New Judges Orientation: Part I

Common Pleas Track

December 9-10, 2025
Thomas J. Moyer
Ohio Judicial Center
Columbus

The Supreme Court *of* Ohio
Judicial College

THE SUPREME COURT *of* OHIO
JUDICIAL COLLEGE

New Judges Orientation: Part I – Common Pleas Track
December 9-10, 2025 – Thomas J. Moyer Ohio Judicial Center, Columbus

AGENDA

TUESDAY, DECEMBER 9

8:15 **Search Warrants** *(Combined session with municipal judges)*
Hon. Patrick J. Carroll, Retired, *Lakewood Municipal Court*

9:45 Break

10:00 **Evidence** *(Combined session with municipal judges)*
Hon. D. Chris Cook, *Lorain County Common Pleas Court*
Hon. Joy Malek Oldfield, *Summit County Common Pleas Court*

11:45 Lunch

12:45 **Civil Practice and Procedure**
Hon. D. Chris Cook, *Lorain County Common Pleas Court*
Hon. Joy Malek Oldfield, *Summit County Common Pleas Court*

2:00 Break

2:15 **Trial Skills Workshop**
Hon. Stephen L. McIntosh, *Franklin County Common Pleas Court*
Hon. Joy Malek Oldfield, *Summit County Common Pleas Court*
Hon. Matthew L. Reger, *Wood County Common Pleas Court*

4:00 Conclude

4:00 **Photos for judges with last names A-L.** (Judges attending the 4:15 p.m. Compensation and Benefits session may get photos taken on Wednesday, December 10, instead. Any judges not attending the Compensation and Benefits session are encouraged to get their photos taken now, regardless of last name.)

4:15 – 4:45 **Compensation and Benefits** *(Optional – No CLE)*
Michele Jakubowski, *Director, Office of Human Resources, Supreme Court of Ohio*
Kim Cardwell, *Deputy Director, Office of Human Resources, Supreme Court of Ohio*
Amber Postlewaite Veal, *Payroll Specialist, Office of Human Resources, Supreme Court of Ohio*
Laken Waldroup, *Employment Specialist, Office of Human Resources, Supreme Court of Ohio*

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AGENDA

WEDNESDAY, DECEMBER 10

8:30 **Arraignments, Taking Pleas, and Guilty and No Contest Pleas, and Plea Requirements under the Constitution, Revised Code, and Crim.R. 11**

- Non-Constitutional Requirements [Crim. R. 11(C)(2)(a)&(b)]
- Constitutional Dimensions [Crim. R. 11(C)(2)(c)]
- Special Statutory Considerations

Hon. Stephen L. McIntosh, *Franklin County Common Pleas Court*
Hon. Joy Malek Oldfield, *Summit County Common Pleas Court*

10:00 Break

10:15 **Arraignments, Taking Pleas, and Guilty and No Contest Pleas, and Plea Requirements under the Constitution, Revised Code, and Crim.R. 11,** *continued*

12:00 Lunch

1:00 **Felony Sentencing, Penalties and Post-Release Control Obligations**

- Purposes and Principles of Sentencing
- Penalty Ranges
- Other Issues
- Collateral Consequences

Hon. Matthew L. Reger, *Wood County Common Pleas Court*

2:30 Break

2:45 **Felony Sentencing, Penalties and Post-Release Control Obligations,** *continued*

4:30 Conclude

4:30 **Photos for judges with last names M-Z** (and judges who didn't get photos taken on Tuesday.)

NOTE:

Additional Judicial College courses are available online for self-study hours, please visit https://www.supremecourt.ohio.gov/JudicialCollegePublicCalendar/#/online

To register for a Judicial College course or to view upcoming course offerings, please visit https://www.supremecourt.ohio.gov/JudicialCollegePublicCalendar/#/catchall

FACULTY BIOGRAPHIES

PATRICK CARROLL served as judge of the Lakewood Municipal Court for almost 32 years and is currently serving as a judge by assignment by the Ohio Supreme Court and as the ABA Judicial Outreach Liaison for the State of Ohio. Prior to taking the bench, Judge Carroll served as an assistant prosecuting attorney for Cuyahoga County, Civil Division, from 1979 to 1984 and in private practice until 1990. Judge Carroll served as a law clerk for Hon. John V. Corrigan at the 8th. District Court of Appeals. From 1981 to 1990 Judge Carroll was an adjunct faculty member for the Cleveland-Marshall College of Law at Cleveland State University. He received his J.D. from Cleveland State College of Law, serving as the Research Editor for the law review. He has written several reported decisions and legal articles, most recently, The inequity of third part bail practices, 53 Loyola Univ. Chicago Law Journal, 153 (2022). Judge Carroll is co-chair of the Editorial Board of the Ohio Jury Instructions Committee for the Ohio Judicial Conference, education chair for the Association of Municipal/County Court Judges of Ohio, a past member of the Supreme Court of Ohio Continuing Legal Education Commission and Judicial College Board of Trustees, and the Board of Trustees of the Cleveland Metropolitan Bar Association. Judge Carroll is a life member of the Eighth District Judicial Conference, a two-time recipient of the President's Award from the Association of Municipal/County Judges of Ohio, and a frequent faculty member for the Judicial College. Judge Carroll was inducted into the Cleveland State University Law School Hall of Fame in 2023 and the 2024 recipient of the Thomas J. Moyer Judicial Excellence award from the Ohio State Bar Association.

D. CHRIS COOK was elected to the Lorain County Court of Common Pleas – General Division, on November 8, 2016, assumed the office on December 24, 2016, and was reelected to full, six-year terms on November 6, 2018, and November 4, 2024. On January 1, 2023, he was elected to serve as Presiding Judge of the Ten-Judge Lorain County Common Pleas Court. Judge Cook also oversees the felony non-support docket and runs a county-wide driver's license reinstatement program.

Prior to becoming a judge, Judge Cook's primary practice involved litigation, specifically in the area of Attorney Discipline, Consumer Sales Practices Act, and the defense of automobile dealerships. He has tried numerous civil and criminal cases to juries throughout the State of Ohio, in both state and federal courts, including multi-million dollar class action matters and

death penalty cases. Judge Cook has been admitted pro hac vice in California, Illinois, and Maryland. He has prosecuted or defended approximately 100 appeals.

Judge Cook Chaired the Supreme Court of Ohio's Board of Professional Conduct in 2023 and 2024, and has been a member of the Board since 2018. He is a member of the Ohio Supreme Court's Judicial Curriculum Committee; and a member of the Ohio Supreme Court's Committee on Grievances Against Supreme Court Justices. He is a former member of the Board of Governors of the Ohio State Bar Association; past President of the Lorain County Bar Association; a former member of the Certified Ethics and Grievance Committee (2002-2012); former Chairman of the Lorain County Bar Association's New Lawyer's Admissions Committee; former Chairman of the Lorain County Bar Association's Unauthorized Practice of Law Committee; and former Supreme Court Certified Bar Counsel to the Lorain County Bar Association (2006 – 2016).

Judge Cook also served as an Assistant Lorain County Prosecutor in both the civil and major felony division for five years; served as Magistrate for the Lorain Municipal Court (2005 – 2016); and Prosecuting Attorney for Sheffield Village, Ohio (2004 – 2016). Prior to taking the bench, Judge Cook was a member of the law firm Cook & Nicol, LLC, in Lorain, Ohio, and was named an Ohio "Super Lawyer" for 2017 by Thomson Reuters.

JOY MALEK OLDFIELD graduated from the University of Akron school of law after obtaining a Bachelors degree in Sociology from John Carroll University Before entering public service, she was recognized throughout the State of Ohio as a Plaintiff's trial attorney. Judge Oldfield started her legal career with Scanlon & Gearinger Co., LPA, and then as a partner at Hill Hardman Oldfield, LLC, where she practiced in the area of complex civil litigation and appeals. A persuasive and effective trial lawyer, she represented clients in state and federal courts throughout Ohio, as well as before the Supreme Court of Ohio and the Supreme Court of the United States. The individuals whose causes she undertook suffered age, gender and race discrimination, sustained serious personal injury, and/or unfortunately lost loved ones due to professional or other negligence. The hallmark of Judge Oldfield's practice as a lawyer was her work ethic, sharp courtroom skills and compassion for humanity.

Drawn to helping people in a larger way, she left a successful career as a private attorney to serve as a Magistrate for Judge Elinore Marsh Stormer in the Summit County Common Pleas Court. As a Magistrate, Oldfield presided over bench and jury trials for civil cases.

In 2011, Judge Oldfield was elected to the Akron Municipal Court, serving until 2016. There, in addition to her duties as a trial court judge, the other judges elected her as the Administrative/Presiding Judge from 2014-2016. And, in keeping with the philosophy of treatment in lieu of incarceration, she revamped and presided over the Akron Municipal Drug Court from 2013-2016.

Judge Oldfield joined the General Division of the Summit County Common Pleas Court in November 2016, and her colleagues immediately selected her as Presiding Judge of the Turning Point Program (the Felony Drug Court).

The hallmark of Judge Oldfield's judicial service has been her tireless work to impact and educate individuals on the disease of addiction and the beauty of recovery. Through her years on the bench, Judge Oldfield spearheaded various initiatives to try and meet all needs – physical, mental, social, emotional, spiritual – for those suffering from the disease of addiction.

Her innovations in this field have been widely recognized. Judge Oldfield founded Faith in Recovery – designed to provide interested participants a spiritual connection along their recovery journey; and, Y-STRONG, designed to provide participants with access to area YMCA facilities for physical wellness. Also under her leadership, the Turning Point Program obtained Summit County's first specialized docket therapy dog, "Tank." With Tank's help, participants can relax, reduce their level of stress and feel more comfortable in the Court setting.

In addition, Judge Oldfield works to educate others – locally, state-wide and on the national level. Two national entities, Substance Abuse and Mental Health Services Administration (SAMHSA) and the Bureau of Justice Assistance (BJA) invited Judge Oldfield to present in a national expert panel to develop guidance for provicers. She also presented "Trauma in Specialty Court Settings" for SAMHSA's National Center for Trauma-Informed Care and Alternatives to Restraint and Seclusion and GAINS Center for Behavioral Health and Justice Transformation. The session was part of a five-part series and provided information on how treatment courts can provide a trauma-informed approach to support recovery. Since then, SAMHSA's GAINS Center continues to partner with Judge Oldfield as a leader and expert in the field of recovery.

In 2019, the University of Akron School of Law hired Judge Oldfield to teach Pretrial Advocacy to second and third year law students. Judge Oldfield continues to teach that course today, designed to instruct students on the skills, standards and ethics required for civil litigation.

A Summit County resident, Judge Oldfield has three daughters.

STEPHEN L. McINTOSH is a 1983 graduate of the Ohio State University Moritz College of Law. While attending the College of Law, he was President of the Black Law Students Association (BLSA) He received the Judge Joseph Harter Trial Advocacy Award upon graduation. His team won best brief at the Frederick Douglas Moot Court Regional Competition.

In 1984 Judge McIntosh began employment with the Columbus City Attorney's Office as an assistant city prosecutor. In 1986, he was appointed Deputy Director of the UCC Div. for Secretary of State Sherrod Brown. In January of 1990, he was hired as an associate with Crabbe, Brown, Jones, Potts and Schmidt, (now Amundsen Davis LLC). Columbus City Attorney Janet E. Jackson appointed Judge McIntosh Chief Prosecutor for her Prosecutor's Division February of 1997, a position he held until January of 2007 when he assumed the bench.

Judge McIntosh serves as the Presiding Judge of the Common Pleas Court and previously served as the Administrative Judge of the Court of Common Pleas General Division. He serves as judge of the court's recovery court docket, TIES. (Treatment is Essential to Success).

Judge McIntosh is a past president of the Columbus Bar Association. He is a member of the John Mercer Langston Bar Association. He is also a member of the Ohio State Bar Association where he served on the Board of Governors and currently serves on the Council of Delegates. He currently serves on the House of Delegates for the American Bar Association.

Judge McIntosh currently serves as chair of the Supreme Court of Ohio Judicial College Board of Trustees. He serves on the OLAP Board where he is a past chair. He previously served as chair of the Supreme Court Task Force to Examine Improvements to the Ohio Grand Jury System and co-chair of the Joint Task Force to Study the Administration of Ohio's Death Penalty. He previously chaired the CLE Commission. He served on the Supreme Court Advisory Committee on Dispute Resolution and the Supreme Court Advisory Committee on Interpreter Services. He currently serves on the Ohio Sentencing Commission.

He has been recognized by Columbus Monthly Magazine and Who's Who Among African Americans in Central Ohio. In 2023 he was recognized by the OSBA with the Chief Justice Thomas Moyer Award for Judicial Excellence. He received the John Mercer Langston Bar Association Legacy Award and received the David L. White Award from Capital University.

MATTHEW REGER is a Wood County Common Pleas judge in Bowling Green Ohio. He has been on the bench since 2017. Prior to that he was the Bowling Green municipal prosecutor for 20 years. He graduated from Michigan State University in 1990 and the University of Toledo College of Law in 1993. He began his career as a staff attorney for Judge Charles Kurfess in 1993, serving until 1996.

In 2006 he took a year away from the Bowling Green prosecutor's office to live and work in the former Soviet Republic of Georgia. Serving with the American Bar Association's Rule of Law Initiative, Judge Reger trained Georgian attorneys and prosecutors in the adversarial system. He also worked with the US Embassy and the Georgian Parliament in the creation of a criminal procedure code that protected basic rights.

Following his return to the United States, in addition to his duties as Bowling Green Prosecutor, he also founded a nonprofit that provided free legal services through his church. Since 2008 he has served as an adjunct professor with Bowling Green State University, teaching several different law related classes.

Judge Reger lives with his wife Heidi and his two children, Elizabeth and Noah, in Bowling Green.

Search Warrants

Hon. Patrick Carroll, Retired
Lakewood Municipal Court

Mechanics and Operation of Search Warrants in Ohio

Written materials prepared by

Patrick Carroll, retired judge

For the Ohio Judicial College[1]

Supreme Court of Ohio

December 9, 2025

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[1] Revised November 18, 2025

Table of Contents

I. General Overview

In Ohio, there are seven recognized exceptions to the warrant requirement:
1) a search incident to a lawful arrest;
2) consent;
3) the stop-and-frisk doctrine;
4) hot pursuit;
5) probable cause plus the presence of exigent circumstances;
6) the plain view doctrine; and
7) administrative searches.
State v. Herbert, 2023-Ohio-4490 (7th. Dist.).

State v. Akron Airport Post No. 8975, 19 Ohio St.3d 49, 51(1985). In order to qualify under the plain view exception, the state must demonstrate:

1) the initial intrusion which afforded the authorities the plain view was lawful;
2) the discovery of the evidence was inadvertent; and
3) the incriminating nature of the evidence was immediately apparent.

Search warrant procedure is based upon the Fourth Amendment to the U.S. Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

1) Obtaining warrant. Crim. R. 41(A)
   A) Request of prosecuting attorney or law enforcement officer,
   B) Issued by judge of court of record, and
   C) Within territorial jurisdiction of court,
   D) If a tracking device warrant, the tracking device includes information obtained outside of the court's jurisdiction as long as it was installed within territorial jurisdiction of the court.

2) Property to be seized. Crim. R. 41(B).
   A) Evidence of commission of a crime,
   B) Contraband, fruits of crime, or things otherwise criminally possessed, or
   C) Weapons or other means to commit a crime.

3) Contents of affidavit(s). Crim. R. 41(C) (1).

A) Under oath
B) Personally to judge or by reliable electronic means,
C) Describing with particularity:
    1) Name of person or place to be searched,
    2) Property to be searched for and seized,
    3) Offense and relation to search[2], and
    4) Affiant's belief of location of property.
    5) If tracking device,
        a) the person or property to be tracked, and
        b) factual basis for belief it will yield evidence of the offense.

4) Search Warrant. Crim. R. 41(C)(2).

A) Based on probable cause from affidavit(s).
B) Probable cause may be based on hearsay if:
    1) Credible and
    2) Factual basis for credibility of information provided.
C) Additional oral information may be provided to supplement affidavits, but must be recorded as part of the affidavit to be admissible.
D) Issued to prosecutor or law enforcement officer in person or by reliable electronic means.
E) Three (3) days to conduct search,
F) Ten (10) days to install tracking device with extensions permitted up to forty-five (45) days.
G) Executed during daytime unless warrant authorizes nighttime.
H) Direction to return warrant to judge or clerk.

5) Execution. Crim. R. 41(D).

A) Police officer must give person searched or leave at place of search:
    1) Copy of search warrant, and
    2) Receipt for property taken,
    3) Promptly prepare return and written inventory of property taken
        a) In presence of person subject to search, or
        b) credible person at scene other than person executing the warrant.

6) Written return, inventory and any other applicable papers to be filed with issuing judge or clerk as warrant specifies. (Crim. R. 41(E)).

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[2] Although Criminal Rule 41 (C) states that the search warrant affidavit shall state substantially the offense as the basis for the search, the failure to name a specific offense to which the evidence is related is not constitutionally significant and does not grounds for suppression. The specific code number or title of the offense is not required. *Cleveland v. Becvar*, 63 Ohio App.3d. 163, 166 (1989)

7) Property seized to be held by:
A) Court issuing warrant, or
B) Law enforcement agency that executed warrant.
(Crim. R. 41(D) (1).

II. Stages of judicial review.

A) Determination of probable cause. (The 2:00 a.m. call).

State v. George, 45 Ohio St. 3d 325 (1989) set out the standard for probable cause by a judge to issue a search warrant.

> In determining the sufficiency of probable cause in an affidavit submitted in support of a search warrant, "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. (*Illinois v. Gates* [1983], 462 U.S. 213, 238-239, followed.)" (First paragraph of the Syllabus of the Court.)

State v. Maranger, 2nd. Dist. Montgomery, No. 27492, 2018-Ohio-1425, citing *State v. George*, noted that the standard is a "fair probability" not an absolute certainty that the items would be found at the location set out in the affidavit.

State v. Castagnola, 145 Ohio St.3d 1, 2015-Ohio-1565. The court should evaluate the nexus between the alleged crime and the objects to be seized and/or the place to be searched.

State v. Tarver, 2025-Ohio-2167 (2d. Dist.). In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, trial and appellate courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant." *George* at paragraph two of the syllabus, citing *Gates*.

Although probable-cause determination for an arrest warrant is similar in nature to that for a search warrant, a search-warrant inquiry is much more complex and presents special considerations, including stale information, nexus with alleged crime, the object sought, and the place searched. Relying on *State v. Constagnola.*

State v. Risner, 12th. Dist. Preble, No. CA2017-06-007, 2018-Ohio-1569. When reviewing an affidavit supporting a search warrant, the trial court on a motion to suppress or the appellate court on review need only ensure that the issuing judge had a substantial basis for concluding that probable cause existed based upon the affidavit. Proof of illegal drug activity at the defendant's house created a valid nexus to uphold the search warrant, even if the defendant was not involved in the specific drug activity observed by the

police. The court also distinguished between an anonymous tip and information from a confidential informant is familiar with the police from past dealings.

State v. Groves, 10th. Dist. Franklin, Nos. 15 App 855-856 & 861-862, recognizing that search warrant affidavits are often drafted by nonlawyers in the midst and haste of a criminal investigation and the judge is expected to interpret the affidavit in a commonsense, practical manner. *Relying on State v. George*, 45 Ohio St. 3d 325 (1989). In this case the court found that any inconsistent statements in the affidavit should be viewed by the common sense standard set out in *State v. George*, and not by a hyper-technical standard, with deference to the to the issuing judge who determined probable cause.

Confidential informant

State v. Harry, 12th. Dist. Butler, No. CA2008-01-13, 2008-Ohio-6380. When a confidential or anonymous informant is the source of the hearsay in support of a search warrant, the informant's veracity, reliability, and basis of knowledge are all highly relevant to the totality of the circumstances in a probable cause determination. There must be some basis in the affidavit to indicate the informant's credibility, honesty, or reliability. This includes detailed information from the informant, police corroboration through its own investigation, and additional testimony by the affiant, if needed, to bolster and substantiate the facts contained in the affidavit. *Relying on Illinois v. Gates*, 462 U.S. 213, 238-39 (1983).

Reviewing all of the information, including hearsay statements from the informant through the affiant and a sufficient basis to show reliability, must show in the affidavit a substantial basis for finding a fair probability that the items identified would be found at the location or on the person identified in the affidavit.

State v. Glynn, 2nd. Dist. Greene, No. 2020-CA-13, 2020-Ohio-4763. Proof of the confidential informant's reliability is not crucial when the police officer had independently corroborated the factual basis for the warrant. In this case the officer was involved in controlled drug buys with the confidential informant both before and after each transaction and the transactions were electronically monitored.

State v. Curtis, 7th. Dist. Belmont, No. 18-BE-7, 2019-Ohio-499. Two controlled drug buys by a confidential informant were sufficient to find probable cause to support a search warrant. The court noted that confidential informants were used in drug buys because drug dealers typically do not sell drugs to someone they do not know for fear of the buyer being an undercover police officer.

State v. Shannon, 2025-Ohio-1224 (5th. Dist.). A detective's independent verification of parts of the information given to him by his confidential sources lent some degree of reliability to the other allegations made by the source. In this case information about where the drugs were stored was corroborated by defendant's location through GPS tracker. Independent verification by officer was able to overcome a deficiency in affidavit

about any statement about either the veracity of the confidential sources or the basis of their knowledge.

State v. Hill, 2023-Ohio-4381(5th. Dist.). A statement in the affidavit of the informant's reliability from past experiences was not necessary when the controlled buys were monitored by the police, the informant was searched immediately before and after the drug buy, the informant provided the purchased drugs to the police, and the police maintained sight of the informant at all times during the procedure.

State v. Vaughn, 2nd. Dist. Montgomery, No. 28409, 2020-Ohio-307. An informant's tip may be reliable despite a factual bias in the affidavit of the reliability of the informant when the factual information provided by the informant is independently verified by the officer. In this case an anonymous tip was made to the police about the defendant's involvement in a bank robbery.

State v. Reed, 6th. Dist. Erie, Nos. E- 18-17 &18, 2020-Ohio-138. A search warrant was valid based upon an affidavit with statements of confidential informants, even when there is little if any statements of the informant's reliability, when the informant's information was shortly followed by controlled drug buys.

State v. Wallace, 6th. Dist. Wood, No. WD-19-080, 2020-Ohio-4168. see also, *State v. Dockum*, 6th. Dist. Wood, No. WD-19-079, 2020-Ohio-4163. (Co-defendant with joint appeal). The smell of raw marijuana alone, as opposed to burnt marijuana, may be grounds for probable cause, as the raw marijuana smell would be generated on a large quantity.

Citizen information.

State v. Garner, 74 Ohio St. 3d 49, 63, 1995-Ohio-168, holding that information coming from a citizen eyewitness is presumed credible and reliable and supplies a basis for probable cause.

State v. Long, 6th. Dist. Wood, No. WD-19-022, 2020-Ohio-4090. Although classified in the affidavit as a confidential informant, the information identified the informant from the circumstances as the next-door neighbor who identified himself to the police. A citizen eyewitness is presumed reliable, relying on *State v. Garner*. This case arose out of the next-door neighbor's observation through a window of the defendant's use of child pornography.

State v. James, 11th. Dist. Trumbull, No. 2022-T-0107, 2023-Ohio-3524. In this case the victim's mother found the cell phone at the victim's residence and gave information, including picture of defendant, to the police in support of a search warrant. Regarding an affidavit supported by a citizen's statement, the court distinguished between statements made by an identified citizen informant, which are presumed reliable unless evidence to the contrary, *State v. Collins*, 2nd. Dist. Greene, No. 2020CA40, 2023-

Ohio-646), and a confidential informant with information not attributed to any one source. *State v. Dalpaiz,* 115 Ohio App.3d 257, 2002-Ohio-7346 (11th. Dist.).

Dog sniff.

State v. Shannon, 2025-Ohio-1224 (5th. Dist.). A canine alert narcotics sniff indicates that narcotics are present in the item being sniffed, or have been present in such a way as to leave a detectable odor. A canine alert outside of a closed door of a commercial storage unit, with the canine legally positioned in the area accessible to the unit facility's employees and anyone renting one of the units in the facility, is not a "search," for Fourth Amendment purposes, and may be considered with other facts to establish probable cause to support a search warrant.

Florida v. Harris, 568 U.S. 237 (2015). "A dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert. If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search." 568 U.S. at 246-247. A defendant, however, has the right to challenge evidence of the dog's reliability by either cross-examining the testifying officer or introducing his own fact or expert witnesses.

B) Review of sufficiency of probable cause on motion to suppress.

State v. George, 45 Ohio St. 3d 325 (1989) set out the standard of review of probable cause on a motion to suppress a search based upon a search warrant.

> In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant issued by a magistrate, neither a trial court nor an appellate court should substitute its judgment for that of the magistrate by conducting a *de novo* determination as to whether the affidavit contains sufficient probable cause upon which that court would issue the search warrant. Rather, the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.
>
> In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, trial and appellate courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant. (*Illinois v. Gates* [1983], 462 U.S. 213, followed.) (Second paragraph of the Syllabus of the Court.)

United States v. Leon, 468 U.S. 897 (1984). Although deference must be given to the judge issuing the warrant a reviewing court must still determine if there was a proper analysis of the totality of the circumstances in the probable cause determination.

State v. Lang, 1st. Dist. Hamilton, No. C-220360. 2023-Ohio-2026. Reversing the trial court's suppression order, the appellate court found that the trial judge engaged in a *de novo* review and substituted its judgment for that of the issuing magistrate.

A reviewing court, which includes a trial court ruling on a motion to suppress, as well as an appellate court, must give great deference to the issuing judge's magistrate's probable-cause determination. After-the-fact scrutiny by the courts of the sufficiency of an affidavit should not take the form of de novo review." The duty of the reviewing court is to ensure that the issuing judge had a substantial basis for concluding that probable cause existed. *State v. George* at 329-330.

State v. Martin, 2025-Ohio-**** (6th. Dist.). Under the totality of the circumstances standard, verifiable proof of each element of an offense is not required to establish probable cause for the search warrant to be issued.

State v. Johnson, 7th. Dist. Mahoning, No. 17-MA-99, 2018-Ohio-2780. When reviewing the sufficiency of probable cause with an affidavit in support of a search warrant, the reviewing court should determine whether the issuing judge had a substantial basis for concluding probable cause existed based upon the totality of the circumstances. The standard for review applies to both the trial and the appellate courts evaluating the suppression motion on the validity of the warrant. *Relying on State v. George and Illinois v. Gates.*

State v. Ward, 1st. Dist. Hamilton, C-040379, 2005-Ohio-3036, Totality of the circumstances means a review of all the facts involved, even tough each individual fact, taken separately, would not prove probable cause. (This case involved a high mileage van that was tracked for many trips between Cincinnati and Florida. The van also was equipped with a secret compartment and coffee grounds around the compartment to diffuse any other odors.)

State v. Gipson, 3rd. Hancock, No. 5-09-19, 2009-Ohio-6234. "The [f]inely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trial, have no place in the magistrate's decision. * * * it is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.'" *quoting Illinois v. Gates*, at 235.

State v. Hobbs, 4th. Dist. Adams, No. 17CA1054, 2018-Ohio-4059. A search warrant is presumed valid when issued after the judge has independently determined that probable cause exists. A determination of probable cause is not a high bar and only requires a probability, not a prima facie showing of criminal activity.

An affidavit that does not set out facts to show the reliability of an informant may still be sufficient to support probable cause when there is other evidence, such as independent police corroboration. If an affidavit includes tainted evidence, the reviewing court, after excluding this evidence, must review the remainder of the affidavit to determine if there are sufficient facts for the warrant to be issued.

The court in *Hobbs*, noted that R.C. 2933.33(A) provides that if methamphetamine is suspected, there is assumed exigent circumstances and reasonable grounds to believe the need to protect lives and property due to the risk of fire or explosion.

State v. Lask, 4th. Dist. Adams, No. 20CA1111, 2021-Ohio-1888. A police officer went to the defendant's house in Ohio after receiving an email from a Kansas officer that the defendant had been stopped the prior week with marijuana paraphernalia. The defendant left the house as the officer approached and was stopped for running a stop sign and determined to be under the influence based on his behavior, filed sobriety tests, and the strong smell of marijuana. Two pounds of marijuana was found in the truck.

The court found that the initial stop in Kansas was illegal, but after excising the tainted Kansas information from the affidavit, the affidavit contained sufficient information to establish probable cause. Although the Kansas information was the reason for the initial check of the defendant's house, the traffic stop was based on independent observations of traffic violations. Because of the independent source of discovery of the two pounds of marijuana, the illegal Kansas stop was not grounds to suppress the evidence discovered in the defendant's truck as residence he had just left.

Burden of Proof

State v. Jordan, 3d. Dist. Union. No. 14-21-21 2022-Ohio-1992. The court held that the defendant had the burden of proving that he had a legitimate expectation of privacy from the helicopter surveillance and that the surveillance was a search within the meaning of the Fourth Amendment. The court in *Jordan* noted that the burden of proof issue normally is raised as a standing issue when the government disputes the defendant's reasonable expectation of privacy or that the government action was a search. Once the defendant has put on evidence to satisfy this requirement, the burden shifts to the government to prove the search was not unreasonable. *Xenia v. Wallace*, 37 Ohio St. 3d 216 (1988). In this case because of the timely dispute raised by the prosecutor, the trial court erred by requiring the government to proceed with the case instead of requiring the defendant to meet the standing threshold.

State v. Hill, 5th. Dist. Stark, No. 2018CA77, 2019-Ohio-___. The burden is on the defendant on a motion to suppress to rebut the presumed validity of the search warrant. In this case, neither the search warrant nor the supporting affidavit were admitted into evidence. In the absence of review of the warrant and the deferential standard of review, a court cannot speculate on the contents of the affidavit or the search warrant.

C) Appellate review.

State v. Hosseinipour, 5th. Dist. Delaware, No. 13 CAA 05-46, 2014-Ohio-1090, noted that there are three methods of challenging on appeal a trial court's ruling on a motion to suppress. An appellant may:

1) challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence.

2) argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law.

3) argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress.

As the court set out in *State v. Holland,* 10th. Dist. Franklin, No. 13-AP-790, 2014-Ohio-1964, appellate review of a trial court's decision regarding a motion to suppress evidence involves mixed questions of law and fact. At suppression hearing the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses.

The appellate court's standard of review of a motion to suppress is two-fold. First, the appellate court must determine whether competent, credible evidence supports the trial court's findings. Second, the appellate court must independently determine whether the facts satisfy the applicable legal standard, without giving any deference to the conclusion of the trial court. *Relying on State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372. As such, the appellate court applies a de novo standard of review on the trial court's conclusions of law based upon the facts in the record. *State v. Seaburn*, 3rd. Dist. Seneca, No. 13-17-12, 2017-Ohio-7115.

See also, *State v. Grace*, 5th. Dist. Fairfield, No. 2022 CA 00039, 2023-Ohio-3781, setting of the standard of review on appeal motion to suppress.

1) Defer to the trial court as finder of fact on factual findings if supported by evidence in the record.
2) Review de novo applicable law based on the facts found by the trial court.
3) If the appellate court determines a search warrant should not have been issued, the appellate court then proceeds to determine if there is a good faith exception. This determination is reviewed de novo on both the law and facts of the case.

State v. Morales, 10th. Dist. Franklin, No. 17AP-807, 2018-Ohio-3687. When a trial court does not make findings on suppression motion as required by Criminal Rule 12(F), the appellate court may make a complete *de novo* review in determining whether the trial court properly denied the motion to suppress.

But see, State v. Peeks, 10th Dist. Franklin, No. 19AP-291, 2020-Ohio-889. This case involved a motion to suppress from a stop and frisk, not a search warrant. Although the trial court granted the motion to suppress, the case was reversed due to the lack of specific factual findings. Criminal Rule 12(F) provides "Where factual issues are involved in determining a motion, the court shall state its essential findings on the record."

In this case, some of the scene was recorded by the police video, but there were factual issues such as if the defendant had slurred speech and impaired motor skills. The video did not resolve the conflict. In addition, although the trial court questioned the credibility of the officer's testimony on some issues the trial court did not set out which parts of the testimony were not credible. With other issues the trial court discussed the evidence but did not decide if the evidence supported the grounds for the search. The appellate court found that the record was insufficient to allow effective appellate review.

State v. Richardson, 2nd. Dist. Greene No. 08CA77, 2009-Ohio-6018. The validity of the warrant must also be viewed in terms of the evidence in support of a criminal conviction. If a conviction is not based upon any illegally seized evidence, any issue about the invalidity of the warrant is moot.

State v. Foster, 10th. Dist. Franklin, No. 18AP-328, 2019-Ohio-2580. The issue of credibility of the police officer is determined at the trial level on a motion to suppress, not the appellate level. When the trial court finds the witness credible, the reviewing court must accept the findings of fact made by the trial court from that witness.

State v. Saxton, 10th. Dist. Franklin, No. 18AP-925, 2019-Ohio-5257. When the trial judge on a motion to suppress strikes a portion of an affidavit to determine if the remainder of the affidavit supported the search warrant, the court of appeals applies a *de novo* standard of review, instead of affording great deference to the issuing judge.

D) *Franks* Hearing.

Franks v. Delaware, 438 U.S. 154 (1978), held that the trial court is required to conduct a hearing if a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth was made by the affiant in an affidavit in support of a search warrant. The defendant must:

1) make a substantial preliminary showing that the affiant made a false statement either:
   A) knowingly, or
   B) with reckless disregard for the truth, and
2) The false statement was necessary to the finding of probable cause.

State v. Sekse, 12th. Dist. Preble, No. CA2015-07-015, 2016-Ohio-2779. Inconsistencies in affidavit that did not have an impact on the determination of probable cause were not grounds for an evidentiary hearing. (Affidavit by confidential informant

made to the defendant after the indictment was not sufficient to warrant a hearing when the confidential informant expressed fear of informing on the defendant.)

"Reckless disregard" means that the affiant had serious doubts about the truth of an allegation. Omissions in an affidavit may be considered false statements if the statements were designed to mislead or were made in reckless disregard of whether they would mislead the judge to obtain the search warrant. *State v. McKnight*, 107 Ohio St. 3d 101, 2005-Ohio-6046. A summary of facts, such as a police report, with some facts omitted, is not, by itself, a false or misleading statement. Similarly, as the case is still under investigation, a different offense than the charges ultimately filed is not false or misleading. The burden is on the defendant by a preponderance of the evidence to successfully attack the veracity of a facially sufficient warrant.

In this case the affidavit set out abduction and kidnapping as the predicate offenses when the victim was only listed as a missing person. Although Criminal Rule 41(C)(1) requires the affidavit to substantially state the offense to which the search relates, the specific offense, especially when under investigation, is not required.

State v. Griffin, 2024-Ohio-1699 (1st Dist.). Although Criminal Rule 41(C)(1) requires the supporting affidavit to state the offense related to the search warrant, a different offense from the one the defendant is later charged is not grounds to invalidate the search warrant. In this case the affidavit stated the offense as weapons under disability while the defendant was later charged with felonious assault. The investigation and search warrant arose out a shooting.

Relying on *State v. McKnight*, 2005-Ohio-6046, the failure to specify the offense to which the evidence is related by name or code section in the affidavit is not constitutionally significant. The critical issue is the warrant bear some relationship to the criminal offense and the property sought to be seized.

State v. Hudson, 2d. Dist. Montgomery, No. 29333, 2022-Ohio-3257. Mere omissions in an affidavit in support of a search warrant are not automatic grounds for a *Franks* hearing. The omission must be intentional and misleading. The court recognized that search warrant affidavits are often drafted in a rush and may not be comprehensive. The court relied on *Mayes v. Dayton*, 134 F.3d 809 (6th. Cir. 1998), which held that affidavits with potentially material omissions are much less likely to merit a *Franks* hearing than are affidavits including allegedly false statements.

State v. Bell, 12th. Dist. Clermont, No. CA2008-05-044, 2009-Ohio-2335. To successfully attack the veracity of a facially sufficient search warrant affidavit, a defendant must show by a preponderance of the evidence that the affiant made a false statement, either intentionally, or with the reckless disregard for the truth. Omissions count as false statements if designed to mislead or made in reckless disregard of whether they would mislead, a judge. In this case the court found that the omission of other, inconstant statements by the teenage stepchildren victims about prior sexual contact with

the defendant, after reviewing the entire affidavit, did not undermine the probable cause for a search warrant to be issued.

State v. Bell, 142 Ohio Misc. 2d 72 (C.P. 2007). If an affidavit contains a false statement or omission made intentionally or with reckless disregard, a warrant based upon the affidavit may be valid if after deleting the statements, the remainder provides a basis for probable cause. If the issue is an omission of information in an affidavit that would mislead the judge to obtain the search warrant, the reviewing court must add the omitted information to determine if the affidavit could still provide an independent basis for probable cause.

State v. Weprin, 2024-Ohio-2469 (2d. Dist). The omission of the victim's prior recantation from the supporting affidavit was not, by itself, grounds for suppression. The omission must be viewed in light of all of the evidence submitted to the judge in support of the warrant to show it would have not been issued without the omitted facts or statement.

A search warrant affidavit that is facially sufficient may be successfully attacked if the defendant can show by a preponderance of the evidence that the affiant made a false statement intentionally, or with reckless disregard for the truth. As omissions may be considered a false statements if it is designed to mislead or made in reckless disregard of whether they would mislead the court. (Citations omitted.) "[A]n omitted fact in an affidavit for a search warrant, in order to be considered intentionally misleading or made with reckless disregard of its tendency to mislead, would necessarily have to be exculpatory information, or information that impeaches a source of incriminating information." *State v. Stropkaj*, 2d Dist. Montgomery No. 18712, (Nov. 16, 2001), citing *Franks* at 155-56.

State v. Tolbert, 2025-Ohio-4469 (8th. Dist.). Under a *Franks* analysis on a motion to suppress, the court must first determine if any statement in the supporting affidavit was knowingly and intentionally false or made with reckless disregard for the truth. If the court determines a false statement was made, the court must determine whether the affidavit still establishes probable cause after excluding the false statement. In this case the lack of findings by the trial court was reversible error.

When a defendant raises an issue of undisclosed inferences in an affidavit, the trial court is required to make findings regarding the significance, and specifically the relevance or complexity, of the undisclosed inferences.

State v. Sells, 2nd. Dist. Miami, No. 2005-CA-8, 2006-Ohio-1859. Omitted facts bearing adversely on the credibility of an informant, such as favorable treatment a witness receives in exchange for cooperating with police, tend to mislead a judge considering a search warrant request. The court must determine:

1) was the intentional, reckless, or negligent, and

2) If intentional or reckless, whether the affidavit would establish probable cause even if the omitted facts were included.

State v. Beaufort, 9th. Dist. Summit, No. 30545, 2023-Ohio-3782. The test set out in *Franks* to require an evidentiary hearing are:

1) The challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine.
2) There must be allegations of deliberate falsehood or reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.
3) The defendant should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons, and
4) The affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.

Allegations of negligence or innocent mistake are insufficient. *United States v. Franks,* 438 U.S.154 at 171-172.

State v. Smedley, 2nd. Dist. Montgomery, No. 27889, 2018-Ohio-4629. A separate *"Franks*" hearing was not required based on an unsupported statement by the defendant challenging the police officer's statement in the affidavit that the officer used independent investigative techniques. Based upon the officer's testimony that he conducted independent surveillance of the defendant's residence before using a confidential informant, there was no proof that the officer's statements were false and made intentionally or with reckless disregard of the truth to obtain the search warrant.

State v. Pitts, 6th. Dist. Lucas, No. L-18-1242, 2020-Ohio-2655. A *Franks* hearing is not required based on a general statement by a defendant that the police officer's affidavit was false, without supporting documentation. The burden is on the defendant to make a substantial preliminary showing of knowing and intentional false statements or in reckless disregard of the truth by the police officer.

State v. Wilkins, 10th. Dist. Franklin, Nos. 18AP-797 & 798, 2020-Ohio-3428. Omitted facts in an affidavit are not knowingly or intentionally false or in reckless disregard to require a *Franks* hearing. In this case the affidavit did not include reference to R.C. 935.08, which provides a 120-day period to apply for a permit to possess a restricted snake. The trial judge was presumed to know the applicable law and apply it accordingly.

State v. Taylor, 2023-Ohio-*** (5th. Dist.). Upon objection by the prosecutor, the trial court properly excluded affidavits by three people mentioned in the search warrant affidavit to contradict the facts in the search affidavit when the three individuals were available to testify, but did not testify at the hearing.

D) Standing to object to search warrant.

State v. Dennis, 79 Ohio St.3d 421, (1997), provides that a person has standing to object to a search warrant when that person has a reasonable expectation of privacy in the place being searched. Relying on *Minnesota v. Olsen*, 495 U.S. 91, 96-97, 100 L. Ed. 1684, 1688, 109 L. Ed. 2d 85, 93 (1990), the court noted that an overnight guest has standing to challenge the legality of a search.

Standing is not achieved solely by a person's status as a defendant or by introduction of damaging evidence. *Alderman v. United States*, 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed.2d 1761 (1969).

State v. Wilson, 5th. Dist. Richland, No. 17CA31, 2019-Ohio-396, finding defense counsel was not ineffective for not filing a motion to suppress search warrant when the defendant asserted that he did not reside at the place searched and would not have standing to object to the search warrant.

State v. Jordan, 6th. Dist. Wood, No. WD-20-082, 2021-Ohio-4402. When a suspicious package is sent through the United States mail, only reasonable suspicion, not probable cause, is required to permit the postal inspector to retain the package for examination by a drug sniffing dog. The defendant did not have standing to object to the search of a package that was not addressed to or from the defendant as the defendant did not have a reasonable expectation of privacy in the package.

E) <u>Identity of confidential informant</u>

State v. Thompson, 4th. Dist. Ross, No. 19CA3696, 2021-Ohio-3390. Statements in an affidavit that the confidential informant has provided reliable information in the past that has proven to be truthful is sufficient to meet the requirements for probable cause. Criminal Rule 41(C)(2) specifically permits hearsay statements in the affidavit if there is a substantial basis of the source's credibility.

Although the state has a privilege to withhold the identity of an informant, this privilege must give way when:

1) the informant helped set up the crime and was present during its occurrence,
2) the testimony of the informant is vital to establishing an element of the offense, or
3) the identity of the informant would be beneficial to preparing a defense to the crime charge.

When the informant's involvement is generally limited to providing tips or information for probable cause for a search warrant, the informant's identity need not be revealed. The burden is on the defendant to show the necessity of disclosure. Speculation by the defendant that the informant may have been involved in the criminal activity is not sufficient to require disclosure.

State v. Wade, 2nd. Dist. Montgomery, No. 28165, 2019-Ohio-2469. This case involved the denial of a motion to identify the confidential informant. The state has an obvious interest in preserving the identity of the confidential informant, which must be balanced with the rights of the defendant on a case-by-case basis. The identity of the informant must be revealed when testimony of the informant is vital to establishing an element of the crime or would be helpful or beneficial to the defendant in preparing and making a defense to the criminal charges. *Relying on State v. Deleon*, 131 Ohio App.3d 632,635-36 (2nd. Dist. 1999). The defendant has the burden to show the need for the identity. Citing *State v. Daniels*, 1st. Dist. Hamilton, No. C-990549, (2000), mere speculation or the possibility that the informant might be of some assistance is not enough to show that the testimony of the informant would be helpful in preparing a defense.

State v. Pitts, 6th. Dist. Lucas, No. L-18-1242, 2020-Ohio-2655. The prosecution was not required to reveal the names of persons stopped after drug buys at the defendant's residence when the criminal charges for drug trafficking were based on the quantity of the evidence seized at the residence, not the individual drug transactions. The decision to order release of an informant's name involves a balancing of the public interest in protecting the flow of information for effective law enforcement with the defendant's ability to prepare a defense.

State v. Smith, 2023-Ohio-4565 (2d. Dist). The burden is on the defendant to show that the need for the informant's testimony outweighs the government's interest in keeping the informant's identity secret. Although the State has an inherent interest in protecting the confidentiality of its informants, the identity of an informant must be revealed to a criminal defendant when the testimony of the informant is vital to establishing an element of the crime or would be helpful or beneficial to the accused in preparing or making a defense to criminal charges. In the present case the informant was not a direct witness, but only passed information to the officer. In addition, the prosecutor indicated the informant would not be called as a witness because his testimony would be inadmissible hearsay. The motion to compel the identity of the confidential informant was properly overruled.

State v. Edwards, 6th. Dist. Lucas, No. L-21-1044, 2021-Ohio-3767. An unsupported statement by the defendant that the affidavit in support of the search warrant contained false information was not sufficient to challenge the search warrant or disclose the name of the confidential informant.

III. Overlap of Criminal Rule 41 and R.C. Chap. 2933.

Although search warrant procedure in Ohio is governed primarily by Criminal Rule 41, R.C. 2933.21 through R.C. 2933.27 also set out procedures for search warrants.

The Ohio Rules of Criminal Procedure went into effect on July 1, 1973. Unlike the Ohio Rules of Civil Procedure, the Criminal Rules did not specifically repeal existing, conflicting statutes.

Because, however, the criminal statutes were not expressly repealed, there still exist statutory procedures in the criminal code that overlap with the Ohio Rules of Criminal Procedure. The legislative intent appears to include the procedures of both Criminal Rule 41 and R.C. Chapter 2933 to apply to search warrants. R.C. 2933.23, regarding a search warrant affidavit, and R.C. 2933.231 regarding a request for a waiver of the statutory precondition for nonconsensual entry, make specific reference to Criminal Rule 41. As such, search warrants are issued by the authority of Criminal Rule 41 and R.C. 2933.21 through 2933.25. *State v. Groves*, 10th. Dist. Franklin, Nos. 15AP-855, 856, 861 & 862, 2016-Ohio-1408.

The Modern Courts Amendment, Sec. 5 (B), Art. IV of the Ohio Constitution, along with Criminal Rule 1(A), recognize that when a conflict arises between the rules and statutory law, the rule will control the statute on procedural matters and the statute will control the rule on matters of substantive law. *Boyer v. Boyer*, 46 Ohio St. 2d. 83 (1976). Criminal Rule 1(C) also provides that the rules of criminal procedure prevail over a procedure set out by statute.

"Procedural," as used in Section 5(B) of Article IV, pertains to the method of enforcing rights or obtaining redress. "Substantive" means that body of law which creates, defines and regulates the rights of the parties. *Krause v. State*, 31 Ohio St.2d. 132 (1972). 31 Ohio St. 2d. at 145. Overruled on other grounds, *Schenkolewski v. Cleveland Metroparks, Sys.* 67 Ohio St. 2d. 31 (1981).

For example, See*, State v. Dibble*, 10th. Dist. Franklin, No.16AP-629, 2017-Ohio-9321, reversed on other grounds, 159 Ohio St.3d 322, 2020-Ohio-546, which recognized requiring recorded statements that supplement a search warrant affidavit is a procedural rule governed by Criminal rule 41(C) and places greater limitations beyond the requirement by the Fourth Amendment of an oath or affirmation to support the warrant. Notwithstanding this distinction, R.C. Chap. 2933 provides search warrant procedures that complement or add to the procedures in Crim.R. 41.

When there is a conflict between the Criminal Rule and R.C. Chapter 2933, Criminal Rule 41 would prevail on procedural issues. *See*, *State v. Krout*, 6 Ohio App.3d 5 (3rd. Dist. 1982), which found that although R.C. 2933.24 provides that the search warrant contains a command that the search be conducted in the daytime, Criminal Rule 41 (C) which automatically provides for daytime search, unless otherwise ordered by the judge, supersedes the specific command language of R.C. 2933.24. *See also, Griffeth Nursing Home v. Celebrezze*, 5th. Dist. Richland, Nos. CA 2255 & 2275 (Jan. 31, 1985). R.C. 2933.24, requiring the affidavit to be attached to the search warrant, is superseded by Criminal Rule 41.

Administrative search warrant.

Bd of Trustees, Blanchard Township v. Simon, 3rd. Dist. Hardin, No. 6-22-17, 2023-Ohio-1704. This case involved an administrative search warrant based on a zoning violation complaint. Although administrative searches are significant intrusions upon the interests protected by the Fourth Amendment, the determination of probable cause is a flexible standard of reasonableness given the agency's particular demand for access and the public need for effective enforcement of the regulation involved. Citing *State v. Finnell*, 115 Ohio App.3d 583, (1st. Dist. 1996).

R.C. 2933.22(B) permits a search warrant to be issued upon probable cause to believe that conditions exist upon such property which are or may become hazardous to the public health, safety, or welfare.

IV. Persons involved in search warrant process.

A) Persons authorized to obtain search warrant.

Criminal Rule 41(A). Authority to obtain a search warrant is limited to prosecutors and law enforcement officers.

Definitions

Crim. R. 2(G). Prosecuting attorney.

See also, R.C. 2935.01(C). Prosecutor.

Crim. R. 2(J). Law enforcement officer.

> "Law enforcement officer" means a sheriff, deputy sheriff, constable, municipal police officer, marshal, deputy marshal, or state highway patrolman, and also means any officer, agent, or employee of the state or any of its agencies, instrumentalities, or political subdivisions, upon whom, by statute, the authority to arrest violators is conferred, when the officer, agent, or employee is acting within the limits of statutory authority. The definition of "law enforcement officer" contained in this rule shall not be construed to limit, modify, or expand any statutory definition, to the extent the statutory definition applies to matters not covered by the Rules of Criminal Procedure.

Thus a person is considered a law enforcement officer if specifically included in the definition or by the person's office, possess arrest authority. *See also*, R.C. 2901.01 (A) (11). Law enforcement officer.

Abernathy v. Kral, No. 3:13CV1646 (N.D. Ohio 2018). A DEA agent acting in conjunction with the county sheriff was a law enforcement officer within the meaning of Criminal Rule 2 to obtain and execute a search warrant. The court noted that not only was the county sheriff present during the execution of the search warrant, but also the agent had been appointed a special deputy sheriff under R.C. 311.04.

Long v. State, 8th. Dist. Cuyahoga, No. 97044, 2012-Ohio-366. The issue of whether a federal special agent who requested the search warrant was a law enforcement officer within the meaning of Criminal Rule 2 was not critical when the warrant was issued to the county sheriff and the Cleveland police.

State v. Joiner, 8th. Dist. Cuyahoga, No. 81394, 2003-Ohio-3324. This case involved a search warrant issued by a common pleas judge to a federal DEA agent. Although there was a genuine issue of whether the DEA agent was a law enforcement officer within the meaning of Criminal Rule 2, the warrant was issued to the DEA agent and local police who worked together in the execution of the warrant.

The court noted that federal and state officers often work in conjunction in criminal cases and their cooperating in the execution of a search warrant is acceptable provided they are searching for the same contraband.

Regarding the DEA agent obtaining the search warrant by himself, the court found that any error was non-fundamental and did not rise to a constitutional violation in light of a finding of probable cause for the warrant.

United States v. Powell, No. 3:19-cr-216, 2020 U.S. Dist. LEXIS 79455, 2020 WL 2199758 (N.D. Ohio 2020). Ohio law requires that a search warrant be issued by a judge to a law enforcement officer. Ohio Crim R. 41(A)(C). A "law enforcement officer" under Ohio law is an officer or employee of a state agency or political subdivision with authority to arrest individuals who violate the law. Ohio Crim. R. 2(J). While a state law enforcement officer must execute a search warrant issued by an Ohio court, that officer may be accompanied by an individual who does not fall within the definition of "law enforcement officer."

State v. Klein, 6th. Dist. Wood, No. WD-84-76, (April 12, 1985). An agent of the Ohio Bureau of Investigation qualified as a law enforcement officer based upon statutory duties and authority under R.C. 109.54. In addition, the agent was authorized to assist local law enforcement who executed the search warrant.

State v. Morgan, 12th. Dist. Butler, Nos. CA2013-08-146 & 147, 2014-Ohio-2472. A dog warden who is certified as an agent of a county humane society under R.C. 1717.06 qualifies as a law enforcement agent for purposes of requesting and executing a search warrant. See *also*, *Mansfield v. Studer*, 5th. Dist. Richland, Nos. 2011-CA-93 &94, 2012-Ohio-4840. Humane society agent appointed by the probate court in accordance with R.C. 1717.06 was a law enforcement officer to request and execute a search warrant.

State v. Sanders, 7th. Dist. Mahoning, No. 01-CA-14, 2002-Ohio-2656. A search warrant issued to a municipal court bailiff was valid. Although a court bailiff is not specifically included in the definition of a law enforcement officer by Criminal Rule 2, the definition of law enforcement officer in Criminal Rule 2 includes a person who:

1) Is an officer, agent, or employee of the state or any of its agencies, and

2) Has the statutory power to arrest violators.

The court found that R.C. 124.11(A)(10) provides that bailiffs of all courts of record, including municipal courts, are in the unclassified civil service of the state and R.C. 1901.23 provides authority for bailiffs to execute arrest warrants, thus satisfying the requirements as a law enforcement officer.

State v. Klein, 6th. Dist. Wood, No. WD-84-76, (April 12, 1985). Although BCI agent was not a law enforcement officer within the meaning of Criminal Rule 2(J), the supporting affidavit demonstrated probable cause for the search warrant to be issued. The court concluded the violation was non-fundamental in nature and reversed the suppression order.

Bd of Trustees, Blanchard Township v. Simon, 3rd. Dist. Hardin, No. 6-22-17, 2023-Ohio-1704. A search warrant issued to, neither of whom were a prosecuting attorney or law enforcement officer, was not valid. The court noted that Criminal Rule 41(A) requires a search warrant be requested by either a prosecuting attorney or law enforcement officer and issued to a law enforcement officer. In this case the court found:

1) Non-attorney employee of prosecutor could not request warrant, and
2) Zoning inspection and township trustee were not law enforcement officers.

In this case, although the appellate court found the search warrant was invalid, the court also found that there was probable cause for the search warrant to be issued and the invalidity of the warrant was based on technical, non-fundamental grounds.

B) <u>When a search warrant is not required.</u>

State v. LaRosa, 165 Ohio St. 3d. 346, 2021-Ohio-4060, holding that a search warrant was not required to seize a washcloth used by hospital employee to clean the defendant when in the hospital because the washcloth was owned by the hospital, not the defendant, and the defendant did not have an expectation of privacy. The court distinguished the washcloth from the defendant's socks and underwear that were removed from the defendant by hospital staff and also seized by the police. The socks and underwear were the defendant's property and had not been abandoned. Therefore, a warrant was needed to take possession of these clothing items.

State v. Jordan, 6th. Dist. Wood, No. WD-20-082, 2021-Ohio-4402. The police cannot rely on exigent circumstances as an exception to a search warrant when the police created the circumstances. In this case the package was detained by the postal inspector, opened after obtaining a warrant, and resealed with a G.P.S. monitor and light sensor inside the package that would be discovered when opened.

State v. Hommes, 11th. Dist. Ashtabula, No. 2020-A-0001, 2021-Ohio-4568. A search warrant was not required when a fire captain entered a house shortly after the fire was put out to investigate the source of the fire and saw guns and illegal drugs in plaint view. Although a homeowner retains an expectation of privacy, a firefighter is permitted to enter a burning structure to put out the fire and attempt to determine the origin of the

fire. If the investigation is concluded or the firefighter enters the building for a purpose other than to put out the fire or determine its origin, then a search warrant is required.

When a firefighter lawfully observes evidence of a crime in plain view, the firefighter may call a police officer to seize the evidence without a warrant. The police officer is only permitted to enter the area that a firefighter is permitted to enter. The court distinguished *State v. Sutcliffe,* 11th. Dist. Portage, No. 2008-P-0047, 2008-Ohio-6782, which suppressed evidence when law enforcement entered the house to seize evidence without a warrant after the fire was out and the investigation was concluded.

C) <u>Who may issue search warrants. Crim. R. 41(C).</u>

In *United States v. Johnson*, 333 U.S. 10 (1948), the court held that the protection provided by the Fourth Amendment can only be guaranteed after review by "a neutral and detached magistrate." 333 U.S. at 14. The term "magistrate" is used in the general sense, and not a specific term or definition. Although an affidavit must be reviewed and approved by a neutral and detached judicial officer before a valid search warrant may be issued, regulation and authorization of the specific judicial officer is left to the individual states to define. *Tampa v. Shadwick*, 407 U.S. 345 (1972).

For the purpose of search warrant procedure under Criminal Rule 41, Crim. R. 2(E) defines "Judge" as a "judge of the court of common pleas, juvenile court, municipal court, or county court, or the mayor or mayor's court magistrate of a municipal corporation having a mayor's court". As such, it does not include a magistrate as a judge for purposes of issuing a search warrant.[3]

Crim. R. 2(F). "Magistrate" means any person appointed by a court pursuant to Crim. R. 19. "Magistrate" does not include an official included within the definition of magistrate contained in section 2931.01 of the Revised Code, or a mayor's court magistrate appointed pursuant to section 1905.05 of the Revised Code.[4]

State v. Dulaney, 3rd. Dist. Paulding, No. 11-12-04, 2013-Ohio-3985. Although the United States Supreme Court has used the term "magistrate" in Fourth Amendment

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[3] An arrest warrant, on the other hand, may be issued, upon a finding of probable cause, by a judge, magistrate, clerk, or officer of the court designated by the judge. Crim. R. 4(A) (1). The warrant procedure applies to both felony and misdemeanor charges. *Metzenbaum v. Vitantonio*, 8th. Dist. Cuyahoga, Nos. 79477- 79481, 2002-Ohio-489. Although Criminal Rule 4 provides greater latitude on who may issue an arrest warrant, probable cause is a critical factor. *State v. Mendell*, 2nd. Dist. Montgomery, No.24822, 2012-Ohio-3178. (Statement by deputy clerk that she did not read the complaint, but automatically issued warrant was not sufficient.)

[4] Although Traffic Rule 2(G) includes "magistrate" in the definition of judge, search warrants are governed by Criminal Rule 41 and therefore, the criminal rules of procedure apply.

cases, it is used as a general term and not as a specific definition. As such, the judge/magistrate for purposes of the Fourth Amendment is the person authorized under state law to issue search warrants.[5]

State v. Kithcart, 5th. Dist. Ashland, No. 12-COA-48, 2013-Ohio-3022. Only a judge, not a magistrate, can sign a search warrant under Ohio Law. The court noted that although R.C. 2933.23 refers to the term "magistrate" for purposes of presenting of an affidavit to a magistrate, Criminal Rule 41 and R.C. 2933.21 limit the authority to issue a search warrant to a judge of a court of record.

In this case the court upheld the search on the grounds that the police acted in good faith to rely on the search warrant and did not intentionally or deliberately disregard Criminal Rule 41. The court further noted, however, that once the appellate court issues a decision holding the practice to be illegal, the good faith exception may not be available for future cases as law enforcement is put on notice.

State v. Commins, 12th. Dist. Clinton, Nos. CA2009-06 04 & 05, 2009-Ohio-6415. The authority to issue a search warrant by Criminal Rule 41 and 2933.25 was limited to a judge of a court of record and a court magistrate did not have authority to issue search a warrant. Criminal Rule 41 does not include the term "magistrate". Although R.C. 2931.01 defines "magistrate" to include a judge, Criminal Rule 2 (E) expressly excludes R.C. 2931.01 within the definition of "judge". While other provisions of R.C. Chapter 2933 refer to a "magistrate" regarding search warrant, they do not authorize the issuance of search warrants by a magistrate. See, also, *State v. Harrison,* 166 Ohio St. 3d.479, 2021-Ohio-4465, citing *Commins*, that only a judge of a court of record was authorized to sign a search warrant and a search warrant signed by a magistrate was void. (Par. 31 & fn.4).

In this case the magistrate obtained a legal opinion from the prosecutor that she was authorized to issue search warrants. Although the appellate court found the search warrant void, the case was remanded to determine if the police acted in good faith. In doing so, the court noted that the focus is placed on the police officer's good faith to rely on the warrant erroneously issued by the magistrate, not the erroneous legal advice provided by the prosecutor.[6]

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[5] *State v. Lang,* 1st. Dist. Hamilton, No. C-220360. 2023-Ohio-2026. The appellate court upheld a search warrant issued by a trial court magistrate but did not address the issue of a magistrate's authority to issue a search warrant. In this case the search warrant was issued by a municipal court judge, which the appellate court referred to as the "issuing magistrate".

[6] While there are a number of appellate decisions in Ohio that have upheld the validity of a search warrant that was issued by a magistrate. These cases, however, did not address the issue of the authorization of a magistrate to issue a search warrant.

Note: Also, a judge, as an elected official and by operation of law, is limited by residence within the court's territorial jurisdiction, with the same territorial limitation imposed by Criminal Rule 412. A magistrate on the other hand, does not have a residency requirement for the territorial jurisdiction of the court.

D) Qualification of Judge

Same Judge.

State v. Ramirez, 77 Ohio St.3d 1237 (1996). A defendant's challenge to the validity of a search warrant is not grounds to disqualify the same judge who issued the warrant from hearing the motion to suppress.

In State v. Johnson, 7th. Dist. Mahoning, No. 17-MA-99, 2018-Ohio-2780, however, to avoid any issues, a visiting judge was appointed to hear and determine the motion to suppress when the trial judge was also the judge who issued the search warrant. *See also*, *State v. Spriggs*, 118 Ohio Misc. 2d 198, 2000-Ohio-2697, noting that having a municipal court issue a search warrant in a felony case avoids a potentially awkward situation of a common pleas judge reviewing probable cause on the warrant issued by the same judge.

State v. Pippin, 10th. Dist. Franklin, No. 15AP-137, 2020-Ohio-503, raised in depth the issue of the propriety of the same judge handling the search warrant and the subsequent trial. Although the appellate court declined to find a specific prohibition, it depends on the length and degree of the judge's involvement. The court recognized that the search warrant process is an *ex parte* presentation to a judge of facts prejudicial to the defendant.

Pippin involved an intercept (wiretap) warrant. The court recognized that this procedure is more involved than a regular search warrant, which is an ongoing process with regular, weekly communications to the judge of the investigation progress and the need for the intercept to continue. In addition, an intercept warrant requires more than probable cause, but must also detail why normal investigative procedures have failed, are unlikely to succeed, or are too dangerous. R.C. 2933.54 (B) (2) and R.C. 2933.54(A) (1)-(3). As such, far more information is provided to the judge, including the defendant's conduct to avoid justice.

The court in *Pippin* referred to *State v. Gillard*, 40 Ohio St. 3d 226 (1988), in which the court held a judge who hears a motion to perpetuate testimony under Criminal Rule 16(F) may not serve as the trial judge in the same case but was not *per se* prejudicial.

While many courts in Ohio have a limited number of judges, the better course of action, when available, would be to have different judges in the warrant process and the trial. Intercept warrants raise an additional problem as they may only be issued by a

common pleas judge who serves at least in part as a general jurisdiction judge. R.C. 2933.522 and R.C. 2933.51.

State v. Cottrell, 5th. Dist. Licking, No. 22CA 0048, 2023-Ohio-2240. This case illustrates avoiding issues when the judge who signed the search warrant is also the assigned trial judge by having the suppression issues assigned to a different judge, when feasible.

State v. Reed, 2d. Dist. Clark, No. 2022-CA-28, 2023-Ohio-2612. Issue of the propriety of the same judge who signed the search warrant hear the motion to suppress was moot after the defendant entered a negotiated guilty plea to resolve all of the criminal charges.

State v. Summers, 2024-Ohio-5200 (5th. Dist.). The trial judge on the motion to suppress was the same judge who signed the search warrant for a blood draw in the OVI case. The issue was not raised on appeal.

Authority of judge.

State v. Hill, 2nd. Dist. Montgomery, No. 24966, 2012-Ohio-5210. This case raised the issue of the validity of a search warrant signed by a magistrate who was temporarily assigned as an acting or substitute judge for a limited time due to the death of the elected judge. The appellate court held that the qualifications of the person sitting as judge could only be challenged by *quo warranto* proceeding and could not be collaterally attacked in a criminal proceeding.

State v. Sanders, 9th. Dist. Summit, No. 2013-Ohio-2672. A search warrant signed by a visiting judge who was serving in the trial court by assignment of the chief justice was valid. The court also noted that the police attempted to contact other judges, but no other judge was available. *See also, State v. Nurse*, 9th. Dist. Summit, No. 26391, 2012-Ohio-6000. Companion case that held when a judge of a court of record issues a search warrant within the court's territorial jurisdiction, the method to challenge the judge's qualifications is by a writ of *quo warranto*.

State v. Paskowsky, 4th. Dist. Athens, No. 904 (August 13, 1979). An acting judge, appointed under the authority of R.C. 1901.01 by a municipal court judge, was vested with full authority of office to issue a search warrant.

Jones v. Harris, 2022 U.S. App. LEXIS 17814, 2022 WL 17688192 (6th. Cir. 2022). Municipal judge had authority to issue search warrant for federal charges when the facts in the affidavit showed probable cause that a state crime had been committed. This case was an appeal of denial of habeas corpus writ.

State v. Hana, 2024-Ohio-5548 (12th. Dist.). A federal magistrate judge has the authority to execute a federal search warrant within the magistrate judge's territorial jurisdiction pursuant to 28 U.S.C.S. § 636(a)(1) and Fed. R. Crim. P. 41(b).

Evidence obtained through the execution of valid federal search warrants is admissible in a state court prosecution, even if the warrants do not comply with state law requirements, as long as the federal warrants were lawfully obtained and did not undermine the integrity of the state courts. The issue of noncompliance raised by the defendant was the search warrant issued by a federal magistrate instead of an Ohio judge.

E) Type of Court.

Both Criminal Rule 41(A) (1) and R.C. 2933.21 provide a search warrant may be issued by a judge of a court of record. A judge of the general division of the common pleas court is so authorized. Similarly, a municipal court is a court of record with criminal jurisdiction to issue search warrants. R.C. 1091.02(A). The authority of a court to issue a search warrant is not limited to the type of criminal offense within the subject matter jurisdiction of that court. *State v. Spriggs*, 118 Ohio Misc. 2d 198, 2000-Ohio-2697, (upholding municipal court's authority to issue a search warrant in a felony case.) *See also*, *State v. Tatonetti*, 11th. Dist. Geauga, No. 1021 (January 7, 1983), upholding the validity of a search warrant issued by a juvenile court judge in a felony case.

Criminal Rule 2(E) expressly includes a common pleas, juvenile, and municipal, and county court for the purposes of the applicability of the Rules of Criminal Procedure. Although there is no clear statutory authority for a domestic relations judge to issue a search warrant, R.C.2301.03 provides that domestic relations judges are judges of the court of common pleas, division of domestic relations with the same qualifications, exercise the same powers and jurisdiction as other judges of the court of common pleas. In addition, a domestic relations court is a court of record.

