outstanding Alumnus Award from Cleveland Marshall Law School and Distinguished Service Award from the Northern Ohio Chapter of the Federal Bar Association. Judge Manos will be missed by all who knew him.

***Douglas W. Hillman.*** The Honorable Douglas W. Hillman passed away on February 1, 2007, just fourteen days shy of his 85th birthday. Judge Hillman was appointed to the United States District Court for the Western District of Michigan in 1979, and served the District as its Chief Judge from 1986 to 1991 when he assumed senior status. He retired from the bench in 2002. Judge Hillman's undergraduate studies at the University of Michigan were interrupted by World War II. In 1942 he joined the Army Air Corps and became a B-24 Liberator bomber pilot who flew 48 bombing missions over occupied Europe and Nazi Germany, for which he received the Distinguished Flying Cross and an Air Medal. Following the war Judge Hillman returned to the University of Michigan to study law in a combined graduate-undergraduate curriculum. He received a B.A. in 1946 and L.L.B. in 1948. After passing the bar he practiced law for 31 years until his appointment to the bench in

1979. During his tenure on the bench, Judge Hillman served on numerous circuit and national committees. He was a life member of the Sixth Circuit Judicial Conference; and in 1989, he served as Chairman of the Planning Committee for that Conference. He was a founder and instructor of the Hillman Advocacy Program, sponsored by the Western Michigan Chapter of the Federal Bar Association, and the Judges of the United States District Court for the Western District of Michigan. Judge Hillman was the recipient of numerous awards including the ACLU Annual Civil Liberties Award and the Champion of Justice Award by the State Bar of Michigan. He will be greatly missed by all who knew him.

## *Appointments*

### *United States District Courts*

***Michael R. Barrett.*** The Honorable Michael R. Barrett was appointed to the United States District Court for the Southern District of Ohio at Cincinnati on May 5, 2006. He succeeds United States District Judge Walter Herbert Rice who assumed senior status in 2004. Judge Barrett received both his B.A. and J.D. from the University of Cincinnati and its College of Law. Following graduation he served as an Administrative Hearing Officer for the State of Ohio; and assistant prosecuting attorney/chief assistant, Hamilton County Prosecutor's Office. At the time of his appointment, Judge Barrett was in private practice with the Cincinnati firm of Barrett & Weber.

***Jack Zouhary.*** Judge Zouhary was sworn in as Judge of the United States District Court for the Northern District of Ohio, Western Division (Toledo) in March 2006. He succeeds Judge David Katz, who assumed senior status in January 2005. Born and raised in Toledo, Judge Zouhary graduated from Dartmouth College and the University of Toledo College of Law. He is married to Kathleen and they have two grown daughters. Judge Zouhary is well familiar with northwest Ohio, having practiced in the private sector with a regional law firm and as corporate general counsel for a highway construction/stone quarry business. Most recently, he served as a Judge on the Lucas County Court of Common Pleas. He is active in the Toledo community and continues his participation in the Toledo Rotary Club. He is also active in the Morrison Waite Chapter of the Inns of Court, various bar associations, and is a frequent lecturer on civility. He was selected as a Fellow of the American

College of Trial Lawyers in 1995 and remains active in the College.

***Sean F. Cox.*** The Honorable Sean F. Cox served as Judge of the Wayne County Circuit Court from March 1996 to June 2006. On June 12, 2006, Judge Cox was appointed United States District Judge for the Eastern District of Michigan and immediately assumed duty. He also served as a visiting Judge for the Michigan Court of Appeals. Prior to his appointment to the Wayne Circuit Court, Judge Cox was in the full time practice of law as a partner with the law firm of Cummings, McClorey, Davis and Acho. He completed his undergraduate degree at the University of Michigan, Ann Arbor, Michigan and is a graduate of the Detroit College of Law (now Michigan State University School of Law).

He is a former President of the Livonia Bar Association and served on the State Bar of Michigan Judicial Qualifications Committee from 1992 through 1996. He served as chair of disciplinary panels for the Michigan Attorney Grievance Commission and wrote opinions on disciplinary issues.

***Thomas L. Ludington.*** The Honorable Thomas L. Ludington was nominated to the United States District Court for the Eastern District of Michigan in 2002 and commissioned in June 2006. Prior to his appointment, he practiced with the law firm of Currie and Kendall, P.C., from 1980 to 1995. He served as managing partner of the law firm for six years before being elected to the Circuit Court. Judge Ludington was elected to the 42nd Circuit Court, State of Michigan, beginning term on January 1, 1995 and served as chief judge in that court until his appointment to the federal bench.

In 1976, Judge Ludington received his B.A. *cum laude* from Albion College and attended the University of Sussex, Brighton, England with an emphasis in philosophy and economics, 1974-1975. He graduated from the University of San Diego School of Law in 1979 and studied at the Institute on International and Comparative Law, Paris, France in 1978. He was admitted to the practice of law in 1979 in the State of California and in 1980 in the State of Michigan.

Judge Ludington has taught various courses in the fields of law and banking, bankruptcy, and law office management. He serves as a director with Albion College Board of Trustees, Saginaw Valley State University Foundation, and Rollin M. Gerstacker Foundation. He was selected as a Fellow of the American Bar

Association and the Michigan State Bar Association.

***Sara E. Lioi.*** The Honorable Sara E. Lioi was sworn in as United States District Judge for the Northern District of Ohio on March 16, 2007. She succeeds United States District Judge Lesley Wells who took senior status in February of 2006. Judge Lioi is a *summa cum laude* graduate of Bowling Green University. She received her J.D. from Ohio State University College of Law. Following graduation, Judge Lioi was in private practice with the Canton law firm of Day, Ketterer, Raley, Wright & Rybolt, first as an associate and then as partner. In 1997 she became Judge of the Stark County Court of Common Pleas, the position she held at the time of her appointment to the District Court.

## *Senior Status*

***John Corbett O'Meara.*** The Honorable John Corbett O'Meara, United States District Judge for the Eastern District of Michigan, assumed senior status on January 1, 2007. Appointed to the Court in 1994, Judge O'Meara continues to render valuable service to the Court. He is a graduate of Notre Dame University and Harvard Law School. Judge O'Meara served on active duty with the U.S. Navy and was released as LT after submarine duty. Thereafter, he served in the U.S. Naval Reserve as Commander. Prior to his appointment to the bench, Judge O'Meara served as Staff Assistant to former United States Senator Philip A. Hart; as a proctor, Harvard College Freshman Halls; Coach, Harvard Freshman Debate Team; associate and then partner at the Dickinson Wright law firm in Detroit. He is the author of numerous publications, including, "The Forum of Fear; A Neurosis Which Can be Cured," *Michigan Bar Journal*, Oct. 1990; chapter on "Sexual Harassment," California Institute Book on Employment Relations, 1992.

***Robert L. Echols.*** The Honorable Robert L. Echols, United States District Judge for the Middle District of Tennessee, assumed senior status on March 1, 2007. Appointed to the Court in 1992, he served as Chief Judge of the District from August 1, 1998 to August 1, 2005. Judge Echols is a graduate of Rhodes College and the University of Tennessee College of Law where he was the recipient of the John R. Stivers Law Scholarship. Following graduation from law school, Judge Echols clerked for United States District Judge Marion S. Boyd of the Western District of Tennessee and served as legislative assistant for

Congressman Dan Kuykendall. He then joined the Nashville law firm of Bailey, Ewing, Dale and Conner as an associate and then as partner. He was one of the founders and partners in the Nashville firm of Dearborn and Ewing.

Judge Echols served in the 207th Judge Advocate General Corps in Washington, D.C., and served in the Tennessee Army National Guard until January 2001, where he held the rank of Brigadier General. His military service brought him numerous awards and commendations, including the Legion of Merit, the Army Commendation Medal twice, and Joint Service Commendation Medal. Judge Echols is the recipient of the Alumni Leadership Award and Outstanding Public Service Award from the University of Tennessee College of Law. He holds memberships in the Federal Judges Association, Tennessee State-Federal Judicial Council, and the American, Tennessee and Nashville Bar Associations. He has served on the Sixth Circuit Judicial Council; the Committee on the Judicial Branch of the Judicial Conference of the United States; the Sixth Circuit Library Committee; and the Planning Committee for the Sixth Circuit Judicial Conference. Judge Echols continues to render valuable service to the District.

### *United States Bankruptcy Courts*

#### *Appointments*

***Paulette Delk.*** The Honorable Paulette J. Delk was appointed United States Bankruptcy Judge for the Western District of Tennessee on July 1, 2006. She was appointed to a new position created by the passage of P.L. 109-8. Before her appointment to the bench, Judge Delk was an Associate Professor at the Cecil C. Humphreys School of Law at the University of Memphis. She received her Bachelor of Arts Degree from Fisk University; a Masters of Social Work from Atlanta University; and her Juris Doctor from DePaul University. She is the author of several articles on bankruptcy, including *Some Highlights of the 2005 Amendments to the Bankruptcy Code: Caution and Concern for Attorneys*, National Bar Association Magazine. Judge Delk is a frequent speaker at bankruptcy seminars such as the Tennessee Federal Judicial Conference and the National Conference of Bankruptcy Judges. She is a member of the American Board of Certification and has served on its Board of Directors and as a member of the Executive Board and Faculty Dean.

***George W. Emerson, Jr.*** The Honorable George W. Emerson, Jr. was appointed United States Bankruptcy Judge for the Western District of Tennessee on July 1, 2006 succeeding United States Bankruptcy Judge William H. Brown who retired on May 31, 2006. Prior to his appointment to the bench, Judge Emerson served as a Chapter 13 and Chapter 7 Trustee as well as Clerk of the Western District of Tennessee Bankruptcy Court from 1983 to 1985. Prior to his service as Clerk of the Bankruptcy Court, he served as law clerk to the late Chief Bankruptcy Judge William B. Leffler. Judge Emerson received his Bachelor of Arts degree, *cum laude*, from the University of Memphis and his law degree from the Cecil C. Humphreys School of Law at the University of Memphis. Since 1985 he has been in private practice and was a partner in the Memphis law firm of Stevenson and Emerson at the time of his appointment. He served as a Chapter 7 Trustee since 1983 and as a Chapter 13 Trustee since 1988. Judge Emerson is a member of the Memphis and Tennessee Bar Associations. As a member of the Memphis Bar, he served as Chairman of the Bankruptcy Section, as a member of the Board of Directors, and as a member of the Unauthorized Practice of Law Committee.

***Daniel S. Opperman.*** The Honorable Daniel S. Opperman was appointed United States Bankruptcy Judge for the Eastern District of Michigan at Bay City on July 13, 2006 to a new position created by the passage of P.L. 109-8. Prior to his appointment to the bench, he was a member of the Saginaw law firm of Braun Kendrick Finkbeiner. Judge Opperman attended Eastern Michigan University as a President's Scholar and graduated with a Bachelor of Science Degree, *magna cum laude*. He is a graduate of Wayne State University Law School where he received his Juris Doctor, *magna cum laude*. While in law school, he served on the Wayne State University Law Review. He is a member of Phi Beta Kappa. Judge Opperman has been active in the Lake Huron Area Council of the Boy Scouts of America and has served that organization in several capacities. He is a member of the State Bar of Michigan, Saginaw County Bar Association, and the American Bankruptcy Institute.

***Retirement.***

***William Houston Brown.*** The Honorable William Houston Brown, United States Bankruptcy Judge for the Western District of Tennessee at Memphis, retired on May 31, 2006.

Appointed to the Court on October 9, 1987, Judge Brown was serving his second 14-year term having been reappointed in 2001. He received his B.A. from Union University in Jackson, Tennessee; his M.A. from Middle Tennessee University; and his J.D. from the University of Tennessee College of Law graduating first in his class and Order of the Coif. Following his graduation from Law School he served as Assistant Professor at Jackson State Community College; Assistant Dean, University of Tennessee College of Law; and Associate Professor at the University of Wyoming College of Law and at the University of Mississippi College of law, the position he held at the time of his appointment. Judge Brown is the author of *Bankruptcy Exemption Manual*; *Bankruptcy Jury Manual*; *TN Debtor-creditor Law and Practices*; and was a contributing editor to *Norton Bankruptcy Law Practice*. He is a Fellow of the American College of Bankruptcy and the Tennessee Bar Foundation; and a member of the National Conference of Bankruptcy Judges; American Bankruptcy Institute; and American Inn of Court.

***United States Magistrate Judges***

***Robert E. Wier.*** Magistrate Judge Wier was appointed by the United States District Court for the Eastern District of Kentucky on September 1, 2006. A Harlan, Kentucky native, he graduated in 1989 with High Distinction and Departmental Honors from the University of Kentucky, where he was Phi Beta Kappa and received a B.A. in English. He was Valedictorian and graduated with High Distinction from the University of Kentucky College of Law, receiving his J.D. in 1992. In law school, Magistrate Judge Wier served as Editor-in-Chief of the *Kentucky Law Journal*, Volume 80.

From 1992-3, Magistrate Judge Wier served as a law clerk for Eugene E. Siler, Jr., Circuit Judge, United States Court of Appeals for the Sixth Circuit. From 1993 to 1995, he was an associate with the law firm of Stoll, Keenon & Park LLP in Lexington, Kentucky. From 1996 to his appointment, Magistrate Judge Wier was a member of the law firm of Ransdell & Wier PLLC, Lexington, Kentucky, where he had a general civil trial and appellate practice in State and Federal Court. His duty station is London, Kentucky.

***Edward B. Atkins.*** The Honorable Edward B. Atkins was sworn in as United States Magistrate Judge for the Eastern District of Kentucky at Ashland and Pikeville on August 24, 2006. He

succeeds the Honorable Peggy Patterson who retired on August 23, 2006. Judge Atkins is a graduate of the University of Kentucky College of Law. Prior to his appointment to the bench, he was a law clerk for Joseph M. Hood, Chief United States District Judge for the Eastern District of Kentucky, and was in private practice in Pikeville, Kentucky with the firm of Smith, Atkins & Thompson.

***John S. Bryant.*** The Honorable John Bryant was sworn in as United States Magistrate Judge for the Middle District of Tennessee on August 3, 2006. He succeeds the Honorable Joe B. Brown who retired on August 2, 2006. Judge Bryant is a graduate of Davidson College and Vanderbilt University School of Law. Prior to his appointment to the bench, Judge Bryant practiced civil litigation in Nashville for 33 years, first with the firm of Bass, Berry & Sims and later with Walker, Bryant, Tipps & Malone.

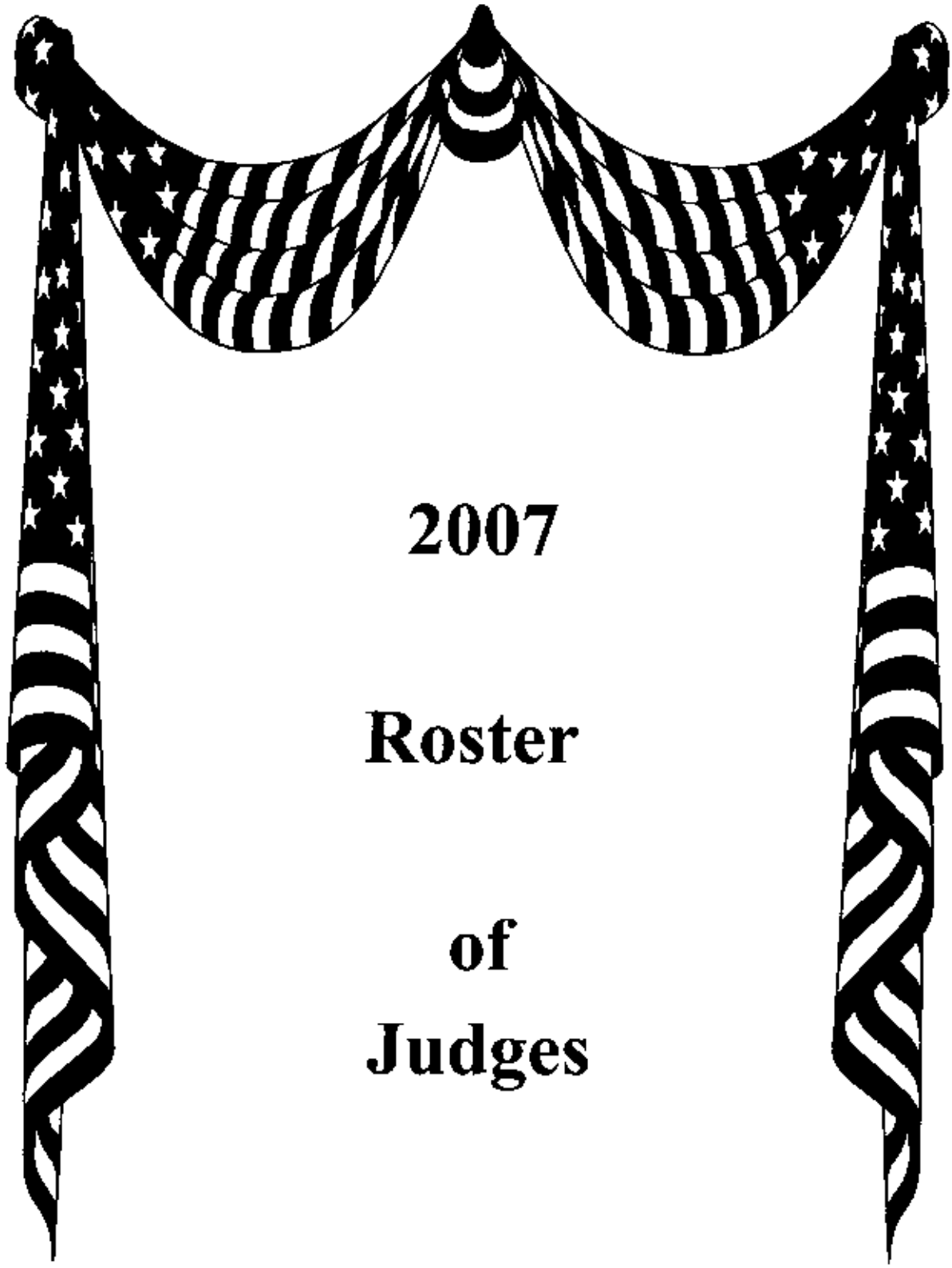
### *Magistrate Judges Retired*

***J. B. Johnson, Jr.*** The Honorable J. B. Johnson, Jr., United States Magistrate Judge for the Eastern District of Kentucky at London, retired on August 31, 2006. Appointed as a part-time magistrate in 1987, he became a full-time magistrate in 1996. Judge Johnson is a graduate of the University of Kentucky and its Law School. In 1961 he entered the United States Air Force as a 1st Lt. and was discharged as a Captain in 1964 after service as Assistant Staff Judge Advocate. Prior to his appointment as magistrate, Judge Johnson was in private practice from 1965 to 1973 and from 1984 to 1996. From 1973 to 1984 he served as Judge of the 34th Judicial Circuit of Kentucky. In 1983 he served as Faculty Adviser at the National Judicial College. Judge Johnson was a member of the Board of Governors of the Kentucky Bar Association from 1991 to 1996; and was a member of the Association of Trial Lawyers of America; and the American Bar Association.

***Peggy E. Patterson.*** The Honorable Peggy E. Patterson, United States Magistrate Judge for the Eastern District of Kentucky at Ashland, retired on August 24, 2006. She is a *cum laude* graduate of Centre College, Danville, Kentucky; and since 1999, she has been a member of Centre's Board of Trustees. She received her J.D. from the University of Kentucky College of Law where she was a member of the National Moot Court Team and the Order of Barristers. Judge Patterson served as law clerk to the late H. David Hermansdorfer, former United States District Judge for the Eastern District of Kentucky. She then entered

private practice with the Ashland office of Ogden, Newell & Welch; first as an associate, then as partner, and finally as co-chair of litigation. Judge Patterson was appointed Magistrate Judge in 1990 and completed her second term at the time of her retirement. She has been a frequent speaker on Federal Civil Litigation topics at Kentucky Bar Association and Federal Bar Association Continuing Legal Education programs and at Federal Judicial Center educational programs for magistrate judges. Her contributions to the judiciary are shown by her service on the Sixth Circuit Judicial Council; the standing committee on the Sixth Circuit Judicial Conference; Administrative Office Advisory Committee for Magistrate Judges; and the Magistrate Judge Education Committee of the FJC. She is a Fellow of the Kentucky Bar Foundation; and a member of the American Judicature Society and American and Federal Bar Associations.

***Joe B. Brown.*** The Honorable Joe B. Brown, United States Magistrate Judge for the Middle District of Tennessee, retired on August 2, 2006. Prior to his appointment as Magistrate Judge, he served from 1971 to 1981 as First Assistant United States Attorney for the Middle District of Tennessee and from 1981 to 1991 as United States Attorney for the Middle District of Tennessee. From 1991 to 1998 Judge Brown was Special Assistant United States Trustee. He is a *cum laude* graduate of Vanderbilt University and an Order of the Coif graduate of its law school. In 1962 he was commissioned a 2LT from ROTC, and served on active duty from 1965 to 1971, U.S. Army, Judge Advocate General's Corps. Judge Brown retired as a COL in 1992 from the U.S. Army Reserve. He is a member of the Tennessee and Nashville Bar Foundations; and the Kentucky and Nashville Bar Associations. Judge Brown is a member of Phi Beta Kappa. He continues to serve the District in recall status.



# 2007

# Roster

# of

# Judges

## *United States Supreme Court*

### *Circuit Justice*

Honorable John Paul Stevens, Washington, D.C.

## *United States Court of Appeals for the Sixth Circuit*

### *United States Circuit Judges*

Honorable Danny J. Boggs, Chief Judge, Louisville, Kentucky
Honorable Boyce F. Martin, Jr., Louisville, Kentucky
Honorable Alice M. Batchelder, Medina, Ohio
Honorable Martha Craig Daughtrey, Nashville, Tennessee
Honorable Karen Nelson Moore, Cleveland, Ohio
Honorable R. Guy Cole, Jr., Columbus, Ohio
Honorable Eric L. Clay, Detroit, Michigan
Honorable Ronald L. Gilman, Memphis, Tennessee
Honorable Julia Smith Gibbons, Memphis, Tennessee
Honorable John M. Rogers, Lexington, Kentucky
Honorable Jeffrey S. Sutton, Columbus, Ohio
Honorable Deborah L. Cook, Akron, Ohio
Honorable David W. McKeague, Lansing, Michigan
Honorable Richard Allen Griffin, Traverse City, Michigan

### *Senior United States Circuit Judges*

Honorable Damon J. Keith, Detroit, Michigan
Honorable Gilbert S. Merritt, Nashville, Tennessee
Honorable Cornelia G. Kennedy, Detroit, Michigan
Honorable Ralph B. Guy, Jr., Ann Arbor, Michigan
Honorable James L. Ryan, Detroit, Michigan
Honorable Alan E. Norris, Columbus, Ohio
Honorable Richard F. Suhrheinrich, Lansing, Michigan
Honorable Eugene E. Siler, Jr., London, Kentucky

## *United States Circuit Judges Retired*

Honorable Pierce Lively, Danville, Kentucky
Honorable Albert J. Engel, Grand Rapids, Michigan
Honorable Harry W. Wellford, Memphis, Tennessee
Honorable H. Ted Milburn, Chattanooga, Tennessee
Honorable David A. Nelson, Cincinnati, Ohio

# *United States District Court*
# *Eastern District of Kentucky*

## *United States District Judges*

Honorable Joseph M. Hood, Chief Judge, Lexington
Honorable Jennifer B. Coffman, Lexington
Honorable Karen K. Caldwell, Frankfort
Honorable Danny C. Reeves, London
Honorable David L. Bunning, Covington
Honorable Gregory F. Van Tatenhove, Pikeville

## *Senior United States District Judges*

Honorable William O. Bertelsman, Covington
Honorable G. Wix Unthank, London
Honorable Henry R. Wilhoit, Jr., Ashland
Honorable Karl S. Forester, Lexington

## *United States Bankruptcy Judges*

Honorable Joseph M. Scott, Jr., Chief Judge, Lexington
Honorable William S. Howard, Lexington

## *United States Bankruptcy Judge Recalled*

Honorable Joe Lee, Lexington

## *United States Magistrate Judges*

Honorable J. Gregory Wehrman, Covington
Honorable James Black Todd, Lexington
Honorable Edward B. Atkins, Ashland
Honorable Robert E. Wier, London

# *United States District Court*
# *Western District of Kentucky*

## *United States District Judges*

Honorable John G. Heyburn II, Chief Judge, Louisville
Honorable Charles R. Simpson III, Louisville
Honorable Thomas B. Russell, Paducah
Honorable Joseph H. McKinley, Jr., Owensboro

## *Senior United States District Judge*

Honorable Edward H. Johnstone, Paducah

## *United States Bankruptcy Judges*

Honorable Joan Lloyd Cooper, Chief Judge, Louisville
Honorable David T. Stosberg, Louisville
Honorable Thomas H. Fulton, Louisville

## *United States Magistrate Judges*

Honorable W. David King, Paducah
Honorable James D. Moyer, Louisville
Honorable E. Robert Goebel, Owensboro
Honorable Dave Whalin, Louisville

# *United States District Court*
# *Eastern District of Michigan*

## *United States District Judges*

Honorable Bernard A. Friedman, Chief Judge, Detroit
Honorable Gerald E. Rosen, Detroit
Honorable Robert H. Cleland, Detroit
Honorable Nancy G. Edmunds, Detroit
Honorable Denise Page Hood, Detroit
Honorable Paul D. Borman, Detroit
Honorable Arthur J. Tarnow, Detroit
Honorable George Caram Steeh III, Detroit
Honorable Victoria A. Roberts, Detroit
Honorable Marianne O. Battani, Detroit
Honorable David M. Lawson, Detroit
Honorable Sean F. Cox, Detroit
Honorable Thomas L. Ludington, Bay City

## *Senior United States District Judges*

Honorable John Feikens, Detroit
Honorable Julian Abele Cook, Jr., Detroit
Honorable Avern Cohn, Detroit
Honorable Anna Diggs Taylor, Detroit
Honorable Lawrence P. Zatkoff, Port Huron
Honorable Patrick J. Duggan, Detroit
Honorable Paul V. Gadola, Flint
Honorable John Corbett O'Meara, Ann Arbor

## *Senior United States District Judges Retired*

Honorable Charles W. Joiner, Ann Arbor
Honorable James Harvey, Port Huron
Honorable James P. Churchill, Bay City
Honorable Stewart A. Newblatt, Flint
Honorable Horace W. Gilmore, Detroit
Honorable George E. Woods, Detroit
Honorable Barbara K. Hackett, Ann Arbor

## *United States Bankruptcy Judges*

Honorable Steven W. Rhodes, Chief Judge, Detroit
Honorable Marci Beth McIvor, Detroit
Hoorable Phillip J. Shefferly, Detroit
Honorable Thomas J. Tucker, Detroit
Honorable Daniel S. Opperman, Bay City

## *United States Bankruptcy Judge Recalled*

Honorable Walter Shapero, Detroit

## *United States Magistrate Judges*

Honorable Steven D. Pepe, Ann Arbor
Honorable Charles E. Binder, Bay City
Honorable Virginia M. Morgan, Detroit
Honorable Donald A. Scheer, Detroit
Honorable R. Steven Whalen, Detroit
Honorable Mona K. Majzoub, Detroit

## *United States Magistrate Judge Recalled*

Honorable Paul J. Komives, Detroit

## *United States District Court*
## *Western District of Michigan*

### *United States District Judge*
Honorable Robert Holmes Bell

### *Senior United States District Judges*
Honorable Wendell A. Miles, Grand Rapids
Honorable Richard A. Enslen, Kalamazoo
Honorable Gordon J. Quist, Grand Rapids

### *Senior United States District Judges Retired*
Honorable Benjamin F. Gibson, Grand Rapids

### *United States Bankruptcy Judges*
Honorable Jo Ann C. Stevenson, Chief Judge, Grand Rapids
Honorable James D. Gregg, Grand Rapids
Honorable Jeffrey R. Hughes, Grand Rapids

### *United States Magistrate Judges*
Honorable Hugh W. Brenneman, Jr., Grand Rapids
Honorable Joseph G. Scoville, Grand Rapids
Honorable Timothy P. Greeley, Marquette
Honorable Ellen S. Carmody, Grand Rapids

# *United States District Court*
# *Northern District of Ohio*

## *United States District Judges*

Honorable James G. Carr, Chief Judge, Toledo
Honorable Solomon Oliver, Jr., Cleveland
Honorable Kathleen M. O'Malley, Cleveland
Honorable Peter C. Economus, Youngstown
Honorable Donald C. Nugent, Cleveland
Honorable Patricia A. Gaughan, Cleveland
Honorable James S. Gwin, Akron
Honorable Dan A. Polster, Cleveland
Honorable John R. Adams, Akron
Honorable Christopher A. Boyko, Cleveland
Honorable Jack Zouhary, Toledo
Honorable Sara E. Lioi, Akron

## *Senior United States District Judges*

Honorable Ann Aldrich, Cleveland
Honorable David D. Dowd, Jr., Akron
Honorable Lesley Wells, Cleveland
Honorable David A. Katz, Toledo

## *Senior United States District Judges Retired*

Honorable John W. Potter, Toledo
Honorable Sam H. Bell, Akron

## *United States Bankruptcy Judges*

Honorable Randolph Baxter, Chief Judge, Cleveland
Honorable Richard L. Speer, Toledo
Honorable Marilyn Shea-Stonum, Akron
Honorable Pat E. Morgenstern-Clarren, Cleveland
Honorable Russ Kendig, Canton
Honorable Mary Ann Whipple, Toledo
Honorable Arthur I. Harris, Cleveland
Honorable Kay Woods, Youngstown

## *United States Magistrate Judges*

Honorable James S. Gallas, Akron
Honorable Patricia A. Hemann, Cleveland
Honorable Vernelis K. Armstrong, Toledo
Honorable Nancy A. Vecchiarelli, Cleveland
Honorable George J. Limbert, Youngstown
Honorable William H. Baughman, Jr., Cleveland
Honorable Kenneth S. McHargh, Cleveland

## *United States Magistrate Judge Recalled*

Honorable David S. Perelman, Cleveland

# *United States District Court*
# *Southern District of Ohio*

## *United States District Judges*

Honorable Sandra S. Beckwith, Chief Judge, Cincinnati
Honorable Susan J. Dlott, Cincinnati
Honorable Edmund A. Sargus, Jr., Columbus
Honorable Algenon L. Marbley, Columbus
Honorable Thomas M. Rose, Dayton
Honorable Gregory L. Frost, Columbus
Honorable Michael H. Watson, Columbus
Honorable Michael R. Barrett, Cincinnati

## *Senior United States District Judges*

Honorable S. Arthur Spiegel, Cincinnati
Honorable John D. Holschuh, Columbus
Honorable Walter Herbert Rice, Dayton
Honorable Herman J. Weber, Cincinnati
Honorable James L. Graham, Columbus
Honorable George C. Smith, Columbus

## *United States Bankruptcy Judges*

Honorable J. Vincent Aug, Chief Judge, Cincinnati
Honorable Thomas F. Waldron, Dayton
Honorable Charles M. Caldwell, Columbus
Honorable Jeffery P. Hopkins, Cincinnati
Honorable John E. Hoffman, Jr., Columbus
Honorable Lawrence S. Walter, Dayton
Honorable C. Kathryn Preston, Columbus

## *United States Bankruptcy Judges Recalled*

Honorable Burton Perlman, Cincinnati
Honorable Donald E. Calhoun, Jr., Columbus

## *United States Magistrate Judges*

Honorable Mark R. Abel, Columbus
Honorable Norah McCann King, Columbus
Honorable Michael R. Merz, Dayton
Honorable Terence P. Kemp, Columbus
Honorable Timothy S. Hogan, Cincinnati
Honorable Sharon L. Ovington, Dayton
Honorable Timothy S. Black, Cincinnati

# United States District Court
# Eastern District of Tennessee

## United States District Judges

Honorable Curtis L. Collier, Chief Judge, Chattanooga
Honorable Thomas W. Phillips, Knoxville
Honorable Thomas A. Varlan, Knoxville
Honorable J. Ronnie Greer, Greenville
Honorable Harry S. Mattice, Jr., Chattanooga

## Senior United States District Judges

Honorable James H. Jarvis II, Knoxville
Honorable R. Allan Edgar, Chattanooga
Honorable Leon Jordan, Knoxville

## Senior United States District Judge Retired

Honorable Thomas Gray Hull, Greeneville

## United States Bankruptcy Judges

Honorable John C. Cook, Chief Judge, Chattanooga
Honorable Richard S. Stair, Jr., Knoxville
Honorable Marcia P. Parsons, Greeneville
Honorable R. Thomas Stinnett, Chattanooga

## United States Magistrate Judges

Honorable Dennis H. Inman, Greeneville
Honorable William B. Mitchell Carter, Chattanooga
Honorable C. Clifford Shirley, Knoxville
Honorable H. Bruce Guyton, Knoxville
Honorable Susan Kerr Lee, Chattanooga

# *United States District Court*

## *Middle District of Tennessee*

### *United States District Judges*

Honorable Todd J. Campbell, Chief Judge, Nashville
Honorable Aleta A. Trauger, Nashville
Honorable William J. Haynes, Jr., Nashville

### *Senior United States District Judges*

Honorable Thomas A. Wiseman, Jr., Nashville
Honorable John T. Nixon, Nashville
Honorable Robert L. Echols

### *Senior United States District Judge Retired*

Honorable Thomas A. Higgins, Nashville

### *United States Bankruptcy Judges*

Honorable George C. Paine II, Chief Judge, Nashville
Honorable Keith M. Lundin, Nashville
Honorable Marian F. Harrison, Nashville

### *United States Magistrate Judges*

Honorable Juliet E. Griffin, Nashville
Honorable E. Clifton Knowles, Nashville
Honorable John S. Bryant, Nashville

### *United States Magistrate Judge Recalled*

Honorable Joe B. Brown, Nashville

# *United States District Court*
# *Western District of Tennessee*

## *United States District Judges*

Honorable James D. Todd, Chief Judge, Jackson
Honorable Jon Phipps McCalla, Memphis
Honorable Bernice B. Donald, Memphis
Honorable Samuel H. Mays, Jr., Memphis
Honorable J. Daniel Breen, Memphis

## *United States Bankruptcy Judges*

Honorable David S. Kennedy, Chief Judge, Memphis
Honorable G. Harvey Boswell, Jackson
Honorable Jennie D. Latta, Memphis
Honorable Paulette Delk, Memphis
Honorable George W. Emerson, Jr., Memphis

## *United States Magistrate Judges*

Honorable Diane K. Vescovo, Memphis
Honorable Tu M. Pham, Memphis
Honorable S. Thomas Anderson, Jackson

## *Staff, United States Court of Appeals*

James A. Higgins, Circuit Executive
Leonard Green, Clerk
Timothy Schroeder, Senior Staff Attorney
Robert W. Rack, Jr., Chief Circuit Mediator
Kathy Joyce Welker, Circuit Librarian

In
Memoriam

Honorable John M. Manos
Honorable Douglas W. Hillman

**Memorial Resolution**
**in Honor of**
**John M. Manos**
**1922-2006**

Judge John M. Manos loved to regale audiences with the accomplishments of the ancient Greeks. Without resort to notes or aids, he would wax eloquent regarding the great contributions Greek civilization made to society and, critically, to the law. He took great pleasure in pointing out that the most important and sustaining aspects of our legal system -- including the jury system itself -- were products of the Greek philosophers and the civilization they inspired.

Listening to John on the topic, one was left with no doubt about either his reverence for the ancient Greeks or his pride in claiming them as his ancestors; he was often heard to say he was "privileged to stand on the shoulders of Plato, Socrates and Aristotle." Knowing John and witnessing his career, one also has no doubt that those ancient Greeks would have been just as proud to claim him as their own. His contributions to the law, the bench and his community ably carried on the great traditions he so loved to herald.

Judge Manos was once quoted as saying, "I want to be remembered as a fair and impartial judge who worked hard and was prepared for every case." When Judge Manos passed away last year after forty-three years on the bench, he got his wish and much more. Yes, he is remembered as a fair, impartial, hardworking and thoroughly prepared jurist, but he is also fondly remembered as a dedicated family man, mentor, community activist, leader in his church, political strategist, great intellect and dear friend to many. He is sorely missed.

John Manos was the son of Greek immigrants, born December 8, 1922, in the modest Tremont neighborhood of Cleveland -- a neighborhood he could view many years later from the windows of his sixteenth-floor chambers in the new Cleveland Courthouse. He graduated from Lincoln High School in Cleveland and, with the benefit of a full scholarship, attended the Case School of Applied Science. There, he was captain and quarterback of the football team and earned a degree in metallurgical engineering. He graduated from Case in 1944 and then served in the United States Navy.

After returning from the Navy, Judge Manos began working as a metallurgical engineer, while taking night classes at Cleveland Marshall Law School, and beginning a family with his wife, Viola. He graduated from Cleveland Marshall in 1950, already enamored with the law. After practicing for thirteen years, including a stint as law director of Bay Village during the famed Sam Shepard trial, Ohio Governor James Rhodes selected him to fill a vacancy on the Cuyahoga County Common Pleas Court. In 1969, Judge Manos was appointed to the Ohio Court of Appeals, where he served until 1976.

In 1976, President Gerald Ford appointed Judge Manos to the United States District Court for the Northern District of Ohio, where he served with distinction for over thirty years. Judge Manos loved all aspects of being on the bench, and threw himself into his work with unequaled gusto. His goal was always to be more prepared than the litigants before him -- on the facts, the law and the rules -- a goal most would agree he satisfied. He handled both high profile and obscure cases with the same passion, and prided himself on being fair to everyone who crossed the threshold of his courtroom. Judge Manos' well-deserved reputation as a great jurist did not come by chance or luck, it was the product of dedication, hard work and commitment to the task.

Though Judge Manos fought a number of illnesses in his final years, his dedication to his office and work remained unimpaired: he held proceedings from his hospital bed, met with law clerks only hours after surgeries and held rehabilitation sessions in his chambers to limit the downtime caused by his recovery. Though his body tried to slow him down, he refused to let his mind give in to the temptation to do so.

While it is true that Judge Manos also earned a reputation for toughness and a brash demeanor -- and that his bald pate, booming voice and large, black-rimmed glasses accentuating his steady gaze struck fear into the hearts of many a young lawyer over the years -- the real John Manos was incredibly kind and soft-hearted. He went out of his way to assist others -- devoting countless hours to the Greek Orthodox Church, helping to create a scholarship fund for Greek students aspiring to college, teaching law students through an elaborate internship program he designed himself, mentoring young lawyers, and offering much-needed advice and assistance to his new colleagues on the bench. No one who sought his help or advice was turned away.

Although Judge Manos accomplished great things in his career and for his community, and received awards too numerous to recount here, it was his family in which he took greatest pride. In addition to Viola, his wife of forty-four years whom he lost in 1989, John was happiest when with, or bragging about (as he often did), his four children -- Donna, Christine, Michael and Keith -- their respective spouses, and his twelve grandchildren. While he loved to talk about how much he "loved the law" and "loved the bench," it was his family -- including his brother Eli -- whom John loved the most.

John M. Manos lived by the creed written many years ago by another American of Greek parentage, Dean Alfange:

> I do not choose to be a common man
> It is my right to be uncommon...
> If I can. I seek opportunity... Not security.
> * * * * * * * * * *
> It is my heritage to stand erect,
> proud, and unafraid; to think and act for
> myself; enjoy the benefits of my
> creations; and to face the world boldly
> and say, "This I have done with my own hand,
> I am a man. I am an American."

Even the most casual observer of Judge Manos saw instantly that he was uncommon. Every day of his life, he stood erect and proud; he fearlessly thought and acted for himself; he gloried in his ability to use his prodigious intellect to the benefit of the law that he so loved. And he gloried in being an American. He was not merely uncommon. He was unique.

Judge Manos' family lost their patriarch, the federal bench lost an icon and we all lost a dear friend on July 5, 2006, when this modern-day Greek philosopher held court for the final time.

Now, therefore, **BE IT RESOLVED**, that the Sixty-Seventh Judicial Conference of the Sixth Circuit, in session in Asheville, North Carolina, this 9th day of May, 2007, pays tribute and appreciation to the memory of Judge John M. Manos, who served the nation and the Northern District of Ohio faithfully and well.

**BE IT FURTHER RESOLVED** that a copy of this Resolution be preserved upon the records of this Conference and that a copy hereof be forwarded to the family as a testament of the affection and admiration in which Judge Manos was held by his colleagues and by the members of the Conference.

Respectfully submitted,

Alice M. Batchelder
United States Circuit Judge
Court of Appeals for the Sixth Circuit

James G. Carr
Chief United States District Judge
Northern District of Ohio

Kathleen M. O'Malley
United States District Judge
Northern District of Ohio

Memorial Resolution
in Honor of
Honorable Douglas W. Hillman
1922-2007

On February 1, 2007, Judge Douglas W. Hillman died, following a long illness. The judges of this court join with the practicing bar to mourn the loss of one of the giants of our legal community.

Douglas Woodruff Hillman was born in Grand Rapids, Michigan in 1922. He graduated from Central High School in 1941 and married his wife, Sally, in 1944. Judge Hillman interrupted his undergraduate studies at the University of Michigan to join the Army Air Corps during World War II, serving with distinction as a bomber pilot in the European Theatre, for which he received the Distinguished Flying Cross and the Air Medal at the age of 23.

Judge Hillman completed his undergraduate education in 1946 and his legal education in 1948, graduating from the University of Michigan Law School. He entered private practice in Grand Rapids, where he devoted thirty years to a distinguished career as a trial lawyer. During his years as a practicing lawyer, Judge Hillman served as President of the Grand Rapids Bar Association and was named a Fellow of the American College of Trial Lawyers, the International Academy of Trial Lawyers, and the International Society of Barristers. He was active in improving the trial skills of younger lawyers, serving on the faculty of the Institute for Trial Advocacy (NITA) and the Advocacy Institute of the Institute for Continuing Legal Education (ICLE) in Ann Arbor, Michigan.

Judge Hillman was appointed as a district judge by President Jimmy Carter. He took office on September 28, 1979. Judge Hillman became Chief Judge of the Western District of Michigan in April of 1986. He served in this position until February 15, 1991, at which time he took Senior Status. Judge Hillman continued to hear civil cases in his home district, while generously serving other districts and circuits by designation, until his retirement in 2002.

Judge Hillman's legal writings disclose a deep attachment to the rule of law and to the protections of the Bill of Rights. Among his major decisions were *Michigan State Chamber of Commerce v. Austin*, 642 F. Supp. 397 (W.D. Mich. 1986, *aff'd sub nom. Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), a First Amendment case; *United States v. Lewis*, 644 F. Supp. 1391 (W.D. Mich. 1986), *aff'd sub nom. United States v. King*, 840 F.2d 1276 (6th Cir.), *cert. denied*, 488 U.S. 894 (1988), a criminal prosecution for slavery. In addition, Judge Hillman issued countless opinions in a multi-district school desegregation case, ranging from the imposition of a remedy in 1981, *see Berry v. School Dist. of City of Benton Harbor*, 515 F. Supp. 344 (W.D. Mich. 1981), through hearings on final status and dismissal on April 4, 2002.

From the vantage point of the practicing bar, Judge Hillman's tenure in office was marked by civility and good relations between the bench and bar. He never forgot what it means to practice law. Everyone, lawyer and litigant alike, who entered his courtroom was treated with courtesy and respect. The community's and practicing bar's high regard for Judge Hillman was reflected in the numerous awards and recognitions he received, including the ACLU Annual Civil Liberties Award 1970; Hon. Raymond W. Fox Advocacy Award 1989; State Bar of Michigan's prestigious Champion of Justice Award 1990; Distinguished Alumni Award, Central High School, Grand Rapids 1990; Service to Profession Award, Federal Bar Association, Western Michigan Chapter 1991; Professional and Community Service Award, Young Lawyers Section, State Bar of Michigan 1996; his designation by Michigan Lawyer's Weekly as one of Michigan's "25 Most Respected Judges"; induction into the Grand Rapids Magazine Medical Hall of Fame 2001; receipt of the Grand Rapids Bar Association's Donald R. Worsfold Distinguished Service Award in 2002 ant the State Bar of Michigan's Frank J. Kelley Distinguished Public Servant Award in 2006.

Judge Hillman's love of the law and of his country led him to serve in numerous capacities to improve justice and to benefit the local and national communities. Of his many and varied accomplishments, Judge Hillman will be most remembered for his work in improving the level of trial advocacy. In 1981, Judge Hillman proposed to the court a unique trial advocacy program for young federal court practitioners. As envisioned by Judge Hillman, the program would involve the cooperation of the federal

judiciary, and the organized bar. The result was the first Trial Skills Workshop, held in January of 1982 in the federal courtrooms in Grand Rapids.

Under Judge Hillman's constant guidance and leadership, the workshop evolved and improved in ensuing years, but it never lost its essential mission of improving the trial skills of federal practitioners. In January of 1991, in honor of Judge Hillman's devotion to the program for over a decade, the Federal Bar Association Chapter announced the renaming of the workshop to the "Hillman Advocacy Program." In January of 2006, the Hillman Advocacy Program celebrated its twenty-fifth anniversary and the training of over 2,000 young lawyers.

THEREFORE, BE IT RESOLVED that the Sixty-Seventh Judicial Conference of the Sixth Circuit, in session at Asheville, North Carolina , this 9th day of May, 2007, pays tribute to the memory of United States District Judge Douglas W. Hillman, who served the Nation and the Western District of Michigan faithfully and well; and

BE IT FURTHER RESOLVED that a copy of this resolution be preserved upon the records of this Conference and that a copy be forwarded to Judge Hillman's wife as a testament to the esteem in which he was held by the members of this Conference and as an expression of our sympathy.

Respectfully submitted,

Robert Holmes Bell,
Chief Judge
United States District Court
Western District of Michigan

Honorable Richard A. Enslen
United States District Judge
Western District of Michigan

Honorable Joseph G. Scoville
United States Magistrate Judge
Western District of Michigan

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Cleveland Plain Dealer


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Section: National

# Federal judge John Manos, is dead at 83 Jurist is called fair, stern John Manos dies, known as tough judge

John Caniglia

John M. Manos 1922 – 2006 Survivors: daughters, Donna Uebler of Chillicothe, Ill.; Christine McLaughlin of Cleveland Heights; sons, Michael of Shaker Heights, and Keith of Willoughby; 12 grandchildren; a brother; and longtime companion Gloria Donahue. Services: 11 a.m., Monday, St. Demetrios Greek Orthodox Church, 22909 Center Ridge Road, Westlake. Contributions: Area Greek Orthodox churches of the donor's choice. Arrangements: Yurch Funeral Home, 5618 Broadview Road, Parma.

U.S. District Judge John M. Manos, for decades recognized as the sternest jurist in Cleveland, died Thursday morning in his sleep at home in Lakewood. He was 83.

Manos served as a judge for 43 years. Lawyers who practiced before him daily said he earned a well-known reputation for fairness, preparation and toughness.

"He demonstrated the most remarkable pursuit of excellence by a jurist that I've ever seen," said Robert Ducatman, an attorney for Jones Day in Cleveland and a former clerk for Manos.

"I've never seen anyone work as hard or study as much. He was simply the quintessential jurist. He is what every judge should aspire to be."

John M. Manos 1922 - 2006 Survivors: daughters, Donna Uebler of Chillicothe, Ill.; Christine McLaughlin of Cleveland Heights; sons, Michael of Shaker Heights, and Keith of Willoughby; 12 grandchildren; a brother; and longtime companion Gloria Donahue. Services: 11 a.m., Monday, St. Demetrios Greek Orthodox Church, 22909 Center Ridge Road, Westlake. Contributions: Area Greek Orthodox churches. Arrangements: Yurch Funeral Home, 5618 Broadview Road, Parma.

In an interview in 2002 with The Plain Dealer, Manos described his passion for his job.

"I love the excitement," he said. "I love to prepare. My quest is for accuracy. Before I go on the bench, I'm prepared. Before I have a pretrial, I'm prepared. Preparation is the most important factor in decision-making."

Manos was the son of Greek immigrants. He graduated from Lincoln High School in Cleveland and went on to the Case School of Applied Science, where he starred as the quarterback and captain of the football team. He graduated in 1944 with a degree in metallurgical engineering. He served in the U.S. Navy for about two years and then began working as an engineer in Cleveland.

While working, he took night classes at Cleveland Marshall Law School, graduating in 1950. He worked as an attorney for 13 years before Ohio Gov. James Rhodes selected him to fill a vacancy in Cuyahoga County Common Pleas Court.

A few years later, Manos and others created a scholarship for Greek students heading to college. Since that time, Manos' Cleveland chapter of the American Hellenic Educational Progressive Association paid out more than $300,000 in scholarships, based on academic and extracurricular achievements.

Manos solicited much of the money. The winners included former President Clinton aide George Stephanopoulos of Orange.

"In the Greek community, he was a pillar," said Assistant U.S. Attorney Alex Rokakis.

In 1969, Manos was appointed to the 8th Ohio District Court of Appeals. In 1976, President Gerald Ford chose him for the federal bench. His reputation grew quickly.

"He was a powerful intellect with a powerful personality and a powerful physical presence," said Cleveland attorney Robert Duvin. "He dominated a courtroom. For the lawyers who practiced in front of him, there will never be a replacement for John Manos. He was a great judge and a great man."

He demanded lawyers prepare before they stepped into his courtroom, whether the hearing was part of a major civil trial or simple pretrial.

"Pity the poor attorney who raises an objection in Manos' courtroom and is unable to state the basis," Rokakis wrote in a profile of Manos for the Federal Lawyer magazine. "The attorney is likely to be scolded, as Manos cites chapter and verse of the Federal Rules of Evidence."

In 1981, Manos handled Mobil Corp.'s attempt to acquire Marathon Oil. The Wall Street Journal called him "a courtroom general" and wrote about his toughness. The judge later ruled that Mobil's $6.5 billion attempt would violate federal antitrust laws.

A few years after the case, Manos began another passion: teaching. He started an internship program that gave students across the country a chance to work on his staff.

Manos taught them the law and made them research it. During trials, they sat in his courtroom and dissected attorneys' arguments.

"I get a big kick out of working with youngsters," Manos said. "They pick up a lot of experience that they wouldn't learn in school."

Manos also mentored young attorneys for decades. In 1984, a young associate with **Jones Day** appeared before Manos in a trial on product liability. **Kate O'Malley** said Manos began helping her soon after.

"Every time I went before him, he was very demanding of me," O'Malley said. "I thought that he was just tough on me. But later, I realized that he was working to make me a better lawyer. He reached out to me, and he would talk a lot. He helped me with career decisions."

Later, O'Malley became Manos' colleague, as a judge in U.S. District Court. He remained a father figure to her.

"He would call or show up in the office and say, 'You're not letting these things get to you, are you?' " O'Malley said. "He always seemed to know the right moment for that. He always was there for advice and counsel. I always hear stories that 'John Manos was so tough.' To me, he was quite soft. He was great."

In 1989, Manos' wife of 44 years, Viola, died. He kept working with the support of his brother Eli, a Cleveland lawyer, and his four children - Donna, Christine, Michael and Keith, as well as his grandchildren. He underwent heart surgery in 1995 and assumed senior status, in which he handled a lighter caseload than other judges.

Because he was on senior status, a new judge will not be named to the federal bench.

Manos' health began to decline in 2002, when surgeons removed two toes because of diabetes. Three years later, he underwent surgery for a broken hip he suffered in a fall.

Through it all, he kept working.

He was hospitalized in early 2006 as doctors amputated his left leg from below the knee. He even conducted a pretrial hearing from his hospital bed.

"He had a great intellect, a legendary work ethic and a great love of the law," said Patrick McLaughlin, Manos' son-in-law and a prominent Cleveland attorney. "The bottom line is that they just don't make many like him any more."

---- INDEX REFERENCES ----

COMPANY: MARATHON OIL; MOBIL CORP

NEWS SUBJECT: (Judicial (1JU36); Legal (1LE33); Social Issues (1SO05); Economics & Trade (1EC26))

REGION: (Greece (1GR49); Europe (1EU83); USA (1US73); Southern Europe (1SO59); Ohio (1OH35); Americas (1AM92); North America (1NO39); Western Europe (1WE41))

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News

# LAWYERS AND TECHNOLOGY

## Videoconferencing is Focus in Asylum Appeal

David Horrigan

In the early 1980s, electrical engineer Constantin Rusu was one of the organizers of a group of intellectuals who formed a transcendental meditation group in Romania. At the time, before the fall of the Iron Curtain, Romania was under the control of Nicolae Ceausescu, arguably one of the most oppressive of the Soviet-bloc dictators.

Mr. Ceausescu's secret police, the Securitate, began to suspect that Mr. Rusu and his friends were potential subversives. After Securitate agents brutally tortured Mr. Rusu - removing his teeth with pliers and a screwdriver - he fled, eventually coming to the United States, where he applied for political asylum.

Mr. Rusu's political asylum hearing became more than a referendum on the evils of totalitarian governments. After his hearing on the merits was held via videoconference from a federal detention center, his case became a legal battleground on the use of trial technology. Rusu v. INS, 296 F.3d 316 (4th Cir. 2002). Although the U.S. Court of Appeals for the Fourth Circuit ultimately ruled against Mr. Rusu - primarily because Mr. Ceausescu was no longer in power and thus did not present a threat of persecution - the court was concerned about due process issues.

Courts across the nation have increased their use of videoconferencing. Proponents cite many benefits, including reduction of expenses, easier access to remote courts and the protection of juvenile witnesses, who can testify without being subjected to a traumatic courtroom experience. Not all lawyers are on the videoconferencing bandwagon, however. Some claim that its use in court, especially in cases such as Mr. Rusu's, violates basic constitutional rights.

The American Immigration Law Foundation (AILF), the Catholic Legal Immigration Network Inc., the Lutheran Immigration and Refugee Service and others joined in an amicus brief in support of Mr. Rusu, arguing that the use of videoconferencing in asylum hearings on the merits constitutes a violation of procedural due process. These lawyers and social services organizations maintain that videoconferencing denies asylum applicants the opportunity to face the court directly, critical in a case where the credibility of the applicant is a crucial factor. In addition, the groups claim that videoconferencing reduces the effectiveness of counsel - the lawyer cannot be in two places at once.

### Haphazard Hearing

The performance of the videoconferencing system in Mr. Rusu's case was something less than spectacular. The groups referred to the "haphazard manner" in which his videoconferenced asylum hearing was conducted, noting that the transcript of the hearing was "marked 'indiscernible' a total of 132 times."

During the proceeding, Mr. Rusu was being held at a federal detention facility in Farmville, Va. The actual hearing was held at the U.S. Immigration Court in Arlington, Va., just outside Washington, D.C. According to Susan Eastwood, a representative of the Justice Department's Executive Office for Immigration Review, the videoconference system was operated by the Immigration and Naturalization Service (INS).

Although he did not represent Mr. Rusu at the now infamous hearing, Michael Begland of the Richmond, Va., office of Hunton & Williams is representing Mr. Rusu pro bono on a motion to reopen filed with the Board of Immigration Appeals. According to Mr. Begland, the Farmville detention center's videoconferencing system consisted of outdated equipment in a temporary trailer. AILF attorney J. Traci Hong, author of the amicus brief, agreed, noting that video and sound quality problems plagued the hearing.

Mr. Begland stressed the inherent problems when an attorney is separated from his client.

"How can you say you're represented if you're separated?" he asked rhetorically, noting that there was no chance for confidential communication between lawyer and client.

The Fourth Circuit recognized Mr. Begland's argument. It said the use of videoconferencing in asylum hearings "results in a 'Catch-22' situation for the petitioner's lawyer" because he must choose between interacting with the judge and opposing counsel and interacting with his client. The court also quoted from its opinion in U.S. v. Lawrence, 248 F.3d 300 (4th Cir. 2001), where it noted, "virtual reality is rarely a substitute for actual presence. ... [E]ven in an age of advancing technology, watching an event on the screen remains less than a complete equivalent of actually attending it."

University of Florida law professor Kenneth Nunn agrees, noting that, were Mr. Rusu a criminal defendant, both the Sixth Amendment and the Federal Rules of Criminal Procedure would guarantee him a right of presence at any adversarial hearings. He noted that the U.S. Supreme Court has permitted videoconferencing in criminal cases in narrow circumstances only.

"The defendant's Sixth Amendment right to presence cannot be overcome simply for the convenience of the court," Mr. Nunn added.

However, not all courts have expressed such reservations about videoconferencing. In fact, in one Ohio federal courtroom, videoconferencing may have prevented a due process problem.

Demonstrative Defendant

U.S. District Judge Kathleen O'Malley of the Northern District of Ohio uses a videoconferencing system in her Cleveland courtroom.

"I think it's extremely useful. I've been disappointed that lawyers and parties have not embraced it as much as I thought they would," Judge O'Malley said.

She said it would be inappropriate for her to comment on whether she would compel a party to use videoconferencing for a criminal proceeding on the merits. Yet she did share an experience where her videoconferencing

system was an important part of one criminal matter.

In that case, a criminal defendant yelled, and said that if they were going to try him, it would have to be with him in shackles and an orange prison jump suit. Judge O'Malley said that in similar circumstances with obstructionist parties, judges have taped their mouths shut, but she added, "the potential for prejudice is obviously huge."

Instead, enter the videoconferencing system. During voir dire, Judge O'Malley used the system so the defendant could witness all proceedings. She gave defense counsel a mobile phone to allow private client consultations. She muted the system volume into the courtroom in the event the defendant decided to start screaming. In the end, the defendant decided to discard the shackles, don court attire and join the proceedings in person without vocal outbursts.

Judge O'Malley noted that, in civil matters, attorneys have used videoconferencing for witnesses such as records custodians and secondary experts, rather than for the parties or critical witnesses. Yet with the unruly criminal defendant, the system may have saved Judge O'Malley from a difficult situation.

The Future

Legal technology consultants who supply such systems, such as David Goldenberg of Doar Communications in Rockville Centre, N.Y., feel that court videoconferencing systems can be designed to avoid potential legal pit- falls.

"The systems can be designed to take away 99 percent of the problems," he said, noting that, if attorneys wish to consult with their clients privately, the systems can be designed with "red phones," allowing private attorney-client conferences.

However, AILF's Ms. Hong remains unconvinced. Although the Fourth Circuit ruled against Mr. Rusu, holding that it need not decide the videoconferencing issue because of the facts in his case, Ms. Hong believes the court has made it clear that compulsory videoconferenced asylum hearings on the merits, although not criminal hearings, violate due process.

Mr. Rusu and Mr. Begland are pursuing Mr. Rusu's case, and Ms. Hong and her fellow public interest lawyers are searching for another test case to end the compulsory use of court videoconferencing.

In the meantime, however, it will be business as usual at the Arlington Immigration Court. Justice's Eastwood noted that the court's system has been updated, including the installation of new speakers and monitors.

"It's an efficient way to do business," she added.

David Horrigan is a reporter at the National Law Journal, a Law Journal affiliate in which this article first appeared.
12/24/2002 NYLJ 5, (col. 1)

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Cleveland Plain Dealer


January 9, 2000

Section: FORUM OPINION & IDEAS

INSIDE POLITICS KUCINICH ROLLS OUT THE WEB SITE

Hold your ears. Dennis Kucinich plans to unveil his long-awaited congressional Web site tomorrow with an accordion fanfare.

Kucinich says the bells and whistles on his Internet entry will include 10-second snippets of Frankie Yankovic polkas, including "Who Stole the Kishka?" "In Heaven, There is No Beer," and the "Too Fat Polka," with vocals by Drew Carey. It will also feature the Texas group Brave Combo's cover of a psychedelic rock standard: "Purple Haze (The Jimi Hendrix Polka)."

He is the last Ohio congressman to go online, though he's been Internet-savvy enough to hawk other people's Web sites. A recent issue of Congressional Quarterly magazine quoted Kucinich in an ad for its "House Action Reports" Web site.

"I don't leave the House without it," Kucinich says in the ad.

Sabrina Eaton - Fun bunch

To qualify as a delegate to a national political convention, all you really need are the time and the inclination to go, and a little help from the party faithful.

The benefits include the opportunity to dress up like Uncle Sam or Betsy Ross, vote on party platforms forgotten at the earliest convenience, wave placards and conga through the aisles with perfect strangers from other states.

Democrats around Ohio elected 95 delegates for each of the party's presidential candidates Monday night. Depending on the results of the primary voting, some combination of them will attend the Democratic National Convention, in Los Angeles, Aug. 14-17.

Delegates backing Bill Bradley include former Rep. Mary Rose Oakar; State Rep. Bryan Flannery; Brook Park Mayor Tom Coyne; Shaker Heights Mayor Judy Rawson; Karen Van Breda Kolff, daughter of Bradley's college

basketball coach; developer Tony George and his wife, Kristine; a Cleveland-Marshall College of Law student; and two students from Mayfield High School.

Vice President Al Gore's slate includes State Rep. Erin Sullivan; Lakewood Mayor Madeline Cain; Cleveland City Councilman Nelson Cintron; Yelena Boxer, fiancee of Rep. Dennis Kucinich; Peggy Zone Fisher, wife of former Ohio Attorney General Lee Fisher; and Thaddeus Jackson, former Cuyahoga County Elections Board member.

James F. McCarty

Call me Kate

Tired of being confused with a controversial Cuyahoga County judge of the same name, U.S. District Judge Kathleen M. O'Malley wants to be called Kate.

O'Malley shares her name with a Cuyahoga County Domestic Relations judge. The two are not related. In fact, the federal judge said they've never met.

Domestic Relations Judge O'Malley made headlines last month when she was accused of stealing $8.72 worth of merchandise from a Marc's discount store.

The company's decision not to prosecute caused plenty of public criticism, some of which rained down on federal Judge Kate, who says everyone from her carpet cleaner to lawyers in her courtroom have asked her if she is the judge accused of trying to leave the store with a toothbrush and eyelash curler refills stuffed down her pants.

Karl Turner

Third fiddle

Word had it that Jimmy Dimora would be a more powerful man starting tomorrow, when the Cuyahoga County commissioners are to elect their president and vice president for the coming year. Some expected Dimora to become the commissioners' president, adding to his clout as chairman of the Cuyahoga County Democratic Party.

But Dimora said Thursday that he plans to vote for Jane L. Campbell for president and Tim McCormack for vice president, because both are up for re-election this year.

"I'd rather have them be in the front jobs right now this election year, rather than myself," Dimora said. "I told them I'd be happy to take the presidency in 2001."

Janet Cho

A little conflicted

Two Democratic pollsters have discovered this year's "soccer moms" - and they look quite a bit like the group of suburban voters that some analysts credit with helping to swing the last two presidential elections toward Bill Clinton.

Surveyors Geoff Garin and Celinda Lake call them "cross-pressured women": married moms living in the suburbs, torn between their support of Democrats on many issues, and their preference for Republicans when questions concerning moral values creep into campaigns.

That group, 18 percent of all female voters, leans toward Republican candidates at this juncture, Garin and Lake said. Apparently, they just don't go to soccer practice as often as they used to.

Tom Diemer

Stump assistants

With the approach of key primaries in Iowa and New Hampshire, GOP presidential candidates who find they need to be in two places or more at once are drafting Ohio supporters as stand-ins.

Cincinnati Congressman Rob Portman is planning to make appearances for Texas Gov. George W. Bush in New Hampshire next week. Ohio Secretary of State Ken Blackwell is visiting the Granite State for millionaire publishing heir Steve Forbes, and Sen. Mike DeWine is planning a trip on behalf of Arizona Sen. John McCain.

Portman, who graduated from Dartmouth College in New Hampshire, plans to tout Bush at his alma mater, and do radio interviews for Bush.

"I don't know what kind of a difference it will make, but I feel strongly enough about the campaign that I want to do everything I can," said Portman, who headed the White House Office of Legislative Affairs when Bush's father was president.

Portman has been mentioned for possible White House posts if George W. is elected, but said he'd prefer to stay in Congress to help push Bush's agenda "through the legislative minefield."

S.E.

Holed up

For his 53rd birthday, Sen. Mike DeWine went to Arizona - not to campaign for that state's Sen. John McCain, DeWine's choice for president, but to visit the Grand Canyon with his wife and three of his children.

DeWine was to be hosted by another one of his kids, son John, a botanist at the national park.

"Mostly, we'll just hike," DeWine said. "(But) we'll ride the mules, too."

Careful, senator. Donkeys and Democrats go back a long way.

T.D.



--- INDEX REFERENCES ---

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Legislation (1LE97); Government (1GO80); World Elections (1WO93); Government Litigation (1GO18); Political Parties (1PO73); Global Politics (1GL73); Public Affairs (1PU31))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); New Hampshire (1NE86); New England (1NE37); North America (1NO39); Texas (1TE14))

Language: EN

OTHER INDEXING: (ARIZONA; ARIZONA SEN; BROOK PARK; CONGRESS; CUYAHOGA COUNTY; CUYAHOGA COUNTY DEMOCRATIC PARTY; CUYAHOGA COUNTY DOMESTIC; CUYAHOGA COUNTY ELECTIONS BOARD; DARTMOUTH COLLEGE; DEMOCRATIC; DEMOCRATIC NATIONAL CONVENTION; DOMESTIC; EATON; FRANKIE YANKOVIC; GARIN; GRANITE STATE; HOUSE ACTION REPORTS" WEB; KAREN VAN BREDA KOLFF; MARC; MARSHALL COLLEGE OF LAW; OFFICE OF LEGISLATIVE AFFAIRS; SABRINA; SHAKER HEIGHTS; STATE REP; SURVEYORS GEOFF GARIN; WHITE HOUSE) (Al Gore; Apparently; Betsy Ross; Bill Bradley; Bill Clinton; Bradley; Brave Combo; Bryan Flannery; Bush; Careful; Celinda Lake; Democrats; Dennis Kucinich; DeWine; Dimora; Donkeys; Drew Carey; Erin Sullivan; Fat Polka; George W. Bush; George W. is; Hold; Holed; Inside Politics; INSIDE POLITICS KUCINICH ROLLS; James F. McCarty; Jane L. Campbell; Janet Cho; Jimmy Dimora; John; John McCain; Judy Rawson; Karl Turner; Kate; Kathleen M. O'Malley; Ken Blackwell; Kristine; Kucinich; Lake; Lee Fisher; Madeline Cain; Mary Rose Oakar; Mike DeWine; O'Malley; Ohio; Peggy Zone Fisher; Plain Dealer; Polka; Portman; S.; Steve Forbes; Stump; Thaddeus Jackson; Tim McCormack; Tired; Tom Coyne; Tom Diemer; Tony George; Uncle Sam; Word; Yelena Boxer)

EDITION: FINAL / ALL

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1998 WLNR 7138866

Cleveland Plain Dealer


September 21, 1998

Section: METRO

# A COURTROOM REVOLUTION U.S. DISTRICT JUDGE KATHLEEN M. O'MALLEY GIVES HER SPACE TO THE FUTURE:BEAMING WITNESSES BEFORE A JURY AND LAUNCHING MATERIALS FROM LAPTOPS

MARK ROLLENHAGEN PLAIN DEALER REPORTER

Off the marble hallways in the old Federal Courthouse in Cleveland is a high-tech courtroom that television sportscaster John Madden would love.

Like Madden during a pro football game, lawyers can use a light pen to draw circles, arrows or squiggly lines to emphasize a section of a document or a portion of videotape shown on small video screens next to each juror's chair.

A closed-circuit video confer ence system and multimedia computer presentations can beam witnesses into the courtroom, and multimedia presentations can be launched from laptops plugged into jacks in the bases of lamps on the lawyers' tables.

"We're catching up with the technology," said Karen Redmond, a spokeswoman for the Administrative Office of U.S. Courts, which funded most of the recent $250,000 electronic overhaul of the U.S. District Court courtroom in Cleveland.

Chief Judge George W. White said the project would help judges and lawyers in the Northern District of Ohio begin using the equipment that will probably be standard in the new federal courthouse that should be completed in about two years.

It is unclear yet whether the high-tech equipment will be moved to the new courthouse or left in the old building for use by the U.S. Bankruptcy Court or senior judges.

"I think that attorneys are going to have to learn to use this equipment because that's the way cases are going to be tried," said U.S. District Judge Kathleen M. O'Malley, who volunteered her courtroom for the project.

She said her courtroom was, for the moment at least, the most technologically advanced federal courtroom in the

nation.

Some elements have been used in various courts for several years, including the closed-circuit television system that some local courts have used to arraign prisoners directly from jail. And for four or five years, several federal judges in Cleveland have received real-time transcripts of trials and hearings on computer monitors mounted on the bench.

Lawyers also have shown documents through overhead projection systems that magnify the documents and display them on a large television screen near the jury box.

But O'Malley's courtroom combines all of these features and includes a James Bond-style podium - complete with a hidden VCR - from which lawyers can make their multimedia presentations. The jury box has one video screen for every two jurors, and lawyers with laptop computers have access to the transcript that instantly shows them the court reporter's notes as they are typed.

Other judges on the U.S. District Court will use the courtroom occasionally, especially for complex trials that require large volumes of documents that might be more easily explained to jurors through the high-tech system.

Some judges are concerned about whether electronic courtrooms will give an unfair advantage to large law firms that employ a battery of computer technicians. White said he could envision circumstances in which he would not allow use of the new equipment because it might give one side a big advantage.

But O'Malley said the electronic courtroom might actually make things more equal. She said small firms or independent lawyers often were more computer-savvy than their counterparts at large firms because they must learn to use the equipment themselves.

"It's not fancy software we're talking about," she said.

Still, the electronic courtroom will present new challenges and require a lot of pretrial planning and work by the lawyers.

The system has an override button at the bench that lets the judge black out the video screens in the courtroom. But the speed of electronic trials will make it even more important to decide early what evidence will be admissible.

"It's a lot harder to pull something off a screen than from in front of a witness," O'Malley said.

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36))

INDUSTRY: (Portable PCs (1PO56); Home & Multimedia PCs (1HO36); Computer Equipment (1CO77); Consumer Electronics (1CO61); Electronics (1EL16))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (ADMINISTRATIVE OFFICE; COURTROOM; US BANKRUPTCY COURT; US DISTRICT; US DISTRICT COURT; VCR; WITNESSES) (Chief; George W. White; James Bond; John Madden; Karen Redmond; KATHLEEN M. O'MALLEY; Madden; Malley; O'Malley; White)

EDITION: FINAL / ALL

Word Count: 775
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Columbus Dispatch (**Ohio**)

April 6, 1995, Thursday

# JUDGES WILL ATTEMPT TO UNTANGLE DEATH PENALTY PROCESS

**BYLINE:** Alan Johnson, Dispatch Statehouse Reporter

**SECTION:** NEWS LOCAL & NATIONAL, Pg. 3C

**LENGTH:** 365 words

A panel of federal, state and local judges is looking at ways to streamline handling of death penalty cases by the courts.

Chief Justice Thomas J. Moyer of the **Ohio** Supreme Court and Chief Judge Gilbert Merritt of the U.S. 6th Circuit Court of Appeals announced creation of the six-member committee yesterday.

Moyer said he wants the group to ''streamline the processes by which we administer death penalty cases.''

Merritt said the committee will ''explore ways to enhance communications and coordination of death penalty cases between the state and federal courts.''

Delays and appeals have stretched some **Ohio** capital cases to 10 years or more. **Ohio's** last execution was March 15, 1963. The death penalty was restored in 1981.

Frustration over the slowness of the process prompted **Ohio** voters to approve a constitutional amendment last fall removing one step in appeals. Legislation being considered by the **Ohio** General Assembly would shorten the process even more.

Judge Patrick M. McGrath of the Franklin County Common Pleas Court and a member of the death penalty committee, termed current delays intolerable.

''We have to be cautious and deliberative with regard to appeals. However, 10 years is unacceptable,'' McGrath said. ''It's not justice if the justice system takes 10 years.''

Another committee member, U.S. District Judge **Kathleen** J. **O'Malley**, said some of the problem might be resolved by improving communcation between state and federal courts.

''Both courts have been very concerned about the unilateral actions of the other,'' O'Malley said. ''Communication is a critical element.''

But O'Malley said much of the delay in death penalty cases is built into the law and is thus up to Congress or state officals to resolve.

''There are a lot of claims that judges don't move quickly or that they put these cases on the back burner,'' O'Malley said. ''That is just not the case. They are given top priority.''

Other members of the committee are U.S. Circuit Judge Nathaniel R. Jones, U.S. District Judge Sandra S. Beckwith, Justice Andrew Douglas of the **Ohio** Supreme Court and Judge Ann Marie Tracey of Hamilton County Common Pleas Court.

**LOAD-DATE:** April 7, 1995

**LANGUAGE:** ENGLISH

10/9/94 Columbus Dispatch (Ohio) 12A
1994 WLNR 5148190

Columbus Dispatch (OH)


October 9, 1994

Section: NEWS

# 2 IN OHIO GET NOD FROM SENATORS FOR FEDERAL JUDGESHIPS
## VACANCIES FILLED IN CLEVELAND, TOLEDO

As part of its late-night session Friday and early yesterday, the Senate confirmed two Ohioans for federal judgeships in the northern part of the

state. **Kathleen O'Malley**, chief of staff in the Ohio **attorney general's** office, will fill a vacant federal judgeship in Cleveland; and David A. Katz, a corporate lawyer from Toledo, was confirmed for a judgeship in that city.

O'Malley has said she left a Cleveland law firm to join the staff of **Attorney General** Lee Fisher in 1991 because she saw it as a steppingstone to her lifelong goal of becoming a **federal judge.**

The position pays $133,600 annually and is a lifetime appointment.

Katz was confirmed even though he was rated unqualified by the American Bar Association, which said he lacks trial and criminal-case experience.

Katz was one of only three of the 140 Clinton judicial nominees to be rated unqualified by the ABA. He had argued that he would bring a balanced background to the bench.

Both he and O'Malley were recommended for confirmation by the Senate Judiciary Committee.

Metzenbaum's adoption bill

sent to Clinton for signing

Congress has given final approval to legislation sponsored by Sen. Howard M. Metzenbaum to tear down racial barriers that have held up some adoptions.

The measure, which now awaits President Clinton's signature, encourages agencies to make adoptions regardless of race when a same-race adoption cannot be made.

"This is a tremendous victory for thousands of children who want more than anything else to be part of a loving family," said Metzenbaum, D-Ohio. "This legislation means children will spend less time in lonely limbo and will arrive at their permanent homes that much sooner."

The transracial adoption law was adopted as part of an education bill approved last week. The Department of Health and Human Services will issue guidelines on the adoptions within six months, and will bar child welfare agencies from delaying, denying or discriminating on race in making adoption

placements. Metzenbaum drew up the legislation to deal with the problem of thousands of children who are available for adoption but remain in foster care because agencies don't want the children adopted by people of a different race. Nationally, 460,000 children are in foster care.

The legislation still encourages agencies to attempt to place children with parents of the same race whenever possible.

Kasich wins 30 percent cut

in ICC funding and duties

Rep. John R. Kasich's plan to kill the Interstate Commerce Commission didn't make it through Congress, but he did win a hefty cut in the agency.

Kasich won House approval of a plan to eliminate the 100-year-old agency and its $45 million budget and to shift some of its few remaining duties to the Department of Transportation.

But the Senate wouldn't go along with killing the independent agency, and a compromise calls for a 30 percent cut in funding and duties.

The final version of the transportation appropriations bill calls for a $14.6 million reduction in the ICC's funding for 1995, and staffing will be reduced from 622 positions down to 428.

Kasich, R-Westerville, promised to make another assault on the agency next year, saying its regulatory duties have diminished to the point that it no longer needs to be a separate agency.

House approves canal area

in Ohio as historic corridor

The House of Representatives last week approved a measure creating an 87-mile Ohio & Erie Canal Heritage Corridor for northeastern Ohio.

The bill, adopted 281-137, designated the Ohio & Erie Canal area and 10 others as historic corridors.

The legislation sets up a federal-state partnership to develop historic areas, providing up to $250,000 a year in federal money for operations and development, said Rep. Ralph Regula, R-Navarre. Federal dollars would be matched by money from state and local governments and private groups.

The money would be used to build trails, preserve historic buildings and make other improvements.

The Ohio area spans an area from Lake Erie to the rural farmlands near historic Zoar.

"We are preserving a piece of our heritage," Regula said.

The bill still must be approved by the Senate to become law.

Review slated of proposal

to merge weather stations

The National Weather Service has backed off its plan to consolidate weather stations in Toledo and Cleveland until an independent review is done by the National Academy of Sciences.

The weather service wants to automate its severe-weather radar system and consolidate the Toledo and Cleveland stations. But Rep. Marcy Kaptur, D-Toledo, complained that Toledo is too far from Cleveland and that relying on Cleveland for weather bulletins could be dangerous to people in northwestern

Ohio. "There have been occasions when Cleveland has actually notified Toledo of storm fronts after a storm has passed," Kaptur said. "This is

unconscionable." Under the agreement, which calls for the National Academy of Sciences review, the National Weather Service must report to Congress that any closings or consolidations will not result in a reduction of service, she

said. Dispatch Washington Bureau

How Ohioans voted in Washington

Here is how Ohioans in the Senate and House of Representatives were recorded last week on key roll-call votes.

--- INDEX REFERENCES ---

COMPANY: IRAN CARBON CO; AMERICAN BAR ASSOCIATION; ITALTSWANA CONSTRUCTION COMPANY (PTY) LTD; STATE FORTIFICATION STS JAKSN MS L L C; HOUSE OF REPRESENTATIVES; UNELKO CORP; UK DEPARTMENT OF HEALTH

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Government (1GO80); Political Parties (1PO73); Economics & Trade (1EC26))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (ABA; AMERICAN BAR ASSOCIATION; CONGRESS; DEPARTMENT OF HEALTH; DEPARTMENT OF TRANSPORTATION; DISPATCH WASHINGTON BUREAU; HOUSE; HOUSE OF REPRESENTATIVES; HUMAN SERVICES; ICC; NATIONAL ACADEMY OF SCIENCES; NATIONAL WEATHER SERVICE; OHIOANS; SENATE; SENATE JUDICIARY COMMITTEE; STATE) (Clinton; David A. Katz; Howard M. Metzenbaum; John R. Kasich; Kaptur; Kasich; Kathleen O'Malley; Katz; Lee Fisher; Marcy Kaptur; Metzenbaum; Nationally; O'Malley; Ralph Regula; Regula; VACANCIES FILLED)

KEYWORDS: OHIO POLITICS VOTE PROFESSION US CONGRESS NAMELIST

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1994 WLNR 4815533



**September 25, 1994**

Section: PERSPECTIVE

# A TRAITOR TO THE CAUSE

MARY ANNE SHARKEY

That the "neofeminists," as some of them are called, degrade the contributions of Gloria Steinem and her generation of activist women is a disgusting display of ingratitude.

"Once we needed her, now we're stuck with her," wrote Camille Pagila in her anti-feminist book. Such a dismissal of the genuine contributions of leaders such as Steinem displays an appalling ignorance of what life was like for women before the feminist movement took hold in this country.

Yet Steinem, as illustrated by her appearance in Cleveland last week, gives her critics ammunition by relying more on feminist myths than facts. As a writer, she would do well to work on her reportorial skills.

Steinem packed the banquet room at Windows on the River with activist women, including judges, state representatives and local officeholders who have known her through the years. She was the draw for a fund-raiser for Ohio Attorney General Lee Fisher, a liberal Democrat who is sidling toward the center as his statewide ambitions grow.

Looking terrific at age 60, Steinem was in good form in her endorsement speech of Fisher, whom she anointed an "honorary woman," and went on a tirade against his Republican opponent, State Sen. Betty Montgomery. Her message was quite clear: Montgomery is a traitor to the cause.

She said she was in an unusual position of endorsing a male candidate against a female candidate - though not endorsing a Democrat over a Republican.

"There aren't too many women who don't represent women," she said. Her term for this, she said, is "the Clarence Thomas syndrome."

Adding that not all women stand for issues important to women, "It is about equality and not about biology," said Steinem.

What had Montgomery, a former Wood County prosecutor who has broken her fair share of gender-bias ground in her home territory, done to deserve this public flogging by an icon like Steinem? Montgomery, too, has been a part of the early struggle as a pioneer woman prosecutor and candidate for Ohio Attorney General.

But Steinem didn't recognize Montgomery's career. With an audience of women, many past child-bearing age, Steinem beat on Montgomery over the tiresome abortion issue.

"She's not pro-choice, at best she's multiple choice," said Steinem. "She chooses to use the tactic of the year, the stealth candidate ... She is either silent or waffling on choice."

To his credit, Fisher corrected the record. "Gloria and I did not have a chance to discuss this," he said. "I consider my opponent to be pro-choice."

Montgomery was incensed. "I am pro-choice," she said. She does oppose Medicaid funding for abortions.

Fisher's attempt at making amends did not cool her anger. "He sends his surrogates in to say these things," she said.

Steinem compounded her error by attacking Montgomery for her stand on the domestic violence bill. Montgomery supports compromise language that gives police discretion in domestic violence cases, rather than the House-passed version that mandates arrest.

The criticism would be well-founded but for one niggling detail: Fisher also agrees with the compromise language of "preferred arrest" over requiring an arrest in domestic violence cases.

"Do you hold the same position as Sen. Montgomery?," he was asked. "Yes," he responded.

Leesa Brown, press secretary to Fisher's campaign, said she did not know where Steinem got her information other than from some area women activists. "We didn't tell Gloria to say those things, particularly the choice thing." Steinem's office has not responded to an inquiry.

Yet, Kate O'Malley, chief of staff to Fisher and nominee for a federal judgeship, defended the criticism of Montgomery. She maintained that Montgomery has given conflicting signals on both issues.

That was not the essence though of Steinem's criticism, just a matter of degree of support.

Steinem said Montgomery is the kind of woman candidate "who looks like you and behaves like them."

Sadly, so did Steinem. She distorted the record of a bona fide woman candidate to suit a political purpose. Feminist leaders cannot claim to have a higher moral purpose for their cause if they resort to the same deceptions as the "old boys network," that Steinem denounced.

Or as Montgomery summed it up, "Lee cannot be more of a woman than I am."

Nor can Steinem elevate Fisher to that lofty status with an honorary title.



---- INDEX REFERENCES ---

INDUSTRY: (Women's Health (1WO30); Healthcare (1HE06); Contraception (1CO66); Healthcare Practice Specialties (1HE49))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (CLARENCE THOMAS; GLORIA; GLORIA STEINEM; OHIO ATTORNEY; PLAIN DEALER; STATE SEN; STEINEM; STEINEM DIDN; TRAITOR) (Betty Montgomery; Camille Paglia; Fisher; Kate O'Malley; Lee Fisher; Leesa Brown; Montgomery; Sadly; Sharkey)

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EDITION: FINAL / ALL

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**September 22, 1994**

Section: METRO

# JUST A MATTER OF TIME FEDERAL JUDGE APPOINTEE AWAITS ROBES

T.C. BROWN PLAIN DEALER BUREAU

COLUMBUS Fortunetelling was not the calling **Kathleen O'Malley** envisioned on Career Day at St. Filicitas Elementary School in Euclid when she was a little girl, but she did show an uncanny knack.

Though that day three decades ago is a distant memory, O'Malley recalls telling classmates that she wanted to be a judge.

"I was always intrigued not as much by the results, but by the process," O'Malley said. "I was always very interested in how lawyers put on trials. It's almost like a mystery unraveling."

That long-ago prediction is a few steps from reality for the 37-year-old first assistant and chief of staff to Ohio Attorney General Lee I. Fisher. President Clinton on Tuesday nominated her to fill a vacant federal court judgeship in Cleveland.

Soon she will make an appearance before the Senate Judiciary Committee to answer questions. Once that hurdle is cleared, the full Senate will vote on confirmation. O'Malley hopes to don judicial robes by the end of next month.

"Not only is this a great responsibility, it is a great honor," said O'Malley, from her spacious, 17th-floor state office draped with family pictures, mementoes and a large wall sign - "It's Crime Stupid."

O'Malley knows lawyers. And not just from business.

She is married to Anthony O'Malley, a partner in a corporate law firm. Two of her three older brothers, Thomas McDonald and Kevin McDonald, are lawyers. The third, Brian McDonald, claims he is the smart one of the bunch because he chose architecture over lawyering, O'Malley said.

O'Malley, a deliberate speaker with a quick wit, is the mother of a 7-year-old daughter and a 5-year-old son.

Her family is thrilled - though her daughter's interest cooled when she learned that her mother would not try the O.J. Simpson case - and both she and her husband are happy to move to Richmond Heights, where their parents live.

O'Malley was born in Philadelphia, but her parents, Thomas and Mildred McDonald, moved first to Cincinnati and then to Richmond Heights by the time O'Malley was 3. Her childhood was filled with her parents' discussions and arguments over legal issues of the day, including the famed Sam Shepard murder case.

O'Malley graduated from the all-girls Regina High School in 1975 and from Kenyon College in 1979 with dual degrees in economics and history. She ranked first in her law school class upon graduation in 1982 from Case Western Reserve University School of Law.

Insight into the federal bench first came in 1982 when O'Malley worked as a clerk for Judge Nathaniel R. Jones, U.S. Court of Appeals (6th Circuit).

In a May letter to Clinton's associate counsel recommending O'Malley for the appeals court, Jones wrote that O'Malley was one of his best clerks. He said she would bring thoughtfulness, racial, ethnic and gender sensitivity, and superior scholarship to the bench.

O'Malley's stint with Jones strengthened her resolve to become a federal judge. She said she learned that the judicial system could have a great social impact, but judges must decide cases wisely.

"You have to be true to the law. You have to be intellectually honest. You can't say I want a certain result and set out to achieve that result regardless of where the law really takes you," O'Malley said. "Jones' attempt to strike a balance between those two ultimate goals is something that stayed with me throughout my career."

O'Malley joined Fisher in April 1991, the day after she was chosen to be a partner in the Cleveland-based Porter Wright Morris & Arthur law firm. She rose from chief counsel to Fisher's chief of staff and first assistant within two years.

Asked about politics, O'Malley chuckled and said she was a political neophyte and was not actively involved.

But she took much of the heat last year when Fisher fired William Damsel, an assistant attorney general, for refusing to quit his political campaign against Rep. Douglas Applegate, D-18, of Steubenville.

O'Malley defended the firing, saying that Damsel did not seek approval from Fisher to run for political office. Damsel claimed that the Applegate camp pressured Fisher, a charge denied by Applegate.

Damsel declined comment this week, saying he is still trying to resolve the issue. O'Malley said politics did not

play a role.

"That was a debate between Bill (Damsel) and the attorney general," O'Malley said.

O'Malley's most ironic case came in which she defended Republican Gov. George V. Voinovich's right to appoint Republicans as judges to the state courts.

"In closing arguments to the judge, I said I'd love to get the next appointment George Voinovich makes to the bench, but I don't have a constitutional right to that appointment," O'Malley said. "Unfortunately for Democrats, I won."

Winning is a priority for O'Malley, said her longtime friend Stephanie Flanigan, a lawyer in Denver.

"She hasn't succeeded because of connections, but because of clear hard work and charisma," Flanigan said. "She's clearly wanted to do this for a long time. We were just waiting for someone to wake up and smell the roses."



--- INDEX REFERENCES ---

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (FILICITAS ELEMENTARY SCHOOL; KENYON COLLEGE; PORTER WRIGHT MORRIS ARTHUR; REPUBLICANS; SENATE JUDICIARY COMMITTEE; US COURT OF APPEALS) (Anthony O'Malley; Applegate; APPOINTEE AWAITS; Brian McDonald; Clinton; Damsel; Douglas Applegate; Fisher; Flanigan; Fortunetelling; George V. Voinovich; George Voinovich; Insight; Jones; Kathleen O'Malley; Kevin McDonald; Lee I. Fisher; Malley; Mildred McDonald; Nathaniel R. Jones; O'Malley; O.J. Simpson; Sam Shepard; Stephanie Flanigan; Thomas; Thomas McDonald; William Damsel)

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States News Service

August 24, 1994, Wednesday

# CLEVELAND ATTORNEY RECOMMENDED FOR FEDERAL BENCH

**BYLINE:** By Laura R. Hamburg, States News Service

**LENGTH:** 513 words

**DATELINE:** WASHINGTON

Richmond Heights native, attorney **Kathleen O'Malley** played it cool when Sen. Howard Metzenbaum called her last week to congratulate her on her nomination to the federal bench.

"After I politely thanked the Senator," said O' Malley, who is **Ohio** Attorney General Lee fisher's chief of staff, "I hung up the phone and screamed.

"I had this overwhelming sense of awe," O'Malley said, "because I realize what an incredible responsibility and an incredible honor it is to serve."

President Clinton is expected to nominate O'Malley, 37, to fill the vacant federal court judgeship in Cleveland. The federal court's Northern District oversees cases in 40 Northern **Ohio** counties.

As O'Malley gets closer and closer to garnering the $133,600-a-year lifetime appointment, her local fan club will be cheering her on.

Her parents, Mr. and Mrs. Thomas McDonald live in Richmond Heights as does her brother, Billy McDonald. While brothers, Thomas L. McDonald Jr. lives in Mentor and Brian B. McDonald lives in Aurora. Another brother Kevin D. McDonald lives in Washington D.C. O'Malley's inlaws, Joseph and Marylou O'Malley live in Rocky River.

O 'Malley said she has spent her entire professional career preparing for this moment.

Everything she has ever done -- from ranking first in her first-year class at Case Western Reserve University School Law to landing a partnership in the litigation department at Porter, Wright, Morris and Arthur law firm in Cleveland -- has been geared towards being a federal judge.

Just ten years after graduating from law school, O' Malley was working as the Attorney General's Chief Counsel, supervising more than 350 lawyers.

"We are tremendously proud of kate and very excited for her," said Attorney General, Lee Fisher. "She's going to make an excellent federal judge," he said. "No one deserves it more than she does."

Since 1993, she has served as Fishor's assistant Attorney General where she is responsible for the overall supervision of the office's 1,000 employees.

"It's all been designed to make me more qualified for the federal judge position," O'Malley said.

"My friends used to joke that in the late 1980's I was the only one they knew who played babysitter taxes," O'Malley said referring to Supreme Court nominee Zoe Baird whose name was withdrawn after it was revealed she didn't pay taxes on her nanny.

"To obtain this nomination at her age really says a lot," said John Habat, vice president of government relations at the Greater Cleveland Growth Association. "She has a reputation as an extremely bright, creative and nice person," Habat said.

O'Malley still has to be confirmed by Senate Judiciary Committee and under go the routine scrutiny of both the FBI and the American Bar Association's background checks.

If confirmed, O'Malley said, she and her husband, Anthony J. and their two children, look forward to moving to back to the Cleveland area.

"My mother and my mother-in-law expressed desire in getting their grandchildren back," O'Malley said. "We feel like we would be going home."

**LOAD-DATE:** August 24, 1994

**LANGUAGE:** ENGLISH

8/18/94 Akron Beacon J. (Ohio) B6
1994 WLNR 1353199



August 18, 1994

Section: OHIO

# O'MALLEY NOMINATED FOR FEDERAL COURT SEAT

CLEVELAND **Kathleen O'Malley**, chief of staff for Ohio Attorney General Lee Fisher, has been recommended to fill a federal judgeship.

President Clinton is expected to nominate O'Malley, 37, based on recommendations from senators Howard Metzenbaum and John Glenn.

She must then be confirmed by the full Senate.

The former resident of Richmond Heights said the appointment would "fulfill a lifetime dream."

The federal court's Northern Ohio District oversees cases in 40 Ohio counties.

The $133,600-a-year lifetime appointment is highly coveted. Metzenbaum and Glenn recommended Cuyahoga County Common Pleas Judge Linda Rocker for the vacancy, but she withdrew from consideration in June.

O'Malley got her law degree in 1982 from Case Western Reserve University. She was awarded the law school's Distinguished Recent Graduate Award in 1992.

O'Malley has never served as a judge.

Gale Messerman, president of the Cleveland Bar Association, said being a good federal judge doesn't necessarily require prior experience on the bench.

IN THE REGION / METRO BRIEF

---- INDEX REFERENCES ---

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (CASE WESTERN; CLEVELAND BAR ASSOCIATION; DISTINGUISHED RECENT GRADUATE AWARD; OHIO; OHIO ATTORNEY; RESERVE UNIVERSITY) (Clinton; Gale Messerman; Glenn; Howard Metzenbaum; John Gleon; Kathleen O'Malley; Lee Fisher; Linda Rocker; Metzenbaum; O'MALLEY) (BIOGRAPHY; KATHLEEN O'MALLEY; AGE; FEDERAL JUDGESHIP RECOMMENDATION; SALARY )

EDITION: 3 STAR

Word Count: 213
8/18/94 AKRONBJ B6
END OF DOCUMENT

8/18/94 Columbus Dispatch (Ohio) 03D
1994 WLNR 5143041

Columbus Dispatch (OH)


August 18, 1994

Section: NEWS

# FISHER COUNSEL MAY GET JUDGESHIP

Alan Johnson, Dispatch Statehouse Reporter

When **Kathleen O'Malley** took the job as **Attorney General** Lee Fisher's chief counsel in 1991, she saw it as a steppingstone toward her lifelong goal of becoming a federal **judge**.

Three years later, at 37, O'Malley's dream appears to be coming true.

O'Malley's name has been sent to President Clinton by Democratic Ohio Sens. Howard Metzenbaum and John Glenn as their recommendation to fill a vacant federal judgeship in northeast Ohio.

Clinton's nomination of O'Malley must be confirmed by the U.S. Senate, possibly by October. The federal judgeship pays $133,600 annually and is a lifetime appointment.

When she got word of her probable nomination, "I screamed, 'Yeah,' " O'Malley said. "There was a strong feeling of relief because I realized how much I wanted this.

"I have always wanted to be a federal **judge**," she said. "It is the place where all of the issues I have spent my career analyzing and attempting to learn come together."

O'Malley, who has never been a **judge**, expressed an interest in the federal bench in 1993, as well as a seat on the federal circuit court.

O'Malley took a pay cut of nearly 50 percent when she left the Cleveland law office of **Porter**, Wright, Morris and Arthur, where she had been since 1984, to work for Fisher for $70,000 a year. She became Fisher's chief of staff last year and now makes an annual salary of $89,003.

"This is an incredible job," she said. "I have learned a lot about the legislature, about politics, the law and life. I am going to have a lot of regrets about leaving Lee, but I couldn't be going to a better position."

Her husband, Anthony, is a partner with the law firm of Vorys, Sater, Seymour and Pease. They have two chil- dren.

A Philadelphia native, she grew up in the Cleveland area. She has a law degree from **Case Western** Reserve University and a bachelor's from **Kenyon** College.

—- INDEX REFERENCES —-

COMPANY: STRATEGIC INTERNET INVESTMENTS INC; JEFFERSON CAPITAL CORP

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (DEMOCRATIC OHIO SENS; JUDGESHIP; **KENYON** COLLEGE; OHIO; SENATE; WESTERN RESERVE UNIVERSITY) (Anthony; Arthur; Clinton; Fisher; FISHER COUNSEL; Howard Metzenbaum; John Glenn; Kathleen O'Malley; Lee; Lee Fisher; Malley; O'Malley; Pease)

KEYWORDS: KEYWORDS: COURT APPOINTMENT

EDITION: Home Final

Word Count: 366
8/18/94 COLDIS 03D
END OF DOCUMENT

8/17/94 Plain Dealer (Clev.) 1A
1994 WLNR 4768569



August 17, 1994

Section: NATIONAL

# FISHER AIDE TOP CHOICE FOR FEDERAL JUDGESHIP

STEVE LUTTNER POLITICS WRITER

**Kathleen O'Malley**, a Richmond Heights native and Ohio **Attorney General** Lee Fisher's chief of staff, has been recommended to fill a vacant federal court judgeship in Cleveland.

President Clinton is expected to nominate O'Malley, 37, based on recommendations from Democratic Sens. Howard Metzenbaum and John Glenn. She must then be confirmed by the full Senate.

"I'm thrilled at the prospect of serving on the federal bench," O'Malley said yesterday during a telephone interview from her Columbus office. "I'm thrilled at the prospect of coming home to Cleveland. And I'm thrilled that Sen. Metzenbaum and Sen. Glenn have given me the opportunity to fulfill a lifetime dream."

The $133,600-a-year lifetime appointment is highly coveted in the Northeast Ohio legal community. Nancy Coffey, Metzenbaum's administrative assistant, said 19 lawyers, including O'Malley, were interviewed.

Metzenbaum and Glenn recommended Cuyahoga County Common Pleas **Judge** Linda Rocker for the vacancy. Rocker was the subject of news reports outlining her involvement in political activities for U.S. Senate candidate Joel Hyatt, Metzenbaum's son-in-law. Ohio's judicial code of conduct generally prohibits **judges** from engaging in political events other than their own elections.

Rocker withdrew from consideration last June, citing questions the American Bar Association raised. She said the bar association, which reviews all prospective federal bench appointees, noted that she had less than the preferred minimum of 12 years' experience as a lawyer.

O'Malley got her law degree in 1982 after graduating from **Case Western** Reserve University's School of Law. O'Malley was awarded the law school's Distinguished Recent Graduate Award in 1992.

She graduated in 1979 from **Kenyon** College magna cum laude and Phi Beta Kappa with a dual degree in economics in history. She is a 1975 graduate of Regina High School in South Euclid.

Since March 1993, O'Malley has served as first assistant and chief of staff for Fisher. She has been responsible for the overall operation of the attorney general's office, which employs more than 1,000 people.

From April 1991 to March 1993, O'Malley served as chief counsel to Fisher, where she supervised more than 350 lawyers in the attorney general's office. She worked earlier as a lawyer in the Cleveland law firm of Porter Wright Morris & Arthur.

O'Malley has never served as a judge, a factor that yesterday didn't seem to bother the presidents of two local bar associations.

"I think she's well-qualified," said Mercedes Spotts, president of the Cuyahoga County Bar Association. "Some judges who have never before had trial experience will come into a courtroom and do a wonderful job."

Gale Messerman, president of the Cleveland Bar Association, said being a good federal judge doesn't necessarily require prior experience on the bench.

"It has to do with one's ability to be a good person, to be impartial and to care about people," Messerman said. "I think Kate will make a fine judge."

Fisher said that O'Malley "... is the best and brightest lawyer I've ever had the pleasure of working with."

O'Malley is married and has two children. The federal court's Northern District oversees cases in 40 Northern Ohio counties extending from Indiana to Pennsylvania.



--- INDEX REFERENCES ---

COMPANY: AMERICAN BAR ASSOCIATION

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (AMERICAN BAR ASSOCIATION; CASE WESTERN RESERVE UNIVERSITY; CLEVELAND BAR ASSOCIATION; CUYAHOGA COUNTY BAR ASSOCIATION; DISTINGUISHED RECENT GRADUATE AWARD; KATE; KENYON COLLEGE; PORTER WRIGHT MORRIS; SCHOOL OF LAW; US SENATE) (Clinton; Fisher; FISHER AIDE; Gale Messerman; Glenn; Howard Metzenbaum; Joel Hyatt; John Glenn; Kathleen O'Malley; Lee Fisher; Linda Rocker; Malley; Mercedes Spotts; Messerman; Metzenbaum; Nancy Coffey; O'Malley; Ohio; Rocker; Sen)

KEYWORDS: BILL CLINTON; NOMINATIONS; APPOINTMENTS; JUDGES; COURTS

EDITION: FINAL / ALL

Word Count: 673
8/17/94 PLDLCL 1A
END OF DOCUMENT

11/10/94 Miami Herald 8
1994 WLNR 2385962



November 10, 1994

Section: BRWD N

# TRIAL ALTERNATIVES

Herald Staff

CHARLOTTE, N.C. Starting next summer, all individuals and businesses seeking a civil jury trial in Superior Court will be required to try an alternative form of dispute resolution, called ADR, before the case is placed on the trial calendar.

Superior Court handles disputes of $15,000 or more.

Parties to Superior Court lawsuits will be able to choose from a variety of ADR options, including mediation, arbitration, early neutral evaluation and summary jury trial. All are designed to resolve cases more quickly and at a lower cost than a standard jury trial.

In mediation, a certified mediator helps parties negotiate a settlement.

In arbitration, an impartial arbitrator conducts a hearing and makes rulings to decide the dispute.

In early neutral evaluation, an independent, experienced attorney reviews the case, providing opinions about the merits of the claims and the likely outcome.

And in a summary jury trial -- a short, informal trial -- a judge or jury gives a nonbinding verdict.

If parties don't agree on which technique to use, the judge will order them to participate in a mediated settlement conference. In any instance, if the case is not settled or parties are not satisfied with the outcome of the ADR proceeding, the case will proceed to a trial.

## VOLUNTEER MEDIATORS

LOS ANGELES -- In an effort to trim a 14,000-case backlog, judges in the Ventura County courts will turn to volunteer mediators to help resolve some of the cases that come before them.

The first cases will enter a new court program which asks parties involved in certain types of civil disputes to meet face to face and, with the aid of a trained mediator, try to reach an agreement without taking up precious court time.

The court is entering an arena previously dominated by private and nonprofit groups and, by doing so, risks forcing existing mediation programs into competition for funding and clients.

Despite this potential conflict, judges, lawyers and mediators are optimistic that court-mandated mediation will alleviate a swollen caseload while introducing litigants to a successful form of dispute resolution.

"We had to find a new and creative way to solve some of the disputes coming into the courthouse," said Superior Court Judge Richard D. Aldrich, one of the designers of the new program.

INMATE LAWSUITS

AKRON, Ohio -- Civil suits filed by prisoners for being denied soap on a rope or having to play basketball on cement instead of wood cost the state too much money and take too much time, according to Attorney General Lee Fisher and state Rep. Wayne Jones, D-Cuyahoga Falls, who are teaming up to put an end to some cases.

"While it is important to recognize that all citizens, including inmates, have a constitutional right to their day in court, the fact is the overwhelming majority of inmate lawsuits are over such frivolous claims as a prisoner being denied his soap on a rope," Fisher said.

Most frivolous cases are not soap-on-a-rope cases -- those take a couple hours' work, said Joe Mancini, an attorney with the attorney general's office.

More common are cases that allege prisoners have been denied medical treatment, that they have been beaten by guards, that they weren't protected from other prisoners or that living conditions in the prison are crowded or unsanitary.

Kate O'Malley, chief of staff for the attorney general's office, said the plan will not penalize those prisoners who have legitimate complaints.

TARGET BEYOND BROWARD

---- INDEX REFERENCES ---

NEWS SUBJECT: (Judicial (1JU36); Legal (1LE33); Prisons (1PR87))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (ADR; BROWARD; SUPERIOR COURT; TARGET) (Cuyahoga Falls; Fisher; Joe Mancini; Kate O'Malley; Lee Fisher; Richard D. Aldrich; TRIAL ALTERNATIVES; Wayne Jones)

EDITION: BRWRD

Word Count: 708
11/10/94 MIAMIHD 8
END OF DOCUMENT

9/14/94 Columbus Dispatch (Ohio) 02C
1994 WLNR 5165010

Columbus Dispatch (OH)


September 14, 1994

Section: NEWS

# STATE LAWYERS TO ARGUE BOTH SIDES OF ISSUE

Jonathan Riskind, Dispatch Statehouse Reporter

Two taxpayer-paid attorneys will argue whether the State Board of Education should be included in an appeal of a court decision finding the state's school funding system unconstitutional.

Attorney General Lee Fisher's office said yesterday that he will appoint an independent counsel to represent the state board in its attempt to withdraw from the appeal of the Perry County Common Pleas Court ruling.

The attorney, who still is to be named, will fight the issue with another Fisher-appointed independent counsel - Joel Taylor, who represents the state in the legal battle.

The state board recently voted against an appeal of Judge Linton Lewis Jr.'s decision but still was included in the appeal requested by Gov. George V. Voinovich and legislative leaders.

The case filed against the state by a coalition of school districts names as defendants the state, the board, the Department of Education and Ted Sanders, superintendent of public instruction.

Voinovich is not named, but Fisher's office has said Voinovich has legal standing as the state's chief executive officer to request an appeal, with or without the support of the board.

Oliver Ocasek, board president, said the 11-member elected body wants out of the case appeal but acknowledged the appeal likely will go forward, whether the board and department are appellants.

"The principle is so serious it had to be stated," Ocasek said. "Lee Fisher has assured the board of having its own day in court to convince a judge of the strength and meaning of the board's vote."

Fisher said he believes it is necessary for all the original defendants to be named as appellants.

"Otherwise, the various parties could be subjected to inconsistent rulings of different courts," said a letter to Ocasek from **Kathleen** M. **O'Malley**, Fisher's chief of staff.

The independent counsel is being named because "we are doing our best to fulfill our obligations as the state's lawyer in pursuing the state's appeal, while at the same time ensuring that those individuals who have been elected by the people to oversee the state's education system have the opportunity to present their views on whether to be included in the appeal," O'Malley said.

However, state Sen. H. Cooper Snyder, Education Committee chairman, said the appointment is a "waste of money" and contributes to the skepticism with which government is regarded.

"John Q. Public holds us all suspect anyhow, and this is just one more little game we're playing," said Snyder, a Republican from Hillsboro.

Rob Biesenbach, Fisher's spokesman, said the cost of the board counsel will be minimal and be paid from money allocated for the appeal.

--- INDEX REFERENCES ---

COMPANY: STATE FORTIFICATION STS JAKSN MS L L C

NEWS SUBJECT: (Legal (1LE33))

Language: EN

OTHER INDEXING: (DEPARTMENT OF EDUCATION; EDUCATION COMMITTEE; PERRY COUNTY COMMON PLEAS COURT; STATE; STATE BOARD) (Fisher; George V. Voinovich; H. Cooper Snyder; Joel Taylor; John Q. Public; Kathleen M. O'Malley; Lee Fisher; Linton Lewis Jr.; Malley; Ocasek; Oliver Ocasek; Rob Biesenbach; Snyder; Ted Sanders; Voinovich)

KEYWORDS: LAWSUIT OHIO STATE SCHOOL FINANCE

EDITION: Home Final

Word Count: 526
9/14/94 COLDIS 02C
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6/30/94 Plain Dealer (Clev.) 1C
1994 WLNR 4771175



**June 30, 1994**

Section: BUSINESS

# PERSONAL INJURY LIABILITY BILL DEAD FOR NOW

TOM DIEMER PLAIN DEALER BUREAU

WASHINGTON A bill making it tougher for consumers to collect multimillion dollar awards in personal injury cases involving faulty products failed a critical test in the Senate yesterday.

It is now off the agenda for this year.

The contentious issue, debated off and on in Congress for a dozen years, divided the Senate and crossed party lines. Senators twice failed to choke off debate that effectively stalled their bill.

Those trying to stop the filibuster against the bill fell three votes short of the 60 needed.

Sen. Jay Rockefeller, D-W.Va., one of the bill's sponsors, said it was taken off the Senate calendar, dooming any chance of passage this year.

Sen. John Glenn, D-O., convinced that the threat of being sued is stifling innovation and invention, sided with the sponsors, Rockefeller and Sen. John Danforth, R-Mo.

Sen. Howard M. Metzenbaum, D-O., disagreed vehemently, calling the bill anti-consumer because it would set a higher standard of proof for lawsuits seeking "punitive" damages in addition to compensation for injuries.

"This bill has gotten better," Metzenbaum said of concessions made by supporters. "It has gone from horrible to very bad."

Other foes said the bill set up a "shield" for businesses that produce defective products that harm consumers.

It would give immunity from punitive damages to companies that gain pre-market approval for their goods from the Food and Drug Administration or the Federal Aviation Administration - unless the business misled or deceived regulators.

No limit, however, would be clamped on an injured party's ability to receive compensation for medical treatment or permanent disability caused by a defective product.

State laws would be pre-empted in areas where they conflict with the new national standards.

Several significant sections of Ohio law appear to agree with the proposed federal legislation, but **Kate O'Malley**, chief of staff to Ohio **Attorney General Lee I. Fisher**, said other "critical areas" would be superseded by the federal bill.

"It makes for a real mucked up system," she said. "I think it is a real bad idea."



--- INDEX REFERENCES ---

NEWS SUBJECT: (Government (1GO80); Economics & Trade (1EC26))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (CONGRESS; FEDERAL AVIATION ADMINISTRATION; FOOD AND DRUG ADMINISTRATION; SENATE) (Howard M. Metzenbaum; Jay Rockefeller; John Danforth; John Glenn; Kate O'Malley; Lee I. Fisher; Metzenbaum; PERSONAL INJURY LIABILITY BILL DEAD; Rockefeller; Sen; Senators; State)

EDITION: FINAL / ALL

Word Count: 437
6/30/94 PLDLCL 1C
END OF DOCUMENT

6/1/94 Columbus Dispatch (Ohio) 04C
1994 WLNR 5156170



**June 1, 1994**

Section: NEWS

# STATE REDUCES PAYMENTS TO TAX COLLECTOR

Robert Ruth, Dispatch Staff Reporter

Attorney General Lee Fisher's office apparently is succeeding this year in sharply reducing controversial payments to a Houston company for helping collect overdue taxes

During the first three months of this year, GC Services was paid $1,356,454, almost one-third less than the $1,998,320 the company received in the first quarter of 1993, according to statistics released this week by Fisher's office.

GC Services has been paid $38.3 million since its first unbid contract with the attorney general's office became effective in October 1986. The original no-bid contract was awarded by then-Attorney General Anthony J. Celebrezze Jr. It was renewed in November 1992 by Fisher.

Despite criticism, Kate O'Malley, Fisher's chief of staff, has defended the contract. However, she has vowed to seek informal bids from many companies when GC Services' contract expires in March.

Also, O'Malley has said Fisher's office is shifting tax-collecting work away from GC Services and giving it to in-house state employees. This shift eventually will result in the company earning significantly less, O'Malley predicted earlier this year.

This year's first-quarter figures appear to confirm O'Malley's prediction.

If GC Services continues to earn fees at its current rate - 32.1 percent less than in 1993 - the company's fees would total $4.63 million for this year. This would be the least GC Services has earned annually from its Ohio contract since the $3.86 million it was paid in 1990.

In recent months, the GC Services contract has been criticized by state Sen. Betty Montgomery, R-Perrysburg, Fisher's re-election opponent, and others, for several reasons:

Statistics from Fisher's office show that in-house employees of the attorney general's office perform similar bill-collecting tasks at less than half the administrative cost of GC Services workers.

Other bill-collection companies, including GC Services itself, provide similar services to other states at far less cost than the Houston company is charging Ohio.

Paul Tipps and Neil S. Clark, two of the most influential lobbyists in Ohio, represent GC Services. Tipps, Clark and their employees have contributed a total of $90,466 to the statewide campaigns of Celebrezze and Fisher during the life of the GC Services contract.

--- INDEX REFERENCES ---

COMPANY: GC SERVICES LP

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Government Litigation (1GO18))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39); Texas (1TE14))

Language: EN

OTHER INDEXING: (GC; GC SERVICES) (Anthony J. Celebrezze Jr.; Betty Montgomery; Celebrezze; Clark; Fisher; Kate O'Malley; Lee Fisher; Malley; Neil S. Clark; O'Malley; Paul Tipps; STATE REDUCES PAYMENTS; Tipps)

KEYWORDS: KEYWORDS: TAXES OHIO BUSINESS

EDITION: Home Final

Word Count: 454
6/1/94 COLDIS 04C
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4/3/94 Plain Dealer (Clev.) 9B
1994 WLNR 4731639

Cleveland Plain Dealer


April 3, 1994

Section: METRO

# COLLECTIONS WORK NOT PUT OUT FOR BID

ASSOCIATED PRESS

COLUMBUS The attorney general's office defended its no-bid method of picking a company to collect overdue taxes, despite criticism that few other states use it.

Kate O'Malley, chief of staff for Attorney General Lee Fisher, said the state bargained hard with GC Services of Houston before renewing its contract in 1992.

"There are some states that do this without putting it out for (bid)," she said. "The implication that every state in the union except the state of Ohio does it this way ... is not fair."

The attorney general's office is drafting requests for proposals to be sent to bill-collection companies before the next contract is awarded in March 1995, O'Malley said.

The Columbus Dispatch reported last week that most states get informal bids from companies because it encourages competition and lower collection fees.

Ohio taxpayers have paid GC Services of Houston $37 million since awarding the company a contract in 1986 without seeking bids. The contract was renewed in 1989 and 1992. In the last seven years, the company has collected $135 million.

Former Attorney General Anthony J. Celebrezze Jr. said he awarded the first contract to GC Services because he was impressed with similar work the company was performing for the Internal Revenue Service.

He denied that the company's two Ohio lobbyists, Paul Tipps and Neil S. Clark, influenced him in awarding the contracts.

GC Services' fees for Ohio collections have ranged from 31% to 25% over those years. The most recent fee was 28%. But GC Services charges Missouri less than half what it charges Ohio, the newspaper said.

No one answered the telephone at GC Services.

A study from the American Collectors Association indicates Washington, D.C., and most states that hire private companies also ask for proposals.

Vicki Siekert, director of compliance for the Wisconsin Department of Revenue, said her agency for the past 10 years has hired private companies to collect overdue taxes that out-of-state residents owe.

The department has received from five to 11 responses each time it has solicited proposals. The fees range from 17% to 22%, she said.

Two weeks ago Connecticut signed its first contracts with private companies to collect delinquent taxes from out-of-state residents. Previously, state employees pursued the claims, said Hans Spalter, director of collection and enforcement for the Connecticut Department of Revenue.

Connecticut received proposals from 18 companies, Spalter said. His agency picked the three that submitted the lowest fees - 17%, 19% and 20%.

Tennessee also seeks proposals to pick companies for collections, said Kelly Johnson, a public information officer for the Tennessee Department of Revenue. Fees range from 8% to 19%.



--- INDEX REFERENCES ---

NEWS SUBJECT: (Legal (ILE33); Judicial (IJU36))

REGION: (Connecticut (1CO13); USA (1US73); Americas (1AM92); Ohio (1OH35); Tennessee (1TE37); New England (1NE37); North America (1NO39); Texas (1TE14))

Language: EN

OTHER INDEXING: (AMERICAN COLLECTORS ASSOCIATION; COLLECTIONS; CONNECTICUT; CONNECTICUT DEPARTMENT OF REVENUE; GC SERVICES; INTERNAL REVENUE; OHIO; TENNESSEE DEPARTMENT OF REVENUE; WISCONSIN DEPARTMENT OF REVENUE) (Anthony J. Celebrezze Jr.; Hans Spalter; Kate O'Malley; Kelly Johnson; Lee Fisher; Malley; Neil S. Clark; Paul Tipps; Spalter; Tennessee; Vicki Siekert)

EDITION: FINAL / WEST

Word Count: 565
4/3/94 PLDLCL 9B
END OF DOCUMENT

4/3/94 Columbus Dispatch (Ohio) 09E
1994 WLNR 5155165

Columbus Dispatch (OH)


April 3, 1994

Section: NEWS

# FISHER OPPONENT HAMMERS ON NO-BID WORK

Robert Ruth, Dispatch Staff Reporter

The state's $37 million no-bid contract with a Houston collection company has become a campaign issue in this year's attorney general race.

State Sen. Betty Montgomery, R-Perrysburg, last week lambasted a 7 1/2-year contract between the attorney general's office and GC Services of Houston for the collection of delinquent state taxes. Montgomery is opposing Attorney General Lee Fisher, a Democrat, who is seeking election to another four-year term.

The contract with GC Services was first awarded in 1986 under then-Attorney General Anthony J. Celebrezze Jr. and renewed by Fisher in 1992.

Montgomery said, "People paying taxes have a right to expect that their money will be spent wisely on the right priorities. The current attorney general is substantially overpaying GC Services. The same company is charging the state of Missouri 55 percent less to accomplish the same task."

A series of articles in The Dispatch has raised questions on the following points:

State employees in Fisher's claims section have been collecting taxes and other overdue bills at less than half the administrative cost charged for GC Services workers.

Other states, which awarded tax collection contracts through informal bidding, pay private companies substantially less than Ohio pays GC Services.

GC Services' two Ohio lobbyists, Paul Tipps and Neil S. Clark, have donated a combined $90,466 to the statewide campaigns of Fisher and Celebrezze during the life of the contract.

Kate O'Malley, Fisher's chief of staff, has defended the deal. However, O'Malley has said the next tax-

collection contract with a private company will be awarded through informal bidding next year.

O'Malley also has noted that Fisher's office has gradually been shifting tax-collection work away from GC Services and is assigning it to state claims section employees.

