

New Judges  
Orientation: Part I  
*Municipal/County Track*

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



THE SUPREME COURT *of* OHIO  
JUDICIAL COLLEGE





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**New Judges Orientation: Part I – Municipal/County Track**  
**December 9-10, 2025 – Thomas J. Moyer Ohio Judicial Center, Columbus**

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**AGENDA**

**TUESDAY, DECEMBER 9**

- 8:15**     **Search Warrants** (*joint session with Common Pleas General Division track*)  
Hon. Patrick Carroll, Retired, *Lakewood Municipal Court*
- 9:45     Break
- 10:00**    **Evidence** (*joint session with Common Pleas General Division track*)  
Hon. D. Chris Cook, *Lorain County Common Pleas Court*  
Hon. Joy Malek Oldfield, *Summit County Common Pleas Court*
- 11:45    Lunch
- 12:30**    **Domestic Violence**  
Hon. Thomas A. Januzzi, *Oberlin Municipal Court*
- 2:15     Break
- 2:30**     **Civil Law and Procedure**  
Hon. Courtney A. Worley, *Brown County Municipal Court*
- 4:00     Conclude Track Education
- 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.)
- 4:15**     **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*
- 4:45     Conclude

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**AGENDA**

**WEDNESDAY, DECEMBER 10**

- 8:15**     **Arraignments, Pleas, Initial Appearances and Pretrial Release and Detention**  
          Hon. Terri L. Stupica, *Chardon Municipal Court*
- 10:15     Break
- 10:30**     **Sentencing**  
          Hon. Gary A. Loxley, *Warren County Court*
- 12:15     Lunch
- 1:00**     **Trial Skills Workshop**  
          Hon. Todd L. Grace, *Athens Municipal Court*  
          Hon. Thomas M. Hanna, Retired, *Kettering Municipal Court*
- 2:15     Break
- 2:30**     **Trial Skills Workshop, *continued***  
          Hon. Todd L. Grace, *Athens Municipal Court*  
          Hon. Thomas M. Hanna, Retired, *Kettering Municipal Court*
- 4:30     Conclude Track Education
- 4:30**     **Photos for judges with last names M-Z** (and judges with last names A-L who didn't get photos taken on Tuesday due to attending the Compensation and Benefits session.)

**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.

**TODD L. GRACE** is in his ninth year as Athens County Municipal Court Judge. Prior to taking the bench, he served for 13 years as a Magistrate in Athens County Juvenile Court while maintaining a private law practice in Athens. During his time at Athens Municipal Court, Judge Grace has significantly expanded the Court's diversion programs and has moved the Court progressively towards digital files and digital court management processes. Judge Grace has served on task forces and workgroups for the Ohio Supreme Court and the Ohio Judicial Conference including the areas of Bail/Bond reform, Model Bond Schedule, New Judge Mentoring Program, Continuing Jury Operations, and Remote Hearings.

In March 2020, with the coronavirus pandemic, Judge Grace and Athens County Municipal Court set up the framework for resolving cases through video conferencing. The Court was able to accept changes of pleas, conduct preliminary hearings, and conduct motion hearings. On May 1st, the Court resumed its pre-trial docket, by Zoom. The practitioners quickly adjusted and more cases were being resolved throughout May and progress was demonstrated on many other cases throughout that time. With the lifting of the Governor's stay at home Order at the end of May, the Court transitioned to a hybrid system where many court participants are still appearing by Zoom, but those who need to appear in person, or just prefer to appear in person, are able to do so. Each of these transitions has required problem solving and flexibility, and Judge Grace is extremely thankful to have the staff and practitioners that have made it possible to transition (somewhat) smoothly through each of these changes.

Judge Grace and his wife, Sarah, have four children ranging from 11 to 23 years old. As you might expect, they do not feel like they can ever get enough done or get enough sleep.

**THOMAS M. HANNA** is retired from Kettering Municipal Court where he began serving as Judge in 2000, after having served there as Acting Judge since 1992. Judge Hanna was also Acting Judge in Dayton Municipal Court for two years, from 1987 until 1989. Before and during his time as Acting Judge, he was in private practice from 1981 until 1999. He continues to frequently sit as a visiting judge. Judge Hanna received his BSBA from the University of Dayton, his MBA from Capital University, and his JD from the University of Dayton School of Law.