1) Probate Court

Prior to the enactment of the Modern Courts Amendment in 1968, the probate court was a separate court. With the Modern Courts Amendment, the probate court was consolidated as a division of the common pleas court. Sec. 4 (C), Art. IV of the Ohio Constitution. A probate judge has jurisdiction in a criminal case as a common pleas judge of the general division by appointment of the chief justice or acting chief justice. Ohio Const. Sec. 5 (A) (3), Art. IV. *See, State v. Cotton,* 56 Ohio St.2d 8 (1978). As the court held in *State v. Bays*, 87 Ohio St. 3d 15, 1999-Ohio-216, any issue of assignment of a probate judge is not jurisdictional in nature and may be waived if not timely raised. *See also, State v. Tolbert*, 4th. Dist. Washington, No. 15CA5, 2015-Ohio-4733. As such, any error in the assignment may be raised by direct appeal, not by way of habeas corpus. S*tate ex. rel. Key v. Spicer,* 91 Ohio St. 3d 469, 2001-Ohio-98.

In addition to an appointment by the chief justice, R.C. 2931.01 also provides limited criminal jurisdiction to a probate judge. This statute, as amended as of March 23, 2016, specifically confers jurisdiction on a probate judge to issue search warrants under R.C. 2933.21 through R.C. 2933.33. In *State v. Brown*, 142 Ohio St.3d 92, 2015-Ohio-486, the court held that a probate judge was not authorized to sign a search warrant unless assigned to another division of the common pleas court. The holding in *Brown* was

statutorily overruled with the 2016 amendment to R.C. 2931.01. *See, State v. Newman*, 5th. Dist. Guernsey, No. 16A15, 2017-Ohio-4047.

The authority of a probate judge to issue a search warrant is limited to a general search warrant and does not include:

1) R.C. 2933.51; Wiretapping & electronic surveillance.[7]
2) R.C. 2933.76; Pen register for trap and trace device.

2) Dual Capacity

State v. Gervin, 3rd. Dist. Marion, No.9-15-51, 2016-Ohio-5670. Probate/domestic relations judge signed the search warrant. The court found that the warrant was valid due to the judge's dual capacity, permitting him to sign the warrant by his authority as a domestic relations judge.

State v. Tatonetti, 11th. Dist. Geauga, No. 1021 (January 7, 1083), upholding the search warrant due to the dual capacity as a probate-juvenile court judge, despite the limitations of a probate judge at that time.

F) Territorial/location limitations. Crim. R. 41(A).

1) Warrant void.

State v. Dulaney, 3rd. Dist. Paulding, No. 11-12-04, 2013-Ohio-3985. A county court judge is limited to a search warrant within its territorial jurisdiction.

This case involved a search warrant for a blood draw after one-car collision by a county court judge where defendant was taken to hospital in adjacent city outside of the court's territorial jurisdiction. The appellate court found that Criminal Rule 41 and R.C. 2933.21 limited the location of the search to the court's territorial jurisdiction, the search warrant was void. In arriving at this conclusion, the court held:

1) A county (and municipal) judge is a creation of statute and is limited to statutory authority.
2) The person issuing search warrant must have some authority to do so under state law.
3) If a judge is not authorized to issue a search warrant, the warrant is void.
4) A jurisdictional violation is not a mere technicality.

Although the court found the search warrant was void, this finding did not automatically require suppression of the blood evidence. The court on appeal applied a

[7] In addition to the limitation of R.C. 2931.01, R.C. 2933.51(w) specifically excludes a judge of the probate, domestic relations, or juvenile court to issue a wiretap warrant.

balancing test to consider the benefits of applying the exclusionary rule to the costs of doing so. As the court noted, the exclusionary rule is a court created rule to act as a deterrent for improper police conduct. Even though the case was reversed upon a finding of a Fourth Amendment violation due to a void warrant, the trial court was required on remand to determine if exclusion of blood evidence was an appropriate remedy.[8]

State v. Jacob, 185 Ohio App.3d 408 (2nd. Dist. 2009). A search warrant issued by a Dayton municipal court judge to seize property in California was invalid. The court held that a judge who acts beyond the scope of statutory authority ceases to be a judge for purposes of issuing a search warrant. The court found that noncompliance with Criminal Rule 41 was more than a technical violation to execute a search warrant beyond the court's jurisdiction, but improperly intruded on the sovereignty of another state. As such, the violation was a fundamental violation of the defendant's constitutional rights and required suppression.

2) <u>Warrant not void</u>

State v. Ridenour, 4th. Dist. Meigs, No. 09CA13, 2010-Ohio-3373. This case involved the validity of a search warrant for a blood draw in an adjacent county. The court upheld the search on the grounds that the noncompliance with Criminal Rule 41, executing a warrant outside of the court's jurisdiction, was a technical violation. The court further noted that there was probable cause for the search due to a fatal collision, but issued by wrong judge. Because the judge met the requirements of being neutral and detached, there was no Fourth Amendment violation. The court also found that because the warrant was issued by a common pleas judge, there was statewide jurisdiction.

State v. Bowman, 10th. Dist. Franklin, No. 06AP-149, 2006-Ohio-6146. A search warrant executed outside of the court's jurisdiction did not require suppression of evidence. In this case a Franklin County municipal court judge issued a warrant for a DNA sample from an inmate in Pickaway. Although the warrant was executed in violation of Criminal Rule 41 and R.C. 2933.21(A), it was held to be a non-constitutional violation and did not require suppression of DNA evidence.

State v. Hardy, 2nd. Dist. Montgomery, No. 16964 (Aug. 28, 1998). A search of a package after being seized by the police and taken into the court's jurisdiction was a violation of Criminal Rule 41, but not a Fourth Amendment violation due to probable cause for the search warrant to be issued. The court further stated that as appellate decisions are being issued establishing violations of Criminal Rule 41, it would be more difficult for police to claim good faith, based upon mistaken reliance on invalid search warrant.

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[8] The court expressly disapproved and declined to follow the decisions in *State v. Bowman*, 10th. Dist. Franklin, No. 06AP-149, 2006-Ohio-6146 & *State v. Hardy*, 2nd Dist. Montgomery, No. 16964 (1998), which held that an invalid warrant for a search outside of the court's territorial jurisdiction was not a violation of the Fourth Amendment.

United States v. Libbey-Tipton, No. 1:16 CR 236 (N.D. Ohio 2016). Implementation of Network Investigative Technique (NIT) computer code which allowed a computer in Virginia to find an exact location of the defendant's computer on a child pornography website was a search outside of the court's jurisdiction. In finding a good faith exception, the court noted that police could not be faulted for not understanding the intricacies of the court's jurisdiction. Applying the balancing test set out in *United States v. Masters*, the court found that the exclusionary rule did not apply. (See page 29 for discussion of *United States v. Masters*.)

3) <u>Consideration of venue under R.C. 2901.12.</u>

R.C. 2901.12, defining venue in a criminal case refers to the territorial jurisdiction of where the offense occurred. This does not automatically extend the jurisdiction of the court for search warrants. As an example, if a blood draw is needed after a motor vehicle collision and the defendant is taken to a hospital outside of the court's territorial jurisdiction, the court where the hospital is located, not the scene of the collision, is determinative.[9]

R.C. 2910.12 expands the trial court's jurisdiction for cases in which some, but not all of the elements of the offense occurred, in cases of conspiracy or offenses committed in an aircraft, motor vehicle, train, watercraft, or other vehicle, in transit, and it cannot reasonably be determined in which jurisdiction the offense was committed. R.C. 2901.12(I) (1) also provides jurisdiction to the trial court for offenses involving a:

> [c]omputer, computer system, computer network, telecommunication, telecommunications device, telecommunications service, or information service, the offender may be tried in any jurisdiction containing any location of the computer, computer system, or computer network of the victim of the offense, in any jurisdiction from which or into which, as part of the offense, any writing, data, or image is disseminated or transmitted by means of a computer, computer

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[9] Because of the need to obtain a search warrant under *Birchfield v. North Dakota*, 579 U.S. __, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016), it is often difficult to obtain a warrant within the statutory time limit in R.C. 4511.19(D)(1)(b). In *State v. Moore,* 2nd. Dist. Montgomery, No. 28640, 2021-Ohio-1114, the court held the blood drawn beyond the three-hour statutory time is not, by itself, an unreasonable search. Relying on *State v. Barger*, 2nd. Dist. Montgomery, No. 27257, 2017-Ohio-4008, the court permitted the late blood sample when the timing was not due to any undue delay or dilatory tactics by the police. The court also relied on the fact that:
1) the warrant required the blood to be drawn as soon as possible,
2) the blood was drawn 19 minutes after the warrant was signed, and
3) the defendant delayed the process by being uncooperative wit the emergency medical staff that caused the delay in seeking the warrant for the blood sample.

system, computer network, telecommunication, telecommunications device, telecommunications service, or information service, or in any jurisdiction in which the alleged offender commits any activity that is an essential part of the offense.

4) Electronically stored records.

Stored Communications Act (SCA) establishes privacy protections for stored wire or electronic communications and records as well as requirements of law enforcement to have access to those records.

18 U.S.C. 2703(d). An electronic communication may be obtained by search warrant, administrative subpoena, or court order if the communication has been in electronic storage for more than 180 days.

18 U.S.C. 2703(a). Only a search warrant may be used to obtain an electronic communication that has been in storage less than 180 days.

A court order must be based upon specific and articulable facts showing that there are reasonable grounds that the information sought is relevant and material to an ongoing criminal investigation. 18 U.S.C. 2703(d).

Generally, notice to the user is required unless the information is obtained by a warrant or unless notification would result in:

A) Endangering the life or physical safety of a person,
B) Flight from prosecutions,
C) Destruction of or tampering with evidence,
D) Intimidation of a potential witness, or
E) Otherwise seriously jeopardize an investigation or unduly delay a trial.

18 U.S.C. 2703(d), 18 U.S.C. 2705(a).

Non-content information, such as name, address, telephone connection records, session times or duration, length of service or type of service utilized as well as the means or source of the payment for the services, may be obtained by a subpoena without a warrant. 18 U.S.C. 2703(c) (2).

State v. Hana, 2024-Ohio-5548 (12th. Dist.). 18 U.S.C. 2703(a) provides separate statutory authority to a federal magistrate to issue a search warrant for electronic communication information and is independent of the limitations of Fed. R. Crim. P. 41(b) which limited the territorial authority of the magistrate.

United States v. Carter, No. 5:16-CR-20-TBR, 2019 U.S. Dist. Lexis 142530, 2019 WL 3997870 (W.D. Kentucky, 2019). Search warrant for Facebook account issued by state court district judge of limited jurisdiction. Although the parties stipulated that the district court did not meet the requirement under 18 U.S.C. 2701 (Electronic

Communications Privacy Act of 1968), as a court of general jurisdiction, the court found that the ECPA did not provide exclusion for any noncompliance with the Act.

State v. Worthan, 2024-Ohio-21 (2d. Dist.). An order granting a motion to suppress affirmed. This case involved a search warrant to Verizon for calling records made by the defendant's cell phone. The court found that the phone records were stored in Florida, although accessible in Ohio, was outside of the municipal court's territorial jurisdiction. In arriving at this conclusion, the court relied on *State v. Jacobs*, supra, that a municipal court could not issue a search warrant for property outside of the court's jurisdiction. In doing so, the court equated physical property with electronic records.

Although under the federal Stored Communications Act, 18 U.S.C. 2701 et. seq., an Ohio common pleas court could issue a valid search warrant for the phone records, the authority is limited to a court of general jurisdiction. The court in *Northam* noted that a municipal court is not a court of general jurisdiction and therefore, lacked authority to issue a search warrant for electronic records under the Federal Stored Communications Act.

State v. Wharton, 2025-Ohio-4485 (5th. Dist.). The municipal court lacked authority to issue a search warrant for the defendant's Dropbox files stored on out-of-state servers, but this jurisdictional defect did not require suppression of the evidence where the detective relied on the warrant in good faith.

The court in *Wharton* adopted the holding in *State v. Worthan*, 2024-Ohio-21 (2d. Dist.), that federal law requires search warrants seeking out of state electronic records be issued by a court of general criminal jurisdiction. Because municipal courts are courts of limited jurisdiction, and not general jurisdiction, a municipal court does not have authority to issue warrants for electronic records in another state.

United States v. Ledbetter, Nos. 2:15-CR-080, 2:14-CR-127, 2015 U.S. Dist. LEXIS 161693, 2015 WL 7758930 (S.D. Ohio 2015). This case involves twenty defendants on RICO charges as members of the North Shore Posse. The defendant, who was under surveillance for drug trafficking, was stopped for traffic violation. The police recovered $51,302 in cash, 2 bags of crack cocaine after a drug dog check of the car, and a loaded firearm. No traffic violation charges were filed.

The government issued multiple subpoenas from the municipal court and grand jury to obtain cell phone records from third party phone carriers to obtain incoming and outgoing phone calls. The court did not directly address the authority of a municipal court to issue subpoenas to obtain cell phone records, finding instead that the Stored Communications Act does not include exclusion of evidence as one of the remedies for violating the statute.

Note: Effective 4/9/25, R.C. 2933.523 was enacted which requires an electronic communication service or a provider of remote computing service operating in the state

to comply with any court order to provide electronic records. R.C. 2933.523 does not expressly refer to municipal courts, but it refers to all courts in Ohio.

It is questionable if R.C. 2933.523 provides authority for municipal courts to issue search warrants for out of state electronic records. A municipal court is a court of limited jurisdiction and the federal Stored Communications Act only permits release of electronic records to a court of general jurisdiction. If R.C. 2933.523 is intended to permit municipal courts to issue electronic record search warrants, it would appear to be in conflict with the Stored Communications Act.

The preemption doctrine of the Supremacy Clause would most likely prevent attempt to use the Ohio statute to permit a municipal court to issue a valid search warrant for electronic records. As the court noted in *Menorah Park Ctr. for Senior Living v. Rolston, 2020-Ohio-6658,* there are three ways by which federal law can preempt state law under the Supremacy Clause. Those include when (1) Congress expressly preempts state law (express preemption), (2) Congress has occupied the entire field (field preemption), and (3) there is an actual conflict between federal and state law (conflict preemption). *Citing English v. Gen. Electric Co.,* 496 U.S. 72 (1990).

Other jurisdictions

State v. Boyd, 2023-Ohio-4725 (7th. Dist.). Pursuant to the Federal Stored Communications Act, a provider of electronic communication services or remote computing services can be compelled to disclose the contents of messages if a warrant was issued using state warrant procedures by a court of general criminal jurisdiction authorized to issue search warrants. 18 USC § 2703(a), (b)(1)(A). Additionally, under California law, a corporation located in California "that provides electronic communication services or remote computing services to the general public" must comply with "a warrant issued by another state to produce records * * * as if that warrant had been issued by a California court." Cal. Penal Code § 1524.2(c). In any case, this assignment of error is without merit.

United States v. Webb, No. CR 19-121-BLG-SPW-1, 2021 U.S. Dist. Lexis 1009, 2021 WL 22720 (D. Montana 2021). A search warrant to obtain cell phone location records was not valid under Montana state law because the defendant was not a Montana resident and the records searched were outside the court's territorial jurisdiction, but the Stored Communications Act does not include suppression or exclusion as a remedy for noncompliance.

United States v. Mozee, No. 1:15-CR-004340WSD-JSA (N.D. Georgia, 2006). A motion to suppress an Internet email account by judge in Alaska on grounds of geographic scope outside court's jurisdiction for records held by the service provider in California was overruled. The court held that the geographic limitation of a search warrant in Federal Criminal Rule 41 is not applicable to the Stored Communications Act, (SCA), 18 U.S.C. 2701, et seq., for the clear intent of the Act was to permit law enforcement to obtain the records stored outside of the court's territorial jurisdiction. In

addition, the SCA specifically provides for a court to issue the search warrant where the investigation is occurring or where the provider or data is located.

United States v. McGuire, No. 2:16-CR-46-GMN-PAL (D. Nevada, 2017). This case involved a motion to suppress evidence obtained from a Facebook account by a search warrant issued by a Nevada judge for information stored in California. The defendant argued that the warrant was beyond the geographic scope of Federal Criminal Rule 41.[10] The court found that 18 U.S.C. 2703(a) created a separate jurisdictional provision and was not dependent upon Criminal Rule 41. The Stored Communications Act gave courts of competent jurisdiction authority based upon where the offense occurred, not where the records were located.

In addition, the Stored Communications Act provides procedures unique to other searches and seizures other than authorized by Criminal Rule 41. The court found that while Criminal Rule 41 outlined the procedure for the warrant, the Stored Communications Act provided the jurisdiction to issue the warrant. In arriving at this conclusion, the court distinguished between seizing a computer outside of the court's territorial jurisdiction and obtaining computer records on the computer but electronically stored in another state.

United States v. Scully, 108 F.Supp. 3d 59 (E.D. N.Y. 2015), finding that a judge had authority to issue a search warrant for electronically stored records under the SCA even though the warrant would ultimately be served in a different state. The SCA applies to a court of competent jurisdiction that includes a judge who "has jurisdiction over the offense being investigated." The SCA also includes authorization to a state court of general criminal jurisdiction authorized by law of that state to issue search warrants. 18 U.S.C. 2711(3)(B).[11]

United States v. Berkos, 543 F.3d 392 (7th. Cir. 2008). The term "jurisdiction over the offense" operates as a separate jurisdictional provision authorizing a warrant for electronically stored records for the authorized provider who is located outside the court's territorial jurisdiction.

The issue is not the location of the records, for the record can be easily transferred to the location of the court, but the recipient of the order to transfer the records. As such,

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[10] Similar to Ohio Crim. R. 41, Fed. Crim. R. 41(b) limits the scope of the search warrant to the seizure of a person or property located within the court's district.

[11] Although a municipal court is a court of limited, not general jurisdiction, a municipal court judge is authorized to issue search warrants in a criminal case for both felony and misdemeanor charges, and therefore, is within the meaning of 18 U.S.C. 2711(3)(B). *See, eg*, *United States v. Ledbetter*, Nos. 2:15-CR-80 & 2:14-CR-127 (S.D. Ohio 2015), upholding subpoena issued by municipal court for cell phone basic subscriber information and call records from the service providers located outside the court's territorial jurisdiction under the Stored Communications Act.

disclosure of the records is not the same as seizure of physical property as the records or information can be obtained anywhere once access or permission is given by the provider.

Courts have recognized that restricting the ability to obtain electronically stored records to the court's own district or territorial jurisdiction creates random and arbitrary ability for law enforcement to obtain records depending on where the records are located at any specific moment. It would also impose a substantial burden on the court where the records are stored. In addition, decisions by the service provider to store records in a specific jurisdiction are based upon the provider's business considerations, not privacy concerns of its customers.

Many of the issues of a court's territorial jurisdiction to obtain electronically stored records located outside of the court's territorial jurisdiction were resolved by the adoption of the Clarifying Lawful Overseas Use of Data Act (CLOUD). 18 U.S.C. 2523, effective March 23, 2018. This legislative amendment to the Stored Communications Act permits access by law enforcement to data stored on servers from U.S. based technology companies regardless of whether the data is stored in the United States. The amendment effectively resolves the issue of a search warrant for electronically stored data being limited by Criminal Rule 41 to the territorial jurisdiction of the court.

G) <u>Neutral and detached</u>.

Coolidge v. New Hampshire, 403 U.S. 443 (1971). A search warrant issued by the attorney general who was actively involved in the prosecution of the case in which the search was involved was not valid as the attorney general was not neutral and detached.

Connelly v. Georgia, 429 U.S. 245 (1977). A justice of the peace who received a fee for every search warrant he issued, but no fee is the search warrant was denied, was not a "detached magistrate" due to the direct, personal, and pecuniary interest in determining probable cause.

Lo-Ji Sales v. New York, 442 U.S. 319 (1979). A town justice of the peace who accompanied and assisted the police is the execution of the search warrant was not neutral or detached. The Court found the justice compromised his judicial neutrality by serving as the leader of the search party. 442 U.S. at 326-37.

In this case the warrant issued by the justice was also invalid due to the lack of particularity. The warrant permitted the police to seize anything the police felt was obscene, resulting in an open-ended warrant to be completed while a search is being conducted.

United States v. Severance, 394 F.2d 222 (4th. Cir. 2005). A judge's revisions to an affidavit to verify or obtain additional information to make a determination of probable cause did not compromise the judge's neutrality or detachment. *See also,*

United States v. Ramirez, 63 F.3d 937 (10th. Cir. 1995. (A judge's alterations of the affidavit were mere common sense extensions of the contents of the narrative portion of the same affidavit.)

United States v. Warren, 365 Fed. Appx. 635, No. 08-1961 (6th. Cir. 2010). Alterations by judge to a search warrant application did not overstep the judicial function of being neutral and detached. By scrutinizing the veracity of the affidavit and making alterations to ensure its accuracy, he executed his Fourth Amendment duty "with a critical eye."

V. Evidence considered to support warrant.

State v. Hawkins, 2025-Ohio-929 (5th. Dist.). "The nexus between the items sought and the place to be searched depends upon all of the circumstances of each individual case, including the type of crime and the nature of the evidence." *State v. Carter*, Greene No. 2011 CA 11, 2011-Ohio-6700 (2d Dist.),

Videos of drug buys furnished by a confidential informant to the police and submitted with the supporting search warrant affidavit may be considered when determining the credibility of the informant and the nexus of the defendant's residence as the place to be searched. In this case the defendant sold drugs out of his car but made frequent return trips to the residence to obtain more drugs.

State v. Hopkins, 2025-Ohio-2102 (12th. Dist.). After the defendant was arrested for violating a civil protection order he made a call from the jail regarding his marijuana grow. Based on the defendant's recorded statements, a search warrant was obtained. The defendant claimed because the protection order charge was later dismissed, the search warrant was invalid. The court noted the subsequent dismissal of the case did not undermine the existence of probable cause at the time of arrest. Moreover, the search warrant was not obtained based on items discovered during entry into the defendant's home for his arrest, but instead, based on his own, later comments.

A) Hearsay. Crim. R. 41(C) (2).

State v. Miley, 8th. Dist. Cuyahoga, No. 56168 (Nov. 9, 1989). Criminal Rule 41 (C) permits a search warrant to be based upon hearsay evidence when there is a substantial basis for believing there is a factual basis for the information.

State v. Negdeman, 12th. Dist. Butler, No. CA81-08-73 (Oct. 20, 1982). If an affidavit is based upon hearsay evidence, the affidavit must recite some of the underlying circumstances from which:

1) The informant concluded the evidence might be discovered, and
2) The affiant concluded that the informant was credible or the information reliable.

State v. Castagnola, 145 Ohio St. 3d 1, 2015-Ohio-1565. When a search warrant is issued based upon an affidavit setting out an inference by the police officer that are stated as facts in the affidavit, the good faith exception to the exclusionary rule does not apply. While an affidavit may contain a summary of the facts, inference from the facts must be drawn by the judge determining probable cause, not the police officer. In this case the affidavit in support of the seizure of a computer was based upon the police officer's statement that the defendant had used the computer for an online search, which was assumed by the officer and no information was given to the officer about any online search.

State v. Smith, 2023-Ohio-4565 (2d. Dist). The affiant may rely on hearsay information because the purpose of the affidavit is not to prove guilt, but only to establish probable cause to search. Moreover, Criminal Rule 41(C) permits hearsay to determine probable cause if there is a substantial basis for believing the source of the hearsay is credible and for believing that there is a factual basis for the information.

State v. Boone, 2nd. Dist. Montgomery, No. 27668, 2018-Ohio-2541. Although an affidavit must provide the issuing judge a basis for determining the veracity, reliability and basis of knowledge of a confidential informant, this basis may be shown by police corroboration or additional statements by the affiant that substantiate the facts in the affidavit. The informant's statements are not considered as separate and independent but intertwined with all of the facts presented to determine probable cause. Other factors include the defendant's prior record and involvement in drug activity.

Summary of multiple officers.

State v. Johnson, 7th. Dist. Mahoning, No. 17-MA-99, 2018-Ohio-2780. The affiant can make reasonable inferences, but the facts behind any significant inferences should be disclosed to the issuing judge who should make his/her own inferences. "Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number." *State v. Henderson*, 51 Ohio St.3d 54, 57 (1990), *quoting United States v. Ventresca*, 380 U.S. 102, 111, (1965).

State v. Revere, 2nd. Dist. Montgomery, No. 28857, 2022-Ohio-551. Hearsay evidence will not per se invalidate a finding of probable cause when the facts in the affidavit permit the judge to determine the credibility of the statement. Hearsay evidence may be from a lay witness and is not limited to a statement by another police officer, if reliable. In this case, although the witness initially lied to the police, all of the witness' statements were included in the affidavit to permit the judge to determine credibility.

State v. Byrd, 2025-Ohio-1045 (9th. Dist.). A search warrant affidavit may be based solely upon hearsay information and need not reflect the direct, personal observations of the affiant, as long as the affidavit provides a substantial basis for believing the source of the hearsay is credible and that there is a factual basis for the information furnished. Crim. R. 41(C)(2).

State v. Henderson, 51 Ohio St. 3d 54 (1990). Observations of fellow officers that have been consistently corroborated and derived through a course of a common investigation are a reliable basis for a warrant applied for by one of their number. *quoting United States v. Ventresca*, 380 U.S. 102, 111 (1965)

State v. Green, 4th. Dist. Ross, No. 21CA3760, 2023-Ohio-501. Evidence of probable cause for a search warrant may be based on the collective knowledge of numerous law enforcement officers involved in an investigation. In this case, although the two officers did not work together on the same investigation, it was not unreasonable for one officer to relay on information about criminal activity from one officer discovered in the course of a separate investigation.

Confidential informant.

State v. Goins, 5th. Dist. Morgan, No. 05-8, 2006-Ohio-74. Hearsay statements are permitted in an affidavit to support a search warrant if the affiant provides a basis of knowledge and some underlying circumstances supporting the affiant's belief that the informant is credible. In the absence of supporting facts to show the credibility of the informant and the reliability of the information provided, the determination of probable cause is effectively made by the affiant or the informant, not the judge. *See also, State v. Humphrey*, 2nd. Dist. Montgomery, No. 25063, 2013-Ohio-40.

State v. Smedley, 2nd. Dist. Montgomery, No. 27889, 2018-Ohio-4629. Controlled drug buys by confidential informant were sufficient to establish probable cause when the police officer independently verified the sale of the drugs. Although the police officer had not used the specific confidential informant before, the police officer's affidavit also showed surveillance of the defendant's residence where multiple persons drove into the parking lot, were met by the defendant at the car, and drove away a short time later and the officer's experience with drug transactions. The court held that the omission of any statements in affidavit about the reliability of confidential information was irrelevant due to three separate controlled drug buys by the police, set out in the affidavit, subsequent to the information provided by the confidential informant.

State v. Harrison, 3rd Dist, Logan, No. 8-22-34, 2023-Ohio-1618. Search warrant for GPS tracker was valid. Because the supporting affidavit was based on officer's observation of drug transaction, the issue of the reliability of the confidential informant was not grounds to suppress the results of the search.

State v. Eichhorn, 47 Ohio App.2d 227 (10th. Dist. 1975). Although a search warrant affidavit may be based on hearsay, the affidavit must set out sufficient facts about the underlying circumstances regarding both the credibility of the informant and the location of the property to be seized. (Corroborated evidence from informant that the defendant/ bar owner spoke to him about moving stolen property was sufficient to support search warrant.)

B) <u>Recorded supplemental oral statements of officer. Crim. R. 41(C) (2).</u>

State v. Dibble, 159 Ohio St.3d 322, 2020-Ohio-546. A detective's unrecorded comments under oath to the judge at the time the search warrant was presented and reviewed were admissible in the hearing on the motion to suppress on the issue of good faith by the officer to rely on the warrant signed by the judge.

State v. Lee, 1st. Dist. Hamilton, No. C-070058, 2008-Ohio-3175, noting that:

> The purpose of Criminal Rule 41(C) is to protect a defendant's rights against the introduction of oral evidence at a post-seizure hearing on a motion to suppress intended "to bolster the affidavits that probable cause existed for the issuance of a warrant." And the requirement that supplemental testimony be "recorded [and] made a part of the affidavit" serves the additional purpose of removing any concern that a reviewing court will have to guess about the actual statements made to the magistrate [or judge] issuing the warrant. (Citation omitted.)

But See, State v. Oprandi, 5th. Dist. Perry, No. 07-CA-5, 2008-Ohio-168. Although the court is generally confined to the four corners of the affidavit in determining whether probable cause exists, the court may look beyond the affidavit to consider unrecorded statements by the police to determine if the officer acted in good faith. *See also, State v. O'Connor*, 12th. Dist. Butler, No. CA2001-08-195, 2002-Ohio-4122, permitting testimony by police officer and issuing judge to testify at the suppression hearing regarding the officer's good faith reliance on a search warrant issued in part based on unrecorded statements.

State v. Neil, 10th. Dist. Franklin, Nos. 14AP-9811 & 15AP-594, 2016-Ohio-4762. When no recorded oral testimony is presented with the affidavit(s), the determination of probable cause is based solely on the affidavits. In this case the trial court could consider the prior affidavit when issuing second search warrant if properly submitted to the court at the time the search warrant was issued.

Unrecorded oral testimony was admissible at the suppression hearing to determine if the affidavit contained false statements. As such, the issue was the good faith of the police officer, not probable cause.

The court of appeals in *State v. Dibble*, 10th. Dist. Franklin, No.16AP-629, 2017-Ohio-9321, reversed on other grounds, 159 Ohio St.3d 322, 2020-Ohio-546, also held that Criminal Rule 41(C), excluding unrecorded statements in support of a search warrant is not unconstitutional. The prosecution argued that the 4th. Amendment only required statements by oath or affirmation for a search warrant. Addressing this issue, the court stated that the 4th. Amendment establishes a floor, not a ceiling. State governments were free to pass more restrictive laws to make it more difficult to obtain a search warrant. The court also stated that Criminal Rule 41(C), regarding admission of evidence was procedural in nature, not substantive, and therefore within the Supreme Court's rule making authority.

C) <u>Stale evidence.</u>

State v. Rigel, 2nd. Dist. Clark, No. 2016-CA-90, 2017-Ohio-7640. Although statements in an affidavit must be timely, there is no arbitrary time limit before the evidence may be considered stale. Rather, the issue is whether the affidavit alleges facts to show that the contraband is still on the property. Evidence of an ongoing investigation will defeat a claim of staleness. See also, *State v. Byrd*, 2025-Ohio-1045 (9th. Dist.). The test for staleness is whether the alleged facts justify the conclusion that contraband is probably on the person or premises to be searched at the time the warrant issues." *State v. Ingold*, 2008-Ohio-2303 (10th Dist.).

State v. A.P., 12th. Dist. Warren, No. CA2018-01-006, 2018-Ohio-3423. On the issue of staleness, the test is whether the facts set out in the affidavit justify the conclusion that the items sought to be seized are on the property sought to be searched. *Relying on State v. Prater,* 12th. Dist. Warren, No. CA2001-12-114, 2002-Ohio-4487. In this case a forty-eight-day delay before obtaining the search warrant was not based on stale evidence when there was ongoing surveillance of the defendant's home and statements by the defendant on social media.

State v. Eal, 10th. Dist. Franklin, No.11AP-460, 2012-Ohio-1373. The court found that the nature of the offense, child pornography, which tends to be collected and stored, was a factor for the trial court to consider in reviewing the affidavit. Another factor considered by the court was that the offense involved an ongoing course of conduct, not an isolated event. A 6-month investigation that included cyber tips of the defendant's conduct was not unreasonably long to be considered stale.

State v. Stewart, 5th. Dist. Perry, No. 21-CA-00008, 2021-Ohio-4444. Month old information in supporting affidavit was not stale for a year-long investigation involving ongoing drug trafficking activity.

State v. Griffin, 2024-Ohio-1699 (1st Dist.). A difference of a week during an ongoing investigation of felonious assault when the perpetrator was unidentified was not unreasonable.

State v. Tarver, 2025-Ohio-2167 (2d. Dist.). Information provided by person when arrested for drug possession about the identity and location of his drug dealer was not stale for a search warrant issued six days later and was sufficient to support the warrant.

State v. Boyd, 7th. Dist. Mahoning, No. 20 MA 0131, 2022-Ohio-3523. A search warrant for Instagram account to retrieve messages between defendant and juvenile about the defendant providing tobacco and alcohol to the juvenile for sex. A search warrant seeking Instagram messages and photos for a limited two-month period corresponding with the screen shot messages and photos and associated information confirming the user of the account was not overly broad.

A prior, four-year-old investigation of the defendant for similar sex offenses with juveniles showed a pattern of conduct and was proper as corroborating evidence, along with the current Instagram account to support a second search warrant to review the contents of the defendant's computers and cellphones. The old information was meant as background and not stale evidence to support the search warrant. The information received by the police that the defendant used cellphones and computers to communicate with juveniles was properly considered as grounds to search the defendant's cellphones and computers.

State v. Green, 4th. Dist. Ross, No. 21CA3760, 2023-Ohio-501. An affidavit must contain some information for the judge to independently determine that probable cause presently exists, not that it existed some time in the past. The court must consider the nature of the criminal activity, the length of the activity, and the nature of the property to be seized. The court noted that with child pornography, months-old information may not be stale because the images can have an indefinite life span and collectors tend to retain the images for a long time. The court noted different time spans for drug offenses, which are sold quickly and gone, and child pornography, with can be kept for longer periods of time and transmitted while retaining the same image.

The court also noted that evidence that a defendant visited or subscribed to child pornography websites supports a conclusion that the defendant has downloaded, kept, or otherwise possessed the material. (Citations omitted.).

State v. Martin, 2025-Ohio-**** (6th. Dist.). A prior history of illegal drug transactions showing an ongoing course of conduct with current drug transactions is background information and not stale evidence.

State v. Byrd, 2025-Ohio-1045 (9th. Dist.). The passage of time is less significant in drug trafficking cases than in cases involving a single instance of criminal conduct. Stale information can be "refreshed" by more recent corroborating information in the affidavit. Although the original drug buy occurred 10 months earlier, there was a subsequent drug buy a week before the search warrant was issued.

State v. Maranger, 2nd. Dist. Montgomery, No. 27492, 2018-Ohio-1425. The test for determining if information in an affidavit is stale is whether the facts in the affidavit justify the conclusion that the contraband remains on the premises to be searched. Factors to be considered to determine if the information contained in the affidavit are stale include:

1) The character of the crime,
2) The defendant,
3) The items to be seized, including perishability of the items,
4) The place to be searched, and
5) Whether the statements relate to a single incident or ongoing conduct.

In this case, evidence of child pornography that had been stored on the defendant's computer for at least four months was not stale in light of the evidence of the ongoing course of conduct by the defendant.

State v. Benedict, 3rd. Dist. Crawford, No. 3-21-08, 2022-Ohio-3600. Regarding whether evidence in support of a search warrant for child pornography is stale, an expert witness may be needed to show that collectors tend to retain their collections for an extended period of time. An expert is not required to establish the qualifications or experience of a police officer to recognize child pornography.

State v. Dixon, 10th. Dist. Franklin, No. 21AP-152, 2022-Ohio-4532. The trial court could draw reasonable inferences that the defendant viewed and downloaded child pornography from a detailed affidavit explaining the procedure to enter the specific meeting room, including creating an online account, link to IP address on defendant's computer, proof of time the defendant was logged onto the site, and observing video displays of child pornography.

A ten-month time lag to obtain a search warrant to seize a computer that the defendant visited and actively participated in a child pornography chat room was not an unreasonable delay and the evidence was not stale. The court distinguished other cases involving a single, brief visit to a child pornography website and no evidence that the person downloaded any images and the defendant had terminated the internet service.

State v. Taylor, 2023-Ohio-*** (5th. Dist.). Year old information as part of an ongoing fourteen-month drug trafficking investigation was not stale. There is no arbitrary time limit that dictates when information [offered to support a search warrant application] becomes stale. *State v. Gleason*, 2022-Ohio-3893. The test for staleness is whether the alleged facts justify the conclusion that contraband is probably on the person or premises to be searched at the time the warrant issues.

State v. Corn, 9th. Dist. Lorain, No. 20CA11686, 2021-Ohio-3444. Factual statements in an affidavit must be so closely related to the time the warrant is sought to justify a probable cause finding. Relying on *State v. Myers*, 9th. Dist. Summit, No. 27576, 2015-Ohio-2135. There is no arbitrary time limit to determine when evidence is stale and it is evaluated determined by the surrounding circumstances, including whether the focus is on a single incident or an ongoing course of criminal conduct. In this case the investigation spanned a number of years, but the affidavit set out facts up to a month before the warrant was obtained.

State v. Hale, 2d. Dist. Montgomery, No.23582, 2010-Ohio-2389. The supporting affidavit for the search warrant was not stale, even though the defendant had purchased a subscription to the child pornography site over a year earlier. The court noted that pornographic images may be stored on a computer for long periods of time. The court also noted that during this time the defendant resided at the same address. "[D]igital images of pornography are easily duplicated and have an infinite life span, being

recoverable even after being deleted from a computer's hard drive." Relying on *United States v. Frechette*, 583 F.3d 374, 379 (6th Cir.2009).

State v. Milancuk, 8th. Dist. Cuyahoga, No. 108507, 2020-Ohio-1607. Appeal of conviction for child pornography on ineffective assistance of counsel for failing to file motion to suppress. Regarding the search warrant being based on stale evidence, the court noted that staleness is not based sole on the time between the events listed in the affidavit and the issuance of the warrant. Factors also include the character of the offense, the items to be seized, the perishable nature of the items, the location of the items, and whether the offense involves a single incident or an ongoing course of conduct. Relying on *State v. Yanowitz,* 67 Ohio App. 2d, 141, 144 (8th. Dist. 1980). The court applied a technology exception for cases involving child pornography that can be stored on a computer, not perishable, and easily disposed of. The warrant was based on three Internet file shares, each a month apart. The court held it was not an unreasonable period of time.

See also, State v. Morales, 10th. Dist. Franklin, No. 17AP-807, 2018-Ohio-3687. There is no arbitrary time limit for evidence to support probable cause and the issue of stale evidence is more than merely the number of days passed.

This case raised an issue of whether evidence to support probable cause for drug offenses was stale after one month. Affirming the conviction, the court noted that probable cause must exist at the time the warrant was issued and the more stale the evidence becomes the less likely to find probable cause. In this case, a one-month delay from the police officer's last contact with the defendant was not too long a time to make the evidence stale in light of all of the circumstances, including numerous undercover drug buys.

State v. Talley, 2nd. Dist. Montgomery, No. 24765, 2012-Ohio-4183. An investigation over a 2-week period of ongoing drug activity, including a controlled drug buy a week prior to the warrant being issued, was not stale information.

State v. Crane, 2nd Dist. Montgomery, No. 17967, (Feb. 25, 2000). A minor delay in execution of a search warrant did not make the information in the affidavit stale when the affidavit showed that the defendant was engaged in ongoing drug activity from his home, as opposed to a transient location, and not for short term duration.

State v. Laubacher, 5th. Dist. Stark, No. 2018 CA 169, 2019-Ohio-5271. A fifteen-day tip is not, by itself, stale. To determine if information used to support a search warrant is stale, the court must consider the character of the offense, the person involved, the thing to be seized, that is, its perishability, the place to be searched, and whether the affidavit refers to a single incident or part of ongoing criminal activity. In this case there was an anonymous tip of the smell of marijuana being burnt. The verification by the police, along with the officer's training and experience, and information seized from the defendant's trash on public property, and electricity usage

from the past two years, were sufficient, viewing the totality of the circumstances, to support the search warrant.

State v. Jones, 3rd Dist. Marion, No. 9-20-04, 2020-Ohio-6667. A chronological, historical recitation of past conduct, including past drug convictions, does not mean the search warrant was based on stale evidence when the recitation was set out to show an ongoing course of drug dealing. Citing *U.S. v. Ortiz,* 143 F3d 728 (2nd/ Cir. 1998), when the supporting facts present a picture of continuing conduct or an ongoing activity, the passage of time between the last described act and the application for a search warrant becomes less significant. Stale or dated information may be considered for probable cause when it is used to corroborate recent information.

State v. Neil, 10th. Dist. Franklin, Nos. 14AP-9811 & 15AP-594, 2016-Ohio-4762. Statements in an affidavit setting out recent information to corroborate otherwise stale information was valid to show an ongoing course of conduct.

D) <u>Sufficiency of affidavit</u>

State v. Shary, 8th. Dist. Cuyahoga, No. 109487, 2021-Ohio-3604. Evidence of surveillance cameras outside a suspected drug dealer was significant to law enforcement to: 1) detect law enforcement approaching the house, and
2) prevent law enforcement from conducting a "trash pull."

Search warrant affidavits are presumed valid and the burden is on the defendant to show statements in the affidavit that are knowingly or intentionally false or made in reckless disregard of the truth. In this case although the two people stopped coming from the defendant's house identified the seller as "Bob" without stating they purchased the drugs from the defendant, Robert Shary, with both stops the drivers were in possession of illegal drugs and one driver admitted her purchased the drugs from that house. Reviewing all of the evidence, including continual, short visits by multiple people to the defendant's house, independent neighborhood complaints, and the surveillance cameras, there was sufficient evidence of probable cause to support the search warrant.

State v. Deerfield, 12th. Dist. Madison, No. CA2020-01-002, 2021-Ohio-1351. Although a police officer may make an inference in an affidavit, the inference must also be based on facts in the affidavit so that it does not usurp the judge's inference drawing authority. The reviewing court must make a determination if the inference is an allowable interpretation from the facts in the affidavit. The court found the police officer's area of expertise and knowledge of the defendant's street name was a matter of routine interpretation. In this case the affidavit was based on Facebook information discussing transport and sale of a stolen firearm.

State v. Frost, 2025-Ohio-1081 (2d. Dist.). When the challenge to the supporting affidavit is limited to the four corners of the affidavit without any additional factual statements, no witnesses may be required to appear and testify.

State v. Grace, 5th. Dist. Fairfield, No. 2022 CA 00039, 2023-Ohio-3781. In this case the police officer/affiant provided no background of his expertise in digital cell phone data, ISP data, or CSLI data to support his assertion. Without that information, the affidavit's language is wholly conclusory as to the existence of probable cause to search Grace's Google account and her Google search history. In addition, an affidavit reciting the officer's "training and experience" without specifically describing the training and experience is not sufficient to support a search warrant. A valid supporting affidavit must show not only that the affiant has knowledge but also that the affiant has sufficient basis for that knowledge.

State v. Thompson, 3rd. Dist. Marion, No. 9-20-35, 2021-Ohio-2979. This case was before the court on a claim of ineffective assistance of counsel for not filing a motion to suppress. The appellate court held that because the supporting affidavit was not part of the record, the merits of the claim could not be addressed. In this case the affidavit was based on text messages taken from the decedent's phone arranging drug buys with the defendant a few hours prior to the discovery of the decedent.

State v. Reedijk, 12th. Dist. Warren, No. CA2020-12-086, 2021-Ohio-2879. An affidavit setting out the police officer's experience with drug trafficking, controlled drug buys, the defendant's criminal history for drug convictions, and an admission by the defendant that he kept property and stayed at his father's Ohio residence was sufficient to establish probable cause to support the search warrant.

State v. Cutlip, 7th. Dist. Belmont, No. 21 BE 0032, 2022-Ohio-3524, motion to reopen appeal denied, 2023-Oiho-914. Although the affidavit did not go into detail about the controlled drug buy, a reasonable interference could be drawn that it was done with marked bills, recorded, or some other indicia of reliability. The court further noted that the drug buy was corroborated by the confidential informant returning to the police after the encounter with the defendant with the recently purchased drugs.

E) <u>Insufficient supporting affidavit.</u>

State v. Siegel, 4th. Dist. Washington, No. 20CA17, 2021-Ohio-4208. With respect to a known informant involved in criminal activity, the affiant must attest to the informant's veracity, reliability, and basis of knowledge, or must independently corroborate the information. Relying on *State v. Connin*, 6th. Dist. Fulton, No. F-20-005, 2020-Ohio-4090. The court in *Siegel* noted that while an informant's admission of criminal activity may provide sufficient evidence of probable cause, courts have found the information from a first-time informant must also the informant's reliability must be demonstrated or corroborated through independent police work. Corroboration by the police of non-illegal facts (defendant's address and type of car) is not sufficient to support probable cause when there are no indicia of reliability or independent corroboration of illegal activity. The appellate court reversed the trial court's denial of the motion to suppress based on the sufficiency of the affidavit.

State v. Quin, 5th. Dist. Licking, No. 2021 CA 00044, 2021-Ohio-4205. The conclusory statements by the police officer without factual support are insufficient to find probable cause for a search warrant to be issued. In this case the affidavit in a vehicular homicide case only stated, without any factual support, that the defendant ran a stop sign and a collision occurred. The affidavit was merely bare bones and did not state any facts from the investigation that would support a conclusion of alcohol use or reckless operation. In this case the appellate court affirmed the suppression of the search based on the insufficiency of the supporting affidavit.

State v. Thompson, 4th. Dist. Ross, No. 19CA3696, 2021-Ohio-3390. Conclusory statements in an affidavit do not provide a substantial basis for search warrant to be issued. Any conclusory statement must be evaluated by a totality of the circumstances set out in the entire affidavit. The statements contained in the supporting affidavit are not to be reviewed in isolation of the entire affidavit.

State v. Schubert, 171Ohio St.3d 617, 2022-Ohio-4604, reversed the court of appeals on the grounds that the affidavit in support of the search warrant was so lacking in indicia of probable cause that no reasonable officer would rely on the warrant has come to be known as a 'bare bones' affidavit." *United States v. White,* 874 F.3d 490, 494 (6th. 2017)., citing *United States v. Weaver*, 99 F.3d 1372, 1380 (6th. Cir. 1996), and therefore, insufficient to support a goof faith finding. This case involved the seizure of the defendant's cell phone after a fatal car crash.

An affidavit is "bare bones" when it fails to establish a minimally sufficient nexus between the item or place to be searched and the underlying illegal activity. *United States v. McPhearson,* 469 F.3d 518, 526 (6th. Cit. 2006). See also, *State v. Grace*, 5th. Dist. Fairfield, No. 2022 CA 00039, 2023-Ohio-3781. A "bare bones" affidavit is one that states suspicions, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge or fails to make some connection between the illegal activity and the place to be searched. Citing *State v. Schubert.*

The Court in *Schubert* noted that to avoid being labeled as "bare bones," an affidavit must state more than "'suspicions, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge,'" *United States v. Christian,* 925 F.3d 305, 312 (6th. Cir. 2019), quoting *United States v. Washington,* 380 F.3d 236, 241 (6th. Cir. 2004), fn. 4 and make "'some connection,'" *id.* at 313, quoting *White* at 497, "'between the illegal activity and the place to be searched,'" *id.*, quoting *United States v. Brown*, 828 F.3d 375,385 (6th. Cir. 2016).

State v. Martin, 1st. Dist. Hamilton, No. C-200067, 2021-Ohio-2599. Order overruling motion to suppress was reversed based on insufficiency of affidavit. (2-1 decision.) The affidavit was based on a trash pull which found some loose marijuana leaves, a marijuana cigar, empty vacuum sealed bags, and two cut straws, one of which had white powder residue. The affidavit also contained a copy of a 14-month-old affidavit from the Butler County Sheriff department about a prior, unrelated drug

trafficking investigation. The court found that the information from Butler County was stale due to the passage of time and no new incidents. The trash pull reveled personal use, not drug trafficking evidence. The investigation began because the defendants were known to the police and moved into Hamilton County. In arriving at its decision, the court noted that the police did not test the items for drug residue, made no controlled drug buys, and did no independent surveillance of the defendant's house.

Place to be searched

State v. Battles, 10th. Dist. Franklin, No. 19AP-653, 2021-Ohio-3005. Reversing a suppression order and finding the affidavit was sufficient for the police to rely on the search warrant with good faith exception. The court stated that probable cause determination only depends on the fair probability of criminal activity, not a prima facie demonstration of criminal activity, relying *on State v. Allen*, 10th. Dist. Franklin, No. 08AP-264, 2008-Ohio-6916. The court further noted that the temporal proximity between a controlled drug transaction and the arrival of the police at the location provides a substantial basis to conclude a nexus exists between the place to be searched and the alleged criminal activity.

Regarding the sufficiency of an affidavit, the court relied on *United States v. Ward,* 967 F.3d 550, 554 (6th. Cir. 2020), that the affidavit lacks the requisite indicia of probable cause if it is a "bare bones" affidavit. An affidavit cannot be labeled "bare bones" simply because it lacks the requisite facts and inferences to sustain the probable cause finding. Rather, it must also be so lacking in indicia of probable cause that, despite the judicial officer having issued the warrant, no reasonable police officer would rely on it. *Unites States v. White*, 873. F.3d 490, 496 (6th. Cir. 2017).

To elude the "bare bones" label, the affidavit must state more than suspicions or conclusions, without providing some underlying factual circumstances regarding the veracity, reliability, and the basis of knowledge and *United States v. Ward,* 967 F.3d 550, 554 (6th. Cir. 2020) make some connection between the alleged illegal activity and the place to be searched.

State v. Frost, 2025-Ohio-1081 (2d. Dist.). Although the detective did not witness any controlled drug buys at the defendant's residence, observations that the defendant left the residence in cars registered to him and drove directly to the drug buy, remained in his car during the transaction, and returned immediately to the residence was sufficient grounds to support a search warrant for the defendant's residence. A photograph of the cars used by the defendant parked at the defendant's residence was part of the supporting affidavit.

On appeal the court noted it was a "close call" because of limited connection between the defendant's drug activities and the residence. Although none of the transactions occurred at the residence, no drugs were reported being seen there, and there was no other drug related activity associated with the home, the court found immediately *prior* to both of the drug transactions, the defendant was inside the residence

and left to conduct the drug transactions. On each occasion, he drove a different vehicle, reflecting that the drugs were more likely coming from inside the home than from the vehicles.

State v. Tarver, 2025-Ohio-2167 (2d. Dist.). Receipts and other papers found while executing a search warrant and showed the defendant has a second residence, along with evidence the place being searched was not the defendant's residence, was sufficient to support the warrant for the second residence. In this case the first residence had extremely low utility bills, no furniture or any evidence of kitchen use and was close in distance to the second residence.

The good faith exception does not apply when (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth, (2) the issuing magistrate wholly abandoned his judicial role, (3) the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or (4) the warrant was so facially deficient that the executing officers cannot reasonably presume it to be valid *Citing Leon.*

State v. Williams, 2025-Ohio-2331 (6th. Dist.). Temporal proximity between a controlled drug transaction and arrival at a residence provided a substantial basis to conclude that a nexus exists between the place to be searched and the alleged criminal activity and probable cause to believe that proceeds of a drug transaction would be located in the residence. The officer's observations of multiple hand to hand drug transactions at the defendant's residence were sufficient to establish a nexus between the defendant's criminal activity and his residence to raise a fair probability that evidence of criminal activity will be found there.

F) <u>Anticipatory search warrants.</u>

Although long in use, anticipatory search warrants were formally approved by the United States Supreme Court in *United States v. Grubbs*, 547 U.S. 90 (2006). Prior to the decision in *Grubbs*, the two primary cases in Ohio for anticipatory search warrants were *State v. Folk,* 74 Ohio App.3d. 468 (2nd. Dist. 1991) and *State v. Nathan*, 2nd. Dist. Montgomery, No. 18911 (decided Nov. 16, 2001).

In *Grubbs*, one of the challenges raised was whether a search warrant could be issued if probable cause did not exist at the time the warrant was issued. The Court in *Grubbs* held that anticipatory search warrants take effect at a specified future time or event, not at issuance, and generally were neither categorically unconstitutional nor in violation of the Fourth Amendment. 547 U.S. at 94.

The court went on to explain that an anticipatory search warrant is a warrant based upon showing probable cause that at some future time (but not presently) certain evidence will be located at a certain time. "Most anticipatory warrants subject their execution to some condition precedent other than the mere passage of time as a triggering

condition. "If the government were to execute an anticipatory warrant before the triggering condition occurred, there would be no reason to believe the item described in the warrant could be found at the searched location; by definition, the triggering condition which establishes probable cause has not yet been satisfied when the warrant is issued." 547 U.S. at 94-95.

In arriving at this conclusion, the Court in *Grubbs* stated, "Because the probable-cause requirement looks to whether evidence will be found when the search is conducted, all warrants are, in a sense, 'anticipatory." 547 U.S. at 95. The Court pointed out that a warrant for electronic surveillance is in effect anticipatory in nature, for when issued, it seeks to obtain future evidence of criminal activity. Thus, there are two prerequisites of probability for an anticipatory search warrant to comply with the Fourth Amendment:

1) If the triggering condition occurs there is a fair probability that contraband or evidence of a crime will be found in a particular place, and
2) There is also probable cause that the triggering condition will occur.

State v. Folk, 74 Ohio App.3d 468 (2nd. Dist. 1991), involved the interception of a package of illegal drugs that was intercepted by the police in Los Angeles and addressed to the defendant in Dayton, Ohio. The Los Angeles police obtained a warrant, opened the package and tested it for drugs. The package was sent to the Dayton Police Department who delivered it to the address. Upon acceptance of the package by the defendant, the police executed the search warrant.

In upholding the validity of the search, the court in *Folk* held that an anticipatory search warrant is valid if the police can prove probable cause will exist in the future when the warrant is executed based upon certain controllable events. As part of the probable cause requirement, the police must show a substantial probability that the seizable property will be on the premises when searched.

Anticipatory search warrants are based upon the principle of judicial preference for searches to be conducted pursuant to a warrant. *State v. Nathan*. The court in *Folk* also noted that the better course of conduct is to encourage law enforcement officers to obtain a search warrant in advance to determine reasonableness and avoid being second guessed by the judiciary after the fact.

In *State v. Nathan,* 2nd. Dist. Montgomery, No. 18911 (decided Nov. 16, 2001) the court found that an anticipatory search warrant to search the defendant's house was not validly executed when the triggering conditions did not occur. In this case the warrant was to be executed when the confidential informant either purchased or saw illegal drugs at the defendant's house. No drug buy occurred and the police executed the search warrant after a traffic stop of the defendant.

Although the court in *Nathan* found that the anticipatory search warrant was not valid, the court upheld the concept of anticipatory search warrant, noting judicial preference for searches conducted by a warrant. The anticipatory search warrant,

however, must be based upon specific, objectively determined events before probable cause exists for the warrant to be valid. A valid triggering condition is essential to probable cause. *State v. Easterly*, 8th. Dist. Cuyahoga, No. 94797, 2011-Ohio-215

The objective nature of the triggering event is necessary to limit the discretion of the police officers executing the warrant. If the triggering event is discretionary, then the validity of the warrant is left to the discretion of the officer at the scene. As the court in *Nathan* warned, when the triggering event does not sufficiently limit the discretion of the executing police officer, it creates a risk of abdicating the judicial function to determining whether probable cause exists.

State v. Maniaci, 3rd. Dist. Marion, 9-17-14, 2017-Ohio-8270. The triggering condition of an anticipatory search warrant is not required to be set out in the warrant itself as long as the condition is explicit, clear, and narrowly drawn. The purpose of defining a triggering event in an anticipatory warrant is to ensure that officers serve an almost ministerial role in deciding when to execute the warrant.

The court is *Nathan* cautioned using anticipatory search warrant in other situations where the evidence to be seized is on a "sure and irreversible" course toward the place to be searched.

Anticipatory search warrants are generally limited to controlled delivery situations such as drug buys with confidential informants or undercover officers. See, *State v. Reece*, 3rd. Dist. Marion, No. 9-17-27, 2017-Ohio-8789; *State v. Easterly*, 8th. Dist. Cuyahoga, No. 94797, 2011-Ohio-215; *State v. McIntosh*, 10th. Dist. Franklin, No. 04AP-296, 2005-Ohio-1152; *State v. Marks*, 2nd. Dist. Montgomery, No. 19629, 2003-Ohio-4205. *See also*, *State v. Thompson,* 5th. Dist. Fairfield, No. 03CA87, 2004-Ohio-7269. (Illegal gambling operations). In these situations the sure and irreversible principle applies, for the contraband is known, but the issue is confirmation of possession or receipt by the defendant.

Other situations may occur for an anticipatory search warrant, however, even though the "sure and irreversible" principle is not applicable. Thus, in *State v. Blevins,* 3rd. Dist. Marion, No. 9-06-40, 2007-Ohio-6972, the issue was not possession or acceptance of the contraband, but waiting until the illegal property (drugs) was brought into the territorial jurisdiction so the warrant could be executed. Issues arise concerning police discretion because this type of anticipatory search warrant does not set out a specific location for the search. An affidavit usually relates to existing probable cause, while with an anticipatory search warrant, probable cause will not exist until later, conditioned on future events. Because of the predictive nature of an anticipatory search warrant, both the triggering condition and its probability of occurrence must be set out in the supporting affidavit.

Similarly, in *State v. Ward,* 1st. Dist. Hamilton, C-040379, 2005-Ohio-3036, the anticipatory search warrant was based upon the return of the defendant's van from Florida. The issue was not if drugs would be present, but when. Thus, probable cause

existed based upon information known to the police and provided to the court, but execution of the warrant was dependent on the less predictive arrival of the defendant to the jurisdiction.

Note: In *United States v. Perkins*, 887 F.3d 272 (6th. Cir. 2018), the court recently held that the trial court properly suppressed evidence recovered from the defendant's residence because the triggering conditions for the anticipatory warrant required delivery of the drugs to the defendant and the package was delivered to the defendant's fiancée. As such, the triggering condition never occurred and the warrant was invalid to support the search of the defendant's residence. The appellate court noted that failure to comply with an anticipatory warrant's triggering event "void[s]" the warrant. The decision was based in part of the language of the warrant that limited the triggering event to delivery to the defendant, not to any other resident of the house.

VI. Knock and announce. R.C. 2933.231.

Prior to executing a search warrant the officer must give notice of the intent to execute the warrant. Commonly known as the "knock and announce" requirement, if the person refuses entry after giving notice, the officer may break down a door or window to gain entry into the building. R.C. 2933.231.

R.C. 2933.231 provides that the officer may obtain a waiver of the knock and announce requirement by including in the affidavit a statement:

1) That there is good cause to believe that there is a risk of serious physical harm to the officer or other authorized person executing the warrant,

2) A factual basis supporting this belief, including the names of all known persons who pose the risk of serious physical harm, and

3) Verification of the address of the building to be searched as the place in relation to the criminal offense or other violation that is the basis for the search warrant.

In addition, any proceedings before the judge or magistrate must be recorded.[12]

If all of these requirements are met to the satisfaction of the judge and the required three (3) findings set out above are contained in the warrant, an additional provision shall be included in the search warrant waiving the knock and announce requirement. The waiver is limited to the address or location of the building set out in the warrant and may not include other buildings. *State v. Bembry*, 151 Ohio St. 3d 502, 2017-Ohio-8114. Once a warrant has been issued, the exclusion of evidence is not the appropriate remedy under Art. I, Sec. 14 of the Ohio Constitution for a violation of R.C. 2935.12, to knock and announce before entering the premises. *Relying on Wilson v.*

[12] R.C. 2933.231 specifically uses both judge and magistrate.

Arkansas, 514 U.S. 927 (1995), the court in *Bembry* noted that the knock and announce requirement was an element of the reasonableness inquiry under the Fourth Amendment.

Citing *Hudson v. Michigan*, 547 U.S. 586 (2006), there are two reasons for not applying the exclusionary rule to a knock and announce violation. First, the purpose of knock and announce is to protect persons and property that could be injured or destroyed by a forced entry as well as the right to privacy. The suppression of evidence would not "heal a physical injury, fix a door, or undo the shock of embarrassment when police enter without notice." Par. 22. See also, *State v. Robinson*, 4th. Dist. Washington, No. 16CA33, 2017-Ohio-8274 (Appropriate remedy for knock and announce violation is a separate civil action by any injured person.) Second, it would create a risk of violation and loss of evidence in an exigent circumstance situation.

State v. Oliver, 112 Ohio St. 3d 447, 2007-Ohio-372, holding that while exclusion of evidence may be applicable to a violation of the knock and announce requirement, the court must only exclude evidence when deterrence to police misconduct outweighs its cost to the public. In this case the trial court found that a one-minute wait after the police announced their presence was not sufficient to find a refusal of access by the defendant. The balancing test set out in *Hudson v. Michigan* was adopted by the court.

State v. Gervin, 3rd. Dist. Marion, No.9-15-51, 2016-Ohio-5670. Exceptions to the knock and announce requirement includes exigent circumstances when fear of the officer's physical safety or risk of destruction of if advance notice was given. In this case the search warrant affidavit detailed significant pattern of violence by the defendant.

State v. Gipson, 3rd. Hancock, No. 5-09-19, 2009-Ohio-6234. The knock and announce rule is to protect privacy, human life, and property. In this case the defendant asserted that although the police announced their presence and identified themselves as police, they did not announce their purpose to execute a search warrant. The court held that in light of the circumstances, including a highly combustible meth lab and seeing a man running out the back door, there were exigent circumstances to permit the police to proceed immediately with the search.[13]

State v. Baker, 6th. Dist. Lucas, Nos. L-15-1295 & 1324 2017-Ohio-1074. A statement in an affidavit that the defendant had a firearm and numerous convictions for violent offenses was a valid basis for the judge to include a waiver of the knock and announce requirement in the search warrant.

State v. Edmonds, 8th. Dist. Cuyahoga, No. 40002 (April 19, 1979). The knock and announce requirement applies to the reasonableness of the search and involves the application of the Fourth Amendment. The purpose of the requirement is to give the person a reasonable opportunity to permit access before forcing access. A 2-3 minute

[13] R.C. 2933.33(A) creates a presumption of exigent circumstances when a law enforcement officer has probable cause to believe that particular premises are used for the illegal manufacture of methamphetamine due to the risk of explosion or fire.

wait before entering home to execute search warrant at 12:40 a.m. was not a reasonable period of time.

State v. Southers, 5th. Dist. Stark, No. CA-8682, (June 8, 1992). A failure by police to either knock and announce or obtain a waiver before breaking down the door did not invalidate the search based upon exigent circumstances of a risk of destruction of evidence and serious physical harm to them due to ongoing drug activity.

State v. Morgan, 5th. Dist. Fairfield, No. 13-CA-30, 2014-Ohio-1900. This case involved a "knock and talk" in which the police arrived without a search warrant due to neighbor complaints about drug activity. When a police officer knocks on a door without a warrant, the resident is not required to open the door, or if the door is opened, may close it. The police cannot use "knock and talk" to create an intrusion or exigent circumstances. In this case another officer went to the back of the house and discovered marijuana plant. The court found that there was a reasonable expectation of privacy in the curtilage of the property and evidence seen in that area not open to the public should be suppressed. *See also, State v. Peterson*, 173 Ohio App.3d 575, 2nd. Dist. 2007-Ohio-5667.

Greer v. Highland Park, 884 F.3d 310 (6th. Cir. 2018). Civil rights action against police for Fourth Amendment violations. The court found lack of compliance with the knock and announce requirement by blowing out the front door with a shotgun at 4:00 a.m. The court also found that the unnecessary hour for the raid and refusal to provide the residents a copy of the search warrant when asked at the scene were sufficient to state a claim of an unreasonable search under the Fourth Amendment.

VII. Night searches. Crim. R. 41(C) (2).

R.C. 2933.24(A) requires search warrants to be executed during daytime hours unless there is urgent necessity for search at night. Criminal Rule 41(C) provides a search warrant shall be served in daytime unless the court authorizes a different time in the warrant based upon reasonable cause. The limitation on nighttime searches without court authorization or exigent circumstances is an attempt to balance the right of privacy with the need for effective law enforcement. *Gooding v. United States*, 416 U.S. 430 (1974).

Crim. R. 41 (F). The term "daytime" is used in this rule to mean the hours from 7:00 a.m. to 8:00 p.m.

State v. Eichhorn, 47 Ohio App. 2d 227 (1975). The decision to permit a nighttime execution of a search warrant is discretionary with the judge issuing the warrant, based upon the facts presented to the judge.

State v. Humphrey, 2nd. Dist. Montgomery, No. 25063, 2013-Ohio-40. Execution of search warrant after 8:00 p.m. without specific authorization in the search warrant for a

nighttime search was not invalid when the police arrived at the house during the day and waited until the defendant returned home after 8:00 p.m.

State v. Eal, 10th. Dist. Franklin, No. 11AP-460, 2012-Ohio-1373. The execution of a search warrant at 7:50 p.m., which carried over into the night, was valid even though the warrant did not authorize a nighttime search. The day/night language in Criminal Rule 41(C) refers to the search command, not the period of the entire search that may extend into the night. In this case the defendant argued that the search was at night because it was executed after sunset. Daytime is determined by the time set out in Criminal Rule 41(F), not the particular day, weather, or location of the sun.

State v. Glass, 9 Ohio Misc. 2d 10 (C.P. 1983). The execution of a search warrant during the night without specific nighttime authorization was not invalid when the delay was due to a good faith error and not a deliberate attempt to wait until darkness. In this case the police went to the house to execute the warrant, but before doing so, discovered the warrant was not signed by the judge and went back to the judge to obtain a properly signed warrant.

State v. Noble, 2nd. Dist. Montgomery, No. 28435, 2020-Ohio-695. Regarding the execution of the warrant at night, the court found that even though there were no specific facts in the affidavit relating to a nighttime search, a review of all of the facts in the affidavit supported the judge's decision to include nighttime search in the warrant.

United States v. McCullough, No. 3:20-cr-148, 2021 U.S. Dist. LEXIS 317416, 2021 WL 781454 (N.D. Ohio 2021). No suppression for nighttime search when the search warrant was silent, but the affidavit, approved by a judge, clearly sought the search to be conducted at night. The court found the omission of the term "nighttime" from the search warrant was a clerical error and not grounds for suppression.

Columbus v. Wright, 48 Ohio App.3d. 107, (10th. Dist. 1988). The court took judicial notice that bars are open and busy at night and found no abuse of discretion to authorize the search at night.

State v. Gordon, 2nd. Dist. Montgomery, No. 12036 (Sept. 12, 1990). A conclusory statement by the police officer in the affidavit that the nighttime search was required for officer safety and to preserve evidence was sufficient to support authorization for night search when the evidence itself, illegal drugs, could be easily destroyed.