Campaign donations have not influenced the contract with GC Services, O'Malley has said. The 1992 contract approved by Fisher eliminated some of the benefits to GC Services that were included in earlier contracts, O'Malley has said.

Montgomery pledged that any future contracts with GC Services and other companies with which the attorney general's office does business will be awarded through competitive bidding.

Also, Ohio companies will be given preference for contracts when their bids are "substantially similar" to bids from out-of-state companies, Montgomery said. State employees will be assigned work when they can perform the tasks cheaper than private companies, she added.

--- INDEX REFERENCES ---

COMPANY: GC SERVICES LP; STATE FORTIFICATION STS JAKSN MS L L C

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Business Management (1BU42); Government Litigation (1GO18); Contracts & Orders (1CO29); Sales & Marketing (1MA51))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39); Texas (1TE14))

Language: EN

OTHER INDEXING: (DISPATCH; GC SERVICES; STATE; STATE SEN) (Anthony J. Celebrezze Jr.; Betty Montgomery; Celebrezze; Fisher; FISHER OPPONENT HAMMERS; Kate O'Malley; Lee Fisher; Malley; Montgomery; Neil S. Clark; O'Malley; Ohio; Paul Tipps)

KEYWORDS: KEYWORDS: OHIO LAW PROFESSIONAL CANDIDATE ELECTION

EDITION: Home Final

Word Count: 501
4/3/94 COLDIS 09E
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4/3/94 Plain Dealer (Clev.) 9B
1994 WLNR 4731639



April 3, 1994

Section: METRO

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---- INDEX REFERENCES ---

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36))

REGION: (Connecticut (1CO13); USA (1US73); Americas (1AM92); Ohio (1OH35); Tennessee (1TE37); New England (1NE37); North America (1NO39); Texas (1TE14))

Language: EN

OTHER INDEXING: (AMERICAN COLLECTORS ASSOCIATION; COLLECTIONS; CONNECTICUT; CONNECTICUT DEPARTMENT OF REVENUE; GC SERVICES; INTERNAL REVENUE; OHIO; TENNESSEE DEPARTMENT OF REVENUE; WISCONSIN DEPARTMENT OF REVENUE) (Anthony J. Celebrezze Jr.; Hans Spalter; Kate O'Malley; Kelly Johnson; Lee Fisher; Malley; Neil S. Clark; Paul Tipps; Spalter; Tennessee; Vicki Siekert)

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Section: EDITORIAL & COMMENT

# COMPETITION CAN CUT COSTS FOR TAXPAYERS

Robert Ruth

Competition in government contracts benefits taxpayers just as competition in the private sector benefits consumers.

In both cases, competition forces companies to offer the best product at the lowest price. Competition has been the fuel of America's free-market economy since Colonial days.

But the "C" word appears to have been anathema to Ohio Attorney General Lee Fisher and his predecessor, Anthony J. Celebrezze Jr. For the past 7 1/2 years, they've saddled taxpayers with a no-bid contract with GC Services of Houston to help collect overdue taxes.

The unbid contract has been quite beneficial to the Houston company, which has charged $37 million in collection fees since October 1986.

But Ohio taxpayers have not been so lucky. A recent review by The Dispatch found that state employees in the attorney general's claims section have been able to collect similar delinquent taxes and other bills for less than half the administrative cost charged for GC Services' workers.

The Dispatch also found that other states, which award similar contracts through informal competitive bidding, have hired tax-collection companies for substantially less than GC Services has charged Ohio.

In fact, GC Services itself charges Missouri 55 percent less to collect overdue taxes than it charges Ohio. Missouri, through informal bidding, forced GC to compete with about 15 other companies.

Taxpayers should not be faulted for being confused as to why the past two attorneys general would award such a lucrative contract to an out-of-state company without bidding.

A cynic might conclude that the answer lies with Paul Tipps and Neil S. Clark, two of Ohio's most influential lobbyists. Tipps and Clark have been hired as GC Services' Ohio representatives with state government.

Both lobbyists and their employees have donated generously to the statewide campaigns of Celebrezze and Fisher during the life of the GC Services contract. Celebrezze has received $52,956 from the Tipps-Clark team, and Fisher has received $37,510.

Celebrezze and officials of Fisher's office have denied that influence from Tipps and Clark played a major role in GC Services' getting the original contract or renewals in 1989 and 1992.

Celebrezze said his claims section's staff was overwhelmed by the volume of overdue taxes and other bills in 1986 and needed help from an experienced private company. GC Services, which was performing similar work for the Internal Revenue Service, was such a company, he said.

Celebrezze might have a point. The original contract even mentions that GC Services' assistance was necessary because of a "substantial but temporary increase in the number of delinquent accounts certified to the attorney general."

But there has been nothing "temporary" about GC Services' contract and renewals. The company has been performing unbid work for the attorney general's office for 7 1/2 years, and the current contract still has 12 months to run.

To his credit, Fisher is finally beginning to shift some work away from GC Services to his own staff. And **Kate O'Malley**, Fisher's chief of staff, has pledged that the next tax-collection contract will be awarded through informal bidding.

But the question remains: Why has it taken so long? If he is re-elected this year, Fisher will be into his second four-year term before other companies, including those in Ohio, will have an opportunity to bid on the tax-collection work.

It's not as if there is a dearth of bill collectors. The American Collectors Association, the trade organization for the industry, has 2,800 companies as members.

Whoever wins the November election should concentrate on one issue in awarding future tax-collection contracts: Which company can offer the best deal for taxpayers?

Robert Ruth is a Dispatch reporter.

---- INDEX REFERENCES ---

COMPANY: INTERNAL REVENUE SERVICE (IRS); GC SERVICES LP

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Taxation (1TA10); Government (1GO80); Government Litigation (1GO18); Tax Law (1TA64))

INDUSTRY: (Accounting, Consulting & Legal Services (1AC73))

REGION: (Missouri (1MI10); USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39); Texas (1TE14))

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**March 27, 1994**

Section: NEWS

# NO-BID PROCESS 'UNUSUAL'

Robert Ruth, Dispatch Staff Reporter

Most states do not use the unbid method that Ohio employed in awarding three multimillion-dollar contracts for a private company to help collect overdue taxes, say experts interviewed by The Dispatch.

Instead, most government agencies solicit informal bids from companies through requests for proposals, called RFPs, before awarding contracts, these experts say.

The reason: Informal bids encourage competition and usually force companies to charge lower collection fees.

Ohio taxpayers have paid GC Services of Houston $37 million since the company was awarded its first no-bid contract in October 1986 by the attorney general's office. The contract with GC Services was renewed in October 1989 and November 1992. In the last 7 1/2 years, the company has collected $134.58 million.

**Kate O'Malley**, chief of staff for **Attorney General** Lee Fisher, defended Ohio's program. "There are some states that do this without putting it out for (bid)," she said. "The implication that every state in the Union except the state of Ohio does it this way . . . is not fair."

However, O'Malley said Fisher's office is aware that other states informally bid such work.

"That's the reason we retained consultants, to do an analysis of what other states do . . . and tell us what is the best way to approach this," she said. "That other states do it differently . . . that's one of the things that prompted us to say, 'Maybe we should change our system.' "

O'Malley referred to two consultants that Fisher hired in November 1992 to analyze the attorney general's system of collecting delinquent taxes and other bills.

In their report, consultants James E. Tierney and David Frohnmayer said the informal bidding process "minim-

izes the fees that outside agencies are able to charge."

O'Malley said Fisher's office is drafting requests for proposals to be sent to bill-collection companies before the next contract is awarded in March 1995.

States contacted by The Dispatch that seek proposals before awarding contracts pay lower collection fees than Ohio is charged. GC Services' fees for Ohio collections have ranged from 31 percent to 25 percent over those years. The most recent fee was 28 percent.

But GC Services charges Missouri 55 percent less than it charges Ohio, The Dispatch found.

Thomas Haag, president of State Collection Services of Madison, Wis., said the Ohio attorney general's no-bid method is "extremely unusual."

Haag's company has been bidding on bill-collection contracts with state and local governments for 15 years. He is an acknowledged expert in the field of bill collecting for government agencies, said Carleton W. Fish, director of communications for the Minneapolis-based American Collectors Association.

Under the RFP system, a government agency invites companies to submit written proposals. The proposals include companies' collection fees and experience, Haag said. Each company's proposal is available for public review.

"RFPs make companies sharpen their pencils and offer the best deal," Haag said.

No such method was used in awarding the three Ohio contracts to GC Services. The Houston company was the only private firm asked to make a proposal. The first two Ohio contracts were awarded by former Attorney General Anthony J. Celebrezze Jr. Fisher renewed the latest contract.

Celebrezze and O'Malley have denied that influence from GC Services' two Ohio lobbyists, Paul Tipps and Neil S. Clark, played any untoward role in awarding the contracts.

Records filed with Secretary of State Bob Taft show that Tipps, Clark and their lobbying employees contributed $52,956 and $37,510, respectively, to the statewide campaigns of Celebrezze and Fisher in the years that the GC Services contract has been in effect.

In addition, William H. Chavanne, Celebrezze's chief of staff when the 1986 and 1989 contracts were signed, now works for Tipps.

Celebrezze said he awarded the first contract to GC Services because he was impressed with similar work the

company was performing for the Internal Revenue Service.

O'Malley said campaign contributions did not influence Fisher.

The 1992 contract placed new limits on the amount of work GC Services performs for the state, O'Malley said.

"What these contributions bought them (Tipps and Clark) is less work for their client, a contract with a shorter term, a contract with no monthly guarantees and a contract that they know will end in an RFP process (next March)," she said. "The client (GC Services) got a lot worse of a deal than it ever had before."

While the 1992 contract eliminated some benefits for GC Services, the company's collection fee was increased to 28 percent, from 25 percent. Last year, under the Fisher-approved contract, the company made a record $6.8 million in fees.

State employees with Fisher's claims section, GC Services and others collected a record $138.1 million in overdue taxes and other bills last year for Ohio.

Tipps and representatives of GC Services did not return phone calls from The Dispatch. Clark returned phone calls but refused to comment.

Philip Rosenthal, president of Nationwide Credit of Alexandria, Va., has performed bill-collection work for government agencies in Maryland and Virginia and for the U.S. Resolution Trust Corp. and the Federal Aviation Administration.

Every agency with which he has dealt uses the RFP method, Rosenthal said. "That's the proper way," he said. "It's based on a grading system that's made public to everyone."

Competition is so intense that some companies, including his own, sometimes offer to perform work for unprofitable fees, Rosenthal said. Although they lose money, these companies offer low bids just to gain experience in working for government agencies, Rosenthal said.

Kay Dinolfo, a spokeswoman for the Missouri Department of Revenue, said GC Services was awarded a contract to collect a variety of delinquent taxes in 1990. GC Services was one of 15 companies to submit proposals, she said.

Under Missouri's fee formula, GC Services gets about 18 percent of all the money it collects, Dinolfo said.

Vicki Sickert, director of compliance for the Wisconsin Department of Revenue, said her agency for the past 10 years has hired private companies to collect overdue taxes owed by out-of-state residents.

The department has received from five to 11 responses each time it has solicited proposals, she said. Their fees range from 16.8 percent to 22 percent.

Connecticut two weeks ago signed its first contracts with private companies to collect delinquent taxes from out-of-state residents. Previously, these types of claims had been pursued by state employees, said Hans Spalter, director of collection and enforcement for the Connecticut Department of Revenue.

Connecticut received proposals from 18 companies, Spalter said. His agency picked the three that submitted the lowest fees - 17 percent, 19 percent and 20 percent, he said.

Likewise, Tennessee seeks proposals to select companies to collect its out-of-state delinquent taxes, said Kelly Johnson, public information officer for the Tennessee Department of Revenue. Fees under her department's current contract range from 8 percent to 19 percent.

A recent analysis by the American Collectors Association indicates most other states and Washington, D.C., that hire private companies also use the RFP method.

Although Ohio has not used the RFP method, O'Malley said Fisher's office conducted hard bargaining with GC Services before renewing the contract in 1992.

--- INDEX REFERENCES ---

COMPANY: STRATEGIC INTERNET INVESTMENTS INC; JEFFERSON CAPITAL CORP; GC SERVICES LP; FEDERAL AVIATION ADMINISTRATION; FEDERAL AVIATION

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Business Management (1BU42); Government (1GO80); Government Litigation (1GO18); Contracts & Orders (1CO29); Sales & Marketing (1MA51))

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THE WALL STREET JOURNAL.
The Wall Street Journal

March 25, 1994 Friday

**SECTION:** ENTERPRISE; Government Watch; Pg. B2

**LENGTH:** 1096 words

**HEADLINE:** Pollution Bill Blasted;
Limo Firms Feel Taken for Ride

**BYLINE:** By Brent Bowers, Staff Reporter of The Wall Street Journal

**BODY:**

SMALL OHIO FIRMS put an environmental crusader on the defensive.

Last August, state Attorney General Lee Fisher unveiled an "environmental crimes" bill that would have toughened penalties for polluters.

But furious opposition from small businesses and farmers forced Mr. Fisher and his legislative allies to water down their proposal. The weakened version, expected to be introduced early next week, would sharply narrow the basis for prosecution and give companies an "audit privilege" that rewards them for good-faith reviews of their environmental practices.

Critics aren't mollified. They claim that even the revised measure would turn minor environmental infractions into felonies. "It basically criminalizes every environmental offense, from littering to improper waste disposal," says Roger Geiger, state director for the National Federation of Independent Business. He says a coalition of mostly small-business associations will continue to lobby against the revised initiative.

Fred Circle, owner of Blackhorse Services Co. in Springfield, frets that the latest bill would increase the paperwork at his small company, which sprays herbicides along roads and under power lines. He says each of his crew leaders currently spends an average of one and one-half hours a day filling out government regulatory forms. "There are already adequate laws and adequate enforcement" of polluters, Mr. Circle says.

Not so, the bill's backers contend. The proposal "is aimed at the 'midnight dumpers' who dump arsenic into a water supply" or commit other environmental atrocities -- rather than at business owners who make honest mistakes, asserts Kate O'Malley, Mr. Fisher's chief of staff. She says the attorney general has consulted with business interests in rewriting the bill.

Jerry Tinianow, a Columbus lawyer active in Ohio's environmental movement, says that "honest businessmen have nothing to fear" from Mr. Fisher's revamped bill. He says opponents have "decided to make this a campaign issue" to unseat Mr. Fisher next fall and replace him with Republican Sen. Betty Montgomery of Perrysburg.

Sen. Montgomery says, "I'm as opposed to this as I've ever been opposed to any legislation."

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ATLANTA'S LIMOUSINE FEES were a stretch, the legislature decides.

Suburban limousine-service companies were outraged by a December city ordinance imposing annual fees of more than $600 on each of their vehicles operating in Atlanta. That compared with a $30 a car renewal fee for Atlanta concerns. Several nearby towns and counties threatened to retaliate by imposing similar levies on Atlanta limousines.

But the suburban limousine owners found their solution in the state legislature. Under a law passed overwhelmingly this month, the state Public Service Commission will take over regulation of the limousine industry from localities, starting May 1. "We encircled Atlanta," boasts Jon Harrer, owner of the VIP Limousine Service in Roswell, Ga. and president of the Georgia Limousine Association.

Atlanta officials defend their ordinance as a way to force outside firms to pay their fair share for access to one of the nation's richest tourist markets. The city contends the fees also permit monitoring of an industry rife with abuses such as price gouging and the use of vehicles for questionable purposes. But Ney Lawson, director of the Atlanta Bureau of Taxicabs and Vehicles for Hire, concedes, "The legislature has spoken."

Atlanta is the latest battleground in a war between cities and their suburbs for more revenue, says Wayne Smith, executive director of the National Limousine Association in Washington, D.C. Revenue-hungry big cities find it easy "to tax ground transportation where the people involved -- the drivers and their riders -- don't vote," he says.

Other states, including Illinois and Washington, also have recently taken over the regulation of limousines to settle similar disputes, Mr. Smith says.

But he believes more skirmishes are inevitable in the fast-growing industry. The number of full-time limousine companies tripled to 1,800 in 1992 from 600 a decade earlier, he says.

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ACT NOW to convince Uncle Sam you're serious about your baseball cards.

If you kept the right records, you have until April 15 to prove that your hobby has become a part-time business -- and therefore eligible for important tax advantages. If you didn't keep the right records before, it isn't too late to start behaving like an entrepreneur this year.

But the Internal Revenue Service often questions whether a hobby really is a business and has set strict standards to test such claims, tax specialists say. "The question is whether an activity is being conducted with the intent of making a profit," says Jacob Weichholz, a tax partner at accounting firm Ernst & Young.

An enterprise almost always passes that test if it has been profitable in three of the past five years, Mr. Weichholz says. So, it makes sense to hold down your pastime's expenses and sell inventory toward year end if such moves will

turn a losing year into the black, he says.

An activity that doesn't meet the profitability test still can be considered a business if it meets certain criteria. For one thing, it should "conduct itself as a business," especially by keeping "appropriate books and records," Mr. Weichholz says.

He says the IRS also considers a range of other factors, including "the element of personal pleasure of recreation." In other words, you shouldn't appear to enjoy the activity too much.

Some popular hobbies whose practitioners have attempted to reclassify as businesses include collecting (everything from antiques to farm tractors), car racing, sewing and embroidery, boating, farming and greyhound racing, says Mark Battersby, publisher of Hobby/Business World, a newsletter in Ardmore, Pa.

But forget about luxury yachts, Mr. Battersby advises. "You can't buy a $100,000 boat and hope to make some money chartering it," he says. "The IRS got wise to that long ago."

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SMALL TALK: Regulations still rank No. 1 on the entrepreneurial hate parade. Of 100 medium-sized companies surveyed by consultants Arthur Andersen last month, 52% cited government regulations as their "biggest challenge." . . . A new federal regulation was too much for David Fusco of Schenectady, N.Y. Police in Guilderland, N.Y., outside Albany say they arrested Mr. Fusco Wednesday after he rammed a town hall building with a back hoe. The attack culminated a dispute with the town supervisor over her demand that he widen sidewalks at a local business development to comply with the Americans With Disabilities Act.

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**March 18, 1994**

Section: NEWS

# UNBID STATE PACT WAS PROPER, SENATOR SAYS
# TAX COLLECTION SERVICE

Robert Ruth, Dispatch Staff Reporter

The chairman of the Ohio Senate Finance Committee has concluded that a $37 million unbid contract for the collection of overdue taxes apparently did not need approval by the State Controlling Board.

Sen. Robert Ney, R-St. Clairsville, made his comments after receiving a two-page analysis from Scott Borgemenke, senior fiscal analyst for the Senate Republican caucus.

The $37 million used to pay GC Services of Houston during the past 7 1/2 years was financed through a special purpose fund that is not directly appropriated by the General Assembly, Borgemenke said in his analysis.

Most major state contracts that are awarded without competitive bidding must be approved the Controlling Board, Ney said. However, unbid contracts financed with so-called unappropriated money are exempt from Controlling Board oversight, Borgemenke wrote Ney.

Therefore, the unbid contract did not require approval of the Controlling Board, Borgemenke said. Ney concurred in Borgemenke's analysis.

Ney last week ordered Borgemenke to investigate the legality of the contract. Ney asked for the review after The Dispatch reported that state employees in the attorney general's claims section have been able during the past 7 1/2 years to collect overdue taxes and other delinquent bills for less than GC Services employees.

Officials in Attorney General Lee Fisher's office have said the contract is legal.

However, Kate O'Malley, Fisher's chief of staff, said the attorney general's office will solicit informal bids from other bill-collection companies before the next contract is awarded next year.

No bids, even informal ones, were solicited when the original GC Services contract was signed in 1986 or when the contract was renewed in 1989 and 1992. Janet Lewis, director of Common Cause-Ohio, a government watchdog group, and others have criticized the attorney general's office for not seeking bids from other companies.

In a related development, state Auditor Thomas E. Ferguson will include the GC Services contract in his annual review of finances in Fisher's office.

John Conley, Ferguson's media information chief, emphasized that the auditor is not launching a special investigation into Fisher's contract with GC Services of Houston.

However, Ferguson is interested in reviewing whether the contract is legal and whether it complies with sound financial practices, Conley said. "Contracting is one of the things we're most interested in when we do regular audits," he said.

---- INDEX REFERENCES ----

COMPANY: STRATEGIC INTERNET INVESTMENTS INC; JEFFERSON CAPITAL CORP; GC SERVICES LP

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Business Management (1BU42); Taxation (1TA10); Government (1GO80); Government Litigation (1GO18); Contracts & Orders (1CO29); Tax Law (1TA64); Sales & Marketing (1MA51); International Taxation (1IN74))

INDUSTRY: (Accounting, Consulting & Legal Services (1AC73))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39); Texas (1TE14))

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OTHER INDEXING: (CONTRACTING; CONTROLLING BOARD; GC SERVICES; OHIO; OHIO SENATE FINANCE COMMITTEE; SENATE REPUBLICAN; STATE CONTROLLING BOARD) (Conley; Ferguson; Fisher; Janet Lewis; John Conley; Ferguson; Kate O'Malley; Lee Fisher; Ney; Robert Ney; TAX COLLECTION; Thomas E. Ferguson; UNBID STATE PACT)

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**March 10, 1994**

Section: NEWS

# LAWMAKER LAUNCHES PROBE INTO UNBID CONTRACT FOR DEBT COLLECTOR

Robert Ruth, Dispatch Staff Reporter

The chairman of the Ohio Senate Finance Committee yesterday ordered an investigation into the legality of a $37 million unbid contract that allows a private company to help collect delinquent state taxes.

Sen. Robert Ney, R-St. Clairsville, said, "I was shocked when I read about this over the weekend."

Ney reacted to a Sunday article in The Dispatch involving an unbid contract between GC Services, a Houston bill-collection company, and the attorney general's office.

He is most concerned, Ney said, with the failure to bring the contract before the State Controlling Board. Ney said he has ordered the Finance Committee staff to investigate whether the attorney general's office acted legally in circumventing the Controlling Board.

State agencies are allowed to award unbid contracts in certain cases. Such contracts generally must go to the Controlling Board for approval, however. The seven-member Controlling Board consists of three Republican legislators, three Democratic lawmakers and a representative of the governor.

None of GC Services' contracts was taken before the board.

The first contract became effective in October 1986 under former Attorney General Anthony J. Celebrezze Jr. The contract was renewed in October 1989 under Celebrezze and in November 1992 under his successor, Lee Fisher.

Kate O'Malley, Fisher's chief counsel, said the attorney general's office acted legally.

The Controlling Board has jurisdiction, O'Malley said, only over money that is directly appropriated from the biennial budget. Bill collection fees come from a special trust fund and are not subject to Controlling Board over-

sight, she said.

Douglas E. Lumpkin, director of administration for Fisher, acknowledged last week that the attorney general's office under Celebrezze debated whether the contract should be brought before the Controlling Board for ap- proval.

The 1992 contract even states that the pact becomes effective "only upon the approval of the Controlling Board."

The Controlling Board clause in the 1992 contract was later judged by the attorney general's staff to be in error, Lumpkin said. O'Malley characterized the Controlling Board language as "boiler plate" that is standard in almost all contracts the attorney general's office signs.

But the 1986 and 1989 GC Services contracts did not contain any language about the Controlling Board.

Ney said the comments by Lumpkin and O'Malley are unconvincing. The attorney general's office itself obviously had questions about whether the contract needed Controlling Board approval, Ney said.

"If there's a question, why not bring it before the Controlling Board to be safe?" he said. "The Controlling Board gives the opportunity for debate and discussion in a public forum."

Janet Lewis, director of the government watchdog group Common Cause-Ohio, agreed. "We have serious concerns about the process used to award this contract," she said. "Decisions like this should be made in the full light of day so the public can be made aware of it."

Ney noted that he has been a member of the Senate Finance Committee for nine years and a member of the Controlling Board for four years. Ney became chairman of the Finance Committee last week.

"In those jobs, I usually hear about everything," Ney said. "But I have never heard of this company or this contract."

O'Malley said, "We have not attempted to hide anything. We have touted our collections system in press releases. We are proud of these contracts."

GC Services has earned $37 million in fees from the state over the past 7 1/2 years. A review by The Dispatch found that state employees in the attorney general's claims section have been able to collect overdue taxes and other bills at less than half the cost of GC Services.

The claims section has charged 11.9 percent in administrative costs for each dollar it collected over the past 7 1/2 years, while GC Services has charged 27.4 percent.

Paul Tipps, a former chairman of the state Democratic Party and one of the most influential lobbyists in Ohio, represented GC Services in 1986. Both Celebrezze and Lumpkin said Tipps did not influence any of the contract decisions.

Tipps' role in 1986 was confined to introducing officials of the attorney general's office with officers of GC Services, Celebrezze said. In 1991, GC Services hired Neil S. Clark, a Republican, as its second lobbyist. Tipps and Clark often work jointly on lobbying projects.

Lumpkin and O'Malley both have said the attorney general's office expects to informally solicit bids before the next bill collection contract is awarded in March 1995.

---- INDEX REFERENCES ---

COMPANY: STRATEGIC INTERNET INVESTMENTS INC; JEFFERSON CAPITAL CORP; GC SERVICES LP

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Business Management (1BU42); Government (1GO80); Government Litigation (1GO18); Economics & Trade (1EC26); Contracts & Orders (1CO29); Sales & Marketing (1MA51))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (CONTROLLING; CONTROLLING BOARD; DISPATCH; FINANCE COMMITTEE; GC SERVICES; OHIO; OHIO SENATE FINANCE COMMITTEE; SENATE FINANCE COMMITTEE; STATE CONTROLLING BOARD) (Anthony J. Celebrezze Jr.; Celebrezze; Clark; Democratic Party; Douglas E. Lumpkin; Fisher; Janet Lewis; Kate O'Malley; LAWMAKER LAUNCHES PROBE; Lee Fisher; Lumpkin; Malley; Neil S. Clark; Ney; O'Malley; Paul Tipps; Robert Ney; Tipps)

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March 6, 1994

Section: NEWS

# $37 MILLION PAID BY STATE FOR JOB WORKERS DO CHEAPER

Robert Ruth, Dispatch Staff Reporter

The state paid a Houston-based company almost $37 million over the past 7 1/2 years to help collect overdue taxes, although public employees perform similar tasks for far less money, The Dispatch has found.

The company - GC Services Corp. - received its first unbid contract in October 1986 when Anthony J. Celebrezze Jr. was attorney general. The contract has been renewed twice - in October 1989 under Celebrezze and in November 1992 under his successor, Lee Fisher.

GC Services has been represented by Paul Tipps, a former chairman of the state Democratic Party and one of the most influential lobbyists in Ohio.

In 1991, the company retained Neil S. Clark, a Republican, as its second lobbyist.

The attorney general's office is in charge of collecting millions of dollars each year owed the state from a variety of sources.

During a two-week review, The Dispatch compared the collection records of GC Services with those of the attorney general's own 118-employee claims section.

For the first 6 1/2 years of the GC Services contract, the company was assigned the collection of all delinquent personal income, corporate franchise and withholding taxes. Last year, millions of dollars in overdue sales taxes were added to GC Services' assignment.

The attorney general's claims section, staffed by full-time state employees, was assigned collection of all other debts - everything from workers' compensation fees to overdue state hospital bills.

Douglas E. Lumpkin, the attorney general's director of administration, and George Calloway, director of the

claims section, said bills collected by GC Services and the attorney general's claims section generally are equally difficult to collect.

Statistics provided by Fisher's office covering the past 7 1/2 years show GC Services charged taxpayers more than twice as much as it cost to have state employees make similar collections:

The state has paid GC Services $36.92 million to collect $134.58 million - or 27.4 cents for each dollar it collected.

Claims section employees collected $404.54 million at a cost of $48.32 million - or 11.9 cents per dollar.

GC Services is paid on a percentage basis adjusted according to the type of taxes collected.

During the same 7 1/2-year period, the attorney general's office farmed out millions of dollars in additional overdue bills for collection by special counsel and General Revenue Corp., a Cincinnati company.

However, the bills funneled to special counsel and General Revenue were either long overdue claims or bills owed by out-of-state debtors.

Those types of claims, most of which require action by attorneys, are considered much more difficult to collect. Therefore, the cost-per-dollar for them is higher than for those pursued by GC Services and in-house employees, Lumpkin and Calloway said.

Neither Lumpkin nor Calloway could explain why state employees have performed collection work so much cheaper. Lumpkin speculated that the average debt assigned to in-house staff might involve more money than the average GC Services claim.

Perhaps, Lumpkin said, much of the cost-per-dollar difference can be explained because "we have a great (in-house) staff. They do a great job."

Since March 1993, Lumpkin and Calloway said, they gradually have been shifting much of the work formerly performed by GC Services to the state's claims section.

Despite this shift, GC Services collected $25.05 million last year in overdue taxes for the state, a record amount for the company, and took in a record $6.82 million in fees, according to statistics from Fisher's office.

**Kate O'Malley**, Fisher's chief counsel, predicted that GC Services' totals in future years probably will decrease as state workers take over more collection work. In addition, GC Services will get accounts that are harder to collect, O'Malley said. Claims section employees will get the easier collections, she said.

A debate is raging throughout the nation on how states can most efficiently collect overdue taxes and other bills, O'Malley said. Fisher and his staff have concluded that the best method is to use in-house state employees to collect the easiest claims and farm out the tougher collections to private companies, O'Malley said.

"And that's the direction we're going," she added.

Tipps has represented GC Services throughout the 7 1/2-year contract period. Over the past four years, he has donated at least $142,000 to various candidates and political party organizations, campaign finance records show. Republican Clark over the same period has donated at least $83,000 to party organizations and candidates.

Clark and Tipps often work jointly on lobbying projects. For instance, Tipps and Clark teamed with Celebrezze last year to lobby on behalf of a bill that would have forced the merger of Ohio's Blue Cross-Blue Shield plans.

In addition, William Chavanne, Celebrezze's chief of staff when the 1986 and 1989 contracts were awarded, now is an employee of Tipps.

Lumpkin said lobbying by Tipps and Clark was not the reason GC Services received the contracts. Celebrezze agreed, saying Tipps' role was limited in 1986 to introducing GC Services personnel to officials from the attorney general's office.

The attorney general's office in the mid-1980s began automating its bill-collection operation, Celebrezze said. The upgraded system meant more delinquent bills would be referred to the attorney general's office at a faster rate.

His office's claims staff, Celebrezze said, was not large enough and did not have enough training to take on the increased collections load in 1986. The claims section had 31 fewer employees than it has now.

Celebrezze said GC Services was awarded the first contract because he was impressed with a similar bill-collection system the company established for the Internal Revenue Service. "The IRS was very happy with them," Celebrezze said.

Lumpkin acknowledged that many companies throughout the nation are in the bill-collection business. However, the attorney general's office did not seek bids for the work because it considered bill-collecting a professional service that is not subject to bidding requirements.

The attorney general's office believes the three contracts with GC Services did not even have to be approved by the state Controlling Board, Lumpkin said. Generally, any unbid contract worth more than $10,000 a year needs approval by the Controlling Board, consisting of six state legislators and a representative of the governor.

The first paragraph of the 1992 contract says, "This contract is subject to and is effective only upon the approval of the Controlling Board."

However, that clause was later judged to be in error, Lumpkin said. None of the unbid GC Services contracts has ever been approved by the Controlling Board, he said.

"We had a lot of discussion about that," Lumpkin said. "The posture we took was that (GC Services) was no different than any other special counsel . . . that we would use for collections on a contingency fee. We don't go to the (Controlling) board for any entity we use on collections on a contingency basis."

O'Malley emphasized that the attorney general's office expects to solicit informal bids from other companies before the next contract is awarded in March 1995.

Drafting contract specifications and other measures needed to initiate a bidding process can be time-consuming, O'Malley said. This is the main reason Fisher, who took office in 1991, and his staff opted to renew GC Service's contract in 1992, rather than invite bids, she said.

Lumpkin defended other parts of the GC Services contracts.

For instance, the company is given free access to the attorney general's $7.5 million bill-collection computer system because the computer is the foundation of bill-collection efforts, Lumpkin said.

GC Services has access to the essential information needed to find debtors and make collections.

Todd Ambs, policy director at the Ohio attorney general's office, said companies that contract with the state for tax collections have access to the same information as department of taxation and attorney general's office staff members, and are governed by the same confidentiality laws.

The computer system was installed, at taxpayer expense, in the mid-1980s by Arthur Andersen & Co. Tipps and Clark also are lobbyists for Arthur Andersen.

Peter Wray, a spokesman for the Ohio Civil Service Employees Association, said his union is leery of state agencies giving private contractors free access to state equipment. The practice artificially lowers private companies' operations costs at taxpayers' expense, Wray said.

The first two GC Services' contracts also guaranteed the company would make minimum monthly fees $266,0000 a month in the 1986 document and $196,000 in the 1989 contract. The guarantees were inserted into the contracts so that GC Services would be protected against loss of business if the computer system shut down for long periods, Lumpkin said. The 1992 contract does not guarantee monthly minimums.

O'Malley emphasized that questions about GC Services' contract should not cloud one important fact: Collections of overdue taxes and other bills have increased dramatically.

In 1985 - before the computer system was installed, GC Services hired and the claims section's staff beefed up - the attorney general's office collected $50.2 million, O'Malley noted. Last year, collections totaled $138.1 million, she said.

Tipps, Clark, Chavanne and spokesmen for GC Services did not return phone calls from The Dispatch.

--- INDEX REFERENCES ---

COMPANY: GC SERVICES LP; BLUE CROSS BLUE SHIELD; ARTHUR ANDERSEN; ARTHUR ANDERSEN WORLDWIDE ORGANIZATION

NEWS SUBJECT: (HR & Labor Management (1HR87); Legal (1LE33); Labor Unions (1LA31); Business Management (1BU42); Taxation (1TA10); Government Litigation (1GO18); Government (1GO80); Sales & Marketing (1MA51); Tax Law (1TA64); Contracts & Orders (1CO29); Judicial (1JU36); Political Parties (1PO73); Public Affairs (1PU31))

INDUSTRY: (Accounting, Consulting & Legal Services (1AC73))

REGION: (Americas (1AM92); North America (1NO39); USA (1US73); Ohio (1OH35))

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OTHER INDEXING: (ARTHUR ANDERSEN; ARTHUR ANDERSEN CO; BLUE CROSS BLUE SHIELD; CONTROLLING; CONTROLLING BOARD; DISPATCH; GC SERVICES; INTERNAL REVENUE; IRS; OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION; REVENUE; REVENUE CORP; SERVICES CORP) (Anthony J. Celebrezze Jr.; Calloway; Celebrezze; Chavanne; Clark; Democratic Party; Douglas E. Lumpkin; Fisher; George Calloway; Kate O'Malley; Lee Fisher; Lumpkin; Malley; Neil S. Clark; O'Malley; Paul Tipps; Peter Wray; Republican Clark; Tipps; Todd Ambs; William Chavanne; Wray)

KEYWORDS: KEYWORDS: CITIES CONTRACT AID TAX STATISTIC

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1994 WLNR 4758242



**February 3, 1994**

Section: METRO

# THEFT CONVICTION MAY DERAIL NOMINEE

VINDU P. GOEL PLAIN DEALER BUREAU

COLUMBUS Gov. George V. Voinovich will probably have to find a new labor nominee for the Ohio Industrial Commission because his current choice, Anthony A. (Ray) Gallagher, was convicted of theft in office 18 years ago.

Voinovich spokesman Michael Dawson said yesterday that the governor's lawyers have examined Gallagher's record and determined that the 1976 theft conviction permanently disqualifies Gallagher from serving in any public office in Ohio - even though a court later expunged the conviction in 1981.

If that analysis is correct, Gallagher wouldn't just lose the chance to set workers' compensation policy as one of three members of the Industrial Commission.

The Parma resident would also be forced to quit his current state job as a member of a regional board that rules on workers' comp cases. Voinovich appointed him to that job in 1991.

Gallagher couldn't be reached for comment yesterday.

Dawson said Voinovich's staff did a background check on Gallagher for the 1991 appointment, but details of the conviction didn't show up in official records because of the expungement.

Gallagher didn't volunteer the information on a background form he filed with the state.

"We were aware that he had a conviction that had been expunged," Dawson said. "But Kurt Tunnell (Voinovich's legal counsel at the time) was not aware that it was theft in office."

Under Ohio law, anyone convicted of theft in office is "forever disqualified from holding any public office, employment or position of trust in this state."

Before taking any further action on Gallagher, Voinovich's office has asked Attorney General Lee I. Fisher for a second opinion.

**Kate O'Malley,** Fisher's chief of staff, said yesterday that she had received the request and would respond promptly.

Fisher's office will also examine whether Gallagher's actions in his current state job must be invalidated, O'Malley said.

Gallagher, an old friend and political supporter of Voinovich, is a member of Pipefitters Local 120 in Cuyahoga County. His appointment last month was controversial within the ranks of Ohio unions. Some members favored other candidates.



--- INDEX REFERENCES ---

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (GALLAGHER; INDUSTRIAL COMMISSION; NOMINEE; OHIO; OHIO INDUSTRIAL COMMISSION; PARMA) (Anthony A.; Dawson; Fisher; George V. Voinovich; Gov; Kate O'Malley; Kurt Tunnell; Lee I. Fisher; Malley; Michael Dawson; Ray; THEFT CONVICTION; Voinovich)

EDITION: FINAL / ALL

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10/30/93 Akron Beacon J. (Ohio) A1
1993 WLNR 1251906

Akron Beacon Journal (Ohio) (KRT)


October 30, 1993

Section: OHIO

# COUNSEL HIRED TO INVESTIGATE FERGUSON CASE NEW EVIDENCE PROMPTS PROBE OF ALLEGED CAMPAIGN CONTRIBUTION SHAKEDOWN

ROGER SNELL, Beacon Journal Columbus Bureau

COLUMBUS Ohio Attorney General Lee Fisher, saying his office has new information in the case, Friday named a former U.S. attorney to investigate whether Auditor Thomas E. Ferguson's office conducted shakedowns of employees in search of campaign cash.

But a Fisher spokeswoman would not say what the new information was, or whether Ferguson himself is a target of the new investigation.

Fisher on Friday said Patrick M. McLaughlin will review allegations that civil servants under Ferguson were illegally solicited for campaign contributions.

McLaughlin was U.S. attorney in Cleveland from 1984 to 1988. He now practices with the Cleveland firm of Mansour, Gavin, Gerlack & Manos.

Fisher's chief of staff, Kate O'Malley, said McLaughlin also will consider unsealing records of Ferguson's admitted adulterous affair with an employee as part of this investigation.

In 1987, Elisabeth Tschantz sued Ferguson and named him as the man who used her as his 'sexual slave.' Tschantz also has accused her former employer and his staff of coercing workers into giving to his campaign.

Within the past year, Ferguson's sealed deposition in Tschantz' lawsuit was leaked. In it, he admitted having an affair with her. She said the sexual liaison continued for three years from mid-1982.

But those court records have remained officially sealed. And a thicket of legal issues in her lawsuit are being reviewed for a second time by a state appellate court. The case has yet to go to trial; evidence of Tschantz' allegations of employee shakedowns has never been presented to a jury.

'Our legal research has found it's not so simple to unseal the records,' O'Malley said. However, McLaughlin has been asked to consider whether the records might potentially assist his investigation, O'Malley said.

A number of auditor's staffers are targets of the investigation, O'Malley said. She would not say if Ferguson also is a target.

Ferguson, once the state's biggest vote-getter, last month announced he will leave office when his fifth term expires in January, 1995. He said in a prepared statement Friday that he already was cleared of previous, similar charges of illegal campaign solicitations.

He said he has never asked or coerced any employee into giving money to his campaign.

Former Attorney General Anthony J. Celebrezze Jr. found no misconduct after an investigation of similar campaign money charges in Ferguson's 1990 re-election.

O'Malley, without elaborating, said Fisher has received new information and allegations within the past year, prompting the call for special counsel.

State taxpayers will be charged up to $39,500 for Fisher to hire McLaughlin, according to a contract.

O'Malley, noting that McLaughlin is a Republican and that Fisher and Ferguson are both Democrats, said McLaughlin was chosen to show balance, and remove politics as an issue in the investigation.

Violation of the campaign financing law is a misdemeanor, punishable by up to six months in jail and forfeiture of office.

Under state law, O'Malley said, Fisher and the special counsel must restrict their investigation into the allegations of coercing money from state employees protected against political pressure by civil service laws.

According to campaign finance reports in May, Ferguson's campaign committee had a balance of $639,594.35. He can donate the money to other candidates, the Democratic Party, a political action committee or a charity -- but cannot convert the money to personal use. slb

Photo

PHOTO: Thomas E. Ferguson doesn't plan to run for auditor again.

---- INDEX REFERENCES ---

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (COUNSEL; DEMOCRATIC PARTY; PHOTO) (Anthony J. Celebrezze Jr.; Elisabeth Tschantz; Ferguson; Fisher; Gerlack Manos; Kate O'Malley; Lee Fisher; Malley; McLaughlin; O'Malley; Ohio Attorney; Patrick M. McLaughlin; Thomas E. Ferguson; Tschantz; Violation) (ELECTION PROCEDURE; CAMPAIGN CONTRIBUTION; THOMAS E. FERGUSON; CONTROVERSY; INVESTIGATION; EMPLOYEE; CIVIL SERVANT; SOLICITATION)

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Columbus Dispatch (OH)


October 30, 1993

Section: NEWS

# ATTORNEY GENERAL TAPS COUNSEL TO PROBE FERGUSON DONATIONS

Alan Johnson, and James Bradshaw, Dispatch Statehouse Reporters

Attorney General Lee Fisher has appointed a special counsel to investigate whether state Auditor Thomas E. Ferguson or his staff illegally solicited campaign contributions from employees.

Patrick M. McLaughlin, an attorney with a Cleveland law firm and a former U.S. attorney, will be paid up to $39,500 for his work.

McLaughlin will receive $125 per hour, about half of his usual hourly rate of $240, plus expenses.

Ferguson said he has no problem with Fisher's appointment of the special investigator yesterday, adding, "This office will be happy to cooperate in any way we can."

At issue is whether Ferguson or any of his staff violated a section of state law, Ohio Revised Code 124 64, which prohibits solicitation of campaign contributions from classified civil service employees. Violation of the law is a misdemeanor, punishable by up to six months in jail, a $500 fine and removal from office.

Fisher, a Democrat, acted after being bombarded with complaints from Ohio Republican Chairman Robert T. Bennett and state Rep. Joan W. Lawrence, R-Galena. Ferguson is a five-term Democrat who announced last month that he will not seek re-election next year.

Kate O'Malley, Fisher's chief of staff, denied the special counsel investigation was timed to begin after Ferguson's announcement.

"It has nothing to do with whether he's running or not," O'Malley said. "That's a completely unfair criticism. The reality is that any time you investigate a fellow elected officeholder, it's a tough and agonizing decision, especially when they're of the same party."

O'Malley blasted Bennett, whom she said has "gone so far out of his way to make this political."

O'Malley said two other agencies, the Ohio Department of Administrative Services and the Franklin County prosecutor's office - both controlled by Republicans - have the same authority as Fisher to investigate allegations against Ferguson, but did not.

"At least the attorney general is willing to step up to the plate," O'Malley said.

Fisher said in a statement that he appointed McLaughlin so an investigation can be done "free in fact from political considerations" and "partisan allegations of impropriety."

Bennett said the investigation is overdue. Lawrence first requested a probe more than a year ago.

"Mr. Fisher has one eye on the election barometer of the future," Bennett said. "The real question is, why did he wait until Ferguson announced that he wasn't going to run for re-election? These are not new allegations."

Claims of forcing workers to contribute to his campaign have been raised against Ferguson in every re-election campaign since he took office in 1974. He said former Attorney General Anthony J. Celebrezze Jr. investigated alleged solicitation of classified employees in his office in 1990 and dismissed the matter for lack of information.

Former Franklin County Prosecutor George C. Smith, now a federal judge, investigated Ferguson on similar charges in 1978-79, but determined that Ferguson could not be indicted because the state had no specific rules banning solicitation of contributions from employees. Rules were formally adopted in 1982.

Ferguson acknowledged in 1990 that he received $2 million in contributions from employees over 16 years in office. His critics allege his employees are forced to contribute 2 percent of their salaries.

Ferguson's statement said he has not accepted campaign contributions from classified employees for the past three years and never coerced workers to give to his elections fund.

He said he is proud that, for years, "the auditor's employees have seen fit to voluntarily support me through contributions to my political campaign fund.

"Once again, an election year is approaching and people are beginning to clamor about campaign finance reform. If history repeats itself, the election will pass without any legislation, and the issue will die for another three years," the auditor said.

He said he has introduced "some of the toughest campaign reform legislation in the country" to state lawmakers

in each of the last two legislative sessions. "They still have not enacted any legislation," he said.

---- INDEX REFERENCES ---

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Government Litigation (1GO18))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (ADMINISTRATIVE SERVICES; OHIO DEPARTMENT; OHIO REPUBLICAN; OHIO REVISED CODE 124) (Anthony J. Celebrezze Jr.; ATTORNEY; Bennett; Ferguson; Fisher; George C. Smith; Joan W. Lawrence; Kate O'Malley; Lawrence; Lee Fisher; Malley; McLaughlin; O'Malley; Patrick M. McLaughlin; Robert T. Bennett; TAPS COUNSEL; Thomas E. Ferguson)

KEYWORDS: ATTORNEY GENERAL LEE FISHER APPOINTMENT ORGANIZATION INVESTIGATION; STATE AUDITOR THOMAS E. FERGUSON CAMPAIGN FINANCE AID EMPLOYEE

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Columbus Dispatch (OH)


October 21, 1993

Section: EDITORIAL & COMMENT

# LAWSUIT ABUSE INMATES INUNDATE STATE LAWYERS, JACK UP COSTS

Ohio inmates filed 575 lawsuits last year, and at the current rate will have filed more than 600 by the end of this year, according to the attorney general's office.

Rights are rights and there may be legitimate grievances, but the state should not have to stand by and smile helplessly while its lawyers slog through a lot of stuff that has little or no merit.

Certainly it's a costly endeavor. Attorney General Lee Fisher was obliged to spend about $1.35 million on inmate lawsuits during fiscal 1993 and is likely to spend at least $1.65 million during fiscal 1994, his staff figures.

Kate O'Malley, Fisher's chief of staff, comments:

"Early on, we realized the amount of attorney time and taxpayer dollars that are going into this. We're frustrated by the number of frivolous suits."

Perhaps an inmate's case currently before the Ohio Supreme Court will turn out to be a case in point. The inmate, serving time on a burglary conviction, resides in the Southern Ohio Correctional Facility, near Lucasville.

As recounted the other day by the Associated Press, basically he is asking for a comb, which for security reasons he has not been allowed. For lack of a comb, good grooming is lost. For lack of good grooming, good marks on a report are lost. For lack of good marks, less restrictive status may be denied.

Oh, yes, the inmate, acting as his own lawyer, also wants the state to pay his attorney fees.

On reputation, Fisher is not one to trample someone's constitutional rights. But the attorney general seems to be of a practical turn of mind and, O'Malley says, is considering whether to propose legislation that would establish an alternative dispute resolution system to deal with inmate complaints.

That seems an attractive option, particularly if it expedites the whole process, frees up some state lawyers for

other tasks and saves taxpayers' money.

What about restricting the number of lawsuits an inmate can file? What about charging filing fees instead of waiving them? Such steps are being considered.

With due regard for rights, officials may be able to relieve some of the burden of frivolous lawsuits filed by people with little to do and lots of time to do it.

--- INDEX REFERENCES ---

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Prisons (1PR87); Government Litigation (1GO18))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (OHIO SUPREME COURT; SOUTHERN OHIO CORRECTIONAL FACILITY) (Fisher; Kate O'Malley; LAWSUIT ABUSE INMATES INUNDATE; Lee Fisher; Malley; Ohio)

KEYWORDS: PRISON LAWSUIT EDITORIAL OPINION

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Columbus Dispatch (OH)


October 11, 1993

Section: NEWS

# TAKING THE STATE TO COURT IS PRISONERS' STRONG SUIT

Alan Johnson, Dispatch Statehouse Reporter

Anthony L. Johnson does not have a plastic comb, and that may cost Ohio taxpayers thousands of dollars.

Johnson, a prisoner at the Southern Ohio Correctional Facility serving an eight-to-15-year sentence for burglary, sued the state because prison officials would not give him a plastic comb. Johnson's case, No. 93-1721 in the Ohio Supreme Court, is one of more than 600 lawsuits prisoners will file against the state this year.

The total bill to taxpayers for fighting prisoner lawsuits, covering everything from attorney's time to postage for prisoner complaints, amounts to millions of dollars a year. The state's cost ranges from a few dollars if a case is dismissed quickly to $50,000 or more if it drags on for years.

Attorney General Lee Fisher spent more than $1.35 million fighting prisoner lawsuits in the fiscal year ending June 30. With the influx of lawsuits from the 11-day riot at the Southern Ohio Correctional Facility, the cost is expected to jump to at least $1.65 million this year.

That does not include other costs incurred by the Ohio Department of Rehabilitation and Correction for staff time, research, depositions and travel in defending against prisoner lawsuits.

Prisoners sue often and over complaints that can seem frivolous. One inmate sued because he did not like the seasoning in his food. Another complained that his television was not delivered on time. That case has been in court almost three years and may cost the state $50,000 to defend.

Several inmates have filed lawsuits over religion, including complaints that they are not allowed to wear long hair as they claim their religion dictates.

Others complain about the quality of medical care or living conditions.

One sued because he was forced to play basketball on a concrete court instead of a wooden court, resulting in injury to his knees.

One inmate went to court when the state refused to let him have Rolling Stone magazine delivered to his cell.

Another asked the Ohio Supreme Court to order a relocation of four park benches on the prison grounds.

No matter how frivolous the cases may seem, the courts, fearing to tread on prisoners' constitutional rights, usually take them seriously, at least in the early stages. As a result of a 1977 landmark U.S. Supreme Court ruling, prisons must provide indigent inmates with legal counsel or access to law books and materials.

The landslide of litigation is frustrating to prison officials and Fisher and his staff, who must defend the state against the legal onslaught.

William Dallman, the state's senior warden at Lebanon Correctional Institution, has had prisoners sue because they are denied special diets or approval for homosexual marriages.

"In the course of my career, I've heard hundreds of lawsuits filed against me that cost the state millions of dollars," Dallman said.

"Some of these guys have spent their lives stomping over the rights of other people," Dallman added. "Now they're sitting back in prison filing suit after suit over their rights."

Kate O'Malley, Fisher's chief of staff, said the attorney general's staff has been struggling with prisoner lawsuits since coming into office almost three years ago.

"Early on, we realized the amount of attorney time and taxpayer dollars that are going into this," O'Malley said. "We're frustrated by the number of frivolous suits . . . but it's a delicate balance.

"Before you take too many Draconian steps you have to remember the Constitution and the fact that prisoner lawsuits have changed conditions in prisons."

O'Malley said the attorney general may propose legislation to create an alternate dispute resolution system that would handle inmate complaints and lessen the burden on the courts.

Officials also are looking at an Arizona law that limits the lawsuits prisoners can file, increases filing fees and prevents them from being automatically waived for inmates.

Johnson's case about the plastic comb is perhaps the most dramatic recent example of prisoner-lawsuit abuse, officials said.

Johnson claims that because he is denied a comb as a high-security prisoner at the Southern Ohio Correctional Facility, he cannot properly groom himself. As a result, Johnson contends, he cannot obtain good marks on a report to the warden that could help him gain less-restrictive security status.

Johnson wants the state to give him a comb and pay his attorney fees, even though he is acting as his own lawyer.

Inmates who receive food, clothing, health care and a place to stay at state expense also get a free ride in filing lawsuits.

The state spends $25,000 to $50,000 stocking law libraries for jailhouse lawyers at each prison, and provides typewriters and paralegal assistance for those who cannot read or write.

The federal courts waive the $25 to $105 lawsuit filing fee in many cases, and the state sometimes picks up the tab for photocopying and mailing lawsuits.

Joe Mancini, who handles prison lawsuits for the attorney general, said the state has to fight inmate claims the same as any other case.

"Whether they're frivolous or not, we have to check out each claim," Mancini said. "We have to put an attorney on it."

Not all prisoner complaints are without merit. There have been several Ohio landmark cases filed for prisoners in the past two decades, including one filed by Nikki Schwartz, the outside negotiator in the Lucasville riot, that produced significant improvements behind bars.

"Overall, litigation has improved conditions in prisons," Mancini said. "There's no doubt they have a tremendous impact, but there's abuse."

The prisoner lawsuits keep Mancini and a staff of 10 lawyers busy full time. Inmates filed 315 suits in 1989, but the number jumped to 575 last year and will top 600 this year, fed by a large number of complaints stemming from the April 11 riot at the Lucasville prison.

Meanwhile, the Ohio Court of Claims received an average of 145 prisoner complaints in each of the past three years. In 1992, prisoners sought $194.2 million in damages from the state. The state paid $150,324 in claims.

---- INDEX REFERENCES ---

COMPANY: STRATEGIC INTERNET INVESTMENTS INC; JEFFERSON CAPITAL CORP

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Prisons (1PR87); Government Litigation (1GO18))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

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OTHER INDEXING: (CONSTITUTION; LEBANON CORRECTIONAL INSTITUTION; LUCASVILLE; OHIO; OHIO COURT OF CLAIMS; OHIO DEPARTMENT OF REHABILITATION; OHIO SUPREME COURT; SOUTHERN OHIO CORRECTIONAL FACILITY; US SUPREME COURT) (Anthony L. Johnson; Dallman; Fisher; Joe Mancini; Johnson; Kate O'Malley; Lee Fisher; Malley; Mancini; Nikki Schwartz; O'Malley; William Dallman)

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Columbus Dispatch (OH)


September 18, 1993

Section: NEWS

# EX-LEGISLATOR CORDRAY NAMED STATE SOLICITOR

Alan Johnson, Dispatch Statehouse Reporter

Richard A. Cordray, a former state representative, congressional candidate and Jeopardy champion, will become the first state solicitor.

Attorney General Lee Fisher has appointed him to that post in an office reorganization involving five top staff members, all of whom will be paid $70,000 to $75,000 annually.

Cordray, 34, a native of Grove City, will coordinate appellate work and training, oversee research and writing of legal opinions and handle high-profile cases, such as defense of the state's hate crimes law.

**Kate O'Malley**, who will remain in her position as chief of staff, said hiring Cordray is an indication of Fisher's "commitment to hiring the best and the brightest."

O'Malley said the reorganization is in line with recommendations of the National Association of Attorneys General that found there were too many sections reporting to a handful of top administrators. "It was like a 40-lane highway trying to come into one," she said.

"This reorganization and our ability to attract such top-quality people . . . will greatly improve the quality of work this office does and the efficiency with which we are able to do it."

Fisher said, "I feel strongly that the office of the attorney general needs to relate to and understand the concerns of real people. . . . Therefore, it is important to me that this office employ not only attorneys who have had long-standing experience in the public sector but also attorneys with extensive experience representing the private sector."

Fisher also appointed:

Nancy Miller, now acting chief counsel, as permanent chief counsel. Miller, who started as a legal intern in 1977, will oversee the work of 350 staff lawyers.

Judith E. Trail, a lawyer with the Arter & Hadden law firm in Columbus, as one of three deputy chief counsels, supervising the anti-trust, environment and health-care fraud sections.

Janet Green Marbley, now a vice president with Huntington National Bank, as deputy counsel over business and government regulations, labor, employment services and taxation.

Larry Braverman, a litigator with the attorney general, as deputy chief counsel supervising legal services for transportation, universities and state elected officials.

Cordray served as state representative from the old 33rd District in 1991-92 before losing a three-way race for the 15th District Congressional seat last year. He has a law degree from the University of Chicago and has been an associate with the law firm of Jones, Day, Reavis & Pogue since 1989.

He worked as law clerk for U.S. Supreme Court Justices Anthony M. Kennedy and Byron R. White and was a champion on the Jeopardy television game show in 1987.

Cordray said, as state solicitor, he hopes to help Ohioans "get the best bang for their buck in court."

"I'm going to be overseeing a lot of the issues and appeals work for the office. . . . There's a lot of very interesting, important issues the attorney general's going to be dealing with in the coming years. I've got a lot to learn."

--- INDEX REFERENCES ---

COMPANY: HUNTINGTON NATIONAL BANK; HUNTINGTON BANCSHARES INC; UNIVERSITY OF CHICAGO; FIRST BANK AND TRUST

NEWS SUBJECT: (HR & Labor Management (1HR87); Local Government (1LO75); Legal (1LE33); Judicial (1JU36); Business Management (1BU42); Government (1GO80); Government Litigation (1GO18); Economics & Trade (1EC26))

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OTHER INDEXING: (ARTER HADDEN; HUNTINGTON NATIONAL BANK; LEGISLATOR; NATIONAL ASSOCIATION OF ATTORNEYS; REAVIS POGUE; US SUPREME COURT; UNIVERSITY OF CHICAGO) (Anthony M. Kennedy; Byron R. White; Cordray; Fisher; Janet Green Marbley; Judith E. Trail; Kate O'Malley; Larry Braverman; Lee Fisher; Miller; Nancy Miller; O'Malley; Richard A. Cordray)

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August 22, 1993

Section: NATIONAL

# COUNSEL WITH CLOUT JOHN CLIMACO SUCCEEDS ON GRIT, CONNECTIONS

DIANE SOLOV and SANDRA LIVINGSTON PLAIN DEALER REPORTERS

John Climaco savors his reputation as a tenacious street fighter who founded Cleveland's most political law firm. He stands nose to nose with the toughest adversaries, and rarely blinks.

But ask him for an interview and the reluctant Climaco evokes an image of the man he was 25 years ago.

"Why do you want to do a story about me?" he asked. "I'm just a small Italian boy."

Hardly.

The first Climaco in Climaco Climaco Seminatore Lefkowitz & Garofoli has used brains, ambition and connections to amass power and a string of plum clients.

He and his lawyers are known for shrewd power plays, hard work and a bulldog approach. They come loaded with longtime connections, from former Cleveland City Council President Anthony J. Garofoli to Kenneth F. Seminatore, who landed the Blue Cross & Blue Shield of Ohio account thanks to his lifelong friendship with the insurer's public-relations guru, William Silverman.

Climaco Climaco partners are active political players: Records show that in the last five years a handful of Climaco partners have contributed more than half a million dollars to campaigns.

This is the firm that John built.

From the get-go, Climaco has ridden shotgun for one high-profile client or another.

He started as the scrappy defender of city workers' rights, then moved on to their bosses at City Hall. He rode into the national limelight as counselor to Jackie Presser and the International Brotherhood of Teamsters.

Today the firm's big-deal client is Blue Cross, which is trying to force a legislative merger of the three Ohio Blues that could transform the health insurance landscape in the state.

A merger could double the size of the Cleveland Blue Cross, already Ohio's largest non-profit health insurer, and mean even bigger fees for Climaco Climaco.

Last year, the midsized law firm took in $6.8 million from Blue Cross - more than eight times what similarly sized Community Mutual of Cincinnati paid its biggest law firms.

"It is difficult to understand how anyone can make that much money in the time span that's involved," said State Rep. Ron Suster, D-14, of Euclid, who sits on the Insurance Committee. Changing times

These should be the best of times for Climaco Climaco. But the potential Blue Cross bonanza comes at a time when the firm has lost a number of lawyers. Some associates who left said the once close-knit firm had brought its legendary roughneck tactics into its offices.

In the last three years, at least 26 of the firm's lawyers have quit, including 17 in the last year, several citing a lack of opportunities and disenchantment with an atmosphere that one lawyer said ranged from "tense to very tense."

The departures, coupled with Climaco's public resignation last fall from his remaining Teamster work, has left Climaco watchers wondering what the firm is up to.

John said it's business as usual: Climaco Climaco is a general business firm that's giving Cleveland's establishment firms a run for their money.

"We are the largest first-generation law firm in this state," he said. "There was no practice here before me. There was no practice here before us. We built this firm on hard work and zealous representation of our clients."

On Thursday, the 51-year-old Climaco sat down to give the interview he had seemed to agonize over. His jacket was off, revealing more than a whiff of cologne, Lady Justice suspenders and the girth that keeps him up to date on the latest diets.

In his office decorated with a deer head and family pictures, Climaco waxed poetic about his children: 25-year-old John, who climbs mountains and is bringing dad on his trip next month to Nepal. And 18-year-old daughter Nicole, who is developmentally disable and the reason for her father's activism in several local organizations for mentally disabled people.

Within moments, Climaco turned his raconteuring to the firm, telling story after story about victories won and

clients gained. Climaco's voice rose and his hands cut the air for particularly good yarns - like about the time he argued a case, its appeal and its final hearing with a U.S. Supreme Court justice all in one day.

Climaco's pride in the firm he built has weathered recurring waves of controversy. A decade ago, his firm was accused of paying bonuses to an associate for assignments the firm got through his uncle, a federal judge. More recently, an enemy accused him of being an FBI informant, and court filings in a current case have suggested he observed a longtime client, a felon, illegally possessing guns during a hunting trip.

Nothing ever came of the first two allegations, and Climaco declined to comment on the third because it is pending.

Beyond the controversy that often shadows him, Climaco is known as a keen lawyer who quickly cuts to the meat of complex problems. He defines the big picture, then brings a full-court press to cover political and public relations angles. He enjoys a bit of drama, sometimes displaying his legendary temper.

"Anybody that doesn't take John Climaco seriously as a legal mind and a legal adversary would be making a very serious mistake," said Robert Duvin, a prominent management lawyer. Union halls to Hollywood

First from a cubbyhole office in the Terminal Tower and later from Roman-columned digs on the Halle Building's ninth floor, Climaco has watched his working-class past through a rearview mirror. He has maneuvered equally well in corporate suites, union halls and Hollywood.

Sammy Davis Jr. was the most famous beneficiary of John Climaco's legal counsel. When he died in 1990, he bequeathed Climaco a brown diamond ring.

The Teamsters and Presser, its president, were among his most infamous clients, until Climaco's dismissal from the powerful international union following Presser's death from brain cancer in 1988.

The firm also has represented reputed Mafia strongman Eugene (The Animal) Ciasullo and landfill developer James A. Palladino, the client Climaco allegedly saw with guns.

Climaco Climaco also has reeled in significant sums from public clients.

Gateway Economic Development Corp. has paid the firm $1.1 million in the last three years. The city of Cleveland paid $285,144 between 1987 and 1992, and Kent State University has paid at least $1.17 million since 1987. And the Ohio attorney general has paid the firm about $1.9 million in legal fees since 1987.

Last month, Climaco won a big case for the state against the bottling industry, which had challenged Ohio's tax on soda pop.

"I know that some people think their strategies are a little bit tough," said **Kate O'Malley**, chief counsel for the Ohio attorney general. "In that case I thought their tactics were appropriately aggressive."

Climaco is boastful about his legendary aggressiveness and makes no apologies for getting a big piece of public business, which has traditionally gone to "establishment" law firms.

"No one gives us these for any reason but our ability to handle them and solve the client's problem," he said.

The firm's political clout probably doesn't hurt either.

Climaco Climaco partners last year operated the state's 10th largest political action committee - Government Under Democracy - or GUD-PAC. It has pumped $396,635 into political campaigns since its creation in 1991. Most of the support has gone to key judges and state legislators.

Before that, the partners made contributions in other ways.

From 1988 to 1990, court filings in a suit by a former partner allege, Climaco Climaco partners shifted $183,890 for contributions from the law firm corporation to a partnership used to pay the rent on the Hulle Building - a maneuver that skirted rules barring corporations from making contributions. Partnerships are not held to the same rules.

Partner John A. Peca acknowledged in a deposition last summer that it is illegal for corporations to make contributions. The amount of rent paid to the partnership "takes into account" money used to pay political contributions, Peca said.

Climaco said the firm has "absolutely not" sought to skirt any laws and added that the partnership makes a range of charitable contributions.

When asked about the law firm's political largess, Climaco said it's the firm's First Amendment right. "I don't ask people why they vote for someone," he said. Blue-collar roots

The son of a steelworker, Climaco grew up on the West Side, graduated from Ohio State University and in 1967 earned a law degree from Case Western Reserve University, paying tuition by working at a local law firm by day and washing the walls of county buildings or tending bar at night.

His law school classmates called him "the ghost," because he turned up for just the last three weeks of class - then crammed for exams.

He was an average student but even then excelled in ambition and tenacity.

In his second year, Climaco ran for the Ohio Assembly but lost the primary. The drive and strong work ethic came largely from his father, who had wanted two sons who would be doctors.

When he hung out his own shingle a year after graduating, many of the clients Climaco picked up were people he had met on the street outside his minuscule Terminal Tower office. His wife and high school sweetheart, Carolyn, went back to teaching to help make ends meet.

Climaco's first big break came with the Civil Service Employees Association, whose frequent battles with Cleveland Mayor Carl B. Stokes' administration paid off in publicity and a $200-a-month retainer. Other labor clients followed, including the Cleveland Police Patrolmen's Association and Presser's campaign to organize public employees statewide.

Meanwhile Climaco and his younger brother, Michael, had became enthusiastic players in local Democratic politics. John Climaco rose to treasurer of the county party.

Michael Climaco won a seat on the Cleveland City Council, while he was still a law-school student and clerking for his brother's firm. He joined the firm upon graduating and today is its managing partner.

"We were raised very, very close," said John Climaco. "Raised to respect each other and to be one, to be a real team."

Following his 1971 election, Michael Climaco was among a handful of white councilmen to support George Forbes' bid for council president. John already knew Forbes. For years thereafter, the Climacos were visible lawyers for City Council. The 1970s were heady days for the young Climacos, who represented council during the city's default.

"They were good, and they were my friends," Forbes said recently.

By the early 1980s, the firm had hit its stride with a stable of colorful clients. It had George, Jackie, Sammy and Dionne Warwick's record deals.

But the climb wasn't without hardships. One particularly grim moment came in 1983, with a federal bribery investigation into whether U.S. District Judge Frank J. Battisti used his influence to enrich his nephew and the Climaco Climaco firm where he worked.

Federal Judge Ann Aldrich accused Climaco Climaco of agreeing to pay Gino Battisti a percentage of fees for any legal assignments his uncle's office sent to the firm. Climaco denied the allegations and publicly called Aldrich a liar.

In the end, no charges were brought, although the Battisti associate who assigned the work, U.S. Bankruptcy Judge Mark Schlachet, resigned in the middle of the scandal. Schlachet now rents space from Climaco Climaco and they have worked together on cases.

The investigation inspired the familial closeness of soldiers in a fox hole. But it also marked a turning point in the firm's transition from a tight Italian family firm: Sources said the Aldrich probe became a loyalty marker distinguishing friend from foe.

"Everyone there during the Aldrich investigation could be trusted," said a lawyer who has since left the firm. "Everybody else's loyalty was suspect."

By the time the Climacos moved from the Leader Building into the Halle Building with fanfare and emotion in 1986, the probe looked like just another pothole the firm had hit on the rocky road to success. Powerhouse days

When the firm moved into its new Halle Building offices, Climaco gathered his lawyers and declared the start of its powerhouse days.

"John said we're going to be the next Baker Hostetler, the next Hahn Loeser or Squire Sanders," said Kathryn T. Joseph, a lawyer who resigned from the firm in 1991. "He came in with a black book of his initial clients and said how he would go out on the street to get a client, eventually getting enough clients for four file drawers. Now in the Halle Building, I think he felt he finally made it."

The new offices became a showcase for Climaco's financial success. The decor, described by one former Climaco lawyer as "Julius Caesar meets Ethan Allen," was Climaco's monument to the firm's up-from-the-bootstraps climb.

From a commercial kitchen gleaming with stainless steel, Vulcan ovens and pots overhead, partner John A. Peca, assisted by the Climaco brothers, cooked up for clients and favorite charities pesto sauce with sun-dried tomatoes, rigatoni bolognaise and John Climaco's favorite - pasta primavera with fresh cream and shrimp. Climaco said everyone chipped in to produce the affairs, though some former associates groused about having to wait tables in the firm's three dining rooms.

But then events conspired to change the very fabric of the firm. Climaco lost Jackie, then George and Sammy.

In 1988, as Climaco was pulling out all the stops to fend off a Justice Department lawsuit to rid the Teamsters of its mob ties, his close friend Jackie Presser died.

A few weeks later, the Teamsters' new president abruptly fired Climaco during a meeting of Teamster lawyers. After the meeting broke, Climaco cleaned out his union's Washington, D.C., office and was gone in 30 minutes.

Presser's successor was bound to bring his own lawyer in anyway, but Climaco's hallmark activism may have worked against him. He had made some enemies among the union's top brass in lining up votes for the successor expected to keep him on as counsel, said James Grady, who followed Climaco as general counsel.

Not everyone was happy with Climaco's departure. Some people who criticized the Teamsters' 1989 settlement with the Justice Department believe Climaco would have gotten a better deal and preserved more of the union's independence from government oversight.

Climaco had been well respected for his work at the union, and in 1988 had made the National Law Journal's list of 100 most powerful lawyers, in part for "approaching union work in a new way" as the Teamsters' general counsel.

Sources said Climaco was devastated by the firing. He was scarce in the office and soon after took a long trip to Europe.

"I think he was hurting deeply and it affected him emotionally" when he lost the Teamsters work, said Thomas L. Colaluca, a former partner who left in 1991. "It was difficult for him to come back."

Climaco said he would have quit under the new regime anyway. As for the trip to Europe, he said it wasn't to salve a wounded ego. It was time for vacation, he said, and he took the jaunt with Sammy Davis, Frank Sinatra and Liza Minnelli.

Climaco also lost a key link to City Hall with Forbes' defeat in the 1989 mayoral race. During the last five years of Forbes' reign, the firm averaged $95,468 in annual fees from City Hall. Since the Michael White era began in 1990, the firm's annual fees have averaged $26,484.

Sammy died of throat cancer before the entertainer's legal troubles with the Internal Revenue Service were resolved, bequeathing Climaco a messy estate to resolve amid many pointed fingers.

As for the diamond ring, Climaco said it was sold at auction to recover funds for the $7 million tax liability Davis left behind. The tax bill stemmed from tax shelters that were later disallowed by the IRS.

"One of the disputes that were bantered about had to do with whether or not he, as Sammy Davis Jr.'s lawyer, had some responsibility for his predicament," said Richard Ferko, the California lawyer representing Davis' widow. No action was taken against Climaco.

Climaco said he was not responsible. Like other taxpayers, Davis got burned by changes in the tax law, he said, adding that he would only discuss what is public record. Singing the blues

By the time the firm had lost its most notable clients, Climaco Climaco had picked up a good piece of asbestos litigation work, which now weighs in at nearly 2,000 cases.

The firm was also benefiting considerably from Seminatore's contacts with Blue Cross.

Fees from the health insurer jumped like temperatures in a hospital ward, from $37,107 in 1984 to $801,949 in 1986, according to annual reports the insurer files with the Ohio Department of Insurance. Since then Climaco Climaco's legal fees have multiplied eight times.

Blue Cross said it beats other Ohio plans in comparative measures of administrative expenses.

"One of the reasons for that outstanding record is the legal work" provided by Climaco, Silverman & Co. spokesman David Eden said in a written statement.

Seminatore is a brilliant lawyer who has made good use of the Climaco Climaco tradition, blending relentless drive, power and tactical deployment of legal artillery.

Consider the firm's machinations in the Cleveland health insurer's takeover of the failed insurance plan in West Virginia three years ago.

Blue Cross considers itself a hero for preserving benefits for West Virginians. But the takeover tactics were questioned by a U.S. Senate subcommittee last year, largely for the agreement the Cleveland Blue won from West Virginia to lock out competing bids for the plan.

And closing his eyes to the firm's labor roots, Seminatore also had a strategy to break the West Virginia plan's unprofitable contract with a Pittsburgh plan that would have left steelworkers' claims unpaid.

In the Senate hearings, the theme song of the Cleveland Blue's tactics became a statement Seminatore made in a conference call to explain the Cleveland Blue's plan to the state insurance department. "There's an old Sicilian saying that goes something like this: `You get rich in the dark.'

Echoing what several outsiders have said, one former Climaco Climaco lawyer said, "The joke was that Blue Cross was run by Seminatore and Silverman." Silverman, founder of William Silverman & Co.'s public relations firm, was also a major player in the takeover campaign.

One result of the takeover was a $22.4 million jury verdict against Blue Cross last year in favor of 13 West Virginia hospitals that were left with a stack of unpaid bills after the Cleveland Blue took over the plan in Charleston, W.Va. Blue Cross' appeal is pending.

In Ohio, Blue Cross is facing an FBI probe concerning its award of a $5 million health-care contract by the Ohio Turnpike Commission. Climaco Climaco represents both parties in the probe.

Partner Peca represents the Turnpike Commission, an appointment he won after his longtime friend, Umberto P. Fedeli, was named commission chairman. Peca also represents Fedeli and his insurance firm, the Fedeli Group, which is one of Blue Cross' top brokers.

Climaco said neither he nor his clients sees a conflict. Rumblings inside

In recent years, the firm also had to fight fires on the inside. Partners and associates left and the entire Columbus office split off after an alliance that lasted about 16 months.

Two Cleveland partners, Allen J. Marabito and Colaluca, quit in 1991 to pursue other interests. When the firm would not buy out Colaluca's partnership share, he sued.

"They have taken the position I'm not even entitled to redeem my interest," Colaluca said. "I think it's characteristic of the way the firm runs. It runs on a very autocratic basis."

Court filings from the suit reveal that in 1990 Climaco brothers held 39% of the firm's stock and earned one third of the $2.5 million in salaries paid out to the dozen partners.

Climaco said he was sad Colaluca left, but declined to comment on his lawsuit.

In the last three years about two dozen lawyers in addition to Colaluca have left the firm, which many had once sought for its family atmosphere and in-the-trenches opportunities. They said things had changed.

"If you weren't happy, the presumption was something was wrong with you," Kathryn Joseph said.

Former associates complained of tight control by Climaco brothers John and Michael, as well as a nearly paranoid concern for loyalty. One lawyer who requested anonymity said that John Climaco frequently began meetings by saying, "Me and my brother were here before you, and we'll be here after you."

At one time, Climaco's fiery charm inspired fierce loyalty and workhorse habits among associates, who commonly pulled "all-nighters" and were expected to bill about 200 hours a month - an unusually hefty load for a midsized firm.

"The firm philosophy was that billing is a very good thing: Bill if you even think about it when you're in the bathroom, when you're in the shower, when you're having sex," one former associate said.

Climaco said lawyers are "encouraged to work hard and only bill for work performed for the client."

But no matter how hard they worked, few saw a clear shot at making partner. Since 1985, only one associate has been among the lawyers who made equity partnership, which gives them a share of the firm.

"This is a firm with the greatest opportunity available to a young lawyer in my opinion of any firm in this area," Climaco said. "All they have to do is come in and work like I do and my partners do ... and they will be part of this organization forever." John said he works 80 to 90 hours a week.

In April, the entire Columbus office, which had merged with Climaco Climaco in 1991, split off.

The Columbus lawyers said they split to establish a "more local office," though lawyers formerly with the firm said the Columbus lawyers had a distaste for Cleveland's relentless tactics.

Today the firm has 53 lawyers, thanks in part to the hiring of new associates, many of them young. Climaco Climaco also opened its doors to prematurely retired politicians.

Former Rep. Edward Feighan joined the firm after leaving Congress last year. Forbes declined an invitation to join the firm after his unsuccessful bid for mayor in 1989, choosing to maintain his own firm.

It's all part of Climaco Climaco's new look, as is the shedding of the firm's representation of area Teamsters. Climaco handed the work to associate John Masters, who had been doing it. Masters, who left to launch his own practice, declined to comment for this story.

Climaco said he had been thinking about giving up Teamsters work since 1986 - two years before Presser's death - so he could concentrate on other types of legal work.

Nearly a year later, Climaco-watchers are still swapping theories about the handoff by a man who is known for never letting go. The most frequently repeated hypothesis suggests Climaco ditched his Teamster work as part of a deal with federal agents, although no evidence has surfaced to support it.

"What?" Climaco belted when told the theory. "What?" Then he leaned back in his chair and laughed loudly. "It's ridiculous. Ridiculous. I can only imagine who's spinning those tales."

But no matter who the client, Climaco's resilience and aggressiveness keep pushing the firm on to new pastures. Just as they always have.

"He got on the right horse," said one former associate. "The idea is to get on the horse, ride as long as you can. When the well runs dry, you try to saddle up a new one."

---- INDEX REFERENCES ---

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Financially Distressed Companies (1FI85); Taxation (1TA10); Government (1GO80); Tax Law (1TA64); Mergers & Acquisitions (1ME39); Economics & Trade (1EC26); Corporate Groups & Ownership (1XO09))

INDUSTRY: (Insurance Regulatory (1IN40); Legal Services (1LE31); Healthcare Regulatory (1HE04); Financial Services (1FI37); Accounting, Consulting & Legal Services (1AC73); Financial Services Regulatory (1FI03); Health Insurance (1HE18); Legal Services Regulatory (1LE16); Insurance Industry Legal Issues (1IN64); Insurance (1IN97); Health Insurance Regulatory (1HE77))

REGION: (North America (1NO39); West Virginia (1WE81); Americas (1AM92); USA (1US73); Ohio (1OH35))

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Columbus Dispatch (OH)


**August 5, 1993**

Section: NEWS

# LEE FISHER FIRES ASSISTANT OVER CONGRESSIONAL RUN

Bill Damsel, an assistant Ohio attorney general, was fired from his $40,227-a-year job for refusing to abandon his campaign for Congress.

Damsel, 37, of Worthington, got his walking papers Friday at the order of Attorney General Lee Fisher. Fisher told him to either give up his job or his plan to run in the Democratic primary against U.S. Rep. Douglas Applegate of Steubenville.

Damsel said he received a onesentence notice informing him he was fired from the job he has held for six years.

Damsel is a political unknown and first-time candidate given little or no chance of unseating Applegate, a 16-year incumbent.

Fisher and Kate O'Malley, his chief of staff, said they determined Damsel could not campaign and do his job as an assistant attorney general at the same time. Damsel contended Fisher and O'Malley told him he had to give up his campaign because they were getting pressure from Applegate, a fellow Democrat.

Fisher and O'Malley denied any political motivation.

---- INDEX REFERENCES ---

NEWS SUBJECT: (Legal (1LE33); Government (1GO80); Government Litigation (1GO18))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

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July 28, 1993

Section: OHIO

# COURT UPHOLDS LAW ON ABORTION WAIT RULING THAT DECLARED LAW UNCONSTITUTIONAL OVERTURNED ON APPEAL

Associated Press

COLUMBUS An appeals court ruled Tuesday that a state law requiring a 24-hour waiting period for an abortion is constitutional.

The 10th Ohio District Court of Appeals ruling reversed a 1992 Franklin County Common Pleas Court ruling that declared the law unconstitutional.

The law requires women to get counseling and a state-prepared pamphlet 24 hours before having an abortion. The pamphlet would detail fetal development, abortion and pregnancy risks, adoption and the father's legal obligations.

'We see no reason to apply a more restrictive standard upon the state under the Ohio Constitution,' appeals Judge Alba L. Whiteside wrote.

He was joined by Judge John C. Young in the majority opinion. Judge Charles R. Petree dissented.

Petree said he dissented partly because of the nature of the material that would be distributed to women.

'They go much further than what's needed for informed consent,' Petree said. 'I think it's an attempt to shock the conscience of somebody going in for abortion.'

The American Civil Liberties Union sued last year to block the law. The lawsuit was filed on behalf of Preterm Cleveland, which performs about 7,500 abortions a year.

Judge Guy Reece said after his May 27, 1992, ruling that the law violated Ohio constitutional protections of liberty and privacy. He said it violated similar guarantees under the U.S. Constitution.

The Ohio attorney general's office asked the appellate court to overturn the decision on Oct. 27, 1992.

Assistant Attorney General Kathleen O'Malley said at the time that the law was a reasonable measure by the state to protect fetal development and the health of a woman.

'We are deeply disappointed,' said Chris Link, executive director of ACLU of Ohio. 'We felt the lower court handed down an excellent decision.'

The ACLU maintains that the waiting period increases the cost of an abortion by requiring two trips to the clinic.

Link said the group will appeal to the Ohio Supreme Court.

'I'm not terribly surprised about the ruling, but it's clear that there is a great injustice for women,' said Carolyn Buhl, director of Preterm Cleveland.

Ohio Attorney General Lee Fisher's office is studying the ruling and had no immediate comment, said spokesman Rob Biesenbach. ds

OHIO NEWS

---- INDEX REFERENCES ---

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Economics & Trade (1EC26))

INDUSTRY: (Women's Health (1WO30); Healthcare (1HE06); Contraception (1CO66); Healthcare Practice Specialties (1HE49))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

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OTHER INDEXING: (10TH OHIO DISTRICT COURT OF APPEALS; ACLU; AMERICAN CIVIL LIBERTIES UNION; COURT; FRANKLIN COUNTY COMMON PLEAS COURT; OHIO; OHIO ATTORNEY; OHIO CONSTITUTION; OHIO SUPREME COURT; US CONSTITUTION) (Alba L. Whiteside; Assistant Attorney; Carolyn Buhl; Charles R. Petree; Chris Link; Guy Reece; John C. Young; Kathleen O'Malley; Lee Fisher; Link; Petree; Rob Biesenbach.) (RULING; ABORTION; WAITING PERIOD; BIRTH CONTROL)

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April 11, 1993

Section: EDITORIALS & FORUM

# POLITICAL POSTURING OVERSHADOWS FRAUD CASE

MARY ANNE SHARKEY

Whodunnit is not the question.

More important to the governor and attorney general is: Who gets the credit for the bust? Who gets to prosecute the case?

This tug-of-war concerns a massive fraud case involving fake claims processed by employees of the Cleveland office of the Ohio Bureau of Workers Compensation. The estimated fraud is more than $500,000; it involves eight or nine state workers.

Charges against the state workers were filed 10 days ago by the Franklin County Prosecutor's office. The Ohio State Highway Patrol investigated the case and took it to

Sharkey is The Plain Dealer's politics editor. Franklin County Prosecutor Michael Miller, a Republican.

Sources close to the case say it was open and shut. Some defendants have confesssed. The patrol did a terrific job of piecing together the case through electronic fingerprinting on the state computers.

And the stage was set for Gov. George Voinovich's administration to take credit for cleaning up a massive fraud in state government (in contrast to the previous Democratic occupant).

Best of all, the whole mess would be over and done with long before the 1994 election. Voinovich would not be dogged with questions on the campaign trail about state workers filing and collecting false claims from the beleaguered Ohio Workers Compensation system.

Not so fast.

Here come Attorney General Lee Fisher and his top assistant, **Kate O'Malley**, who said they were called into

the case by the head of the Workers Compensation Bureau to investigate.

Bureau administrator J. Wesley Trimble, however, told The Plain Dealer that he merely called the attorney general's office to inform them of the case.

Fisher said his office by state statute clearly had jurisdiction and should have been asked to handle the prosecution. Such a law is on the books, but the attorney general's office has rarely prosecuted these cases. Workers compensation fraud cases usually are handled by county prosecutors.

This is the heart of the dispute: The governor's staff claims Fisher had no business in the investigation, that he got wind of it only after an article appeared in The Plain Dealer about the massive fraud in the Cleveland office.

"This is all so obvious. It's typical Lee," said a Republican staffer.

The day after the charges were filed, Fisher called on Michael Miller to withdraw them and hand over the case to the attorney general's office.

Miller told Fisher that he would be more than happy to work with him on it. "But Lee said to Mike: 'You don't understand. I want you out,' according to those who attended the meeting.

And so Miller got out - much to the chagrin of the governor's office. "Fisher gave Miller one helluva pitch for the case - and he bought it," said a source close to the investigation.

Fisher has moved the case to the Cuyahoga County prosecutor's office, presumably friendlier turf.

The attorney general said he moved the case to Cuyahoga County because the witnesses are here and it is where the fraud occurred. Further, he said Jones' office had also started the investigation by issuing some subpoenaes.

Fisher believes that the governor's office got wind of his staff's involvement and rushed to get the charges filed in Columbus. "They could have jeopardized the case," he said.

But a contrary view is held by Bill Owens, an assistant Franklin County prosecutor, who fears that the fight over jurisdiction will give defense attorneys a good issue on appeal.

"It should be the case that matters - not who is prosecuting it," Owens said.

Fisher and O'Malley say they are incensed by the charge of politics. "This is ridiculous," said Fisher. "This story is just the opposite from the way this is being spinned. We had a professional responsibility to get into it."

The attorney general said there is still work to be done on the case. He said that by filing charges prematurely the cases would not be as strong. "I have nothing but good things to say about the patrol. They have done an excellent job," he said. "But we need to continue the investigation."

How long?

Say into 1994 when Voinovich and Fisher are up for election?

Fisher said that's absurd. "I know that's what some of the governor's staff thinks. But our concern is for this case.

"If there were any politics being played here, and I think there were, it was by certain members of the governor's staff," Fisher said.

Investigators fear the raw politics might overshadow the crime. One investigator said, "We don't care who prosecutes the case - just do it. These are state workers who stole money from a fund to take care of injured workers. Can you get any lower than that?"

Only if you are in politics.



---- INDEX REFERENCES ---

NEWS SUBJECT: (HR & Labor Management (1HR87); Crime (1CR87); Legal (1LE33); Judicial (1JU36); Social Issues (1SO05); Business Management (1BU42); Criminal Law (1CR79); Workers' Compensation (1WO34); Government Litigation (1GO18); Economics & Trade (1EC26))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (BUREAU; FRANKLIN COUNTY; FRANKLIN COUNTY PROSECUTORS; FRANKLIN COUNTY PROSECUTOR MICHAEL MILLER; JONES; MICHAEL; MILLER; OHIO BUREAU OF WORKERS; OHIO STATE HIGHWAY; OHIO WORKERS; PATROL; PLAIN DEALER; WORKERS COMPENSATION BUREAU) (Bill Owens; Fisher; George Voinovich; J. Wesley Trimble; Kate O'Malley; Lee; Lee Fisher; O'Malley; Owens; POLITICAL POSTURING OVERSHADOWS FRAUD; Sharkey; Voinovich; Whodunnit)

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April 8, 1993

Section: NATIONAL

# FRAUD CASE BECOMES A BATTLEGROUND FOR POLITICIANS

VINDU P. GOEL PLAIN DEALER BUREAU

COLUMBUS Gov. George V. Voinovich and Attorney General Lee I. Fisher are fighting like alley cats for control over a politically juicy investigation of fraud at the Cleveland office of the Ohio Bureau of Workers' Compensation.

The State Highway Patrol, which reports to Voinovich, charged eight people with theft last week in connection with the case, which sources say involves about $500,000 in fake claims authorized by bureau employees.

However, a judge dismissed the charges late Monday at Fisher's request.

Fisher's top deputy, **Kate O'Malley**, said the charges were "premature" and have probably damaged the investigation.

"Several people, not just people who were charged, were cooperating with the investigation. I suspect now the cooperation will stop," O'Malley said. "These actions by the governor frustrate me because they evidence an absolute disregard for what's in the best interests of the state of Ohio."

Behind the shenanigans is a power struggle for control of a high-profile case of the workers' comp system gone bad - at a time when politicians of both parties are promising to clean up the troubled system.

The investigation into alleged fraud began about two months ago after an employer complained that claims were being filed against his defunct business by nonexistent employees, according to sources familiar with the probe.

Investigators found a pattern of bogus checks, apparently authorized under the code of Gary L. Boley, a claims representative.

Bureau investigators informed Voinovich, a Republican, about the allegations and asked the highway patrol to help them investigate. The patrol agreed, and the U.S. Postal Service was brought in because the checks were

mailed.

Then the story gets murkier.

According to O'Malley, Bureau Administrator J. Wesley Trimble called her about two weeks ago and asked for Fisher's help in prosecuting the case. Fisher is a Democrat.

"He said, 'I really want to make sure we do this right,' O'Malley recalled. Trimble indicated he was calling at the request of the bureau's 12-member board, she said.

Through a spokeswoman, Trimble said he merely informed O'Malley about the investigation. "We were concerned about who was supposed to prosecute the case," said bureau spokeswoman Brenda Proctor. "Our understanding was that the attorney general has jurisdiction."

In any case, Fisher's office began poking around, talking to other investigators to get caught up.

Fisher's sudden interest in the case unnerved the highway patrol and the governor's office, particularly since the attorney general's office hasn't handled a workers' comp fraud case in about a decade.

Maj. Warren H. Davies, who is leading the patrol's investigation, said the patrol was not aware of Fisher's involvement in the case until March 30, just as his people were close to wrapping up the investigation.

According to Voinovich's legal counsel, Kurt Tunnell, Fisher's people marched in and said they were going to take over the case.

"The attorney general's office had made a decision that they were going to prosecute the case," Tunnell said. The case would be tried in Cuyahoga County, assisted by Cuyahoga County Prosecutor Stephanie Tubbs Jones, a Democrat.

That's not how O'Malley remembers it. "Everybody talked at length about how everybody would work together," she said.

Regardless, patrol investigators immediately met with William Owen, an assistant prosecutor in the office of Franklin County Prosecutor Michael Miller, a Republican.

The next day, the patrol filed charges - in Columbus' Franklin County Municipal Court - against six men and two women, all from Northeast Ohio. Two of the men, Boley and his housemate, David C. Townsend, work for the bureau but are currently on administrative leave

According to Davies and Owen, charges were filed in the normal course of persuading witnesses and defendants to be more cooperative.

"The investigation is basically a paper kind of case. It would be difficult to damage or screw up the paper trail," Davies said.

Officials familiar with the investigation, though, say investigators were also trying to make sure Fisher didn't take over the whole case. There is some dispute over the attorney general's legal jurisdiction over the matter.

O'Malley sees a more political motive in the filing: Tunnell wanted to make sure the Voinovich administration retained some control over the case.

"He admitted he made the decision to file charges," O'Malley said. "He said the attorney general's office did not have jurisdiction."

Fisher and O'Malley met with Miller and Owen last week and finally concluded that cooperation was a better strategy. So the charges were dropped until the investigation is concluded, Owen said.

At that point, prosecution will be jointly handled by Fisher, Miller and Jones. "I'm very happy with the way we're heading now," O'Malley said.



--- INDEX REFERENCES ---

COMPANY: UNITED STATES POSTAL SERVICE

NEWS SUBJECT: (Crime (1CR87); Legal (1LE33); Judicial (1JU36); Social Issues (1SO05); Criminal Law (1CR79); Government Litigation (1GO18); Economics & Trade (1EC26))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (BATTLEGROUND; BUREAU; CUYAHOGA COUNTY PROSECUTOR STEPHANIE TUBBS JONES; DEMOCRAT; FRANKLIN COUNTY MUNICIPAL COURT; FRANKLIN COUNTY PROSECUTOR MICHAEL MILLER; FRAUD; JONES; MILLER; NORTHEAST OHIO; OHIO; OHIO BUREAU OF WORKERS; US POSTAL SERVICE) (Boley; Brenda Proctor; David C. Townsend; Davies; Fisher; Gary L. Boley; George V. Voinovich; Gov; J. Wesley Trimble; Kate O'Malley; Kurt Tunnell; Lee I. Fisher; Maj; Malley; O'Malley; Owen; Trimble; Tunnell; Voinovich; Warren H. Davies; William Owen)

KEYWORDS: FRAUDS & SWINDLES; EMBEZZLEMENT

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March 14, 1993

Section: BUSINESS

# COMPUSERVE SAYS CLINTON'S UNPLUGGED

VINDU P. GOEL

The MTV President is taking a hint from one-time rival Jerry Brown and is hawking his vision of America through another electronic medium: the computer network.

Columbus-based CompuServe Inc., the industry leader, just inaugurated a new bulletin board section, called "White House," devoted to discussing all things presidential. Topics range from the feds' handling of the wackos in Waco to prospects for legalizing marijuana so the president - and everyone else - can safely inhale.

Not that Bill Clinton is likely to show up for a live electronic town hall, as Brown did during the campaign.

Heck, CompuServe members complain that they can't even get a response from White House staff members, let alone the Salesman-in-Chief. (Of course, maybe they're simply having problems running those fossil computers left behind by the previous occupant of the White House, who was not exactly known for his technical aptitude.)

Still, CompuServers hope to have some influence on Clinton. After all, the president has paid at least lip service to the technology community, courting Silicon Valley executives and proposing a national electronic superhighway.

But will the president actually listen to forum members, or is this just another PR outlet for Slick Willie?

CompuServe spokeswoman Debra Young said that so far, the communication has been mostly one way, with the White House posting news releases and copies of Clinton's official schedule.

"They have agreed to participate somewhat," Young said. "But they have made no commitments."

How Clintonian. Just like that middle-class tax cut

Agency's fishing for its own lawyer

Attorney General Lee Fisher is the latest politician to get dragged into the Workers' Comp Wars.

How? It seems the Ohio Industrial Commission, which rules on disputes in the workers' compensation system, thinks Fisher's people do a lousy job of handling commission cases that are appealed to the courts.

So IC Chairman Don Colasurd has asked the General Assembly to give him $315,772 over the next two years to hire his own lawyers to keep an eye on Fisher's lawyers.

Only one problem: According to the Ohio constitution, the attorney general's office is the state's lawyer. Period.

Such constitutional quibbles don't bother Colasurd. He says he simply wants to settle more cases faster and that the Fisher folk need some outside prodding.

"They're our attorneys. They're supposed to be responsive to us," Colasurd said.

Indeed, Colasurd complains that the AG's office wastes a lot of everybody's time by preparing cases for trial and then settling them at the eleventh hour. "We're spending an awful lot of money and creating a backlog in the court system."

Not surprisingly, the AG's office doesn't exactly support Colasurd's attempted power grab.

"It's our view that that's an unnecessary expense," said **Kate O'Malley**, Fisher's chief of staff. "And Don Colasurd has been told he can call me anytime."

As to Colasurd's complaints about early settlements, O'Malley said the problem is that opposing attorneys, especially claimants' attorneys, don't want to talk about settling until just before trial.

And Colasurd, a former claimants' attorney, ought to know that.

"Nobody pushes for settlement until the last minute," O'Malley said.

So Fisher isn't going to let Colasurd hire more lawyers without a fight. Indeed, Fisher, a Democrat, said he's trying to reduce the number of non-AG lawyers used by all government departments, including the departments controlled by Republican Gov. George Voinovich.

"It's fiscally duplicative," Fisher said. "We want to increase our cooperation with all of our clients."

Yeah - at least until Campaign '94 gets rolling.

---- INDEX REFERENCES ---

COMPANY: MAYOTTE TOURISME ET VOYAGES; COMPUSERVE CORP

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (AG; COMPUSERVE; COMPUSERVE INC; HECK; IC; MTV; OHIO; OHIO INDUSTRIAL COMMISSION; SLICK WILLIE; UNPLUGGED; WHITE HOUSE) (Assembly; Bill Clinton; Brown; CLINTON; Colasurd; CompuServers; Debra Young; Fisher; George Voinovich; Goel; Jerry Brown; Kate O'Malley; Lee Fisher; Malley; Republican Gov; Silicon Valley; Topics; Yeah; Young)

EDITION: FINAL / ALL

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END OF DOCUMENT

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Columbus Dispatch (OH)


**January 31, 1993**

Section: NEWS

# CLEVELAND LAWYER IN SPOTLIGHT AS SPECIAL COUNSEL

Robert Ruth, Dispatch Staff Reporter

Until a couple of months ago hardly anyone in Franklin County, including political insiders, had heard of Steven D. Bell, a soft-spoken lawyer from Cleveland.

But his obscurity in central Ohio has ended.

Bell, 40, is the special counsel investigating allegations that some of the county's best-known Republican figures are guilty of hatching a sophisticated campaign money laundering scheme seven years ago.

Bell's allegations have brought the wrath of much of the Republican Party down on his broad shoulders. An attorney for one of the accused Republicans on Monday accused Bell of launching a political vendetta.

Bell's 45-page report on his probe has been labeled sloppy and libelous by other Republicans' attorneys.

Asked recently about these verbal attacks, Bell chuckled and said, "I expected it. I knew the entire investigation would be subject to a great deal of public scrutiny."

**Kate O'Malley**, chief counsel for Attorney General **Lee Fisher**, also is amused at the recent pillorying Bell has undergone. It reminds her, O'Malley said, of an adage attorneys often cite: "When you have the facts, you argue the facts; when you have the law, you argue the law; when you have neither, you pound the table."

At the request of the bipartisan Ohio Elections Commission, Fisher, a Democrat, hired Bell on Sept. 24 to conclude the much-delayed investigation of Republicans.

Bell, a partner in the Cleveland firm of Ulmer & Berne, said he was stunned when he was approached for the job. A longtime Republican, Bell had briefly met the Democrat attorney general only once. "It was at a large meeting in Cleveland in December," Bell recalled. "Along with 300 other attorneys, I shook his hand.

"I had no idea I was even under consideration. You do not expect to get phone calls asking you to serve as special counsel when the attorney general is of the other party."

O'Malley said Bell's credentials fit all of the criteria Fisher believed were necessary to lead such a politically sensitive probe.

"We wanted someone from outside Franklin County who had prosecutorial and investigative experience," she said. "And we wanted a Republican whose reputation was above reproach."

Bell received an undergraduate degree from the University of Notre Dame in 1970 and a law degree from the University of Akron four years later. After that, he went into private practice and joined the city of Akron's law department in January 1981, eventually becoming the agency's chief trial attorney.

In January 1984, Bell was appointed an assistant U.S. attorney in Cleveland under former President Ronald Reagan's administration. During a four-year stint in the Cleveland office, he served as chief of the U.S. attorney's appellate and civil divisions.

He has been in private practice since October 1988, specializing in environmental and toxic cases.

Bell is no stranger to high-profile cases. He defended the city of Akron when a highway bridge collapsed, killing several people. He even defended former FBI Director William Webster when Webster was sued by Cuyahoga County municipal judges. The judges had been caught in an FBI bribery sting.

Bell won both cases at the trial level, but lost the bridge case on appeal. The city eventually settled with the families of the victims.

Looking back on his years as a trial attorney, Bell said, "This is nothing new. I've been called everything in the book."

---- INDEX REFERENCES ---

COMPANY: UNIVERSITY OF NOTRE DAME; ACRON JSC

NEWS SUBJECT: (Crime (1CR87); Legal (1LE33); Social Issues (1SO05); Criminal Law (1CR79); Government Litigation (1GO18))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (AKRON; COUNSEL; FBI; OHIO ELECTIONS COMMISSION; ULMER BERNE; UNIVERSITY OF AKRON; UNIVERSITY OF NOTRE DAME) (Bell; Cleveland; CLEVELAND LAWYER;

Fisher; Kate O'Malley; Lee Fisher; O'Malley; Ronald Reagan; Steven D. Bell; William Webster)

KEYWORDS: CAMPAIGN FINANCE FRAUD FRANKLIN COUNTY REPUBLICAN PARTY PROFILE; STEVEN D. BELL LAW PROFESSION

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1992 WLNR 4531667

Cleveland Plain Dealer


**December 15, 1992**

Section: METRO

# COURT LOOKS AT TEEN ABORTIONS

MARK TATGE PLAIN DEALER BUREAU

COLUMBUS The Ohio Supreme Court lifted the veil of secrecy surrounding judicial rulings on whether a minor may get an abortion without telling her parents.

In a unanimous decision overturning part of a state law, the court said that the judge's ruling about whether to allow an abortion - and the judge's name - must be open to the public. However, the court upheld the part of the law keeping the teen-ager's identity confidential.

Under Ohio's six-year-old parental notification law, minors seeking an abortion can ask the courts for permission without the parents being notified.

Yesterday's decision, which argues the public enjoys constitutional protections when it comes to courtrooms and public records, may have implications for cases in which parties have sought to seal court records from public view.

In Cuyahoga County, for example, dozens of lawsuits have been partially or fully sealed from public view. Currently, defense attorneys want to seal records in the murder case against Kevin Young, the preppy house painter charged with stabbing a former high school classmate to death.

"If there is a constitutional right to see these (abortion case) records, then there is a constitutional right to see other records," said David Marburger, attorney for the Cincinnati Post, which filed the lawsuit.

Marburger said the parental notification law had essentially created a "secret appellate system of justice."

**Kate O'Malley**, chief counsel for the Ohio attorney general's office, disagreed that the decision had broad implications for public records cases. "I think it just offers a specific remedy to a particular (type of) case," she said.

Justice Herbert R. Brown, who wrote the decision, cited harm caused by keeping opinions secret

"Keeping judicial reasoning a secret prevents everyone, including appellants, their attorneys and other judges, from knowing common law as it develops," Brown said.

Brown, in one of his last opinions before leaving the court in January, said "as a general principle, courts should be open and the public should have access to the proceedings. Indeed, this is a requirement of the Ohio Constitution."

Brown said access to court decisions must be permitted provided they do not directly or indirectly disclose the identity of the minor seeking the abortion.

But on the question of revealing the identity of the pregnant minor, the court was unyielding. "If the minor's parents can discover her identity or the facts of her case through the court proceedings, the reason for (seeking) judicial" permission is destroyed, Brown wrote.

The abortion consent case decided yesterday stems from the Cincinnati Post's quest for information concerning the outcome of appeals filed in the 2nd and 6th district of the Ohio Court of Appeals. A reporter had been denied access to routine information about the cases, such as docket numbers and the names of judges who had presided over them.

O'Malley said the court had gone far beyond simply deciding whether the newspaper should have access to certain court records.

"What the court's opinion did is, it crafted an opinion that can be used by other judges," she said. "I wasn't surprised by the court's decision, but on the other hand, I didn't think the court would rewrite the law."

O'Malley said the decision may create more confusion than clarity by putting the responsibility of deciding what is or isn't a public record in the hands of court clerks. The result may be more litigation to decide what is a public court record, she said.



--- INDEX REFERENCES ---

NEWS SUBJECT: (Violent Crime (1VI27); Legal (1LE33); Social Issues (1SO05); Technology Law (1TE30); Crime (1CR87); Judicial (1JU36); Criminal Law (1CR79); Economics & Trade (1EC26))

INDUSTRY: (Bioethics (1BI56); Healthcare (1HE06); Women's Health (1WO30); Healthcare Policy (1HE46); Contraception (1CO66); Healthcare Practice Specialties (1HE49))

REGION: (Americas (1AM92); North America (1NO39); USA (1US73); Ohio (1OH35))

Language: EN

OTHER INDEXING: (ABORTIONS; COURT; OHIO; OHIO CONSTITUTION; OHIO COURT OF APPEALS; OHIO SUPREME COURT) (Brown; David Marburger; Herbert R. Brown; Kate O'Malley; Kevin Young; Marburger; O'Malley)

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November 8, 1992

Section: NEWS

# LIBRARY PROJECT TURNS TO CONFLICT OVER CONTRACTING BLACK BUSINESS ALLEGES IMPROPRIETIES

David Lore, Dispatch Special Projects Editor

Minority contractor Ronald D. Johnson says the Ohio Board of Regents didn't go by the book in handling his $1.9 million library computerization contract.

Johnson, a black man and president of Comdata Inc., 175 S. 3rd St., wants apologies and a revised report card from the regents, Ohio's higher education coordinating board, not to mention up to $1 million.

State officials reject Johnson's charges but won't discuss details, believing litigation is likely. "When all this comes out, it will be established that the state has taken a very reasonable and appropriate posture," said Kate O'Malley of the Ohio Attorney General's office.

Comdata was chosen in June 1991 on a minority enterprise contract to direct the preparation of about 11.5 million bibliographic records at 18 academic libraries for OhioLINK, a statewide electronic "card catalog."

OhioLINK, when it starts next year, is to allow library users on Ohio campuses to get books and other materials from 17 college libraries and the state library within 48 hours.

Ohio is legally bound to buy about 15 percent of goods and services from minority businesses. Johnson says the regents, however, tried to squeeze him out when it became clear he wanted a real share of the work and not a limited role passing money to a favored, non-minority subcontractor.

E. Garrison Walters, a vice chancellor at the regents, said there was no such intent.

He said Johnson's failure to nail down a contract with the subcontractor caused a 10-month delay in approval of his contract. "It's absolutely untrue that we delayed the contract or tried to sabotage it."

Comdata, a 6-year-old computer services company with 15 employees, was hired by the regents as project manager to direct two veteran library cataloging companies: Amigos Bibliographic Council Inc. of Dallas and Blackwell North America Inc. of Lake Oswego, Ore.

A contract was to be signed soon after initial tests were completed during July and August 1991.

Amigos dropped out for technical reasons, but Blackwell technicians began preparing university library records in October last year, even though its subcontract with Comdata was delayed.

Johnson says he couldn't sign a contract with Blackwell until he had a contract from the regents, although he later did so.

Former OhioLINK Director Len Simutis recommended approval of Comdata's contract last November. But, for reasons never explained in selective correspondence released to The Dispatch by OhioLINK, the Comdata contract then virtually disappeared.

By spring, Johnson had become angry about the regents' failure to approve his contract. He also was upset with OhioLINK's direct dealings with the subcontractor, Blackwell, not just on technical issues but on financial and contract ones as well.

While Comdata pressed the regents for a contract, Blackwell complained about working for Comdata without a contract. And both companies protested not being paid because of the impasse.

Asked about the contract delays, Walters said, "It seems reasonable to be concerned that the vendor can do what the vendor promised." If Comdata couldn't reach terms with Blackwell, he said, "that would call into question the original process."

Johnson's failure to close a contract with Blackwell, however, was never raised by the state as a stumbling block on the state contract until March of this year, Johnson and available records indicate.

Comdata and Blackwell finally signed a contract in April, making terms conditional on the eventual state contract. It was June, nearly a year after the original award, before the regents - and the State Controlling Board - approved the state contract with Comdata.

The delay, Johnson says, made him borrow hundreds of thousands of dollars and pitted him in a bitter financial dispute with Blackwell over work done prior to April.

Johnson says OhioLINK owes him about $500,000, plus damages, and that the state held up his contract in an attempt to force him out. According to OhioLINK records, Simutis suggested in March that Comdata be re-

placed by another minority contractor - Excel Management Systems of Columbus - if Comdata couldn't settle with Blackwell.

Meanwhile, Blackwell has sued Comdata in Franklin County Common Pleas Court for $289,255, plus $1 million in punitive damages.

The regents, in turn, are disputing more than $200,000 in Comdata billings and insisting that another $300,000 paid earlier to Comdata be forwarded to Blackwell.

Until recently, the contract dispute had not interrupted work on the library database project.

Johnson, however, said he has fired Blackwell and now is looking for a new subcontractor to prepare the millions of library records. No records have been processed in about a month, he said.

That won't affect completion of the $20 million OhioLINK project, said program Director Thomas J. Sunville, but it could threaten the quality of the computer work and, thus, the network's usefulness.

Johnson said he wants the regents to apologize and explain their lapses to his bank and to the participating universities to show "we weren't the bad guys here.

"This is the sort of thing that causes small businesses, and minority businesses, a problem," he said.

Walters, however, said Comdata's problems stem from its performance, not from the regents.

"My impression is that OhioLINK (officials) were trying hard to negotiate a contract with Comdata and were frustrated. It was the inability of Comdata to do what they promised," Walters said.

O'Malley in the attorney general's office said that, if there was talk of replacing Comdata with Excel as minority contractor, it was because "if Comdata didn't perform under its (agreement), we'd have to look for another source."

Curtis Jewell is president of Excel Management, 30 S. Young St., and president of the Urban Business Professional Association.

Jewell lost out to Johnson on the original contract, but said he would not have gone along with any attempt to oust Comdata. "I would not have touched it with a ten-foot pole," he said. "It was tainted. They (the regents) did not do it right. They really did not want to do business with minority firms."

Minority contractors often complain they are expected to pass money on to non-minority firms, rather than do the work, said Booker Tall, state equal employment opportunity coordinator.

--- INDEX REFERENCES ---

COMPANY: STRATEGIC INTERNET INVESTMENTS INC; JEFFERSON CAPITAL CORP; EXCEL MANAGEMENT SYSTEMS INC

NEWS SUBJECT: (Small Business (1SM15); Legal (1LE33); Business Management (1BU42); Minority Businesses (1MI90); Government Litigation (1GO18); Contracts & Orders (1CO29); Sales & Marketing (1MA51))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (BIBLIOGRAPHIC COUNCIL INC; COMDATA; COMDATA INC; EXCEL; EXCEL MANAGEMENT; EXCEL MANAGEMENT SYSTEMS; OHIO; OHIO ATTORNEY; OHIO BOARD; OHIOLINK; STATE CONTROLLING BOARD; URBAN BUSINESS PROFESSIONAL ASSOCIATION) (Amigos; Booker Tall; Curtis Jewell; E. Garrison Walters; Jewell; Johnson; Kate O'Malley; Len Simutis; LIBRARY PROJECT TURNS; O'Malley; Orc; Ronald D. Johnson; Simutis; Thomas J. Sanville; Walters)

KEYWORDS: RONALD D. JOHNSON OHIO BOARD OF REGENTS OPINION CONTRACT

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1992 WLNR 4530334

Cleveland Plain Dealer


October 28, 1992

Section: STATE & REGION

# ABORTION WAIT LAW VALIDITY ARGUED

PLAIN DEALER BUREAU

COLUMBUS Defenders and challengers of a law that would require Ohio women to wait 24 hours before having an abortion argued yesterday about whether the law violates the state constitution.

The arguments by lawyers for the American Civil Liberties Union of Ohio and **Attorney General** Lee I. Fisher's office came at a hearing before the Court of Appeals (10th District) in Columbus.

Fisher's office is asking the appeals court to overturn Franklin County Common Pleas **Judge** Guy L. Reece II's ruling in May that found the abortion-wait law violated the state and federal constitutions.

The law, struck down the day before it was to take effect, would require women to be given a state-printed booklet showing fetal development and alternatives to abortion at least 24 hours before having an abortion.

Fisher's chief counsel, **Kathleen O'Malley**, reminded the three-judge panel yesterday that the U.S. Supreme Court upheld in June the constitutionality of a Pennsylvania abortion law that is virtually identical to Ohio's.

O'Malley argued that if a law virtually identical to Ohio's has been found constitutional under the U.S. Constitution, the ACLU cannot argue that the law violates the Ohio Constitution. She argued that the Ohio Constitution cannot be interpreted as granting broader rights than the U.S. Constitution.

ACLU lawyer Kevin O'Neill, who is representing Preterm Cleveland, argued the abortion-wait law violates the freedom-of-conscience provision in the Ohio Constitution.

He said the Ohio Constitution protects abortion rights more than the U.S. Constitution does.

The panel, **Appeals Judges** John C. Young, Alba L. Whiteside and Charles R. Petree, did not say when they expected to rule on the appeal.

--- INDEX REFERENCES ---

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Economics & Trade (1EC26))

INDUSTRY: (Women's Health (1WO30); Healthcare (1HE06); Contraception (1CO66); Healthcare Practice Specialties (1HE49))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (ACLU; AMERICAN CIVIL LIBERTIES; APPEALS; COURT OF APPEALS; OHIO CONSTITUTION; US CONSTITUTION; US SUPREME COURT) (ABORTION WAIT LAW VALIDITY; Alba L. Whiteside; Charles R. Petree; Defenders; Fisher; Guy L. Reece; John C. Young; Kathleen O'Malley; Kevin O'Neill; Lee I. Fisher; O'Malley)

KEYWORDS: OHIO LAWS; ABORTION

EDITION: FINAL / ALL

Word Count: 361
10/28/92 PLDLCL 5B
END OF DOCUMENT

10/14/92 Akron Beacon J. (Ohio) D4
1992 WLNR 1157427



October 14, 1992

Section: OHIO

# JUVENILE ABORTIONS SEALED IN SECRECY CINCINNATI POST SEEKS OPEN RECORDS ON JUDGES' RULINGS, WITH IDENTIFICATION OF ALL MINORS OMITTED; ATTORNEY GENERAL'S OFFICE DEFENDS LAW AS A WAY TO ENSURE PRIVACY

ROGER SNELL, Beacon Journal Columbus Bureau

COLUMBUS Nobody knows how often Ohio judges have allowed children to get an abortion without their parent's consent.

The records are secret, as part of a 1985 law passed by the Ohio General Assembly.

The secrecy that was supposed to protect a child's privacy is going too far and is also protecting Ohio's juvenile court and appellate judges from accountability, a newspaper lawyer argued before the Ohio Supreme Court on Tuesday.

The Cincinnati Post is seeking the court-ordered release of records showing the number of juvenile abortion requests granted, denied or still pending in Ohio courts.

The newspaper also wants to know how each juvenile court and appellate court judge has ruled on these issues and wants to see the legal opinions, with any name or identifying information of the child deleted.

Even basic docket sheets and journal entries have been sealed from public release, said attorney David Marburger, representing the Cincinnati Post.

Marburger said the Post has no desire to know the names or details of the juveniles. It wants to track the record of judges.

Marburger said publicly elected judges should face public scrutiny.

'This becomes a Star Chamber thing where you don't have any knowledge of who's doing what,' Justice Herbert Brown said. 'That really bothers me. Courts are supposed to be open.'

The Star Chamber was a 15th century English court marked by secrecy and arbitrary decisions.

Attorney **Kathleen O'Malley**, of **Attorney General** Lee Fisher's office, defended the state's current law and rejected the public's interest in such a private matter.

O'Malley said the Ohio General Assembly knew what it was doing when it sealed off records involving juvenile abortions.

Ohio's abortion law, already upheld in the past two years by the Ohio Supreme Court, requires minors to notify their parents before an abortion.

But the 1985 law also allows **a judge** to grant a waiver or 'judicial bypass' if the girl is mature or can show parental notification is not in her best interests.

The Post is trying to document how many times these waivers are granted and by which **judges**.

The court's ruling could have enormous political consequences for **judges**, who are publicly elected but have been able to avoid scrutiny on such an emotional issue as abortion.

It is unlikely that this case will be ruled on before the Nov. 3 election, however.

O'Malley said release of court records would violate the law and serve no legitimate public purpose.

Chief Justice Thomas J. Moyer asked if there was any other area of the courts that was so secretly protected.

O'Malley said there was none that she knew of. But she said lawmakers intentionally created this court proceeding so that it would be confidential.

Brown, Moyer and Justice Andy Douglas appeared to be leaning in favor of some sort of compromise that would allow reporters to see the **judges'** records but protect the minors.

Justice Craig Wright also seemed favorable to public release, but with more stringent restrictions.

He feared that court officials might not remove all identifying information in a court opinion.

'Why doesn't the public have a right to know if **Judge** Jones is approving or denying every request for an abortion?' Brown said. 'If an entrenched right-to-life **judge** is turning down every one of these requests, isn't the minor a victim of that?'

O'Malley noted that litigants can't choose their judges anyway, but the legislature should write the laws and determine policy, not the courts. ds

--- INDEX REFERENCES ---

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Economics & Trade (1EC26))

INDUSTRY: (Healthcare Policy (1HE46); Bioethics (1B156); Healthcare (1HE06))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (ENGLISH; JUSTICE ANDY DOUGLAS; JUSTICE CRAIG WRIGHT; LAW; OHIO; OHIO GENERAL ASSEMBLY; OHIO SUPREME COURT; POST; PRIVACY; STAR CHAMBER) (Brown; David Marburger; Herbert Brown; Jones; JUVENILE ABORTIONS SEALED; Kathleen O'Malley; Lee Fisher; Marburger; Moyer; O'Malley; Thomas J. Moyer) (BIRTH CONTROL; ABORTION; PRIVACY; OHIO JUDGE ; CINCINNATI POST; COURT RECORDS; DOCUMENT; PUBLIC RECORD; CONTROVERSY)

EDITION: 1 STAR

Word Count: 706
10/14/92 AKRONBJ D4
END OF DOCUMENT

7/3/92 Plain Dealer (Clev.) 2C
1992 WLNR 4491813

Cleveland Plain Dealer


July 3, 1992

Section: STATE & REGION

# MCDONALD'S, WENDY'S AND COKE WON'T BE AT STATE FAIR

ASSOCIATED PRESS

COLUMBUS Two of the four fast-food restaurants opposed to the Ohio State Fair's exclusive contract with Pepsi will pull out of the fair, company officials said yesterday.

McDonald's, Wendy's, White Castle, and Donatos Pizza have said the contract would force them to violate their agreements to sell only Coke products.

McDonald's and Wendy's said they would not have booths at the fair.

Donatos announced that it would continue to sell at the state fair, while a White Castle official said the company was expected to make a decision Monday.

Earlier this week, the State Controlling Board approved a $2.6 million contract making Pepsi the exclusive provider of soft drinks at the fair.