**THOMAS A. JANUZZI** has been the judge of the Oberlin Municipal Court since 2002 and will be completing his fourth term on December 31, 2025. Judge Januzzi received his Bachelor of Science in Business Administration from Ashland College 1979 and his Juris Doctor from Cleveland Marshall College of Law at Cleveland State University 1982. Prior to taking the bench, he practiced law from 1982-2001. He was a partner in the law firm of Trigilio, Stephenson & Januzzi in Lorain, Ohio and served as an acting judge in Oberlin Municipal Court from 1991-2001. He also served as a law clerk, volunteer mediator, arbitrator, and receiver in the Lorain County Common Pleas Court.

Judge Januzzi served as a trustee of the Association of Municipal and County Judges of Ohio, on several of the association's committees, and as the chair of the Rules of Superintendence and Rules of Practice Committee. He is also an active member of the Ohio Judicial Conference, where he serves on the Judicial Ethics and Professionalism, Criminal Law and Procedure, Legislative Committee and Court Administration Committees. Judge Januzzi has also served on The Supreme Court of Ohio Advisory Committee on Case Management, Time Guidelines Subcommittee. He is the past president of Lorain County Bar Association and served on the Advisory Committee for the Lorain County Court of Common Pleas Office of Dispute Resolution and on the Lorain County Bar Association Legal Ethics Committee.

Judge Januzzi is active in community outreach where he has presented at local high schools on Roles in the Justice System and Underage Drinking, has been a volunteer judge for Oberlin High

School Street Law Mock Court program and Amherst High School Mock Trial program, and has been a participant in the Lorain County Bar Association Mock Court program. He also speaks to local civic and community groups. Judge Januzzi has prepared numerous Power Point presentations on a variety of topics which are on the Oberlin Municipal Court website. Judge Januzzi is also a frequent presenter for Lorain County Bar Association seminars including recently OVI seminars and Marsy's Law.

Judge Januzzi has been a teacher for Parish School of Religion for the past 11 years for St. Joseph Catholic Church in Amherst, Ohio for the 8th grade confirmation students and teacher of Parish School of Religion for Sacred Heart of Jesus Catholic Church in Oberlin for the past 8 years.

Judge Januzzi has written four articles for the OJC publication For the Record: Plea Bargaining – 1st Quarter 2011; Ex Parte Communications 1st Quarter 2013; The “Sleep-Driving” Defense submitted for publication in 1st Quarter 2014 and Calming the Municipal Court Accused 3rd Quarter 2018, and most recently an Article in the

Tom and his wife, Margie, have been married for 44 years and have four daughters ages 42, 40, 38, and 36 and Fifteen (15) grandchildren [9 girls and 6 boys].

Tom is eligible to run for a 5<sup>th</sup> term next year but has decided to leave full time employment to spend more time with his good wife and family including the grandchildren and Tom's 96 year old mother who has been in an assisted living facility since July 2023.

**GARY A. LOXLEY** has served as a judge on the Warren County Court since May 2013. A native of Greenville, Ohio, Judge Loxley is a graduate of Miami University (Oxford) and the Ohio Northern University College of Law. He began his legal career as a commissioned officer in the United States Army Judge Advocate General's Corps in 1988. For nearly 15 years, he served as an Assistant Prosecuting Attorney in the Warren County Prosecutor's Office. He engaged in the private practice of law in Dayton from 1998-2002.

In 2018, Judge Loxley retired as a colonel from the United States Army Reserve Judge Advocate General's Corps. During his 36 years in the Army, he served in many leadership and command assignments, including service as a Military Judge in the United States Army's 1st and 2nd Judicial Circuits. He earned a Master of Strategic Studies degree from the United States Army War College.

Judge Loxley is active in several local, state, and national organizations and committees, especially veterans interest groups. He is a member of the Warren County (Past President) and Ohio Bar Associations, Association of Municipal and County Judges of Ohio, and the Ohio Judicial Conference. In 2015, he established a specialized docket for veterans known as the Warren County Veterans Court and serves as its Presiding Judge. As a result of the contributions he made to the community after his active military service, Judge Loxley was inducted into the Ohio Veterans Hall of Fame, Class of 2021.