State v. Gipson, 3rd. Hancock, No. 5-09-19, 2009-Ohio-6234. Although the affidavit did not set out specific facts for the judge's authorizing a night search, a review of the affidavit in its entirety supported the judge's authorization for nighttime execution of the warrant.

State v. Flores, 6th. Dist. Wood, No. WD-18-016, 2018-Ohio-3980. A search warrant authorizing a night search under Criminal Rule 41 (C) does not restrict a police

officer to conduct the search only during the night hours. The night time authorization merely grants the officers the additional option of executing the search at night.

OVI Searches.

State v. Nevels, 2024-Ohio-4964 (3d. Dist.). The search warrant was executed at 4:38 a.m. and did not provide for non-daytime execution as required by Crim. R. 41(C)(2). Similarly, Crim. R. 41 (D)(1) requires the officer to promptly file the inventory with the court. Although the appellate court agreed there was noncompliance with the warrant procedure, there was no material prejudice to the defendant. Moreover, as a blood draw in an OVI case, there was a time constraint to execute the warrant. R.C. 4511.19(D). The order excluding the blood test results and dismissal of OVI charge was reversed.

VIII. Time for search warrant execution.

A) Time limit on execution - Criminal Rule 41(C)(2).

1) 3 days for search warrant to person or place.
2) 10 days for tracking device.
3) 45 day extension upon application to the court.

Search warrant

State v. Crane, 2nd Dist. Montgomery, No. 17967, (Feb. 25, 2000). A search warrant executed at 7:30 a.m. after the third day for service was a minor infraction that did not rise to the level of a violation of the Fourth Amendment to require suppression of evidence.

Although both Criminal Rule 41 and R.C. 2933.24 require a search warrant to be issued within 3 days, it is a procedural issue, not a right conferred on a defendant.

State v. Hosseinipor, 5th. Dist. Delaware, No. CAA-05-46. There was no prejudice in the execution of a second search warrant to obtain the files from the defendant's computer when the computer was already seized and in police custody from a prior search warrant. The court also noted that the delay in obtaining the information was reasonable due to the need to have the FBI specialists obtain the information from the computer.

State v. Alexander, 4th. Dist. Adams, No. 21CA1144, 2022-Ohio-1812. A delay by the police to execute a search warrant until the defendant was home was not unreasonable as long as the warrant was executed within the three-day time limit of Cri. R. 41(C)(2). Finding the warrant lawfully executed, the court overruled the defendant's claim that the police intentionally waited until he arrived so they could search him and his car.

State v. Ward, 1st. Dist. Hamilton, C-040379, 2005-Ohio-3036.) Same time limits apply for execution of anticipatory search warrant.)

Tracking device

State v. Rigel, , 2017-Ohio-7640 (2d. Dist.). Extension of 45-day period does not require an additional affidavit by Criminal Rule 41, and a motion by the prosecutor setting out good cause for the extension is sufficient. The court found that the request due to ongoing investigation was sufficient to support extension.

State v. Gaffney, 2025-Ohiuo-4963 (7th. Dist.). An order suppressing all evidence obtained after expiration of the 45-day deadline for the GPS tracking set out in Criminal Rule 41(C)(2) was affirmed. The trial court was not required to suppress all of the evidence, including evidence obtained within 45-day period, due to noncompliance with the search warrant.

State v. Winningham, 1st. Dist. Hamilton, No. C-120788. A 30-day extension of GPS was reasonable upon filing a second affidavit showing the defendant had been involved in a domestic relations case and was unable to meet with the intended drug dealer. This case was before the 45-day time provided by Criminal Rule 41. The court found that the GPS was installed within 3-days and permitted for a period of 30 days, not an open ended or unreasonable period to time.

State v. Hill, 2023-Ohio-4381(5th. Dist.). Although the defendant disputed timely service of the tracker warrant, his recorded statement in jail statement the next day that he was served with tracker warrant was sufficient to show the warrant was served within the ten-day required time under Criminal Rule 41(D)(2).

B) Criminal Rule 45 – computation of time.

In computing time for execution of a search warrant,

A) The date the warrant was issued does not count.
B) Intervening Saturday, Sunday, or holiday is not included (less than 3 days), and
C) If the last day is a Saturday, Sunday, or holiday, the time extends to the next business day.

State v. Seaburn, 3rd. Dist. Seneca, No. 13-17-12, 2017-Ohio-7115. Criminal Rule 45, permitting extension of time, applies to search warrants and tolls the time for execution when applicable. *See also, State v. Baker,* 6th. Dist. Lucas, Nos.-L-45-1295 & 1324. (Warrant issued on Friday must be served by the following Wednesday); State *v. Coleman*, 8th. Dist. Cuyahoga, No. 91058, 2009-Ohio-1611; *State v. Talley*, 2nd. Dist. Montgomery, No. 24765, 2012-Ohio-4183.

IX. Exclusionary Rule.

Boyd v. United States, 116 U.S. 616 (1886), is generally recognized as the origin of the exclusionary rule. *Boyd* involved the court ordered production of the defendant's papers to be used against him in a civil forfeiture case. Although the holding in *Boyd* has been undermined over the years, the fundamental principle of the right to privacy by the Fourth Amendment and enforcement by the exclusionary rule remains. The rule was solidified in *Weeks v. United States*, 232 U.S. 383 (1914), in which the court held that evidence procured by a constitutional violation was not admissible. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the exclusionary rule was applied to state court proceedings when evidence was seized in violation of the Fourth Amendment.

A) Fundamental and non-fundamental violations.

United States v. Vasser, 648 F.2d 507 (9th. Cir. 1980), held that a violation of Federal Criminal Rule 41 does not require suppression of the evidence seized if the violation was non-fundamental in nature. The court in *Vasser* held that a violation of Criminal Rule 41 was fundamental, and requires suppression of the evidence, when it renders the search unconstitutional under the Fourth Amendment. A violation of Criminal Rule 41 that does not rise to a constitutional level is non-fundamental in nature and does not require exclusion of evidence unless:

1) there is prejudice to the defendant, or
2) there was intentional and deliberate disregard for the requirement,

648 F.2d at 510. relying on *United States v. Radlick*, 581 F.2d 225 (9th. Cir. 1978).

In *Vasser*, the police officer providing surveillance tape recorded an affidavit, presented it to the judge to listen, and swore to its truth before the judge. Although the affidavit did not comply with the technical requirements of Criminal Rule 41, the court upheld the affidavit in light of the urgency of the circumstances facing the police officer at the time.

State v. Wilmoth, 22 Ohio St.3d 251 (1986). Search warrants are subject to both statutory and constitutional requirements. An error in the search warrant process that is not constitutional in nature is a "non-fundamental" violation and does not require suppression of the evidence. (Sworn oral statement to judge without affidavit.)

State v. Nevels, 2024-Ohio-4964 (3d. Dist.). Dismissal of OVI charge by trial court for failure to comply with the search warrant procedures in Criminal Rule 41was reversed. Although the violations were not constitutional, the trial court found dismissal of the charge and exclusion of the blood results necessary to uphold the integrity of the requirements of the Criminal Rules. (Par. 11).

The exclusionary rule is limited to fundamental violations of Criminal Rule 41which would renders the search unconstitutional under traditional Fourth Amendment standards. (Par. 36, relying on *United States v. Vasser*, 648 F.2d 507 (9th Cir. 1980)). The trial court ordered the dismissal and evidence exclusion to uphold the integrity of

compliance with Criminal Rule 41. The exclusionary rule, however, is inapplicable when a violation of Crim. R. 41 was not a violation of a constitutional nature. (Par. 36, relying on *State v. Campbell,* 2022-Ohio-3626). In the present case the violations of Criminal Rule 41 were not fundamental and the dismissal of the OVI charge and exclusion of the blood sample test results were reversed.

See also, State v. Gaffney, 2025-Ohiuo-4963 (7th. Dist.). "The exclusionary rule applies to constitutional violations, not statutory ones." *State v. Simpson*, 2023-Ohio-3207 (3d Dist.), quoting *State v. Campbell*, 2022-Ohio-3626 and citing *State v. Ridenour*, 2010-Ohio-3373 (4th Dist.).

State v. Nevels, 2024-Ohio-4964 (3d. Dist.). Dismissal of OVI charge was reversed. The defendant was indicted on two counts of felony OVI (impaired operation and specified concentration of alcohol in his blood) and identify fraud. The blood sample was obtained pursuant to a search warrant after the defendant's refusal. After a hearing on the defendant's motion to suppress, the motion was overruled for lack of any constitutional violations.

The OVI charge based on the blood sample, however, was dismissed and the evidence of the blood results were held inadmissible for the remaining OVI charge for failure to comply with the search warrant procedures in Criminal Rule 41. In this case the warrant had numerous mistakes that the issuing judge hand corrected before the warrant was issued. Although the violations were not constitutional, the trial court found dismissal of the charge and exclusion of the blood results necessary to uphold the integrity of the requirements of the Criminal Rules. (Par. 11). The prosecutor appealed the dismissal.

Criminal Rule 48(B) permits a court to dismiss a case over the objection of the prosecutor in the interest of justice, setting out the findings of fact and reasons for the dismissal. Because criminal rule 48(B) provides the prosecutor the right to object, a dismissal may not properly be ordered without adequate notice and an opportunity to be heard by the prosecution. (Par. 17-19, citations omitted). In this case the court held that while the trial court articulated findings of fact and the reasons for the dismissal, because the prosecutor was not provided an adequate opportunity to object or present an argument in opposition, the order of dismissal was reversed. (Par. 20).

The exclusionary rule is limited to fundamental violations of Criminal Rule 41which would renders the search unconstitutional under traditional Fourth Amendment standards. (Par. 36, relying on *United States v. Vasser*, 648 F.2d 507 (9th Cir. 1980)). The trial court ordered the dismissal and exclusion of evidence to uphold the integrity of compliance with Criminal Rule 41. The exclusionary rule, however, is inapplicable when a Crim. R. 41 violation is not of a constitutional nature. (Par. 36, relying on *State v. Campbell,* 2022-Ohio-3626). In the present case the Criminal Rule 41 violation were not fundamental and the dismissal of the OVI charge and exclusion of the blood sample test results were reversed.

United States v. Beals, 698 F.3d. 148 (6th. Cir. 2012). This case involved the validity of a search warrant in federal court issued by a state court judge due to a procedural defect in the execution of the warrant. The court found:

1) Federal law, not state law governs the validity of a search warrant because the issue is whether there was a violation of the Fourth Amendment, not state law.
2) If the noncompliance under state law does not permit a valid warrant to be issued, it raises a federal issue as a violation of the Fourth Amendment due to the lack of a neutral and detached magistrate.

As such, the federal court may need to review state law and procedure to determine if there was a Fourth Amendment violation.

United States v. Masters, 614 F.3d. 236 (6th. Cir. 2010). This case involved a search warrant executed outside of the court's jurisdiction. The court found that the jurisdictional limit relates to the validity of the judge to issue the warrant. The required qualifications of a person authorized to issue a search warrant is a matter of state, not federal law. A search warrant issued by someone who does not have the authority to do so is invalid.

While the search warrant was invalid, the exclusionary rule was not automatically applied. Upon a finding of a Fourth Amendment violation, the court should apply a balancing test to determine if the benefits of deterrence outweigh the costs of excluding evidence.

Relying on *Herring v. United States*, 555 U.S. 135, (2009), regarding application of the exclusionary rule, the court noted:

1) Exclusionary rule is not an individual right of the defendant,
2) Exclusion of evidence is a last resort, not a first impulse, and
3) Exclusionary rule is meant to curb police, not judicial misconduct.

After remand, *United States v. Masters*, 491 Fed. Appx. 593, No. 11-5753 (6th. Cir. 2012), the court found the police acted in good faith in obtaining the warrant from the judge based upon the location of the defendant's trailer on the county border and the address provided by the defendant on his sex offender registration. Although other police officers were aware of the defendant's correct address, the court drew the distinction that knowledge of the correct information imputed to other officer working on the case, but not the entire department.

B) <u>Good Faith by police officer.</u>

In *United States v. Calandra*, 414 U.S. 338 (1974), the Court limited the application of the exclusionary rule, holding that it was a judicially created remedy to safeguard Fourth Amendment rights by its deterrent effect, not a personal right of the

defendant. Later that year in *Michigan v. Tucker*, 417 U.S. 433 (1974), the Court recognized "the pressures of law enforcement and the vagaries of human nature" may result in some police error, but the deterrence effect of the exclusionary rule would not apply if the police acted in good faith. This rule was extended in *United States v. Janis*, 428 U.S. 433 (1976), if the law enforcement officer relied in good faith on a search warrant that was later proved to be defective.

In *United States v. Leon,* 486 U.S. 897 (1984), the Court officially adopted the good faith exception to the exclusionary rule, holding that the exclusionary rule should not be applied to suppress evidence obtained by police officers acting in objectively reasonable, good faith reliance on a search warrant issued by a detached and neutral magistrate, but ultimately found to be invalid. In doing so, the court recognized that a police officer cannot be expected to question a judge's determination of probable cause and with reliance on the warrant, there is no police illegality and no police misconduct to deter.

The issue of good faith by a police officer is only reached when the search warrant was not supported by probable cause or was otherwise deficient. The question before the court on a motion to suppress is whether to uphold the search based upon an invalid search warrant. A broad application of "good faith" runs the risk of the exception eclipse the rule against unreasonable searches.

To avoid this situation, the Court in *Leon,* set out guidelines that courts should follow when determining good faith reliance by a police officer on a faulty warrant. To begin with, the officer's reliance on the probable cause determination and on the technical sufficiency of the warrant must be objectively reasonable. Good faith would not apply if:

1) The judge issuing the warrant was mislead by information in an affidavit that the affiant knew was false or would have known to be false except for his reckless disregard for the truth, or
2) The judge wholly abandoned his/her judicial role as a detached and neutral magistrate, or
3) There is no objective good faith that the warrant was based on an affidavit so lacking in indicia of probable cause to render official belief in its existence entirely unreasonable, or
4) The warrant is so facially deficient, i.e., failing to particularize the place to be searched or the things to be seized, that the executing officer cannot reasonably presume it to be valid.

468 U.S. 922-23. When considering a facially invalid warrant, the trial court must review both the text of the warrant and circumstances of the search to determine if the officer might have reasonably presumed the warrant to be valid. *State v. Castagnola*, 145 Ohio St. 3d 1, 22, 2015-Ohio-1565. The inquiry would also include whether the affidavit was rejected by another judge before the warrant was obtained.

State v. Dibble, 159 Ohio St.3d 322, 2020-Ohio-546, held that unrecorded statements made under oath to a judge at the time the affidavit was reviewed and the search warrant signed, but not contained in the affidavit, were admissible to show the police officer's good faith. *Dibble* involved a high school teacher who had improper sexual contact with female students at school. Although the affidavit was limited to conduct that occurred at school, based upon unrecorded statements made by the detective to the judge, the search warrant also included the defendant's home, where numerous illegal photographs and other materials were discovered.

In upholding the validity of the search, the Court held that sworn but unrecorded oral information that the police gave to the judge at the time the warrant was approved could be considered in determining the good faith exception to the exclusionary rule.

The Court also noted that it was unclear whether the recording requirement of Criminal Rule 41(C)(1) was limited to the initial probable cause determination or applied to a motion to suppress with the issue of good faith. In arriving at this conclusion the Court noted that the *Leon* decision, establishing the good faith exception, was issued eleven years after the adoption of Criminal Rule 41(C)(1), and therefore, not considered when the rule was drafted. In addition, the recording requirement of Criminal Rule 41 is a procedural rule and a violation does not rise to the level of constitutional magnitude.

The court also stated that the obligation to record supplemental statements was the duty of the judge, not the detective, and the application of the exclusionary rule would not serve to deter and bad police conduct.

State v. Wilmoth, 22 Ohio St. 3d 251 (1986). An oath given by the police officer to the judge after, instead of before the statement was made was an error by the judge, not the police, and therefore, the exclusionary rule was not applicable for the violation of Criminal Rule 41.

State v. Keefer, 4th. Dist. Hocking, No. 19CA2, 2019-Ohio-2419. On an issue of good faith exception to the exclusionary rule for a defective search warrant, the trial court on a motion to suppress is not limited to the four corners of the affidavit. The appellate court noted a split of authority on this issue in the Ohio appellate courts. The court based its decision on the language in *Leon*, that all of the circumstances involving the issuing of the warrant may be considered in determining whether a reasonably, well trained police officer would have known that the search was illegal despite the authorization by the search warrant.

In this case, a statement in the affidavit that the confidential informant was reliable, without corroborating evidence and the hearsay nature of the information provided by the informant, was not sufficient to support a search warrant under the totality of the circumstances. The good faith exception applied in this case because:

1) The detective obtained separate review by a prosecutor before obtaining the warrant and had a right to rely on the prosecutor's opinion and the judge's issuing

the search warrant when there was no allegation of misconduct by either the prosecutor or the judge.

2) Although the affidavit was lacking probable cause, it was not so lacking in indicia of probable cause to be entirely unreasonable in light of the remaining factual statements in the affidavit.

State v. Hale, 2d. Dist. Montgomery, No.23582, 2010-Oho-2389. The court found that even though the warrant was not sufficiently supported by operative facts, the police were entitled to rely on the judge's ruling. In this case the court noted that the trial court carefully reviewed the affidavit before signing the warrant. The trial judge did not merely "rubber stamp" the search warrant and the police were entitled to rely on the judge's judgment to issue the warrant.

State v. Owens, 3rd. Dist. Marion, No.9-16-40, 2017-Ohio-2590. The court affirmed search based on good faith of police officers even though the search warrant was faulty due to supporting affidavit based on conclusory statements by the police. Relying on *Castognola*, the court stated that supporting affidavits must contain operative facts, not the police officer's conclusions. Although both the appellate and trial court recognized that the search warrant was based upon an improper affidavit that did not set out probable cause, the search was upheld. This is a questionable case, for the faulty search warrant was based upon non-compliance by the police officers to provide the court operative facts, yet the court held the officers acted in good faith.

State v. Corbin, 194 Ohio App.3d 720, 6th. Dist. 2011-Ohio-3491. Murder conviction upheld. The totality of circumstances is considered when determining if an affidavit supports the judge's decision that there was a substantial basis of probable cause exists for the search warrant.

Relying on *Leon*, the court in *Corbin* stated that absent an allegation that the judge did not act in a neutral or detached role, the police may rely on the search warrant unless the officers were reckless or dishonest in preparing the affidavit in support of the warrant. In this case evidence to support the search warrant was found in the victim's home, but there was a question about the validity of consent for that search that discovered evidence to support the affidavit.

State v. Villolovos, 6th. Dist. Lucas, Nos. L-18-1113, 1114, & 1115, 2019-Ohio-241. The good faith exception to the exclusionary rule is premised on the notion that when officers act with good faith, there is no misconduct to deter, *quoting United States v. Leon*, 414 U.S. 897. The good faith exception, however, applies when the officer, acting on objective good faith, obtained a search warrant from a judge and acted within its scope. Because the police officer in this case acted outside of the scope of the warrant by taking property not described in the warrant, the good faith exception did not apply.

State v. Wallace, 6th. Dist. Wood, No. WD-19-080, 2020-Ohio-4168. see also, *State v. Dockum*, 6th. Dist. Wood, No. WD-19-079, 2020-Ohio-4163. (Co-defendant with joint appeal). Although the officers could smell raw marijuana from the property, when

there were multiple buildings, including a garage, shed, and residence, the police officers improperly entered the residence without a warrant to determine the source of the smell. The good faith exception to the exclusionary rule applies when a police officer objectively and reasonably relies on a defective search warrant. In this case, the officers' statements that they believed the building was abandoned was not reasonable due to objective signs of habitation, including lit lights, a sign directing deliveries to the back of the building, and other items on the property.

State v. Thomas, 10th. Dist. Franklin, No. 16AP-852, 2018-Ohio-758. Affirmed on appeal the order granting a motion to suppress. Addressing the issue of good faith exception to an otherwise invalid search, the court noted that the good faith exception should be narrowing applied and only when the officer relies, in an *objectively reasonable manner*, on a mistake made by someone other than the officer. *Relying on State v. Thomas*, 10th. Dist. Franklin, No. 14AP-185, 2015-Ohio-1778. In this case the warrantless search by the officers, based upon their own observations that the defendant may have had a gun, was not sufficient to establish a good faith exception to the exclusionary rule. The "objectively reasonable" standard applies to establish the police officers acted in good faith, even if the search warrant or other information later proved to be invalid or incorrect.

State v. Quin, 5th. Dist. Licking, No. 2021 CA 00044, 2021-Ohio-4205. The good faith exception to a faulty search warrant does not apply when the affidavit in support of the search warrant did not contain any factual statements.

State v. Siegel, 4th. Dist. Washington, No. 20CA17, 2021-Ohio-4208. Although a reviewing court may look beyond the four corners of the affidavit and review information provided to the judge to determine if the police officer acted in good faith, the reviewing court is limited to the affidavit to determine good faith when no other information was provided to the judge who issued the search warrant.

State v. Martin, 1st. Dist. Hamilton, No. C-200067, 2021-Ohio-2599. The court found that the good faith exception did not apply because the affidavit, based on a single trash pull and a drug investigation from an adjoining county years prior to the warrant, was so lacking in evidence of probable cause that a reasonably well-trained police officer should have known better than to rely on it.

State v. Jacob, 185 Ohio App. 3d 408, 2nd. Dist. 2009-Ohio-7048. A search warrant issued by municipal judge to seize property in California was without jurisdiction and could not be cured by the police officer's good faith.

Good faith and appellate decisions

Once issues are decided by an appellate court, clarifying the authority for a search warrant, the issue of good faith to rely on a warrant issued contrary to law is diminished. See, e.g. *State v. Kithcart*, (permitting a magistrate to issue a search warrant) and *State v. Hardy. (*Seizure of property outside the court's territorial jurisdiction). *See also*, *State v.*

Shipley, 5th. Dist. Stark, No. 2012 CA 100, 2013-Ohio-2225 & *State v. McCloude*, 5th. Dist. Stark, No. 2012 CA 101, 2013-Ohio-2226, stating that once an appellate court has determined that a judge was without authority to issue a search warrant, the state was on notice in any future, similar actions and could not rely on good faith to uphold the validity of the search.

See also, *State v. Wharton*, 2025-Ohio-4485 (5th. Dist.). Municipal court search warrant for out of state electronic records was unauthorized by federal statute. *State v. Worthan*, 2024-Ohio-21 (2d. Dist.). The *Worthan* decision was issued on January 5, 2024. The officer in the present case applied for the search warrant on January 11, 2024. After the search warrant was issued and the *Worthan* case became known in Ohio, the municipal court notified the police all future search warrant for electronic records must go through the common pleas court.

The officer was unaware of the jurisdictional issue at the time, and immediately changed practices once informed of the proper procedure, demonstrating no deliberate, reckless, or grossly negligent conduct that would warrant exclusion. The court in *Wharton* found the good faith exception *Leon* did not require suppression of the evidence.

C) <u>Arrest Warrant.</u>

State v. Hinshaw, 2nd. Dist. Montgomery, No.27985, 2018-Ohio-4226. Distinguishes an arrest warrant from a search warrant for lawful entry into the defendant's residence. Probable cause is not required to enter a defendant's residence to execute an arrest warrant. In this case the police officer was not searching the house, but to execute an arrest warrant. The court found that for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carried with it the authority to enter the defendant's dwelling when there is reason to believe the defendant is present. This authority is limited to the defendant's residence and does not extend to a third party's premises. *Steagald v. United States,* 451 U.S. 204 (1981)[14]. *See also*, *State v. Martin*, 151 Ohio St.3d 470, 2017-Ohio-7556, [15] and *State v. Chavez*, 2nd. Dist. Montgomery, No. 27840, 2018-Ohio-4351 (Search of hotel room upheld when defendant's car was registered to hotel room and there was a reasonable expectation that the defendant was the registered occupant.) The court in *Hinshaw* also noted there is no difference between a felony and misdemeanor warrant.

[14] The issue in *Steagald* was the right of the homeowner, not the person on the arrest warrant, to object to a search without a search warrant.

[15] The issue in *Martin* involved the discovery of the murder weapon when the defendant was arrested in someone else's home. While the court in *Martin* recognized that an arrest warrant did not authorize the police to enter the premises of a third party, the defendant must have a legitimate expectation of privacy to challenge the admission of evidence from a warrantless search.

State v. Curry, 2025-Ohio-2083 (1st. Dist.). A protective sweep of apartment after the defendant was in custody was an unconstitutional search. The officer walked through the apartment after the arrest and saw drugs and firearms in plain view which were the basis of a subsequent search warrant. At the time of the sweep, there was no reasonable or articulable suspicion of anyone else in the residence posing a danger to the officers or others.

*Maryland v. Buie***,** 494U.S. 325 (1990). A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. A protective sweep is permissible when:

1) The searching officer possessed a reasonable belief , based on specific and articulable facts, of a danger to an officer or others,
2) The protective sweep last no longer than is necessary to dispel the reasonable suspicion of danger.

State v. Adams, 2015-Ohio-3954. Officers must articulate facts that would warrant a reasonably prudent officer to believe that the area to be swept harbored an individual posing a danger to those on the scene.

State v. Davis, 3rd. Dist. Allen, Nos. 1-17-44 & 45, 2018-Ohio-4368. A protective sweep conducted, as part of an arrest for the safety of the police and others is valid basis for obtaining a search warrant based upon contraband discovered.

X. Procedural Issues and Irregularities.

A) Procedural challanges to affidavit.

State v. Groves, 10th. Dist. Franklin, Nos. 15 App 855-856 & 861-862, 2016-Ohio-1408. The affidavit of a police officer summarizing ongoing surveillance and controlled drug buys was sufficient to support probable cause for search warrant to be issued. Summary of events, if accurate, is permitted.

State v. Weichowski, 49 Oho App.2d 151 (9th. Dist. 1975). Although the affidavit did not set out a specific offense or code section, from the facts contained in the affidavit, the judge could reasonably infer the criminal offense.

State v. Coleman, 8th. Dist. Cuyahoga, No. 91058, 2009-Ohio-1611. Incorrect information in affidavit should be excised, with the court to determine if the remainder is sufficient to find probable cause.

State v.. Lucas, 2025-Ohio-4863 (5th. Dist.). Officer's affidavit was not sworn due to mistaken belief that the precatory language in the affidavit and the notary's jurat and signature included the officer's oath. The court assumed a good faith error when considering there was no dispute that the facts in the affidavit were correct and the officer

was truthful. In this case the signing process was done electronically, with no in-person contact between the officer and either the notary on the affidavit or the judge.[16]

The majority opinion sideswept the decision of whether the affidavit was defective and upheld the search on the basis of a good faith mistake by the officer. The concurring opinion agreed that the officer made a good faith mistake that would not be repeated. The concurring opinion also found the affidavit was defective on the grounds that Article I, Sec.14 of the Ohio Constitution required a search warrant to be issued based on a statement of probable cause under oath or affirmation.

State v. Mansfield, 9th. Dist. Medina, No. 06CA22-M, 2007-Ohio-333. An affidavit not signed by the police officer, but sworn to before the judge issuing the search warrant was found to be a procedural defect that did not affect the determination of probable cause. The court found that the statements were presented to the judge under oath and only the signature was missing. Because there was a determination of probable cause based upon the sworn statements of the police officer, there was no prejudice to the defendant.

State v. Nevels, 2024-Ohio-4964 (3d. Dist.). The officer submitted an affidavit and warrant from a prepared template that had included incorrect identification information for a prior search warrant. The issuing judge noticed and crossed out the incorrect identification information and made hand corrections before issuing the warrant. The trial court found the issuing judge became a scrivener and advocate for an improperly prepared warrant by making it possible for the police to execute the warrant within the three-hour time limit without resubmitting a corrected warrant. (Par. 11). On appeal the court noted a judge is not prohibited from making corrections on a search warrant. (Par. 38).

Columbus v. Wright, 48 Ohio App.3d. 107, (10th. Dist. 1988). A search warrant issued by a judge of competent jurisdiction is presumably valid and a police officer may rely upon the validity of the search warrant in conducting the search. In this case the supporting affidavit was not filed with the court. In upholding the validity of the search, the court stated that the absence of the affidavit did not mean that no affidavit was presented to the court for the search warrant. Defects in filing did not affect the validity of the warrant or the search.

State v. Shingles, 46 Ohio App.2d 1 (9th. Dist. 1974). An affidavit sworn to before a notary instead of the judge, as required by Criminal Rule 41(C), was not sufficient to support a valid search warrant. In this case the prosecution sought to have the police officer and the judge testify that the statements in the affidavit were the same as the oral statements made to the judge when the warrant was issued. Because, however,

[16] Another issue which the appellate court found was not fatal to the search warrant was the notary did not provide any information on the affidavit of a valid notary commission or otherwise authorized to administer oaths.

the oral statements to the judge were not recorded, additional testimony to verify the affidavit without a record was improper.

State v. Lumbus, 8th. Dist. Cuyahoga, No. 102273, 2016-Ohio-380. In this case the defendant asserted that the affidavit was not filed with the clerk of court prior to the warrant being issued. The Court held that R.C. 2933.23 requires the affidavit to be filed with the person issuing the warrant, not the clerk. The filing requirement with the clerk is limited to the search warrant return and inventory. Crim. Rule 41(E).[17] Note, in this case the defendant also disputed the signatures of the judges who signed the two warrants, requiring both judges to appear at the suppression hearing to verify their signatures.

State v. Wilkes, 6th.Dist. Wood, No.WD-19-087, 2020-Ohio-5292. Clerical errors resulting in factual inconstancies between the search warrant and the supporting affidavit were not grounds to suppress the search when the testimony of the police involved showed that the inconstancies were due to inadvertent lax report writing practices by the police. In this case the warrant showed by its time stamp that it was executed six minutes after being signed by the judge when in fact a longer period was involved.

State v. White, 2024-Ohio-1023 (1st. Dist.). Neither the R.C. 2933.23 nor Criminal Rule 41(C)(1), which govern the search warrant affidavit, requires the affidavit to be notarized. Although R.C.147.542 sets out notarial certificate requirements, the court held the specific search warrant procedures prevail over the general notary statute and a notary seal is not required. See also, *State v. Ball*, 7th. Dist. Noble, No. 249, (March 15, 2000). Criminal Rule 41 does not require a seal on the affidavit as long as the affidavit was sworn to before the judge of a court of record.

State v. Nevels, 2024-Ohio-4964 (3d. Dist.). The officer submitted an affidavit and warrant from a prepared template that had included incorrect identification information. The issuing judge noticed and crossed out the incorrect identification information and made hand corrections before issuing the warrant. The trial court found the issuing judge became a scrivener and advocate for an improperly prepared warrant by making it possible for the police to execute the warrant within the three-hour time limit without resubmitting a corrected warrant. (Par. 11). On appeal the court noted a judge is not prohibited from making corrections on a search warrant. (Par. 38).

B) <u>Procedural challenges to search warrant.</u>

Groh v. Ramirez, 540 U.S. 551 (2004). A search warrant that did not describe the property to be seized was plainly invalid. Although the application described the items to be seized (firearms), the warrant did not incorporate the application, affidavits, or other supporting document and they were not accompanied or attached to the warrant. As such, the search warrant did not meet the particularity requirement for reasonableness

[17] Criminal Rule 12 (B) provides for filing directly with the judge, who may accept the document for filing, noting the date and time received, and forwarding the document to the clerk of court.

under the Fourth Amendment.

State v. Williams, 57 Ohio St. 3d 24 (1991). The failure of the judge to sign the search warrant made the search warrant void, regardless of the judge's intent. The court noted that a search warrant without a judge's signature is not a warrant. A search warrant cannot command seizure of property without a commander. The judge's signature is the best device to safeguard an individual's rights under the Fourth Amendment to inform the person being searched that the warrant was lawful.

Distinguish between lack of judge's signature on arrest warrant and search warrant. In *State v. Harrison,* 166 Ohio St. 3d. 479, 2021-Ohio-4465, an unsigned arrest warrant that incorporated a fully executed criminal complaint and accompanying affidavit was grounds for a valid arrest. The arrest was initially suppressed by the trial court, but reversed by the court of appeals on the rounds of the good faith exception to the exclusionary rule.

In upholding the arrest, the Supreme Court in *Harrison* found that Criminal Rule 4 (C)(1) does not require the warrant to be signed, as is required under Federal Criminal Rule 4.

Relying on *State v. Williams*, the Court noted that while there is no express requirement under Criminal Rule 41 for a search warrant to be signed by a judge, the judge's signature is the only identifiable, objective manifestation of a judge's intent to issue the search warrant. Although the Court questioned the practice to issue unsigned arrest warrants, the finding of probable cause by the judge was sufficient to confirm the intent to issue the arrest warrant. The unsigned warrant being based on a finding of probable cause supported by factual statements under oath and specifically describing the person to be seized was also sufficient to meet the requirements of the Fourth Amendment.

In upholding the arrest warrant as valid, the Court held that the good faith exception to the exclusionary rule was not applicable.

State v. Sadler, 2025-Ohio-4665 (5ht. Dist.). A clerical error in the date of a search warrant (showing August instead of October) does not invalidate the warrant when the affidavit contained information from October, the warrant was executed the same day it was requested, and there was no evidence of either flagrant, deliberate, or reckless police conduct or prejudice to the defendant. The warrant contained a technical violation which did not rise to the level of constitutional error.

State v. Carpenter, 12. Dist. Butler, No. CA2002-11-494, 2007-Ohio-5790. (Although the judge's signature on the affidavit with date and time and notations "no knock" and "execute day or night" clearly indicated the judge's intent to issue the warrant, the absence of the judge's signature on the warrant was held to be void.)

State v. Gervin, 3rd. Dist. Marion, No.9-15-51, 2016-Ohio-5670. In this case the judge properly signed and dated the affidavit, but only signed the search warrant without dating it. The evidence showed that the judge signed the affidavit and search warrant at the same time. The court held that clerical errors inadvertently made without prejudice to the defendant did not invalidate an otherwise valid search warrant.

State v. Harrington, 10th. Dist. Franklin, No.14AP-571, 2015-Ohio-2492. The judge's signature on the search warrant notarizing the officer's signature instead of as judge issuing the warrant did not invalidate the warrant. The warrant was signed by the judge, albeit on a notary line, and the notarization of the warrant was superfluous.

State v. Newman, 5th. Dist. Guernsey, No. 16CA15, 2017-Ohio- 4047. Clerical error of different court in heading of search warrant was not prejudicial to the defendant and is not sufficient to invalidate warrant. In this case the search warrant was signed by the Guernsey juvenile judge, but the warrant had the municipal court in its heading.

State v. Humphrey, 2nd. Dist. Montgomery, No. 25063, 2013-Ohio-40. The absence of night search authorization in search warrant was not a fundamental violation of Criminal Rule 41 to require exclusion of evidence.

Warrant not present at search.

State v. Ealom, 8th. Dist. Cuyahoga, No. 91140, 2009-Ohio-1073. Once the search warrant was signed by the judge the police were able to execute on it. The police are not required to physically have the search warrant in their possession at the time of the search if it is produced within a reasonable time. In this case the surveillance team was waiting at the premises until they received confirmation that the search warrant had been issued.

State v. Quinones, 8th. Dist. Cuyahoga, No. 91632, 2009-Ohio-2718. There is no requirement under the Fourth Amendment of the United States Constitution, the Ohio Constitution, or Criminal Rule 41 requiring the officer to present the occupant of the premises with a copy of the warrant prior to performing the search. (In this case the detective left the judge's home with a signed copy of the search warrant, immediately notified the surveillance team, and went directly to the premises. The court found that the occupant was given a copy of the search warrant within a reasonable amount of time after the search began. *See also, State v. Striks*, 2nd. Dist. Montgomery, No. 26387, 2015-Ohio-1401.

XI. Particularity.

State v. Castagnola, 145 Ohio St. 3d 1, 2015-Ohio-1565. There are two primary concerns when evaluating the requirement of particularity:

1) The warrant must provide sufficient information to "guide and control" the judgment of the law enforcement officer of what to seize when executing the warrant, and

2) The category of items must not be too broad to include items that should not be seized.

State v. Thompson, 4th. Dist. Ross, No. 19CA3696, 2021-Ohio-3390. There are two primary considerations when evaluating whether a search warrant particularly describes the place to be searched or the person or items to be seized.

1) Information to guide and control the officer executing the search warrant without discretion by the officer, and
2) whether the specified category of items is too broad that will include items that should not be seized in light of the circumstances and the nature of the activity under investigation.

Relying on *State v. Castagnola.* A catchall phrase, such as "any other controlled substances or drugs of abuse" is not overly broad or invalid when it follows a list of specific items pertaining to the alleged criminal offense. When a search warrant is overly broad to seize items not based on the probable cause in the affidavit (e.g. driver's license, photos, tax records) those items may be excluded without suppressing the seizure of any items related to the criminal offense included in the search warrant. Relying on *State v. Clark*, 4th. Dist. Vinton No. 92 CA 485 (June 18, 1993).

State v. Byrd, 2025-Ohio-1045 (9th. Dist.). A search warrant is sufficiently particular if it enables the searchers to identify what they are authorized to seize, even if it uses broad categories of items, as long as the description is as specific as the circumstances and nature of the activity under investigation permit.

State v. McCrory, 2011-Ohio-546 (6th Dist.). A temporal limitation in a search warrant is just one indicium of particularity but is not required, as long as the warrant is otherwise sufficiently particular. The affidavit satisfied the specificity requirement for a search warrant when it was as specific as the circumstances and the nature of the activity under investigation permitted and enabled the searchers to identify what they were authorized to seize. *State v. Armstead*, 2007-Ohio-1898 (9th Dist.).

A) <u>Persons. Crim. R. 41(C) (1).</u>

State v. Gordon, 2nd. Dist. Montgomery, No. 12036 (Sept. 12, 1990). A limited detention of a person is permitted during the execution of a search warrant. A search of the person is permitted when the criminal activity is not conducted in a fixed place and the person being searched is likely to have the property being sought by the search warrant. (Cocaine and gun in the defendant's purse at restaurant while a search warrant was being executed at her home for drug trafficking).

State v. Kinney, 83 Ohio St.3d 85 (1998). A command in the search warrant to search "all persons" at the premises was reasonable when the supporting affidavit showed probable cause that every individual on the subject premises would be in possession of, at the time of the search, evidence of the kind sought in the warrant. The determination of reasonableness of the scope of the warrant will depend upon:

1) the necessity of the type of search,
2) the nature and importance of the crime suspected,
3) the purpose of the search, and
4) the difficulty of a more specific description of the persons to be searched.

Kinney involved a search warrant for drugs in a private residence. In upholding the search to include "all persons" at the location, the Court distinguished between a private residence or other limited location, as opposed to a public place. The Court in *Kinney* also recognized that a police officer may not be able to name specific people who will be present at the time of the search warrant, but would have ample cause to suspect criminal wrongdoing due to the presence of the person at the particular place. (e.g. Who visits a crack house? 83 Ohio St. 3d at 90.) The Court also recognized that the illegal drugs, which are the basis of the warrant, are easily transported or concealed.

State v. Haralson, 2nd. Dist. Miami, No. 2021-CA-38, 2022-Ohio-2052., finding that a search of a person as part of executing a search warrant is valid when the criminal activity alleged is conducted with no fixed place and is of such a character that the person to be searched is likely to have the property searched for on his person or in his possession. See also, *State v. Brock*, 2nd. Dist. Montgomery, No. 11449, (Sept. 21, 1989). (An affidavit alleging drug trafficking activity of a transient nature supported a conclusion that the drug trafficking evidence could be found on the defendant's person.)

State v. Cottrell, 5th. Dist. Licking, No. 22CA 0048, 2023-Ohio-2240, upholding detaining defendant who was located in someone else's residence during the execution of a search warrant.

A law enforcement to detain occupants of a premise subject to a valid search warrant while the search is underway. *Michigan v. Summers*, 452 U.S. 692, 705 (1981). Detaining such individuals serves three important objectives: (1) prevents flight, (2) minimizes the risk of harm to officers and others, and (3) facilitates the orderly completion of the search. 452 U.S. at 702-03. The detention does not require a finding of probable cause so long as police have an articulable basis for suspecting criminal activity 452 U.S. at 698-99.

"The term 'occupant' refers not only to the owner of the premises but may also include other individuals who may be deemed to have such a relationship to the premises to be searched that police may make a reasonable connection between the person and his property within the residence." *State v. Hawkins*, 5th. Dist. Richland, No. 95 CA 55, (July 22, 1996).

B) Places. Crim. R. 41(C) (1)

State v. Hobbs, 4th. Dist. Adams, No. 17CA1054, 2018-Ohio-4059. Although the affidavit must show a nexus between criminal activity and the place searched or items to be seized, it is not based upon any activity of the owner of the place being searched. The nexus may be shown by the:

1) Type of crime,
2) Nature of the evidence sought,
3) Suspect's opportunity for concealment, and
4) Normal inference of where a criminal would hide evidence.

State v. Ealom, 8th. Dist. Cuyahoga, No. 91140, 2009-Ohio-1073. The test for sufficiency of the description of a place to be searched is reasonableness, *relying on Steele v. United States,* 267 U.S. 498 (1925), holding that "It is enough if the description is such that the officer with the search warrant can, with reasonable effort ascertain and identify the place intended." 267 U.S. 503. In this case a discrepancy in room numbers in the hotel was based on the hotel numbering system, not any misinformation in the affidavit or warrant.

State v. Lang, 1st. Dist. Hamilton, No. C-220360. 2023-Ohio-2026. Reversing the trial court's suppression order, the appellate court found the search warrant of the defendant's residence was valid even though he sold drugs at a different location when the officer observed the same conduct over a period of time of the defendant travelling between the two places. From observed drug dealing activities and controlled drug buys, the court found sufficient reliable facts in the affidavit to establish a nexus between the defendant's residence and criminal activity even though the activity did not occur at the residence. Relying on *State v. Young*, 10th. Dist. Franklin, No. 15-AP-1038, 2016-Ohio-5944.

The defendant's pattern of activity provided sufficient evidence to allow the issuing judge to draw the conclusion that evidence was likely to be found at defendant's residence where the affidavit established a consistent pattern of defendant's activities in which he left the residence in the early afternoon, conducted drug sales at another address and then returned to the residence and stayed overnight, even though no criminal activity was conducted at that address.

State v. Deeble, 2024-Ohio-5418 (6th. Dist.). Validity of search warrant for defendant's apartment was upheld even though the officer only witnessed drug transactions from the defendant's truck. For a nexus to exist, the circumstances must indicate *why* certain evidence of illegal activity will be found in a particular place. (Par. 32, citations omitted). In a drug case, a nexus requires some reliable evidence connecting drug activity to the alleged dealer's residence, such as drug transactions happening at the residence or the suspect going to and from the residence in close temporal proximity to a drug transaction. (Par. 33 citations omitted).

An officer's reasonable belief, based on the officer's training and experience, without some evidentiary support linking the location to the drug activities, does not create the nexus necessary for probable cause to search .(Par. 33-34, citations omitted).

While the information in the officer's affidavit failed to explain why evidence of drug trafficking will be found in the defendant's apartment, the court found the informant's information of a prior drug buy in the defendant's apartment was reliable after the informant made a controlled drug buy with the police.

State v. Hill, 2023-Ohio-4381(5th. Dist.). An officer's statement in an affidavit that the defendant was followed by the police from his home to another location with the confidential informant who made six or seven controlled buys was sufficient to establish a nexus between the defendant's home and drug trafficking.

State v. Boone, 6th. Dist. Lucas, No. L-14-1145, 2015-Ohio-2944. A misprint in an affidavit referring to a vehicle instead of residence was not defective when the affidavit fully described the house to be searched. When determining probable cause, the judge must consider the entire affidavit.

State v. Pruitt, 97 Ohio App.3d 258 (11th. Dist. 1994). An incorrect street name with the same address number in search warrant, based upon same information in the affidavit, was not defective when the search warrant and affidavit fully described the house to be searched. The street name had been changed by the city a few years earlier, but the house number was the same. In light of testimony of a full description of the house, including drug buys by confidential informants, the motion to suppress was overruled. In doing so, the court noted that although Criminal Rule 41(C) requires the warrant to particularly describe the place to be searched, it does not have to be correct in every detail if the warrant sufficiently describes the location.

State v. Jones, 8th. Dist. Cuyahoga, No. 103495, 2016-Ohio-4565. A search warrant with an incorrect address that correctly describes the place to be searched is valid. In this case the warrant referred to apartment 1, not apartment 3, but described the apartment as the one with the white door. Only apartment 3 had a white door, which was the apartment under surveillance for drug activity.

State v. Beaufort, 9th. Dist. Summit, No. 30545, 2023-Ohio-3782. Mistaken belief by police of only one apartment on the first floor of the building based on outside utility meters di not invalidate search warrant. Although the affidavit referred to apartment # 1 to be searched, the affidavit adequately describers the adjacent apartment #2. The warrant described the premises to be searched with sufficient particularity even though the apartment was mislabeled as apartment 1. The warrant and affidavit described premises to be searched as the area between the front door and rear door and the only apartment with access to both the front and rear doors was the apartment on the right where the drugs were found.

State v. Payne, 8th. Dist. Cuyahoga, No. 107825, 2019-Ohio-4158. A search warrant listing one address for a multi-unit building when the building was specifically described and the defendant occupied the entire building. In this case there was another entrance with a separate address, but only one street number showing on the front of the building.

State v. White, 2024-Ohio-1023 (1st. Dist.). Search warrant was not invalid when it identified apartment "B" in the northwest corner of a four suite apartment building when the apartment was "D." The warrant and the testimony at the suppression hearing clearly showed that the premises to be searched was on the top floor of the northwest corner of the building, and that was the apartment that the police officers searched.

State v. Saxton, 10th. Dist. Franklin, No. 18AP-925, 2019-Ohio-5257A search warrant that describes the wrong address is not necessarily invalid if the affidavit and search warrant sufficiently describe with particularity the place to be searched. In this case the search warrant listed the address of the defendant's business, but part of the business was an adjoining building with a different address but the address was not on the building. The incorrect address, by itself, was not sufficient to invalidate the search warrant.

When the police seek to obtain a search warrant for a defendant's home based upon criminal activity at the defendant's place of business, there must be some reliable statements in the affidavit connecting the criminal activity to the residence. In this case the police witnessed the defendant going from his place of business to his residence immediately after a controlled drug buy. The temporal proximity of the defendant's travel to his residence, along with the detective's narcotic investigation experience was sufficient to establish the nexus in this case.

State v. Vaughn, 2nd. Dist. Montgomery, No. 28409, 2020-Ohio-307. A clerical error in the affidavit listing the wrong city where the crime occurred did not render the search warrant invalid. In this case the affidavit stated that the robbery occurred in Kettering when the bank was located in Oakwood on the border of Kettering. The search warrant directed the search of the defendant's residence in Oakwood.

State v. Stoermer, 2nd. Dist. Clark No. 2017-CA-93, 2018-Ohio-4522. A parked car in the driveway in the immediate proximity of the house was within the scope of the search warrant that specifically included "curtilage". *See also, State v. Ballez*, 6th. Dist. Lucas, No. L-10-1012, 2010-Ohio-4720 at par. 13.

Stat*e v. Kolle,* 4th. Dist. Pickaway, No. 221CA8, 2022-Ohio-4322. A search warrant for northeast quadrant of the defendant's property sufficiently described the property to be searched where the marijuana plants were growing based on aerial surveillance.

State v. Cottrell, 5th. Dist. Licking, No. 22CA 0048, 2023-Ohio-2240. Although the defendant was not the target of the search, the defendant's truck, located on the

defendant's property at the time the search warrant was executed, and law enforcement's intelligence regarding activity at the residence was within the scope of the search warrant when the police officer had reason to believe that the defendant's vehicle was associated with not only the premises but also with the targets of the search.

State v. Benedict, 3rd. Dist. Crawford, No. 3-21-08, 2022-Ohio-3600. For purposes of obtaining a search warrant, the relevant issue is where the electronic device is located, not the location where the pornographic photo was taken.

C) Things. Crim. R. 41(B) & (C) (1).

1) Generally.

State v. Halcyzyszak, 25 Ohio St.3d 301 (1986). General and exploratory searches are prohibited as an evidence gathering tool. Items seized pursuant to a general warrant violate the Fourth Amendment and must be suppressed.

State v. Miley, 8th. Dist. Cuyahoga, No. 56168 (Nov. 9, 1989). Evidence not specifically described in the search warrant may be seized by the police if:

1) Based upon information known to the police officer the articles seized were closely related to the crime being investigated, or
2) The police officer had reasonable cause to believe the items seized were instrumentalities of the crime.

(Money orders found in the defendant's home purchased from the same bank as her employer could be seized even though the warrant was limited to financial records of the defendant's employer in her possession. The money orders were purchased from funds stolen by the defendant from her employer.)

State v. LaRosa, 165 Ohio St. 3d. 346, 2021-Ohio-4060. A search warrant authorizing swabbing the defendant's hands sufficiently identified the place and/or object subject to the search and therefore, included fingernail scrapings. The court found that the search warrant was not a general or open ended.

State v. La Rosa, 11th. Dist. Trumbull, No. 2018-T-97, 2020-Ohio-160. The court held that fingernail scrapings were within the scope of the search warrant that permitted hand swabs of the defendant. The purpose of describing with particularity in a search warrant the item to be seized is to prevent the seizure of one thing when the warrant describes something else. The standard applied to the search warrant as to what may be seized is for nothing to be left to the discretion of the officer executing the warrant. In this case the warrant directed the police to search and seize evidence from the defendant's hands, which the court held could reasonably include the defendant's fingernails.

State v. Hale, 2d. Dist. Montgomery, No.23582, 2010-Oho-2389. A general warrant that provided the police with unlimited search is not valid. The test of particularity include:

1) whether the warrant supplies enough to guide and control the officer's judgment in deciding what to take, and
2) Whether the category of items to be seized were too broad in the sense that it includes items that should not have been seized.

The warrant in this case was limited to the pandering obscenity charge and the police officers properly limited their search to the confines of the charges filed. If a police officer seizes property beyond the scope of the search, the seizure is improper.

State v. Harris, 8th. Dist. Cuyahoga, No. 105284, 2018-Ohio-578. A search warrant that sought any biological and/or forensic material tending to establish that a rape occurred was sufficiently particular to include the defendant's towel, even though a towel was not specifically sought or mentioned in the search warrant.

State v. Shannon, 11th. Dist. Lake, No. 2017-L-92, 2019-Ohio-421. Crim. R. 41 (C) does not require the affidavit in support of a search warrant describe the items to be seized with particularity, as long as the items were generally related to the property described in the warrant. The affidavit providing a general description of the items to be seized complies with Criminal Rule 41. In this case seizure of the victim and defendant's clothing in rape case was upheld due to probable cause of the defendant's DNA on the clothing. The warrant authorized seizure of clothing and bed sheets, but other clothes were found to be within the scope of the warrant that would contain evidence of sexual activity with the victim.

State v. Craw, 3rd. Dist. Mercer, No. 10-17-09, 2018-Ohio-1769. A search warrant for drug items relating to illegal drug possession and manufacturing was not overly broad and did not lack particularity for failing to specifically include methamphetamine by name. In addition, a warrant may satisfy the particularity requirements by being interpreted with reference to an affidavit incorporated or physically attached to the search warrant.

State v. White, 2024-Ohio-1023 (1st. Dist.). Although the confidential informant did not specifically observe the defendant with a firearm, a search warrant describing the property to be seized included drugs and weapons was not overly broad. The court noted a recognized nexus between guns and drug activity, particularly when the suspected drug activity involves drug trafficking and not merely use or possession of drugs in order to justify pat downs for weapons. *State v. Pattson*, 2d Dist. Montgomery No. 24224, 2011-Ohio-3507, ¶ 20. *See also, State v. Evans,* 1993-Ohio-186,quoting *United States v. Ceballos*, 719 F.Supp. 119, 126 (E.D.N.Y.1989) ("The nature of narcotics trafficking today reasonably warrants the conclusion that a suspected dealer may be armed and dangerous.")

State v. Noble, 2nd. Dist. Montgomery, No. 28435, 2020-Ohio-695, upholding the search of a safe, which was requested in the affidavit, but not included in the search warrant. The court found that the critical issue was the items being sought, not where the items were kept.

State v. Davis, 3rd. Dist. Allen, Nos. 1-17-44 & 45, 2018-Ohio-4368. Seizure of IPad and tablet was sufficiently included in a search warrant authorizing seizure of all computers and was not barred based upon lack of particularity. In addition, the court found that the police acted in good faith objectively relying on the search warrant.

State v. Villolovos, 6th. Dist. Lucas, Nos. L-18-1113, 1114, & 1115, 2019-Ohio-241. Affirming an order to suppress seizure of video recorder as outside the scope of the search warrant. The police had obtained a search warrant after a controlled drug buy. While executing the search warrant, the police seized security cameras outside the residence and a video recorder at the premise. The state argued that because it was a search of a drug house, it would be reasonable to assume the equipment recorded drug activity.

The permissible scope of a search is defined by the terms of the search warrant. The warrant should be clear regarding the items to be seized so that nothing is left to the discretion of the police officer. In this case the court found that the video recorder was not a drug transaction record as the officer testified that he did not know what was on the video when the recorder was seized. The court noted that there were multiple cameras on the property that could have been for a legitimate security purpose. As a result, the police could not establish any relationship between the recorder and the crime being investigated.

State v. Pitts, 6th. Dist. Lucas, No. L-18-1242, 2020-Ohio-2655. The use of the term "currency" in the search warrant was sufficiently particular to include the buy money accepted by the defendant.

2) <u>Computers and electronic devices.</u>

State v. Castagnola, 145 Ohio St. 3d 1, 2015-Ohio-1565. A warrant for the search of records on a computer must be narrow in scope to guide and control the person conducting the search to only those documents or records that are related to the offense for which the warrant was issued and not other items beyond the scope of the search warrant. In this case the language of the search warrant was overly broad, permitting the examination of every record and document on the defendant's computer. The court also noted that the issue of the particularity requirement overlaps with the issues of probable cause and reasonableness. The particularity requirement is critical in light of the wide range of information stored on a computer.

State v. Shaskus, 10th. Dist. Franklin, No. 14AP-812, 2016-Ohio-7942. A search of computer files that was limited to emails relating to the commission of compelling

prostitution was not overbroad. A warrant is overbroad when it authorizes seizure in excess of probable cause.

State v. Knoefel, 11th. Dist. Lake, No.2014-L-088, 2015-Ohio-5207 (Issue of cell phone content search warrant- particularity). A general search of an unidentified cell phones found at the murder scene was permitted because the police were trying to determine if the phone contained any information relating to the murder. The court distinguished *Castagnola* on the basis that *Castagnola* involved the search of a computer for a specific offense, not ownership of the phone. A description of property to be seized will vary with the circumstances of the case and will be valid if it is as specific as the circumstances and nature of the investigation permit, *relying on Guest v. Leis*, 255 F.3d. 325 at 336 (6th. Cir. 2001).

The court held that the use "any and all" in a search warrant is permitted to allow access to the entire contents of an email account in order to conduct a search for emails within the limited categories contained in the warrant, applying a reasonableness test on a case-by-case basis. In this case, although the entire contents of the email were seized, the detective performed a filtering procedure to restrict his review of the emails. The court noted that filtered searches, such as a keyword search, focused on the emails that were within the scope of the search warrant.

Similarly, the court held that a temporal limitation is not required, based upon the type of offense, for some child pornography may be stored on a computer for an extended period of time. A temporal limitation is one factor for the court to consider in determining the particularity and limitation of the warrant. *See also, State v. McCrory*, 6th. Dist. Wood, No. WD-09-74, 2011-Ohio-546, (Upholding a search warrant without a temporal limitation because the warrant contained sufficient subject matter limitations to satisfy the particularity requirement.) This case involved a search of the defendant's computer for Craigslist related information which the defendant used to lure the victim to his home. During the search of the computer, the executing officer discovered child pornography and stopped the search to obtain an additional search warrant.

State v. Mack, 2025-Ohio-4812 (5th. Dist.). A valid search warrant application must show more than the person connected with a property is suspected of a crime, and must also establish probable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought.

Regarding searches of computers, cell phones, and other electronic devices that store information, a search warrant that includes broad categories of items to be seized may nevertheless be valid when the description is as specific as the circumstances and the nature of the activity under investigation permit. Officers must describe what they believe will be found on a computer with as much specificity as possible under the circumstances. This will enable the searcher to narrow his or her search to only the items to be seized. Adherence to this requirement is especially important when, as here, the person conducting the search is not the affiant.

A search warrant that lacks particularity of the object to be seized may be valid if the warrant 1) specifically incorporates the supporting affidavit, 2) is attached to the search warrant, and 3) the affidavit sets out the scope or restrictions to meet the particularity requirement.

State v. Hana, 2024-Ohio-5548 (12th. Dist.). A search warrant of the defendant's Instagram account was tailored to "specific aspects" of account that would "likely produce evidence" of the defendant's criminal conduct as the defendant used his Instagram account to communicate with others in order to traffic drugs.[18]

State v. Grace, 5th. Dist. Fairfield, No. 2022 CA 00039, 2023-Ohio-3781. Issues regarding search warrants for records from AT&T and Google. During the break-in, the defendant was sprayed with mace. The search warrant discovered a Google search the night of the offense on how to remove mace from clothing.

The court noted that general search warrants are not favored, especially when seeking digital information. In this case the officer's repeated use of the phrase "could lead to more specific location information" was speculation not based on facts. Although the Fourth Amendment does not require a search warrant to specify restrictive search protocols, it prohibits a sweeping comprehensive search of a computer's hard drive. *State v. Castagnola, supra*.

The court in *Grace* found that the information in the warrant affidavit did not establish a minimal connection between the alleged crime and the Google account and search history that were searched. The court further found that due to the deficiencies in the bare bones affidavit, the search warrant was defective as a matter of law and the police could not rely on good faith to justify the search.

The court in *Grace* cited *California v. Riley*, 573 U.S. 373 (2014), rejecting seizure of a cell phone also includes its contents based on the nature and the quantity of information contained in a cell phone and the owner's expectation of privacy and *Carpenter v. United States*, 585 U.S. 296 (2018) that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through cell site location information. (CSLI). As such, the affidavit needs more than "there may be something relevant and would like to go through the files."

3) Cell phone issues

State v. Hudson, 2d. Dist. Montgomery, No. 29333, 2022-Ohio-3257. No error for police officer to take cell phone from defendant to obtain search warrant when there

[18] The defendant argued he was convicted and sentenced to prison for trafficking a drug that is now legal in Ohio. The court noted, however, although it is legal for adults to possess small quantities of marijuana in Ohio, it is not now, nor has it ever been, legal to coordinate the sale and distribution of nearly 73 pounds of the drug within this state.

was probable cause of evidence of a crime on the cell phone and concern that the evidence would be deleted or lost if left with the defendant. In this case the defendant admitted he had taken surreptitious nude photos of the victim and that the photos were on his cell phone.

State v. Smith, 124 Ohio St.3d 163, 2009-Ohio-6426, permitting seizure of a cell phone until a search warrant could be obtained. The court held the police had an immediate interest in collecting and preserving evidence and could take preventive steps to ensure that the data found on the phone are neither lost nor erased. This case involved the seizure of the defendant's cell phone after a police controlled call was made to the defendant from a person who had overdosed from drugs purchased from the defendant. Although the seizure of the phone was permitted, the warrantless search of the data within the phone was reversed.

State v. Swing, 12th. Dist. Clermont, No. CA2016-10-68, 2017-Ohio-8039. A search warrant for cell phone data regarding sexual imposition charge without a time limit was not overly broad, even though the offense occurred on one day when there was evidence that the defendant had taken pictures of the victim on prior dates.

The court recognized the difficulty in limiting a search of computer files to comply with the particularity requirement of the Fourth Amendment, stating that the requirement is satisfied by restricting the search to the circumstances and nature of the activity being investigated. *See also, State v. Pippin*, 12th. Dist. Hamilton, Nos. C-160380-381, 2017-Ohio-6970 (A search warrant of the defendant's cell phone that was conditioned on and limited to the crime being investigated was valid).

> Unlike a physical object that can be immediately identified as responsive to the warrant or not, computer files may be manipulated to hide their true contents. *United States v. Mann,* 592 F.3d 779, 782 (7th Cir.2010). In turn, there may be no practical substitute for actually looking in many (perhaps all) folders and sometimes at the documents contained within those folders, and that is true whether the search is of computer files or physical files. It is particularly true with image files. *United States v. Burgess*, 576 F.3d 1078, 1094-1095 (10th Cir.2009) (upholding a warrant to search all computer records" for evidence of drug trafficking). The same applies to cell phones, devices that the United States Supreme Court has described as nothing more than "minicomputers that also happen to have the capacity to be used as a telephone. *Riley v. California*, 573 U.S 373, 134 S.Ct. 2473, 2489, 189 L. Ed. 2d 430 (2014).

State v. Swing, supra at Par. 44.

State v. Schubert, 5th. Dist. Licking, No. 2020 CA 0040, 2021-Ohio-1478. An affidavit to search a cell phone found at the scene of a fatal collision that may lead to any drug use by the defendant was speculative and not sufficient to support probable cause. The court noted that it declined to adopt a rule that the police could obtain a warrant to search every cell phone found in a crash scene on the speculation that texting or other

improper cell phone use while driving may be found on the phone. In this case the court upheld the search on the good faith exception as there were no witnesses to the crash and the presence of drugs in the defendant's system, information on the cell phone could also provide information on any distracted driving when the crash occurred. **Note:** After the first search warrant was issued, the police found evidence of child pornography on the defendant's phone and obtained a second search warrant on this issue.

Reversed, *State v. Schubert,* 2022-Ohio-4604 on finding of good faith finding that none of the averments in the affidavit suggest that the cell phones might contain evidence of the crime of aggravated vehicular homicide but was based only on speculation that cellphone use was involved in the crash. Moreover, the police in this case already had evidence of the cause of the crash from the blood results showing a number of drugs of abuse in the defendant's system at the time of the crash.

State v. Stewart, 2024-Ohio-5802 (8th. Dist.). A defendant's claim that the supporting affidavit was overgeneralized and failed to set forth either any link of the defendant's cell phone to the alleged sexual offense or specific facts limiting the information sought could not be determined due to the failure to include the affidavit in the record for review. In this case the court upheld the denial of the motion to suppress on the grounds of inevitable discovery.

State v. Bedsole, 12th. Dist. Warren, Nos. CA2021-09-089 & CA2021-09-090, 2022-Ohio-3693. This case involved a search warrant for historical and ongoing cellphone tower locations. It was not necessary that a particular cell phone or number was associated with a crime and it sufficient that there was probable cause that the defendant committed a crime and the data associated with the cell phone would assist in ascertaining the defendant's location. In this case the affidavit contained sufficient evidence that the defendant was involved with a stolen car from the DNA taken from the cigarette butts from a stolen car, but nothing in the affidavit to show the cell phone number belonged to the defendant.

Although there was nothing in the affidavit to show how the police knew the cell phone number belonged to the defendant in order to protect the defendant's wife who provided the information, the court found based on the totality of the circumstances there was sufficient detail. The court noted that the better course would have to describe the spouse as a confidential informant and state in the affidavit how she is credible and reliable.

United States v. Bell, No. 5:32-cr-00536, 2024 U.S. Dist. LEXIS 146061, 2024 WL 3831737 (N.D. Ohio 2024). Motion to suppress cell phone contents from search warrant was overruled. While the Supreme Court in *Riley v. California*, 573 U.S. 373 (2014), held that law enforcement may not search the data on a cell phone incident to an arrest, it cautioned that its "holding, of course, is not that information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." *Id.* at 401.

In this case the police sought and obtained a search warrant, but the warrant affidavit must still contain a nexus between Bell's suspected drug trafficking and his cell phone. In *United States v. Bass*, 785 F.3d 1043 (6th Cir. 2015), the court found such a nexus where the defendant "was suspected of crimes in which cell phones were frequently used" and "had continued to use his cell phone before" his arrest. *Id.* at 1049. Similarly, in *United States v. Merriweather*, 728 F.App'x 498 (6th Cir. 2018), decided under the good-faith exception, the court found a nexus where law enforcement recovered the searched cell phone in the defendant's car along with suspected oxymorphone pills and cocaine. *Id.* at 505. Those facts together with the affiant's experience and training that "drug dealers use cell phones to coordinate with conspirators, customers, and suppliers" were sufficient for "an officer [to] reasonably conclude that the affidavit provided probable cause to believe [the defendant's] cell phone contained incriminating evidence." *Id.*

The court held the search warrant affidavit contained considerably more than the mere fact that the defendant was arrested with the cell phone on his person. Rather, law enforcement found the cell phone on Bell's person near "the very drugs" he has been charged with possessing, and along with a digital scale and cash, which are "tools of the [drug] trade." *United States v. Bell*, 766 F.3d 634, 637 (6th Cir. 2014). Accordingly, the search warrant affidavit contained sufficient probable cause to search Bell's cell phone. *See United States v. Lavallis*, 515 F. Supp. 3d 686, 691 (E.D. Mich. 2021) (concluding that "probable cause to search a cell phone exists simply because cell phones discovered in proximity to crime or contraband almost invariably contain incriminating evidence").

Third Parties.

State v. Collins, 2d. Dist. Greene, No. 2022-CA-40, 2023-Ohio-646. A description of pornographic material found on an unattended cell phone that was not password protected was sufficient to support a search warrant, even though the officer relied on the description from the third party and did not personally look at the images. In this case the cell phone was found on restaurant table.

State v. James, 11th. Dist. Trumbull, No. 2022-T-0107, 2023-Ohio-3524. Victim's phone found at the victim's home by her mother who looked at contents and found the defendant's picture was valid grounds for search warrant. The victim's mother's checking the phone did not invalidate search warrant because "The unlawful acts of private individuals in conducting illegal searches and seizures are not subject to constitutional proscription." *State v, Morris,* 42 Ohio St.2d 307, 316 (1975).

XII. Inventory and return of search warrant.

A) Receipt. Crim. R. 41 (D).

State v. Gordon, 2nd. Dist. Montgomery, No. 12036 (Sept. 12, 1990). Criminal Rule 41(D) requires the police to give a receipt for the property seized to a credible

person at the scene, who may or not be the person from whom the property was taken. In this case the defendant was not home at the time of the search. The court found that the defendant was not required to be present when the inventory was made as long as the receipt was given to another credible person at the scene.

State v. Vinson, 10th. Dist. Franklin, No.20AP-356, 2021-Ohio-836. Filing of return of search warrant six days after the search warrant was obtained and executed does not affect the validity of the search warrant. Relying on *State v. Downs*, a late filing is an administrative, not a constitutional error.