McDonald's ran a full-page advertisement yesterday in the Columbus Dispatch thanking customers at the fair for 18 years of support.

McDonald's also included a coupon for a free Coke at its restaurants.

"The fair is very important to us, but we have to protect our brand and our position," said Alex Conti, McDonald's regional marketing director.

In lieu of participating at the fair, Wendy's will support Ohio's youth by contributing $50,000 to continuing education programs, said Gordon Teter, president and chief operating officer.

The contribution of Wendy's, based in suburban Dublin, will be made through Ohio Future Farmers of America and 4-H Clubs, Teter said in a news release.

Kim Bartley, director of marketing for Columbus-based White Castle, said the company had already paid $46,000 in exchange for promotional signs at a fair pavilion.

The company wants the state fair to either return the money or allow it to sell Coke at the fair just this year, she said.

Donatos will serve alternative drinks at the fair such as iced tea and lemonade.

The company opposes the state fair's contract with Pepsi, but that should not keep fair goers from enjoying its product, said Mike Zangerle, marketing director.

Wednesday, House Finance Chairman Patrick A. Sweeney, D-9, of Cleveland, asked State Auditor Thomas E. Ferguson to look into what he called State Fair Manager Billy Inmon's erratic management of the fair.

Sweeney said in a letter to Ferguson that recent controversies over provider contracts, employment practices and other matters suggest the fair may become a burden for taxpayers.

Inmon will cooperate in any investigation of his management practices, said Bob Hanseman, an aide.

Sweeney said Ferguson should determine if the commission's contracts are being competitively bid and if they violate existing agreements with other vendors.

Meanwhile, Ohio Attorney General Lee I. Fisher has ruled that the state fair contracts with more than 150 workers appear to violate state labor laws.

At issue is the hiring of non-union contract workers at below the prevailing wage.

"We just warned them that the safest way to operate .. is to terminate them," said Kate O'Malley, chief counsel with the attorney general's office.

Fair spokesman Pieter Wykoff said the current employment contract has been used at least since 1987.



---- INDEX REFERENCES --

COMPANY: MCDONALDS CORP

NEWS SUBJECT: (HR & Labor Management (IHR87); Business Management (IBU42); Labor Relations (ILA21); Contracts & Orders (ICO29); Sales & Marketing (IMA51))

INDUSTRY: (Restaurants & Food Service (1RE91); Fast Food (1FA67); Food & Beverage Distribution & Services (1FO39); Food & Beverage Production (1FO79); Agriculture, Food & Beverage (1AG53))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (HOUSE FINANCE; MCDONALDS; OHIO; OHIO FUTURE FARMERS; OHIO STATE FAIR; STATE CONTROLLING BOARD; STATE FAIR; WENDY; WHITE CASTLE) (Alex Conti; Billy Inmon; Bob Hanseman; Donatos; Donatos Pizza; Ferguson; Gordon Teter; Inmon; Kate O'Malley; Kim Bartley; Lee I. Fisher; McDonald; McDonald's, Wendy; Mike Zangerle; Patrick A. Sweeney; Pieter Wykoff; Sweeney; Teter; Thomas E. Ferguson; Wednesday; Wendy)

KEYWORDS: OHIO STATE FAIR; PEPSI; COCA-COLA; MCDONALD'S; WENDY'S

EDITION: FINAL / ALL

Word Count: 623
7/3/92 PLDLCL 2C
END OF DOCUMENT

7/2/92 Plain Dealer (Clev.) 1C
1992 WLNR 4490531



July 2, 1992

Section: STATE & REGION

# FAIR TOLD 150-PLUS WORKERS ILLEGALLY HIRED

MARK TATGE PLAIN DEALER BUREAU

COLUMBUS The Ohio State Fair may have to scuttle contracts it signed with more than 150 workers because the agreements appear to violate state labor laws.

As of late yesterday, the workers were still on the job. But a letter from Attorney General Lee I. Fisher's office told fair officials that they may be criminally and civilly liable unless the contracts are brought in compliance with state laws.

"We just warned them that the safest way to operate about these illegalities is to terminate them," said Kate O'Malley, chief counsel with the attorney general's office.

The Ohio Expositions Commission, which oversees the fair, may have to fire the 158 workers it has hired and write a new contract. Whether the same workers would then be rehired is unclear.

Union officials want to see competitive bids and are likely to fight any effort to retain the current workers.

Jim Rarey, executive secretary-treasurer of the Columbus Central Ohio Building Trades Council, said the fair was violating the state's prevailing-wage law. He said he would file a complaint with the state Department of Industrial Relations today.

State Fair General Manager Billy Inmon has raised the ire of Rarey and other union officials in recent weeks by hiring non-union contract labor in hope of saving the fair money. The fair lost $39,000 last year on revenue of $7.8 million.

Inmon was unavailable for comment late yesterday.

The hiring controversy comes as the fair reaches a critical phase in preparations for its opening. More than 2,000 workers are hired for the 17-day fair, which is the largest in the nation. Last year, nearly 3.5 million visitors at-

tended the fair.

Fair spokesman Pieter Wykoff said the current employment contract has been used at least since 1987.

"I don't know the status of the contract or whether we will have to come up with a new contract," Wykoff said.

State Rep. Patrick A. Sweeney, D-9, of Cleveland, released a copy of a letter yesterday that he sent to state Auditor Thomas Ferguson. The letter asks for an investigation of the fair's employment practices, purchasing procedures and Inmon's "erratic" management practices.

"In recent weeks, the operation of the Ohio State Fair has provided the backdrop for an ongoing public debate - one marked by media hype, intense contract disputes and sometimes high drama," Sweeney's letter said.

Sweeney said his office had received reports that contracts had gone to non-Ohio residents, including a number of Kentuckians who may be friends of Inmon.

"I also am distressed by reports that Mr. Inmon is providing these out-of-state contractors with free lodging on state property," Sweeney said.

In response to Sweeney's criticisms, Wykoff said: "We have nothing to fear from any investigation or audit at the Ohio State Fair. ... We are trying to do everything aboveboard. ... We are trying to clean up the mess that was left us."

Wykoff said only six of 158 workers are living on the fairgrounds. Those workers are staying in barracks at the Rhodes Center. Nearly all the workers are from Ohio.

He said Sweeney's attack on Inmon and the Expositions Commission was "political sour grapes" because the fair board went ahead and approved a $2.6 million exclusive contract with PepsiCo despite Sweeney's objections.



---- INDEX REFERENCES ---

COMPANY: PEPSICO INC

NEWS SUBJECT: (HR & Labor Management (IHR87); Business Management (IBU42); Labor Relations (ILA21); Economics & Trade (IEC26); Contracts & Orders (ICO29); Sales & Marketing (IMA51))

REGION: (USA (IUS73); Americas (IAM92); Ohio (IOH35); North America (INO39))

Language: EN

OTHER INDEXING: (EXPOSITIONS COMMISSION; OHIO; OHIO EXPOSITIONS COMMISSION; OHIO STATE FAIR; PEPSICO; RHODES CENTER; STATE DEPARTMENT OF INDUSTRIAL; STATE FAIR; STATE REP) (FAIR TOLD; Inmon; Jim Rarey; Kate O'Malley; Lee I. Fisher; Manager Billy Inmon; Patrick A. Sweeney; Pieter Wykoff; Rarey; Sweeney; Thomas Ferguson; Wykoff)

KEYWORDS: FAIR; OHIO STATE FAIR; EMPLOYEES; WORKERS

EDITION: FINAL / ALL

Word Count: 672
7/2/92 PLDLCL 1C
END OF DOCUMENT

6/30/92 Akron Beacon J. (Ohio) A1
1992 WLNR 1175513

Akron Beacon Journal (Ohio) (KRT)


**June 30, 1992**

Section: OHIO

# OHIO HIGH COURT TO RULE ON LAW

PHILLIP E. CANUTO, Beacon Journal medical writer *** The Associated Press contributed to this story.

Now that the U.S. Supreme Court has ruled on a Pennsylvania law requiring a 24-hour waiting period before a woman can get an abortion, the fate of a similar Ohio law will land squarely in the lap of the Ohio Supreme Court.

By saying the waiting period is legal under federal law, the U.S. Supreme Court gave Ohio and other states more power to tell women when they can and cannot have abortions.

But the ruling does not require the states to impose such restrictions. So how the Ohio Supreme Court views the Ohio law will depend on whether the justices agree that the Ohio Constitution provides more privacy and abortion rights than the federal Constitution.

'I think we've got a shot,' said Kevin O'Neill, Ohio legal director for the American Civil Liberties Union, which is trying to overturn the Ohio waiting-period law. 'I'd rather be in front of the Ohio Supreme Court (than the federal court).'

The Ohio law, called House Bill 108, was passed and signed into law last summer. On May 27, a Franklin County Common Pleas judge blocked it from taking effect, ruling that it violated both the state and federal constitutions.

The case is now before the appeals court in Franklin County. After a ruling there, both sides say it will be appealed to the Ohio Supreme Court.

The ACLU argues that several sections of the Ohio law, including one that discusses freedom of conscience, provide the ammunition they need to overturn the Ohio waiting period.

But Kate O'Malley, chief counsel for Attorney General Lee Fisher, who is defending the Ohio law, doubts that the court will find any difference between the state and federal constitutions.

She argues that in other cases not involving abortion, the Ohio court has found that the federal and state constitutions are essentially the same.

'The Ohio Supreme Court, in our view, would have to overturn itself to reach the conclusion the ACLU is arguing for,' O'Malley said.

State Rep. Jerome Luebbers, D-Cincinnati, who sponsored the Ohio law, said he was confident the law would be upheld if it went to the Ohio Supreme Court.

'The fact that the court did find the informed consent provision (in the Pennsylvania law) constitutional will speak very well of our chances in Ohio,' Luebbers said from Cincinnati.

'I can't imagine in the final analysis that the Ohio court, after seeing the ruling that was issued today, would find anything objectionable in the Ohio law,' he said.

Both O'Malley and O'Neill predict that it could be more than a year before the Ohio Supreme Court makes a final ruling.

It's unlikely that this case would ever get to the U.S. Supreme Court, which leaves it to state courts to interpret their own constitutions. The federal court reviews state constitutions only when they restrict protected rights, not when they expand those rights. njs

Decision on abortion *** See other stories about the abortion ruling

---- INDEX REFERENCES ----

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Economics & Trade (1EC26))

REGION: (Pennsylvania (1PE71); USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (ACLU; AMERICAN CIVIL LIBERTIES UNION; FRANKLIN COUNTY COMMON PLEAS; HIGH COURT; HOUSE BILL 108; OHIO; OHIO CONSTITUTION; OHIO SUPREME COURT; STATE REP; US SUPREME COURT) (Decision; Jerome Luebbers; Kate O'Malley; Kevin O'Neill; Lee Fisher; Luebbers; O'Malley; O'Neill) (ABORTION; UNITED STATES SUPREME COURT RULING; WAITING PERIOD; OHIO SUPREME COURT)

EDITION: 1 STAR

Word Count: 581
6/30/92 AKRONBJ A1
END OF DOCUMENT

6/10/92 Akron Beacon J. (Ohio) D1
1992 WLNR 1171707



June 10, 1992

Section: OHIO

# STATE ATTORNEYS DEFEND A LAW THEY DON'T LIKE AT LEAST ONE ISN'T SAD THAT SHE FAILED TO RESCUE ABORTION RESTRICTIONS

CHERYL CURRY, Beacon Journal Columbus Bureau

COLUMBUS As one of the state's top lawyers, **Kate O'Malley** considers herself to be fiercely competitive.

But when she lost an important abortion case last month as the chief legal counsel for the Ohio **attorney general**, she wasn't exactly disappointed.

'It was sort of a weird mix of emotions,' O'Malley said. 'Of course I wanted to win, but from a personal standpoint, I was also kind of happy about the way the **judge** ruled.'

The Franklin County common pleas **judge**, Guy Reece II, struck down as unconstitutional a law that would have required women seeking an abortion to receive state-published information and physician counseling at least 24 hours in advance.

O'Malley is one of at least a dozen high-level Democrats in the state's legal office, including the **attorney general** himself, who have ties to abortion rights groups.

As other states tentatively wait for a ruling to be handed down by the U.S. Supreme Court on a similar Pennsylvania law, some Ohio government officials are caught between meeting a professional obligation to uphold the state's abortion law at the same time they personally oppose it.

'This issue has been very hard on all of us,' said Leesa Brown, spokeswoman for the **Attorney General's** Office. 'We're a bunch of like-minded liberals .....so this has been very stressful.'

Beginning today, the office has 30 days to decide how to handle the second round of defending the law, signed by Republican Gov. George Voinovich in August.

The American Civil Liberties Union is expected to request a summary judgment, giving the **Attorney** Gener-

al's Office until July 10 to respond to the ruling.

The office, which has already said it will appeal, must decide whether it also will request a judicial stay allowing the state to enforce the abortion law pending a decision by the appeals court.

Ed Markovich, executive director of Right to Life of Greater Akron, said he is confident the Attorney General's Office will 'continue to use very good, strong arguments, even if their personal opinions are out of touch.'

'In a way you have to admire them for having the courage of their convictions,' Markovich said. 'But they don't have the force of the law or logic to sustain them.'

Attorney General Lee Fisher said he decided to defend the 24-hour waiting period bill after his staff researched the issue and agreed there was a legal basis because it would not prevent women from seeking abortions.

Fisher, a Cleveland Democrat and a former Ohio senator, is a longtime supporter of abortion rights.

During his 1990 campaign for office, Fisher was endorsed by the National Abortion Rights Action League. At that time, Fisher said he might not enforce an anti-abortion law if he thought it was unconstitutional.

'I would be less than candid if I didn't say that it is now clearly an awkward and uncomfortable position to have to defend a law I would have undoubtedly voted against if I were still in the Senate,' Fisher said.

He predicted political fallout from his role will be minimal.

'I think people understand that the attorney general is far more than a robot or rubber stamp,' Fisher said. 'It is my duty to defend the law if there is a good basis for doing so, regardless of how I may feel personally.'

The appeal is expected to be heard next by the Franklin County Court of Appeals. From there, it would move to the Ohio Supreme Court. ds

Photo

PHOTO: headshot of Fisher in the 1x paper on page D2

--- INDEX REFERENCES ---

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (AMERICAN CIVIL LIBERTIES UNION; CLEVELAND DEMOCRAT; FRANKLIN COUNTY COURT OF APPEALS; GREATER AKRON; NATIONAL ABORTION RIGHTS ACTION LEAGUE; OHIO; OHIO SUPREME COURT; US SUPREME COURT) (Ed Markovich; Fisher; George Voinovich; Guy Reece; Kate O'Malley; Lee Fisher; Leesa Brown; Malley; Markovich; O'Malley; Republican Gov; STATE ATTORNEYS DEFEND) (ABORTION; BIRTH CONTROL; 24-HOUR WAITING PERIOD; BIOGRAPHY)

EDITION: 2 STAR

Word Count: 691
6/10/92 AKRONBJ DI
END OF DOCUMENT

5/29/92 Columbus Dispatch (Ohio) 01A
1992 WLNR 4927255

Columbus Dispatch (OH)


May 29, 1992

Section: NEWS

# STAY OF ABORTION RULING MULLED
# IF GRANTED, STATE COULD ENFORCE NEW LAW WHILE IT APPEALS

Mary Yost, and Catherine Candisky, Dispatch Staff Reporters

State officials may request a judicial stay, allowing the state to enforce Ohio's abortion law, while they appeal a ruling that the law violates both U.S. and Ohio constitutions.

"We are very seriously considering a stay," said Leesa Brown, spokesman for Attorney General Lee Fisher.

Courts usually maintain status quo while reviewing cases. In this case, that would mean women would not have to follow an informed-consent law requiring them to receive state-printed information and physician counseling at least 24 hours before an abortion. The law was to take effect yesterday.

Franklin County Common Pleas Judge Guy L. Reece II threw out the law Wednesday, saying that it hindered a woman's effort to obtain an abortion. He ruled in a lawsuit the American Civil Liberties Union had filed in January on behalf of Cleveland's PreTerm abortion clinic.

Kathleen O'Malley, chief counsel for Fisher, had told Reece that the law does not stop women from having abortions. The state will appeal Reece's decision to the Franklin County Court of Appeals and, if necessary, the Ohio Supreme Court, she said.

Reece gave the ACLU's Kevin O'Neill two weeks to draft a judgment entry of the decision. Once it is filed with the court, the state can request a stay of Reece's ruling and will have 30 days to file an appeal.

The stay request first would be made to Reece and, if he turns it down, then to the Court of Appeals.

Reece yesterday said he expects much of his decision to remain intact after the higher courts' reviews.

Part of it, however, likely will be overturned after the U.S. Supreme Court announces its ruling in Pennsylvania

vs. Casey, a challenge on federal grounds to a Pennsylvania abortion law similar to Ohio's. Observers on both sides of the debate expect the court to uphold the Pennsylvania law as constitutional in a ruling this summer.

Reece's ruling, however, goes a step further in finding that Ohio's law also violates the state constitution. The Ohio Constitution, Reece wrote in his decision, affords greater protection of individual rights than its federal counterpart.

"Ohio's right to privacy is sufficiently broad to protect women from the type of governmental regulation that (the law) advocates," he wrote.

---- INDEX REFERENCES ---

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Economics & Trade (1EC26))

INDUSTRY: (Healthcare Policy (1HE46); Bioethics (1BI56); Healthcare (1HE06))

REGION: (Pennsylvania (1PE71); USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (ACLU; AMERICAN CIVIL LIBERTIES UNION; APPEALS; COURT OF APPEALS; FRANKLIN COUNTY COMMON PLEAS; FRANKLIN COUNTY COURT OF APPEALS; OHIO CONSTITUTION REECE; OHIO SUPREME COURT; US SUPREME COURT) (Casey; Fisher; Guy L. Reece; Kathleen O'Malley; Kevin O'Neill; Lee Fisher; Leesa Brown; Observers; Ohio; Part; Reece)

KEYWORDS: ABORTION LAW OHIO VIOLATION FRANKLINCOUNTY RULING; COURT GUY L. REECE

EDITION: HOME FINAL

Word Count: 444
5/29/92 COLDIS 01A
END OF DOCUMENT

6/10/92 Akron Beacon J. (Ohio) D1
1992 WLNR 1171707



June 10, 1992

Section: OHIO

# STATE ATTORNEYS DEFEND A LAW THEY DON'T LIKE AT LEAST ONE ISN'T SAD THAT SHE FAILED TO RESCUE ABORTION RESTRICTIONS

CHERYL CURRY, Beacon Journal Columbus Bureau

COLUMBUS As one of the state's top lawyers, **Kate O'Malley** considers herself to be fiercely competitive.

But when she lost an important abortion case last month as the chief legal counsel for the Ohio attorney general, she wasn't exactly disappointed.

'It was sort of a weird mix of emotions,' O'Malley said. 'Of course I wanted to win, but from a personal standpoint, I was also kind of happy about the way the judge ruled.'

The Franklin County common pleas judge, Guy Reece II, struck down as unconstitutional a law that would have required women seeking an abortion to receive state-published information and physician counseling at least 24 hours in advance.

O'Malley is one of at least a dozen high-level Democrats in the state's legal office, including the attorney general himself, who have ties to abortion rights groups.

As other states tentatively wait for a ruling to be handed down by the U.S. Supreme Court on a similar Pennsylvania law, some Ohio government officials are caught between meeting a professional obligation to uphold the state's abortion law at the same time they personally oppose it.

'This issue has been very hard on all of us,' said Leesa Brown, spokeswoman for the Attorney General's Office. 'We're a bunch of like-minded liberals .....so this has been very stressful.'

Beginning today, the office has 30 days to decide how to handle the second round of defending the law, signed by Republican Gov. George Voinovich in August.

The American Civil Liberties Union is expected to request a summary judgment, giving the Attorney General's

5/28/92 Columbus Dispatch (Ohio) 01A
1992 WLNR 4925634

Columbus Dispatch (OH)


May 28, 1992

Section: NEWS

# JUDGE THROWS OUT OHIO ABORTION LAW

Catherine Candisky, and Mary Yost, Dispatch Staff Reporters

An Ohio law requiring women to receive state-prepared materials about fetal development and abortion options and then wait 24 hours before having an abortion was thrown out yesterday by a Franklin County Common Pleas judge.

Judge Guy L. Reece II found the law violates both the U.S. and Ohio constitutions. The law was to go into effect today.

The state will appeal the decision to the Franklin County Court of Appeals.

"There is no evidence to the effect that an abortion may proceed more safely 24 hours after the required information is imparted to the woman," Reece wrote.

The American Civil Liberties Union filed the suit on behalf of a Cleveland abortion clinic to block the law. The suit argued the law frustrates a woman's effort to obtain an abortion.

"We will savor the victory today, but we realize that we must protect this decision. This is the first round in a three-round prize fight," said Kevin O'Neill, legal director for the ACLU's Ohio chapter.

Assistant Attorney General Kathleen O'Malley criticized the ruling, saying Reece "went to great lengths to mischaracterize the state's argument" and ignored a 1989 U.S. Supreme Court decision. In Webster vs. Reproductive Health Services, the court found provisions are allowed if they do not interfere unduly with a woman's procreative choices, O'Malley said.

Noting the Ohio Constitution provides broader protection of individual liberty than its federal counterpart, Reece ruled the law violates state guarantees of privacy, free speech, liberty, equal protection and freedom of conscience. The law also conflicts with the federal constitutional guarantees of free speech and due process, he said.

The law would have required women to meet with their physician for counseling and obtain a state pamphlet detailing fetal development, abortion and pregnancy risks, adoption, and legal obligations of the father for child support 24 hours before an abortion.

Reece found the wait increased the costs of obtaining an abortion by requiring at least two separate trips to a clinic. Those costs, he wrote, include child care, lost wages, transportation and possible overnight lodging.

In a two-day hearing last week, workers at Cleveland's PreTerm clinic testified abortion clinics are in 11 of Ohio's 88 counties, and many women visiting PreTerm traveled more than 100 miles round trip.

Reece found the law would illegally restrain physicians by requiring them to make statements to patients that may be contrary to their beliefs.

Reece wrote, "If the reasoning of the state of Ohio were true, that the state's interest in maternal health is such that this information should be provided to pregnant women contemplating abortion, how much stronger would the argument be for giving this same information to women who are going to carry the pregnancy to term? Are not these women even more in need of information about the medical risks of childbirth, the public availability of medical assistance benefits, and the father's liability for child support? But this the state does not require."

Observers expect the U.S. Supreme Court to uphold a Pennsylvania law similar to Ohio's. The Pennsylvania law has been challenged on federal grounds. A decision is expected this summer.

"It could blow our federal claim out of the water, but we still have the state claims, and that's how we want to win. The federal claims are a dead end," O'Neill said.

"Judge Reece made history today," he said. "What we're seeing is the beginning of a renaissance in state courts finding greater protections under their state constitutions."

In San Francisco yesterday, a judge found that a California law requiring unmarried girls under 18 to get a parent's or judge's permission before an abortion violates that state's constitution.

Superior Court Judge Maxine Casey ruled the measure violates a minor's right to privacy.

State constitutions also have been utilized recently in California and other states, including Massachusetts, to provide abortion funding to indigent women.

In response to Reece's ruling, PreTerm Director Carolyn Buhl said, "Women are going to be able to continue to think through their own decision."

Janet Folger, legislative director for Ohio Right to Life, said, "The decision strips . . . the power to make reasonable laws relating to abortion, even if the Supreme Court decides such laws are constitutional."

Planned Parenthood and the National Abortion Rights Action League of Ohio praised Reece's decision but said they are not relaxing efforts to elect abortion rights candidates to the General Assembly.

The abortion battle "is all left in the state legislatures now," said Carole J. Rogers, public affairs director of Planned Parenthood Affiliates of Ohio. "After 10 years of lobbying in the Ohio legislature, it is clear that we need to focus more on changing faces than changing minds."

"Perhaps this is a trend where we will find women's rights and access to abortions protected under state constitutions," said Catherine Girves, of the National Abortion Rights Action League of Ohio's board of directors.

-- INDEX REFERENCES --

COMPANY: STRATEGIC INTERNET INVESTMENTS INC; JEFFERSON CAPITAL CORP

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Economics & Trade (1EC26))

INDUSTRY: (Women's Health (1WO30); Healthcare (1HE06); Contraception (1CO66); Healthcare Practice Specialties (1HE49))

REGION: (Pennsylvania (1PE71); USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39); California (1CA98))

Language: EN

OTHER INDEXING: (ACLU; AMERICAN CIVIL LIBERTIES; FRANKLIN COUNTY COMMON PLEAS; FRANKLIN COUNTY COURT OF APPEALS; II; JUDGE MAXINE CASEY; NATIONAL ABORTION RIGHTS ACTION LEAGUE; NATIONAL ABORTION RIGHTS ACTION LEAGUE OF OHIO; OHIO; OHIO CONSTITUTION; PLANNED PARENTHOOD AFFILIATES; REPRODUCTIVE HEALTH SERVICES; SUPERIOR COURT; SUPREME COURT; US SUPREME COURT; WEBSTER) (Assembly; Carole J. Rogers; Carolyn Buhl; Catherine Girves; Janet Folger; Judge Guy; Judge Reece; JUDGE THROWS; Kathleen O'Malley; Kevin O'Neill; Malley; Massachusetts; Neill; Observers; Planned Parenthood; PreTerm; Reece)

KEYWORDS: ABORTION RULING FRANKLINCOUNTY COURT LAW OHIO

EDITION: HOME FINAL

Word Count: 1011
5/28/92 COLDIS 01A
END OF DOCUMENT

87 of 109 DOCUMENTS



United Press International

May 27, 1992, Wednesday, BC cycle

**SECTION:** Domestic News

**LENGTH:** 414 words

**HEADLINE:** Judge rules Ohio abortion law unconstitutional

**DATELINE:** COLUMBUS, Ohio

**BODY:**

A judge ruled Wednesday that Ohio's informed consent abortion law scheduled to go into effect Thursday is unconstitutional.

The law, which would have required women to get state-ordered information 24 hours before having an abortion, was challenged by the American Civil Liberties Union.

Franklin County Common Pleas Court Judge Guy Reece granted the ACLU an injunction after two days of testimony.

The ACLU suit was filed on behalf of Cleveland's Preterm Clinic, where about 7,500 abortions were performed last year.

"This move (using the Ohio Constitution) is unprecedented and the American Civil Liberties Union should be praised for helping win the women of Ohio a renewed chance at freedom of choice," NARAL Ohio, an affiliate of the National Abortion Rights Action League, said in a statement.

In closing arguments Tuesday, Kevin O'Neill, legal director for the ACLU's Ohio chapter, told Reece the new law would particularly hurt poor and rural women.

The requirement for physician counseling 24 hours before an abortion would mean at least two trips to a clinic, he said. O'Neill said 588 women who visited Preterm last year traveled more than 100 miles round trip.

O'Neill also strongly criticized a brochure printed by the Ohio Department of Health. The law would require each woman be given a copy of the brochure before having an abortion. The pamphlet details fetal development, risks of abortion and pregnancy, adoption and a father's responsibilities to a child.

"It is designed to inspire a sense of guilt and shame and to dissuade her from having an abortion," O'Neill told the judge.

84 of 109 DOCUMENTS


Chicago Tribune

May 27, 1992, Wednesday, FINAL

**SECTION:** NEWS; Pg. 4; ZONE: M

**LENGTH:** 138 words

**HEADLINE:** Ohio judge promises ruling on pre-abortion information

**BYLINE:** From Chicago Tribune wires

**DATELINE:** COLUMBUS, Ohio

**BODY:**

A judge promised Tuesday to decide by Thursday whether women seeking an abortion must receive information from the state about fetal development and alternatives to abortion. A state law requiring that women be given such information 24 hours before having an abortion is scheduled to take effect Thursday. Closing arguments in a challenge to the law were given before Judge Guy Reece Jr. of Franklin County Common Pleas Court. Two days of hearings were held last week. Kevin O'Neill, legal director for the American Civil Liberties Union of Ohio, Tuesday repeated his claim that a 24-hour waiting period would be a burden on women who would have to return to abortion clinics more than once. Kate O'Malley, chief counsel for the attorney general's office, said the brochure is needed to tell women about risks.

**LOAD-DATE:** 05-28-92

"Judge Reece is to be commended for his courageous ruling, but our victory must now be protected in the appellate court," said NARAL Ohio, which participated in the court process by filing a "friend of the court" brief.

"If the Ohio Supreme Court will not find in the Ohio Constitution a fundamental right to protect freedom of choice, our victory today will be meaningless.

"The Ohio Supreme Cpurt must protect the women of our state against the potential overturn of Roe vs. Wade by guaranteeing a woman's right to choose a safe, legal abortion."

Kathleen O'Malley, chief counsel for Ohio Attorney General Lee Fisher, argued the law would ensure that a woman made "an educated and thoughtful decision" before getting an abortion.

She said the state's interest lies in "maternal health and fetal life."



The Associated Press

May 26, 1992, Tuesday, PM cycle

**SECTION:** Domestic News

**LENGTH:** 359 words

**HEADLINE:** Ohio Judge Promises Abortion Decision Before Thursday

**BYLINE:** By RODD AUBREY, Associated Press Writer

**DATELINE:** COLUMBUS, Ohio

**BODY:**

A judge promised today to decide by Thursday whether women seeking an abortion must receive information from the state about fetal development and alternatives to abortion.

A state law requiring that women be given such information 24 hours before having an abortion is scheduled to take effect Thursday.

Closing arguments in a challenge to the law were given before Judge Guy Reece Jr. of Franklin County Common Pleas Court. Two days of hearings were held last week.

Kevin O'Neill, legal director for the American Civil Liberties Union of Ohio, today repeated his claim that a 24-hour waiting period would be a burden on women who would have to return to abortion clinics more than once.

He also attacked a state-mandated brochure that informs women about fetal development and alternatives to abortion, saying it would "inspire a sense of guilt in women and thereby dissuade them to have an abortion."

Kate O'Malley, chief counsel for the attorney general's office, defended the brochure, calling it an objective statement of fact telling women about risks. She said women still are not required to read the information.

O'Malley also argued that the law allows women to get abortions in an emergency without the 24-hour waiting period.

During testimony Friday, Dr. Richard Schmidt of Cincinnati said women considering an abortion should have the same type of information as people about to have other operations.

Schmidt, the state's only witness, called information such as that in the state brochure "an essential element in any

medical or surgical procedure."

On Thursday, Carolyn Buhl, director of a clinic called Preterm Cleveland, said some women couldn't afford the extra afford transportation or lodging costs if they had to go to a clinic twice, 24 hours apart. She warned that abused women could be in more danger if they had to leave home twice.

The lawsuit was filed on behalf of Preterm in January, the 19th anniversary of the U.S. Supreme Court decision Roe vs. Wade, which legalized abortion.

The high court is considering the constitutionality of a Pennsylvania law similar to Ohio's. A decision is expected this summer.

5/18/92 Cin. Post 5A
1992 WLNR 588724

Cincinnati Post (OH)


May 18, 1992

Section: NEWS

# ABORTION RULING DUE SOON ACLU FIGHTS COUNSELING LAW

ASSOCIATED PRESS

COLUMBUS The judge who was asked to rule on the constitutionality of a state law requiring abortion counseling says he will decide the issue before May 28, when the law is to fully take effect.

The American Civil Liberties Union of Ohio has filed suit in Franklin County Common Pleas Court to try to overturn the law that requires women to wait 24 hours before having an abortion.

The group says the legislation violates the federal and state constitutions and frustrates women's efforts to obtain abortions.

The state says the law doesn't hinder a woman's choice and ensures an educated decision.

The law went into effect Nov. 28, but its most significant provisions were delayed from taking effect until May 28 to allow for preparation of legal challenges.

Both sides plan to present witnesses and evidence in hearings set for Thursday and Friday before Judge Guy Reece II.

The law requires women to be counseled by a doctor and to be given printed material about abortion 24 hours before the procedure takes place. The material, prepared by the state, includes details about fetal development, the risks of abortion and available alternatives.

Kevin O'Neill, the ACLU's Ohio legal director, said he will present four witnesses, including a doctor, executive director and counselor from a Cleveland center where abortions are performed. Written testimony is expected from a Yale University law professor and physician.

O'Neill said the abortion law violates federal and state guarantees of liberty and violates the state constitution's

right of free conscience.

"The Ohio Constitution's liberty clause provides much broader protection than that provided in the federal Constitution," he said. "Ohio has a freedom of conscience provision with no counterpart in the federal Constitution."

**Kathleen O'Malley**, chief counsel for Ohio Attorney General Lee Fisher, said she plans to call a doctor as a witness.

"The law does not unduly burden a woman's ability to make her procreated choices," she said.

Both sides in the debate are awaiting a U.S. Supreme Court decision that could overturn Roe vs. Wade, the 1973 case affirming a woman's right to an abortion.

-- INDEX REFERENCES --

COMPANY: YALE UNIVERSITY

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Economics & Trade (1EC26))

INDUSTRY: (Women's Health (1WO30); Healthcare (1HE06); Contraception (1CO66); Healthcare Practice Specialties (1HE49))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (AMERICAN CIVIL LIBERTIES; FRANKLIN COUNTY COMMON PLEAS COURT; US SUPREME COURT; YALE UNIVERSITY) (ABORTION RULING DUE; ACLU; ACLU FIGHTS COUNSELING LAW; Guy Reece; Kathleen O'Malley; Kevin O'Neill; Lee Fisher; O'Neill; Roe; Wade; Written)

EDITION: METRO

Word Count: 437
5/18/92 CINPOST 5A
END OF DOCUMENT

5/17/92 Columbus Dispatch (Ohio) 01D
1992 WLNR 4929188

Columbus Dispatch (OH)


May 17, 1992

Section: NEWS

# ABORTION HEARINGS TO RESUME
# ACLU CHALLENGES LAW TO TAKE EFFECT AT END OF MONTH

Catherine Candisky, Dispatch Staff Reporter

Hearings on a law requiring women to wait 24 hours before having an abortion resume Thursday in Franklin County Common Pleas Court, a week before the state law goes into full effect.

The American Civil Liberties Union of Ohio filed a lawsuit to overturn the law on grounds it violates both federal and state constitutions and frustrates women's efforts to obtain an abortion.

The state says the law does not hinder a woman's choice and ensures an educated decision.

Both sides plan to present witnesses and other evidence in hearings scheduled Thursday and Friday before Judge Guy Reece II.

Reece plans to announce his ruling before May 28, when enforcement of the law is to begin.

Kevin O'Neill, ACLU's Ohio legal director, said he will present four witnesses, including a physician, executive director and counselor from a Cleveland clinic where abortions are performed. Testimony is expected by affidavit from a Yale University law professor and physician on informed consent and medical ethics.

O'Neill said Ohio's law violates federal and state guarantees of liberty, and violates the state constitution's right of free conscience. Both, he argued, give women reproductive freedom without governmental interference.

The challenge marks a legal departure from the federal court system and an unprecedented claim to Ohio constitutional guarantees, O'Neill said.

"The Ohio Constitution's liberty clause provides much broader protection than that provided in the federal constitution," he said. "Ohio has a freedom of conscience provision with no counterpart in the federal constitution."

**Kathleen O'Malley**, chief counsel for Attorney General Lee Fisher, said she plans to call a physician as an expert witness to testify about informed consent and medical ethics. "The law does not unduly burden a woman's ability to make her procreated choices," O'Malley said.

The Ohio law went into effect Nov. 28, but major provisions are not to be enforced until May 28, a six-month delay built into the legislation to allow for preparation.

The law requires women seeking abortions to be counseled by a doctor and to be given printed information about abortion 24 hours before the procedure. The printed material, prepared by the state, includes details about fetal development, the risks of abortion, and available alternatives.

The ACLU filed suit in January on behalf of Preterm Cleveland, a Cleveland clinic. Fisher, Gov. George V. Voinovich and Dr. Edward G. Kilroy, director of the Department of Health, were named defendants.

The challenge comes as both sides of the abortion debate await a U.S. Supreme Court decision that could overturn Roe vs. Wade, the 1973 case affirming a woman's right to an abortion.

The high court is reviewing Pennsylvania vs. Casey, a challenge to a Pennsylvania law which, like the Ohio law, calls for a 24-hour wait and abortion counseling. O'Neill noted the Pennsylvania law was challenged on federal, not state, constitutional guarantees.

--- INDEX REFERENCES ---

COMPANY: YALE UNIVERSITY; UK DEPARTMENT OF HEALTH

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Economics & Trade (1EC26))

INDUSTRY: (Healthcare Policy (1HE46); Bioethics (1BI56); Women's Health (1WO30); Healthcare (1HE06); Contraception (1CO66); Healthcare Practice Specialties (1HE49))

REGION: (Pennsylvania (1PE71); USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (ABORTION; ACLU; AMERICAN CIVIL LIBERTIES; DEPARTMENT OF HEALTH; FRANKLIN COUNTY COMMON PLEAS COURT; OHIO CONSTITUTIONS; PENNSYLVANIA; US SUPREME COURT; YALE UNIVERSITY) (Casey; Edward G. Kilroy; Fisher; George V. Voinovich; Guy Reece; Kathleen O'Malley; Kevin O'Neill; Lee Fisher; Malley; Neill; O'Neil; Ohio; Reece; Roe; Testimony; Wade)

KEYWORDS: ABORTION FRANKLINCOUNTY LAW LAWSUIT WOMEN DISCRIMINATION

EDITION: HOME FINAL

Word Count: 591
5/17/92 COLDIS 01D

END OF DOCUMENT

3/31/92 Plain Dealer (Clev.) 6B
1992 WLNR 4492822

Cleveland Plain Dealer


**March 31, 1992**

Section: METRO

# PANEL PONDERS NAMING NAMES IN NEWS MEDIA

CHERYL JACKSON PLAIN DEALER REPORTER

CLEVELAND U.S. District Judge Ann Aldrich said yesterday that the news media acted correctly this weekend in publishing the name and photograph of a Philadelphia man with AIDS who is suspected of having sex with boys.

"He may have been around people in Cuyahoga County and people from Cuyahoga County may have been to Philadelphia. Who knows?" Aldrich told members of the Press Club of Cleveland and Society of Professional Journalists.

"If he's that age and he's been dealing with hundreds of young children, they could have moved all over the country. They might not all be in Pennsylvania."

Aldrich was part of a panel discussing "Naming Names in Sensitive Situations" at the Press Club of Cleveland.

Panelist Thomas H. Greer, vice president and senior editor of The Plain Dealer, agreed with Aldrich's comments.

"The crime was a very heinous crime involving hundreds of minors and I think there was a need for the public to know who this person was so others who may have had contact with him could seek medical assistance," Greer said.

Panelists, including James Neff, a former PD reporter writing a book about rape victims, and Cuyahoga County Prosecutor Stephanie Tubbs Jones, discussed various situations in which identities of victims or sources might be withheld or disclosed.

"I think that when there are situations in which the disclosure of information will impact on the ability of the law enforcement official or agency to actually pursue the crime, then I think there has to be a different balance that is drawn," said **Kate O'Malley**, chief counsel to Ohio Attorney General Lee I. Fisher. O'Malley explained that disclosing names of rape accusers might deter victims from going to police

Like many other papers, The PD maintains a policy of withholding names of rape accusers unless accusers request that their names be published, Greer said.

He said the paper published the name of a woman who accused rap singer Joseph Simmons of Run-DMC of rape after it was discovered she had made similar allegations about other men and then recanted her story.

"At that point, she was no longer a rape victim. She was a woman who had made up a story about a celebrity," Greer said.

Ed Garston, a Cable News Network bureau chief, said the network's policy to withhold the identity of rape accusers helps to unfairly protect plaintiffs from the scrutiny that defendants undergo.

"If this person is going to make those charges and put this person's freedom in jeopardy, then certainly they should both be subject to the same scrutiny," he said, adding the issue is often debated at the network.

But Neff countered: "These victims and survivors are in different stages of recovery. It's just not a good idea for them to be humiliated again."



---- INDEX REFERENCES ----

COMPANY: TIME WARNER INC

NEWS SUBJECT: (Violent Crime (1VI27); Crime (1CR87); Legal (1LE33); Social Issues (1SO05); Criminal Law (1CR79); Technology Law (1TE30))

REGION: (Pennsylvania (1PE71); USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (AIDS; CABLE NEWS NETWORK; PD; PLAIN DEALER; PRESS CLUB; SOCIETY OF PROFESSIONAL) (Aldrich; Ann Aldrich; Ed Garston; Greer; James Neff; Joseph Simmons; Kate O'Malley; Lee I. Fisher; Neff; O'Malley; PANEL PONDERS; Panelist Thomas H. Greer; Panelists)

KEYWORDS: ACQUIRED IMMUNE DEFICIENCY SYNDROME; NEWS AND NEWS MEDIA; RAPE; PRESS CLUB; THOM GREER

EDITION: FINAL/ LAKE/ GEAUGA

Word Count: 567
3/31/92 PLDLCL 6B
END OF DOCUMENT

3/29/92 Columbus Dispatch (Ohio) 08C
1992 WLNR 4919498

Columbus Dispatch (OH)


March 29, 1992

Section: NEWS

# ACLU ASKS DELAY IN STATE'S NEW ABORTION LAW

Staff and wire reports

A Franklin County judge is being asked to prevent a new abortion waiting-period law from taking effect until the U.S. Supreme Court rules on a similar measure from Pennsylvania.

Kevin O'Neill, legal director for the American Civil Liberties Union of Ohio, asked Common Pleas Judge Guy L. Reece Friday to delay implementation of the Ohio law, saying it unduly burdens a woman's ability to obtain an abortion. The law is scheduled to go into effect May 28.

The ACLU is seeking to overturn the legislation sponsored by Rep. Jerome Luebbers, D-Cincinnati, which requires that women wait 24 hours after notifying a doctor of their intention to have an abortion.

Women would have to be provided with state-printed brochures depicting a fetus during development and outlining the risks of the procedure and alternatives to it.

Reece has set a hearing for May 21.

The U.S. Supreme Court agreed in January to review provisions of the Pennsylvania law, which requires a 24-hour wait before a woman may have an abortion, doctors to tell patients about alternatives, parental consent before a minor has an abortion and husbands to be notified in most cases before an abortion is performed.

**Kathleen O'Malley**, chief counsel for Attorney General Lee Fisher, who is representing state officials in the case, said there is no guarantee when the court will rule in the Pennsylvania case.

--- INDEX REFERENCES ---

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36))

INDUSTRY: (Healthcare Policy (1HE46); Biocthics (1BI56); Women's Health (1WO30); Healthcare (1HE06); Contraception (1CO66); Healthcare Practice Specialties (1HE49))

REGION: (Pennsylvania (1PE71); USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (ACLU; AMERICAN CIVIL LIBERTIES; US SUPREME COURT) (ABORTION LAW; Guy L. Reece; Jerome Luebbers; Kathleen O'Malley; Kevin O'Neill; Lee Fisher; Reece)

KEYWORDS: OHIO ABORTION LAW CITIES

EDITION: HOME FINAL

Word Count: 273
3/29/92 COLDIS 08C
END OF DOCUMENT

3/27/92 Plain Dealer (Clev.) 1C
1992 WLNR 4487551

Cleveland Plain Dealer


March 27, 1992

Section: METRO

# VOINOVICH'S NAMING OF JUDGES DEFENDED

MARY BETH LANE PLAIN DEALER BUREAU

COLUMBUS Gov. George V. Voinovich's system for naming judges is legal and the challenge brought by a Cincinnati Democrat who wants to be a judge should be dismissed, Voinovich's lawyers told a federal judge yesterday.

But the lawyer for Robert B. Newman, a lawyer and aspiring judge who is suing Voinovich in U.S. District Court, claimed the Republican governor has illegally used politics and race as criteria in naming judges. He said Voinovich's practices have excluded blacks and Democrats from the bench.

U.S. District Court Judge George C. Smith said he will rule next week.

Newman is seeking a court order that would block Voinovich from filling an upcoming vacancy in Hamilton County Common Pleas Court with Voinovich's choice, Hamilton County Prosecutor Arthur Ney Jr., a Republican.

The Ohio Constitution calls for governors to name judges when in-term vacancies occur. The appointees must then run in the next election if they want to remain.

Voinovich has named 45 judges since he took office - 43 Republicans and two Democrats. The group includes two blacks and nine women.

Attorney General Chief Counsel Kathleen O'Malley said Voinovich has not violated the Voting Rights Act or the First Amendment right to free speech, as Newman claims.

Newman, who is white, cannot claim a violation of the Voting Rights Act, designed to protect minorities, because he is not a member of the protected class, she said.

Newman also cannot claim his First Amendment rights were violated just because he is a Democrat whom Voinovich chose not to appoint to the vacancy, she said.

"He was a Democrat during the Celeste years and never received an appointment," O'Malley said, referring to the eight years Democratic former Gov. Richard F. Celeste was in office. "He certainly waited a long time to file a claim."

Newman's lawyer, Bruce J. Petrie Sr., argued that Voinovich's system of naming judges has, in effect, told Newman, "You have no opportunity to be considered in my administration to be a judge because your views are offensive to me on a political basis."

Voinovich aide Andrew Futey described how Voinovich fills judicial vacancies. Futey said the Republican county chairman in the county with the vacancy is asked to submit the names of at least two, preferably three, qualified candidates.

The GOP chairmen are asked to recommend "the best and brightest" candidates, with an eye toward demographic balance and potential for re-election, he said. The GOP chairmen are also supposed to ask local bar associations for ratings on the recommended candidates.

Futey said he then asks the State Highway Patrol to conduct background checks on the recommended candidates. He then gives the recommendations to Voinovich, who makes the choice.

Futey said whether or not a judicial aspirant was a Voinovich campaign contributor was "never looked at."

Newman acknowledged that Celeste, who filled judicial vacancies with all Democrats, never named him. But he said he never applied for a judgeship under Celeste.

He insisted that party affiliation should not have anything to do with filling judicial vacancies. Celeste's system of naming judges "was just as offensive to me," he said.



---- INDEX REFERENCES ---

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Economics & Trade (1EC26))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (GOP; OHIO CONSTITUTION; PLEAS COURT; US DISTRICT COURT; VOINOVICH) (Andrew Futey; Arthur Ney Jr.; Attorney; Bruce J. Petrie Sr.; Celeste; Chief Counsel; Futey; George C. Smith; George V. Voinovich; Gov; Kathleen O'Malley; Malley; Newman; Richard F. Celeste; Robert B. Newman; Voinovich)

KEYWORDS: GEORGE VOINOVICH; APPOINTMENT; JUDGES; OHIO; SUITS

EDITION: FINAL/ SPORTS FINAL

Word Count: 655
3/27/92 PLDLCL 1C
END OF DOCUMENT

1/31/92 Plain Dealer (Clev.) 1C
1992 WLNR 4458660

Cleveland Plain Dealer


**January 31, 1992**

Section: STATE & REGION

# LAWYER DENIED CLEMENCY RECORDS

T.C. BROWN PLAIN DEALER BUREAU

COLUMBUS Ohio Public Defender Randall M. Dana was denied access yesterday to records he needs to try to prove his contention that the Adult Parole Authority has not always followed the law when considering clemency for inmates.

Franklin County Common Pleas Judge Richard S. Sheward denied Dana's request yesterday in the third day of a civil trial challenging prisoner commutations and clemencies granted by former Gov. Richard F. Celeste.

Attorney General Lee I. Fisher challenged the seven death-row commutations and four clemencies for lesser crimes granted by Celeste last year during his last week in office. Dana is defending the clemencies.

At issue in the trial is the governor's constitutional authority to grant clemencies vs. state laws that regulate the process of such actions. Fisher contends Celeste did not follow the law.

Jill D. Goldhart, acting chief of the Parole Authority, briefly testified that she was not the keeper of the records sought by Dana. Dana had subpoenaed Goldhart and records of clemency requests by death-row inmates for the last 10 years on the previous day, giving Goldhart two hours to appear with the documents.

Sheward was prepared yesterday to grant Dana's request for the records on Monday, but when the lawyers for both sides could not agree on what should be examined, Sheward abruptly changed his mind.

Dana said he sought information from the Parole Authority files that might show it had failed to act or notify the governor of its recommendations for inmates who had applied for clemency.

"Our argument is that the Parole Board is not applying the statutes properly," Dana said.

If he could prove that, he believed he could win the case, Dana said, arguing that Celeste had not acted improperly, either.

Sheward once again, as he has done numerous times over the past three days, chastised Dana and his co-counsel, Adele Shank, for being unprepared for the trial that has been pending for a year.

"You're asking too much of the Adult Parole Authority and the court," Sheward said to Dana. "I cannot and will not turn this trial into a discovery process. The fact remains this (records check) could have been done months ago."

Dana admitted to Sheward that the defense was not prepared for the trial. But he insisted that it would be the most important case Sheward would ever hear.

"I'm sorry the way the case was handled by all of us," Dana said. "It deserved better than it got."

Sheward scheduled closing arguments for 9 a.m. Monday and gave both sides until Feb. 7 to file any post-trial information. Sheward said he would make a ruling within a week of Feb. 7.

After the hearing, Dana said the case would not end with Sheward's ruling.

"This case will go on for 10 years. It's a very political issue," Dana said. "If we win, they will appeal. If they win, you know what will happen."

Celeste commuted death-penalty convictions against Debra Brown, Elizabeth Green, Leonard Jenkins, Willie Lee Jester, Lee Seiber, Donald Maurer and Rosalie Grant days before leaving office without any action or recommendations by the Parole Board.

In particular, Dana said Maurer and Grant had legally applied for consideration of commutations months before Celeste's action, but he said there was no indication of action by the Parole Authority.

Maurer, of Massillon, was convicted of murder and sexual assault of his 7-year-old neighbor, Dawn Hendershot, in 1982. Grant, from Mahoning County, was convicted for torching her home and killing two of her three children.

Kate O'Malley, Fisher's chief legal counsel, said the governor might have the authority to grant clemencies, but the legislature passed laws guiding the process to protect the victims and the public.

"It is important to clarify what the constitution and the legislature have defined as the powers of the governor with respect to clemency," O'Malley said. "That is why we brought this case to court."

O'Malley said Dana's arguments to examine records of inmates not pardoned by Celeste were irrelevant to the matter at hand.

--- INDEX REFERENCES ---

NEWS SUBJECT: (Legal (1LE33); Economics & Trade (1EC26))

Language: EN

OTHER INDEXING: (ADULT PAROLE AUTHORITY; FRANKLIN COUNTY COMMON PLEAS; GOV; PAROLE AUTHORITY; PAROLE BOARD) (Adele Shank; Attorney; Celeste; Dana; Dawn Hendershot; Debra Brown; Donald Maurer; Fisher; Goldhart; Grant; Jill D. Goldhart; Kate O'Malley; LAWYER DENIED CLEMENCY; Lee I. Fisher; Lee Jester; Lee Seiber; Leonard Jenkins; Malley; Maurer; Monday; O'Malley; Ohio Public Defender; Randall M. Dana; Richard F. Celeste; Richard S. Sheward; Rosalie Grant; Sheward)

KEYWORDS: PRISONERS; CONVICTS; COMMUTED

EDITION: FINAL / ALL

Word Count: 825
1/31/92 PLDLCL 1C
END OF DOCUMENT

1/31/92 Columbus Dispatch (Ohio) 02C
1992 WLNR 4912422

Columbus Dispatch (OH)


**January 31, 1992**

Section: NEWS

# PAROLE BOARD DENIES ATTORNEY'S SPECULATION

Catherine Candisky, Dispatch Staff Reporter

State Public Defender Randall M. Dana said yesterday he suspects the Ohio Parole Authority may be ignoring clemency requests for some Death Row prisoners.

Dana said he has been told of four requests to commute death sentences that were submitted to the board but apparently never reviewed.

He admitted he has no proof that the four requests were made.

"If there are the documents that we're talking about, then the parole board isn't applying the statute and may be acting in bad faith," Dana said.

Board officials said they process all applications for clemency and they have no record of the four requests.

Judge Richard S. Sheward of Franklin County Common Pleas Court ruled yesterday that Dana's request to review the board's records was too late.

Sheward quashed Dana's subpoena for the records, refusing to delay a trial challenging 11 commutations by former Gov. Richard F. Celeste. In seven of the cases, he commuted death sentences to life in prison.

"This is the third day of trial and not a time for discovery," Sheward told Dana. "You cannot have a week recess after the plaintiff has rested and then reopen your case. That would be prejudicial to the plaintiff."

Dana and his co-counsel, S. Adele Shank, appointed to represent the prisoners, filed the subpoena Wednesday, during the second day of the trial. They demanded clemency applications for any Death Row prisoner that had been submitted to the parole board since 1982.

Board officials told Sheward yesterday that locating the records, which are on microfilm, and converting them to paper could take up to a week.

Attorney General Lee Fisher is challenging commutations and pardons granted to 11 prisoners by Celeste on Jan. 9, 1991, in one of his last acts in office.

Although the Ohio Constitution gives the governor the power to grant clemency, Fisher's chief counsel, Kathleen O'Malley, said Celeste failed to obtain recommendations from the parole board, which she said also is required by state law.

Dana and Shank rested their case yesterday without presenting any witnesses. Sheward, who is leaving town for his mother's funeral, set closing arguments for Monday and said he will issue his decision by Feb. 14.

Earlier, in an opening statement he had asked to give after the attorney general's office rested its case, Dana acknowledged that he and Shank were unprepared.

"We don't have any witnesses. I'm sorry for the way this case was handled," he told Sheward. "It probably deserved better than it got."

Dana told reporters afterward that Celeste is not required to consider recommendations from the parole board. But even if he had wanted to, Dana said, some reviews were not even available because the board apparently was ignoring some requests for clemency.

Dana said he wanted to review the board's records because applications from two defendants - Donald Maurer and Rosalie Grant, both convicted child killers - have never surfaced in board records. Maurer and Grant say they applied at least six months before Celeste commuted their death sentences.

Two blanket requests for clemency - one from Amnesty International and another from a group of Roman Catholic bishops - also reportedly were submitted to the board.

"We process all applications," said Raymond Capots, parole board chairman. He said could not locate applications from Maurer and Grant.

Capots said a blanket request from a group such as Amnesty International would not prompt investigations of all 105 on Ohio's Death Row.

--- INDEX REFERENCES ---

COMPANY: STRATEGIC INTERNET INVESTMENTS INC; JEFFERSON CAPITAL CORP

NEWS SUBJECT: (World Organizations (1IN77); Legal (1LE33); Economics & Trade (1EC26))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (ATTORNEY; BOARD; FRANKLIN COUNTY COMMON PLEAS COURT; GOV; OHIO; OHIO CONSTITUTION; OHIO PAROLE AUTHORITY; PAROLE BOARD; ROMAN CATHOLIC; STATE PUBLIC) (Adele Shank; Capots; Celeste; Dana; Donald Maurer; Fisher; Grant; Kathleen O'Malley; Lee Fisher; Maurer; Randall M. Dana; Raymond Capots; Richard F. Celeste; Richard S. Sheward; Rosalie Grant; Shank; Sheward)

KEYWORDS: RANDALL M. DANA RICHARD F. CELESTE COURT DEATH PRISON SENTENCE; GOVERNOR RULING VIOLATION

EDITION: HOME FINAL

Word Count: 691
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1/30/92 Columbus Dispatch (Ohio) 01C
1992 WLNR 4909747



January 30, 1992

Section: NEWS

# CELESTE DIDN'T FOLLOW CLEMENCY RULES, JUDGE TOLD

Catherine Candisky, Dispatch Staff Reporter

The Adult Parole Authority generally does not issue recommendations to the governor on clemency for Death Row prisoners until all appeals have been exhausted, a former parole chief testified yesterday.

But if former Gov. Richard F. Celeste had given at least a month's notice, the Parole Authority may have done an earlier review, said John W. Shoemaker, who retired last month as parole chief.

Shoemaker testified in Franklin County Common Pleas Court in a lawsuit challenging clemencies that Celeste granted to seven Death Row prisoners and four other convicts Jan. 11, 1991, in some of his last acts in office.

Representatives of Attorney General Lee Fisher say although Celeste had the authority to grant clemencies, state law requires that he first obtain a recommendation from the Adult Parole Authority.

"The governor has the right to dispense with (some procedures) only if an execution date is set, not because the governor is leaving office," said Kathleen O'Malley, Fisher's chief counsel.

State Public Defender Randall M. Dana, appointed to represent the prisoners, has argued that the governor's power to grant clemency is guaranteed by the Ohio Constitution. The governor is not required to impose or even consider any recommendation from the Parole Authority, said S. Adele Shank, Dana's co-counsel.

During questioning by Assistant Attorney General Jack Decker, Shoemaker explained the parole board investigates each application for clemency and holds a hearing before issuing a recommendation.

The board also must give a three-week notification of the hearing to prosecutors and the judge, and to victims or their families if they request it, he said.

Shoemaker, who became parole chief in 1975, said previous governors had requested recommendations from the

parole board "well ahead" of when they left office.

The seven-member board needs at least one month to complete an investigation and make a recommendation, he said. The process generally takes six months.

Celeste's office called Jan. 9 and told the board that if the cases could not be expedited, to send over incomplete files. Two days later, the then-governor granted the clemencies.

In cross-examination by Dana, Shoemaker acknowledged it was doubtful the board would consider a case until all appeals are exhausted.

Shoemaker denied that the board postponed acting on an application for clemency until a governor, depending on his view of the death penalty, left office.

Celeste, a Democrat, vigorously opposed the death penalty and approved 67 bids for clemency his last month in office, including the 11 challenged by Fisher.

Later yesterday, Judge Richard S. Sheward again refused the defense attorneys' request to delay the trial while they wait for parole records dating back to 1980.

Dana and Shank subpoenaed the records at 11 a.m. yesterday. The judge accused the attorneys of using thinly veiled legal maneuvers to delay the trial.

"Apparently your philosophy of the practice of law is that the attorney has no obligation in the preparation of a case," Sheward told Dana and Shank. "This should have been done six months ago."

The tongue-lashing prompted Shank to demand Sheward remove himself from the case. "I resent your representation," she said.

Sheward refused to recuse himself, and he threatened to find Shank in contempt of court after she ignored three requests to sit down.

Dana and Shank have made more than a dozen requests in the two-day trial for delays, arguing they are unprepared and that each defendant should have a separate attorney.

The defense is to present its witnesses, if any, this morning after reviewing the clemency records of other Death Row prisoners. The records were subpoenaed yesterday from Shoemaker's successor, Jill Goldhart.

Calling the subpoena "unreasonable," Sheward ordered Goldhart to gather whatever records she can and have them in court by 9 a.m.

---- INDEX REFERENCES ---

NEWS SUBJECT: (Legal (1LE33); Economics & Trade (1EC26))

Language: EN

OTHER INDEXING: (ADULT PAROLE AUTHORITY; CELESTE; DEATH ROW; FRANKLIN COUNTY COMMON PLEAS COURT; GOV; OHIO CONSTITUTION; PAROLE AUTHORITY; RULES; STATE PUBLIC) (Celeste; Dana; Fisher; Goldhart; Jack Decker; Jill Goldhart; John W. Shoemaker; Kathleen O'Malley; Lee Fisher; Randall M. Dana; Richard F. Celeste; Richard S. Sheward; S. Adele Shank; Shank; Sheward; Shoemaker)

KEYWORDS: LAWSUIT COURT DEVELOPMENT PRISON END MULTIPLE NAMELIST RICHARD; CELESTE

EDITION: HOME FINAL

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1/29/92 Plain Dealer (Clev.) 1D
1992 WLNR 4458172



January 29, 1992

Section: STATE & REGION

# STATE SAYS IT HAS PROVED CASE AGAINST CELESTE

JIM UNDERWOOD PLAIN DEALER BUREAU

COLUMBUS State lawyers believe they proved yesterday that former Gov. Richard F. Celeste, hours before leaving office last year, bypassed state law in commuting the sentences of seven death-row inmates.

"I think the testimony of Raymond Capots proved our case today," said **Kate O'Malley**, chief counsel for Attorney General Lee I. Fisher, who is challenging the commutations and clemency granted to four others convicted of lesser crimes.

Capots, chairman of the Ohio Adult Parole Authority, testified in Franklin County Common Pleas Court yesterday that there were no hearings, investigations, parole-board votes or recommendations sent to Celeste before he commuted the sentences.

Capots said that on Jan. 9, 1991, the parole authority received a phone call from Celeste's office asking it to send over case files on the death-row inmates. "We were told that if we can't expedite the process to send over what we've got," Capots said.

The parole administrator could not remember who made the phone call. Celeste signed the commutations Jan. 10 and left office Jan. 14.

"We told them it was impossible to expedite these cases and that we would send them what we have," Capots said.

That testimony is key to the state's case, which is built on the premise that while Celeste had constitutional authority to commute the sentences, he ignored state laws that established procedures he should have followed before he granted the commutations.

Capots was expected to resume testimony today at 10 a.m. in the courtroom of Judge Richard Sheward.

The state also was expected to present the testimony today of John W. Shoemaker, retired Parole Authority

chief.

Ohio Public Defender Randall Dana and his co-counsel, Adele Shank, said they would call about three witnesses in their effort to defend Celeste's commutations.

Dana argues that Celeste had broad authority to commute and pardon, with constitutional powers that cannot be restricted by law or regulation.

Sheward severely criticized Dana for what he called 11th-hour legal maneuvering to delay the trial. For example, Dana argued that all defendants needed separate legal counsel because he might have to raise arguments that would pit one defendant against another.

Sheward said he should have thought about that months ago instead of broaching the issue at the last minute.

"We're playing legal gymnastics and I think that's a joke," Sheward said in chastising Dana from the bench.

Sheward was angry because the case has been pending for a year, and yet in the past month Dana and the public defender's office have flooded the court with motions and other procedural pleadings.

One of those motions was to compel the deposition of Gov. George V. Voinovich. Sheward rejected that effort, saying Voinovich was not the issue and was not even in office when Celeste commuted the sentences.

"I'm at a total loss about what George Voinovich knows about this case," Sheward said.

Others who testified yesterday included Marc Baumgarten, an Ohio Department of Mental Health lawyer who said he was loaned to Celeste's office in the administration's closing days to help with legal matters, including clemency cases.

Baumgarten said under cross-examination that he was not called to handle any of the death-row cases.

The seven commutations in question were in death-penalty cases involving Debra Brown, Elizabeth Green, Leonard Jenkins, Willie Lee Jester, Donald Maurer, Lee Seiber and Rosalie Grant.

Celeste also commuted the death sentence of Beatrice Lampkin of Cincinnati but apparently followed the parole board procedures in that case. Fisher is not challenging Lampkin's case.



---- INDEX REFERENCES ---

NEWS SUBJECT: (Economics & Trade (1EC26))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (CAPOTS; DANA; FRANKLIN COUNTY COMMON PLEAS COURT; GOV; LAMPKIN; OHIO ADULT PAROLE AUTHORITY; OHIO DEPARTMENT; OHIO PUBLIC DEFENDER RANDALL DANA; PAROLE AUTHORITY; PROVED; RAYMOND CAPOTS; STATE) (Adele Shank; Baumgarten; Celeste; Debra Brown; Donald Maurer; Fisher; George V. Voinovich; George Voinovich; Kate O'Malley; Lee I. Fisher; Lee Jester; Lee Seiber; Leonard Jenkins; Marc Baumgarten; Mental Health; Richard F. Celeste; Richard Sheward; Rosalie Grant; Sheward; Voinovich)

EDITION: FINAL / ALL

Word Count: 744
1/29/92 PLDLCL 1D
END OF DOCUMENT

1/29/92 Columbus Dispatch (Ohio) 04B
1992 WLNR 4907902

Columbus Dispatch (OH)


**January 29, 1992**

Section: NEWS

# CELESTE'S PARDON PROCESS ASSAILED AS TRIAL STARTS

**Catherine Candisky, Dispatch Staff Reporter**

Former Gov. Richard F. Celeste failed to obtain recommendations from the Ohio Adult Parole Authority before granting commutations to seven Death Row prisoners and pardons to four other convicted criminals, the parole board chairman testified yesterday.

Raymond Capots, parole chairman, said Celeste's office requested files on the prisoners on Jan. 9, 1991, two days before Celeste granted the commutations and pardons as one of his last acts in office.

Attorneys representing Attorney General Lee Fisher, seeking to reverse the action, called Capots to show Celeste abused his power.

Earlier yesterday, Judge Richard S. Sheward refused to postpone the trial over a barrage of objections from Ohio Public Defender Randall M. Dana.

"I will stand mute . . . throughout the trial," Dana told Sheward. "I'm not participating for fear of a conflict."

Sheward blasted Dana and co-counsel S. Adele Shank, saying "It isn't my fault if you're unprepared."

The judge also criticized the attorneys for making 28 filings within the last three weeks in an apparent 11th-hour effort to postpone the trial. Their last filing came at 8:54 a.m. yesterday six minutes before the trial started.

"The last three weeks you've been bringing papers up in wheelbarrows," Sheward said. "I don't like this way you bootstrap a continuance when you sit and don't do anything until the past month."

Dana repeatedly asked to be removed from the case, arguing he could not represent all seven Death Row prisoners and faced a conflict of interest with one of the defendants. Dana noted that the defendant, Debra Denise Brown, was co-defendant in a criminal case with Alton Coleman, who was represented by Dana's office.

"Motion overruled. You're on the case. You're staying on the case," Sheward told Dana. "You're not abandoning ship on the day of the trial."

Sheward also denied defense requests for a delay, a jury trial, separate counsel for the seven Death Row defendants and to take the deposition of Gov. George V. Voinovich. Many of the requests, Sheward said, came too late.

Dana later softened his position and participated in cross-examination of three witnesses.

"I changed my mind," he said later. "The judge said he wasn't going to let us off the case. I would have had to let the attorney general present uncontested testimony."

Dana, appointed to represent the defendants, has argued the governor's constitutional power is unlimited in granting commutations and pardons.

During questioning by Assistant Attorney General John Gideon, Capots explained that his office had received applications for pardons from four of the prisoners. The board, however, had not completed its review or issued any recommendations to Celeste.

"In many cases (Celeste received) just the application itself," Capots said. "There had been no hearings or investigations and therefor no recommendation."

Capots explained that when a prisoner applies for a pardon or clemency, the parole authority conducts an investigation and then forwards its recommendation to the governor's office. The review can take up to six months, he said.

Celeste's office first asked the parole authority if it could complete its reviews in a few days, Capots said. When told that was impossible, the governor's staff asked for the files, Capots added.

In regard to the seven Death Row prisoners, "no investigation had been conducted because no applications had been received," Capots testified.

During cross-examination by Dana, Capots testified that the governor is not required to follow the recommendation of the parole authority.

Assistant Attorney General Jack Decker said in his opening statement that the adult parole authority is required to investigate requests for pardons and clemency before the governor can act on any request.

"This action is not intended to attack the wisdom of the decisions Governor Celeste made," Decker said. "The issue is whether he had the constitutional power."

Fisher's Chief Counsel **Kathleen O'Malley** said the state will call John W. Shoemaker, former chief of the Adult Parole Authority, before resting its case today.

---- INDEX REFERENCES ---

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Government Litigation (1GO18))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (ADULT PAROLE AUTHORITY; CELESTE; GOV; OHIO ADULT PAROLE AUTHORITY; OHIO PUBLIC; STARTS) (Alton Coleman; Assistant Attorney; Capots; Celeste; Dana; Debra Denise Brown; Decker; Fisher; George V. Voinovich; Jack Decker; John Gideon; John W. Shoemaker; Kathleen O'Malley; Lee Fisher; Motion; Randall M. Dana; Raymond Capots; Richard F. Celeste; Richard S. Sheward; S. Adele Shank; Sheward)

KEYWORDS: RICHARD F. CELESTE COURT GOVERNOR PRISON SENTENCE; LAW VIOLATION

EDITION: HOME FINAL

Word Count: 815
1/29/92 COLDIS 04B
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12/4/91 Akron Beacon J. (Ohio) A1
1991 WLNR 1094020

Akron Beacon Journal (Ohio) (KRT)


**December 4, 1991**

Section: OHIO

# WRIGHT'S VOTE SAVES THE DAY FOR GOP FRIEND CRUCIAL VOTE BY JUSTICE FAVORS LAWYER WHO HOLDS WRIGHT'S CAMPAIGN STASH

ROGER SNELL, Beacon Journal Columbus Bureau

COLUMBUS Ohio Supreme Court Justice Craig Wright gave $70,120 in campaign funds to attorney N. Victor Goodman just weeks before voting in favor of Goodman's clients in a case that could decide control of the Ohio House for at least the next decade.

In fact, Wright made sure his vote counted in the 4-3 ruling by informing Chief Justice Thomas J. Moyer of his decision before the Nov. 20 vote was taken -- and before final evidence was submitted.

Wright said he left his vote with Moyer before he went to Hawaii on Nov. 19 to speak at a legal conference. He didn't need to hear final evidence from the parties because he had read the legal briefs, Wright said.

Whether Wright's vote actually broke a tie is unknown because such decisions are made secretly and presided over by Moyer, a Republican. Moyer, who apparently cast two of the four votes for Goodman -- his and Wright's -- couldn't be reached Tuesday.

The court publicly released the rulings Nov. 20. For unexplained reasons, Wright's vote was counted when it was decisive in the 4-3 ruling, but not on a separate 6-0 vote the same day on another Goodman motion.

Goodman, representing Republicans in the reapportionment case, wanted to get the case decided by the Ohio Supreme Court before the federal courts could act. The 4-3 vote approved Goodman's motion to expedite the case. That means that the Supreme Court would consider the facts and rule on the merits of the redistricting plan.

However, shortly after, a federal court ordered a stay of the Supreme Court decision, so now the case is in both courts.

The three Democratic justices who dissented said the Supreme Court had no reason to 'rush to judgment or to pressure the process.'

Goodman had other ties to Wright, handling his fund-raising and campaign expenses as treasurer when Wright won re-election to the court last year. James DeLeone, co-counsel with Goodman in the case, was Wright's 1984 treasurer.

Wright, a Republican, transferred all remaining campaign funds to Goodman on Aug. 9 and Sept. 4, listing it for 'VICPAC' in his campaign reports.

On Sept. 6, Goodman created a new political action committee called VICPAC and named himself as treasurer, according to records filed with Secretary of State Robert Taft II.

'That money will go to judicial candidates,' Wright explained Tuesday. 'He writes the checks, but I control it and will decide who to give the money to.'

Wright said he won't run again in 1996. Goodman created VICPAC and named it for himself, Wright said.

Wright couldn't explain why his existing campaign committee needed to be replaced by VICPAC, which doesn't mention Wright's name in any of the records. Wright said Goodman would have to explain the details, but Goodman hasn't responded to calls.

Wright said he considered disqualifying himself from Goodman's case, but saw no conflict and felt he could be fair. 'I've ruled against Vic a number of times on other cases I've sat on.'

The reapportionment dispute could decide whether new legislative boundaries drawn by Gov. George Voinovich, Senate President Stanley J. Aronoff and Taft will be upheld for 1992 elections.

The political stakes are so considerable that the Democrats -- primarily House Speaker Vernal Riffe and State Auditor Thomas Ferguson -- tried to force the dispute before a three-judge panel of the 6th U.S. Circuit Court of Appeals, controlled 2-1 by Democratic judges.

The federal case began Tuesday in Cincinnati, centering on interpretation of the federal Voting Rights Act.

In the Supreme Court, Goodman is arguing state constitutional questions. The Supreme Court is controlled 4-3 by Republicans, and the party line is how justices voted on the Nov. 20 motion.

Kate O'Malley, chief counsel for Democrat Attorney General Lee Fisher, said the Supreme Court's expedited hearing burdened attorneys who were preparing for the federal trial. She would not comment on whether she or other attorneys for the Democratic defendants will seek a motion to disqualify Wright from deciding the final case dl

Justices for all? / An ongoing look at the Ohio Supreme Court

---- INDEX REFERENCES ---

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Economics & Trade (1EC26))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (FEDERAL VOTING RIGHTS; GOODMAN; HOUSE SPEAKER VERNAL RIFFE; JUSTICE CRAIG WRIGHT; OHIO HOUSE; OHIO SUPREME COURT; REPUBLICANS; SENATE; SUPREME COURT; US CIRCUIT COURT OF APPEALS; VICPAC; WRIGHT) (Democratic; George Voinovich; Goodman; HOLDS WRIGHT; James DeLeone; JUSTICE FAVORS LAWYER; Kate O'Malley; Lee Fisher; Moyer; N. Victor Goodman; Robert Taft; Stanley J. Aronoff; Taft; Thomas Ferguson; Thomas J. Moyer) (STATE GOVERNMENT; OHIO SUPREME COURT RULING; BIOGRAPHY; CRAIG WRIGHT; LEGISLATURE; JUDGE; ELECTION PROCEDURE; FINANCE)

EDITION: 1 STAR

Word Count: 824
12/4/91 AKRONBJ A1
END OF DOCUMENT

11/8/91 Plain Dealer (Clev.) 2C
1991 WLNR 4238343

Cleveland Plain Dealer


November 8, 1991

Section: STATE & REGION

# RULING CITED IN LAWSUIT STEINER COULD BE LIABLE FOR STATEMENTS

MARY BETH LANE PLAIN DEALER BUREAU

COLUMBUS The lawyer for a lobbyist who filed a $4 million defamation lawsuit against Curt Steiner, a senior aide to Gov. George V. Voinovich, cited a new U.S. Supreme Court ruling in arguing yesterday that Steiner is not legally immune from the lawsuit.

Alfred J. Weisbrod, who represents lobbyist Edward J. Orlett, made the argument in a brief filed with Judge Fred J. Shoemaker of the Ohio Court of Claims. Shoemaker is expected to rule in several weeks.

Weisbrod cited an 8-0 Supreme Court opinion issued Tuesday that said state officials could be held personally liable for damages for violating a person's civil rights. The opinion said a state's immunity from civil-rights lawsuits does not protect state officials who are sued personally.

Kathleen O'Malley, chief counsel for the Ohio attorney general's office, who is defending Steiner, has argued that Steiner's job as communications director and deputy chief of staff for Voinovich makes him legally immune from the lawsuit under the "absolute privilege" doctrine. The doctrine holds that public officials are legally immune from defamation lawsuits stemming from statements made in the course of their duties.

Orlett sued after Steiner told The Plain Dealer that Orlett offered Voinovich a political donation while discussing the renewal of a lottery contract with Syntech International Inc., the lottery supplier for which Orlett lobbies.

Orlett has denied making such an offer. He says Steiner's statements have hurt his lobbying business and caused him stress.

Citing the Supreme Court decision, Weisbrod argued that Steiner's claim to legal immunity was "seriously flawed," and said the Court of Claims judge should let the lawsuit proceed to a jury trial.

"Mr. Steiner must confront his accuser in a court of law and face the consequences of his actions," Weisbrod said. "Anything less would be ... a message that there are two sets of rules in this state: one for associates of the party in power, another for everyone else."

In a shot at the Steiner defense, Weisbrod said, "Obviously, defendant is scrambling in the realization that his facial opening may have written a check which his posterior cannot cash."

O'Malley could not be reached for comment.



— INDEX REFERENCES —

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Social Issues (1SO05); Liability (1LI55))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (COURT OF CLAIMS; CURT STEINER; MR STEINER; OHIO; OHIO COURT OF CLAIMS; PLAIN DEALER; STEINER; SUPREME COURT; SYNTECH INTERNATIONAL INC; US SUPREME COURT) (Alfred J. Weisbrod; Edward J. Orlett; Fred J. Shoemaker; George V. Voinovich; Kathleen O'Malley; O'Malley; Orlett; RULING CITED; Shoemaker; Voinovich; Weisbrod)

EDITION: FINAL / ALL

Word Count: 463
11/8/91 PLDLCL 2C
END OF DOCUMENT

11/6/91 Akron Beacon J. (Ohio) D1
1991 WLNR 1060305

Akron Beacon Journal (Ohio) (KRT)


November 6, 1991

Section: OHIO

# SPLIT ON UNION WAGES GOV. VOINOVICH IS UNHAPPY WITH ATTORNEY GENERAL FOR TRYING TO WIN REHEARING IN SUPREME COURT OF PAY ISSUE IN CONSTRUCTION OF HOSPITALS AND NURSING HOMES

ROGER SNELL, Beacon Journal Columbus bureau

COLUMBUS Why watch L.A. Law reruns when you can tune into the Ohio Supreme Court's latest episode of Episcopal Retirement Homes?

This cliffhanger could decide whether Ohio construction workers will be paid union wages for their work on private, non-profit hospitals and nursing homes.

Multimillion-dollar expansions -- and the final bill -- at Akron General Medical Center and Children's Hospital Medical Center of Akron could be affected by the case, which involves a Cincinnati nursing home.

In a previous episode, four justices who got big union campaign contributions decided to rehear the Episcopal case without anyone officially asking them to.

In the most recent twist, the governor and the attorney general have split over how the state should enforce a union wage law.

Gov. George V. Voinovich's administration went public Monday in the Toledo Blade with its displeasure over Attorney General Lee Fisher's trying to win the case now that a rehearing is up for grabs.

John Stozich, Voinovich's director of the Department of Industrial Relations, repeated the same complaint Tuesday. He said Fisher is fighting the Supreme Court loss without his permission.

'We didn't want anything,' Stozich said. 'I'm willing to live with the Supreme Court's decision.'

The Department of Industrial Relations lost the case 4-3 in August, when Justices Thomas Moyer, Craig Wright, Robert Holmes and Alice Robie Resnick ruled prevailing wages didn't have to be paid when public

bonds were used to build private, non-profit nursing homes or hospitals.

This meant the Republican administration no longer had to enforce a union wage law on these projects.

But Resnick decided to switch her vote.

Justices Andy Douglas, A. William Sweeney, Herbert R. Brown and Resnick said their reconsideration of the case had nothing to do with a letter from the Ohio AFL-CIO president, who had given them more than $200,000.

Fisher allowed the initial ruling to stand as the Voinovich administration wished, but he got back into the case when it was clear it was being reconsidered, said Kathleen O'Malley, chief counsel for Fisher.

'Lee's opinion is that the prevailing wage should be aggressively enforced,' O'Malley said.

Gregory Mohar, who argued the case for Episcopal Retirement, is a partner with Republican Senate President Stanley J. Aronoff in a Cincinnati law firm. Stozich said Aronoff never contacted his department about the case.

Kurt Tunnell, the governor's chief legal counsel, said Stozich called the shots for the administration. 'I don't think it was rolling over and playing dead,' Tunnell said. 'The governor leaves these issues to his department directors to decide.' njs

Photo

PHOTO: (2) 1- Gov. George Voinovich liked orginal decision, 2- Attorney General Lee Fisher cites public good.

JUSTICES FOR ALL? / An ongoing look at the Ohio Supreme Court

---- INDEX REFERENCES ---

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36))

INDUSTRY: (Housing (1HO38); Healthcare (1HE06); Nursing (1NU59); Healthcare Services (1HE13); Hospital (1HO39); Healthcare Service Providers (1HE78); Healthcare Practice Specialties (1HE49); Real Estate (1RE57))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (AKRON GENERAL MEDICAL CENTER; CIO; DEPARTMENT OF INDUSTRIAL;

EPISCOPAL; EPISCOPAL RETIREMENT; EPISCOPAL RETIREMENT HOMES; HOSPITAL MEDICAL; JUSTICES; OHIO; OHIO SUPREME COURT; REHEARING; REPUBLICAN SENATE; SPLIT; SUPREME COURT; VOINOVICH) (A.; Alice Robie Resnick; Andy Douglas; Aronoff; Craig Wright; Fisher; George V. Voinovich; George Voinovich; Gov; Gregory Mohar; Herbert R. Brown; John Stozich, Voinovich; Kathleen O'Malley; Kurt Tunnell; Lee; Lee Fisher; Malley; Multimillion; NURSING HOMES; PAY ISSUE; Resnick; Robert Holmes; Stanley J. Aronoff; Stozich; Thomas Moyer; Tunnell; Voinovich; William Sweeney) (OHIO SUPREME COURT; LEE FISHER; GEORGE VOINOVICH; BIOGRAPHY; LABOR UNION; SALARY; WAGES; CONSTRUCTION; RULING)

EDITION: 1 STAR

Word Count: 574
11/6/91 AKRONBJ D1
END OF DOCUMENT

10/30/91 Plain Dealer (Clev.) H1
1991 WLNR 4230390

Cleveland Plain Dealer


October 30, 1991

Section: BUSINESS

# TRW CREDIT UNIT CLOSE TO SETTLING SUIT

VINDU P. GOEL PLAIN DEALER BUREAU

COLUMBUS TRW Inc.'s credit-reporting division is close to a settlement with more than 14 states over allegations of sloppy error-checking and illegal sales of private data.

Ohio Attorney General Lee Fisher said yesterday that numerous states expects to file a joint settlement of lawsuits and other disputes with TRW. "That lawsuit is in the process of being settled right now," Fisher said.

Ohio never formally joined any lawsuit against TRW and has played no significant role in the national debate, which was led by Texas and New York, but "we are a party to the settlement," said Chief Counsel **Kathleen O'Malley**.

Fisher and O'Malley provided no further details of the settlement, and a spokeswoman for their office said officials would not discuss terms of the deal until it is filed with a federal court in Texas within the next week or two.

TRW confirmed that a settlement was in the works but said little more. "The discussions have proceeded well, and we're hopeful of reaching an early agreement," said spokeswoman Priscilla Luce.

The suits filed in July originally sought to force TRW to improve its procedures for fixing mistakes and to stop the company from selling private data on consumers, such as income and payment patterns, to junk mailers. TRW has maintained that its activities meet the letter and the spirit of the law.

TRW has softened its defensive stance in recent weeks, especially after publicity about an entire Vermont town that was denied credit because of TRW's mistakes.

In an attempt to placate consumers and head off new federal regulations, the company said earlier this month it would offer people a free copy of their credit report once a year. Reports usually cost $10 to $15 each.

Fisher said pressure from his office was partly responsible for TRW's decision to give away free reports.

The TRW settlement may force changes at the nation's other two major credit firms; Equifax Inc. and TransUnion Co. O'Malley said Ohio is part of a multistate task force investigating alleged abuses by those compan- ies.

Richard Barr, a spokesman for the New York Attorney General's office, declined to comment on Fisher's remarks, saying the litigation is pending.

Stephen Gardner, Texas's point man in the litigation, could not be reached for comment.



--- INDEX REFERENCES ---

COMPANY: EQUIFAX INC

NEWS SUBJECT: (Legal (1LE33); Technology Law (1TE30); Government Litigation (1GO18))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39); New York (1NE72); Texas (1TE14))

Language: EN

OTHER INDEXING: (EQUIFAX INC; TRANSUNION CO) (Chief Counsel Kathleen; Fisher; Lee Fisher; O'Malley; Ohio; Ohio Attorney; Priscilla Luce; Richard Barr; Stephen Gardner; TRW; TRW CREDIT)

EDITION: FINAL / ALL

Word Count: 473
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END OF DOCUMENT

10/25/91 Columbus Dispatch (Ohio) 02B
1991 WLNR 4623565

Columbus Dispatch (OH)


October 25, 1991

Section: NEWS

# PANEL ASKED TO HOLD OFF ON FEE CUTS OUT-OF-STATE TRASH

Lee Leonard, Dispatch Statehouse Reporter

State legislators have been urged to refrain from reducing Ohio's higher fees for trash imported from other states, despite the threat of an adverse court determination on the 3-year-old law.

Although the fee schedule has been declared unconstitutional, the state attorney general's office told a legislative panel yesterday to give attorneys a chance to defend the fees on appeal before altering them.

"We must have the opportunity to fully and fairly litigate this matter on as level a playing field as possible, and your cooperation in refraining from major amendment at this time is indispensable," said **Kathleen** M. **O'Malley**, chief counsel. "Reactive changes in response to shotgun complaints about specific provisions of the bill could undercut the critical purposes sought to be served."

O'Malley testified before the Ohio House Energy and Environment Committee, which held six hearings around the state on the progress of implementing House Bill 592, enacted in 1988 to regulate solid waste disposal.

A federal court this year ruled it an unconstitutional restraint of trade to charge higher fees to out-of-state firms and to require them to accept Ohio court jurisdiction.

The state is appealing, and oral arguments are scheduled for Nov. 14 in the 6th U.S. Circuit Court of Appeals in Cincinnati. O'Malley said the state has a good chance of success on appeal.

Carolyn Watkins, chief of the Division of Solid and Infectious Waste in the Ohio Environmental Protection Agency, counseled against any major changes in the law.

Watkins said 1993 will be a better time for re-evaluation, when plans will be approved for all local and regional solid waste disposal districts.

She said the panel should look at possible changes in the funding of disposal programs and at developing markets for recycled products.

Watkins suggested the state try to attract industries that use recycled products. She also said the state should use recycled paper and crumb rubber, and recycled plastic for traffic cones and drain tiles.

Rep. Joseph Secrest, D-Senecaville, chairman of the committee, said his panel will have some short- and long-term recommendations for change. "We're not going to add new regulatory oversights or hoops for the districts to jump through," he said. "I think we're hearing pretty clearly (from the public testimony), let's give the system a chance to work, it's working fairly well."

O'Malley presented a spirited defense against relaxing the required personal background checks on owners and officers of companies which collect and dispose hazardous waste.

The Ohio Chemical Recyclers Association has complained that the attorney general's office conducts unnecessary background checks and charges hazardous waste disposers for an unfair proportion of the cost.

---- INDEX REFERENCES ---

COMPANY: STRATEGIC INTERNET INVESTMENTS INC; JEFFERSON CAPITAL CORP

NEWS SUBJECT: (Legal (1LE33); Judicial (1JU36); Health & Family (1HE30); Government (1GO80); Economics & Trade (1EC26); Health & Safety (1HE24))

INDUSTRY: (Environmental (1EN24); Environmental Solutions (1EN90); Hazardous Waste (1HA81); Municipal Solid Waste Disposal (1MU11); Environmental Services (1EN69); Environmental Regulatory (1EN91))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (ENVIRONMENT COMMITTEE; HOUSE BILL 592; OHIO; OHIO CHEMICAL RECYCLERS ASSOCIATION; OHIO ENVIRONMENTAL PROTECTION AGENCY; OHIO HOUSE; PANEL; US CIRCUIT COURT OF APPEALS) (Carolyn Watkins; Infectious Waste; Joseph Secrest; Kathleen M. O'Malley; O'Malley; Reactive; Watkins)

KEYWORDS: COST STATES TRASH ORGANIZATION RULING

EDITION: Home Final

Word Count: 553
10/25/91 COLDIS 02B
END OF DOCUMENT

8/19/91 Columbus Dispatch (Ohio) 03C
1991 WLNR 4635495

Columbus Dispatch (OH)


August 19, 1991

Section: NEWS

# ATTORNEY GENERAL'S CHIEF COUNSEL 'ALWAYS WANTED TO BE A LAWYER' JOB WITH FISHER IS VERY DEMANDING, SAYS WOMAN, 34

Alan Johnson, Dispatch Statehouse Reporter

**Kathleen** McDonald **O'Malley** knew at an early age what she wanted to do in life.

"Other than when I was a little kid - when I wanted to be a doctor or a nun - I always wanted to be a lawyer," she said.

O'Malley, 34, is one of the state's top lawyers as chief counsel for Attorney General Lee Fisher. Appointed to the $70,000-a-year position April 29, O'Malley is the first woman to hold the job since the 1970s.

The decision to accept Fisher's offer wasn't easy, however. O'Malley said she swallowed a pay cut approaching 50 percent in leaving a position as a partner with the Cleveland office of the law firm of Porter, Wright, Morris and Arthur, where she had been since 1984.

"I started thinking about the experience, the fact I would get to do something completely different, to move into arenas I'd never been in before," O'Malley said. She also believes that the job will be a steppingstone to her long-term goal of becoming a judge.

As chief counsel, O'Malley oversees all legal matters for Fisher except Medicaid fraud and law enforcement duties involving the Bureau of Criminal Identification and Investigation and the Peace Officers Training Academy.

She serves as attorney for the state's top elected officials, including Gov. George V. Voinovich and his staff, House Speaker Vernal G. Riffe Jr., D-Wheelersburg, and Secretary of State Bob Taft.

"It's very demanding," O'Malley said. "It's a lot busier than I ever expected

"The pressure I feel in this job is there are so many things to be done and - with the lack of manpower, the lack

of a budget - there just aren't enough hours in the day."

O'Malley was born in Philadelphia but grew up in the Cleveland area. Her father was a chemical engineer who longed to be a lawyer himself, she said.

She received a bachelor's degree in economics and history from Kenyon College and a law degree from Case Western Reserve University. She served as a clerk in the U.S. Court of Appeals in Cincinnati before going to work for the law firm of Jones, Day, Reavis and Pogue in Cleveland in 1983.

Fisher, a Democrat, didn't know O'Malley until he began looking this year for candidates to fill top slots in his new administration. He found out later that she, too, is a Democrat.

Based on recommendations from others, he sought her out; but she was applying for the job at the same time, she said.

Fisher called O'Malley a "very experienced and capable professional who will be one of only a handful of women currently heading up the diverse and complex legal operations of a state attorney general."

Although some people find the hard-driving Fisher a hard boss to work for, O'Malley, whose professional engine also runs at high speeds, has not found that to be the case.

"Lee's a perfectionist," she said. "He goes at high gear and expects everyone else to go at high gear. It's a little intimidating when he leaves you a voice mail message at 4 a.m.

"He expects us to be perfectionists but in smaller spheres," she added.

O'Malley and her husband, Anthony J., a lawyer attorney with Vorys, Sater, Seymour and Pease, had just purchased and renovated an old house in the Cleveland suburb of Shaker Heights when Fisher's job offer came. They are trying to move to Columbus with their children, Nora, 4, and Jack, 2.

O'Malley's work schedule leaves little time for recreation and hobbies.

"The kids are my hobby," she said. "They're my life outside work."

--- INDEX REFERENCES ---

COMPANY: US COURT OF APPEALS

NEWS SUBJECT: (Legal (ILE33); Judicial (IJU36); Government Litigation (IGO18))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (BUREAU OF CRIMINAL; KENYON COLLEGE; PEACE OFFICERS TRAINING ACADEMY; US COURT OF APPEALS; WESTERN RESERVE UNIVERSITY) (Anthony J., a; Arthur; ATTORNEY; Bob Taft; Fisher; George V. Voinovich; Jack; Kathleen McDonald O'Malley; Lee; Lee Fisher; Malley; Medicaid; Nora; O'Malley; Pease; Vernal G. Riffe Jr.)

KEYWORDS: KATHLEEN MCDONALD O'MALLEY LAW PROFESSION PROFILE

EDITION: Home Final

Word Count: 677
8/19/91 COLDIS 03C
END OF DOCUMENT

7/19/91 Akron Beacon J. (Ohio) C6
1991 WLNR 1095213

Akron Beacon Journal (Ohio) (KRT)


July 19, 1991

Section: OHIO

# APPEAL OF TCI RULING UP IN THE AIR ATTORNEY GENERAL HASN'T DECIDED WHETHER TO TRY TO REVERSE $685,000 AWARD TO TELEPHONE SYSTEM COMPANY

ROGER SNELL, Beacon Journal Columbus Bureau

COLUMBUS Ohio Attorney General Lee Fisher said Thursday he will decide soon whether to fight a court ruling sticking taxpayers with a $685,000 bill for an unbid phone contract signed by State Auditor Thomas E. Ferguson.

Although the state's own attorneys have called the May 1987 contract illegal, no attempt has been made to hold Ferguson or his staff accountable for signing it or for the expenses.

Records in the Ohio Court of Claims show the state auditor's office was charged interest rates of up to 93 percent a year on one of three contracts with Tele-Communications Inc. of Brook Park. Standard interest rates on government leases are 8.82 percent, legal briefs noted.

The contract was so lucrative that TCI made gross profits of up to 45 percent -- at the expense of Ohio taxpayers, court documents show. TCI officials contend their charges covered overhead and expenses of installing a new phone system for the state, and they argued it was Ferguson's fault for not getting a detailed list of charges before signing the deal.

TCI lobbyist Robert McEaneney, who has pleaded guilty to conspiring to bribe other state officials, got a 20 percent commission on the contract.

As auditor, Ferguson has frequently sued individuals who cost the state money for illegal contracts or appropriations. He could not be reached for comment and was said to be traveling.

Fisher said at a news conference that the previous attorney general, Anthony J. Celebrezze Jr., found no reason to seek reimbursement from the auditor.

But Celebrezze's staff wrote in a legal brief that taxpayers were being 'taken for a ride' because of Ferguson's

deal. Officials have evaded how this deal happened when attorneys and top staff in Ferguson's office reviewed the contract before signing.

Fisher's staff is handling the final stages of litigation and won't open old issues, chief counsel **Kate O'Malley** said.

'The case is so far down the road that the issue of accountability had already been addressed, and I believe adequately,' O'Malley said.

Fisher and Ferguson, both Democrats, will meet soon to determine whether to appeal Tuesday's ruling against the state, Fisher said.

Ohio Court of Claims Judge Russell Leach ruled Tuesday that Ferguson entered into a binding $549,580 lease in 1987 and couldn't arbitrarily stop payment.

Leach ordered the state to pay past-due bills of $243,593 and added TCI's legal fees of $441,695 to Ferguson's and the state's bill.

The state now owes more than $685,000 in unpaid bills and legal fees for a contract that was so vague that legal documents note there was no agreed-upon dollar amount.

Three state employees in other agencies have been indicted for their dealings with TCI, which got more than $7 million in no-bid deals.

The state paid $1.7 million in a June settlement involving similar phone disputes at the state lottery, employment services, agriculture and industrial relations offices.

Assistant attorney general Nancy Miller, who has handled the case, said Ferguson stopped payments -- following Celebrezze's legal advice.

TCI disconnected the phones for Ferguson's failure to pay, leading to lawsuits in 1989. Ferguson stopped payment before paying more than the phone service was worth, Miller said. That is why Ferguson and his employees weren't held accountable for expenses, she said. ds

Photo

PHOTO: headshots (2): Ohio Attorney General Lee Fisher inherited TCI problem.; State Auditor Thomas Ferguson isn't being held accountable.

---- INDEX REFERENCES ---

COMPANY: TELE COMMUNICATIONS INC

NEWS SUBJECT: (Infrastructure (1IN78); Legal (1LE33); Judicial (1JU36); Business Management (1BU42); Economics & Trade (1EC26); Contracts & Orders (1CO29); Sales & Marketing (1MA51))

INDUSTRY: (Telecom Regulatory (1TE65); Telecom (1TE27); Telecom Network Infrastructure (1TE95); Telecom Network Service Failure (1TE17))

REGION: (USA (1US73); Americas (1AM92); Ohio (1OH35); North America (1NO39))

Language: EN

OTHER INDEXING: (OHIO COURT OF CLAIMS; TCI; TELE COMMUNICATIONS INC) (Anthony J. Celebrezze Jr.; Celebrezze; Ferguson; Fisher; HASN; Kate O'Malley; Leach; Lee Fisher; Malley; Miller; Nancy Miller; Ohio; Ohio Attorney; Records; Robert McEaneney; Russell Leach; Standard; Thomas E. Ferguson; Thomas Ferguson) (BUSINESS INDUSTRY; TELEPHONE; CONTRACT; STATE GOVERNMENT; TAXPAYER; FINANCE; DAMAGE ACTION)

EDITION: 1 STAR

Word Count: 700
7/19/91 AKRONBJ C6
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United States Senate
Committee on the Judiciary

Questionnaire for Judicial Nominees

# Supplemental Opinions

Kathleen M. O'Malley
Nominee to be United States Circuit Judge
for the Federal Circuit

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | | |
|---|---|---|
| **EDWARD P. LENTZ,** | : | **Case No. 1:04cv669** |
| **Plaintiff,** | : | **JUDGE KATHLEEN O'MALLEY** |
| **v.** | : | |
| **THE CITY OF CLEVELAND, et al.,** | : | **OPINION & ORDER** |
| **Defendants.** | : | |

Before the Court is *Defendants' Rule 50 Motion for Judgment Notwithstanding the Verdict and Alternative Motions* (Doc. 175), in which the City of Cleveland ("the City"), its Safety Director, and its Chief of Police (collectively, "Defendants") ask the Court to enter post-verdict judgment in their favor as a matter of law.[1] Alternatively, Defendants ask the Court for a new trial or, absent either judgment or a new trial, for a remittitur of the $800,000 judgment the jury awarded to Plaintiff Edward Lentz ("Lentz"). Also before the Court is *Plaintiff's Motion for Prejudgment and Post-Judgment Interest* (Doc. 174). For the reasons outlined below, the Court finds that Defendants are not entitled to: (1) judgment as a matter of law; (2) a new trial; or (3) remittitur. Accordingly, the Court **DENIES** Defendants' motion, and finds that the jury's verdict (Doc. 166) and the Court's

[1] Defendants refer to their motion as a "motion for judgment notwithstanding the verdict." In 1991, however, Federal Rule 50 was amended and the terminology was changed to refer to this motion as a renewed motion for judgment as a matter of law. *See* Fed. R. Civ. P. 50 advisory committee's note (1991 amendment); *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 786 n.1 (6th Cir. 2005) (noting change). The Court, therefore, refers to this motion using the current language of Rule 50.

judgment (Doc. 167) stand. In addition, the Court finds that Plaintiff is entitled to post-judgment, but not prejudgment interest. Accordingly the Court **GRANTS in part** and **DENIES in part** Plaintiff's motion.

## I. BACKGROUND

By way of introduction, the Court briefly summarizes the events and allegations that led to the trial in this case. The following is only a summary, however. Additional evidence presented and legal determinations made during the trial are also discussed, as necessary, in the discussion section of this Opinion and Order. The Court, moreover, refers to the detailed trial record, which cannot be fully repeated in this order, to support its conclusions.

Plaintiff Edward Lentz is a Cleveland police officer. This lawsuit arises from the City's response to, and investigation of, Lentz's non-fatal shooting of a suspect while on duty. Specifically, as it relates to the claims that ultimately went to trial in this case, Lentz alleges that he was the subject of reverse discrimination (he is white) and unlawful retaliation (1) when he was assigned to police gymnasium duty for 652 days pending the investigation of the shooting, and (2) when the Police Department brought departmental charges against him relating to his actions during the shooting.

The shooting incident occurred on December 6, 2001, while Lentz was assigned to guard the home of then-Mayor-elect Jane Campbell. At 8:30 a.m. that day, Lentz noticed a blue station wagon come to a quick halt after driving down the street on which he was parked. As Lentz stepped out of his own vehicle and approached the station wagon, the station wagon backed away. He ordered the driver to stop, but the vehicle backed up, hit a tree, and drove toward Lentz. There are disputes as to the events that followed, but, at some point, Lentz ended up on the roof of the vehicle. For

instance, while Lentz testified that the vehicle struck him, and that his arm was caught in the luggage rack, forcing him to pull himself up onto the vehicle to avoid being dragged, Defendants presented evidence of some witness statements indicating that Lentz grabbed onto the vehicle of his own free will. There are also disputes as to how fast the station wagon was going, both at that time the vehicle approached Lentz and after Lentz found himself on the roof.

With Lentz on the roof, the station wagon headed toward a busy intersection. According to Lentz, in an effort to stop the vehicle, for his safety and the safety of others in the intersection, Lentz shot fourteen rounds through the roof of the vehicle, hitting the driver. The vehicle continued through the intersection and crashed into a yard. After Lentz commanded both occupants, a driver and a passenger, out of the vehicle, he determined that the driver was struck and called for backup and an ambulance. It was later determined that the driver of the vehicle was Lorenzo Locklear, a 12 year-old African American male. He had stolen the vehicle and had illegal drugs in his possession. His wounds were non-fatal. The passenger, a 14 year-old African American male, was not harmed.

Immediately following the incident and pursuant to departmental policy, Lentz was given an automatic three-day administrative leave. Thereafter, and also pursuant to departmental policy, he was assigned to police gymnasium duty pending an investigation by the Use-of-Deadly-Force ("UDF") investigation team. Also immediately following the incident, on December 7, 2001, members of the local media made a public records request regarding the incident. Lentz believed that the Police Depart responded to the request by releasing, among others, his confidential personnel file, including his medical records. Based on this belief, Lentz filed a grievance on December 21, 2001, alleging that the Police Department violated its collective bargaining agreement with the Cleveland Police Patrolmen's Association ("CPPA"). On January 8, 2002, then-Chief of Police

Mary Bounds denied the grievance.

On February 6, 2002, the UDF investigation team completed its investigation and sent its report to First Assistant Prosecutor Edward Buelow, who was acting prosecutor in the absence of a chief prosecutor at that time. On March 11, 2002, Buelow submitted the case to a grand jury. However, in April 2002, Lieutenant Robert Klimak of Internal Affairs requested the file back to re-interview witnesses and canvass the neighborhood.

While Lt. Klimak was conducting the reinvestigation, on April 19, 2002, the Cleveland Plain Dealer published a newspaper article about the shooting which referenced certain psychological information about Lentz. Specifically, the article referenced Lentz's pre-employment psychological evaluations conducted by the City, evaluations which would have been in Lentz's personnel file. On July 17, 2002, Lentz filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC") against the City for unlawful disclosure of medical records in violation of the Americans with Disabilities Act ("ADA"). On September 5, 2002, the EEOC issued a determination that Cleveland violated the ADA and, later, issued a right to sue letter.

Thereafter, in October 2002, Lt. Klimak resubmitted the UDF investigation report to Chief Prosecutor Sanford Watson. Rather than return directly to the grand jury, on February 5, 2003, Prosecutor Watson charged Lentz charged with felonious assault and a misdemeanor charge for providing false information to the UDF investigation team regarding the events leading up to the shooting. The matter was then resubmitted to the grand jury and, on April 2, 2003, the grand jury returned an indictment on the misdemeanor falsification charge, but not on the felonious assault charge. On July 27, 2003, after the state presented its case, the Cuyahoga County Court of Common Pleas judge dismissed the misdemeanor charge on a motion for acquittal pursuant to Rule 29 of the

Ohio Rules of Criminal Procedure. The judge reasoned that the state's witnesses either had an obstructed view of the incident, rendering their testimony unreliable, or that their testimony tended to support the notion that the vehicle had, in fact, struck Lentz.

On August 29, 2003, the Police Department filed departmental charges against Lentz for (1) violating the "use of force" policy, (2) alleging untruthful accounts of the shooting incident, and (3) "failing to notify" dispatch before he approached the vehicle. On September 4, 2003, Lentz entered a plea of no contest to the "failure to notify" charge and the Police Department dismissed the other charges.[2] On September 8, 2004, he received a 3-day administrative leave. On September 17, 2003, he was reinstated and received back pay. In total, he spent 652 days on gymnasium duty.

On March 22, 2004, Lentz filed this lawsuit in the Cuyahoga County Court of Common Pleas, and Defendants removed the case to this Court on April 8, 2004. In his Complaint, Lentz alleged reverse discrimination, retaliation, malicious prosecution, abuse of process, invasion of privacy, and unlawful disclosure of records in violation of the ADA. The Court granted partial summary judgment to Defendants on several of Lentz's claims, and only the following claims proceeded to trial: a claim for discrimination under O.R.C. § 4112 and 42 U.S.C. §§ 1981, 1983, and

[2] While Lentz did not dispute that he technically failed to notify the dispatch of certain of his actions as the events unfolded, substantial evidence was submitted at trial indicating that any such failure was the result of radio malfunctions which interfered with Lentz's efforts to remain in contact with dispatch.

a claim for retaliation under O.R.C. § 4112 and 42 U.S.C. §§ 1981, 1983.[3]

On January 26, 2007, following a seven day jury trial, a jury found that Lentz was the subject of unlawful discrimination and retaliation, and that the City was liable for both actions. On January 30, 2007, the Court entered judgment on the verdict. Defendants then filed the present motion for judgment notwithstanding the verdict, for a new trial, or for an amended judgment. The Court now turns to that motion.

## II. MOTION FOR JUDGMENT AS A MATTER OF LAW AND MOTION FOR A NEW TRIAL

Defendants do not differentiate which of their arguments are directed toward their motion for judgment as a matter of law and which are directed toward their motion for a new trial. The Court treats all of Defendants arguments as directed toward both motions and, accordingly, discusses them together.

### A. Legal Standards

Federal Rule 50(b) governs post-verdict motions for judgment as a matter of law. A motion under Rule 50(b) "may be granted only if in viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion, in favor of the moving party." *Gray v. Toshiba America Consumer Products, Inc.*, 263 F.3d 595, 598 (6th Cir. 2001) (citing *K&T Enters., Inc. v. Zurich Ins. Co.*, 97

[3] After initially granting judgment for Defendants on Lentz's retaliation claim in its entirety, the Court reinstated that claim, in part, as it related to the alleged adverse actions of gymnasium duty and the filing of departmental charges. (Doc. 94). The Court reasoned that "these two issues rely on the same evidence used to support the existing reverse discrimination claim, evidence of which raises triable issues of material fact. There is, therefore, little prejudice to the Defendants from trying these issues in one proceeding and less likelihood of reversal based on having imposed a burden on Plaintiff which is arguably too stringent at this stage of the proceedings." (*Id.*)

F.3d 171, 175-75 (6th Cir. 1996)). Put another way, "sufficient evidence for submission to the jury will be found 'unless, when viewed in the light of those inferences most favorable to the non-movant, there is either a complete absence of proof on the issues or no controverted issue of fact upon which a reasonable person could differ.'" *Am. & Foreign Ins. Co. v. Bolt*, 106 F.3d 155, 157 (6th Cir. 1997) (quoting *Monette v. AM-7-7 Baking Co., Ltd.*, 929 F.2d 276, 280 (6th Cir. 1991)).

For a moving party to succeed on such a motion, it "must overcome the substantial deference owed a jury verdict." *Radvansky v. City of Olmsted Falls*, --- F.3d ---, 2007 WL 2141379, *3 (6th Cir. July 27, 2007). The Court is not free to weigh the parties' evidence or to pass upon the credibility of witnesses. *Black v. Zaring Homes*, 104 F.3d 822, 825 (6th Cir. 1997); *K & T Enters.*, 97 F.3d at 175. Nor may the Court substitute its own judgment for that of the jury. *Zaring Homes*, 104 F.3d at 825; *K & T Enters.*, 97 F.3d at 175-76. Instead, the Court must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the record. *Zaring Homes*, 104 F.3d at 825; *K & T Enters.*, 104 F.3d at 176.

Defendants' alternative motion for a new trial is governed by Federal Rule 59(a). In contrast to judgment as a matter of law, "[t]he authority to grant a new trial is confided almost entirely to the exercise of discretion on the part of the trial court." *Williamson v. Owens-Illinois, Inc.*, 787 F.2d 594, 1986 WL 16533 at *3 (6th Cir. 1986) (quoting 11 Wright & Miller, Federal Practice and Procedure, §2806 (1973)). When reviewing a motion for a new trial, a court "should indulge all presumptions in favor of the validity of the jury's verdict." *Brooks v. Toyotomi Co.*, 86 F.3d 582, 588 (6th Cir. 1996) (citing *Ragnar Benson, Inc. v. Kassab*, 325 F.2d 591, 594 (3rd Cir. 1963)). A jury verdict must be upheld so long as there is any competent and substantial evidence in the record

to support it, even if contradictory evidence was presented. *Green v. Francis*, 705 F.2d 846, 849 (6th Cir. 1983). The simple fact that "the grant of a new trial might result in a different outcome is not a valid ground for disturbing a jury's verdict which is otherwise based upon legally sufficient evidence." *Brooks*, 86 F.3d at 588 (citation omitted).

**B. Discussion**

In support of their motion for judgment as a matter of law or, alternatively, for a new trial, Defendants organize their challenges into three broad arguments: (1) there was insufficient evidence to support Plaintiff's discrimination claim; (2) there was insufficient evidence to support Plaintiff's retaliation claim; and (3) the Court's rulings on certain motions in limine improperly affected the presentation of evidence. With respect to their challenges to the sufficiency of the evidence for the discrimination claim and retaliation claim, Defendants organize their arguments by addressing each element of those claims, as well as by addressing the evidence required for municipal liability for each claim. For the sake of consistency, the Court uses the same organization for its opinion.

As an initial matter, however, although not raised by Plaintiff, the Court notes that Defendants might be precluded from raising some of their instant arguments in support of their Rule 50 motion because they failed to raise those arguments in their Rule 50(a) pre-verdict motion for judgment as a matter of law, made orally at trial. (Trial Transcript ("Tr.") at 849-868). As the advisory committee's notes to Rule 50 make clear, "[a] post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion." Fed. R. Civ. P. 50 advisory committee's note (1991 amendment); *see also Kusens v. Pascal Co., Inc.*, 448 F.3d 339, 361 (6th Cir. 2006) ("A post-trial motion for judgment may not advance additional grounds that were not raised in the pre-verdict motion." (citing *Am. & Foreign Ins. Co. v. Bolt*, 106 F.3d 155, 159-60 (6th Cir. 1997))).

It is also true, though, that "technical precision is not required" when a party lays out its grounds for judgment in a Rule 50(a) motion, and a Rule 50(a) motion should not be read narrowly. *Kusens*, 448 F.3d at 361. In addition, the purpose of a Rule 50(a) motion is to put the Court and the opposing party on notice of any deficiencies in the opposing parties case, and, where that purpose is met, courts take a "liberal view" of what grounds in a pre-verdict motion will support a post-trial motion. *Id.*

In this case, there are several arguments advanced by Defendants in their present motion that are not supported by their pre-verdict motion. With respect to Lentz's discrimination claim, Defendants only argued in their pre-verdict motion that Lentz's claim failed because there was no evidence of similarly situated employees who were treated differently, and because Plaintiff did not demonstrate that the legitimate, non-discriminatory reasons proffered by Defendants were pretextual. Defendants did not argue at any time during their pre-verdict motion, as they do now, that the gymnasium duty and the departmental charges were not adverse employment actions or materially adverse actions.[4] With respect to Plaintiff's retaliation claim, Defendants only argued in their pre-verdict motion that the decision-makers were not aware that Lentz had engaged in protected activity, and that Plaintiff had not shown that Defendants' proffered legitimate, non-discriminatory reasons were pretextual. Defendants did not argue at any time during their pre-verdict motion, as they do now, that there was no causal connection between Plaintiff's protected activity and the allegedly retaliatory actions.

The Court, therefore, could preclude Defendants from arguing in these motions that the

[4] While Defendants did object to the Court's jury instruction on that issue, they did not include that argument in their Rule 50(a) motion.

gymnasium duty and the departmental charges were not adverse employment actions, and that there was no causal connection between Lentz engaging in a protected activity and the allegedly adverse actions. Because the Court ultimately concludes that these arguments do not warrant the relief Defendants seek, however, it does not reach the question of whether Defendants should be barred from raising them now. It notes only the unsteady ground on which Defendants stand in making certain Rule 50 arguments. With that in mind, the Court now turns to Defendants' arguments.

**1. Discrimination Claim**

The evidentiary standards that apply to Plaintiff's claim for intentional discrimination under O.R.C. § 4112 and 42 U.S.C. § 1981 mirror the standards that apply to a claim for discrimination under Title VII. *Little Forest Medical Ctr. of Akron v. Ohio Civ. Rights Comm'n*, 61 Ohio St.3d 607, 609 (1991). That is, the Court must apply the *McDonnell Douglas* framework, which first requires a plaintiff to establish a *prima facie* case. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Talley v. Bravo Pitino Rest., Ltd.*, 61 F.3d 1241, 1246 (6th Cir. 1995). To make out a *prima facie* case of discrimination, a plaintiff must establish that: (1) he is a member of a protected group; (2) he was qualified for the position; (3) he was subject to an adverse employment decision; and (4) he was treated differently than similarly situated non-protected employees.[5] *Newman v. Federal Exp.*

[5] The Sixth Circuit has modified this test where, as here, a plaintiff claims that he was the subject of reverse discrimination. *See Sutherland v. Michigan Dept. of Treasury*, 344 F.3d 603, 614 (6th Cir. 2003). In those circumstances, "to satisfy the first prong of the prima facie case, the plaintiff must demonstrate background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Id.* (internal quotation and citation omitted). In their present motion, Defendants do not challenge the sufficiency of the evidence as to the first prong of this modified test - i.e., they do not argue that Plaintiff failed to demonstrate that background circumstances indicate that the City is that unusual employer that discriminates against the majority. Defendants, therefore, have waived this argument for purposes of these post-trial motions.

*Corp.*, 266 F.3d 401, 406 (6th Cir. 2001). Once the plaintiff establishes a *prima facie* case for a discrimination claim, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse action, after which the plaintiff must demonstrate that the proffered reason was a mere pretext for what was actually an improper motive. *Talley*, 61 F.3d at 1246. The ultimate burden of persuasion always remains with the plaintiff. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993).

In this case, the only element of the *prima facie* case that Defendants do not challenge is that Lentz was qualified; they attack the sufficiency of the evidence for the remaining elements of a *prima facie* case as well as the evidence that their proffered reasons for their actions were mere pretext.

**a. Member of a Protected Group**

Defendants argue that Plaintiff never put into evidence that he is white, and that mere jury observation of Plaintiff in the courtroom is insufficient to establish that fact. Regardless of whether jury observation is sufficient, witness testimony referred to Plaintiff's race, (Tr. at 889), and certain exhibits admitted into evidence indicate that Plaintiff is white (*see, e.g.*, Plaintiff's Exhibits ("Pl. Ex.") 13, 67). Accordingly, Plaintiff has presented sufficient evidence of his race for purposes of his reverse discrimination claim.

**b. Adverse Employment Action**

Defendants next argue that Plaintiff did not present sufficient evidence that his gymnasium duty and departmental charges constituted adverse employment actions, and that the Court erred in

instructing the jury that those events did constitute adverse employment actions as a matter of law.[6] Defendants argue that Lentz's gymnasium duty in this case is akin to the paid administrative leave that the Sixth Circuit has found not to be an adverse employment action in other cases. *See, e.g.*, *Dedinger v. State of Ohio*, 2006 WL 3311284 (6th Cir. Nov. 14, 2006) (citing *Peltier v. United States*, 388 F.3d 984, 988 (6th Cir. 2004)). In addition, Defendants contend that certain witnesses testified that gymnasium duty was not a bad experience. As to the departmental charges, Defendants argue that these charges flow automatically when criminal charges are brought against an officer, and that the threat of discipline does not constitute an adverse employment action.

As an initial matter, the Court reiterates that Defendants did not raise these arguments in their pre-verdict motions made at trial. To the extent that Defendants' earlier failure bars them from raising these arguments now, these arguments can be rejected on that ground alone. In addition, the Court already ruled in this case, in the context of Defendants' motion for summary judgment, that these actions do constitute adverse employment actions as a matter of law. *See Lentz v. City of Cleveland*, 410 F.Supp.2d 673, 686 (N.D. Ohio 2006) (Manos, J.) ("Thus, given (1) the loss [of] opportunities for overtime and secondary employment, (2) the significant differences between gym duty and active duty, (3) the uniqueness of police work rendering this reassignment particularly

[6] Notably, to the Defendants' benefit, the Court did not instruct the jury that the criminal charges brought against Lentz were adverse employment actions. Plaintiff's challenge that decision as error, pointing out that the Court's summary judgment opinion in this case (issued by a previously-assigned judicial officer) alluded to the fact that those charges constituted adverse actions. *See Lentz v. City of Cleveland*, 410 F.Supp.2d 673, 689 (N.D. Ohio 2006) (Manos, J.) ("[T]he Court concludes that [Lentz] has set forth sufficient evidence so that a reasonable jury could conclude that his prolonged detail to gym duty and the filing of criminal and departmental charges were all based upon his race to alleviate public concern and thus, discriminatory." (emphasis added)). For the reasons stated during the final pretrial in this matter, (Transcript from 1/11/07 Final Pretrial ("Final Pretrial Tr.") at 42-45), however, the Court stands by its ruling.

undesirable, (4) the fact that officers do not like gym duty; and (5) the length of the investigation; the Court concludes that an almost two-year reassignment to gym duty pending an investigation constitutes an adverse employment action."). As to the departmental charges, the Court also stated that the pursuit of those charges after the criminal charges were dropped might lead a reasonable jury to conclude that the charges were motivated by discriminatory intent. *Id.* at 689.