Judge Loxley and his wife Jennie are the parents of four grown children and have six grandchildren.

**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 & Gearing 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.

**TERRI STUPICA** has presided over the Chardon Municipal Court since January 2012. She earned her undergraduate degree at John Carroll University in 1984 and her J.D. from Cleveland-Marshall College of Law in 1987, after attending Loyola Marymount Law School in her second year

as a non-matriculating student. She is a member of the Ohio Bar Association and Geauga County Bar Association, serving as president last year. She is past Chair of the Supreme Court of Ohio Commission on Continuing Legal Education and is a member of the Supreme Court Case Management Advisory Committee, Ohio Judicial Conference Traffic Law and Judicial Ethics, Professionalism and Diversion Committees. She has served as a Supreme Court Mentor to New Lawyers from 2011 through 2014. She is a founding member of the Geauga County Opiate Task Force and a member of the U.S. District Attorney's Heroin and Opioid Action Plan Committee. Judge Stupica is active speaking at numerous forums throughout Ohio, including Judicial Conference Courses, Ohio Women's Bar Foundation Leadership Institute, Lake Erie College, Lakeland Community College, American Legion Post 459, Rotary and Kiwanis clubs, D.A.R.E graduations at elementary schools and at high school health classes, regarding substance abuse and leadership. Finally, she has judged Notre Dame Cathedral Latin's mock trials since 2012.

**COURTNEY A. WORLEY** has served as the Brown County Municipal Court Judge since January 2024. A proud graduate of Fayetteville Perry High School, she earned her Bachelor's degree *cum laude* from Wilmington College, and her Juris Doctor from Capital University Law School.

Prior to taking the bench, Judge Worley served as an Assistant Prosecuting Attorney in Brown County for over six years, handling a wide range of criminal, civil, and appellate cases. She represented the State of Ohio in matters involving criminal prosecution, children services, adult protective services, and child support. In addition to her work in the prosecutor's office, Judge Worley also established her own private law firm, where she assisted clients with a variety of legal issues.

Since assuming her judicial role, Judge Worley has been committed to enhancing the court's impact through innovation and reform. She launched a Driving Under Suspension Diversion Program and is actively developing a specialized docket to address substance use and mental health challenges in her community. She is also leading a transition to a fully digital, paperless court system aimed at improving efficiency and accessibility.

Judge Worley contributes to judicial advancement statewide as a member of the Ohio Judicial Conference's Criminal Law and Procedure Committee, where she helps shape policy and procedural improvements in Ohio's courts.



# 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<sup>1</sup>**

**Supreme Court of Ohio**

**December 9, 2025**

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<sup>1</sup> Revised November 18, 2025

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## **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 (7<sup>th</sup>. 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<sup>2</sup>, 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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<sup>2</sup> 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*, 12<sup>th</sup>. 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*, 10<sup>th</sup>. 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*, 12<sup>th</sup>. 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*, 2<sup>nd</sup>. 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*, 7<sup>th</sup>. 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 (5<sup>th</sup>. 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(5<sup>th</sup>. 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*, 2<sup>nd</sup>. 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*, 6<sup>th</sup>. 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*, 6<sup>th</sup>. Dist. Wood, No. WD-19-080, 2020-Ohio-4168. see also, *State v. Dockum*, 6<sup>th</sup>. 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*, 6<sup>th</sup>. 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*, 11<sup>th</sup>. 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*, 2<sup>nd</sup>. 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 (11<sup>th</sup>. Dist.).