State v. Haralson, 2nd. Dist. Miami, No. 2021-CA-38, 2022-Ohio-2052. R.C. 2933.23, referring to filing with the judge is the supporting affidavit, not the search warrant. A search warrant is not required to be filed with the clerk of court prior to its execution.

State v. Ward, 44 Ohio App.2d 85 (9th. Dist. 1974). The failure to complete inventory "in the presence of at least one credible witness" did not render the search invalid. In this case, a car with visible weapons was seized and impounded until a search warrant was obtained. The court noted that a good search is not made bad by police officers' failure to promptly file inventory and return. Failure to comply with Criminal Rule 41(D) to file return and inventory does not affect a search that is otherwise reasonable.

State v. Thompson, 11th. Dist. Trumbull, No. 2018-T-81, 2019-Ohio-4835. Completion of the inventory with a copy served on the person whose property was seized, although required by R.C. 2933.241, is a ministerial act that does not violate any fundamental right of the defendant and does not affect the validity of the search.

B) Return of search warrant. Crim. R. 41(E).[19]

State v. Downs, 51 Ohio St. *47 (1977)* 8, *sentence vacated on other grounds*, 438 U.S. 909 (1978). The failure to return a search warrant to the properly designated judge and to prepare an inventory pursuant to Criminal Rule 41 (D) & (E) does not render inadmissible the evidence seized pursuant to the warrant. *(8th. Paragraph of the syllabus of the court).*

State v. Miley, 8th. Dist. Cuyahoga, No. 56168 (Nov. 9, 1989). Criminal Rule 41 (D) requires the police officer executing the search warrant to leave a receipt at the place where the property was seized and make an inventory of the property in the presence of at least one credible witness other than the person executing the search warrant.

Criminal Rule 41(E) requires the warrant and an inventory of the property taken to be filed with the court that issued the warrant.

[19] See also, R.C. 2933.241 which also governs procedures for return of inventory.

C) <u>Inventory. Crim. R. 41(D).</u>

State v. Scrugggs, 10th. Dist. Franklin, No.2AP-621, 2003-Ohio-2019. Although Criminal Rule 41(D) requires the inventory to be "promptly" filed, there is no specific time limit to do so. *Relying on State v. Downs*, the court held that the failure to timely file the inventory was "merely an administrative error" which was not prejudicial to the defendant.

State v. Taylor, 11th. Dist. Portage, No. 1528, (Nov. 1, 1985). Inventory for search warrant issued by a juvenile court judge should be filed with the clerk of the juvenile court, not the general division of the common pleas court, even though the case was bound over to the common pleas court.

State v. Demus, 2nd. Dist. Clark, No. 97-CA-76 (1998). The lack of inventory as required by Criminal Rule 41(D) is a technical violation and not grounds to suppress evidence.

State v. DeLeon, 2d. Dist. Montgomery, No. 12074 (Oct. 24, 1991). Although the warrant was issued by a county court judge, the inventory was filed with the clerk of the common pleas court, and later filed with the county court clerk. The late filing, although not in compliance with Criminal Rule 41(E), did not invalidate an otherwise valid search warrant.

State v. Dolce, 92 Ohio App. 687, (6th. Dist. 1993). The lack of detailed inventory did not invalidate search carried out by warrant. In this case numerous documents were seized. The court found that notwithstanding the lack of detail, the procedure was adequate because the documents seized were:

1) Placed in locked boxes,
2) Persons reviewing documents were required to sign logbook, and
3) The documents were under camera surveillance.

State v. Givens, 14 Ohio App.3d 2, (9th. Dist. 1983), which involved an issue of a partial inventory. An inventory that did not include all of the items taken from the defendant's house was not invalid when the only items used at trial were included in the inventory.

State v. Negdeman, 12th. Dist. Butler, No. CA81-08-73 (Oct. 20, 1982). The failure to comply with Criminal Rule 41 (E) to file inventory with the clerk of court was administrative in nature and not an error of constitutional magnitude requiring suppression of the evidence seized. See also, State *v. Petty,* 5th. Dist. Richland, No. 2019 CA 84, 2020-Ohio-1001. When serving a search warrant, Criminal Rule 41(D)(1) requires the officer to either serve a copy of the warrant and receipt of property taken with the person whose property is being seized or left at the property being searched. In this case the officer could not remember if he served the warrant on the defendant or left it at the house. The appellate court held that as a procedural rule under Criminal Rule 41, the exclusionary rule did not apply.

State v. Moretti, 10th. Dist. Franklin, Nos. 73AP-440-442 (April 9, 1974). The filing of the inventory is a statutory, not a constitutional requirement and the failure to do so does not invalidate an otherwise valid search. The filing of the inventory:

1) Avoids disputes of what property was seized,
2) Corroborates seized property to the search warrant,
3) Protects property owner with a clear record of what was taken,
4) Protects the police from claims for property not taken, and
5) Serves as a link in the chain of evidence.

In this case the search warrant was returned and filed with the clerk of court, but no inventory was filed. The court noted that the failure to file the inventory may raise an issue of admissibility of the evidence seized, but not by the exclusionary rule.

United States v. Dudek, 530 F.2d. 684 (6th. Cir. 1975). The return of a search warrant is a ministerial act and the failure to timely do so does not affect the validity of the search warrant or its execution. The issue regarding suppression of evidence is based upon the Fourth Amendment, not statutory compliance. The inadvertent failure to follow post search requirements does not require exclusion of property otherwise lawfully seized.

State v. Weichowski, 49 Oho App.2d 151 (9th. Dist. 1975). Preparation of the inventory is a ministerial act, not a statutory right, and could be corrected later. In this case the inventory did not show who was present at the time of the search, but the evidence at the motion to suppress showed there was a credible person who met the requirements of Criminal Rule 41(D). The court held that Criminal Rule 41(D) does not require the inventory to include the name of the person present.

XIII. Sealing of search warrant papers.

A) Confidential information

Moore v. Wilson, No. 5:07-cv-537 (N.D. Ohio 2008). Although the Fourth Amendment generally allows a defendant to inspect a copy of the affidavit supporting the search warrant, it is a qualified right, subject to the discretion of the court if the government asserts a compelling government interest such as the protection of a state's informant. *See also, Sanders v. Bradshaw*, No. 5:14-cv-2663 (N.D. Ohio 2015).

State v. Lawson, 11th. Dist. Lake, No. 2001-L-71, 2002-Ohio-5605. A court may deny a motion to unseal search warrant papers if:

1) There is a compelling governmental interest to keep the papers sealed, and
2) There are no less restricted means, such as redaction, viable to provide an effective remedy. In this case the information could not be redacted without revealing the identity of the confidential informant.

State v. Lewis, 5th. Dist. Stark, No.2001-CA-24, 2011-Ohio-199. The burden is on the prosecution to show a compelling governmental interest to seal the search warrant affidavit, not on the defendant to show the need for the information.

Compelling governmental interests include:

1) Ongoing criminal investigation,
2) Identity of confidential informant, or
3) Wiretap not yet terminated.
4) Privacy interest of those named in the affidavit.
5) Methods or techniques of investigation.

In re Search Warrant for 2934 Morrison Road, 48 F. Supp. 2d 1082 (N.D. Ohio 1999). A defendant has a general, but not absolute right to inspect search warrant papers. Conclusory statements by the government that unsealing affidavit would compromise investigation is not sufficient to maintain sealed affidavit. This case involved a pre-indictment motion to return seized evidence. The court found that the search warrant and inventory were sufficient to decide the motion and the affidavit was not needed to be unsealed.

The court also noted that when a search warrant is sealed on the grounds of ongoing investigation, it is a temporary order for a reasonable period of time.

State v. Moon, 8th. Dist. Cuyahoga, No. 93673, 2014-Ohio-108. The trial court has discretion to grant motion to unseal search warrant papers.

Griffeth Nursing Home v. Celebrezze, 5th. Dist. Richland, Nos. CA 2255 & 2275 (Jan. 31, 1985). A trial court has the inherent power to seal search warrant papers. This case involved a grand jury proceeding. The court held the search warrant affidavit could remain sealed at this stage of the prosecution but may be available after charges were filed.

State v. Scrugggs, 10th. Dist. Franklin, No.2AP-621, 2003-Ohio-2019. A post conviction motion for release of search warrant documents was properly denied when the defendant was aware of the search warrant during the trial and made no attempt to obtain the documents.

In re Search Warrants issued August 29, 1994, 889 F. Supp. 296 (S.D. Ohio 1995). The court stated that the right to inspection of a search warrant affidavit is based upon the Fourth Amendment guaranteed right to be secure from unreasonable searches, it is inherently part of that right that the same persons be allowed to know whether the Fourth Amendment mandate of probable cause, supported by an affidavit, has been satisfied.

Indianapolis Star v. United States, 692 F.3d 424 (6th. Cir. 2012). This case involved a lawsuit by a newspaper to unseal search warrant documents. The trial court had sealed the search warrant and the inventory from the search, but not the supporting

affidavit. The court found that the newspaper did not have a First Amendment right to pre-indictment inspection. The court noted that the public and the press enjoy the right to access in criminal trials, which is grounded on assuring freedom of communication in matters relating to the function of the government.

The court found that the right was not unlimited and applied the "experience and logic" test, which considers whether:

1) The proceeding is historically open to the public or the press, and
2) Public access plays a significant positive role in the functioning of the particular process.

The court noted that while disclosure would apply to preliminary hearings, voir dire, suppression hearings, and other criminal proceedings, a search warrant is historically an *ex parte* proceeding in which the government has an interest to preserve evidence. Although the court held there was a qualified common law right to inspection, the government's interest outweighed the newspaper's interest in public disclosure of the documents. In addition, due to the ongoing nature of the investigation, the court should respect the confidentiality of investigation and the government's need for secrecy at this stage of the proceedings.

The court set out numerous reasons for the government's need for secrecy at this stage of the investigation, including:

1) Affect ongoing wiretaps and other undercover operations,
2) Reveal the identity of a confidential informant,
3) Provide indication to potential defendants or other places to be searched,
4) May reveal names of innocent people who are not directly involved in the criminal proceeding,
5) Force the government to effectively reveal its theory of the case.

Although the denial of the motion to unseal the documents was affirmed, the court noted that the government's interest was temporary in nature and subject to review at a later date. On remand, the trial court was required to conduct an *in camera* inspection of the search warrant documents. *In re Fair Finance*, No. 5:09-cv-117 (N.D. Ohio 2010).

B) <u>Public records.</u>

State v. Lawson, 11th. Dist. Lake, No. 2001-L-71, 2002-Ohio-5605. R.C. 149.43(A) (2) exempts as public record confidential information that would endanger police or witnesses.

State v. Ambartsoumov, 10th. Dist. Franklin, No. 09AP-1054, 2010-Ohio-6293. Statutory right to public records under R.C. 149.43 does not include confidential law enforcement investigatory records. (Note: In this case a sealed copy of the records at

issue were provided to the court of appeals to determine there was no violation under *Brady v. Maryland*, 373 U.S. 83 (1963).[20]

Note: a public records request for court documents is governed by Superintendence Rule 44, not R.C. 149.43.

XIV. *Carpenter v. United States* and investigation court orders and subpoenas.

Carpenter v. United States, 585 U.S. 296 (2018), requires cell phone tower records to be obtained by a search warrant, with proof of probable cause, instead of a court order. While this is an oversimplification of the Court's holding, the decision has great ramifications on search warrant procedure.

This case involved a four-month robbery spree in Michigan and Ohio. When one of the people was caught, he gave the names and cell phone number of 15 accomplices. From this information, the FBI obtained a court order for two of the defendant's wireless carriers to disclose cell/site information for calls made by the defendant during the four-month period. The information placed the defendant near four of the places and at the time of the robberies charged.

Cell phone tower records were obtained by a court order, but no search warrant.[21] The issue on appeal was whether there was a reasonable expectation of privacy in the location information that the defendant shared with the wireless carriers.[22] The Court held that the government's acquisition of cell-site records was a search within the meaning of the Fourth Amendment.

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[20] The three basic components of *Brady* include:

1) Evidence must be favorable to the accused by either
   A) Exculpatory, or
   B) Impeachment,
2) Evidence was suppressed, either willfully or inadvertently, by the prosecution, and
3) There was prejudice to the defendant.

[21] Federal Stored Communications Act, 18 U.S.C. Sec. 2703, permitted investigation court order to obtain cell phone record from third party wireless carrier upon showing "reasonable grounds" for believing the records were relevant and material to ongoing investigation.

[22] A motion to suppress was denied in the trial court on the issue of probable cause and affirmed on appeal in the court of appeals on the grounds of lack of expectation of privacy.

Under prior holdings, the Court found no expectation of privacy when information was voluntarily turned over to a third party. *United States v. Miller*, 425 U.S. 435 (1976) (Financial records held in a bank) and *Smith v. Maryland*, 442 U.S. 735 (1979) (record of dialed phone numbers conveyed to the phone company.) The Court maintained this principle of lack of expectation of privacy for information given to third parties but declined to extend it to cell phones due to novel circumstances raised by cell phone use.[23] In doing so, the Court noted that the third party doctrine is based on a reduced expectation of privacy of information knowing shared with another. A cell phone, however, logs cell site information by its operation, without any affirmative act by the user beyond powering up.

> "Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the government employs its own surveillance technology or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI [cell site location information]." 585 U.S. 296 (slip op at 11).

The Court also distinguished prior cases involving GPS, which are normally limited to vehicle movements, while a cell phone tracks nearly exact movements of the owner's location which do not cease when the person exits the vehicle.[24]

Search warrants and subpoenas.

State v. Leibold, 2nd. Dist. Montgomery, No. 25124, 2013-Ohio-1371. A clerk of court cannot issue a subpoena at the request of a police officer to obtain records prior to the filing of criminal charges without judicial oversight. Because there is no expectation of privacy for electrical usage record, a search warrant was not required, but the subpoena needed judicial review and approval. *See also, State v. Coleman*, 2nd. Dist. Montgomery, No. 25248, 2012-Ohio-6042. (Affidavit presented by police to judge to obtain court order compelling electricity usage records.) Although R.C. 1901.31(E) authorizes a municipal clerk to issue subpoenas, this authority must be read in terms of R.C. 1901.20(B), which requires some type of proceeding before the court. (R.C. 2937.19 provides the same authorization with the same limitation to pending cases before the court to issue subpoenas.)

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[23] Cell phones and the services they provide are such a pervasive and insistent part of daily life that carrying one is indispensible to participation in modern society. (Citation omitted), which include incoming calls, texts, or emails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates. 585 U.S. ___ (slip op. at 17).

[24] Although. The Court in *Carpenter* reversed the decision of the court of appeals, the terms "suppress" or exclude" were not part of the Court's order.

United State v. Bigi, No. 309-cr-153 (S.D. Ohio 2010). A search warrant is explicitly restricted by the Fourth Amendment, and a subpoena cannot be utilized as a vehicle to circumvent the constitutional rights attached to a search warrant. The municipal court orders were not lawful subpoenas but were rather *de facto* search warrants. As such, the Fourth Amendment required that the orders not issue without the presentation of an affidavit establishing probable cause.

In this case there were no written matters submitted to the court to obtain the orders to seize records, only an oral briefing not presented under oath, after which the court order was signed to obtain personal, financial and telephone records from third parties. Although the court found that the records were not lawfully obtained, being held by third parties, the defendants did not have a reasonable expectation of privacy.

Note: R.C. 2939.12 provides specific authority for a grand jury to have a clerk issue subpoenas for grand jury proceedings. Although this is a pre-charging stage of the criminal process, it is done as part of a formal proceeding. As the court noted in *United States v. Bigi,* a grand jury subpoena is the only authority available for a law enforcement officer to obtain investigative subpoenas.

As a general rule, the better practice is to issue a search warrant to obtain documents in the pre-charging stage unless a court order is specifically authorized by statute.

State ex. Rel. Kelley v. Junkin, 8th. Dist. Cuyahoga, No. 91860, 2009-Ohio-2723. A municipal judge did not have the authority to order DNA and handwriting exemplar for a criminal suspect outside of the court's territorial jurisdiction. There was also no authority for a motion to compel evidence to assist in the police investigation when there was no case pending before the court. With the absence of an affidavit, the order to compel production of evidence could not be considered a search warrant.

State v. Schaaf, 6th. Dist. Wood, No. WD-22-045, 2023-Ohio-4009. As part of arson investigation, the police sent a preservation letter to Verizon to ask them to preserve all of the defendant's phone records in their possession. The records were later obtained by search warrant to place the defendant's location by cell towers on the night of the fire.

<u>R.C. 2935.23, Investigatory subpoenas</u>

- Limited to
    - Felony offenses
    - Before the defendant is arrested
- Witness must appear in court
- Sworn and examined under oath by prosecutor or court
- Recorded in writing and provided to the court.

State v. Daiw, 2025-Ohio-2323. This case involved the defendant using an online market site to lure a victim to a location on the pretense of selling a laptop computer. At the agreed meeting place the victim was assaulted and his money and iPhone stolen at gunpoint. The police issued a subpoena under R,C, 2935.23 to Letgo, the online site, to obtain an IP address and email address associated with the posting, and a single latitude and longitude point.

The trial court granted a motion to suppress. The court of appeals reversed, holding the defendant did not have a reasonable expectation of privacy in his location data because police obtained only a single, voluntarily communicated data point that was historical in nature and was not a real-time location or the defendant's home. The Supreme Court affirmed the reversal, holding a defendant who voluntarily shares a location data-point with a third party online marketplace app does not have a reasonable expectation of privacy in that information. Consequently, the Fourth Amendment does not require law enforcement to obtain a search warrant before securing a single historical location data point from a third party. The Court distinguished Carpenter v. United States based on the limited information sought in the present case compared to "the large swath of location information that Carpenter did not voluntarily convey." (Par. 24).

The Court noted the incident occurred at a McDonalds in a public area on an open street. (Par. 33-34). In addition, Letgo users make the choice to create an account and voluntarily provide their location information to a third party. (Par. 31).

Although the Supreme Court did not address the procedural aspects of the investigatory subpoena, the court of appeals held requesting information in lieu of mandatory appearance in court requirement was in conflict with R.C. 2935.23. *State v. Daiw,* 2024-Ohio 2237, (10th. Dist.) The appellate court further held, however, that the violation of state law does not automatically give rise to a Fourth Amendment violation and the evidence should not be suppressed absent a 'legislative mandate requiring the application of the exclusionary rule,' (Par. 24. Citations omitted.)

The court distinguished a search warrant, which requires probable cause and a subpoena which is analyzed by a general reasonableness standard under the Fourth Amendment. Reasonableness is based on the subpoena being 1) sufficiently limited in scope, 2) relevant in purpose, and 3) specific in directive so that compliance will not be unreasonably burdensome." (Internal citation and quotations omitted.) *Carpenter v. United States*. (Par. 26.).

State v. Lemasters, 2013-Ohio-2969 (12th. Dist.). Use of R.C. 2935.23 to obtain subscriber information was affirmed. The court found a subscriber does not have a reasonable expectation of privacy with respect to his subscriber information, including the IP address associated with his internet service.

The defendant asserted the Electronic Communications Privacy Act (ECPA) required a court order, not a subpoena. The court noted the ECPA expressly stated "the remedies and sanctions described in this chapter are the only judicial remedies and

sanctions for nonconstitutional violations of this chapter." Based on this language, suppression of evidence was not an available remedy for any information obtained in noncompliance with the ECPA.

Similarly, although the subscriber information was sent directly to the officer and not by personal appearance as required by R.C. 2935.23, noncompliance was not grounds for suppression.

State v. Fielding, 2014-Ohio-3105 (10th Dist.). Affirming the use of an investigatory subpoena to obtain from the internet provider the defendant as the internet subscriber assigned to the IP address in question and provide the defendant's home address, home telephone number, and e-mail address. The subpoena was issued by a municipal court judge after the police discovered downloaded child pornography. In addition to the use of a subpoena, the court also held:

1) The defendant did not have a reasonable expectation of privacy in his subscriber information provided to a third party, and
2) The remedy for any violation of the ECPA a civil action for damages, not suppression." Citing *State v. Thornton*, 2009-Ohio- 5125 (10th. Dist.).

The impact of *Carpenter v. United States* and cell phone data.

Although the court in *Carpenter* found that obtaining the cell phone tower records was a search within the Fourth Amendment, the court did not order suppression of the evidence as a remedy for the warrantless search. The case was remanded to the trial court for further proceedings. It is significant that the decision in *Carpenter* does not make any reference to suppression or exclusion of evidence.

The *Carpenter* case was decided on narrow grounds. The Court in *Carpenter* did not declare the procedure used to obtain electronically stored records under the Stored Communications Act invalid or the statute unconstitutional.[25] The recent amendment to the SCA by the adoption of the Clarifying Lawful Overseas Use of Data Act (CLOUD). 18 U.S.C. 2523, effective March 23, 2018, indicates at least legislative intent to continue the procedures for law enforcement to obtain electronically stored information.[26] The Court recognized the validity of a statute to authorize law enforcement to obtain certain

[25] Notwithstanding the carefully worded and limited language used by Chief Justice Roberts, as least one court, *United States v. Beverly*, No. H-16-215-1, S.D. Texas, decided October 25, 2018, granted a motion to suppress cell tower records stating that *Carpenter* declared the Stored Communications Act unconstitutional and the information obtained by a subpoena instead of a warrant was subject to exclusion.

[26] The adoption of CLOUD was the basis for the dismissal of *United States v. Microsoft,* involving the validity of a court in the United States to order production of electronically stored record in Ireland.

information from wireless carriers by court order or subpoena instead of a search warrant. As such, court orders or subpoenas, with a showing of reasonable grounds, instead of the higher standard of probable cause for a search warrant, may be applicable for other types of electronically stored information. The Court in *Carpenter* also contemplated law enforcement to obtain these records without a warrant if exigent circumstances should arise.

The SCA does not set out any method for showing reasonable grounds. Courts reviewing whether reasonable grounds have been established refer to affidavits filed similar to a search warrant procedure. At a minimum, there should be a finding by a judge of reasonable grounds in the court order or subpoena. In this regard, the court order or subpoena should only be issued by a judge after being approved by a judge, as opposed to a witness subpoena under Criminal Rule 17 issued by a clerk without judicial review.

The Court in *Carpente*r did not overrule the lack of expectation of privacy for information turned over to a third party. Rather, the decision was based on the unique character of a cell phone and the significantly personal information it holds and can convey.

The decision in *Carpenter* also leaves open the remedy for a violation of the Stored Communications Act. *See, State v. Rivera,* 12th. Dist. Butler, No. CA2008-12-256, 2010-Ohio-323, holding that a lack of compliance with 18 U.S.C. 2703(d) to obtain text messages was a violation of a federal statute, but not an unreasonable search under the Fourth Amendment. In this case the police officer obtained the records by a court order instead of a search warrant for records electronically stored less than 180 days and without notice to the defendant. The court noted that because the SCA provided both civil and criminal penalties for violation of the Act, but no other remedies, the defendant was not entitled to exclude the text messages as evidence.[27]

State v. Haygood, 8th. Dist. Cuyahoga, No. 112065, 2023-Ohio-3970. Cell phone records obtained by search warrant gave cell tower locations that could generate a map showing the defendant's phone locations consistent with the number of robbery incidents. The court in *Haygood* noted that cell phone triangulation or cell mapping, when properly qualified, may be considered to show a defendant's location near a crime scene, citing:

- *State v. Bradford*, 8th. Dist. Cuyahoga, No. 2018-Ohio-1417. ("Typically, cell phone tower mapping by a layperson permits an inference to be drawn by the factfinder that the cell phone owner was in the area at the listed

[27] Most courts dealing with cell site records that occurred prior to the *Carpenter* decision have upheld the seizure on the grounds of good faith exception by police officers who relied on a court order that was issued based upon the law prior to the decision in *Carpenter*. *See, e.g. United States v. Wright*, No. 2:17-cr-00160-JAD-VCF, (D. Nevada, decided October 17, 2018.

time, to corroborate other evidence of the defendant's presence at a crime scene.");

- *State v. Daniel,* 8th. Dist. Cuyahoga, No. 2016-Ohio-5231. (Finding that any potential problems with cell phone location data goes to the weight of the testimony — not to the reliability or admissibility of the testimony);
- *State v. Dunn*, 8th. Dist. Cuyahoga, No101648, 2015-Ohio-3138. ("A review of the record demonstrates that no *witness* testified about Dunn's location at the time of the murder by means of cell phone tower location and mapping. Any inferences or speculation about Dunn's location by use of this cell phone evidence was established by the state during its closing argument.");
- *State v. White,* 2d. Dist. 2015-Ohio-3512. (observing that numerous federal courts widely accept the use of cell phone location records to determine the general location of a cell phone and holding the same).

State v. Scullin, 8th. Dist. Cuyahoga, No. 107866, 2019-Ohio-3186. This case involved a search warrant for the contents of a cell phone of the murder victim and other family members present at the scene. The affidavit in support of the search warrant stated that based upon the nature of the homicide, there was a high probability that the victim and the murderer knew each other. The warrant was to obtain records of the person's location at the time of the offense.

The appellate court also found that there was no expectation of privacy to the phone records because the records are maintained by the third party phone company. This conclusion appears to be in conflict with the decision in *Carpenter* in which the U.S. Supreme Court distinguished phone records held by the third party carrier as not a waiver of the expectation of privacy due to the unique and pervasive use of a cell phone. (Questionable decision would appear to be outcome oriented).

State v. Smith, 2023-Ohio-4565 (2d. Dist). Although under *Carpenter v. United States,* a search warrant is generally required to obtain historical cell phone location records, exigent circumstances are an exception to the need for a search warrant to locate a suspect by cell phone location when the police sought to find an armed fleeing suspect following a shooting. The gravity of the offense is an important consideration when determining exigent circumstances. *See also, State v. Snowden*, 2019-Ohio-3006 (2d. Dist).

XVI. Blood draws and medical records.

Disposition of blood sample.

State v. Simpson. 3d. Dist. Allen, No. 1-22-79. 2023-Ohio-3207. This case involved a search warrant for a blood draw after a car collision. The search warrant directed the

police to return the seized property (drawn blood) to the judge. Instead, the blood was sent to the toxicology lab for testing. Although the warrant specifically stated that the blood was to be returned to the judge, the appellate court found the warrant language was based on outdated language from R.C. 2933.26, which has been superseded by Criminal Rule 41(D)(1), permitting the seized property to be held by the law enforcement agency. The lack of compliance did not affect the validity of the search, and therefore, any noncompliance was nonfundamental in nature and not grounds for suppression.[28]

An order to obtain a blood sample for OVI investigation necessarily includes testing the blood for alcohol level, and therefore, was not beyond the scope of the warrant. The court cited numerous out of state cases that held when the justification for seizing the blood sample was the need to obtain evidence of alcohol content. *United States v. Snyder*, 852 F. 2d. 471, 479 (9th. Cir. 1988). See also, *State v. Frescoln,* 911 N.W. 2d 450, 455-56 (Iowa, App. 2017), holding "a commonsense reading of the warrant implies the blood sample would be subjected to chemical testing". Accord, *State v. Maniaci,* 3d. Dist. Marion, No. 9-17-14, 2017-Ohio-8270. (warrants and their supporting documents are to be read in a commonsense fashion, not hypertechnically)

The court in *Simpson* also relied on R.C. 4511.191, the implied consent statute, that a privilege to drive includes a driver's implicit consents to a search, through means of a chemical test, to determine the amount of intoxicating substances in the driver's body.

Time constraints.

State v. Stankorb, 1st. Dist. Hamilton, No. C-230097. 2023-Ohio-3808. When blood is obtained pursuant to a search warrant. R.C. 4511.19(D)(1)(b) permits a trial court to admit the results of a forensic blood-alcohol test, provided that the blood was drawn from the accused within three hours of the time of the alleged offense and analyzed in accordance with methods approved by the director of health by an individual possessing a valid permit issued by the director of health. *State v. Cast,* 12th. Dist. Butler, No. CA2021-09-107, 2022-Ohio-3967 at par. 10.

The defendant was required to challenge the admissibility of the blood-alcohol test results and lab report in a pretrial motion to suppress and cannot be raised for the first time at trial.

State v. Urbanski, 6th. Dist. Lucas, No. L-22-1304, 2023-Ohio-3966. In this case the blood was drawn six hours after the incident as required by R.C. 4511.19(D)(1)(b). The court in *Urbanski* relied on *State v. Hassler*, 115 Ohio St. 3d 322, 2007-Ohio-4947 that a blood sample taken outside the time frame set out in R.C. 4511.19(D) is admissible to prove that a person is under the influence of a drug of abuse as proscribed by R.C.

[28] The appellate court suggested that both law enforcement and the court should review standard search warrant language to eliminate antiquated verbiage and comply with Criminal Rule 41.

4511.19(A)(1)(a) in the prosecution for a violation of R.C. 2903.06, provided that the administrative requirements of R.C. 4511.19(D) are substantially complied with and expert testimony is offered.

In this case there was detailed testimony by the arresting officer and the crime-lab toxicology analyst of substantial compliance with the forensic testing requirements under R.C. 4511.19(D)(1)(b) and Ohio Adm, Code 3701-53-06 on the collection, handling, and testing of the defendant's blood samples.[29]

State v. Nevels, 2024-Ohio-4964 (3d. Dist.). The search warrant was executed at 4:38 a.m. The warrant did not provide for non-daytime execution as required by Crim. R. 41(C)(2). Similarly, Crim. R. 41 (D)(1) requires the officer to promptly file the inventory with the court. Although the appellate court agreed there was noncompliance with the warrant procedure, there was no material prejudice to the defendant. Moreover, as a blood draw in an OVI case, there was a time constraint to execute the warrant. R.C. 4511.19(D).

Procedure to obtain medical records in criminal cases.

R.C. 2317.02(B)(2)(a) provides:

> If any law enforcement officer submits a written statement to a health care provider that states that an official criminal investigation has begun regarding a specified person or that a criminal action or proceeding has been commenced against a specified person, that requests the provider to supply to the officer copies of any records the provider possesses that pertain to any test or the results of any test administered to the specified person to determine the presence or concentration of alcohol, a drug of abuse, a combination of them, a controlled substance, or a metabolite of a controlled substance in the person's whole blood, blood serum or plasma, breath, or urine at any time relevant to the criminal offense in question, and that conforms to section 2317.022of the Revised Code, the provider, except to the extent specifically prohibited by any law of this state or of the United States, shall supply to the officer a copy of any of the requested records the provider possesses. If the health care provider does not possess any of the requested records, the provider shall give the officer a written statement that indicates that the provider does not possess any of the requested records.

R.C. 2317.022 contains a form for the police officer to obtain the medical records.

[29] This case involved a search warrant for the blood draw was hand drafted by the police officer who then made five attempts before being able to find a judge to review the warrant.

While there is no dispute that R.C. 2317.02 waives the physician/patient privilege in criminal actions, the issue is whether this statutory procedure preempts a search warrant requirement by waiving a defendant's reasonable expectation of privacy. In S*tate v. Eads*, 1st. Dist. Hamilton, Nos. C-109213, C-109214, & C-109215, 2020-Ohio-2805, a motion to suppress medical records by R.C. 2317.02 was overruled due to police officer's good faith reliance on statute to obtain medical records. This case involved medical records containing tests for intoxicants that hospital staff administered for medical purposes after car collision.

The court in *Eads* found the officer's warrantless acquisition of the defendant's medical records was in violation of his Fourth Amendment rights. The defendant retained a reasonable expectation of privacy in the alcohol-and drug-test results created during his emergency treatment, even though R.C. 2317.02(B)(2)(a) and R.C. 2317.022 ostensibly required the hospital to comply with the officer's request for the information and the information is exempt from Ohio's physician-patient privilege.

Alcohol-and drug-test results, if any, are exempt from Ohio's physician-patient privilege in criminal actions. R.C. 2317.02(B)(1)(c). The trial court may consider the results of blood and urine testing as evidence of guilt in an OVI prosecution for driving while under the influence of alcohol, a drug of abuse, or a combination of them, in violation of R.C. 4511.19(A)(1)(a) or an equivalent offense that is vehicle-related, if the records are supported by expert testimony. R.C. 4511.19(D)(1)(1).

The Fourth Amendment protections arise when there is a legitimate expectation of privacy that has been infringed by government action. *Smith v. Maryland,* 442 U.S. 735, 740 (1979). Even though a motorist has a diminished expectation of privacy because of the compelling governmental need for regulation (*Missouri v. McNeely* 569 U.S. 141, 159 (2003)), state-action category of intoxicant testing is considered a search that triggers the Fourth Amendment's warrant requirement, unless some recognized exception applies.

In *North Dakota v. Birchfield*, __ U.S. __ (2016), the Court found a breath test that leaves no residue with the police and reveals nothing more than the amount of alcohol in the suspect's breath, does not implicate significant privacy concerns, but blood records contain far mor information beyond level of alcohol or drugs of abuse. In *Eads*, the acquisition of the defendant's blood-alcohol level did not involve a physical intrusion into the defendant's body by the government, but it did reveal much more than the amount of alcohol in his blood, especially when the entirety of that written information is turned over the officer.

The court in *Eads* referred to *Carpenter* by analogy, by which the statute to obtain cell phone records does not require law enforcement to secure a warrant before obtaining the records. Under *Carpenter* there is a two-part analysis to determine a person's reasonable expectation of privacy;

1) The nature of the document sought, and
2) Whether the document was voluntarily exposed.

Regarding the nature of the documents the court in *Eads* found the medical records containing the reports revealed the defendant's use of alcohol, drugs of abuse, and controlled substances which were deserving of protection because of their "deeply revealing nature," and provided "an intimate window into the defendant's life."

The court in *Eads* further found that the medical records were obtained through emergency medical treatment and not voluntarily exposed by the defendant. The court in *Eads* also held that the defendant had not voluntarily provided the records because although he had consented to treatment, "it was the hospital's protocol to collect the information" in order to treat him. *Id.* at Par. 36. Based on these findings, the court in *Eads* held that the defendant had a reasonable expectation of privacy and obtaining the defendant's medical records was a search, requiring a search warrant.

The Supreme Court has never equated the decision to drive with an actual waiver of Fourth Amendment rights. *See Mitchell v. Wisconsin*, 588U.S. 840 (2019).

State v. Gubanich, 9th. Dist. Medina, No. 21CA0054-M, 2022-Ohio-2815, involved a blood draw without a search warrant but by R.C. 2317.02(B)(2)(a) after motorcycle collision in hospital where the defendant was taken for treatment. The defendant was charged with OVI as a result of the blood level results. The trial court found that although the defendant had a legitimate expectation of privacy and the statute did not override the Fourth Amendment, the officer acted in good faith when the plain language of the statute authorized the action.

The court in *Gubanich* held that R.C. 2317.02(B)(2)(a) waived the physician/patient privilege as a matter of law when law enforcement seeks to obtain relevant test results upon a proper written request. Relying on *State v. Mayl,* 106 Ohio St.3d 207, 2005-Ohio-4629 at par 54-55. In *Grubanich* the court acknowledged *State v. Saunders*, 5th. Dist. Morrow, No. 17CA0001, 201-Ohio-7348 and *State v. Eads*, 1st. Dist. Hamilton, Nos. C-190213, C-190214, & C-190215 2020-Ohio-2805, did not obviate the need for officers to obtain a warrant before seizing health records. The officer in *Grubanich*, however, did not direct the hospital staff to draw the blood or that the blood was drawn for any reason other than medical treatment. The officer in this case merely sought a copy of the test results from blood already drawn.

The court in *Gubanich*, similar to *Eads*, held that the good faith exception applied to searches conducted in reasonable reliance on subsequently invalided statutes. *State v. Banks-Harvey,* 152 Ohio St.3d 368, 2018-Ohio-201. Generally, a police officer is not expected to question the judgment of the legislature that passed a law.

State v. Rogers. 10th. Dist. Franklin, No. 21-AP 546, 2023-Ohio-2749. Affirmed granting motion to suppress medical records in OVI case. The defendant was hospitalized after a motor vehicle collision, but the police office was not able to reach the duty judge to obtain a search warrant. Instead, the police obtained the defendant's medical records by R.C. 2317.02(B)(2)(a) the following day by a subpoena signed by a municipal judge. The court found the defendant had a legitimate expectation of privacy in his medical

records, citing the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and Ohio Adm. Code 3701-83-11, exempting medical records from public records requests. Moreover, the police sought and obtained all of the defendant's medical records, not just alcohol and drug information, and therefore, was overly broad. As a subpoena, instead of a search warrant, the judge was not given the opportunity to review any supporting affidavit and narrow the scope of the records sought.

Finding that a search warrant was required, the court in *Rogers* cited *State v. Helper*, 6th. Dist. Wood, WD-15-012, 2016-Ohio-2662, stating, "In no circumstance is an R.C. 2317.022 request a substitute for a warrant for a blood draw for a blood-alcohol test nor is it a recognized exception to the warrant requirement." The court of appeals upheld the trial court's findings that *Carpenter v. United States* announced a legal rule that prohibited the use of a subpoena to obtain a defendant's medical records.

In *Cleveland v. Khamies,* 8th. Dist. Cuyahoga, No. 111661, 2023-Ohio-812, however, the court found that R.C. 2317.02 waives the physician/patient relationship in certain circumstances, including OVI offenses, and therefore complies with constitutional privacy interests. Citing *Cleveland v. Rollins,* 8th. Dist. Cuyahoga, No. 79614, 2002-Ohio-1087, the court in *Khamies* found a defendant in an OVI case has effectively consented to a waiver of his privacy rights right to the results of diagnostic tests that were given at a time relevant to that criminal offense.

In *Khamies* the court acknowledged the *Eads* decision but held that because the medical records were obtained in compliance with R.C. 2317.02, there was no Fourth Amendment violation.[30] The court apparently construed R.C. 2317.02, waiving physician/patient privilege as implied consent under R.C. 4511.191. The court in *Eads*, however, stated that a state cannot pass a law to limit the scope of the Fourth Amendment.

One of the critical issues is the amount of information in a defendant's medical records that exceed the presence and amount of alcohol, medication, and/or drugs of abuse in the defendant's system. While a subpoena is often issued without judicial review, a search warrant determines whether there is probable cause for release of the medical records, and if so, may limit the scope of the records obtained.

To date the following Ohio appellate districts have held that a search warrant, rather than a subpoena or the statutory procedure in R.C. 2317.02 is required to obtain a defendant's medical records and blood results in an OVI case.

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[30] This issue in this case was raised by ineffective assistance of counsel, not directly on the procedure under R.C 2317.02. It is unclear from the decision if the records were obtained by subpoena or search warrant. From the decision, the records were apparently sent directly to the judge. The appellate court found that the trial judge did not go through the defendant's entire medical records and therefore, no violation of the defendant's expectation of privacy.

Search warrant required

1st. Dist.	S*tate v. Eads*, 1st. Dist. Hamilton, Nos. C-109213, C-109214, & C-109215, 2020-Ohio-2805.
3rd. Dist.	*State v. Little,* 3rd. Dist. Auglaize, No. 2-13-28, 2014-Ohio-4871 and *State v. Clark*, 3rd. Dist. Hancock, No. 5-13-34, 2014-Ohio-4873.
5th. Dist.	*State v. Saunders*, 5th. Dist. Morrow, No. 17CA0001, 2017-Ohio-7348.
6th. Dist.	*State v. Helper*, 6th. Dist. Wood, WD-15-012, 2016-Ohio-2662.
9th. Dist.	*State v. Gubanich,* 9th. Dist. Medina, No. 21CA0054-M, 2022-Ohio-2815.
10th. Dist.	*State v. Rogers.* 10th. Dist. Franklin, No. 21-AP 546, 2023-Ohio-2749.

Search Warrant not required

8th. Dist.	*Cleveland v. Khamies,* 8th. Dist. Cuyahoga, No. 111661, 2023-Ohio-812.[31]

Unclear if search warrant required.

2nd. Dist.	*State v. Smith,* 2d. Dist. Greene, 2019-CA-16, 2019-Ohio-4706. (Medical records were obtained by R.C. 2317.022, but prosecutor went back and obtained the same records with a search warrant.)
12th. Dist.	*State v. Perry*, 12th. Dist. Preble, No. CA2017-01-002, 2017-Ohio-7214. (Search warrant issue raised to obtain medical records, but not decided, finding the issue was moot due to defendant's no contest plea to R.C. 4511.19(A)(1)(a) charge and specific blood/alcohol level not applicable.)

Notwithstanding the split of appellate court authority, to date there has been no decision directly on the constitutionality of R.C. 2317.02 by the Fourth Amendment, although it has been raised in some cases.

XVI. Interceptor warrants, tracking devices and pen registers.

[31] In *State v. Harper,* 8th. Dist. Cuyahoga, No. 105961, 2018-Ohio-690, raised the need for a search warrant, but did not decide the issue.

A) Interceptor warrants. (Wiretap).

R.C. 2933.53 set out the procedure for an interceptor warrant in Ohio.

A) Limits jurisdiction to a common pleas judge only.[32]
B) Sets out specific qualifications and certification for person applying for warrant.
C) Not required for:
    1) Pen register used in accordance with federal or state law.
    2) Interception of a wire, oral, or electronic statement with a:
        a) law enforcement officer who is a party to the communications and one of the parties has given prior consent to the interception by the officer, or
        b) non-law enforcement officer who is a party to the communications or one of the parties has given prior consent to the interception by the person, and the communication is not intercepted for the purpose of committing a criminal offense.
    3) A trap and trace device used in accordance with federal of state law.

State v. Pippin, 10th. Dist. Franklin, No. 15AP-137, 2020-Ohio-503An intercept (wiretap) warrant may only be issued by a common pleas judge who serves at least in part as a general jurisdiction judge. R.C. 2933.522 and R.C. 2933.51.

State v. Nettles, 6th. Dist. Sandusky, No. S-17-053, 2018-Ohio-4908, the court held that a common pleas judge in either the county where the interception is to take place or where the interceptor device is installed. The case was affirmed on appeal, 159 Ohio St.3d 180, 2020-Ohio-768, on different grounds. The Supreme Court held that the inception of a cell phone call first occurs when the government captures and redirects the contents of the call at the place where the speaker uses the phone. The inception also occurs when the government actually hears the contents of the call at the listening posts.

R.C. 2933.57. Oral order for interception.

A common pleas judge may issue an oral order for interception without a warrant under the following conditions:

A) A written application for an interception warrant is filed with the court within 48 hours, and
B) A determination by the judge:
    1) Valid grounds for the order,
    2) Probable cause to believe that an emergency situation exists, and

[32] A Judge of a court of common pleas is expressly limited to the general division of that court and excludes a judge specifically elected or appointed as a probate, domestic relations, or juvenile judge. R.C. 2933.51(W).

3) The emergency situation involves an immediate danger of death or serious physical harm that justifies the authorization for immediate interception without a written application.

R.C. 2933.59. Executing intercept warrant.

The law enforcement officer who executes the interception warrant or order must:

1) Execute it in compliance with the warrant or order.

2) Have training or work under the direct supervision of an officer who has received training established by the attorney general and the Ohio peace officer training commission, and

3) Record by appropriate audio recording, or if not available, immediately reduced to writing with the audio recording or writing be done in a way that will protect the recording or transcription from editing or any other alteration.

Upon expiration of the period of interception,

1) Immediately cease interception and recording,
2) Remove or permanently inactivate the interception device,
3) Immediately make available to the judge who issued the warrant the recording or writing of the intercepted communications which shall be sealed under the judge's direction.

The recordings or writing summaries shall be kept for at least ten (10) years and ordered destroyed by the judge after that period.

R.C. 2933.60. Report of interception warrant by judge and prosecutor.

The judge involved with the intercept warrant is required to make a report to both the administrative office of the United States Court in Washington, D.C. and the Ohio Attorney General within thirty (30) days of the expiration of warrant, after extensions, if applicable, or the denial of the warrant with the following information:

1) The fact that an application or extension an interception warrant was made,

2) The kind of warrant or extension, including a statement that it was not practical to provide a description of the nature and location of the facilities from which, or the place where the oral communication is to be intercepted or the person might thwart the interception or a wire or electronic communication by changing the location of the interception.

3) Whether the warrant was granted, extended, or denied,

4) The period of interception authorized by the warrant, and the number and duration of any extensions,

5) The designated offenses specified in the warrant, application, or extension,

6) The identity of the person who made the application, and/or executed any accompanying affidavit to an application, and the prosecuting attorney or assistant prosecuting attorney who authorized the application,

7) The nature of the facilities or the place where the communications were to be intercepted.

R.C. 2933.61. Inventory and service.

A) Time for service. Within a reasonable period, but not more than ninety (90) days after termination or denial of the intercept warrant.

B) Person responsible to serve notice. The common pleas judge who issued, extended, or denial the warrant.

C) Persons served.

1) The persons named in the application or the interception warrant, and
2) Any other parties to intercepted wire, oral, or electronic communications that the judge determines in the judge's discretion should be notified in the interest of justice.

D) Content of notice.

1) The fact that the application was made or warrant issued,
2) The date the warrant was issued or denied, and if issued, the period of time in effect, and
3) During the stated period wire, oral, or electronic communications were or were not intercepted.

The judge has the discretion to delay the service of the inventory for a specified period of time.

R.C. 2933.62. Inadmissibility of evidence for non-compliance.

Any contents, wire, oral, or electronic communication or evidence derived from an intercept warrant is inadmissible in any trial or hearing, including a grand jury proceeding, if there is any violation of the statutory procedures to obtain and execute the intercept warrant.

Except for a grand jury proceeding, service of any contents, wire, oral, or electronic communication or evidence derived from an intercept warrant shall be served on the parties at least ten (10) days prior to the trial or hearing. The warrant and application are also required to be served. A judge may modify the disclosure of the ten (10) day period based upon the circumstances of the case and a determination of no prejudice to the party.

State v. Miller, 5th. Dist. Stark, No.CA-8951 (April 26, 1993). Recording a phone conversation with the consent of one of the parties to the conversation was not a wiretap. (This case involved a motion to suppress, but no warrant.) The conversation involved a phone call with a minor victim and the defendant at the police station. The court stated that the phone call was similar to a recorded drug buy phone call conducted by the police.

State v. Geraldo, 68 Ohio St.2d 120 (1968), Suppression is not required for a warrantless recording of a telephone conversations between a consenting informant and a non-consenting defendant.

State v. Stalnaker, 11th. Dist. Lake, No. 2004-L-100, 2005-Ohio-7042. Interception of a wire, oral, or electronic communication is generally illegal unless one party has given prior consent to the interception. R.C. 2933.52(B). In this case the issue was not that consent was given by the 12-year-old victim, but whether the police coerced the consent. Based upon the evidence, the court found the consent was not coerced.

State v. Knoefel, 11th. Dist. Lake, No.2014-L-088, 2015-Ohio-5207. Although the telephone conversation was recorded in California by the victim without the defendant's knowledge, any violation of California law by not having all parties consent to the recording did not rise to a constitutional violation or a violation of Ohio or Federal law, and therefore, not subject to exclusion.

State v. Dew, 7th. Dist. Mahoning, No. 08-MA-62, 2009-Ohio-6537. A telephone conversation recorded by the police in Ohio between the defendant who was driving in his car in Pennsylvania and the consenting victim who was in California, did not require a warrant even though both parties must consent to record under both California and Pennsylvania law. The court found that R.C. 2933.53(F)(2), which permits interception without a warrant if one party consents, is not limited to the location of the caller. The court also considered that the offense occurred in Ohio and the information was being obtained for a case in Ohio.

State v. Hosseinipour, 5th. Dist. Stark, No. 13 CAA-05-46, 2014-Ohio-1090. A search warrant issued by a municipal judge to obtain emails and hard drive contents on a computer was not an interceptor warrant under R.C. 2933.53.

State v. Bell, 142 Ohio Misc. 2d 72 (C.P. 2007). The issue involved the authority of a municipal court judge to issue a search warrant to obtain emails from the hard drive of a defendant's computer. The defense argued that it was an interception warrant which

could only be issued by a common pleas judge. In denying the motion to suppress the court found:

1) R.C. 2933.51(F) defines an interception warrant as one for the interception of electronic communications.
2) Interception is contemporaneous with the transmission of the communication.
3) Interception does not include stored data.
4) R.C. 2933.53 to .56 contemplates installation of interception device to trap live communications.
5) R.C. 2933.53(B)(6) requires the supporting affidavit to state the length of time the interception will be in effect, which implies ongoing, future communications, not stored data.

Applying the statutory framework for an interception warrant, the court held that an interception warrant was not required for the retrieval of stored communications and a municipal court judge had authority to issue a warrant to seize computer based stored data.

B) Tracking devices.

United State v. Jones, 565 U.S. 400 (2012), holding that a GPS tracking device is a search within the meaning of the Fourth Amendment. Unlike an interception warrant or pen register, a tracking device warrant is:

1) Governed primarily by Criminal Rule 41, not R.C. Chap. 2933.

2) May be issued by any court of record, which would include municipal and county courts.

Criminal Rule 41(G) defines a tracking device as a **"**means an electronic or mechanical device which permits the tracking of the movement of a person or object."

Tracking device procedure.

1) Crim. R. 41(C) (1). The supporting affidavit must:
   A) Name or describe the person to be tracked or particularly describe the property to be tracked,
   B) State substantially the offense in relation, and
   C) State the factual basis for the affiant's belief that the tracking will yield evidence of the offense.

2) Crim. R. 41(C) (2). The tracking devise warrant shall specify the time the tracking device will be:
   A) Installed, but not longer than 10 days, and
   B) Removed, but not to exceed 45 days after installation.

3) Crim. R. 41(D) (2). The law enforcement officer must enter onto the warrant:

A) The exact date and time the device was installed, and
B) The period during which it was used.

4) Crim. R. 41(D) (2). After the tracking device is removed, the law enforcement officer must:

A) Promptly make return to court, and
B) Serve a copy of the warrant on the person who was tracked or whose property was tracked within 10 days after the use of the tracking device has ended.[33]

State v. Stock, 8th. Dist. Cuyahoga, No. 105996, 2018-Ohio-3496. Criminal Rule 41(G) authorizes a warrant for a tracking device to be installed within the court's jurisdiction, but the actual tracking may be both inside and outside the court's territorial jurisdiction.

C) Pen registers. (Track and Trace).

R.C. 2933. 51(U) defines a pen register as "a device that records or decodes electronic impulses that identify the numbers dialed, pulsed, or otherwise transmitted on telephone lines to which the device is attached."

Smith v. Maryland, 442 U.S. 735 (1970), relied on by the court in *Carpenter v. United States*, held that a pen register was not a "search" within the meaning of the Fourth Amendment and there was no expectation of privacy. *See also*, *Riley v. California*, 573 U.S 373, 134 S.Ct. 2473, 2489, 189 L. Ed. 2d 430 (2014), distinguishing a pen register from a search based upon the limited information obtained from a pen register.

Following the decision in *Smith,* 18 U.S.C. 3121 was enacted to prohibit the installation of a pen register without a court order certifying that the information likely to be obtained is relevant to an ongoing criminal investigation. 18 U.S.C. 3123. A violation of this statute, however, does not result in an unconstitutional search. Congress provided a criminal penalty and did not require exclusion of evidence for violation of the statute. *See, United States v. Thompson*, 936 F.2d. 1249 (11th. Cir. 1991) (An application for pen register order when a prosecutor signed the name of a different prosecutor was a violation of the statute, but in light of express statutory penalties, exclusion was not permitted.)

R.C. 2933.76 set out the procedure for a pen register order warrant in Ohio.
A) Limits jurisdiction to a common pleas judge only.
B) Requires the pen register to be installed within the court's jurisdiction.

[33] Upon motion by the law enforcement officer or prosecutor, the court, for good cause, may delay service of the notice.

R.C. 2933.76(C) requires the law enforcement officer must make a written application under oath stating:

1) The name of the law enforcement officer or agency seeking the order and the officer or agency who is conducting the criminal investigation.

2) The name, if known, of the person to whom the telephone or other line to which the pen register or trap and trace device is to be attached is leased or in whose name that telephone or other line is listed.

3) The name, if known, of the person who is the subject of the criminal investigation to which the application relates.

4) The number and, if known, the physical location of the telephone or other line to which the pen register or the trap and trace device is to be attached.

5) A statement of the offense to which the information that is likely to be obtained by the installation and use of the pen register or trap and trace device relates.

6) The information that is likely to be obtained by the installation and use of the pen register or trap and trace device is relevant to an ongoing criminal investigation being conducted by the investigative or law enforcement agency.

The order shall:

A) make finding for each of the six (6) statutory requirements set out in R.C. 2933.76(C).

B) be valid for no more than sixty (60) days but may be extended for an additional sixty (60) days by court order. R.C. 2933.76(E).

State ex. rel. Ohio Bell Tel. Co. v. Williams, 63 Ohio St.2d 51 (1980). The phone company appealed the denial of a writ of prohibition to prevent a judge from ordering the company to cooperate with police to set up a pen register. In upholding the denial, the Ohio Supreme Court held that the phone company's technical assistance was critical to the order being carried out. *Relying on United States v. New York Telephone Co*. 434 U.S. 159 (1977), the court noted that a pen register:

- Only recorded outgoing numbers,
- Was not an intercept because it did not acquire the contents of the calls,
- Does not hear sound,
- Did not identify the caller,
- Did not identify the recipient of the call,
- Cannot verify is a call was actually made, and
- Was not a wiretap.

The court relied on the language in Criminal Rule 41(B) that authorizes a search warrant for any evidence and held that a court of general jurisdiction had the inherent authority to order a non-party to comply with the search warrant.[34]

State v. Kail, 2nd. Dist. Montgomery No. 16812 (decided June 19, 1998). 4,270 incoming and outgoing phone calls over a three (3) month period could be considered along with other evidence to establish probable cause for drug activity in light of the totality of the circumstances.

XVII. Electronically transmitted search warrant procedure.

Criminal Rule 41(C) (1) was amended in 2010 to permit a search warrant to be issued based upon affidavits communicated to the judge "by reliable electronic means". The amendment to Ohio Criminal Rule 41 was based in part on the language of Federal Rule 41, which permits a search warrant to be issued based on information communicated by "telephone or other reliable means". The use of search warrants based on telephonic information under the federal rule have been approved by the courts. *See, e.g*. *McNeeley v. Missouri*, 569 U.S. 141, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013), in which the Court acknowledged the significant advances that have transpired since *Schmerber v. California*, [384 U.S. 757, 86 S.Ct. 1826, 16 L. Ed 2d 908 (1966)] was decided allowing for more expeditious processing of warrant applications through telephonic or other reliable means.

In *Riley v. California*, 573 U.S 373, 134 S.Ct. 2473, 2489, 189 L. Ed. 2d 430 (2014), the Court approved the use of email with search warrants, stating that recent technological advances made the process of obtaining a warrant itself more efficient. 573 U.S. at 401, 134 S.Ct. at 2493, 189 L. Ed. 2d at 451.

Effective July 1, 2021, Criminal Rule 41 was amended to permit:

1) A judge to require the affiant to appear personally *or by reliable electronic means* for examination under oath. Crim. R. 41(C)(2).
2) File the return of the search warrant and inventory with the court *either in person or by reliable electronic means.* Crim. R. 41(D)(1).
3) File return of tracking device with the court *either in person or by reliable electronic means.* Crim. R. 41(D)(2).

E-warrants provide an expeditious method for a court to review a search warrant application and issue the warrant when time is critical. The most common examples are 1) blood draws in OVI cases[35] and 2) real time location of suspect.

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[34] The decision limited the authority to issue a pen register to the common pleas court. The procedure was subsequently codified in R.C. 2933.76 which expressly limits the authority to a common pleas judge.

To date, no Ohio appellate court has addressed the procedure for search warrants issued based on electronically transmitted information since the 2010 amendment to Criminal Rule 41. In *State v. Shaulis*, 9th. Dist. Wayne, No. 01CA44 (Feb. 20, 2002), the officer faxed a copy of the affidavit to the judge and then swore to the truth of the affidavit to the judge over the phone. Although the appellate court did not approve of the procedure of using a fax machine instead of direct contact between the officer and the judge, the court further found that because a neutral judge issued the search warrant based upon credible and reliable information, there was no Fourth Amendment violation of the defendant's rights. The 2010 amendment to Criminal Rule 41(C), permits affidavits to be communicated to the judge and a search warrant issued by the judge "through reliable electronic means".

A review of other states with comparable authorizing language sets out approved procedures and limitations.

Commonwealth v. Almonor, 482 Mass 35, No. SJC-12499 (2019). Real time location of the defendant was held to be a search under Massachusetts Constitution. In this case the information was obtained from mobile phone service provider by request form instead of a search warrant. The court found that because the murder had occurred hours ago, the defendant had a sawed-off shotgun, the urgent necessity to apprehend the defendant, the risk of flight and danger, there were sufficient facts to support a finding of exigent circumstances.

In the concurring opinion, Chief Justice Gants used the case to promote the ability to obtain a search warrant by reliable electronic means, including e-mail and video conferencing. The opinion pointed out that the length of time to obtain a search warrant includes the time needed to:

1) write the affidavit and warrant,
2) locate a judge, especially when the court is closed, and
3) appear before the judge to obtain the warrant.

The second and third factor can be reduced with an electronic warrant. By reducing the time to obtain a warrant, situations for a warrantless search due to exigent circumstances are also reduced, providing for greater opportunities for judicial review before a search is conducted in conformity with the Fourth Amendment.

State v. Sauter, 2018 N.D. 75 (2018). This case involved a warrantless blood draw based on exigent circumstances due to inability to locate judge for search warrant and the defendant's critical medical condition. In the concurring opinion upholding the

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[35] While metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that must be considered in deciding whether a warrant is required, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant. *McNeeley v. Missouri*, *supra.*

blood draw, the court noted that with search warrant authorization by electronic means, the need for exigent circumstances should be reduced in these types of cases. The court cautioned that both law enforcement and trial judges should take steps to implement procedures for electronic application and issuance of search warrants. North Dakota Law not only permits search warrants to be issued electronically, but also based upon sworn statements in an affidavit with an electronic signature of the affiant.

Clay v. State, 391 S.W. 3d 94 (Texas, 2013). The court upheld the validity of a search warrant in which the affidavit was sworn to the judge telephonically instead of in person. This case involved an OVI blood draw. The police officer swore and signed the affidavit while on the phone to the judge and faxed the affidavit to the judge. The judge faxed back the search warrant. Although Texas did not have a provision for telephonic applications and issuance of search warrants, the court held that the affiant's personal appearance was not required for a valid warrant to be electronically issued.

The court in *Clay* essentially adopted an electronic transmission procedure for search warrants. In this case the court found that the police officer and judge knew each other and recognized each other's voice on the phone. The court also noted that, notwithstanding the lack of express statutory authority, the federal courts have permitted telephonic search warrant procedures and therefore, the absence of the affiant personally swearing to the judge was not a Fourth Amendment violation. The court also noted electronic search warrant procedures have been adopted and upheld in numerous states.

State v. Hyo Yu, No. 05-16-00518-CR, Ct. App. 5th. Dist. Texas (2017), similar to *State v. Clay*, involved a search warrant obtained by telephone for a blood draw in an OVI case. The court of appeals found the search warrant was validly obtained and reverse the trial court's order of suppression. In this case the police officer signed the supporting affidavit, scanned it, and emailed it to the judge. The judge signed the search warrant with an electronic signature and court seal and emailed back to the officer. The only verbal communication between the officer and the judge was a call by the officer to the judge that the search warrant affidavit was being sent to the judge.

The Court of Appeals in *Hyo Yu* found that even though there was no direct communication with the judge, the testimony of the officer that 1) she emailed the documents to the judge's email address, 2) the search warrant was returned from the judge's email address to the officer, and 3) the search warrant contained the judge's signature and official seal, was sufficient to show a valid search warrant was issued.

Taylor v. State, 69 N.E.3d 502 (Indiana, 2017), upholding PDF copy of search warrant emailed by the judge to the police officer. In this case, the defendant did not challenge the form of the warrant, but that it was not served on him prior to the blood draw in an OVI case. The court held that neither Indiana law nor the Fourth Amendment required the warrant to be served on the defendant prior to the search or seizure as long as the warrant was issued before the blood draw.

Moore v. Paterson, No. 15-CV-936, (E.D. Wisconsin, 2016). Upholding validity of blood draw in OVI case under Wisconsin law when the judge signed the search warrant and emailed the signed warrant to the police officer. In this case the officer swore and signed the affidavit in front of another officer/notary and emailed the completed affidavit to the judge. After receiving the affidavit, the judge independently swore in the police officer over the phone, examined the affidavit, and after determining probable cause, issued the warrant.

State v. Gravett, 2017 N. J. No. A-2878-15T1 (July 13, 2017). This case involved a warrantless blood draw after a serious motor vehicle collision. The court upheld the blood sample on the basis of exigent circumstances due to the limited police resources and the magnitude of the crash, including taking care of multiple injured people and directing traffic. The court cited *Missouri v. McNeely,* __ U.S. __ (2013), recognizing more expeditious processing of warrant applications through telephonic or other reliable electronic means, but also recognizing that the availability of a telephonic warrant procedure does not eliminate exigent circumstances when time is of the essence to preserve evidence. In this case there was no officer available due to the crash.

Commonwealth v. Harper, 2016 Ky. App. Nos. 2014-CA-2055-2057. A warrant issued based on an oath given telephonically did not comply with the statutory language to be made under oath and signed before a judge. In this case Kentucky did not have a statutory procedure for electronically issuing search warrants. Notwithstanding the lack of authority, the court held that the unauthorized oath did not violate the defendant's Fourth Amendment protections based on Federal Rule 41, which permits telephonic oaths.

State v. Collins, 2017 Me. Super. Lexis 299, No. CR-2017-492 (Dec. 18, 2017). This case involved a blood draw with an electronic search warrant after a motor vehicle crash. Electronic search warrant procedure was designed to deal with the practical reality when a judge is not nearby when a police officer needs to obtain a search warrant. Although in this case the affidavit was not signed by the police officer, it contained an attestation clause that was transmitted from the officer's laptop computer. The judge acknowledged the attestation and completed the jurat. The court found the officer's inclusion of the attestation clause was tantamount to an electronic signature.

Smith v. State, 2013 Wy. 122, 311 P.3d 132 (2013), upholding the constitutionality of the procedure for a remotely communicated search warrants. Under the Wyoming statute, a remotely communicated search warrant is limited to OVI cases in which the police officer calls the judge with the conversation recorded, swears out a statement to the judge, and if the judge determines probable cause, the judge authorizes the police officer to sign the judge's name to the search warrant. The court held that a recorded conversation under oath to the judge that could be transcribed, met the affidavit requirement. The court also approved standard form warrant applications to streamline the warrant process for blood draws in OVI cases.

Commonwealth v. Wiggins, 2014 Pa. Dist. & Cty. Dec., affirmed, 116 A.3d 682. Pennsylvania law permits a search warrant with advanced communication technology, but also required the affiant to personally communicate with the judge by simultaneous visual communication. As such, a search warrant issued by fax and telephone alone was invalid as not in compliance with Pennsylvania law. The audiovisual requirement permits the judge to see the affiant and verify his identity while administering the oath. The court found that the additional requirement of visual contact provided greater safeguards under Pennsylvania law than under the federal system.

Recording issues with electronic search warrants

In *United States v. Rupert*, No. 20-cr-104 (NEB/TNL) (U.S. Dist. Ct. Minn., Jan. 6, 2021)[36], the court approved a search warrant procedure obtained by telephone. This case involved a search warrant to obtain Facebook posts regarding organization of a riot with the police. The police officer in *Rupert*

1) Emailed copies of the affidavit and search warrant to the judge,
2) Contacted the judge simultaneously with video and audio by facetime,
3) Swore to the truth of the affidavit to the judge by video/audio,
4) Signed the affidavit in front of the judge by video/audio,
5) Scanned and emailed the executed affidavit to the judge.

After reviewing the affidavit, the judge signed the search warrant and sent a copy of the signed search warrant to the officer. The court found that the search warrant was obtained by reliable electronic means within the meaning of Federal. Criminal Rule 41.

The decision in *Rupert* also addressed the issue off recording the search warrant process. Federal Criminal Rule 4.1 requires a court to take testimony by an electronic recording device, transcribe the recording, and certify the accuracy of the transcript and exhibits when issuing a criminal summons by telephone. Fed. Crim. R. 41(d)(2)(C) also requires the court to record any additional statements supplementing an affidavit in support of a search warrant.[37]

The proceedings in *Rupert* were not recorded. The court held that because the officer only attested to the truth of the affidavit, did not provide additional statements, and the judge issued the search warrant solely on the basis of the affidavit, the recording procedures did not apply.

XVIII. Airspace surveillance.

Open Fields.

[36] This case is a magistrate's report which was approved and adopted as the judgment of the court on March 12, 2021.

[37] Both Ohio Criminal Rule 4 (probable cause for warrant) and Rule 41 have similar recording requirements.

Bd of Trustees, Blanchard Township v. Simon, 3rd. Dist. Hardin, No. 6-22-17, 2023-Ohio-1704. Under the open-fields doctrine, "even though there [is] a trespass by police officers, no illegal search or seizure occur[s] because the Fourth Amendment protection afforded to people in their 'persons, homes, papers, and effects' is not extended to 'open fields.'" Citing *State v. Woolley*, 5th Dist. Ashland No. 16-COA-003, 2017-Ohio-576, ¶ 28, quoting *Hester v. United States*, 265 U.S. 57, 59 (1924).

State v. Vondenhuevel, 3d. Dist. Logan, No. 8-04-15, 2004-Ohio5348, finding no expectation of privacy legitimately attaches to open fields.

Aerial Surveillance.

State v. Harsh, 2014-Ohio-251 (12th. Dist.). Aerial surveillance of marijuana fields. The Fourth Amendment does not require the police traveling in the public airways to obtain a warrant in order to observe what is visible to the naked eye, (*relying on California v. Ciraolo*, 476 U.S. 207 (1986)) and helicopter surveillance did not constitute a search under the Fourth Amendment. *Florida v. Riley.*

State v. Pierson, 9th. Dist, Lorain, No. 21CA011793 2022-Ohio-4140. After anonymous tip that the defendant was growing marijuana, two fly overs by the police and view of the area from the neighbor's adjacent property of the plants were sufficient to support a search warrant. Although the police officer was unable to identify marijuana plants from the sky, the vegetated area was consistent with the area of the property he later observed.

State v. Stevens, 5th. Dist. Coshocton, No. 2022CA0017, 2023-Ohio-889. This case involved air surveillance by a camera equipped drone to look at a damaged car that was traced to the defendant's property after the drive left the scene of the collision. The vehicle was located in the open on the back of the defendant's property with damage corresponding to the collision.