In addition, the Court again, during the jury instruction conference with the attorneys, reiterated its conclusion that the gymnasium duty and the departmental charges constituted adverse employment actions. (Tr. at 1261-62). As the Court explained, this conclusion was independent of its earlier finding in the summary judgment context, and was based on the evidence presented during trial, including substantial testimony that gymnasium duty was dirty, dismal, and prevented officers from earning overtime and engaging in secondary employment. (*Id.*) Indeed, despite Defendants' current contention, there was really no credible evidence to the contrary on this point. The Court also explained that its conclusion was based on the unique circumstances of this case, including the length of the gymnasium duty at issue here and the effects of such an extended assignment. (Tr. at 1262). Having so found, the Court does not see a reason to change its decision, and Defendants have not presented any compelling argument to do so.

First, Defendants' argument that paid administrative leave does not constitute an adverse employment action is not persuasive given the circumstances of this case. This Court already rejected that argument, finding that the gymnasium duty in this case is distinguishable from the paid administrative leave the Sixth Circuit previously has found not to be actionable. *See Lentz*, 410 F.Supp.2d at 685 (citing the loss of opportunity, difference in responsibilities, and unique nature of police work). In addition, the case law on which Defendants rely specifically states that "a

suspension with pay and full benefits pending a timely investigation into suspected wrongdoing is not an adverse employment action." *Peltier*, 388 F.3d at 988 (emphasis added). In this case, the twenty-month investigation cannot be characterized as timely. Indeed, the twenty-month investigation in this case is far longer than the five-month investigation in *Peltier* or the three-month investigation in *Dendinger*. *See Peltier*, 388 F.3d at 986; *Dendinger*, 2006 WL 3311284 at *2. Indeed, testimony at trial indicated that the length of this investigation fell far outside the norm for such inquiries, and was actually the longest in departmental history. For that reason, Defendants' reliance on those cases is of no avail.

In addition, to the extent that the filing of departmental charges extended Lentz's gymnasium duty, the filing of those charges are intertwined with the gymnasium duty. The departmental charges, therefore, go beyond mere threats of discipline. Although Defendants contend that departmental charges automatically result from the filing of criminal charges (a point that will be discussed below), that explanation, even if true, does not account for the fact that Lt. Klimak requested, and Director Draper ratified, amended departmental charges after the criminal charges against Lentz were no longer pending - i.e., after the criminal charges were either no-billed by a grand jury or dismissed by a state court judge. Indeed, Lentz remained in the gymnasium for almost two months after the state court judge dismissed the final criminal charge on July 27, 2003. In addition, the request for amended departmental charges included a charge for failing to notify dispatch, a charge that previously had not been levied against Lentz. Given those facts, it is clear that the departmental charges also constitute an adverse employment action for purposes of Lentz's discrimination claim.

The Court, therefore, must reject Defendants' contention that, as a matter of law, the twenty-

month gymnasium assignment and departmental charges were not adverse employment actions.[7]

**c. Similarly Situated Employees**

Next, Defendants argue that Plaintiff failed to present sufficient evidence that similarly situated African-American officers were treated differently. Specifically, Defendants argue that the African-American officers offered for comparison by Plaintiff are not similarly situated because: (1) the facts of each of their use of force incidents were different than Lentz's incident; (2) the investigation of each incident did not reveal inconsistent statements between the officer and the witnesses, as occurred in Lentz's case; (3) the relevant decision-makers in the other officers' use of force incidents were different than those in Lentz's case; and (4) the standards and policies of the City have changed.[8]

During the course of the trial, Plaintiff called as witnesses four African-American Cleveland police officers and presented the UDF files of three other African-American Cleveland police officers, all of who had been involved in shootings. Most of the shootings involved suspects in cars, and some involved instances where the officer had been caught on the suspect's car and dragged. These shootings all occurred between 1997 and 2002, and the length of these officers' gymnasium duty ranged from 95 days to 254 days. Lentz's shooting occurred in 2001, and his gymnasium duty

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[7] Defendants also argue under the "adverse employment action" element that the jury may have been misled into thinking that the criminal charges against Lentz constituted an adverse employment action, despite the Court's repeated instructions that the gymnasium duty and departmental charges were the only adverse actions in this case. The Court addresses this argument in the section of the opinion dealing with Defendants' complaints about the Court's evidentiary rulings.

[8] In addition, Defendants also argue that Plaintiff failed to put into evidence the race of the African-American officers he claims were similarly situated. Because certain exhibits contain that information, *see, e.g.,* Pl. Ex. 67, the Court also rejects that argument.

lasted 652 days.

Defendants' primary contention is that these officers were not similarly situated to Lentz because Lentz's incident was more complicated, in that there were more witnesses, there were differing witness accounts, and Lentz fired fourteen shots (compared to the next highest number of shots fired by the proffered comparable officers, six). In addition, Defendants argue that only one officer's shooting occurred during the terms of Safety Director James Draper and Chief of Police Edward Lohn, who were in office during part of Lentz's gymnasium duty.[9] For the reasons that follow, the Court does not find that Defendants' arguments warrant upsetting the jury's verdict in this case.

Generally, "[w]hether two employees are similarly situated ordinarily presents a question of fact for the jury." *Riggs v. Airtran Airways, Inc.*, --- F.3d ----, 2007 WL 2258826, at *6 (10th Cir. Aug. 8, 2007) (quoting *George v. Leavitt*, 407 F.3d 405, 414 (D.C. Cir. 2005)); *see also Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000) (same). In this case, the jury was instructed clearly that "what the plaintiff must show is that he was treated adversely because of his race; i.e., that he was treated differently than other, similarly situated non-white officers." (Jury Instructions, Doc. 164 at 23; Tr. at 1365) (emphasis added).[10] Although the Court recognizes that Lentz's incident was not identical to the incidents of the seven officers that Plaintiff offers as comparables, the law does not require an exact correlation. *See Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352

[9] As to Defendants' contention that a change in City policies renders these officers not similarly situated, the Court does not consider this argument because Defendants do not identify what standards or policies of the City have changed, or what effect any changes have had.

[10] At the jury charge conference, Defendants did not object to this instruction or request any further instruction on this point. (Tr. at 1269-70).

(6th Cir. 1998). They need only be similar in all relevant aspects. *Id.* As the Court recognized when it denied Defendants' motion for summary judgment on this point, "no shooting incident between an officer and a citizen will ever be exactly similar and [] some investigations may take longer than others." *Lentz*, 410 F.Supp.2d at 686. As indicated above, many of the comparable officers put forward by Lentz were involved in incidents with suspects in cars, and, in two cases, in incidents where officers were dragged by the suspect's vehicle. The longest gymnasium duty any of the other officers received was 254 days, compared to Lentz's 652 days. A careful review of the testimony of each of these officers reveals sufficient similarities between the events and the investigative processes employed, to justify allowing a properly instructed jury to assess whether the officers were, indeed, "similarly situated."[11]

In addition, the Court is not persuaded that the fact that there may have been different office-holders during certain of the relevant shooting incidents mandates upsetting the jury's decision. First, one officer's shooting incident did occur while Director Draper and Chief Lohn were in office. That officer spent 254 days in the gymnasium, less than half the time Lentz spent in the gymnasium. In addition, the concerns over racial tension that Lentz alleges motivated his treatment by the City would have been present in the few years preceding his incident. Indeed, the jury heard testimony from Director Draper himself that the 2001 mayoral election emphasized that Cleveland was a city "with deep racial divides." (Tr. at 706). A jury could conclude that these racial divides did not appear for the first time in 2001, but existed in prior years as well. The identity of individual office-holders, therefore, is less relevant than the concerns present at the time, a fact the jury was entitled

[11] Defendants' arguments on this point, taken to their logical conclusion, would mean that no officer could ever bring an action for discrimination in connection with his treatment after such an incident. The Court declines to endorse such an extreme result.

to conclude based on the evidence.

It is significant, moreover, that these office-holders all acted pursuant to long-standing municipal policies governing responses to incidents such as those described by the various officers, and pursuant to a well-established decision-making chain of command. Supervisory differences between the officers are far less important in such a military-type hierarchy than they would be in a standard private-employer context.

The question of whether these officers were similarly situated, therefore, was an issue for which there was clearly enough of a dispute to require submission of that question to the jury, subject to the clear jury instructions given. Those instructions were that, "what the plaintiff must show is that he was treated adversely because of his race; i.e., that he was treated differently than other, similarly situated non-white officers." (Jury Instructions, Doc. 164 at 23; Tr. at 1365) Given the evidence, it cannot be said that, "viewing the evidence in the light most favorable to [Lentz], there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion, in favor of [Defendants]." *Gray*, 263 at 598. Accordingly, the Court rejects Defendants' argument that it is entitled to judgment as a matter of law based on this issue.

**d. Pretext**

Once the plaintiff establishes a *prima facie* case for a discrimination claim, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse action, after which the plaintiff must demonstrate that the proffered reason was a mere pretext for what was actually an improper motive. *Talley*, 61 F.3d at 1246. In this case, Defendants offered the following reasons for Plaintiff's gymnasium stay: (1) it was standard procedure to keep an officer in the gymnasium for the length of the investigation and final disposition by the prosecutor; (2) Lt. Klimak

took back the file because he believed it was not fully investigated; (3) there was no chief prosecutor until October 2002; (4) the chief prosecutor came to an office that had a back log of use of deadly force and internal affairs cases; (5) the prosecutor evaluated cases based on whether there was a statute of limitations and prioritized use of deadly force cases by fatalities first; and (6) both Prosecutor Buelow and Watson determined that there was probable cause to charge Plaintiff criminally. As to the departmental charges, Defendants contend that such charges are automatically filed when criminal charges are issued, and that amendment of departmental charges is permitted.

The proffer of these legitimate, non-discriminatory reasons shifts the burden to Plaintiff to establish that they are mere pretext for discriminatory motives. Plaintiff can meet his burden if he can show that the reasons: (1) have no basis in fact; (2) did not actually motivate the challenged conduct; or (3) are insufficient to explain the challenged conduct. *Carter v. Univ. of Toledo*, 349 F.3d 269, 274 (6th Cir. 2003). Plaintiff argues that the asserted justifications have no basis in fact or are not sufficient to warrant the actions taken by Defendants because the initial investigation was completed in only three months, which the evidence showed was the standard practice, and the reinvestigation was just a "mock" investigation that served no legitimate purpose, as evidenced by the fact that it revealed only one previously unidentified witness.

As to Lt. Klimak's decision to take back Lentz's UDF file, the jury was presented with the following evidence. The initial investigation, conducted by Lt. Joseph Petkac, was completed in three months and submitted to the prosecutor's office. Lt. Petkac testified that there was a ninety-day limitation on investigations generally, and that any extension beyond that time would have to be requested. (Tr. at 546-548). Lt. Petkac also testified that, when he sends a file to the prosecutor's office, he is "comfortable" and "confident" that it is complete. (Tr. at 549.) The assistant prosecutor

at the time, Edward Buelow, received the file and, after one month, submitted criminal charges to the grand jury. Buelow testified that he believed the file was sufficient to support submission of a case to a grand jury, and that he had some additional questions about the file answered before submitting the case to the grand jury. (Tr. at 590).

The jury also heard Lt. Klimak testify that he had never before taken a file back after it had been submitted to the grand jury. (Tr. at 605). He also stated that, prior to taking the file back, he never indicated to anyone that he had any questions about the investigation. (Tr. at 651). Lt. Klimak's re-investigation lasted six months, but he only interviewed one new witness that had not been interviewed during Lt. Petkac's investigation; all of the remaining witnesses but one had been interviewed by the original team within 72 hours of the shooting incident in the original investigation. When given a chance to explain why he took Lentz's UDF file back, Lt. Klimak's only explanation was that it was not investigated to his satisfaction, and he wanted to take a "closer look" at certain aspects of the case. (Tr. at 978). After Lt. Klimak took the case back from the grand jury, it was not resubmitted to a grand jury until almost ten months later, with Lentz all the while continuing on gymnasium duty. Given these circumstances, a jury could conclude that this explanation either was simply not true or that it was insufficient to explain the alleged conduct.

In addition, the jury heard circumstantial evidence from which it could have concluded that Defendants were motivated by Plaintiff's race when they took the adverse actions in this case. For example, the jury heard that, based on certain data compilations comparing the length of gymnasium duty officers received pending a UDF investigation, the five officers who received the longest periods of gymnasium time were white officers involved in the shootings of black suspects. (Tr. at 889-96). The jury also heard evidence that Director Draper talked to Chief Lohn about six pending

investigations of police shootings, including Lentz's case. Draper testified that he told Chief Lohn that these cases needed to be handled with care to avoid civil unrest and, potentially, riots, as had occurred recently in Cincinnati following a police shooting. (Tr. at 715-17). In addition, Draper stated that he met with the Cleveland NAACP President George Forbes, who told Draper that members of the NAACP were concerned about the police shootings. (Tr. at 713). Draper also testified that he and Chief Lohn attended a City council hearing in which the recent police shootings were discussed, including where Lentz's case "certainly was mentioned in the context of the incidents." (Tr. at 722). Draper also testified that he had bi-weekly meetings with Mayor Campbell and Chief Lohn regarding the police shootings. (Tr. at 714). Further, there was testimony that Chief Lohn was aware that Klimak had taken back the investigation (Tr. at 669-70), and testimony that Klimak had brief conversations with Chief Lohn while he was conducting the reinvestigation (Tr. at 642).

In addition to evidence that these decisionmakers had discussions about Lentz's case, the jury also heard evidence about the high-profile nature of this case. First, the shooting itself occurred outside of the Mayor-elect's house. Mayor Campbell, who was in office during the pendency of Lentz's gymnasium duty, clearly was aware of and familiar with the incident. Second, Plaintiff offered into evidence numerous news accounts - including a summary of fifty television new clips - about Lentz's shooting and subsequent investigation. In one article, Mayor Michael White personally discussed Lentz's shooting incident and the investigation into that incident. (Ex. 29; Tr. at 102-03). Finally, the shooting involved a twelve-year old suspect which, by itself, may have garnered attention even aside from the other factors. Based on this evidence, a reasonable jury could have inferred that Lentz's case was so high-profile that Mayor Campbell, Director Draper, Chief

Lohn, and Lt. Klimak had it on the forefront of their thoughts and discussions, including their discussions about racial concerns. And, the jury could have inferred that these officials made a conscious decision to delay any resolutions of the matter in hopes that the emotions surrounding it would lessen over time.

As to the departmental charges, Defendants argue again that these charges are filed automatically when criminal charges issue, and that amendment of the departmental charges is permitted. First, in support of their contention that departmental charges are "automatically" filed, Defendants cite to a portion of the transcript in which Lt. Klimak merely states that, once criminal charges issue, the Safety Director has to determine an officer's status. (Tr. at 1009). Indeed, although Lt. Klimak stated that departmental charges "flow after" criminal charges, the process he described consists of him having to request charges, the Chief having to approve the request, and the Safety Director issuing a charging letter and holding a hearing on the charges. (Tr. at 1010). This is hardly the automatic process Defendants claim that it is. Indeed, the relevant collective bargaining agreement provides for a special procedure "in the event that" administrative charges are brought that are based on the same circumstances that give rise to criminal charges, indicating that it is possible, but not automatic, that such a situation could arise. (Def. Ex. 1053 at p. 59, ¶ 71) (emphasis added).

Second, even if the jury concluded that departmental charges normally would flow automatically from criminal charges, the jury could question the propriety of following that practice in this case, where the grand jury ultimately did not indict on the key charges initially brought.

Third, simply because an amended departmental charge is permitted does not mean it was brought for a legitimate purpose. As noted above, *supra* Part II.B.1.b, Lt. Klimak requested, and

Director Draper ratified, amended departmental charges after all criminal charges against Lentz were no longer pending. These amended charges included, moreover, a charge for failing to notify dispatch, a charge that previously had not been levied against Lentz. A reasonable jury could question the true intent of these actions.

Viewing the evidence in Lentz's favor, as the Court must, the Court concludes that reasonable minds could reach a conclusion other than the one Defendants urge. The investigation of Lentz's shooting incident was completed, sent to the prosecutor, and submitted to a grand jury. The evidence indicated that both the original investigator and prosecutor considered the case to be sufficiently complete. Lt. Klimak justified his decision to take the file back and reinvestigate, the first time he had ever done so after a UDF file has gone to the prosecutor's office, by citing only his subjective belief that the case was not fully investigated. This decision led to a six month investigation followed by a four month delay before the case was again submitted to the grand jury, and Lt. Klimak did not dispute that it took him four months to even start canvassing for witnesses. He explained the delay both by saying he was busy with other cases (Tr. at 614) and that he wanted to make sure he was thorough (Tr. at 648-49), explanations which are, on their face, somewhat inconsistent. It is reasonable for the jury to have concluded that, given the unusual and unprecedented circumstances of this case, Lt. Klimak's espoused subjective belief that the file needed more investigation did not actually motivate his decision to take back the file after it had been submitted to the grand jury.[12] This is particularly true, moreover, when one keeps in mind that

[12] In addition, although Defendants' third, fourth, and fifth proffered justifications pertain to the four-month delay between Lt. Klimak's submission of his re-investigation to the prosecutor and the ultimate issuance of criminal charges, this is only a four-month period out of the nearly two years Lentz spent in gymnasium duty. Even if a jury accepted these justifications, a reasonable jury could still find liability based on the remaining delays.

it was the jury who was charged with making all relevant credibility determinations in this case, leaving them free to disbelieve any portions of Lt. Klimak's proffered explanations for his conduct.

The Court clearly instructed the jury as to Plaintiff's burden of demonstrating that Defendants' proffered justifications were mere pretext. Indeed, the jury instructions even explained that "Lentz must show both that the explanation is false and that discrimination was the real reason the defendant took adverse actions against him." (Doc. 164 at 25; Tr. at 1367). The Court, moreover, expressly included an instruction, not even requested by Defendants, to avoid any possibility that the jury would find in favor of Lentz simply because they believed he was the victim of "racial politics" or "political motivations." The jury was clearly instructed that:

> You should understand that the issue in this case is not whether the plaintiff, as a general matter, was the victim of racial politics or whether he or other officers may have been treated unfairly for "political reasons." Instead, what the plaintiff must show is that he was treated adversely because of his race; i.e., that he was treated differently than other, similarly situated non-white officers. Thus, you may not find in favor of the plaintiff solely because you disagree with or disapprove of the way the plaintiff was treated by the defendants or find the defendant's actions to be unacceptable.

(Doc. 164 at p. 23; Tr. at 1365-66). Even after being given these instructions, the jury viewed the evidence presented and found that Defendants' justifications were mere pretext, finding Defendants liable for discrimination. Defendants have not presented a reason to overcome the substantial deference the Court must give to the jury's verdict.

**e. Municipal Liability**

Defendants also challenge the jury's finding that the City is liable under 42 U.S.C. §§ 1981 and 1983. In order for the City to be held liable for discrimination under 42 U.S.C. §§ 1981 and 1983, a plaintiff must establish that the City's official policy or custom caused a constitutional

violation. *Monell v. Dept. of Social Servs. of the City of New York*, 436 U.S. 658 (1978). A single decision of a policymaker can, in some circumstances, constitute an "official policy" for purposes of municipal liability. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1985) ("[I]t is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances."). However, "municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Id.* at 482. In addition, "'[i]f the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final' policy." *Feliciano v. City of Cleveland*, 988 F.2d 649, 656 (6th Cir. 1993) (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988)).

Based on the applicable law, the Court instructed the jury that, in order to find the City liable, the jury was required to find more than just that the City employed an individual who violated Plaintiff's rights. (Doc. 164 at 26; Tr. at 1369). The jury was instructed that Plaintiff must show the violation resulted from the City's official policy or custom, which could include (1) a policy statement or decision by a policymaking official, (2) the ratification by a policymaking official of a subordinate's discriminatory decision, or (3) a custom that is a widespread, well-settled practice that constitutes a standard operating procedure of the City. (Doc. 164 at 26-28; Tr. at 1368-70). Any one of these three theories would render the City liable, and the jury was not required to identify which theory on which it based its decision.[13] Significantly, the Court, to the benefit of Defendants,

[13] Neither party challenged the verdict form in this case or asked that the Court include jury interrogatories that asked on which theory of municipal liability the jury relied. Although Defendants proposed jury interrogatories as part of their proposed jury instructions, (Doc. 133), none of those proposed interrogatories addressed this particular question.

limited the relevant policymakers for purposes of the first two theories only to the Mayor and the Safety Director, expressly excluding the Chief of Police.[14]

As to a decision or ratification by a policymaker, Plaintiff does not point to any direct evidence showing that Mayor White or Mayor Campbell directly decided, or ratified a decision, to keep Lentz in gymnasium duty or to bring departmental charges. The majority of the evidence to which Plaintiff points relates to Director Draper. First, as to the departmental charges, it is clear that Draper personally issued and ratified the departmental charges brought against Lentz, including the amended departmental charges that were brought after the criminal charges against Lentz were no longer pending. Draper testified that any charges that could result in more than a three day suspension were required to come before the Safety Director rather than the Chief of Police (Tr. at 728), and the relevant collective bargaining agreement between the City and the CPPA gives the Safety Director exclusive authority to hear such charges. (Def. Ex. 53 at p.59). Indeed, Draper signed the amended departmental charges levied against Lentz. (Pl. Ex. 62). Defendants themselves argue that "the Director ultimately did not ratify all of the charges requested by Lt. Klimak, when he dismissed some of them." (Doc. 175 at 26). By negative implication, Draper did authorize or ratify the others, accordingly. Thus, as it relates to the amended departmental charges that had the effect of extending Lentz's gymnasium duty by two months, Director Draper himself ratified the charges. Indeed, Director Draper, whose testimony was particularly candid, conceded as much. Because of his final authority to do so, authorization or ratification of those charges constitutes a City policy for purposes of *Monell* liability.

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[14] Plaintiff argues in its present brief that not including the Chief of Police as a policymaker was erroneous.

In addition, as mentioned in the previous section of this opinion, *supra* Part II.B.1.d, the jury also heard evidence that policymakers (the Safety Director and the Mayor) specifically discussed Lentz's case, and did so repeatedly. This evidence, although not direct evidence of a decision by a policymaker that violated Lentz's constitutional rights, demonstrates that the racial component of these police shootings, including Lentz's case, was on the minds of policymakers, and that policymakers discussed the investigations with those making the decisions regarding the investigations and gymnasium duty. As such, it is circumstantial evidence that could support a jury finding that there was either an unlawful decision, or ratification of an unlawful decision, by a policymaker. Given the standard the Court must apply in reviewing these post-verdict motions, and the extensive jury instructions on this issue, the Court cannot conclude that the jury's verdict on this issue should be upset.

Although the jury only was required to base its finding of municipal liability on one of three theories, Plaintiff also argues that there is evidence to support a finding that the City had a well-established practice of punishing white officers with gymnasium duty. Plaintiff points to the evidence that the five officers who received the longest periods of gymnasium time were white officers involved in the shootings of black suspects. (Tr. at 889-96). Plaintiff also points to the testimony of Officer James Simone and Officer Joseph Paskvan, both of whom are white officers who spent time in the gymnasium following shooting incidents.[15] (Tr. at 498; Tr. at 771-72). Officer Simone testified as to his involvement in ten shootings as a police officer, as well as his experience investigating "dozens" of shootings when he was assigned to a UDF investigation team. (Tr. at 484,

[15] The Court here is referring to the testimony of these witnesses as to their personal experiences, not as to the improper general opinion testimony these witnesses attempted to offer.

487-88). Based on his personal experiences, Officer Simone testified that a white officer involved in a shooting, on average, spends more time in the gymnasium than a black officer involved in a shooting. (Tr. at 499-500). Officer Paskvan testified to his involvement in nine shootings as a police officer, including one in which he spent seventeen months in the gymnasium after a shooting that garnered media attention. (Tr. at 774-75). Finally, Plaintiff calls attention to the testimony of Robert Beck, the president of the CPPA, regarding his experience with the role that race and media coverage played in the City's investigation of police shootings. (Tr. at 737-41). Although this is not strong and undisputed evidence of a well-settled practice or standard operating procedure, the Court does not have to decide that, as a matter of law, such a practice or procedure existed. It only has to decide, viewing the evidence in a light most favorable to Plaintiff, and giving Plaintiff the benefit of all reasonable inferences, whether there is evidence upon which the jury could properly support a verdict in favor of Plaintiff. The Court decides that there is such sufficient evidence in this case.

Accordingly, for the reasons stated above, the Court concludes that it cannot upset the jury verdict as it pertains to Plaintiff's claim for discrimination, including the jury's decision that the City is liable for such discrimination.

**2. Retaliation Claim**

The *McDonnell Douglas* framework applied to Plaintiff's discrimination claim also applies to Plaintiff's retaliation claim. *Dixon v. Gonzales*, 481 F.3d 324, 333 (6th Cir. 2007). In order to establish a *prima facie* case of retaliation, a plaintiff must demonstrate that: (1) he engaged in a protected activity; (2) his exercise of such protected activity was known by the defendant; (3) the defendant took an action that was "materially adverse" to the plaintiff; and (4) a causal connection existed between the protected activity and the materially adverse action. *Abbott v. Crown Motor Co.*,

*Inc.*, 348 F.3d 537, 542 (6th Cir. 2003); *see also Burlington N. & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405, 2415 (2006) (modifying the third element to require a "materially adverse action" rather than an "adverse employment action"). As with the discrimination claim, once the plaintiff establishes a *prima facie* case for either a discrimination or retaliation claim, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse action. *Abbott*, 348 F.3d at 542. The plaintiff must then demonstrate that the proffered reason was a mere pretext for what was actually an improper motive. *Id.*

In this case, the parties stipulated that Plaintiff satisfied the first element.[16] Plaintiff filed a grievance on December 21, 2001 and an EEOC charge on July 17, 2002, both of which were based on his good faith belief that Defendants released his confidential medical records. In addition, the jury heard testimony that, on January 23, 2003, Lentz asked his attorney, Patrick D'Angelo, to make a renewed demand to the City to resolve his EEOC charge. (Tr. at 131-32). Beyond this first element to which the parties stipulated, Defendants argue that Plaintiff did not establish that the relevant decisionmakers knew that Lentz engaged in protected activities, they object to the Court's instruction that the gymnasium duty and departmental charges constituted materially adverse actions, and they argue that Plaintiff did not establish a causal connection between the Plaintiff's protected activities and the adverse actions. In addition, Defendants argue that Plaintiff failed to demonstrate that Defendants' legitimate, non-discriminatory reasons were pretext, and that Plaintiff failed to establish municipal liability under *Monell*.

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[16] Although Defendants acknowledge this stipulation, they complain about the extent to which Plaintiffs were permitted to refer to these protected activities. The Court addresses this argument in the section of the opinion dealing with Defendants' complaints about the Court's evidentiary rulings.

**a. Knowledge of Decisionmakers**

Defendants argue that there is no evidence that any relevant decisionmaker knew that Plaintiff filed a grievance or an EEOC charge, except for Director Draper being told in passing that Plaintiff either had, or was going to, file an EEOC charge. While there is not overwhelming evidence that satisfies this element, there are three key points. First, Plaintiff's December 21, 2001 grievance has a stamp on it indicating that it was received by the "Chief's Office." (Pl. Ex. 31). In addition, that grievance was denied in a letter signed by Chief Mary Bounds. (Pl. Ex. 32). After seeing the denial letter, Chief Bounds testified that she must have been aware of the grievance at some time. (Tr. at 445). Second, Director Draper testified that the union president, Robert Beck, informed him that Lentz had or was going to file an EEOC charge. (Tr. at 724) ("[I]n a meeting in my office it was the union president that let me know that [Lentz] had - - he was going to. I don't know whether he had filed it, but he was thinking about filing it."). Draper also testified that the EEOC charge was something that he was aware of before the final resolution of Lentz's departmental charges. (Tr. at 725). Thus, there is direct evidence that both the Chief of Police and Safety Director knew that Lentz had engaged in protected activity.

Finally, the jury could reasonably conclude from circumstantial evidence that the relevant decisionmakers were aware of the EEOC complaint and the January 2003 letter to the City discussing it. Defendants contend that these documents were sent to the City law department, not the Safety Director or the Police Department, and that Chief Lohn and Lt. Klimak testified that they were not aware of them. A reasonable jury, however, could disbelieve Chief Lohn and Lt. Klimak and rely instead on the affirmative evidence offered by Plaintiff. For example, the evidence, discussed *supra* Part II.B.1.d, that Draper had a conversation with Lohn about pending investigations

of police shootings, including Lentz's case, and that Chief Lohn and Lt. Klimak also had brief conversations about the reinvestigation of Lentz's case. Likewise, the jury heard evidence of the high-profile nature of the case, such that it could conclude that Lentz's name would not have been easily forgotten by the decisionmakers or that, given this background, it is unlikely that the City Law Department would not have discussed the charges by Lentz with the relevant officials.

Although there is not strong evidence to satisfy this element, the Court concludes that, based on the evidence presented, a reasonable jury could have concluded that the relevant decisionmakers were aware that Lentz engaged in a protected activity.

**b. Materially Adverse Action**

Defendants again argue that it was error for the Court to instruct the jury that the gymnasium duty and the departmental charges, in the circumstances of this case, constitute materially adverse actions. For the reasons stated above in the discussion of Plaintiff's discrimination claim, the Court rejects that argument. Indeed, with respect to a retaliation claim, the adverse actions do not need to be employment related, *Burlington N.*, 126 S.Ct. at 2415, arguably making this an easier decision in the context of this claim as it relates to the departmental charges.

Defendants also argue that, under this element, the adverse actions must occur after the decisionmakers became aware of the protected activity. The Court will address this argument below in its discussion of the causal connection element, where it belongs.

**c. Causal Connection**

Next, Defendants argue that there was insufficient evidence from which the jury could conclude that there was a causal connection between Lentz's protective activity and the materially adverse actions. "To establish a causal connection, a plaintiff must 'proffer evidence sufficient to

raise the inference that her protected activity was the likely reason for the adverse action.'" *Dixon*, 481 F.3d at 333 (quoting *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir.1997)). "Although temporal proximity itself is insufficient to find a causal connection, a temporal connection coupled with other indicia of retaliatory conduct may be sufficient to support a finding of a causal connection." *Randolph v. Ohio Dept. of Youth Servs.*, 453 F.3d 724, 737 (6th Cir.2006). Consistent with that statement, "[t]he causal connection between the adverse employment action and the protected activity . . . may be established by demonstrating that the adverse action was taken shortly after plaintiff filed the complaint and by showing that he was treated differently from other employees." *Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F.3d 1073, 1080 (6th Cir. 1999).

As an initial matter, the Court again reiterates that Defendants did not argue in their pre-verdict Rule 50(a) motion that there was insufficient evidence to support a finding of a causal connection. Defendants primarily argued that there was no evidence that any decisionmaker was aware that Lentz engaged in protected activity, a separate element. To the extent that their failure to challenge the evidence regarding a causal connection bars them from now raising that issue under Rule 50, the Court could reject that argument solely on that basis. For the reasons stated below, however, the Court finds that there was sufficient evidence from which a reasonable jury could conclude that there was a causal connection between the protected activity and the adverse employment actions.

In this case, the jury heard the following evidence. Plaintiff filed a grievance with the Police Department on December 21, 2001. In April 2002, Plaintiff's case was taken back from the grand jury to be reinvestigated, even though the original investigator and original prosecutor believed it was complete and ready to be submitted to the grand jury. Lt. Klimak testified that this was the first

time he had taken a case back after it had been submitted to the grand jury. (Tr. at 605). Plaintiff filed an EEOC charge on July 17, 2002. On January 23, 2003, Lentz asked his attorney, Patrick D'Angelo, to make a renewed demand to the City to resolve his EEOC charge.[17] (Tr. at 131-32). On February 5, 2003, criminal charges were filed against Lentz, followed by a request for departmental charges from Lt. Klimak. The remaining criminal charge against Lentz was dismissed on July 27, 2003. That same day, Lt. Klimak requested amended departmental charges against Lentz, including a new charge that previously had not been raised, a charge for failure to notify. Those amended charges were officially lodged against Lentz a few weeks later.

Regarding temporal proximity, most striking is the fact that the departmental charges issued only about two weeks after Plaintiff's attorney sent a demand to the City to renew the EEOC charge. Although Defendants maintain that departmental charges always result automatically from criminal charges, the evidence was not as clear on this point as Defendants suggest, *see supra* Part II.B.1.d. The amended departmental charges were brought, moreover, as soon as Lentz was cleared of all criminal charges brought against him.

While temporal proximity alone is insufficient to establish a causal connection, a plaintiff may demonstrate a causal connection by showing temporal proximity "and by showing that he was treated differently from other employees." *Moore*, 171 F.3d at 1080. The lengthy discussion above, *supra* Part II.B.1.c, indicates the ways in which the evidence showed that Lentz was treated differently than other employees. The unique treatment Lentz received could be considered as indicia of retaliation, at least when viewing the light in an evidence most favorable to Lentz, which

[17] Lentz also testified that he received a copy of the letter, though the letter was not used as an exhibit in this case.

the Court must do at this stage of the proceedings.[18]

While it is possible that, on this particular claim, the Court "may have reached a different conclusion sitting as the finder-of-fact, it is not [the Court's] place to substitute [its] judgment for that of the jury." *Barnes v. City of Cincinnati*, 401 F.3d 729, 738 (6th Cir. 2005). The jury was clearly instructed as to what it needed to find in order to conclude that plaintiff had established a causal connection between his protected activity and any adverse actions against him, including that timing alone is not sufficient. The Court instructed that:

> A causal connection may be shown in many ways. For example, one factor you may consider, among others, is whether there is sufficient connection through timing, that is the defendant's action followed shortly after the defendant became aware that plaintiff filed a grievance or filed an EEOC charge. Causation is, however, not determined by timing alone nor is it ruled out by a more extended passage of time. Causation also may or may not be proven by antagonism shown toward the plaintiff or a change in the demeanor toward the plaintiff.

(Doc. 164 at p. 31; Tr. at 1373).[19] Given the deference this Court owes to the jury verdict, the Court is not willing to upset the verdict based on this issue.

**d. Pretext**

Defendants also argue that Plaintiff did not establish that their legitimate, non-discriminatory reasons for their actions were mere pretext. As with Plaintiff's discrimination claim, the same burden-shifting analysis applies. The Court does not repeat the legal framework here. In addition, much of the same analysis regarding the discrimination claim applies here. For the same reasons

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[18] As noted above, moreover, the evidence at trial indicated that the "failure to notify" with which Lentz was charged may have arisen from the City's own faulty radio system. Surely the jury was free to conclude that levying charges in those circumstances - after Lentz had been cleared of all others brought against him - was not prompted by the blind following of customary departmental policy.

[19] Defendants did not object to this instruction. (Tr. at 1277).

stated in that section, a reasonable jury could reject the justifications for Lt. Klimak reinvestigating Lentz's case, the filing of the departmental charges, and the filing of amended departmental charges. The primary difference in the analysis as it relates to the retaliation claim is that the jury must also have found not only that the proffered explanations are false, but that retaliation (as opposed to discrimination) was the real reason Defendants took adverse actions against Plaintiff.

Although the evidence on this issue certainly is not as strong as it is with respect to the discrimination claim, there is one crucial point: the jury heard significant evidence that this was a high-profile case about which the decisionmakers, Mayor Campbell, Director Draper, Chief Lohn, and Lt. Klimak had at least some discussions. Viewing the evidence in a light most favorable to Plaintiff, as the Court must, and keeping in mind once more the jury's right to make all relevant credibility determinations, a jury could conclude that the relevant decisionmakers were aware of, and were motivated by, Plaintiff's protected activity when taking the adverse actions against Plaintiff. Again, the Court is not to put itself in the position of the trier of fact. That is the jury's role, and the jury was given specific instructions as to how to fulfill that role. (Doc. 164 at p. 32) ("In order to prove that defendants City of Cleveland's alleged explanation is a pretext for impermissible retaliation, plaintiff Edward Lentz must show both that the explanation is false and that retaliation was the real reason the defendant took the adverse action.") (emphasis in original). The jury heard all the evidence, received clear instructions, and found that Defendants unlawfully retaliated against Lentz. Again, that the Court might have reached a different conclusion is not a compelling reason to upset the jury's verdict. Accordingly, the Court does not find that there is insufficient evidence of pretext such that a reasonable jury would have to find in favor of Defendants.

**e. Municipal Liability**

As with Plaintiff's discrimination claim, the jury was instructed that, in order to find the City liable under 42 U.S.C. §§ 1981 and 1983 for the alleged retaliation, Plaintiff must show the violation resulted from any one of the following: (1) a policy statement or decision by a policymaking official; (2) the ratification by a policymaking official of a subordinate's discriminatory decision; or (3) a custom that is a widespread, well-settled practice that constitutes a standard operating procedure of the City. (Doc. 164 at p. 33; Tr. at 1376). Like the discrimination claim, the jury was instructed that the Mayor and the Safety Director (but not the Chief of Police) had policymaking authority. (*Id.*)

The jury concluded that municipal liability existed in this case, though it was not required to indicate on which of the above theories it based its decision. Based on the evidence presented, there are two potential theories the jury could have used to reach its decision. First, as with Plaintiff's discrimination claim, the evidence showed that Director Draper personally ratified the departmental charges and amended departmental charges brought against Lentz. As such, his decision or ratification constitutes City policy for purposes of *Monell* liability. Second, there is sufficient circumstantial evidence, discussed above, *supra* Part II.B.2.a, that policymakers and decisionmakers discussed Lentz's case such that a jury could infer that there had been ratification of a decision to unlawfully retaliate against Lentz. Given the existence of such evidence, the Court must defer to the jury's verdict.

Accordingly, for the reasons stated above, the Court finds that there is sufficient evidence to support the jury's finding that Defendants are liable for Plaintiff's claim of retaliation, including the

jury's finding of municipal liability.[20]

**3. Evidentiary Rulings**

Next, Defendants challenge the Court's rulings with respect to certain of their motions in limine. In addition, Defendants argue that Plaintiff impermissibly went beyond some of the Court's limiting instructions in some situations. They argue that these errors and violations improperly affected the presentation of the evidence. Although never expressly stated, presumably Defendants believe that these evidentiary errors warrant judgment in their favor or a new trial.

The standard to review Defendants' arguments is set forth in Fed. R. Civ. P. 61:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

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[20] Even if the Court found that there was insufficient evidence for the jury's finding as to retaliation, upsetting the jury's verdict on that one claim likely would not reduce the judgment award. Plaintiff alleges the same adverse actions and same injury for each claim: the extended gymnasium duty and accompanying negative effects, both financially and emotionally. The jury was not asked to divide its award by claim, and, although Defendants proposed jury interrogatories to that effect, they did not object to their absence in the verdict form. Indeed, allowing the jury the possibility of awarding damages for each claim likely would run afoul of the rule against double recovery, as each claim alleges the same injury. *See Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 581 (6th Cir. 1994) ("If two claims arise from the same operative facts, and seek identical relief, an award of damages under both theories will constitute double recovery . . . . (quoting *U.S. Industries, Inc. v. Touche Ross & Co.*, 854 F.2d 1223 (10th Cir. 1988), *implied overruling on other grounds recognized by Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996)). The jury was even instructed to that effect. (Doc. 164 at p. 37) ("[E]ven if you determine the plaintiff has proven both of his claims, you can only award damages for the plaintiff that the plaintiff has actually suffered. You cannot award 'double damages' merely because the plaintiff has proven both of his claims.").

The Court addresses each of Defendants' arguments in turn.

**a. Witnesses**

Defendants argue that the Court erred in permitting Officer Joseph Paskvan, Officer James Simone, attorney Patrick D'Angelo, and union president Robert Beck to testify in this matter. Defendants' arguments, however, read like a summary of the Court's evidentiary ruling rather than an argument as to why the ruling was prejudicial or "inconsistent with substantial justice." Indeed, Defendants do not even attempt to argue how the testimony of these witnesses affected the jury's determination.

First, the Court notes that, although the Court ruled that D'Angelo could testify, he was not called during trial. Defendants, therefore, cannot argue that any prejudice flowed from the Court's ruling, even if erroneous. As to Officer Paskvan, Defendants argue that Paskvan's testimony is irrelevant because he is not similarly situated to Plaintiff. As is clear from the record, the Court carefully limited the scope of Paskvan's testimony to remove any potential prejudice to Defendants, but permitted him to testify as to some of his personal experiences as it relates to his own gymnasium duty following a shooting incident. (Tr. at 5). Given Defendants repeated contention that imposing gymnasium duty on an officer was akin to doing that officer a favor, testimony from officers who actually experienced such assignments was certainly relevant. Paskvan's testimony during trial conformed to the Court's limitations on it. For these reasons, and the reasons explained by the Court in ruling on Defendants motion in limine, (tr. at 4-8), the Court finds no prejudice in permitting Paskvan to testify in this matter.

As to Officer Simone, Defendants argue that Simone testified about his general opinions rather than his personal experiences despite not being identified as an expert. Defendants admit,

however, that the Court carefully circumscribed the scope of Simone's testimony when it permitted him to testify, (Transcript from 1/11/07 Final Pretrial ("Final Pretrial Tr.") at 60-61), and it further limited his testimony during trial, sustaining Defendants' objections to certain questions and reminding both Simone and Plaintiff's counsel about the permissible parameters of Simone's testimony, (Tr. at 483-91). Given the careful limiting of Simone's testimony, the Court sees no substantial injustice that flowed from permitting him to testify.

As to Beck, Defendants also argue that he was permitted to present generalized "opinion" testimony. Again, however, the Court limited Beck to testifying as a fact witness regarding his personal experiences. During trial, the Court reigned in Beck's testimony when he began to stray from these limitations by sustaining Defendants' objections and reminding the witness about the permissible scope of his testimony. (Tr. at 752) (COURT: "Mr. Beck, only testify to facts. Not to your feelings."). Again, given these limitations, there is no prejudice that resulted from Beck's testimony.

**b. News Stories**

Defendants moved in limine to prevent Plaintiff from presenting as evidence certain newspaper articles and television news clips to the jury. The news stories pertained to the media attention and public outcry surrounding police shootings in the City of Cleveland in late 2001 and 2002. Some, but not all, specifically referred to Lentz's case. Defendants argued that the news stories were hearsay, irrelevant, and prejudicial. The Court denied Defendants' motion, finding that they were not being offered for the truth of the matter they asserted, and that they were relevant to show public concern and media attention surrounding the shooting incident as well as to support Plaintiff's contention that all relevant policymakers were aware of, and concerned about, everything

related to that incident, including any punishment meted out to Lentz. (Tr. at 2-3). The Court, however, noted it would restrict the manner in which they were used to diminish any potential prejudice to Defendants. (*Id.*) At trial, the Court restricted Plaintiff to showing only one of the fifty television news clips to the jury, and allowed Plaintiff only to summarize the rest in one brief document. (Tr. at 1056-57). Only the single news clip and the document summarizing the stories was admitted into evidence and given to the jury during deliberations. When the jury requested the additional news clips, the Court did not grant the request. Despite these limitations, Defendants complain that the Court erred in its rulings.

The only argument Defendants present (as separate from the rest of its brief on this point, which is only a summary of the Court's rulings and presentation of evidence) is that, based on the jury's request to see all the newscasts, it is "highly probable" the jury wanted to see the clips for the truth of the matter they assert. There is no reason to accept Defendants' speculation. It is equally likely that they wanted to better determine the extent of media coverage and public outcry. In any event, they were not given the rest of the news clips. Even if they accepted the one clip they did view for the truth of the matter asserted, Defendants do not explain how that is so prejudicial as to require a new trial.[21] For those reasons, and the reasons stated by the Court when it denied Defendants' motion in limine, the Court must reject Defendants' argument on this issue.

**c. EEOC Charge**

Defendants moved in limine to prevent Plaintiff from referring to the City's alleged release of his medical records. It was this alleged release that caused Lentz to file a grievance and an EEOC

[21] Indeed, much of the substance of the news clip, if believed, was actually unflattering to Plaintiff.

charge, which are the protected activities to which the parties stipulated for purposes of Lentz's retaliation claim. The Court denied the motion limine, but strictly limited Plaintiff's ability to refer to the alleged release of the medical records. (Final Pretrial Tr. at 22). In addition, the Court gave the jury a thorough and clear limiting instruction during trial when Lentz testified in relation to his EEOC charge. (Tr. at 110-11). Given the limitations the Court applied to this evidence, and the careful instruction it gave to the jury, the Court does not find that reference to the EEOC charge was so prejudicial as to require a new trial, or that it was prejudicial at all for that matter.

Defendants' other primary complaint with respect to the EEOC charge is Plaintiff's reference to certain letters containing settlement requests. One is a November 2002 letter sent to the EEOC from Patrick D'Angelo, the attorney representing Lentz in connection with his EEOC charge. (Pl. Ex. 45). The other is a letter sent from D'Angelo directly to the City on January 23, 2003, a letter that was not included by Plaintiff in his trial exhibits. Defendants claim that reference to these letters went beyond the Court's limiting instruction with respect to the EEOC charge, and that they were prejudiced because Plaintiff indicated that the January 23, 2003 letter was actually received by the City, when the letter itself was not in evidence and there was nothing to indicate to whom the letter was addressed.

First, the Court notes that Defendants' argument regarding these letters does not actually relate to the prejudice that flowed from permitting reference to the EEOC charge; rather it relates to the sufficiency of the evidence for Lentz's retaliation claim. Specifically, Defendants argue that no relevant decisionmaker was aware of Lentz's protected activity, and that these letters should not be used as evidence of knowledge. Indeed, there is no substantive information in the November 2002 letter, the only letter the jury viewed, that adds more information about the EEOC charge than the

jury already knew. The jury was instructed that Lentz had a good faith belief that the City released his medical records, but that, later, it was determined that there was no evidence that the City did so. (Tr. at 110). The settlement demand is consistent with Lentz's good faith belief that the City had violated his rights.

As to the City's argument that these letters should not be used to show that the relevant officials were aware of Lentz's protected activity, that argument is without merit. The jury was free to infer that other City officials, outside of the City's law department, were aware of a formal letter sent by Lentz's attorney to the City. Likewise, Defendants were free to cross-examine Lentz about the letters and present evidence to the jury that the relevant decisionmakers assert they were not aware of them. Simply because Defendants would like the jury to accept their arguments does not mean that evidence that points to a different conclusion is improper. The Court, therefore, does not find that there was any error allowing evidence of these letters.[22]

**d. Grand Jury**

Defendants filed a motion in limine to prevent Plaintiff from referring to the grand jury proceedings in which the grand jury returned an indictment on the misdemeanor falsification charge against Lentz, but not on the felonious assault charge. Defendants sought to exclude reference to those proceedings as well as to the prosecutor's thought process. Defendants complain that the jury

[22] Defendants also made passing reference in their motion in limine, as well as in their present motion, that these letters constitute conciliation efforts by the EEOC that may not be used in a "subsequent proceeding." *See* 42 U.S.C. § 2000e-5(b). These letters, however, were from Lentz's attorney to the EEOC and from Lentz's attorney directly to the City. The plain language of the statute that Defendants' cite pertains only to conciliation efforts by the EEOC, not to settlement demands by a private party. Notably, Defendants did not argue in their motion in limine, or now, that these demands should be excluded pursuant to any Federal Rule of Evidence.

in this case might have believed that, because the grand jury did not return an indictment on the felonious assault charge, Prosecutor Watson had no probable cause to bring the charge in the first instance.

The Court denied Defendants' motion, reasoning that Plaintiff did not seek to introduce the actual substance and details of the grand jury proceedings, but merely the result of those proceedings - i.e., the fact that the grand jury decided not to indict on the felonious assault charge. As the Court indicated when it denied Defendants' motion, Defendants were free to tell the jury that a failure to return an indictment does not necessarily mean that there was no good faith basis to submit the charge to the grand jury in the first instance. (Final Pretrial Tr. at 50-51). Indeed, Defendants elicited testimony from Prosecutor Watson that the grand jury's decision not to indict on the felonious assault charge is not a repudiation of Watson's decision to charge Lentz, but a common occurrence in the grand jury system. (Tr. at 1158-59). Thus, although the Court does not find that permitting limited reference to the grand jury proceedings was erroneous, even if it was erroneous, Defendants cannot claim any prejudice. Having taken advantage of the opportunity to explain their position to the jury, Defendants removed any potential prejudice.

In addition, evidence of the result of the grand jury proceedings is relevant to the decision by Director Draper to ratify amended departmental charges after the grand jury's decision. In other words, even though the most serious criminal charge against Lentz had been no-billed by the grand jury (and after the lesser misdemeanor offense had been dismissed), Lt. Klimak requested, and Director Draper ratified, amended departmental charges against Lentz, despite being aware of the grand jury's decision. The result of the grand jury proceeding, therefore, speaks directly to Defendants' position that departmental charges cannot be evidence of discriminatory or retaliatory

intent because departmental charges "automatically" flow after criminal charges are filed. The fact that the departmental charges did not mirror the criminal charges, and were not "automatically" withdrawn after the grand jury refused to indict on at least some of the matters upon which the departmental charges were allegedly premised is highly relevant to this point.

**e. Dr. Steinberg**

Defendants reiterate their objection to the Court's decision to allow Dr. Joel Steinberg to testify about the emotional and psychological harm that he believes Lentz has suffered as a result of the City's actions. They do nothing more, however, than cite to the reasons in their motion in limine to exclude Dr. Steinberg that the Court has already rejected. Most of the City's arguments in its motion were general attacks on Steinberg's conclusions rather than his methodology, and they are clearly matters that go to weight and credibility, rather than admissibility, of his evidence. Defendants had ample opportunity to cross-examine Dr. Steinberg regarding the issues they raised in their motion, and they covered many of those issues. Accordingly, for those reasons, and for the reasons stated by the Court when it denied Defendants' motion in limine, this argument must again be rejected.

**f. Similarly Situated Employees**

Defendants argue that the Court erred in permitting evidence of the seven comparable African-American officers who Plaintiff argued were similarly situated but treated more favorably. Defendants first contend that these officers were not properly disclosed, and were not similarly situated as a matter of law and should not have been presented to the jury. For the reasons stated by the Court when it denied Defendants' motion, these officers were sufficiently disclosed to be permissible witnesses. (Final Pretrial Tr. at 51-52). Also, for the reasons stated above, *supra* Part

II.B.1.c, the Court rejects Defendants' argument that these officers were not similarly situated as a matter of law.

Defendants also argue that the jury could have assumed that these officers were, in fact, similarly situated because they were permitted to testify and/or the jury was permitted to see their UDF files. According to Defendants, that risk is especially acute because there was not a separate jury instruction as to what makes one similarly situated. First, the jury was instructed that Lentz must show that "he was treated differently than other, similarly situated non-white officers." (Doc. 164 at p. 23; Tr. at 1365). Defendants did not object to this instruction at the attorney charge conference, nor did they request a separate instruction on the "similarly situated" element. Indeed, even Defendants' own proposed instructions did not contain a separate instruction on this element. (*See* Doc. 133). Defendants cannot now assert that the Court erred in not providing one. Moreover, Defendants' contention that the jury might have *assumed*, apparently without deciding, that these officers were similarly situated is mere speculation; there is no reason to believe that assertion. Accordingly, Defendants' argument on this issue must be rejected.

**g. Criminal Charges**

Defendants moved in limine to exclude reference to the filing of criminal charges as an adverse employment action. The Court granted Defendants motion in part, in that it excluded reference to the criminal charges as an adverse employment action for purposes of opening statements, and reserved the question of how the jury would be charged on that issue until it heard all the evidence. (Final Pretrial Tr. at 46-47). In addition, the Court ruled that those charges could be referred to during trial because, according to Defendants, they were so closely tied to the departmental charges, they required discussion to put the reasons for the departmental charges in

context. (*Id.* at 47). Ultimately then, the Court concluded that the jury could not consider the filing of criminal charges as an adverse employment action, and instructed the jury only that the gymnasium duty and the departmental charges constituted the adverse employment actions.

Despite receiving a mostly favorable ruling on their earlier motion, Defendants now complain that the reference to criminal charges during the course of the trial might have misled the jury into believing that those charges were a part of the action for which the City was liable. Aside from the fact the jury was specifically instructed that only the gymnasium duty and the departmental charges constituted the adverse employment actions in this case, Defendants necessarily had to reference the criminal charges as a key component of their defense. Defendants argued throughout trial that departmental charges flow automatically from criminal charges. Presumably, Defendants would have preferred the Court to rule that only Defendants can refer to the criminal charges to absolve their conduct, but not permit Plaintiff to question that conduct. The Court's failure to take that unreasonable course of action can hardly be a basis for a new trial. Accordingly, the Court rejects Defendants' argument on this issue.

**4. Conclusion and Overview of Sufficiency of the Evidence**

This case is one which highlights the importance of letting certain matters go to trial and play out in front of a jury. Defendants' written descriptions of the events at issue, both pretrial and now post-trial, paint a very different picture than that actually developed through the evidence presented at trial. Indeed, based on the parties' written pretrial submissions, this Court had its doubts about Plaintiff's ability to establish certain critical elements of certain of his claims. Thus, while the Court felt that genuine issues of fact prevented judgment in Defendants' favor as a matter of law, the Court went into the trial believing Defendants might ultimately prevail in the jury battle over those material

issues.

Despite receiving numerous favorable evidentiary rulings from this Court, and similarly favorable cautionary instructions to the jury, however, the trial simply did not unfold as Defendants had hoped. Safety Director Draper was quite candid in his description of the level of concern caused by and, thus, given to, the Lentz shooting. These descriptions were confirmed by substantial circumstantial evidence from which the jury could infer that virtually nothing about these events, and particularly the officer involved therein, went unnoticed by the City's relevant decision-makers. Against this backdrop are both the fact that the job of ferreting out intent and motive are quintessentially questions for the jury, and that those questions largely turn on credibility determinations, which the jury must be left free to make as it sees fit.

The evidence in this case[23] can be fairly interpreted in more than one way, and the credibility of at least certain of Defendants' witnesses was open to fair attack.[24] That the jury may have doubted

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[23] Interestingly, Defendants vigorously sought, and continue to seek, exclusion of virtually all evidence which might undercut their own explanations for their actions with respect to Officer Lentz. Again, while improper evidence should certainly be excluded from a jury's consideration, evidence is not rendered improper merely because it is inconsistent with the defendants' theory of the case.

[24] One key witness, Lt. Klimak, warrants specific discussion. Although the cold record will not bear out his demeanor on the stand, even the cold record shows the absurdity of some of his testimony when contrasted with the other testimony the jury heard. For example, the jury heard testimony from several officers - not just Lentz - that the police gymnasium was dirty and cold, that one officer wore a prison uniform to report to the gymnasium to express his feelings about it, and that officers would not want to spend one year there, much less two years. In contrast, Lt. Klimak testified that the gymnasium is "not an unpleasant experience," that gymnasium time is time spent "getting to be buff" for which people "spend big money," and that "You could have put me there for two years and I wouldn't have complained." (Tr. at 600-01). Such testimony, in the face of contradictory statements from so many witnesses, combined with his overall demeanor, could lead a reasonable jury to conclude that his testimony was unreliable.

Defendants' explanations for their actions, or have interpreted the evidence differently than Defendants asked them to, does not render the verdict suspect.

This is why we have juries and why, barring extreme circumstances, we must give deference to the decisions they make. For the reasons stated and those reflected in the Court's rulings at trial, Defendants' motions for judgment as a matter of law, or, alternatively, for a new trial, must be denied.

## III. MOTION TO AMEND THE JUDGMENT (REMITTITUR)

In the alternative, Defendants also request that the Court reduce the present judgment because it is not supported by the evidence. For the reasons briefly stated below, Defendants' alternative motion must be denied.

### A. Legal Standard

As a general rule, the Sixth Circuit has held that "a jury verdict will not be set aside or reduced as excessive unless it is beyond the maximum damages that the jury reasonably could find to be compensatory for a party's loss." *American Trim, LLC v. Oracle Corp.*, 383 F.3d 462, 475 (6th Cir. 2004) (quoting *Farber v. Massillon Bd. of Educ.*, 917 F.2d 1391, 1395 (6th Cir. 1990). A trial court is within its discretion in remitting a verdict "only when, after reviewing all the evidence in the light most favorable to the prevailing party, it is convinced that the verdict is clearly excessive; resulted from passion, bias, or prejudice; or is so excessive or inadequate as to shock the conscience of the court." *Id.* "If there is any credible evidence to support a verdict, it should not be set aside." *Id.*

### B. Discussion

After finding Defendants liable for both discrimination and retaliation, the jury concluded

that Lentz should be awarded $800,000 to compensate him for his injuries. (Verdict, Doc. 166 at p. 5). The jury was not required to assign specific amounts to specific injuries - e.g., a specific amount for lost economic opportunities or for emotional distress. Neither party objected to the absence of interrogatories requesting that the jury parse out its award, and Defendants do not challenge the absence of those interrogatories now. Indeed, by failing to object formally on the record at the jury charge conference, Defendants have waived their right to raise such a challenge at this point. *See* Fed. R. Civ. P. 51(c); *Roberts v. City of Troy*, 773 F.2d 720, 723 (6th Cir. 1985) ("Under Rule 51, Fed.R.Civ.P., failure to object waives the right to appeal from an incorrect instruction."); *see also Preferred RX, Inc. v. Am. Prescription Plan, Inc.*, 46 F.3d 535, 548 (6th Cir. 1995) ("Even though defendants' principal quarrel is with the interrogatories rather than the charge itself, their obligation to formally object and state their position was not lessened.").[25]

Defendants now ask the Court to amend the judgment award in this case on the basis that it is not supported by the evidence presented at trial. They do not, however, suggest an alternative amount. In support of their argument, Defendants argue that some of Lentz's claimed economic losses are not supported by the evidence, his emotional distress does not amount to $800,000 in damages, the award constitutes improper punitive damages, and Lentz failed to mitigate his damages by requesting to be released from the gymnasium or seeking secondary employment.

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[25] As indicated above, *supra* n.17, Defendants did propose interrogatories requesting a parsed out award with their proposed jury instructions. However, Defendants did not object to the absence of these interrogatories in the verdict form. Although Defendants do not attempt to make this argument, the Court notes that merely offering an instruction clearly does not preserve a later objection to different instructions. *See Roberts v. City of Troy*, 773 F.2d 720, 723 (6th Cir. 1985) (rejecting argument that a party "implicitly objected by offering a different instruction"); *see also Woodbridge v. Dahlberg*, 954 F.2d 1231, 1237 (6th Cir. 1992) ("The law in this circuit generally requires a formal objection").

As an initial matter, the Court notes that most of Defendants' arguments are misplaced. Having not objected to the absence of interrogatories requiring the jury to parse out its award, Defendants are left without firm ground to argue that any particular basis for the jury's award is without support. For example, Defendants argue that about $11,000 of the $40,000 of Lentz's claimed lost economic damages were, in fact, returned to Lentz as unpaid overtime when he was reinstated. As such, Defendants contend that Lentz was not entitled to that particular portion of his claimed economic losses. Without knowing how much of the award was tied to lost economic damages (as opposed to emotional distress), it is entirely possible that the jury accepted Defendants' argument and still awarded the remainder of the $800,000 to compensate Plaintiff for his emotional distress. As the verdict form reads, there was no way for the Court to determine that calculation and, therefore, no basis to grant the relief Defendants request.

Similarly, perhaps the jury, at Defendants' urging, did not believe that Lentz was prevented from seeking, or actually would have sought, secondary employment as a mason, such that he cannot claim $52,000 in lost secondary employment opportunities. It is possible that the jury could have accepted that argument but still awarded $800,000 to Lentz for emotional distress. The verdict form, on its face, simply does not lend itself to such attacks.

Likewise, Defendants also have no basis to contend that, in determining the amount to be awarded for emotional damages, the jury improperly considered certain "stressors" that are not legally attributable to the City. Despite admitting that "[t]he Court was very clear in that the only grounds for which the City could be potentially liable were the gymnasium stay and departmental charges," (Doc. 175 at p. 52), Defendants argue that the jury improperly awarded Lentz damages on account of actions for which the City could not be liable, such as the filing of criminal charges

or the release of medical records. Defendants, however, had every opportunity to point out to the jury that Plaintiff's expert, Dr. Steinberg, should discount these actions in determining the emotional injury Plaintiff suffered as a result of the City's actions. Indeed, Defendants made that point both on cross-examination of Dr. Steinberg and in closing argument. (Tr. at 362-63, 1331).

In any event, because we are left with an award of a single figure, not attributed to specific injuries, Defendants have no basis to contend that the jury improperly considered one factor or another. It is equally possible that the jury considered Defendants' arguments and "remitted" its own verdict - i.e., that it decided that the total emotional distress Lentz suffered should be compensated in the amount of $3.5 million, for example, but the portion attributable to actionable wrongs only amounts $720,000 or $770,000, or whatever amount it concluded. In short, because Defendants failed to request interrogatories that would itemize the jury's damage award, it is left without any basis to challenge specific evidence that the jury did or did not consider. It has, moreover, waived even the ability to argue that the Court erred in not including such interrogatories.

One final point is worth noting. Defendants argue that the jury award constituted improper punitive damages. Aside from arguing that Plaintiff's counsel may have urged an award that is punitive in nature in closing argument, Defendants provide no support for their argument. The Court clearly instructed the jury on damages, noting in two separate places that any damage award "must compensate him only for the damages he suffered, no more and no less," and that damages "must be fair compensation, no more and no less." (Doc. 164 at pp. 37, 38; Tr. at 1378, 1379). The Court has no reason to believe that the jury did not understand or follow those instructions.

Accordingly, for the reasons stated above, the Court must deny Defendants' motion pursuant to amend the judgment.

## IV. MOTION FOR PREJUDGMENT AND POST-JUDGMENT INTEREST

Finally, Plaintiff moves for prejudgment and post-judgment interest on the jury award of $800,000. For the reasons stated below, the Court denies Plaintiff's request for prejudgment interest and grants his request for post-judgment interest.

### A. Prejudgment Interest

A post-judgment motion for prejudgment interest should be treated as a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e). *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175 (1989).[26] In the Sixth Circuit, "the award of prejudgment interest is within the discretion of the trial court." *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1170 (6th Cir. 1996) (citing *E.E.O.C. v. Wooster Brush Co. Employees Relief Ass'n*, 727 F.2d 566, 579 (6th Cir. 1984)). "Prejudgment interest helps to make victims of discrimination whole and compensates them for the true cost of money damages they incurred." *E.E.O.C. v. Wilson Metal Casket Co.*, 24 F.3d 836, 842 (6th Cir. 1994) (citing *West Virginia v. United States*, 479 U.S. 305, 310 (1987)). Prejudgment interest is commonly awarded to back pay awards. *Thurman*, 90 F.3d at 1170 (citing *Wooster Brush*, 727 F.2d at 579).

In this case, the Court declines to award prejudgment interest to Plaintiff. Although there is support for the proposition that prejudgment interest should apply to all past injuries, including emotional injuries, *see Thomas v. Texas Dept. of Criminal Justice*, 297 F.3d 361, 372 (5th Cir. 2002), the somewhat unique nature of Plaintiff's emotional injuries renders such an award inappropriate in this case. Plaintiff's claim of emotional harm was premised on an adjustment

[26] There is no dispute that Plaintiff's motion was within the ten-day time limit imposed by Rule 59(e).

disorder with anxiety and depressed mood which, by definition, was temporary and dissipated once the causes of the disorder (gymnasium duty, among others) were no longer present. According to Plaintiff's expert, the disorder ceased prior to the filing of this lawsuit. These emotional injuries, therefore, were not injuries that Plaintiff suffered throughout the pendency of this lawsuit. In addition, the nature of the emotional harm (which is caused by a cumulation of stressors) does not lend itself to a precise start date or "date of injury" from which the Court could find that interest began to run. For that matter, there is also no precise end date when the disorder subsided. For his part, Plaintiff has not attempted to define any specific dates to guide the Court. The Court, therefore, is unable to calculate a prejudgment interest award with any certainty and must deny Plaintiff's request for such an award.

In addition, because the award was given in one amount to compensate Plaintiff for all of his injuries, both economic and emotional, the Court also cannot award prejudgment interest on only the economic injuries Plaintiff alleged (e.g., lost court time, no lunch time). It is simply not possible to parse out the award that way. Just as the general nature of the verdict form worked to the detriment of Defendants in their attempt to remit the award, it works to the detriment of Plaintiff in his request for prejudgment interest.

For these reasons, the Court concludes that Plaintiff is not entitled to pre-judgment interest.

**B. Post-Judgment Interest**

Unlike prejudgment interest, the award of post-judgment interest is not discretionary. Under 28 U.S.C. § 1961, "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." (Emphasis added). Under this statute, interest runs from the date of the entry of judgment by the court rather than from the date of the jury verdict. *Scotts Co. v. Central Garden &*

*Pet Co.*, 403 F.3d 781, 792 (6th Cir. 2005) (citing *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990)). In this case, the Court entered judgment on January 30, 2007. (Doc. 167). Accordingly, Plaintiff is entitled to post-judgment interest on the jury award of $800,000 at the statutory rate of interest, computed daily from January 30, 2007 to the date of payment.

## V. CONCLUSION

For the reasons stated above, *Defendants' Rule 50 Motion for Judgment Notwithstanding the Verdict and Alternative Motions* (Doc. 175) is **DENIED**, and *Plaintiff's Motion for Prejudgment and Post-Judgment Interest* (Doc. 174) is **GRANTED in part** and **DENIED in part**. Plaintiff is entitled to post-judgment interest on the judgment but not prejudgment interest.

In addition, the Court **TERMS** *Plaintiff's Motion for Attorney Fees and Costs* (Doc. 184) subject to reassertion after either Defendants' time to file a notice of appeal passes or, if an appeal is taken, after resolution of the appeal, whichever occurs sooner.

**IT IS SO ORDERED.**

**s/Kathleen M. O'Malley**
**KATHLEEN McDONALD O'MALLEY**
**UNITED STATES DISTRICT JUDGE**

**Dated: September 21, 2007**

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | | |
|---|---|---|
| **WARREN DAVIS,** | : | **Case No. 1:03CV1311** |
| | : | |
| **Plaintiff,** | : | **JUDGE O'MALLEY** |
| | : | |
| **v.** | : | **MEMORANDUM & ORDER** |
| | : | |
| **UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, et al.,** | : | |
| | : | |
| **Defendant.** | : | |

Plaintiff Warren Davis originally filed this action in state court against the following defendants: (1) United Automobile, Aerospace and Agricultural Implement Workers of America ("the Union"); (2) Region 2B of the Union ("Region 2B"); (3) Union President Ronald Gettelfinger; and (4) Region 2B Director Lloyd Mahaffey. In his complaint, Davis alleges that, in 1983, he was elected to the position of Director of Region 2. Davis further alleges that the UAW has an unwritten rule that a person may not hold the position of Director after age 65. Davis decided not to adhere to this rule, and ran for re-election in June of 2002, even though he was older than 65. Davis won the election. Davis alleges that the defendants then punished him for violating the age rule. Davis alleges this punishment came primarily in two forms: (1) the defendants broke up Region 2, distributed its members to other regions (including Region 2B), and eliminated the position of Director of Region 2; and (2) the defendants

issued a defamatory press release, attacking Davis and seeking to lower his reputation with Union members. Davis also alleges the defendants took these actions in retaliation for Davis's having urged other Union members to disregard the unwritten age rule.

Based on these allegations, Davis stated the following claims: (1) age discrimination, in violation of Ohio Rev. Code §4112.02; (2) wrongful discharge, in violation of Ohio public policy; (3) libel; (4) defamation; (5) retaliation, in violation of Ohio Rev. Code §4112.02; and (6) conspiracy to discriminate on the basis of age.

Currently pending are the following motions: (1) motion by defendants to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted (docket no. 5); (2) defendants' motion to transfer venue to the United States District Court for the Eastern District of Michigan (docket no. 6); and (3) motion by Davis to remand (docket no. 12). For the reasons stated below, the motion to remand is **GRANTED**, and this case is **REMANDED** to the Cuyahoga County, Ohio Court of Common Pleas, where it was originally filed. Given that the Court concludes it does not have jurisdiction over the case, the Court does not rule on the other motions, leaving them for the state court.[1]

I.

In his motion to remand, Davis boils his complaint down to its essence in two paragraphs, as follows:

[1] The Court does note, however, that the basis for defendants' motion to transfer venue has become virtually moot, as the "related case" pending in the United States District Court for the Eastern District of Michigan has been dismissed. The dismissal is currently on appeal.

> Plaintiff Warren Davis was a member of UAW since 1954, and became the Director of Region 2, an elected position, in 1983. Pursuant to UAW rule and custom, Plaintiff was expected to retire at age sixty-five. This policy is a blatant violation of Ohio law, and federal law, prohibiting discrimination on the basis of age. Plaintiff declined to retire, ran for re-election, and was re-elected by popular vote to the Region 2 Director position.
>
> Thereafter, the named Defendants publicly chastised Mr. Davis because of his refusal to leave quietly at age sixty-five, and vocally defended their unlawful policy of seeking "new and fresh" leadership, meaning persons under age sixty-five. Ultimately, Defendants eliminated Plaintiff's position by eliminating Region 2 entirely; Defendants also made defamatory statements during and after their campaign to get rid of Mr. Davis.

Memo. in support at 1 (emphasis in original). Davis then explains that, even though the defendants' actions allegedly violated "Ohio law, and federal law, prohibiting discrimination on the basis of age," he chose to state "six causes of action, all of which are based on state law," and not to state any federal law claims. Id. (emphasis added).

Despite Davis's choice to bring only state-law claims, the defendants removed the action to this Court. Defendants give two reasons why the case is properly removed to this Court. First, defendants assert that "adjudication of Davis'[s] claims implicate and will require substantial interpretation of numerous provisions of UAW's Constitution, making this action one that is completely preempted by LMRA Section 301 and thus properly removable." Response at vi (citing Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §185). Second, defendants assert that "Title IV of the Labor-Management Reporting and Disclosure Act ["LMRDA"], 29 U.S.C. §§481-483, completely preempts Davis'[s] claim for installation in elective union office, the pay and benefits incident to that office, and the invalidation of conflicting results in other union elections." Id. The Court examines these two arguments separately.

A. LMRA Preemption.

As defendants note, LMRA "preempts state law rules that substantially implicate the meaning of collective bargaining agreement terms." DeCoe v. General Motors Corp., 32 F.3d 212, 216 (6th Cir. 1994). Under the principle of LMRA preemption, "a suit in state court alleging a violation of a provision of a labor contract must be brought under §301 and be resolved by reference to federal law." Id. (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 210 (1985)). To determine whether a plaintiff's state law claims are, in fact, subject to LMRA preemption, this Court must take a two-step approach:

> First, the district court must examine whether proof of the state law claim requires interpretation of collective bargaining agreement terms. Second, the court must ascertain whether the right claimed by the plaintiff is created by the collective bargaining agreement or by state law. If the right both is borne of state law and does not invoke contract interpretation, then there is no preemption. However, if neither or only one criterion is satisfied, section 301 preemption is warranted.

Id. (citations omitted). Further, "[i]n order to make the first determination, the court is not bound by the 'well-pleaded complaint' rule, but rather, looks to the essence of the plaintiff's claim, in order to determine whether the plaintiff is attempting to disguise what is essentially a contract claim as a tort." Id. (citation omitted). If the plaintiff can prove all of the elements of his claim without the necessity of contract interpretation, then his claim is independent of the labor agreement. Dougherty v. Parsec, Inc., 872 F.2d 766, 770 (6th Cir. 1989). "[N]either a tangential relationship to the CBA, nor the defendant's assertion of the contract as an affirmative defense will turn an otherwise independent claim into a claim dependent on the labor

contract." DeCoe, 32 F.3d at 216 (citation omitted).[2] When undertaking this analysis, the Court must strictly construe the notice of removal and resolve all doubts against removal. Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit, 874 F.2d 332, 339 (6th Cir. 1989). In addition, "[t]he party seeking removal bears the burden of establishing its right thereto." Id. (citing Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97-98 (1921).

In this case, the defendants recite four different reasons why the Court will have to interpret the Union Constitution in order to dispose of Davis's claims. First, the Court will have to examine the Constitution to determine whether Davis was "properly elected" to the position of Director of Region 2. Second, the Court will have to examine the Constitution to determine whether Davis is a "bona fide executive or high policymaker," which could exempt him from protection under the Ohio Age Discrimination statute. Third, the Court will have to determine whether the defendants' allegedly defamatory remarks were privileged by the "free speech clause" contained in the Union's ethical code. And fourth, the Court will have to examine the Constitution to determine whether Davis is entitled to reinstatement, which he requests in his prayer for relief. As explained below, the Court disagrees with the defendants on each count -- none of Davis's claims require anything more than a tangential reference to the Constitution, and will not require substantial interpretation of

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[2] In this case, the defendants premise their LMRA preemption arguments not on the implication of the meaning of a collective bargaining agreement, but on the implication of the meaning of the Union Constitution. The LMRA preemption analysis, however, remains the same. See United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada, AFL CIO v. Local 334, United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Industry of U.S. and Canada, 452 U.S. 615 (1981) (holding that a dispute implicating a union constitution could be subject to LMRA preemption); Wooddell v. International Broth. of Elec. Workers, Local 71, 502 U.S. 93 (1991) (holding that a claim by a union member that union officers violated the union's constitution could be subject to LMRA preemption).

its terms and provisions.

Addressing the first point, the defendants note that Davis alleges explicitly in his complaint that he was "properly elected" under the Union Constitution, and that the defendants "violated" the Constitution when they arranged for the position of Director of Region 2 to be eliminated. The defendants insist that proof of these allegations "indubitably will require interpretation of the Constitution's terms." Response at 9. The Court, however, disagrees that it will have to interpret the Constitution in order for Davis to prove his claims. As Davis points out, the defendants have never denied (and have no basis for denying) that Davis was elected pursuant to a regular and orderly process provided for under the Union Constitution. Admittedly, because the defendants have filed a motion to dismiss, the defendants have not formally answered Davis's allegation regarding his having been elected. But the Union does not seriously assert that Davis was not elected, and the Union never took any action challenging the validity of the election. Indeed, in the internal Union appeal brought by Davis to challenge the elimination of Region 2, the Union described the relevant facts and noted that "Davis was elected by acclamation." Union Decision at 1 (Apr. 15, 2003).[3]

More important, the critical question in this case is not whether Davis was elected, nor is it whether the defendants eliminated Davis's position. Both of these questions are questions of fact, and are not under serious dispute. Indeed, the critical question is not even whether the defendants' violated the Union Constitution by eliminating Region 2; while this question may have some evidentiary value, it is not a question that must be answered for Davis to prove all of the elements of his claims. In other words, Davis's claims for defamation, age discrimination, and retaliation do not require proof that the Union violated its own Constitution.

[3] Interestingly, the same decision notes that, although Davis also asserted that the elimination of Region 2 violated age discrimination laws, that was an issue for a court to decide. Id. at 4.

Rather, the central question is whether the defendant's actions – regardless of whether they violated the Union Constitution – were motivated by discriminatory and/or maliciously defamatory intent. The question of whether the defendants eliminated Region 2 because: (1) it was no longer needed, (2) they felt Davis acted unethically during his political maneuvering, (3) they wanted to discriminate against Davis based on his age, or (4) for some other reason, does not require a fact-finder or a Court to interpret the Union Constitution.

On this point, the Court finds instructive the case of Smolarek v. Chrysler Corp., 879 F.2d 1326 (6th Cir. 1989), cert. denied, 493 U.S. 992 (1989). In Smolarek, one of the plaintiffs (Fleming) claimed that, after he suffered an injury at work, his employer (Chrysler) purposely gave him "job assignments inconsistent with his limitations," harassed him, and finally terminated him. Id. at 1328. Fleming filed a grievance, asserting that his termination was the product of illegal discrimination and in violation of the CBA. Fleming also filing a complaint in state court, asserting claims for: (1) violation of the Michigan statute that outlawed discrimination against the handicapped (known as "HCRA"); (2) retaliation for stating an intention to file a worker's compensation claim; (3) breach of the implied duty of good faith and fair dealing; and (4) intentional interference with employment relations. Although all of these claims were premised on state law, Chrysler removed the case to federal court, citing LMRA preemption. The Sixth Circuit Court of Appeals, however, held that the case had to be remanded to state court. The Smolarek court reasoned as follows:

> To defend against the HCRA charge, Chrysler must show that its actions were motivated by some factor other than Fleming's handicap. We recognize that Chrysler is likely to assert as its defense to Fleming's claim that it based its actions on the provisions of the labor agreement regarding reinstatement and accommodation. Even this defense, however, does not require a finding of preemption. In order to resolve the HCRA claim in light of this defense, a court need only decide whether Chrysler took actions adverse to Fleming because of his handicap or rather solely because Chrysler felt bound by the union agreement to take the actions or for some other legitimate reason. It is not necessary to decide at the outset whether or not Chrysler's interpretation of the agreement is correct as a matter of federal labor law. The

> question is a factual one: What was Chrysler's motivation? Under [Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 108 S. Ct 1877 (1988)], therefore, Fleming's HCRA claim is sufficiently "independent" of the collective bargaining agreement to escape §301 preemption, for "resolution of the state-law claim does not require construing the collective-bargaining agreement." 108 S. Ct. at 1882 (emphasis added) (footnote omitted).

Smolarek, 879 F.2d at 1334.

Also, in Smolarek, the court examined a discrimination claim by a different plaintiff (Smolarek), who asserted that, after he suffered a seizure at work, his employer of 30 years terminated him illegally. Id. at 1328. Smolarek did not assert a claim that Chrysler violated the CBA. Rather, Smolarek filed a complaint in Michigan state court, alleging handicap discrimination under HCRA and workers' compensation retaliation. Defendant Chrysler removed the case, citing LMRA preemption; Chrysler argued that Smolarek's claim was "'substantially dependent' on interpretation of the collective bargaining agreement's provisions regarding an employee's right to reinstatement following disability leave." Id. at 1332. Chrysler even characterized Smolarek's discrimination claim as, in actuality, a disguised claim for breach of the CBA. Id. The Sixth Circuit Court of Appeals rejected Chrysler's arguments, and held remand was appropriate:

> The fact that the collective bargaining agreement contains a provision regarding reinstatement does not compel a finding of §301 preemption. * * * Even if Smolarek may have been able to charge Chrysler under these circumstances with a violation of the collective bargaining agreement, he did not choose to do so and this does not mean that §301, even if applicable but not utilized by plaintiff, preempts the claim. * * *
>
> Chrysler may, in its own defense, assert that its treatment of Smolarek was allowed or required by the terms of the collective bargaining agreement and therefore was not based on Smolarek's handicap. The assertion of a defense requiring application of federal law, however, does not support removal to federal court:
>
> > It is true that when a defense to a state claim is based on the terms of a collective bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives. But the presence of a federal question, even a §301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule – that the plaintiff is the master of the complaint, that a federal question

> must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.

Id. at 1332-33 (quoting Caterpillar, Inc. v. Williams, 482 U.S. 386, 398-99 (1997)). See also Knafel v. Pepsi-Cola Bottlers of Akron, Inc., 899 F.2d 1473, 1483 (6th Cir. 1990) ("Whether Pepsi harassed Knafel so outrageously as to cause her emotional distress and physical injury is a question that the district court can decide without interpreting the collective bargaining agreement. The LMRA does not deprive an employee of all common law rights of action"); LaPointe v. United Autoworkers Local 600, 8 F.3d 376, 381 (6th Cir. 1993) ("the ADEA action is not preempted by section 301 of the Labor Management Relations Act because 'employees have the right not to be discriminated against on the basis of age or handicap without regard to the collective bargaining agreement's language about an employee's rights'").

The holding of Smolarek applies directly to this case. It is true that the defendants will certainly point to (indeed, have pointed to) certain provisions in the Union Constitution and argue that those provisions, and not any discriminatory motive, excuse or explain why they took the actions they did. But this defense does not require substantial interpretation of the Constitution itself. Even if there is some interpretation of the Constitution that is required, it will be minimal and tangential to the claims Davis asserts. Simply, Davis's stated causes of action are "state[-law] claim[s], sufficiently set out as separate and apart from a [claim of violation of the Union Constitution], and thus avoid[] preemption." Id. at 1331. As such, the defendants' removal of this case to federal court based on LMRA preemption, premised on the need to interpret the Union Constitution's provisions regarding Davis's election, was not properly grounded.

Essentially the same analysis applies to the defendants' second point – that, because Davis has alleged he is not a bona fide executive or high policymaker, the Court will have to interpret the Union Constitution.

As defendants note, the Ohio Age Discrimination statute states that it is not illegal "for any employer . . . or labor organization to . . . [r]etire an employee who has attained sixty-five years of age who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position . . . ," if the employee is entitled to an annual pension of at least $44,000.00. Ohio Rev. Code. §4112.02(O)(3). Davis affirmatively alleges he does not fall within this exception. Complaint at ¶10. The defendants assert that the Union Constitution contains a number of provisions defining the power of the International Executive Board, of which Davis was a member; accordingly, the defendants insist that "[e]ach of these Constitutional provisions must be interpreted against the statutory definitions of bona fide executive and high policymaker." Response at 11-12. Once again, however, the defendants' reliance upon the Constitution as an affirmative defense does not turn Davis's independent claims into labor contract claims. Whether Davis meets the legal requirements for the "bona fide executive" exemption will require a simple factual analysis. The question of what powers the Union Constitution gave to Davis may well have important evidentiary value regarding the applicability of the exemption set out in §4112.02(O)(3). But the extent of the duties and responsibilities accorded to Davis under the Union Constitution is not a question that requires substantial interpretation of that document, nor is it a question that must be answered for Davis to prove all of the elements of his claims.

The defendants' third point is that the "Ethical Practices Code" ("EPC") contained in the Union Constitution arguably invested them with a legal privilege to issue their allegedly defamatory remarks, and the Court will have to interpret the EPC to determine the scope of this privilege. This argument is also unavailing. The provision to which the defendants point states:

> Each member shall have full freedom of speech . * * * Each member shall have the right freely to criticize the policies and personalities of Union officials; however, this right does not include the right to undermine the Union as an institution; to vilify other members of the Union

> and its elected officials or to carry on activities with complete disregard of the rights of other members and the interests of the Union . . . ."

Constitution at 140, EPC §1. As an initial matter, this provision explicitly limits the free speech "rights" of Union members, excluding the right to "vilify" other members – which obviously incorporates exclusion of the "right" to defame or slander. Thus, any arguable privilege of the defendants to criticize Davis is exactly contiguous with Davis's common-law right to be free from defamation. Further, an ethical code promulgated by a union cannot supercede state law. Unlike the situation in DeCoe, 32 F.3d at 216, the defendants' remarks in this case were not made during the course of grievance procedures required by a collective bargaining agreement. While the defendants' statements in DeCoe were arguably contractually mandated, and thus arguably privileged, the EPC in this case merely sets out aspirations. Interpretation of the CBA was required in DeCoe to determine the scope of the plaintiff's rights; interpretation of the EPC in this case is not required to determine whether the defendants defamed Davis. Again, the question of whether the defendants violated the EPC may have some evidentiary value, but it is not a question that must be answered for Davis to prove all of the elements of his defamation claims.

Finally, the defendants' fourth point is that Davis seeks, among other things, reinstatement, and the Court will have to interpret the Union Constitution "to determine whether the Constitutional amendment that eliminated Davis'[s] former region was properly enacted in the manner required by the Constitution." Response at 13. The defendants add that the Court will also have "to determine whether Davis is eligible to hold office under the terms of the UAW Constitution, given his subsequent retirement from Ford Motor Company." Id. The relief Davis seeks, however, is not an essential element of any of his claims. "If the plaintiff can prove all of the elements of his claim without the necessity of contract interpretation, then his claim

is independent of the labor agreement." DeCoe 32 F.3d at 216. The defendants' argument that Davis, if he prevails on his substantive claims, is not entitled to reinstatement, is more in the line of assertion of an affirmative defense. Whether Davis is entitled to reinstatement is a question that neither a Court nor a jury will address, if at all, until after Davis has proved "all of the elements of his claim[s]." Id. Thus, LMRA preemption is not premised properly on Davis's prayer for reinstatement.[4]

As the Sixth Circuit has explained, an age discrimination action normally "is not preempted by section 301 of the Labor Management Relations Act because 'employees have the right not to be discriminated against on the basis of age or handicap without regard to the collective bargaining agreement's language about an employee's rights.'" LaPointe v. United Autoworkers Local 600, 8 F.3d 376, 381 (6th Cir. 1993) (quoting O'Shea v. Detroit News, 887 F.2d 683, 687 (6th Cir. 1989)). "It is irrelevant to the preemption question whether or not the employer can defend by showing it had the right under the collective bargaining agreement to do what it did." O'Shea, 887 F.2d at 687. In this case, the defendants have not shown that any of Davis's state-law claims require interpretation of the Union Constitution, or invoke rights created by the Constitution, or are in some other way dependent on the Constitution. At best, the defendants show that their affirmative defenses will require reference to the Constitution. This is not enough to obtain federal jurisdiction under LMRA preemption.

B. LMRDA Preemption.

[4] Moreover, Davis essentially moots the defendants' argument regarding LMRA preemption and reinstatement by conceding that the remedy of reinstatement is not available to him. As discussed below, Davis makes this concession during the course of arguing the viability of LMRDA preemption jurisdiction.

The defendants also argue that, in addition to being preempted by LMRA, Davis's claims are preempted by LMRDA. Congress passed LMRDA "in large part to address the growing problems of racketeering, crime, and corruption in the labor movement." Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local No. 54, 468 U.S. 491, 505 (1984). Unlike the case with LMRA, LMRDA preemption is quite narrow. Defendants concede, as they must, that "Congress did not intend to occupy the entire field of regulation, as the text of LMRDA explicitly makes reference to continued viability of state laws." O'Hara v. Teamsters Union Local No. 856, 151 F.3d 1152, 1161 (9th Cir. 1998) (citing 29 U.S.C. §523). Indeed, "Congress expressly provided two broad anti-preemption provisions in the LMRDA in response to objections initially raised by then Sen. John F. Kennedy (D-Mass.)." Fulton Lodge No. 2 of Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Nix, 415 F.2d 212, 215 (5th Cir. 1969) (citing 29 U.S.C. §§413 and 523) (footnotes omitted, emphasis added); see Brown, 468 U.S. at 505-06 (characterizing §523(a) of LMRDA as "an express disclaimer of pre-emption of state laws regulating the responsibilities of union officials, except where such pre-emption is expressly provided" ).

Despite the narrowness of LMRDA preemption, it does exist to the extent "expressly provided" by Congress. In particular, 29 U.S.C. §§481-83 provides that the exclusive remedy for challenging the results of a Union election is by pursuing administrative procedures prescribed by the Secretary of Labor. The defendants seek to bring this case within the ambit of LMRDA preemption by focusing, again, primarily on one aspect of the relief sought by Davis: reinstatement. After Davis was elected as Director of Region 2, the delegates to the Union's Constitutional Convention voted to amend the Constitution and eliminate Region 2, and with it Davis's position. Defendants argue that Davis, by seeking reinstatement, is essentially challenging the results of the Union Constitutional Convention delegates' vote, which he may not do by any means other

than those set out in 29 U.S.C. §§481-83. Defendants further note that, for Davis to obtain the Court-ordered reinstatement he seeks, a Court would have to choose between conflicting Union election results: "the results of the first election in which Davis was [elected as] Director of Region 2, and the results of [subsequent] elections, in which other persons were elected to serve redrawn jurisdictions which include among them portions of the UAW membership formerly in Region 2." Motion to dismiss at 12. Again, defendants note that "only the Secretary of Labor may bring an action seeking the installation in union office of a disappointed union member such as Davis, or related relief." Id. Indeed, defendants argue that even Davis's prayer for an award of back pay shows the propriety of their removal of this case under LMRDA preemption principles, because a back pay award would necessarily be attributable to Davis's valid election as Director of Region 2.

In response to the defendants' LMRDA argument, Davis concedes that the remedy of reinstatement is not available to him. Reply at 13. This goes a long way toward mooting the defendants' argument. The question remains, however, whether Davis's prayer for back pay, alone, gives rise to LMRDA preemption. The defendants do cite a single unreported case lending some support to this position. See Bermingham v. Castro, 1999 WL 644342 at *2 (9th Cir. 1999) ("although Bunting is not seeking to set aside the December 1989 election, the damages that he seeks for lost income and benefits attributable to the business agent position effectively challenge the validity of the election already conducted, which is an area in which Title IV provides the exclusive remedy").

The Court concludes, however, that the nature of the relief requested by Davis, alone, does not create federal preemption jurisdiction. The LMRDA is careful to state that, "except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer

. . . of a labor organization . . . under the laws of any State . . . ." 29 U.S.C. §523(a). "Generally speaking, [Ohio] law imposes a responsibility on employers, including unions, to refrain from discharging an employee on the basis of . . . age over 40." Smith v. International Brotherhood of Electrical Workers, 109 Cal.App.4th 1637, 1653, 1 Cal.Rptr.3d 374, 385 (Cal. Ct. App. 2003) (emphasis added). As the Smith Court noted,

> [b]ecause the LMRDA does not "explicitly provide to the contrary," these responsibilities [not to discriminate or retaliate] are neither "reduced" nor "limited" by the provisions of the Act. As a logical corollary, neither are the state's means of enforcing these responsibilities reduced or limited by the Act. Therefore, the LMRDA does not preempt an action against a union for unlawful discharge based on age . . . .

Id. Moreover, there is no direct conflict between federal law and the state laws allegedly violated by the defendants in the present case. "Nothing in the LMRDA even remotely condones the practice of age . . . discrimination on the part of elected union officials." Id. To adopt the defendants' argument, merely because Davis prayed for back pay as one measure of the damages he suffered due to the defendants' allegedly illegal actions, he may not pursue his state law claims against them. This argument reads too much into Davis's prayer for relief.

Ultimately, if Davis proves that the defendants subjected him to illegal discrimination, retaliation, and/or defamation, he is entitled to compensatory damages.[5] A state court can surely instruct a jury regarding the proper measure of those damages, according to state law. An award of damages that includes back pay would not necessarily imply, as defendants assert, that one or more of the Union's election results were invalid. Such an award could also (and would probably more accurately) imply that, regardless of the validity of the election, the defendants worked to obtain those results by pursuing discriminatory, retaliatory, and/or

[5] The Court expresses no opinion as to whether Davis might be entitled to punitive damages.

defamatory actions. Davis's state-law claims do not attack the ultimate validity of any Union election results; rather, his claims challenge the means by which the defendants secured those results. The LMRDA simply does not preempt state-law claims accusing a Union defendant of illegal acts and seeking appropriate relief. See Bloom v. General Truck Drivers, Office, Food & Warehouse Union, Local 952, 783 F.2d 1356, 1361 (9th Cir. 1986) (examining LMRDA and holding that to protect a defendant from a claim of wrongful discharge "by preempting a state cause of action based on it does nothing to serve union democracy or the rights of union members; it serves only to encourage and conceal such [illegal] acts and coercion by union leaders").

II.

In sum, the Court concludes that neither LMRDA nor LMRA preempt Davis's state law claims. Accordingly, the defendants' removal of the case to this Court was not well-taken, and Davis's motion to remand must be granted. Finally, the Court concludes that, in the circumstances presented, an award to Davis of attorneys' fees and costs under 28 U.S.C. §1447 is not appropriate.

**IT IS SO ORDERED.**

**s/Kathleen M. O'Malley**
**KATHLEEN McDONALD O'MALLEY**
**UNITED STATES DISTRICT JUDGE**

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

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| **CSX TRANSPORTATION, INC., et al.,** | : | **Case No. 1:02CV2394** |
| | : | |
| **Plaintiffs,** | : | **JUDGE O'MALLEY** |
| | : | |
| **v.** | : | **MEMORANDUM & ORDER** |
| | : | |
| **UNITED TRANSPORTATION UNION, et al.,** | : | |
| | : | |
| **Defendants.** | : | |

On December 6, 2002, Plaintiffs CSX Transportation, Inc. and Consolidated Rail Corporation (collectively, "the Carriers") filed this action against Defendants, United Transportation Union and its General Committees of Adjustment (GO-081, GO-663, GO-619, and GO-769) (collectively, "the Unions"), seeking declaratory and injunctive relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Railway Labor Act, 45 U.S.C. §§ 151 63 ("RLA").

The Carriers have moved for summary judgment, asking this Court to declare the dispute between the parties a "minor" dispute within the meaning of the RLA and to find that the dispute is within the exclusive jurisdiction of an arbitration panel established under the RLA. The Unions have also moved for summary judgment, arguing that the dispute is a "major" dispute and that the parties must engage in mediation under the RLA, rather than arbitration.

After full briefing on this issue, the Court held a hearing on July 2, 2003, where it heard oral argument from both sides. Having considered all of the submitted papers and oral argument, the matter is ripe for decision.

For the reasons stated below, the Court **GRANTS** the Unions' motion for summary judgment and **DISMISSES** the action against them. The Carriers' motion for summary judgment is **DENIED**.

**I. Disputes Under the Railway Labor Act**

Collective bargaining in the railway industry is governed by the RLA. The major purpose behind the RLA is to avoid interruptions in commerce and to maintain labor peace. 45 U.S.C. § 151a. As such, the RLA provides mandatory methods of dispute resolution. *See Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 302-303 (1989); *Detroit and Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 148 (1969). Moreover, the RLA imposes a heavy duty on all parties "to exert every reasonable effort . . . to settle all disputes." 45 U.S.C. § 152, First

When parties desire to change aspects of an existing agreement, accordingly, they are required to engage in a fairly intensive negotiation process, and their negotiation is classified as a "major" dispute." First, a party wishing to amend a bargaining agreement must serve a Section 6 Notice with the opposing party that states the specific issues or terms the originating party wishes to open for negotiation.[1] 45 U.S.C. § 156. Once served, the parties are required to meet and confer. *Id.* If the parties are unable to reach an agreement, either party may request that the dispute be mediated by the National Mediation Board ("NMB"). 45 U.S.C. § 155. If the mediation proves unsuccessful, a Presidential Emergency Board may be appointed to intervene and assist the parties in resolving their dispute. 45 U.S.C. § 160. During this entire period, neither party may change the *status quo*. *Detroit and Toledo*, 396 U.S. at 150. Only after this entire process is complete may a party resort to self-help. *United Airlines v. International Assoc. of Machinists*, 243 F.3d 349, 362 (7th Cir. 2001).

[1] Collective bargaining agreements in the railway industry typically do not expire.

If, on the other hand, a dispute concerns the application or interpretation of terms in an existing collective bargaining agreement (as distinct from a stated desire to change the terms of such an agreement), the process is classified as a "minor" dispute and an entirely different resolution process ensues. 45 U.S.C. § 153. The parties must handle the dispute in the usual manner for processing claims and grievances on the property. 45 U.S.C. § 153, First(i). If the parties cannot resolve the dispute in this manner, it can be referred by either party to binding arbitration before the National Railroad Adjustment Board ("NRAB") or another agreed-upon arbitration board. 45 U.S.C. § 153, First(i) & Second. Parties may not resort to self-help with minor disputes.

**II. Background**

In 2002, the numerous railroads represented by the National Carriers' Conference Committee (including the Plaintiffs) were engaged in national bargaining with the Unions on changing various agreements between them (i.e., a major dispute). These negotiations culminated in a national agreement regarding the terms in dispute. That agreement became effective on August 20, 2002. The 2002 national agreement chiefly deals with compensation and benefits and contains a provision for further negotiations regarding certain health and welfare issues.

National agreements typically do not have fixed terms or expiration dates. Instead, they contain moratorium provisions precluding either party from seeking to change an agreement for a set period of time, i.e., prohibiting the filing of Section 6 notices during some specified window of time. As defendants point out, the purpose of these moratoria is to assure that the renegotiation process does not become perpetual; absent some moratorium, agreements to specific terms (such as rates of pay) effectively would be meaningless because they would be subject to immediate renegotiation through

use of a Section 6 notice. The 2002 national agreement contains such a moratorium period in Article X. It provides:

**Section 2—Effect of this Agreement**

(a) The purpose of this Agreement is to fix the general level of compensation during the period of the Agreement and is in settlement of the dispute growing out of the notices dated November 1, 1999 served by and on behalf of the carriers listed in Exhibit A upon the organization signatory hereto, and the notices dated on or subsequent to November 1, 1999 served by the organization upon such carriers, except as otherwise provided in Article IV of this Agreement.

(b) This Agreement shall be construed as a separate agreement by and on behalf of each of said carriers and their employees represented by the organization signatory hereto, and shall remain in effect through December 31, 2004 and thereafter until changed or modified in accordance with the provisions of the Railway Labor Act, as amended.

(c) The parties to this Agreement shall not serve nor progress prior to November 1, 2004 (not to become effective before January 1, 2005) any notice or proposal for changing any matter contained in:

(1) This Agreement,
(2) the proposals of the parties identified in Section 2(a) of this Article, and
(3) Section 2(c) of Article XV of the Agreement of January 27, 1972, and any pending notices which propose such matters are hereby withdrawn, except as otherwise provided in Article IV of this Agreement.

(d) The parties to this Agreement shall not serve nor progress prior to November 1, 2004 (not to become effective before January 1, 2005) any notice or proposal which might properly have been served when the last moratorium ended on January 1, 2000.

(e) This Article will not bar management and committees on individual railroads from agreeing upon any subject of mutual interest.

On March 21, 2002, before the signing of the national agreement, but well after the negotiation process for that agreement was underway, CSX Transportation's Senior Director– Labor Relations, Steven Friedman, notified the Unions that CSX Transportation intended to introduce "push cars" in the Northern District. In response, the Unions' General Chairpersons served Section 6 Notices on the Carriers on March 25 and 27, 2002. These notices proposed (1) establishing a rule concerning the construction, use, equipment, and safety rules regarding "push cars"; (2) amending the current crew consist agreement regarding both staffing and compensation; and (3) amending the current caboose agreement regarding the distances a trainman could be required to ride.

The Carriers responded on April 2, 2002, acknowledging their receipt of the Section 6 Notices and suggesting that these issues be handled in the national discussions. The Unions declined to take these issues to the national conference, however. The parties then began separate conferences on this issue, meeting on May 6, 2002 and July 30, 2002, but could not reach an agreement.[2] Another conference was set for September 24, 2002 to discuss these issues. Before the September 24 conference convened, however, the Carriers sent a letter dated September 6, 2002 claiming that the moratorium provision in the August 20, 2002 national agreement barred any further progression of these Section 6 Notices. The Carriers suggested that, if the Unions disagreed with this assessment, the matter could be taken to arbitration to decide if the moratorium provision applied. The Unions responded on September 12, 2002, and disagreed with the Carriers' assessment, contending instead that the Section 6 Notices did not fall within the moratorium provision.

The parties met two more times, on September 24, 2002 and November 21, 2002, but could not

[2] The Carriers expressly reserved their right to challenge the legality and propriety of the Section 6 Notices, however.

reach an agreement.[3] On November 22, 2002, the Unions requested that the NMB help the parties mediate this dispute. The Carriers proposed a different mechanism, filing a notice of intent for arbitration before the First Division of the NRAB on November 25, 2002. In light of the conflicting approaches, the NMB asked for written comments on its jurisdiction to hear the dispute. The NMB has not issued a response to these comments. At the July 2, 2003 hearing on this matter, the parties indicated that the NMB was awaiting a ruling from this Court before proceeding to act on the Union's request for mediation.

On December 6, 2002, the Carriers filed suit in this Court, alleging that the Unions violated the RLA, 45 U.S.C. § 152 First, by "failing to maintain" agreements. In the alternative, the Carriers allege that the disagreement between the parties is a minor dispute. In their motion for summary judgment, however, the Carriers have focused entirely on their minor dispute allegation and have abandoned any alternative argument.

**III. Analysis**

The Court's role in this dispute is limited. The Court is not to decide the substance of the underlying Section 6 Notices propounded by the Unions. Instead, the Court's limited role in this case is to determine whether the Carriers' argument that the moratorium provision in the August 20, 2002 national agreement bars further progression of the Unions' Section 6 Notices is "arguably justified" or not "obviously insubstantial." If the Court concludes that the Carriers' position is "arguably justified," the matter will be sent to arbitration before the NRAB, and the NRAB will determine whether the

[3] Again, the Carriers expressly reserved their right to challenge the legality and propriety of the Section 6 Notices.

moratorium provision bars further progression of the Unions' Section 6 Notices. If, on the other hand, the Court concludes that the Carriers' position is not "arguably justified," the matter will not be sent to the NRAB, and the Unions will be free to pursue the major dispute resolution mechanisms provided by the RLA, including the mediation before the NMB. Simply put, the Court must determine whether the parties' disagreement over the application of the moratorium provision is properly classified as a major or minor dispute.

**A. Differentiation Between "Major" and "Minor" Disputes**

The RLA does not explicitly use either the term "major" or "minor." Rather, these are terms adopted by courts as a shorthand method of describing the two classes of controversies distinguished in the RLA. *United Transportation Union v. South Carolina Public Railway Commission*, 130 F.3d 627, 631 (4th Cir. 1997).

Major disputes are based on § 2 Seventh and § 6 of the RLA, 45 U.S.C. §§ 152 Seventh and 156. Section 2 Seventh states that "No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements" or through mediation procedures described in § 6.

Minor disputes, on the other hand, are based on § 2 Sixth and § 3 First(i) of the RLA, 45 U.S.C. §§ 152 Sixth and 153 First(i). These sections establish procedures for resolving disputes arising out of "grievances or out of the interpretation or application of agreements concerning rates or pay, rules, or working conditions." 45 U.S.C. § 152 Sixth.

In *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299 (1989) ("*Conrail*"), the Supreme Court articulated a standard for differentiating between major and minor

disputes. It found that major disputes

> relate[] to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

*Id.* (quoting *Elgin, J & E.R. Co. v. Burley*, 325 U.S. 711, 723 (1945)). Minor disputes, on the other hand

> contemplate[] the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, *e.g.*, claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.

*Id.* at 303 (quoting *Burley*, 325 U.S. at 723). In a nutshell, "major disputes seek to create contractual rights, minor disputes to enforce them." *Id.* at 302.

The distinction between major and minor disputes does not turn on the importance of the underlying dispute or the likelihood that the parties will ultimately seek to exercise self-help in resolving the dispute. *Id.* at 305. "Rather, the line drawn in *Burley* looks to whether a claim has been made that the terms of an existing agreement either establish or refute the presence of a right to take the disputed action. The distinguishing feature of such a case is that the dispute may be conclusively resolved by interpreting the existing agreement." *Id.*

The Supreme Court established the following test for distinguishing between major and minor disputes: where a party "asserts a contractual right to take the contested action, the ensuing dispute is

minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement. Where, in contrast, the employer's claims are frivolous or obviously insubstantial, the dispute is major." *Id.* at 307. The Supreme Court cautioned that the manner in which a party categorizes a dispute is not determinative, however. *Id.* at 305. A court must substitute its own characterization when determining how to classify a dispute, but its analysis is weighted in favor of finding a dispute to be minor. Thus, a party has a "relatively light burden" to establish that the dispute is minor. *Id.* at 307. Importantly, the Court is not to consider which party would likely prevail at arbitration if the Court were to classify the dispute as minor. The inquiry is whether a party's argument that the dispute can be resolved by an existing agreement is frivolous or obviously insubstantial.

> A district court need not, indeed should not, assess the relative merits of the parties' competing interpretations of the contract in order to find the dispute "minor." If the railroad's assertion that the collective bargaining agreement controls the dispute rises above the "frivolous or obviously insubstantial," then the court must dismiss the action for lack of subject matter jurisdiction.

*United Transportation Union*, 130 F.3d at 632 (quoting *Railway Labor Executives Ass'n v. Chesapeake W. Ry.*, 915 F.2d 116, 119 (4th Cir. 1990)).

**B. The Carriers' Argument**

The Carriers argue that the parties' dispute over the interpretation of the moratorium provision in the August 20, 2002 national collective bargaining agreement is a quintessentially minor dispute because it can be resolved by resorting to the language of the agreement. Moreover, they assert that their interpretation cannot be said to be frivolous because of the clear language of the provision.[4]

[4] Indeed, the Carriers claim to believe strongly that their interpretation would prevail at arbitration if the Court were to rule that this dispute is minor. As stated above, the Court's role is more limited.

The Carriers point to § 2(c) of Article X of the national agreement, which states that "any pending notices which propose such matters are hereby withdrawn, except as otherwise provided in Article IV of this Agreement." Article IV deals with continuing negotiations on health and welfare issues that are not relevant to this analysis. The "any such matters" refers to three categories of notices: (1) those that propose to change the national agreement, (2) those proposals identified in § 2(a) of Article X, and (3) those that propose to change § 2(c) of Article XV of the January 27, 1972 agreement. The Carriers argue that the Unions' March 2002 Section 6 Notices fall within the second category, the proposals identified in § 2(a).

Section 2(a) explains that the purpose of the national agreement "is to fix the general level of compensation during the period of the Agreement and is in settlement of the dispute growing out of the notices dated November 1, 1999 served by and on behalf of the carriers . . . and the notices dated on or subsequent to November 1, 1999 served by the organization upon such carriers . . . ." Because the Unions' Section 6 Notices were served after November 1, 1999, the Carriers argue that they fall within the scope of the moratorium.

In addition, the Carriers argue that § 2(d) further evidences that the Unions' Section 6 Notices are barred by the moratorium. In § 2(d), the parties agreed to neither "serve nor progress prior to November 1, 2004 . . . any notice or proposal which might properly have been served when the last moratorium ended on January 1, 2000." The Carriers contend this language creates a broad prohibition against serving or progressing any new notices.

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It need not conclusively determine that the moratorium provision absolutely bars progression of the Unions' Section 6 Notices. The Court will only determine whether the Carriers' argument that it does is "frivolous or obviously insubstantial."

**C. The Unions' Argument**

The Unions, on the other hand, argue that their Section 6 Notices involve issues that were not discussed at the national conference, and, therefore, are not encompassed by the moratorium provision. In particular, they contend that the second item in the Section 6 Notices, regarding "crew consists," has always been negotiated locally and has never been the subject of a national moratorium. Typically, each carrier negotiates locally with respect to crew consist and negotiates a local moratorium on this issue. CSX Transportation apparently does not have a moratorium provision in its local agreement with the Unions, and the Unions argue that CSX Transportation is trying to use the national agreement to acquire something for which it did not bargain. The Unions contend that the Carriers' argument that the national moratorium applies makes no sense because the other national carriers already have local moratoriums with the Unions and would have no interest in applying this national moratorium to their local crew consist agreements.

As to the push car and caboose items, the Unions argue there was no intention to bargain, and no effort to discuss, these quintessentially local issues on a national basis. The Unions point out that the National Agreement arose out of and expressly resolved a dispute over rates of compensation and benefits triggered by the Carriers' own Section 6 notice of November 1999 and a series of counter notices on the same topics served shortly thereafter by the Unions. All of these notices predated the March 2002 push car announcement by a substantial period of time.

Furthermore, the Unions argue that the Carriers' interpretation of the moratorium provision does not comport with reason. The Unions argue that a national agreement could never be expected to prohibit the serving of Section 6 Notices on issues that are local in nature, because the national agreement could never be expected to resolve every local issue. Indeed, the national agreement only

addresses a narrow class of issues, chiefly compensation and benefits. The Unions contend that if the parties truly intended to make the moratorium provision as broad as the Carriers urge, they would have used specific language indicating that desire.

**C. Relevant Case Law**

The Carriers cite to a number of cases in which courts have found that a party's claim that a moratorium provision bars serving or progressing Section 6 Notice makes the dispute a minor one. *Brotherhood of Locomotive Engineers v. Portland Terminal R.R. Co.*, 860 F.2d 1088, 1988 WL 109115, unpublished (9th Cir. Oct. 11, 1988); *International Longshoremen's Ass'n, Local 158 v. Toledo Lakefront Dock & Pellet Co.*, 776 F.2d 1341 (6th Cir. 1985); *St. Louis Southwestern Ry. Co. v. United Transportation Union*, 646 F.2d 230 (5th Cir. 1981); *Burlington Northern Inc. v. Railroad Yardmasters of America*, Nos. 76 C 1750, 76 C 1869, 76 C 1937, 1976 WL 1570 (N.D. Ill. June 21, 1976); *Southern Pacific Transportation Co. v. Brotherhood of Ry., Airline and Steamship Clerks, Freight Handlers, Express and Station Employees*, No. C-75-2187 SW, 1975 WL 1246 (N.D. Cal. Dec. 18, 1975). These cases are distinguishable from the current case in one critical aspect, however. The subject of each Section 6 Notice clearly was the same as the subject matter of the relevant collective bargaining agreement or was explicitly prohibited in the moratorium provision.

For instance, in *International Longshoremen's Ass'n, Local 158 v. Toledo Lakefront Dock & Pellet Co.*, 776 F.2d 1341 (6th Cir. 1985), the parties reached an agreement that allowed Toledo Lakefront to implement certain technological and operational changes in exchange for job protection benefits for the union members. This agreement contained a moratorium provision that stated that "no party to this Article shall serve any notice or proposal for the purpose of changing the subject matter

of the provisions of the Appendix I [the Job Protection Agreement] prior to June 14, 1987 . . . ." *Id.* at 1342. The Union filed a Section 6 Notice on April 28, 1983, seeking to negotiate modifications in manning requirements. The Sixth Circuit found that the moratorium provision arguably barred this notice (and, thus, that the dispute was minor) because changes in manning were contemplated in the original agreement.

> We agree that Toledo Lakefront's claim that negotiations concerning manning are barred by the moratorium provision of the Miami Agreement is arguably correct and the dispute, therefore, is a minor one. Section 10 of the Miami Agreement specifically addresses the possibility that changes in the manning may be necessary due to the technological and operational changes.

*Id.* at 1344. Significantly, both the agreement containing the moratorium provision and the new topic of dispute were local.

In *Brotherhood of Locomotive Engineers v. Portland Terminal R.R. Co.*, 860 F.2d 1088, 1988 WL 109115, unpublished (9th Cir. Oct. 11, 1988), the parties reached an agreement regarding job security for the engineers and the exclusive right to perform engineering services at the Portland Terminal Railroad Company. The agreement contained a moratorium provision that precluded the parties from filing any Section 6 Notices with respect to these issues. Within the moratorium period, the union filed two Section 6 Notices proposing that no engineering job be eliminated and that certain tasks be given exclusively to their engineers. The Court found that the moratorium provision arguably barred the Section 6 Notices (and, thus, that the dispute was minor) because the subject of the new proposals was nearly identical to the subject of the agreement. Again, the underlying agreement upon which the carrier relied was a local agreement.

The Court finds particularly illuminating the NRAB's decision in *Elgin, Joliet and Eastern Ry.*

*Co. v. United Transportation Union*, First Div. NRAB, Award No. 24161 (1992). The union served a Section 6 Notice regarding the use of portable radios on December 30, 1968. The carrier contended that this issue was withdrawn by a local agreement dated January 17, 1975, which stated that "pending Section 6 notices served by the United Transportation Union (T) on behalf of yardmen are withdrawn . . . ." *Id.*, p. 2. The carrier also argued, in the alternative, that, if the local agreement did not withdraw the notice, an October 31, 1985 national agreement did as it stated that "any pending notices which propose such matters are hereby withdrawn." *Id.* One of the issues resolved in the national agreement included

> Road and yard employees in ground services and qualified engine service employees may perform the following items of work in connection with their own assignments without additional compensation.
>
> (9) Use communication devices . . . .

*Id.*

As here, the carrier argued that these moratoria barred further progression of the Section 6 Notices. The NRAB analyzed both moratorium provisions and concluded that the local agreement did not withdraw the Section 6 Notice because the local agreement only addressed economic issues between the parties. There was no discussion about the use of portable radios during the local negotiations. Thus, the NRAB concluded that the moratorium provision did not apply to topics that were never addressed. The NRAB did find, however, that the moratorium provision in the national agreement barred further progression of the Section 6 Notices because the use of communications devices was discussed during national negotiations.

The holdings of these cases can be distilled down to a simple proposition. The Court is to look at the moratorium provision in the prior agreement to see exactly what is barred. Only if the subject

matter of the contested Section 6 Notice was arguably the same as that of the prior agreement (or was specifically mentioned in the moratorium provision) will the Court conclude that a dispute is minor. With this analysis now in hand, the Court turns to the facts of this case.

**D. The Moratorium Provision Does Not Arguably Bar Progression of the Unions' Pending Section 6 Notices.**

The Carriers acknowledge that the subject matter of the Unions' Section 6 Notice was not discussed during national negotiations. Indeed, the national agreement solely involves issues of compensation and benefits.[5] There were no provisions in the national agreement involving "push cars," crew consist, or the distance trainmen can ride in cabooses. Instead, the Carriers argue that the moratorium provision generally bars further progression of *any* pending Section 6 Notices, regardless of their subject matter.

Section 2(a) defines the purpose of the national agreement--"to fix the general level of compensation"--and expressly provides that it is in resolution of a dispute growing out of a series of notices between the national carriers and the Unions on the subject of compensation. Section 2(c) then defines the scope of the moratorium provision listing which subjects cannot be progressed.

> (c) The parties to this Agreement shall not serve nor progress prior to November 1, 2004 (not to become effective before January 1, 2005) any notice or proposal for changing any matter contained in:
>
> (1) This Agreement,
> (2) the proposals of the parties identified in Section 2(a) of

[5] The article headings in the national agreement bear this out—Wages, Optional Alternative Compensation Program, Cost-of-Living Payments, Health and Welfare, Pay System Simplification, Service Scale, Enhanced Manpower Utilization, National Wage and Rules Panel, and Off-Track Vehicle Accident Benefits.

this Article, and

(3) Section 2(c) of Article XV of the Agreement of January 27, 1972, and any pending notices which propose such matters are hereby withdrawn, except as otherwise provided in Article IV of this Agreement.

Thus, the national agreement bars changing any matter (1) that is in the national agreement, (2) that was contained in the notices referenced in § 2(a), and (3) that is in a section of another national agreement that is not relevant here.

The Court does not read §§ 2(a) and (c) of the moratorium provision to prohibit the service or further progression of *all* Section 6 Notices until November 1, 2004. Were the Carriers' interpretation correct, there would be no need to specifically identify prohibited items in subsections 2(c)(1)–(3). This language would be surplusage, because *all* notices on *any* subject matter would be barred. There would be no need to resort to this unnecessarily convoluted language if the parties intended to bar progression of *all* pending notices. Instead, the Court interprets this subsection as limiting further progression of notices related to the compensation and benefits that were either (1) included in the national agreement; or (2) either referenced in the Notices prompting the national negotiations or discussed during the course of the negotiations, but not included in the final agreement. Indeed, this comports with all of the case law cited by the parties. In every case where it was found that a moratorium provision arguably barred progression or service of a Section 6 Notice, the subject matter of the underlying agreement was the same or at least similar to the subject matter of the notice. Likewise, in the one case where it was found that a moratorium provision did not apply, it was because the subject matter was different, despite the presence of a broadly-worded moratorium provision.[6]

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[6] In *Elgin*, the moratorium provision in the local agreement stated that "pending Section 6 notices served by the United Transportation Union (T) on behalf of yardmen are withdrawn . . . ." *Id.*, p. 2.

The Carriers also resort, albeit somewhat in passing, to § 2(d), which states:

> The parties to this Agreement shall not serve nor progress prior to November 1, 2004 (not to become effective before January 1, 2005) any notice or proposal which might properly have been served when the last moratorium ended on January 1, 2000.

The Carriers did not emphasize this section at oral argument and say little about it in their briefs. This is likely because § 2(d) appears to exclude *on its face* the very notices at issue here. The Carriers' announced their intent to use the "push cars" on March 21, 2002. Any Section 6 notices addressing that decision, accordingly, post-dated that announcement. Because § 2(d) limits only the service or progression of notices regarding disputes that were "ripe" as of January 1, 2000, § 2(d) could not be read to bar notices regarding this far more recent dispute. Reference to § 2(d), accordingly, adds nothing to the Carriers' argument.

Having considered all of the case law cited by the Carriers and, in particular, NRAB's decision in *Elgin*, the Court finds that neither § 2(c) nor § 2(d) applies to bar further progression of the Unions' Section 6 Notices at issue here. This conclusion does not resolve completely the question presented, however. The Court's role is not to decide whether the moratorium provision applies. The Court, rather, must decide whether the Carriers' argument that it does apply is "frivolous" or "obviously insubstantial." If not, the Court must leave the final resolution of that question to an appropriate mediator. The Court must be mindful, further, that the Carriers' burden to show that the dispute is minor is relatively light.