### Dog sniff.

*State v. Shannon*, 2025-Ohio-1224 (5<sup>th</sup>. 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*, 1<sup>st</sup>. 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-\*\*\*\* (6<sup>th</sup>. 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*, 7<sup>th</sup>. 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*, 1<sup>st</sup>. Dist. Hamilton, C-040379, 2005-Ohio-3036, Totality of the circumstances means a review of all the facts involved, even though 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*, 3<sup>rd</sup>. 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*, 4<sup>th</sup>. 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*, 4<sup>th</sup>. 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*, 5<sup>th</sup>. 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*, 5<sup>th</sup>. 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*, 10<sup>th</sup>. 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*, 10<sup>th</sup> 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*, 2<sup>nd</sup>. 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*, 10<sup>th</sup>. 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*, 10<sup>th</sup>. 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*, 12<sup>th</sup>. 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 (1<sup>st</sup> 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 (6<sup>th</sup>. 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*, 12<sup>th</sup>. 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 (8<sup>th</sup>. 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*, 2<sup>nd</sup>. 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*, 9<sup>th</sup>. 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*, 2<sup>nd</sup>. 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*, 6<sup>th</sup>. 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*, 10<sup>th</sup>. 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-\*\*\* (5<sup>th</sup>. 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*, 5<sup>th</sup>. 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*, 6<sup>th</sup>. 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) Identity of confidential informant**

*State v. Thompson*, 4<sup>th</sup>. 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*, 2<sup>nd</sup>. 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 (2<sup>nd</sup>. Dist. 1999). The defendant has the burden to show the need for the identity. Citing *State v. Daniels*, 1<sup>st</sup>. 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*, 6<sup>th</sup>. 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*, 6<sup>th</sup>. 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*, 10<sup>th</sup>. 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*, 10<sup>th</sup>. 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 (3<sup>rd</sup>. 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*, 5<sup>th</sup>. 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*, 3<sup>rd</sup>. 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, (1<sup>st</sup>. 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*, 8<sup>th</sup>. 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*, 8<sup>th</sup>. 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*, 6<sup>th</sup>. 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*, 12<sup>th</sup>. 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*, 5<sup>th</sup>. 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*, 7<sup>th</sup>. 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*, 6<sup>th</sup>. 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*, 3<sup>rd</sup>. 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) When a search warrant is not required.**

*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*, 6<sup>th</sup>. 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*, 11<sup>th</sup>. 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 plain 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) Who may issue search warrants. Crim. R. 41(C).**

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.<sup>3</sup>

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.<sup>4</sup>

*State v. Dulaney*, 3<sup>rd</sup>. 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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<sup>3</sup> 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*, 8<sup>th</sup>. 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*, 2<sup>nd</sup>. 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.)

<sup>4</sup> 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.<sup>5</sup>

*State v. Kithcart*, 5<sup>th</sup>. 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*, 12<sup>th</sup>. 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.<sup>6</sup>

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<sup>5</sup> *State v. Lang*, 1<sup>st</sup>. 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”.

<sup>6</sup> 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*, 7<sup>th</sup>. 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*, 10<sup>th</sup>. 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*, 5<sup>th</sup>. 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 (5<sup>th</sup>. 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*, 2<sup>nd</sup>. 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*, 9<sup>th</sup>. 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*, 9<sup>th</sup>. 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*, 4<sup>th</sup>. 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 (6<sup>th</sup>. 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 (12<sup>th</sup>. 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*, 11<sup>th</sup>. 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*, 4<sup>th</sup>. 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. *State 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*, 5<sup>th</sup>. 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.<sup>7</sup>
- 2) R.C. 2933.76; Pen register for trap and trace device.

## **2) Dual Capacity**

*State v. Gervin*, 3<sup>rd</sup>. 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*, 11<sup>th</sup>. 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*, 3<sup>rd</sup>. 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

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<sup>7</sup> 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.<sup>8</sup>

*State v. Jacob*, 185 Ohio App.3d 408 (2<sup>nd</sup>. 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) Warrant not void

*State v. Ridenour*, 4<sup>th</sup>. 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*, 10<sup>th</sup>. 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*, 2<sup>nd</sup>. 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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<sup>8</sup> The court expressly disapproved and declined to follow the decisions in *State v. Bowman*, 10<sup>th</sup>. Dist. Franklin, No. 06AP-149, 2006-Ohio-6146 & *State v. Hardy*, 2<sup>nd</sup> 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) Consideration of venue under R.C. 2901.12.**

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.<sup>9</sup>

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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<sup>9</sup> 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*, 2<sup>nd</sup>. 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*, 2<sup>nd</sup>. 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 with 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 (12<sup>th</sup>. 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 (5<sup>th</sup>. 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 (7<sup>th</sup>. 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.<sup>10</sup> 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).<sup>11</sup>

*United States v. Berkos*, 543 F.3d 392 (7<sup>th</sup>. 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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<sup>10</sup> 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.