The court found that the vehicle was not on the curtilage of the property and there were no steps to hide the car. Instead, the car was seen in the open in the back of the yard with a number of other cars. The court also noted that the drone was below 400 feet in regulated FAA airspace. There was no fence around the property. A such, the court found there was no reasonable expectation of privacy, and that surveillance of the car was not an unreasonable search based on the open fields doctrine, citing *State v. Paxton,* 82 Ohio App.3d 818 (6th. Dist. 1992), which relied on *Oliver v. United States,* 466 U.S. 170 (1984).

The court defined curtilage as is an area around a person's home upon which he or she may reasonably expect the sanctity and privacy of the home. For Fourth Amendment purposes, the curtilage is considered part of the home itself." *Oliver* at 180. The only areas of the curtilage where officers may lawfully go are those impliedly open to the public, including walkways, driveways, or access routes to the house. *State v. Cook,* 5th. Dist. Muskingum, Nos. 2010-CA-40 & 2010-CA-41, 2011-Ohio-1776, citing *State v.*

Birdsall, 6th. Dist. Williams, No. WM-09-016, 2010-Ohio-2382. Because the curtilage of a property is considered to be part of a person's home, the right of the police to come into the curtilage is highly circumscribed. *State v. Woljevach*, 160 Ohio App.3d 757, 2005-Ohio-2085 (6th. Dist.).

The dissenting opinion concurred on the open fields doctrine, but pointed out that the use aerial drones to surveil a house or curtilage is equivalent to a physical intrusion and thus a search requiring a warrant. Thus, the court should remain conscious of the difference in the technologies and not give carte blanch to the use of aerial drones. While the drone in this case was properly in federally regulated airspace, there is an issue whether the homeowner has a property right in that airspace and any constitutional protection against surveillance in that airspace.

Factors to consider for aerial drone surveillance.[38]

- Training and qualifications of drone operator
- Type of drone
- Altitude at time of surveillance
- FAA regulations
- Location of area searched.
    - Curtilage,
    - Open field
- Reasonable expectation of privacy

State v. Doyle, 5th. Dist. Knox, No.16CA05 2016-Ohio-5742 set out the extent of a home's curtilage is resolved by considering four main factors:

1) the proximity of the area claimed to be curtilage to the home;
2) whether the area is included within an enclosure surrounding the home;
3) the nature of the use to which the area is put; and
4) the steps taken to protect the area from observation by passersby.

State v. Jordan, 3d. Dist. Union. No. 14-21-21 2022-Ohio-1992. Appeal by prosecutor of order to suppress marijuana plants seized after observed by police from a helicopter about three hundred feet above the defendant's backyard. Reversing the trial court, the court of appeals considered:

1) whether the police helicopter's compliance with applicable FAA regulations;
or observed the defendant's property at an unlawful altitude;
2) whether the helicopter observed the defendant's property at an unlawful altitude;

[38] 14 CFR 107, et seq. sets out federal regulations fand limitations or the operation of drones. In addition, the Ohio Administrative Code imposes restrictions on drone use for Miami University (Ohio. Admin. Code. 3339-16-17), Bowling Green State University (Ohio Admin. Code 3341-6-50), University of Toledo (Ohio Admin. Code 3364-16-14), Kent State University (Ohio Admin. Code 3342-5-12.16), and Youngstown State University (Ohio Admin. Code. 3356-4-14).

3) the frequency or rarity of helicopter flights at that altitude; and
4) the extent to which the helicopter interfered with the defendant's normal use of his home or its curtilage, which involves a consideration of whether the occupants of the helicopter observed "intimate details connected with the use of the home or curtilage" and whether the helicopter created wind, dust, threat of injury, or undue noise. Relying on the standard set out in *Florida v. Riley*, 488 U.S. 445 at 451-52 (1989).

Regarding the frequency or rarity of flights, the inquiry is in terms of the general frequency of public use of airspace at a particular altitude, not the regularity of air traffic at that altitude over the defendant's property specifically. *Florida v. Riley,* 488 U.S. at 451.

The court in *Jordan* found that the defendant did not prove an objectively reasonable expectation of privacy against aerial surveillance and the observation of the growing marijuana plants from the helicopter was not a search within the meaning of the Fourth Amendment. Although the court recognized the protection afforded to a person's home, including the curtilage, the court noted that the curtilage itself does not bar police observation, but whether the property could be observed from a position "within public navigable airspace * * * in a physically nonintrusive manner" and that "[a]ny member of the public flying in this airspace who glanced down could have seen everything that [the] officers observed from a position "within public navigable airspace * * * in a physically nonintrusive manner" and that "[a]ny member of the public flying in this airspace who glanced down could have seen everything that [the] officers observed." Relying on *California v. Cirialo,* 476 U.S. 207 at 213-214. (1976).

State v. Bradley, 2025-Ohio-58 (2d. Dist.). Citing *Florida v. Riley*, aerial surveillance at least 400 feet in the air by a helicopter or airplane does not s a general rule violate the Fourth Amendment. The court found a drone is no more intrusive than a helicopter.

A drone aerial surveillance from adjacent public property was not an illegal entry onto the defendant's property or a violation of the Fourth Amendment. In this case the drone was operated over property adjacent to the defendant's property. No search warrant was obtained prior to the surveillance.

State v. Fulcher, 2024-Ohio-1609 (2d. Dist.). Marijuana plants being grown outside, in an unsecured area, and were visible by normal unaided vision in a public space, i.e., airspace were in violation of R.C. 3780.(A)(1)(b) which provides home grown marijuana may not be visible by normal unaided vision from a public space.

Air surveillance 500 feet over the defendant's property was not a Fourth Amendment violation.

State v. Little, 2009-Ohio 4003, 2d. Dist, No. 2008 CA 18, 183 Ohio App. 3d 680. Search warrant based on information obtained from unlawful aerial surveillance was invalid. In this case the helicopter initially flew about 400 hundred feet above the

defendants' property, but once the suspected marijuana was spotted, the helicopter descended to about 100 feet above the property. The defendants' property was located within five miles of the Dayton Airport. The police did not comply with FAA regulations to inform the air traffic control (ATC) intention to fly in that area, as well as maintain contact with the ATC while flying in the restricted airspace. Based on the failure to comply with FAA regulations, the court found the police officer's observations took place from an unlawful vantage point.

XIX. Disposition of property.[39]

Criminal Rule 41(D) provides that property seized as evidence shall be kept by the court that issued the warrant or the law enforcement agency that executed the warrant. *See also,* R.C. 2933.26 & R.C. 2933.27. Criminal Rule 12 (G) provides for the return of tangible evidence if a motion to suppress is granted.

R.C. 2981.03 sets out the procedure for return of property unlawfully seized. If the defendant makes the motion after the complaint, indictment or information is filed, it treated as a motion to suppress. R.C. 2981.04(A) (4). R.C. 2981.11(A) requires the law enforcement agency that seized the property by a search warrant to be kept safely until it is no longer needed as evidence or to be held for some other lawful purpose.

State v. Coleman, 8th. Dist. Cuyahoga, No. 91058, 2009-Ohio-1611. The issue of forfeiture of property seized by the execution of a search warrant is governed by R. C. Chapter 2981 and notice of the forfeiture must be given to the defendant in the complaint, indictment or information.

State v. Thompson, 2nd. Dist. Montgomery, No. 27989, 2018-Ohio-4690. The trial court properly denied the defendant's post trial motion for return of cell phone seized by a search warrant. Even though the prosecutor had not filed forfeiture proceeding under R.C. 2981, the court found that the property might have future evidentiary value due to the defendant's pending appeals.

State v. Humphrey, 2024-Ohio-5510 (2d. Dist.). The defendant was not entitled to the return of cash seized by the police by a search warrant when the defendant's conviction was pending on appeal. R.C. 2981.11(A)(1) permits the law enforcement agency to keep the property seized under warrant and held as evidence until it is no longer needed for evidence or some other lawful purpose. Although this statute "is part of the law of forfeiture, it is applicable to any property seized in the execution of a search warrant and held prior to its final disposition." *State v. Patton*, 2014-Ohio-3000 (2d Dist.), quoting *State v. Bates*, 2012-Ohio-1397 (6th Dist.).

[39] R.C. 2333.81 governs the retention and disposition of electronic recordings during custodial interrogation and R.C. 2333.82 governs retention and disposition of biological evidence.

State v. Martre, 6th. Dist. Lucas, No. L-22-1199, 2022-Ohio-639. Three methods for a defendant to seek return of property seized in the execution of a search warrant include:

1) A civil replevin action,
2) A motion within an existing forfeiture proceeding, or
3) A post dismissal or post conviction motion under R.C. 2981.03(A)(4) or R.C. 2981.11(A)(1).

A defendant is not permitted return of property containing contraband. R.C. 2981.13. In this case the defendant's cell phone and memory card contained child pornography, which were properly disposed of by the police. R.C. 2981.12.

State v. Pitts, 6th. Dist. Lucas, No. L-18-1242, 2020-Ohio-2655. Items seized with a search warrant may not be returned to the defendant if the items are to be used as evidence or subject to forfeiture at the conclusion of the case.

State v. Moreno, 2nd. Dist. Miami, No. 2016-CA-9, 2017-Ohio-479. R.C. 2981.03 gives standing to a person with an interest in the property to seek conditional release of the property seized by a search warrant. In order to prevail on the motion for release of the property, the movant must show the property:

1) is not contraband,
2) will not be used as evidence in a pending case,
3) will not be used as evidence in another case, and
4) the seizure was invalid.
   A) search warrant invalid.
   B) property was beyond the scope of the search warrant.

State ex rel. Matre v. Reed, 2024-Ohio-1624. A post judgment order to return non contraband property to the defendant is not a post-trial suppression order or a basis to vacate the conviction. A motion for return of property filed under R.C. 2981.03(A)(4) after the indictment, information, or complaint shall be treated as a motion to suppress.

State v. Moore, 8th. Dist. Cuyahoga, No. 92829, 2010-Ohio-3305. A pretrial motion for return of property based on a claim of illegal seizure is to be treated as a motion to suppress. A plea of no contest preserves for appeal the issue of return of property. In this case the motion for return of property was part of a motion to suppress. The trial court properly denied the motion to return property (cash) as evidence of a criminal tool to facilitate sale of drugs.

State v. Coleman, 8th. Dist. Cuyahoga, No. 91058, 2009-Ohio-1611. Although the defendant was not entitled to return of property after motion to suppress was overruled, the prosecution still had the burden of proving the property was subject to forfeiture. In this case indictment did not contain specification for forfeiture of property.

Glass v. Del. Cnty. Sheriff's Office, 2024-Ohio-1301 (5th. Dist.). The owner of property is not entitled to immediate possession of the property by replevin action when the property was seized by law enforcement through a search warrant during a criminal

investigation. R.C. 2981.11(A)(1) allows a law enforcement agency to possess and retain custody of property lawfully seized pursuant to a search warrant as part of a criminal investigation. Similarly, Criminal Rule 41(D) provides the seized property shall be "kept for use as evidence by the court which issued the warrant or by the law enforcement agency."

Miller v. Ohio State Highway Patrol, 12th. Dist. Fayette, No. CA2019-08-017, 2020-Ohio-3231. The common pleas court did not have jurisdiction to order the return of money seized by a state trooper after the money had been turned over to the DEA. R.C. 2981.14 permits the transfer of funds in excess of $100,000 to federal law enforcement, which applied in this case of the amount of $284,000. (Note: this was a warrantless search from a traffic stop.

State *v. Kolle,* 4th. Dist. Pickaway, No. 221CA8, 2022-Ohio-4322. Although Criminal Rule 41(D)(1) requires evidence seized from a search warrant to be kept by the court or law enforcement officer, it does not require the state to present the property seized at trial or preclude the state from resenting a photograph instead of the property itself. Relying on Evidence Rule 1003. The evidence in this case was a photograph of the money seized along with illegal drugs.

Brown v. Cincinnati, 1st. Dist. Hamilton, No. C-200031, 2020-Ohio-5418. This case involved claims for replevin and conversion to recover property seized by police after the defendant's acquittal of domestic terrorism charges. The summary judgment in the trial court on the plaintiff's claim for replevin was reversed as immunity under R.C. 2744.02 is limited to monetary damages and does not prevent a judgment for replevin. Regarding the claim for conversion, the court found that executing a search warrant was a governmental function and therefore fell within the scope of immunity. In this case the denial of summary judgment for the city on the claim for conversion for the property listed in the search warrant was reversed, but affirmed on the plaintiff's conversion claim for property alleged to have been seized by the police that was not listed in the return.

State v. Owens, 4th. Dist. Athens, No. 99CA34, (2000). The defendant's motion for return of fourteen beer kegs, two beer taps and other property after motion to suppress was granted was not a separate lawsuit against the Ohio Dept. of Liquor Control, but part of the criminal proceedings in the municipal court. Thus, the statute conferring exclusive jurisdiction on Franklin County Common Pleas Court for lawsuits against Ohio Dept. of Liquor Control was not applicable. Criminal Rule 12(F), providing for return of property, did not authorize the trial court to assess monetary damages due to loss of property.

State ex rel. Go Go Girls Cabaret, inc., 187 Ohio App.3d 356, 7th. Dist. 2010-Ohio-870, holding that the judge in the criminal case for which the search warrant was issued had jurisdiction to determine release of any property seized and could not be circumvented by a separate replevin action.

IMPACT OF S.B. 288, effective 4/4/2023.

State v. Campbell, 170 Ohio St.3d 278, 2022-Ohio-3626. Although a probation officer had authority to conduct a search under R.C. 2951.02(A), the authority was limited to those situations when the probation officer has reasonable grounds to believe the probationer is violating either the law or the terms of probation. While a probation officer does not have the authority to search a cell phone without a reasonable cause to believe, a violation of a state statute is not grounds for suppression under the Fourth Amendment.

Note: R.C. 2951.02(A) (misdemeanor) and 2951.02(B)(2) (felony), effective 4/4/2023, expands a probation officer's authority to search a felony offender without any reasonable basis for probation violation or criminal activity if the court requires as a condition of probation that the defendant consents to a search and the defendant agrees to the terms of probation. The statutory amendment effectively overrules the holding in *State v. Campbell*.

Hands-free offense cell phone search or seizure restrictions. R.C. 4511.204(G).

On stop for hands-free violation, a law enforcement officer

1) Must inform the driver of the right to decline search of device.
2) Shall not
    a. access the device without a warrant unless the operator voluntarily and unequivocally gives consent for the officer to access the device,
    b. confiscate the device while awaiting a warrant to access the device, or
    c. obtain consent to access the device through coercion or any other improper means.

Issues involving consent.

State v. Hale, 3rd. Dist. Mercer, No. 10-22-01, 2023-Ohio-980. Regarding whether a defendant voluntarily consented to a blood draw, the implied consent sanction for refusing to submit to the blood draw does not apply until the defendant is placed under arrest. Threatening or informing the defendant that the defendant would lose his driver's license for not submitting to the blood draw was coercive and undermined the validity of the consent given (Cases cited).

Regarding a comment by the police officer about a search warrant if consent is not given, the courts have drawn a distinction between telling the defendant the officer will seek a search warrant and telling the defendant a search warrant will be obtained. "[a]n officer's threat to obtain a warrant may invalidate the suspect's eventual consent if the officers lack the probable cause necessary for a search warrant" (Citations omitted). The phrasing of the statement as a foregone conclusion undermines the defendant's consent unless there was probable cause for the warrant to be obtained.

State v. Fry, 4th. Dist. Jackson, No. 03CA26, 2004-Ohio-5747. Factors to be considered in determining whether consent is voluntarily given include:

1) the suspect's custodial status and the length of the detention;
2) whether consent was given in public or at a police station;
3) the presence of threats, promises, or coercive police procedures;
4) the words and conduct of the suspect;
5) the suspect's awareness of his right to refuse consent and his status as a "newcomer to the law"; and
6) the suspect's education and intelligence.

In *State v. Morris*, 2d. Dist. Clark, No. 2021-CA-31, 2022-Ohio-94, the court also considered 1) the extent and level of the defendant's cooperation, and
2). the defendant's belief that no incriminating evidence would be found.

Evidence

Hon. D. Chris Cook
Lorain County Common Pleas Court

Hon. Joy Malek Oldfield
Summit County Common Pleas Court

NEW JUDGE ORIENTATION I

DECEMBER 9, 2025

EVIDENCE & TRIAL ISSUES

NEW JUDGES ORIENTATION: PART I

SUPREME COURT *of* OHIO
JUDICIAL COLLEGE
December 9, 2025

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HYPO #1

EXPERT REPORT, MEDICAL RECORDS, OR BOTH

THE PLAINTIFF IN A MVA NEGLIGENCE CASE PRODUCED HIS MEDICAL RECORDS AND CALLED HIS ER DOC AS AN EXPERT. THE ER DOC ALSO PRODUCED AN "EXPERT REPORT," BUT THE REPORT DID NOT CONTAIN SOME INFORMATION THAT WAS IN THE MEDICAL RECORDS. DEFENDANT OBJECTS TO ANY TESTIMONY FROM THIS EXPERT BEYOND THE SCOPE OF THE REPORT.

HOW DO YOU RULE?

So here is the conundrum – Civ. R 26(B)(7)(c) requires an expert report to contain all of the information that the expert will testify about but Civ. R 26(B)(7)(d) provides for the use of a healthcare provider's medical records ". . . in lieu of an expert report . . ." As such, the question presented is thus: what happens when the proponent of expert testimony provides both an expert report and medical records from a healthcare provider where the expert report does not contain some information in the medical records?

Put another way, the Civil Rules contemplate the use of experts and their reports or the admission of a treating physician's records, but not both. So, does "in lieu" also mean "in addition to?"

HYPO #2

INTRODUCTION OF NON-PARTY VICTIM

IN A CIVIL MED-MAL PRACTICE CASE, THE PLAINTIFF WANTS TO INTRODUCE THE MINOR, NON-PARTY CHILD VICTIM TO THE JURY.

DO YOU ALLOW IT?

Pursuant to Evid. R. 611 and 614, a trial court has discretion to control the flow of the trial, including the questioning of witnesses, "in search for the truth." *State v. Rendon,* 8th Dist., 2009-Ohio-5966, ¶ 8.

The trial court has broad discretion in the admission of evidence, including expert testimony. *Knowlton v. Schultz,* 1st Dist., 2008-Ohio-3984, ¶ 27.

The trial court enjoys broad discretion regarding the admission or exclusion of evidence, and this court will not overturn the trial court's ruling absent an abuse of discretion and a showing of material prejudice. *Drew v. Marino,* 9th Dist., 2004-Ohio-1071, ¶ 8.

HYPO #3

DEMONSTRATIVE EVIDENCE

AT THE START OF A TRIAL, ONE OF THE PARTIES WANTS TO USE DEMONSTRATIVE EVIDENCE IN THEIR OPENING STATEMENT THAT THEY DO NOT INTEND ON INTRODUCING IN EVIDENCE AND DID NOT IDENTIFY IN DISCOVERY.

DO YOU ALLOW IT?

Demonstrative evidence is admissible if it satisfies the general standard of relevance set forth in Evid.R. 401, is not subject to exclusion pursuant to Evid.R. 403, and is substantially similar to the object or occurrence that it is intended to represent. *State v. Jones,* 2012-Ohio-5677, ¶ 82, citing *State v. LaMar,* 95 Ohio St. 3d 181, (2002).

It is within the trial court's discretion to determine whether demonstrative evidence is helpful or misleading to the trier of fact and the trial court's ruling is reviewed under an abuse-of-discretion standard on appeal. *Id.* citing *State v. Cowans,* 87 Ohio St. 3d 68, 77, (1999); *State v. Herring,* 94 Ohio St. 3d 246, 255, (2002); *Waechter v. Laser Spine Inst., LLC,* 8th Dist. 2023-Ohio-3715, at ¶ 47.

NOTE: Don't worry about citing criminal cases in civil matters (and vise-versa) if they support an evidentiary position.

HYPO #4

DOES A CRIMINAL DEFENDANT HAVE A "RIGHT" TO A BENCH TRIAL?

JOHNNY JAILHOUSE IS CHARGED WITH RAPE. HE WANTS TO WAIVE THE JURY AND HAVE YOU TRY THE CASE. THE STATE OBJECTS, AND YOU WOULD PREFER A JURY TRIAL.

HOW DO YOU RULE?

Pursuant to R.C. 2945.05 (and Crim. R. 23(C)), "the defendant may waive a trial by jury and be tried to the court without a jury."

The waiver must be 1) signed by the defendant; 2) have specific statutory language; 3) made in open court; 4) filed with the clerk; and can be withdrawn anytime before the trial's commencement."

State v. Cruz-Ramos, 2019-Ohio-779 (7th Dist.), ¶ 17.

DISCUSSION

The right to waive one's constitutional right to a jury trial under R.C. 2945.05, "is a statutory and non-constitutional right." *Id.* at ¶ 18.

NOTES:

1) You do not have to advise a defendant who pleads guilty that the guilty plea waives the right to a bench trial.

2) Even with a properly executed waiver, you must still find that the waiver was knowingly, intelligently, and voluntarily made, and can reject the waiver if not. So, have a dialogue *on the record* with the defendant prior to accepting the waiver.

3) Note in Federal Court, the government must consent to a jury waiver! Fed. R. Crim. 23(a)(3).

HYPO #5

WHAT IF ONE CO-DEFENDANT WANTS A JURY TRIAL, AND THE OTHER CO-DEFENDANT WANTS A BENCH TRIAL?

YOU ARE ASSIGNED TWO FELONIOUS ASSAULT CASES WITH CO-DEFENDANTS. AT THE FIRST PRE-TRIAL, EVERYONE AGREES TO CONSOLIDATE THE TRIALS AND A TRIAL DATE, BUT CO-DEF #1 WANTS A JURY TRIAL AND CO-DEF #2 WANTS A BENCH TRIAL.

HOW DO YOU RULE?

DISCUSSION

THIS IS A TOUGH CALL.

1) YOU COULD "UNCONSOLIDATE" THE TRIALS. WHAT ARE THE DOWNSIDES TO THIS?

2) PROCEED WITH A JURY TRIAL, AS IT IS A CONSTITUTIONAL RIGHT, AND THE RIGHT TO A BENCH TRIAL IS MERELY STATUTORY.

3) BIFURCATE THE BENCH-TRIAL CO-DEF DETERMINATION OF GUILT/INNOCENCE AND YOU DECIDE. THIS IS NOT UNCOMMON: THINK CERTAIN SPECS (RVO, MDO), PRIOR CONVICTIONS FOR SENTENCING ENHANCEMENT (OVI, DV). ARE THERE OTHERS?

HYPO #6

WHEN, IF EVER, CAN THE COURT QUESTION A WITNESS AT TRIAL?

YOU ARE PRESIDING OVER THE JURY TRIAL OF QUICK DRAW DREW ON A MURDER CHARGE. DREW CLAIMS SELF DEFENSE, BUT AFTER HE TESTIFIES AND IS CROSSED, YOU HAVE SOME UNANSWERED QUESTIONS.

CAN YOU QUESTION HIM?

DOES IT CHANGE ANYTHING IF IT IS A BENCH TRIAL?

DISCUSSION

EVID. R. 614(B) "Interrogation by Court" The court may interrogate witnesses, in an impartial manner, whether called by itself or by a party.

JURY TRIAL

YOU CAN QUESTION HIM, BUT YOU MUST BE *VERY CAREFUL.*

You must not convey to a jury your impression as to the credibility or lack of credibility of a witness. *State v. Kittle,* 2017-Ohio-7853, (9th Dist.), ¶ 18.

BENCH TRIAL

YOU CAN QUESTION HIM, AND HAVE MUCH MORE LATITUDE

"When the matter is proceeding as a bench trial, the trial judge is afforded greater flexibility in questioning a witness because there is no risk of prejudicially influencing a jury." *Id.*

HYPO #7

CAN THE COURT HOLD AN OFFENDER IN CONTEMPT FOR FAILING TO PAY COURT-ORDERED RESTITUTION?

RONNY ROBBER PLEAD GUILTY TO STEELING $5,000.00 AT GUNPOINT FROM VINNY VICTIM. YOU SENTENCED RONNY TO PRISON AND ORDERED HIM TO PAY, BY AGREEMENT, $5,000.00 TO VINNY IN RESTITUTION. RONNY IS RELEASED FROM PRISON, IS DISCHARGED FROM SUPERVISION, BUT NEVER PAYS A DIME OF THE RESTITUTION. VINNY FILES A MOTION TO ENFORCE THE RESTITUTION ORDER AND HOLD RONNY IN CONTEMPT.

WHAT DO YOU DO?

DISCUSSION

FIRST, DO YOU HAVE JURISDICTION OVER RONNY?

I DON'T KNOW!!

SECOND, IS THERE ANY DIFFERENCE BETWEEN ENFORCEMENT OF COURT COSTS, FINES, AND RESTITUTION?

ABSOLUTELY!!

COURT COSTS ARE CIVIL IN NATURE – VERY LITTLE DISCRETION

FINES ARE CRIMINAL IN NATURE – A LITTLE MORE DISCRETION

BUT WHAT IS "RESTITUTION"? CIVIL OR CRIMINAL IN NATURE?

DISCUSSION

R.C. 2929.281 is the Restitution Statute, but it give us no guidance on this question.

The Supreme Court Bench Card: "Collection of Court Costs & Fines in Adult Trial Courts" gives guidance on just that – collection of *Court Costs* & *Fines*, but is no help with Restitution.

What about case law? *State v. Brandon,* 2008-Ohio-403, (2nd Dist.).

Trial court sentenced Brandon to 30-days jail after finding him in contempt for failing to pay restitution. Brandon appealed; the trial court reversed. But the reversal was based upon the fact that because the trial court found Brandon in *criminal* contempt, he should have been given due process rights, which the court failed to provide. Interestingly, the issue of whether the court could hold Brandon in contempt *ab initio* is not discussed. Does the court's silence give us any guidance?

NOTE: The Ohio Pub. Def. advises, w/out citation, that trial courts cannot use their contempt power to enforce restitution orders.

HYPO #8

JURISDICTION ON APPEAL

THE DEFENDANT IN A CIVIL CASE TOOK AN INTERLOCUTORY APPEAL IN YOUR DISTRICT APPELLATE COURT ON A DISCOVERY ISSUE. THE COURT OF APPEALS AFFIRMED YOUR DECISION AND REMANDED THE CASE.

YOU SET THE CASE FOR TRIAL IN 90 DAYS, BUT IN THE INTERIM, THE DEFENDANT FILES A NOTICE OF APPEAL IN THE OHIO SUPREME COURT SEEKING JURISDICTION.

CAN YOU PROCEED WITH YOUR TRIAL OR DO YOU LOSE JURISDICTION?

DISCUSSION

The general rule of law is that the trial court loses jurisdiction to take action in a cause after an appeal has been taken and decided * * * "When an appeal is taken from the district court the latter court is divested of jurisdiction, except to take action in aid of the appeal, until the case is remanded to it by the appellate court." *State ex rel. Special Prosecutors,* 55 Ohio St.2 94 (1978).

"It has been stated that the trial court does retain jurisdiction over issues not inconsistent with that of the appellate court to review, affirm, modify or reverse the appealed judgment, such as the collateral issues like contempt, appointment of a receiver and injunction." *Special Prosecutors, supra,* citing *In re Kurtzhalz,* 141 Ohio St. 432 (1943).

DOES THIS LINE OF CASES ONLY APPLY TO APPEALS OF RIGHT OR DISCRETIONARY APPEALS AS WELL?

DISCUSSION

APPEAL PENDING IN SUPREME COURT

The juvenile court's final disposition of a child while the child's adjudication is pending on appeal is necessarily inconsistent with the jurisdiction of the appellate court, regardless of whether the appeal is pending before the intermediate appellate court or a higher court. Accordingly, this Court concludes that the juvenile court lacked jurisdiction to proceed with the permanent custody hearing while Mother's perfected appeal to the Supreme Court of Ohio was pending.

In Re: C.T., 2024-Ohio-5083, ¶ 13.

HYPO #9

TERMINATION OF COUNSEL MID-TRIAL

YOU ARE IN THE MIDDLE OF A CRIMINAL JURY TRIAL. AT THE END OF DAY TWO, THE DEFENDANT ADVISES YOU THAT SHE WANTS TO FIRE HER ATTORNEY AND PROCEED *PRO SE*.

- HOW DO YOU HANDLE THIS REQUEST?
- DOES IT MATTER IF HER LAWYER IS PRIVATELY RETAINED?

DISCUSSION

. . . a defendant's unambiguous assertion of the right to self-representation triggers a trial court's duty to conduct the *Faretta* inquiries to establish that the defendant is knowingly and voluntarily waiving his constitutional right to counsel.

State v. Obermiller, 2016-Ohio-1594, at ¶ 29-30.

BUT WHAT IF, AS IN THIS CASE, THE DEFENDANT MAKES THIS REQUEST MID-TRIAL?

DISCUSSION

As for allowing a defendant to fire his counsel mid-trial, consider *Gordon*, a 10th District case on point:

"In his first assignment error, defendant contends that the trial court committed reversible error when it refused to permit him to discharge counsel and proceed pro se after the trial had begun."

"Defendant relies on *Faretta v. California,* 422 U.S. 806 (1975), in which the United States Supreme Court held that a criminal defendant has a constitutional right to self-representation. Where a trial court denies a request for self-representation "when properly invoked," the denial is reversible error per se, not subject to a harmless-error analysis. *E.g., State v. Vrabel,* 2003-Ohio-3193; see, also, *State v. Reed,* 74 Ohio St. 3d 534, (1996)."

DISCUSSION

However, the right is not absolute, and a request for self-representation must be timely and unequivocal * * * the trial court did not abuse its discretion and properly refused appellant's request to represent himself after voir dire had been completed and on the first day that evidence was to be presented); *State v. Cassano,* 2002-Ohio-3751, at ¶ 38-41, (noting that a request to exercise the right of self-representation must be timely and unequivocally asserted); *United States ex rel. Maldonado v. Denno,* (C.A.N.Y. 1965), 348 F. 2d 12, 15, (observing that, once a criminal trial has started with defendant represented by counsel, his right to discharge his lawyer and proceed pro se is sharply curtailed): *United States v. Martin,* (C.A.6, 1994), 25 F. 3d 293, 296, * * * upholding denial of request for self-representation where the request was made on the day of trial and it was the first time that defendant gave his attorney any notice of dissatisfaction

State v. Gordon, 10th Dist., 2004-Ohio-2644, at ¶ 27-31.

SO, DOES ANY OF THIS ANALYSIS CHANGE IF COUNSEL IS PRIVATELY RETAINED?

HYPO #10

WHEN TO ADMIT EXPERT REPORT

AN EXPERT TESTIFIES AT TRIAL FOR THE STATE AND IDENTIFIES HER REPORT. THE PROSECUTOR MOVES TO ADMIT THE REPORT INTO EVIDENCE THE DEFENDANT OBJECTS.

- SHOULD YOU ADMIT IT?
- DOES IT GO BACK TO THE JURY?
- WHAT ABOUT A POLICE REPORT?

DISCUSSION

An appellate court "will not reverse a trial court's ruling on evidentiary issues absent an abuse of discretion and proof of material prejudice." *State v. Thompson,* 3rd Dist. 2017-Ohio-792, ¶ 18, quoting *State v. McKelton,* 2016-Ohio-5735, ¶ 181. Thus, a trial court's decision to admit or exclude the report of an expert witness will not be disturbed in the absence of an abuse of discretion. *State v. Brown,* 11th Dist., 2016-A-0021, ¶ 34; *State v. Wilson,* 3rd Dist., 2022-Ohio-504, at ¶ 51.

DISCUSSION

SO WHAT ARE THE BEST REASONS TO KEEP IT OUT?

- EVID.R. 401 "RELEVANCE"
- EVID.R. 403 "PREJUDICE" Other witnesses' testimony doesn't go to jury
- EVID.R. 403 "CONFUSION" What if one party scored some points on cross and the expert's testimony differs from the report?
- EVID.R. 403 "CUMULATIVE" Do they really need the testimony *and* the report?
- EVID.R. 801 "HEARSAY" How do you cross-examine a report?

HYPO #11

HOW LONG CAN THE COURT RETAIN JURISDICTION OVER AN OFFENDER CHARGED WITH A REAGAN TOKES QUALIFYING OFFENSE, AND FOUND NGRI OR INCOMPETENT, AND NON-RESTORABLE?

WANDA IS CHARGED WITH AGGRAVATED BURGLARY FOR BREAKING INTO HER NEIGHBOR'S HOME AND THREATENING TO KILL HER. ULTIMATELY, SHE IS FOUND NGRI AND YOU DETERMINE THAT SHE IS A PERSON SUBJECT TO HOSPITALIZATION. R.C. 2945.40.

HOW LONG CAN YOU EXERCISE JURISDICTION OVER WANDA: 11 YEARS OR 16 ½ YEARS?

DISCUSSION

If you are in the 8th Dist., 11 years.

Any term of incarceration beyond 11 years can only be imposed by the ODRC as a result of misbehavior in prison. Wanda is not in prison, nor is she subject to the ODRC's jurisdiction.

State v. Young, 2021-Ohio-215 (8th Dist.), ¶ 22.

If you are in the 12th Dist., 16 ½ years.

The language at issue in the commitment statute is clear and unambiguous – it provides that the length of the commitment is limited to the maximum prison term the offender could have received if convicted. Here, 16 ½ years.

State v. Hopkins, 2023-Ohio-2816 (12th Dist.), ¶ 20.

DISCUSSION

ARE NOT THESE TYPE OF COMMITMENTS AFTER NGRI OR INCOMPETENCY, NON-RESTORABLE, CIVIL COMMITMENTS?

WHY SHOULD REAGAN TOKES BE CONSIDERED WHEN THE OFFENDER HAS NOT BEEN CONVICTED OF A CRIME?

IF YOU THINK THE 12TH DIST. GOT IT RIGHT, WHAT ABOUT THE PRESUMPTION OF RELEASE AFTER SERVING THE MINIMUM REAGAN TOKES SENTENCE?

WHILE IT IS TRUE THAT THE COMMITMENT STATUTE REFERENCES THE "MAXIMUM TERM" AVAILABLE FOR THE OFFENSE, IS NOT THE MAX TERM ONLY POSSIBLE BECAUSE OF ACTION TAKEN BY ODRC?

HYPO #12

IF AN INDICTMENT CONTAINS AN MDO SPEC, AND THE DEFENDANT IS CONVICTED OF IT, MUST YOU IMPOSE AN ADDITIONAL SENTENCE OF 3, 4, 5, 6, 7, OR 8 YEARS?

Dealing Don is charged with an F1 Trafficking in Cocaine offense and is designated a "major drug offender" in the body of the indictment and is also indicted with an MDO spec. (R.C. 2941.1410)

What is the minimum sentence you must impose on the predicate offense?

Upon a plea or conviction of the MDO spec, can you impose an additional term?

Does it change anything if the drug charged is fentanyl or a fentanyl-related compound?

DISCUSSION

THE MINIMUM SENTENCE

If the amount of the drug is = to or > 100 grams, the offender is a major drug offender and the court "shall impose as a mandatory prison term a maximum first degree felony mandatory prison term." R.C. 2925.03(C)(4)(g). 11-16 1/2 years

CAN YOU IMPOSE ADDITIONAL TIME FOR THE MDO SPEC?

NO. Not for cocaine.

WHAT IF THE DRUG IS FENTANYL OR FENTANYL-RELATED COMPOUND?

YES. For fentanyl or Fentanyl-related compounds only.

DISCUSSION

The plain language of R.C. 2941.1410(B) provides that a mandatory prison term may only be imposed for an MDO specification if the indictment specifies that the offender is a major drug offender *and* the drug involved is a fentanyl-related compound or mixture thereof.

State v. Gill, 2024-Ohio-2792 (1ST Dist.), ¶ 66.

Read together, R.C.2929.14 and 2941.1410 only authorize the imposition of an additional prison term for an MDO specification when the drug involved is a fentanyl-related compound or a mixture thereof.

Gill, at ¶ 68.

HYPO #13

CAN YOU "UNSEAL" A SEALED CRIMINAL RECORD?
WHAT IF THE RECORD WAS EXPUNGED?

Six months ago, you sealed the criminal record of Rehabd Rhonda's convictions for Theft F5 and OOB F5. Unbeknown to you, Rhonda sued the arresting officer and subdivision in federal court in a 1986 action. The defendant officer and subdivision move you to "unseal" the record to assist in their defense of the civil case.

Can you "unseal" the conviction?

Does it make any difference if Rhonda's convictions were expunged?

DISCUSSION

Can you unseal the case?

Yes. R.C. 2953.34 is titled "Effect of Sealing or *Expungement* Order." (Emphasis added.) It reads, in pertinent part,

> Inspection of the *sealed* records included in a sealing order may be made only by the following persons or for the following purposes.

The statute lists a number of situations in which the court may unseal a sealed record, and a law enforcement officer defending a civil suit is included.

DISCUSSION

Does it change anything if you *expunged* the record?

There is no caselaw on this issue, but I say yes. *Sealing* a criminal record and *expunging* one are different things. Sealed records exists, expunged records do not. So, if nothing exists after expungement, what is there to "inspect?"

As an initial matter, we note that the Ohio Revised Code distinguishes between the sealing of a record and the expungement of a record. "*Expungement often refers to the destruction, deletion, or erasure of records so they are no longer retrievable." State v. T.C.N.,* 2023-Ohio-3156 (8th Dist.), ¶ 9, citing *Capital One Bank N.A. v. Essex*, 2014-Ohio-4274 (2nd Dist.) ¶ 11, referencing former R.C. 2953.37(A)(1) and R.C. 2953.38(A)(1). "*Sealing, to the contrary, does not require the destruction of the records but limits access to the records to specific persons/entities."*

State v. K.W., 2024-Ohio-1778 (8th Dist.), ¶ 16, emphasis added.

HYPO #14

WHAT IS THE PROPER EVIDENTIARY STANDARD TO ALLOW PUNITIVE DAMAGES TO GO TO THE JURY?

KESTER SAMPLES DIED IN A NURSING HOME. THE JURY FOUND THE NURSING HOME NEGLIGENT AND AWARDED $250K IN DAMAGES.

THE ESTATE NOW SEEKS PUNITIVE DAMAGES IN A BIFURCATED TRIAL.

THERE IS EVIDENCE THAT THE NURSING HOME FAILED TO IDENTIFY THE SAME PRESSURE INJURY TWICE, FAILED TO PROVIDE A WOUND VAC ORDERED BY HIS DOCTOR, AND MAY HAVE ENGAGED IN FALSE CHARTING.

THERE IS ALSO EVIDENCE THAT KESTER WAS 85, HAD CO-MORBIDITY AILMENTS, THAT THE NURSING HOME PROVIDED NUMEROUS CARE PLANS, AND THAT PRESSURE WOUNDS ARE OFTEN UNAVOIDABLE.

DISCUSSION

SO, HOW DO YOU DECIDE WHETHER TO ALLOW THE PUNITIVE DAMAGES CLAIM TO GO TO THE JURY?

Punitive damages may only be awarded when "[t]he actions or omissions of [the] defendant **demonstrate malice** . . . The plaintiff must demonstrate that punitive damages are appropriate "by clear and convincing evidence[.] *Estate of Kester Samples v. LaGrange Nursing,* 2024-Ohio-4441 (9th Dist.), ¶ 12, emphasis added.

Pertinent herein, the Ninth District defines "actual malice" thus,

> "Actual malice," for purposes of punitive damages, consists of . . . "**a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm**." * * * This definition describes "a positive element of conscious wrongdoing . . . . This element has been termed conscious, deliberate or intentional. It requires the party to possess knowledge of the harm that might be caused by his behavior[,]" and "mere negligence" is not sufficient. *Id.* at ¶ 13, emphasis added.

DISCUSSION

Clarifying the issue further, the Ninth District continued,

. . . "actual malice requires consciousness of the near certainty (or otherwise stated 'great probability') that substantial harm will be caused by the tortious behavior. Any less callous mental state is insufficient to incur that level of societal outrage necessary to justify an award of punitive damages." * * * "Actual malice" for purposes of punitive damages, therefore, differs from recklessness with respect to the actor's awareness of the risk and the degree of harm that is likely to result. * * * On the other hand, "actual malice" is a different issue than whether proof of a "direct intent to injure" is required.

Id. at ¶ 17.

DISCUSSION

DO WE HAVE A NEW STANDARD OF REVIEW?

- BEYOND A REASONABLE DOUBT
- ACTUAL MALICE ("SUBSTANTIAL CERTAINTY")
- CLEAR & CONVINCING
- PREPONDERANCE
- PROBABLE CAUSE
- ARTICULATABLE SUSPICION

HYPO #15

TO PLEA OR NOT TO PLEA – THAT IS THE QUESTION

AT THE FINAL PRE-TRIAL IN AN F-4 DOMESTIC VIOLENCE CASE, BOTH THE PROSECUTOR AND DEFENDANT MOVE TO AMEND THE INDICTMENT TO AN M1 DUE TO THE NON-COOPERATION OF THE VICTIM

THE PROSECUTOR ADVISES THAT THE VICTIM HAS RECANTED AND DOES NOT WANT TO TESTIFY AND SHE APPROVES OF THE REDUCTION BUT WILL NOT BE IN COURT TO ALLOCUTE.

DISCUSSION

UPON INQUIRY BY YOU, THE PROSECUTOR CONCEDES THAT THERE IS STRONG EVIDENCE OF GUILT SUCH AS PHOTOGRAPHS, MEDICAL RECORDS, AND EXCITED UTTERANCES.

THERE HAVE ALSO BEEN SOME NEGATIVE MEDIA COVERAGE IN THE PAPERS AND NEWS ABOUT "SOFT" JUDGES REDUCING OR DISMISSING DOMESTIC VIOLENCE CASES.

WHAT DO YOU DO?

- ACCEPT THE AMENDMENT AND TAKE THE PLEA
- REJECT THE AMENDMENT (NOW WHAT?), OR
- SUGGEST A DISMISSAL W/OUT PREJUDICE?

DISCUSSION

CAN YOU REJECT THE PLEA?

Of Course.

It is well settled that the trial court enjoys wide discretion in deciding whether to accept or reject a negotiated plea agreement. *Santobello v. New York,* 404 U.S. 257 (1971); *Akron v. Ragsdale,* 61 Ohio App. 2d 107, 109-110 (9th Dist. 1978). Indeed, a defendant has no absolute right to have a guilty plea accepted. *Santobello,* at 262; *State v. Caldwell,* 2013-Ohio-5017, at ¶ 10.

BUT *SHOULD* YOU?

Therefore, while the trial court may reject a plea, in doing so, it "must provide a reasoned exercise of discretion in order to justify a departure from the course agreed on by the prosecution and defense." *United States v. Maddox,* 48 F. 3d 555, 556 (D.C. Cir. 1995); *see also Santobello,* 262; *Cadwell,* at ¶ 23.

WHAT ABOUT A DISMISSAL? Yep.

CRIM. R. 48(A) "The state may *by leave of court* . . . file an entry of dismissal . . .

DISCUSSION

AND

As noted above, a criminal defendant does not have an absolute right to have a proffered guilty plea accepted. The determination of whether to accept such a plea is within the trial court's discretion. *State v. Jackson,* 68 Ohio App. 2d 35, 37 (1980). That discretion is "to be exercised cautiously," however, and a voluntary and intelligent guilty plea should not be rejected "without good reason."

State v. Stafford, 9th Dist. Lorain No. 92CA005476, (1993).

DISCUSSION

FINAL THOUGHTS

DO THE SEPARATION OF POWERS DOCTRINE EMBODIED IN THE U.S. AND OHIO CONSTITUTIONS TRUMP A PROCEDURAL RULE AND CASE LAW?

WHERE IS THE LINE BETWEEN THE CONSCIENTIOUS JUDGE SEEKING TO DO JUSTICE IN HER COURT AND THE JUDGE WHO HAS BECOME THE "PROSECUTOR IN THE BLACK ROBE"?

DISCUSSION

WARNING – AVOID OVER INVOLVEMENT IN PRE-TRIALS

A judge's participation in the actual bargaining process presents a high potential for coercion. The defendant often views the judge as the final arbiter of his fate or at the very least the person in control of the important environment of the courtroom. He may be led to believe that this person considers him guilty of the crime without a chance of proving otherwise . . .

State v. Bryd, (1980), 63 Ohio St.2d 288, 292

Although this court strongly discourages judge participation in plea negotiations, we do not hold that such participation per se renders a plea invalid under the Ohio and United States Constitutions. Such participation, however, due to the judge's position in the criminal justice system presents a great potential for coerced guilty pleas and can easily compromise the impartial position a trial judge should assume.

Bryd, at 293.

HYPO #16

THREE-STRIKES AND YOU'RE OUT!

DOES OHIO HAVE A THREE-STRIKES & YOU'RE OUT LAW?

REPEAT RICK IS BEFORE THE COURT FOR SENTENCING. HE PLEAD LAST MONTH TO ONE COUNT OF AGG. ROBBERY (F1) WITH A RVO SPEC. THE PSI SHOWS THAT IN 2015 HE WAS CONVICTED OF AGG. BURGLARY (F1) AND IN 2018 HE WAS CONVICTED OF FELONIOUS ASSAULT (F2.)

- WHAT IS THE MINIMUM SENTENCE RICK CAN GET?
- DOES IT CHANGE ANYTHING IF THE AGG. BURGLARY CONVICTION WAS FROM 1998, NOT 2015?

DISCUSSION

WHAT IS THE MINIMUM SENTENCE RICK CAN GET?

11-16 ½ plus 1 year (RVO min.) for a mandatory sentence of 12-16 ½.

The RVO Spec R.C. 2941.149 is mandatory (if imposed) and is in the range of 1-10 years. R.C. 2929.14(B)(2)(a)(i).

DOES IT CHANGE ANYTHING IF THE AGG. BURGLARY WAS FROM 1998, NOT 2015?

Yes, no longer requires longest possible term plus consecutive RVO spec but is still mandatory. (The "lookback" is 20-years).

2929.14(B)(2)(b)

DISCUSSION

ARE THERE ANY WORK-AROUNDS?

- YOUR BEST BET IS ON A PLEA, TRY TO GET THE PROSECUTOR TO DISMISS THE RVO SPEC OR ONE OF THE F1/F2 PRIORS.

- IF THE PROSECUTOR WON'T AGREE TO THAT, MAYBE SHE WILL AMEND THE DATE OF THE FIRST PRIOR TO OUTSIDE THE 20-YEAR LOOK-BACK WINDOW.

- REMEMBER – ANY CONVICTION FOR AN F1/F2 w/a PRIOR F1/F2 CONVICTION MAKES THE SENTENCE ON THE NEW F1/F2 MANDATORY.

- R.C. 2929.13(F)(6)

DISCUSSION

2929.14(B)(2)(b)

The court shall impose on an offender the longest prison term authorized or required for the offense or, for offenses for which division (A)(1)(a) or (2)(a) of this section applies, the longest minimum prison term authorized or required for the offense, and shall impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 of the Revised Code that the offender is a repeat violent offender. This is the RVO spec.

(ii) The offender within the preceding twenty years has been convicted of or pleaded guilty to three or more offenses described in division (CC)(1) of section 2929.01 of the Revised Code, including all offenses described in that division of which the offender is convicted or to which the offender pleads guilty in the current prosecution and all offenses described in that division of which the offender previously has been convicted or to which the offender previously pleaded guilty, whether prosecuted together or separately.

2929.01(CC)

(CC) "Repeat violent offender" means a person about whom both of the following apply:

(1) The person is being sentenced for committing or for complicity in committing any of the following:

(a) Aggravated murder, murder, any felony of the first or second degree that is an offense of violence, or an attempt to commit any of these offenses if the attempt is a felony of the first or second degree;

DISCUSSION

Discretionary RVO time: if the court elects the maximum from range for underlying offense and LWOP is not imposed, it may add one to 10 more years if the court finds under R.C. 2929.14(B)(2)(a)(i-v) that the prison term for the underlying offense is:

• Inadequate to punish the offender and protect the public (see recidivism factors in [R.C. 2929.12(D) - (E)]); and

• Demeaning to seriousness of offense (see seriousness factors in [R.C. 2929.12(B-C)]).

• For F-2 offenses, the court also must find serious physical harm or attempt or threat to do so.

• Under R.C. 2929.14(B)(2)(b), the court must impose the maximum prison term authorized for the offense, plus an additional one to 10 years for RVO with three or more RVO offenses in 20 years, including current, if LWOP not required or imposed.

FROM: The Ohio Supreme Court – "Felony Sentencing Quick Reference Guide"

HYPO #17

WHEN MUST YOU IMPOSE A MANDATORY FINE IN A DRUG CASE? CAN YOU WAIVE IT? WHAT ABOUT A MANDATORY FINE IN AN OVI CASE?

You must impose a mandatory fine in all F1, F2, and F3 drug offenses (R.C. 2925), controlled substances cases (R.C. 3719), and pharmacist/dangerous drug cases (R.C. 4729), of one-half the maximum statutory amount for the level of the offense.

> For a first, second, or third degree felony violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code, the sentencing court shall impose upon the offender a mandatory fine of at least one-half of, but not more than, the maximum statutory fine amount authorized for the level of the offense . . .
>
> R.C. 2929.18(B)(1).

DISCUSSION

WAIVER OF MANDATORY FINE IN DRUG CASES

If the offender is indigent, the mandatory fine should not be imposed, verses imposed, then waived.

> If an offender alleges in an affidavit filed with the court prior to sentencing that the offender is indigent and unable to pay the mandatory fine and if the court determines the offender is an indigent person and is unable to pay the mandatory fine described in this division, the court shall not impose the mandatory fine upon the offender.
>
> R.C. 2929.18(B)(1).

DISCUSSION

WAIVER OF MANDATORY FINE IN OVI CASES

This is a close question, and like many issues (such as the 2929.13(F)(8) conundrum) it may depend on your appellate district.

2929.18(B)(3) mandates the imposition of mandatory fines in F4 and F3 OVI cases,

> For a fourth degree felony OVI offense and for a third degree felony OVI offense, the sentencing court shall impose upon the offender a mandatory fine in the amount specified in division (G)(1)(d) or (e) of section4511.19 of the Revised Code, whichever is applicable.

R.C. 4511.19(G)(1)(d)(iii) & (iii) require the imposition of a $1,350.00-$10,000.00 mandatory fine for both F4 and F5 OVI offenses.

DISCUSSION

So, in OVI cases, upon the filing of an Affidavit, should you impose the mandatory fine, or if imposed, waive it?

Notice that R.C. 2929.18(B)(3) *does not* have a waiver section like 2929.18(B)(1) does. Should we assume that by not including a waiver provision in (B)(3) like they did in (B)(1), the General Assembly did not want to give judges the option to waive (or not impose) mandatory fines in OVI cases? *Expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of another).

But, isn't it equally plausible that the fact that the section is *silent* as to waiver means that we are not precluded from waiving the fines? In other words, there is no ". . . the court *shall not* waive . . ."

DISCUSSION

And what about our duty to inquire into a defendant's ability to pay a fine?

A court that imposes a financial sanction upon an offender may hold a hearing if necessary to determine whether the offender is able to pay the sanction or is likely in the future to be able to pay it. R.C. 2929.18(E).

If we can't consider waiving a mandatory fine in an OVI case, what is the point of this section? Is it superfluous? Is it surplusage?

As noted, some districts have said NO to waiving mandatory OVI fines, to wit:

2nd *State v. Kirchgessner,* 2nd Dist. Miami No. 2022-CA-1, 2022-Ohio-3499
8th *State v. Kelley,* 8th Dist. Cuyahoga No. 97389, 2012-Ohio-2309
10th *State v. Small,* 10th Dist. Franklin No. 14AP-659, 2015-Ohio-3640.

Since I am from the 9th, and there is no Supreme Court case on point I can find, I routinely waive mandatory fines in OVI cases.

HYPO #18

THE RIGHT TO APPELLATE COUNSEL POST-GUILTY PLEA

IN ALL CASES, IS A CRIMINAL DEFENDANT WHO PLEADS GUILTY ENTITLED TO THE APPOINTMENT OF APPELLATE COUNSEL AT THE STATE'S EXPENSE IN ORDER TO PURSUE A DIRECT APPEAL?

GUILTY GLEN PLEADS TO AN F3 TRAFFICKING CHARGE. HE IS SENTENCED TO ONE-YEAR IN PRISON. SOMETIME AFTER BEING SENTENCED, HE FILES A *PRO SE* MOTION FOR THE APPOINTMENT OF APPELLATE COUNSEL.

MUST YOU APPOINT HIM AN ATTORNEY?

WHAT IF GLEN'S SENTENCE WAS AN AGREED SENTENCE?

DOES IT MATTER *WHEN* HIS REQUEST IS MADE (WITHIN THE APPEAL TIME OR NOT) – SEE: *State v. Diamond,* 2023-Ohio-40 (9th Dist.)

DISCUSSION

First, we must distinguish between convictions resulting from 1) A trial (jury or bench); 2) A plea of no-contest; and 3) A plea of guilty (including an *Alford* plea). As will be discussed below, these distinctions matter greatly.

So where do we begin?

How about Crim. R. 44. It reads as follows,

> Assignment of Counsel. Counsel in serious offenses
>
> Where a defendant charged with a serious offense is unable to obtain counsel, counsel shall be assigned to represent the defendant at every stage of the proceedings from their initial appearance before a court through appeal as of right, unless the defendant, after being fully advised of their right to assigned counsel, knowingly, intelligently, and voluntarily waives their right to counsel.

DISCUSSION

But, what is "an appeal of right?"

So, back to our starting point. The *nature* of the conviction matters.

CONVICTIONS RESULTING FROM TRIAL

Let's look at Crim. R. 32(B) – Sentence; Notification of Right to Appeal. It reads, in part:

(B) Notification of right to appeal.

(1) After imposing sentence in a serious offense that has gone to trial, the court shall advise the defendant that the defendant has a right to appeal the conviction.
***

(3) If a right to appeal or a right *to seek leave* to appeal applies under division (B)(1) or (B)(2) of this rule, the court also shall advise the defendant of all of the following:

DISCUSSION

(a) That if the defendant is unable to pay the cost of an appeal, the defendant has the right to appeal without payment;

(b) That if the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost;

So, we know that where a defendant has "gone to trial," he has a *right* to "appeal the conviction." Crim. R. 32(B)(1). And, if he has a right to appeal, he also has the right to the appointment of counsel "without cost." Crim. R. 32(B)(3)(b).

But what else do we now know? That in some situations, a defendant must "seek leave" to appeal which clearly implies, that at least in certain circumstances, the court has discretion.

DISCUSSION

Ok, so a defendant convicted after trial has a right to the appointment of counsel at the state's expense in order to pursue a direct appeal because it is an appeal "of right."

What about a conviction resulting from a no-contest plea?

Crim. R. 32(B)(2) & 44(A) help a bit, but not much.

Crim. R. 12(I) is helpful

> Effect of plea of no contest
>
> > The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence.

DISCUSSION

In *State v. Beasley,* however, the Ohio Supreme Court observed,

> A plea of no contest, however, does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a motion to suppress evidence. Crim R. 12(I). A valid guilty plea by a counseled defendant, however, generally waives the right to appeal all prior non-jurisdictional defects, including the denial of a motion to suppress.

State v. Beasley, 152 Ohio St.3d 470, 2018-Ohio-16, @ ¶ 15.

In the matter of *State v. Hendrix,* 9TH Dist., 2024-Ohio-5048, ¶ 9-12, the Ninth District discussed when a plea of no-contest preserves issues for appeal, and compared them to motions *in limine* (not preserved) and motions to suppress (preserved). If there is a right to appeal, that is, the issue is preserved for appeal, then the Defendant has the right to the appointment of counsel.

DISCUSSION

CONVICTIONS RESULTING FROM A GUILTY (OR ALFORD) PLEA

Now we (finally) get to the question at hand.

Does a defendant convicted of a serious offense have a *right* to the appointment of appellate counsel at the state's expense in order to pursue a direct (or delayed) appeal?

DISCUSSION

THE *ALFORD* PLEA

The Ninth District Court of Appeals released a very recent decision that confirms that an *Alford* plea is, for all intent and purpose, a guilty plea and as such, waives most appellate rights.

The United States Supreme Court has recognized that "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *North Carolina v. Alford*, 400 U.S. 25, 37 (1970). An *Alford* plea "is merely a species of a guilty plea," however, and it does not preserve the right to appeal. *State v. Carter*, 124 Ohio App.3d 423, 429 (2d Dist. 1997). See also *State v. Snow Veley*, 2023-Ohio-4682, ¶ 9-10 (6th Dist.) (noting that an Alford plea does not preserve the right to appeal the denial of a motion to suppress). When a defendant is incorrectly informed that pleading guilty preserves the right to appeal, the plea is not entered knowingly, voluntarily, and intelligently. State v. Engle, 74 Ohio St.3d 525, 528 (1996).

So, for purposes of evaluating whether or not a defendant is entitled to the appointment of appellate counsel, we treat a plea of guilty and an *Alford* plea the same.

DISCUSSION

The Revised Code sheds light on the issue of what is "an appeal of right."

R.C. 2953.08 – Appeal as Matter of Right; Grounds

In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:

- Max sentence;
- Prison term for 4th or 5th degree felony;
- Person plead guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense and was adjudicated a sexually violent predator in relation to that offense, and was sentenced pursuant to R.C. 2971.03(A)(3);
- Sentence is contrary to law;
- Court imposes full 10-years on RVO Spec.

DISCUSSION

Additional grounds where a defendant can appeal as a matter of right:

> (C)(1) Consecutive sentences imposed pursuant to R.C. 2929.14(C)(3) that exceed the maximum definite prison term allowed by division (A) of that section for the most serious offense.
>
> (C)(2) A defendant may seek leave to appeal an additional sentence imposed pursuant to R.C. 2929.14(B)(2)(a) or (b) if the additional sentence is for a definite prison term that is longer than five years.

However,

> (D)(1) A sentence imposed upon a defendant is not subject to review under this section if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge.

DISCUSSION

CONCLUSION

We can say for sure that a defendant convicted *after trial* has the right to the appointment of appellate counsel, because he has an appeal of right.

We can also say for sure that a defendant convicted after a *no contest plea* also has the right to the appointment of appellate counsel because Crim.R. 12(I) implies such and *Beasley* mandates it.

As for defendants convicted after a guilty (or Alford) plea, it depends!

If the defendant has an "appeal of right," he also has the right to the appointment of counsel. And, the court must advise a defendant of the right to appeal, or the right to seek leave to appeal, "where applicable." Crim.R. 32(B)(2).

DISCUSSION

So, when does such a defendant have an appeal of right? When the Criminal Rules, the Revised Code, or case law, says so.

And when is an appeal of right "applicable?" After a conviction at trial, after a plea of no-contest, or when one (or more) of the R.C. 2953.08(A) factors are met, and section (D)(1) is inapplicable. It also arises where a defendant wishes to raise an ineffective assistance of counsel or jurisdictional argument.

Finally, what about a defendant who pleads guilty to a serious offense, is convicted, and thereafter requests the appointment of appellate counsel without ever satisfying R.C. 2953.08 or raising an ineffective assistance or jurisdictional argument?

HAVE A HEARING – USE YOUR DISCRETION

DISCUSSION

FINAL NOTES:

WHAT IF THE STATE APPEALS?

If the state appeals, an indigent criminal defendant has the right to the appointment of appellate counsel at the state's expense.

In any proceeding brought pursuant to division (A) of this section, the court, in accordance with Chapter 120. of the Revised Code, shall appoint the county public defender, joint county public defender, or other counsel to represent any person who is indigent, is not represented by counsel, and does not waive the person's right to counsel.

R.C. 2945.67(B).

HYPO #19

PRO SE (SELF-REPRESENTED) LITIGANTS – TO HELP OR NOT TO HELP

HOW MUCH IT TOO MUCH WHEN YOU HAVE A *PRO SE* – SELF-REPRESENTED LITIGANT?

THE OLD WAY

> We have repeatedly declared that "pro se litigants * * * must follow the same procedures as litigants represented by counsel." *** * *** " 'It is well established that *pro se* litigants are presumed to have knowledge of the law and legal procedures and that they are held to the same standard as litigants who are represented by counsel.' "

State ex rel. Neil v. French, 2018-Ohio-2692, ¶ 10.

DISCUSSION

BUT THE SAME CASE OBSERVES . . .

> Neil is correct that the state's appellate courts sometimes express a willingness to deviate from this principle. * * * ("Because we ordinarily prefer to review a case on its merits rather than dismiss the action due to procedural technicalities, we generally afford considerable lenience to pro se litigants"); * * * (a "court may afford a pro se litigant some leeway by generously construing his filings"). But that leeway manifests in limited ways: attempting to address a pro se litigant's arguments on the merits when they are indecipherable * * * or liberally construing the allegations in a pro se prisoner complaint as stating the elements of a claim . . .

Id. at ¶ 11.

DISCUSSION

THE NEW WAY

THE CODE OF JUDICIAL CONDUCT IS INSTRUCTIVE

> To ensure self-represented litigants the opportunity to have their matters fairly heard, a judge may make reasonable accommodations to a self-represented litigant consistent with the law. See also Rule 2.6, Comment [1A].

OCJC R.2.2[4]

DISCUSSION

The rapid growth in litigation involving self-represented litigants and increasing awareness of the significance of the role of the courts in promoting access to justice have led to additional flexibility by judges and other court officials in order to facilitate a self-represented litigant's ability to be heard. By way of illustration, individual judges have found the following affirmative, nonprejudicial steps helpful in this regard: (1) providing brief information about the proceeding and evidentiary and foundational requirements; (2) modifying the traditional order of taking evidence; (3) refraining from using legal jargon; (4) explaining the basis for a ruling; and (5) making referrals to any resources available to assist the litigant in the preparation of the case.

Comment [1A] to ORJC 2.6

DISCUSSION

THE CODE OF JUDICIAL CONDUCT IS ALSO INSTRUCTIVE

The rapid growth in litigation involving self-represented litigants and increasing awareness of the significance of the role of the courts in promoting access to justice have led to additional flexibility by judges and other court officials in order to facilitate a self-represented litigant's ability to be heard. By way of illustration, individual judges have found the following affirmative, nonprejudicial steps helpful in this regard: (1) providing brief information about the proceeding and evidentiary and foundational requirements; (2) modifying the traditional order of taking evidence; (3) refraining from using legal jargon; (4) explaining the basis for a ruling; and (5) making referrals to any resources available to assist the litigant in the preparation of the case.

Comment [1A] to ORJC 2.6

HYPO #20

SOVEREIGN CITIZENS – BE FIRM BUT RESPECTFUL

WHO/WHAT ARE THEY

The sovereign citizen movement is a decentralized, anti-government extremist ideology whose adherents believe that they are separate or "sovereign" from the jurisdiction of federal, state, and local governments and thus not bound by U.S. law. The FBI classifies sovereign citizen extremists as a domestic terrorist threat.

BELIEFS

Illegitimate Government: The central belief is that the original, lawful government of the U.S., established under common law, was secretly replaced by an illegitimate, de facto "corporate" government, often linked to the U.S. abandoning the gold standard in the 1930s.

Opting Out: Followers believe that by filing specific pseudo-legal documents or using certain phrases (e.g., "I do not consent"), they can "opt out" of this alleged corporate contract and regain their personal "sovereignty".

DISCUSSION

"Strawman" Theory: A prevalent theory posits that each person has two identities: a flesh-and-blood person and a government-created legal entity or "strawman" (often noted by an all-caps name on official documents). They believe only the "strawman" is subject to government laws and debts, and they attempt to separate themselves from this corporate identity to access secret government-held bank accounts (a claim the IRS calls "pure fantasy").

Rejection of Authority: Adherents reject most forms of government authority, including paying taxes, having driver's licenses, vehicle registration, and other standard forms of identification. They often declare themselves "travelers" rather than "drivers" to justify ignoring traffic laws.

Common Law Courts: Some members create their own "shadow governments" or "common law courts" and issue their own fraudulent documents, such as license plates or passports.

DISCUSSION

ACTIVITIES & TACTICS

Paper Terrorism: This is their most common tactic, involving the filing of numerous frivolous lawsuits, false liens against the property of public officials (judges, police, etc.), and other bogus legal documents to harass, intimidate, and retaliate against perceived enemies and clog the court system.

Scams and Fraud: They engage in various financial frauds, including tax evasion schemes, mortgage scams, and the use of fictitious financial instruments to pay off debts or make purchases.

DISCUSSION

Confrontations and Violence: Interactions with law enforcement, particularly during traffic stops or eviction attempts, can become confrontational and deadly, as they fundamentally deny police jurisdiction. They have been responsible for murders of police officers and other violent incidents.

Recruitment: The movement has grown during times of financial instability or social unrest and spreads its message through the internet, social media, and in jails and prisons. They have seen recent overlaps and recruitment from movements like QAnon and anti-vaccination groups

CONCLUSION

While the movement originated with white supremacist and anti-Semitic roots, it has evolved to attract people of various ethnic and racial backgrounds, including a significant number of African Americans who often affiliate with "Moorish" sovereign citizen groups.

DISCUSSION

A LOOK AT ONE CASE

Furr was a criminal defendant . . . In that proceeding, he filed a motion to dismiss the case against him based upon (1) his "reservation of rights" under the Uniform Commercial Code ("UCC") 1-308 and (2) an argument that the proceedings violated 18 U.S.C. 241 and 242 because they deprived him of his UCC rights. These arguments are characteristic of a "sovereign-citizen" defense. By invoking UCC 1-308, so-called sovereign citizens contend that they preserve their common law rights and exempt themselves from federal and state law.

Furr v. Ruehlman, Judge, 2023-Ohio-481, ¶ 2.

In this case, however, Furr's argument is not cognizable in mandamus. Ohio courts of appeals have routinely rejected as baseless these sorts of sovereign-citizen challenges to a trial court's jurisdiction in criminal cases.

Id. at ¶ 10.

Civil Practice and Procedure

Hon. D. Chris Cook
Lorain County Common Pleas Court

Hon. Joy Malek Oldfield
Summit County Common Pleas Court

Civil Law and Procedure

New Judge Orientation, 12/8/2025 12/11/2025

Adapted from the presentation of the Honorable Gene A. Zmuda of the Sixth District Court of Appeals

JOY MALEK OLDFIELD, JUDGE, SUMMIT COUNTY COMMON PLEAS COURT
PRESIDING JUDGE, TURNING POINT PROGRAM

D. CHRIS COOK, JUDGE, LORAIN COUNTY COMMON PLEAS COURT

Part I: Constitutional Basis for Courts

OHIO CONSTITUTION, ART. IV., SEC. 1

The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the Supreme Court as may from time to time be established by law.