Despite this light burden, the Court not only finds that the moratorium provision does not apply, but also finds that the Carriers' argument that it does apply is obviously insubstantial. In *none* of the cases cited by any of the parties has a court or the NRAB found that a moratorium provision bars the

progression of Section 6 Notices that are completely unrelated to the subject matter of the collective bargaining agreement between the parties. Indeed, in *Elgin*, the NRAB draws a sharp distinction between related and unrelated Section 6 Notices. In that case, the NRAB found that a broadly-worded, apparently general moratorium provision did not serve to bar further progress of a Section 6 Notice because this notice was unrelated to the underlying agreement. Only the moratorium provision in the national agreement, which contained the same subject matter as the Section 6 Notice, would serve to bar further progression. The same is true here.

The Court finds, therefore, that the Carriers' argument that a moratorium provision in a national agreement that is completely unrelated to the subject of local notices somehow bars further progression of those local issues is without merit and obviously insubstantial. If the parties truly wished to create such a broad moratorium, they could and would have stated clearly their intention to do so. The Court will not import such a drastic limitation on the parties' ability to address matters between them without at least some indication that is what they agreed to.

**IV. Conclusion**

For the reasons stated above, the Court finds that the Carriers' argument that the moratorium provision in the August 20, 2002 national agreement bars further progression of the Unions' March 25 and 27, 2002 Section 6 Notices to be frivolous and obviously insubstantial. The Court classifies the dispute over these Section 6 Notices a major dispute, amenable to the standard mechanisms for resolving major disputes set forth in the RLA.

The Court, therefore, **GRANTS** defendants' motion for summary judgment (docket #16) and **DENIES** plaintiffs' motion for summary judgment (docket #18). Further, this case is **DISMISSED.**

**IT IS SO ORDERED.**

**s/Kathleen M. O'Malley**
**KATHLEEN McDONALD O'MALLEY**
**UNITED STATES DISTRICT JUDGE**

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | | |
|---|---|---|
| **DEMARKUS HODGE,** | : | **Case No. 01CV1773** |
| | : | |
| **Petitioner,** | : | **JUDGE O'MALLEY** |
| | : | |
| **v.** | : | **MEMORANDUM & ORDER** |
| | : | |
| **PAT HURLEY, Warden,** | : | |
| | : | |
| **Respondent.** | : | |

Petitioner DeMarkus Hodge petitioned this Court for a writ of habeas corpus pursuant to 28 U.S.C. §2254, challenging the constitutional sufficiency of his state court conviction for the rape of his girlfriend's 3-year old child. Hodge, who was 17 years old when the crime was committed, is serving a sentence of life in prison. Hodge's petition was referred to Magistrate Judge Jack B. Streepy of this Court, pursuant to Local Rule 72.2(b)(2), who recommended that the petition be denied. Both petitioner Hodge and respondent Hurley have filed objections to the Magistrate Judge's report: Hodge objects to the recommended ruling, and Hurley objects to the Magistrate Judge's conclusion that, although Hodge's petition fails on the merits, several of Hodge's arguments were not procedurally defaulted.

For the reasons stated below, the Court finds that neither Hurley's nor Hodge's objections are well-taken. Accordingly, the Court **ADOPTS** the Magistrate Judge's recommendation. Hodge's petition

for a writ of habeas corpus, pursuant to 28 U.S.C. §2254, is **DENIED**, and this case is **DISMISSED**. The Court certifies, pursuant to 28 U.S.C. §1915(a)(3), that an appeal from this decision would be frivolous and could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. §2253(c); Fed. R. App. P. 22(b).

I. Procedural Default.

Hodge raises a single ground for relief – the ineffective assistance of his trial counsel. To show that this ground for relief is well-taken, Hodge points to four of his attorney's allegedly deficient actions: (1) failure to object to the admission of the government's expert report; (2) failure to object to a jury instruction; (3) failure to adequately prepare his own expert witness to testify; and (4) failure to object to prosecutorial misconduct. Hodge points to these failures both individually and collectively as evidence that he was deprived of his Sixth Amendment right to assistance of counsel.

In his Return, respondent Hurley argues that the first, second, and fourth of Hodge's arguments are procedurally defaulted, because Hodge did not lodge a contemporaneous objection at trial. The Magistrate Judge addressed this issue cursorily, holding simply that, "[s]ince the [Ohio] appellate court reached the merits [of these three arguments], there was no procedural default." Report at 1-2.[1] Hurley objects to this conclusion, noting that the Ohio appellate court: (1) stated specifically that Hodge's counsel had not complied with Ohio's contemporaneous objection rule; and (2) reviewed these three arguments for plain

[1] The Ohio Supreme Court denied leave to appeal and dismissed Hodge's case as not involving any substantial constitutional question. Thus, the Ohio court of appeals was the highest court to examine Hodge's grounds on appeal.

error. Hurley argues that, even though the Ohio appellate court "reached the merits" of Hurley's first, second, and fourth assertions of ineffective assistance of counsel, this does not excuse Hurley's procedural default for purposes of habeas review.

Hurley's statement of the law is correct, but it does not apply given the posture of this case. It is true that, when a defendant fails to comply with Ohio's contemporaneous objection rule, federal habeas review of that ground is barred, absent a showing of cause and prejudice. See Hinkle v. Randle, 271 F.3d 239, 244 (6th Cir. 2001) ("We have held that Ohio's contemporaneous objection rule constitutes an adequate and independent state ground that bars federal habeas review absent a showing of cause and prejudice."). Hurley is also correct that federal habeas review remains barred even if the state appellate court undertook a "merits review" of the defaulted ground for plain error. See Seymour v. Walker, 224 F.3d 542, 557 (6th Cir. 2000) ("Controlling precedent in our circuit indicates that plain error review does not constitute a waiver of state procedural default rules.") (citing Paprocki v. Foltz, 869 F.2d 281, 284-85 (6th Cir. 1989)).

In his petition, however, Hodge has not raised the propriety of the trial court's rulings themselves. Hodge does not argue on habeas, for example, that he was deprived of a fair trial because the trial court allowed the prosecutor to engage in misconduct. This argument would, in fact, be procedurally defaulted, unless Hodge could show cause and prejudice, because Hodge did not object at trial to the prosecutor's behavior. Hinkle, 271 F.3d at 244-45. To show cause, of course, Hodge would have to argue ineffective assistance of counsel. See Hinkle, 271 F.3d at 245 ("In Murray v. Carrier, 477 U.S. 478, 487 (1986), the Supreme Court held that attorney error is not cause for procedural default analysis unless the performance of petitioner's counsel was constitutionally ineffective under the standard established in

Strickland v. Washington, 466 U.S. 668 (1984)").

In fact, this is precisely what Hodge is arguing – Hodge asserts on habeas that his counsel was ineffective for failing to object to the prosecutor's behavior. A habeas argument that counsel was ineffective for failing to object at trial is different than a habeas argument that the trial court ruled improperly. To prevail on the former argument, Hodge must meet the standard set out in Strickland, and that is the analysis the Magistrate Judge employed. Hurley's objection that several of Hodge's arguments are procedurally defaulted is a non sequitur, because Hurley is not arguing on habeas the merits of the trial court's evidentiary rulings. Indeed, Hurley's objection that the Court should use a procedural default analysis – which calls for application of Strickland – is nugatory, because Hodge's actual ground of ineffective assistance of counsel already calls for this analysis. To adopt Hurley's view of procedural default, Hodge's counsel could avoid default only by raising his own ineffectiveness at trial. Hurley's objection to the Magistrate Judge's report is not well-taken.

II. Ineffective Assistance of Counsel.

Turning to Hodge's objections, Hodge asserts that there was no physical evidence connecting him to the crime, so the case was essentially "he said, she said": he testified at trial that he did not commit the crime, while his girlfriend – that is, the victim's mother, Consuela Fenn, with whom Hodge lived – testified she saw him commit the crime. Hodge attacked Fenn's credibility by, among other things, noting that: (1) it was the victim's great-grandmother, Flonica Lovejoy, who discovered the victim's injuries; and (2) Fenn did not state to anyone that she saw Hodge rape her child until two days after Lovejoy discovered the injuries.

Hodge first argues that he would have won this credibility contest, except for the fact that his counsel allowed the government to take improper steps to "bolster" Fenn's testimony. At trial, the government introduced the testimony and reports of two experts: (1) Lauren McAliley, a pediatric nurse practitioner who examined the victim; and (2) Dr. Lolita McDavid, the medical director of the Child Protection program at Rainbow Babies and Childrens Hospital. Both stated, in essence, that, based on all the evidence, they "believed Fenn's statement" that she saw Hodge rape the victim, because the medical evidence was consistent with her statement. In fact, Hodge's counsel did object to at least some of these "bolstering" statements, but the trial court overruled the objections.[2] Given the trial court's earlier testimonial rulings, Hodge's counsel did not object when Dr. McDavid's written expert opinion was offered into evidence. Hodge argues that his counsel was ineffective for "object[ing] to testimony objectionable under Boston, but not to the report." Objections at 6 (referring to Ohio v. Boston, 545 N.E.2d 1220 (Ohio 1989)).

Hodge further asserts that his counsel's error was compounded when counsel failed to object to the jury instruction regarding weighing of expert testimony. The instruction actually given by the trial court referred to expert opinions based on hypothetical questions; Hodge insists the instruction should have

[2] Hodge's objections were based on Ohio v. Boston, 545 N.E.2d 1220 (Ohio 1989), which holds that "an expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant," because to do so invades the province of the jury. Id. syllabus at 1222. This Court's review of the Hodge trial transcript (which the Court read in its entirety) reveals that the trial court overruled the objections because: (1) the declarant at issue in this case was not the child victim, but rather her mother, Fenn; and (2) the experts did not give their opinion on Fenn's veracity so much as state that the medical and other evidence was consistent with Fenn's statements to the police.

referred to expert opinions based on underlying facts and data.[3] Hodge argues on habeas that his counsel's failure to object to the jury instruction was extremely prejudicial, as the jury was left rudderless, thereby depriving him of a fair trial.

Hodge goes on to argue that the "bolstering statement" error was compounded yet again when Hodge's own expert, Dr. Steiner, based his opinion on the belief that Fenn did not tell anyone for nearly four months that she saw Hodge rape her child – when, in fact, Fenn told her family and the police that she saw Hodge rape her child two days after the injuries were discovered. Hodge asserts his counsel was incompetent for not reading Dr. Steiner's report and correcting his misapprehension before trial, at which time the government made Dr. Steiner look foolish. Hodge argues that, given the "battle of the experts," allowing Dr. Steiner to testify based on this misapprehension made the government's experts' "bolstering statements" appear even stronger.

Finally, Hodge argues that the prosecutor engaged in misconduct during closing arguments by making several improper statements. To counter Hodge's argument that Fenn could not be believed, in light of her two-day delay in disclosing that she saw Hodge rape her child, the government introduced evidence that Hodge had a history of beating Fenn and had threatened her with harm if she said anything. In closing argument, the prosecutor referred to "battered women syndrome," even though there was no expert testimony at trial about this syndrome. Hodge also points to allegedly improper statements by the prosecutor during closing argument regarding: (1) his personal belief of who was telling the truth; (2)

[3] Hodge is correct that the experts at trial were asked to voice opinions based on underlying facts and data, but it is also true that the experts were asked hypothetical questions – specifically, with regard to the opinion of Hodge's own expert, Dr. Steiner.

Hodge's bad character generally; and (3) unethical or inappropriate tactics of defense counsel and witnesses.

The Magistrate Judge examined all of Hodge's arguments and concluded that none of them met the standard for habeas relief. This Court agrees. A petitioner can succeed on a claim of ineffective assistance of counsel only if he can "show both that his counsel's performance 'fell below an objective standard of reasonableness' and that he was prejudiced as a result" of counsel's alleged errors. Glenn v. Tate, 71 F.3d 1204, 1206 (6th Cir. 1995) (quoting Strickland v. Washington, 466 U.S. 668, 687-88 (1984)). To show that counsel's performance is deficient under Strickland, Hodge must demonstrate that his attorney's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Cashin v. United States, 1998 WL 552869 at *1 (6th Cir. Aug. 18, 1998). To show that he was prejudiced by his counsel's alleged errors, Hodge must demonstrate that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. "[S]trategic decisions of counsel normally will not be second-guessed." Cashin, 1998 WL 552869 at *2. The Court must strongly presume that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690.

It is important to note that this habeas Court cannot "grant the writ merely because it disagrees with the state court decision, or because, left to its own devices, it would have reached a different result."

Nevers v. Killinger, 169 F.3d 352, 361 (6th Cir. 1999), cert. denied, 119 S. Ct. 2340 (1999) (quoting O'Brien v. Dubois, 145 F.3d 16, 25 (1st Cir. 1998)); Tucker v. Prelesnik, 181 F.3d 747, 753 (6th Cir. 1999). Rather, this Court is required to determine whether the state court's conclusion – that counsel was not ineffective – was unreasonable. Williams v. Taylor, 120 S.Ct. 1495, 1498-99 (2000) ("a federal habeas court may not grant relief simply because it concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable"); Nevers, 169 F.3d at 360 (citing 28 U.S.C. §2254(d)(1)); Tucker, 181 F.3d at 755 ("the issue . . . is whether the [state] court made an unreasonable application of the Strickland standard"). A state court's application of federal law is unreasonable "if it is so offensive to the precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." Tucker, 181 F.3d at 753.

In this case, the Ohio appellate court applied the Strickland analysis and concluded that Hodge's trial counsel was not ineffective. The Magistrate Judge, in turn, concluded that the state court's analysis was not an unreasonable application of federal law. This Court agrees that the state court's Strickland analysis and conclusions are not unreasonable.

With regard to McDavid's expert report, the trial court had already overruled Hodge's counsel's objections that the witness's oral, testimonial statements were inadmissible under Boston. The decision of counsel not to object subsequently to the admissibility of virtually identical written statements contained in the expert report was easily a reasonable professional judgment, and cannot be deemed prejudicial in light of the admission of the oral testimony.

With regard to the jury instruction on expert testimony, the state court concluded that there was

no prejudicial error with the instructions as a whole, and therefore no prejudice to Hodge, even if his counsel's failure to object could be construed as ineffective. The Magistrate Judge found this analysis complied with Strickland, and the Court agrees.

With regard to Hodge's counsel's failure to prepare his own expert, Dr. Steiner, and counsel's failure to object to the prosecutor's inappropriate comments at closing argument, the Ohio appellate court essentially assumed some level of ineffectiveness, but found the ineffectiveness did not rise to constitutional levels because there was no prejudicial error. The Magistrate Judge again found that this analysis complied with Strickland. And again, the Court agrees. When a defendant claims his counsel provided constitutionally ineffective assistance, the "threshold issue is not whether [his] attorney was [merely] inadequate; rather, it is whether he was so manifestly ineffective that defeat was snatched from the hands of probable victory." United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992), cert. denied, 508 U.S. 975 (1993). The state court determined that Hodge's counsel's inadequacies, if any, did not reach this level, and this Court cannot conclude that the state court's determination was outside the universe of plausible, credible outcomes.[4] Hodge "is not entitled to the most canny lawyer available, only an adequate one." Id. at 230 (citing Flippins v. United States, 808 F.2d 16, 19 (6th Cir. 1987), cert. denied, 481 U.S. 1056 (1987)).

Having read the entire trial transcript, the expert reports and other exhibits, the appellate court

[4] The Court reaches this conclusion despite its belief that the prosecutor's comments during closing argument were inappropriate. Again, the question presented at this stage of review is not whether the prosecutor engaged in some degree of misconduct, but whether, in the totality of the circumstances, the failure of Hodge's trial counsel to object to that misconduct rendered trial counsel's performance constitutionally ineffective. The Court finds it did not.

opinion, and the Magistrate Judge's report, the Court is convinced that Hodge received a fair trial, the result of which is reliable. Whether viewed singly or in combination, the alleged errors of Hodge's trial counsel did not work to deprive him of any Sixth Amendment right. Accordingly, the petition is denied, and the case is dismissed.

**IT IS SO ORDERED.**

/s Kathleen M. O'Malley

**KATHLEEN McDONALD O'MALLEY**
**UNITED STATES DISTRICT JUDGE**

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | | |
|---|---|---|
| **GREGORY ESPARZA,** | : | **Case No. 3:96-CV-7434** |
| | : | |
| **Petitioner,** | : | **JUDGE O'MALLEY** |
| | : | |
| **vs.** | : | **MEMORANDUM & ORDER** |
| | : | |
| **CARL ANDERSON, Warden,** | : | |
| | : | |
| **Respondent.** | : | |

Gregory Esparza petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Esparza challenges the constitutional sufficiency of his conviction by a jury for aggravated capital murder, and also challenges the constitutionality of the imposition of a sentence of death.

For the reasons set forth below, Esparza's petition for a writ of habeas corpus is **GRANTED in part** and **DENIED in part.** Specifically, the Court finds that Esparza's challenges to the constitutionality of his underlying conviction are without merit. The Court further finds, however, that Esparza's challenge to the constitutionality of the imposition of the death penalty is well-taken, for the reasons explained herein.

Accordingly, the Court issues a writ of habeas corpus as follows. The respondent shall set aside Esparza's sentence of death and instead impose a sentence of life imprisonment, as mandated by Ohio Rev. Code § 2929.03(A) for any conviction for aggravated murder with no capital specification. This

shall be done within 180 days from the effective date of this Order. On this Court's own motion, execution of this Order and, hence, its effective date, is stayed pending appeal by the parties.

## I. PROCEDURAL HISTORY

On February 12, 1983, Melanie Gerschultz was shot and killed during an armed robbery of the Island Variety Carryout store in Toledo, Ohio, where she was working at the time. Some eight months later, on October 13, 1983, petitioner Esparza was indicted on two counts: (1) aggravated murder during the commission of an aggravated robbery, pursuant to Ohio Rev. Code § 2903.01; and (2) aggravated robbery, in violation of Ohio Rev. Code § 2941.141. Specifically, the indictment provided, in full:

> *THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that* GREGORY ESPARZA, on or about the 12th day of February, 1983, in Lucas County, Ohio, did purposely cause the death of Melanie Gerschultz, while committing aggravated robbery, in violation of § 2903.01(B) of the Ohio Revised Code, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.
> SPECIFICATION TO FIRST COUNT:
> THE GRAND JURORS FURTHER FIND AND SPECIFY that the defendant had a firearm on or about his person or under his control while committing the offense pursuant to § 2929.71, Ohio Revised Code.
> SECOND COUNT:
> And THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do further find and present that GREGORY ESPARZA, on or about the 12th day of February, 1983, in or about his person or under his control, while committing a theft offense, in violation of § 2911.01 of the Ohio Revised code, being a felony of the first 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.
> SPECIFICATION TO SECOND COUNT:
> ADDITIONAL SPECIFICATION TO THE FIRST COUNT:
> THE GRAND JURORS further find and specify that the said offense was committed while GREGORY ESPARZA, the accused herein, was committing armed robbery.

Esparza pleaded not guilty to the charges and proceeded to trial on May 4, 1984. The jury returned a verdict of guilty as to both charges on May 10, 1984. The trial court then held a sentencing hearing, pursuant to Ohio Rev. Code §§ 2929.022(A) & 2929.03. On May 16, 1984, the jury returned with the recommendation that Esparza be given the death penalty. The trial judge accepted the jury's recommendation and sentenced Esparza to death for his murder conviction. The trial judge also sentenced Esparza to serve seven to twenty-five years of imprisonment for his conviction for aggravated robbery, plus three years on the firearms specification.

Esparza appealed his convictions and sentence of death. The Ohio Court of Appeals affirmed, State v. Esparza, No. 12258, 1986 WL 9101 (Ohio Ct. App. Aug. 22, 1986), as did the Ohio Supreme Court. State v. Esparza, 529 N.E.2d 192 (Ohio 1988).[1] Esparza then filed a Petition for a Writ of Certiorari in the United States Supreme Court, which was denied. Esparza v. Ohio, 490 U.S. 1012 (1989).

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[1] Justice Brown wrote a dissenting opinion in which Justice Wright concurred. Justice Brown dissented because he believed that "the majority's interpretation of R.C. § 2929.03(D)(1) [the statute outlining the procedure for requesting and creating the pre-sentence investigation and psychological reports] is unconstitutional, forces ineffective assistance of counsel, violates the capital sentencing scheme in Ohio and, in the present case, results in a denial of the defendant's rights under the Fifth Amendment." Esparza, 529 N.E.2d at 200.

Justice Brown found that the majority's interpretation of Ohio Rev. Code § 2929.03(D) allowed prejudicial information to be put before the jury that would not otherwise be admitted, such as the defendant's history as a drug abuser and his criminal arrest record. Justice Brown found that the most serious error which occurred was that, through the introduction of these reports, "the state was allowed to rebut mitigating factors which had not been raised by defendant." Id. at 201. He found that this unprovoked rebuttal had the further consequence of transforming "the non-existence of mitigating factors into aggravating circumstances not specifically enumerated in R.C. §2929.04(A)(1) through (8)." Id. Justice Brown, therefore, held that it was error for the judge not to keep out those aspects of the report which were "not relevant to the mitigating factors raised by defendant." Id. at 202.

Justice Brown also found that the manner in which the pre-sentence report was taken violated Esparza's Fifth Amendment privilege against compelled self-incrimination "because he was not advised before the psychological examination that he had the right to refuse to answer questions and that his statement could be used against him at the capital sentencing stage." Id. at 203.

Esparza also petitioned for post-conviction relief in state court, pursuant to Ohio Rev. Code § 2953.21. The trial court dismissed Esparza's petition. State v. Esparza, No. CR83-6602 (Ohio Ct. Common Pleas June 18, 1990). After being provided with records from the City of Toledo pursuant to a public records request, Esparza filed a second, or successor, petition for post-conviction relief in the trial court, based on the information provided by the City of Toledo.[2] The Court of Appeals affirmed the dismissal of Esparza's petition. State v. Esparza, No. L-90-235, 1992 WL 113827 (Ohio Ct. App. May 29, 1992).[3] Esparza then filed an appeal with the Ohio Supreme Court, which declined to exercise jurisdiction. State v. Esparza, 602 N.E.2d 250 (Ohio 1992).

Esparza also pursued relief pursuant to State v. Murnahan, 584 N.E.2d 1204 (Ohio 1992), where he asserted that appellate counsel had been ineffective. The Court of Appeals ordered Esparza's direct appeal reopened to consider issues relating to an ex parte certification hearing conducted by the trial judge. State v. Esparza, No. L-84-225, 1994 WL 395114 (Ohio Ct. App. July 27, 1994). After reopening, the Ohio Court of Appeals affirmed the trial court. State v. Esparza, No. L-84-225, 1995 WL 302302 (Ohio Ct. App. May 19, 1995). Esparza appealed to the Ohio Supreme Court, which denied his appeal. State v. Esparza, 660 N.E.2d 1194 (Ohio 1996).[4]

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[2] In State ex rel Clark v. City of Toledo, 560 N.E.2d 1313, 1315 (Ohio 1990), the Ohio Supreme Court held that "a criminal defendant who has exhausted the direct appeals of his conviction may avail himself of Ohio Rev. Code §149.43 to support his petition for post-conviction relief." Section 149.43 allows individuals to obtain the investigatory files of law enforcement agencies, as well as other public documents.

[3] Judge Sherck dissented on the grounds that the indictment was invalid because it lacked a required specification and, thus, the trial court lacked jurisdiction to impose a sentence of death. See Esparza, 1992 WL 113827 at *9. Judge Scherk found that it was error to sentence Esparza to death because his indictment failed to mention an accomplice and failed "to charge the accused with being the principal offender, or committing the aggravated murder with prior calculation and design." Id. at *10.

[4] Justice Wright dissented for the same reasons he dissented in Esparza's direct appeal.

## II. FACTUAL HISTORY

In its consideration of Esparza's direct appeal, the Ohio Supreme Court set out the factual history of this case, as revealed by the evidence adduced at Esparza's trial. The facts surrounding the underlying incident are as follows:

> At approximately 9:30 p.m. on February 12, 1983, a man entered the Island Variety Carryout in Toledo, Ohio, wearing a green ski mask and a dark blue jacket. The victim, Melanie Gerschultz, and James Barrailloux, both store employees, were the only other persons present and were standing in the back of the store as the man entered. The man approached the pair, pointed a small black handgun at them and ordered one of them to open the cash register at the front of the store. Gerschultz complied and walked towards the cash register. As she opened the register, Barrailloux crouched down and left the store through the rear door, entering the attached home of the store owner, Evelyn Krieger. While he was alerting Krieger of the robbery, they heard a gunshot. Barrailloux and Krieger re-entered the store to find Gerschultz lying on the floor with a fatal gunshot wound in her neck. The cash register was open and approximately $110 was missing. A small round hole was found in the sheet of clear Plexiglas located to the side of the cash register, through which the bullet had apparently passed.

Esparza, 529 N.E.2d at 194.

At trial, Albert Richardson, a former cellmate of Esparza's, and Lisa Esparza, Esparza's sister, testified that Esparza told them he had robbed the convenience store and had shot Ms. Gerschultz. Barrailloux also testified that the perpetrator was of the approximate height, weight, build, and complexion of Esparza, though he could not actually identify Esparza. There was no physical evidence linking Esparza to the crime. Other relevant facts will be set forth when necessary during the Court's discussion of Esparza's individual claims for relief.

## III. FEDERAL HABEAS PROCEEDINGS

On July 12, 1996, Esparza filed a notice of intent to file a petition for a writ of habeas corpus, motion for appointment of counsel, and motion to proceed in forma pauperis. The Court granted the latter two motions and appointed attorneys Randall L. Porter and Jeffry Kelleher as co-counsel for Esparza.

On September 5, 1996, Esparza filed his petition, and, on that same day, filed a motion to stay the execution of his death sentence. The Court granted Esparza's motion to stay execution of his death sentence on September 6, 1996.[5] Respondent filed his return of writ on October 25, 1996. Esparza filed his traverse on April 1, 1997.

Esparza also filed a motion to expand the record, a motion to conduct discovery, and a motion to correct and expand the record. Esparza sought discovery relating to the following claims and issues: (1) under-representation of Hispanics in his petit and grand jury venires; (2) suppression of material exculpatory evidence by the prosecution; (3) failure by the trial court to appoint competent experts; and (4) ineffective assistance of counsel. The Court permitted Esparza to conduct limited discovery on some of these issues.

Esparza also filed a motion for an evidentiary hearing on the same issues. The Court granted the motion. Under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"):

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court *shall not* hold an evidentiary hearing on the claim *unless* the applicant shows that —
>
> (A) the claim relies on —
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable;

[5] The execution was scheduled to take place on September 10, 1996.

> or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2) (emphasis added). The Court concluded that Esparza had not *failed* to develop the factual basis of the claims for which he sought an evidentiary hearing, because he requested a hearing at virtually each stage of his state court proceedings, but was denied a hearing each time. See Williams v. Taylor, -- U.S. --, 146 L. Ed. 2d 435, 449 (2000) ("Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel"). Consequently, § 2254(e)(2) did not preclude an evidentiary hearing, and the determination of whether an evidentiary hearing was warranted fell within the Court's discretion pursuant to Rule 8 of the Rules Governing Habeas Corpus Proceedings.[6]

At the hearing, four witnesses testified for the petitioner: Keithly Sparrow, Robert Dixon, Dr. Michael Gelbort and Lisa Esparza. Keithly Sparrow, Esparza's trial counsel, testified about his representation of Esparza during the guilt and mitigation phases of the trial. Sparrow stated that, when appointed, the trial judge informed him he would be working under "serious time constraints." Sparrow explained that he was not appointed to represent Esparza until March 8, 1984, and Esparza's trial commenced on April 30, 1984. Sparrow testified that he did not begin preparing for the mitigation stage of the proceedings until after Esparza was found guilty, leaving him only the course of a weekend

[6] This evidentiary hearing turned out to be very helpful to the Court's understanding and analysis of several of petitioner's claims.

to prepare for that stage of the trial. Sparrow also stated that he did not seek Esparza's prior school, medical or other records for the mitigation stage of the proceeding. He did not interview most members of Esparza's family, and those that he did interview, he interviewed inadequately because of his lack of research into Esparza's background. He further testified that he requested a pre-sentence investigation report without understanding the consequences of that request, and with very little knowledge of Esparza's background.

Robert Dixon, a lawyer with considerable experience in death penalty cases, discussed the level of skill, expertise and the standard of conduct an attorney should have when representing a defendant in a death penalty proceeding. He stated that Mr. Sparrow clearly fell below this standard by failing to prepare for the mitigation proceedings, by failing to adequately research Esparza's background – especially his family conditions and his mental disabilities, and by requesting the pre-sentence investigation report without understanding the ramifications of that request – that all information gathered for that report likely would be admitted into evidence.

Dr. Michael Gelbort, an expert in the field of neuropsychology, explained that damage to the frontal lobes of Esparza's brain, resulting from a childhood injury, causes him to have difficulty recognizing the consequences of an action before following through with that action. Dr. Gelbort also testified that, because of this injury, Esparza has difficulty controlling his impulses. Finally, Dr. Gelbort testified that this traumatic brain injury was severe enough to seriously impair Esparza's cognitive functioning, such that this intelligence level is borderline retardation.

Finally, Lisa Esparza testified that she was coerced by her then boyfriend, Frank Ochoa, into testifying against her brother in order to collect money from the "CrimeStopper" program. She further

testified that the prosecutor and the police threatened to take away her children if she did not testify against Esparza. She claimed that this coerced testimony was false when given.

Three witnesses testified for the respondent: Judge Ruth Ann Franks, Detective Arthur Marx, and Frank Ochoa. Judge Ruth Ann Franks, the lead prosecutor in the case, testified in regards to the alleged coercion of Lisa Esparza, Esparza's sister, to testify against Esparza. She denied threatening Lisa Esparza in any way or coercing her to testify against her brother. She also discussed the open file policy at the prosecutor's office at the time of Esparza's trial. Detective Arthur Marx, the primary investigator in the murder of Melanie Gerschultz, discussed the investigation and Lisa Esparza's alleged coercion. He also denied coercing Lisa Esparza to testify against her brother.

Frank Ochoa was Lisa Esparza's boyfriend during the period when the incidents leading up to the trial and the trial itself took place. He testified that he did not coerce Lisa Esparza into testifying against her brother.

## IV. ESPARZA'S GROUNDS FOR RELIEF

In his petition, Esparza asserts fifty-six (56) separate grounds for relief:

1. The indictment failed to contain all of the elements of the capital specification thereby violating Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

2. The State of Ohio improperly used an informant to solicit information from Petitioner after Petitioner's right to counsel attached, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

3. The prosecutor's failure to provide trial counsel with exculpatory evidence violated Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

4. The prosecutor's threats to the witnesses that the state called to testify at trial violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

5. The prosecutor's statements to prospective witness[es] advising the witnesses not to speak with defense counsel violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

6. The under-representation of Hispanics and other cognizable groups in the venires from which Petitioner's grand jury and petit juries were drawn violated Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

7. The trial court's conducting of an *ex parte* certification hearing violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

8. The trial court's securing of a promise from each prospective juror that she or he could vote to impose the death penalty violated Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

9. The prosecutor's excusal of all prospective jurors who had any scruples against the death penalty violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

10. The exposure of prospective jurors to extra-judicial sources of information concerning Petitioner's case[] violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

11. The acts and omissions of Petitioner's counsel during voir dire deprived Petitioner of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

12. The false and unreliable testimony of Lisa Esparza violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

13. The prosecutor's suppression of evidence caused trial counsel to be ineffective in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution[.]

14. The actions of Petitioner's trial counsel in failing to conduct an adequate trial phase investigation deprived Petitioner of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

15. The failure of Petitioner's trial counsel to request a review of the prior statements of the witnesses called to testify by the State of Ohio deprived Petitioner of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

16. The actions of Petitioner's trial counsel in calling Else Dile to testify[] deprived Petitioner Esparza of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

17. The actions and omissions of Petitioner's trial counsel in raising the wrong defense deprived Petitioner of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

18. The trial court failed to appoint a reasonable and necessary expert for the trial phase in violation of Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

19. Trial counsels' failure to object to an improper indictment, inadmissible evidence and improper jury instructions deprived Petitioner of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

20. The prosecutor's misconduct during the trial phase[] deprived Petitioner Esparza of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

21. The instructions provided to the jury in the trial phase violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

22. The trier of fact's verdicts were based upon insufficient evidence as to the elements of identity and specific intent to kill, thereby violating Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

23. There did not exist sufficient evidence in support of the capital specification, thereby violating Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

24. The trial court's failure to provide Petitioner Esparza with an independent, competent psychologist when this service was reasonably necessary to adequately present Petitioner's mitigation evidence violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

25. The trial court's refusal to permit Petitioner to withdraw his request for a Presentence Investigation and a Psychological Report violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

26. Petitioner was denied his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments because the trial court admitted a Presentence Investigation Report which had been prepared without reference to the appropriate guidelines.

27. The trial court's admission of the Presentence Investigation, which contained numerous inaccuracies violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

28. The admission of the presentence investigation[,] which contained two prior reports prepared by the Lucas County Adult Probation Department concerning totally unrelated offenses violated

Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

29. Petitioner Esparza was denied his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments[,] because he was not informed of his Miranda rights at the commencement of his interview by members of the Adult Probation Department.

30. Petitioner was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments[,] because the PSI cited to the fact that the Petitioner had exercised his right not to testify.

31. Petitioner was denied his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments[,] because the PSI which was admitted into evidence contained numerous non-statutory aggravating circumstances.

32. Petitioner was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments because the jury was repeatedly informed during the mitigation phase of the Petitioner's prior criminal record, as both a juvenile and as an adult.

33. Petitioner was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments[,] because the trial court admitted a Psychological Report which had not been prepared pursuant to the required procedures.

34. Petitioner was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments because the trial court admitted a PSI which contained Petitioner's criminal record.

35. Petitioner was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments because the Mitigation Psychological Report cited to the fact that the Petitioner had exercised his right not to testify.

36. Petitioner Esparza was denied his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments because he was not informed of his Miranda rights at the commencement of his interview by the members of the court clinic.

37. Petitioner Esparza was denied his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments because the Psychological Report which was admitted into evidence contained numerous non-statutory aggravating circumstances.

38. The trial court's wrongful admission of testimony that the Petitioner had an anti-social personality that "causes" him to deny his guilt as to offenses that he has in fact committed denied Petitioner his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

39. Petitioner Esparza[‘s] rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments were violated when the trial court denied defense counsel’s requests for additional time to prepare for the sentencing hearing.

40. The admission of a photograph of the decedent and a photograph of the decedent’s child violated Petitioner’s rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

41. The trial court’s admission of improper rebuttal testimony violated Petitioner’s rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

42. The prosecutor’s introduction of nonstatutory aggravating circumstances throughout the penalty phase, violated Petitioner’s rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

43. The trial court’s preclusion of mitigating evidence at the sentencing hearing violated Petitioner Esparza’s rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

44. The errors and omissions of Petitioner’s counsel during the mitigation phase deprived Petitioner of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

45. The prosecutor’s misconduct during the mitigation phase[] deprived Petitioner Esparza of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

46. The trial court and prosecutor impermissibly shifted the burden of persuasion to the Petitioner in the sentencing phase in violation of Petitioner’s rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

47. The trial court and prosecutor’s repeated admonishments to the jurors that any death verdict was only a recommendation deprived Petitioner Esparza of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

48. The instructions provided to the jury in the mitigation phase violated Petitioner Esparza’s rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

49. The instructions by the trial court in the mitigation phase, when viewed in their entirety, mandated a sentence of death in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

50. The trial court’s reliance upon nonstatutory aggravating circumstances, misconceptions of law, and its failure to recognize mitigating evidence and factors violated Petitioner’s rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

51. Petitioner Esparza's death sentence violates the Fifth, Sixth, Eighth and Fourteenth Amendments because residual doubt exists as to his conviction.

52. Petitioner Esparza[‘s] convictions and death sentence are unreliable due to the cumulative error that occurred in the trial and sentencing phases and therefore his convictions and death sentence violate the Fifth, Sixth, Eighth and Fourteenth Amendments.

53. The actions and omissions of Petitioner Esparza's appellate counsel on direct appeal deprived Petitioner Esparza of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

54. The Lucas County Court of Appeals[‘] flawed appellate review violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

55. The statutory provisions governing the Ohio capital punishment scheme violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. This scheme is unconstitutional on its face and as applied to Petitioner.

56. The use of the same felony (aggravated robbery) to elevate the murder to aggravated murder and from aggravated murder to capital murder violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

**V. THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996**

As this Court previously concluded, the AEDPA, applies to this case because Esparza filed his petition for habeas corpus relief on September 5, 1996, after the AEDPA's effective date of April 24, 1996. The AEDPA changed federal habeas corpus law in several important respects. Among the most significant of these changes is the standard of review to be applied to state court legal and factual determinations. Under the Act:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d).

The Supreme Court, in Williams v. Taylor, -- U.S. --, 146 L. Ed. 2d 389 (2000), recently set forth the standard of review a federal habeas court must apply under § 2254(d).[7] The Supreme Court provided definitions for the phrases "contrary to," "unreasonable application of" and "clearly established federal law" in § 2254(d)(1). See id.

The Supreme Court first pointed out that the phrases "contrary to" and "unreasonable application of" must be given independent meanings. See id. at 425. A state court decision can be "contrary to" the Supreme Court's clearly established precedent in two ways: (1) "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law," and (2) "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to" that decision. Id.

The Williams Court also stated that the word "contrary" "is commonly understood to mean "diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" Id. Thus, §2254 "suggests that the state court's decision must be substantially different from the relevant precedent of [the Supreme Court]." Id. The Supreme Court suggested that this phrase would be applicable if the state court applies a rule that contradicts the governing law set forth in prior Supreme Court cases, such as if a state court were to hold that, in order to establish an ineffective assistance of counsel claim, a

[7] This decision displaces the Sixth Circuit's previous efforts in Nevers v. Killinger, 169 F.3d 352, 361-362 (6th Cir. 1998) and Maurino v. Johnson, 210 F.3d 638, 643-44 (6th Cir. 2000) to clarify this aspect of the statute. See Harris v. Stovall, 212 F.3d 940, 942 (6th Cir. 2000)

defendant must prove by preponderance of the evidence, instead of only a "reasonable probability," that the results of the trial would have been different. Id. at 426.

The Supreme Court held that an "unreasonable application" occurs when "the state court identifies the correct legal principle from this Court's decision but unreasonably applies that principle to the facts of the prisoner's case."[8] The Court emphasized, however, that "unreasonable" means more than simply incorrect. See id. at 428. ("For purposes of today's opinion, the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law.") (emphasis in original). "A federal habeas court may not find a state adjudication to be 'unreasonable' 'simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.'" Harris v. Stovall, 212 F.3d 940, 942 (6th Cir. 2000) (*citing* Williams, -- U.S. --, 146 L. Ed. 2d at 429).

The Supreme Court also pointed out that to determine the reasonableness of the state court's decision, a court must employ an objective test, not a subjective one. The Supreme Court, thus, rejected the Fourth Circuit's holding that a state court's application of federal law was only unreasonable "if the state court has applied federal law in a manner that reasonable jurists would all agree is unreasonable." See Williams, -- U.S. --, 146 L. Ed. 2d at 42. The Court reasoned that this test was too subjective

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[8] The Supreme Court also discussed a second aspect of the Fourth Circuit's test to determine whether the state court "unreasonably applied" applicable precedent. See Williams, -- U.S. --,146 L. Ed. 2d. at 427. The second part of the Fourth Circuit's test provides that a state court "unreasonably applied" Supreme Court precedent "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Id. The Supreme Court had reservations about this prong of the test, because it was imprecise and could be difficult to apply. The Court stated that, "although that holding may perhaps be correct, that classification does have some problems of precision." Id. at 427. Finding that the case in front of them did not require the Court to reach this issue, the Williams Court decided to leave for another day how such "extension of legal principle" cases should be treated.

because a court might "rest[] its determination. . . on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case." Id. at 428.

The Williams Court also provided further guidance for the phrase "clearly established by holdings of the Supreme Court." See id. at 429. The Court stated that this statutory phrase "refers to the holdings, as opposed to its dicta, of this Court's decisions as of the time of the relevant state-court decision." Id. The Sixth Circuit has previously stated that "this provision marks a 'significant change' and prevents the district court from looking to lower federal court decisions in determining whether the state court decision is contrary to, or an unreasonable application of clearly established federal law." Harris v. Stovall, 212 F.3d 940, 944 (2000) (*quoting* Herbert v. Billy, 160 F.3d 1131, 1135 (6th Cir. 1998)).

The Williams Court referred to the jurisprudence it has developed under Teague v. Lane, 489 U.S. 288 (1989), to help guide federal courts as to what qualifies as "clearly established Federal law." See Williams, -- U.S. --, 146 L. Ed. 2d at 430. The Williams Court stated "[w]hatever would qualify as an 'old rule' under Teague will constitute 'clearly established Federal law, as determined by [this] Court.'" Id. Under Teague, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." Teague v. Lane, 489 U.S. 288, 301 (1989). "To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Id. "In determining whether the relief requested would constitute a new rule, the question becomes, 'whether a state court considering [the petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude

that the rule [he] seeks was required by the Constitution.'" Harris v. Stovall, 212 F.3d at 944 (*quoting* Caspari v. Bohlen, 510 U.S. 383, 390 (1994)). See also Saffle v. Parks, 494 U.S. 484, 488 (1990).

## VI. PROCEDURAL DEFAULT

Respondent argues that Esparza is precluded from pursuing many of his stated grounds for issuance of the writ on the grounds of procedural default.[9] The Court will address the question of procedural default with respect to those individual grounds respondent attacks on that basis.[10] As an initial matter, however, the Court here sets out the applicable law and addresses Esparza's more general arguments regarding the application of procedural default.

### A. Legal Standards

Normally, a federal court may not consider "contentions of federal law which are not resolved on the merits in the state proceeding due to petitioner's failure to raise them as required by state procedure." Wainwright v. Sykes, 433 U.S. 72, 87 (1977). If a "state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual

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[9] Respondent does not contend that any of petitioner's claims are unexhausted. Respondent asserts, rather, that certain of petitioner's claims could not have been presented to the state's highest court because of petitioner's procedural defaults at earlier stages of the proceedings. See Coleman v. Thompson, 501 U.S. 722, 732 (1991) ("A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him."). Although the state's failure to raise exhaustion does not invariably waive the defense, see Granberry v. Greer, 481 U.S. 129, 133-34 (1987), and it is petitioner's burden to prove exhaustion, see Rust v. Zent, 17 F.3d 155, 160 (1994), the Court sees no obvious exhaustion problems with the petition in this case and does not engage in a sua sponte analysis of exhaustion where respondent has failed to raise it.

[10] The Court does not engage in a sua sponte analysis of procedural default where respondent has declined to raise the issue.

prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 749 (1991).

In Maupin v. Smith, 785 F.2d 135 (6th Cir. 1986), the Sixth Circuit Court of Appeals set out the analytical framework for determining claims of procedural default. "When a state argues that a habeas claim is precluded by the petitioner's failure to observe a state procedural rule, the federal court must go through a complicated [four-step] analysis." Id. at 138.

> First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule. . . . Second, the court must decide whether the state courts actually enforced the state procedural sanction. . . . Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim. [And fourth, if] the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate . . . that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Id. (citations omitted).

**B. Esparza's Challenges to The Application of Procedural Default**

Esparza attacks respondent's procedural bar arguments in three ways. First, Esparza challenges respondent's arguments with respect to each individual claim that respondent contends was waived, arguing either that they were raised below (and simply overlooked by respondent), or that, under Maupin, application of procedural default would be improper as to that claim. The Court will address these arguments in its discussion of Esparza's individual claims for relief. Second, Esparza asserts more general, *systemic*, challenges to the imposition of the procedural default rule as it relates to all of his claims; Esparza asserts a number of these arguments and each will be separately addressed. Esparza's

third argument goes unstated but is implicit in the manner in which he presents his claims. It relates to claims that were only raised in the context of ineffective assistance of counsel claims, as opposed to separate claims, in his state proceedings, but are asserted as independent claims in his federal action. Esparza argues that, because the state courts necessarily had to address the merits of the underlying, substantive claims in resolving the ineffective assistance of counsel claims – to determine cause and prejudice – his substantive claims *were* raised, and addressed, in his state action.

**1. Systemic Challenges**

**a. Ohio's Procedural Rules Are Not Adequate Under Maupin Because They Are not Consistently and Regularly Applied**

Esparza argues that none of the state procedural rules relied upon by respondent are "adequate" under the third prong of Maupin. A procedural rule is not "adequate," unless, among other things, it is regularly and consistently applied. See Warner v. United States, 975 F.2d 1207, 1213 (6th Cir. 1992) (stating that the rule only applies to "firmly established and regularly followed state practices.") (*citing* Ford v. Georgia, 498 U.S. 411, 422 (1991)).

Esparza contends that Ohio courts are inconsistent in their application of the procedural rules upon which respondent bases his waiver arguments, especially the Perry rule[11] and especially in capital cases, and that he thus cannot be held to have procedurally defaulted under Maupin. In support, Esparza cites to several capital cases in which the Ohio Supreme Court, on direct appeal, sua sponte addressed the merits of claims that the Court of Appeals had concluded were barred by res judicata, or considered claims that had not even been raised in the Court of Appeals, and, thus, *should have been* barred by res judicata.

[11] State v. Perry, 226 N.E.2d 104 (Ohio 1967) (holding that any claim that was raised or could have been raised in direct appeal is barred from review on post conviction under the doctrine of res judicata).

Some of the cases relied on by Esparza clearly do not support his argument and are, in fact, inapposite. For instance, in each of the following three cases, a well-established exception to the res judicata doctrine applied, or the court did not actually engage in a merits review. Esparza first relies on State v. Buell, 489 N.E.2d 795, 811 (Ohio 1986). In Buell, the court analyzed the constitutionality of the imposition of the death penalty in light of the recently decided United States Supreme Court decision in Caldwell v. Mississippi, 472 U.S. 320 (1987), even though the petitioner did not raise the issue at trial, or in his appeal to the Ohio Supreme Court. The reason the Ohio Supreme Court considered the claim sua sponte was that it *could not have been raised before*. Caldwell was decided in 1985, after Buell's appeal had been filed and resolved by the Ohio Court of Appeals.

Similarly, in State v. Huertas, 553 N.E.2d 1058 (Ohio 1990), the Ohio Supreme Court resolved an issue and ultimately granted relief on the basis of a Supreme Court opinion, Booth v. Maryland, 482 U.S. 496 (1987), *overruled by* Payne v. Tennessee, 501 U.S. 808 (1991), which was issued after the petitioner's trial and after the appeal had been filed, but before the appellate court issued its decision. Id. Booth held that the use of victim impact evidence during the penalty phase of a capital trial is unconstitutional. There is no indication in the opinion itself that the petitioner had failed to raise a claim based on the use of victim impact statements. Thus, it is possible that the *claim* had been raised below, even if the petitioner could not have relied on Booth. Thus, Huertas is unhelpful to Esparza.[12]

Esparza's reliance on State v. Rogers, 512 N.E.2d 581 (Ohio 1987), suffers from the same defect. The court considered a claim based on the prosecutor's evidentiary use of the petitioner's post-Miranda exercise of his right to silence, in violation of the recently decided Wainwright v. Greenfield,

[12] For many of the same reasons, State v. Post, 513 N.E.2d 754 (Ohio 1987), does not support Esparza's argument. As the Ohio Supreme Court itself noted, Booth had *just* been decided during the time in which the petitioner's appeal to the Ohio Supreme Court was pending.

474 U.S. 284 (1986). As in Huertas and Buell, the United States Supreme Court decision was issued after the petitioner's direct appeal to the Court of Appeals, and, thus, the appeal to the Ohio Supreme Court presented the earliest opportunity for raising the claim.

In other cases, however, the Ohio Supreme Court did appear to ignore the res judicata bar and address the petitioner's claims on the merits without explaining why it was doing so. See State v. Williams, 528 N.E.2d 910 (Ohio 1988) ("Because of the gravity of the sentence that has been imposed on appellant, we have reviewed the record with care for any errors that may not have been brought to our attention. In addition, we have considered any pertinent legal arguments which were not briefed or argued by the parties."); State v. Barnes, 495 N.E.2d 922 (Ohio 1986)(stating, "since the instant argument was neither raised before, nor ruled on by, the court of appeals, this court is not required to address it on the merits," but addressing the claim anyway); State v. Hamblin, 524 N.E.2d 476 (Ohio 1988) ("Because this is a capital case, we will review all five arguments [even those not raised below] relating to the claim of ineffective assistance of counsel."); State v. Esparza, 529 N.E.2d 192 (Ohio 1988) (considering issue of jury venire, even though it was "challenge[d] for the first time on appeal").[13]

Esparza's argument is not without force. Ultimately, however, it is unpersuasive. As an initial matter, the Sixth Circuit has specifically held that Ohio's application of the res judicata doctrine under Perry *is* an adequate and independent state ground. See Brooks v. Edwards, 96 F.3d 1448 (Table), 1996 WL 506505, at *5 (6th Cir. Sept. 5, 1996) ("The procedural rule [of res judicata] applicable to petitioner's claim is an adequate and independent state ground for refusal to hear the claim by the Ohio Supreme Court."). As Brooks observed, "[t]he doctrine of res judicata has been explicitly set forth in

[13] In virtually every case in which the Ohio Supreme Court has forgiven a procedural default, and addressed a claim on its merits, the Court has concluded that the claim was without merit.

numerous Ohio decisions, and Ohio courts have consistently refused to review claims on the merits under this doctrine." Id. (citations omitted).

That the Ohio Supreme Court occasionally chooses to address the merits of claims that are otherwise barred from review on the basis of res judicata does not mean that Ohio's law of res judicata is so inconsistent as to be inadequate, moreover. Rather, these are the exceptions that prove the rule. Consistency does not compel slavish adherence. As the Fourth Circuit has held, "[c]onsistent or regular application of a state rule of procedural default does not require that the state court show an 'undeviating adherence to such rule admitting of no exception.'" Yeatts v. Angelone, 166 F.3d 255, 263-64 (4th Cir. 1999) (*quoting* Wise v. Williams, 982 F.2d 142, 143 (4th Cir.1992)). Rather, the procedural rule is adequate, if, as "a general rule, [it has] been applied in the vast majority of cases." Plath v. Moore, 130 F.3d 595, 602 (4th Cir.1997) (internal quotation marks omitted), *cert. denied*, 523 U.S. 1143 (1998). While the Ohio courts of appeals may not be paradigms of consistency, they do not ignore or arbitrarily decline to apply Ohio's procedural bars, including the Perry rule, on a regular basis. Indeed, the procedural bar is applied in the vast majority of cases, both capital and non-capital. Moreover, there has been no showing that, because of the above-mentioned exceptions, Esparza or other capital habeas petitioners *reasonably* came to believe that the Perry rule had been abandoned in capital cases.[14] Thus, there was no basis to conclude that the exception had become the rule, or that it would have been reasonable for a petitioner to assume that it had.[15] Accordingly, the Court concludes the Perry

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[14] Indeed, in several capital cases, the Ohio Supreme Court has enforced procedural bars. See Bueke v. Collins, Case No. C1-92-507, slip op., at 63-64 (S.D. Ohio Oct. 19, 1995) (collecting cases).

[15] The Ohio Supreme Court has expressly rejected the argument that procedural bars are or should be less strictly enforced in capital cases:

> The mere fact that punishments differ provides no basis to assert that procedural rules

rule is adequate.[16] In reaching this conclusion, the Court observes that the Sixth Circuit recently rejected the very argument now advanced by Esparza. See Mapes v. Coyle, 171 F.3d 408, 421 (6th Cir. 1999) ("The cases that [petitioner] claims demonstrate Ohio's wavering commitment to its procedural default rules do not in fact do so."). See also Scott v. Mitchell, 209 F.3d 854, 869 (6th Cir. 2000) (rejecting petitioner's claim that Ohio's procedural default rules are too loosely applied to comport with due process); Byrd v. Collins, 209 F.3d 486 (6th Cir. 2000) (rejecting petitioner's claim that the Perry Rule or the Cole Rule was not regularly applied and thus not an adequate and independent state ground for purposes of invoking a procedural bar). A district court within this circuit earlier rejected this argument as well. See Bueke v. Collins, No. C1-92-507, at 65 ("Petitioner has not cited a single case holding that a consistently enforced state procedure bar[,] which on some occasions is not invoked for unexplained reasons generally consistent with plain error review[,] should not be enforced in federal habeas corpus.").

**b. Ohio's Post-Conviction System Does Not Comport With Due Process Requirements**

Esparza also asserts a broad challenge to the constitutionality of Ohio's post-conviction system, contending that Ohio's post-conviction bar of res judicata does not satisfy due process requirements.

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> should differ in their application to the crime charged. We hold that capital defendants are not entitled to special treatment regarding evidentiary or procedural rules . . . . We will utilize the doctrine of waiver where applicable; yet we must also retain the power to sua sponte consider particular errors under exceptional circumstances.

State v. Greer, 530 N.E.2d 382, 394 (Ohio 1988).

[16] Esparza attempts to bolster his argument by pointing to several *non-capital* cases in which the courts, on post-conviction review, similarly declined to apply res judicata and considered otherwise barred claims on their merits. For the same reasons explained above, this claim too must fail. See supra; Bueke, C1-92-507, at 66-67.

According to Esparza, Ohio's post-conviction system is designed to create procedural defaults for the sake of judicial convenience, and provides no meaningful opportunity for petitioners to identify, investigate, or prove constitutional violations. Esparza, however, does not explain precisely what it is about the system that permits this to occur. The thrust of his argument seems to be that Ohio's post-conviction practice makes compliance with its procedural requirements so difficult that petitioners are set up for failure.[17] This argument is unpersuasive.

In support of this argument, Esparza primarily relies on three cases: Easter v. Endell, 37 F.3d 1343, 1345 (8th Cir. 1994); Harmon v. Ryan, 959 F.2d 1457, 1462 (9th Cir. 1992); and Kim v. Villalobos, 799 F.2d 1317, 1321 (9th Cir. 1986). None of these cases supports Esparza's argument that *Ohio's* application of res judicata in post-conviction proceedings violates due process.

In Easter, the petitioner pled guilty to various crimes in an Arkansas state court in December of 1989. At the time, Arkansas did not allow those who pleaded guilty to appeal; in addition, Arkansas had no real post-conviction system in place. A year after Easter's guilty plea and conviction, Arkansas erected a post-conviction procedure (Rule 37) that allowed for the review of guilty pleas. However, petitions containing such challenges were required to be filed within ninety (90) days of judgment. The Arkansas Supreme Court subsequently held that individuals who had pleaded guilty during the period in which Rule 37 was *not* in effect had a right to challenge their guilty pleas under the rule. Fox v. State, 832 S.W.2d 244 (Ark. 1992). The Arkansas Supreme Court also said, however, that such challenges

[17] Esparza attempts to bolster his argument that the post-conviction process is inadequate by pointing to the record of its results. Thus, Esparza points out that (1) only one death-sentenced petitioner has ever been granted post-conviction relief by a state trial court; (2) in only eight instances has an Ohio Court of appeals remanded a post-conviction matter for further review (review which did not result in a grant of relief) and; (3) the Ohio Supreme Court has never granted discretionary review in a capital post-conviction proceeding. These results, as discouraging to petitioner as they might be, do not necessitate the conclusion that the process which produces them is constitutionally infirm, however.

still had to be made within the ninety (90) day period. Easter filed a Rule 37 petition, and it was denied as untimely. Easter raised a challenge to his guilty plea on federal habeas review, and the district court held that the claim was procedurally defaulted.

The Eighth Circuit Court of Appeals reversed. The Court held that the Fox procedural bar was not adequate *as to Easter*,[18] because it was not a firmly established rule when applied to him.[19] In this case, Esparza has not shown that any of his procedural defaults were due to a procedural rule that was not firmly established at the time it was applied to him.[20]

Harmon also offers no support for Esparza's claims. In Harmon, the district court dismissed the petitioner's habeas corpus petition because he had failed to pursue a direct appeal in the Arizona Supreme Court first. The Ninth Circuit reversed, holding, basically, that the Arizona Supreme Court had misled the petitioner about what he needed to do to exhaust his state remedies. The Ninth Circuit held that the petitioner's default was due to the fact that, prior to its occurrence, the Arizona Supreme Court expressly held that "'[o]nce the defendant has been given the appeal to which he has a right [i.e., in the state intermediate appellate court], state remedies have been exhausted.'" Harmon, 959 F.2d at 1463 (*quoting* State v. Shattuck, 684 P.2d 154, 157 (Ariz. 1984)). Thus, the Ninth Circuit concluded, in light of Shattuck, it was reasonable for an Arizona defendant to believe that an appeal to the Arizona

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[18] The Court was careful to point out that "Arkansas' post-conviction procedures as embodied by Fox are not *in themselves* constitutionally infirm." Easter, 37 F.3d at 1346.

[19] This was an application of the Supreme Court's decision in Ford v. Georgia, 498 U.S. 411 (1991) (holding that a state procedural rule which was not clearly defined before the default is not an adequate state ground for purposes of determining procedural default).

[20] Pearson v. Norris, 52 F.3d 740 (8th Cir. 1995), also involved Arkansas Rule 37. In Pearson, the Court held that, since any attempt by the petitioner to file an untimely Rule 37 petition would be rejected by the Arkansas courts, the claim should be addressed by the federal district court on the merits.

Appeals Court was all that was needed to exhaust his state remedies before pursuing a federal habeas action, and the failure to appeal to the Arizona Supreme Court was excused. Here, Esparza has not pointed to a single decision which misled him about his obligations.

Likewise, Kim does not assist Esparza's argument. In Kim, the Ninth Circuit held that, where a pro se prisoner's failure to plead his claims with particularity resulted in his being unable to pursue post-conviction relief, the procedural default would be excused. Here, there is no such obstacle to Esparza, who was represented by counsel throughout his appeal and post-conviction proceedings.

Other than to complain about the result reached in his case, where virtually all of his post-conviction claims were deemed barred from further review, Esparza has failed to identify how Ohio's post-conviction review process is constitutionally infirm. While the procedure may be strict, and its track-record fairly pitiful, it is not draconian, and certainly does not resemble the Kafkaesque procedural rigamarole condemned by Bartone v. United States, 375 U.S. 52, 54 (1963) (per curiam) ("Where state procedural snarls or obstacles preclude an effective state remedy against unconstitutional convictions, federal courts have no other choice but to grant relief in the collateral proceeding."). Accordingly, this argument fails.

**c. The Perry Rule Does Not Bar Consideration of Ineffective Assistance of Trial Counsel Claims.**

Esparza argues that Ohio has carved out an exception to the Perry rule, allowing claims premised on the ineffective assistance of trial counsel to be raised for the first time in post-conviction proceedings. Because so many of Esparza's claims are premised on the alleged ineffectiveness of his trial counsel, the existence, or non-existence, of such an exception is critical to the Court's procedural default analysis.

Unfortunately for Esparza, however, while it is true that an exception to the Perry rule does exist for certain ineffectiveness of counsel claims, that exception does not apply to the ineffectiveness of counsel claims in Esparza's petition. The Ohio Supreme Court has made it clear that, where a petitioner is represented by new counsel on appeal and the ineffectiveness claim is based on facts in the trial record, res judicata will apply to bar that claim if not presented on direct appeal. See Ohio v. Cole, 443 N.E.2d 169, 171 (Ohio 1982)(When defendant "upon direct appeal was represented by new counsel. . . and when such question of effective counsel could fairly be determined without examining evidence outside the record, none of the qualifications engrafted on the Perry decision is apposite.") See also Combs v. Coyle, 205 F.3d 269, 275 (6th Cir. 2000)(Cole bars post-conviction ineffective assistance of counsel claims where petitioner had new counsel on direct appeal); Bueke v. Collins, slip. op., C1-92-507 at 70 (Ohio "demands that ineffective assistance of counsel claims based on facts of record be presented on direct appeal when the defendant is represented by new counsel on direct appeal"). Because Esparza was represented by new counsel on direct appeal and his claims do not, in most instances, depend on evidence dehors the record, Esparza may not avoid application of Perry to those claims.

The conclusion that Esparza's ineffective assistance of counsel claims may not escape Perry is true, moreover, despite Esparza's citation to State v. Cooperrider, 448 N.E.2d 452 (1983). Cooperrider, only states the exception to this rule that, when the trial record does not contain sufficient evidence regarding the issue of competency of counsel, an evidentiary hearing is required to determine the

allegation and the issue may, then, be raised through the post-conviction remedies of Ohio Rev. Code § 2953.21.[21]

**d. The Perry Rule Does Not Promote a Legitimate State Interest**

Finally, Esparza argues that the Perry rule cannot be applied to procedurally bar any of his claims because it does not promote a legitimate state interest, relying on Henry v. Mississippi, 379 U.S. 443, 447 (1965) (finding that Mississippi's contemporaneous objection rule promotes a legitimate state interest). Esparza cites to several Sixth Circuit decisions in which the judges of that court bemoaned the fact that Ohio's post-conviction procedures had been effectively gutted by Perry. Esparza has not, however, cited to this Court a single instance in which the Sixth Circuit has directed district courts to disregard Perry entirely. Indeed, a panel of the Sixth Circuit very recently went to great pains to discuss the benefits of contemporaneous objection rule, finding that it served numerous legitimate interests, not the least of which was protecting the finality of jury verdicts. See Scott v. Mitchell, 209 F.3d 854, 870-871 (6th Cir. 2000). Accordingly, petitioner's blanket request that this Court refuse to impose Ohio's procedural bars to his claims is rejected.[22]

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[21] That federal courts may apply a more lenient procedural bar standard in cases under 28 U.S.C. § 2255 does not change the fact that Ohio's procedural default is an adequate and independent ground to foreclose federal habeas review of certain ineffective assistance of counsel claims. See Byrd v. Collins, 209 F.3d 486, 521 (6th Cir. 2000) (holding that Cole is an adequate and independent state ground for purposes of invoking a procedural bar to ineffective assistance of trial counsel claims); but see id. at 548 (Jones, J., dissenting) (stating that taking into account the Ohio Supreme Court's decision in Cooperrider and the Sixth Circuit's recognition of the murkiness of Ohio's procedural framework for presenting ineffective assistance of counsel claims, neither the Cole rule, nor the Murnahan procedure was sufficiently established and followed to serve as an "adequate" state procedure that could bar a federal habeas court's examination of ineffective assistance of counsel claims)

[22] Esparza also argues that he can establish cause and prejudice for any of his procedural defaults. Whether Esparza has established cause and prejudice for any defaults will be addressed in the context of Esparza's individual claims.

**2. Procedural Default of Claims Raised In the Context of Ineffective Assistance of Counsel Claims in State Court, But Raised as Independent Claims On Federal Habeas Review**

As noted, many of the claims Esparza raises in this action were raised in his state proceedings, not as separate and independent claims for relief, but as components of ineffective assistance of counsel (trial and appellate) claims in his state proceedings. In some instances, the state courts addressed the substance of those underlying claims in order to determine whether Esparza's counsel's failure to raise them at the earliest opportunity for doing so constituted ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). The reason for this is obvious. Under Strickland, counsel's conduct will only be deemed constitutionally deficient if *both* of the following are true: (1) counsel's conduct fell below basic standards of assistance, *and* (2) that, but for counsel's professional failures, the result of the trial would likely have been different – i.e., the defendant was prejudiced thereby. If the underlying claim upon which the ineffective assistance of counsel claim is based lacked merit, then Esparza would have suffered no prejudice from his counsel's failure to raise it, and no constitutional violation could be established.[23] Thus, the Court's analysis of the underlying claim served to *inform* its resolution of Esparza's ineffective assistance of counsel claim. The fact that the state courts engaged in that analysis, as they must under Strickland, does not, as Esparza contends, serve as evidence that those courts *excused* the procedural default. To hold otherwise would eviscerate the continued vitality of the procedural default rule; every procedural default could be avoided, and federal

[23] For example, in the case of an ineffective assistance of trial counsel claim premised on trial counsel's failure to file a motion to suppress an allegedly overly suggestive pre-trial identification, a determination that the pre-trial identification was *not* overly suggestive would preclude a finding that counsel's performance was constitutionally deficient.

court merits review guaranteed, by claims that every act giving rise to every procedural default was the result of constitutionally ineffective counsel.

As the Sixth Circuit recently stated in Mapes v. Coyle:

> Since the central issue before us is whether, as the federal district court found, Mapes's appellate counsel was constitutionally ineffective for failing to raise several alleged trial errors, we must first determine whether the trial court in fact erred. If it did not, there can be no constitutional deficiency in appellate counsel's failure to raise meritless issues. If the trial court did err, the questions then become whether appellate counsel was constitutionally ineffective for failing to raise those errors on appeal and, if so, whether the petitioner was prejudiced by counsel's unsatisfactory representation. We shall address those questions in due course, but we must, of course, first examine Mapes's allegations of error, even though, on their own merits, they may be defaulted.

171 F.3d 408, 413 (6th Cir. 1999). As Mapes suggests, an analysis of a particular claim for purposes of determining whether counsel's failure to assert that claim at trial or on appeal was ineffective is independent of whether the underlying claim would itself be procedurally defaulted if asserted as a discrete claim. Accordingly, to the extent Esparza asserts claims here that were only asserted *as part of* an ineffective assistance of counsel claim during state court proceedings, and were only considered in that context, those claims are deemed to be procedurally defaulted, notwithstanding evidence that the state courts touched on the substance of those claims. Cf. Scott v. Mitchell, 209 F.3d at 865-868 (rejecting rule in Knuckles v. Rogers, No. 92-3208, 1993 WL 11874 (6th Cir. Jan. 21, 1993) and holding that a state court's plain error review does not excuse procedural default). The Court will, of course, address the substance of such claims in the context of Esparza's ineffective assistance of counsel claims, or in the context of a claim that the procedural default should be excused under a cause and prejudice standard, if appropriate, but that consideration is not the same as a merits review of those claims.

## VII. INDIVIDUAL GROUNDS FOR RELIEF

Esparza's claims fall into five broad categories: (1) constitutional violations which tainted the entire course of the state proceedings; (2) constitutional violations relating to the guilt phase and conviction; (3) constitutional violations relating to the mitigation phase and sentencing; (4) constitutional violations relating to Esparza's appeals; and (5) systemic challenges to Ohio's capital punishment scheme in general.

### A. Constitutional violations which tainted the entire course of the state proceedings

#### 1. Sixth Claim for Relief

In his sixth claim, Esparza contends that Hispanics were under-represented in both his grand and petit jury venires, in violation of his constitutional rights. This claim was raised in Esparza's direct appeal and was considered on the merits by both the Ohio Court of Appeals and Ohio Supreme Court. Thus, it is not procedurally defaulted and the Court may consider it on the merits.

A petit jury venire must represent a "fair cross section of the community." Holland v. Illinois, 493 U.S. 474, 480 (1990); Taylor v. Louisiana, 419 U.S. 522, 528-29 (1975). To establish a prima facie violation of the fair cross-section requirement, the petitioner must show that (1) the group which allegedly was excluded is a distinctive group in the community; (2) the representation of this group in venires is not reasonable when compared to the number of such persons in the community; and (3) the under-representation is due to a systematic exclusion of the group in the jury selection process. Duren v. Missouri, 439 U.S. 357, 367-68 (1979).

Applying this constitutional test, both the Ohio Court of Appeals and the Ohio Supreme Court, on direct appeal, rejected this claim. According to the Ohio Court of Appeals:

> We find that appellant has failed to show [prongs] (2) and (3). Appellant cites a political and demographic profile of Hispanics in Toledo, but fails to correlate these findings to Hispanic representation on juries in Toledo or show how it is unfair and unreasonable in relation to the number of such persons in the community. As far as the third prong is concerned, the under-representation is not due to the systematic or intentional exclusion of Hispanics. The percentage of Hispanic representation in jury pools depends in part on how many Hispanics register to vote. It is within this group's power to control their eligibility for jury duty.
> "[T]he use of voter-registration lists as the source of names of prospective jurors is not unlawful even though it results in the exclusion of nonvoters."

Esparza, 1986 WL 9101, at *22 (*quoting* State v. Strodes, 357 N.E.2d 375 (Ohio 1976), *vacated on other grounds*, 438 U.S. 911 (1978)) (alteration in original).[24] The Ohio Supreme Court also agreed, stating: "Appellant has demonstrated neither an unfair representation of Hispanics on Lucas County juries, nor that such alleged under-representation resulted from a systematic exclusion by the state of that group." Esparza, 529 N.E.2d at 197-98 (*citing* State v. Puente, 431 N.E.2d 987 (Ohio 1982); Duren v. Missouri, 439 U.S. 357 (1979)).

It is true that Hispanics are a distinctive group and courts have specifically so found. United States v. Cannady, 54 F.3d 544, 547 (9th Cir. 1995). It is equally true that those who do not register to vote are *not* a distinctive group, as explained above. The Court concludes that the decisions of the Ohio Court of Appeals and Ohio Supreme Court were not unreasonable applications of clearly established federal law. Esparza has presented no evidence suggesting either that the representation of Hispanics in venires is unreasonable, or that any under-representation that exists is the result of a systematic exclusion of Hispanics in the jury selection process. Accordingly, Esparza's sixth claim for relief is without merit.

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[24] It is well-established that those who are non-voters, or, more precisely, those who are not registered to vote, do not comprise a distinctive group for purposes of the fair cross-section inquiry. See Silagy v. Peters, 905 F.2d 986, 1010 (11th Cir. 1990); United States v. Afflerbach, 754 F.2d 866, 869-80 (10th Cir. 1985).

**2. Esparza's Eighth and Ninth Claims for Relief**

Esparza's eighth claim for relief is that his constitutional rights were violated when the trial court "secured a promise" from each juror that he or she could vote to impose the death penalty. This claim is based on the following question posed to the venire by the trial court:

> But the question is, if you were selected as a member of a jury, and because of a finding of that jury, you might later be asked to consider the death penalty, are there circumstances that you can foresee that would preclude or prevent you for [sic] following the Judge's instructions and fairly considering the possibility of the imposition of the death penalty in a case?

This claim was not raised in Esparza's direct appeal. Esparza's ninth claim is that the prosecutor unconstitutionally excluded all prospective jurors who were opposed to, or had reservations about, the death penalty. Esparza did not object to this during voir dire. The ninth claim was asserted in Esparza's direct appeal, and, although the Court of Appeals noted that Esparza failed to assert it below, both it and the Ohio Supreme Court addressed the claim on its merits, thus permitting this Court to do so as well.[25] Because the eighth and ninth claims are resolved on the basis of the same legal principles, and a resolution of one resolves both, the Court will discuss the merits of these claims, despite the procedural default as to at least one of them.

Esparza's argument appears to be that a "death qualified" jury is an unconstitutionally comprised jury. A "death qualified jury" is a jury made up of jurors who are not opposed to the death penalty and indicate that they would consider imposing the death penalty upon conviction. Witherspoon v. Illinois, 391 U.S. 510 (1968). In Witherspoon and its progeny, the Supreme Court has made clear that a "death qualified jury" is constitutional, so long as the jurors are willing "to consider all of the penalties

[25] These claims were not merely assessed under a "plain error" standard, which would not, as noted above, excuse the procedural default under Scott.

provided by state law," including the death penalty. Id. at 522 n.21. See Lockhart v. McCree, 476 U.S. 162 (1986); Wainwright v. Witt, 469 U.S. 412 (1985). See also Byrd v. Collins, 209 F.3d 486, 528 (6th Cir. 2000);United States v. Villarreal, 963 F.2d 725, 728-29 (5th Cir. 1992); Brown v. Dixon, 891 F.2d 490, 497 (4th Cir. 1989).

The Ohio Supreme Court cogently analyzed, and rejected, this claim:

> In his ninth proposition of law, appellant argues the state unconstitutionally exercised its peremptory challenges to remove six prospective jurors who were generally opposed to, or expressed reservations concerning, the death penalty. No objection was made during trial on this issue, which was raised for the first time on appeal. [Citation omitted.] Notwithstanding the resulting waiver of this issue, however, we find no merit to appellant's arguments.
>
> It is well-established that the Equal Protection Clause forbids the state's use of peremptory challenges to purposefully exclude "any identifiable group in the community which may be the subject of prejudice." Swain v. Alabama (1965), 380 U.S. 202, 205, 85 S.Ct. 824, 827, 13 L. Ed. 2d 759; Hernandez v. Texas (1954), 347 U.S. 475, 74 S.Ct. 667, 98 L. Ed. 866; Avery v. Georgia (1953), 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244; Batson v. Kentucky (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L. Ed. 2d 69. However, the prosecutor is entitled in any given case to a presumption that he "is using the State's challenges to obtain a fair and impartial jury to try the case before the court," Swain, supra, 380 U.S. at 222, 85 S.Ct. at 837, which may be rebutted by establishing the prosecutor's peremptory challenges resulted in systematic exclusion of such identifiable group from jury panels. Swain, supra, at 224, 85 S.Ct. at 838; see, also, Batson, supra, 476 U.S. at 87-88, 106 S.Ct. at 1717-18. In Lockhart v. McCree (1986), 476 U.S. 162, 176-177, 106 S.Ct. 1758, 1766-67, 90 L. Ed. 2d 137, the United States Supreme Court held that prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors in a capital case, i.e., "Witherspoon-excludables," are not distinctive, identifiable groups for the requirement that a jury represent a fair cross-section of the community. The Court thus upheld the practice of "death qualifying" a jury. If those persons who unequivocally oppose the death penalty do not constitute an "identifiable group" for fair cross-section purposes, even less so do those persons, like the six jurors identified by appellant here, who have some reservations and concerns about the death penalty but state that they are able to put those feelings aside and follow the instructions of the trial court. "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." Swain, supra, 380 U.S. at 220, 85 S.Ct. at 835. "'[I]t must be exercised with full freedom, or it fails at its full purpose.'" Lewis v. United States (1892), 146 U.S. 370,

> 378, 13 S.Ct. 136, 139, 36 L.Ed. 1011. Appellant's ninth proposition of law is not well-taken.

The Ohio Supreme Court's decision was not contrary to clearly established federal law. Accordingly, claims eight and nine lack merit.

**3. Tenth Claim for Relief**

Esparza's tenth claim for relief is that the exposure of prospective jurors to information from the media about his case deprived him of his constitutional rights. This claim is based on the following facts: one of the prospective jurors admitted that she had listened to a radio broadcast concerning Esparza's case *after* she was told to avoid media coverage; and another prospective juror stated that she had discussed the case with other prospective jurors while waiting. Esparza complains that the trial court did not make further inquiry of these prospective jurors after learning this information, and that this failure to make further inquiry violated Esparza's right to a fair trial**.** Neither prospective juror was ultimately selected to sit as a juror, so Esparza's argument seems to be that these improprieties infected the other members of the venire, and that the court should have questioned the other members to ensure that they had not been prejudiced by these improprieties.

This claim apparently was raised for the first time during Esparza's delayed motion for reconsideration. Esparza's counsel did not object at the time of trial, nor did Esparza's appellate counsel raise it in the course of Esparza's direct appeal. Rather, it was asserted as part of an ineffective assistance of appellate counsel claim – i.e., appellate counsel was ineffective for failing to assert that trial counsel was ineffective for failing to move for a mistrial after the trial court's failure to make further inquiry. It is, thus, procedurally defaulted as a discrete claim. It may only be considered in the

context of an ineffective assistance of appellate counsel claim, as made clear in Mapes, and as discussed supra, at Part VI.B.2, pp. 30-31.

The test for evaluating ineffective assistance of counsel claims was developed and set forth in Strickland and has been previously set forth in this opinion. Briefly, in Strickland, the United States Supreme Court held that a petitioner must demonstrate "cause" and "prejudice" to prevail on an ineffective assistance of counsel claim. To demonstrate cause, the petitioner must show "that counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 687-88. "The objective standard of reasonableness is 'highly deferential' and includes a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Skaggs, 27 F.Supp.2d 952, 967 (1988) (*citing* Strickland, 466 U.S. at 688, 689). Under this standard, "[t]he assistance required of counsel is not that of the most astute counsel, but rather that of 'reasonably effective assistance.'" Id.

A defendant is entitled to effective assistance of counsel in his first appeal as a matter of right. Evitts v. Lucey, 469 U.S. 387, 396 (1985). Attorney error may constitute cause for failure to comply with a procedural rule if it constitutes ineffective assistance of counsel under Strickland. See, e.g., Rust v. Zent, 17 F.3d 155, 161 (6th Cir. 1994); Ritchie v. Eberhart, 11 F.3d 587, 591 (6th Cir. 1993). The two-part test enunciated in Strickland, discussed above, is, thus, applicable to claims of ineffective assistance of appellate counsel: Esparza must show that his appellate counsel's performance was deficient, and that the deficient performance so prejudiced the defense that the appellate proceedings were unfair and the result unreliable. Strickland, 466 U.S. at 687. An appellant has no constitutional right to have every non-frivolous issue raised on appeal, Jones v. Barnes, 463 U.S. 745, 750-54 (1983), and tactical choices regarding issues to raise on appeal are properly left to the sound professional

judgment of counsel. United States v. Perry, 908 F.2d 56, 59 (6th Cir. 1990), *cert. denied*, 498 U.S. 1002 (1990). Indeed,

> [m]ost cases present only one, two, or three significant questions . . . . Usually, . . . if you cannot win on a few major points, the others are not likely to help, and to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the stronger ones.

Jones, 463 U.S. at 752 (*quoting* R. Stern, Appellate Practice in the United States 266 (1981)). Moreover, an attorney is not required to present an argument on appeal for which there is no good-faith factual support in order to avoid a charge of ineffective representation. Krist v. Foltz, 804 F.2d 944, 946-47 (6th Cir. 1986).

To establish prejudice generally, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. To satisfy this showing, the petitioner must show that his counsel's blunders "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686. In the context of an ineffective assistance of *appellate* counsel claim, a petitioner must show "that the direct appeal of [those] issue[s] [that appellate counsel did not raise] would likely have been successful." Leggett v. United States, 1996 WL 665580, at *2 (6th Cir. Nov. 14, 1996).

This claim clearly would fail under the prejudice prong. In cases involving pretrial publicity, "the relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." Patton v. Yount, 467 U.S. 1025, 1035 (1984). "It is sufficient if the juror can lay aside his impression or opinion

and render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U.S. 717, 722 (1961). Most recently, the United States Supreme Court has emphasized that there is no *per se constitutional* requirement that a court specifically inquire about the content of any pre-trial publicity that might have been viewed by potential jurors:

> Although precise inquiries about the contents of any news reports that a potential juror has read might reveal a sense of the juror's general outlook on life that would be of some use in exercising peremptory challenges, this benefit cannot be a basis for making "content" questions about pretrial publicity a constitutional requirement, since peremptory challenges are not required by the Constitution. Ross v. Oklahoma, 487 U.S. 81, 88, 108 S.Ct. 2273, 2278, 101 L. Ed. 2d 80. Moreover, although content questions might be helpful in assessing whether a juror is impartial, such questions are constitutionally compelled only if the trial court's failure to ask them renders the defendant's trial fundamentally unfair. See Murphy v. Florida, 421 U.S. 794, 799, 95 S.Ct. 2031, 2036, 44 L. Ed. 2d 589. Furthermore, contrary to the situation in Aldridge, supra, 283 U.S., at 311-313, 51 S.Ct., at 471-72, there is no judicial consensus, or even weight of authority, favoring Mu'Min's position. Even the Federal Courts of Appeals that have required content inquiries have not expressly done so on constitutional grounds.

Mu'Min v. Virginia, 500 U.S. 415, 416 (1991).

In its consideration of Esparza's claim, the Ohio Court of Appeals, after reviewing a transcript of the voir dire, concluded that there was nothing to suggest that other members of the venire had been affected by exposure to pretrial publicity or improper discussions about the case among the venire:

> A review of the transcript of the voir dire proceedings in this case reveals that the lower court ascertained from each of the jurors impaneled that he or she could set aside any preconceived notions of the case and base the verdict on the evidence presented at trial. As such, appellant's eleventh assignment of error fails to raise any substantive grounds for relief.

Esparza, 1994 WL 395114, at *11.

The Ohio Court of Appeals did not expressly rely on federal law in reaching this decision.[26] Its decision, however, was entirely consistent with, indeed, compelled by, controlling federal constitutional law. As the Sixth Circuit recently held:

> Because this case did not involve a televised confession as in Rideau or the carnival atmosphere displayed in Estes and Sheppard, the clearly established law [this Court] must apply here is that of Irvin, where the question was whether 'adverse pretrial publicity . . . create[d] such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed.

Nevers, 169 F.3d at 365.[27] This case likewise did not involve a televised confession or anything approaching a carnival atmosphere. Thus, the Ohio Court of Appeals applied the correct standard, Irvin, and correctly applied that standard to the facts of Esparza's case. Accordingly, the Ohio Court of Appeals' application of federal law was not unreasonable.

**B. Constitutional Violations Relating to the Guilt Phase and Conviction**

**1. Second Claim for Relief**

Esparza's second claim for relief is that the State of Ohio improperly used an informant to solicit information from him *after* his right to counsel had attached, in violation of his constitutional rights. At trial, Albert Richardson, Esparza's former cellmate at the Lucas County Jail, was called to testify by the State. Richardson testified that Esparza told him he had robbed the convenience store and shot and killed Melanie Gerschultz.

[26] The Ohio Court of Appeals relied on State v. Booher, 560 N.E.2d 786, 799 (Ohio 1988). Booher held that "[i]t is not error to impanel a jury who has been exposed to pretrial publicity when they state that they can be fair and impartial and base their verdict on the evidence that is presented at trial." Id.

[27] The references are to Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963).

Esparza claims that Richardson was working as a government informant at the time of these conversations. Esparza's claim is based on the fact that, following an initial conversation with Esparza, Richardson contacted the "CrimeStopper" program, a privately funded program that pays individuals who provide information used to solve crimes, and told them he had information; at trial, Richardson denied that he contacted the CrimeStopper program, insisting that he contacted the Toledo Police Department directly. Richardson subsequently had other conversations with Esparza, and also met privately with Detective Marx, of the Toledo Police Department.

This claim was not raised until Esparza's successor post-conviction proceeding. It is not, however, procedurally defaulted. This claim is premised on information that was not made available to Esparza until after the conclusion of his direct appeals, pursuant to his public records litigation based on State ex rel. Clark v. City of Toledo, 560 N.E.2d 1313 (Ohio 1990), and, hence, is premised on matters dehors the record. Accordingly, the Court will address this claim on the merits, as did the state courts.

Esparza argues this claim as though it arises under the Fifth Amendment principles of Miranda v. Arizona, 384 U.S. 436 (1966). It is clear, however, that this claim is, or must be, cognizable under the Sixth Amendment right to counsel, or not at all. This is true because Miranda only applies to custodial interrogations by law enforcement officers or those acting at their direction. While Esparza was jailed (on an unrelated matter) during these discussions, he was free to refuse to talk to Richardson or move away from him at any time. There was, accordingly, no "custody" element to this interaction.[28] The Court will analyze this claim, therefore, as one asserted under the Sixth Amendment and Massiah

[28] United States v. Mathis, 391 U.S. 1 (1968) even if considered controlling law, is not to the contrary. The relevant inquiry is whether the questioner had placed or was affiliated with those placing the defendant in custody. Richardson clearly does not fall into that category.

v. United States, 377 U.S. 201 (1964), not as one under the Fifth Amendment or Miranda. So analyzed, it is clearly without merit.

The Sixth Amendment does not forbid admission "of an accused's statements to a jailhouse informant who was placed in close proximity but [made] no effort to stimulate conversations about the crime charged." Kuhlmann v. Wilson, 477 U.S. 436, 456 (1986). Esparza has not presented any evidence to show that Richardson stimulated the conversations, or to show, for that matter, that he told Richardson about his involvement in the crime at any time after Richardson contacted a third party regarding Esparza. Esparza merely asserts that Richardson chose, after the fact, to share the information he acquired with law enforcement. Where there is no evidence that Richardson induced Esparza to speak or did so at the prompting of some governmental official or entity, that claim cannot succeed.

**2. Esparza's Third Claim for Relief**

Esparza's third ground for relief is that the prosecutor failed to provide him with exculpatory evidence, in violation of his constitutional rights. Specifically, Esparza alleges that the prosecutor failed to provide evidence that: (1) would impeach the trial testimony of James Barrailloux and Lisa Esparza; (2) implicates other suspects in the Island Carryout murder; (3) indicates Esparza was intoxicated during the time the murder was committed and that he suffered from a mental disorder.

Although this claim was not raised on direct appeal, like Esparza's second claim for relief, it is not procedurally defaulted as it also is premised on information that was not made available to Esparza until after the conclusion of his direct appeals, pursuant to his litigation based on State ex rel. Clark v. City of Toledo, 560 N.E.2d 1313 (Ohio 1990). Accordingly, the Court also will address this claim on the merits, without the benefit of a state court decision.

To establish a claim under Brady v. Maryland, 373 U.S. 83 (1963), "the petitioner has the burden of establishing that the prosecutor suppressed evidence; that such evidence was favorable to the defense; and that the suppressed evidence was material." See Carter v. Bell, 218 F.3d 581, 2000 WL 895827, *19 (6th Cir. July 7, 2000) (*citing* Moore v. Illinois, 408 U.S. 786, 794-95 (1972)). "The inquiry is objective, independent of the intent of the prosecutors." Id. (*citing* Brady, 373 U.S. at 87).

"[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 676 (1985). There is no Brady violation "where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available . . . from another source, because in such cases there is really nothing for the government to disclose." Coe v. Bell, 161 F.3d 320, 344 (6th Cir. 1998), *cert. denied,* – U.S. – , 120 S. Ct. 110 (1999) (citations omitted) (internal quotation marks omitted).

Recently, the Supreme Court expounded on the prejudice or "reasonable probability" prong of Brady. In Strickler v. Greene, 527 U.S.263, 296 (1999), the Court found that, although the prosecutor had violated the first two prongs of Brady by failing to provide exculpatory material to the defense, the petitioner did not sufficiently demonstrate that "there [was] a reasonable probability that his conviction or sentence would have been different had these materials been disclosed." In that case, the principal witness positively identified the petitioner during trial. In fact, she provided specifics of petitioner's abduction of the victim and how she was able to remember such detail. Id. at 272. Upon obtaining the interviewing detective's handwritten notes from initial interviews with the witness, however, her credibility was undercut significantly. The Court determined that, even if the witness's testimony had

been impeached entirely, there was ample other evidence to convict, and, thus, provide the Court with sufficient assurance that the wrongfully excluded evidence would not have upset the trial's outcome. Id. at 296.

It is here that Esparza's first two sub-claims also must fail. Were the Court to extricate James Barrailloux and Lisa Esparza's testimony from the totality of the evidence offered at trial, there nonetheless would be ample evidence remaining to provide the Court with confidence in the trial's outcome. Richardson's testimony, for example, provided the jury with Esparza's confession of the killing. Furthermore, a jury reasonably could have found that, although other suspects were investigated for this homicide, Esparza was the actual assailant.

Esparza's claims of exculpatory evidence revealing that he was intoxicated on the evening of the Island Carryout murder and his mental dysfunction fail because that information was not solely under the State's control. Esparza, more so than the prosecution, would have knowledge of his intoxication on the night of the offense and of prior mental evaluations. Accordingly, the Court finds Esparza's third claim to be without merit.

**3. Esparza's Fourth and Fifth Claims for Relief**

Esparza's fourth and fifth claims for relief are based on his allegation that the prosecutor threatened Lisa Esparza and improperly told witnesses that they could not speak with defense counsel, and that this served to prevent his counsel from conducting an adequate investigation into the case. Respondent does not contend that these matters are procedurally barred from review by this Court.

During the evidentiary hearing before this Court, Lisa Esparza testified that the then-prosecutor, Ruth Ann Franks, and the police department threatened to take away her children if she did not testify against Esparza. Judge Franks testified and denied the allegation, explaining that she merely told Ms.

Esparza, as she told all witnesses, that she was to testify truthfully. Judge Franks further testified that she never instructed witnesses *not* to talk with defense counsel. Rather, she stated that, as a prosecutor, she told witnesses that they are free to talk to whomever they please, and are equally free to refuse to speak with anyone with whom they do not wish to speak. For various reasons, the Court does not credit the testimony of Lisa Esparza and finds the contrary testimony of Judge Franks to be credible.[29] Thus, Esparza's fourth and fifth claims for relief are rejected because they are not supported by credible evidence.

**4. Esparza's Seventh Claim for Relief**

In his Seventh Claim for Relief, Esparza asserts that his Eighth and Fourteenth Amendment rights were violated when the trial court failed to recuse itself after conducting a witness certification hearing pursuant to Ohio R. Crim. P. 16(B)(1)(e).[30] This rule states in relevant part:

> **Discovery and Inspection**
>
> ***
>
> (B) **Disclosure of evidence by the prosecuting attorney**
>
> (1) *Information subject to disclosure.*
>
> ***
>
> (e) Witness names and addresses; record. Upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney. Names and addresses of witnesses shall not be subject to disclosure if the prosecuting attorney certifies to the court that to do so may subject the witness or others to

[29] Applying standard tests to assess the credibility of witnesses the Court finds that the demeanor of Ms. Esparza on the witness stand, the timing of her disclosure, certain inconsistencies in her testimony (both internal and with respect to other descriptions of the government's alleged improprieties) and her relationship with the defendant all negatively impacted her credibility.

[30] Respondent makes no allegation that this claim is procedurally defaulted. Therefore, the Court will address this claim on the merits.

> physical or substantial economic harm or coercion. Where a motion for discovery of the names and addresses of witnesses has been made by a defendant, the prosecuting attorney may move the court to perpetuate the testimony of such witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

Ohio R. Crim. P. 16(B)(1)(e).

Prior to Esparza's trial, the Prosecutor sought a Rule 16(B)(1)(e) hearing regarding the testimony of Catherine B. Stegg, Esparza's girlfriend and mother of his son. During this hearing, over which the trial judge presided, the State proffered that Stegg was afraid to testify against Esparza and a "family member" because she feared physical repercussions to either herself or her child. To justify these fears, the State introduced Esparza's prior criminal record and an alleged incident in which Esparza threatened Toledo police officers while in custody. Further, the State noted that it was defendant's brother, Peter Esparza whom Stegg feared. Esparza now claims that, because the trial court conducted this hearing, prejudice against himself and his brother arose thereby, and he should be afforded relief.

The Ohio Supreme Court has instructed that "when the State seeks to obtain relief from discovery or to perpetuate testimony under Criminal Rule 16(B)(1)(e), the judge who disposes of such a motion may not be the same judge who will conduct the trial." State v. Gillard, 533 N.E.2d 272, 274 (Ohio 1988), *cert. denied*, 492 U.S. 925 (1989). Upon examining this claim in the context of Esparza's Murnahan petition, the Ohio Court of Appeals found that, although the court should not have presided over both the Rule (16)(B)(1)(e) hearing and the trial, this error was harmless:

> It was therefore error for Judge Riley to preside over both the certification hearing and the trial below, and original trial . . . . The court in Gillard, however, ... held that a violation of rule [requiring separate judges to preside over the hearing and

> trial] is not per se prejudicial. Rather, the appellant must establish that but for the error, the outcome of the case would have been different.
>
> Upon review of the entire record in this case, we conclude that the error below was harmless . . .. In particular, we note that the evidence to which Judge Riley was exposed at the certification hearing, i.e., appellant's history of violent behavior, was also admitted at the penalty phase of the trial below. In response to appellant's assertion that the certification hearing evidence prejudiced the judge against Peter Esparza, a witness at the trial below, the record reveals that although the prosecutor argued that Peter Esparza had a criminal record and that Stegg had reason to fear him, Peter Esparza's record was submitted to the court and only revealed convictions for traffic violations.

State v. Esparza, App. No. L-84-225, 1995 WL 302302, at *3 (Ohio Ct. App. May 19, 1995).

Pure errors of state law cannot justify habeas relief; only trial defects that rise to the level of a federal constitutional violation can support such extraordinary relief. To succeed on his claim, petitioner must establish that a violation of the constitution, laws or treaties of the United States occurred. 28 U.S.C. §2241; Pulley v. Harris, 465 U.S. 37, 41 (1984). Thus, the Court need not assess the wisdom of Criminal Rule 16 or the state court's findings that it was violated in this case, and must examine, instead, the scope of the alleged prejudice resulting therefrom to determine whether Esparza has been denied his right to due process under the United States Constitution.

Esparza propounds that, because the trial court also presided over the Rule 16(B)(1)(e) hearing, "structural" constitutional error resulted. Most constitutional errors are non-structural, and, thus, are subject to harmless error review. See Neder v. United States, 527 U.S. 1, 7 (1999)(*citing* Arizona v. Fulminante, 499 U.S. 279, 306-307 (1991) (collecting cases)). A limited class of errors, however, are structural and can never be held harmless, no matter what the evidence is of the defendant's guilt. See Johnson v. United States, 520 U.S. 461, 468 (1997) (*citing* Gideon v. Wainwright, 372 U.S. 335 (1963) (complete denial of counsel); Tumey v. Ohio, 273 U.S. 510 (1927) (biased trial judge); Vasquez v. Hillary, 474 U.S. 254 (1984) (racial discrimination in selection of a grand jury); McKaskle v. Wiggins,

465 U.S. 168 (1984) (denial of self-representation at trial); Waller v. Georgia, 467 U.S. 39(1983) (defective reasonable doubt instruction)). A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," Arizona v. Fulminante, 499 U.S. 279, 310 (1991).

The Court declines to place the Rule 16 violation in this ilk. Although the trial court erroneously presided over the hearing, the appellate court correctly noted that much of the evidence that was introduced at that hearing also was introduced during the sentencing phase of the trial. Additionally, while the trial judge in Ohio is the final arbiter of whether the defendant will receive the death penalty under Ohio Rev. Code § 2929.04, it is the jury who initially determines guilt and recommends the death sentence to the trial court. Here, the jury weighed the facts presented in evidence during both the guilt and mitigation stages of the trial and convicted and sentenced the petitioner. It is upon the jury's recommendation that the trial judge then acts; in the absence of a jury recommendation, the death sentence is not an option for a trial judge. Thus, while a trial judge's role in a capital proceeding remains significant by virtue of his power to refuse to honor a jury's death recommendation, that role is still a limited one. Finally, Esparza characterizes this error as "structural" without case law to support this assertion. Although the petitioner avows this error "cannot be characterized in any other way," the Court finds this hollow assertion unpersuasive. Consequently, Esparza's seventh claim for relief is not well-taken.

**5. Esparza's Ineffective Assistance of Counsel During Pre-trial and Trial Claims: Claims 11, 13, 14, 15, 16, 17 and 19**

Claims number 11, 13, 14, 15, 16, 17, and 19 all allege ineffective assistance of trial counsel during the voir dire and guilt phase of the trial and will be treated simultaneously. All these claims are subject to a consideration of procedural default as they were not raised during Esparza's direct appeal. As such, Esparza must demonstrate cause and prejudice before the procedural default may be excused. Some of these claims were raised and addressed, however, in Esparza's Murnahan petition, where the issue presented was whether *appellate* counsel was inadequate because he failed to present certain of these alleged trial errors to the Court of Appeals in a timely fashion. Thus, the Court finds that claims 13 and 19 (2)(3) and (4) are procedurally defaulted as they were never raised in *any* state court proceeding and because Esparza cannot show prejudice by virtue of that failure.[31] Because Esparza was

[31] Esparza can show no prejudice because none of these claims are meritorious.

Esparza's thirteenth claim for relief is that the prosecution's suppression of exculpatory evidence *caused* trial counsel's ineffectiveness in violation of Brady v. Maryland, 373 U.S. 83 (1963). These claims are essentially identical to Esparza's third claim for relief. Because the Court finds no constitutional violation pursuant to Brady, the Court subsequently determines that this claim fails under the prejudice prong of Strickland. Thus, Esparza's thirteenth claim for relief is not well-taken.

The defaulted sub-claims in Esparza's nineteenth claim for relief allege that counsel's performance was deficient because counsel failed to object to: (1) unduly suggestive pretrial identification procedures; (2) testimony concerning the alarm system; and, (3) the testimony of Lisa Esparza. The Court finds these sub-claims lack merit. In sub-claim two, Esparza contends that counsel was ineffective for failing to object to the pre-trial identification procedures employed by the state. During pre-trial identification, the state displayed only Esparza's photograph to witnesses to identify Melanie Gerschultz's assailant. Esparza asserts this process was prejudicial because only he could be identified by this procedure, as indeed he was.

An alleged violation of petitioner's due process rights by virtue of a pretrial identification must withstand a two-part test. First, the petitioner must establish that the procedure was unduly suggestive. Thigpen v. Cory, 804 F.2d 893, 895 (6th Cir. 1986), *cert. denied*, 482 U.S. 918 (1987). If so, the court must evaluate the "totality of the circumstances to determine whether the identification was reliable, despite the unduly suggestive nature of the identification procedure." Id. As the Sixth Circuit has held, "[i]t is the likelihood of misidentification that violates the defendant's due process right." Ledbetter v. Edwards, 35 F.3d 1062, 1070 (6th Cir. 1994), *cert. denied*, 515 U.S. 1145 (1995)(*citing* Neil v. Biggers, 409 U.S. 188, 198 (1972)). The Court looks to "the reliability of the identification in

not prejudiced by any of the trial errors asserted in the remaining claims, the Court finds those claims are not well-taken, whether considered direct claims or ineffective assistance of appellate counsel claims.

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determining its admissibility; if an identification is reliable, it will be admissible even if the confrontation procedure was suggestive." Carter v. Bell, 218 F.3d 581, 605 (6th Cir. 2000). "The due process concern is heightened[, however,] when that misidentification is possible because the witness is called upon to identify a stranger whom she has observed only briefly, under poor conditions, and at a time of extreme emotional stress and excitement." Ledbetter, 35 F.3d at 1070 (*citing* Manson v. Brathwaite, 432 U.S. 98, 112 (1977))(other citations omitted).

In determining the reliability of the identification a court is to examine the following five factors:

> (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's [sic] degree of attention at the time of the observation; (3) the accuracy of the witness's [sic] prior description of the criminal; (4) the level of certainty demonstrated by the witness when confronting the defendant; and (5) the length of time between the crime and the confrontation.

Id. at 1071 (citation omitted).

The Court finds it impossible to apply this test to Esparza's allegations because the Petition alleges use of improper identification procedures but does not provide the Court specific instances in which the police department utilized this procedure and or explain how it impeded counsel's performance. The Traverse adds no further insight into use of these identification techniques, moreover. If these methods were *only* employed with Lisa Esparza, for instance, or were used with witnesses who had already provided detailed descriptions of Esparza, no defect could be found. Because Esparza provides no factual basis to support this claim, it is without merit.

Sub-claim three is equally without merit. In that sub-claim, Esparza asserts that counsel was deficient for failing to object to the testimony and prosecutorial commentary that Melanie Gerschultz initiated the alarm system, provoking Esparza to retaliate by shooting her. The underlying substantive claim is addressed elsewhere in this Opinion, infra, p. 65- 66 part VI - B- 9. Because that claim lacks merit, Esparza's assertion in an ineffective assistance of counsel framework also must fail under the prejudice prong of Strickland.

Finally, sub-claim four, that trial counsel's failure to object to portions of Lisa Esparza's testimony constitutes ineffective assistance of counsel is equally meritless. While Lisa Esparza's fear of repercussion from revealing to authorities that her brother had implicated himself in the Gerschultz murder does not portray Esparza in a most favorable light, these objectionable portions of her testimony do not undermine the reliability and fairness of the proceeding as Strickland requires to implicate a Sixth Amendment violation. Lisa Esparza's fears likely would have been evident to the jury even in the absence of direct testimony on them. Thus, although trial counsel's performance may have been deficient, "his performance did not undermine confidence in the outcome of [the] trial as there was an abundance of other evidence to support [the] convictions." Watson v. United States, 168 F.3d 491 (Table), 1998 WL 791846, at *1 (6th Cir. Nov. 5, 1998).

As stated above, a petitioner must demonstrate both that counsel's performance was deficient and that he was prejudiced by that performance before he can prevail on an ineffective assistance of counsel claim. Thus, petitioner must first show "that counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 687-88. "The objective standard of reasonableness is 'highly deferential' and includes a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Skaggs, 27 F.Supp.2d 952, 967 (1988) (*citing* Strickland, 466 U.S. at 688, 689). Under this standard, "[t]he assistance required of counsel is not that of the most astute counsel, but rather that of 'reasonably effective assistance.'" Id.

A defendant is entitled to effective assistance of counsel in his first appeal as a matter of right. Evitts v. Lucey, 469 U.S. 387, 396 (1985). Attorney error may constitute cause for failure to comply with a procedural rule if it constitutes ineffective assistance of counsel under Strickland. See, e.g., Rust v. Zent, 17 F.3d 155, 161 (6th Cir. 1994); Ritchie v. Eberhart, 11 F.3d 587, 591 (6th Cir.1993). The two-part test enunciated in Strickland, discussed above, is, thus, applicable to claims of ineffective assistance of appellate counsel: Esparza must show that his appellate counsel's performance was deficient, and that the deficient performance so prejudiced the defense that the appellate proceedings were unfair and the result unreliable. Strickland, 466 U.S. at 687. In the context of an ineffective assistance of *appellate* counsel claim, a petitioner must show "that the direct appeal of [those] issue[s] [that appellate counsel did not raise] would likely have been successful." Leggett v. United States, 101 F.3d 702 (Table), 1996 WL 665580, at *2 (6th Cir. Nov. 14, 1996).

In determining whether this standard has been satisfied, a Court must be mindful that an appellant has no constitutional right to have every non-frivolous issue raised on appeal, Jones v. Barnes, 463 U.S. 745, 750-54 (1983), and tactical choices regarding issues to raise on appeal are properly left

to the sound professional judgment of counsel. United States v. Perry, 908 F.2d 56, 59 (6th Cir.), *cert. denied*, 498 U.S. 1002 (1990). Indeed,

> [m]ost cases present only one, two, or three significant questions . . . . Usually, . . . if you cannot win on a few major points, the others are not likely to help, and to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the stronger ones.

Jones, 463 U.S. at 752 (*quoting* R. Stern, Appellate Practice in the United States 266 (1981)). Moreover, an attorney is not required to present an argument on appeal for which there is no good-faith factual support, in order to avoid a charge of ineffective representation. Krist v. Foltz, 804 F.2d 944, 946-47 (6th Cir. 1986). With this standard in mind, the Court will consider those claims premised on Esparza's contention that his appellate counsel should have pursued different or additional arguments on appeal.

**a. Esparza's Eleventh Claim for Relief**

In Esparza's eleventh claim, he recites a litany of trial counsel's purported failures during voir dire and asserts that appellate counsel was deficient in failing to point these failures out to the Court of Appeals. Specifically, Esparza maintains that trial counsel failed to ask questions regarding jurors' beliefs about the death penalty, failed to "rehabilitate" any "favorable" jurors, and failed to object to numerous instances of prosecutorial misconduct.

As the Ohio Court of Appeals noted:

> Upon a thorough review of the record in this case, as well as our previous decisions and the decision of the Ohio Supreme Court affirming appellant's conviction and sentence, we conclude that appellant has failed to establish that the outcome of his trial would have been different had his trial counsel not committed the alleged errors.

State v. Esparza, No. L 84-255 (Ohio Ct. App. July 27, 1994). Upon review of the record, the Court determines that the Ohio Court of Appeals decision was not an unreasonable application of clearly established federal law. None of these alleged errors infected the voir dire process in such a way as to draw into question the fundamental fairness of either that process or the verdict of the jury selected thereby. Thus, Esparza's appellate counsel was not ineffective for failing to raise these issues and Esparza's eleventh claim for relief is not well-taken.

**b. Esparza's Fourteenth and Seventeenth Claims for Relief**

As the allegations in Esparza's fourteenth and seventeenth claims for relief are essentially identical, the Court will address them together. In these claims, Esparza alleges ineffective assistance of counsel based on his appellate counsel's failure to attack trial counsel's failure to conduct an adequate pre-trial investigation. Had trial counsel effectuated a proper pre-trial investigation, Esparza argues, counsel would have discovered the identity of other individuals suspected in Melanie Gerschultz's murder. This discovery allegedly would have led trial counsel to pursue a strategy other than the "burden of proof" strategy followed at trial, and raising this point on appeal allegedly would have prompted reversal.

These assertions are unpersuasive as they fail both prongs of the Strickland test. Trial counsel's decision regarding what defense to assert at trial is precisely the type of decision for which Strickland mandates deference. Further, even if counsel had presented a defense suggesting other possible suspects, there is no certainty that the outcome would have been altered:

> [T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.

Lockhart v, Fretwell, 506 U.S. 364, 369 (1993)(*quoting* United States v. Cronic, 466 U.S. 648, 658 (1984)).

An abundance of evidence, most particularly the testimony of Lisa Esparza and of Richardson, render the jury's findings reliable. Thus, Esparza cannot satisfactorily demonstrate how, if appellate counsel had raised this issue on appeal, the result of the appeal would have been altered. Because the Ohio Court of Appeals' determinations were not unreasonable, the Court finds Esparza's fourteenth and seventeenth claims for relief are not well-taken.

**c. Esparza's Fifteenth Claim for Relief**

In this claim for relief, Esparza contends that trial counsel was ineffective for failing to request an in camera inspection of witnesses' statements to which he is entitled pursuant to Ohio R. Crim. P. 16(B)(1)(g) and that appellate counsel should have pursued this issue. Had the trial court held such a hearing, Esparza maintains, trial counsel would have ascertained various inconsistencies in the testimony of Lisa Esparza and James Barrailloux, thus creating a possibility for impeachment.

The Court finds this argument unpersuasive under Strickland. While Esparza supplies elaborate detail regarding disparities between the investigative statements and the trial testimony of several eyewitnesses, Esparza again fails to persuade the Court that these inconsistencies were so material as to have altered the outcome of Esparza's appeal. The Court finds the Ohio Court of Appeals reasonably applied federal law to this claim and, thus, Esparza's fifteenth claim for relief is not well-taken.

**d. Esparza's Sixteenth Claim for Relief**

In his sixteenth claim for relief, Esparza asserts trial counsel's ineffectiveness because counsel called Ms. Elsie Dile to testify and appellate counsel did not attack this decision on appeal. At trial, Ms. Dile described a man who was present at her home on the night of the murder as not particularly tall,

with broad shoulders, a shaven head and wearing a ski mask. She particularly noted the ski mask, claiming it was identical to one depicted on the Channel Eleven news that evening. On cross-examination, the prosecutor effectively impeached Ms. Dile's testimony with the testimony of Channel Eleven news director, Rick Gevers. Mr. Gevers stated that, on the night of the robbery, the news broadcast made no mention of the ski mask. Esparza asserts that, if trial counsel had diligently conducted a pre-trial investigation, counsel would have discovered this inconsistency and never called Ms. Dile to testify.

Once again, this claim questions trial strategy and is at loggerheads with Strickland. Even Esparza concedes in his Petition that one strategy of the defense in calling Ms. Dile might have been "to demonstrate that Gregory could not have been at his sister Lisa's apartment confessing to her on the night of the slaying." The fact that the potential benefits of Ms. Dile's testimony may have been undercut by her tendency to overstate the facts does not render the initial decision to call her ineffective. Because this was a tactical decision made by trial counsel, it is not unreasonable that appellate counsel failed to raise it in Esparza's direct appeal. Consequently, Esparza's sixteenth claim for relief is not well-taken.

**e. Esparza's Nineteenth Claim for Relief**

In Esparza's nineteenth ground for relief, he maintains trial counsel's ineffectiveness based on counsel's failure to make numerous objections to: (1) an inadequate capital specification; (2) unduly suggestive pretrial identification procedures; (3) testimony concerning the alarm system; (4) testimony of Lisa Esparza; (5) the prosecutor's closing arguments; and, (6) the court's jury instructions in the trial phase. As stated above, sub-claims two, three and four are procedurally defaulted. Furthermore, sub-claims one, three, five, and six are raised as separate substantive claims and addressed elsewhere in this

Opinion. All of the substantive underlying claims, except for claim one, lack merit, and, therefore, fail the prejudice prong of Strickland, i.e., counsel was not unreasonable to not object as it could not have produced a different outcome. Thus, these subclaims are not well-taken. The Court discusses the underlying substantive claim in claim one, that the indictment lacked all of the elements necessary for the capital specification in part VII.C.1 of this decision.

**6. Esparza's Twelfth Claim for Relief**

Esparza's twelfth ground for relief is that Lisa Esparza's testimony was false and unreliable, and the prosecutor's solicitation of this testimony violated Esparza's constitutional rights. This claim is based on Lisa Esparza's recent recantation of her earlier testimony. She now claims that she lied when she testified that Esparza admitted to killing Melanie Gerschultz. Because this claim is based on facts obtained during the evidentiary hearing, the Court decides the claim without the aid of state court factual findings.

The Sixth Circuit has set forth the requirements for a prosecutorial misconduct claim premised on a prosecutor's alleged use of perjured testimony:

> The knowing use of false or perjured testimony constitutes a denial of due process if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. In order to establish prosecutorial misconduct or denial of due process, the defendants must show (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false. The burden is on the [petitioner] to show that the testimony was actually perjured, and mere inconsistencies in the testimony by government witnesses do not establish knowing use of false testimony.

Coe v. Bell, 161 F.3d 320, 343 (6th Cir. 1998) (*quoting* United States v. Lochmondy, 890 F.2d 817, 822 (6th Cir. 1989)).

Esparza's only evidence on this score is Lisa Esparza's own recantation. Lisa Esparza testified regarding the reasons behind her earlier testimony, asserting that she was instructed to testify as she did by her then-boyfriend, Frank Ochoa. Lisa Esparza testified that she was afraid of her boyfriend because he beat her and further claimed she was threatened by then-prosecutor Franks that, if she chose not to testify, her children would be taken away from her.

After observing Lisa Esparza's demeanor on the witness stand, her lack of a cogent, convincing explanation for her earlier testimony *and* her delay in coming forward, the Court does not find Lisa Esparza's claim to be credible.[32] Accordingly, Esparza is unable to show that the statement was false, and, therefore, also is unable to show that the prosecution knowingly presented perjured testimony. Accordingly, this claim is without merit.

**7. Esparza's Eighteenth Claim for Relief**

In his eighteenth claim, Esparza alleges his Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated when the trial court failed to appoint an independent pathologist or forensic expert to counter the State's expert. Specifically, Esparza notes that the State's expert found that physical evidence suggested the fatal shot was fired by someone standing directly in front of the Plexiglas, consistent with the State's theory that Gerschultz was shot when attempting to press the alarm button. Esparza claims both that counsel was ineffective for failing to request an independent expert and that the trial court erred when it did not, sua sponte, appoint an independent expert to counter the State's expert. The Court disagrees.[33]

[32] On the contrary, despite fair room for impeachment of Mr. Ochoa's character, the Court found Mr. Ochoa's denials of Ms. Esparza's claims believable.

[33] The Court notes that respondent did not address this claim in the Return of Writ. While respondent did group this claim into its section addressing "Errors Associated with the Pre-Sentence Investigation

If declared indigent, a criminal defendant possesses the right to obtain a competent psychiatrist if sanity at the time the crime was committed is at issue. Ake v. Oklahoma, 470 U.S. 68 (1985). The Supreme Court has eschewed extending this right to non-psychiatric experts. In Caldwell v. Mississippi, 472 U.S. 320 (1985), the Court determined that the petitioner in that case was not entitled to receive state-funded services from various experts without a prior showing that such testimony related to a significant issue at trial. The Court stated:

> [P]etitioner also requested appointment of a criminal investigator, a fingerprint expert, and a ballistics expert, and those requests were denied. The State Supreme Court affirmed the denials because the requests were accompanied by no showing as to their reasonableness. For example, the defendant's request for a ballistics expert included little more than the general statement that the requested expert would be of great necessarius witness. Given that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process . . . .

Id. at 323 n.1 (citations omitted)(internal quotation marks omitted).

Similar to the Caldwell petitioner, Esparza provides no factual allegations to substantiate the claim that *his* independent expert would conclude differently than the State's. Without such assertions, the Court finds no constitutional infirmity in counsel's failure to request and the trial court's failure to appoint such an expert. Accordingly, Esparza's eighteenth claim for relief is not well-taken.

**8. Esparza's Twentieth Claim for Relief**

Esparza's twentieth claim for relief alleges prosecutorial misconduct during voir dire and the guilt phase of the trial. During voir dire, Esparza alleges that the State bolstered the testimony of Albert Richardson, vouching for his credibility. During trial, Esparza asserts that the prosecutor characterized

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and Psychological Report," that section of the brief solely addresses Esparza's claims grounded in his psychological evaluation. Because respondent neither alleges procedural default nor claims petitioner failed to address the claim in the state courts, the Court will address this claim on the merits.

Alexander's testimony as "wonderful" and engaged in excessive leading of the State's witnesses on direct examination. Finally, Esparza alleges numerous instances of prosecutorial misconduct during closing arguments as the prosecutor: (1) misstated the law as to the issues of intent and foreseeability; (2) argued the relative value of giving Richardson a reduced sentence for Melanie Gerschultz's life; (3) urged the jury to overlook the lack of eyewitness identification; (4) urged the jury to find guilt to protect the State's witnesses from petitioner; and, (5) argued facts not in the evidence.

The Court finds this claim procedurally defaulted. In its brief, respondent correctly asserts that these claims were not asserted on direct appeal and, thus, may not be pursued further, either in state or federal court. In his Traverse, petitioner contends that respondent did not allege the twentieth claim for relief was procedurally defaulted. Esparza then makes reference to respondent's Return of Writ answering allegations of prosecutorial misconduct during the *mitigation* phase of the proceeding. Because Esparza does not demonstrate cause and prejudice to excuse default, the Court concludes these claims are procedurally defaulted.[34]

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[34] To aid in appellate review, the Court finds that none of these claims are meritorious in any event.

A prosecutor's conduct does not amount to a constitutional violation unless the comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986)(*quoting* Donnely v. DeChristoforo, 416 U.S. 637, 642 (1974)).

The prosecutor's comments must be so egregious as to render the trial fundamentally unfair. See Byrd v. Collins, 209 F.3d 486, 529 (6th Cir. 2000). "To constitute a denial of due process, the misconduct must be 'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" Id. The Sixth Circuit has used a four-part test to determine whether the prosecutor's conduct is egregious. A reviewing court should determine the degree to which the remarks complained of have a tendency to mislead the jury and prejudice the accused; whether they were isolated or extensive; whether they were deliberately or accidently placed before the jury; and the strength of the competent proofs introduced to establish the guilt of the accused. Id. (*quoting* Pritchett v. Pitcher, 117 F.3d 959, 964 (6th Cir.) *cert. denied*, 522 U.S. 1001 (1997). Relief will not be granted unless " the prosecutor's statement likely had a bearing on the outcome of the trial in light of the strength of the competent proof of guilt." Id.

The Court does not find that any error arose to such a level as to render the trial fundamentally

**10. Esparza's Twenty-First Claim for Relief**

In his twenty-first claim for relief, Esparza alleges his Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated because of an array of jury instructions the trial court provided during the guilt phase.[35] Esparza asserts the trial court charged the jury improperly in eight instances[36]: (1) regarding the lesser-included offense of manslaughter; (2) as to motives behind the testimony of state witnesses; (3) that a pistol was a deadly weapon; (4) in defining terms constituting elements of the offenses charged; (5) in giving cautionary instructions regarding Albert Richardson's testimony; (6) as to how the jury is to react if in equipoise regarding whether circumstantial evidence creates inferences of guilt or innocence; (7) as to placement of the burden of proof regarding specific intent to kill; and (8) on the issue of the reliability of eyewitness testimony.

An incorrect jury instruction does not warrant federal habeas corpus relief if it was merely undesirable, erroneous or even universally condemned. Instead, the instruction must violate a constitutional right. Estelle v. McGuire, 502 U.S. 62, 72 (1991). Upon review, a court must determine whether there is a reasonable likelihood that the jury applied the instruction in a way that prevents consideration of constitutionally relevant evidence. Boyde v. California, 494 U.S. 370, 380 (1990). The impropriety of the instruction must be considered in the context of the instructions as a whole and

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unfair. While some of the prosecutor's arguments may not have been appropriate, taken en toto, the prosecutorial comments do not taint the entire proceeding. Further, the Court finds resounding evidence of guilt introduced at trial. Thus, Esparza's contention of prosecutorial misconduct at voir dire and during the guilt phase of the trial does not merit habeas relief.

[35] Respondent does not allege procedural default. Therefore, the Court will address this claim on the merits.