<sup>11</sup> 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) Neutral and detached.**

*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 if 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 in 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 (4<sup>th</sup> 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 (10<sup>th</sup>. 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 (6<sup>th</sup>. 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 (5<sup>th</sup>. 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 (12<sup>th</sup>. 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*, 8<sup>th</sup>. 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*, 12<sup>th</sup>. 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*, 2<sup>nd</sup>. 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*, 7<sup>th</sup>. 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*, 2<sup>nd</sup>. 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 (9<sup>th</sup>. 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*, 4<sup>th</sup>. 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*, 5<sup>th</sup>. 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*, 2<sup>nd</sup>. Dist. Montgomery, No. 25063, 2013-Ohio-40.

*State v. Smedley*, 2<sup>nd</sup>. 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*, 3<sup>rd</sup> 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 (10<sup>th</sup>. 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) Recorded supplemental oral statements of officer. Crim. R. 41(C) (2).**

*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*, 1<sup>st</sup>. 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*, 5<sup>th</sup>. 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*, 12<sup>th</sup>. 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*, 10<sup>th</sup>. 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*, 10<sup>th</sup>. 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 4<sup>th</sup>. Amendment only required statements by oath or affirmation for a search warrant. Addressing this issue, the court stated that the 4<sup>th</sup>. 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) Stale evidence.

*State v. Rigel*, 2<sup>nd</sup>. 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 (9<sup>th</sup>. 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 (10<sup>th</sup> Dist.).

*State v. A.P.*, 12<sup>th</sup>. 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*, 12<sup>th</sup>. 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*, 10<sup>th</sup>. 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*, 5<sup>th</sup>. 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 (1<sup>st</sup> 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*, 7<sup>th</sup>. 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*, 4<sup>th</sup>. 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, which 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-\*\*\*\* (6<sup>th</sup>. 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 (9<sup>th</sup>. 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*, 3<sup>rd</sup>. 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*, 10<sup>th</sup>. 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-\*\*\* (5<sup>th</sup>. 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*, 9<sup>th</sup>. 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*, 9<sup>th</sup>. 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*, 8<sup>th</sup>. 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 (8<sup>th</sup>. 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*, 10<sup>th</sup>. 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*, 2<sup>nd</sup>. 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*, 2<sup>nd</sup> 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*, 5<sup>th</sup>. 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*, 3<sup>rd</sup> 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 (2<sup>nd</sup>/ 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*, 10<sup>th</sup> 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) Sufficiency of affidavit**

*State v. Shary*, 8<sup>th</sup> 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*, 12<sup>th</sup> 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*, 5<sup>th</sup>. 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*, 3<sup>rd</sup>. 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*, 12<sup>th</sup>. 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*, 7<sup>th</sup>. Dist. Belmont, No. 21 BE 0032, 2022-Ohio-3524, motion to reopen appeal denied, 2023-Ohio-914. Although the affidavit did not go into detail about the controlled drug buy, a reasonable inference 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) Insufficient supporting affidavit.**

*State v. Siegel*, 4<sup>th</sup>. 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*, 6<sup>th</sup>. 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*, 5<sup>th</sup>. 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*, 4<sup>th</sup>. 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 (6<sup>th</sup>. 2017)., citing *United States v. Weaver*, 99 F.3d 1372, 1380 (6<sup>th</sup>. 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 (6<sup>th</sup>. Cir. 2006). See also, *State v. Grace*, 5<sup>th</sup>. 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 (6<sup>th</sup>. Cir. 2019), quoting *United States v. Washington*, 380 F.3d 236, 241 (6<sup>th</sup>. 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 (6<sup>th</sup>. Cir. 2016).