Limits to Jurisdiction

JURISDICTIONAL PRIORITY RULE

Otherwise, valid jurisdiction preempted by earlier *commencement* in another court of concurrent and co-extensive jurisdiction.

- Do claims in both cases comprise part of the "whole issue" within the jurisdiction of the first court?
- "Whole issue" requires (1) substantially same parties and (2) ruling of second court may affect or interfere with resolution in first court.

State ex rel. Tri Eagle Fuels L.L.C. v. Dawon, 2018-Ohio-3054, 118 N.E.3d 304, ¶ 7 (8th Dist.)

Previously filed quiet title action will not bar an eviction action in municipal court. *See State ex rel. Brady v. Pianka,* 106 Ohio St.3d 147, 2005-Ohio-4105, 832 N.E.2d 1202.

A second eviction action, however, is barred. *Meyers v. Chiaverini,* 3d Dist. Henry No. 7-16-01, 2016-Ohio-3498.

Limits to Jurisdiction

JURISDICTIONAL PRIORITY RULE

- First to file is not determination, rather, first to commence by perfecting service.
- "It is a fundamental rule that, as between courts of concurrent and coextensive jurisdiction, the one whose power is first invoked by the institution of proper proceedings, and the service of the required process acquires the right to adjudicate upon the whole issue and to settle the rights of the parties to the exclusion of all other tribunals."

(Citation omitted) *State ex rel. Largent v. Fisher,* 43 Ohio St.3d 160, 540 N.E.2d 239 (1989).

Limits to Jurisdiction

VENUE

The court's authority to hear and decide a case is separate from proper venue, which pertains to the location in which the case should be heard.

Improper venue is remedied by **transfer, not dismissal.**

Fuller v. Fuller, 32 Ohio App.2d 303, 290 N.E.2d 852 (10th Dist.1972); *see also Hose v. Gatliff,* 9th Dist. Summit No. 21957, 2004-Ohio-4958 (Civ.R. 3 does not provide authority to dismiss for improper venue; "the trial court is only to transfer venue when the original venue is improper.").

Part II: Court Rules Authority and the Modern Courts Amendment

Modern Courts Amendment of 1968

- Eliminated common pleas review of municipal and county court judgments
- Vested plenary power with the supreme court for controlling the practice of law and overseeing conduct of the bar
- Imposed age restriction for running or judicial office (70)
- Upheld validity of local rules of court

Application to the Civil Rules

PROCEDURAL V. SUBSTANTIVE

- Pursuant to Civ.R. 1(A) and (C), if a conflict arises between Rule and Statute, the applicable Rule controls on procedural matters, with the Statute controlling on matters of substantive law.
- "Procedural" refers to the method of enforcing rights or obtaining redress.
- "Substantive" refers to the law creating, defining, or regulating the rights as well as those legally recognized rights.

Havel v. Villa St. Joseph, 131 Ohio St.3d 235, 2012-Ohio-552, 963 N.E.2d 1270.

Authority of a Court

"It has been firmly established that a trial court retains control over the disposition of its trial docket and the control falls within the sound discretion of the trial court." (denying writs of procedendo and mandamus where litigant believed trial court failed to timely act on remand of proceedings)

State ex rel. S.Y.C. v. Floyd, 8th Dist. Cuyahoga No. 109602, 2020-Ohio-5189, ¶ 11, citing *State ex rel. Charvat v. Frye,* 114 Ohio St.3d 76, 2007-Ohio-2882, 868 N.E.2d 270 (additional citation omitted.)

Authority of a Court

But see:

Sup.R. 40 (A)

(1) Each trial judge shall review, or cause to be reviewed, all cases assigned to the judge. Cases that have been on the docket for six months without any proceedings taken in the case, except cases awaiting trial assignment, shall be dismissed, after notice to counsel of record, for want of prosecution, unless good cause be shown to the contrary.

(2) All cases submitted for determination after a court trial shall be decided within ninety days from the date the case was submitted.

Authority of a Court, *continued*

But see:

Sup.R. 40 (A)

(3) All motions shall be ruled upon within one hundred twenty days from the date the motion was filed, except as otherwise noted on the report forms.

(4) All child support hearings involving an obligor or obligee called to active military service in the uniformed services, as defined in section 3119.77 of the Revised Code, shall be heard within thirty days from the date the court receives notice that the obligor or oblige has requested a hearing.

Mandamus or Procedendo?

A writ of procedendo or mandamus is appropriate where a respondent has delayed in proceeding to judgment. *State ex rel. AIY Properties, Inc. v. Scott*, 2023-Ohio-3484, ¶ 10 (8th Dist.)

A writ of procedendo is proper when a court has refused to enter judgment or has unnecessarily delayed proceeding to judgment.

Sup.R. 47(B) gives an aggrieved party a right to a writ of mandamus for a violation of Sup.R. 44 through 47:

A person aggrieved by the failure of a court or clerk of court to comply with the requirements of Sup.R. 44 through 47 may pursue an action in mandamus pursuant to Chapter 2731. of the Revised Code.

State ex rel. Culgan v. Collier, 2013-Ohio-1762, ¶ 7 and ¶ 9

Authority of a Court

SUBJECT MATTER AND PERSONAL JURISDICTION

There is no statute limiting personal jurisdiction. Apply due process jurisprudence in determining whether personal jurisdiction is proper.

Lack of subject matter jurisdiction renders a judgment void. But, contrary to subject matter jurisdiction, personal jurisdiction may be waived. See Civ. R. 12(B) and (H). A court obtains personal jurisdiction over a defendant by service of process, or by a defendant's voluntary appearance or actions. *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156.

Authority of a Court, *continued*

SUBJECT MATTER AND PERSONAL JURISDICTION

Status as "sovereign citizen" or "Moorish American" has no bearing on personal jurisdiction. *See City of Shaker Heights v. El-Bey,* 2017-Ohio-929, 86 N.E.3d 865 (8th Dist.) (courts reject sovereign citizen theories and consent is not necessary to exercise personal jurisdiction).

Once personal jurisdiction is waived, the court shouldn't sua sponte bring it up. See *D'Amore v. Mathews*, 2011-Ohio-2853, ¶ 34, 193 Ohio App. 3d 575, 580–81, citing *Snyder Computer Sys., Inc. v. Stives,* 175 Ohio App.3d 653, 2008-Ohio-1192 and *Weiss, Inc. v. Pascal,* Cuyahoga App. No. 82565, 2003-Ohio-5824, ¶ 7.

Authority of a Court

SUBJECT MATTER AND PERSONAL JURISDICTION

Important distinctions: "[a] request by a defendant to the trial court for leave to move or otherwise plead is not a motion or a responsive pleading contemplated by Civ. R. 7, and the obtaining of such order does not constitute waiver under Civ. R. 12(H) of any affirmative defenses, nor does it submit the defendant to the jurisdiction of the court." *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 156. Even consent entries stipulating to plead don't waive this defense. See *Shannon Village Homeowners' Assoc. v. Miller*, (10th Dist.), 2023-Ohio-1449.

Authority of a Court, *continued*

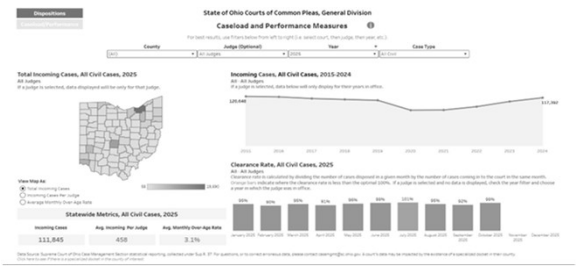
SUBJECT MATTER AND PERSONAL JURISDICTION

Pay attention to the answer: If defendant properly asserts the affirmative defense in an answer or responsive pleading, s/he can participate in litigation and move to dismiss on that basis right before trial. (***Parties who assert an affirmative defense * * * in their first responsive pleading do not waive that defense by actively participating in litigation of the case." *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 145, 2007-Ohio-3762 at ¶16.)

Even if in the answer, if defendant later files a motion to dismiss with some but not all of the 12(B) affirmative defenses, then the others are waived under 12(G). See *Stewart v. Forum Health*, (7th Dist) 190 Ohio App. 3d 484, 2010-Ohio-4855 ¶¶37-39.

Part III: Civil Case Management

Ohio Caseload Data 2025



DIFFERENTIAL CASE MANAGEMENT

- There are over 700 State Courts at all levels, resulting in potentially 700 different paths to disposition.
- Rapid technological advances, paired with an increasing generational disconnect among attorneys, resulting in communication gaps that impede the flow of discovery
- What is the Court's modern role in guiding the proceedings?
- Microsoft Power BI – check out Supreme Court data

DIFFERENTIAL CASE MANAGEMENT

(changes to the guidelines, Sup. R. 39, effective 1/1/2026)
Statistical Reporting Information and Forms » Supreme Court of Ohio

Subject Matter Jurisdiction	Case Type	Current Time Guideline	New Time Guideline
General Division	Administrative Appeal	100% in 9 months	95% in 9 months
General Division	Complex Litigation	100% in 36 months	95% in 36 months
General Division	Foreclosure	100% in 12 months	95% in 12 months
General Division	Other Civil	100% in 24 months	95% in 24 months
General Division	Other Torts	100% in 24 months	95% in 24 months
General Division	Product Liability	100% in 24 months	95% in 24 months
General Division	Professional Torts	100% in 24 months	95% in 24 months
General Division	Workers Compensation	100% in 12 months	95% in 12 months

DIFFERENTIAL CASE MANAGEMENT

SO WHAT DOES THAT EVEN MEAN?

Technique by the courts to tailor the case management process to the needs of the individual cases…paying attention to what kind of case you have in front of you.

DIFFERENTIAL CASE MANAGEMENT

HYPOTHETICAL

You have an initial case management conference on July 1, 2025. When do you set trial? Does it matter what kind of case it is?

During the pendency of the case, counsel for the plaintiff misses two status conferences in a row. Defense counsel tells you he intends to file a motion to dismiss. You set a status conference so we have a future date and he subsequently files. But before you rule, the plaintiff's counsel appears at the third status. He is apologetic, falls on the sword, explains his circumstances.

CASE MANAGEMENT

FED. R. CIV. P. 26(F) - (OHIO CIV. R 26(F)

- Newly adopted under the Ohio Civil Rules (2020)
- Conference of the Parties; Planning for Discovery
- Emphasizes parties' obligation to asses their claims/defenses and potential settlement, identify preservation issues, and cooperatively develop a discovery plan prior to meeting with the Court
- Differential case management can assist in eliminating any unfair gamesmanship and ensuring efficient and correct discovery practice

APPROPRIATE PARTICIPATION

- Days of proceeding without court participation in scheduling and discovery may be over?
  - Importance of an initial pretrial with the Court's knowledgeable participation in scheduling the case
  - Importance of identifying unique issues or defenses
- Benefits of early intervention in discovery disputes
  - Require parties to identify Electronically Stored Information pertinent to case at initial pretrial
  - Require parties to seek leave of court prior to filing any motion to compel/motion for protective order
  - Other benefits?

CASE MANAGEMENT

CIV.R. 16 STAFF NOTE 2020

- "Civ. R. 16 has been amended to bring the Ohio rule closer to the federal rule, while still allowing for Ohio courts to decide whether to hold a scheduling conference. Civ. R. 16(A) lists several purposes for why a scheduling conference may be held. In addition, the last paragraph of Civ. R. 16(A) provides that parties will attempt to agree on the schedules contemplated by Civ. R. 16, and courts will endeavor to respect the agreements of the parties. …

CASE MANAGEMENT, *continued*

CIV.R. 16 STAFF NOTE 2020

- Similar to the prior version of Civ. R. 16, Civ. R. 16(A) still provides that holding a scheduling conference is permissive, not mandatory. However, Civ. R. 16(B) requires that in all cases, except those set forth in Civ. R. 1(C), a scheduling order must be issued by the court. The purpose of this requirement is to promote greater consistency, predictability, and transparency for attorneys, parties, and unrepresented parties in courts across Ohio.

CASE MANAGEMENT

CIV.R. 16 STAFF NOTE 2020

- Civ. R. 16(B)(1) clarifies that a scheduling order must be issued after the court receives the parties' Civ. R. 26(F) report or after the court holds a scheduling conference. If no report is submitted or the court does not hold a scheduling conference, the court must issue the scheduling order sua sponte.
- Civ. R. 16(B)(2) specifies the timing requirements by which a scheduling order must be issued, based on the date that any defendant has been served with the complaint or that any defendant has responded to the complaint. This subsection does not require a court to wait for all defendants to be served with the complaint or respond to the complaint before entering a scheduling order.

CASE MANAGEMENT, *continued*

CIV.R. 16 STAFF NOTE 2020

- Civ. R. 16(B)(3) lists potential content that a court may include in a scheduling order.
- Civ. R. 16(C) describes a variety of items that a court may address at a scheduling conference, including a timetable to address deadlines for discovery and various disclosures, dispositive motions, and trial. Many of the items now listed in Civ. R. 16(C) were included in the prior version of Civ. R. 16.
- Civ. R. 16(E) and (F) are identical to these same subsections in the federal rule.

SCHEDULING ORDERS

HYPOTHETICAL

- Plaintiff corporation provides machinery to Defendant corporation under the terms of a contract. Defendant did not pay Plaintiff because it says the machinery does not operate as intended.
- Plaintiff files a complaint for breach of contract and unjust enrichment against Defendant corporation.
- Defendant files a detailed, 20-page Motion to Dismiss arguing that no payment obligation arose under the terms of the contract, that the machinery does not work as intended, and Plaintiff's unjust enrichment claim fails as a matter of law because of the existence of a breach of contract claim. Plaintiff responds in opposition to the Motion to Dismiss.

SCHEDULING ORDERS

HYPOTHETICAL (CONT'D)

- What do you do?
  - Rule on Motion to Dismiss?
  - Set first pretrial?
  - Schedule case management dates?

SCHEDULING ORDERS

- Determine whether an expedited schedule is desirable
- Provide separate discovery deadline pertinent to dispositive motions if appropriate
- Determine the deadline for all discovery, with limitations on fact and expert depositions as appropriate
- Identify any preliminary pre-discovery motion practice, and provide briefing schedule and requirements
- Provide a deadline for scheduling mediation and filing any dispositive motions

SCHEDULING ORDERS

- Address issues unique to discovery of Electronically Stored Information
  - Preservation
  - Cost-shifting
  - Format for production, and procedures to avoid unnecessary burden and expense
  - Protocol for production of metadata
  - Security measures necessary
- Establish protections for inadvertent disclosures
- Identify the need for protective orders as soon as practicable
- Require parties to email courtesy copies of all motions to the Court, and encourage email notice among the parties

Case Management Conference

You have a first pretrial scheduled via entry to the parties. One lawyer fails to appear.

What do you do?

Part IV: Injunctions

INJUNCTIONS

WHAT IS A TRO?

- Civil Rule 65 (formerly 2727.01 – 2727.15)
  - TRO
  - Preliminary Injunction
  - Permanent Injunction
- Equitable Relief

INJUNCTIONS

What is equitable relief?

- Remedy
- Order telling someone what to do or not to do
- Injunction
- Specific performance

INJUNCTIONS

What ISN'T equitable relief?

- Not a cause of action
- Not a declaratory judgment
- Not a stay
- Not an award for equitable monetary relief

INJUNCTIONS

When do WE grant a TRO?

(and what are OUR rules)

INJUNCTIONS

We can deny TRO without a hearing

See Civ. R. 65

Hohmann, Boukis & Curtis Co, LPA v. Brunn Law Firm Co., LPA., (8th Dist. 2000), 138 Ohio App.3d 693, 698-99

Ridenour v. Wilkinson, 10th Dist. No. 07AP-200, 2007-Ohio-5965, ¶49

In re Estate of Goerskey, (11th Dist. 2001), 2001 WL 824326

But see Johnson v. Morris, (4th Dist. 1995), 108 Ohio App.3d 343 (required to have a hearing before denying BUT harmless error bc later lost on SJ)

INJUNCTIONS

Why do we grant a TRO?

- Emergency
- Maintain the status quo
- Prevent immediate and irreparable harm

INJUNCTIONS

Defining the status quo…

- "The status quo of a situation may be, as in the instant case, the very thing which threatens immediate and irreparable injury." Kroger Co. v. Cleve/Lorain, Inc., 8th Dist. Cuyahoga No. 48369, 1985 WL 8600, *1.
- Has the status quo recently emerged as the prevailing situation? Id.

INJUNCTIONS

Defining immediate & irreparable injury…what it is and ISN'T

- Not redress for past harm
- Not meant to avoid potential monetary loss
- Depends on the facts and circumstances in your case

INJUNCTIONS

What can the trial court order?

- Enjoin a person from acting or interfering
- Restraining the sale or transfer of property
- Be careful about prior restraints on speech***

INJUNCTIONS

What are the requirements for an ex parte TRO?

- "may be granted without written or oral notice"
- "clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury"
- "attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim"

INJUNCTIONS

Immediate and irreparable injury

- Case specific – pay attention to the details

INJUNCTIONS

May be granted without written or oral notice

- Civ.R. 65(A) requires attorney to provide efforts s/he made for notice AND
- Identify why it should be granted WITHOUT notice
- If you do grant it, then (just like all ingredients in cooking) be mindful of the expiration date

INJUNCTIONS

What happens if there IS notice to adverse party?

- What does this mean?
- What is notice? Is it oral or written?
- By whom? Court or the complainant?

INJUNCTIONS

What happens if there is notice to adverse party, but no full hearing?

- Civ.R. 65(A) applies to TROs "granted without written or oral notice to the adverse party"
  - But do you keep the time limits?
  - At least one court has held that a TRO issued with notice is not subject to the time limits in Civ.R. 65(A). See Citicasters Co. v. Stop 26 Riverbend, Inc., 7th Dist. No. , 2002 WL 31163655

INJUNCTIONS

What happens if there is notice to adverse party and there is an opportunity for hearing?

- With notice AND a hearing?
- No longer ex parte restraining order
- You ain't making a TRO casserole anymore
- You ARE making a Preliminary Injunction soufflé
  - See Turoff v. Stefanac, 16 Ohio App.3d 227 (8th Dist.1984) (With notice and opportunity for hearing, the court can treat the Motion for Temporary Restraining Order as a Motion for Preliminary Injunction)

INJUNCTIONS

- An injunction lasts longer
  - Can issue injunction to maintain status quo until there can be a full trial. Bd. of Educ. Ironton City Schools v. Ohio Dept. of Educ., 4th Dist. Lawrence No. CA92-39, 1993 WL 256320, *2.

INJUNCTIONS

Disadvantages

- Court must hold the hearing
- What discovery is needed?
- Logistical issues

INJUNCTIONS

What does a preliminary injunction hearing look like?

INJUNCTIONS

Consolidating preliminary injunction & trial

- Before **or after** the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Civ.R. 65(B)(2)

INJUNCTIONS

What happens in case of appeal?

- Provisional remedy generally not subject to immediate appeal
  - See 2505.02(B)(4)
  - But see
    - In re Estate of Goerskey, (11th Dist. 2001), 2001 WL 824326 (is denial of TRO final and appealable)
    - M.R., a Cincinnati Police Officer v. Niesen, 167 Ohio St. 3d 404 (prior restraint of speech…)

Part V: Commencement of a Lawsuit

Initial Considerations:

- Subject Matter Jurisdiction
- Service

Subject Matter Jurisdiction

***ADAMS ROBINSON ENTS. V. ENVIROLOGIX CORP.*, 111 OHIO APP.3D 426, 430-431 (2D DIST.1996)**

"The subject matter jurisdiction of Ohio's courts is governed by the Ohio Constitution and state statutes. ***

The common pleas courts are constitutional courts of general jurisdiction. Ohio Constitution Art. IV, § 4. Notwithstanding, the Ohio Supreme Court has held that their jurisdiction is limited to those matters designated by statute. ***

The municipal courts are of statutory creation. Thus, their jurisdiction is likewise limited only to those matters statutorily delineated. ***"

Case Initiation and Intake

SUBJECT MATTER JURISDICTION

- Torts (Personal injury, Products Liability, Medical Malpractice, Legal Malpractice, Dental Malpractice, Wrongful Death, Business Torts)
- Breach of agreement (Breach of Contract, Breach of Lease, Breach of Warranty, Promissory Notes, Cognovit Notes)
- Declaratory Judgments
- Injunctions
- Money due
- Equitable causes of action (unjust enrichment, quantum meruit, promissory estoppel)
- Workers' Compensation
- Administrative Appeals

Case Initiation and Intake

MONETARY BASIS FOR JURISDICTION (COUNTIES WITH MUNICIPAL COURTS)

- The Court of common pleas has original jurisdiction in all civil cases in which the sum or matter in dispute exceeds the exclusive original jurisdiction of county courts and appellate jurisdiction from the decisions of boards of county commissioners. R.C. 2305.01.
- A municipal court shall have original jurisdiction only in those cases in which the amount claimed by any party, or the appraised value of the personal property sought to be recovered, does not exceed **fifteen thousand dollars**, except that this limit does not apply to the housing division or environmental division of a municipal court. R.C. 1901.17.

Case Initiation and Intake, *continue*

MONETARY BASIS FOR JURISDICTION (COUNTIES WITH MUNICIPAL COURTS)

- The court of common pleas may on its own motion transfer for trial any action in the court to any municipal court in the county having concurrent jurisdiction of the subject matter of, and the parties to, the action, if the amount sought by the plaintiff does not exceed **one thousand dollars** *and* if the judge or presiding judge of the municipal court concurs in the proposed transfer. R.C. 2305.01.

Case Initiation and Intake

MONETARY BASIS FOR JURISDICTION (COUNTIES WITH COUNTY COURTS)

- The Court of common pleas has original jurisdiction in all civil cases in which the sum or matter in dispute exceeds the *exclusive* original jurisdiction of county courts. R.C. 2305.01.
- Ohio county courts only have *exclusive* jurisdiction in civil actions for the recovery of sums not exceeding **$500** and original jurisdiction in cases in which the amount claimed does not exceed $15,000. R.C. 1907.03(A).
- If a counterclaim is filed in a civil action in a county court and the counterclaim exceeds fifteen thousand dollars, the county court shall certify the action to the court of common pleas.

Case Initiation and Intake

HYPOTHETICAL:

- You receive a case transferred from municipal or county court. Plaintiff's original complaint contained one claim for breach of contract in the amount of $10,000 arising under a services agreement. Plaintiff later amended the complaint with an additional damages claim for $10,000.

What do you do with the transferred case?

Case Initiation and Intake

TRANSFERS FROM MUNICIPAL COURT (AMOUNT AT CONTROVERSY IN EXCESS OF $15,000)

- "In the event that a counterclaim, cross-claim, or third-party claim exceeds the jurisdiction of the court, the court shall certify the proceedings in the case to the court of common pleas." Civ.R. 13(J).
- BUT Civ.R. 13(J) does not expressly permit certification on the basis of a complaint or amended complaint. Moreover, to read such permission into the rule would cause Civ.R. 13(J) to conflict with Civ.R. 12(H)(3). *State ex rel. Natl. Emp. Ben. Services, Inc. v. Court of Common Pleas of Cuyahoga Cnty.*, 49 Ohio St.3d 49, 50 (1990).
- Therefore, in hypothetical, common pleas court does not acquire jurisdiction.
- Civ.R. 12(H)(3) provides that a court shall dismiss an action if the court lacks subject matter jurisdiction.

Subject Matter Jurisdiction

***PATTON V. DIEMER*, 35 OHIO ST.3D 68, 70 (1988)**

[A] judgment rendered by a court lacking subject matter jurisdiction is void *ab initio*.

Subject Matter Jurisdiction

ADMINISTRATIVE APPEALS

- Board of Zoning Appeals
- Boards of Mental Health and Addiction Services
- Board of Developmental Disabilities

Subject Matter Jurisdiction

HYPOTHETICAL

You have been assigned an administrative appeal from a city agency. *** You can't find the record for your review.

What do you do?

Subject Matter Jurisdiction

R.C. 119.12(J)

- Within thirty days after receipt of a notice of appeal from an order in any case in which a hearing is required by sections 119.01 to 119.13 of the Revised Code, the agency shall prepare and certify to the court a complete record of the proceedings in the case. Failure of the agency to comply within the time allowed, upon motion, shall cause the court to enter a finding in favor of the **party adversely affected**. Additional time, however, may be granted by the court, not to exceed thirty days, when it is shown that the agency has made substantial effort to comply.

Subject Matter Jurisdiction

IS DISMISSAL REQUIRED UNDER R.C. 119.12(J)?

- Split of authority on whether "prejudice" is required prior to dismissal for failure to file a complete record.
- The statute simply says that when there is a failure to timely file a "complete record," the court shall, upon motion, "enter a finding in favor of the party adversely affected." R.C. 119.12(I). The statute doesn't distinguish "mere omissions" from more serious failures. And the "adversely affected" language applies universally to all failures to timely file a complete record. So, the statute either requires prejudice or it doesn't. There is no room for a middle ground. The judicially manufactured sometimes-prejudice-is-required, sometimes-it's-not approach cannot be reconciled with the statutory language.

Subject Matter Jurisdiction, *continued*

IS DISMISSAL REQUIRED UNDER R.C. 119.12(J)?

- We make clear today that **prejudice is always required**. The plain meaning of "party adversely affected" leaves no room for any other construction.
- *Goudy v. Tuscarawas Cnty. Pub. Def.*, 2022-Ohio-4121.

Service

CIV.R. 4

Upon the filing of the complaint the clerk shall forthwith issue a summons for service upon each defendant listed in the caption. Upon request of the plaintiff separate or additional summons shall issue at any time against any defendant.

Service

ADDITIONAL RULES

Civ.R. 4.1 & 4.6 – Methods of Service; Limits

Civ.R. 4.2 – Who May be Served

Civ.R. 4.3 & 4.5 – Out of State/Foreign Country Service

Civ.R. 4.4 – Service by Publication

Civ.R. 4.7 – Waiving Service

Service vs. Subject Matter Jurisdiction

Despite the failure to appear or respond, a court may consider whether exercise of subject matter jurisdiction is appropriate, sua sponte.

See Moore v. Franklin Cty. Children Servs.,2007-Ohio-4128 (10th Dist.)

"The issue of subject-matter jurisdiction involves 'a court's power to hear and decide a case on the merits and does not relate to the rights of the parties.'"

Part VI: FLOPs and Defaults

Service – Time to Respond

Civ. R. 12(A) – answer to complaint, cross-claim, or counterclaim within 28 days of service.

Civ. R. 12(B) – permits a motion raising certain defenses as responsive pleading.

R.C. 1925.02(B) – no provision for answer in small claims cases

R.C. 1923.061 – defense "may be asserted at trial"

Failure to commence within 6 months

- A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant, or upon an incorrectly named defendant whose name is later corrected pursuant to Civ.R. 15(C), or upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ.R. 15(D). Civ.R. 3(A).
- If a service of the summons and complaint is not made upon a defendant within six months after the filing of the complaint and the party on whose behalf such service was required **cannot show good cause why such service was not made within that period**, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This division shall not apply to out-of-state service pursuant to Rule 4.3 or to service in a foreign country pursuant to Rule 4.5. Civ.R. 4(E)

Failure to commence within 6 months

PLAINTIFF DOES NOT OBTAIN SERVICE WITHIN 6 MONTHS

- Can the Court *sua sponte* dismiss the case?
- *See Thomas v. Freeman*, 79 Ohio St.3d 221 (1997)
  - Affirmed dismissal under Civ.R. 4(E) after the following notice was issued:
  - "Case will be dismissed within 7 days of filing of this notice unless counsel can show cause as to why no activity has taken place in six months."
- What does your Court's notice look like?

Order issued 6 months after complaint filed and no service obtained. Does it comply?

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

CREDIT ACCEPTANCE CORPORATION — CASE NO. CV-2024-09-3859
Plaintiff — JUDGE JOY MALEK OLDFIELD
-vs-
JESSE DAVIS — ORDER
Defendant

The docket indicates that service on the Defendant has not been accomplished.

Pursuant to Rule 4(E), O.R.C.P., the action shall be dismissed as to the Defendant without prejudice, if service is not accomplished within six months after filing.

FAILURE TO COMPLY WITH THIS COURT ORDER OR ANY OTHER COURT ORDER SHALL RESULT IN SANCTIONS, INCLUDING BUT NOT LIMITED TO, DISMISSAL OR ADVERSE JUDGMENT.

Your immediate attention to this matter is suggested.

Joy Malek Oldfield
JUDGE JOY MALEK OLDFIELD

CC: ATTORNEY KIMBERLY A. KLEMENOK
ATTORNEY EDEN SARVER
ATTORNEY ERIN ENDERLE
ATTORNEY CRYSTAL M. DUPLAY
ATTORNEY YALE R. LEVY

Failure to commence within 6 months

PLAINTIFF DOES NOT OBTAIN SERVICE WITHIN 6 MONTHS

- Does your Court have a local rule?
  - Each judge shall review or cause to be reviewed quarterly, all assigned cases which have been on the docket for six (6) months and in which no proceedings have taken place. When the assigned judge's docket reveals no activity in the previous six (6) months and no assigned trial date, such cases shall be published for dismissal with mail notice to all counsel. On the date assigned, the case shall be dismissed, or upon showing good cause, set for trial or other disposition as ordered by the Court, all in accordance with C.P. Sup.R. 7 through 9. Summit County Loc.R. 7.18.

Failure to commence within 6 months

PLAINTIFF DOES NOT OBTAIN SERVICE WITHIN 6 MONTHS

- How is your Court's docket review practically accomplished?
  - New cases entered into a database?
  - Periodic review of incoming cases
- What else are you looking for when managing new cases?
  - Get service?
  - Defaults?

Motion for Default Judgment

CIV.R. 55

When a defendant fails to appear or respond, a claimant may seek judgment by default pursuant to Civ.R. 55, which provides:

(A) **Entry of Judgment.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply in writing or orally to the court…

Motion for Default Judgment

SERVICE IS ESSENTIAL

Remember – you cannot enter default judgment without proper service….

Service – Time to Respond

Defendant fails to file a timely Answer or request an extension to plead. Instead, Defendant attempts to file an Answer without leave, after Plaintiff moved for default judgment.

Should the Court construe the untimely Answer as a request for leave to plead?

Service – Time to Respond

***MILLER V. LINT,* 62 OHIO ST.2D 209, 214 (1980)**

"[T]he failure of the defendant to comply, even substantially, with the procedures outlined in the Civil Rules subjected her to the motion for a default judgment, and the plaintiffs, having complied with the Civil Rules, had a right to have their motion heard and decided before the cause proceeded to trial on its merits."

Default Judgment

An automobile leasing company files a breach of contract claim against a consumer. The consumer is identified as "Robert J. Smith, Jr." Summons issues by certified mail, and a "Mary Smith" signs the return receipt. No answer is filed.

May the Court grant default judgment, considering the discrepancy in the named defendant and the name of the person who signed for service?

Default Judgment

INDIVIDUAL SERVICE VERSUS CORPORATE SERVICE

"Service is perfected by certified mail when it is sent to an address that is reasonably calculated to reach the defendant. *** Proper service of process is "[evidenced by a return receipt signed by ***any person*** * * * ." Civ.R. 4.1, section 1. (Emphasis added.). Valid service of process is presumed when the envelope is received by any person at the defendant's residence; the recipient need not be an agent of the defendant. ****" Ohio Civ. Rights Comm. v. First Am. Properties*, 113 Ohio App.3d 233, 237 (2d Dist.1996)

Default Judgment, *continued*

INDIVIDUAL SERVICE VERSUS CORPORATE SERVICE

Bowling v. Grange Mut. Cas. Co., 10th Dist., 2005-Ohio-5924 (service to corporation effective when sent certified mail, picked up at post office and signed for by authorized third party mail delivery service agent, even if corporation later claims it didn't receive the complaint; no excusable neglect for 60(B) from valid default when company did not have a procedure in place to deal with certified mail after messenger/mail deliver service signed for it)

Default Judgment - Notice

In limited circumstances, default judgment may not be entered without notice to the defendant

See Civ.R. 55(A)

… If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least seven days prior to the hearing on such application.…

Default Judgment - Notice

WHAT CONSTITUTES AN "APPEARANCE?"

- Answer
- Motion to Dismiss
- ? ? ? ?

Default Judgment - Appearance

WHAT IS AN APPEARANCE?

"For purposes of Civ.R. 55(A), an 'appearance' is an overt action clearly expressing an intention and purpose to defend against a lawsuit. …

In construing the notice provisions of Civ.R. 55(A), Ohio courts liberally interpret the term 'appeared.' …

'[T]he determination of whether a party has appeared in an action for the purposes of Civ.R. 55(A) notice requirements does not necessarily hinge on whether a formal filing was made with the court.' …

A party will be said to have appeared in the action when that party clearly expresses to the opposing party an intention to defend the suit. Id. No formal filing is required."

***Wells Fargo Bank, N.A. v. Myers,* 2015-Ohio-4212 (6th Dist.)** (citations omitted)

Default Judgment - Appearance

WHAT IS AN APPEARANCE?

Request for extension and for mediation: Where defendant requested foreclosure mediation and an extension to plead, and participated in mediation, these actions constituted an appearance. *Bank of New York Mellon v. Watkins*, 2012-Ohio-4410 (10th Dist.)

Default Judgment - Appearance

WHAT IS AN APPEARANCE?

Notice of Appearance: Where debtor filed his notice of appearance, this notice was an "appearance" for purposes of Civ.R. 55(A). *Discover Bank v. Crocker,* 2016-Ohio-2759 (9th Dist.)

Default Judgment - Appearance

HYPOTHETICAL

Plaintiff corporation files its complaint, and perfects service on Defendant corporation, alleging breach of a commercial lease agreement.

Counsel for Defendant phones plaintiff's counsel to discuss the allegations, seeking dismissal of all claims, but files no Answer or other pleading.

Plaintiff files a Motion for Default Judgment, noting its contact with Defendant's counsel.

May the Court rule on the Motion without notice to Defendant?

Default Judgment - Appearance

WHAT IS AN APPEARANCE?

Where counsel for the parties had a single telephone conversation and plaintiff's counsel was **aware of defendant's intention to defend the suit**, default judgment could not be granted without notice as provided by Civ.R. 55(A), as the phone conversation between counsel constituted an "appearance" in the matter. *AMCA Internatl. Corp. v. Carlton*, 10 Ohio St.3d 88, 90, (1984)

Default Judgment - Appearance

HYPOTHETICAL

Plaintiff corporation files its complaint, and perfects service on Defendant corporation, alleging breach of a commercial lease agreement.

Defendant has an attorney contact plaintiff's counsel **only to discuss possible settlement.**

Plaintiff files a Motion for Default Judgment, noting its contact with Defendant's counsel.

May the Court rule on the Motion without notice to Defendant?

Default Judgment - Appearance

WHAT IS AN APPEARANCE?

Where counsel was not yet retained by the defendant, and only discussed possible settlement, the court found no appearance, triggering the notice requirements of Civ.R. 55(A).

"In fact, absent representations to the contrary, engaging in settlement discussions could reasonably be construed as an indication that a party did not wish to defend a lawsuit." *Mueller v. Hammann,* 2013-Ohio-5098 (1st Dist.)

Default Judgment - Appearance

CAN LOCAL RULE REQUIRE SERVICE OF DEFAULT JUDGMENT MOTION?

Local rules may not impose a service requirement that is inconsistent with the Rules of Civil Procedure. *Ellison v. K 2 Motors LLC,* 2023-Ohio-1871 (10th Dist.)

Service not required on parties in default for failure to appear, with "appeared" construed liberally for purpose of Civ.R. 55(A). Service/notice required if pleadings assert new or additional claims or for additional damages. Id., citing to Civ. R. 5(A).

Default Judgment - Appearance

WHAT IS AN APPEARANCE?

A deficient pleading, ordered stricken, may still constitute an "appearance,"
requiring notice under Civ.R. 55(A).

"The filing of an answer by an officer of a corporation was an appearance in the action within the meaning of Civ.R. 55(A), even though the answer was unsigned and was later stricken because it had not been filed by an attorney." *See Plant Equip., Inc. v. Nationwide Control Serv.*, 2003-Ohio-5395 (1st Dist.)

To Constitute an Answer:

Civil Rule 8(B): requires short and plain terms as to defenses to each claim asserted (either admit, deny, without knowledge)

Civil Rule 5: requires a certificate of service, indicating a copy of the filing has been served on other parties

Special Appearance

BAYLISS V. DURRANI, 2022-OHIO-914, ¶ 14 (1ST DIST.)

"[T]he Ohio Rules of Civil Procedure have abolished any distinction between "general" and "special" appearances. Civ.R. 12(B) through (H) delineate the methods of asserting defenses and objections. Staff Notes to Civ.R. 12(B). "Rule 12(G) follows up *the abolition of the special appearance* in Rule 12(B) by actually compelling the defendant who makes a motion to include therein all defenses and objections then available to him which this rule permits to be raised by motion." (Emphasis added.) Staff Notes to Civ.R. 12(G)."

Default Judgment - Damages

OHIO CIV. R. 55(A)

"If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall when applicable accord a right of trial by jury to the parties."

Default Judgment

HYPOTHETICAL

A bank sues a consumer for $15,000.00 in credit card debt. The consumer mails the court a type-written letter, agreeing he owes some of the claimed amount, but most of the charges belong to his ex-wife, who was ordered to pay the debt as part of their divorce decree. The consumer takes no further action.

Should the Court:

-Ignore the letter?

-File the letter with the clerk and serve a copy on plaintiff's counsel?

-Send a reply to the consumer telling him he needs to file an answer?

Default Judgment

HYPOTHETICAL

Plaintiff seeks default judgment on a claim of breach of a commercial lease, and also seeks damages based on breach of the "use" provision within the lease.

The lease, however, does not provide for liquidated damages based on breach of the "use" provision.

The Court, nevertheless, awards an amount of damages without hearing.

Was this error?

Default Judgment - Damages

***ABBOTT V. FORD DEV. CORP.,* 2015-OHIO-5233 (1ST DIST.) (FISCHER, P.J., DISSENTING)**

While Rule required hearing to determine damages, no requirement that hearing be an *oral hearing* where no oral hearing is requested.

"But, surely, once a court determines that a hearing is necessary to establish the proper amount of damages, a defendant who has made an appearance is entitled to notice of that hearing."

In this case defendant failed to answer complaint, plaintiff filed motion for default, defendant then filed notice of appearance and motion for leave to file answer out of time. Court indicated it was granting default and plaintiff filed proposed entry, to which defendant objected. Court issued entry granting liability and indicating intent to hold damages hearing but then held damages hearing without notice to appearing defendant. Can't do that.

Default Judgment - Damages

***W2 PROPS., LLC V. HABOUSH,* 2011-OHIO-4231 (1ST DIST.)**

"Before granting default judgment, the trial court must ascertain what damages are appropriate. The court has discretion in doing so, but that discretion is limited. … [A] damages hearing may not be necessary where the damages are definite, such as a liquidated claim, or where the damages are otherwise discernable from the record, but a hearing may be necessary where the damages are not definite[.]"

Default Judgment

TOLEDO V. HERON ARIZONA FUND 1, LLC, 2024-OHIO-1510 (6TH DIST.)

[A] party appearing *after* a default judgment is awarded is not then entitled to notice and a hearing under Civ.R. 55(A).

Default Judgment

HYPOTHETICAL

The Court grants Plaintiff's Motion for Default Judgment and awards damages without hearing. Defendant seeks relief from the damages portion of the judgment, specifically, the portion awarded that represented unliquidated damages.

Should the Court grant the requested relief?

Default Judgment

MAKE SURE DEFAULT DAMAGES ARE SUPPORTED

"Under Civ.R. 55(A), it is discretionary whether a trial court will conduct a hearing regarding damages. Where a damages claim is 'liquidated' or based on a readily ascertainable amount, such as an account, no additional proof is necessary. …

However, 'where the amount awarded by the trial court in a default judgment is not supported by either an evidentiary hearing or evidence in the record, the trial court abuses its discretion in denying relief from the damages portion of the default judgment.' …*K. Ronald Bailey & Assocs. Co., LPA v. Soltesz,* 2006-Ohio-2489 (6th Dist.) See also *W2 Props., LLC v. Haboush,* 2011-Ohio-4231 (1st Dist.) and *Hajjar Fam. Revocable Tr. v. Flan Wa Allan L.L.C.*, 2009-Ohio-5156 (9th Dist.)

***If Complaint clearly sets forth amount, likely judgment is fine. If not, or if you have questions – set for hearing

Part VII: Pro se litigants

Civil Proceedings

KEY POINTS

Pro se litigants are required to comply with the Civil Rules.

"It is well-established that pro se litigants are held to the same rules, procedures, and standards as litigants represented by counsel."

Chibinda v. Ohio Bur. of Motor Vehicles, 2018-Ohio-1378, ¶ 29 (10th Dist.)

Courts should grant pro se litigants reasonable leeway and liberally construe pleadings "so as to decide issues on the merits," but must also hold pro se litigants "to the same standard as any represented party."

Robinson v. Lorain County Printing & Publishing Co., 2023-Ohio-3 (9th Dist.)

Civil Proceedings

SAMPLE PRO SE ANSWER

Civil Proceedings

KEY POINTS

While courts should construe pleadings with leeway, the integrity of the Civil Rules depends on consistent application

See, e.g., Smallwood v. Shiflet, 2016-Ohio-7887 (8th Dist.)

"Civ.R. 8(F) requires the court to liberally construe all pleadings to do substantial justice. Although this rule provides trial courts with leeway in addressing the pleadings of pro se parties, such leeway is not boundless. ***

Even in instances where courts have been willing to overlook procedural deficiencies in pro se answers defendants have still been required to, at a minimum, indicate their intent to defend the case and state in short and plain terms their defense to the claims asserted."

Civil Proceedings

POVERTY AFFIDAVIT

"[I]f a party makes an application to be qualified as an indigent litigant as set forth in section 2323.311 of the Revised Code, the clerk of the court shall receive and file the civil action or proceeding or the responsive action by the defendant."

R.C. 2323.31

Civil Proceedings

SERVICE ON OPPOSING PARTY REQUIRED

See CitiMortgage, Inc. v. Bumphus, 2011-Ohio-4858 (6th Dist.)

"A trial court cannot consider pleadings filed without a certificate of service. Civ.R. 5(D) * * * Therefore, a court may not consider an "answer" that does not include a certificate of service and may grant default judgment against the defendant for failing to defend."

Civil Proceedings

A pro se litigant may only represent themselves, and may not appear on behalf of a family member, corporation, or based on a "power of attorney"

See, e,g., Cincinnati Bar Assn. v. Foreclosure Solutions, L.L.C., 2009-Ohio-4174, ¶ 21

"The unauthorized practice of law is the rendering of legal services for another by any person not admitted to practice in Ohio under Rule I and not granted active status under Rule VI, or certified under Rule II, Rule IX, or Rule XI of the Supreme Court Rules for the Government of the Bar of Ohio." Gov.Bar R. VII(2)(A).

We have defined the practice of law expansively. In Ohio, the practice of law is not limited to the conduct of cases in court but embraces "the preparation of pleadings and other papers incident to actions," "the management of such actions," and "in general all advice to clients and all action taken for them in matters connected with the law." ***.

Civil Proceedings

Keybank Natl. Assn. v. Sarameh, 2013-Ohio-2576 (2d Dist.)

A non-attorney may not represent another based on a power of attorney; such conduct violates R.C. 4705.01, prohibiting the unauthorized practice of law, and Civ.R. 11, requiring parties not represented by an attorney admitted to practice to sign their own pleadings.

Vilardo v. Sheets, 2006-Ohio-3473 (12th Dist.)

Default judgment against corporation proper, despite purported pro se answer filed on behalf of company. Corporate defendants must appear through a licensed attorney.

Contact Info

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Trial Skills Workshop

Hon. Stephen L. McIntosh
Franklin County Common Pleas Court

Hon. Joy Malek Oldfield
Summit County Common Pleas Court

Hon. Matthew L. Reger
Wood County Common Pleas Court

Ohio Judicial College
Trial Skills Workshop

Trial Skills Problems:

PROBLEM #1 – PRE-TRIAL CONFERENCES (GROUND RULES)

TOPIC SUMMARY: Participants will learn to use the pre-trial conference as a forum for communicating to the lawyers the judge's ground rules for conducting a trial.

POINTS TO COVER:

1. Procedure rules regarding pretrial conferences
2. Orders setting pretrial conferences
3. The utility of pretrial conferences and case management
4. Conducting the pretrial conference
5. The ground rules
6. Communicating the ground rules to counsel.

MATERIALS:

PROBLEM 1 HYPOTHETICAL 1A

Judicial Assistant: Judge, I need some guidance from you regarding a couple of cases that are on our next jury trial docket.

Judge: OK, which cases do you want to discuss?

Judicial Assistant: Well, the first one is Morris vs. Case Transportation, Inc. It's a rear end collision, with a claim of soft tissue injury. The plaintiff's lawyer is that real nice lady lawyer, Sally Schaeffer, and the defendant is represented by Thompson E. Lewis, VI, the managing partner over at Bigg, Biggar & Biggast, PA. The attorneys don't want to have a pretrial, which you ordered without any input from the lawyers. The pretrial is scheduled for this Friday, and both the lawyers say they are really busy, and would just as soon skip it. They tell me they've tried to settle, but to no avail. They don't believe anything will be resolved at the pretrial, and they could sure put their valuable time to better use. I told them I'd run it by you.

Judge: Anything else?

Judicial Assistant: Yes, they would also like to know, if you are having a pretrial, whether they need to show up personally. They each would like to send an associate from their respective firms. As an alternative, could they appear by telephone?

Judge: Is that all?

Judicial Assistant: Well, the other case is Mickle vs. Menendez Grocery. It's a slip and fall. The plaintiff is claiming a herniated disc. This case was on your predecessor's trial docket, about 20 months ago, but no action was taken, so it was continued. The lawyers tell me nothing has changed since the last pretrial, and they'd like to forgo the conference next week and just show up the morning of trial.

Judge: Anything else?

Judicial Assistant: Yes, the case will be over the Supreme Court time guidelines on the current trial date.

LEADER: (PASS THE GAVEL)

Review:

- Purpose and utility of pretrial conferences.
- Judicial preferences regarding pretrial conferences (necessity, attendance by trial counsel telephone hearings).
- Judicial philosophy regarding mandatory mediation.
- See Civil Rule 16

- Rules of Superintendence—Time Guidelines
- Pre-trial orders
- Local Court Rules

PROBLEM 1 HYPOTHETICAL 1B

Prosecutor: Your honor, the next case on your pretrial docket is State v. Manson. It's a grand theft, and the defendant has a rather lengthy prior record. The victim is requesting restitution, as soon as possible. The prosecution is asking for 60 days jail time, followed by 3 years probation, with restitution and all costs to be paid within 90 days.

Defense Counsel: Judge, my client couldn't possibly accept any plea agreement which involves jail time. We don't quarrel with probation and full restitution and costs, but no jail.

Prosecutor: Judge, we have an open and shut case. There are three eyewitnesses, and we have a confession!

Defense Counsel: Your honor, my client cannot afford to go to jail at this time. If disposition requires incarceration, we demand a jury trial. I'll be filing a motion to suppress this alleged confession, and various motions in limine. It will take quite some time to get all these matters heard. Judge, I assure you we will have a very active and lengthy defense. Since we assumed the prosecution would be reasonable, we haven't done too much. Speedy trial runs next week, but there is no way we can be ready for trial as scheduled. Judge, we were sandbagged by the prosecution. The defendant requests a continuance, and asks that it be charged to the prosecution for speedy trial purposes.

Judge: Is the defendant present?

Defense Counsel: I believe he may have just started a new job today. For the record, I will waive his presence.

LEADER (PASS THE GAVEL)

Review:

- Where is the pre-trial held?
- What matters should be covered during a pretrial conference in a criminal case?
- To what extent does the judge wish to get involved in trying to resolve the case by pleas?
- Should the role of the judge be passive and merely accept or reject a tendered plea agreement, or should the judge get actively involved in plea negotiations, and make his or her own plea offer to the defendant?
- Any problems with undercutting the prosecutor's offer?

- Presence of the defendant required, unless waived in writing.
- Should the judge discuss possible sentences?
- Potential number of witnesses.
- Speedy trial issues.

PROBLEM 1 HYPOTHETICAL 1C

Defense Attorney: Your honor, I have never had the privilege of appearing in your court. Is there anything I should be aware of regarding your procedural personal preferences?

LEADER (PASS THE GAVEL)

Review:

- Need to seek permission to approach witnesses for review of exhibits?
- Permissible to travel from behind podium during voir dire?
- Speaking objections?
- Use of first names?
- Stand or sit when jury enters or leaves courtroom?
- Requests of offers re stipulations before the jury?
- Other . . .?
- Means of communicating personal procedural preferences:
    - Standard orders
    - Review orally during pretrial conference
    - Handouts
    - Bulletin board postings
    - Bar magazines, newsletters, and other such publications
    - Internet home page
    - Other

PROBLEM #2—OPENING REMARKS

TOPIC SUMMARY: Participants will be able to qualify, select and manage a jury.

It is essential to the proper performance of their duties that jurors be informed of their responsibilities before the trial begins. Most counties have a film, video or slide presentation which provides a general orientation for persons summoned for jury service. However, each judge has the responsibility of explaining to the prospective jurors summoned to the courtroom what will be required of them during the jury selection and what will be required if selected as jurors.

POINTS TO COVER:

1. How prospective jurors are seated in the courtroom.

2. Practical concerns of jurors
   a. breaks
   b. smokers
   c. physical problems (example – hard of hearing, diabetes)
   d. small children
   e. length of trial
   f. hours normally worked (example – 8:00 am. –5:00p.m., 10:00 a.m. – 6:00 p.m.)

3. Introductions of courtroom personnel

4. Introduction of lawyers, defendant, parties

5. Identification of case set for trial

6. Explanation of voir dire process

7. Explanations of jury selection

8. Americans With Disabilities Act

9. What to do when attorneys:

a. Ask jurors questions previously asked by judge or another counsel
b. Ask questions which require jurors to commit to a verdict
c. Argue the case or ask questions which are in substance arguments of the case.

10. Limitation of time allowed attorneys for voir dire.

11. Collective questions vs. individual questions.

12. Jurors who wish to be excused.

13. Discussion of method or methods of jury selection.

14. Number of peremptory challenges.

15. Basis for a challenge for cause.

16. Presence of a criminal defendant during jury selection.

17. Discriminatory use of peremptory challenges.

18. One Day/One Trial.

MATERIALS:

PROBLEM 2 HYPOTHETICAL 2A

Bailiff Smith

To Judge: "Judge, how many jurors do you want brought to court for your felonious assault trial?

Leader: **[Hands gavel to student judge.]**

Lawyer Smith: "Judge, may we approach the bench? Judge, I've never tried a case before you. How do you select a jury? Do you allow back striking?"

Leader: **[Hands gavel to student judge for a ruling.]**

Lawyer Jones: (*If jury selection is done at bench)*
"Judge, my client, Sam Sleuth, has a right to be present during jury selection. Can he come up here to the bench with us?"

Or "Judge, my client, Sam Sleuth, trusts me to select this jury. Can he go outside and have a cigarette while we select this jury?"

(If jury selection is done while jury is out of courtroom)
"Judge, I object to selecting this jury without being able to look at the prospective jurors. I can't remember them with them out of the courtroom and us in the courtroom. Besides, it violates my client's constitutional right to confrontation."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 2 HYPOTHETICAL 2B

Lawyer Smith: "Your honor, you limited my time on voir dire to 30 minutes. I didn't have time to ask all my questions. You're prohibiting me from effectively representing my client. I need at least thirty more minutes, and I'm asking for that much additional time."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 2 HYPOTHETICAL 2C

Leader: Assume jury selection has begun. Challenges for cause have been dealt with and no jurors have been struck for cause. Continue with the selection allowing attorney Smith and Jones to exercise peremptory challenges." (Hands gavel to student judge).

The following dialogue should occur some time during the jury selection.

Defense Lawyer

Smith: "Your Honor, I object. The last juror struck by Lawyer Jones was black. My client's black. That violated Batson.**"**

Leader: **[Hands gavel to student judge for a ruling.]** (Make sure judge makes the proper inquiry).

Prosecution Jones: "Your Honor, I've already accepted two blacks. Besides, I didn't strike that juror because he's black. That juror was sleeping during voir dire; he wasn't paying attention, and I don't think he'll listen to the evidence."

Leader: Makes sure judge evaluates the reasons given by Prosecutor Jones to determine if they are race neutral; also, whether they are supported in the record.

If the judge sustains the objections, talk about what judge should do. Simply disallow the strike? Dismiss the entire jury and start again? If judge overrules objection, talk about what would have happened had it been sustained.

Continue with jury selection.

Defense Lawyer
Smith: "Your Honor, I object, the prosecutor has jury struck a woman (or another woman) juror. My client's a woman. That violates Batson."

Prosecutor Jones: "Your Honor, Batson applied only to bias of race, not gender."

Leader: **[Hands gavel to student judge for a ruling.]**

Discussion should center around whether cases apply only to blacks and whether they are applicable to other groups such as Hispanics and women.

Conclude jury selection

PROBLEM #3 – MOTIONS IN LIMINE

TOPIC SUMMARY: A Motion in Limine (at threshold) provides a helpful advance in ruling on admissibility; it can prohibit (preclude the calling of a witness, reference to prejudicial matters), or it can be conditional (meeting criteria prior to admission, laying foundation).

Grounds and purposes of the Motion include:
Identification of matter or documents.
Prejudicial (unfair) effect if allowed.

POINTS TO COVER:

1. Purpose of Motion in Limine is to prevent the introduction of improper evidence, the mere mention of which would be prejudicial.

2. Trial courts should not allow Motions in Limine to be used as unwritten and unnoticed Motions for Partial Summary Judgment or Motions to Dismiss. *Id.*

3. Must a Motion in Limine be in writing or can it be oral?

4. Does a judge have to rule on a Motion in Limine prior to trial?

5. When should a Motion in Limine be heard by the judge and where should the jury be, if selected?

6. Is the granting of a Motion in Limine irrevocable or can the judge change his/her ruling during the course of the trial depending on the evidence?

7. What responsibility does the judge have in informing the witnesses about the Motion?

8. What do you do when the Motion is granted and then violated by the opposing counsel?

MATERIALS:

PROBLEM 3 HYPOTHETICAL 3A

Lawyer Smith: "Judge, I have five Motions in Limine which I would like to make before we begin opening argument. I haven't had time to put the motions in writing, but they're short."

Lawyer Jones: "Objection, your Honor, the motions need to be in writing. I can't be expected to keep track of six oral motions. Besides, he hasn't given me any notice of these motions."

Leader: **[Hands gavel to student judge for a ruling.]**

Lawyer Jones: **"**Judge, I object for another reason. This isn't the proper time to hear a Motion in Limine."

PROBLEM 3 HYPOTHETICAL 3B

Defense Lawyer Smith: "Your Honor, now that the jury is selected, but before we start this trial, I would like to make an oral Motion in Limine. I believe the defendant's confession was made after many hours of questioning and coercion by the police and after he had repeatedly asked for a lawyer; therefore, I believe it should be excluded."

Prosecutor Jones: "I object, your Honor, this is not timely. Mr. Smith should have filed a Motion to Suppress and had this matter resolved in a hearing prior to trial."

Leader: **[Hands gavel to student judge for a ruling.]**

(After the ruling, inform student judge that a written motion to suppress was timely filed, but contained only boiler plate language without specific facts. Ask for a new ruling.)

Review:

- Is a hearing required?
- Who goes first?
- Who has BOP/burden of going forward?

- Is a motion to suppress proper for a non-constitutional issue?

PROBLEM 3 HYPOTHETICAL 3C

Defense

Lawyer Smith: "Your Honor, I make a Motion in Limine to prohibit evidence regarding our my client's prior theft conviction. It's not relevant to this case, and I have reason to believe the Prosecutor will try to elicit this testimony from one of his witnesses."

Leader: **[Hands gavel to student judge for a ruling.]**

(Assume student judge grants the oral Motion in Limine. The trial is in progress, and the defendant has testified. Discuss what convictions are admissible. Also, what of remoteness in time?)

Prosecutor Jones: "Judge, the defendant has just lied on the stand. He told this jury he has never been in trouble with the law before in his life. Judge, he has a prior conviction for theft. The jury has a right to know he's lying. I should be able to introduce evidence of that prior theft conviction."

Defense
Lawyer Smith: "I object, your Honor, you granted my Motion in Limine about this very issue. All evidence of my client's prior theft. conviction was excluded from this trial."

Leader: **[Hands gavel to student judge for a ruling.]**

Review:
- Should you make evidentiary rulings before trial generally?

PROBLEM #4—WITNESS SEQUESTRATION

TOPIC SUMMARY: This problem considers and explains whether and when witnesses must or should be excused from the courtroom during trial proceedings.

POINTS TO COVER:

1. Is it discretionary with the court?

2. When in the course of the trial is it proper (before voir dire? Before opening statements? Before testimony?)

3. Are there certain witnesses who do not have to be excluded? (Victims? Mothers of small children who are also witnesses? Case detectives? Experts?)

4. What does the judge say to the witnesses when rule is invoked?

5. What to do when rule is violated.

PROBLEM 4 HYPOTHETICAL 4A

Defense Lawyer Smith: "Before we start the trial, your Honor, I would like to request that separation of witnesses be invoked and that all witnesses on both sides be excluded from the courtroom until they are called to testify. Since I have never practiced before you would your Honor indicate what you will tell potential witnesses and what, if anything, you will require of counsel regarding sequestration of witnesses?"

Prosecutor Jones: "I object, your Honor, we haven't started the testimony. We're just starting voir dire. The victim's family, who are also witnesses, want to be in the courtroom during voir dire and opening statements. They shouldn't have to leave the courtroom until the evidentiary part of the trial. And even then, the victim or her representative can be present for the trial. Doesn't the constitution say so?"

Leader: **[Hands gavel to student judge for a ruling.]**

Prosecutor Jones: "I have no objection to witnesses being excluded, your Honor, but I would like to have the investigating officer remain in the courtroom and sit with me at counsel table so that we can confer during the trial."

Lawyer Smith: "I object, your Honor, the prosecution has no right to that. All witnesses should leave the courtroom until they're called.

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 4 HYPOTHETICAL 4B

Lawyer Smith: "Your Honor, I have just discovered that one of the prosecutor's witnesses who was supposed to have been excluded, walked into the courtroom and has been sitting here during the testimony of the other prosecution witness. Of course, I asked the bailiff to exclude her as soon as I knew she was in the courtroom. However, under the circumstances, I must move for a mistrial."

Prosecutor Jones: "Your Honor, I oppose the mistrial. It is true one of my witnesses was in the courtroom for part of the testimony this morning. I did not realize it until I turned around and saw her in the back of the courtroom. She was not here yesterday at the beginning of the trial when you excluded the witnesses. There was not willful disobedience on my part or the witness' part. I don't think a mistrial is either appropriate or necessary."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM #5—SCOPE OF DIRECT AND CROSS EXAMINATIONS

TOPIC SUMMARY: Participants will be able to control, when necessary, the scope of direct and cross-examination.

POINTS TO COVER:

1. When to limit direct or cross examination.

2. When to limit redirect or recross.

3. How to handle lawyers who are disrespectful to witnesses.

4. How to handle gender bias or racial bias as it relates to witnesses.

MATERIALS:

PROBLEM 5 HYPOTHETICAL 5A

(Assume direct and cross have taken place)

Prosecutor Jones: "Mr. Witness, in what county did the assault occur?"

Lawyer Smith: "Objection, that question is outside the scope of cross examination. He had Mr. Witness on the stand on direct for two hours; he certainly could have asked the question."

Leader: **[Hands gavel to student judge for a ruling.]**

(Assume judge sustains objection)

Prosecutor Jones: "Judge, this is just a technical point. It may be outside the scope of cross, but I have to prove the crime occurred in New Rome. This is an essential element of my case. If you don't let me ask the question you will in essence be directing a verdict."

Leader: **[Hands gavel to student judge for a ruling.]**

(Assume direct, cross, redirect, attorneys are seated, witness has left the stand)

Prosecutor Jones: **(*Jumps up excitedly)*** "Judge, I've got to ask two more questions. I forgot to prove venue. I would like to recall Mr. Witness for that purpose."

Lawyer Smith: "Objection, your Honor, he has already called this witness and the witness has left the courtroom."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 5 HYPOTHETICAL 5B

Prosecutor: "Mr. Witness, I know I asked this question earlier, but after that lengthy cross examination by Lawyer Smith, the jury has probably forgotten what you said in response to my direct examination, so let me ask you once more. . . .

Lawyer Smith: "Objection."

Leader: Discuss need to limit repetitive questions/attorney trying to get the "last word".

PROBLEM 5 HYPOTHETICAL 5C

(Assume direct, cross and redirect have occurred)

Lawyer Smith: "Your Honor, I know at the beginning of the trial, you said you were only going to allow direct, cross and redirect of witnesses, but I have some more questions for this witness. I would like to recross."

Leader: **[Hands gavel to student judge for a ruling.]**

OR

Lawyer Smith: "Judge, I know you said you were only going to allow direct, cross and redirect of witnesses; however, the prosecution went into new matters in redirect. I should now be allow to recross."

Leader: **[Hands gavel to student judge for a ruling.]**

Review:

- The judge has the authority to set limitations on direct, cross, redirect, etc., but the judge's rule or order must be set forth in advance.

PROBLEM #6—COMMON OBJECTIONS

TOPIC SUMMARY: Participants will be able to respond appropriately to common objections made by counsel.

Assume trial is in progress. The trial is based on information charging felony OVI. The purpose of this exercise is NOT to review the evidence code, but to help the judge respond effectively and appropriately to objections.

POINTS TO COVER:

1. How to handle objections when attorney states no grounds for the objection.
2. How to handle objections when attorney states wrong grounds for the objection.
3. How to handle objections when attorney states no grounds, but grounds are obvious.
4. Should the judge require attorneys to stand when making objections.
5. How to handle attorneys who argue objections before the jury.
6. How to handle a proffer of evidence.
7. When does the judge ask questions?
8. How to handle attorneys who object only to delay the trial.

MATERIALS:

PROBLEM 6 HYPOTHETICAL 6A

Prosecutor Jones: "Dr. Do Little, what were the results of the Breathalyzer test you conducted on Mr. Bud Wieser?"

Lawyer Smith: "Objection, your Honor!"

Leader: **[Hands gavel to student judge for a ruling.]**

(Discussion should center on the fact that no grounds were given for the objection. Is the judge's response any different if the grounds are obvious?)

Judge: "Lawyer Smith, state the ground for your objection."

Lawyer Smith: "Judge, I object because it's prejudicial and improper."

Leader: **[Hands gavel to student judge for a ruling.]**

Discussion should center on fact that wrong grounds were given. Should the judge overrule the objection because the grounds were incorrect? Should the judge sustain the objection if he/she believes objection should be sustained on other grounds? Should judge sustain the objection and state grounds for his/her sustaining the objection?)

Lawyer Smith: "I object, your Honor, the proper predicate has not been laid by the prosecutor."

Leader: **[Hands gavel to student judge for a ruling.]**

Assume judge sustains this objection.

Prosecutor Jones: "Ask to approach the bench."

"Judge, I think I've laid the proper predicate. What's wrong? Lawyer Smith ought to have to state what's wrong with the predicate."

Lawyer Smith: "Judge, I shouldn't have to help him try his case."

Leader: **[Hands gavel to student judge for a ruling.]**

(Discussion should include the following: Should the judge make Lawyer Smith be more specific or simply sustain the objection if proper predicate has not been laid?)

Assume the judge has sustained the improper predicate objection three times. Each time Prosecutor Jones has gone back and tried again to lay the proper predicate with his witness Dr. Do Little.

Prosecutor Jones: Ask to approach the bench.

"I just don't know what else to do to get this in, Judge. I've tried. If you don't let it in, I'll lose my case. What's wrong with the predicate?"

Leader: **[Hands gavel to student judge for a ruling.]**

(Discussion should included the following: Does it make a difference if the case is a vehicular manslaughter rather than a felony OVI?)

PROBLEM 6 HYPOTHETICAL 6B

Police Officer is on the stand. Direct examination has taken place. Lawyer Smith is cross examining the witness.

Lawyer Smith: "Mr. Police Officer, I show you a photograph, marked Defense Exhibit I. Do you recognize it?"

Police Officer: "Yes, it's a photograph of the Defendant's car as it looked when I arrived at the scene on the night of the accident."

Lawyer Smith: "Judge, I offer into evidence Defense Exhibit I."

Prosecutor Jones: In front of jury.

"Objection! Lawyer Smith knows better than that. He's trying to introduce evidence in my case. He can't do that and he knows it. He's trying to put one over on you."

Leader: **[Hands gavel to student judge for a ruling.]**

(*Discussion should include the fact that the attorney argued the objection in front of the jury as well as the attempt to offer evidence at the wrong time.)*

Assume judge sustains the objection.

Lawyer Smith: Ask to approach the bench.

"Judge, I'm just going to have to recall this witness in my case if you don't let the photograph in. There's no question that it will be admissible. Mr. Police Officer is a busy man; there's no need to make him come back."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 6 HYPOTHETICAL 6D

Defense Attorney: "Mr. Witness, isn't it true that you have been arrested in the past?"

Plaintiff's Attorney: "Objection, Your Honor, improper impeachment."

Leader: **[Hands gavel to student judge for a ruling.]**

Defense Attorney: "Mr. Witness, have you ever been convicted of a felony?"

Witness: "No."

Defense Attorney: "Isn't it true you have a prior conviction for grand theft?"

Plaintiff's Attorney: "Objection, counsel must have certified copies of any purported prior convictions in court before he can even ask the question, improper impeachment, move to strike, move to reprimand counsel before the jury, move for a mistrial."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM #7—WITNESS PROBLEMS

TOPIC SUMMARY: Participants will be able to identify and deal with selected witness problems.

POINTS TO COVER:

1. Should the judge control the questioning of witnesses, and if so, how?

2. How and when should a judge protect a witness from harassment?

3. What role does a judge play in determining the competency of witnesses?

4. Does the judge have the duty to aid the discovery of the truth by controlling the questioning of witnesses?

5. When should a guardian ad litem be appointed for a victim? For a witness? What about interpreters?

MATERIALS:

PROBLEM 7 HYPOTHETICAL 7A

Prosecutor Jones: **"**The State calls Jimmy Juvenile. I'm asking that Jimmy take the stand but that the clerk not swear him in at this time."