[36] The Court has grouped together similar claims so that they may be addressed simultaneously.

the trial record. Id. Rarely will an erroneous jury instruction justify reversal in a criminal case when no objection was made in the trial court. Henderson v. Kibbe, 431 U.S. 145, 154 (1977).

When considered in the context of the entire proceeding, this claim must fail. Although the allegations in each of Esparza's sub-claims do assert federally cognizable rights, any imperfections found within each instruction do not rise to the level of a federal constitutional violation. Upon review of the record, there appear to be no constitutional infirmities. The Court will address the reasons for its conclusion as to each claim.

Esparza first takes issue with the trial court's instruction regarding the lesser-included offense of manslaughter, noting that the court charged the jury that it first must find defendant not guilty of aggravated murder before concluding he could be found guilty of involuntary manslaughter. While it is true the trial court did so charge, this charge is not constitutionally infirm. To support this sub-claim, Esparza cites to Lee v. Taylor, 740 F.2d 968 (6th Cir 1984). This case is inapposite to Esparza's claim. In that case, the trial court impermissibly required the defendant to prove beyond a reasonable doubt that he was under extreme emotional distress for the jury to find him guilty of the lesser-included offense of voluntary manslaughter. See Lee v. Taylor, 566 F. Supp. 28 (N.D. Ohio 1983). The court did not shift the burden to the defendant on any issue here and its instruction on this point, thus, did not suffer from the deficiency presented in Lee. Since Esparza offers nothing else to support this claim and the Court finds Lee distinguishable, the Court finds no constitutional infirmity in this instruction.[37]

[37] Nothing in U.S. v. Monger, 185 F.3d 574 (6th Cir. 1999) persuades this Court otherwise. In Monger, the Sixth Circuit held that the defendant was entitled to an instruction on a lesser-included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater, but did not state anything about the order in which the jury must ascertain guilt on the instructed offenses.

Esparza next claims that the he should be afforded relief because the trial court failed to disclose the monetary motives behind Lisa Esparza and Albert Richardson's testimony. To support the claim that such an instruction invokes a constitutional right, Esparza cites to United States v. Griffin, 382 F.2d 823 (6th Cir. 1967), in which the Sixth Circuit overturned a conviction without a cautionary instruction regarding the testimony of an informant whose testimony was largely uncorroborated. In a subsequent case, however, the Sixth Circuit explained and distinguished Griffin, affirming another informant-based conviction without a cautionary charge because both informants' testimonies substantially corroborated each other "as to the major aspects of the case, not just the minor points." United States v. Curtsinger, 9 F.3d 110 (Table), 1993 WL 424842, at *19 (6th Cir. Oct. 20, 1993), *cert. denied*, 510 U.S. 1207 (1994). Because Lisa Esparza and Albert Richardson's testimony are substantially, if not completely, corroboratory, this sub-claim is without merit.

Esparza alleges further constitutional infirmity because the trial court told the jury that a loaded pistol is a deadly weapon. Esparza claims that this instruction implicitly revealed to the jury that the prosecution had met its burden as to one element of the offense. When charging the jury, the trial court did tell the jury that a loaded pistol was a deadly weapon. The trial court did not, however, make the essential link to Esparza's case – that he, in fact, possessed a loaded pistol. Thus, the court did not remove an aspect of the state's burden from the jury's consideration and no constitutional right is implicated.

Esparza contends that the court did not adequately define the terms of the offenses, as was requested in his own jury instructions. In this allegation, however, Esparza neither cites specific examples of which charges were omitted nor explains why the trial court's charges were deficient. Without further explanation, the Court cannot find a constitutional violation.

Esparza next claims that the trial court twice gave a cautionary instruction to explain the purpose of introducing Richardson's prior criminal convictions. Esparza maintains that this instruction somehow served to "bolster" and accentuate Richardson's testimony. The Court finds to the contrary. Rather than enhancing Richardson's testimony, the trial court's instruction *undermined* Richardson's credibility as it permitted jurors to consider his criminal convictions when determining his believability. Thus, this sub-claim is not well-taken.

Esparza claims constitutional infirmity because the trial court failed to instruct the jury that, if the circumstantial evidence creates inferences that are equally consistent with either innocence or guilt, such inferences must be resolved in favor of the defendant's innocence. The Court finds this argument unpersuasive as Esparza can point to no law that requires such a charge. Furthermore, the Court determines that, taken as a whole, the trial court adequately apprized the jury of the means by which it can draw inferences from circumstantial evidence and of the nature of the heavy burden of proof imposed upon the prosecution in any criminal case.

Esparza next argues that the trial court impermissibly shifted the burden of proof when instructing the jury about the intent to kill it must find to convict. The Court disagrees with this factual assessment. The trial court correctly noted that it was the state's obligation to present sufficient evidence that Esparza possessed the specific intent to kill Ms. Gerschultz. Thus, this sub-claim is without merit.

Finally, Esparza asserts constitutional infirmity because the trial court did not charge the jury about the potential concerns raised when relying on eyewitness testimony. To support this proposition, Esparza cites United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972). Telfaire, however, does nothing to support Esparza's claim. In Telfaire, the D.C. Circuit *upheld* the trial court's omission of an

eyewitness charge, determining that "the minds of the jury were plainly focused on the need for finding the identification of the defendant as the offender proved beyond a reasonable doubt." Id. at 556. Similarly, the trial court here adequately advised the jury of their obligation to identify Esparza as Melanie Gerschultz's assailant. Accordingly, this sub-claim is without merit.

As none of the above sub-claims present federal constitutional issues, Esparza's twenty-first claim for relief is not well-taken.

**10. Esparza's Twenty-Second and Twenty-Third Claims for Relief**

Both the twenty-second and twenty-third claims for relief allege that there was insufficient evidence to convict Esparza of capital murder. Specifically, Esparza contends that there was insufficient evidence to: (1) identify Esparza as the assailant; (2) find that Esparza possessed the requisite specific intent to commit aggravated murder; or, (3) find by proof beyond a reasonable doubt that Esparza was guilty of the capital specification.[38]

"Sufficient evidence supports a conviction if, after viewing the evidence (and the inferences to be drawn therefrom) in the light most favorable to the prosecution, the court can conclude that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Fisher v. Burke, 113 F.3d 1234 (Table), 1997 WL 225507, at *2 (6th Cir. May 1, 1997) (*citing* Jackson v. Virginia, 443 U.S. 307, 324 (1979)). See also Scott v. Mitchell, 209 F.3d 854, 885 (6th Cir. 2000); Walker v. Russell, 57 F.3d 472, 475 (6th Cir. 1995), *cert. denied,* 516 U.S. 975 (1995). The Fourteenth Amendment does not "requir[e] that all other interpretations of the evidence except guilt of the defendant be ruled out." Delk v. Atkinson, 665 F.2d 90, 100 (6th Cir. 1981). A conviction may be

[38] Because respondent does not allege that any of these claims have been procedurally defaulted, the Court will address these claims on the merits.

supported entirely by circumstantial evidence, Tilley v. McMackin, 989 F.2d 222, 225 (6th Cir. 1993),[39] and such evidence need not remove every reasonable hypothesis except that of guilt. Neal v. Morris, 972 F.2d 675, 678 (6th Cir.1992).[40]

Esparza points to inconsistencies in the statements of identifying witnesses James Barrailloux, Lisa Esparza, and Albert Richardson to buttress his claim that there was insufficient evidence to identify him as the murderer. Additionally, Esparza maintains that Barrailloux could not specifically identify him as the assailant and that both Lisa Esparza and Albert Richardson stood to gain pecuniarily for their testimony.

Although inconsistencies no doubt exist, they are not so egregious as to warrant relief based on insufficient evidence. As stated above, Esparza is not entitled to a favorable jury factual finding merely because the jury *could have* adopted other plausible factual scenarios. The Court concludes that a factfinder could reasonably infer that the inconsistencies between Barrailloux's testimony and Esparza's actual appearance are insignificant. Furthermore, a rational factfinder could conclude that the testimony of Lisa Esparza and Richardson was truthful, despite possible ulterior motives for taking the stand.

The Ohio Supreme Court concluded there was ample circumstantial evidence to support the jury's finding that Esparza possessed the specific intent to kill:

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[39] Indeed, "[c]ircumstantial evidence . . .may . . .be more certain, satisfying and persuasive than direct evidence." Michalic v. Cleveland Tankers, Inc., 364 U.S. 325, 330 (1960).

[40] Under current Ohio law, murder convictions can rest solely upon circumstantial evidence. See State v. Grant, 620 N.E.2d 50, 65 (Ohio 1993), *cert. denied*, 513 U.S. 836 (1994)(*citing* State v. Nicely, 529 N.E.2d 1236, 1239 (Ohio 1988)). Ohio law formerly required that, where "[c]ircumstantial evidence [is] relied upon to prove an essential element of a crime[,] [it] must be irreconcilable with any reasonable theory of an accused's innocence in order to support a finding of guilt." State v. Kulig, 309 N.E.2d 897, syllabus (Ohio 1974). This is no longer the law in Ohio. State v. Jenks, 574 N.E.2d 492 (Ohio 1991).

> The record shows appellant entered the carryout for the express purpose of committing a robbery. He carried a loaded semi-automatic handgun which requires cocking before the first bullet from the magazine enters the firing chamber, making it able to fire. He ordered Gerschultz to the cash register, obtained the money, and while standing near or exiting through the entrance, he fired a shot which passed through the Plexiglas, striking Gerschultz in the neck. The fact that the hole in the Plexiglas was four feet, seven and one-half inches from the floor and that Gerschultz was five feet, five inches tall indicates that he fired the shot directly at her, and considerably weakens [Esparza's] argument that he meant to fire only a warning shot in her direction. It is well established that where an inherently dangerous instrumentality was employed, a homicide occurring during the commission of a felony is a natural and probable consequence presumed to have been intended. Such evidence is sufficient to allow a jury to find a purposeful intent to kill.

State v. Esparza, 529 N.E.2d 192, 198-99 (Ohio 1988). The Court does not find this conclusion unreasonable.

Esparza also states that the jury could not have found beyond a reasonable doubt that he was guilty of the capital specification, because they were not charged with the capital specification. Although the Court finds that it was constitutional error not to charge the jury with all of the elements in the capital specification, and the Court, as explained below, grants partial habeas relief on that ground, the Court's analysis of that claim for relief is not based on the sufficiency of the evidence against Esparza. Indeed, as discussed below, had Esparza been properly indicted, and the jury, in turn, properly charged, the evidence clearly could have supported the conclusion that Esparza was the principal perpetrator of this offense. The Court, therefore, does not find this claim for relief, as presented here, well-taken.

**11. Esparza's Fifty-First Claim for Relief**

In his fifty-first ground for relief, Esparza alleges that his death sentence is unconstitutional because residual doubt exists as to his conviction.[41] Esparza then reviews inconsistencies in the

[41] Respondent does not allege this claim is procedurally defaulted. The Court will address this claim on its merits.

testimony of the governmental eyewitnesses regarding the identification of the Island Carryout robber. The Court is unaware of any constitutional right regarding residual doubt. If petitioner is arguing that the inconsistent testimony is inconclusive beyond a *reasonable* doubt, essentially an insufficient evidence assertion, the Court addressed that claim in Esparza's twenty-second and twenty-third grounds for relief.

In its Return of Writ, respondent addresses this issue as though petitioner were asserting the trial court should have instructed the jury that residual doubt may constitute a separate mitigating factor. This response appears inapplicable to petitioner's original claim and Esparza does not address this claim in his Traverse. If this is, indeed, petitioner's allegation, then respondent correctly asserted in its Return of Writ that "the Supreme Court rejected the contention that a defendant convicted of a capital crime has a constitutional right to a jury instruction concerning residual doubts over a defendant's guilt at the sentencing phase of the trial." Resp. Return of Writ at 163 (*citing* Franklin v. Lynaugh, 487 U.S. 164 (1988)). Because petitioner alleges no cognizable constitutional claim, his fifty-first ground for relief is not well-taken.

### C. Constitutional Violations Relating to the Mitigation Phase and Sentencing

#### 1. First Claim for Relief

Esparza's first ground for relief is based on the fact that the indictment did not contain all of the elements necessary to charge him with capital murder. For this reason, Esparza asserts it was error for the judge to impose a sentence of death.[42] Specifically, Esparza alleges that the death penalty

[42] Respondent does not allege that this claim is procedurally defaulted, nor could he in light of the record below. Although Esparza did not raise this issue until his first post-conviction appeal, the appellate court found that the issue was not barred by the doctrine of res judicata because "[i]t is well-established that a court has no power to substitute a different sentence for that provided for by statute," and when a court does impose a sentence not provided for by law, such sentence is void. Moreover,

specification in Count One (1) failed to allege that Esparza either (a) was the principal offender, or (b) had committed the aggravated murder with prior calculation and design. Because these elements were absent from the indictment, the jury instructions, which mirrored the language of the indictment, did not require the jury to find the existence of one or both of these facts as a prerequisite to a guilty verdict. Thus, Esparza challenges the failure of the indictment to actually charge him with capital murder and the failure of the trial court to instruct the jury that they must find one of these specifications in order to convict him of capital murder.

Under Ohio law, an indictment must charge, and a jury must find, that the defendant either was the principal offender or acted with prior calculation and design in the commission of an aggravated murder before a defendant can be death-penalty eligible. Specifically, Ohio Rev. Code § 2929.03(A) provides:

> (A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

Ohio Rev. Code § 2929.04 states in relevant part:

> (A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:
>
> * * *
>
> (7) The offense was committed while the offender was committing, attempting to commit ... aggravated robbery, ... and either the offender was the principal offender in

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an attack on a void judgment is always proper and may be raised at any point during a case's proceedings." See State v. Esparza, 1992 WL 113827, at *6 (Ohio App. May 29, 1992) (citations omitted). The appellate court then proceeded to address the claim on its merits. The Court, therefore, finds that the claim is not procedurally defaulted and will, thus, address it on its merits.

> the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

Ohio Criminal Rule 7(B) also requires an indictment to include "words sufficient to give the defendant notice of all elements of the offense with which he is charged." Ohio R. Crim. P. 7(B).

As stated previously, the first count of the indictment charging Esparza with aggravated murder reads:

> "THE JURORS OF THE GRAND JURY *of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that* GREGORY ESPARZA, on or about the 12th day of February, 1983, in Lucas County, Ohio, did purposefully cause the death of Melanie Gerschultz, while committing aggravated robbery, in violation of § 2903.01(B) of the Ohio Revised Code, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.
> SPECIFICATION OF FIRST COUNT:
>
> THE GRAND JURORS FURTHER FIND AND SPECIFY that the defendant had a firearm on or about his person or under his control while committing the offense pursuant to §2929.71, Ohio Revised Code.
>
> * * *
>
> ADDITIONAL SPECIFICATION TO THE FIRST COUNT: THE GRAND JURORS further find and specify that the said offense was committed while GREGORY ESPARZA, the accused herein, was committing aggravated robbery.

State v. Esparza, No. L-84-2257, 1992 WL 113827, at * 3 (Ohio Ct. App. May 29, 1992).

Upon review of the face of the indictment, it is apparent that the indictment, indeed, failed to contain an appropriate capital specification because it did not charge Esparza with being the principal offender or with having committed the murder with prior calculation and design. It is also obvious from the face of the record that the trial court failed to instruct the jury that, in order to convict Esparza of *capital* murder, as distinct from mere *aggravated* murder, it must find that he either was the principal offender or that he committed the murder with prior calculation and design.

The state court conceded that there was no capital specification obvious on the face of the indictment, but concluded that this fact did not prohibit Esparza's conviction for capital murder. This is so, the state court reasoned, because it found that the indictment was sufficient, despite the absence of certain precise language, to put Esparza on notice of all of the elements of the offense with which he was charged. Thus, the state court found that the "principal offender" specification was implicit in the indictment because no one other than Esparza was charged with participating in the events described. The court stated:

> We conclude that where only one defendant is named in an indictment alleging felony murder, it would be redundant to state that the defendant is being charged as the principal offender. Only where more than one defendant is named need the indictment specify the allegation 'principal offender.'

State v. Esparza, 1992 WL 113827, *8 (Ohio App. May 29, 1992).[43]

It appears, accordingly, that without saying so expressly, the state court engaged in a harmless error analysis, finding that the absence of the words "principal offender" in the indictment was not meaningful where, as here, there was only one offender charged in that indictment.[44] While there is a

[43] The state court judges to consider the issue were not unanimous on this point. When the matter was considered by the state court of appeals, Judge Sherck dissented, finding the indictment invalid because it lacked a required specification and concluding that the trial court, therefore, lacked jurisdiction to impose a sentence of death. See Esparza, 1992 WL 113827 at *9. More specifically, Judge Scherk found that it was error to sentence Esparza to death because his indictment failed to mention an accomplice and failed "to charge the accused with being the principal offender, or committing the aggravated murder with prior calculation and design." Id. at *10.

[44] Under Ohio law, "principal offender" simply means "actual killer." See State v. Chinn, 709 N.E.2d 1166, 1177 (Ohio 1999) (*citing* State v. Penix, 513 N.E.2d 744, 746 (1987)).

certain appeal to the state court's logic,[45] the Court is compelled to conclude that it is inconsistent with, and, indeed, is an unreasonable application of federal law.

> To be on firm constitutional footing, an indictment must pass a two-pronged test:
>
> > [F]irst, the indictment must set out all of the elements of the charged offense and must give notice to the defendant of the charges he faces; second, the indictment must be sufficiently specific to enable the defendant to plead double jeopardy in a subsequent proceeding, if charged with the same crime based on the same facts.

United States v. Martinez, 981 F.2d 867, 872 (6th Cir. 1992), *cert. denied*, 507 U.S. 1041 (1993)(*citing* Russell v. United States, 369 U.S. 749, 763-64 (1962)). Mindful that "the state legislature's definition of the elements of the offense is usually dispositive," Hoover v. Garfield Heights Mun. Court, 802 F.2d 168, 173 (6th Cir. 1986), *cert. denied*, 480 U.S. 949 (1987), it is clear that Esparza's indictment did not pass the first prong of the Martinez test as it did not specify the elements required to charge Esparza with capital murder as defined by Ohio Rev. Code §2929.04(A)(7), though it may have, as the Ohio courts concluded, given Esparza sufficient notice of the charge he faced.

In In re Winship, 397 U.S. 358, 364 (1970), the United States' Supreme Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. Similarly, in United States v. Gaudin, 515 U.S. 506, 510 (1995), the Supreme Court unanimously found that the right to due process of law and to a trial by jury, taken together, entitle a criminal defendant to "a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." And, the Supreme Court re-emphasized these principles in 1999 when, in Jones v. United States, 526 U.S.

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[45] While the state court did not say so, it presumably extended this logic to the absence of a charge to the jury on this issue; where the evidence only references one offender, a jury finding that Esparza was *an* offender implies the finding that he was also *the principal* offender.

227, 243, n.6 (1999), it noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact, (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."

Most recently, and most pointedly for purposes of this case, the Supreme Court relied on this line of authority to reverse imposition of a sentence because that sentence was premised on a finding by a trial judge that the crime of which the defendant had been convicted was prompted by racial bias. Apprendi v. New Jersey, – U.S. –, 120 S.Ct. 2348 (2000). The Apprendi Court concluded that, because the finding of racial bias increased the penalty to which the defendant was exposed beyond the statutory maximum for the original offense of conviction,[46] it actually subjected the defendant to punishment for a *different* crime, with *different, additional* elements. The Supreme Court concluded that it was unconstitutional to sentence Apprendi for a crime where an element of that crime had neither been set forth in the indictment, nor submitted to a jury for determination by proof beyond a reasonable doubt. The Apprendi Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 120 S.Ct. at 2362.[47]

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[46] The defendant pled guilty to two counts of possession of a firearm for an unlawful purpose and one count of unlawful possession of an anti-personnel bomb which together exposed him to a maximum 20 year sentence. With the racial bias enhancement, the defendant faced a potential 30 year sentence.

[47] As explained in the concurring opinion by Justice Thomas, joined by Justice Scalia, "[w]hat matters is the way by which a fact enters into a sentence. If a fact is by law the basis for imposing or increasing punishment – for establishing or increasing the prosecution's entitlement – it is an element" which, in turn, must be decided by a jury. 120 S.Ct. At 2378.

Apprendi's application to the circumstances presented in this case is obvious. Esparza, as noted previously, was charged in the indictment with aggravated murder under Ohio Rev. Code § 2903.01(B). More specifically, Esparza was charged with purposefully causing the death of another while committing or attempting to commit aggravated robbery. That crime is punishable by a sentence of life imprisonment, with parole eligibility after twenty (20) years. Ohio Rev. Code § 2929.04(A)(7) operates to increase or enhance the sentence for the crime of aggravated murder beyond the statutory maximum otherwise set for that crime. Indeed, § 2929.04(A)(7) contains the ultimate sentencing enhancement – increasing the potential sentence from life imprisonment to death. Before the penalty enhancement under Ohio Rev. Code § 2929.04(A)(7) may apply, however, it must be established either that the defendant was the principal offender or that he committed the murder with prior calculation and design. Under Apprendi, these facts are elements of the crime of capital murder, which is differentiated from the crime of aggravated murder both by the existence of these differentiating facts and by the nature of the punishment which can be imposed. Thus, under Apprendi and Jones, it would be unconstitutional to convict a defendant of capital murder unless one or both of the enhancing facts under § 2929.04(A)(7) are charged in the indictment, submitted to the jury and found to exist by proof beyond a reasonable doubt.

There is no reference in the indictment in this case to Ohio Rev. Code § 2929.04(A)(7); the only statutory section mentioned in reference to Count 1 is Ohio Rev. Code § 2903.01(B). There is also no reference in the indictment to either of the sentencing-enhancing elements or facts required by § 2929.04(A)(7). Thus, while the indictment refers in two separate places to the fact that Esparza is alleged to have committed a murder in the course of an aggravated robbery, there is nothing in the indictment which refers to *any* fact or element which differentiates the charges against Esparza from

the charge of aggravated murder; there is, accordingly, nothing in the indictment which indicates that the enhanced penalty authorized by Ohio Rev. Code § 2929.04(A)(7) might be applicable. There is, moreover, nothing in the record which indicates that the jury was ever referred to Ohio Rev. Code § 2929.04(A)(7), or asked to make any finding as to the specifications thereunder.

For all of these reasons, it is clear that, while Esparza was indicted for, and found guilty of, aggravated murder, the same cannot be said with respect to the crime of capital murder. It is clear, moreover, that application of the death penalty in such circumstances runs afoul of the Supreme Court's ruling in Apprendi, and of Esparza's right to due process and right to a trial by jury.

The next question the Court must answer is whether this error is, as the state courts appeared to believe, a harmless one in the context of this case. There are two prongs to this inquiry: (1) whether the error is susceptible to a harmless error analysis, and (2) if so, whether it is clear beyond a reasonable doubt that the error had no injurious or substantial effect on the jury's verdict.[48] In this case, the answer to prong one is particularly meaningful because, as the state court concluded, a strong inference can be drawn that the "Apprendi error" described above was, in the context of this case, inconsequential to the jury's verdict.[49]

The Court may only subject an error to a harmless error review where the Court concludes that the error is not "structural." See Neder v. United States, 527 U.S. 1, 7 (1999). A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial

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[48] When a reviewing court is in "grave doubt" or equipoise about whether or not the error is harmless, the Court must conclude that the error affected the jury's verdict. See O'Neal v. McAninch, 513 U.S. 432, 435 (1995).

[49] It is clear from the record that no one other than Esparza was indicted or tried for this murder. It appears, accordingly, that the state prosecuted Esparza as the *sole* offender involved in this robbery and murder.

process itself," Arizona v. Fulminante, 499 U.S. 279, 310 (1991). While most constitutional errors are non-structural, and, thus, subject to harmless error review, see Neder at 7, there is a class of "structural" errors which are deemed so offensive to the trial process that they can never be considered harmless, no matter what the evidence establishes with respect to the defendant's guilt. See, e.g., Johnson v. United States, 520 U.S. 461, 468 (1997) (*citing* Gideon v. Wainwright, 372 U.S. 335 (1963) (complete denial of counsel is structural error); Vasquez v. Hillary, 474 U.S. 254 (1984) (racial discrimination in selection of a grand jury is a structural defect); McKaskle v. Wiggins, 465 U.S. 168 (1984) (denial of self-representation at trial is a structural defect); Waller v. Georgia, 467 U.S. 39 (1983) (defective reasonable doubt instruction not subject to harmless error assessment); Tumey v. Ohio, 273 U.S. 510 (1927) (biased trial judge not subject to harmless error review "no matter what the evidence was against [the defendant]").

As the Supreme Court has recently explained, this structural versus non-structural dichotomy is an absolute one – one which is not altered by the practical realities of the case at hand:

> Under our cases, a constitutional error is either structural or it is not. Thus, even if we were inclined to follow a broader "functional equivalence" test (e.g., where other facts found by the jury are "so closely related" to the omitted element "that no rational jury could find those facts without also finding" the omitted element, Sullivan, 508 U.S. at 281) (internal quotation marks omitted), such a test would be inconsistent with our traditional categorical approach to structural errors.

Neder, 527 U.S. at 14. Thus, the question of whether an error is structural must be decided without reference to the evidence admitted at trial; an assessment of the character of the defect simply does not turn on its actual effect in the particular case at bar. While this absolute has been stated clearly, it is less clear which errors fall on the respective sides of it. And, it is particularly difficult to discern whether,

or to what extent, the type of error defined in Apprendi should be deemed structural for purposes of a harmless error analysis.

The Supreme Court has held that the failure to charge a jury as to an element of an offense can constitute harmless error. Neder, 527 U.S. at 15. In Neder, the defendant was convicted of tax fraud, which is essentially the act of knowingly making materially false statements in connection with the filing of a tax document. Although the trial court failed to instruct the jury that it needed to determine whether any false statements to the taxing authorities were material, the Supreme Court allowed the conviction to stand, finding the error was harmless. Id. While the holding in Neder is arguably inconsistent with the Apprendi Court's later conclusion that the right to have every element of an offense decided by the jury is a constitutional right "of surpassing importance," Apprendi, 120 S.Ct. at 2535, Apprendi did not overrule Neder; indeed, the Apprendi majority did not even mention Neder.[50] This Court, accordingly, must attempt, to the extent possible, to reconcile the two Supreme Court decisions. Upon doing so, the Court concludes that the error which infected Esparza's trial by virtue of the defective indictment was a structural one which is not subject to review for harmless error.

In United States v. Monger, 185 F.3d 574, 577 (6th Cir. 1999), the Sixth Circuit drew a distinction between the failure to charge on a single element of an offense of conviction (as in Neder) and the failure to submit an entirely separate crime to the jury for consideration. Thus, in Monger, the Sixth Circuit held that the failure to charge the jury on a lesser included offense was structural error which could never be harmless, whatever the strength of the evidence on the actual offense of conviction. The Sixth Circuit said that the failure to instruct on the entire offense of simple possession

[50] It is notable, however, that several of the Justices who helped comprise the majority in Apprendi dissented from the majority holding in Neder.

infected the trial process and, thus, invalidated the defendant's conviction for possession with intent to distribute, regardless of the overwhelming evidence on the issue of intent. A similar distinction can be drawn in this case.

In Esparza's case, the trial court did not simply fail to charge the jury on one element of the offense of conviction. Here, the trial judge, led down this path by the defective indictment, charged the jury as to one offense – aggravated murder – but sentenced Esparza as if he had been convicted of an entirely separate offense – capital murder. As the Apprendi Court pointed out, the threshold inquiry must be "the seemingly simple question of what constitutes a 'crime'." 120 S.Ct. at 2367 (Thomas, J., concurring). This is so because "[t]he judge's role in sentencing is constrained at the outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed [are] by definition "elements" of a *separate* legal offense." Id. at 2358, n.10 (emphasis added). In Apprendi, the Court was concerned with a judge, rather than a jury, finding an element of a crime that changes the actual offense charged:

> Indeed, the effect of New Jersey's sentencing "enhancement" here is unquestionably to turn a second-degree offense into a first degree offense, under the State's own criminal code. The law thus runs directly into our warning in Mullaney that Winship is concerned as much with the category of substantive offense as "with the degree of criminal culpability" assessed. This concern flows not only from the historical pedigree of the jury and burden rights, but also from the powerful interests those rights serve. The degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment.

See id. at 2365 (citations omitted).[51] If this Court were to apply a harmless error review to the defect at issue in this case, or to find it acceptable for the state court to do so, the Court would be engaging in the very conduct which Apprendi deemed constitutionally offensive – it would be using its judgment to convert Esparza's conviction from one for aggravated murder to one for capital murder. As the Supreme Court said in Sullivan v. Louisiana, 508 U.S. 275, 280 (1983), "to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the finding to support that verdict might be – would violate the jury trial guarantee."[52]

This post-hoc determination by an appellate court of what the jury would have done *if* the capital specification question had been presented to it is particularly troubling in light of the capital scheme at issue here. As discussed later in this opinion, the Ohio Supreme Court, this Court, and the Sixth Circuit have all relied upon the existence of the capital specifications set forth in Ohio Rev. Code § 2929.04(A)(7) to conclude that the Ohio capital scheme has sufficiently narrowed the class of persons subject to the death penalty to render that scheme constitutional under Zant v. Stephens, 462 U.S. 862 (1983).[53]

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[51] In Mullaney v. Wilbur, 421 U.S. 684, 698 (1975), the Supreme Court found that Maine's law requiring a defendant to establish by a preponderance of the evidence that he acted in the heat of passion in order to reduce his charge from murder to manslaughter, violated due process. The Court concluded that it is the prosecution which must prove beyond a reasonable doubt the *absence* of heat of passion in order to convict a defendant of murder. In In Re Winship, 397 U.S. 358 (1970), the Supreme Court found that juvenile criminal defendants, as well as adult criminal defendants, have a constitutional right to have every element of the crime proved beyond a reasonable doubt.

[52] This same concern prompted the Supreme Court's conclusion in Rose v. Clark, 478 U.S. 570, 578, (1986), that a Court may not direct a verdict against a criminal defendant, no matter how overwhelming the evidence of guilt.

[53] "[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. at 877.

Thus, the Ohio Supreme Court has emphasized that a defendant may not be subject to the death penalty for a mere violation of Ohio Rev. Code § 2903.01(B); before the death penalty can be imposed, the state "must *additionally* prove that the offender was the principal offender in the commission of the aggravated murder or, if the offender was not the principal offender, that the aggravated murder was committed with prior calculation and design." State v. Jenkins, 473 N.E.2d 264 (Ohio 1984), *cert denied*, 472 U.S. 1032 (1985)(emphasis added). See also State v. Barnes, 495 N.E.2d 922, 925 (Ohio 1986), *cert. denied*, 480 U.S. 926 (1987) ("the trial court had to find that [the defendant] committed murder while committing or attempting to commit a specified felony *and further* that the defendant was the principal offender or the murder was premeditated."). And, federal courts, as this one does here, have relied upon this interpretation of Ohio's capital scheme, by the highest court in the state, as support for the conclusion that Ohio's capital scheme does narrow the class of persons to whom the death penalty can be applied, and does not use the precise same factors both to convict for aggravated murder and to subject one so convicted to the death penalty. See, e.g., Scott v. Mitchell, 209 F.3d 854, 885 (6th Cir. 1999).

Where the existence of the specifications under Ohio Rev. Code § 2929.04(A)(7) and of the state's obligation to prove those specifications as additional factors, are critical to the constitutionality of the capital scheme, a failure to charge those factors or submit them to the jury surely must be structural. Because the state failed to indict Esparza for the offense of capital murder, and failed to instruct the jury to find all elements of the offense of capital murder, and because that error is not

susceptible to a review for harmless error, Esparza is correct that imposition of the death penalty upon him would be unconstitutional.[54]

The conclusion that an Apprendi-type error renders imposition of the death penalty unconstitutional in the circumstances of this case still would not entitle Esparza to relief if that conclusion were premised on an entirely new rule of constitutional law. This is true for two reasons: under Teague v. Lane, 489 U.S. 288, 310 (1989), a defendant generally may not rely upon new constitutional rules of criminal procedure on habeas review when the case has become final before the new rules were announced, and (2) under the AEDPA, this Court may not reject a state court ruling as unreasonable unless it finds it was unreasonable under "clearly established federal law at the time the case was decided." While it is true that Apprendi has surprised many lower courts and commentators, and may change the post-1990 landscape with respect to how the Federal Sentencing Guidelines are applied, the Apprendi majority makes it quite clear that *it* does not believe it is espousing a new rule of law.[55] Indeed, the Apprendi majority takes great pains to trace the history of its holding to the constitution itself and to the Supreme Court's fairly unequivocal statements in In Re Winship, decided

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[54] The Court need not and does not decide whether all Apprendi-type errors should be considered structural. It only concludes that, given the unique statutory structure at issue in this case and the circumstances presented here, the failure to submit any capital specification to the jury was structural. Cf. United States v. Nordby, -- F.3d --, 2000 WL 1277211 (9th Cir. Sept. 11, 2000); United States v. Mojica Baez, -- F.3d --, 2000 WL 1211013 (1st Cir. Aug. 30, 1999).

[55] The Supreme Court, indeed, traces this rule to English common law, and takes pains to show that the rule persisted, without any question to its endurance, until very recently. See Apprendi, 120 S.Ct. 2348, 2356 (2000) ("As a general rule, criminal proceedings were submitted to a jury after being initiated by an indictment containing 'all the facts and circumstances which constitute the offence, . . .stated with such certainty and precision, that the defendant may be enabled to determine the species of offence they constitute, in order that he may prepare his defense accordingly . . . *and that there may be no doubt as to the judgement which should be given*, if the defendant be convicted.' J.Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862) (emphasis added) . . . This practice at common law held true when indictments were issued pursuant to statute.")

well before Esparza's trial. Apprendi, 120 S.Ct. at 2359. The Apprendi majority emphasizes that, to the extent a different rule seemed to prevail after McMillan v. Pennsylvania, 477 U.S. 79 (1986), it was that decision, and those lower court decisions which interpreted it broadly, which were out of step with clearly established federal law. Apprendi, 120 S.Ct. at 2360-61.

This Court must examine the question of what constitutes a new rule of law under Teague, or what constitutes clearly established federal law under the AEDPA, as if looking at that question in 1983 and shortly thereafter, when Esparza was indicted, convicted and sentenced, and his appeals were considered. Examined in that light, it is clear that the Apprendi majority itself would say that the rule of law it espouses *was* firmly established well before that point in time. The fact that subsequent case law may have raised doubts about the continued vitality of that rule does not render the Supreme Court's reaffirmation of the principles in In Re Winship a new rule of law, either for purposes of Teague, or of the AEDPA.[56]

Accordingly, because the state courts' endorsement of the death penalty where, as here, no capital specification was included in the indictment and none was found by the jury, is an unreasonable application of clearly established federal law, Esparza's first claim for relief is well-taken in part. The sentence of death imposed upon Esparza must be set aside; Esparza shall be re-sentenced according to the statutory guidelines for aggravated murder in the absence of a capital specification, as set forth in Ohio Rev. Code § 2929.03(A), which mandates a sentence of life imprisonment for that crime. [57]

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[56] The Court recognizes that this conclusion could have the effect of barring resort to Apprendi by petitioners who seek to file a second or successive petition under the AEDPA. The Court does not, however, finally decide that issue because it is not squarely before it.

[57] The indictment properly charged Esparza with aggravated murder under Ohio Rev. Code § 2903.01(B), the judge properly charged the jury with the elements of aggravated murder, and the jury properly found Esparza guilty of aggravated murder. Thus, the Court's acceptance of this claim for

Understanding that the entire mitigation phase of the trial was unnecessary because Esparza was never properly charged with a capital crime, the Court nonetheless proceeds to examine Esparza's claims for relief based on alleged errors in that stage of the proceedings.

**2. Esparza's Twenty-Fourth Claim for Relief.**

In his twenty-fourth ground for relief, Esparza asserts that the trial court unconstitutionally failed to provide him with an independent, competent psychologist to present mitigating evidence. Esparza alleges that expert assistance was necessary to help prove that he had a mental disease or defect – a statutory mitigating factor in the sentencing phase. The respondent did not assert that this claim was procedurally defaulted. The court will, therefore, analyze this claim on its merits.

Esparza relies on Ake v. Oklahoma, 470 U.S. 68, 83 (1985), for the proposition that he is constitutionally entitled to a psychologist to help him establish mitigating factors in a sentencing hearing. Esparza's reliance is misplaced. In Ake, the Court held that a defendant is entitled to a competent psychiatrist to aid with his defense in two circumstances. First, a request for psychiatric assistance must be granted during the guilt phase of the trial "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial." Id. at 83. Second, the request must be granted during the mitigation phase of the trial when "the State presents psychiatric evidence of the defendant's future dangerousness" so that the defendant may rebut those claims. Id. A defendant is entitled to a psychiatrist to rebut the government's expert because "[w]ithout a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of

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relief does not vitiate the fact that Esparza was found guilty of this offense. The Court only sets aside Esparza's sentence of death under this claim for relief, because Esparza was never charged with or convicted of a capital crime.

an aggravating factor." Id. at 83. Even though a defendant is entitled to a psychiatrist under these circumstances, the defendant is not entitled to any psychiatrist he desires or to a helpful psychiatric opinion. See id. ("This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his own personal liking or to receive funds to hire his own.")

Esparza's claim falls outside the constitutional guarantee of psychiatric aid outlined in Ake. Esparza is not arguing that the prosecution offered psychiatric evidence of Esparza's future dangerousness and that he needed a psychologist to counter this inequity. Esparza is simply claiming that a psychologist was necessary to help prove a statutory mitigating factor. The Constitution does not guarantee a psychologist in this situation.

Esparza's claim is similar to the claim made in Kordenbrock v. Scroggy, 919 F.2d 1091 (6th Cir. 1989). In Kordenbrock, the defendant argued that he was entitled to a psychiatrist to help prove that his use of drugs and alcohol diminished his responsibility for the crime. The defendant wished to use a psychiatrist to prove his drug use both in the guilt and sentencing phases. Six judges on a thirteen judge panel held that Ake guaranteed access to psychiatric assistance in only "two situations - when the defendant's sanity is a significant factor at trial and in the context of a capital sentencing proceeding when the State presents psychiatric evidence of the defendant's future dangerousness." Id. at 1120 (citations omitted). This panel of judges held that the defendant was not entitled to psychiatric help at trial because he never "attempted to raise insanity as a defense." Id. at 1119. The defendant was also not entitled to psychiatric help to prove mitigating factors because "the state presented no psychiatric evidence at the sentencing phase." Id. at 1120. Another judge held that a defendant was only entitled to psychiatric assistance under Ake when he "specifically pleads insanity or its equivalent." Id. at 1131 (Wellford, J., dissenting).

The prosecutor presented no psychiatric evidence during the sentencing phase, thus Esparza did not require psychiatric testimony for rebuttal purposes. The only psychiatric evidence proffered was from the pre-sentence investigation and psychological report, which Esparza requested and therefore submitted to evidence himself.[58] Although that testimony was hardly favorable to Esparza, as discussed later in the opinion, Esparza was not entitled to a favorable opinion. Accordingly, Esparza's twenty-fourth claim for relief is not well-taken.

**3. Constitutional Violations Associated with the Admission of the Pre-Sentence Investigation and a Psychological Report because it Contained Allegedly Inadmissible and Prejudicial Information: Esparza's Twenty-Fifth, Twenty-Sixth, Twenty-Seventh, Twenty-Eighth, Twenty-Ninth, Thirtieth, Thirty-First, Thirty-Second, Thirty-Third, Thirty-Fourth, Thirty-Fifth, Thirty-Sixth, Thirty-Seventh, Thirty-Eighth, Forty-First and Forty-Second Claims for Relief.**

Esparza's twenty-fifth through thirty-eighth, forty-first and forty-second claims for relief make a variety of allegations about the pre-sentence investigation and psychological report. Many of these claims are similar or linked together so that, if the pre-sentence investigation procedure is constitutional, all of the claims will fail together. But, if the pre-sentence investigation procedure is unconstitutional, many of the claims would succeed together. Each claim will be briefly stated.

Esparza's twenty-fifth claim is that the trial court impermissibly refused to allow him to withdraw his request for the pre-sentence investigation and psychological report.

Esparza's twenty-sixth claim is that the trial court impermissibly admitted the pre-sentence investigation report because it had been prepared without reference to the appropriate guidelines. Esparza claims that the report did not contain complete information on Esparza's social, medical or

[58] Although the Court believes it is better practice to authorize appointment of a psychiatrist for a capital defendant whenever the jury is exposed to a state *or* court-sponsored psychological assessment, the practice does not appear to be constitutionally mandated.

mental health history or a complete and accurate discussion of his prior commitments to state institutions. He also claims that the report exceeded the guidelines by containing an item-by-item discussion of each of the mitigating factors and details from probation reports from unrelated cases.

Esparza's twenty-seventh claim is that inaccurate information contained in the report violated his constitutional rights. Esparza claims that the information regarding his history of substance abuse and his intelligence was inaccurate.

Esparza's twenty-eighth claim is that the admission of the pre-sentence investigation report, containing probation reports about totally unrelated offenses, violated his constitutional rights. Esparza alleges that these reports were unduly prejudicial because they constituted evidence of inadmissible prior bad acts through hearsay testimony. Esparza asserts that these bad acts were considered by the jury as non-statutory aggravating factors.

Esparza's twenty-ninth claim is that the state's failure to inform him of his Miranda rights prior to being interviewed for the pre-sentence investigation report was a violation of his constitutional rights. Esparza's thirty-sixth claim is that the state's failure to inform him of his Miranda rights prior to being interviewed for the psychological report violated his constitutional rights.

Esparza's thirtieth claim is that pre-sentence investigation report impermissibly commented on Esparza's exercise of his right not to testify. Esparza's thirty-fifth claim is that the psychological report impermissibly commented on Esparza's exercise of his right not to testify.

Esparza's thirty-first claim is that the pre-sentence investigation report impermissibly contained numerous non-statutory aggravating circumstances. These circumstances are: (1) Esparza was not employed and had never held steady employment, (2) Esparza's criminal record "escalated rapidly," (3) prior incarcerations did not deter his criminal behavior, (4) Esparza fathered a child out-of-wedlock,

(5) most of the mitigating factors were not present, (6) an earlier pre-sentence report did not support Esparza's claimed history of drug abuse, (7) Esparza exercised his right to remain silent, and (8) that Esparza made "claims" of innocence. Also, Esparza again asserts that the report contained inaccurate information about his intelligence – that he had average intelligence – when, in actuality, his intelligence level is low.

Esparza's thirty-seventh claim is that psychological report impermissibly contained numerous non-statutory aggravating circumstances. Esparza claims that these circumstances were: (1) the report discussed his prior criminal record and commented on "the apparent escalation of aggressive acting out," (2) Esparza had a fairly high likelihood of committing future similar criminal acts, (3) he and his friends would set garbage cans on fire, (4) Esparza's discussion of his prior offenses, (5) Esparza's discussion of his experience with alcohol and drugs, (6) Esparza's 'vehement' denial of the offense, (7) evidence of disciplinary infractions while in jail, and (8) evidence to rebut mitigating factors that Esparza did not raise.

Esparza's thirty-second claim is that the jury was repeatedly informed of his prior juvenile and adult criminal record in violation of his constitutional rights.

Esparza's thirty-third claim is that the trial court impermissibly admitted a psychological report with the pre-sentence investigation report which had not been prepared pursuant to the required procedures. Specifically, Esparza claims that, because of lack of adequate time to prepare the report, no social worker was involved, no records were sought or obtained from other institutions or agencies except the Probation Department and Prosecutor's office, no psychiatrist was involved, the two psychologists conducted a joint interview of petitioner, rather than separate interviews, and that those who prepared the report relied on illegible records.

Esparza's thirty-fourth claim is that the psychological report impermissibly contained his prior record.

Esparza's thirty-eighth claim is that the trial court impermissibly admitted the testimony of a psychologist who stated that Esparza has an anti-social personality that causes him to deny his guilt.

Esparza's forty-first claim is that the admission of improper rebuttal testimony of an author of the psychological report to the effect that no mitigating factors existed was a violation of his constitutional rights.

Finally, Esparza's forty-second claim is that the introduction of non-statutory aggravating factors throughout the sentencing phase violated his constitutional rights.

Respondent has not specifically argued that these claims were procedurally defaulted. In fact, respondent contained his entire argument on the procedural default of these claims to the unsupported statement that "[m]any are subject to procedural default." The claims concerning the pre-sentence investigation report have certainly multiplied since Esparza argued them in the Ohio Courts, and no doubt many of them are procedurally defaulted. However, because procedural default is an affirmative defense, the Court finds that respondent has not met its burden in alleging procedural default. Therefore, the Court will examine these claims on the merits.

Esparza's claims concerning the pre-sentence investigation and psychological report can be reduced to three general arguments asserting more specific constitutional violations. The first argument is that the statements obtained from Esparza that were later included in these reports were obtained in violation of Esparza's Fifth Amendment right against self-incrimination because he was not warned that his statements may be used against him in the sentencing phase. The second argument is that the information included within these reports constituted non-statutory aggravating factors and thus was

prejudicial to the defendant in violation of his Eighth and Fourteenth Amendment Rights. The third argument is that the psychologists did not follow the correct procedures in creating the pre-sentence investigation report. Although the Court is concerned with the extreme and seemingly unnecessary damage that the pre-sentence investigation and psychological report caused Esparza, and the fact that these reports appear to present a trap for unwary and unenlightened defense attorneys, the Court finds these arguments, at least as presented in this section, lack merit.

As to the first argument, Esparza waived his Fifth Amendment right against self-incrimination when he requested the pre-sentence investigation under Ohio Rev. Code § 2929.03. Esparza requested the report so that it would be introduced into evidence during the sentencing phase of the trial in order to help prove mitigating factors. Esparza knew or should have been told by counsel that the full contents of what he discussed with the psychologists could potentially be admitted, whether or not it was helpful to his defense. See State v. Buell, 489 N.E.2d 795, 808 (Ohio 1986) (results of a mental examination as requested under Ohio Rev. Code § 2929.03 are made available to all parties including the judge and the jury). Esparza, knowing that the reports were created in order to be admitted into evidence during the sentencing phase, thereby waived his Fifth Amendment right against self incrimination as to the material gathered in the report. Although the Fifth Amendment would be violated if a court *orders* a defendant to undergo a psychiatric examination without informing the defendant that his statements can be used against him, and then admits his statements into evidence during the sentencing phase in order to prove statutory aggravating circumstances, see Estelle v. Smith, 451 U.S. 454, 468 (1981), the Fifth Amendment is not violated if the defendant requests the psychiatric evaluation himself and voluntarily submits to it.

> A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. This statement leads logically to another proposition: if a defendant requests such an evaluation or presents psychiatric evidence of such an evaluation, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.

Buchanan v. Kentucky, 483 U.S. 402, 422-423 (1987). In this case, Esparza *requested* the pre-sentence investigation report, which included a psychological report, in order to help prove mitigating factors in the sentencing hearing. Esparza thus had no Fifth Amendment privilege against the introduction of that evidence in the sentencing phase of the hearing. Further, Esparza's Fifth Amendment rights were not violated by the state calling Dr. Cassel, one of the psychologists who participated in the psychological report, as a rebuttal witness and asking her to discuss the absence of the statutory mitigating factors. Under Buchanan, the State is permitted to rebut the presentation of psychiatric evidence from the report itself. Therefore, the whole of the report could be admitted into evidence without violating the Fifth Amendment even if the defendant did not agree beforehand to that specific procedure. Here, where the law apparently dictated that the entire report be admitted and petitioner was or should have been aware of that fact, the petitioner cannot show a constitutional violation because damaging information from the reports was admitted along with the mitigating information. Nor can he show that the cross-examination of one of the professionals who prepared the report in order to elicit the existence or non-existence of any mitigating factors was improper.

The fact that Esparza's counsel requested the pre-sentence investigation report, however foolhardy that request, militates against finding a violation of Esparza's Sixth Amendment right to counsel on the theory that the pre-sentence investigation report circumvented Esparza's counsel's

control of Esparza's defense. The Sixth Amendment right to counsel will be violated if a court orders a psychiatric evaluation without notifying counsel. See Powell v. Texas, 492 U.S. 680 (1989), Satterwhite v. Texas, 486 U.S. 289 (1988). In Esparza's case, however, his counsel was not only notified of the evaluation, but requested it himself. Esparza's Sixth Amendment right to counsel, therefore, was not violated in this respect.[59]

Esparza's second main argument is that the information contained within the pre-sentence investigation and psychological report contained impermissible evidence and non-statutory aggravating factors. Esparza contends that the reports impermissibly: (1) emphasized his prior criminal record, (2) included probation reports and disciplinary infractions Esparza committed while in custody, (3) revealed he was not employed and had a child out of wedlock, (4) depicted his criminal record as "escalat[ing] rapidly," and, (5) proclaimed that his prior incarceration had a lack of deterrent effect. The reports contained the psychologists' conclusions that Esparza's "acting out" was escalating, and that a fair likelihood existed that he would commit similar future acts. They related that he and his friends set garbage cans on fire, and that he had an anti-social personality that caused him to deny his guilt. The report also contained inaccurate information about his level of intelligence and his history of substance abuse. Finally, the reports commented on the fact that Esparza exercised his right to remain silent during trial. Esparza argues that many of these items were used by the jury as non-statutory aggravating factors, instead of factors militating in favor of mitigation. The Court finds that, while it was error for the trial court not to examine the report and redact inaccurate, unduly prejudicial or completely

[59] Whether counsel's performance was deficient by virtue of this request is an issue that will be addressed later in this Opinion.

irrelevant material before submitting the report to the jury, see Ohio R. Evid. 403, it was not error of a constitutional magnitude.[60]

In Ohio, a death penalty trial is a bifurcated proceeding: the guilt phase of the trial is separate from the sentencing phase of the trial. See Ohio Rev. Code § 2929.03. The proceeding is constructed this way to shield the jury, during the guilt phase, from information that might impermissibly affect their decision whether the defendant committed the crime. During the sentencing phase, though, it is necessary that the jury hear information that would be prejudicial during the guilt phase, so they may fashion a sentence tailored to the defendant's individual circumstances. The Supreme Court's propensity is to allow a wide scope of evidence in for the judge and jury's consideration during the sentencing phase. In Gregg v. Georgia, 428 U.S. 153, 204 (1976) the Court expressly rejected the defendant's contention that the scope of the evidence admitted during the sentencing phase was too broad. The Court stated:

> We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far reaching arguments. So long as the evidence introduced and the arguments made do not prejudice the defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

Id. In Esparza's case, there was certainly a wide scope of evidence admitted during the sentencing phase. Much of this evidence was damaging to Esparza. It would be impossible to conclude that this evidence did not enter into the jury's calculations on whether to impose the death penalty or affect the

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[60] In State v. Esparza, 529 N.E.2d 192, 201 (Ohio 1988), Justice Herbert Brown, joined by Justice Wright dissented from the majority opinion because they believed the trial court erred by admitting the complete pre-sentence investigation and psychological report without considering the prejudicial consequences of the information contained therein. Those justices were particularly concerned with the points Esparza raises here – the inclusion of information which constituted non-statutory aggravating factors and of conclusions by psychologists which invaded the province of the jury.

outcome of their determination in this regard. However, the question here is not whether this information was damaging to Esparza, or even whether a proper balancing of the prejudicial effect of that evidence with its probative value would justify precluding some of this information under the Rules of Evidence (which the Court believes it would); the question is whether allowing this information into evidence during the sentencing phase was so prejudicial as to violate Esparza's constitutional rights.

Esparza alleges that much of this evidence was used as non-statutory aggravating factors by the jury. Under Ohio law, the death penalty may not be imposed unless certain statutory aggravating factors are "specified in the indictment" and "proved beyond a reasonable doubt." Ohio Rev. Code § 2929.04. "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty... the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." California v. Ramos, 463 U.S. 992, 1008 (1983). In Ohio, after the aggravating factor or factors have been proven, the court or jury is, indeed, free to consider a wide variety of factors.[61] The statute states that the sentencing jury or judge must "weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character and background of the offender[,]" the statutory mitigating factors and all other mitigating factors. Ohio Rev. Code § 2929.04. While the Court is amazed at the scope of what the probation officer saw fit to put into the pre-sentence investigation report, raising questions about whether the probation officer was acting more as an advocate than an officer of the court, much of the evidence that came in through that report illustrated factors that the jury, generally, is entitled to

[61] This Court has already concluded that the first phase of this capital scheme never actually occurred in this case, rendering the sentencing or mitigation phase improper in its entirety. For purposes of this discussion, the Court assumes that its earlier conclusion was in error and that it was, accordingly, appropriate to instruct the jury that a statutory aggravating circumstance had been established by virtue of Esparza's conviction.

consider under the Ohio statutory scheme – that is the nature and circumstance of the offense and the history, character and background of the offender.

The Ohio Supreme Court dispensed with the allegation that the report contained non-statutory aggravating factors by pointing out that "the jury was properly instructed as to the aggravating circumstances and mitigating factors it was to consider." Esparza v. State, 529 N.E.2d 192, 195 (Ohio 1988). This Court is to presume that the jurors followed the trial court's instructions. See Richardson v. Marsh, 481 U.S. 200 (1987). Indeed, Esparza does not provide any facts or evidence to undermine the presumption that the jury properly weighed the evidence when determining his sentence.

Even if the jury did consider this evidence as an aggravating factor, there still would be no constitutional violation. In Zant v. Stephens, 462 U.S. 862 (1983), the Supreme Court found that consideration of a non-statutory aggravating circumstance, although against state law, did not offend the Constitution when there were two other statutory aggravating circumstances that the jury could have relied upon:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.

Id. at 879-880. Here, the factors that the jury may have considered in the pre-sentence investigation and psychological reports were not only permitted under the Constitution, they are permitted under Ohio law.

There is no merit, moreover, to Esparza's claim that it is unconstitutional for the jury to consider his prior record or the disciplinary infractions he received while incarcerated. "Nothing in the United

States Constitution prohibits a trial judge from instructing a jury that it would be appropriate to take account of a defendant's prior criminal record in making its sentencing determination, even though the defendant's prior history of noncapital convictions could not by itself provide sufficient justification for imposing the death sentence." Zant, 462 U.S. at 888. See Barclay v. Florida, 463 U.S. 939, 958 (1983) (holding it is not unconstitutional for a Florida court to have considered prior record as an aggravating circumstance even though it was not an aggravating circumstance under Florida Law);see also Romano v. Oklahoma, 512 U.S. 1, 12 (1994) ("The Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings.")

Esparza argues that it was improper for the jury to hear false information through the pre-sentence investigation and psychological reports. He points specifically to the allegedly misleading information that his intelligence level was average when it was actually low and also the alleged misrepresentation of his history of drug abuse. Esparza relies on Johnson v. Mississippi, 486 U.S. 578 (1981) for the proposition that the jury is not allowed to "consider evidence that has been revealed to be materially inaccurate." Id. at 579. In Johnson, however, the evidence relied upon was the statutory aggravating factor of a prior conviction that had later been overturned. A prior conviction is capable of being verified as accurate or inaccurate. Here, psychologists and probation officers may disagree on how to characterize Esparza's intelligence level, and his history of drug abuse is not a fact that is subject to verification. These allegedly misleading facts are neither severe enough nor concrete enough to be deemed "materially inaccurate." Moreover, the Supreme Court has since commented, "[c]ontrary to petitioner's assertion, Johnson does not stand for the proposition that the mere admission of irrelevant and prejudicial evidence requires the overturning of a death sentence." Romano v. Oklahoma, 512 U.S. 1, 11 (1994). The Court, therefore, finds no merit to these allegations.

Finally, Esparza claims that the pre-sentence investigation and psychological report impermissibly commented on the exercise of his right not to testify at trial. The Court scoured the report and could not find a single place that commented on Esparza not testifying at trial. Notably, Esparza does not point the Court to a single page, or phrase, where this supposed impermissible recounting occurred. The Petition only refers to a part of the report stating that Esparza "refused to talk about the circumstances" of prior offenses. Petition at p. 59. In reality, the report states that "he refused to talk about the circumstances involved in this latter offense" referring specifically to a prior Attempted Robbery charge. See Psychological Report. This sentence cannot logically be linked to any refusal on Esparza's part to testify in the current proceedings. Because there is no support for the allegation that the psychological report impermissibly commented on Esparza's right not to testify, the Court finds this claim to be without merit.

Esparza's third general argument is that the procedures for the pre-sentence investigation and psychological reports were not followed and that there were many factors that should have been considered in these reports that were ignored. As discussed in claim twenty-four, Esparza was not constitutionally entitled to a psychologist to aid with the mitigation proceedings. See Estelle v. Smith, 451 U.S. 454 (1981); Buchanan v. Kentucky, 483 U.S. 402 (1987). Because there is no constitutional guarantee to a psychologist in this situation, the threshold for the inadequate assistance of an expert psychologist must necessarily be quite low. Although the Court will not go so far as to say that nothing that the psychologists could have done could rise to the level of constitutional error because their presence was not constitutionally mandated, the Court does not find that any constitutional error exists in this case. Esparza is not entitled to a psychologist of his choosing, and he is not entitled to a favorable opinion from the psychologist that is chosen for him. See Ake v. Oklahoma, 470 U.S. at 83.

The fact that the psychologists did not follow state procedures (which they clearly did not) does not, in and of itself, give rise to constitutional implications. Although the psychologists did not do the most thorough and comprehensive job in this case, a fact that is particularly troubling and disappointing considering the gravity of the task with which they were charged, this Court is not prepared to say that their failure to follow state procedures and careless work could, by itself, provide a basis for granting habeas.[62] The Court, therefore, finds that these claims are not well-taken.

**4. Esparza's Fortieth Claim for Relief**

Esparza's fortieth claim is that the admission of the victim's photograph during the sentencing phase violated his constitutional rights. The trial court admitted into evidence a photograph of the victim and her daughter in front of the American flag. The prosecutor also made several statements about the pain and loss of the victim's friends and family. Esparza objects to this evidence because "the use by the State of evidence of the victim's background, and reliance upon such evidence in its argument for the death penalty, is improper and constitutes error...[because it] serves to inflame the passion of the jury with evidence collateral to the principal issue at bar." State v. White, 239 N.E.2d 65 (Ohio 1968).

The Constitution, however, provides no bar to the admission of victim impact statements during the sentencing phase of a trial. The Supreme Court has held "that if the state chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." Payne v. Tennessee, 501 U.S. 808, 827 (1991) (cited in State v. Hill, 661 N.E.2d 1068, 1076 (Ohio 1995)). "There is nothing unfair about allowing the jury to bear in mind that harm

[62] The many errors and inadequacies in the report do lend support to petitioner's contention that the trial court erred when it failed to allow adequate time for preparation of the report. That is a separate claim, however, and will be analyzed as such.

[to the victim and the victim's family] at the same time as it considered the mitigating evidence introduced by the defendant." Id. See also Byrd v. Collins, 209 F.3d 486, 531-32 (6th Cir. 2000). Therefore, the introduction of the victim's photograph to the jury, and the statements by the prosecutor reminding the jury of the victim and her family, even if violative of state law, did not violate Esparza's constitutional rights.

**5. Esparza's Forty-Third Claim for Relief**

Esparza's forty-third claim is that the trial court improperly excluded mitigating evidence at the sentencing hearing. Specifically, Esparza claims that the trial court excluded a letter which he wrote to his foster parents expressing his desire to rehabilitate himself and support his children. Esparza also claims that the trial court precluded one of the psychologists who helped prepare the psychological report from testifying regarding the existence of mitigating factors.

Respondent does not argue that these claims were procedurally defaulted. The Court, therefore, addresses these claims on their merits.

Esparza asserts that it was unconstitutional to preclude the jury from hearing the psychologist's opinion as to the presence of mitigating factors. Whether or not this is true, Esparza misrepresents the record when stating this claim because the jury was not precluded in this case from hearing the psychologist's opinion on those factors. The psychologist was asked by the defense whether there were any mitigating factors available to Esparza. The trial judge sustained an objection to this question because it called "for a multiple conclusion of the witness for a matter that is reserved for the jury." Tr. T. V. p. 108. Esparza's counsel then questioned the psychologist as to the presence of each individual mitigating factor that Esparza wished to raise. See Tr. T. V. p. 108-112. The psychologist freely gave his opinion about each of these mitigating factors. The opinion of the psychologist as to each of these

mitigating factors was in no way precluded despite the ruling on the initial objection to that line of questioning. This portion of the claim is, thus, without merit.

As to the claim that Esparza's letter was unconstitutionally precluded from consideration by the jury, both the Appellate Court and the Supreme Court squarely addressed this issue. Both found that this claim was not well-taken. Therefore, this claim was not procedurally defaulted.

The United States Supreme Court has strongly suggested that all relevant mitigating factors must be considered by a death-sentence jury. In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court held that the trial court violated the defendant's Eighth Amendment rights by refusing, as a matter of law, to evaluate all the evidence of mitigation. The trial court considered the youth of the offender in imposing the death sentence, but refused to consider the fact that the defendant had been physically abused and was emotionally disturbed. Id. at 108-109. The Supreme Court restated the relevant rule several times in overturning the imposition of the death penalty:

> We concluded that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 110 (*quoting* Lockett v. Ohio, 438 U.S. 586, 604 (1976).

If, after Eddings and Lockett, any question about the relevance of mitigating evidence remained, it was resolved in Sumner v. Shuman, 483 U.S. 66 (1987). There, the defendant, an inmate serving a life sentence who, after killing another inmate in prison, was not allowed to introduce any mitigating factors and a death sentence was imposed. The Court found this unconstitutional because the sentencing authority must be permitted to consider any relevant mitigating evidence before imposing a death sentence. Id. at 76.

The Sixth Circuit has reiterated the strong constitutional concern over precluding a defendant from presenting mitigating evidence. In a recent case, the Sixth Circuit found that it was error for an Ohio trial court to prohibit a jury from considering mitigating evidence relating to a prior murder conviction. Mapes v. Coyle, 171 F.3d 408, 418 (6th Cir.1999).

In this matter, the Ohio Court of Appeals upheld the trial court's decision to exclude the defendant's letter, finding that the letter was irrelevant. The letter was written while Esparza was incarcerated on the charge leading to his conviction of aggravated murder three weeks prior to the original trial date. The appellate court noted that the United States Supreme Court had not limited "the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." State v. Esparza, No. L-84-225, 1986 WL 9101 *15 (Ohio App. Aug. 22, 1986) (*quoting* Lockett v. Ohio, 438 U.S. 584, 604 (1978)). The appellate court stated that "[a]ny relevance the letter may have to appellant's character is outweighed by its unreliability; the circumstances under which the letter was written are suspect." Id.

The Ohio Supreme Court affirmed the appellate court's decision. It found that the letter was irrelevant because the circumstances under which it was written "indicate a lack of trustworthiness." State v. Esparza, 529 N.E.2d 192, 198 (Ohio 1988). The court stated, "[d]ue to the likelihood that this letter was written for the purpose of communicating a statement to the jury, its exclusion as irrelevant was proper. Moreover, exclusion of the letter was harmless given the other testimony of appellant's continued family contacts which was presented to the jury by appellant's foster father." Id.

This Court may not grant a writ of habeas corpus "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as

determined by the Supreme Court of the United States." 28 U.S.C. § 2254 (d)(1). See Discussion, supra, at Part V, pp. 14-17. The Court does not find that the Ohio courts unreasonably applied federal law. Although it is true that a defendant has the right to present any and all mitigating evidence during the sentencing phase of the hearing, this does not mean that the defendant can submit irrelevant and untrustworthy information. In this case, Esparza was not precluded from arguing the existence of a mitigating *factor* - i.e., that he desired to rehabilitate himself, he was only prohibited from introducing one form of *evidence* to support that mitigating factor, a letter. Because this Court does not find the Ohio courts' conclusion that the letter was irrelevant is an unreasonable application of federal law, this claim is without merit.

**6. Esparza's Forty-Fifth Claim for Relief.**

Esparza's forty-fifth claim is that the prosecutor's misconduct during the sentencing phase violated his constitutional rights. Because respondent does not argue that these claims are procedurally defaulted, they will be addressed on the merits.

Esparza alleges numerous instances of prosecutorial misconduct. They can be reduced, though, to six general areas of alleged misconduct. First, the prosecutor referred to non-statutory aggravating circumstances, including the facts of the case, and argued that mitigating circumstances were actually aggravating. Second, the prosecutor referred to a statutory aggravating circumstance of which the defendant was not found guilty. Third, the prosecutor referred to Esparza's future dangerousness. Fourth, the prosecutor argued that Esparza's proffered mitigating factors did not mitigate his crime. Fifth, the prosecutor referred to other individuals with similar backgrounds who did not commit crimes. Sixth, the prosecutor made repeated references to the victim.

When a petitioner seeks relief through habeas corpus based on improper prosecutorial comments, it "is not enough that the prosecutor's remarks were undesirable or even universally condemned. The relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181 (1986) (citations omitted).[63] This question must be answered in light of the totality of the circumstances in the case. Lundy v. Campbell, 888 F.2d 467, 473 (6th Cir. 1989), *cert denied*, 495 U.S. 950 (1990).

In the Sixth Circuit, a court is to engage in a two-stage process to determine whether a prosecutor's statements entitle a defendant to relief. See e.g. U.S. v. Francis, 170 F.3d. 546, 552 (6th Cir. 1999) (setting forth two-step procedure). First, the Court must determine whether the prosecutor's statements were improper. U.S. v. Cobleigh, 75 F.3d 242, 247 (6th Cir. 1996). "Then if improper, the court must determine if the impropriety was flagrant . . ." Id. at 247 (citations omitted). See also Francis at 552. The Court considers the following four factors in evaluating whether the statements were flagrant:

> (1) whether the remarks tended to mislead the jury or to prejudice the accused [including whether the trial judge gave an appropriate cautionary instruction to the jury];
> (2) whether they were isolated or extensive;
> (3) whether they were deliberately or accidentally placed before the jury; and
> (4) the strength of the evidence against the accused.

See Byrd v. Collins, 529 F.3d 486, 529 (6th Cir. 2000). "To constitute a denial of due process, the misconduct must be so pronounced and persistent that it permeates the entire atmosphere of trial." Id. (internal quotations removed). Only if the comments were both improper and flagrant will the

[63] Whether the prosecutor engaged in unconstitutional misconduct is a mixed question of fact and law. See United State v. Clark, 982 F.2d 965, 968 (6th Cir. 1993).

petitioner be entitled to relief. "The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." Smith v. Phillips, 455 U.S. 209, 219 (1982).

First, Esparza claims that the prosecutor argued non-statutory aggravating factors. Here, Esparza refers to several comments made by the prosecutor about the nature and circumstances of Esparza's crime. Esparza contends that these are not valid aggravating circumstances under Ohio law. The Ohio Supreme Court does not agree with Esparza's contention. "[A] prosecutor may incorporate proven facts surrounding a murder into the state's closing arguments even when these proven facts could increase rather than decrease the likelihood that a sentence of death will ultimately be recommended." State v. Hill, 661 N.E.2d 1068, 1076 (Ohio 1996). As well as not offending Ohio law, the prosecutor's arguments do not violate any federal constitutional right. As we have already explained, a wide scope of evidence may be considered during sentencing. See Gregg v. Georgia, 428 U.S. 153, 204 (1976); Zant v. Stephens, 462 U.S. 862 (1983). There is no constitutional prohibition against mentioning the facts of the crime during sentencing. Id. Therefore, this claim is without merit.

Second, Esparza argues that the prosecutor referred to other statutory aggravating factors of which the defendant was not found guilty. Specifically, Esparza alleges that the prosecutor stated that Esparza shot the victim in order to escape detection and referred to aggravating circumstances in the plural form, where there was, at best, only one proven aggravating circumstance. Esparza has again alleged no constitutional violation. There is no constitutional prohibition to mentioning the circumstances of the crime. See Gregg v. Georgia, 428 U.S. at 204. And, there appears to be no prohibition against asking the jury to draw inferences from those circumstances. As for the prosecutor's reference to *circumstance**s***, in the plural form, this Court does not find that this reference was so

improper as to result in an unfair trial or to taint the jury's sentencing determination. The jury was instructed that they were to weigh the aggravating circumstance of Esparza's conviction for murder committed during the course of an aggravated robbery against any mitigating factors.[64] The prosecutor's few stray comments do not overcome the presumption that the jury followed the trial court's instructions.

Third, the prosecutor made repeated references to Esparza's future dangerousness. While these comments may have been improper, in light of Ohio law, there is no *constitutional* prohibition to considering future dangerousness in a sentencing procedure. In fact, many states expressly consider this as a factor. See Estelle v. Smith, 451 U.S. 454, 458 (1981) (Texas requires a sentencing jury to consider the defendant's future dangerousness).

Fourth, Esparza claims a hodge-podge of improper innuendos and unfair argument on the part of the prosecutor that demeaned mitigating evidence or the mitigation procedure. Many of these statements are argued to be improper only because they imply that the jury should not give weight to Esparza's mitigating evidence. While these comments were largely unnecessary and may, in conjunction, constitute error, the Court does not find that any of these statements were constitutionally infirm, nor does Esparza argue that any of these statements violate the federal constitution. Further, even if these statements were improper, they most assuredly did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S 168, 181 (1986).

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[64] Again, the Court assumes, for purposes of this discussion, that the aggravating circumstance described to the jury in this case was sufficient to justify imposition of the death penalty, though, as the Court previously found, it was not.

Fifth, the prosecutor compared Esparza to other individuals from similar backgrounds and with similar hardships who are law-abiding citizens. Esparza claims that this comparison impaired his right to individual consideration in the sentencing process. While a defendant is entitled to individual consideration, see McCleskey v. Kemp, 481 U.S. 279 (1987), individual consideration is not necessarily hampered by the suggestion at issue here. Nor does Esparza offer any support for his argument that an impairment of individuality is always the logical result of such a suggestion.

Sixth, the prosecutor made references to the victim and the victim's family's loss. As discussed earlier, there is no constitutional prohibition to a consideration of the victim during the sentencing phase. See Payne v. Tennessee, 501 U.S. 808, 827 (1991) . See also Byrd v. Collins, 209 F.3d 486, 532 (6th Cir. 2000).

The Court concludes that the prosecutor's comments to which Esparza objects, even though at times improper, did not deny Esparza due process or inject any fundamental unfairness into the trial. Therefore, Esparza's forty-fifth claim is not well taken.

**7. Esparza's Forty-Seventh Claim for Relief**

Esparza's forty-seventh claim is that the trial court's and prosecutor's admonishments to the jurors that any death verdict was only a recommendation unconstitutionally diminished the jury's responsibility for imposition of the death penalty. Respondent does not allege that this claim is procedurally defaulted. The claim was, in fact, asserted on direct appeal. See State v. Esparza, No. L-84-225, 1986 WL 9101 *7 (Ohio App. Aug. 22, 1986). Therefore, the Court will address this claim on its merits.

Esparza points to four different occasions during voir dire and at the beginning of the sentencing phase when either the prosecutor or the trial judge told the jurors that the penalty that they decided upon

was a recommendation. Esparza also points to the jury instruction that the trial court delivered at the close of the sentencing phase. The challenged instruction is quoted below:

> If all twelve members of the jury find, by proof beyond a reasonable doubt, that the aggravating circumstances which Gregory Esparza was found guilty of committing outweighs the mitigating factors, then you must return such finding to the Court. I instruct you as a matter of law that if you make such a finding, then you have no choice and must recommend to the Court that the sentence of death be imposed upon the defendant, Gregory Esparza.
>
> A jury recommendation to the Court that the death penalty be imposed is just that – a recommendation, and is not binding upon the Court. The final decision as to whether the death penalty shall be imposed upon the Defendant rests upon this Court.
>
> In the final analysis, after following the procedures and applying the criteria set forth in the statute, I will make the decision as to whether the Defendant, Gregory Esparza, will be sentenced to death or to life imprisonment.
>
> Now, on the other hand, if . . . you find that the State of Ohio failed to prove that the aggravating circumstances which the defendant, Gregory Esparza, was found guilty of committing, outweigh the mitigating factors, then you will return your verdict indicating your decision. In this event, you will then proceed to determine which of two possible life imprisonment sentences to recommend to the Court.
>
> Your recommendation to the Court shall be one of the following: One, that Gregory Esparza be sentenced to life imprisonment with parole eligibility after 20 full years of imprisonment; Or, second, that Gregory Esparza be sentenced to life imprisonment with a parole eligibility after 30 full years of imprisonment.
>
> This particular recommendation that you make involving life imprisonment is binding upon the Court, and I must impose the specific life sentence which you have recommended.

T. Vol. V. pp. 214, 215 (emphasis added). As Esparza notes, this instruction draws a clear contrast between the jury's decision to recommend a sentence of death versus a decision to recommend a sentence of life imprisonment: a recommendation of death is not binding, while a recommendation of life imprisonment is.

Esparza insists this instruction unconstitutionally misled the jury, because it impermissibly alleviated the jury's responsibility for its decision, citing Caldwell v. Mississippi, 472 U.S. 320 (1985). The Caldwell Court concluded that the defendant's death sentence was unconstitutional, because "it is

constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Id. at 328-29. Esparza relies on this language and argues that the trial court's instruction impermissibly led the jury to believe that final responsibility for determining whether Esparza should suffer a death sentence lay with the judge, and not with the jury themselves.

Esparza cannot prevail on this claim because, unlike Caldwell, the trial judge's instructions did not mislead the jury and are an accurate statement of Ohio law. See Scott v. Mitchell, 209 F.3d 854, 877 (6th Cir. 2000); Mapes v. Coyle, 171 F.3d 408, 414-415 (6th Cir. 1999).

> Caldwell is limited to situations in which the jury is misled as to its role in a way that allows it to feel less responsible than it should for the sentencing decision. Thus, to establish a Caldwell violation a defendant must necessarily show that the remarks to the jury improperly described the role assigned to the jury by local law.

Id. (*citing* Romano v. Oklahoma, 512 U.S. 1, 9 (1994) (quotations omitted). Scott and Mapes both found the exact instruction with which Esparza takes issue, to accurately describe Ohio law. See id; Mapes, 171 F.3d at 414-15.

**8. Esparza's Forty-Eighth and Forty Ninth Claim for Relief**

Esparza's forty-eighth claim is that the instructions given to the jury during the sentencing phase violated his constitutional rights. Esparza's forty-ninth claim is that instructions given to the jury during the sentencing phase, viewed in their entirety, mandated a sentence of death.

Esparza lists a total of six jury instructions he contends are improper, and two jury instructions that should have been given but were not. These allegedly impermissible instructions are: (1) Esparza bore the burden of proof at the mitigation phase; (2) the state's burden of proof was met if the jurors were firmly convinced of the truth of the charge; (3) the aggravating circumstances must "outweigh"

the mitigating factors; (4) sympathy could play no part in the jury's decision; (5) the jury could consider the quantity of the aggravating circumstances when there was only one aggravating circumstance; and, (6) unanimity was required for the imposition of either of the two life sentence verdicts.

Esparza alleges that these instructions should have been given but were not: (1) lingering doubt could be considered as a factor in sentencing; and, (2) the jury could exercise mercy even if aggravating circumstances outweigh mitigating factors.

**a. Procedural Default.**

Respondent alleges that all of these claims are procedurally defaulted but one, claim number four, the instruction given to the jury to disregard sympathy. The Court agrees with respondent.

Esparza argued on both direct appeal and before the Supreme Court of Ohio that it was error to instruct the jury to disregard sympathy. Both courts addressed the claim concerning the disregard of sympathy on its merits. See State v. Esparza, No. L-84-225, 1986 WL 9101, at *9 (Ohio App. Aug. 22, 1986); State v. Esparza, 529 N.E.2d 192, 197 (1988). This claim is, therefore, not procedurally defaulted.

Esparza also raised his jury unanimity claim on direct appeal, but the Ohio Courts found that Esparza waived the jury unanimity issue pursuant to Crim. R. 30(A), because he did not specifically object to the instruction at trial court in a timely manner. See State v. Esparza, No. L-84-225, 1986 WL 9101, at *9 (Ohio App. Aug. 22, 1986). Esparza's claim is, thus, procedurally barred as the Court concludes that Esparza cannot overcome any of the four prongs of Maupin. See Scott v. Mitchell, 209 F.3d 854, 864-72 (6th Cir. 2000). Esparza did not raise the rest of these claims on direct appeal, or in front of the Supreme Court. Thus, the rest of the claims are procedurally defaulted.

The Court will first address the jury sympathy instruction on its merits, because that claim has not been procedurally defaulted. The Court will then briefly address the procedurally defaulted claims on their merits to determine whether they could provide a basis for Esparza's later ineffective assistance of appellate counsel claims.

**b. Jury Sympathy**

Esparza argues that it was improper to tell the jury that sympathy could play no part in its deliberations. Esparza contends that sympathy and mercy are legitimate considerations at the penalty phase in capital cases. The challenged instruction is quoted below:

> *You must not be influenced by any consideration of sympathy or prejudice.* It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the Court to your findings and to render your verdict accordingly. In fulfilling your duties, your efforts must be to arrive at a just verdict. Consider all the evidence and make your finding with intelligence and impartiality and *without bias, sympathy or prejudice* so that the State of Ohio and the Defendant will feel that their case was fairly and impartially tried.

Tr. T. p. 218 (emphasis added). Essentially, Esparza argues the two-fold instruction told jurors they should not allow "sympathy" to influence them, while "sympathy" is precisely what mitigating factors are designed to invoke.

A death-sentenced defendant made a similar argument in California v. Brown, 479 U.S. 538 (1987), arguing that an instruction to the jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" was unconstitutional. Id. at 542. The Supreme Court rejected this argument, noting that "[e]ven a juror who insisted on focusing on [the phrase 'mere sympathy'] in the instruction would likely interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase." Id. Here, the trial court did not warn simply against feelings of sympathy, but

directed the jury to "make your finding with intelligence and impartiality, without bias, sympathy, or prejudice, so that the [parties] will feel that their case was fairly and impartially tried." Read in its entirety, this instruction similarly warns jurors to ignore emotional responses that are not rooted in the evidence, including those emotional responses that might dispose the jury against the defendant. See Scott v. Mitchell, 209 F.3d 854, 878 (6th Cir. 2000) (finding no error in a similar instruction). Accordingly, this Court finds that this claim is not well-taken.

**c. Procedurally Defaulted Claims raised in Petitioner's Murnahan Proceedings**

To the extent these claims were raised at all, they were alleged as part of an ineffective assistance of appellate counsel claim in a Murnahan appeal. Therefore, this court will analyze the underlying merit of these defaulted claims to determine whether they could provide a basis for the ineffective assistance of appellate counsel claim.

**i. Jury Unanimity Instruction**

Esparza argues that he was unconstitutionally prejudiced by the instruction that unanimity was required for the imposition of either of the two life verdicts. Esparza claims that this instruction had the effect of unconstitutionally increasing the likelihood that the jurors would return a recommendation of death, because the trial court incorrectly suggested that the jury's recommendation - of either death or life imprisonment - must be unanimous. The challenged instruction is quoted below:

> If all twelve members of the jury find, by proof beyond a reasonable doubt, that the aggravating circumstance which Gregory Esparza was found guilty of committing outweighs the mitigating factors, then you must return such finding to the Court. I instruct you as a matter of law that if you make such finding, then you have no choice and must recommend to the Court that the sentence of death be imposed upon the Defendant, Gregory Esparza.
>
> ***
>
> Now, on the other hand, if, after considering all of the relevant evidence raised at trial, the testimony, other evidence, the reports prepared for this hearing, and the

arguments of counsel, you find that the State of Ohio failed to prove that the aggravating circumstance which the Defendant, Gregory Esparza, was found guilty of committing outweighs the mitigating factors, then you will return your verdict indicating your decision. In this event, you will then proceed to determine which of the two possible life imprisonment sentences to recommend to the Court.

***

I am going to turn now to the verdict forms which apply in this case. I will read them and explain them. No inference is to be drawn by you from the order in which I read these forms to you.

The first verdict form, and they are two in number, by the way, but the first verdict form that I will read to you is headed as being a "Verdict in Sentencing Proceedings." It also has, of course, the case name and the court name and the case number.

It reads that, "We the jury in this cause, being duly impaneled and sworn, for verdict find and say that the aggravating circumstance which the defendant, Gregory Esparza, was found guilty of committing, does not outweigh the mitigating factors present in this case. Therefore, we, the said jury, recommend to the Court that the sentence of life imprisonment with parole eligibility after serving," there is a blank space for you to insert either twenty or thirty, "full years of imprisonment be imposed upon the Defendant Gregory Esparza." Then there are twelve signature lines or signature bars for the signatures of the jurors concurring in such verdict. The insertions must be in ink. The signatures must be in ink, and of course, to arrive at a verdict in this proceeding, the same as in the earlier proceeding, all twelve jurors must agree.

You will note there is a special space for the foreman to sign. That is simply a matter of convenience to the Court.

The second verdict form has the same headings and reads, "We, the jury in this cause, being duly empaneled and sworn, for verdict find and say that the aggravating circumstance which the Defendant, Gregory Esparza, was found guilty of committing does beyond a reasonable doubt outweigh the mitigating factors present in this case.

Therefore, we, the said jury, recommend to the Court that the sentence of death be imposed upon the Defendant Gregory Esparza."

There is no insertion, of course, necessary. If this is your verdict form selected, again, the twelve signature lines or signature bars are there. One for the foreman, the rest for the balance of the jury. All signatures must be in ink. And again, before any verdict is properly reached, all twelve jurors must concur therein.

***

Now ladies and gentlemen of the jury, after you retire, first take care of the obligation about a foreman that I have mentioned to you. Wait for the evidence to be brought into you along with the verdict forms and whenever all twelve of you, and I repeat, all twelve jurors agree upon a verdict, you will sign the verdict agreed upon in ink after, if necessary, making the proper insertions, and then you will advise the Court that you have arrive at the verdict.

Tr. T. V. Pp. 214-222. (emphasis added).

Although the undersigned was originally of a contrary view, the Sixth Circuit recently found an instruction, essentially identical to the one above, to be constitutional. See Scott v. Mitchell, 209 F.3d 854, 876 (6th Cir. 2000).[65] The Sixth Circuit found that "nothing in [the language of the instruction] could be reasonably taken to require unanimity as to the presence of a mitigating factor." Id. (*quoting* Coe v. Bell, 161 F.3d 320, 338 (6th Cir. 1998)). Therefore, this claim is without merit.

**ii. Burden of Proof**

Esparza claims that the trial judge improperly stated that the burden of proof was on Esparza during the mitigation phase. Esparza cites three instances where the trial judge allegedly misplaced the burden of proof. In two of these three instances the judge correctly stated that the burden of proof was on the state and not Esparza. In the last instance, the statement of the trial court can not reasonably be interpreted to concern the burden of proof.

In the first two instances about which Esparza complains, the court stated:

> In this hearing, this portion of the trial, the defense has the burden of going forward with any mitigating evidence. However, the burden of proof remains on the State of Ohio, and that will be addressed at the proper time. But because of the fact that there is that burden of going forward with the evidence, the defense will be presenting its evidence first, which is contrary to what you are used to. Tr. T. V. p. 25
>
> The State of Ohio has the burden of proving by proof beyond a reasonable doubt that the aggravating circumstances which the Defendant, Gregory Esparza, was found guilty of committing is sufficient to outweigh the factors in mitigation of the imposition of the sentence of death. The Defendant has no burden of proof. His only burden is to go forward with the evidence. Tr. T. V. p. 211.

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[65] Scott was a decision affirming in part and reversing in part an order of this Court. This Court found this instruction to be constitutionally infirm under Mills v. Maryland, 486 U.S. 367 (1988), Kubat v. Thieret, 867 F.2d 351 (7th Cir. 1989) and Kordenbrock v. Scroggy, 919 F.2d 1091 (6th Cir. 1990) (en banc) as support for that conclusion. The Sixth Circuit disagreed with this Court's reasoning.

These instructions clearly place the burden of proof on the state. The burden to go forward with the evidence is different from the burden of proof and the trial judge made this clear in his instructions. The petitioner ought to understand this distinction as well.

The last instance Esparza refers to occurred after the state rested. The court, in asking whether the defense desired to rebut the state's case, said "It is up to the defense if it has anything further." This statement cannot be interpreted reasonably to mean that the trial court was placing the burden of proof on the defendant. This Court finds that the petitioner misrepresented the record in attempting to assert this claim, and, therefore, finds no merit to it.

**iii. Reasonable Doubt Instruction**

Second, Esparza contends that the instruction that the state's burden of proof was met if the juror's were firmly "convinced of the truth of the charge," was an unconstitutional presumption in favor of a death sentence, since the jurors had already found the charge to be "true" beyond a reasonable doubt during the guilt phase of the trial. Esparza argues that this impermissibly shifted the burden of proof to Esparza during the sentencing phase, and created a mandatory death penalty. Again, Esparza takes a few words out of context to create an issue where there is none. The jury instruction Esparza challenges is the court's definition of reasonable doubt. After the court correctly placed the burden of proof on the state to prove the aggravating circumstance beyond a reasonable doubt, the trial judge stated:

> Reasonable doubt is present when, after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced of the truth of the propositions required to be proven. Reasonable doubt is a doubt based upon reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

Tr. T. V. p. 212. The court's definition of reasonable doubt is an acceptable and valid explanation of this standard. See Scott v. Mitchell, 209 F.3d 854, 883 (6th Cir. 2000); Byrd v. Collins, 209 F.3d at 486, 527-28 (6th Cir. 2000); Thomas v. Arn, 704 F.2d 865, 867-69 (6th Cir. 1983). See also Victor v. Nebraska, 511 U.S. 1, 8 (1994). Since this is a correct statement of the law, preceded by a correct statement of the state's burden, the Court does not perceive where any possible unconstitutionality could lie. Accordingly, the Court finds this claim equally without merit.

**iv. Definition of "Outweigh"**

Esparza next takes issue with the trial court's failure to provide a meaningful definition of "outweigh," when the court stated that aggravating circumstances must "outweigh" the mitigating factors. The trial court stated that "[t]o outweigh means to weigh more than, to be more important. The existence of mitigating factors does not preclude or prevent the death sentence if the aggravating circumstance outweighs the mitigating factors." Tr. T. V. P. 213. Esparza does not explain how the perceived lack of a further definition of "outweigh" is any threat to his constitutional rights. The Ohio sentencing scheme instructs jurors to "weigh against the aggravating circumstances proved beyond a reasonable doubt" the mitigating circumstances. Ohio Rev. Code § 2929.04(B). This instruction is clear enough without additional definition. Accordingly, this Court finds this portion of the claim not well-taken.

**v. "Quantity of Aggravating Circumstance" Instruction**

Next, Esparza claims that it was improper for the trial court to state that the jury could consider the "quantity of aggravating circumstance" when there was only one statutory aggravating circumstance. Again Esparza takes words out of context in order to attempt to create a viable issue. These words were

taken from a discussion by the court primarily instructing the jurors to weigh the quality of the aggravating and mitigating factors rather than the quantity. The trial court stated:

> It is the quality of the evidence that must be given primary consideration by you. The quality of the evidence may or may not correspond with the quantity of the evidence, that is, the number of Witnesses or Exhibits presented in this case. It is not only the quantity of aggravating circumstance versus the quantity of mitigating factors which is the basis of your decision. The quality or importance of the mitigating factors and of the aggravating circumstance must also be considered.

Tr. T. V. p. 213. The trial judge was very careful during this admonition to always put the words "aggravating circumstance" in the singular. In fact, this discussion makes it clear that the jury was weighing one aggravating circumstance against more than one mitigating factor. Accordingly, this Court finds this claim to be without merit.

**vi. Lingering Doubt Instruction**

Next are two instructions that Esparza contends should have been given to the jury, but were not. First, Esparza asserts the jury should have been instructed that lingering doubt is a factor which can be considered in sentencing.[66] The Court finds this claim to be without merit. The trial court clearly instructed the jury that mitigating factors include any circumstance relevant to whether a death sentence was appropriate: "those mitigating factors include, but are not limited to, the nature and circumstance of the offense, the history, character and background of the offender, and ... any other factors which are relevant to the issue of whether the offender should be sentenced to death." Tr. T. V. at p. 212-213. The trial court's failure to specifically enumerate the factor of residual doubt does not

[66] A "residual doubt" theory involves presentation of "further evidence in an attempt to instill in the jury a reasonable doubt of guilt, with the apparent aim of persuading the jury that the death penalty should not be imposed where some doubt as to guilt remained." State v. Apanovitch, 514 N.E.2d 394, 402 (Ohio 1987). The Supreme Court defined residual doubt as "a lingering uncertainty about facts, a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolute certainty.'" Franklin v. Lynaugh, 487 U.S. 164, 188 (1988).

create a concern of constitutional implications. "[T]he Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances." Zant v. Stephens, 462 U.S. 862, 890 (1983). As long as the jury instructions regarding aggravating and mitigating circumstances leave "no reasonable possibility that the jury misunderstands its role in the capital sentencing procedure or misunderstands the meaning and function of mitigating circumstances," no constitutional error is present. Peek v. Kemp, 784 F.2d 1479, 1494 (11th Cir. 1986), *cert. denied*, 479 U.S. 939 (1986).

The Supreme Court recently affirmed these principles in Buchanon v. Angelone, 522 U.S. 269 (1998), when it was "call[ed] on... to decide whether the Eighth Amendment requires that a capital jury be instructed on the concept of mitigating evidence generally, or on particular statutory mitigating factors." Id. at 270. In Buchanon, the trial court's instructions to the sentencing jury regarding the meaning and identity of mitigating factors were less precise than the instructions Esparza's sentencing jury received. See id. at 272 n.1 (quoting jury instructions). The defendant contended that these instructions "failed to provide the jury with express guidance on the concept of mitigation, and to instruct the jury on particular statutorily defined mitigating factors," id. at 276, and that "the Eighth Amendment. . . requires the court to instruct the jury on its obligation and authority to consider mitigating evidence, and on particular mitigating factors deemed relevant by the State." Id. at 275.

A majority of the Supreme Court, however, disagreed, noting the Court had "never... held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence." Id. The Buchanon Court stated:

> By directing the jury to base its decision on "all the evidence," the instruction afforded the jurors an opportunity to consider mitigating evidence. The instruction informed the jurors that if they found the aggravating factor proved beyond a reasonable doubt then

> they "may fix" the penalty at death, but directed that if they believed that all the evidence justified a lesser sentence that they "shall" impose a life sentence. The jury was thus allowed to impose a life sentence even if it found the aggravating factor proved.

Id. at 277. The Court concluded that "[t]he absence of an instruction on the concept of mitigation and of instructions on particular statutorily defined mitigating factors did not violate the Eighth and Fourteenth Amendments to the United States Constitution." Id. at 279.

Even more than the trial court in Buchanon, Esparza's trial judge instructed the jury regarding the concept of mitigation, gave examples of mitigating factors, and explained how to weigh mitigating factors in its death penalty deliberations. These mitigating instructions clearly meet constitutional requirements, as established by Buchanon. Indeed, the jury instructions to which Esparza objects would apparently receive the approval of even the dissenters in Buchanon. Because the challenged instruction clearly explains to the jury its role in the penalty phase of the trial and how to identify and weigh mitigating circumstances, this claim fails.

**vii. Mercy Instruction**

The second instruction that Esparza contends should have been given to the jury, but was not, is that the jury could exercise mercy even if the aggravating circumstances outweighed the mitigating factors. The Sixth Circuit addressed this issue in Mapes v. Coyle, 171 F.3d 408 (6th Cir. 1999) and concluded it would be error if the court had given this instruction. The Sixth Circuit stated that, an instruction that the jury may "disregard the statutory criteria for imposing a death sentence may be constitutionally impermissible in light of the probability that such an instruction would result in arbitrary and unpredictable results." Id. at 415 (citations omitted). "[S]entencers may not be given unbridled discretion in determining the fates of those charged with capital offense." Id. (*citing*

California v. Brown, 479 U.S. 538, 541 (1987). Therefore, the Court found that "there is no merit whatsoever to [petitioner's] claimed entitlement to a 'merciful discretion' instruction, in light of the likely tendency of such an instruction to lead to arbitrary differences in whom is selected to be sentenced to death." Id. Accordingly, this Court finds no merit to Esparza's claim for a jury instruction that gives the jury "merciful discretion" on whether or not to sentence Esparza to death.

Because none of these claims were found to have merit, it was not ineffective assistance for appellate counsel to forgo raising them. On the contrary, appellate counsel was using the time and resources of the court much more effectively by ignoring these meritless claims.

**9. Esparza's Forty-Sixth Claim for Relief**

Esparza's forty-sixth claim is that the trial court and the prosecutor impermissibly shifted the burden of persuasion to the petitioner during the sentencing phase.

Esparza asserts several instances where the trial court allegedly instructed the jury that the burden of proof was on the defendant. In all of these instances the trial court stated quite clearly that the burden of proof was on the state. The Court has addressed all of these instances in Esparza's previous claim of improper jury instructions and has not found an improper placement of the burden of proof in the record of the proceedings.

Esparza also alleges that the prosecutor made several statements that could be interpreted as placing the burden of proof on Esparza during the sentencing phase. The Court has already found these claims to be without merit in its discussion of alleged prosecutorial misconduct. Accordingly, the Court finds Esparza's forty-sixth claim to be without merit.

**10. Esparza's Fiftieth Claim for Relief**

Esparza's fiftieth claim is that the trial court's reliance on non-statutory aggravating circumstances, misconceptions of law, and its failure to recognize mitigating evidence and factors violated Esparza's constitutional rights. The Court has addressed these issues separately in earlier claims and found them to be without merit. Combining these claims into one claim does not change the Court's previous findings. Accordingly, the Court finds Esparza's fiftieth claim to be without merit.

**11. Esparza's Forty-Fourth, Thirty-Ninth, and Fifty-Second Claim for Relief**

The Court now addresses several other claims in Esparza's petition which the Court finds well-taken. Because these claims are based on similar facts and events, the analysis the Court must take in examining these claims is intertwined; the Court, thus, addresses these claims together.

Esparza's forty-fourth claim is that his counsel provided him with ineffective assistance during the mitigation phase of trial. Esparza's thirty-ninth claim is that the trial judge impermissibly denied Esparza a continuance to allow his counsel to prepare for the mitigation phase of the trial and to allow adequate time for preparation of a pre-sentence investigation report. Esparza's fifty-second claim asks that the Court find that the cumulative error that occurred during the mitigation phase militates in favor of granting Esparza's habeas petition. The Court, as discussed below, finds Esparza's counsel to have been grossly unprepared for the mitigation phase of the trial. The Court also finds that it was an abuse of discretion for the trial judge, who knew that Esparza's counsel was unprepared, and could not have had time to prepare for the mitigation phase of trial, to refuse to grant Esparza a continuance to prepare for this aspect of the proceedings. Finally, the Court finds that, while both of these errors provide individual grounds for habeas relief, these errors, in combination with each other and with other problems that infected the sentencing phase of this proceeding, together constitute cumulative error.

**a. Ineffective Assistance of Counsel during Mitigation Phase**

Esparza's forty-fourth claim is that the ineffective assistance of his counsel during the sentencing phase deprived him of his constitutional rights. Esparza alleges that his trial counsel was deficient in at least the following ways: (1) counsel did not prepare for the sentencing phase of trial; (2) counsel did not thoroughly investigate and present evidence which would have given the sentencing jury a complete explanation of Esparza's developmental history and the manner in which his history contributed to his commission of the offense; (3) counsel did not interview or present as witnesses many family members, close friends and associates who had first hand knowledge of Esparza's traumatic and chaotic childhood, and his loss and dislocation in life as an adult; (4) the few witnesses Esparza's trial counsel did present could have offered more mitigating factors in their testimony if counsel had properly investigated the nature of their relationship with Esparza and their familiarity with his history; (5) counsel did not collect any records in order to document Esparza's personal development, nor did he provide any records to the psychologist who evaluated Esparza; (6) counsel requested that the probation department prepare a pre-sentence investigation and psychological report, without investigating what sort of information would be included in those reports, without understanding that the reports would be put before the jury, and with knowledge that the report would be prepared in approximately twenty-four (24) hours; (7) counsel did not object to and, in fact, jointly offered much evidence through the pre-sentence investigation and psychological reports that was extremely damaging to Esparza; (8) counsel did not argue residual doubt as a mitigating factor; (9) counsel did not offer Esparza as a witness in the sentencing phase, where Esparza could have made an unsworn statement, not subject to cross-examination; and, (10) counsel failed to object to numerous errors and improprieties in the state's presentation and argument during the sentencing phase.

Respondent does not assert that this claim is either unexhausted or subject to procedural default. Indeed, respondent quotes from the Ohio appellate court decision where the claims presented here were squarely addressed on the merits. On direct appeal, the state courts found that Esparza had not been denied effective assistance of counsel at either stage of the proceedings. See State v. Esparza, No. L-84-225, 1986 WL 9101 at *22 (Ohio App. Aug. 22, 1986); State v. Esparza, 529 N.E.2d 192, 198 (Ohio 1988). During post-conviction proceedings, moreover, the state courts again rejected this claim on the merits, concluding that it was proper to decide the issue without an evidentiary hearing because they believed the claim could be determined by reference to the trial court record. State v. Esparza, 1992 WL 113827 at *6 (Ohio App. May 29,1992) ("Upon a thorough and careful review of the penalty proceedings in petitioner's capital trial, we conclude that trial counsel's failure to interview or call all potential witnesses did not amount to ineffective assistance of counsel. Moreover, because the issue of ineffective assistance of counsel during the penalty phase of a capital trial can be determined upon a review of the record, the trial court did not err in dismissing the fiftieth cause of action without a hearing").[67] This Court will accordingly, proceed to address the issue on the merits.

As stated above, under Strickland v. Washington, 466 U.S. 668 (1984), counsel's conduct will only be deemed constitutionally deficient if both of the following are true: (1) counsel's conduct fell below basic standards of assistance, and (2) that, but for counsel's professional failures, the result of

[67] This Court, after conducting its own hearing, finds, moreover, that the sentencing phase ineffective assistance of counsel claim is largely based on evidence dehors the record. "Ohio imposes a procedural bar only as to those ineffective assistance of trial counsel claims which rest on facts of record that could have been determined on direct appeal." See Beuke v. Collins, No. C-1-92-507, 1995 U.S. Dist LEXIS 22095, *100 (S.D. Ohio Oct 19, 1995). Therefore, Ohio has constructed no procedural bar to the consideration of this claim of ineffective assistance of counsel, to the extent the evidence supporting it is based on what the trial counsel did *not* do, not what the trial counsel did ineffectively. This is evidence dehors the record. Esparza clearly raised this claim in post-conviction proceedings, which is all that the Ohio Courts require in order for Esparza to escape procedural default in such circumstances.

the trial would likely have been different - i.e., the defendant was prejudiced thereby. Therefore, the petitioner must demonstrate both cause and prejudice to prevail on an ineffective assistance of counsel claim. To demonstrate cause, the petitioner must show "that counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 687-88. "The objective standard of reasonableness is 'highly deferential' and includes a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Skaggs v Parker, 27 F.Supp.2d 952, 967 (1988) (*citing* Strickland, 466 U.S. at 688-89). Under this standard, "[t]he assistance required of counsel is not that of the most astute counsel, but rather that of 'reasonably effective assistance.'" Id.

To establish prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. To satisfy this showing, the petitioner must show that his counsel's blunders "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

State court findings that an attorney's action was based on a tactical decision are entitled to a presumption of correctness. Evans v. Thompson, 881 F.2d 117 (4th Cir. 1989), *cert. denied*, 497 U.S. 1010 (1990). Here, the state appellate court was faced with the issue of ineffective assistance of counsel during the mitigation proceedings on two separate post-conviction appeals. The court both times found that Esparza had not been denied the effective assistance of counsel during this phase of the proceedings. State v. Esparza, 1992 WL 113827 at *6 (Ohio App. May 29, 1992) ("Upon a thorough and careful review of the penalty proceedings in petitioner's capital trial, we conclude that trial counsel's failure to interview or call all potential witnesses did not amount to ineffective assistance of

trial); State v. Esparza, 1994 WL 395114 at *7 (Ohio App. July 27, 1994) ("upon a complete review of the mitigation hearing and evidence we concluded that trial counsel reasonably investigated and prepared for the sentencing phase of the trial and provided appellant effective assistance of counsel at this stage.")

The state courts, however, during the post-conviction appeals did not grant a hearing to determine Esparza's claim for ineffective assistance of counsel because they found that the evidence of ineffective assistance, if any, was in the record of the proceeding. State v. Esparza, 1992 WL 113827 at *6. ("[T]he issue of ineffective assistance of counsel during the penalty phase can be determined upon a review of the record, and without resort to evidence dehors the record, the trial court did not err in dismissing the fiftieth cause of action without a hearing"). This Court, after conducting an independent hearing on this issue, determines that the Ohio appellate courts, though due the utmost deference, not only made an incorrect decision, but made an *unreasonable* decision in concluding that Esparza was given the effective assistance of counsel. This Court finds that the Ohio appellate court decisions were an unreasonable application of Supreme Court precedent. See Williams v. Taylor, -- U.S. --, 146 L. Ed. 2d 389 (2000).

During the evidentiary hearing held by this Court on August 17, 1999, attorney Keithly Sparrow testified about his representation of Esparza during the sentencing phase of the proceeding. Sparrow testified that he had not begun preparation for the mitigation phase of the trial until Esparza was found guilty, late in the day on Thursday May 10, 1984.[68] The sentencing phase of the trial began on Monday,

[68] During the evidentiary hearing Sparrow bluntly stated that he had not prepared for the mitigation phase until after Esparza was found guilty.

> Q: As of that date and hour that jury came back with a guilty verdict, had you interviewed any witnesses with a view toward possible sentencing hearing?
> Sparrow: I don't recall specifically.

May 14, 1984. He, accordingly, had only a few days, over a weekend, to prepare for the mitigation phase. He requested an independent psychologist to help the defense with the mitigation proceedings, but did not explain to the trial court why psychological aid was necessary in order to present potential mitigating factors. The judge, thus, denied this motion.

In the evidentiary hearing held before this Court on August 18, 1999, it was established that Esparza suffers from damage to the frontal lobes of his brain (caused by a traumatic head injury as a child) and that this injury interferes with his ability to properly understand the consequences of his actions before he acts, to plan ahead or to inhibit impulsive behaviors.[69] Esparza's intelligence level

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> Q: Had you obtained any physical or documentary evidence to review for a potential sentencing hearing?
> Sparrow: Probably not. I can't recall specifically but probably not.
> . . .
> Q. Is it correct to say that your preparation for the sentencing hearing began on the 11th of May, 1984.
> Sparrow: That's probably correct, that's accurate.

Later on Sparrow restated that he not begun preparations for the mitigation phase until after the guilty verdict .

> The Court: You said that you didn't begin preparations for the sentencing or mitigation phase of the proceeding until after the verdict in the case?
> Sparrow: It's my recollection, Your Honor, as best I can recall.

[69] The expert witness, Dr. Michael Gelbort, testified about Esparza's organic brain disorder:

> The tests that he took showed difficulty, dysfunction, deficits or damage in the frontal lobes. . .deficits in the form of learning and frontal lobes were showing fairly consistent impairment, and impairment was arising in terms of impulse control, the ability to appropriately inhibit or stop thoughts, words, behaviors, things like that.
> . . .
> The frontal lobes are responsible for integrating our behavior, for organizing our behavior, for helping us think the big thoughts rather than the basic thoughts. . . they're the part of the brain that help us think the big thoughts that plan, to anticipate, to consider consequences. They're also very involved in us starting behavior or initiating, and inhibiting or stopping behavior that we don't want to display or show. So the people after brain injury sometimes have initiation problems and they become the proverbial couch potato, they sit and don't do anything. More likely is that they become disinhibited

is also on the borderline of mental retardation. If Mr. Sparrow had investigated Esparza's prior records, he would have discovered this information and been in a position to support his request for an independent psychologist.[70] He also would have been in a position to share these facts about Esparza with the jury.

After being denied an opportunity to pursue issues regarding Esparza with an independent psychologist, Mr. Sparrow requested a pre-sentence investigation and psychological report. He did so, however, without doing any independent investigation of Esparza's history and home life, and without

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and they act before they think. They speak before they think. Those are frontal lobe deficits as well.

. . .

Mr. Esparza showed on testing and shows historically some difficulties with anticipating consequences of his own behavior. With planning and adapting in a meaningful way. He's not so impaired as to be unable to get through a day by day existence but he has not done so from what I can see in his history in as effective a manner as a normal individual.

The testing shows reasoning problems, problems with judgment, especially showed problems in figuring out what's important in a situation. In other words, if you present five different ideas and ask him to figure out how to proceed, whereas most people will figure out which is the most important idea and what the limiting factor is or what to proceed upon, he is kind of – its kind of hit or miss for him. And what else is interesting that show up clearly in the testing is that you give him the same type of problem five different types and he'll happen on five different solutions or three different solutions, whereas most people happen on the same solution over and over again. They'd see it, size it up the same way, and proceed the same way.

And with him because of the fact the frontal lobes are not functioning correctly, he cannot make that happen. He may want it to happen. He may be motivated to figure things out and to plan ahead, but his brain does not support normal reasoning problem solving. It's like a runner who wants to run a race but has a leg that's an inch shorter. Try as they might they're working with a handicap or an impediment and their physiology their actual physical functioning does not support normal abilities, normal functioning.

[70] Had the trial court been presented with the substantial evidence of a brain disorder that was provided to this Court, it might well be appropriate to conclude that the denial of Esparza's request for appointment of a psychologist was error. In the absence of such a record, however, this ruling is only problematic if it supports petitioner's ineffectiveness of counsel claims.

understanding that anything included in that report likely would be admitted into evidence.[71] Mr. Sparrow did not collect any information, or give any information to the agency that created these

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[71] Q: . . .Did you have any notion of what would be contained in the mental status examination report to the Court?
Sparrow: No.
Q: Did you have any notion what would be contained in the presentence report?
Sparrow: No.
. . .
Q: In your judgment at the time, was this presentence report harmful to Mr. Esparza?
Sparrow: Extremely so.
Q: Contained, for example, his prior criminal history?
Sparrow: Right.
Q: Would that have been admissible but for your request to have a presentence report prepared?
Sparrow: He didn't testify
. . .
Q: In any event, the fruit of your request, which was this pre-sentence report, caused you and your co-counsel to do whatever you could to get it back off the table?
Sparrow: Right
Q: And have it withdrawn?
Sparrow: Right?
Q: And that request was denied by the trial court?
Sparrow: Right
. . .
The Court: Did you know at the time that you asked for a PSI that no matter what was in it, it would all be presented to the jury?
Sparrrow: I don't think we did, you know, but again, part of our problem with the PSI is that we had to eat what they put on the table, and it wasn't palatable, and we had no way to get rid of it, and I'm convinced in hindsight that was an error to order it.
The Court: When you asked for the PSI, whether or not you realized that everything would have to go to the jury, did you have any idea how bad the information would be when you got it back.
Sparrow: No, And again, because my recollection was that the writer was coming to her own conclusions about how certain evidence fit certain of the factors, so I guess we may well have thought, well, we'll get a neutral report of some sort, just a social history and all that without having the writer go into, this is an aggravating factor, this is a mitigating factor, this is that, this is the other.
So that's what I mean when I say we had to eat what was there.
The Court: So you didn't anticipate that consideration of all potential mitigating factors under the Ohio law?
Sparrow: No.

reports.[72] These reports, which were created in only one day, were furnished to the court during a hearing on Saturday, May 12, 1984.[73] Mr. Sparrow also made no effort to locate and interview

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[72] Sparrow candidly admitted this during the evidentiary hearing:

> Q: Did you -- the attorneys representing Mr. Esparza furnish any data, materials, information to the Court diagnostic and treatment center?
> Sparrow: No.
> Q: Did you orally even, a phone call to pass along any information?
> Sparrow: No.

[73] Bob Dixon, an attorney with considerable expertise in death penalty cases, testified during the evidentiary hearing that Esparza's counsel's decision to request the pre-sentence investigation and psychological reports was ineffective assistance of counsel, at the time when Esparza's counsel made that decision.

> Q: Do you have an opinion on whether that [requesting a pre-sentence investigation and psychological report] is an acceptable practice or not?
>
> Dixon: I think it would be completely unacceptable practice to have a client referred to the probation department for preparation of a pre-sentence report.
> Q: Why is that?
> Dixon: Lack of confidentiality. I also believe that in my experience that most of the Court psychiatric clinics are not familiar with just the statutes themselves governing mitigation. They're certainly not familiar with what I would say favorable case law to the defense, expanding the scope of those statutes; and on the other side, limiting the scope of the aggravating circumstances. And I don't think that most people in the Court psychiatric clinics or rather probation departments have the expertise to develop that kind of report. I think developing that kind of report also requires the participation and input of the attorney, and working with a person that would gather the information, because the attorney knows the legal parameters, if you will, whereas the social worker who is trained at gathering information and putting together social histories and spotting problem areas or favorable areas, they may not be as familiar with the legal side of it.
> So of course, if you choose the Court clinic, you don't have that opportunity to form that kind of working relationship, and then also again, you lose the confidentiality, the report goes to the Court and it. . . also goes to the jury per statute.
> . . .
> Q: In terms of the general opinion you expressed that such reports should not be ordered, was that the state of or was that the general opinion of competent capital defense counsel in the early 1980s?
> Dixon: Yes.
> . . .
> Absolutely. That was specifically discussed as something that we not do under any circumstances.

mitigation phase witnesses until after the guilty verdict.[74] While Mr. Sparrow did call a few witnesses in the sentencing phase, Esparza's grandfather, aunt, brother and foster-parent, he did not interview them beforehand to determine what they might offer the jury by way of insight into Esparza.[75] Mr.

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[74] Q: From your appointment on March 8, 1984, until the commencement of trial on April 30th, can you describe for us what you did to prepare for the potential sentencing phase of his trial?
Sparrow: I don't have a specific recollection. Probably not a lot but I can't remember now,
Q: Do you recall whether you or co-counsel prepared and presented to Greg Esparza releases to obtain medical records, psychological records, juvenile records, probation records?
Sparrow: I don't recall doing that
. . .
Q: Do you recall that you or co-counsel or your investigator sat down with Mr. Esparza to obtain a family and personal history from him?
Sparrow: Not in that manner, no.

Q: Can you tell the Court today when it was you learned that. . . Mr. Esparza had foster parents?
Sparrow: No I don't recall. Toward the end if not after the verdict.

[75] Esparza lists in his traverse information that was not presented to the trier of fact because his counsel made little effort to seek out this sort of information. Although some of these facts, presented singularly, would have little effect on a juror's determination of mitigating factors, the cumulative effect of these facts surely could have resulted in a different outcome in the mitigation stage of the analysis.

1) There were rats and cockroaches in the household in which the Esparza children were raised. Exhibit B, D.
2) There was never any food in the house for the Esparza children. Exhibit I.
3) Frank Esparza, petitioner's father, drank excessively. He would often be absent from the household for days. When he would drink he became violent. Exhibit B, F, G, H, I, J.
4) Frank Esparza would frequently beat his wife and children and would use a broom or belt. Exhibit E, F, P.
5) Petitioner received the worst treatment of the Esparza children. Exhibit O.
6) Petitioner's brother, Peter Esparza, was treated much better than Gregory Esparza. Exhibit A.
7) At the age of four or five years, Greg was struck by an automobile and rendered unconscious. He suffered a traumatic head injury as a result of this accident. Exhibit H.
8) Frank Esparza would frequently be involved in fights outside the household. Exhibit H, O.
9) Beatrice, petitioner's mother, verbally abused her children, as she would take out her frustrations.
10) Beatrice would not attempt to defend the children when they were being beaten by her husband. Exhibit E, O.
11) After Frank left his family for the last time, Beatrice began to drink heavily. She did not care about her children. Exhibit F, H.

Sparrow also did not call Esparza to present an unsworn statement or apology to the jury during the mitigation hearing, even though Esparza would not have been subject to cross-examination for that statement.[76] Nor did Mr. Sparrow present evidence of Esparza's remorse for the crime.[77]

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12) Beatrice Esparza would also often absent herself from the home for periods of days. Exhibit B, O.
13) The Esparza children, prior to being placed in foster homes were raised by their ten-year old sister Ruth. Exhibit B.
14) The Esparza children were removed from their home at an early age in a paddy wagon and placed in an orphanage. Exhibit A.
15) Greg was the last of the Esparza children who left the orphanage or Children's Home. Exhibit L, O.
16) Grandmother Carmen Dela Rosa, who assisted in raising Greg, hated Petitioner and referred to the Petitioner as the "devil." Exhibit A.
17) Grandfather Richard Dela Rosa hated Greg because Greg was like his father. Exhibit C.
18) Greg's grandparents did not have the resources or parenting ability to raise the Esparza children. Exhibit M, P.
20) One of the times Gregory Esparza left the Children's Home he resided with his father. His father's girlfriend physically abused Petitioner. Exhibit C.
21) During the same time period Petitioner's father would beat Greg in the area of his genitals. Exhibit J.
22) Petitioner's mother died while he was in the orphanage. Greg Esparza was particularly affected over the death of his mother. Exhibit D.
23) Greg was physically abused by the principal at one of his schools while he was in a foster home. Exhibit K.
24) Gregory Esparza helped to raise his brother Ray Esparza, when Ray had no place else to live. Exhibit C.
25) Greg's brothers and sisters never wanted to be with Greg as he grew older. Exhibit L.
26) Petitioner was always trying to seek the approval of the other family members. Exhibit A.
27) Greg was a follower who could easily be talked into committing inappropriate acts. Exhibit H.
28) Most of the males in the Esparza family are heavy drinkers. Exhibit N.

See Traverse at pages 92-94.

[76] Robert Dixon testified at the evidentiary hearing that presenting a defendants unsworn statement during the mitigation phase is almost always good practice.

Q: You stated that at a minimum in your affidavit, and I believe you testified to this, that the defendant should give an unsworn apology during mitigation.
Dixon: Yes.
Q: Would this apply in every case?

The Supreme Court has recently granted habeas on facts the Court perceives as less extreme than those existing here. See Williams v. Taylor, -- U.S. --, 146 L. Ed. 2d 389 (2000). In Williams, the Supreme Court found that trial counsel's representation of the petitioner during the sentencing phase fell short of professional standards when:

> The record establishes that counsel did not begin to prepare for that phase of the proceeding until a week before trial. They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood. . . Had they done so, the jury would have learned that Williams' parents had been imprisoned for criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social service bureau for two years during his parent's incarceration. . .

Williams, 146 L. Ed. 2d at 419. Williams' counsel also failed to introduce available evidence that Williams was borderline mentally retarded and did not advance beyond the sixth grade in school. In Esparza's case, Esparza's counsel had only one weekend to prepare for the mitigation phase of the trial, far less than the week found inadequate in Williams. Esparza's counsel also failed to investigate and present similar mitigating evidence on Esparza's part, evidence of an extremely traumatic and abusive childhood, and evidence of Esparza's brain injury and resulting mental deficiencies.

In Williams the Supreme Court also pointed out that Williams' counsel spent much of his closing argument undermining the mitigating factors by emphasizing that it was hard to find a reason to grant Williams mercy. See id. at 403, n. 2. Esparza's counsel's uninformed decision to request a pre-

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> Dixon: I think in almost every case I've handled I would want my client to do that if he's able to do so.

[77] During the guilt phase of the trial, Albert Richardson, the jailhouse informant, testified that Esparza did not mean to hit Gerschultz when he fired the shot, that it was meant to be a warning, and that Esparza called the convenience store that night to check on the well-being of the victim. Tr. T. V. III at p. 1452. Mr. Sparrow did not present this information, or any other evidence of remorse, during the mitigation phase. Indeed, he did not even refer back to this important fact in his presentation to the jury.

sentence and psychological report resulted in an unintended emphasis, but an emphasis nonetheless, on the psychologist's view that Esparza lacked mitigating factors. Thus, Esparza's counsel, like the counsel in Williams, not only failed to present much evidence that was mitigating to Esparza, but caused evidence to be presented that was wholly counter to his role as a defense attorney charged with presenting mitigating factors.

The Sixth Circuit has also addressed the issue of ineffective assistance of counsel during the mitigation phase, and has granted a partial writ of habeas corpus on similar facts in several recent cases. In Carter v. Bell, 218 F.3d 581 (6th Cir. 2000), the Sixth Circuit found that petitioner's counsel was ineffective because they failed to present evidence "including assertions of illegitimacy, extreme childhood poverty and neglect, family violence and instability during childhood, poor education, mental disability and disorder, military history, and positive relationships with step-children, adult family and friends." Id. at 592-593.

In Rickman v. Bell, 131 F.3d. 1150, 1157 (6th Cir. 1997), the Sixth Circuit noted that trial counsel "did not interview any witnesses, conduct any research, or obtain and review any records, including those regarding [petitioner's] employment, education, mental health, social services contact, military service, or prison experience." In that case, trial counsel's preparation "consisted solely of interviews he conducted with [petitioner]." Id.[78]

In Groseclose v. Bell, 130 F.3d 1161 (6th Cir. 1997), trial counsel "almost entirely failed to investigate the case; he never, for example, interviewed the crime-incidence witnesses or any family

[78] Although in Rickman there was the additional factor that petitioner's trial counsel's position was hostile to petitioner, this case still "stands for the relevant proposition that the complete failure to investigate, let alone present, existing mitigating evidence is below an objective standard of reasonable representation, and may in fact be so severe as to permit us to infer prejudice." See Carter v. Bell, 218 F.3d 581, 595 (6th Cir. 2000)

members." Id. at 1166. In that case, the Sixth Circuit found that petitioner's counsel was ineffective during both the trial and mitigation phase. During mitigation, trial counsel failed to show that the petitioner had no criminal history, was active in church, had a positive military record, and "a plethora of family members to testify on this behalf." Id. at 1171. Failure to prepare for the mitigation phase of the trial, coupled with the failure to put before the jury these mitigating factors was enough to show ineffective assistance of counsel.

In Austin v. Bell, 126 F.3d 843, 848 (6th Cir. 1997), the Sixth Circuit held that trial counsel's failure "to investigate and present any mitigating evidence during the sentencing phase so undermined the adversarial process that [petitioner's] death sentence was not reliable." Id. In that case, petitioner's attorney did not present any mitigating evidence "because he did not think that it would do any good." Id. The Court found this was ineffective assistance because "given that several of Austin's relatives, friends, death penalty experts, and a minister were available and willing to testify on his behalf, this reasoning does not reflect a strategic decision, but rather an abdication of advocacy." Id. at 849.

The Sixth Circuit granted a partial writ of habeas corpus on almost identical facts in Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995). In Glenn, the lawyers representing the defendant similarly "made virtually no attempt to prepare for the sentencing phase of the trial until after the jury returned its verdict of guilty." Glenn, 71 F.3d at 1207. The Sixth Circuit found that "[t]his inaction was objectively unreasonable. To save the difficult and time-consuming task of assembling mitigation witnesses until after the jury's verdict in the guilt phase almost insures that witnesses will not be available." Id. (citations omitted). The Sixth Circuit listed a number of areas where the lawyers involved in that case lacked reasonable preparation.

> The lawyer's made no systematic effort to acquaint themselves with their client's social history. They never spoke to any of his numerous brothers and sisters. They never examined his school records. They never examined his medical records . . . or records of mental health counseling they knew he had received. They never talked to his probation officer or examined the probation officer's records. And although they arranged for tests, some months before the start of the trial, to determine whether he was competent to stand trial, they waited until after he had been found guilty to take their first step – or misstep... toward arranging for expert witnesses who might have presented mitigating evidence on John Glenn's impaired brain function.

Glenn, 71 F.3d at 1208. This same list, as well as the list set forth above in Williams and Carter, could easily describe the lawyers who represented Esparza during his sentencing phase. Similarly, Esparza's lawyers did not begin preparation for the sentencing phase until after trial. They did not collect records of Esparza's social and medical history. They did not present mitigating factors that could have and should have been presented because they had made little effort to discover what those mitigating factors were. Also, much like in Glenn, they made the same mistake of asking for a pre-sentence investigation report without understanding the enormous risks and pitfalls inherent in that request.

The lawyers in Glenn also requested a pre-sentence investigation report without understanding that anything contained in that report would be admitted into evidence. These same lawyers did not offer any information or investigatory materials to the psychologists and other professionals responsible for creating these reports. When the lawyers in Glenn realized the magnitude of their error, they similarly asked the trial court to keep out portions of the report. The trial court refused in that case as well. The Sixth Circuit explained this error:

> Defense counsel asked the trial court to redact this sentence before sending the report to the jury, but the court refused to do so. This was probably an error on the court's part in our view. The problem would never have arisen, however, if defense counsel had not settled for court-appointed experts whose reports were going to be given to the jury willy-nilly, rather than exercising the right to obtain defense experts under O.R.C. § 2929.024, the statute initially cited by counsel.

Glenn, 71 F.3d at 1210. Esparza's attorney made the same mistake in asking for court-appointed experts whose reports and conclusions would come into evidence without regard for how they may affect the defendant – whether that evidence was mitigating or damaging. Esparza's attorney similarly asked to take back his request for the pre-sentence investigation once he realized that everything in the report would be entered into evidence and once he recognized how shoddily it had been thrown together. By that time, again, it was too late. Because of these omissions, mistakes and general lack of crucial knowledge, this Court finds that Esparza's attorneys were ineffective during the mitigation phase of the proceedings.

The next inquiry, then, is whether this ineffectiveness prejudiced Esparza. "To establish prejudice [Esparza] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Williams v. Taylor, -- U.S. --, 146 L. Ed. 2d 389, 416 (2000). Therefore, the question is "whether counsel's conduct so undermined the proper functioning of the adversarial system that the trial [a term that includes capital sentencing proceedings] cannot be relied on as having produced a just result ." Glenn, 71 F.3d at 1210-1211 (*citing* Strickland, 466 U.S. at 686).

The proceedings here cannot be relied upon to have produced a just result. Defense counsel only called four witnesses who personally knew Gregory Esparza: his grandfather, his aunt, his brother and his foster-parent. A cursory and ill-prepared direct examination was performed on each of them. This examination elicited very little mitigating evidence. If defense counsel had been prepared, much more could have been offered through each of these witnesses and through other witnesses who were not called. For instance, further testimony about the abusive and harsh environment in which Esparza was

raised could have been proffered. The jury could have been presented with more evidence of the physical abuse that Esparza suffered from the hands of both his father and, later, his father's girlfriends, and the emotional and verbal abuse he sustained from his mother and grandparents. Also, the jury could have learned more about Esparza's extended periods in orphanages and his poor relationship with his own siblings. The jury would have learned about Esparza's traumatic head injury as a child and resulting brain damage. And, the jury also could have learned of Esparza's personality as a follower who easily could be talked into inappropriate acts.[79] Finally, the jury could have heard from Esparza himself regarding his intoxication on the night of the murder and his remorse for having fired the fatal shot.

There was also much evidence that came in during the sentencing phase that a reasonably prepared attorney would not have allowed, or at least would have sought to exclude. This evidence

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[79] In Scott, this Court refused to set aside a death penalty on ineffective assistance of counsel grounds, despite the fact that *no* mitigation evidence was presented at the sentencing phase. See Scott v. Anderson, 58 F.Supp. 2d 767, 813 (N.D. Ohio 1998). That decision was then upheld by the Sixth Circuit. See Scott, 209 F.3d at 879. Unlike in Scott, however, counsel's failure to present mitigating evidence here cannot be characterized as a tactical decision made to keep prior criminal acts out of the sentencing proceeding and, thus, avoid damage to counsel's pursuit of a residual doubt theory. Id. In Scott, petitioner's counsel decided not to call petitioner's family to testify during the sentencing proceeding because he was worried that the prosecutor would have elicited information concerning his background, including "robbery assault, kidnaping, and other violent acts upon innocent citizens" which would have undercut his continued claims of innocence. Id. There, it was not a question of a failure to prepare, but a circumstance where, even with preparation, the risks of presenting mitigating evidence (of which there was a paucity) outweighed the benefits. See, e.g., Abdur'Raman v. Bell, 2000 WL 1285481 at *12 (6th Cir. Sept. 13, 2000) (finding that counsel's failure to present defendants background as mitigating evidence was not ineffective assistance of counsel because defendants violent background could also be viewed as aggravating circumstances). Here, counsel did call some of Esparza's family, and did not ever state, nor does it appear that he would have had cause to state, he was concerned that prosecutors would attempt to divulge Esparza's criminal history through them. See Williams v. Taylor, -- U.S. --, 146 L. Ed. 2d 389, 420 (2000) (finding that counsel's failure to present sufficient mitigating evidence was not justified by a tactical decision to keep out petitioner's relatively tame juvenile record).

came in through the pre-sentence investigation and psychological report that Esparza's counsel requested while still ignorant of the consequences of that request. The evidence that came in through these reports was devastating. One of the psychologists, Charlene Cassel, as part of the report, systematically went through each mitigating factor and explained why she believed it did not apply or exist in this case. She also testified (with what appears to be an absence of any real basis for doing so) that Esparza had an anti-social personality disorder that could not be treated successfully, and that there was a high degree of probability that Esparza would commit future criminal acts. The other psychologist, William Seman, testified that Esparza's denial that he was involved with the murder was consistent with his anti-social personality disorder, and, in his experience, it was "not unusual for people to deny their culpability in an offense." Tr. T. V. p. 121. These conclusions were reached, moreover, without the benefit of any medical evidence regarding Esparza's earlier traumatic head injury. Further, Esparza's criminal record, and his juvenile criminal records, were included in these reports as well as the disciplinary infractions he incurred while he was in jail. This information would not have been admitted, or at least not in such detail, if these reports had not been requested.[80]

The failure of defense counsel to investigate Esparza's background was both objectively unreasonable and prejudicial. The failure to investigate caused defense counsel to be unable to argue competently that Esparza was entitled to a psychologist who would aid the defense. This, in turn, led

[80] This Court is at a loss to understand why the trial court did not attempt to prevent the obvious prejudice to Esparza from submission of an unexpurgated version of this report. While Ohio law seems to call for submission of a pre-sentence report, whenever requested by a defendant, that rule surely does not trump the rules of evidence or relieve the court of its obligation to guard against undue prejudice. It was completely inappropriate for the psychologists to put themselves in the role of judge and jury in this case, but that is essentially what their gratuitous comments attempted to do. In the interest of assuring a fair and reasoned consideration of the grave issue put to this jury, the trial court should have exercised some care over the matters to which the jury was exposed.

to the request for a pre-sentence investigation report which allowed the jury to consider damaging information which it would not have seen otherwise. The Court finds that Esparza has shown that his counsel's lack of preparation and ignorance of the effect of his decision to request a pre-sentence investigation and psychological report establish a "reasonable probability" that the outcome of the trial, but for counsel's ineffectiveness, would have been different. Therefore, the Court finds that Esparza's forty-fourth ground for relief is well-taken.[81]

**b. Trial Court's Denial of Continuance**

Esparza's thirty-ninth claim is that the trial court violated his constitutional rights when it denied defense counsel's request for additional time to prepare for the sentencing hearing. This claim was raised on direct appeal, and respondent does not allege that it has been procedurally defaulted. Therefore, this Court will address this claim on its merits.

The trial court's decision to deny a continuance is within the discretion of the trial judge and depends on "facts and circumstances of that case with the trial judge considering the length of delay, previous continuances, inconvenience to litigants, witnesses, counsel and the court, whether the delay is purposeful or is caused by the accused, the availability of other competent counsel, the complexity

[81] Cynical observers might say that cases like Williams, Carter, Rickman, Glenn and this one provide a roadmap to counsel wishing to avoid imposition of the death penalty – do nothing, and the penalty will be set aside. Even if the Court were to believe that some counsel might adopt such a gravely speculative strategy (one that the state could easily thwart by sending cases back quickly for new sentencing proceedings or even mandating trial court oversight of counsel's preparation for that aspect of the case), it is simply not a concern *in this case*. This case was one of the early cases tried after the death penalty was re-instituted in this state. At that point, counsel then had no idea how federal courts might react to their efforts or lack thereof. There was, moreover, simply no way counsel could have prepared adequately for the mitigation phase of this particular case, given the extreme time constraints the court imposed upon them. Finally, the Court was able to observe the demeanor of Mr. Sparrow while testifying – he did not present himself as a man who believed he had out-maneuvered the Court. He appeared to be a truthful man, trying to explain the errors borne of his inexperience and the lack of time and resources afforded him.

of the case, and whether denying the continuance will lead to identifiable prejudice." Wilson v. Mintzes, 761 F.2d 275, 281(6th Cir. 1985)(citations omitted). The decision of the trial judge "will be reversed only for an abuse of discretion." Id.(citations omitted). The Supreme Court laid out the standard for whether the denial of a continuance deprives a defendant of his constitutional rights in Ungar v. Sarafite, 376 U.S. 575, 589-90 (1961). The Supreme Court stated:

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.

Id.

The Supreme Court of Ohio determined, based on the reasons presented to the trial judge for the continuance, that the denial of the continuance was not an abuse of discretion. State v. Esparza, 529 N.E.2d 192 (Ohio 1988). The Supreme Court of Ohio stated "[a]s the request was indefinite as to duration and vague for its purpose, its denial was not an abuse of discretion." Id. at 196.

In the rare circumstances of this case, the Court finds the Ohio Supreme Court's decision to be an unreasonable application of federal law.[82] The trial judge in this matter was aware *both* that he had appointed trial counsel less than eight weeks before trial was to commence *and* that counsel was relatively inexperienced in capital cases when appointed. Both of Esparza's trial counsel had only handled one previous capital case. Indeed, the trial court appointed Esparza's counsel after

[82] The Court can conceive of very few circumstances under which a denial of a request for a continuance would fail to pass constitutional muster. In the circumstances presented here, the refusal to grant some additional time to prepare for the sentencing phase of the proceedings truly did render Esparza's right to defend with counsel "an empty formality." Ungar, 376 U.S. at 589-90.

experiencing difficulty with getting Esparza's prior counsel to comply with the court's trial schedule. When Esparza's counsel accepted the appointment, they did so at the personal request of the trial judge and with the understanding that the guilt phase of trial would commence when planned.[83] The trial court knew that, due to the rigorous schedule it imposed on Esparza's counsel, counsel would have little or no time to prepare for both the guilt phase and the sentencing phase of the proceedings. The trial court also was aware, when the continuance was requested, that trial counsel, in fact, had *not* prepared for the sentencing phase of the proceedings. Rather than allow trial counsel the time to prepare themselves so that they could properly investigate both the law and the facts necessary to present mitigating evidence on Esparza's part, the court showed a "myopic insistence upon expeditiousness in the face of a justifiable request for delay." See Ungar, 376 U.S. at 590. The trial court, thus, bears at least partial responsibility for Esparza's counsel's ineffectiveness during the mitigation phase. In such circumstances, the Court finds it was impermissibly arbitrary for the trial court to deny a continuance to allow time to prepare for a portion of the proceedings which literally could mean the difference between life and death for a defendant. Esparza's thirty-ninth claim for relief, therefore, is well-taken.

**c. Cumulative Error**

Esparza's fifty-second claim is that the convictions and death sentence are unreliable due to cumulative error in the trial and sentencing phase. Accumulated errors are not tantamount to reversible

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[83] During the evidentiary hearing, Keithly Sparrow recounted how he became Esparza's counsel.

> Q: When you were appointed you described a conversation with Judge Riley. Did that conversation include scheduling of Mr. Esparza's trial?
>
> Sparrow: . . . my recollection of that conversation was that the judge was reasonably frustrated at having to get someone else involved, was telling me that there was some serious time constraints, and that before – he wanted to know could I do it in those time constraints, and that was the nature of the that conversation. My impression was that he was reasonably frustrated with the way the case had gone to that point.

error "if the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict." Satterwhite v. Texas, 486 U.S. 249, 256 (1988). If error occurred, but without constitutional significance, then the error is deemed harmless and the verdict sound. Id. The Court rejects Esparza's cumulative error claim as to the guilt phase of his trial but finds this claim well-taken as to the sentencing phase.

The Court has found that two of the grounds raised by Esparza in his petition justify the conclusion that the mitigation phase of this proceeding was constitutionally defective.[84] The Court is also troubled by the blanket introduction into evidence of the pre-sentence investigation and psychological reports. The reports were extremely prejudicial. They showed a lack of professionalism on the part of those who created them, with the psychologists, particularly, appearing to be taking sides and acting as adversaries against Esparza, rather than objective medical personnel. It is unclear why such a prejudicial report was created and even more unclear why the trial court allowed it, without alteration, into evidence. Although the Court has found that fault lies primarily with Esparza's counsel for requesting the reports without understanding that they normally are to be put before the jury, the enormous risk present in requesting a report resembles a spring-trap set by the state for unwary defendants. A simple, but uninformed, request results in the state being able to put as much damaging information as it can collect before the jury, and to support this damaging evidence with so-called "neutral" and "expert" witnesses who appear to be acting, in this case at least, as witnesses for the

[84] The Court also has found that Esparza's first claim for relief, that the indictment did not properly charge the elements of the capital offense and that the jury was, thus, never charged with the elements of that capital offense, is well-taken. Since this claim for relief, however, vitiates the need for the mitigation stage of the trial altogether, the Court does not include this claim in its cumulative error analysis of the mitigation stage of the proceedings.

prosecution. The defense attorney, by making this request, essentially negates any of the protections the sentencing procedure is designed to afford a capital defendant.

The Court finds that Esparza's counsel's ineffectiveness during the sentencing phase of the trial, coupled with the trial judge's refusal to provide Esparza's counsel with a continuance to prepare for the sentencing phase of the trial, and the prejudicial effect of the blanket admission of the pre-sentence investigation report, including its psychological aspects, constitute cumulative error sufficient to mandate partial habeas corpus relief. Thus, although the Court did not find admission of the pre-sentence investigation materials constituted constitutional error standing alone, when viewed against the backdrop of the entire sentencing proceeding, that prejudicial and seemingly inexplicable decision provides a further ground to conclude that the imposition of the death penalty in this case was not done in conformance with the Constitution.[85]

Accordingly, the Court finds that Esparza's fifty-second ground for relief, as to the sentencing phase of the proceedings only, is well-taken.

**D. Constitutional Violations Relating to Esparza's Appeals**

**1. Esparza's Fifty-third Claim**

Esparza's fifty-third claim is that the actions and omissions of his appellate counsel on direct appeal violated his constitutional rights. Specifically, Esparza challenges his appellate counsel's failure to raise the following issues:

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[85] As noted above, at footnote 1, two Ohio Supreme Court Justices found the Ohio procedure which mandates the blanket admission of any requested pre-sentence investigation report to be unconstitutional. This Court does not go so far. This Court finds, instead, that the trial court retained the authority under Rule 403 of the Rules of Evidence to redact portions of a pre-sentence investigation report before its submission to the jury and that its failure to exercise that authority contributed to the fundamental unfairness of the sentencing proceedings in this particular case.

A. The prosecutor committed unconstitutional misconduct during the guilt phase
B. Improper jury instructions were given during the guilt phase.
C. The jury was impartial because each juror served a commitment during voir dire that he or she could impose the death penalty.
D. Trial counsel was ineffective during the mitigation phase.
E. Hearsay evidence was improperly admitted
F. The omissions and commissions of trial counsel violated Esparza's constitutional rights.
G. The denial of due process, equal protection and an impartial jury
H. The prosecutor committed unconstitutional misconduct during the penalty phase.
I. The death sentence in Esparza's case is unreliable and inappropriate.
J. Improper jury instructions were given during the sentence phase.

Esparza also argues that his appellate counsel: (1) failed to ensure a complete record of proceedings was transferred to the appellate court, and, (2) deprived him of his right to information about and input into the direct appeals process. Esparza provides no further argument or factual basis for these claims.

A defendant is entitled to effective assistance of counsel in his first appeal as a matter of right. Evitts v. Lucey, 469 U.S. 387, 396 (1985). In this case, Esparza has not come close to showing his appellate counsel was ineffective. First, several of these arguments *were* raised on direct review by appellate counsel, and, thus, there was no failure to raise them.[86] Second, as to those claims that counsel did not raise, Esparza does not explain how his counsel's judgement was objectively unreasonable, and the Court finds it was not. Further, and of equal importance, Esparza has "failed to establish prejudice because he has not shown that the direct appeal of [those] issue[s] [that appellate counsel did not raise] would likely have been successful." Leggett v. United States, 1996 WL 665580 at *2 (6th Cir. Nov. 14, 1996). Accordingly, the Court finds Esparza's fifty-third ground for relief not well-taken.

[86] For instance, claims relating to ineffectiveness of trial counsel, were presented to the Ohio courts, and have been discussed at length elsewhere in this Opinion.

**2. Esparza's Fifty-Fourth Claim for Relief**

Esparza's fifty-fourth claim is that the Ohio Court of Appeals review was flawed and, thus, violated his constitutional rights. Specifically, Esparza asserts that the Court of Appeals improperly found that a letter written by Esparza to his foster-parents was not admissible as mitigation evidence, and employed improper definitions of both mitigating and aggravating circumstances. The Court has already dealt with the merits of each of these claims and found them not well-taken. The Court, therefore, finds Esparza's fifty-fourth claim to be without merit.

**E. Systemic challenges to Ohio's capital punishment scheme in general.**

**1. Esparza's Fifty-fifth Claim for Relief**

Esparza's fifty-fifth ground for relief is aimed at the structure of Ohio's capital punishment scheme. In this claim, Esparza asserts that Ohio's capital punishment scheme is unconstitutional on its face. The Court is not persuaded by Esparza's allegations. In summary fashion, the Court will list below Esparza's allegations, in italics, and thereafter state the reasons they are unpersuasive.

- *The death penalty is not the least restrictive means of effectuating deterrence*. The Supreme Court addressed this point directly in Gregg v. Georgia, 428 U.S. 153 (1976). Noting that exacting criminal punishment is a legislative responsibility, the Court limited its own ability to "require the legislature to select the least severe penalty possible." Id. at 175.

- *The death penalty violates the Eighth Amendment prohibition against cruel and unusual punishment.* This argument also was rejected in Gregg. See Gregg, 428 U.S. at 199 (holding death penalty per se not constitutionally barred).

- *Ohio's scheme is unconstitutionally arbitrary because it allows for prosecutorial discretion to determine whether to seek a capital indictment.* Once again, the Supreme Court in Gregg v. Georgia, 428 U.S. 153 (1976), rejected this argument under a similar death penalty statute, condoning the discretionary system.

- *Ohio's scheme is unconstitutional because it lacks specific standards for the imposition and review of a death sentence as it neither narrows the class of death-eligible defendants, individualizes the sentence during trial, nor determines the appropriateness of the sentence*

*upon review.* The Supreme Court has articulated clearly the constitutional mandates for imposing the death penalty. In Lockett v. Ohio, 438 U.S. 586 (1978), the Court held that any death penalty statute must allow the sentencer to review all mitigating evidence during the penalty phase, thereby fashioning a sentence befitting the defendant particularly. Because death "is so profoundly different from all other penalties," the Court reasoned, it cannot be imposed without individualizing the sentence. Id. at 605. The Court further refined the statutory limiting requirement in Zant v. Stephens, 462 U.S. 862 (1983). In that case, the Court concluded that any death penalty statute must narrow the class of death-eligible defendants from those not death eligible. Id. at 877. Specifically, a state may choose either to legislatively limit the definition of death-eligible crimes, or it may broadly define capital offenses but narrow the defendants who actually receive a death sentence by using aggravating factors during the penalty phase. Lowenfield v. Phelps, 484 U.S. 231, 246 (1987).

Ohio's death penalty scheme complies with both these mandates. First, Ohio Rev. Code §§ 2929.04(B) and (C) allow the defendant to present, and the fact finder to consider, all statutorily enumerated mitigating factors. Moreover, § 2929.04(B)(7) permits a fact finder to consider all mitigating factors in addition to those enumerated in the statute. Finally, the Ohio death penalty scheme satisfies the Zant requirements by demanding the fact finder to find the existence of at least one aggravating factor set forth in § 2929.04(A).

Upon appeal, a reviewing court must determine whether the sentence imposed is appropriate. Ohio Rev. Code § 2929.05(A). Consequently, Ohio's scheme in determining which capital defendants actually receive the death penalty and review of the death sentence comport with constitutional mandates.

- *Ohio's scheme is unconstitutional because it fails to require that the State prove (a) the absence of any mitigating factors and/or (b) that the death penalty is the only appropriate remedy.* Esparza's first argument was specifically rejected in Walton v. Arizona, 497 U.S. 639, 649-50 (1990). There, the Court held a death penalty scheme requiring the defendant to establish mitigating factors by a preponderance of evidence is constitutionally acceptable burden shifting. In Ohio, the burden on the defendant is even less, a burden to come forward with evidence of mitigating factors; the burden of persuasion remains with the state.

  Esparza's second argument that the State must prove that the death penalty is the only appropriate remedy also is misplaced. No such constitutional mandate exits. Moreover, the Ohio scheme provides for an appropriateness review on direct appeal. See above.

- *Ohio's scheme is unconstitutional because a three-judge panel is not required to identify and articulate the existence of mitigating factors and aggravating circumstances.* While the Supreme Court does "require that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed," Gardner v. Florida, 420 U.S. 349, 361 (1977), there is no actual criterion stating that the trial judge must identify and articulate the specific factors used to formulate the decision. Furthermore, Ohio Rev. Code § 2929.03(F) requires that a trial judge make a written finding as to the existence of specific mitigating factors and aggravating circumstances, and why the aggravating circumstances outweigh the mitigating factors. By making a record of these

determinations, the appellate court is able to make an "independent determination of sentence appropriateness." State v. Buell, 489 N.E.2d 795, 807 (Ohio 1986), *cert. denied*, 479 U.S. 871 (1986). Thus, no constitutional infirmity exists.

- *Ohio's scheme is unconstitutional because the defendant must prove the presence of mitigating factors by a preponderance of evidence.* As stated above, the Supreme Court accepted this penalty scheme in Walton v. Arizona, 497 U.S. 639 (1990).

- *Ohio's scheme is unconstitutional because aggravating factors are introduced during the guilt phase rather than the mitigation phase of trial.*[87] As addressed above, Ohio's scheme meets the constitutional requirements of both considering all mitigating evidence and sufficiently tailoring the sentence to the individual defendant.

- *Ohio's scheme is unconstitutional because it imposes a risk of death on those capital defendants who choose to exercise their right to trial.* In United States v. Jackson, 390 U.S. 570, 582 (1968), the Supreme Court determined that a legislative body cannot produce a chilling effect on a defendant's Fifth Amendment right not to plead guilty and Sixth Amendment right to demand a jury trial. In that case, the Court struck down the capital portions of a federal kidnaping statute because it authorized only the jury to impose the death sentence. Conversely, in Ohio "a sentence of death is possible whether a defendant pleads to the offense or is found guilty after a trial." State v. Buell, 489 N.E.2d 795, 808 (Ohio 1986). Consequently, the Ohio scheme comports with constitutional mandates.

- *Ohio's scheme is unconstitutional because it fails to provide an adequate proportionality review by comparing defendants who received the death penalty with others who received the death penalty rather than with those who received life sentences.* The Supreme Court has determined that a comparative proportionality review is not constitutionally required. Pulley v. Harris, 465 U.S. 37 (1984).

- *Ohio's scheme is unconstitutional because it fails to provide the sentencing authority with an option to impose a life sentence when it finds only aggravating circumstances exist.* The Supreme Court rejected the identical argument in Blystone v. Pennsylvania, 494 U.S. 299 (1990).

**2. Fifty-Sixth Ground for Relief**

Esparza's fifty-sixth ground for relief is that the use of the same felony (aggravated robbery) to elevate the murder to aggravated murder *and* to elevate aggravated murder to capital murder violated

[87] Esparza contends that by requiring proof of the aggravating specifications simultaneously with guilt, Ohio's death penalty scheme fails to make a sufficiently individualized death penalty determination.

his constitutional rights. Essentially, Esparza argues that Ohio's capital sentencing scheme does not, as it must, "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983).[88] Esparza argues that the aggravating specification contained in Ohio Rev. Code § 2929.04(A)(7) merely duplicates the definition of felony murder in § 2903.01(B), and thus that the same act both convicts and aggravates.

To the extent this is a challenge to Ohio's statutory death penalty scheme, it must fail. As noted in State v. Jenkins, 473 N.E.2d 264 (Ohio 1984), *cert. denied*, 472 U.S. 1032 (1985), "while a conviction under R.C. 2903.01(B) cannot be sustained unless the defendant is found to have intended to cause the death of another, the state, in order to prevail upon an aggravating circumstance under R.C. 2929.04(A)(7), must *additionally* prove that the offender was the principal offender in the commission of the aggravated murder or, if the offender was not the principal offender, that the aggravated murder was committed with prior calculation and design." Id. at 280 n.17 (emphasis added). Thus, "[t]he trial court had to find that [Esparza] committed murder while committing or attempting to commit [aggravated robbery] *and, further,* that [Esparza] was the principal offender or that the murder was premeditated." State v. Barnes, 495 N.E.2d 922, 925 (Ohio 1986), *cert. denied*, 480 U.S. 926 (1987) (emphasis added). This additional factor does "narrow the class of persons eligible for the death penalty," Zant, 462 U.S. at 877, – if Esparza were found to have an accomplice, for instance, that "accomplice could be convicted of aggravated murder but would not be subject to the death penalty."

[88] This is a facial challenge, as distinguished from Esparza's claim concerning the failure of the indictment to charge that he was, and the trial court's failure to instruct the jury that they must find him to be, the principal offender.

Id. "By such a limitation, the category of death-eligible aggravated murderers is narrowed in compliance with Zant and no constitutional violation arises." Id.

Even if it were true that the same act both convicted and aggravated under § 2903.01(B) and § 2929.04(A)(7), moreover, this alone would not provide grounds for issuance of the requested writ. "[T]he fact that the aggravating circumstance duplicate[s] one of the elements of the crime does not [alone] make [a death] sentence infirm." Lowenfield v. Phelps, 484 U.S. 231, 246 (1988); Tuilaepa v. California, 512 U.S. 967, 972 (1994) ("The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both)"). The narrowing function required by Zant may be performed by the state legislature. Id. at 246-47; see id. at 255 (Brennan, J., dissenting) ("the critical narrowing function may be performed [by the legislature] prior to and distinct from the sentencing process" to ensure "that the number of those eligible for the death penalty [are] smaller than the number of those convicted of murder"). With § 2929.04(A), the Ohio General Assembly "narrow[ed] the class of felony murders subject to the death penalty by excluding those who commit [murder in the course of an] arson, robbery, burglary or escape, unless they are charged with a different aggravating circumstance." State v. Buell, 489 N.E.2d 795, 807 (Ohio 1986), *cert. denied*, 479 U.S. 871 (1986). Thus, as long as there is a narrowing which occurs, the death penalty can be constitutionally imposed upon that narrower class of persons.

## VIII. CONCLUSION

It is clear that the state of Ohio may, within certain well-established limitations, impose the death penalty upon offenders without running afoul of the United States Constitution. It is also clear that the Ohio legislature has adopted a statutory scheme for imposition of the death penalty which *can*, if appropriately followed, result in a constitutionally permissible sentence of death. It is also clear, however, that the manner in which the death penalty was imposed in this case fails to comport with the dictates of the Constitution.[89] No desire on the part of this Court to give deference to the state court judgments, no matter how strong that desire might be, can justify turning a blind eye to the infirmities which permeated the charging decisions in and the mitigation phase of this capital case.

Accordingly, the Court grants Esparza's petition in part, and issues a writ of habeas corpus as follows. The respondent shall set aside Esparza's sentence of death and, instead, impose a life sentence under Ohio Rev. Code § 2929.03(A) for aggravated murder with no capital specification. The respondent shall re-sentence Esparza, within 180 days from the effective date of this Order. On this Court's own motion, execution of this Order and, hence, its effective date, is stayed pending appeal by the parties.

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[89] It would not have been difficult to assure the constitutional application of the death penalty in this case. Surely the prosecutor was aware of its obligation to charge and prove a capital specification prior to imposition of the death penalty and was aware of how to accomplish both of those things. Similarly, egregious mistakes of counsel, and the trial courts refusal to give counsel an adequate opportunity to prepare, were readily avoidable with little cost or inconvenience to the state. Finally, it would have taken very little time and effort on the trial courts part to redact what were clearly inappropriate and, to some extent, unfounded facts and opinions from the pre-sentence investigation report. While the constitution affords states great leeway in their decision to impose the death penalty, it requires a minimum of care in its application in a particular case. Evidence of that constitutionally mandated level of care is simply missing from the record in this case.

The Court hereby issues a certificate of appealability pursuant to 28 U.S.C. § 2253(c) as to all issues raised by petitioner and certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal in forma pauperis would not be frivolous and can be taken in good faith.

**IT IS SO ORDERED.**

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**KATHLEEN McDONALD O'MALLEY**
**UNITED STATES DISTRICT JUDGE**

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

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|---|---|---|
| **CLEVELAND BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,** | : | **CASE NO. 1:90-CV-1404** |
| | : | **JUDGE O'MALLEY** |
| | : | **MEMORANDUM & ORDER** |
| **Plaintiffs,** | : | |
| **v.** | : | |
| **CITY OF PARMA, OHIO,** | : | |
| **Defendant.** | : | |

Plaintiffs, the Cleveland and National Branches of the National Association for the Advancement of Colored People (collectively, the "NAACP"), bring this action against defendant, the City of Parma ("Parma"), alleging that Parma discriminates against blacks in the hiring of municipal employees. The NAACP seeks prospective injunctive relief to eliminate Parma's allegedly discriminatory practices and their effects. Parma now moves for summary judgment on the NAACP's claims on the grounds that they are not justiciable, primarily asserting the NAACP lacks standing to assert the claims in its complaint and that subsequent events have rendered those claims moot (Dkt. #152). The NAACP also moves for summary judgment on the issue of disparate impact liability (Dkt.

#155). For the reasons set forth below, Parma's motion for summary judgment is **GRANTED** and the NAACP's motion for summary judgment is **DENIED**.[1] Accordingly, this case is hereby **DISMISSED**.

## I. Background

### A. Procedural History

This action originally was filed on August 6, 1990, and was assigned to the late Judge Frank Battisti. The case was transferred to Judge Robert Krupansky in November of 1994, who was then acting as a District Judge by designation. The case ultimately was transferred to the undersigned in March of 1996.

There were several motions pending at the time the case was transferred to this Court. Those motions, some of which had been pending for more than four (4) years, included the following: (1) Parma's motion to dismiss (filed September, 1991); (2) the NAACP's motion for summary judgment on the issue of liability (filed November, 1991); (3) Parma's motion for summary judgment (filed December, 1991); (4) the NAACP's motion for leave to file an amended complaint (filed November, 1992); and (5) a motion by Artis Tomblin — one of the individuals on whose behalf the NAACP brought suit — to intervene as a plaintiff (filed February, 1995).[2]

At a case management conference held on April 15, 1996, the parties agreed that the motions needed to be updated, both factually and legally. Accordingly, the Court vacated all outstanding motions without prejudice to subsequent renewal. The parties requested that, before filing their

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[1] Parma also has filed three motions to strike various pleadings and affidavits submitted by the NAACP. Because this Court is granting Parma's motion for summary judgment, its motions to strike (dkt. ## 165, 170, 173) are **DENIED AS MOOT.**

[2] The Court denied Tomblin's motion to intervene in an order dated April 15, 1996.

renewed motions, they be given another opportunity to settle the case, and the Court granted this request, allowing them sixty (60) days to attempt to reach a compromise. At the same time, the Court established deadlines for additional discovery and the filing of renewed motions, in the event the settlement discussions failed to result in a resolution of the case.

In June, 1996, the Court again met with the parties. They asked for referral to mediation and an extension of all deadlines to allow for additional attempts to resolve the case. Consequently, all deadlines were extended and the parties were referred to mediation. At the request of the parties, the deadline for the completion of mediation was continued until January, 1997. The parties were unable to resolve their differences in mediation, however, and on January 29, 1997, the Court met with the parties to establish firm deadlines for the completion of discovery and the filing of renewed motions. Pursuant to those deadlines, Parma and the NAACP filed renewed motions for summary judgment in the summer of 1997. Both parties also filed reply and opposition briefs. Supplemental briefs containing later-decided authority were filed in November, 1997.[3]

**B. Factual History**

The NAACP, which has branches throughout the country, is a voluntary association devoted to eliminating discrimination and racial prejudice, improving the social and economic status of minority groups, and securing equal opportunities for minorities. The NAACP accomplishes these goals through political action, education, and litigation, and these efforts have resulted in several important advances in civil rights for minorities in general, and for blacks in particular. Though the NAACP seeks to better the lives of and opportunities for all minorities, membership in the NAACP is limited to only those individuals who formally join and pay annual dues to support the association's efforts.

[3] The NAACP never renewed its motion to file an amended complaint.

Parma, located within ten (10) miles of Cleveland, is a mostly white community with a history of discriminating against blacks in housing. In 1973, the United States government brought a Fair Housing Act action against Parma. In U.S. v. City of Parma, 494 F. Supp. 1049 (N.D. Ohio 1980), Judge Battisti found that Parma discriminated against blacks in providing low and moderate income housing. A remedial order was issued, under which Parma was to take several affirmative steps to remedy its discriminatory practices and their effects, U.S. v. City of Parma, 504 F. Supp. 913 (N.D. Ohio 1980), and that order was largely affirmed on appeal. U.S. v. City of Parma, 661 F.2d 562 (6th Cir. 1981) (affirming injunctive relief and reversing decision to appoint special master).

In November, 1996, following a motion by Parma for relief from the remedial order, the parties, after extensive negotiations, entered into an agreement to vacate Judge Battisti's order and redefine the City's continuing obligations. Under this agreement, approved by and embodied in an order of this Court, the parties acknowledged the many efforts Parma had made to comply with the 1980 order and set forth those actions the parties agreed were necessary to assure Parma's eventual transition to a fully open community. The November, 1996 agreement was significant in many respects. First it constituted a negotiated resolution of an emotionally charged, contentious civil rights case which had been pending for twenty-three years. Next, as the government attorneys explained when praising the settlement, in it the City agreed to take creative, affirmative steps to alter its racial composition, many of which may not have been available via court order. Finally, it included a recognition that many traditional methods for encouraging growth of the minority population in a community had not been successful in Parma, despite substantial efforts by Parma officials to comply with the obligations imposed upon the City by Judge Battisti.

This last fact was borne out by relevant statistics: Nearly ten (10) years after the remedial order was imposed, the racial composition of Parma's residents still had not changed significantly. As of 1990, less than one percent (1%) of Parma's residents were black. By comparison, Cuyahoga County — in which both Cleveland and Parma are located — had a black population of nearly twenty-five percent (25%). It was at that point, and against the background of a history of housing discrimination, that the NAACP filed a charge with the EEOC alleging that Parma discriminates against blacks in the recruitment and hiring for municipal jobs.

The NAACP's charge focused on the fact that, between 1976 and 1988, a Parma ordinance required that all municipal employees live in Parma.[4] It is that residency requirement, viewed in light of Parma's history of housing discrimination and resulting monochromatic racial makeup, which the NAACP asserted unfairly disadvantaged minorities in their quest for public employment.

The NAACP brought this attack on Parma's 1976 residency requirement even though Parma changed its residency requirement in 1988 to a move-in requirement.[5] Thus, while the 1976 law made

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[4] Specifically, the ordinance provided:

> No person shall be appointed or employed by the City of Parma unless such person is a bona fide resident of the City. All persons appointed and/or employed after the effective date of this Ordinance shall maintain their residency within the City of Parma during such employment.

Parma, Oh., Ordinance 223-76 (December 8, 1976) (amending Parma, Oh. Codified Ordinance §173.05).

[5] The 1988 ordinance stated:

> Any person who is appointed to or commences employment in a position with the City on or after the effective date of this section, shall, within eighteen (18) months of such event, become a permanent resident of the City. Failure to become a permanent resident within such time shall be grounds for dismissal from service with the City. Any person who is an employee or appointee of the City on the effective date of this section shall maintain his residency with the City, provided, however, that at any time after the fifth anniversary of any such appointment or

it clear that, as a practical matter, an applicant would not even be eligible for a job unless he or she lived in Parma, under the 1988 ordinance, a potential employee was given eighteen (18) months to move into Parma after hiring. In other words, residency was no longer a prerequisite to working for the City. It became, instead, a requirement for continued employment following an eighteen (18) month grace period.

Parma made additional changes to its recruitment practices and employment requirements in the mid-1990's.[6] Thus, in 1995, Parma eliminated residency as a formal employment consideration altogether. Instead, within eighteen (18) months of beginning employment with Parma, municipal employees were required to live within fifteen (15) miles of the city. Parma, Oh., Ordinance 299-95 (November 10, 1995) (amending Parma, Oh., Codified Ordinance §173.05). This radius encompassed all of the City of Cleveland and virtually all of Cuyahoga County. In 1996, Parma amended the ordinance again, this time by expanding the fifteen (15) mile requirement to twenty-two (22) miles. Parma, Oh., Ordinance 190-96 (July 3, 1996) (amending Parma, Oh., Codified Ordinance §173.05). This twenty-two (22) mile radius encompassed not only all of Cuyahoga County, but portions of surrounding counties as well.

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> commencement of employment with the City . . . the employee shall be permitted to reside within a municipality which abuts the City of Parma.

Parma, Oh., Ordinance 86-88 (June 13, 1988) (amending Parma, Oh. Codified Ordinance §173.05).

[6] It is likely that these changes were at least partially in response to this litigation.

Sometime before 1996, Parma also began advertising in the *Plain Dealer, The Call & Post* (which has a predominately black readership), and *The Sun* newspapers to announce job openings and scheduled civil service examinations and continues regularly to engage in such advertising whenever examinations are being offered. Parma also posts job openings for law enforcement positions at Cuyahoga Community College, Cleveland State University, Lorain Community College, and Lakeland Community College, and distributes brochures about working for the Parma Police Department which are specifically directed at minorities. In addition, Parma sends postcards which notify the recipient of upcoming civil service examinations to anyone who requests to be placed on its mailing list. Finally, at the behest of the NAACP, Parma has hired a consulting firm (chosen by the NAACP) to create a new written test for Parma's police officer examination and has announced its intent to do the same for its fire fighter examination.

The procedure for obtaining employment with Parma is as follows. Any individual interested in a municipal job must first submit an application. The applicant then is notified of the dates on which the civil service test (if required) is being given. For positions other than that of fire fighter or police officer, the applicant is at that point placed on an eligibility list in ranked order. For the fire fighter and police officer positions, if the applicant passes the written test, he or she must then take and pass a physical agility test. If the applicant passes that test, he or she is then placed on an eligibility list in ranked order. The applicant will then be subject to an interview, background check, and polygraph examination before being hired.

### C. The EEOC Charge and Complaint

In its EEOC charge, the NAACP acknowledged the change effected by the 1988 residency requirement, but pointed out that, as late as 1989, Parma continued to make hiring decisions on the basis of pre-1988 eligibility lists, when residency was still a pre-hiring requirement for all city positions.[7] The NAACP contended, accordingly, that non-residents effectively were excluded from consideration, despite the change in the law. Moreover, contended the NAACP, up until that time, Parma limited its recruitment efforts to word-of-mouth and postings in Parma's City Hall, neither of which was (for obvious reasons) an effective means of communicating job openings to blacks who lived outside of Parma. Based on these facts, the NAACP charged that "Parma discriminates in hiring by refusing to recruit, consider, select and employ blacks on the same basis as whites." (EEOC Charge para. 4). Notably, the EEOC Charge contained no explicit reference to Parma's testing procedures or any discriminatory impact they might have. All allegations centered on the residency requirement and recruitment techniques that served to limit recruitment to residents of Parma, which (allegedly)

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[7] In its EEOC charge, the NAACP makes the following allegations regarding the residency requirement:

> Parma has discriminated against blacks in recruiting for civil service jobs by directing its recruitment towards residents of Parma and by stating in announcements of examination that applicants for the positions must move into Parma. Before November, 1988, applicants were required to move in upon appointment, but since that date, they are allowed eighteen months to move in. Parma has discriminated against blacks in recruiting for non-civil service jobs by limiting recruitment for most positions to word of mouth and by directing recruitment to residents of Parma and towards friends and relatives of current employees. Although Parma changed its residence requirement for civil service employees in 1988, it continues to use eligibility lists created, and applications for non-civil service jobs collected when the prior residence requirement was in effect.

(EEOC Charge para. 3).

effectively limited employment opportunities to whites since they comprised more than ninety-nine percent (99%) of Parma's population at the time. The charge was spurred by and premised upon the interaction between Parma's historically discriminatory housing policies and hiring laws and practices which effectively reserved city jobs for city residents.

After receiving its right-to-sue letter at the end of May, 1990, the NAACP timely filed this action on August 6, 1990. The complaint was filed on behalf of several individuals whom the NAACP identified as its members; these included Kenneth Berts, Wendy Childress, Arthur Collins, Ronda Crayton, Clarence Johnson, Maurice McIntosh, Leon Pettigrew, and Lenora Saleem. In the amended complaint, however, the NAACP identifies a different group of "members" on whose behalf it brings the instant claims and upon whom it bases its standing to raise those claims. The NAACP makes a point of emphasizing that, because it never renewed its motion for leave to file an amended complaint,[8] it is the original complaint with which the Court should be concerned and that Parma's reliance on the amended complaint in its summary judgment motion is misplaced.

The NAACP's response (as well as the briefs filed on behalf of its own summary judgment motion), however, focuses on the "members" identified in its amended complaint, and ignores four of the eight individuals identified in the original complaint. The individuals discussed by both the NAACP and Parma in the latest round of briefing are Marlon Allen, Wendy Childress, Arthur Collins, Ronda Crayton, Maurice McIntosh, and Art Tomblin. Because both Parma and the NAACP focus on

[8] In its brief in opposition to Parma's motion for summary judgment, the NAACP states that the amended complaint "was never filed, because Judge Battisti did not act upon it, and because this Court vacated all motions pending in 1996 after the time the case was reassigned." (Pl. Br. in Opp. at 8 n.1). What the NAACP forgets is that there was nothing standing in the way of it renewing its motion to file an amended complaint. It was not this Court's order vacating all outstanding motions (which both parties agreed was appropriate in the circumstances) that resulted in the amended complaint not being filed, but the NAACP's own failure to submit a renewed motion to file an amended complaint.

the injuries allegedly suffered by these individuals in their briefs, and not on those identified in the original complaint, the Court also will focus on these individuals in its analysis of the NAACP's standing. The Court notes, however, that were it to focus solely on the original complaint in determining whether standing exists, it would be constrained to conclude that the complaint contains inadequate allegations to support the standing of the NAACP to prosecute this case. See e.g., Newark Branch, NAACP v. Town of Harrison, 907 F.2d 1408, 1415-16 (3d Cir. 1990).[9]

**D. Individuals Identified as Members by the NAACP**

As the NAACP's standing in this case is dependent on the standing of its members or any one of them to bring this action on his or her own behalf, the Court now outlines the factual underpinnings of each of the putative members' claims.

**1. Arthur Collins.**

Collins is not now and never has been a member of the NAACP. Collins works as a snowplow driver for the City of Cleveland, a job which he has held since 1990, and is a member of a truck driver's union. In 1990, Collins was interested in becoming a police officer or truck driver for Parma; however, according to his 1990 deposition, he never wrote to or called Parma to inquire about possible job opportunities. Currently, the only position he is potentially interested in is that of truck driver, which is, like his present job, a union position. Since 1990, Collins has made no inquiries regarding employment opportunities in Parma, or any other municipality, and has not asked the truck drivers'

[9] The sole purpose of the amended complaint appears to have been to cure the original complaint's failures with respect to establishing the NAACP's standing.

union whether any such positions are available. In fact, according to his most recent deposition testimony, Collins has no particular desire to obtain a job with the City of Parma.

**2. Maurice McIntosh.**

Although McIntosh was a member of the NAACP for one year in the early 1980's while he was in college, he has not been a member of the NAACP since. Since 1990, McIntosh has worked for the Cuyahoga county Youth Development Center in Hudson. McIntosh inquired about employment with the City of Parma in December, 1990 after seeing a newspaper advertisement in either the *Plain Dealer* or *The Sun*. McIntosh went to City Hall and submitted an employment application. He subsequently received at least one notification of a firefighter's examination that was scheduled for April, 1993. Postcards notifying him of police officer examinations also were mailed, but he does not remember receiving them. He never sat for any of these examinations and has not made any further inquiries about obtaining employment with the City of Parma since 1990.

In his deposition, McIntosh stated that he no longer is interested in a police or fireman's position with Parma, because of his age (thirty-six). While he is not actively seeking employment, and apparently is content with his present job, he stated that he would accept a position with Parma in some other capacity if he were presented with the appropriate opportunity.

**3. Rodney Blanton.**

Blanton was not a member of the NAACP at the time this action was filed and is not now a member of the NAACP, although he was a member for one year from 1995 to 1996. According to the NAACP, he has authorized it to represent his interests in the case.

At the time the parties filed their briefs, Blanton worked as a corrections officer for the Ohio Department of Rehabilitation and Corrections. Prior to this position, Blanton worked simultaneously

in part time positions at the Cleveland Marriot in Beachwood, and at UPS. In 1989, he applied for a police officer position with Parma. He passed both the written examination and the physical agility test and was placed on the list of eligibles (with a rank of 18). He was removed from the list of eligibles, however, because of his responses to a polygraph examination.[10]

In 1997, just prior to his second deposition, Blanton was offered a job with the Cuyahoga County Sheriff's Office. He intends to accept this position, and has indicated that he no longer is interested in working for Parma as a police officer.

**4. Marlon Allen.**

Allen is a longtime member of the NAACP. In 1990, he was interested in working as a firefighter for Parma. In addition, he expressed "slight" interest in working as a police officer for the City. However, Allen never inquired, formally or informally, about what he needed to do to obtain a job with Parma. He, thus, never applied for and was never rejected for any position with the City.

Allen has since moved out-of-state. He currently lives in Atlanta, Georgia, and has represented that he has no intention of returning to Ohio or of obtaining employment with Parma.

**5. Wendy Childress.**

Childress is not currently a member of the NAACP. In her most recent deposition, she states that she does not believe that she ever has been a member of the NAACP. The NAACP represents that she was a member of the organization in 1990, but the record to which it purports to point for support was not included with its brief or in the appendix submitted with that brief. The Court nonetheless

[10] Blanton did not file an EEOC charge regarding his removal from the list and the NAACP concedes that certain of Blanton's responses during his first polygraph examination were untruthful.

accepts the NAACP's representation that Childress was a member of the organization in 1990 for purposes of the instant motion.

Childress currently lives in the Cleveland Metropolitan area and works for the American Red Cross as an office assistant. In 1990, she stated that she was interested in a position with the police department or some type of clerical position with Parma, but she never contacted Parma about employment opportunities or the steps she needed to take to apply for such opportunities. Since that time, she has not contacted Parma about obtaining employment or taken any other affirmative steps toward getting a job with Parma. In her most recent deposition, Childress said she would not want to work in Parma if she were required to live there as well. Even though she is now aware that there is no longer a residency requirement, Childress maintains that she currently has no present intent or desire to work for Parma.

**6. <u>Ronda Crayton</u>.**

With the exception of Allen, Crayton is the only individual identified by the NAACP who has been a member of the NAACP throughout the course of this litigation. Crayton currently works as an investigator with the Cuyahoga County Department of Children and Family Services, and also works part time as a security officer for the City of Cleveland and as a substitute teacher for the Cleveland Public Schools.

In late 1989, Crayton applied for a position with the Parma Police Department. She passed the written examination, but failed the agility portion of the test, and, thus, was not placed on the list of eligibles. Crayton believes she was failed because of her gender. The NAACP makes the same

contention.[11] Crayton has not sought to obtain a position with the Parma Police Department since and has no present intent to do so at any time in the near future, though she insists that she would accept a position as a Parma police officer if she were presented with the opportunity.

**7. Artis Tomblin.**

Tomblin was a member of the NAACP in 1990 at the time the suit was filed, but he has not been a dues-paying member of the organization for several years. He currently works as the Executive Director for a non-profit organization he founded in 1992.

In February, 1990, Tomblin submitted an employment application with Parma and requested that he be contacted regarding future employment opportunities, including any examinations for police and fire positions. Although Parma insists it sent Tomblin postcards notifying him of all police and fire examinations, Tomblin recalls having received only one such postcard. Nonetheless, he chose not to sit for the examination, because, in his view, it would have been fruitless to take the test in light of the residency requirement.

Tomblin no longer has an interest in working as a fireman or policeman in Parma, and has taken no affirmative steps since that time to obtain a position with Parma. Tomblin says that he would "consider" working in a civil service position only "if pay was comparable and maybe if the residency requirement goes on for all civil service positions." (Def. Ex. P at 33). Although Tomblin did state that he would give such an opportunity "serious consideration," id. at 34, he stressed that he "couldn't say honestly that [he] would accept [the position]." Id. at 33.

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[11] The NAACP also contends that, by discriminating against Crayton because of her gender, Parma engaged in racial discrimination as well. This is so, the NAACP submits, because African-American women apply for law enforcement positions more often than white women. Thus, the NAACP asserts all gender discrimination relating to law enforcement positions also can be characterized as race discrimination.

## II. The Claims Properly Before This Court

As an initial matter, the Court must first set forth which claims properly are before this Court, and which are not. Properly before this Court are the NAACP's claims regarding Parma's residency requirement in both its 1976 (to the extent and only to the extent eligibility lists continued to be constructed from applicants who sought employment prior to the 1988 change) and 1988 incarnations. In addition, the NAACP's claims regarding Parma's reliance on word-of-mouth and City Hall postings to recruit applicants for jobs are properly before this Court. These claims were clearly identified in the EEOC charge.

The NAACP's more recent challenge to Parma's police, fire, and other examinations, however, is not properly before this Court. This claim was neither expressly made in the EEOC charge, nor could it fairly be said to have "grown out of" that charge. The EEOC charge read as a whole clearly focuses on the residency requirement and other recruitment practices that had the effect of favoring Parma residents either prior to 1990, or at any point thereafter. That charge cannot fairly be characterized as raising a challenge to the testing procedures employed in Parma. Consequently, it did not put the EEOC or defendant Parma on notice that such a practice was being challenged, and did not allow a meaningful opportunity for the accomplishment of Title VII's mediation goals.[12] Although the charge does contain a catchall allegation which states that "Parma discriminates in hiring by refusing to recruit, consider, select and employ blacks on the same basis as whites," (EEOC Charge para. 4), "such vague, general allegations" are "incapable of inviting a meaningful EEOC response." Butts v. City of New York Dept.

[12] In this regard, it is telling that, when the NAACP began to complain about Parma's testing procedures, which it appears did not occur until sometime during the settlement negotiations in 1996, Parma indicated a willingness to evaluate and change its procedures with the input of the NAACP and/or with the help of consultants recommended by the NAACP.

of Housing, 990 F.2d 1397, 1403 (2d Cir. 1993). See also Marshall v. Federal Express Corp., 130 F.3d 1095, 1098 (D.C.Cir. 1997) ("A vague or circumscribed EEOC charge will not satisfy the exhaustion requirement for claims it does not fairly embrace."); Rush v. McDonald's Corp., 966 F.2d 1104, 1110 (7th Cir. 1992) (holding that a party "may not complain to the EEOC of only certain instances of discrimination, and then seek judicial relief for different instances of discrimination"); Schnellbaecher v. Baskin Clothing Co., 887 F.2d 124, 127 (7th Cir. 1989) (stating that "allowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would circumvent the EEOC's investigatory and conciliatory role, as well as deprive the charged party with notice of the charge, as surely as would an initial failure to file a timely EEOC charge"). "Naturally every detail of the eventual complaint need not be presaged in the EEOC filing, but the substance of [a Title VII] claim . . . must fall within the scope of "'the administrative investigation that can reasonably be expected to follow the charge of discrimination.'" Marshall, 130 F.3d at 1098 (quoting Park v. Howard University, 71 F.3d 904, 907-09 (D.C. Cir. 1995)).

The EEOC charge was drafted by a representative of the NAACP, who, we may presume, was familiar with the practice and the specificity required in such charges. While an inartfully drafted EEOC charge may be forgiven — at least to some degree — when filed by a plaintiff without the benefit of counsel, less leniency is required when a charge is filed on behalf of a national organization which regularly engages in race discrimination litigation and has years of experience and scores of talented attorneys available to assist in drafting the charge. The recruitment and testing claims are vastly different claims, require separate proofs, and, it would seem, the resolution of one claim has no impact on and is unrelated to the outcome of the other. There is nothing on the face of the charge that

would lead the EEOC to investigate Parma's testing procedures, and there is nothing that would lead Parma to believe that such procedures were being challenged.

The NAACP's complaint similarly contains no express challenge to Parma's testing procedures. The factual allegations of the complaint focus on the percentage of blacks in Parma's available labor pool and the 1976 and 1988 incarnations of Parma's residency (or move-in) requirements. There is no factual allegation concerning Parma's testing procedures. In paragraph fourteen (14) of the complaint, the NAACP alleges that Parma's employment practices are discriminatory in the following ways:

> a. By failing or refusing to recruit and hire blacks on the same basis as whites;
>
> b. By following recruitment practices which advise residents of Parma, and friends and relatives of incumbent employees of Parma, of employment opportunities in the municipal employment of Parma without advising black persons in the relevant labor market of such opportunities;
>
> c. By following recruitment practices which have the effect of deterring non-residents, including almost all blacks, from applying for employment opportunities with Parma;
>
> d. By traditionally requiring that appointments be limited to residents of Parma, and by requiring that employees of defendant establish and maintain their residence in Parma, a requirement that was intended to exclude and does disproportionately exclude blacks from municipal employment;
>
> e. By failing and refusing to take the appropriate recruitment measures to correct the effects of the defendant's past discriminatory policies and practices;
>
> f. By limiting hiring, until very recently, to lists of eligibles created when appointments were limited to residents of Parma;
>
> g. Upon information and belief, by using unvalidated selection procedures that have the effect of disproportionately excluding from employment those black applicants who do obtain timely information regarding employment opportunities and who are not deterred by the discriminatory practices of defendant.

(Complaint para. 14). Paragraph 14(g) is the only allegation which arguably can be read as asserting a challenge to Parma's testing procedures, but even it lacks enough specificity to have put Parma on

notice that testing was an issue in this case. Indeed, in November, 1990, Parma, unsure of exactly what claims were being asserted, filed a motion for a more definite statement (Dkt. #13). In response to that motion, the NAACP insisted that its "complaint . . . [was] not vague or ambiguous," because it "assert[ed] two kinds of claims for relief." (Memorandum of Pl. in Opp. To Def. Mot. for a More Definite Statement at 2) (Dkt. #14). The "two kinds of relief" identified by the NAACP were (1) a claim of purposeful discrimination based on the combination of Parma's "practice of excluding blacks from housing opportunities," and its residency requirement and recruiting techniques, id., and (2) a claim of disparate impact based on Parma's "practice of limiting appointments to residents ." Id. at 15.[13]

Thus, not only did the NAACP fail to assert a discernable claim against Parma's testing practices in either its EEOC charge or its complaint (or even in the amended complaint it sought leave to file), it affirmatively represented that it was seeking relief only as to Parma's residency requirement, recruiting procedures which favored residents, and their continuing effects, under theories of discriminatory treatment and discriminatory impact. After making such representations, upon which both Parma and this Court reasonably have relied throughout this litigation, the NAACP cannot now be heard to assert claims concerning Parma's testing practices.

Because it cannot fairly be said that this claim grew out of or is related to the central claims raised in the EEOC charge so as to put either the EEOC or Parma on notice that the testing procedures were under attack, and because of the NAACP's own affirmative representations that it was asserting

[13] The NAACP made similar representations as to the scope of its claims in a Motion to Compel filed on April 10, 1991. (Pl. Mot. To Compel at 3-4) (Dkt. #33).

only claims based on the residency requirement and recruiting practices of Parma, the NAACP's challenge to Parma's written and physical agility tests (a challenge not fully developed even in its current briefs) is not properly before this Court.[14] It must be raised, if at all, in a separate action after Title VII's investigatory and mediation goals have been satisfied.[15]

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[14] Indeed, it is not clear whether the tests currently in use were used when the complaint in this case was filed or when any of the individuals the NAACP identifies considered employment with Parma.

[15] This case is distinguishable from United States v. City of Northlake, 942 F.2d 1164 (7th Cir. 1991). In Northlake, the Civil Rights Division of the Department of Justice brought a Title VII action against (among other Illinois cities) the City of Northlake. The United States alleged that Northlake failed to recruit and hire blacks on the same basis as whites, and expressly challenged Northlake's residency requirement on both disparate treatment and disparate impact grounds. Several years after the litigation began, a consent decree was entered.

When the United States later claimed the City was in violation of its obligations under the consent decree because it continued to use oral interview procedures, the Seventh Circuit allowed that challenge. The Court noted that, while "the complaint specifically identified the residency requirement, [it] also alleged that the defendant discriminated against blacks in both its failure or refusal to adopt objective[,] valid and non-discriminatory municipal hiring procedures . . . and its failure to adopt and implement a vigorous recruitment program designed to attract qualified blacks for employment by the City." Id. (citations to the record omitted). The Seventh Circuit did not premise its reversal, however, on the complaint's vague and perfunctory mention of a testing claim. Its holding was, rather, premised on the contents of the consent decree and policy considerations peculiar to the issuance of that decree. The Court reasoned that to require the United States to "proceed by way of a 'fresh' complaint . . . [would] undermine[] the purpose of a consent decree in the first instance — namely, to avoid protracted litigation by entering into a court-supervised agreement that resolves the dispute to the satisfaction of all parties concerned and guarantees the viability of the agreement under the watchful eye of the judge whose signature appears at the end of the document." Id. This, in turn, would discourage civil rights plaintiffs from entering into such decrees. Id.

Here, because no consent decree has been entered, the practical and policy concerns that were so significant to the outcome of Northlake are not implicated. In fact, allowing the NAACP to include a challenge to Parma's testing practices at this late date presents its own policy concerns; it would frustrate the mediation policy which animates Title VII's requirement that plaintiffs file an EEOC charge before filing suit.

## III. Mootness

Under Article III of the Constitution, this Court may decide only "actual, ongoing controversies." Honig v. Doe, 484 U.S. 305, 317 (1988). See also Allen v. Wright, 468 U.S. 737, 750 (1984); Kentucky Right to Life, Inc. v. Terry, 108 F.3d 637, 644 (6th Cir.), cert. denied, 118 S.Ct. 162 (1997). "The mootness doctrine . . . demands a live case-or-controversy when a federal court decides a case." Terry, 108 F.3d at 644. See also National Black Police Association. v. Dist. of Columbia, 108 F.3d 346, 349 (D.C. Cir. 1997) (stating that "a live controversy must exist at all stages of review") (citing Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1990); Preiser v. Newkirk, 422 U.S. 395, 401 (1975)). Accordingly, "[e]ven where litigation poses a live controversy when filed, . . . a federal court [must] refrain from deciding it if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'" Clark v. United States, 915 F.2d 699, 701 (D.C. Cir. 1990) (en banc) (quoting Transwestern Pipeline Co. v. FERC, 897 F.2d 570, 575 (D.C. Cir. 1990)). "Legislative repeal or amendment of a challenged statute" or ordinance during the course of litigation "usually eliminates this requisite case-or-controversy." Terry, 108 F.3d at 644. As the Seventh Circuit has stated, "[v]ictory in the legislative forum makes judicial proceedings moot." Miller v. Benson, 68 F.3d 163, 164 (7th Cir. 1995).

Parma's City Council has totally eliminated residency as a requirement for anyone seeking employment with the City. Thus, the challenged ordinance has effectively been repealed, and the primary obstacle to minority recruitment and hiring by Parma has been removed. In addition, Parma now advertises in three newspapers, one of which has a predominately black readership, regularly posts job openings at several local colleges which have significant black student bodies (using brochures directed at recruiting blacks), and routinely mails postcards notifying anyone who requests to be

informed about upcoming civil service, police officer, and fire fighter examinations. As a result, Parma no longer confines its recruitment efforts to postings at City Hall and word-of-mouth, which favored whites over blacks. Parma's elimination of the residency requirement and its affirmative — and active — efforts to recruit individuals, including minorities, outside of Parma, have given the NAACP what they sought to achieve by this action.

Where a political body voluntarily repeals a challenged ordinance or statute, or discontinues a challenged practice, however, two requirements must be satisfied before the case will be considered moot. County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). First, there must be no reasonable expectation that the challenged ordinance or practice will be reenacted or reinstated. Id. Second, "interim relief or events [must] have completely or irrevocably eradicated the effects of the alleged violation." Id. This is the so called "voluntary cessation" doctrine.

Parma has given the NAACP what it sought, there is no reasonable expectation that Parma will reenact the challenged ordinance or practices, and Parma's repeal of the residency requirement and other affirmative actions have eradicated the effects of what properly has been challenged in this case. "A determination by this Court of the legal issues tendered by the parties is no longer necessary to compel" the relief sought by the NAACP or to halt the allegedly discriminatory practices it challenged. DeFunis v. Odegaard, 416 U.S. 312, 317 (1974). Accordingly, this case is now moot. See id.; Terry, 108 F.3d at 645; Miller, 68 F.3d at 164 ("The state legislature gave plaintiffs what they sought, and this case is therefore moot."). The additional relief sought by the NAACP, radio advertisements and statements in newspaper advertisements which specifically encourage minority applicants, is too slight in comparison to the rest of the relief already obtained to justify this Court's continued jurisdiction and involvement in this case. S-1 v. Spangler, 832 F.2d 294, 297 (4th Cir. 1987) (holding that, where the

specific relief sought "no longer has sufficient utility to justify decision of [the] case on the merits" the case is moot).

There is no indication that Parma will reenact the earlier ordinance or take any other action toward reinstating the residency requirement, and, in the absence of such an indication, the voluntary cessation doctrine does not prevent a finding of mootness. See Terry, 108 F.3d at 645 ("This exception properly applies only when a recalcitrant legislature clearly intends to reenact the challenged regulation.) (emphasis added); National Black Police Association 108 F.3d at 349 ("[T]he mere power to reenact a challenged law is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists. Rather, there must be evidence indicating that the challenged law likely will be reenacted."). Indeed, all indications point in the opposite direction. Parma has settled the housing discrimination case and has taken a number of affirmative steps, a number of which were not even contemplated by the remedial order, in the housing case, to make itself a more open community. Parma has steadily liberalized the residency requirement over the past ten (10) years to the point that it essentially no longer exists at all, and employees are free to live anywhere in Cuyahoga county, and may even live in surrounding counties. In addition, Parma has taken several other steps to improve its recruitment efforts and make its practices more satisfactory to minorities, by, for instance, volunteering to use whatever police officer examination the NAACP wants and representing that it would do the same for the fire fighter examination.[16] Finally, it should not be forgotten that Parma is under the

[16] Given these promises, even if the Court were to conclude that the NAACP properly had challenged the City's testing procedure in this case, the Court likely would find that challenge moot as well. See Lee v. Biloxi School Dist., 963 F.2d 837, 839 (5th Cir. 1992) (holding that defendants' express commitment to provide relief requested, where defendants' recent behavior indicated strongly that promise would be upheld, mooted case). Cf. Defunis, 416 U.S. at 317 (finding mootness where defendant promised not to interfere with plaintiff's status as a student, regardless of outcome of case on merits); Committee in Solidarity v. Sessions, 929 F.2d 742, 744-45 (D.C. Cir. 1991) (stating that "'it

watchful eye of the public and press as it continues in its nearly thirty year effort to rid itself of the stigma of being a racially intolerant community. It is, therefore, not likely to retreat from its actions and representations. Based on these factors, the rationale behind the voluntary cessation doctrine simply does not apply. Accordingly, the voluntary cessation doctrine does not prevent a finding of mootness. See Terry, 108 F.3d at 645 (finding mootness where legislature repealed offensive legislation and its prior conduct showed that it would not likely reenact the legislation).

The actions taken by Parma have also completely and irrevocably eradicated the effects of the challenged violation, and there is, thus, no issue left for this Court to resolve. "Where intervening legislation has settled a controversy involving only injunctive or declaratory relief, the controversy has become moot." In re Bunker Ltd. Partnership, 820 F.2d 308, 311 (9th Cir. 1987). Parma no longer makes hiring decisions — for any position — using eligibility lists that were prepared when either the residency or move-in requirements were in place. Thus, the continuing discriminatory effect of the residency requirement, or of eligibility lists which were limited to Parma residents, has been eliminated, and, in fact, was eliminated at least by 1996 if not by 1990, and a "continuing violation" theory is not available to the NAACP. To the extent there are additional lingering effects of the earlier residency requirement, those effects are mooted both by the recruitment efforts that Parma directs toward non-residents, as evidenced by its advertisements in *The Plain Dealer, The Sun,* and *The Call & Post,* and its promotions at local colleges, and by its proactive housing measures. That the NAACP would like Parma to advertise in a different medium — without even demonstrating that it will reach more potential applicants — or include an express statement in its advertising indicating its desire to hire

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has been the settled practice' to accept [a defendant's] representations in determining whether a case presents a live controversy") (quoting Defunis at 317).

minorities, does not serve to maintain a case or controversy. Where the challenged action has stopped and remedial steps have been put in place to eliminate its effects, the controversy is dead. See Spangler, 832 F.2d at 297. If a plaintiff could breathe life into any case in which the challenged statute has been repealed and substantial steps already undertaken to remedy the lingering effects of that statute simply by conjuring up additional forms of relief — whose potential for success beyond that afforded by the relief already provided is purely speculative — plaintiffs could keep cases alive indefinitely. The case or controversy requirement of Article III of the United States Constitution is not that malleable.

United States v. City of Warren, 759 F. Supp. 355, 365 (E.D. Mich. 1991), upon which the NAACP relies, does not counsel otherwise. There, the district court concluded, in an action involving a challenge to a residency requirement, that the case was not moot even though the city had taken several remedial steps to correct its effects (including, inter alia, elimination of the residency requirement and discontinuation of lists developed while the old residency requirement was in effect, advertising in black newspapers and on local colleges, etc.). The Court premised its conclusion, however, on the fact that in that case both injunctive relief and monetary damages for the victims of Warren's discriminatory practices were being sought. Thus, because "Warren ha[d] never taken a single step to attempt to identify victims of that discriminatory practice, much less provide full, make-whole relief to them," the Court concluded that the city's acts did not "completely and irrevocably eradicate the effects of the alleged violations." Id. at 365-66.[17] Here, by contrast, money damages have not been sought; the NAACP seeks only injunctive relief. Yet, there is no meaningful injunction this Court could enter, and certainly none which could give the NAACP more than the City has given it voluntarily.

[17] In Warren, the district court ultimately identified only one victim of that city's discriminatory practices. As to that single victim the court concluded that an award of compensatory damages was appropriate. Those issues are not presented by this case.

Thus, unlike the situation in Warren, where money damages were available as a remedy for past wrongs, there is no additional substantial relief that this Court could provide which would remedy the injuries suffered by the members on whose behalf the NAACP brings this suit.[18]

If this were 1978, rather than 1998, a different result may well be warranted. A pre-employment residency requirement in an all-white community with a history of intolerance most certainly would be discriminatory. The status quo in 1998, however, does not mirror the status quo twenty years earlier.[19] In the intervening years since the late 1970's and early 1980's, Parma's laws and practices have changed to such a degree that the NAACP is left complaining about what was wrong in the past, rather than what is wrong today. In a case seeking prospective injunctive relief, such complaints have no vitality. Accordingly, this case is moot.

## IV. The NAACP's Standing

Even if the case as a whole were not moot, this case would not be justiciable for an additional reason: the NAACP lacks standing. Because none of the individuals identified as members of the organization have standing in their own right, the NAACP cannot have standing to sue on their behalf.

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[18] The injury the NAACP complains of relates only to the residency requirement and the fact that none of its identified members lived in Parma or desired to live in what they perceived to be a racially intolerant community. None of the identified "members," it would appear, would benefit from radio advertisements or additional statements in newspapers, the marginal additional benefit the NAACP claims it wants from this Court.

[19] Indeed, the status quo in 1990, when this action was filed, was not the same as that in 1978, or at any time between 1976 and 1988.

### A. General Principles

"The doctrine of standing serves both as a constitutional limitation on judicial power, deriving from the 'case or controversy' requirement in Article III . . . and as a self-imposed prudential doctrine intended to monitor judicial review of public acts." Lugo v. Miller, 640 F.2d 823, 827 (6th Cir. 1981). The standing inquiry requires the Court to determine whether a particular controversy "warrants [the] invocation of federal court jurisdiction and . . . justif[ies] exercise of the court's remedial powers" on behalf of a particular plaintiff. Warth v. Seldin, 422 U.S. 490, 498-99 (1975) (citation omitted).

Standing is dependent upon a tripartite showing. First, the plaintiff must have suffered a "distinct and palpable injury," id. at 501, or, if injunctive relief is being sought — as is the case here — the plaintiff must show a likelihood of future injury. See City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983). The Supreme Court recently has elaborated on the type of showing required to establish the likelihood of future injury, stating that, "to maintain [a] claim for forward-looking relief," the plaintiff must show "'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 (1995) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). See also Brunet v. City of Columbus, 1 F.3d 390, 396 (6th Cir. 1993) ("If the injury is not actual, but imminent, the plaintiff cannot simply allege possible injury at some indefinite, future time.") (citing Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)). Significantly, "the fact of past injury, 'while presumably affording [the plaintiff] standing to claim damages . . . , does nothing to establish a real and immediate threat that he would again' suffer similar injury in the future.'" Id. at 210-11 (quoting Lyons, 461 U.S.

at 105).[20] Second, that injury must "bear[] a 'fairly traceable connection' to the challenged government action." Lugo, 640 F.2d at 827 (quoting Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72 (1978)). Third, it must be likely "that the injury will be redressed by a favorable decision, by which [it is meant] that the 'prospect of obtaining relief from the injury as a result of a favorable ruling' is not 'too speculative.'" Florida General Contractors v. City of Jacksonville, 508 U.S. 656, 663 (1993) (quoting Allen v. Wright, 468 U.S. 737, 752 (1984)). See also Steel Company v. Citizens for a Better Environment, ____U.S. ___, 118 S.Ct. 1003, 1017 n.5 (1998) (noting that the reason for the redressability requirement is to ensure that "a plaintiff 'personally would benefit in a tangible way from the court's intervention'") (citation omitted); Linton v. Tenn. Comm'r of Health and Environment, 973 F.2d 1311, 1316 (6th Cir. 1992). As the party invoking this Court's jurisdiction, the NAACP bears the burden of establishing standing. See Brunet, 1 F.3d at 396.

**B. Associational Standing**

The NAACP brings this action for injuries allegedly suffered — or likely to be suffered in the future — by its members, rather than for any injuries it has itself suffered. "Even in the absence of injury to itself, an association may have standing solely as the representative of its members." Warth v. Seldin, 422 U.S. 490, 511 (1975). "The possibility of such representational standing" does not, however, obviate the need for a "case or controversy" within the contemplation of Article III. Id. (citing Sierra Club v.Morton, 405 U.S. 727, 738 (1972)).

[20] Accordingly, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974). Rather, past exposure to illegal conduct merely serves as evidence of "whether there is a real and immediate threat of repeated injury." Id.

An association has standing to sue on behalf of its members only if the following three requirements have been satisfied: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit." Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977). See also National Rifle Association of America v. Magan, 132 F.2d 272, 294 (6th Cir. 1997); Greater Cincinnati Coalition for the Homeless v. City of Cincinnati, 56 F.3d 710, 717 (6th Cir. 1995).[21] The dispute in this case revolves around the first prong. Parma contends that the NAACP lacks standing because none of the individual members upon whom it purports to base this action has standing to sue in his or her own right. The Court agrees.

### C. Analysis

#### 1. The Distinction Between Past and Future Injuries for Purposes of Achieving Standing to Obtain Injunctive Relief

The first step in determining standing in this case is to ascertain precisely what injury the putative members assert they have suffered. As the NAACP stresses, its claim is not that the putative members were denied any particular job. Rather, it is that they were denied the opportunity to compete for jobs on an equal basis with whites. Thus, the NAACP is correct that it need not demonstrate that any of its putative members would actually have obtained or will obtain a job with the City of Parma to establish standing. See Adarand, 515 U.S. at 211 ("The aggrieved party 'need not allege that he would have obtained the benefit but for the barrier in order to establish standing.'") (quoting General

[21] Associational standing is sometimes characterized as an exception to the prudential bar against third-party standing. See, e.g., Erwin Chemerinsky, Federal Jurisdiction §2.3.4 at 82 n.152 (2d ed. 1994).

Contractors, 508 U.S. at 666). See also Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 281 (1978) (stating that, "even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing").

That it is unnecessary for the NAACP to show that one of its members would have gotten a job but for the alleged discriminatory practice does not mean that it is also unnecessary for the NAACP to demonstrate that injury was "imminent." The NAACP appears to believe that General Contractors dispensed with Lujan's imminence requirement in cases where injunctive relief is sought.[22] The case did no such thing.

General Contractors (and Bakke before it) simply liberalized the definition of an injury-in-fact. It did not eliminate it. To show an injury in fact in a case where the injury sought to be remedied is prospective (as in this case), a plaintiff still must show that he or she will be exposed to the allegedly injurious behavior. It is not enough, in other words, for a plaintiff to say the injurious practice exists; he or she must show that there is a substantial likelihood that it will be applied to him or her. If this was not clear from General Contractor's insistence that a plaintiff show that he or she is "able and ready" to bid on a project (or apply for a job), Adarand, which was decided after General Contractor and relied on it, makes it abundantly clear. In Adarand, the Court acknowledged that the plaintiff did not have to show that it would be the low bidder on a government contract in order to establish standing. 515 U.S.

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[22] For instance, in the NAACP's brief in support of its motion for summary judgment, it boldly states that "whether or not [its putative members] are not presently interested in employment, plaintiffs still have standing." (Pl. Br. in Supp. of Mot. for Summary Judgment at 24). In addition, in its brief in opposition to Parma's motion for summary judgment, the NAACP recites a narrow interpretation of the General Contractor rule: "Where an organization challenges institutional barriers that make it more difficult for members of one racial group to obtain a benefit than members of other groups [sic] an association has standing if one or more members has applied or sought to apply." (Pl. Br. in Opp. to Def. Mot. for Summary Judgment at 27).

at 211. The Court did not stop there, as the NAACP asks this Court to do, however. Instead, the Court queried whether "the future use of subcontractor compensation clauses will cause Adarand 'imminent' injury." Id. Thus, the Court held that, to establish standing, the plaintiff must "show[] that sometime in the relatively near future it will bid on another government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors." Id. To make this determination, the Court examined whether the plaintiff had bid on such contracts in the past, its intent to bid on them in the future, the likelihood that it would do so, and whether it would do so soon or farther into the future.[23]

Thus, the NAACP misses the point when it contends that whether any of its "members" intends to pursue a job in Parma in the near future is irrelevant. In fact, given that the remedy sought in this case is (and can only be) prospective and equitable in nature, that is the issue in this case. The standing of the individual members of the NAACP, and that of the NAACP, turns on precisely that question, since the only injury which this Court possibly could remedy in this case is a future injury; thus, contrary to the NAACP's view, the past injuries allegedly suffered by the individual members are largely irrelevant in this case. See Adarand, 515 U.S. at 210-11 ("[T]he fact of past injury, 'while presumably affording [the plaintiff] standing to claim damages . . . , does nothing to establish a real and immediate threat that he would again' suffer similar injury in the future.'") (quoting Lyons, 461 U.S. at 105). Accordingly, the injuries allegedly suffered by the individuals in this case in the past, to which the NAACP devotes virtually all of its briefing, would have afforded the "members" standing to assert

[23] The Adarand Court concluded that, "[b]ecause the evidence in this case indicates that the [agency] is likely to let contracts involving guardrail work that contain a subcontractor compensation clause at least once per year in Colorado, that Adarand is very likely to bid on each such contract, and that Adarand often must compete for such contracts against small disadvantaged businesses, we are satisfied that Adarand has standing to bring this lawsuit." 515 U.S. at 212 (emphasis added).

damages claims on their own behalf, but those past injuries, by themselves, do nothing to give the NAACP standing to assert claims for prospective equitable relief.[24] Id. An organization cannot bootstrap standing to pursue injunctive relief on behalf of its members on the fact that its members may have standing (or may have had standing in the past) to bring damages actions for past injuries. See Lyons, 461 U.S. at 105-06; Tucker v. Phyfer, 819 F.2d 1030, 1034 (11th Cir. 1987) (stating that a "live controversy concerning" a claim for which the plaintiff was seeking monetary damages "could not perform 'double duty' simultaneously providing [the plaintiff] with standing to prosecute both his claim for damages and his claim for injunctive relief"). In other words, "Article III's command that a plaintiff have standing to assert his claim clearly mandates more than that the plaintiff and the defendant have a dispute over something; it means that the plaintiff and the defendant must have a justiciable dispute over the specific claim the plaintiff asserts." Tucker, 819 F.2d at 1034. Consequently, at least one of the "members" must be able to show that he or she will be or presently is being denied the opportunity to obtain employment with the City of Parma "in the relatively near future." Adarand, 515 U.S. at 211.

The Court realizes that where, as here, a case has been aging for several years, it would be unduly harsh, unfair, and unrealistic to require that the individuals upon whose behalf an organization brings an action forgo all other opportunities in order to demonstrate genuine interest in a position. Nonetheless, the Court must have some assurance that there is a "case or controversy" for which federal intervention is warranted. At any rate, it is not necessary to impose such a draconian requirement, any more than General Contractors required that member contractors forgo bidding on other projects

[24] They do, of course, supply relevant evidence — depending on how recently efforts were made and their extent — on the issue of whether a member has a sincere interest in employment with Parma. See Adarand, 515 U.S. at 212; General Contractors, 508 U.S. at 656.

pending the outcome of the litigation. Thus, the fact that all of the members identified here are now employed in other jobs does not defeat the possibility that they may show an injury-in-fact.

At least one member must, however, show that he or she still seeks to work for Parma, and has taken some action toward that end (which need not entail the actual submission of an application) that shows a present intent, as distinct from a mere passive interest. To ascertain whether this intent exists, the Court, following General Contractors and Adarand, considers the members' most recent statements regarding their interest in obtaining employment with Parma, any past efforts made to obtain such employment, the recency of those efforts, and the extent of those efforts. As the Supreme Court stated in Lujan, so called "'some day' intentions — without any description of concrete plans, or indeed even any specification of when the some day will be — do not support a finding of the 'actual or imminent' injury that our cases require." Lujan, 504 U.S. at 564. Thus, vague, hedging expressions of a mere interest in obtaining a position with Parma at some point in the future are insufficient to create an injury-in-fact under Article III. See Id. (stating that the members' mere "'inten[t]'" to expose themselves to illegal conduct was "simply not enough").

**2. The Standing of Individual "Members" of the NAACP**

With these principles in mind, the Court proceeds to a determination of whether any of the individuals on whose behalf the NAACP brought this suit have standing, and, consequently, whether the NAACP has standing to assert claims on their behalf. The Court concludes that they do not, and that the NAACP thus lacks standing in this case.

**a. The Standing of Collins and McIntosh**

Two of the individuals identified by the NAACP as putative members are not really members of the NAACP at all and were not members at any time during this litigation. These individuals are

Arthur Collins and Maurice McIntosh. Collins has never been an NAACP member. Although McIntosh was a member at one point in the early 1980's, that one time membership is insufficient to make him a member of the NAACP for purposes of this litigation because it did not overlap at all with any period during which this litigation has been pending. Because these individuals do not satisfy even the minimal requirement of membership, the NAACP cannot premise its own standing on them.

**b. Ronda Crayton's Standing**

Ronda Crayton lacks standing for several reasons. First, she fails to assert an imminent injury as required under Lujan and its progeny. She did apply and take the requisite tests for a police officer position, which shows that she was interested in the position in the past. Further, she has stated that she is still interested in a position with the Parma Police Department and would accept such a position if it were offered to her. Since 1990, however, Crayton has not inquired about obtaining a position with the Parma Police or taken any other steps which would indicate a sincere desire or genuine interest in obtaining such a position. While there certainly may be a "case or controversy" regarding a damages action for her alleged past injury, the lack of any indication of an imminent injury is insufficient to create a case or controversy for purposes of injunctive relief and fails to show that she is "able and ready" to seek employment with Parma in the future. General Contractors, 508 U.S. at 666. See also Adarand, 515 U.S. at 211; Lujan, 504 U.S. at 555; Warth, 422 U.S. at 516.

Even assuming that Crayton were able to establish the existence of an imminent injury-in-fact, Crayton would clearly fail the causation and redressability elements of the standing inquiry. Her claim is premised solely on her failure of the agility portion of the police examination. She contends that her failure was a product of gender discrimination. Although the NAACP attempts to bootstrap a claim for race discrimination onto this explicit gender discrimination claim, the Court does not find that effort

credible, and views it as an attempt to create a justiciable case where none exists. Because the claim available to Crayton and that sought by the NAACP are not even the same, it is difficult to see a causal relationship between the alleged race discrimination by Parma in the recruitment of employees and the disparate impact its agility test has on females.

Further, the specific relief requested in this case — the elimination of the residency requirement (which has already been accomplished) and affirmative steps to increase recruitment of blacks — would not redress Crayton for the injury she allegedly suffered. Where the specific relief requested is not likely to — or, as in this case, simply will not — redress the injury asserted, the redressability prong has not been satisfied. See Steel Company, ____ U.S. at ____, 118 S.Ct. at 1019 ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."); See also Allen v. Wright, 468 U.S. 737, 754-55 (1984). The relief requested in this case focuses on residency requirements and hiring policies which disproportionately favor residents. That relief would not benefit Crayton, however. To redress Crayton's alleged injury, this Court would have to require Parma to create and implement an agility test which does not disproportionately fail females. Quite obviously, that relief is aimed at remedying the effects of gender discrimination, not race discrimination, and would not be achieved by an order invalidating residency requirements or resident-friendly policies. Thus, given the claims properly before this Court, it would be virtually impossible for this Court to remedy Crayton's claim.

Even under the NAACP's unusual theory that gender discrimination equals race discrimination in the law enforcement field, any incidental benefit to African-American females would be too attenuated. Such accidental relief cannot provide standing where it otherwise would not exist. Because the remedy is not aimed at redressing the race discrimination claim which serves as the predicate claim

for this case, but some other injury that is merely tangential to this case, the potential for redressability is purely speculative. Cf. Allen, 468 U.S. at 752 (holding that redressability requires that the "prospect of obtaining relief from the injury as a result of a favorable ruling" must not be "too speculative"). For any one of the above reasons, Clayton lacks standing and the NAACP cannot obtain standing on her behalf.

**c. Artis Tomblin's Standing**

Artis Tomblin also lacks standing. Like Crayton, there is no question that he expressed an interest in obtaining employment with Parma in and before 1990, and even as late as 1993. His interest, however, has waned over the years and lacks the concreteness necessary for a "case or controversy" as that term is contemplated within the meaning of Article III. In fact, to the extent Tomblin is interested at all in obtaining a job in Parma, it more closely resembles the passive "some day" interest rejected in Lujan and Warth, not the current, active interest held to be sufficient in General Contractors and Adarand.

Even if this Court were to credit Tomblin's contention that he did not follow through on any past opportunities because he thought it would be "futile" or "fruitless" to apply, his future plans, as expressed in his own words, are insufficient to generate an "imminent" injury under Lujan. "The fact that [Parma] may have been utilizing employment practices which had a discriminatory impact on blacks does not, in and of itself, mean for purposes of Title VII that every black who may [be] generally interested" in working for Parma is "thereby injured by [Parma's allegedly discriminatory] practices." Town of Harrison, 907 F.2d at 1416 (emphasis added). Rather, a "nonapplicant must show that he was [or will be] a potential victim of unlawful discrimination." Teamsters v. United States, 431 U.S. 324, 367 (1977). Tomblin has shown, at most, that he is "generally interested" in working for Parma, which

is the type of "abstract injury" which is insufficient to establish an injury-in-fact. See O'Shea, 414 U.S. at 494. Consequently, "the NAACP, as an association, cannot achieve standing[,] despite its longstanding and sincere interest in rectifying such perceived discrimination." Harrison, 907 F.2d at 1416 (citations omitted). See also General Contractors, 508 U.S. at 666; Adarand, 515 U.S. at 211; Lujan, 504 U.S. at 555; Warth, 422 U.S. at 516.

Moreover, the obstacle which Tomblin identifies as having prevented him from applying for a job, and which made such application fruitless, the residency requirement, has been eliminated as a condition of employment. Throughout his deposition, this is the one consideration that made him believe it would be futile to apply. That obstacle having been eliminated, and there being no other significant obstacle identified by Tomblin that would cause him to believe that it would be futile even to attempt to get a job with Parma, Tomblin has not made the requisite showing that would cause this Court to interpret his failure to take any affirmative steps toward employment with Parma in the last three to four years as anything other than a lack of genuine interest in the position. Cf. Harrison, 907 F.2d at 1416. Indeed, Tomblin does not state in his most recent deposition that he still thinks it would be fruitless to apply.

The elimination of the residency requirement serves to redress the very injury about which Tomblin complained, and it is difficult to comprehend how any additional relief (radio advertisements or affirmative statements on employment forms) would in any way redress that injury. Tomblin already is aware of how to obtain a job in Parma, and is aware that Parma advertises for positions in the *Plain Dealer* and other Cleveland metropolitan area newspapers, including one that has a primarily black

readership.[25] Thus, the redressability prong of the standing test has not been satisfied. See Spangler, 832 F.2d at 297 (holding that case was moot where "specific relief sought . . .no longer ha[d] sufficient utility to justify decision of th[e] case on the merits"). Cf. Steel Company, 1998 WL 88044 at 13 ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.").

**d. Rodney Blanton's Standing**

Like Tomblin and Crayton, Blanton lacks standing both because he has not shown that he is likely to suffer an imminent injury, and because the relief requested by the NAACP is not likely to redress his injuries. As already mentioned, Blanton was offered a job with the Cuyahoga County Sheriff's Office, he intends to accept that position, and he thus has no present concrete plans or desires to accept a position with the Parma Police Department. While Blanton may have or may have had a damages action against Parma for damages based on his allegation that similarly-situated (those that made false statements or had criminal backgrounds) white candidates were treated differently than he, that past injury does not generate a present case or controversy for purposes of an action for injunctive relief. See General Contractors, 508 U.S. at 666. See also Adarand, 515 U.S. at 211; Lujan, 504 U.S. at 555; Warth, 422 U.S. at 516.

Moreover, the specific relief requested in this action — elimination of the residency requirement and recruitment efforts designed to reach minorities — will do nothing to remedy the injury allegedly

[25] The only additional relief which the NAACP seeks in this case is (1) an order that Parma include a statement in its newspaper advertisements for jobs that states that "minorities are especially encouraged" to apply, which it included in its 1991 advertisements; and (2) an order requiring Parma to advertise on WZAK, where it advertises housing opportunities, which has a predominately black audience. In his 1997 deposition, however, Tomblin testified that he does not listen to WZAK. Thus, the specific relief requested does not appear designed to benefit Tomblin — or any of the putative members — in any material way.

suffered by Blanton. Since he applied for a police officer position and took the written and physical tests required to obtain that position, it is obvious that neither the residency requirement nor the recruitment practices about which the NAACP complains in this case served (or now serve) as obstacles or deterrents to his attempt to get a job with the City. It was only the City's refusal to retain Blanton on its eligibility lists, based on his polygraph responses, that limited his ability to compete for a law enforcement position. Thus, the link between the relief requested in this action and the injury suffered by Blanton is not simply speculative, it is nonexistent and so does not generate a justiciable case. See General Contractors, 508 U.S. at 663 (holding that it must be likely "that the injury will be redressed by a favorable decision, by which [it is meant] that the 'prospect of obtaining relief from the injury as a result of a favorable ruling' is not 'too speculative'") (citation omitted). "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." Steel Company, ___ U.S. at ___, 118 S.Ct. At 1019. See also Allen, 468 U.S. at 754-55. Accordingly, Blanton lacks standing in this case.

**e. Wendy Childress' Standing**

Like Crayton, Tomblin, and Blanton. Childress also has expressed no concrete plans to apply for or otherwise inquire about working for Parma. Unlike Crayton and Tomblin, Childress has never contacted or taken even the smallest step to determine what she would have to do to obtain employment with Parma. In her most recent deposition, moreover, Childress was quite clear that she has absolutely no interest in applying for employment with Parma, and she maintains this view even though she now is aware that the principal obstacle identified by her — the residency requirement — has been eliminated. The Court fails to comprehend how the NAACP can claim standing on the basis of an individual who has affirmatively stated that she has no intent — not even a "some day" intent— to

expose herself to illegal contact, and, thus, is not in danger of suffering an injury-in-fact. Accordingly, the NAACP cannot base its standing on Childress.[26]

### 3. The Failure of Tomblin, Childress and Blanton to Maintain Membership in the NAACP

There may be an even more basic barrier to the NAACP's attempt to premise its own standing on Tomblin, Childress and Blanton: the fact that none of those individuals has maintained membership in the NAACP throughout this litigation, or even a significant portion of it. Thus, the question arises whether an organization can premise standing on that of an individual who, for whatever reason, decides to discontinue his or her membership before the completion of litigation.

Parma briefly raises this point in its brief, but does not argue it at any length and cites no cases in support. In similarly pithy fashion, the NAACP responds simply by stating that standing is determined at the time the lawsuit is filed, and the fact of an individual's continued membership beyond that point is irrelevant, again with no support.[27] While the issue has not been squarely addressed by the Sixth Circuit, or by any court for that matter, it would seem that, in order for an organization to maintain organizational standing, the putative member upon whom it bases that standing must maintain his or

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[26] The same is true for Marlon Allen. Allen now lives and works in Atlanta, Georgia, and informed Parma's counsel that he has no interest of returning to the Cleveland area or working for Parma. Based on this representation, Parma did not depose him in its latest round of depositions. The NAACP does not dispute this, only makes perfunctory mention of him in its brief in opposition to Parma's motion for summary judgment, and bases its case for Allen's standing on the fact of alleged past discrimination. As was true for Crayton, Tomblin, and Childress, past injury is relevant only insofar as it indicates a present intent to seek employment with Parma. It is not sufficient in itself. Because Allen does not seek employment with Parma, and because he now lives and works in another state nearly seven hundred (700) miles away, any potential injury to Allen is purely speculative. Accordingly, he lacks standing as well.

[27] Blanton was not even a member of the NAACP when the action was filed. Because he was a member, albeit briefly so, during the cause of the litigation, the Court considered his individual standing and its possible effect on that of the NAACP.

her membership throughout at least a substantial portion of the litigation; erstwhile membership is not enough. Indeed, this is the only approach that is faithful to the rationale behind allowing associational standing in the first instance and that avoids the prohibition against third-party standing.

According to the Sixth Circuit, "[a] plaintiff must maintain standing throughout all stages of his litigation." City Communications, Inc. v. City of Detroit, 888 F.2d 1081, 1086 (6th Cir. 1989) (citations omitted). "Therefore, a plaintiff's standing is evaluated at the time it is challenged." Id. (citations omitted).[28]

Associational standing is an exception to the general bar against third-party standing. To allow an organization to assert claims on behalf of individuals who may once have been but are no longer members, or are only members fleetingly during the litigation, would be to allow an end-run around the bar against third-party standing. At the risk of mixing a metaphor, the exception would swallow the rule. The Court agrees that, "[a]lthough the NAACP Branches have formal memberships and collect

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[28] City Communications acknowledged its apparently inconsistent holding in an earlier case, Senter v. General Motors Corp., 532 F.2d 511, 520 (6th Cir. 1976), where the Court held that "[s]tanding is determined as of the date the suit is filed." The Sixth Circuit distinguished Senter, however, on the grounds that it "involved a Title VII class action and the appropriateness of the plaintiff as the named representative — specific issues inapplicable to this case." City Communications, 888 F.2d at 1086.

This case also is distinguishable from Senter. While this case also involves Title VII, it does not involve a class action. Moreover, Senter was concerned with the issue of whether a subsequent offer of a promotion by an employer, where the claim was that the employer had denied promotions for discriminatory reasons in the past, mooted the named representative's claim (and that of the class) for damages. In such a case, it is easy to see that the subsequent action does not erase the fact of past injury for which damages are the only appropriate remedy. Here, by contrast, the claim is for prospective injunctive relief, and, in such cases, where the challenged activity ceases or the defendant does what the plaintiff requests, the plaintiff has achieved all that is possible in the litigation, and there is, thus, no longer any reason for continued court intervention. See Steel Company, ___ U.S. at ___, 118 S.Ct. at 1019. In addition, the Court in Senter seemed to be concerned with the possibility that the employer might revoke the promotion or rescind the offer after the litigation concluded, a concern that, for a number of reasons, is not present here. See the Court's discussion of the "voluntary cessation" doctrine in Part III supra.

annual dues from the members, their efforts are on behalf of all black persons and they undertake to assist black persons claiming to be victims of discrimination whether or not they are formal members of the NAACP." Town of Harrison, 749 F. Supp. at 1332. That fact, however, does not mean that the NAACP can assert claims in federal court on the basis of any minority injured by discrimination, any more than an environmental group can assert claims on behalf of a non-member simply because they share the same laudable goal of protecting the environment. As the Supreme Court held in Sierra Club v. Morton, "[a] mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to [confer standing]," 405 U.S. 727, 739 (1972), even if it happens to be brought on behalf of an individual who would have standing to sue on her own behalf. See Health Research Group v. Kennedy, 82 F.R.D. 21, 25-26 (D.C.Cir. 1979).

Similarly, even though it is obvious that the NAACP shares with minorities in general — indeed, with all reasonable persons, regardless of race — a commitment and desire to end racial discrimination in general, that does not give it license to litigate claims on the basis of particular wrongs suffered by individual black persons, unless there is "something more" connecting that individual person with the NAACP than shared interests and a fleeting membership in the organization. Cf. Kennedy, 82 F.R.D. at 25. As Judge Sirica stated so well in Kennedy, "if the existence of cognizable injury, in and of itself, were sufficient to satisfy the Article III requirement, then any association or, for that matter, any individual, could gain standing simply by presenting the court with the case or controversy of any unrelated third party." Id. "Surely," observes Judge Sirica, "something more is required and must be found in the special relationship between an association and its members." Id. It certainly would stand to reason that a minority who has been the victim of discrimination is not likely

to object to the NAACP litigating on his behalf, and, indeed, their interests usually can be said, as a matter of common sense, to coincide. A shared interest, however, has never been the test for associational standing or, for that matter, for third party standing in general. See Sierra Club, 405 U.S. at 739. Indeed, if it were, the Court would have come to a much different conclusion in Sierra Club v. Morton.

Although actual and continuous membership (or its functional equivalent, see, e.g., Hunt) in an organization resembles the antediluvian formality of a wax seal in cases where it is obvious that the erstwhile member and the organization's interests are aligned, or at least are not divergent, it does provide some assurance — without the need for a time-consuming and detailed inquiry by the Court — that there is a sufficient nexus between the individual and the organization and an alignment of their particular interests in the litigation, such that the normal prohibition against raising the claims of third parties should be relaxed. See Kennedy, 82 F.R.D. at 26 ("So long as the courts insist on some sort of substantial nexus between the injured party and the organizational plaintiff — a nexus normally to be provided by actual membership or its functional equivalent measured in terms of control — it can reasonably be presumed that, in effect, it is the injured party who is himself seeking review.") (emphasis in original). The associational standing exception is premised on the assumption that the individual member has some degree of control and influence over the goals which the organization pursues on his or her behalf and the manner in which it pursues them, by voting or otherwise, and that the individual also does something to support that organization in its efforts, either financially (in the form of dues) or otherwise. See Hunt, 432 U.S. at 344-45 (noting the following as "indicia of membership": "[t]hey alone elect the members of the Commission; they alone may serve on the Commission; they alone finance its activities, including the costs of this lawsuit") (emphasis added); Kennedy, 82 F.R.D. at 25-

26. When an individual ceases to be a member of that organization — or its functional equivalent — he or she obviously ceases to retain any control over the organization or influence in its practices; moreover, because that individual no longer provides financial assistance (or its equivalent in volunteer labor), he or she does not have a stake in the enterprise and shows an indifference to its efforts, even if they might, in the abstract, share the same ultimate goals. Thus, the rationale for allowing associational standing in the first place disappears, and, in a case like this, the Court is presented with a case of third-party standing and nothing more.

To a certain extent, of course, the aggrieved individual serves merely as the vehicle through which the organization accomplishes its objectives. In other words, their continued involvement in the litigation is not necessary for the organization to achieve its goals — indeed, if the individual's participation were necessary, the organization would lack standing under the third prong of the test set forth in Hunt. Nonetheless, because membership indicates that the individual upon whose behalf the suit is being prosecuted has some level of control over the organization, it is fair to assume that that individual will maintain some influence over the course of the litigation as well, and that he can, to some degree at least, ensure that the litigation focuses on his injuries and will remedy them (or at least will not lose site of them). The Court realizes that, in this case, there is no evidence that any of the identified members object to the way in which this suit is being prosecuted. In fact, in his deposition, Tomblin made a point of emphasizing that his lapse in membership was not due to his disagreement with the organization or its policies.

As explained above, however, whether the individual and the organization share the same goals and ideals is not the test for associational standing. Formal or functional control is the test, and that is what is lacking here. The fact remains that there is no indication that any of the individuals identified

has any of the indicia of control which the functional test in Hunt requires. See Hunt, 432 at 345. This Court could not carve out an exception in this case without also emasculating the bar against third party standing and the rule announced by the Supreme Court in Hunt.[29] Thus, contrary to the NAACP's claim that membership at the inception of or sometime during the lawsuit is sufficient, it would seem that substantially continuous membership in the organization during the course of the litigation is necessary to ensure that the individual maintains some level of control over both the organization and the prosecution of the lawsuit which is, ostensibly at least, supposed to be on his behalf. The erstwhile memberships of Blanton, Tomblin and Childress, consequently, do not suffice.[30]

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[29] The NAACP has not argued or demonstrated that any of the other exceptions to the bar on third party standing applies, and, after consulting the relevant law, this Court could find none either.

[30] This case illustrates in a fairly concrete manner the importance of the control rationale and the necessity for at least some level of sustained membership in actions brought for injunctive relief by organizations where standing is based on that of individual members of the organization. Parma has characterized the NAACP's approach to this litigation as a "moving target" strategy. That is, whenever Parma voluntarily gives the NAACP the relief it seeks, Parma claims the NAACP adds additional claims and seeks additional relief to prolong the life of this lawsuit. These claims are further and further divorced from the injuries allegedly suffered by the individuals who suffered them and from the allegations and concerns which prompted this action. Presumably, if the NAACP were representing the interests of an individual who actually had a voice in the way the NAACP has approached this litigation (aside from Crayton, whose claim from the beginning lacked any relationship to the claims being made in this action), he or she would seek to focus the NAACP on his or her actual injuries, rather than on hypothetical injuries unrelated to those about which the individuals in this case initially complained. See, e.g., In re Air Crash Disaster at Detroit Metropolitan Airport, 737 F. Supp. 399, 403 (E.D. Mich. 1989) (stating that bar on third party standing "assures the court that the issues before it will be concrete and sharply presented") (citing Baker v. Carr, 369 U.S. 186, 204 (1962).

## V. Conclusion

Accordingly, because (1) all claims for relief properly asserted in this action are moot and (2) the NAACP lacks standing to bring claims on behalf of the named plaintiffs, Parma's motion for summary judgment is **GRANTED**. The NAACP's motion for summary judgment is **DENIED**, because the merits of this case are not justiciable. In addition, Parma's motions to strike all are **DENIED** as moot. This case is **DISMISSED**.

**IT IS SO ORDERED.**

**KATHLEEN McDONALD O'MALLEY**
**UNITED STATES DISTRICT JUDGE**

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | | |
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| **LSJ INVESTMENT COMPANY, INC.,** | : | **Case No. 1:96-CV-1527** |
| | : | |
| **Plaintiff,** | : | **JUDGE O'MALLEY** |
| | : | |
| **v.** | : | **MEMORANDUM & ORDER** |
| | : | |
| **WHITESTONE GAMES, INC., et al.,** | : | |
| | : | |
| **Defendants.** | : | |

Plaintiff LSJ Investment Company, Inc. ("LSJ") originally brought this action against nine defendants: (1) Whitestone Games, Inc. ("Whitestone"); (2) Whitestone director Hernan Saide; (3) Whitestone director Amy Habie; (4) Diehard Marketing Group, Inc.; (5) Diehard Game Club, Inc.; (6) O.L.D., Inc; (7) O.L.D. employee Morrie Friedman; (8) Diehard Game Club employee David Bergstein; and (9) Diehard Marketing Group employee Andrew Fell. The gist of LSJ's amended complaint is that defendants engaged in racketeering activity and fraud in connection with selling to LSJ a "turn-key" retail video game store. LSJ brings claims for (1) violation of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §1962(c) ("RICO"); (2) rescission of contract; (3) fraud; and (4) breach of contract.

The Court now rules on the following pending motions: (1) Habie's motions to dismiss the complaint (docket no. 36) and the amended complaint (docket no. 63) against her are both **DENIED AS MOOT**; (2) Whitestone's motion to dismiss counts I and III against it (docket no. 39) is **DENIED**; and (3) Saide's motion to dismiss the complaint against him (docket no. 40) is **DENIED**.

I. Habie's Motions.

On October 16, 1997, the Court granted LSJ's unopposed motion to voluntarily dismiss Habie as a defendant from this case. Accordingly, Habie's motions to dismiss the complaint and amended complaint are denied as moot.

II. Saide's Motion.

A. Allegations

Saide, who is a director of Whitestone, moves to dismiss the amended complaint against him for lack of personal jurisdiction.[1] The amended complaint alleges LSJ and Whitestone entered into an agreement whereby Whitestone would supply to LSJ a "turn-key" specialty retail video game store, in exchange for total payments to Whitestone, equipment suppliers, and others of no more than $150,000. Pursuant to the agreement, LSJ transferred about $69,000 to Whitestone, and $34,000 to various contractors for fixtures and equipment. Despite LSJ's payments, Whitestone has not supplied the promised video game store, and allegedly informed LSJ that its money "had been spent elsewhere and was gone and that the money was no longer available for LSJ's store." LSJ believes at least three other courts are entertaining litigation against Whitestone containing allegations similar to those made in this case.

The allegations regarding Saide, in particular, are as follows. Whitestone is a Florida corporation, and Saide is a Florida resident. Saide is the president of Whitestone, as well as one of its directors and shareholders. After LSJ applied to Whitestone for a license to open a "Diehard Game

[1] LSJ filed its amended complaint after Saide filed his motion to dismiss. Because the parties have indicated the motion is equally applicable to the amended complaint, the Court construes the motion as one to dismiss the amended complaint.

Club Super Store," Saide informed LSJ it would be awarded a license and that defendant O.L.D. would be the consultant for store construction. This communication was via a letter on Whitestone letterhead, and Saide signed the letter in his capacity as president of Whitestone. Later, Saide signed the agreement between Whitestone and LSJ, also in his capacity as Whitestone's president. Finally, LSJ alleges Saide is associated with O.L.D. and the other defendants, and he knew that: (1) these other defendants would make representations to LSJ; and (2) these representations would be and were fraudulent.

B. Applicable Law.

When a defendant challenges personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2), the plaintiff bears the burden of proving that jurisdiction is proper. Theunissen v. Matthews, 935 F.2d 1454, 1458 (6th Cir. 1991) (citing McNutt v. General Motors Acceptance Corp. of Indiana, 298 U.S. 178 (1936)). In meeting this burden, the plaintiff may not rest on his pleadings, but must, by affidavit or otherwise, set forth specific facts to support jurisdiction. Id.

It is within the Court's discretion to rule on a 12(b)(2) motion before trial, or to defer the hearing and determination of the motion until trial. Fed. R. Civ. P. 12(d); Theunissen, 935 F.2d at 1458. If the Court chooses to decide the motion before trial, it may do so in one of three ways. First, it may decide the motion on the basis of the written submissions alone. Under this option, the plaintiff need only make a prima facie showing that jurisdiction is proper. American Greetings Corp. v. Cohn, 839 F.2d 1164, 1168-69 (6th Cir. 1988); General Acquisition, Inc. v. Gencorp, Inc., 766 F. Supp. 1460, 1485 (S.D. Ohio 1990). This burden is relatively slight, and the court must consider the pleadings and affidavits in the light most favorable to the plaintiff. Armbruster v. Quinn, 711 F.2d 1332, 1335 (6th Cir. 1983); Welsh v. Gibbs, 631 F.2d 436, 438-39 (6th Cir. 1980), cert. denied, 450 U.S. 981 (1981). The court's other two options are to permit discovery in aid of the motion, or to hold an evidentiary

hearing on the merits of the motion. Theunissen, 935 F.2d at 1459. These alternatives are typically invoked when the written submissions create questions of credibility or raise disputed issues of fact. Welsh, supra. Under the latter two options, the plaintiff must prove jurisdiction by the higher standard of a preponderance of the evidence. Id; Serras v. First Tennessee Bank Nat. Ass'n, 875 F.2d 1212, 1214-15 (6th Cir. 1989).

In this case, the Court finds that the parties' written submissions have not raised issues of credibility or disputed issues of fact, and thus the Court can decide the motion on the submitted written materials alone.[2] At this stage of the case, therefore, LSJ need only make a prima facie showing that personal jurisdiction over Saide exists.

The constitutional limits pertaining to personal jurisdiction are set by the due process clause, which permits personal jurisdiction over an out-of-state party who possesses minimum contacts with the forum state, as long as the exercise of jurisdiction comports with "traditional notions of fair play and substantial justice." International Shoe, 326 U.S. at 316. The Sixth Circuit has adopted a three-part test for determining whether a given set of circumstances provides sufficient contacts between a nonresident defendant and Ohio to support personal jurisdiction:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Southern Machine Co. v. Mohasco Inds., Inc., 401 F.2d 374, 381 (6th Cir. 1968) (footnote omitted).

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[2] The parties have not submitted affidavits; instead, the Court is presented only with pleadings and motion briefs. It is in part for this reason that the Court denies Saide's motion to dismiss, as LSJ's allegations, when viewed in a light most favorable to LSJ and absent any controverting affidavits, make out a prima facie case of personal jurisdiction.

When the first two prongs of the Mohasco test are met, an inference arises that the third element, fairness, is also present. Mohasco, 401 F.2d at 381. The factors this Court must consider in determining the third prong of the test include: (1) whether the defendant should have foreseen the possibility of a foreign suit; (2) whether the defendant was a passive or active participant in the transaction in question; and (3) the extent of Ohio's interest in the controversy. Reliance Electric Co. v. Luecke, 695 F. Supp. 917, 921 (S.D. Ohio 1988).

Personal availment is the sine qua non of in personam jurisdiction, and a defendant who purposefully directs his acts toward the forum state "must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985); Theunissen, 935 F.2d 1460. If the defendant should reasonably have foreseen that his actions would have consequences in the forum state, then his acts were directed toward that state. Mohasco, 401 F.2d at 382; In-Flight Devices, 466 F.2d at 226.

C. Analysis.

Saide asserts that, based on LSJ's allegations, LSJ has not carried its burden of demonstrating a basis for personal jurisdiction over him. Saide notes that every one of LSJ's allegations regarding his role in the LSJ/Whitestone deal refers to acts he undertook in his capacity as president of Whitestone. Saide thus concludes that the Court does not have personal jurisdiction over him in his individual capacity, even though it may have personal jurisdiction over the company on whose behalf he acted.

The Sixth Circuit Court of Appeals has indicated that extending personal liability to corporate officers for acts taken on behalf of the corporation may conflict with the due process requirements of the fourteenth amendment. Weller v. Cromwell Oil Co., 504 F.2d 927, 931 (6th Cir. 1974). However, the United States Supreme Court has subsequently addressed the issue of corporate employee liability

in Calder v. Jones, 465 U.S. 783 (1984). In Calder, the California plaintiff sued the Florida defendants, a writer and editor for the National Enquirer, for libel. The defendants' only connection with California was that the article they wrote about the plaintiff was published in California. The Supreme Court found jurisdiction over the defendants was proper even though the article was written in Florida and was within the scope of their employment, because their "status as employees does not somehow insulate them from jurisdiction." Id. at 790.

In this case, LSJ alleges that Saide made several communications to LSJ in Ohio, relating to their common business. These communications were allegedly undertaken with the intent to cause harm to LSJ here in Ohio. Moreover, these actions were allegedly undertaken in furtherance of a conspiracy; LSJ implies that Saide's role in this conspiracy may have been in his individual capacity, as well as his official capacity. The Court must construe LSJ's allegations in a light most favorable to LSJ.

It is true that personal jurisdiction over a corporation by itself will not confer personal jurisdiction over employees, officers, or directors of the corporation. Weller, 504 F.2d at 931. Personal jurisdiction over a corporation does not ipso facto give personal jurisdiction over the corporation's officers. Lex Computer & Mgt. Corp. v. Eslinger & Pelton, P.C., 676 F. Supp. 399, 405 (D. N.H. 1987). But if the officers themselves also have sufficient contacts with the forum, personal jurisdiction may be appropriate — even if the individual made those contacts solely on behalf of the corporation. Thermothrift Industries, Inc. v. Mono-Therm Insulation Systems, Inc., 450 F. Supp. 398, 404 (W.D. Ky. 1978). LSJ alleges Saide had just as much contact with Ohio as the Calder defendants had with California.

"To assert personal jurisdiction over [a corporation's president], [LSJ] must demonstrate [the president's] direct personal involvement in some decision or action which is causally related to [the] alleged injury, apart from defendant's mere status as a corporate officer." Lex Computer, 676 F. Supp. at 405. In this case, LSJ has made out a prima facie case that Saide was personally involved in the decisions that led to LSJ's alleged injuries. Saide is a "primary participant[] in an alleged wrongdoing intentionally directed at [an Ohio] resident, and jurisdiction over [him] is proper on that basis." Calder, 465 U.S. at 790. Given his actions, Saide could reasonably expect to be haled into court in Ohio. Accordingly, the motion to dismiss for lack of personal jurisdiction is denied.[3]

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[3] It must be noted that the Court's denial of Saide's motion, based on LSJ's having made out a prima facie case of personal jurisdiction, is not a final determination on this issue. As the Sixth Circuit noted:

> A threshold determination that personal jurisdiction exists "does not relieve [the plaintiff] . . . at the trial of the case-in-chief from proving the facts upon which jurisdiction is based by a preponderance of the evidence." United States v. Montreal Trust Co., 358 F.2d 239, 242 n.4 (2d Cir.), cert. denied, 384 U.S. 919, 86 S.Ct. 1366, 16 L.Ed.2d 440, reh'g denied, 384 U.S. 982, 86 S.Ct. 1858, 16 L.Ed.2d 693 (1966). Moreover, a pretrial ruling denying a 12(b)(2) motion to dismiss "does not purport to settle any disputed factual issues germane to the underlying substantive claim. What is settled is the court's power to exercise personal jurisdiction over a defendant, nothing more." Val Leasing, Inc. v. Hutson, 674 F. Supp. 53, 55 (D. Mass. 1987). As the Supreme Court has said in McNutt, the party asserting jurisdiction "must carry throughout the litigation the burden of showing that he is properly in court." McNutt, 298 U.S. at 189, 56 S.Ct. at 785.

Serras, 875 F.2d at 1214-15. Based on the relatively scant record in this case going to personal jurisdiction, the Court concludes it would be inappropriate to dismiss Saide from this case at this time.

III. Whitestone's Motion.

Whitestone moves to dismiss the RICO count contained in LSJ's amended complaint, for failure to state a claim upon which relief can be granted.[4] Specifically, Whitestone asserts LSJ has not adequately pleaded the elements of a RICO claim. The Court finds this motion is not well-taken.

In order to state a RICO claim, a plaintiff must allege that: (1) a person (2) participated in the conduct (3) of an enterprise (4) through a pattern (5) of racketeering activity. Central Distributors of Beer, Inc. v. Conn, 5 F.3d 181, 183 (6th Cir. 1993), cert. denied, 512 U.S. 1207 (1994). Whitestone asserts LSJ does not adequately allege the existence of a continuing enterprise. The bases for this assertion are that: (1) LSJ alleges the defendants "were" associated, not "are" associated, so LSJ does not allege the existence of a going concern; and (2) LSJ does not sufficiently allege a threat of continuing activity.