(Jimmy Juvenile takes the stand.)

"Jimmy, how old are you?"

Jimmy: "I'm six years old."

Prosecutor Jones: "Where do you go to school?"

Jimmy: "I go to Seneca School. I'm in the first grade."

Prosecutor Jones: "Do you know the difference between right and wrong?"

Jimmy: Silence.

Prosecutor Jones: "I'll ask you another question. Is it wrong to tell a lie or O.K. to tell a lie?"

Jimmy: "Wrong."

Prosecutor Jones: "What happens if you tell a lie?"

Jimmy: "My Mother hits me."

Prosecutor Jones: "You Honor, I ask that the clerk swear the witness."

Clerk: (Administers the oath.)
"Do you swear or affirm that the evidence you will give will be the truth, the whole truth and nothing but the truth?"

Jimmy: Silence.

Leader: **[Hands gavel to student judge for a ruling.]**

(Discussion should include when the determination of a child witness' competency to testify should be made. [Prior to trial? Outside presence of jury?] Discussion should also include whether the traditional oath has to be given and whether judge has to state on the record that he/she finds the witness competent to testify—if he/she allows him to testify.)

Assume Judge determines Jimmy is competent to testify.

Lawyer Smith: "I object to Jimmy testifying, your Honor. We don't know what he might say. After all, he's only six years old. I think we should hear his testimony first, outside the presence of the jury, and then determine whether this six year old child is competent to testify."

Prosecutor Jones: "Your Honor, the scope of the examination has nothing to do with competency; the witness is either competent of not. I shouldn't have to reveal his testimony in advance."

Leader: **[Hands gavel to student judge for a ruling.]**

Assume Jimmy has been found competent to testify and is about to be called to the stand.

Prosecutor Jones: "Judge, we have a small child size chair which we have brought to the courtroom. We would like Jimmy to sit in that chair, NOT the normal witness chair."

Lawyer Smith: "Objection, if he is competent to testify, he ought to have to sit in the witness chair."

Leader: **[Hands gavel to student judge for a ruling.]**

(Discussion should included similar such requests which could be made. Can the guardian hold the child in her lap while he testifies? Can he take a teddy bear to the stand with him?)

Assume Jimmy is testifying.

Prosecutor Jones: "Your Honor, I object to the length of the questioning on cross by Lawyer Smith. Jimmy has been on the stand for forty-five minutes. He has asked the same question in ten different ways. Enough is enough. Direct only lasted fifteen minutes."

Lawyer Smith: "Judge, I'm asking the same question ten different ways because I keep getting different answers. This witness is the most important witness. I've got a right to cross examine him properly. If you limit my cross examination, you will keep me from effectively representing my client and I will be forced to ask for a mistrial."

Leader: **[Hands gavel to student judge for a ruling.]**

(Discussion should include whether the student judge's ruling would change if the case being tried was capital sexual battery rather than a misdemeanor child abuse.)

PROBLEM 7 HYPOTHETICAL 7B

(Assume the prosecution witness, after testifying favorably for the state on direct examination, testifies as follows on cross.)

Lawyer Smith: "Mr. Witness, was the person you say you saw driving the car wearing a hat as you testified on direct or no hat as you testified to on deposition? Which statement is correct?

Witness: "I have answered all the questions I'm going to answer. All I want to do is get out of this court. Judge, I'm not answering any more questions. That lawyer is trying to make me look stupid. I'm leaving."

Witness rises from witness chair and starts to leave the courtroom.

Leader: **[Hands gavel to student judge for a ruling.]**

(Discussion should include what to do with the jury during this exchange.)

Change the facts, same players.

Lawyer Smith: "Mr. Witness, did you see my client behind the wheel of the car?"

Witness: "Well, I was a ways away, it was dark, it's been a long time; I've been thinking about this. . . ."

Lawyer Smith: *(Angrily interrupts witness)* "Judge, will you instruct the witness to answer the question? I requires a simple 'yes' or 'no'."

Prosecutor Jones: "I object, your Honor, the witness is trying to answer the question."

Leader: **[Hands gavel to student judge for a ruling.]**

(Questioning by Lawyer Smith continues.)

Lawyer Smith: (Raised voice, obviously angry.)
"Mr. Witness, did you see the defendant behind the wheel of the car? Just answer the question and be quick about it this time."

Prosecutor Jones: "Judge, I object, he's badgering the witness."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 7 HYPOTHETICAL 7C

(Female witness is on the stand. Lawyer Smith is cross examining her.)

Lawyer Smith: "Susan, we've previously heard from Mr. Carney and Mr. Pearce as witnesses in this case. I know this is difficult for you because the scene was bloody, and I'm not going to make you identify any of the photographs of the domestic violence victim, the men already did that; but, please tell us what you saw. –Oh, the Judge has Kleenex on the bench if you need some."

Leader: **[Hands gavel to student judge for a ruling.]**

Review:
Is there anything wrong here? Should the judge step in? How protective should the judge be, if at all?

PROBLEM 7 HYPOTHETICAL 7D

Assume case being tried is a gross sexual imposition.

Lawyer Smith: "Come on Ms. Easy, isn't it true you slept with my client at least ten times before you decided to claim he molested you?"

Prosecutor Jones: "Objection, your Honor, he's harassing the witness."

Lawyer Smith: "Come on Judge, are you going to limit my cross just because Ms. Easy keeps crying?"

Leader: **[Hands gavel to student judge for a ruling.]**

Lawyer Smith: ***(continues)*** In fact, Ms. Easy, haven't you slept with my client's best friend and his best friend and his best friend? In fact, don't you sleep around with whoever you can find that's willing?"

Prosecutor Jones: Does not object.

Leader: **[Hands gavel to student judge.] Judge, do you step in?**

PROBLEM 7 HYPOTHETICAL 7E

Lawyer Smith: "The Defense calls Mr. Harry Hispanic. State your name please."

Witness: "Harry Hispanic."

Lawyer Smith: "Mr. Hispanic, will you please tell this jury what you observed on the night of the accident when you arrived at the scene."

Witness: "Huh—I don't understand, my English is not real good. Would you repeat the question?"

Leader: **[Hands gavel to student judge.] Judge, what do you do if anything?**

(Discussion should center around whether the judge should step in and order an interpreter or leave it to the discretion of Lawyer Smith who called the witness. Discussion should include when determination should be made about the need for an interpreter for witnesses—pre-trial if possible. Also include need to swear the interpreter and have interpreter state his/her name for the record.)

PROBLEM 7 HYPOTHETICAL 7F

Assume witness on the stand has been involved in serious accident and has suffered some brain damage making him mentally deficient but still competent to testify.

Lawyer Smith calls Mr. Witness to stand.

Lawyer Smith: "Mr. Witness, I know it's hard for you to remember the accident, but I'm going to ask you some questions and just answer the best you can. You remember when the red car came across the center line and struck your car, don't you."

Witness: "Yes."

Prosecutor Jones: "Objection, your Honor, Lawyer Smith is leading the witness. Lawyer Smith might as well be testifying."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 7 HYPOTHETICAL 7G

Assume the case being tried is a felony domestic violence. State calls the Victim to the stand to testify.

Prosecutor Jones: "The State calls Vicky Victim. Ms. Victim, state your name and tell the jury how you are related to the defendant."

Witness: "Vicky Victim; the defendant is my fiancé. We're going to get married."

Prosecutor Jones: "Ms. Victim, please tell this jury what happened on the night in question."

Witness: "I really don't remember exactly, a lot was going on; there was a party, you know. I just don't remember exactly."

Prosecutor Jones: "Ms. Victim, were you struck on the mouth?"

Witness: "Well, yes, somehow my two front teeth got knocked out."

Prosecutor Jones: "Who knocked out your two front teeth, Ms. Victim?"

Witness: "Well, I really didn't see, you know, lots was going on—I don't know."

Prosecutor Jones: Asks to approach the bench.
"Judge, it's obvious this witness is not testifying truthfully; she's probably scared. I'd like you to order her to answer my question."

Lawyer Smith: "I object, judge."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM #8—MOTIONS FREQUENTLY MADE AT TRIAL

TOPIC SUMMARY: Participants will explore the criteria and factors in determining whether to grant or deny motions made during trial.

POINTS TO COVER:

CRIMINAL

1. Motion to exclude Evidence based on failure to provide complete witness list.

2. Motion for Judgment of Acquittal.

3. Motion for Mistrial.

4. Motion to Disqualify Judge.

5. Motion to Amend the Information.

CIVIL

1. Motion for Voluntary or Involuntary Dismissal.

2. Motion for Directed Verdict.

3. Motion to Conform Pleadings to the Evidence.

4. Motion to Disqualify Judge.

MATERIALS:

PROBLEM 8 HYPOTHETICAL 8A

Prosecutor Jones: "The State calls Wanda Witness."

Lawyer Smith: "Objection, your Honor, this witness was never furnished to the defense in discovery."

Prosecutor Jones: "I know, Judge, I didn't find out about this witness until yesterday when another witness gave me her name. As soon as I found out, I told Lawyer Smith. I gave him the name this morning. I don't know what else I can do."

Lawyer Smith: "Judge, if this witness testifies, I'm going to be greatly prejudiced."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 8 HYPOTHETICAL 8B

(Assume State has presented its evidence but not yet rested.)

Prosecutor Jones: "Your Honor, I move to amend the complaint as follows: the date in the complaint states December 30th but the evidence has shown the crime actually occurred in the early morning hours of December 31st. The information should read December 31st.""

Lawyer Smith: "Objection! He can't amend the complaint now. The jury's been sworn."

Prosecutor Jones: "The Defendant isn't prejudiced. He's known what the witnesses were going to testify to all along. I just noticed the complaint had the wrong date."

Leader: **[Hands gavel to student judge for a ruling.]**

(Discussion should also include motions to amend the information immediately prior to trial; amendments which might prejudice the Defendant such as changing the name of the victim. What options does a judge have? Deny the motion? Grant a continuance? Bill of Particulars? Alibi Defense? Indictment vs. Information? Civil Complaint?)

PROBLEM 8 HYPOTHETICAL 8C

(Assume criminal case, Defendant is charged with Having Weapons Under Disability)

Prosecutor Jones: "Mr. Police Officer, do you see the defendant in the courtroom and if so, would you point him out."

Police Officer: "He's over there, dressed in that plaid shirt and jeans. That's the same shirt he had on the night I arrested him for this WUD and the same shirt he had on the last time I arrested him for WUD."

Lawyer Smith: "Objection, your Honor. I move for a mistrial."

Leader: **[Hands gavel to student judge for a ruling.]**

(Discussion should include what factors a judge should weigh in deciding whether to grant a mistrial.)

Change Facts

Lawyer Smith: "Mr. Curtis Newman, did you start shoving something into your glovebox when Mr. Police Officer pulled you over?"

Witness: "Heck no, that police officer lied. He's lied before. You know, he beat me up and he's being sued for beating up two other guys. I saw it in the newspaper."

Prosecutor Jones: "Objection, your Honor, I move for a mistrial."

Leader: **[Hands gavel to student judge for a ruling.]**

(Discussion should include possible double jeopardy problems.)

PROBLEM 8 HYPOTHETICAL 8D

(Assume you are in the second day of a two-day jury trial in which the Defendant is charged with Theft.)

Lawyer Smith: "Your Honor, before the jury is brought in I would like to make Motion to Disqualify you. This is an oral motion because I just found out about this and haven't had time to prepare a written motion. I've been told that you and Prosecutor Jones are friends and go to the Ohio State football games together every week-end. In fact, you went to Ann Arbor together last Saturday for the OSU-Michigan game. My client does not believe he can receive a fair trial in front of you."

Leader: **[Hands gavel to student judge for a ruling.]**

(Discussion should center on fact the motion is not in writing, there is no certificate of counsel it is made in good faith, no accompanying affidavits, and not timely.)

Assume judge denies motion. The next day, Lawyer Smith files a written motion with certificate of good faith and two accompanying affidavits. Also, assume Judges does not go to OSU football games with Prosecutor Jones and did not go to Ann Arbor last Saturday with him.

Leader: What do you do now, Judge?

PROBLEM #9—MISCELLANEOUS ISSUES RELATING TO DEMONSTRATIVE EVIDENCE, JURY VIEWS, NOTE TAKING, AND JUROR QUESTIONS

TOPIC SUMMARY: Participants will discuss the proper procedures for handling physical and demonstrative evidence at trial, ruling on requests for jury views, and for responding to juror requests to ask questions and take notes.

POINTS TO COVER:

1. Use of demonstrative evidence in opening and closing arguments by lawyers.

2. Showing to jury or allowing jury to see evidence before admission.

3. Marking evidence for identification.

4. Jury views.

5. Jury questioning/note taking.

MATERIALS:

PROBLEM 9 HYPOTHETICAL 9A

(Assume opening statements are in progress.)

Prosecutor Jones: "As you can see, members of the Jury, from this photograph of the scene the ground was very grassy."

Defense Lawyer Smith: "I object. That photo is not in evidence. This is improper."

Leader: **[Hands gavel to student judge for a ruling.]**

Prosecutor Jones: "As you can see, members of the jury, from this sketch of the scene. . ."

Defense Lawyer Smith: "Same objection."

Prosecutor Jones: "But I could just as easily have drawn it while I spoke, it's admissible."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 9 HYPOTHETICAL 9B

Prosecutor Jones: "I ask that the clerk mark these photographs for identification."

Defense Lawyer Smith: "Your honor, while counsel was having those marked he held them so that they were clearly visible to the jury. I move for a mistrial."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 9 HYPOTHETICAL 9C

The Defense counsel is cross examining the arresting officer in OVI case.

Defense Attorney: "Isn't it true there are a lot of pot holes where you asked the defendant to perform the field sobriety exercise?"

Witness: "No. It was nice and level."

Defense Attorney: "Your Honor, I move for a jury view so the jury can see all the pot holes for themselves."

Leader: **[Hands gavel to student judge for a ruling.]**
(Discuss jury views, how and when they should be considered.)

PROBLEM 9 HYPOTHETICAL 9D

Assume Defendant did not testify and the defense counsel is giving closing argument and identity is the disputed issue.

Defense Attorney: "Jim (the defendant), stand up, come up here with me and let's demonstrate something for this jury."

Prosecutor: "Your Honor, I object. The defendant didn't testify."

Leader: **[Hands gavel to student judge for a ruling.]**

(Discuss what you would allow, e.g., height, weight, defendant speaking to show accent or lack of accent, tattoos, gloves.)

If this happens during the defense's case and the defense counsel asks the defendant to demonstrate, does the defense lose final closing argument?

PROBLEM 9 HYPOTHETICAL 9E
Assume the plaintiff has finished her testimony.

Juror #1: *Raises hand.* "Judge, can I ask this witness a question?"

Leader: **[Hands gavel to student judge for a ruling.]**

Now assume defendant in criminal case has finished testifying.

Juror #1: "Judge, I want to ask the defendant if he/she has a criminal record."

Leader: **[Hands gavel to student judge for a ruling.]**

Assume the defense counsel has finished redirect of his client and turns and says to the judge. "I now offer my client to the jury for any questions they may have." What do you do?

Juror #2: Judge, can I take notes?

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM #10—MAINTAINING PROFESSIONALISM

TOPIC SUMMARY: Participants will be able to recognize attorney's improper behavior during trial and consider alternatives available to the judge.

POINTS TO COVER:

1. Options for discipline of attorneys and clients; fines, probation, jail, donations to charity, threats.

2. Use of contempt, serious ramifications of use of contempt—establish standard early.

3. Consider discipline without jeopardizing a client's rights.

MATERIALS:

PROBLEM 10 HYPOTHETICAL 10A

(A Civil Case)

(Assume Plaintiff's Lawyer is experienced.)

Plaintiff's Lawyer Jones: "Mr. Police Officer, did you charge the defendant?"

Defense Lawyer Smith: I object, irrelevant and so prejudicial as to require a mistrial. I request counsel be held in contempt.

Leader: **[Hands gavel to student judge for a ruling.]** Then, "Any different ruling if liability is not a close question?"

PROBLEM 10 HYPOTHETICAL 10B

Leader: "You have requested all jury instructions to be on your desk by 9:00 a.m. the following morning to review. Tomorrow arrives.

(Hands gavel to student). "Ask for the jury instruction."

Plaintiff's Lawyer Jones: "Here are the Plaintiff's, your Honor."

Defense Lawyer Smith: "I don't have mine, judge. My secretary messed up and forgot to do them."

Plaintiff's Lawyer Jones: "That's not fair. I move for sanction."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 10 HYPOTHETICAL 10C

(Assume last day of long, heated jury trial and in front of the jury the following exchange takes place.)

Defense Lawyer Smith: "I object."

Leader: "Sustained."

Plaintiff's Lawyer Jones: (In front of the jury) "Judge, you are wrong and you are denying my client the right to a fair trial." (emphatic)

Leader: "How do you handle this?"

PROBLEM 10 HYPOTHETICAL 10D

Leader: Hands gavel to student and directs student to ask counsel for any last motions before trial begins.

Defense Lawyer Smith: "I need a continuance. I know you already denied my first motion for continuance this morning, but I am not ready. If you make me go to trial I'll be ineffective."

Leader: **"What will you do?"**

PROBLEM 10 HYPOTHETICAL 10E

Leader: This occurs at pretrial.

Defense Lawyer Smith: Judge, I need to continue this trial because I have a case specially set in federal court on the same day.

Leader: You check with federal court which indicates case was continued a month ago. **[Pass gavel.]**

PROBLEM 10 HYPOTHETICAL 10F

Judge: State v. Larry Later
"This case is set for Jury Trial this morning!—Where is Mr. Later? Where is his attorney, Lawyer Smith?

Prosecuting Attorney: "I don't know, judge. I haven't seen either one."

Leader: **[Pass gavel.]**

Ten minutes passes

Prosecuting Attorney: "Judge, Mr. Later is in the courtroom now."

Leader: **[Pass gavel.]**

Defense Lawyer Smith: "Judge, wait. I told Mr. Later to meet me out in the lobby. It's my fault he wasn't in the courtroom when you called the case earlier this morning. If you take someone into custody, it ought to be me. It's my fault he's late."

Leader: Pass gavel.

*(Discuss if **capias** is issued.)*

PROBLEM #11—CLOSING ARGUMENTS

TOPIC SUMMARY: Participants will be able to recognize and rule correctly on improper closing arguments.

POINTS TO COVER:

1. Improper comments by attorneys in closing arguments.
2. Repetitive argument.
3. Limits on time of argument.
4. Comments outside scope of evidence.

MATERIALS:

PROBLEM 11 HYPOTHETICAL 11A

(Assume you are in the middle of closing arguments in a criminal case.)

Prosecutor Jones: "As a prosecuting attorney, I can tell you I have no interest in prosecuting an innocent person. If I did not truly believe the defendant to be guilty, I would not have filed these charges."

Defense Lawyer Smith: "I object and move for a mistrial."

Leader: **[Hands gavel to student for a ruling.]**

PROBLEM 11 HYPOTHETICAL 11B

(Assume the lawyer arguing has one minute to go.)

Plaintiff's Lawyer Jones: "I know that the minute I sit down I will remember something I forgot to tell you. . . so to be on the safe side, I'd better go over the whole argument again."

Leader: **"What do you do?"**

PROBLEM 11 HYPOTHETICAL 11C

Prosecutor: "Members of the jury, I submit the defendant's testimony is unworthy of belief. He's a chronic, pathological liar."

Defense: "I object and move for a mistrial."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 11 HYPOTHERTICAL 11D

Defense Attorney: "This is a clear case of self defense. Imagine you were faced with a 240 pound maniac rushing at you. Wouldn't you have pulled a gun to protect yourself?"

Prosecutor: Objection and move for a mistrial.

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 11 HYPOTHETICAL 11E

Leader assume prosecutor states during closing argument:

Prosecutor: "We have an obligation to make you feel just a bit of what Mary, the victim, felt, because otherwise it's easy to forget that."

Defense Attorney: "Your Honor, now that the State has concluded its closing argument, I object to the improper comment regarding jury feeling what the victim felt and move for mistrial."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 11 HYPOTHETICAL 11F

Leader: "You heard that the victim was high on cocaine. How can he possibly identify his attacker?"

Prosecutor: "Objection—there is no evidence that the victim was high on cocaine or anything else."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 11 HYPOTHETICAL 11G

Prosecutor Jones: "Your Honor, I hate to interrupt opposing counsel during his closing argument, but we each agreed to a 20 minutes time limit. I stuck to the 20 minutes, but now Defense Lawyer has gone on and on for nearly 35 minutes."

Defense Lawyer Smith: "I have a lot to say, Your Honor. This is an important case. Besides, you cannot limit my client's right to be heard."

Leader: --Discuss time limits.
--When can they be imposed?
--What is a "fair" amount of time?
--How does a judge control time limits?

PROBLEM 11 HYPOTHETICAL 11H

Prosecutor Jones: "This obscenity case is very important to our community and its citizens. Law abiding citizens do not want this smut in their neighborhoods. I urge you, by your verdict, to send a strong message to smut dealers—no more in our community."

Defense Lawyer Smith: "Objection!"

Leader: Discuss emotionally improper arguments.
<u>If there is no objection, when/should trial court intervene so as to preserve the fairness of the proceeding?</u>

PROBLEM 11 HYPOTHETICAL 11I

(Criminal Case—Aggravated Possession of Drugs. Pros. states during closing argument:)

Prosecutor: "I don't know why the Defense counsel objected to the I.D. technician telling you about the fingerprint results. Maybe he will tell you, unless he has something up his sleeve along with the perjured testimony and planted evidence."

Defense Attorney: "Objection, move for mistrial."

Leader: **[Hands gavel to student judge for a ruling.]**

Prosecutor cont.: "If you believe the detective is a perjurer, likes to point the finger at innocent people and would look you straight in the eye and lie, raise your hand now, and I will sit down. God forbid you should believe a police officer whose testimony went "uncontradicted" by these Defendants.

Defense Attorney: "Object, move for mistrial."

PROBLEM 11 HYOPTHETICAL 11J

Defense Lawyer Smith: "Your Honor, my client waives his initial closing argument. I shall save my closing remarks for rebuttal after the prosecutor gets finished."

Prosecutor Jones: "Your Honor, the State of Ohio waives its closing argument, as well."

Defense Lawyer Smith: "In that event, Judge, I shall make my rebuttal argument now."

Prosecutor Jones: "Wait a minute Judge, there was no defense argument and there was no prosecution argument, so what' to rebut?"

Leader: *Both sides have waived argument.*

Suppose the Prosecutor had said more such as, "Since the jury carefully heard the evidence that proves Defendant guilty, I shall waive argument also." Has argument to jury, albeit short, been made?

Suppose attorney tells jury he will only take five (5) minutes now and reserve remainder for rebuttal and Defense attorney objects. Permissible?

PROBLEM 11 HYPOTHETICAL 11K

Criminal Case (Judges Improper comments)

Leader: Pass gavel to student before reading this Hypothetical). (Student is to assume he/she is Judge in scenario).

Assume Defense Counsel referring to specific testimony, argues that witnesses lied. "They are liars."

Judge: "That's just improper for you to call him a liar. There's no evidence that anybody is a liar. I had to talk to you a couple of times. It's not up to you to call anyone a liar in this court, do you understand?"

Defense Counsel: "Your Honor, may counsel approach the bench? Your Honor, you have unreasonably criticized me in presence of jury at least 3 times—during opening and now during closing argument and your castigation of counsel has impaired the fairness of the trial for defendant, I move for a mistrial."

Does student judge grant or deny? What, if possible, is appropriate?

PROBLEM #12—JURY INSTRUCTIONS

TOPIC SUMMARY: Participants will be able to decide what jury instructions should be given to the jury.

POINTS TO COVER: 1. "Ohio Jury Instructions" are suggested.

2. Don't stop thinking just because there are standard instructions.

3. Sometimes law changes and standard instructions do not.

4. Methods by which instructions can go to the jury: written, recorded, verbal.

MATERIALS:

PROBLEM 12 HYPOTHETICAL 12A

Defense Lawyer Smith: "Your Honor, the defense requests that you give a special instruction on identity since that is the issue in this case." (hands instruction to student).

Prosecutor Jones: "I object. Not in the standard instructions."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 12 HYPOTHETICAL 12B

Prosecutor Jones: "Your Honor, the defendant is charged with Public Indecency. As I'm sure you are aware, the jury instructions do not define 'private parts'. Accordingly, we are requesting that you included in your instruction to the jury the following language defining 'private parts': 'private parts are defined as genitalia.'"

Defense Attorney Smith: "I object. The Supreme Court saw fit not to define the term 'private parts'. That instruction the Supreme Court wrote is the one they want given. It should not be modified at all."

(What if the prosecutor asks for "breasts" to be included in "private parts"?)

PROBLEM 12 HYPOTHETICAL 12C

Defense Attorney Smith: "This is a Disorderly Conduct Charge. The State claims the Defendant was disorderly because she refused to leave when the rest of the crowd left and refused to stop yelling at officers. My client has a Constitutional right to yell at officers, unless the words are fighting words. I propose this special jury instruction."(Hands instruction to student.)

Prosecutor Jones: "I object to Defendant's proposed instruction, it improperly places the Court in the position of commenting on the evidence. Further, the cases cited by Defense Counsel are distinguishable."

Leader: "What will you consider in ruling on this requested instruction?"

(Chaplinsy v. New Hampshire and State v. Hoffman)

PROBLEM 12 HYPOTHETICAL 12D

Plaintiff's

Lawyer Jones: "Judge, I hand you a charge that has been submitted to the Supreme Court for approval by the Civil Jury Instruction Committee. It's just better than the standard instruction in the book."

Defense Lawyer Smith: "It is not in the book. It is not the law."

Leader: "What should be taken into consideration in making a ruling?"

PROBLEM 12 HYPOTHETICAL 12E

Defense Lawyer Smith: **"**I request the jury instructions be tape recorded as the court reads them, and sent to the jury room with a tape player for use during deliberations."

Prosecutor Jones: "I object. If the jury has a question about the instructions and plays the tape, they may only play a portion of the instruction and receive an incomplete statement of the law."

Leader: **[Hands gavel to student for ruling.]**

PROBLEM #13—JURY DELIBERATION

TOPIC SUMMARY: The participants will be able to respond to problems that arise during jury deliberations.

POINTS TO COVER:

1. Questions and notes from the jury.

2. Questions to the bailiff from jurors.

3. Presence of defendant during these events.

4. Sending evidence back to jury room; guns, drugs, etc.

5. Deadlocked jury, now what?

6. Warning lawyers to check evidence before it goes back with jury.

7. When to order mistrial; how much time should pass when jury is deliberating.

9. Excusing the alternate juror.

10. Care and feeding of jury.

MATERIALS:

PROBLEM 13 HYPOTHETICAL 13A

(Assume jury is in deliberation)

Bailiff: "Your Honor, the jury gave me this note." Your Honor, we would like:

1. To hear all the testimony about the accident again.
2. For you to send back the two depositions given by the doctors.
3. To smoke.
4. A calculator.
5. A dictionary.
6. For you to explain what the "greater weight of the evidence means."
7. The video tape that is in evidence.

Leader: **What do you do? In what order and why?** *(Assume the bailiff has told the jury the judge never allows this.)*

PROBLEM 13 HYPOTHETICAL 13B

Bailiff: "Judge, they've asked to have the guns, ammo and drugs back with them. Any problem?"

Prosecutor Jones: "I object. Too dangerous."

Defense Lawyer Smith: "It's all evidence, they have a right to see it all."

Leader: **[Hands gavel to student judge for a ruling.]**
(What if the Bailiff offers to stay in the deliberation room with the material?)

PROBLEM 13 HYPOTHETICAL 13C

Leader: Assume a note is sent from a deliberating jury. The note reads. . ." . . .I need to speak with you in private, your Honor. Signed Mr. Lamberth."

(Hands gavel to student judge for ruling)

PROBLEM 13 HYPOTHETICAL 13D

(Assume the jury has been discharged and sent home.)

Bailiff: "Judge, some of the marijuana that was admitted into evidence and sent to the jury room for deliberation is missing. What do you want me to do?"

PROBLEM 13 HYPOTHETICAL 13E

Leader: "You notice that the jury has come back from deliberation and you see that a photo marked for identification but never admitted, has been sent back with them. No one has notice or objected. What do you do?" **[Hands gavel to student judge for ruling.]**

Leader: *(Same situation except counsel notices and makes the following motion.)*

Defense Lawyer Smith: "I move for a mistrial. Evidence improperly before the jury."

Leader: **[Hands gavel to student judge for a ruling.]** *(How can these situations be avoided?)*

PROBLEMS 13 HYPOTHETICAL 13F

Prosecutor Jones: "Your Honor, the jury has been deliberating for over 3 hours. The case only took 2 hours to try. Could you please ask them if there's some additional information they need?"

Defense Attorney Smith: "I object."

Leader: **[Hands gavel to student judge for a ruling.]** *(Do you interrupt the jury?*
Do you order dinner if it's after 7:00 p.m.?)

PROBLEM 13 HYPOTHETICAL 13G

(Two hours later)

Bailiff: "The jury is in the Courtroom. Sir, they have a question."

Foreperson: "Your Honor, it is 8:00 p.m., we have been at it for over five hours now. We are exhausted, and can't decide tonight. Can we go home for the night, and start again in the morning?"

Prosecutor Jones: "No problem for the State."

Defense Attorney Smith: "I object, I want them tired and angry. That helps the defense."

Leader: **[Hands gavel to student judge for a ruling.]**
(What if it is 5:00 p.m. and a single parent juror has to pick up a child from day care? How can this be avoided?)

PROBLEM 13 HYPOTHETICAL 13H

Leader: The jury has sent a note wanting to know what happens when they can't reach a unanimous decision—they're split 6-2.
[Hands gavel to student judge for a ruling.]

What happens when the judge forgets to excuse an alternate juror? Is there a situation when a judge would allow less than a unanimous verdict? Would you allow a case to go to the jury with 5 jurors and no alternates—in what situations?

--Discuss propriety of Judge inquiring how jury is split.
--What if it was a civil case, split 6-2?

PROBLEM #14—RECEIVING VERDICTS AND CONCLUDING TRIALS

TOPIC SUMMARY: The participants will be able to receive a jury verdict and close the trial proceedings.

POINTS TO COVER:

1. Verdict form proper—what to look for.
2. What to say when jury re-enters courtroom.
3. Who takes verdict from whom?
4. Polling the jury.
5. Verdict on one count but not on others.
6. How and when to discharge the jury.
7. Continued bond after criminal verdict.
8. What to say to defendant's lawyer—criminal.
9. Safety of jurors—verdict late at night.
10. Adjudicate right there—criminal.
11. Who does judgment—civil.

MATERIALS:

PROBLEM 14 HYPOTHETICAL 14A

Bailiff: "Your Honor, they have a verdict."

Leader: "What do you do first?" (cover how to bring them in, where they stand, etc.)

Lawyer: "We would like the jury polled, please."

Leader: "Must you? How is it done? Who does it?"

Juror: (While being polled). "No, that's not what I wanted to do."

Leader: "Now what do you do?"

PROBLEM 14 HYPOTHETICAL 14B

Bailiff: "The jury is in the courtroom, your Honor."

Leader: "Have you reached a verdict?"

Foreperson: "Your Honor, we are deadlocked on one count but have verdict on the other."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 14 HYPOTHETICAL 14C

The Clerk: "We find the defendant guilty."

Leader: "What do you say to the jury?" *(appreciation and rules of privacy)*

"To the criminal defendant?" *(bond)*

"To the lawyers?" *(who prepares judgment in civil case)*

(Assume the jury has been discharged but several jurors have chosen to remain in the courtroom)

"Do you continue with sentencing?"

PROBLEM 14 HYPOTHETICAL 14D

Plaintiff's

Lawyer Jones: "Permission to speak to the panel after discharge."

Leader: **[Hands gavel to student judge for a ruling.]**

PROBLEM 14 HYPOTHETICAL 14E

Defense Attorney: "Judge, the verdict and your instructions asked the jury to reduce all future economic damages to their present money value. The verdict awards $3,000.00 for future medical and lost wages and then "reduces" that amount to $9,000.00. This is a fatal inconsistency in the verdict, and I suggest a mistrial is in order."

Plaintiff's Counsel: "Judge, can't we fix this?"

Leader: **[Hands gavel to student judge for a ruling.]**

What if it is a criminal verdict and it is incomplete? (Not signed, all boxes not checked—such as firearms, value, etc.)

Discuss use of interrogatories and verdict forms.

PROBLEM 14 HYPOTHETICAL 14F

(Assume the jury has just returned a $15,000.00 verdict.)

Plaintiff's
Lawyer Jones: "Your Honor, we anticipated that we might win, so we have a judgment prepared for you to sign for the full amount plus interest at 10%."

Leader: "Do you sign?"

PROBLEM 14 HYPOTHETICAL 14G

Judicial Assistant: "Judge, a juror from last week's trial is here and wishes to speak with you about the verdict."

Leader: **[Hands gavel to student judge for a ruling.]**

Arraignments, Taking Pleas, and Guilty and No Contest Pleas, Plea Requirements Under the Constitution, Revised Code, and Crim.R. 11

Hon. Stephen L. McIntosh
Franklin County Common Pleas Court

Hon. Joy Malek Oldfield
Summit County Common Pleas Court

Arraignment Procedure (Long and Short)

I. Introductory Issues

A. Call the Case (go on the record)
B. (M) Identify who is present (confirm victim notification and/or presence)
   i. Discussion R.C. 2930.14 and R.C 2930.09 versus Ohio Const. Art. I, §10(a)
   ii. Review Ohio Supreme Court Understanding Marsy's Law
C. Confirm Defendant name
D. Remote Proceedings?
   i. (M) If remote proceedings ensure parties can see and hear the court and counsel
   ii. (M) Ensure defendant understands s/he can have a private conversation with counsel
   iii. (M) Ensure defendant requests or consents to appearing remote

II. Arraignment Procedure (short form when pleading NOT GUILTY)

A. (M) Identify substance of the charges
   i. Crime
   ii. Level of offense
   iii. Date/County
   iv. Prosecuting witness if any
B. If NO defense counsel
   i. Do not accept statements regarding the substance of the charge from defendant
   ii. Enter NOT GUILTY plea
   iii. (M) Ascertain indigency
   iv. Follow local protocol for filling out form
   v. Appoint counsel (private or public defender)
      1. Consider R.C. 2941.51(D) reimbursement advisement
   vi. If defendant refuses counsel
      1. Ascertain indigency
      2. Explain to defendant you want him/her to consider whether an attorney can help and that you will give them the opportunity to waive counsel at the next court date after consideration
      3. Appoint counsel
      4. Continue Arraignment and set also for Pro Se Colloquy
C. If defense counsel is there
   i. Turn to defense counsel - "I'm going to turn to your lawyer and allow him/her to speak on your behalf"
   ii. Normally defense counsel will waive a reading of the indictment and any defect in time, manner or method of service
      1. Beware of defense counsel or defendant stating that defendant hasn't seen a copy of the indictment!
   iii. Defense counsel will enter NOT GUILTY plea

D. (M) Consider bond (ALWAYS whether counsel or not)
    i. Any conditions
        1. GPS
        2. EMHA
        3. Supervision
        4. Evaluations
    ii. Procedure to sign bond/get booked at jail if felony summons
    iii. Address TPO/no contact if appropriate
E. Consider speedy trial (pay attention if defendant is in custody!)
F. Consider case management
    i. Are you setting a trial date and final pretrial? Or setting First Pretrial/Status?
    ii. Are you addressing discovery?
    iii. Are you addressing IILC/pretrial motion deadlines? (R.C. 2951.041)
    iv. Address STD testing if appropriate (R.C. 2907.27)
    v. Address TPO/no contact if appropriate
G. If remote, get contact information for future proceedings

III. Arraignment Procedure (short form when pleading GUILTY)

A. (M) Identify substance of the charges
    i. Crime
    ii. Level of offense
    iii. Date/County
    iv. Prosecuting witness if any
B. If NO defense counsel
    i. DO NOT ACCEPT A GUILTY PLEA
    ii. Do not accept statements regarding the substance of the charge from defendant
    iii. Enter NOT GUILTY plea
    iv. (M) Ascertain indigency
    v. Follow local protocol for filling out form
    vi. Appoint counsel (private or public defender)
        1. Consider R.C. 2941.51(D) reimbursement advisement
    vii. If defendant refuses counsel
        1. Ascertain indigency
        2. Explain to defendant you want him/her to consider whether an attorney can help and that you will give them the opportunity to waive counsel at the next court date after consideration
        3. Appoint counsel
        4. Continue Arraignment and set also for Pro Se Colloquy
    viii. Address bond and set bond until next appearance
C. If defense counsel is there
    i. Turn to defense counsel - "I'm going to turn to your lawyer and allow him/her to speak on your behalf"

ii. Normally defense counsel will waive a reading of the indictment and any defect in time, manner or method of service
    1. Beware of defense counsel or defendant stating that defendant hasn't seen a copy of the indictment!
iii. Defense counsel will inform the court defendant is pleading GUILTY
iv. (M) Go to plea colloquy on Plea Script

IV. <u>Arraignment Procedure (long form when pleading NOT GUILTY)</u>

A. (M) Identify substance of the charges
    i. Crime
    ii. Level of offense
    iii. Date/County
    iv. Prosecuting witness if any
B. If NO defense counsel
    i. Do not accept statements regarding the substance of the charge from defendant
    ii. Enter NOT GUILTY plea
    iii. (M) Ascertain indigency
    iv. Follow local protocol for filling out form
    v. Appoint counsel (private or public defender)
        1. Consider R.C. 2941.51(D) reimbursement advisement
    vi. If defendant refuses counsel
        1. Ascertain indigency
        2. Explain to defendant you want him/her to consider whether an attorney can help and that you will give them the opportunity to waive counsel at the next court date after consideration
        3. Appoint counsel
        4. Continue arraignment and set also for Pro Se Colloquy
C. If defense counsel is there
    i. Turn to defense counsel – "I'm going to turn to your lawyer and allow him/her to speak on your behalf"
    ii. <u>(M) Reading of indictment</u>
    iii. <u>(M) penalties associated with crimes charged (See Penalty Chart)</u>
    iv. Defense counsel will enter NOT GUILTY plea
D. (M) Consider bond (<u>ALWAYS whether counsel or not</u>)
    i. Any conditions
        1. GPS
        2. EMHA
        3. Supervision
        4. Evaluations
    ii. Procedure to sign bond/get booked at jail if felony summons
    iii. Address TPO/no contact if appropriate
E. Consider speedy trial (pay attention if defendant is in custody!)

F. Consider case management
    i. Are you setting a trial date and final pretrial? Or setting First Pretrial/Status?
    ii. Are you addressing discovery?
    iii. Are you addressing IILC/pretrial motion deadlines? (R.C. 2951.041)
    iv. Address STI testing if appropriate (R.C. 2907.27)
    v. Address TPO/no contact if appropriate
G. If remote, get contact information for future proceedings

V. Arraignment Procedure (long form when pleading GUILTY)

A. (M) Identify substance of the charges
    i. Crime
    ii. Level of offense
    iii. Date/County
    iv. Prosecuting witness if any
B. If NO defense counsel
    i. DO NOT ACCEPT A GUILTY PLEA
    ii. Do not accept statements regarding the substance of the charge from defendant
    iii. Enter NOT GUILTY plea
    iv. (M) Ascertain indigency
    v. Follow local protocol for filling out form
    vi. Appoint counsel (private or public defender)
        1. Consider R.C. 2941.51(D) reimbursement advisement
    vii. If defendant refuses counsel
        1. Ascertain indigency
        2. Explain to defendant you want him/her to consider whether an attorney can help and that you will give them the opportunity to waive counsel at the next court date after consideration
        3. Appoint counsel
            a. Consider R.C. 2941.51(D) reimbursement advisement
        4. Continue Arraignment and set for Pro Se Colloquy
    viii. Address bond and set bond until next appearance
C. If defense counsel is there
    i. Turn to defense counsel – "I'm going to turn to your lawyer and allow him/her to speak on your behalf"
    ii. <u>(M) Reading of indictment</u>
    iii. <u>(M) penalties associated with crimes charged (See Penalty Chart)</u>
    iv. Defense counsel will inform court defendant is entering GUILTY plea
    v. (M) Go to plea colloquy on Plea Script

The A,B,C's of Taking the "Perfect" Plea. What Every New Judge Needs to Know (In Non-Death Penalty Cases).

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I. Constitutional Imperatives

A guilty plea is a grave and solemn act to be accepted only with care and discernment. Central to the plea and foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. The plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial. ***Brady v. U.S.,* 397 U.S. 742 (1970).**

Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. ***Brady v. U.S.,* 397 U.S. 742 (1970)**.

When a judge discharges the function of placing a change of plea on the record the court leaves a record adequate for review and forestalls the spin-off of collateral proceedings that seek to probe murky memories. ***Boykin v. Alabama*, 395 U.S. 238 (1969).** In this case, the judge asked no questions of petitioner concerning his plea, and petitioner did not address the court.

When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently and voluntarily. Failure on any of these points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution. ***State v. Engle*, 74 Ohio St.3d 525 (1996).** In this case, the defendant's plea was predicated on a belief that she could appeal the trial court's rulings that her counsel believed had stripped her of any meaningful defense. Court of Appeals held that under Crim. R. 12(H), appellant had waived the assignments of error that were based on the trial court's refusal to allow testimony on the battered woman syndrome or duress.

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury**. Ohio Constitution Article I, Section 5**

II. Compliance with the Rules of Criminal Procedure

A. *Crim. R. 11(C)(2): "In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a*

plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

1) Determine that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing. [Crim. R. 11 (C)(2)(a)]

2) Inform the defendant of and determine that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence. [Crim. R. 11(C)(2)(b)]

3) Inform the defendant of and determine that the defendant understands that by pleading the defendant is waiving his/her rights to jury trial, to confront witnesses against him/her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the State to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself/herself. [Crim. R. 11(C)(2)(c)].

The constitutional rights are: **(1)** a jury trial; **(2)** confrontation of witnesses against him; **(3)** the compulsory process for obtaining witnesses in his favor; **(4)** the state must prove the defendant's guilt beyond a reasonable doubt at trial; and **(5)** the defendant cannot be compelled to testify against himself. If the trial court fails to strictly comply with these requirements, the defendant's plea is invalid.

The non-constitutional rights that the defendant must be informed of are: **(1)** the nature of the charges; **(2)** the maximum penalty involved, which includes, if applicable, an advisement on post-release control; **(3)** if applicable, that the defendant is not eligible for probation or the imposition of community control sanctions; and **(4)** that after entering a guilty plea or a no contest plea, the court may proceed directly to judgment and sentencing.

For the non-constitutional rights, the trial court must substantially comply with Criminal Rule 11 mandates. **State v. Veney, 120 Ohio St.3d 176, 2008-Ohio-5200**

Trial court substantially complied with Crim. R. 11(C)(2)(c). Court should also ask if Defendant understands each of his rights, not just that he appreciates that he is giving them up by entering a plea. ***State v. Ellis*, 2015-Ohio-3438 (10th District).**

Crim. R. 11 is designed to ensure that a defendant is informed and thus enables the judge to determine that the defendant understands that his plea waives his right to trial and other rights and incidents of a trial. To that end, a reviewing court must determine whether the record demonstrates that the defendant was informed of the relevant constitutional rights and incidents of trial and that a guilty plea represents a knowing and voluntary forfeiture. ***State v. Ballard,* 66 Ohio St. 2d 473 (1981)**.

Crim R. 11(C) requires a trial judge to determine whether that criminal defendant is fully informed of his or her rights and understands the consequences of his or her guilty plea. This court has held that the preferred method of informing a criminal defendant of his or her constitutional rights during the plea colloquy is to use the language contained in Crim. R. 11(C). However, a trial court's failure to literally comply with Crim. R. 11(C) does not invalidate a plea agreement if the record demonstrates that the trial court explained the constitutional

right "'*in a manner reasonably intelligible to that defendant.*' ***State v. Barker,*** **129 Ohio St. 3d 472 (2011), citing *State v. Veney*, 120 Ohio St.3d 176 (2008),**

Crim.R. 11 plays an important function in that it remedies the problems inherent in a subjective judgment by a trial court as to whether a defendant has intelligently and voluntarily waived his constitutional rights. ***State v. Stone,*** **43 Ohio St.2d 163 (1975).**

Ohio's Crim.R. 11 outlines the procedures that trial courts are to follow when accepting pleas. We have explained that the rule 'ensures an adequate record on review by requiring the trial court to personally inform the defendant of his rights and the consequences of his plea and determine if the plea is understandingly and voluntarily made.' ***State v. Dangler,*** **162 Ohio St. 3d 1 (2020).**

Although it is always possible to provide more information during a plea colloquy, following the requirements of Rule 11 are enough. ***State v. Russell*****, 2019-Ohio-704 (8th).**

The preferred method is to use the language contained in the rule, stopping after each right and asking whether the defendant understands that right and knows that his plea waives it. If not done, the record must, in some way, affirmatively demonstrate the propositions made necessary by the rule. ***State v. Henderson*****, 2006-Ohio-6306 (2nd District).**

Knowing and Intelligent

Judge deviated from the jointly recommended sentence. ***State v Poole,*** **2024-Ohio-4892, 2024 Ohio App LEXIS 3641 (5th District)**

Improper advisement of post release control. ***State v Henderson*****, 2024-Ohio-4854, 2024 Ohio App. LEXIS 3611 (7th District)**

Failure to inquire of Defendant's veteran status at plea. ***State v Love*****, 2024-Ohio-4853, 2024 Ohio LEXIS 3618 (7th District)**

The Defendant argued that the court could not tell if the defendant subjectively understood the effects of entering the plea. ***State v Witterstaetter,*** **2024-Ohio-191, 2024 Ohio App LEXIS 189 (12th District)**

Defendant alleged he was off his meds and that he had been threatened by his attorney to enter the plea. ***State v Howard*** **2024-Ohio-243, Ohio App LEXIS 242 (8th District)**

Failure to Inform Defendant

Failure to inform the Defendant that he was a TIER III sex offender constituted noncompliance and defendant's guilty plea voided. A defendant need not show prejudice. **State v Sanders, 2016-Ohio-1397, 2016 Ohio App. LEXIS 1270 (6th District)**

Constitutional Rights - Crim. R. 11(C) (2) (c)

Crim. Rule 11(C) (2) creates constitutional rights and non-constitutional rights that a trial court must address prior to accepting a defendant's guilty plea.

B. *Constitutional Rights as listed in Crim Rule 11 (C)(2)(c) include:*

a) right to a jury trial;

b) right to confront witnesses against him or her;

c) right to compulsory process;

d) right that State must prove guilt beyond a reasonable doubt;

e) right against self-incrimination.

Court should also ask if Defendant understands each of his rights, not just that he appreciates that he is giving them up by entering a plea. ***State v. Ellis*, 2015-Ohio-3438 (10th).**

The preferred method is to use the language contained in the rule, stopping after each right and asking whether the defendant understands that right and knows that his plea waives it. If not done, the record must, in some way, affirmatively demonstrate the propositions made necessary by the rule. ***State v. Henderson*, 2006-Ohio-6306 (2nd).**

Although the trial court did not stop after each right, the court specifically addressed each of the constitutional rights listed in Crim.R. 11. After reciting the rights listed in Crim. R. 11, the court asked the defendant if he understood that by pleading guilty, he would be giving up those rights. ***State v. Cutlip*, 2012-Ohio-5790 (2nd).**

<u>Right against Self Incrimination</u>

When discussing constitutional rights, a trial court is required to personally inform the defendant in a manner reasonably intelligible to him of his privilege against self-incrimination along with the other constitutional rights listed in the rule at the time he enters his plea. ***State v. Gomez,* 2017-Ohio-8832 (10th).**

"The 'right to remain silent' has been described as a 'term of art synonymous with the Fifth Amendment privilege against self-incrimination.' ***State v. Henderson*, 2006-Ohio-6306 (2nd).**

Courts have found that advising a defendant that he is waiving his or her "right to remain silent" is sufficient to explain the privilege against compulsory self-incrimination and complies with Crim.R. 11(C). However, there is no requirement that a trial court use that phrase during a plea colloquy." ***State v. Caudell,* 2020-Ohio-1557 (11th.).**

When addressing a defendant's right against self-incrimination a trial court is not required to inform the defendant that the defendant's silence could not be used against him at trial. ***State v. Phillips*, 2020-Ohio-2785 (3rd).**

If trial court fails to address this right reversal is mandated**. *State v Hamilton*, 2022-Ohio-139 (6th).**

"[TRIAL COURT]: "Do you understand that you're not required to testify against yourself?

"[MR. CAUDELL]: Yes, Your Honor.
"[TRIAL COURT]: Are you waiving that right?
"[MR. CAUDELL]: Yes."

Crim R. 11(C) does not contain the phrase right to remain silent". The trial court must notify the defendant that he or she cannot be compelled to testify against himself or herself at a trial. However, courts have found that advising a defendant that he is waiving his or her "right to remain silent" is sufficient to explain the privilege against compulsory self-incrimination and complies with Crim.R. 11(C). However, there is no requirement that a trial court use that phrase during a plea colloquy." ***State v. Caudell,*** **2020-Ohio-1557, 2020 Ohio App. Lexis 1518 (11th District)**

[Trial court]: You've got a right to defend yourself. You could come up here on the witness stand, tell your side of the story. You could call your own witnesses, present your own evidence. And do you understand if we go through with this plea today, that's not happening either?

[Snyder]: I understand that, Your Honor.

The trial court failed to fully comply with Crim. R. 11(C)(2)(c) when it accepted his guilty plea. At the change-of-plea hearing, the only references to the right against self-incrimination and the right to compulsory process were in the above exchange. When a trial court fails to explain the constitutional rights that a defendant waives by pleading guilty or no contest, the reviewing court presumes that the plea was entered involuntarily and unknowingly, and no showing of prejudice is required. In such circumstances, the defendant's plea is invalid. ***State v Snyder*****, 2024-Ohio-4860, 2024 Ohio App. LEXIS 3602 (3rd District)**

THE COURT: Sir, when you're entering your plea, you're giving up your right to a jury trial or a bench trial. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You're also giving up your right to have your attorney use the court's subpoena power to bring in witnesses to speak on your behalf or to cross-examine those witnesses speaking against you. Do you understand you're giving up that right?

THE DEFENDANT: Yes.

THE COURT: You're also giving up your right to have the State prove your guilt beyond a reasonable doubt on each and every element of this charge. In all likelihood, I'll be basing my finding of guilt based solely on the statements made by the prosecutor as to what evidence would be presented at trial and what facts were alleged in the indictment. Knowing that, sir, do you still wish to maintain your plea?

THE DEFENDANT: Yes.

The Court failed to strictly comply with Criminal Rule 11 regarding the defendant's privilege against self-incrimination. "When a defendant enters a plea in a criminal case, the plea must be made knowingly, intelligently, and voluntarily. Failure on any of those points renders enforcement of the plea unconstitutional under both the United States Constitution and the Ohio Constitution." **State v. Engle, 74 Ohio St.3d 525, 527, 1996-Ohio-179. Cited in *State v Hamilton*, 2022-Ohio-139, 2022 Ohio App. LEXIS 124 (6th District)**

<u>Jury Trial</u>

Where a court informed a defendant that he would be waiving his right to a trial as opposed to a jury trial, the court's inquiry combined with the appellant's written plea of guilty which contained the reference to a jury trial supports a finding that the court strictly complied with the rule,

however, the trial court is reminded to use the express language of "jury trial" in future cases. ***State v. Gibson*, 2006-Ohio-4182 (11th).**

Even though written pleas form mentioned right to a jury trial failure of judge to specifically mention during exchange is error. ***State v. Thomas*, 2018-Ohio-2815 (7th).**

Defendant need not be advised that a unanimous verdict is necessary for conviction. ***State v. Akins, 2024-Ohio-598 (2nd)***

Right to Compulsory Process

When a judge indicates to a defendant that he is "giving up your right to call witnesses to speak on your behalf" the judge adequately advises the defendant of his right to compulsory process. An alleged ambiguity during plea colloquy may be clarified by reference to written plea and other portions of the record. ***State v. Barker, 129 Ohio St.3d 472 (2011).***

Before a defendant waives his constitutional rights, the trial court must inform him of his right to compulsory process of witnesses. Failure to strictly comply with this duty results in an invalid plea. ***State v. Moore,* 2017-Ohio-8483 (8th).**

Use of the phrase "entitled to summon witnesses" satisfies requirement of informing defendant of right to compulsory process. ***State v. Welly*, 2016-Ohio-863 (3rd).**

Proof Beyond a Reasonable Doubt

The requirement that the State proves that a Defendant is guilty beyond a reasonable doubt is a constitutional protection subject to strict scrutiny. ***State v. Veney,* 120 Ohio St.3d 176 *(2010)*.**

Trial court is not required to state that "each element has to be proven beyond a reasonable doubt" to comply with Crim. R. 11(C)(2)(c). ***State v. Eckels*, 173 Ohio App.3d 606 (2007).**

Right of Confrontation

Use of phrase" giving up your right to challenge any evidence or testimony that might be introduced against you" satisfies the obligation to inform defendant of right to confrontation. ***State v. McKeithen*, 2019-Ohio-493 (7th).**

Strict Compliance

Strict compliance envisions reviewing all constitutional rights using language that is understood. ***State v Miller,* 159 Ohio St.3d 447 (2020).**

To determine if a trial court strictly complies with constitutional rights only the colloquy may be considered. ***State v. Troiano,* 2010-Ohio-3019 (10th).**

Other Issues

Courts need not advise defendant of appellate rights at plea hearing. ***State v. Herbert,* 2019-Ohio-5092 (7th).**

Trial court not required to advise defendant of right to a bench trial. ***State v. Cruz-Ramos*, 2019-Ohio-779 (7th)**.

The right to testify is not specifically enumerated in Crim. R. 11 as a constitutional right and the defendant need not be informed of such a right. ***State v. Phillips*, 2020-Ohio-2785 (3rd).**

Non-Constitutional Rights - *Crim.R. 11(C)(2)(a-b)*

C. *Non-Constitutional Rights include:*

1) Voluntariness of Plea

2) Nature of Charge

3) Maximum Penalty

4) Eligibility for Community Control Sanctions

5) Effect of Plea

6) Proceed to Judgment

Non-Constitutional rights colloquy requires substantial compliance. ***State v. Engle,* 74 Ohio St.3d 525 (1996).**

Substantial compliance exists when a defendant, under the totality of the circumstances, subjectively understands the implications of the plea and the rights waived. ***State v. Nero,* 56 Ohio St.3d 106 (1990).**

Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving. ***State v. Hudson-Bey,* 2016-Ohio-7722 (4th).**

In part, substantial compliance can be established by reference to the written plea agreement. ***State v. Lauth*, 2013-Ohio-3478 (7th).**

Where error is non-constitutional aspect of plea, defendant must show prejudice. **State v. Gaines**, **2015-Ohio-5132 (8th District)** (court overstated consequences of PRC)

III. Voluntariness

Indication that defendant was taking medications did not render plea involuntarily. ***State v. Johnson*, 2019-Ohio-4541 (7th).**

Coercion not present when defendant indicated to the Court that no threats or promises were made to him. ***State v. Armstrong,* 2015-Ohio-3343 (8th).**

A. *Penalties and Consequences - Crim.R. 11(C)(2)(a)*

Misstatement as to maximum sentence constitutes grounds for reversal. ***State v. Drake,* 2017-Ohio-4027 (9th)**.

Fines and other financial sanctions, including restitution, are penalties that must be discussed.

***State v. Whitesell*, 2006-Ohio-1781 (12th).**

If defendant subjectively understands mandatory nature of penalty, failure to mention the qualifier "mandatory" does not render plea involuntary. ***State v Homolak,* 2019-Ohio-869 (8th).**

Failure to advise of fine is not error if no fine is imposed. ***State v. Taylor,* 2015-Ohio-1643 (8th).**

Failure to advise defendant of lifetime OL suspension violated requirements of Crim. R 11(C)(2)(a). ***State v. Greene,* 2006-Ohio-480 (2nd).**

The consecutive sentence requirement of R.C. 2921.331(D) (Failure to Comply with the Order or Signal of a Police Officer) must be explained under the maximum penalty language requirement Crim. R. 11(C)(2)(a). ***State v. Pitts,* 159 Ohio App.3d 852 (2005).**

The consecutive language requirement of R.C. 2921.331(D) (Failure to Comply with the Order or Signal of a Police Officer) need not be addressed pursuant to Crim. R. 11(C)(2). ***State v. Bailey*, 2004 Ohio LEXIS 240.**

Court is not required to "add up" all the penalties for multiple counts to inform Defendant of maximum penalty**. *State v Berry*, 2023-Ohio-605 (8th).**

Merger of offenses may require an explanation during plea proceedings. ***State v. Black*, 2012-Ohio-3774 (10th).**

Plea of guilty not necessarily involuntary even if defendant is not informed that sentences may be imposed consecutively. ***State v. Johnson,* 40 Ohio St.3d 130 (1988).**

When a trial court takes a plea from a defendant facing multiple charges, the court must advise the defendant as to the maximum penalty as to each offense and whether each offense is non-probationable. ***State v. Novoa*, 2021-Ohio-3585 (7th).**

Crim. R. 11(C)(2)(a) requires Court to explain the consequences of the charge. The term "charge" indicates only a single and individual criminal offense; consequently, the term maximum charge is to be understood as referring to a single penalty. ***State v. Horn,* 2013-Ohio-1986 (8th).**

Trial court failed to substantially comply with requirement of advising defendant as to maximum penalty by failing to advise of additional consecutive mandatory sentence relating to DUI specification. ***State v. Eckels*, 173 Ohio App.3d 606 (2007).**

Post-release control is a penalty which the court must inform the offender of pursuant to Crim. R. 11(C)(2)(a). ***State v. Witesell*, 2006-Ohio-1781 (12th).**

Court must advise sex offender of his classification status and notification requirements. However, if court fails to do so Defendant must show prejudice. ***State v Dangler*, 2020-Ohio-2765.**

Court must advise of possible PRC supervision and penalties as it affects maximum sentence, but it may accomplished if mentioned only in plea form. ***State v. Camp*, 2018-Ohio-2964 (2nd).**

Failure to notify maximum sentence on each count after indicated cumulative number for all counts not error. ***State v. Hickman*, 2019-Ohio-2819 (5th).**

Court not required to advise Defendant that guilty plea would forfeit his right to appeal denial of suppression motion. ***State v. Hickman*, 2019-Ohio-2819 (5th).**

Court cannot rely on notification of penalties at arraignment to satisfy plea requirement. ***State v Duty*, 2017-Ohio-451 (4th).**

Court not required to address penalties for indictment counts not being plead to. ***State v. Hall*, 2023-Ohio-1229(6th).**

Nature of the Charge

Court is not required to review each element of offense with offender so long as he understands the nature of the charge. ***State v. Stubbs, 2014-Ohio-3696 (10th).***

In order for a trial court to determine that a defendant is entering a plea with an understanding of the nature of the charge, the court need not advise him of the elements of the offense or specifically ask him if he understands the charge so long as the totality of the circumstances indicate that the trial court was warranted in deciding that the defendant understood the charge. ***State v. Peyton,* 2017-Ohio-8253 (2nd).**

[T]he Ohio Supreme Court has held that where criminal defendants are represented by counsel, Crim.R. 11(C) does not require trial courts to inform defendants of affirmative defenses that may be available to them prior to accepting their guilty pleas. ***State v. Cooke*, 2020-Ohio-2725 (8th), citing *State v. Reynolds*, 40 Ohio St.3d 334 (1988).**

Eligibility for Community Control Sentence

When dealing with non-constitutional warnings including eligibility for community control, the trial court need only substantially comply with the rule. ***State v. Yanez*, 150 Ohio App.3d 510 (2002).**

Court complied with Crim.R. 11(C)(2) when it advised defendant that he would receive five years of actual incarceration without further advising defendant that he would be ineligible for probation. Defendant asserted that "actual incarceration" was a legal term of art and obscure to the general public. ***State v. Sims*, 95-LW-2519 (9th Dist., 5/24/95).**

Defendant was entitled to withdraw plea prior to sentencing upon discovering his ineligibility for a community control for a felony DUI conviction. ***State v. Murphy,* 176 Ohio App.3d 345 (2008).**

The trial court failed to comply with requirements of Crim. R. 11(C)(2)(a) when it stated that community control would be "unlikely" where the court was obligated to impose a mandatory prison term. ***State v. Howard*, 2008-Ohio-419 (1st).**

Pleas to offense that carried mandatory prison term was not made voluntarily because Defendant was not advised he was ineligible for community control sentence. ***State v. Given*, 2015-Ohio-361 (12th).**

B. *Effect of Plea*

Failure to personally address defendant on issue of effect of pleas does not require reversal if it can be shown from the record that defendant knew that his plea was an admission of guilt. ***State v. Porterfield*, 2004-Ohio-520 (11th).**

Crim.R. 11(C) requires the court to personally address the defendant as it relates to each of his rights. Failure to strictly comply with the constitutional rights provisions invalidates the plea. Strict compliance does not, however, require a verbatim recitation of the Crim.R. 11(C) rights. ***State v. Conrad,* 2020-Ohio-6673(11th), ¶10 citing *State v. Veney*, 120 Ohio St.3d 176, 2008-Ohio-5200.**

The motivational niceties of a guilty plea are not an element of Rule 11 inquiry. ***State v. Holder*, 97 Ohio App.3d 486 (1994).**

The Court may substantially comply with Crim. R. 11(C)(2)(b) even where it does not explain that a guilty plea is a complete admission of guilt. ***State v. Gruber*, 2001-Ohio-8898 (11th).**

In order to satisfy Crim.R. 11(C)(2)(b)'s requirement that the defendant understands the effect of the guilty plea, the trial court must inform the defendant, either orally or in writing, of the language set forth in Crim.R. 11(B) which defines the effect of a guilty plea as 'a complete admission of the defendant's guilt.'" ***State v. Krieger,* 2020-Ohio-6964 (4th).**

A defendant who has entered a guilty plea without asserting actual innocence is presumed to understand that he has completely admitted his guilt. In such circumstances, a court's failure to inform the defendant that his guilty plea is a complete admission is presumed not to be prejudicial. ***State v. Griggs,* 103 Ohio St.3d 85 (2004).**

"We hold that a defendant who has entered a guilty plea without asserting actual innocence is presumed to understand that he has completely admitted his guilt. In such circumstances, a court's failure to inform the defendant of the effect of his guilty plea as required by Crim.R. 11 is presumed not to be prejudicial." ***State v. Peck,* 2015-Ohio-1279 (7th).**

<u>Proceed to Judgment and Sentence</u>

No prejudice if Court fails to advise defendant of right to proceed with sentence if sentencing hearing is conducted later. ***State v. McKenna,* 2009-Ohio-6154.**

No prejudice if "proceed to judgment" language is in plea document. ***State v. Patton,* 2017-Ohio-1197 (2nd).**

IV. Special Statutory Considerations

A. *R.C. 2945.17: (A) At any trial, in any court, for the violation of any statute of this state, or of any ordinance of any municipal corporation, except as provided in divisions (B) and (C) of this section, the accused has the right to be tried by a jury.*

B. *Non-Citizen Notification*

C. *R.C. 2937.06(B): "Prior to accepting a plea of guilty…the court shall comply with sections 2943.031 and 2943.032 of the Revised Code."*

R.C. 2943.031: "If you are not a citizen of the United States you are hereby advised that conviction of the offense to which you are pleading guilty (or no contest, when applicable) may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

(1) Trial court accepting a guilty or no contest plea from a defendant who is not a citizen of the United States must give verbatim the warnings set forth in R.C. 2943.031(A). State v. Francis, 104 Ohio St.3d 490 (2004).

If attorney fails to advise client as to consequences of non-citizenship, defendant must show deficient representation and prejudice. ***State v Bozso,* 2020-Ohio-3779 (8th).**

D. *Post-Release Control Notification*

R.C. 2943.032(E): "If the offender violates the conditions of a post-release control sanction imposed by the parole board upon the completion of a stated prison term, the parole board may impose upon the offender a residential sanction that includes a new prison term of up to nine months."

(1) Crim.R. 11 does not require the Court to advise the Defendant about the possibility of parole. However, if a Court erroneously advises a Defendant who is charged with an unclassified felony that he or she may be subject to a period of post-release control, rather than parole, the plea may be vacated upon a showing of prejudice. State v. Clark, 119 Ohio St 3rd 239 (2008).

(2) Where the trial court mentions post-release control . . . but fails to inform the defendant of the duration of mandatory post-release control, and the pleas form sets out proper term the trial court substantially complies with the maximum penalty requirements of Crim.R 11(C)(2)(a). State v. Taylor, 2018-Ohio-1528 (10th).

(3) If the trial court fails to inform the defendant at plea that additional prison time can be imposed for a violation of post-release control, plea must be vacated as a reviewing court cannot say whether the plea would have otherwise been made. State v. McCollins, 2006-Ohio-4886 (8th).

(4) Trial court's misstatement as to length of PRC can be cured if from all circumstances, the defendant was informed of the actual term. State v. Bach, 2005-Ohio-4173 (6th).

It is well settled that a trial court has a statutory duty to provide notice of post release control at the sentencing hearing' and that 'any sentence imposed without such notification is contrary to law. **State v. Trone, 2020-Ohio-384, quoting State v. Jordan, 104 Ohio St.3d 21 (2004).**

(5) Post release control notifications are non-constitutional requirements under Crim. R. 11(C). State v. Howard, 2017-Ohio-8020 (3rd).

(6) Trial court substantially complied with post-release control notification although court at stated that post-release control was discretionary, the plea agreement signed by the defendant clearly

indicated that post-release was mandatory. State v. Torres, 2008-Ohio-815 (6th).

(7) A defendant need not be re-advised of his post-release control obligations if a plea and sentencing hearing are combined. State v. Jackson, 2006-Ohio-1147 (10th).

(8) If a defendant is convicted of several offenses, R.C. 2967.28(B)(2) requires the Court to advise the defendant as the greatest term allowed since post-release control terms are served concurrently. State v. Smith, 2007-Ohio-2841 (9th).

PRC Sentence - R.C 2929.141

Court requires that a defendant currently on PRC must be advised of the possibility of receiving an additional consecutive sentence if convicted of new felony. ***State v. Bishop*, 156 Ohio St.3d 156 (2019).**

V. No Contest Plea-Criminal Rule 11(B)

A. *Criminal Rule 11(B)(2): "A plea of no contest is not an admission of guilt, but an admission of the truth of the facts alleged in the indictment… "*

Sworn testimony is unnecessary to establish guilt if the allegations of the indictment state a felony offense. The procedure of Crim. R. 11(C) does not envision an affirmative defense hearing or mini-trial where a defendant enters a no contest plea to a felony. To raise an affirmative defense, a defendant must plead not guilty to the charged offense and stipulate to the facts**. State ex. rel. Stearn *v. Mascio,* 75 Ohio St.3d 422 (1996).**

Where the indictment contains sufficient allegations to state a felony offense and the defendant pleads no contest, the court must find the defendant guilty of the charged offense. ***State v. Bird* 81 Ohio St.3d 582 (1998).**

Court must advise of consequences of a no contest plea to a felony. ***State v Heard*, 2017-Ohio-8310 (8th).**

A court must personally address a defendant to determine if he/she understands the consequences of a no contest plea. ***Westlake v. Kilbane,* 146 Ohio App.3d 308 (2001).**

A judge's duty to a defendant before accepting his plea of no contest is graduated according to the seriousness of the crime with which the defendant is charged. Ohio Crim. R. 11 distinguishes between pleas of guilty and no contest in felony cases under Crim. R. 11(C), misdemeanor cases involving serious offenses under Crim. R. 11(D), and misdemeanor cases involving petty offenses under Crim. R. 11(E). The requirement is placed upon a court to provide the protections that the criminal rules provide to felony offenders should not be read into the Ohio traffic rules which deal only with misdemeanor offenses. ***State v. Watkins,* 99 Ohio St.3d 12 (2003).**

An explanation of circumstances may come from the complaint, accident report, or arresting officer's report or other sources. ***State v. Murphy,* 116 Ohio App.3d 41(1996).**

Although a better practice would be to include a recitation of the circumstances of the offense, Crim. R. 11(C)(2) merely requires that the court determine that the defendant who has tendered a plea of guilty or no contest understands the nature of the charge or charges to which he is pleading. ***State v. Kruger*, 2006-Ohio-2361 (2nd).**

Because a plea of no contest provided for in R.C. 2937.07 confers a substantive right it is not superseded by Crim. R. 11. ***Wauseon v. Badenhop,* 9 Ohio St.3d 152 (1984).**

Plea Negotiations

Rule 11(F) Negotiated plea in felony cases. When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

Ineffective assistance of counsel claims may be asserted regarding plea negotiations. ***Missouri v Frye*, 132 Sp.Ct. 1399 (2012).**

Court must notify Defendant that it is not bound to accept a joint sentencing recommendation. . ***State v. Lumbus*, 2013-Ohio-4592 (8th).**

Alford Plea

An Alford Plea is valid when its validity cannot be seriously questioned in view of a strong factual basis in the record on which to determine that the defendant's plea was voluntarily and intelligently given. **North Carolina v. Alford, (1970) 400 U.S. 25.**

B. *A court may accept an Alford Plea if the following requirements are met:*

a) The record affirmatively demonstrates that the defendant's guilty plea was not the result of coercion, deception or intimidation;

b) Counsel was present at the time of the plea;

c) Counsel's advice was competent, in light of the circumstances surrounding the indictment;

d) The plea was made with the understanding of the nature of the charge;

e) Defendant was motivated either by a desire to seek a lesser penalty or a fear of the consequences of a jury trial or both.

***State v. Al-Jumailee*, 2007-Ohio-2061 (9th).**

Where defendant asserts innocence at a plea hearing trial court must determine that defendant has made rational calculation to plead guilty notwithstanding his belief in his innocence. At a minimum court must inquire of defendant as to his/her reasons for deciding to plead guilty including fear of consequences of a jury trial and any desire to seek lesser penalty. ***State v. Padgett,* 67 Ohio App 3d 332 (1990).**

An Alford Plea is merely a species of a guilty plea having the effect of waiving defendant's right to an appeal. The standard for determining the validity of an Alford Plea is the same as a regular plea: whether the plea represents a voluntary and intelligent choice among the alternative courses of action available to the defendant. The court may accept a plea of guilty despite a protestation of innocence if strong evidence of guilt substantially negates the defendant's claim. ***State v. Carter,* 124 Ohio App.3d 423 (1997).**

While most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the later element is not a constitutional requisite before the imposition of a criminal penalty. The fact that a defendant is unwilling to admit his/her participation in a crime does not necessarily demonstrate that the plea was not a product of a free and rational choice especially where competent counsel represents the defendant. A change of plea is valid where it is not the result of coercion if counsel was present at the time and his/her advice was competent under the circumstances, the plea was made with an understanding of the charge and the plea was clearly motivated either by desire to seek a lesser penalty or the fear of the consequences of a jury trial and evidence is presented to court of other sources which substantiate the defendant's guilt. ***State v. Piacella,* 27 Ohio St.2d 92 (1971).**

A court is not required to inquire into a defendant's reasons for pleading guilty despite assertions of innocence when the assertions occur at sentencing after the guilty plea was accepted. ***State v. Gales,* 131 Ohio App.3d 56 (1999).**

A defense counsel's characterization of a guilty plea as an Alford Plea, even if on the record, is insufficient absent a specific protestation of innocence by the accused. ***State v. Raymond*, 2006-Ohio-3259 (10th).**

An Alford Plea is a species of a guilty plea and is procedurally indistinguishable from a guilty plea. It waives all errors. ***State v. Howard*, 2013-Ohio-1437 (11th).**

Competency

All defendants must be competent before they can enter a change of plea. ***State v. Brown,* 2018-Ohio-4984 (10th).**

A trial court shall not find the defendant incompetent to stand trial solely based upon the fact that the Defendant is receiving psychotropic medication. An additional inquiry is necessary into a defendant's mental state once a defendant has stated that he is under the influence of drugs or medication. The test of determining whether a person is competent to stand trial or enter a guilty plea is the same. ***State v. Mink*, 101 Ohio St.3d 350 (2004).**

A defendant is unable to knowingly, intelligently, and voluntarily plead guilty to an offense if he lacks the capacity to understand the nature and object of the proceedings against him. A defendant's plea is not void solely because he is taking anti-depressant medications because a defendant is presumed to be mentally competent and bears the burden of rebutting this presumption. If a defendant tells the trial court that he is taking medication when he is pleading guilty, the court must ensure that the defendant is competent at the time he is entering his plea. In doing so, the court does not need to hold a hearing; a colloquy with the defendant can establish a defendant's competence. ***State v. Doak*, 2004-Ohio-1548 (7th).**

Emotional disturbance or mental illness does not necessarily render a defendant incompetent. ***State v. Bock,* 28 Ohio St.3d 108 (1986).**

"[E]ven a defendant who may be emotionally disturbed or even psychotic can still be capable of understanding the charges against him and assisting his counsel." ***State v. Griffith*, 2016-Ohio-8510 (2nd).**

Where it is clear that a criminal defendant is heavily medicated during the course of plea proceedings, the court should not accept a change of plea. ***State v. Newland,* 113 Ohio App.3d 832 (1996)**.

The test for whether a defendant is competent to plead guilty is the same test for whether a defendant is competent to stand trial: whether the defendant comprehends the proceedings against him and has the ability to consult with a lawyer with reasonable understanding. ***Godinez v. Moran,* (1993) 509 U.S. 389.**

Ascertaining whether a defendant has the ability to read and write English is important to a determination of voluntariness. ***State v. Jordan*, 2002-Ohio-857 (6th).**

Ineffective Assistance of Counsel

Ineffective assistance of counsel may also prevent a defendant from entering into a knowing and voluntary plea. ***Tollett v. Henderson,* (1973) 411 U.S. 258.**

A guilty plea is not voluntary if it is the result of ineffective assistance of counsel. ***State v. Salter,* 2016-Ohio-4772 (6th).**

Asking a defendant about the competency of counsel assuages a multitude of sins. ***State v. Pruitt*, 2006-Ohio-4106 (8th).**

VI. Collateral Consequences

After adoption of Adam Walsh Act , the Supreme Court of Ohio held in *State v. Williams*, 2011-Ohio-3374, that provisions of the law are punitive in nature and must now be addressed during pleas proceeding to comply with Crim.R. 11 (C)(2)(a). ***State v. Hawkins*, 2013-Ohio-2572 (2nd).**

Court not required to inform defendant pursuant to Crim. R. 11(C) that after his plea is entered a civil complaint for forfeiture can be filed under R.C. 2925.43 as forfeiture is a civil penalty. ***State v. Farley*, 2003- Ohio-7338 (4th).**

Neither a trial court nor an attorney need inform a defendant of every possible effect of pleading guilty to a charge. It is not error for a court to fail to advise a defendant that conviction for aggravated menacing would preclude him from any future employment at a facility that provides care to older adults or persons with mental retardation or developmental disabilities. ***State v. Wilkinson*, 2005-Ohio-314 (2nd).**

Prior to accepting a plea a court is not required to explain to a defendant expungement rights. ***State v. Hartup,* 126 Ohio App.3d 768 (1998).**

A court is not required to advise defendant at plea that the state attorney general is authorized to institute civil legal proceedings against the defendant for payments made from the Victim of Crime funds. R.C. 2743.72. ***State v. Tucker*, 2002-Ohio-7009 (5th).**

Procedural Issues

The court cannot ascertain defendant's understanding of his constitutional rights solely through the assurance of counsel. ***State v. Younger,* 46 Ohio App.2d 269 (1975).**

Crim. R. 11(C) does not require the judge to obtain a statement of the facts of the case either from the State of Ohio or from the defendant prior to accepting a plea, although this may be the better practice. ***State v. Greathouse,* 158 Ohio App.3d 135 (2004).**

A defendant's mere affirmative response to a question of whether he understands the nature of the charge against him, without more, is insufficient to support the necessary determination that he understands the nature of the charge against him. ***State v. Blair,* 128 Ohio App.3d 435 (1998).**

Crim. R. 11(C)(2) requires the court to address each defendant personally. While it is recommended that a trial judge stop after naming each constitutional right and ask if the defendant understands that right, failure to do so will not necessarily invalidate a plea. ***State v. Holt*, 2004-Ohio-3252 (9th).**

"Before accepting a guilty plea, Crim.R. 11 requires the trial court to personally address a defendant to determine if the plea is voluntary, and that defendant understands both the plea itself as well as the rights waived by pleading guilty." ***State v. Spencer,* 2013-Ohio-137(10th).**

When informing a defendant about his constitutional rights including the right to compulsory process, the court is better served by using action verbs to explain the right including words such as "force," "subpoenaed," "compelled," "summoned" or "required" to appear. A court merely advising a defendant that he has "the right to bring in witnesses to this courtroom to testify for your defense" is insufficient to apprise a defendant of his constitutional right to compulsory process. ***State v. Rosenberg*, 2005-Ohio-101 (8th).**

Rule 11(F) requires that plea negotiations be placed on the record but need not be subject of inquiry as part of a Rule 11(C) colloquy. A judge's admonition that he/she is not bound by a recommendation is not required to be discussed but it is clearly the preferred practice. ***State v. Dickson*, 2004-Ohio-4262 (2nd). *But see. Amended Crim.R. 11(F).***

Adherence to the provisions of Crim. R. 11(C) requires an oral dialogue between the trial court and the defendant. ***State v. Nevels*, 2020-Ohio-915 (8th).**

There is no prohibition on a trial court conducting a group plea hearing. ***State v. Strimpel*, 2018-Ohio-1628 (8th).**

Taking a Plea from an Unrepresented Defendant

Every defendant has a constitutional right to represent him or herself. Prior to granting such a request, a trial court must make a detailed inquiry of the defendant to be assured that the decision to represent him or herself is appropriate. ***State v. Dean,* 127 Ohio St.3d 140 (2010).**

Inquiry of Defendant Prior to Accepting Guilty Plea

I. Introductory Issues

A. Call the Case (go on the record)

B. Confirm Defendant name.

C. (M) Identify who is present (confirm victim notification and/or presence)

i. Under Marsy's Law, victims have the right to speak at plea. Ohio Const. Art. I, §10(a); R.C. 2930.14

D. Ask State of Ohio to put resolution on the record (i.e., any amendments, dismissals, understanding of anticipated plea) (Criminal R. 11(F))

i. Note: Criminal Rule 11 (F) requires plea negotiations be placed on the record. Include dismissed charges of declinations to prosecute for related or unrelated offenses. Victim can object to negotiated plea.

E. Ask Defendant attorney to confirm

II. Colloquy with Defendant – Waiver of Constitutional Rights

A. (M) You've heard the State and your lawyer identify the plea negotiations in this case?

B. You discussed this with your lawyer before the hearing?

C. (M) Do you understand that while you and the state have presented to the Court a recommendation for sentencing, that this Court is not bound to accept the recommendation and that sentencing falls solely within my authority ***

D. Is it your intention today to proceed as they indicated and plead guilty to _____(IDENTIFY CHARGE AND LEVEL OF OFFENSE)

i. If also pleading to CCV, make sure to acknowledge that: I understand you're also pleading guilty to violating community control in Case No. _____. Is that true?

E. For GUILTY plea

i. (M) When you plead GUILTY to your new charges, you are waiving important constitutional rights, making a complete admission of your guilt, and admitting that you committed the offenses we've identified.

ii. For CCV – in the case of your community control violation, you're admitting you violated the rules of supervision and will be found GUILTY of that.

iii. (M) I can then find you guilty and sentence you.

F. For NO CONTEST in felonies

1. (M) By pleading no contest to this felony offense you are not admitting you're guilty but you are admitting the truth of the facts as alleged in the indictment

2. (M) And if the allegations in the indictment are sufficient to state a felony offense the court must find you guilty

3. Do you consent to a finding of GUILT?

G. For NO CONTEST in misdemeanors

1. By pleading no contest to this misdemeanor offense you are not admitting that you are guilty of the charge, but you are admitting the truth of the facts provided to the court on which your charge is based and waiving your right to contest those.

2. And based on that admission, if those facts establish each element of the charges, I can find you guilty of those charges.

3. Do you waive a recitation of the facts and consent to a finding of GUILTY?

H. FOR ALFORD plea

1. Do you understand that although you are maintaining your innocence, if you plead GUILTY the court can still find you guilty of this offense?

2. Have you talked to your lawyer about this decision?

3. (M) Why are you pleading GUILTY even though you're still claiming you are innocent?

4. (M) Is your decision based in whole or in part on the fear of any consequences from a trial to me or a jury, and/or a desire by you to have a lesser penalty by entering the plea?

5. (M) If you still want to plead guilty under these circumstances, I am going to make sure the parties read a statement of facts into the record as a factual basis to accept your change of plea.

I. Waivers for GUILTY, NO CONTEST or ALFORD

i. (M) You are giving up your right to continue to plead NOT GUILTY and to go forward with a TRIAL on this matter, before a judge or a jury of twelve people.

1. For CCV – and you're giving up your right to have a hearing on the community control violation in front of me.

ii. (M) AT TRIAL, you had the right to force the prosecutor to prove each charge against you and every element of each charge beyond a REASONABLE DOUBT. That is the prosecutor's burden of proof.

1. For CCV – at your CCV hearing, you could've forced the prosecutor to prove that you MORE LIKELY THAN NOT violated the rules of supervision that were placed on you in the earlier case after you were found guilty and sentenced. That is the prosecutor's burden of proof. (M)

iii. In your jury trial on your new charges, all twelve people would have had to agree that you are guilty before you could be found guilty.

iv. (M) At any trial (and/or at any CCV hearing), you don't have a burden of proof. You do, though, have important constitutional rights you are waiving and I want to make sure you understand them.

1. (M) You have the right to question or cross-examine witnesses that would have been called to testify against you.

2. (M) You have the right to subpoena witnesses and compel them to appear and testify on your behalf.

3. You have the right to testify yourself.

4. (M) You have the right to do nothing, and no one could have forced you to do anything, including testify. And no one could've held it against you if you made that choice.

5. (M) Do you understand that by entering this plea (GUILTY/NO CONTEST/ALFORD), you're giving up these constitutional rights and, as I explained earlier, you can be found GUILTY and sentenced?

6. Do you have any questions about the constitutional rights you're giving up?

v. If plea form – you've read the written plea form, gone over it with counsel and signed it? (you go over it, make sure it's consistent)

vi. Any questions about this?

III. Colloquy with Defendant – Charges/Penalties

A. Since you've waived your constitutional rights and can be found guilty and sentenced, I want to explain to you the penalties associated with the charges to which you're pleading GUILTY/NO CONTEST/ALFORD.

B. DEFINITE SENTENCING

i. (M) You understand that _____ (CHARGE) carries _____ (Identify range of penalties for that felony offense) (use chart)

ii. For CCV penalties: You are also subject to penalties on your CCV cases. I can continue you on community control, with additional terms and conditions including placing you in a facility, or I can terminate you from supervision and impose the reserved prison time for you in this case which is _____. (Check what you reserved)

C. INDEFINITE SENTENCING

i. (M) Do you understand you are pleading to an offense that carries an indefinite sentence?

ii. (M) That means for that charge you will receive a minimum and maximum term.

iii. The minimum term (a) for an F1 can be anything in the range of 3-11 years; (b) for an F2 can by anything in the range of 2-8 years.

iv. The maximum term is then calculated with a mathematical formula that takes your minimum term and adds 50%

v. So for example, on your F1, if I select a minimum term of 3 years, your maximum term is 4.5. If I select your minimum term of 11 years, your maximum is 16.5 years.

vi. So for example, on your F2, if I select a minimum term of 2 years, your maximum term is 3. If I select your minimum term of 8 years, your maximum is 12 years.

vii. (M) Be sure defendant understands the maximum penalty for a single F1 (16.5 years) and F2 (12 years)

viii. Earned Good Time Credit: It is possible to earn good time credit of 5 to 15% against your minimum sentence for good behavior (NOT SEX OFFENSES OR MANDATORY TIME)

ix. I can deny that request but if I did, I'd have a hearing on that.

x. Regardless whether you received good time credit though, you are presumed eligible for release when you finish your minimum term unless ODRC decides to keep you there for bad behavior in prison.

xi. If that happens, they will give you a new release date and re-evaluate your behavior during that time.

xii. And they can do that over and over again until your maximum term is over.

xiii. No matter what your behavior is, you have to be released at the end of your maximum term. But obviously you want to behave in prison so you don't have to wait that long,

D. (M) **IF MANDATORY TIME** – Do you understand that this offense carries a mandatory prison term, and therefore, you are not eligible for community control or judicial release or other prison programming opportunities during the mandatory portion of the sentence?

E. **IF NONMANDATORY TIME**- Do you understand that in cases in which someone faces a non-mandatory sentence, the Court can consider placing you on community control for up to five years? If I place you on community control for a felony offense, you are required to comply with the rules and regulations of the Adult Probation Department, as well as any other conditions I set forth. If you fail to do that, the Court can impose (1) a longer term of community control, (2) a more restrictive sanction including jail time or residential, or (3) a prison term.

F. **CONCURRENT/CONSECUTIVE** – Do you understand that because you are pleading guilty to more than offense, the Court can run the sentences for these charges or any other time you're serving CONCURRENTLY (meaning together or at the same time) or CONSECUTIVELY (meaning one on top of the other, or stacked)?

i. For indefinite, even if I choose to stack your time, you will get a minimum term for each charge that qualified, but only one indefinite term will be applied to your sentence.

1. Identify the longest minimum and maximum term available

ii. For definite, identify the longest term.

G. **PRC consequences (M)**

i. If you ever go to prison on this charge, once you are released

1. (DISCRETIONARY – you may be put on supervision by the Adult Parole Authority called post-release control) or

2. (MANDATORY – you will be put on supervision by the Adult Parole Authority called post-release control).

ii. Post release control means you are supervised by the Adult Parole Authority and they're in charge of your behavior after prison. And they can send you back to prison if you don't follow their rules. They can send you for nine months every time you violate with them, and up to ½ of your sentence (or stated minimum term) for the total of you're your violations with them. And, if you pick up a new felony while they're supervising you, your new judge can sentence you on your new case and add time consecutively (stack time) onto that sentence because you picked it up while you were on PRC. The new judge can add a year onto that sentence or whatever time is left on your PRC supervision, whatever is greater.

iii. PRC term (see chart) For your charge, you may/will be put on that PRC supervision for _____.

iv. PRC on CCV (try to combine with earlier for efficiency if same term exists); same for identical terms

H. **COMMUNITY CONTROL AVAILABLE**: You understand that instead of prison, I can choose to place you on community control. And if I choose to do that, you have to follow the law, and the rules of supervision and this Court. If you don't do that, you will face a violation and I will have to decide again whether to keep you on supervision for the same or longer period, or kick you off and send you to prison?

I. **FINANCIAL SANCTIONS**: You also understand that as part of your sentence, I can impose a fine, order you to pay court costs, supervision fees and restitution (M) if appropriate?

i. Identify available fine (use chart)

ii. If you can't afford your financial obligations you can request to do community service and have it applied towards your costs and fees.

iii. ***DRUG OFFENSES MAY HAVE MANDATORY FINE AT 50% OF MAXIMUM AMOUNT. ADVISE IF FINE IS MANDATORY, AND ESTABLISH INDIGENCY IN ORDER TO WAIVE FINE

J. **DETERMINE ANY LICENSE SUSPENSIONS**: (M) Do you understand that your right to operate a motor vehicle in the State of Ohio may/will be suspended or revoked?

i. Class One – Lifetime

ii. Class Two – Three Years to Life

iii. Class Three – Two to Ten Years

iv. Class Four – One to Five Years

v. Class Five – Six months to Three Years

vi. Class Six – Three months to Two Years

vii. Class Seven – Up to One Year

K. **GUN SPECIFICATION**: Do you understand that in addition to the underlying potential sentence you face, you are pleading to a gun specification?

i. (M) This requires that you must serve a mandatory prison term of ____ years (1, 3 or 6).

ii. (M) Do you understand that Ohio requires the term for the gun specification be served first and consecutive to any other prison term imposed for an underlying offense? *** be sure and explain this is not part of the indefinite term and runs on top of that

L. RVO: advise based on statute

M. **FORFEITURE SPECIFICATION**: Do you understand that if you plead guilty to the specification you are forfeiting or giving up your right to ____. (amount of money/property/gun). In the case of a weapon, "the Court will order the weapon destroyed or provided to law enforcement for their purposes.)

N. **SEX/ARSON/VIOLENT OFFENDER REGISTRY**

i. Identify registration requirement

ii. Use Form

iii. Be sure to identify term

O. **ENHANCEABLE NATURE OF THE OFFENSE**: Do you understand that the charge _____ to which you're pleading guilty is what we call an enhanceable offense. That means that with this conviction on your record, if you are ever again charged with _____ the court in your new case can use this conviction to enhance the penalty you face. You could serve more time as a minimum, pay a bigger financial consequence, and have a higher level offense on your record.

IV. Background

A. (M) Are you a United States citizen?

******IF NOT STATE** "If you are not a citizen of the United States you are hereby advised that conviction of the offense to which you are pleading guilty may have the consequence to you

of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. R.C. 2943.031

B. (M) Have you served in the military? R.C. 2929.12(F)

C. Are you under the influence of drugs/alcohol /prescription medication?

   i. If yes, ask what type, purpose, frequency, last ingestion and side effects

   ii. Question counsel to determine if there are any concerns about competency

   iii. Make observational findings that defendant is alert, answered all questions appropriately, demeanor, etc. (I always ask defendant to tell me what s/he's pleading to and the level of offense)

D. Do you suffer from any physical or mental disability?

E. Are you taking any medication for those disabilities?

F. Are you currently on any supervision, either state or local probation, or federal supervision of any kind?

   i. You understanding your plea of GUILTY and a conviction here can have an impact on those cases and cause you other consequences?

G. (M) Has anyone promised you anything or threatened you with anything in order to get you to plead GUILTY today?

V. Attorney Competence

A. Have you had enough time to consult with your lawyer before proceeding?

B. (M) Are you satisfied with your lawyer?

C. Has s/he gone over with you the plea form, the charges and consequences you're facing, the rights you're waiving, as well as all other information you requested?

VI. Appeal Rights

A. Any appeal in a criminal case must be filed within thirty days after you are sentenced; and if you cannot afford an attorney the court can appoint one to represent you.

VII. Conclusion

A. Do you have any questions about the rights you're waiving or the consequences you are facing?

B. Understanding all the rights you're waiving and all the consequences you're facing, how do you wish to plead to _____ (identify CHARGE and felony level).

C. I do find that you've entered your plea knowingly, intelligently and voluntarily and I do find you GUILTY of _____ (identify CHARGE and felony level).

D. * DISMISS ANY CHARGES THAT PROSECUTOR DISMISSED IF SENTENCING THEN (OR HOLD IN ABEYANCE IF CONTINUING SENTENCING)**

E. ***NOTE WHETHER ANY GUNS/CONTRABAND TO BE DESTROYED

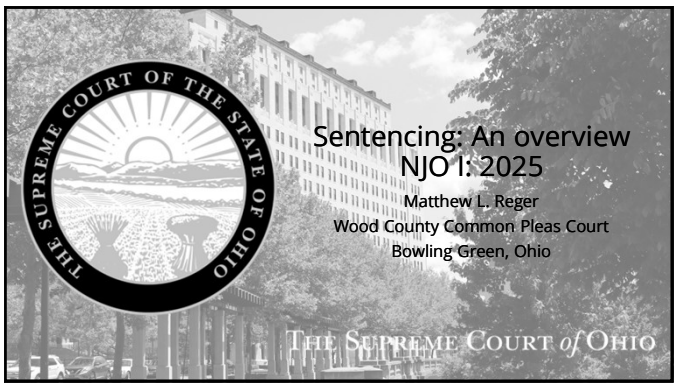
DEGREE	FINE	BASIC PRISON TERMS	MDO/RVO R.C. 2929.01(CC) / 2941.149 (ADDED TIME)	PRC ***mandatory 5 years on sex offenses
F1	$20,000	Definite sentencing (committed before 3/22/2019) **3-11 years (in yearly increments)** Indefinite sentencing (committed on or after 3/22/2019) **3-11 years minimum term +50% maximum term (POSSIBLE MAXIMUM = 16.5 yrs)**	Discretionary 1-10 years (elect maximum from range, no LWOP & factors apply *R.C. 2929.14(B)(2)(a)(i-v) Mandatory: 1-10 yrs plus maximum for the offense if 3 or more RVO in 20 yrs (if no LWOP required or imposed) *R.C. 2929.14(B)(2)(b)	Mandatory: 2-5 years
F2	$15,000	Definite sentencing (committed before 3/22/2019) **2-8 years (in yearly increments)** Indefinite sentencing (committed on or after 3/22/2019) **2-8 years minimum term +50% maximum term (POSSIBLE MAXIMUM = 12 yrs)**	Discretionary 1-10 years (elect maximum from range, no LWOP & factors apply INCLUDING serious physical harm or attempt or threat to do so) *R.C. 2929.14(B)(2)(a)(i-v) Mandatory: 1-10 yrs plus maximum for the offense if 3 or more RVO in 20 yrs (if no LWOP required or imposed) *R.C. 2929.14(B)(2)(b)	Mandatory: 18 months – 3 yrs
F3*	$10,000	**9, 12, 18, 24, 30 or 36 months** Certain offenses enhanced F3** **12, 18, 24, 30, 36, 42, 48, 54 or 60 months**		Discretionary up to 2 years Mandatory 1-3 years for offense of violence (including ESCAPE)
F4**	$5,000	**6-18 months in monthly increments**		Discretionary up to 2 years
F5**	$2,500	**6-12 months in monthly increments**		Discretionary up to 2 years
M1	$1000	**6 months SCJ**		None
M2	$750	**90 day SCJ**		None
M3	$500	**60 day SCJ**		None
M4	$250	**30 day SCJ**		None
MM	$150	no jail time		None

*F3 higher penalties (see R.C. 2929.14 (A)(3)(a): Aggravated Vehicular Homicide (2903.06), Aggravated Vehicular Assault (2903.08), Sexual Battery (2907.03), Sexual Battery (2907.03), Unlawful Sexual Conduct with a Minor (2907.04), Gross Sexual Imposition (2907.05), Pandering Obscenity Involving a Minor or Impaired Person (2907.321), Domestic Violence (2919.25(D)(6)(d)(e)), Illegal Use of a Minor or Impaired Person in Nudity Oriented Performance (2907.323), Assisted Suicide (3795.04), repeat felony OVI (4511.19(A)), some Robbery (2911.02) and Burglary (2911.12) – if the offender has been convicted of or pleaded guilty in 2 or more separate proceedings to 2 or more violations of Aggravated Robbery (2911.02), Aggravated Burglary (2911.11), or Burglary (2911.12); certain Failure to Comply (2921.331(B) if division (C)(5) applies)

** mandatory 1-yr community control for non-violent, no prior felony F4 and F5; see Felony Sentencing Reference Guide

Felony Sentencing, Penalties and Post-Release Control Obligations

Hon. Matthew L. Reger
Wood County Common Pleas Court



How is it going?

THE SUPREME COURT of OHIO

What do you know about sentencing?

THE SUPREME COURT of OHIO

What do you know?

In what do you feel comfortable in sentencing?

What do you know you don't know? Where are you struggling with sentencing?

What are your unknown unknowns? What do you still want to know?

THE SUPREME COURT of OHIO

How do you determine an appropriate sentence? What sources?

Revised Code or . . . something else?

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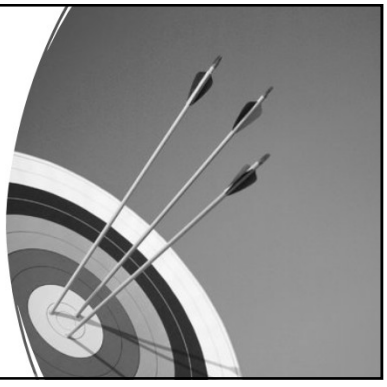
Sentencing: What you need to know!

Getting it right.

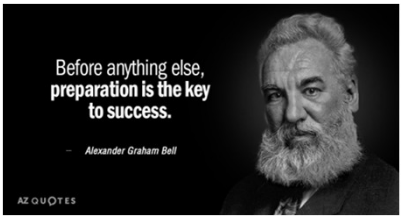
Prepare and know what you have to do.

Then make it your own.



Preparing for sentencing

What do you do before you do what you have to do?



Preparation for Sentencing

Do you have a PSI?
- –Have you met with the probation officers?
- –Did Δ participate?

Review the plea?
- –Any agreements?
- –Did you make any representations?

THE SUPREME COURT of OHIO

Preparing for sentencing

Facts of the case: From PSI or from plea hearing what do you know? Did you have a trial? Jury or court?

Defendant Statements*:* Are there statements of the defendant in the report? Note them to see how they correspond to statements made on the record.

Psychological/psychiatric exams: competency exam, offered by defense

Bond Violations

THE SUPREME COURT of OHIO

Preparing for sentencing

***Statements from victims, representative or family*:** written presented to you ahead of time

Victim impact statements: included with PSI?

Will the victim, victim representative or attorney for victim be present?*:* Are you prepared for this?

Defense sentencing memorandum?

THE SUPREME COURT of OHIO

Preparing for sentencing

Restitution: Is there restitution and has a final number been reached? (Cannot order restitution after sentencing)

Registries: Do you have the paperwork for these and are they filled out?

Any statements that you want to make*?*

THE SUPREME COURT of OHIO

Sentencing Hearing:

R.C. 2929.19: Sentencing Hearing

The hearing is mandatory for felony offenses where an offender has been convicted by jury or through a plea or remanded for sentencing from court of appeals.

Must Inform the offender of conviction and ask why sentence should not be imposed

THE SUPREME COURT of OHIO

The Sentencing Hearing: Preliminary

Remember the courtroom has more than attorneys and the defendant, it includes victims, victim's families, defendant's family, friends, interested parties, press, and the public at large

Procedure for the sentencing?

Explain to the parties and those in attendance what your process is for a sentencing hearing?

THE SUPREME COURT of OHIO

Sentencing Hearing

PSI (R.C. 2951.03, Crim. R. 32)

What has been disclosed? What will you put on the record?

Defense counsel and defendant have opportunity to comment on PSI

Any addition or corrections to PSI?

THE SUPREME COURT of OHIO

Sentencing Hearing

Who must be allowed to speak? R.C. 2929.19, Crim. R. 32(A)(1)

1. **Prosecutor**
2. **Victim or victim's representative**
3. **Defendant**
4. **Defense Counsel**
5. **With approval of the court, any other person**

THE SUPREME COURT of OHIO

Sentencing Hearing: Ground Rules

What ground rules will you set for the hearing and statements?

- ***Rules on use of swear words***
- ***Rules on who to speak to***
- ***Advise of the court reporter taking this down (if you have one)***
- ***Where to speak from***

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Sentencing Hearing

Before imposing sentence, Court must consider:

1. **The record** (What have you considered?)
2. **Any information presented at the hearing**
3. **Pre-sentence investigation report**
4. **Victim impact statement** (R.C. 2947.051)
5. **Special considerations** when offender was under 18 at time of offense

THE SUPREME COURT of OHIO

Sentencing: What you need to know NOW!

The Record considered:

- *That portion of PSI relied upon by Court*
- *Plea negotiations*
- *Sworn testimony*
- *Psychological/psychiatric exams*
- *Letters from victims other than spoke at sentencing hearing*
- *Evidence presented at trial, at plea, or in PSI*
- *Other relevant information (e.g. post plea actions, bond performance, etc.)*

THE SUPREME COURT of OHIO

Sentencing: What you need to know NOW!

Now its your turn to talk:

Where do you start?

Walk down the sentencing path

Sentencing: What you need to know NOW!

Lay the groundwork:

What offenses are you sentencing?

Merger Analysis: *are there multiple offenses arising out of the same incident?*

Agreed sentence: *Have the parties agreed to a sentence? Have you agreed to that sentence?*

Level of the offenses: F1, F2, F3, F4, F5

THE SUPREME COURT of OHIO

Preparation Advice

Merger: This should have been addressed at the plea and if possible briefs submitted.

Plea agreement: Be sure to review plea entry and papers.

Special felonies: Are one of the offense one with special penalties? (e.g. F-4 OVI (30 months), F-3 Unlawful Sexual Conduct (60 months)

THE SUPREME COURT of OHIO

Sentencing Hearing

Other things you may need to go over with defendant:

Sex Offenses: Notify of tier reporting requirements

- Advise of requirement
- Complete notification form

Other Registries: arson, violent offender

Prep advice: have forms filled out ahead of time

THE SUPREME COURT of OHIO

Sentencing Hearing

Sentencing considerations

R.C. 2929.11: Overriding purposes and principles of sentencing

To protect the public from future crime by the defendant or others, to punish the offender, and promote the effective rehabilitation of the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources

THE SUPREME COURT of OHIO

Sentencing Hearing

To achieve those purpose, Court must consider:

- ***Incapacitating the offender***
- ***Deterring the offender***
- ***Deterring others***
- ***Rehabilitating the offender***
- ***Providing for restitution***

THE SUPREME COURT of OHIO

Sentencing Hearing

In sentencing the Court must ensure all the following:

- *Sentence not based upon impermissible purposes*
- *Sentence is consistent with other similar offenders committed by like offenders*
- *Sentence is proportional to harm caused and impact upon victim*

THE SUPREME COURT of OHIO

Sentencing Hearing

May not sentence based upon offender's race, ethnicity, gender, or religion

Do you address this?

THE SUPREME COURT of OHIO

Sentencing Hearing

Seriousness Considerations: R.C. 2929.12(B)
Considerations that make offense less serious: R.C. 2929.12(C)
Recidivism more likely: R.C. 2929.12(D)
Recidivism less likely: R.C. 2929.12(E)
Offender military service: R.C.2929.12(F)
Alford Plea and remorse: R.C. 2929.12(G)
***Prep advice*: Have checklist filled out ahead of time**

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Sentencing Hearing

Crim. R. 32(A)(4): In serious offenses, Court must state statutory findings and give reasons supporting those findings, if appropriate.

Prep: Do you have those written out?

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Sentencing Hearing: Prison

Is a prison term necessary?

If so, then the court must state the term on the record

Is it mandatory?

If so, court must notify the offender that the penalty is mandatory

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Sentencing Hearing: Prison

Inform Defendant of:

Mandatory consecutive sentences R.C. 2929.14(C)(1 – 3)

PCR time (Was defendant informed of this possibility at plea?)

THE SUPREME COURT of OHIO

Sentencing Hearing: Prison

Considerations for Discretionary Consecutive: R.C. 2929.14(C)(4)

A. *Necessary to protect public and punish*
B. *Not disproportionate to seriousness of conduct and danger to public*
C. *One of three options*:
   1. *Crime committed while on CC (felony), awaiting trial/sentencing, under PRC; or*
   2. *Harm so great; or*
   3. *Criminal history*

Prep advice: Have a checklist filled out ahead of time.

THE SUPREME COURT of OHIO

Consecutive Sentences: A note on appellate review

***State v. Teeple*, 2025-Ohio-1505, ¶ 16**:

R.C. 2953.08(G)(2): allows an appellate court to **increase, reduce, modify, or vacate a sentence and remand for sentencing** if it **clearly and convincingly** finds that the record does not support the trial court's findings under R.C. 2929.13(B) or (D), 2929.14(B)(2)(e) or (C)(4), or 2020.20(I) or is otherwise contrary to law.

¶ 20:

An appellate court cannot substitute is judgment for the trial judge but when a judge sentences outside of the consideration of R.C. 2929.11 and 2929.12 it is contrary to law.

Conclusion: Make findings!

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Sentencing Hearing: Prison

Reagan Tokes: Preparation

Know what offense you are imposing the maximum and minimum term: The most serious offense

Know the minimum term and how to calculate the maximum term

Have a script for the instructions

THE SUPREME COURT of OHIO

Sentencing Hearing: Prison

Reagan Tokes/S.B. 201/R.C. 2967.271 (Non-life indefinite prison term)

The Equation: X (minimum term) + $\frac{X}{2}$ = Y (Maximum term)

Inform defendant *of the maximum and minimum term and what happens at the end of the minimum term and at the end of the maximum term and in between those terms*

THE SUPREME COURT of OHIO

Consecutive Sentence with Indefinite Sentence

R.C. 2967.271 (Non-life indefinite prison term)

The Equation: X (minimum term) + $\frac{X}{2}$ = Y (Maximum term)

Inform defendant *of the maximum and minimum term and what happens at the end of the minimum term and at the end of the maximum term and in between those terms*

THE SUPREME COURT of OHIO

More Reagan Tokes

Scenario: Defendant, Brandon F., convicted of **Aggravated Robbery (F1), Felonious Assault (F2)** and **Failure to Comply with an Order of Signal of a Police Officer (F3).**

Defendant had been chased by police and evaded them enough that he was able to abandon his vehicle and hide at a local manufacturing facility. The owner arrives around 6:00 a.m. and is attacked by Brandon F. and beaten severally. Brandon takes a company truck and leaves the victim bleeding. Brandon is quickly pursued by police and ultimately forced to crash.

Victim survived but has long term implications from attack. Company trust that was stolen was totaled by Brandon.

Sentencing options under Reagon Tokes

What is the most serious offense?

Under Reagan Tokes? In your assessment? Are they the same?

What sentence?

Aggravated Robbery (F1)

Felonious Assault (F2)

Consecutive?

Failure to Comply has a mandatory consecutive sentence (R.C. 2921.331(D))

How much time will you impose on this offense?

R.C. 2929.144

'[i]f the offender is being sentenced for more than one felony . . . and if the court orders that some or all of the prison terms imposed are to be served consecutively, the court shall add all of the minimum terms imposed on the offender . . . for a qualifying felony of the first or second degree that are to be served consecutively, the court shall add all of the minimum terms imposed on the offender . . . that are to be served consecutively, and the maximum term shall be equal to the total of those terms so added by the court plus fifty percent of the longest minimum term or definite term for the most serious felony being sentenced".

IMPOSITION OF PRISON SENTENCE

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that on **Count 1**, Defendant shall serve a stated indefinite term of **three (3) to four and one half (4 1/2) years** at the Ohio Department of Rehabilitation and Corrections, under the offense of Aggravated Robbery, a violation of R.C. 2911.01(A)(3) and 2911.01(C), a felony of the first degree. **Said sentence shall run consecutively to the sentence imposed for Count 2.**

IT IS FURTHER ORDERED that on **Count 2**, Defendant shall serve a term of **five (5) years** at the Ohio Department of Rehabilitation and Corrections, under the offense of Felonious Assault, a violation of R.C. 2903.11(A)(1) and 2903.11(D)(1)(a), a felony of the second degree.

IT IS FURTHER ORDERED that according to R.C. 2929.144, considering the consecutive sentence imposed in this case for Counts 1 and 2, and the sentence imposed in 2023CR039 for Failure to Comply with an Order or Signal of a Police Officer, which must be served consecutively to the offenses in this case pursuant to R.C. 2921.331(D), the **total sentence for Defendant is a minimum of ten (10) years (three years for F1 Aggravated Robbery plus 5 years Felonious Assault plus 24 months (2 years) for Failure to Comply with an Order or Signal of a Police Officer in case number 23CR039) with a maximum sentence of eleven and half (11 ½) years.**

Reference: 2929.144

THE SUPREME COURT of OHIO

Sentencing: What you need to know NOW!

What must be in the **sentencing entry**?

1. *Name and code section of offense(s)*
2. *Sentence for each offense*
3. *When the sentence contains mandatory time*
4. *Whether sentences are to be served concurrently or consecutive if multiple offenses*
5. *Name and section numbers for any specifications*

THE SUPREME COURT of OHIO

Sentencing Hearing: Prison

Post Release Control notification

***Sex Offenses**: 5 years*

***F1**: Up to 5 years, but not less than 2 years*

***F2**: Up to 3 years, but not less than 18 months*

***F3(Offense of violence):** Up to 3 years, but not less than 1 year*

***F3(non-violent, F4, and F5**: Up to 2 years at the discretion of ODRC*

THE SUPREME COURT of OHIO

Sentencing Hearing: Prison

*Determine, **notify (at hearing)**,and include in the sentencing entry:*

- **Total number of days of confinement, including sentencing date**
- Do not include conveyance time or previous prison time (re-sentence after early release)

THE SUPREME COURT of OHIO

Sentencing Hearing: Community Control

Mandatory Community Control: **R.C. 2929.13(B)(1)(a):**

1. Most serious offense is F-4 or F-5
2. Not an offense of violence or assault
3. No prior felony record
4. No prior misdemeanor offense of violence in past 2 years
5. No firearm
6. No physical harm
7. No bond violations
8. Not for hire or organized criminal activity
9. Not a probation violation

THE SUPREME COURT of OHIO

Sentencing Hearing: Community Control

Just because an offense is not a mandatory community control does not mean you cannot put them on community control.

A prison term may not be consistent with the purposes and principles of sentencing.

THE SUPREME COURT of OHIO

Sentencing Hearing: Community Control

Advise of conditions of community control:

Specifically state specific conditions and incorporate general conditions.

Terms can include both residential and non-residential sanctions.

Residential: CBFC or up to 180 days in jail

Establish whether term will be under basic or intensive supervision.

Ask defendant if he/she understands the terms imposed

Specifically tailored conditions for particular defendant

THE SUPREME COURT of OHIO

Sentencing Hearing: Community Control

Advise defendant of the following:

If you violate the terms of your community control sanctions, violate any law, or leave the state without the permission of your probation officer, the Court may extend the period of supervision, impose a more restrictive sanction or may impose a prison term from the range for your level of offense

THE SUPREME COURT of OHIO

Sentencing Hearing: Fines and Costs

FINES AND COSTS

Mandatory fines and waiver procedure

Discretionary fines: Must consider present and future ability to pay

Inform about cost, possible payment schedule and ability to perform community service, up to 40 hours per month, to receive credit against costs at minimum wage. (R.C. 2947.23)

***Other payments*:** R.C. 2929.18(A)(5)

THE SUPREME COURT of OHIO

Sentencing Hearing: License Suspension

If operator's license suspension is imposed, Court **must state on the record and place in the entry the length of the suspension** depending upon the category of the offense.

The Court may consider granting limited driving privileges in some cases.

THE SUPREME COURT of OHIO

Probation Violation

- The Court noted that a "community control revocation hearing is a sentencing hearing, at which 'the court sentences the offender anew'" requiring compliance with the relevant sentencing statutes in R.C. 2929.
- In determining a sentence, the trial court has the discretion to "continue the community control sanction, impose a more restrictive sanction, or impose a prison term as a penalty.
- The Court has wide discretion in imposing a sentence because the range of community control violations can range from minor to major.
- In exercising the discretion, the trial court "must 'consider both the seriousness of the original offense leading to the imposition of community control and the gravity of the community control violations.'"
- But in doing so the court's "focus must be on the violation of community control".

THE SUPREME COURT of OHIO

Community Control Violation

CCV Scenario 1: Offender convicted of Possession of Cocaine (F5) and Endangering Children (F3). She was using Cocaine while breast feeding her infant.

Placed on community control for **5 years** with **90 days imposed** to be completed in **CBCF**. Placed on ISP supervision. Offender informed that if she violates CC: **12 months** can be imposed on Count 1 and **36 months** can be imposed on Count 2

THE SUPREME COURT of OHIO

Community Control Violation

1 year later, CCV for positive drug screen and admitted to use of alcohol

While awaiting hearing on CCV violation a new violation occurs when offender for providing fraudulent sober support meeting documentation to probation department.

Offender appears for CCV hearing two months later and has submitted letters of recommendation, shows she is actively engaging in treatment and seems to be serious about treatment.

THE SUPREME COURT of OHIO

Community Control Violation

On Tuesday, Court continues offender on Community Control at CCV hearing.

On Wednesday, Court finds that letters of recommendation were fraudulent.

What can the judge do?

What should the judge do?

THE SUPREME COURT of OHIO

Community Control Violations

Same offender, after having served 11 months in prison is granted early release and placed on community control. Two months after offender is charged with OVI and Failure to Control. Two months after that she tests positive for alcohol at a probation appointment.

A month later she admits to both probation violations.

What do you do?

THE SUPREME COURT of OHIO

Community Control Violations

This matter appears on your docket today, based upon a probation violation against Defendant Cheech Marin. Marin was indicted on one count of Passing Bad Checks after he wrote a rent check to his landlord in the amount of $1,500.00, which was dishonored and not paid. The Prosecutor refused to reduce the offense.

Although eligible, the Defendant prohibited his attorney from filing a Motion for Drug Treatment in Lieu of Conviction because he does not believe that he has any substance abuse problems. Approximately one year ago, Marin pled guilty to the charge, a felony of the fifth degree, and was sentenced by you to serve a term of community control for **three years** and you informed Defendant that if he violated CC, a prison term of **eleven months** could be imposed.

Community Control Violations

- One of those conditions was that he not use illegal substances. The original PSI indicated that at the time of the offense, the Defendant was a recently married college senior who was studying world history and had no previous criminal record.
- The Notice of Probation Violation states that the Defendant has been on probation for nearly twelve months. Although he has remained employed, paid his court costs and restitution, Marin has tested positive for Marijuana for three consecutive months.

Community Control Violations

Probation indicate that Marin has been warned by his probation officer numerous times to stop using marijuana. In frustration, the probation officer filed the violation with the hope the Court could get Marin's attention. Marin finds nothing wrong with the use of marijuana and believes that it is an injustice for the law to prohibit him from using.

Based upon the evidence presented at the hearing, Marin continues to support his wife and infant son as a research assistant for a local publishing company. His work supervisor is aware of his recreational drug use.

What are your choices?

R.C. 2929.15(B)/2929.15(E)

Sentencing Hearing

Appellate Rights

1. *Do you understand that you have a right to an appeal in this matter within 30 days after the filing of the Court's sentencing entry?*
2. *Do you understand that if you are unable to pay for the costs of a transcript, the record, and all relevant documents required for the appeal, they would be provided without cost to you?*
3. *Do you understand that if you are unable to pay for an appeal, you are entitled to have a notice of appeal filed without the payment of a filing fee?*
4. *Do you understand that if you are unable to obtain counsel for an appeal, counsel will be appointed for you at no cost?*

Bond on Appeal?

THE SUPREME COURT of OHIO

THE SUPREME COURT of OHIO

Retributive Theory v. Utilitarian Theory

Two competing theories exist that explain why we punish people when they commit crimes.

Retributive theory is also known as "just deserts" and used a look back approach

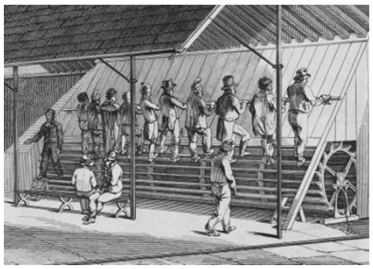
Utilitarian Theory looks forward to correcting the wrong.

Retribution Theory

The punishment should be proportionate to the seriousness of the crime and the culpability of the offender.

Utilitarian: Deterrence

The punishment should be sufficient to outweigh the benefits of the crime.



Utilitarian: Incapacitation

The amount of punishment should be proportionate to the risk posed by the offender.

Utilitarian: Rehabilitation

The nature and duration of the punishment should be based on the offender's need for treatment and potential for reform.

THE SUPREME COURT of OHIO

Philosophy of sentencing

Overriding Purpose of sentencing: To punish the offender and protect the public from future crime by the offender and others using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on the state or local government resources

R.C. 2929.11(A)

THE SUPREME COURT of OHIO

Philosophy of sentencing

Principles of sentencing:
Always consider the need for incapacitation, deterrence, rehabilitation, and restitution

THE SUPREME COURT of OHIO

Philosophy of sentencing

Principles of sentencing:
A sentence should be commensurate with, and not demeaning to, the seriousness of offender's conduct and its impact on the victim.

Consistent with sentences for similar crimes by similar offenders

THE SUPREME COURT of OHIO

Scenario 1: State of Ohio v. Michael M Phase I

Defendant pled guilty six weeks ago to the amended offense of Corrupting Another with Drug in violation of 2025.02(A)(1) and (C)(3)(b), an F3. Before amendment, the charge was an F2.

You were not involved in any plea negotiations. You have received the PSI and have spoken with the probation officer.

THE SUPREME COURT of OHIO

Scenario 1:
State of Ohio
v. Michael M
Phase I

- What are your thoughts on sentencing at this point?
- What other information do you need?
- Where are you leaning and why?
- How open are you to a different result?
- What are you looking for in the hearing?

THE SUPREME COURT of OHIO

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Scenario 1:
State of Ohio
v. Michael M
Phase II

- What are your thoughts now?
- What information from the attorneys was helpful to you?
- What information from the attorneys did not help you?
- What information do you still want to hear?

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Scenario 1:
State of Ohio
v. Michael M
Phase III

- Where are you now?
- What questions would you have had for Michael?
- Have you changed from where you originally were? Why or why not?
- Did you choose community control? Why?
- Did you choose prison? Why?

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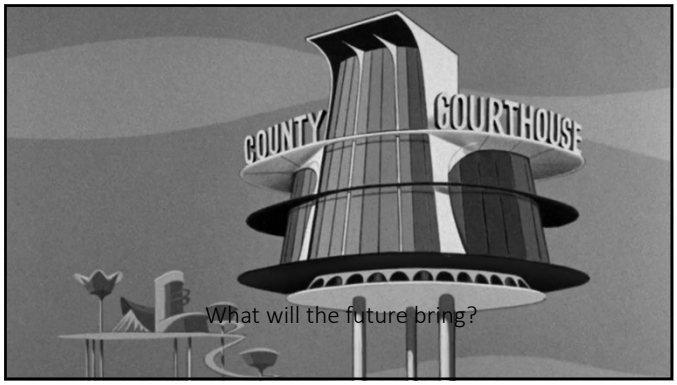
Considerations from Michael M.

- What are you trying to accomplish with community control?
- Is a community control sentence saying something about the seriousness of the offense?
- What is a prison sentence saying about the seriousness of an offense?
- What is the purpose of a prison sentence?
- Do you consider early release in your calculation of a prison sentence? How much time? When is early release?

THE SUPREME COURT of OHIO



AI Victim Statement

State of Arizona v. Horcasitas: Victim statement created by AI

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Judge's Reaction to AI statement

THE SUPREME COURT of OHIO

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OFFENSE

Official Version:

The following version of the **INSTANT OFFENSE** was compiled using police reports provided by the Bowling Green Police Division. On November 24, 2015, Detective [redacted] spoke with Sara [redacted] (20 years old), the victim in this criminal matter, following Officer [redacted] investigation. Officer [redacted] responded to the Wood County Hospital on November 23, 2015, regarding a female patient who believed she was drugged the night prior. Sara reported to the Wood County Hospital after taking an at home drug test which tested positive for benzodiazepine. She became concerned after the CVS pharmacist told her benzodiazepine could be used as a date rape drug. During her interview with Detective [redacted] on November 24, 2015, Sara stressed how important it was for him to be aware of everything about her relationship with Michael [redacted], the defendant in this criminal matter. Sara advised she met the defendant on Tinder in September of 2014. Later in the month, their relationship turned into a casual sexual relationship. Sara stated she ended their sexual relationship in November 2014, after she started dating another male. After she ended the relationship, the defendant continued to send her text messages asking to "hang out." Their sexual relationship started again at the beginning of the 2015 school year. Sara advised Detective [redacted] she and the defendant never had a social life together and would meet up to "hook up." After a month, the defendant told Sara he would "date her if she wanted," which upset her. Sara advised she called off their relationship and told the defendant she wanted a relationship and not for him to date her for casual sex. The defendant continued to message Sara trying to be friends, but his conversations eventually led back to sex. The defendant suggested they go to a movie and Sara agreed to meet the defendant November 22, 2015, the night of the **INSTANT OFFENSE**, as "friends only." Part of their agreement was they would not have sex the night of their date.

The night of the **INSTANT OFFENSE**, the defendant asked if she wanted to have a drink before the movie. He told her he knew a bartender who would serve her despite her being under age. Sara stated they went to Downtown Sports Bar around 9:00 p.m. and parked behind 130 E. Court St. Detective [redacted] noted there are two parking lots closer to the Downtown Sports Bar, which would have been available to park in on a Sunday night. At the bar, the defendant ordered two rum and cokes. As soon as the drinks were brought back, the defendant asked Sara if she could go out to his truck and retrieve the rest of his money. Sara noted the defendant's request seemed weird, but there was a football game on and she figured the defendant wanted to watch the game. When Sara returned to the bar, her drink had been moved to her spot. She noticed the drink was bitter and tasted like "chewing an Aspirin." Sara continued to drink her drink although she believed it was drugged, because she did not want to raise suspicion and compromise her safety. She added the defendant told her, "you better finish that whole drink before we leave." Sara stated she was unsure of his "tone" and could not tell if he was serious or not. Sara decided to message a friend, Michael [redacted], and asked him to text her every ten minutes and if she stopped responding to call her and then the police. She stated they left the bar around 9:55 p.m. and drove to the movie. On the way to the movie theater, Sara stated the defendant made "really weird comments" about their drinks.

Official Version-continued:

Sara stated they arrived at the movie theater around 10:05 p.m., and she started to feel tired. During the credits, the defendant indicated he was "really thirsty," and asked if she wanted anything to drink. Sara told the defendant she was not thirsty and he left. She advised when he returned he only had M&M's. According to Sara, the defendant kept "trying to put the moves" on her, but she would shrug him off because she wanted to watch the movie. She explained the defendant would start to make out with her and when she stopped kissing him he would start kissing her neck. Sara assumed the defendant was trying to make sexual advances towards her during the movie. She noted the defendant wanted to leave after she stopped him from kissing her. Sara advised she was "conscious" during the movie, but was unable to concentrate. After they left the movie theater, the defendant drove Sara home, and gave her a goodnight kiss. Sara stated the defendant drove off and she "crashed" and fell asleep after she got into her apartment.

The next day, Sara indicated she woke up groggy and went to CVS and bought an over the counter drug test. She stated she took the test in the restroom at CVS and the drug test showed positive for benzodiazepine. Sara asked the pharmacist if benzodiazepine could be used as a date rape drug. Detective [redacted] followed up with Melanie [redacted], the pharmacist Sara spoke with at CVS. Melanie reported Sara started to tear up after it was confirmed benzodiazepine could be a date rape drug. Sara messaged the defendant asking what was in her drink the night prior. The defendant denied he put anything in her drink and stated "1.) we didn't do anything last night. 2.) it was planned and my idea not to do anything that night. 3.) I didn't try to do anything." The defendant continued to deny tampering with Sara's drink and believed she had trust issues for not believing him.

Sara told Detective [redacted], the only medication she was prescribed was Ritalin and advised she had not taken any during the school year. She stated she did use marijuana, but on a "very occasional" basis. She denied any recreational use of any additional illegal substances or pills.

On December 9, 2015, Detective [redacted] reviewed the video footage from Downtown Sports Bar the night of the **INSTANT OFFENSE**. Detective [redacted] observed Sara and the defendant enter the bar and sit at the bar area where Sara described. The defendant ordered two drinks and the bartender, in view of the camera, made the drinks and sat them in front of the defendant. The defendant was observed paying for the drinks and then he handed his keys to Sara. After she received the keys, Sara walked out of the back door of the bar. As Sara walked away, the defendant's right hand was observed going into his right front pants' pocket. An item was removed from his pocket and placed on his lap. Detective [redacted] noted the defendant looked around the bar area while he fidgeted with the item in his lap. The defendant then slid the drink on his left closer to himself. Detective [redacted] noted the defendant scanned the bar area and door Sara left out of before he poured the item from his lap into the left drink. He then placed the item in his hand back into his pocket before he started stirring the drink. The defendant also appeared to use his hand to wipe the bar top clean. He continued to stir the drink and look around the bar in a manner, which appeared to Detective [redacted], as "an individual looking around to see if anyone was watching them." The defendant then slid the tampered drink to his left, where Sara was seated. Sara was observed walking back into the bar and drinking from the tampered drink.

Official Version-continued:

On December 14, 2015, Detectives H[redacted], M[redacted], K[redacted], and H[redacted] conducted a search warrant on the defendant's residence. During questioning, the defendant denied corrupting Sara with drugs and stated nothing happened. Detective H[redacted] played the video from the bar the night of the **INSTANT OFFENSE**, which showed the defendant placing something into Sara's drink. The defendant stated "I don't know who that is." Detective H[redacted] noted the defendant appeared to have a hard time swallowing and acted panicked. The defendant told Detective H[redacted], "I didn't do anything to her, she said that right? Why would I drug someone and then not do anything to them?" On December 17, 2015, results from the Lucas County Toxicology confirmed Sara's urine sample contained Alphahydroxyalprazolam and Alprazolam (commonly known as Xanax). Alprazolam is a "minor" tranquilizer of the benzodiazepine family and Alphahydroxyalprazolam is its active metabolite.

The defendant was indicted on the offense of Corrupting Another with Drugs, a felony of the second degree. He appeared before the Court on February 8, 2017, and entered a guilty plea to the amended charge of **Corrupting Another with Drugs**, a violation of Ohio Revised Code 2925.02(A)(1)(C)(3)(b), a felony of the third degree. The Court accepted his plea and adjudged him guilty. The matter was referred to the Wood County Adult Probation Department for the preparation of a presentence investigation report and bond was continued. Sentencing is scheduled for **April 14, 2017, at 1:00 p.m.**

Defendant's Version:

The defendant provided a written version of the **INSTANT OFFENSE** and it is attached for review.

During the presentence interview, the defendant stated the events leading up to the **INSTANT OFFENSE** started over a year prior to November 22, 2015. He stated he met Sara on a dating application called Tinder in September of 2014, and within a month they had developed a sexual relationship. He advised their sexual relationship lasted for over a year, into the 2015 school year. Outside of the sexual aspect of the relationship, the defendant reported they had a good friendship and enjoyed their time together. He stated they were able to relax and joke around with each other. During their relationship, the defendant reported they had taken Xanax a couple of times together, as recent as a couple months prior to the **INSTANT OFFENSE**. According to the defendant, Sara became interested in more of a "dating" relationship as opposed to a causal sexual relationship. The defendant was in agreement with Sara and stated it was his idea for them to go on a date. Also, he claimed it was his idea for them to not have sex the night of the **INSTANT OFFENSE**. He indicated given the relationship they had, he decided to play a prank on Sara.

Defendant's Version-continued:

The defendant reported while in college he was introduced to Xanax, a benzodiazepine, and marijuana to deal with the aches and pains of playing college football. He indicated Xanax was used recreationally as well with friends, including with Sara. A few days prior to the night of the **INSTANT OFFENSE**, the defendant bought 4 or 5 Xanax pills to deal with a sport's injury.

According to the defendant, he was having difficulty sleeping and Xanax helped him sleep through the night. Over the course of the next few days, the defendant had taken all but 1 or 2 of the Xanax pills. He decided with 1 of the remaining pills he was going to play a practical joke on Sara during their date. The defendant explained how Sara would joke around with him about how he was a "lightweight" and was not able to handle his alcohol. He stated it became an inside joke between the two of them. He thought it would be a funny to joke around about Sara not being able to handle her alcohol. The defendant indicated since it was his idea not to have sex on their date, the fact benzodiazepines were used as a "date rape" drug never crossed his mind. He stated his sole intention was to play a practical joke on Sara, which he explained was apparent through his actions the night of the **INSTANT OFFENSE**. The defendant stated he was known as a funny guy and was always joking around, to the point people would tell him he was immature and needed to act his age. He believed given his personality and actions on November 22, 2015, Sara would have known he was playing a joke on her.

The day of the **INSTANT OFFENSE**, the defendant stated he and Sara agreed to go to the movies. The movie did not start until 10:10 p.m., so the defendant asked if Sara wanted to get a drink at Downtown Sports Bar. According to the defendant, he knew the bartender so Sara would not get in trouble for drinking since she was underage. He indicated while in the bar he asked Sara if she could go out to his truck and get the rest of his money. When she walked away the defendant decided to put the Xanax pill he had in his pocket in Sara's drink as a joke. His intention was for Sara to believe she was drunk given the effects of a benzodiazepine, and to think she could not handle her alcohol. He admitted after he placed the pill in her drink he stirred it and slid the drink in front of her seat. The defendant discussed making comments about the drink and her not drinking it, which were said in a joking manner. He indicated he told Sara "to quit babysitting her drink" because she was drinking slowly. According to the defendant, his statements were not an attempt to make her drink. The defendant ordered another drink before leaving the bar to go to the movie.

While waiting to get tickets for the movie, the defendant stated one of Sara's classmates, Mike, approached her and started talking to her. According to the defendant, Sara acted embarrassed about being seen with him out in public. Once in the movie, he admitted they kissed, but nothing further since they decided not to have sex on their date. He indicated given the length of the movie he started to fall asleep and they both agreed to leave early. The defendant stated he drove Sara home, gave her a goodnight kiss, and drove off. He was adamant nothing sexual happened the night of the **INSTANT OFFENSE**.

Defendant's Version-continued:

He stated he was surprised the next day when Sara was upset asking if she was drugged and did not see it as a joke. The defendant indicated he had not realized the severity of his actions and how it affected Sara, so he denied tampering with her drink. He stated he continued to deny everything so he would not get in trouble and lose his scholarship. The defendant directed his thoughts back to him not acting his age and stated he was immature and he should have told Sara right away. He mentioned a possible alterative motive for Sara filing the charges against him. He believed Sara's family and friends found out about her relationship with the defendant and they disapproved of her being with a black man.

The defendant heard Sara was considered a "nigger lover" after people around campus found out about their relationship. He stated regardless of her motives, his intentions during the **INSTANT OFFENSE** were to play a practical joke on a friend. He indicated he did not realize the severity of his actions and takes full responsibility for his actions.

Judge Matthew Reger,

My name is Sara [redacted], I am the victim of Mike's actions on November 22, 2015. While I plan to speak at the sentencing trial about how these events have impacted me there is one portion I am not comfortable speaking about in detail publicly. However, I feel it is important regarding the impact of Mike's actions. As you already know Mike is not a good person, what you don't know though is that Mike is one of a number of men who have assaulted me. Growing up due to circumstances I ended up falling into a cycle of abusive men and while I silently tried to break that cycle for years I was never able to escape it completely, although I did make progress. During the summer of 2015 I made a huge decision to finally speak to a professional and begin receiving help to overcome my past. It is easily the most terrifying thing I have ever done but the first week of Fall Semester I went to BGSU's counseling center and began working with one of their therapists and I made amazing progress, for the first time in years I was truly able to say I loved myself. During that time I spoke for the first time about the ways in which I had been sexually, emotionally, and physically abused and raped throughout my life. During that time I also came to realize that I slept with men as a form of self-harm. At this point I broke off my sexual relationship with Mike and explained that I was working through some stuff and that hooking up was not something I could currently do in a healthy manner. I was doing so well, my depression lessened to only a random day here or there and my eating disorders practically disappeared. In November Mike asked if I would be comfortable hanging out or going on a date with the concept of sex off the table. Saying yes was not a decision I made lightly; my therapist and I heavily discussed pro's and con's, if I was emotionally ready, if I felt confident enough to explore dating again, and if I trusted Mike. After spending the majority of an appointment discussing this we decided that I was ready and that while I did not have intentions of seriously dating again, going on a "date" with a man I knew and trusted would be extremely healthy and beneficial for overcoming my past. Instead that night threw me right back into the cycle, I was assaulted again and I do believe that I was almost raped again. Drugging people like that is not something done just to make them feel funny. He destroyed me and he destroyed everything I had slowly spent years overcoming. I am comfortable speaking to those effects in the court room so I will end here for now, but I am not comfortable publicly discussing the fact that I've been a victim before. If you're a victim once you are lucky if you have the majority of people believe that it was not your fault, if you are the victim multiple times those numbers change drastically and I am not strong enough to deal with the possible backlash of speaking about my full story publicly.

Sara [redacted]

Sentencing: Michael

Phase I: Sentencing conclusions after being presented with facts of the case.

Count **Sentence**

Corrupting Another with Drugs (F3)

Community Control: How long? Conditions?

In reaching this decision what was important to you?

What other information do you want to know that you think could be revealed in the hearing?

Sentencing: Michael

Phase II: Sentencing conclusions after hearing from attorneys at hearing

Count **Sentence**

Corrupting Another with Drugs (F3)

Community Control: How long? Conditions?

What information from the attorneys was helpful to you?

What information from the attorneys did not help you?

What information do you still want to hear?

Sentencing: Michael

Phase III: Sentencing conclusions after hearing from victim and offender

Count **Sentence**

Corrupting Another with Drugs (F3)

Community Control: How long? Conditions?

If you chose community control, why?

What questions would you have wanted to ask the offender?

If your conclusions changed from your initial thoughts on sentencing, why did they?

Why did you choose the sentencing option you did?

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