The Court finds LSJ's allegations sufficient to allege the existence of an enterprise, and will not grant Whitestone's motion on this basis. LSJ's use of the past tense in its complaint is not a pleading failure upon which the Court will base dismissal. Further, the Court finds LSJ has alleged "predicates [that] are a regular way of conducting defendant[s'] ongoing legitimate business . . . or of conducting or participating in an ongoing and legitimate 'RICO enterprise.'" Vild v. Visconsi, 956 F.2d 560, 569 (6th Cir. 1992), cert. denied, 506 U.S. 832 (1992) (citation omitted). Whitestone's argument that racketeering, if any, only occurred during the seven months between the time LSJ answered the advertisement and the time it demanded its money back, is unavailing. LSJ sufficiently alleges a "continuing activity." Accordingly, Whitestone's motion to dismiss is also denied. It is denied,

[4] Originally, Whitestone moved to dismiss LSJ's fraud claim for lack of specificity, as required by Rule 9(b). Whitestone concedes, however, that LSJ has adequately pleaded its fraud claim in the amended complaint.

however, without prejudice to a reconsideration of this issue in the context of a well developed and well supported motion for summary judgment, if appropriate.

**IT IS SO ORDERED.**

**KATHLEEN McDONALD O'MALLEY**
**UNITED STATES DISTRICT JUDGE**

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | | |
|---|---|---|
| **CRAIG BLAKE, et al.,** | : | **Case No. 1:96-CV-2337** |
| | : | |
| **Plaintiffs,** | : | **JUDGE O'MALLEY** |
| | : | |
| **v.** | : | **OPINION & ORDER** |
| | : | |
| **FRED WRIGHT, et al.,** | : | |
| | : | |
| **Defendants.** | : | |

This action is brought against the City of Independence ("City") and the City's ex-Chief of Police, Fred Wright, by eight City police officers and five of their spouses. Plaintiffs assert Chief Wright and the City violated their constitutional rights by wiretapping their private telephone conversations over police department office telephone lines. Currently pending are the following motions: (1) defendants' motion to strike certain appendices to the complaint and to place certain documents under seal (docket no. 3); (2) defendants' motion for judgment on the pleadings (docket no. 8); and (3) Wright's motion for a more definite statement, or to dismiss (docket no. 9). For the reasons stated below, the motion to strike is **DENIED**, the motion to place documents under seal is **DENIED**, the motion for judgment on the pleadings is **DENIED**, the motion for more definite statement is **DENIED AS MOOT**, and the motion to dismiss is **DENIED**.

I. Wright's Motion for More Definite Statement

Chief Wright notes that nowhere in the complaint do plaintiffs state explicitly whether they are suing him in his individual capacity. Wright asks that the Court order plaintiffs to state more definitely whether they sue him in his official capacity only or in his individual capacity as well, so that he can answer the complaint appropriately. In response, plaintiffs write that they "hereby definitively state that they are seeking relief from Chief Wright personally for damages due as a result of his civil rights violations . . . and illegal wire taps." Brief in Opposition at 1 (emphasis in original). Plaintiffs also note that, although they did not use the word "individually" in their complaint, the nature of the relief they requested against Wright and the arguments they made in their briefs give a clear signal that they are suing Wright in his individual capacity.

The Sixth Circuit has held that "plaintiffs seeking damages under §1983 [must] set forth clearly in their pleading that they are suing the state defendants in their individual capacity for damages, not simply in their capacity as state officials." Wells v. Brown, 891 F.2d 591, 592 (6th Cir. 1989) (emphasis added). In Lovelace v. O'Hara, 985 F.2d 847 (6th Cir. 1993), the Sixth Circuit Court of Appeals adopted the position of the dissent in Hill v. Shelander, 924 F.2d 1370 (7th Cir. 1991), which stated:

> where a complaint alleges that the conduct of a public official acting under color of state law gives rise to liability under Section 1983, we will ordinarily assume that he has been sued in his official capacity and only in that capacity . . . . If a plaintiff intends to sue public officials in their individual capacities or in both their official and individual capacities, he should expressly state so in the complaint.

Hill. 924 F.2d at 1379 (Coffey, J., dissenting) (quoting Kolar v. Sangaman County of the State of Illinois, 756 F.2d 564, 568-69 (7th Cir. 1985)) (emphasis added by Judge Coffey).

In this case, it is arguable whether plaintiffs alleged clearly in their complaint that they are suing Wright in his individual capacity. However, plaintiffs have stated explicitly in their briefs that they are suing Wright in his individual capacity, and Wright (assuming they were) has already moved to dismiss the individual capacity claims on the basis of qualified immunity. Thus, there is no question that Wright has received actual and timely notice that he is being sued in his individual capacity, and Wright has not suffered any prejudice from any supposed failure of the plaintiffs to make clear the exact nature of the claims they assert. As did Wright himself, the Court reads plaintiffs' complaint as suing Wright in his individual and official capacities; accordingly, the motion for more definite statement is denied as moot.[1]

The Court addresses below, in section III.B of this opinion, Wright's arguments that, to the extent plaintiffs sued him in his individual capacity, those claims should be dismissed because he is qualifiedly immune.

II. Motion to Strike and to Place Documents Under Seal

Appended to plaintiffs' complaint, as exhibits, are three memoranda received by City Mayor Greg Kurtz and labeled "confidential." Two of the memoranda are written by Jeff Caldwell, a part-time deputy; the other memorandum is written by Lieutenants Dale Christ and John Nicastro. The memoranda discuss: (1) Chief Wright's decision to tape all communications made using police department telephone lines and radio bands; (2) the implementation of that decision; (3) complaints by police officers upon learning their "private" telephone calls had been intercepted; and (4) the morale problems Chief Wright's decisions caused.

[1] To the extent that the Court should "ordinarily assume that [Wright] has been sued in his official capacity and only in that capacity," Hill. 924 F.2d at 1379 (Coffey, J., dissenting), the Court finds that this case is not "ordinary" because plaintiffs immediately made clear, and Wright himself assumed, that he was being sued in both his official and individual capacities.

Defendants ask the Court to strike these memoranda pursuant to Fed. R. Civ. P. 12(f), and further ask the Court to require all pleadings to be placed under seal. Rule 12(f) states that the Court "may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." After reading each of the memoranda, however, the Court concludes that these documents contain no such material.

Defendants assert, in somewhat conclusory fashion, that the material discussed in the memoranda is redundant and impertinent and immaterial and scandalous. Although the defendants may find the information contained in the memoranda troublesome, or believe it to be inaccurate, it is certainly information that is: (1) not merely repetitive of the allegations contained in the complaint; (2) not disrespectful to the parties or the Court; (3) material to the claims and defenses raised in the lawsuit; and (4) not needlessly defamatory, insulting, or sensational. Moreover, while it may have been unnecessary for plaintiffs to attach these materials to their complaint to adequately state a claim, there is nothing in the Civil Rules that prohibits plaintiffs from attaching them — as long as the documents are not subject to the provisions of Rule 12(f). See Fed. R. Civ. P. 10(c) (noting, to the contrary, that "a copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes"). As such, the Court declines to strike the memoranda from the plaintiffs' complaint.

Further, the Court finds no valid basis to place any of the pleadings, or any other documents filed with the Court,[2] under seal. The "First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal." Richmond Newspapers, Inc. v.

[2] Some or all of the parties are apparently laboring under the common misconception that the pending motions and responsive briefs are "pleadings." These documents are not pleadings. See Fed. R. Civ. P. 7(a, b) (defining "pleadings" and "motions and other papers"). The court declines to place the pleadings or any of the other documents discussed by the parties under seal.

Virginia, 448 U.S. 555, 599 (1980). This right of access to trials includes the "general right to inspect and copy public records and documents, including judicial records and documents." Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978) (footnote omitted). There exists a "strong presumption in favor of openness" to the public of court documents, for a number of compelling policy reasons. Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1179 (6th Cir.1983), cert. denied, 465 U.S. 1100 (1984). Thus, "[j]udicial proceedings are not closed whenever the details are titillating, and open only when the facts are so boring that no one other than the parties cares about them." Matter of Grand Jury Proceedings: Krynicki, 983 F.2d 74, 78 (7th Cir. 1992).

Defendants argue that the memoranda and the motions discussing them should be placed under seal because the memoranda are "confidential internal investigatory memoranda of the Independence Police Department which identify by name innocent and uncharged individuals." This description makes it sound as though the memoranda discuss a criminal investigation and mention the names of victims, informants, witnesses, or uncharged suspects. Simply, the memoranda are not of this ilk. Rather, the memoranda are directed to the Mayor to inform him of serious morale problems in the City's police department. The first Caldwell memorandum does mention in passing that Caldwell had warned Chief Wright that Caldwell believed taping of the police officers' telephone conversations might be illegal. But this point is made to the Mayor only to highlight Caldwell's feeling that Chief Wright did not care what Caldwell thought, or what his police force thought of him. Indeed, in his second memorandum, Caldwell makes it clear that he and other police officers were concerned with whether Chief Wright should continue to act as Chief, given his perceived intrusion into the officers' personal lives. Nowhere does the suggestion appear that any entity is undertaking a criminal investigation.

There is also evidence that some or all of the memoranda were "passed around" indiscriminately to City police officers as a matter of shared concern. Finally, defendants admit that the Mayor discussed much of the subject matter of the memoranda with the media. These facts make it clear that the memoranda are not "confidential law enforcement investigatory records" or documents discussing "confidential matters of the employer," as those terms are used in the sources cited by plaintiffs.

Defendants have not provided the Court with any overriding reason to ignore the strong presumption that the documents filed in this case should be available for public inspection. Accordingly, the Court declines to place any of the documents so far filed in this case under seal.

III. Motions to Dismiss and for Judgment on the Pleadings

Plaintiffs have brought three claims against defendants: (1) infringement of their Fourth Amendment right to be free of unreasonable searches, in violation of 42 U.S.C. §1983; (2) violation of the Federal Wiretap Act, 18 U.S.C. §2510 et seq.; and (3) violation of the Ohio Wiretap Statute, Ohio Rev. Code §2933.52. Both defendants have moved for judgment on the pleadings as to all claims. In addition, Chief Wright moves for dismissal of the claims against him in his individual capacity, on the basis of qualified immunity.

A. Judgment on the Pleadings

Both the City and Chief Wright move for judgment on the pleadings, pursuant to Fed. R. Civ. P. 12(c). "In considering such a motion, the court must accept all the factual allegations of the complaint as true." Paskvan v. City of Cleveland Civil Service Com'n, 946 F.2d 1233, 1235 (1991) (citing Beal v. Missouri Pac. R.R. Corp., 312 U.S. 45, 51 (1941)). Taking the plaintiff's well-pleaded factual allegations as true, "if it appears beyond doubt that the plaintiff can prove no set of facts in support of

its claims that would entitle it to relief, then . . . dismissal is proper." Forest v. United States Postal Serv., 97 F.3d 137, 139 (6th Cir.1996). The "complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." In re DeLorean Motor Co., 991 F.2d 1236, 1240 (6th Cir.1993).

Regarding plaintiffs §1983 claim, defendants assert plaintiffs cannot prevail because, as a matter of law, they cannot show any search conducted by defendants was "unreasonable." The parties agree that, to succeed under §1983 based upon a Fourth Amendment violation, plaintiffs must show: (1) they had "an actual (subjective) expectation of privacy;" and (2) "the expectation [is] one that society is prepared to recognize as 'reasonable.'" United States v. Bailey, 628 F.2d 938, 941 (quoting Katz v. United States, 398 U.S. 347, 361 (1967) (Harlan, J., concurring)).

Defendants assert plaintiffs cannot show, as a matter of law, that they had a reasonable expectation of privacy in the telephone calls they made or received using the City's police department telephones, for several reasons. First, defendants argue that police officers generally have reduced expectations of privacy while at work by virtue of their membership in the police force. Defendants further argue that, because police departments commonly have systems that record telephone lines, the plaintiffs in this case could not reasonably expect their conversations over the City police department telephone lines to be private. Finally, defendants argue that Ohio law explicitly allows a police department to "intercept wire communications coming into and going out of [its] communications system" under certain circumstances, Ohio Rev. Code. §2933.52(B)(8), so the plaintiffs could not reasonably expect their telephone lines to be untapped.

These arguments are unavailing for the simple reason that, at this juncture, the Court must accept as true plaintiffs' allegation that "Chief Wright approved and followed a department policy that permitted the officers to use the non-emergency [telephone] lines for personal calls," and he gave the plaintiffs reason to believe their telephone calls "would remain private and confidential." Complaint at ¶7.[3] That Chief Wright is authorized to tap the police department telephone lines does not necessarily mean he can do so even after indicating to the plaintiffs that their personal calls on those lines would remain personal. Thus, even accepting defendants' assertions that, regarding police officers at work, society is prepared to recognize as reasonable only limited expectations of privacy, the Court cannot say as a matter of law that society would not recognize as reasonable an officer's expectation of privacy in a telephone conversation over a line that his own Chief declared was available, and presumably safe, for private, personal calls.

Indeed, defendants' invocation of Ohio Rev. Code §2933.52(B)(8) confirms this position. The statute authorizes

> A police . . . communications system to intercept wire communications coming into and going out of the communications system of a police department . . . if both of the following apply:
>
> (a) the [tapped] telephone [lines] . . . is limited to the exclusive use of the communication system for administrative purposes; and
>
> (b) at least one telephone [line] . . . that is not subject to interception is made available for public use at each police department.

These requirements ensure that, at a minimum, at least one telephone line is available for private, unmonitored use, protecting the privacy of both the public and the police department employees. Further, it is plain that police officers and visitors must know which single line is the one that is not

[3] That the memoranda attached to plaintiffs' complaint support this allegation — by virtue of describing the surprise, shock, and anger of the police force upon learning the telephone lines were tapped — reinforces the Court's determination that Wright's motion to strike is not well-taken.

tapped — otherwise, the requirements of §2933.52(B)(8)(a & b) are meaningless. For example, maintaining one untapped, private telephone line, but not telling calers which of several telephone lines is the one not tapped, does not comport with the clear intent of the statute. Thus, the Court rejects defendants' suggestion that merely keeping one untapped telephone line available, after having declared a number of such lines so available and then changing that policy unannounced, satisfies the requirements of the Ohio statute and makes plaintiffs' expectations unreasonable as a matter of law.

It may be that, as the facts are developed in this case, defendants can show beyond dispute that no promises (express or implied) were made regarding the sanctity of one or more of the telephone lines and that plaintiffs' expectations of privacy were unreasonable as a matter of law. Cf. PBA Local No. 38 v. Woodbridge Police Dept., 832 F. Supp. 808, 818-19 (D. N.J. 1983) (granting summary judgment on certain claims, because plaintiff police officers had no reasonable expectation of privacy in using "beeping" telephone lines, while denying summary judgment on other claims, because plaintiffs did have reasonable expectation of privacy in using other telephone lines). Accepting the allegations as true, however, as is required pursuant to defendants' Rule 12(c) motion, the Court cannot conclude that plaintiffs can prove no set of facts in support of their §1983 claim that would entitle them to relief. Accordingly, judgment on the pleadings as to plaintiffs' §1983 claim is denied.

Turning to plaintiffs' Federal Wiretap Act claim, defendants give two principle reasons why plaintiffs cannot prevail as a matter of law. First, defendants assert they have a complete defense under the statute: they cannot be held liable "when the interception was done in good faith reliance on a statutory authorization." 18 U.S.C. §2520(d).[4] The statute defendants rely upon, however, is Ohio Rev.

[4] To the extent plaintiffs assert the "good faith" language of this provision is tantamount to a statutory qualified immunity, the result is the same. See the Court's qualified immunity analysis, below.

Code §2933.52(B)(8); as noted above, the Court finds there is a substantial question whether the statute authorized all aspects of Wright's alleged actions. Further, there is a question of fact whether any reliance by Wright was in good faith, and plaintiffs have alleged it was not.[5]

Second, defendants contend they fall within the Federal Wiretap Act's "telephone extension exemption," which excludes from the definition of "electronic device" any equipment used "by an investigative or law enforcement officer during the course of his duties." 18 U.S.C. §2510(5)(a)(ii). Once again, this argument may prove well taken in the context of a summary judgment motion, but plaintiffs have alleged that Wright's actions were not "necessary for the normal course of operations at the [City] police department." Complaint at ¶29. It is unclear at this juncture whether Chief Wright intercepted plaintiffs' telephone conversations in the course of pursuing his legitimate duties, or, instead, in pursuit of illegitimate or personal purposes. Because the Court must accept plaintiffs' allegations as true, the "telephone extension exemption" does not allow judgment under Rule 12(c).

To state a valid civil claim under the Federal Wiretap Act, plaintiffs must allege that the "individual defendants (1) willfully or intentionally, (2) intercepted or endeavored to intercept, (3) a wire, oral or electronic communication without the callers' consent." In re State Police Litigation, 888 F. Supp. 1235, 1262 (D. Conn. 1995), appeal dismissed, 88 F.3d 111 (2nd Cir. 1996). Plaintiffs have made the required allegations, and the Court cannot conclude that plaintiffs can prove no set of facts in support of their Federal Wiretap Act claim that would entitle them to relief. Accordingly, judgment on the pleadings as to this claim is also denied.

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[5] Indeed, plaintiffs specifically allege that Wright was informed, on at least one and possibly more occasions, that his actions were not consistent with the requirements of the Federal Wiretap Act, but that Wright chose to ignore these warnings.

Finally, defendants restate their argument that they cannot be held liable under the Ohio Wiretap Statute because §2933.52(B)(8) authorized their actions. As noted above, the Court cannot say as a matter of law that merely keeping one untapped telephone line available, after having declared a number of such lines available and then changing that policy unannounced, satisfies the requirements of the Ohio statute. Because this is what plaintiffs allege defendants did, and because the Court must accept those allegations as true, judgment on the pleadings as to plaintiffs' Ohio Wiretap Statute claim is also denied.[6]

B. Qualified Immunity

Chief Wright moves for dismissal of the claims against him in his individual capacity, on the basis of qualified immunity. Qualified or "good faith" immunity is an affirmative defense that is available to government officials performing discretionary functions. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982); Anderson v. Creighton, 483 U.S. 635, 639 (1987). "Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." Anderson, 483 U.S. at 639 (citing Harlow, 457 U.S. at 818-19); Yates v. City of Cleveland, 941 F.2d 444, 446 (6th Cir. 1991). In ruling on a motion for judgment on the pleadings, a district court will consider the allegations put forth by the plaintiff, and "unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." Mitchell, 472 U.S. at 526.

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[6] In their motion for judgment on the pleadings, defendants also argue that punitive damages are unavailable against the City. Because plaintiffs respond that they seek punitive damages only against Chief Wright in his individual capacity, the Court finds this issue moot.

The United States Supreme Court has elaborated on what is meant by "clearly established:"

> the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 640 (citations omitted). The Sixth Circuit Court of Appeals adds that, in inquiring whether a constitutional right is clearly established, this Court is to "look first to decisions of the Supreme Court, then to decisions of [the Sixth Circuit Court of Appeals] and other courts within [the Sixth Circuit,] and finally to decisions of other circuits." Daugherty v. Campbell, 935 F.2d 780, 784 (6th Cir. 1991), cert. denied, 502 U.S. 1060 (1992).

The ultimate burden of proof is on the plaintiff to show the defendants are not entitled to qualified immunity. Wegener v. Covington, 933 F.2d 390, 392 (6th Cir. 1991). Defendants bear the initial burden of coming forward with facts to suggest they were acting within the scope of their discretionary authority during the incident in question. Id. Thereafter, the burden shifts to the plaintiff to establish that the defendants' conduct violated a right so clearly established that any official in defendants' positions would have clearly understood that they were under an affirmative duty to refrain from such conduct. Id. However,

> summary judgment would not be appropriate if there is a factual dispute (i.e., a genuine issue of material fact) involving an issue on which the question of immunity turns, such that it cannot be determined before trial whether the defendant did acts that violate clearly established rights. . . . Summary judgment also should be denied if the undisputed facts show that the defendant's conduct did indeed violate clearly established rights. In either event, the case will then proceed to trial, unless the defendant takes a successful interlocutory appeal on the issue of qualified immunity.

Poe v. Haydon, 853 F.2d 418, 426 (6th Cir. 1988), cert denied, 488 U.S. 1007 (1989) (citations omitted). Accord, Brandenburg v. Cureton, 882 F.2d 211, 215-16 (6th Cir. 1989).

Looking to the state of the law as it existed in August of 1996, when Chief Wright took the actions complained of, the Supreme Court had stated long before that "the broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitate the application of the Fourth Amendment safeguards." United States v. United States District Court for the Eastern District of Michigan, Southern Division, 407 U.S. 297, 313 (1972) (citing Katz v. United States, 389 U.S. 347 (1967) (footnote omitted)). Similarly, the Sixth Circuit Court of Appeals had explicitly recognized the "constitutional right to privacy in wire communications." United States v. Jones, 542 F.2d 661, 670 (1976); see United States. v. Passarella, 788 F.2d 377, 379 (6th Cir. 1986) ("Katz protects a person's own conversational privacy from unjustifiable governmental intrusions"). Thus, it is fair to say that, at the time Chief Wright took his actions, a clearly established legal rule existed that he could not intercept private telephone communications without first obtaining a warrant, absent some exception to the warrant requirement.

Chief Wright makes two primary arguments that he did not violate this clearly established rule. First, he argues he did not intercept any telephone communications that the plaintiffs could reasonably expect were private. For the reasons noted above, the Court must reject this argument at this time. Plaintiffs allege Wright indicated to them that the telephone lines they were using were available for personal calls. This allegation, if true, could give the plaintiffs a reasonable expectation that their conversations on those telephone lines were private. The Court does not find it objectively reasonable for a police chief to believe it is legal to tell his officers their office telephone lines are private, and then tap those telephone lines without prior notice. Taking plaintiffs' allegations as true, Chief Wright is

not qualifiedly immune on the basis that the plaintiffs could not reasonably expect their conversations were private.

Chief Wright's second argument presents a somewhat closer question: he asserts that he relied in good faith upon statutory exceptions to the warrant requirement applicable to police department telephone lines. Specifically, Chief Wright notes that the Ohio Wiretap Statute allows interception of telephone communications into and out of a police department so long as (1) the telephone line is limited to use for administrative purposes and (2) at least one other telephone line is available for private conversations. Ohio Rev. Code §2933.52(B)(8).[7] Wright contends a reasonable officer could (and he did) believe in good faith that his actions were permitted because he met the criteria of the Ohio statute: (1) all of the telephone lines he tapped in the police station were, pursuant to written department policy, supposed to be used only for official purposes; and (2) he did not tap a pay telephone line, which remained available to the police officers for private conversations.

The Court rejects Wright's argument. At about the same time Chief Wright decided to tap the police department telephone lines, another Judge of this Court wrote that a "reasonable police chief would know that instituting a warrantless wiretap . . . is illegal." Lewis v. Village of Minerva, No. 5:94-CV-2508, slip op. at 29 (N.D. Ohio July 12, 1996) (Dowd, J.) (police chief tapped city hall telephone lines in order to intercept conversations of a police sergeant). Plaintiffs have alleged that Chief Wright permitted them to use the telephones for non-administrative purposes (private conversations); thus his contention that written police department policy proscribed private conversations on the tapped

[7] The Federal Wiretap Act, in turn, exempts a defendant from damages "when the interception was done in good faith reliance on a statutory authorization." 18 U.S.C. §2520(d). Thus, Chief Wright relies on the Ohio statute as providing the exception to the warrant requirements codified in the Federal Wiretap Act.

telephone lines is contrary to the allegations this Court must accept as true. It is not reasonable for a police chief to rely upon an exception to the warrant requirement when that exception itself contains requirements protecting police officers' ability to be free from unknown warrantless wiretapping. See In re State Police Litigation, 888 F. Supp. 1235, 1267 (D. Conn. 1995), appeal dismissed, 88 F.3d 111 (2nd Cir. 1996) ("[d]efendants . . . fail to establish that the limits of the law enforcement exception [to the wiretap warrant requirement] . . . were not clearly defined").[8]

Further, the Court notes that although the parties have focused their briefing on the question of qualified immunity with respect to Chief Wright's actions of tapping the telephone lines, plaintiffs have also alleged that Chief Wright "surreptitiously monitored them . . . through other electronic devices and equipment." Complaint at ¶16. With this allegation, plaintiffs are referring to one of the memoranda from Caldwell to Mayor Kurtz, where Caldwell suggests: (1) Chief Wright may have installed intercoms disguised as carbon monoxide detectors; (2) Chief Wright may have used these intercoms to eavesdrop on conversations the plaintiffs reasonably believed were private; and (3) Chief Wright may even have monitored the plaintiffs' conversations from his home, via telephone modem. These allegations may prove false, but the Court must accept them as true, and defendants do not argue that Chief Wright could have reasonably believed such actions were legal. Thus, the Court cannot say plaintiffs' allegations do not state a claim of a violation of clearly established law.

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[8] Chief Wright argues that, when he took his alleged actions, there existed no case law "on all fours," explicitly saying it was improper to tap internal police department telephones without the police officers' knowledge. Even assuming this is true in light of Lewis, the Supreme Court has cautioned that a Court should not hold "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." Anderson, 483 U.S. at 640 (emphasis added). Rather, qualified immunity attaches unless "in the light of pre-existing law the unlawfulness [is] apparent." Id.

In sum, based on the allegations contained in the complaint alone, it does not appear that Chief Wright's actions were objectively reasonable when assessed in light of the legal rules that were then clearly established. Accordingly, the motion to dismiss the individual capacity claims against Chief Wright based on qualified immunity is denied.

**IT IS SO ORDERED.**

**KATHLEEN McDONALD O'MALLEY**
**UNITED STATES DISTRICT JUDGE**

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

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| **GLYNN DOUGLAS,** | : | **Case No. 1:91-CV-1481** |
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| **Plaintiff,** | : | **JUDGE O'MALLEY** |
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| **v.** | : | **O R D E R** |
| | : | |
| **ARGO-TECH CORPORATION,** | : | |
| | : | |
| **Defendant.** | : | |

This action is brought by Glynn Douglas against his employer, Argo-Tech Corporation, for violations of the Fair Labor Standards Act and parallel state statutes. Douglas filed a motion for summary judgment (docket no. 28) and Argo-Tech filed a cross-motion for summary judgment (docket no. 31). This Court referred the case to Magistrate Judge Perelman for a Report and Recommendation, which the Magistrate Judge filed on September 27, 1994. The Magistrate Judge, in an 18 page report, recommended that: (1) Argo-Tech's motion be denied; and (2) Douglas's motion be granted to the extent that Douglas be allowed to recover overtime pay for two years; but that (3) Douglas's motion be denied to the extent that Douglas not be allowed to recover overtime pay for a third year, because Argo-Tech's violation was not willful. The Magistrate Judge did not make any explicit recommendation as to whether Douglas should receive, in addition to his two years of overtime pay, liquidated damages (as allowed under 29 U.S.C. §216(b)).

The parties each filed objections to the Magistrate Judge's recommended ruling. The Court has reviewed de novo the parties' cross motions for summary judgment, the Magistrate Judge's Report and Recommendation, and the parties' objections thereto. The Court finds that neither parties' objections are well-taken, and that the Magistrate Judge's recommended rulings are appropriate. Accordingly, the Court adopts the Magistrate Judge's Report and Recommendation as its own. Douglas's motion for summary judgment (docket no. 28) is **GRANTED IN PART**, as described below, and Argo-Tech's cross-motion for summary judgment (docket no. 31) is **DENIED**. In addition, Douglas's request for liquidated damages (no docket number) is **DENIED**. Finally, the parties are directed to submit briefs on the issue of attorney's fees, as described more fully at the end of this Order.

I.

The facts are set out in the Magistrate Judge's Report and Recommendation at pages 1-7, and need not be repeated here. The parties agree that the material facts are not in dispute.

The parties also agree that the Fair Labor Standards Act, 29 U.S.C. §201 et seq. ("FLSA"), generally requires employers to pay employees: (1) at least the minimum wage; and (2) one and one-half times their regular rate of pay for all hours worked in excess of 40 hours per week. 29 U.S.C. §§206, 207(a)(1). The FLSA also provides, however, that these minimum wage and overtime pay requirements do not apply to certain types of employees. 29 U.S.C. §213(a)(1). The pivotal question in this case is whether Douglas falls within the exemptions described in §213(a)(1), so that Argo-Tech is not obligated to pay Douglas overtime pay.

Whether an employee is exempted from the FLSA overtime provisions is addressed at 29 C.F.R. §541.2(a-e(1)), quoted at page 12 of the Magistrate Judge's Report and Recommendation. Under this regulation, an employer can show that an employee is exempt from the FLSA overtime pay requirements by satisfying a five prong test, commonly known as the "long test." The long test applies to employees who are paid "on a salary or fee basis at a rate of not less than $155 per week." Id. at §541.2(e)(1) (part of the fifth prong). There is also a "short test," described at 29 C.F.R. §541.2(e)(2), which is applicable to employees who are paid "on a salary or fee basis at a rate of not less than $250 per week." Id. at §541.2(e)(2). Essentially, an employee who is paid a weekly salary of $250 per week or more need only satisfy the first two prongs of the "long test" to be exempt from the FLSA overtime pay provisions. Vezina v. Jewish Community Ctr. of Metro. Detroit, No. 93-CV-74153, 1994 U.S. Dist. LEXIS 19024 at *9-*10 (E.D. Mich. Sept. 23, 1994). Under both the short and long tests, the employee must be paid "on a salary or fee basis," not an hourly basis, for the exemption to apply.

There is no question that Argo-Tech paid Douglas in excess of $250 per week, so the short test governs this dispute. Accordingly, Argo-Tech must show that: (1) it paid Douglas on a "salary or fee basis," not an hourly basis; (2) Douglas's primary job duties consisted of "nonmanual work directly related to management policies or general business operations of [Argo-Tech]" (prong one of the long test); and (3) Douglas's job duties required him to "customarily and regularly exercise[] discretion and independent judgment" (prong two of the long test). 29 C.F.R. §541.2(a)(1), (b), (e)(2). Argo-Tech must show that each of these three requirements are met to avoid a duty to pay Douglas a fifty percent premium for his overtime.

Douglas argues that Argo-Tech cannot meet the first or second of these three requirements. The Magistrate Judge agreed. Regarding the second requirement, the Magistrate Judge found:

> as a union official it was the plaintiff's obligation to represent union members in grievances against the company and to advocate the union's position during collective bargaining. As such, the plaintiff's work cannot be deemed to have been "directly related" to the management policies or general business operations of his employer . . . .

Report at 14 (emphasis added). Essentially, the Magistrate Judge ruled that because Douglas's fundamental job duty was to further the interests of union member employees and not Argo-Tech, Douglas's duties were not "directly related to [Argo-Tech's] management policies or general business operations."

Regarding the first requirement, the Magistrate Judge found that Douglas did not receive a salary from Argo-Tech:

> the appropriate provision of the collective bargaining agreement (Section 10.8) required the plaintiff to use a time clock to document his hours worked[,] and his compensation for any week in which he worked less or more than forty hours varied based upon the hours worked. Therefore, it cannot be said that he was regularly paid "a predetermined amount . . . without regard to the number of days or hours worked."

Report at 15 (quoting from 29 C.F.R. §541.118(a)).

Argo-Tech objects to these findings of the Magistrate Judge, largely restating the arguments it made initially in support of its motion for summary judgment. Regarding the second requirement, Argo-Tech argues that merely because Douglas's primary job duty was to further the interests of the union, not Argo-Tech, does not mean that Douglas's duties were not "directly related to [Argo-Tech's] management policies or general business operations." Argo-Tech notes that 29 C.F.R. §541.2(a)(1) distinguishes between manual and nonmanual labor, not between whether that labor most benefits the employer or the union member employees, and Douglas provided only nonmanual labor. Argo-Tech

insists that this labor, handling employee grievances as a union representative, did relate directly to the policies and operation of Argo-Tech. Argo-Tech adds that Douglas's role was highly analogous to a labor relations director, which is a "classic example[] of an exempt administrative employee." Argo-Tech's Objections at 8 (citing 29 C.F.R. §541.201(a)(2)(ii)).

As to the first requirement, Argo-Tech argues that, despite Douglas's weekly payment being tied to the hours he and other employees in his department worked, he was guaranteed a predetermined minimum weekly payment well in excess of $250 — he could never receive less than the equivalent of forty hour's worth of compensation. Argo-Tech insists that, even though Douglas was paid on an hourly basis, his guaranteed minimum weekly wage met the "salary" requirement of the short test.

Argo-Tech's objections are not trivial. It is not unreasonable to believe that Douglas's role of ensuring Argo-Tech's compliance with the collective bargaining agreement bore some relation to Argo-Tech's management policies and business operations. And there is case law supporting the proposition that an employee who is paid on an hourly basis is still "salaried," and thus exempt from the overtime pay requirements of the FLSA, if the employee is effectively guaranteed a minimum payment in excess of the FLSA cutoffs. E.g., Nairne v. Manzo, slip op., No. 86-0206 (E.D. Pa. Nov. 13, 1986) (available on LEXIS).

In the final analysis, however, the Court must reject Argo-Tech's objections. This rejection is based on the heavy burden Argo-Tech is required, but fails, to bear. The exemptions from the FLSA overtime pay provisions, outlined in 29 U.S.C. §213(a)(1), must be "narrowly construed against the employers seeking to assert them." Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960). Furthermore, application of the exemptions "is limited to those [circumstances] plainly and

unmistakenly within [the exemptions'] terms and spirit." Id. The burden is on the employer to show that all elements of the exemption are plainly and unmistakenly met. Idaho Sheet Metal Works, Inc. v. Wirtz, 383 U.S. 190, 209 (1966).

The evidence mustered by Argo-Tech — even when viewed in a light most favorable to Argo-Tech — does not permit a finding that Argo-Tech "plainly and unmistakenly" meets the short test exemption in this case. No fact finder could reasonably conclude that pursuant to the collective bargaining agreement, Douglas "plainly and unmistakenly" was to receive a guaranteed minimum weekly wage tantamount to a "salary."[1] The language of the collective bargaining agreement and the parties' actions make such a conclusion far less than plain. The mere fact that the CBA explicitly required Douglas to "clock in and out" weighs overridingly against a clear and unmistaken conclusion that Douglas received a salary.

Nor could a fact finder reasonably conclude that Douglas's job duties were "plainly and unmistakenly" related directly to Argo-Tech's own management policies or general business operations.[2] Douglas's role was to ensure Argo-Tech's actions did not harm union members. The CBA itself makes it clear that Douglas's loyalties were to the union, and his responsibilities were to protect the union employee's rights. That Douglas was paid by Argo-Tech to perform these duties on the union's behalf was simply a bargained-for benefit to the union, and does not transform Douglas's work to being in furtherance of Argo-Tech's policies. The company's and the union's interests and objectives

[1] It is worth noting that the parties could have made it quite clear in the collective bargaining agreement that Douglas's compensation was a "salary," if that was their intention. The parties did not do so.

[2] Here again, the Court observes (without relying on this observation) that the parties could have easily added a recitation to the collective bargaining agreement, stating that Douglas's duties were related to, and even in furtherance of, Argo-Tech's corporate policies and operations.

are simply so different that such a conclusion cannot be called obvious, as a matter of law.

In sum, the Court agrees with the Magistrate Judge that Argo-Tech has not carried its burden of proving that Douglas is exempt from the overtime pay provisions of the FLSA. Accordingly, Douglas's motion for summary judgment on that issue is **GRANTED**.

II.

The statute of limitations for violations of the FLSA is two years, unless the violation is willful, in which case it is three years. 29 U.S.C. §255(a). The Magistrate Judge found that "although the defendant's acts constituted a violation of the FLSA, there is no genuine issue of material fact indicating that such violation was committed willfully. As a result, the plaintiff [is] limited to recovering back pay for the period commencing two years prior to the filing of the instant case." Report at 18.

The plaintiff did not object to this part of the Magistrate Judge's report, with which this Court agrees. Accordingly, Douglas's motion for summary judgment on that issue is **DENIED**.

III.

Douglas objects to the Magistrate Judge's Report and Recommendation because it fails to state that he is entitled to an additional amount of liquidated damages, pursuant to 29 U.S.C. §216(b). This section of the FLSA states: "Any employer who violates the provisions of section[s] 206 or 207 of this title shall be liable to the employee . . . affected in the amount of their . . . unpaid overtime compensation . . . and an additional equal amount as liquidated damages." 29 U.S.C. §216(b) (emphasis added). However, "[t]he Court may, in its discretion, refuse to award liquidated damages 'if, and only if, the employer shows that he acted in good faith and that he had reasonable grounds for believing that

he was not violating the [FLSA].'" Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962, 967 (6th Cir. 1991) (quoting Marshall v. Brunner, 668 F.2d 748, 753 (3d Cir. 1982)) (emphasis in original).

As the Court has implied above, the undisputed evidence in this case shows that, indeed, Argo-Tech's failure to pay Douglas overtime pursuant to the FLSA was both reasonable and made in good faith. When the union negotiated the collective bargaining agreement with Argo-Tech, Douglas was one of the union negotiators. The provisions going to the way Douglas was to be compensated as an Argo-Tech employee, while not "plainly and unmistakenly" providing for a minimum weekly compensation, are still less than clear. Argo-Tech's belief that Douglas met the "salary" requirement of the short test was objectively reasonable. Furthermore, Argo-Tech's actions were undisputably taken in subjective good faith. From the very start, Argo-Tech indicated to Douglas and his union how it calculated Douglas's pay. There is no evidence that Argo-Tech believed its conduct was wrong, or suspected its position might be unjustified; rather, the evidence is to the contrary.

Argo-Tech's belief that Douglas met the second requirement of the short test was also objectively reasonable. Although the union and Argo-Tech's interests are diverse, they also share enough interests in common that it was objectively reasonable for Argo-Tech to believe Douglas's job duties were in some way related to Argo-Tech's management policies and general business operations. And the only record evidence is that Argo-Tech's position was taken in good faith. Accordingly, the Court overrules Douglas's objection that he is entitled to liquidated damages in this case.

IV.

Having found that Douglas is entitled to overtime pay for the period commencing two years prior to the filing of the instant case, one final issue becomes relevant: attorney's fees. When a plaintiff

prevails on a FLSA claim, the Court "shall, in addition to any judgment awarded to plaintiff . . . , allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. §216(b). An award of attorney's fees is mandatory. Fegley v. Higgins, 19 F.3d 1126, 1134 (6th Cir. 1994), cert. denied, 115 S.t. 203 (1994). Because "attorney fees are an integral part of the merits of FLSA cases and part of the relief sought therein[,] . . . a final determination as to the award of attorney fees is required as part of the final appealable judgment." Shelton v Ervin, 830 F.2d 182, 184 (11th Cir. 1987).

In order to settle this final issue, Douglas shall submit to the Court, within 10 days of the date of this Order, a brief of no more than 10 pages setting out his claim for attorney's fees. Within 20 days of the date of this Order, Argo-Tech shall file a brief in response, with the same page limitation.[3] The parties are directed to attend a status conference with the Court on Tuesday, July 18, 1995 at 8:30 a.m., to discuss this final issue.

**IT IS SO ORDERED.**

**KATHLEEN MCDONALD O'MALLEY**
**UNITED STATES DISTRICT JUDGE**

[3] Ultimately, the amount of an attorney's fees award under the FLSA is within the discretion of the Court, and must be based upon "a myriad of factors." Fegley v. Higgins, 19 F.3d 1126, 1134 (6th Cir. 1994), cert. denied, 115 S.t. 203 (1994). The primary factors governing the Court's discretion in this case, however, are set out in Hensley v. Eckerhart, 461 U.S. 424 (1983). See Posner v. The Showroom, Inc., 762 F.2d 1010 (6th Cir. 1985) (available on LEXIS). ***The parties are advised to review Posner before submitting their briefs.***

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | | |
|---|---|---|
| **BRENDA MARTINEZ,** | **:** | **Case No. 1:08-CV-2904** |
| **Plaintiff,** | **:** | |
| | **:** | **JUDGE KATHLEEN O'MALLEY** |
| **v.** | **:** | |
| **CUYAHOGA COUNTY RECORDER'S OFFICE,** | **:** | **MEMORANDUM AND ORDER** |
| **Defendant.** | **:** | |

This Court recently conducted a bench trial in the above-captioned case. That trial considered a single issue, whether Plaintiff Brenda Martinez ("Martinez") was denied her constitutional right to procedural due process when she was terminated by Defendant Cuyahoga County Recorder's Office ("Recorder's Office"). For reasons more fully explained below, the Court finds that she was not, and rules in favor of the **DEFENDANT**.

## I. BACKGROUND

### A. Factual Allegations

On November 6, 2008, Martinez was working in the Cashier's Department in the Recorder's office. Sometime before lunch that day, Martinez commented to a co-worker that it would be difficult for one black man to run the White House, given the number of black people that it takes to operate a White Castle. Martinez and the County Recorder do not agree as to the precise wording of this comment, but neither its substantive meaning, nor the fact that Martinez made the comment in the workplace, is in dispute.

Two employees reported the "White Castle" statement to County Recorder Lillian J. Greene ("Greene"). The first employee, Jerome Gibson ("Gibson"), reported that he overheard a woman on an elevator who, while talking on her cellular telephone, stated that she heard a "curly haired supervisor" in the Recorder's Office make the above statement. The second, Jerome Petro ("Petro"), reported that he had heard the above comment directly from Martinez. Another employee, moreover, reported an additional statement. This employee, Ron Mack ("Mack"), reported that Martinez told Mack that "the White House would now be called the Black House."

After learning of these statements, Greene called Martinez into her office for a meeting. Executive Assistant Doreasa Mack and Personnel Director Mary Walsh ("Walsh") were also present. Greene asked Martinez about the White Castle remark, and Martinez admitted to making such a comment. Green also asked Martinez about the Black House comment, which Martinez denied making. Green then terminated Martinez. The meeting lasted less than 3 minutes. Martinez notes that she was not told who her accuser was, that she was denied the opportunity to present witnesses or evidence, and that she was not allowed to have counsel or another representative during this meeting.

Martinez then brought this action, asserting that she was denied her constitutional right to procedural due process prior to termination from her position as a classified civil employee.

**B. Procedural History**

On December 11, 2008, Martinez filed a complaint asking this Court to restore her to her former position with the County Record. (Doc. 1.) On December 12, 2008, Martinez moved for a temporary restraining order ("TRO") seeking immediate relief. (Doc. 3.) That same day, she also filed a motion for a preliminary injunction. (Doc. 4.)

On December 22, 2008, this Court held a hearing on Martinez's motion for a TRO. (Docs. 7, 11.) The Court denied that motion, but set an expedited briefing schedule combining a trial on the merits with the motion for preliminary injunctive relief, a procedure to which neither party objected.

(Doc. 11.) Although her initial claim asserted not only the procedural due process claim addressed here, but a first amendment claim as well (Doc 1), she withdrew that claim on February 24, 2009, prior to the March 11, 2009 bench trial (Doc. 30).

On April 20, 2009, in light of the parties' need for a quick resolution, this Court entered an order finding for the **DEFENDANT** and only then ordered the parties to submit proposed findings of fact and conclusions of law. (Doc. 30.) This order contains the Court's ultimate findings and conclusions in support of its April 20, 2009 merits determination.

**C. Legal Standard**

It is well-established that classified civil employees have a constitutionally protected interest in their position. *See generally Cleveland Bd. of Edn. v. Loudermill*, 470 U.S. 532 (1985). This entitles those employees to due process prior to being terminated or demoted. They are only, however, due a somewhat limited amount of process:

> The essential requirements of due process are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

*Id*. at 546 (citations omitted). Indeed, "[o]nly if there is no provision for a post-termination hearing must the pre-termination hearing provide all the procedural safeguards to which due process entitles a tenured public employee." *Michalowicz v. Vill. of Bedford Park*, 528 F.3d 530, 534 (7th Cir. 2008) (citation omitted).

Although many courts have held that "[a] brief face-to-face meeting with a supervisor provides sufficient notice and opportunity to respond to satisfy the pretermination due process requirements of Loudermill," it does not appear that most courts have had the opportunity to consider a hearing that was as brief as the hearing in question in this case. *See, e.g., West v. Grand County*, 967 F.2d 362, 368 (10th

Cir. 1992) (noting that the plaintiff "had several pretermination opportunities to discuss her potential termination with the new county attorney and other county officials"). At least one court, however, has approved of a hearing that lasted no more than a few minutes. *See Powell v. Mikulecky*, 891 F.2d 1454, 1455 (10th Cir. 1989). In *Powell*, the Tenth Circuit concluded that a plaintiff's right to procedural due process was not violated, even though the plaintiff was asked only two questions during the pre-termination hearing. The court describes the facts as follows:

> [In] June 24, 1986, [Defendant] conferred with [Plaintiff]. . . . [Defendant] asked [Plaintiff] if he had met with the fire chiefs . . . while [Defendant] was on vacation. [Plaintiff] said "yes." [Defendant] asked [Plaintiff] if [Plaintiff] and others had asked them not to sign a mutual aid agreement. [Plaintiff] responded: "in the form that we had heard it would be, yes." At that point, [Defendant] informed [Plaintiff] that he was discharged, effective immediately.

*Id*. The court explained that even this brief meeting provided adequate due process, because an employee is only entitled to three elements under *Loudermill*: (1) notice (satisfied during the face-to-face meeting); (2) an opportunity to respond (the plaintiff had responded "yes"); and (3) an explanation of the employer's evidence if such an explanation is necessary for the employee to understand or refute the charges (although the defendant had not explained the basis for his suspicions, the plaintiff had not asked). *See id*. at 1459; *see also Lusher v. City of Mansfield*, No. 1:05-CV-1754, 2007 U.S. Dist. LEXIS 16772, at *28-29 (N.D. Ohio Mar. 8, 2007), *aff'd* 279 Fed. Appx. 327 (2008) (per curiam) ("The "pretermination opportunity to respond is not required to be an elaborate opportunity to respond but an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true." (citing *Day v. City of Southfield*, No. 94-1119, 1995 U.S. App. LEXIS 19948, at *13 (6th Cir. July 21, 1995))); *accord Marrero-Gutierrez v. Molina*, 491 F.3d 1, 8 (1st Cir. 2007). The Tenth Circuit later made clear, however, that such a brief meeting is only appropriate if a plaintiff actually concedes the charges against him. *See Lovingier v. City of Black Hawk*, No. 98-1133, 1999 U.S. App. LEXIS 29752, at *10-11 (10th Cir. Colo. 1999)

(explaining that when an employee does not concede the grounds for termination, she is entitled to greater opportunity to respond).

While there is admittedly limited precedent concerning such a brief hearing, there do not appear to be any cases in opposition to *Powell*. It is clear, moreover, that "the critical inquiry [when determining whether a pre-termination proceeding comported with due process] . . . is whether the charges [were] accurate and the employee underst[ood] them, not whether the employee . . . had a sufficient amount of time to fully prepare." *Lusher*, 2007 U.S. Dist. LEXIS 16772, at *25. In sum, procedural due process only requires that an employee be given the opportunity to correct any misunderstanding of the facts giving rise to termination. *See id*.

**D. Analysis**

As explained in detail below, this case is somewhat straight forward. Because Martinez admitted to making one of the statements that provided the basis for her termination, she was not constitutionally entitled to additional process prior to that termination. It is critical to understand that the Court does not, and has not been asked to, conclude whether Martinez's termination was substantively reasonable, or whether she is entitled to reinstatement and back-pay under Ohio law. The Count finds only that even the briefest meeting can, under these circumstances, provide the required constitutional pre-termination safeguards so long as there are comprehensive post-termination procedures available.

## II. FINDINGS OF FACT

1. Martinez was employed by the Recorder's Office. (Complaint at ¶ 6 (Doc. 1); Answer at ¶ 6 (Doc. 10).)

2. The Recorder's Office is a public agency responsible for the recording of all documents relating to land, mortgages, and leases, as well as a variety of other legal documents, such as living wills. (Hrg. Tr. at 41:20 – 42:4.)

3. On August 20, 2001, Martinez began work for the Recorder's Office as a cashier. (*Id*.) She was promoted to a cashier department supervisor in 2007. (Hrg. Tr. Of March 5, 2009 ("Hrg. Tr.") at 123:14-20.)

4. In the course of her duties, Martinez regularly interacted with and was exposed to members of the public. (Hrg. Tr. at 42:9-15.)

5. Martinez was a classified civil service employee during the time relevant to this litigation. (Complaint at ¶ 8; Answer at ¶ 8.)

6. On July 1, 2008, Lillian J. Greene ("Greene") was appointed to serve as the Cuyahoga County Recorder ("Recorder"). (Hrg. Tr. at 41:4-8.) She was then elected to this position on November 4, 2008. (*Id*. at 41:9-11.)

7. The Recorder is responsible for supervision of the Recorder's office, which includes the authority to hire and fire employees. (*Id*. at 21:18-22:19.)

8. Prior to her appointment as Recorder, Greene had been a Cuyahoga County Court of Common Pleas Judge for over 20 years. (*Id*. at 41:15-17.)

9. On November 4, 2008, Barack Hussein Obama was elected President of the United States.

10. Prior to lunch on November 6, 2008, Gibson reported that he had overheard a member of the public state that a cashier department supervisor had made a negative comment about blacks in the White House. (*Id*. at 42:16-44:23.) Gibson believed that the member of the public was referring to Martinez. (*Id*. at 44:8-12.)

11. Very shortly following that conversation, Petro told Greene that Martinez had said "How do they expect one black man to run the White House if [eleven] of them can't run White Castle." (*Id*. at 44:17-45:5; Ex. 1002.)

12. Later, Mack told Greene that Martinez had also said that "the White House would now be called the Black House." (Ex. 1003.)

13. Green asked Gibson, Petro, and Mack to write incident reports explaining what each of them had heard, and they did so. (County's Br. of June 4, 2009 at 10; Exs. 1001-1003.)

14. Greene and Walsh reviewed the Human Resource manual to determine the consequences for Martinez's alleged behavior. (Hrg. Tr. 98:1 – 99:3.)

15. Greene then decided to meet with Martinez in order to ask Martinez about these allegations. (Hrg. Tr. at 48:7-11.) Prior to that meeting, Greene did not review Martinez's employment record. (*Id*. at 36:19-24.)

16. Greene prepared a termination letter prior to that meeting, although Green had not definitively determined whether Martinez would be fired. (*Id*. at 34:16-22.) According to that letter, Martinez was to be terminated because she:
    a. Made racially derogatory remarks in The Cashier's area;
    b. Made racially derogatory remarks that were overheard by customers;
    c. Made racially derogatory remarks to co-workers; and
    d. Committed insubordination, given that Greene is black.

    (Pl. Ex. 3.)

17. When Martinez returned from lunch, she was summon to a meeting in Greene's office. (*Id*. at 48:7-18.) She was not told the reason for the meeting in advance. (*Id*. 130:13-15.) Two other County employees, including Walsh, also attended the meeting. (*Id*. at 48:19-49:2.)

18. Martinez entered Greene's office at 13:30:50. (Stipulation of Parties ("Stip.") (Doc. 28).)

19. Green told Martinez about the Gibson, Petro, and Mack reports. (Hrg. Tr. at 49:3-6.) Martinez was not, however, handed a copy of those reports. (*Id*. at 111:21-24.)

20. Greene asked Martinez whether it was true that Martinez had said, "Well, I guess the White House will now be called the Black House." (*Id*. at 31:3-19.) Martinez replied that she had not. (*Id*.)

21. Greene then asked Martinez whether it was true that Martinez had said "Eleven of them [Blacks] could not manage White Castle, so how do they expect one to manage the White House?" (*Id*. at 32:15-21.) Martinez replied that she had. (*Id*. at 32:14-21; 99:24-100:14.)[1]

22. Greene asked Martinez why Martinez had made that statement. (*Id*. at 32:22-33:20.) Martinez said that she did not see anything wrong with the statement that she [Martinez] had made. (*Id*.) Martinez also stated that she [Martinez] was not a racist and that she [Martinez] had Blacks in her family. (*Id*.)

23. Greene determined that Martinez should be fired because Martinez made a racially derogatory statement where members of the public would be able to hear that statement, and because Martinez did not believe there was anything wrong with what Martinez had said. (*Id*. at 51:2-8.)

24. Greene told Martinez that Martinez's statement was racially derogatory and would not be tolerated in an office where members of the public interact with County personnel. (*Id*. at 49:3-50:3.) Greene then handed Martinez the previously-prepared letter of termination. (*Id*.)

[1] Martinez claimed at trial that she only admitted to Green that she had made a comment about "White Castle," not that she had made this specific comment about White Castle. Martinez does not deny that the comment made in the work place was the one referenced in the incident reports, however. There are, moreover, witnesses other than Martinez and Green to the pretermination hearing who recall references to the entire text of the comment during that meeting. Having heard all of the testimony and having had the opportunity to assess the credibility of the witnesses, the Court finds that Martinez was asked about the comment in its entirety and admitted to making the comment in its entirety.

25. Prior to firing Martinez, Greene had never fired any County Recorder employee or held a pre-termination hearing for any reason. (Hrg. Tr. at 22:11-19.)

26. Martinez left Greene's office, approximately two minutes and fifty-four seconds after entering, at 13:33:44. (Stip.)

27. The County Recorder contends that the above procedure was a proper pre-termination hearing, whereas Martinez contends that it was not.

28. Had Martinez been given more time to respond, she would have explained that, when making the "white castle" statement, she was repeating or paraphrasing something she had heard on the radio. (Hrg. Tr. 130:24-131:7.)

29. Martinez has appealed her termination to the Ohio State Personnel Board of Review. As of the trial in this matter, that appeal was still pending.

## III. CONCLUSIONS OF LAW

1. Under Ohio law, an employee in the classified service may be terminated for the grounds set forth in Ohio Revised Code Section 124.34. An employee in the classified service who has been terminated may appeal the termination to the Ohio State Personnel Board of Review pursuant to Ohio Revised Code Section 124.34(B).

2. An appeal to the Ohio State Personnel Board of Review provides an employee with a full post-termination administrative review by neutral reviewers. *See, e.g.*, *Loudermill*, 470 U.S. at 547-548 (noting that the wait for post-termination proceedings under Ohio law does not give rise to heightened pre-termination requirements); *Collyer v. Darling*, 98 F.3d 211, 217 (6th Cir. 1996) (noting that back-pay is available under Ohio law); *State ex rel. Johnson v. Ohio Dep't of Rehab. & Corr.*, NO. 2000-04-014, 2001 Ohio App. LEXIS 2152, at *1 (Ohio Ct. App. May 14, 2001) (noting that reinstatement is available under Ohio law). Furthermore, a final order of the Ohio State Personnel Board of Review is subject to judicial review by way of appeal to the Ohio Court of Common Pleas pursuant to Ohio Administrative Code Sections 124-15-06 thru 124-15-08 and is governed by the provisions of Chapters 119 and 124 of the Ohio Revised Code.

3. Martinez was a classified civil service employee who could only be discharged for cause and after being afforded a due process hearing (the "pre-termination hearing" or "pre-termination meeting").

4. Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, an employee in the classified service is entitled to receive pre-termination notice and an opportunity to be heard. *See Loudermill*, 470 U.S. at 546. That case explained:

> The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to

> present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

*Id*. (citations omitted).

5. The pre-termination hearing, though necessary, need not be elaborate. *Id*. at 545. Indeed:

> [T]he pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.

*Id*. at 545-46; *see also Guarino v. Brookfield Twp. Trustees*, 980 F.2d 399 (6th Cir. 1992) ("Even if [Plaintiff] had not been told in these circumstances exactly what the meeting was going to be about, or had not been given a detailed opportunity to respond to the charges presented against him, that state of affairs would be insufficient to justify denial of summary judgment."). As the Tenth Circuit has explained:

> The pretermination hearing is merely the employee's chance to clarify the most basic misunderstandings or to convince the employer that termination is unwarranted. The pretermination hearing is intended to supplement, not duplicate, the more elaborate post-termination hearing. Because the posttermination hearing is where the definitive fact-finding occurs, there is an obvious need for more formal due process protections at that point. To duplicate those protections at the pretermination stage would cause unnecessary delay and expense while diffusing the responsibility for the ultimate decision to terminate an employee. The idea of conducting two identical hearings runs counter to traditional principles of adjudication.

*Powell v. Mikulecky*, 891 F.2d 1454, 1458 (10th Cir. 1989).

6. The "pretermination opportunity to respond is not required to be an elaborate opportunity to respond but an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true." *Lusher v. City of Cleveland*, No. 1:05CV1754, 2007 U.S. Dist. LEXIS 16772, at *28-29 (N.D. Ohio, Mar 8, 2007), *aff'd* 279 Fed. Appx. 327 (6th Cir. 2008) (citing *Day v. City of Southfield*, No. 94-1119, 1995 U.S. App. LEXIS 19948, at *13 (6th Cir. July 21, 1995)); *see also Marrero-Gutierrez v. Molina*, 491 F.3d 1, 8 (1st Cir. 2007).

7. When, as here, there are comprehensive post-termination proceedings available, "a plaintiff alleging a due process violation . . . must show that he was not provided the most basic notice of the charges, description of the evidence against him, and some opportunity to tell his side of the story." *Hilbert v. Ohio Dep't of Rehab. & Corr.*, 121 Fed. Appx. 104, 115 (6th Cir. 2005) (emphasis added); *see also Dean v. City of Bay City*, 239 Fed. Appx. 107, 113 (6th Cir. 2007) ("With respect to the pre-termination due process, the Sixth Circuit simply requires notice and an opportunity to present his or her side of the story to the official responsible for the termination." (citing *Farhat v. Jopke*, 370 F.3d 580, 595 (6th Cir. 2004); *Buckner v. City of Highland Park*, 901 F.2d 491, 494 (6th Cir. 1990)).)

8. A pre-termination hearing may be exceedingly brief if the employee concedes the factual allegations that provide the grounds for termination and if adequate post-termination procedures are in place. *See Powell*, 891 F.2d at 1454; *Lusher*, 2007 U.S. Dist. LEXIS 16772 at *27-29; *see also Coleman v. Reed*, 147 F.3d 751, 754 (8th Cir. 1998); *cf. Lovingier v. City of Black Hawk*, No. 98-1133, 1999 U.S. App. LEXIS 29752, at *10-11 (10th Cir. Colo. 1999) (explaining that when an employee does not concede the grounds for termination, she is entitled to greater opportunity to respond). In such a situation, a plaintiff is not entitled to the "opportunity to conduct discovery, present evidence and witnesses, and confront witnesses against him." *Michalowicz*, 528 F.3d at 537. Indeed, "only if there is no provision for a post-termination hearing must the pre-termination hearing provide all the procedural safeguards to which due process entitles a tenured public employee." *Id*. at 534. Furthermore, in these circumstances, "there is no requirement that the hearing officer be impartial; indeed, the terminating employer may preside. . . . To demonstrate [that the bias of the hearing officer deprived the terminated employee of her due process rights], the plaintiff would have to show that the alleged bias deprived him of the opportunity to put his facts before the decisionmaker, or that there was an[] error of primary facts in the grounds used for termination that could be explained only by bias. *Jackson v. Norman*, 264 Fed. Appx. 17, 19 (1st Cir. 2008) (citation omitted); *Farhat*, 370 F.3d at 595 (6th Cir. 2004).

9. This Court has previously relied on cases such as *Hilbert* and *Powell* as clarifying the appropriate standard by which to evaluate the constitutionality of pre-termination proceedings. *See Lusher*, 2007 U.S. Dist. LEXIS 16772 at *27-29. This Court held:

> [A] pretermination hearing should only permit an employee to clarify an error or mistake on the part of the employer, not to collect evidence and engage in an elaborate adversarial procedure.

*Id*. at *28; *see also Lusher*, 279 Fed. Appx. 327 ("For the reasons set forth in the Opinion and Order of the district court dated March 8, 2007, the judgment of the district court is AFFIRMED." (emphasis in origional)). In the absence of further guidance from the Supreme Court, the Sixth Circuit, or other circuit courts, this Court continues to believe that it is bound to hold that procedural due process requires only notice and the opportunity to clarify an error or mistake during a pre-termination hearing.[2] Procedural due process is not violated when an employee concedes the charges against her, even when the employee has a legitimate argument that those charges should not lead to termination, so long as fuller and more comprehensive post-termination proceedings are available. *Powell*, 891 F.2d at 1454; *Lusher*, 2007 U.S. Dist. LEXIS 16772 at *27-29.

10. While the pre-termination meeting in this case was exceedingly brief, Martinez's admission that she made at least one of the reported statements confirmed that there were reasonable grounds to terminate her employment.

11. The post-termination administrative review available pursuant to Ohio law is comprehensive, and provides Martinez adequate opportunity to contest her termination. *See*, *e.g.*, *Loudermill*, 470 U.S. at 547-548; *Collyer*, 98 F.3d at 217; *Johnson*, 2001 Ohio App. LEXIS 2152, at *1 (Ohio Ct. App. May 14, 2001) (noting that reinstatement is available under Ohio law); c*f. Moss v. Bierl*, 134 Fed. Appx. 806, 810 (6th Cir. 2005) ("We emphasize that these limited pre-termination procedures satisfy federal due process requirements only because of the extensive post-termination hearing and remedial provisions provided by Michigan law – including full compensation for lost work time if reinstatement is ordered.").

12. Although a close call given that Greene prepared a letter of termination prior to the meeting, the Court accepts Greene's unequivocal testimony that she did not make a final decision to terminate Martinez until after Martinez admitted to making one of the racist statements and until after Martinez said that she saw nothing wrong with those statements.

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[2] Indeed, requiring more process might elevate form over function. It is difficult to imagine, for example, how any measure of process might have altered Greene's decision to terminate Martinez once Martinez admitted to making a racist remark and further stated that she saw nothing wrong with having done so. The Court does not necessarily believe that termination of an employee who seems oblivious to the harmful nature of racially-charged remarks is the course of action most likely to further the goal of a post-racial society, or the most understanding path that a supervisor might choose to take, but that is not the question this court is empowered to address.

13. Even if Greene had decided to terminate Martinez prior to the meeting, Martinez still could not assert a procedural due process claim because, in that meeting, Martinez admitted to making the statement for which she was terminated. *See Powell*, 891 F.2d at 1454; *Lusher*, 2007 U.S. Dist. LEXIS 16772 at *27-29; *cf. Lovingier*, 1999 U.S. App. LEXIS 29752, at *10-11.

14. The Recorder's Office did not violate Martinez's procedural due process right to a pre-termination hearing.

This Court, accordingly, finds in favor of the **DEFENDANT**.

**IT IS SO ORDERED.**

**s/Kathleen M. O'Malley**
**KATHLEEN McDONALD O'MALLEY**
**UNITED STATES DISTRICT JUDGE**

**Dated: September 16, 2009**

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

MINUTES OF PROCEEDINGS
CIVIL HEARING

DATE: February 5, 2008

A.C.L.U., et al.,

Plaintiff(s),

CASE NO.: 1:08CV145

v.

COURT REPORTER: Cynthia Lee

Jennifer Brunner, et al.,

JUDGE KATHLEEN M. O'MALLEY

Defendant(s).

( ) Jury impanelment. ( ) Opening statements of counsel.

( ) Plaintiff's case ( ) begun ( ) continued & ( ) not concluded (✓) concluded.

( ) Defendant's case ( ) begun ( ) continued & ( ) not concluded (✓) concluded.

(✓) Testimony taken. (See Witness List.)

( ) Rebuttal of plaintiff. ( ) Surrebuttal of defendant.

(✓) Final arguments. ( ) Charge to Jury.

( ) Jury deliberations ( ) begun ( ) continued & ( ) not concluded ( ) concluded.

Adjourned until _____ at _____.

A hearing was held on the Plaintiffs' motion for preliminary injunction. The motion for preliminary injunction was DENIED on the record at the conclusion of the hearing.

(✓) Exhibits located in file
( ) Exhibits returned to counsel.

Nathaniel J. McDonald
Courtroom ~~Deputy~~ Clerk

TIME: 7 hours

Law

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | | |
|---|---|---|
| **Parkwood Place, Inc., Ltd., et al.,** | : | **Case No. 1:03CV1744** |
| | : | |
| **Plaintiffs,** | : | **JUDGE O'MALLEY** |
| | : | |
| **v.** | : | |
| | : | **MEMORANDUM & ORDER** |
| | : | |
| **City of Brecksville, et al.,** | : | |
| | : | |
| **Defendants.** | : | |

This action is before the Court upon the motion of defendant City of Brecksville ("Brecksville") to dismiss the plaintiffs' First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). (Doc. 6). The Court has reviewed the motion, plaintiffs' memorandum in opposition (Doc. 15), and Brecksville's reply memorandum (Doc. 20). For the reasons set forth herein, the Court has determined that Brecksville's motion should be **GRANTED** in its entirety.

**I. Background**

Plaintiffs Parkwood Place, Inc., Ltd. and J. Harvey Crow (collectively, "plaintiffs") brought this action in the Cuyahoga County Court of Common Pleas, alleging that two Brecksville zoning ordinances violated their constitutional rights. Brecksville removed the case to this Court on August 18, 2003. (Doc. 1). Plaintiffs' First Amended Complaint raises claims for unconstitutional taking and deprivation of property without due process of law, unconstitutional retroactive impact and unconstitutional impairment of contracts, breach of contract,

contempt of court, and for declaratory and injunctive relief.

Plaintiffs own 85 acres of land at Miller Road and Interstate I-77 in Brecksville, Ohio. In 1980, plaintiffs filed a complaint in Cuyahoga County Court of Common Pleas, *J. Harvey Crow v. City of Brecksville, et al.*, No. 015815. That case sought to have the court declare that the "R-20 residential" zoning of the plaintiffs' property was unconstitutional. On June 12, 1981, the court entered judgment, declaring that the residential zoning was unconstitutional as applied to seven parcels of real estate owned by plaintiffs. The court found that the zoning designation had no reasonable relationship to the health, safety, welfare and morals of the community, and was arbitrary, confiscatory, unreasonable, unlawful and discriminatory. In its judgment, the court ordered the rezoning of the land as agreed by the parties: (1) Parcels numbered 604-7-7, 604-8-1, 604-8-2, 604-8-3, and 604-8-4 were rezoned to the multiple zoning classification of Motor Service, Community Facilities and Office Building; (2) Parcel 604-8-7 was rezoned to Local Business, Community Facilities and Office Laboratory; (3) Parcel 603-20-29 was rezoned to "R-8" Single Family and Office Laboratory; and (4) Parcel 603-21-22 was rezoned to "R-8" Single Family and "R-16" Single Family. The Judgment Entry also provided for the inclusion of a theater building in the community facility zoning parcels. The Court ordered that the Brecksville zoning map be amended to reflect the rezoning of the land.

Subsequent to the 1981 judgment, the zoning classifications of the land in question were several times the subject of proposed amendments presented to the voters. In 1987, the voters defeated a petition initiated by Crow to add a Laboratory Business classification to six of the parcels. In 1988, Crow obtained approval of his proposal to add a Shopping Center classification to seven of the parcels. No shopping center was ever built, however, and the Shopping Center designation was removed by the voters in 1991. Additionally, in 1990, Crow unsuccessfully sought to change the zoning classification of Parcel 603-20-29 from R-8 and

Office Laboratory to Shopping Center.

In 1999, Brecksville again sought to rezone the subject parcels. Among other actions, the city sought to (1) remove the Community Facility classification from all parcels; and (2) remove Motor Service from parts of certain parcels. Accordingly, the Brecksville City Council passed two ordinances, Nos. 3742 and 3746, and sent these ordinances to the Cuyahoga County Board of Elections to be placed on the November 2, 1999 ballot.

On October 18, 1999, plaintiffs filed a complaint against the Cuyahoga County Board of Elections and Brecksville, claiming that the proposed ordinances violated the 1981 judgment entry and that the ballot language was unconstitutionally vague and overbroad. *See Parkwood Place Ltd. et al. v. Cuyahoga County Board of Elections et al.*, No. 393905 ("the 393905 complaint"). Plaintiffs sought declaratory and injunctive relief to prohibit Brecksville and the Board of Elections from placing the ordinances on the ballot. The trial court, however, denied plaintiffs' request for an injunction; both ordinances were placed on the ballot and approved by the voters.

Following the election, plaintiffs amended their complaint. In the amended complaint, plaintiffs claimed that (1) the ordinances were unreasonable, arbitrary, and unconstitutional; (2) they constituted a taking of property without just compensation; (3) they impaired the obligations of "the agreed upon court findings and zoning uses provided in the Court's [1981] judgment" and impaired any contract to which plaintiffs were a party; and (4) the city's action constituted contempt of court. On August 11, 2000, the plaintiffs moved for summary judgment, requesting that the court declare the 1981 judgment valid and enforceable and declare Ordinance Nos. 3742 and 3746 void and unconstitutional. The court denied that motion and held that, although the 1981 judgment was valid, that judgment was not meant to be forever binding on the land. Rather,

the court found that the language in the judgment indicated that any future rezoning of the land was placed within the province of the legislative branch of Brecksville. The Eighth District Court of Appeals affirmed that decision and held that the 1981 judgment did not preclude either party from subsequently seeking amendment to the zoning classifications of plaintiffs' land. *See Parkwood Place, LTD. v. Cuyahoga County Bd. of Elections*, 2002 Ohio App. LEXIS 3577, *12 (8th Dist. July 3, 2002).[1]

After the case was remanded to the trial court, defendants filed a motion for summary judgment. Plaintiffs, however, voluntarily dismissed the case without prejudice. Plaintiffs then filed the instant action in the Cuyahoga County Court of Common Pleas on July 8, 2003. After removal of the action to this Court based on federal question jurisdiction, Brecksville filed the pending motion to dismiss.

**II. Standard of Review**

In order to grant a motion to dismiss under Fed. R. Civ. P. 12(b)(6), "there must be no set of facts which would entitle the plaintiff to recover. Matters outside the pleadings are not to be considered, and all well-pleaded facts must be taken as true." *Hammond v. Baldwin*, 866 F.2d 172, 175 (6th Cir. 1989) (citations omitted). Thus, the allegations of the complaint must be taken as true and construed in a light most favorable to the plaintiff. *See Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983), *cert. denied*, 469 U.S. 826 (1984); *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976). The complaint is only to be dismissed if the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). However, the Court need not accept as true a legal conclusion couched as a factual allegation. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986).

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[1]The Ohio Supreme Court declined to hear plaintiffs' appeal. *See Parkwood Place, Ltd. v. Cuyahoga County Bd. of Elections*, 97 Ohio St. 3d 1470 (2002).

## III. Discussion

In its motion to dismiss, Brecksville argues that plaintiffs' claims should be dismissed because they are barred by (1) the statute of limitations for § 1983 claims; (2) the doctrine of the "law of the case," as established by the opinion of Ohio's Eighth District Court of Appeals; and (3) the plaintiffs' failure to exhaust adequate state law remedies (i.e., a mandamus action to compel the Brecksville Law Director to commence eminent domain proceedings). Additionally, Brecksville argues that the court may not grant plaintiffs' requested equitable relief because such interference in Brecksville's legislative zoning scheme would constitute an impermissible merging of legislative and judicial powers. Alternatively, Brecksville asserts that the Court should abstain from deciding this dispute, because state law is unclear and clarification of that law might obviate the necessity of deciding plaintiffs' federal claims.

### A. Statute of Limitations

The parties apparently agree that, in Ohio, section 1983 claims are governed by a two-year statute of limitations. *See Browning v. Pendleton*, 869 F.2d 989, 992 (6th Cir. 1989). For purposes of section 1983 actions, the cause of action accrues (and the statute of limitations begins to run) when an event occurs that "should have alerted the typical lay person to protect his or her rights." *Dixon v. Anderson*, 928 F.2d 212, 215 (6th Cir. 1991). Brecksville argues that the relevant date in this case was November 2, 1999, the date of passage of the ordinances in question. *See Kuhnle Bros. v. County of Geauga*, 103 F.3d 516, 521 (6th Cir. 1997)("[i]n the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed.")(citation omitted). Accordingly, Brecksville contends that this action, filed on July 8, 2003, is time-barred.

Plaintiffs counter that their claims fall within the Ohio savings clause, O.R.C. § 2305.19, which is an exception to the strict application of statutes of limitations under Ohio law. That section provides, in relevant part:

> In an action commenced, or attempted to be commenced, if in due time judgment for the plaintiff is reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for commencement of such an action at the date of reversal or failure has expired, the plaintiff, or, if he dies and the cause of action survives, his representatives may commence a new action within one year after such date. . .
>
> .

O.R.C. § 2305.19. Section 2305.19 effectively "tolls" the statute of limitations for one year to allow refiling, where a cause of action was timely filed and was terminated other than on the merits. Since plaintiffs' voluntary dismissal was not a disposition "on the merits," plaintiffs contend that the savings clause applies to permit their refiling of these claims on July 8, 2003, less than one year after the voluntary dismissal of the first action.

Plaintiffs contend that the claims asserted in this case were first raised in plaintiffs' Amended Complaint filed in the Cuyahoga County Court of Common Pleas, Case No. 393905, on January 10, 2000, and its Second Amended Complaint, filed in that case on January 14, 2000. The Amended Complaints asserted that the ordinances violated and were in direct contempt of the 1981 judgment entry, and that the ordinances were unconstitutional under both the United States and Ohio constitutions. Plaintiffs specifically alleged violations of 42 U.S.C. §§ 1983 and 1988, and also requested a declaratory judgment, injunctive relief, damages, costs, and attorney fees. Accordingly, plaintiffs contend that the precise allegations of the instant complaint were raised well within the statute of limitations for the section 1983 claim.

Brecksville's reply brief does not attempt to refute plaintiffs' argument with respect to the Ohio savings clause, and thus Brecksville may have abandoned its statute of limitations claim. In any event, plaintiffs appear to be correct in their assertion that the allegations of this case fall within the savings clause of O.R.C. § 2305.19. The Court does not discern any meaningful difference between the allegations set forth in the 1999 case and those before the Court here. Moreover, there can be no reasonable dispute that a voluntary dismissal is a dismissal other than on the merits. *See Ater v. Follrod*, 238 F. Supp. 2d 928, 942 (S.D. Ohio 2002)("[a] voluntary dismissal under Ohio Rule of Civil Procedure 41(A)(1) constitutes a failure 'otherwise than upon the merits. . . .'"). Accordingly, the Court holds that plaintiffs' claims are not time-barred.

**B. "Law of the Case" and Collateral Estoppel Doctrines**

Brecksville's next contention is that plaintiffs' claims for breach of contract, contempt of court and unconstitutional impairment of contracts, as well as the declaratory and injunctive relief claims, are barred by the doctrine of the "law of the case," as set forth in the opinion of Ohio's Eighth District Court of Appeals. That doctrine provides that, once a court has established a rule of law, that decision should continue to govern the same issues throughout the litigation of the case. *See Arizona v. California*, 460 U.S. 605, 618 (1983). Essentially, "law of the case" "operates to preclude reconsideration of identical issues." *Petition of United States Steel Corp.*, 479 F.2d 489, 493-94 (6th Cir. 1973). The doctrine applies both to a court's own decisions and to "the decisions of a coordinate court in the same case. . . ." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816 (1988). Brecksville asserts that, where the coordinate decision is made by a state trial or appellate court, federal courts will nonetheless apply the "law of the case" doctrine. *See Ellison v. Empire General Life Ins. Co.*, 1990 U.S. App. LEXIS 21015, *7 (6th Cir. Dec. 3, 1990)(unpublished disposition).

The "law of the case" doctrine, however, is not "recognized as an inexorable command." *United States Steel*, 479 F.2d at 494. Rather, it "is a discretionary tool available to a court in order to promote judicial efficiency." *United States v. Todd*, 920 F.2d 399, 403 (6th Cir. 1990). "It is within the sole discretion of a court to determine if a prior ruling should be reconsidered." *Id.*

The Eighth District Court of Appeals found in 2002 that the "1981 judgment [did] not preclude the city from subsequently enacting ordinances to amend the zoning of [plaintiffs'] land." 2002 Ohio App. LEXIS 3577, *12. Brecksville asserts that this finding constitutes the law of the case and, thus, that this Court should adhere to the ruling of the Eighth District. Brecksville contends that compliance with the plain language of the Eighth District's holding, which stated that the 1981 judgment did not prohibit a rezoning of the plaintiffs' land, would require dismissal of the breach of contract and contempt of court claims, as well as the claim for unconstitutional impairment of contracts. Additionally, Brecksville argues that the related declaratory and injunctive relief claims are barred by the doctrine of the law of the case. Brecksville contends that allowing plaintiffs to pursue their claims on any of these issues would constitute a blatant disregard of the law of the case doctrine and of the Eighth District's order.

Plaintiffs' argument in opposition to the "law of the case" issue is very limited; plaintiffs argue simply that the doctrine should not apply because the Court is not faced here with issues identical to those decided by the Eighth District Court of Appeals. Specifically, plaintiffs claim that the Eighth District decided only that (1) the 1981 judgment, although valid, did not preclude the city from rezoning; and (2) the constitutional issues could not be heard due to the failure of service on the Ohio Attorney General pursuant to O.R.C. § 2721.12. Thus, plaintiffs assert that the issue decided regarding enforceability of the 1981 judgment is distinct from the claims involving breach of contract or impairment of contractual obligations. Plaintiffs argue, moreover, that

the constitutional claims never have been addressed by any court. Finally, plaintiffs assert that, since the "law of the case" doctrine is "considered to be a rule of practice rather than a binding rule of substantive law[,]" *Nolan v. Nolan*, 11 Ohio St. 3d 1, 3 (1984), the Court should not apply the doctrine where it will produce unjust results.

Although neither party specifically has delineated the scope of the "law of the case" doctrine in its briefs, the Court's research indicates that a federal court does not defer unquestioningly to the findings of a state court in all situations. Specifically, although *Ellison*, 1990 U.S. App. LEXIS 21015, at *6-7, cited by Brecksville, applied the "law of the case" where the circumstances involved a federal court sitting in diversity, that case indicates that the "law of the case" doctrine does not control a federal court's findings on federal questions. *See also Robinson v. Gorman*, 145 F. Supp. 2d 201, 204 (D. Conn. 2001)("[t]he state court's decision as to matters of federal law is not entitled to be treated as the law of the case. . . ."); *Waag v. Thomas Pontiac, Buick, GMC*, 930 F. Supp. 393, 406 (D. Minn. 1996)("[w]hile the 'law of the case' generally prevents relitigation of an issue previously decided in the same case, the doctrine need not be followed when a claim based on a federal question is removed to federal court.").

The Court thus wishes to clarify that it does not intend to apply the "law of the case" doctrine to prevent litigation of any of the plaintiffs' federal claims.[2] This includes Count III (the § 1983 claim for unconstitutional taking), Count VI (the claim for unconstitutional retroactivity and impairing the obligation of contracts), as well as Counts I and II (the declaratory and injunctive relief claims), to the extent those counts seek equitable relief in connection with the federal claims. It is incumbent on the Court, however, to exercise

[2]Several of plaintiffs' federal claims fail, however, based on the doctrine of collateral estoppel, as set forth *infra* in this section.

its discretion to determine whether to apply the law of the case doctrine to the remaining state law claims, and to decide what the result of such application should be.

Counts IV and V, which allege breach of contract and contempt of court, are premised primarily on the argument that, since the 1981 judgment entry permanently established a zoning scheme for plaintiffs' property, Brecksville's subsequent attempt to rezone that property violated both the parties' agreement and the Court's ruling. Brecksville, on the other hand, contends that this precise issue was reached by the state appellate court, 2002 Ohio App. LEXIS 3577, *12, when that court stated, "the 1981 judgment does not preclude the city from subsequently enacting ordinances to amend the zoning of [Plaintiffs'] land." *Id.* The Court agrees that the Eighth District's statement subsumes the claims that the plaintiffs seek to raise.[3]

Counts IV and V are state law claims and involve the interpretation of Ohio law. The Eighth District opinion addressed the central issue underlying the breach of contract and contempt of court claims–that is, whether the 1981 judgment permanently barred the parties from attempting to change the zoning classifications associated with plaintiffs' property. The appellate court found that the agreement was intended only to establish zoning effective between the parties at that time and to return the zoning issue to the legislative body of Brecksville, so that further amendments to the zoning could proceed in accordance with the usual process. The appellate court's decision provided an interpretation of the agreed 1981 judgment entry; the import of this ruling was, essentially, that subsequent attempts to change applicable zoning violated neither the parties' agreement nor the 1981 court order.

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[3]This analysis also applies to Count VI (the claim for unconstitutional retroactivity and impairment of contracts) to the extent that claim is based on the Ohio, rather than the federal, constitution. Additionally, this analysis applies to Counts I and II (the declaratory and injunctive relief claims), to the extent that the equitable relief is sought in connection with plaintiffs' state law claims.

Although the Court acknowledges that "law of the case" is a discretionary doctrine, *see Todd*, 920 F.2d at 403, the Court finds the Eighth District's ruling to be a reasonable interpretation, consistent with this Court's understanding of Ohio law and with the likely goals of the 1981 court. Conversely, the Court believes that no legitimate purpose would be served by allowing relitigation of the issues implicitly resolved by the language in the Eighth District's order. Thus, in this case, the Court's application of the "law of the case" doctrine works no undue hardship on the parties, nor does it produce an unjust result. *Cf. Nolan*, 11 Ohio St. 3d at 3-4. Accordingly, this Court applies the law of the case doctrine and concludes that the Eighth District's decision governs the plaintiffs' claims for breach of contract and contempt of court, as well as the claims for equitable relief associated with those state law claims. Brecksville's motion to dismiss is granted with respect to the state law claims, and plaintiffs' state law claims are dismissed pursuant to this Court's application of the "law of the case" doctrine.

Although the Court expressly has declined to apply the "law of the case" doctrine to dispose of plaintiffs' federal claims, there is a separate basis that compels dismissal of the claims set forth in Count VI (unconstitutional retroactivity and unconstitutional impairment of contracts). While defendant Brecksville's brief makes no mention of the doctrine of collateral estoppel, that doctrine unequivocally bars the claims set forth in Count VI. Even if the "law of the case" doctrine would not counsel in favor of dismissal of these federal claims, plaintiffs' claims here rely on a factual predicate that is inconsistent with the explicit findings of the Eighth District Court of Appeals. Accordingly, collateral estoppel bars plaintiffs from relitigating those issues.

The doctrine of collateral estoppel, or issue preclusion, stands for the principle that a "question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed

in a subsequent suit between the same parties or their privies . . . ." *Cordin v. Fordu (In re Fordu)*, 201 F.3d 693, 702 (6th Cir. 1999), *quoting Montana v. United States*, 440 U.S. 147, 153 (1979). "Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been actually litigated and decided." *Fordu*, 201 F.3d at 703. In Ohio, the application of collateral estoppel is appropriate where the matter at issue "(1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action." *Thompson v. Wing*, 70 Ohio St. 3d 176, 183 (1994).

The Court finds that the doctrine of collateral estoppel precludes all the claims raised by the plaintiffs in Count VI. Collateral estoppel may be applied to preclude relitigation of both factual and legal issues, as long as those issues were in issue and directly determined in a prior suit between the parties or entities in privity with parties to the current action. Here, these precise parties litigated the force, effect and scope of the 1981 judgment before the Ohio state courts and received a final judgment determining that the "1981 judgment [did] not preclude the city from subsequently enacting ordinances to amend the zoning of [plaintiffs'] land. . . ." 2002 Ohio App. LEXIS 3577, *12. The Ohio court of appeals interpreted both the validity and scope of the 1981 agreement and judgment. That court based its findings both on the language of the judgment and on the Court's determination that the parties' actions were inconsistent with an understanding that the 1981 judgment was intended permanently to establish the zoning of the plaintiffs' property. Following the Eighth District's opinion, there is no room for debate as to the extent of the City's obligations under the 1981 judgment–those obligations were delineated by the Eighth District opinion. Since the federal claims raised by plaintiffs in Count VI necessarily depend on a contrary interpretation of the 1981 judgment, those claims are barred by the

doctrine of collateral estoppel and, accordingly, must fail.[4]

Since the Court has disposed of all claims premised on an alleged violation of the 1981 agreement and judgment, the only remaining question relates to the claims challenging the constitutionality of the 1999 zoning ordinances. The Court now turns to consider the posture of those claims and whether they are presently ripe for decision.

**C. Ripeness of Takings Claims**

Defendant Brecksville contends that the Court should dismiss all of plaintiffs' federal claims relating to regulatory taking or due process, on the ground that those claims are not yet ripe for judicial review. The Supreme Court has not established a "formula for determining whether a regulatory taking has occurred, preferring instead to engage in essentially ad hoc, factual inquiries." *Waste Mgmt. v. Metropolitan Gov't*, 130 F.3d 731, 737 (6th Cir. 1997)(internal quotation omitted). In determining whether a taking has occurred, a court considers several factors, including "(1) the character of the governmental action; (2) the economic impact of the regulation on the claimant; and (3) the extent to which the regulation has interfered with the claimant's distinct investment-backed expectations." *Id.*

Brecksville asserts that this case is not in the proper posture to allow the Court to determine these factors, since plaintiffs have not pursued all appropriate avenues to obtain a final ruling from the city on the zoning applicable to their property. The ripeness question "goes to whether the district court [has] subject matter jurisdiction." *Tari v. Collier County*, 56 F.3d 1533, 1535 (11th Cir. 1995). Thus, the Court must consider the ripeness issue prior to reaching the merits of any claims.

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[4]Likewise, to the extent that Counts I and II seek declaratory and injunctive relief in connection with plaintiffs' federal claims in Count VI, Counts I and II also must be dismissed.

Essentially, Brecksville contends that none of plaintiffs' claims can be ripe until plaintiffs have (1) received a final decision from the city with respect to the applicable zoning, and (2) pursued all available state procedures and been denied just compensation for the alleged taking. Plaintiffs, on the other hand, argue that the ripeness requirements should not apply to them, since the Ohio mandamus procedure does not provide an adequate remedy to compensate for their loss.

Before evaluating the ripeness of plaintiffs' claims, however, the Court first must determine precisely what claims plaintiffs seek to assert in their First Amended Complaint. Although the Court has reviewed the parties' briefs carefully, the parties' arguments inappropriately blur the various types of takings claims available to a plaintiff in the zoning context. Thus, the Court has performed extensive research in order to summarize the law in this area and analyze the ripeness requirements applicable to the claims actually raised by the plaintiffs here.

Generally speaking, a plaintiff seeking relief from an allegedly unconstitutional zoning scheme has four types of claims from which to choose: (1) a regulatory takings claim seeking just compensation pursuant to the Fifth Amendment; (2) a "due process takings" claim; (3) an "arbitrary and capricious due process" claim; and (4) a claim that the regulation unconstitutionally denies the plaintiff equal protection.[5] *See generally Eide v.*

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[5]Although not discussed by the *Eide* court, a plaintiff also may state a claim for violation of procedural due process rights. *See Pearson v. Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir. 1992). Plaintiffs' complaint, however, fails to state such a claim here. Although the First Amended Complaint mentions a lack of procedural due process (Doc. 5, at ¶ 34), plaintiffs do not allege that they were deprived of property "without either of the fundamental elements of procedural due process: notice or an opportunity to be heard." *Tri-Corp Mgmt. Co. v. Praznik*, 2002 U.S. App. LEXIS 6199, * 11 (6th Cir. Mar. 29, 2002)(unpublished disposition).

Alternatively, plaintiffs could state a procedural due process claim by alleging that they were deprived of property " pursuant to a 'random and unauthorized act' *and* that available state remedies would not adequately compensate for the loss." *Tri-Corp*, 2002 U.S. App. LEXIS 6199 at *10 (emphasis in

*Sarasota County*, 908 F.2d 716, 720-723 (11th Cir. 1990); *see also Pearson v. Grand Blanc*, 961 F.2d 1211, 1215 (6th Cir. 1992)(adopting the *Eide* categorization of federal zoning cases). A just compensation claim is appropriate where a landowner can demonstrate that the regulation in question "goes too far," and thus that property was taken from the landowner without a provision for affording just compensation. *See Eide*, 908 F.2d at 720. A "due process takings" claim, to the extent that such a claim exists,[6] applies where a regulation destroys the value of a plaintiff's property to the extent that it has the same effect as a taking by eminent domain–in effect, an invalid exercise of the police power. *See id*. at 721. An "arbitrary and capricious due process" claim is equivalent to a substantive due process claim, *see Pearson*, 961 F.2d at 1216, and a plaintiff may use this claim to mount either a facial challenge to the regulation or a challenge to the regulation as applied. To succeed on this type of due process claim, a plaintiff must demonstrate that a regulation is arbitrary and capricious or does not bear a substantial relation to the public health, safety, morals, or general welfare. *See Eide*, 908 F.2d. at 721. Finally, a plaintiff may allege that a regulation is unconstitutional because it denies the plaintiff equal protection. *See id*. at 722. The analysis for each of these types of claims, including the ripeness analysis, differs depending on the plaintiffs' allegations.

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original). Given the Court's analysis, *infra*, regarding the adequacy of state remedies, however, plaintiffs also are unable to state a procedural due process claim under this second prong.

Accordingly, the Court finds that plaintiffs' complaint cannot be read to state a claim for procedural due process. The Court will analyze the plaintiffs' claims only in the context of the categories set forth above.

[6]Subsequent to *Eide*, the Eleventh Circuit clarified that it did not recognize a separate "substantive due process taking" claim; rather, the only substantive due process claim was that for arbitrary and capricious conduct. *See Villas of Lake Jackson v. Leon County*, 121 F.3d 610, 612 (11th Cir. 1997). That holding was based on at least one Supreme Court decision issued subsequent to *Eide*. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). The Sixth Circuit has not yet addressed the Eleventh Circuit's holding in *Villas of Lake Jackson*. Given the Court's ruling that a "due process takings" claim would not be ripe for decision in any event, the Court need not address this issue.

Although plaintiffs' complaint is not a model of clarity, a careful review of that pleading indicates that plaintiffs seek to assert several challenges to the constitutionality of Brecksville's zoning ordinances. First, plaintiffs clearly seek to allege a category (1) claim for a regulatory taking without just compensation. *See* First Amended Complaint, Doc. 5, at ¶ 22 ("The ordinances unconstitutionally restrict the owner's ability to use the land, substantially reduce the uses and value of the land and constitute an unconstitutional taking requiring compensation to the Plaintiffs."). Arguably, plaintiffs' allegations that they have been deprived of the value of the land also may assert a claim of the second category–that is, a "due process takings" claim. Finally, plaintiffs assert an "arbitrary and capricious due process" claim or a claim that the city's arbitrary zoning action violated their substantive due process rights. *See* First Amended Complaint, Doc. 5, at ¶ 22 ("The ordinances are unreasonable, arbitrary and confiscatory and not based on health, safety, morals and welfare of the community, do not advance legitimate state interest [sic], and are, therefore, unconstitutional in that they are in derogation of common law and deprive the property owners of certain uses of their land.").[7] Accordingly, the Court analyzes the ripeness of each of these claims separately, in accordance with the principles applicable to each type of claim.

With respect to plaintiffs' just compensation claim, the standard ripeness requirements, recognized by both parties in their briefing, must apply. Since the takings clause bars only governmental takings without just compensation, this category of claim cannot be ripe for review until property has been finally taken and the owner has been denied appropriate compensation. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191, 194 (1985)(claim for regulatory taking not ripe where plaintiff (1) never

[7]Plaintiffs' briefing relating to the motion to dismiss also unequivocally indicates plaintiffs' intent to assert an "arbitrary and capricious" substantive due process claim. (Doc. 15, at 11-13).

had applied for a variance from the zoning in effect and (2) had not sought compensation through available state procedures). The *Williamson* court stated that, in the context of a regulatory takings claim under the Just Compensation clause, a plaintiff's claim "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id*. Such finality, the Court held, does not exist until a plaintiff has pursued and exhausted available state procedures for seeking compensation. *See id.* at 195. In *Williamson*, the Court found that Tennessee had available an inverse condemnation action, which was an adequate remedy through which the plaintiff could seek compensation for the alleged governmental taking. *See id.* at 196-97.

Relying on this analysis, Brecksville asserts that plaintiffs' claim cannot be ripe for adjudication, because Ohio also has an adequate procedure permitting citizens to recover just compensation for governmental takings–specifically, a mandamus procedure to compel the city to commence eminent domain proceedings. *See Silver v. Franklin Township, Bd. of Zoning Appeals*, 966 F.2d 1031, 1035 (6th Cir. 1992)(claim was unripe where plaintiff had failed to use Ohio's mandamus procedure or to allege that the procedure was inadequate); *Tri-Corp*, 2002 U.S. App. LEXIS 6199 at *21-22 (holding that *Silver*'s analysis applies to regulatory taking claims); *State ex rel. Elsass v. Shelby County Bd. of Comm'rs*, 92 Ohio St. 3d 529, 533 (2001)("[m]andamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged. . . ."). Brecksville asserts that, since plaintiffs' complaint does not allege either (1) that plaintiffs have filed an unsuccessful writ of mandamus; or (2) that such a writ would not provide a "reasonable, certain and adequate" means of seeking just compensation, the Court should find that plaintiffs' complaint, on its face, is not ripe for judicial review.

Plaintiffs, on the other hand, maintain that the writ of mandamus is an inadequate provision for obtaining

compensation for a governmental taking, and that no court has ruled otherwise. Plaintiffs assert that the *Silver* holding was based on the plaintiff's failure to allege the inadequacy of Ohio's mandamus proceeding, and that *Silver* did not go so far as to hold that mandamus constituted a "reasonable, certain and adequate" provision for obtaining compensation. Additionally, plaintiffs note language in *Tri-Corp* to the effect that "Ohio does not have an inverse condemnation or other formalized procedure for seeking just compensation for a taking. . . ." *Tri-Corp*, 2002 U.S. App. LEXIS 6199, at *20.

Plaintiffs argue that the mere fact that an available state procedure exists to initiate appropriation proceedings does not mean that procedure is constitutionally adequate. In fact, plaintiffs assert, mandamus only issues where there is no "plain and adequate remedy in the ordinary course of the law." O.R.C. § 2731.05. Since mandamus is an extraordinary remedy, plaintiffs contend that it cannot be an adequate remedy for the taking allegedly suffered by the plaintiffs.

The Court has considered the parties' briefing on this issue carefully and finds that plaintiffs' just compensation claim is not ripe for decision. Accordingly, the Court has no jurisdiction over that claim, and the claim must be dismissed. First, there is no allegation that plaintiffs have sought a variance under any procedure that might be available through the city of Brecksville.[8] Plaintiffs do not allege either that a variance procedure is unavailable in Brecksville or that the result of such a procedure would be predetermined. Second, the plaintiffs' complaint fails to allege either that plaintiffs have sought a writ of mandamus under Ohio law or that resort to the mandamus procedure would be futile. The Court notes that plaintiffs' brief does argue

[8]In fact, neither party has mentioned in its briefs whether relief would be available through the granting of a variance. Absent allegations that plaintiffs have sought a variance, or that such relief is unavailable, however, plaintiffs' claim is not ripe for adjudication by this Court.

strenuously that the Ohio mandamus procedure presents an inadequate means of seeking compensation for the plaintiffs' loss. Even if inadequacy of remedy were alleged in the complaint, however, the Court refuses to find that Ohio's mandamus procedure is so inadequate that resort to that procedure would be futile.

Although the Court recognizes the limited nature of the *Silver* holding, the *Silver* court strongly suggested that the Ohio mandamus procedure provided an adequate avenue for the plaintiff to seek compensation for the alleged taking. *Tri-Corp*, too, carefully analyzed conflicting authorities and determined that the *Silver* approach was appropriate in the context of a regulatory, rather than a physical, takings claim. Furthermore, the result reached by *Silver* and *Tri-Corp* is in accordance with the great weight of authorities, both published and unpublished, which generally have relied on *Silver* to find regulatory takings claims (like that at issue here) unripe unless plaintiffs have pursued available claims in Ohio state court. *See, e.g., Alsenas v. City of Brecksville*, 2000 U.S. App. LEXIS 14520, *5 (6th Cir. Jun. 19, 2000)(unpublished disposition)("[t]he allegation of a taking of property without compensation was not ripe because Alsenas has not been denied compensation under state inverse condemnation proceedings. . . ."); *Ardire v. Rump*, 1993 U.S. App. LEXIS 17220, *10 (6th Cir. Jun. 30, 1993)(unpublished disposition)("Ohio law provides a procedure for obtaining compensation for a governmental taking; namely, an action in mandamus under Ohio Rev. Code § 2731 to force the city to commence eminent domain proceedings. . . ."); *D.A.B.E., Inc. v. City of Toledo*, 292 F. Supp. 2d 968, 971, n.1 (N.D. Ohio 2003)("the Sixth Circuit has held that the state of Ohio has provided an adequate procedure for seeking just compensation for a regulatory taking. . . ."); *Triomphe Investors v. City of Northwood*, 835 F. Supp. 1036, 1047 (N.D. Ohio 1993)(claim was unripe because plaintiff had failed to use the Ohio mandamus procedure).

Moreover, Sixth Circuit authority issued subsequent to the completion of briefing in this matter

conclusively resolves the issue and buttresses this Court's conclusion. In *Buckles v. Columbus Mun. Airport Auth.*, 2004 U.S. App. LEXIS 3599, *6-8 (6th Cir. Feb. 23, 2004)(unpublished disposition), the Sixth Circuit examined *Silver*, as well as *Kruse v. Village of Chagrin Falls*, 74 F.3d 694, 700 (6th Cir. 1996), a case that reached an opposite conclusion in a case involving a physical taking of property. The court relied on *Elsass* and other recent Ohio Supreme Court pronouncements in finding that mandamus was the appropriate vehicle for a landowner seeking compensation for an alleged taking, *see Buckles*, 2004 U.S. App. LEXIS 3599, at *7, particularly where the taking results from regulatory action, as distinct from a physical intrusion onto and deprivation of property. The Sixth Circuit noted that, "[a]lthough mandamus is formally an extraordinary remedy, mandamus actions for this purpose have become routine in Ohio." *See id.* at *8.

Accordingly, the Court finds that Ohio's mandamus procedure is an available and adequate procedure through which plaintiffs may seek compensation for an unconstitutional regulatory taking. Since plaintiffs have not availed themselves of that procedure, they have not yet been denied just compensation, and their takings claim is not ripe for decision. Thus, that claim must be dismissed.

The result is identical with respect to any "due process takings" claim raised by the plaintiffs. Assuming such a claim is alleged and that it would be viable, a "due process takings" claim would be governed by the same finality requirements applicable to a claim for just compensation. *See James Emory, Inc. v. Twiggs County*, 883 F. Supp. 1546, 1557 (M.D. Ga. 1995). Without a final decision by the decisionmaker, "a court cannot determine whether a regulation has gone too far. . . ." *Id.* As noted above, plaintiffs have neither applied for a variance from the applicable zoning nor alleged that such relief is unavailable. Thus, a "due process takings" claim is unripe for the same reasons applicable to a just compensation claim.

With respect to plaintiffs' "arbitrary and capricious" substantive due process claim, it is obvious that

plaintiffs seek to challenge Brecksville's unconstitutional application of the1999 zoning ordinances to their seven parcels. In order to sustain this type of "arbitrary and capricious" challenge, a plaintiff must show final application of a regulation to the property in question. "In order 'for as applied arbitrary and capricious due process . . . claims to be ripe, the particular zoning decision being challenged must be finally applied to the property at issue.'" *Christopher Lake Dev. Co. v. St. Louis County*, 35 F.3d 1269, 1273 (8th Cir. 1994), *quoting Eide*, 908 F.2d at 724-25. A final decision has been reached when the "initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Williamson*, 473 U.S. at 193.

Although an "arbitrary and capricious" claim, in certain circumstances, may ripen earlier than a Fifth Amendment just compensation claim,[9] a plaintiff nonetheless is required to exhaust appropriate remedies prior to pursuing an "arbitrary and capricious" claim. The extent to which resort to state procedures will be required depends on the nature of the claim and the remedy sought. Where, as here, the plaintiff seeks final relief–*i.e.*, an injunction requiring the city to grant commercial zoning–the plaintiff must first obtain a final decision denying commercial zoning, including at least one application for a variance. *See id.*; *James Emory*, 883 F. Supp. at 1559. Since the plaintiffs have not sought any variance or special exception from the application of the ordinances (and have not alleged that such application would be futile), any claim seeking final relief, such as reinstatement of the previous zoning classifications, is unripe at this point.

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[9]For example, an "arbitrary and capricious" claim does not require a demonstration of reapplication for a different, less ambitious zoning scheme. *See James Emory*, 883 F. Supp. at 1559. Additionally, a plaintiff in an "arbitrary and capricious" suit need not pursue compensation procedures, since the plaintiff claims that the government's action is unconstitutional regardless of whether compensation is paid. *See Eide*, 908 F.2d at 725, n. 16.

Thus, in summary, the Court rules as follows with respect to the plaintiffs' claims relating to takings and substantive due process:

(1) Both the plaintiffs' just compensation claim and "due process takings claim," to the extent such claims are alleged, are unripe due to the plaintiffs' failure to seek a variance from the applicable ordinances or to pursue the Ohio mandamus procedure to recover just compensation.

(2) With respect to the plaintiffs' "as applied arbitrary and capricious" substantive due process claim, such a claim also is unripe due to the plaintiffs' failure to seek a variance from the applicable ordinances prior to pursuing final relief in this Court.

Accordingly, plaintiffs' takings claim and "arbitrary and capricious" substantive due process claim must be dismissed.

**D. Intrusion on Legislative Functions**

As an alternative argument, Brecksville asserts that, if the Court allows the plaintiffs to pursue their claims against the City, the Court would be impermissibly intruding on Brecksville's zoning powers, which are properly delegated to Brecksville legislative bodies. Brecksville argues that federal courts should remain "confined to the role of the judicial branch . . . and . . . [should] not intrude upon the roles of the legislative and executive branches. . . ." *See Associated Gen. Contrs. of Am. v. City of Columbus*, 172 F.3d 411, 415 (6th Cir. 1999). Essentially, Brecksville asserts that, if the Court were to rule that the 1981 Cuyahoga County Court of Common Pleas judgment constituted a permanent bar on rezoning of the plaintiffs' property, the Court impermissibly would interfere with the municipal body's future discretion to determine the appropriate zoning for those parcels. A court, Brecksville argues, can do no more than "intervene . . . after a legislative

enactment has been passed"; it may not restrict a municipality's discretion in advance. *See id.*[10]

The Court finds that it is unnecessary to reach this argument and, accordingly, the Court declines to do so. The Court previously has addressed the scope and effect of the 2002 Eighth District opinion, *see* section II.B., *supra*, and the Court's analysis in that section has disposed of all claims, both state and federal, that are premised on the City's alleged failure to comply with the 1981 agreement and judgment entry. Similarly, in that section, the Court adopted both the Eighth District's legal findings and the factual underpinnings for its decision. Accordingly, this case presents no issue of conflict between the legislative and judicial branches, and the Court does not consider any such argument.

**E. Abstention**

Finally, and as an alternative to its other arguments, defendants argue that this Court should abstain from deciding this case pursuant to *Railroad Com. of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941), because state law is unclear and a clarification of that law might obviate the necessity of deciding the federal questions in this case. *Pullman* abstention is appropriate where a case presents (1) an unclear state law, and (2) the likelihood that a clarification of the state law would obviate the necessity of deciding the federal

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[10]*See also New Orleans Water Works Co. v. New Orleans*, 164 U.S. 471, 481 (1896):

> ...the courts will pass the line that separates judicial from legislative authority if by any order, or in any mode, they assume to control the discretion with which municipal assemblies are invested when deliberating upon the adoption or rejection of ordinances proposed for their adoption. The passage of ordinances by such bodies are legislative acts, which a court of equity will not enjoin.

*Id.*; *quoted in Associated Gen. Contrs.*, 172 F.3d at 415.

question. *See Tyler v. Collins*, 709 F.2d 1106, 1008 (6th Cir. 1983). Brecksville argues here that Ohio law is unclear with respect to the validity and enforceability of the 1981 settlement agreement and order, and that a clarification might resolve the federal question, because a state court might order that the 1981 judgment be enforced in accordance with plaintiffs' interpretation of that judgment.

Plaintiffs do not address defendants' abstention argument. The Court notes, however, that "[abstention] from the exercise of federal jurisdiction is the exception, not the rule. . . ." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). Federal courts should exercise their discretion to abstain only where "a state statute is . . . 'fairly subject to an interpretation which will render unnecessary' adjudication of the federal constitutional question." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984)(internal quotation omitted).

Even if it were necessary to reach the abstention argument in this case (which, given the Court's disposition of the matter, it is not), the Court believes that such an argument is both inappropriate and, indeed, somewhat absurd in this case. As Brecksville strenuously has argued, and as this Court previously has found, a state court already has rendered unambiguous findings relating to the interpretation of the 1981 agreement and judgment under state law. The Eighth District's order constituted a final judgment, and the Court agrees with Brecksville's assertion that there was nothing unclear about that order. There is, thus, nothing about state law that needs clarification

Moreover, even if state law were unclear, abstention in this case would be illogical; there is simply no pending state court action in which any unclear state law issues could be resolved. Brecksville's own removal of this case to this Court divested the state court of jurisdiction and deprived that court of the opportunity to resolve any allegedly ambiguous state law issue. This Court thus has no state court action to which it could

defer, nor any forum in favor of which it could abstain. In any event, given the Court's disposition of this action, the question of abstention is moot, and the Court accordingly declines to address that argument.

## IV. Conclusion

For the foregoing reasons, Brecksville's motion to dismiss (Doc. 6) is **GRANTED** in its entirety. Judgment will be entered in favor of defendant Brecksville, and against the plaintiffs, in an appropriate order.

**IT IS SO ORDERED.**

**s/Kathleen M. O'Malley**
**KATHLEEN McDONALD O'MALLEY**
**UNITED STATES DISTRICT JUDGE**

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

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| **TAMIKA WILLIAMS, et al.,** | : | **Case No. 1:01CV1999** |
| | : | |
| **Plaintiffs,** | : | **JUDGE O'MALLEY** |
| | : | |
| **v.** | : | **MEMORANDUM & ORDER** |
| | : | |
| **CITY OF CLEVELAND, et al.,** | : | |
| | : | |
| | : | |
| **Defendants.** | : | |

Plaintiff Tamika Williams, on behalf of Trevon Williams, originally filed this action in the Cuyahoga County Court of Common Pleas, and the defendants removed the case to this Court. Williams named as defendants the City of Cleveland ("City"); City police officer Michael Meyer; and several unknown City police officers. Williams alleges that Trevon Williams was unconstitutionally seized when Officer Michael Meyer inadvertently shot him while engaged in a struggle with a fleeing suspect. Based upon these allegations, Williams states the following claims: (1) excessive use of deadly force by Office Meyer in violation of Williams' Fourth and Fourteenth Amendment rights; (2) state law assault and battery; and, (3) loss of consortium.

Prior to the February 8, 2002, Case Management Conference, defendants filed a motion for summary judgment (Docket #10) as to all of Williams' claims. The Court ordered Williams to respond only

to the Fourth Amendment claim because the parties agreed, pursuant to Civil Rule 56(f), that additional discovery was needed with respect to the substantive due process and state law claims. For the reasons stated below, the Court finds that defendants' motion for summary judgment on Williams' Fourth Amendment claim is well taken. Accordingly, judgment on Williams' Fourth Amendment claim is entered in favor of defendants, and that claim is **DISMISSED**.

## I. Factual Background

The following facts are not in dispute. On June 18, 2001, at approximately 9:30 p.m., Officer Meyer responded to a call concerning a vehicle that was fleeing from police. Officer Meyer saw the vehicle and pursued it until it stopped. Both occupants of the vehicle exited and fled in the area of E. 149th Street and Lakeshore Boulevard, a residential area. Officer Meyer pursued one of the fleeing suspects on foot. When Officer Meyer caught the suspect, a struggle ensued, during which his firearm discharged, grazing the suspect. Tragically, the bullet went on to strike the Plaintiff, six-year old Trevon Williams, in his abdomen. Williams was standing on the front porch of his house at the time.

Williams does not allege that Officer Meyer intended to shoot him. Rather, all the parties agree that the shooting, as it relates to Williams (as opposed to the fleeing suspect), was an accident. Indeed, Officer Meyer, in his affidavit, averred that he did not even see Williams until after his gun had fired. (Meyer Affidavit ¶ 12). While Williams does not dispute this averment, she does claim that issues of fact exist as to whether "Officer Meyers [sic] intentionally or recklessly fired his weapon at the suspect." (Response at 2).

## II. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides that:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . .

Rule 56(e) specifies the materials properly submitted in connection with a motion for summary judgment:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein . . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In reviewing summary judgment motions, this Court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *White v. Turfway Park Racing Ass'n, Inc.*,

909 F.2d 941, 943-44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the Court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252.

Summary judgment is appropriate whenever the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322. Moreover, "the trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989) (citing *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1034 (D.C. Cir. 1988)). The non-moving party is under an affirmative duty to point out specific facts in the record as it has been established which create a genuine issue of material fact. *Fulson v. City of Columbus*, 801 F. Supp. 1, 4 (S.D. Ohio 1992). The non-movant must show more than a scintilla of evidence to overcome summary judgment; it is not enough for the non-moving party to show that there is some metaphysical doubt as to material facts. *Id*.

## III. Discussion

### A. Law

The threshold question before the Court is whether the accidental shooting of Trevon Williams qualifies as a Fourth Amendment "seizure." If it does not, the Court's inquiry necessarily

ends because the Fourth Amendment would not apply. If the shooting was a seizure, however, the Court must then apply an objective reasonableness analysis to determine if the seizure, under the specific facts of the case, constituted a violation of Williams' constitutional right against unreasonable seizures. *Graham v. Conner*, 490 U.S. 386, 396-97 (1989).

Generally speaking, "whenever an officer restrains the freedom of a person to walk away, he has seized that person." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (officer's fatal shooting of a fleeing suspect constituted a Fourth Amendment seizure). This general test becomes problematic, however, when the "restraint" in question results from an accidental occurrence (e.g., accidental shooting of an innocent bystander). Recognizing this problem, the Supreme Court addressed the intent element of the seizure analysis in *Brower v. County of Inyo*, 489 U.S. 593 (1989).

In *Brower*, the Court explained that "the Fourth Amendment requires an intentional acquisition of physical control" . . . and elaborated that "a seizure occurs even when an unintended person or thing is the object of the detention or taking [provided] the detention or taking itself [is] willful." *Id*. at 595 (emphasis added). In other words, while it is possible for an innocent person to be unintentionally seized within the meaning of the Fourth Amendment (i.e., law enforcement officer fires at dispersing witness, mistakenly believing witness to be a fleeing felon), this is only so where the state actor involved actually intends to restrain the very person whose freedom is curtailed by the unintended action. The intent element, therefore, focuses on the subject of the detention rather than actions taken.

In *Brower*, the Court then illustrated the nature of the intent requirement with the following hypothetical:

> [I]f a parked and unoccupied police car slips its brake and pins a passerby against a wall, it is likely that a tort has occurred, but not a violation of the Fourth Amendment. And the situation would not change if the passerby happened, by lucky chance, to be a serial murderer for whom there was an outstanding arrest warrant - - even if, at the time he was thus pinned, he was in the process of running away from two pursuing constables. It is clear, in other words, that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement through means intentionally applied.

*Id*. at 596-97.

The *Brower* hypothetical's final statement - "governmental termination of freedom of movement through means intentionally applied" - arguably could be interpreted (as plaintiff attempts to do so here) to place the focus on the officer's intent to take certain action (e.g., to fire his weapon), rather than on his intent to seize a particular individual. That is not, however, the proposition for which *Brower* stands. Subsequent courts, including the United States Supreme Court, repeatedly have held that non-targeted innocent parties who are collaterally injured by police force cannot state a Fourth Amendment claim, whether or not force was intentionally directed at the police suspect. See e.g., *County of Sacramento v. Lewis,* 523 U.S. 833 (1998) (relying on *Brower*, Court concludes Fourth Amendment does not apply where passenger on motorcycle driven by subject of police chase is killed when struck by police car after motorcycle skids on pavement); *Claybrook v. Birchwell*, 199 F.3d 350 (6th Cir. 2000)(noting Fourth Amendment does not apply to claim of suspect's daughter-in-law who was shot during gun battle between police and suspect). In *Claybrook*, the Sixth Circuit expressly noted that "the Fourth Amendment . . . does not apply to section 1983 claims which seek remuneration for physical injuries inadvertently inflicted upon an

innocent third party by police officers' use of force while attempting to seize a perpetrator, because the authorities could not 'seize' any person other than one who was a deliberate object of their exertion of force." *Claybrook*, 199 F.2d at 359. *See also, Apodaca v. Rio Arriba County Sheriff's Dept*., 905 F.2d 1445 (10th Cir. 1990) (holding that when a police officer's car, while responding to a call, accidentally hit the plaintiff's car, no seizure occurred because the officer did not intend to stop the plaintiff); *Clark v. Buchko*, 936 F. Supp. 212, 219 (D.N.J. 1996)(describing cases involving accidental shootings in which courts concluded that no Fourth Amendment claims existed because the officers lacked intent to seize the victims by firing their weapons).

Two cases make the distinction between intentional force directed at a criminal suspect and intentional force directed at a victim especially clear: *Brown v. City of Louisville*, 1994 U.S. App. LEXIS 23115 (6th Cir. 1994), and *Dahm v. City of Miamisburg*, 1997 WL 1764770 (S.D. Ohio 1997). In *Brown*, whose facts are very similar to those here, a police officer who had been called to the scene of a domestic dispute accidentally shot the plaintiff after shoving the other party to the dispute with the butt of his shotgun, causing the gun to discharge over his shoulder. In that case, the Sixth Circuit held that the police officer did not violate the plaintiff's Fourth Amendment rights because she was merely a bystander who was indirectly injured as a result of police conduct directed toward another. In *Dahm*, a police officer, while executing a search warrant, shot at an attacking dog as he entered the plaintiff's house. The officer's shot missed the dog, however, and struck the plaintiff. While the court noted that the case differed from *Brown* in that the officers executing the search warrant may have intended, upon entering the house, to "seize" the plaintiff, it still held that no Fourth Amendment "seizure" had occurred.

Thus, in the absence of an intentional use of force directed at the victim of that force, no seizure occurs and no claim under the Fourth Amendment can be asserted. This is not to say, however, that innocent bystanders who are injured by police conduct have no cause of action. They simply have no claim under the Fourth Amendment. Rather, constitutional tort claims asserted by non-intended targets who are collaterally injured by police conduct are properly adjudged under the substantive due process clause of the Fourteenth Amendment, and, as in this case, state law.[1] *Claybrook*, 199 F.3d at 359; *Lewis*, 523 U.S. at 823.

**B. Application**

It is undisputed that Trevon Williams' presence near Officer Meyer was unconnected to Meyer's pursuit of the fleeing suspect, which ultimately gave rise to Williams' injury. As outlined above, the test for "seizure" under the Fourth Amendment turns on the objective intent of the police officer with respect to the individual whose movement was ultimately restrained; the test does not depend on the police officer's intent with respect to the conduct which ultimately caused the restraint. In this case, Officer Meyer's intent was directed solely at the suspect. Had the discharge of Officer Meyer's gun disabled the suspect, the suspect may be able to contend that he had been "seized" for purposes of the Fourth Amendment. That is not what occurred, however. The victim of the weapon's accidental discharge was Williams, not the fleeing suspect. Considering these facts in light of Officer Meyer's objective intent to apprehend only the suspect, the Court finds that, while

[1] The ability to pursue these claims are, of course, dependant upon the burdens and immunities applicable in light of the facts and circumstances presented in any given case.

Williams, tragically, was injured, he was not "seized" for purposes of the Fourth Amendment because Officer Meyer never intended to restrain him.

Supreme Court and Sixth Circuit case law make clear the proper application of the Fourth Amendment's intent requirement as it relates to "seizures." If the plaintiff was not the intended subject of the police officer's use of force, he was not "seized" for purposes of the Fourth Amendment. Because no Fourth Amendment seizure occurred when Trevon Williams was accidentally shot, the Court need not elaborate on the reasonableness analysis outlined in *Graham*.

**IV. Conclusion**

Because the Plaintiff was not the subject of a Fourth Amendment seizure, his claim under 42 U.S.C. § 1983 for violation of his Fourth Amendment rights is invalid. Accordingly, Defendants' Motion for Summary Judgment **AS TO THE FOURTH AMENDMENT ISSUE ONLY** is hereby **GRANTED**.

**IT IS SO ORDERED.**

**s/ Kathleen M. O'Malley**
**KATHLEEN McDONALD O'MALLEY**
**UNITED STATES DISTRICT JUDGE**