*State v. Martin*, 1<sup>st</sup>. 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 revealed 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*, 10<sup>th</sup>. 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*, 10<sup>th</sup>. 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 (6<sup>th</sup>. 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. *United States v. White*, 873 F.3d 490, 496 (6<sup>th</sup>. 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 (6<sup>th</sup>. 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 (6<sup>th</sup>. 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) Anticipatory search warrants.**

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 (2<sup>nd</sup>. Dist. 1991) and *State v. Nathan*, 2<sup>nd</sup>. 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 (2<sup>nd</sup>. 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*, 2<sup>nd</sup>. 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*, 8<sup>th</sup>. 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*, 3<sup>rd</sup>. 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 in *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*, 3<sup>rd</sup>. Dist. Marion, No. 9-17-27, 2017-Ohio-8789; *State v. Easterly*, 8<sup>th</sup>. Dist. Cuyahoga, No. 94797, 2011-Ohio-215; *State v. McIntosh*, 10<sup>th</sup>. Dist. Franklin, No. 04AP-296, 2005-Ohio-1152; *State v. Marks*, 2<sup>nd</sup>. Dist. Montgomery, No. 19629, 2003-Ohio-4205. See also, *State v. Thompson*, 5<sup>th</sup>. 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*, 3<sup>rd</sup>. 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*, 1<sup>st</sup>. 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 (6<sup>th</sup>. 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.<sup>12</sup>

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.*

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<sup>12</sup> 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*, 4<sup>th</sup>. 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*, 3<sup>rd</sup>. 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*, 3<sup>rd</sup>. 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.<sup>13</sup>

*State v. Baker*, 6<sup>th</sup>. 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*, 8<sup>th</sup>. 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

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<sup>13</sup> 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*, 5<sup>th</sup>. 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*, 5<sup>th</sup>. 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, 2<sup>nd</sup>. Dist. 2007-Ohio-5667.

*Greer v. Highland Park*, 884 F.3d 310 (6<sup>th</sup>. 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*, 2<sup>nd</sup>. 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*, 10<sup>th</sup>. 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*, 2<sup>nd</sup>. 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, (10<sup>th</sup>. 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*, 2<sup>nd</sup>. 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*, 3<sup>rd</sup>. 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*, 6<sup>th</sup>. 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*, 2<sup>nd</sup> 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*, 5<sup>th</sup>. 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*, 4<sup>th</sup>. 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*, 1<sup>st</sup>. 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-Ohio-4963 (7<sup>th</sup>. 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*, 1<sup>st</sup>. 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(5<sup>th</sup>. 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*, 3<sup>rd</sup>. 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*, 6<sup>th</sup>. Dist. Lucas, Nos.-L-45-1295 & 1324. (Warrant issued on Friday must be served by the following Wednesday); *State v. Coleman*, 8<sup>th</sup>. Dist. Cuyahoga, No. 91058, 2009-Ohio-1611; *State v. Talley*, 2<sup>nd</sup>. 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 (9<sup>th</sup>. 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 (9<sup>th</sup>. 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 41 was 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 41 which would renders the search unconstitutional under traditional Fourth Amendment standards. (Par. 36, relying on *United States v. Vasser*, 648 F.2d 507 (9<sup>th</sup> 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-Ohio-4963 (7<sup>th</sup>. 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 41 which 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 (6<sup>th</sup>. 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 (6<sup>th</sup>. 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 (6<sup>th</sup>. 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) Good Faith by police officer.**

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 misled 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*, 4<sup>th</sup>. 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*, 3<sup>rd</sup>. 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 *Castagnola*, 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, 6<sup>th</sup>. 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*, 6<sup>th</sup>. 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*, 6<sup>th</sup>. Dist. Wood, No. WD-19-080, 2020-Ohio-4168. see also, *State v. Dockum*, 6<sup>th</sup>. 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*, 10<sup>th</sup>. 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*, 10<sup>th</sup>. 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*, 5<sup>th</sup>. 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*, 4<sup>th</sup>. 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*, 1<sup>st</sup>. 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, 2<sup>nd</sup>. 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*, 5<sup>th</sup>. Dist. Stark, No. 2012 CA 100, 2013-Ohio-2225 & *State v. McCloude*, 5<sup>th</sup>. 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 (5<sup>th</sup>. 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) Arrest Warrant.

*State v. Hinshaw*, 2<sup>nd</sup>. 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)<sup>14</sup>. See also, *State v. Martin*, 151 Ohio St.3d 470, 2017-Ohio-7556,<sup>15</sup> and *State v. Chavez*, 2<sup>nd</sup>. 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.

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<sup>14</sup> 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.

<sup>15</sup> 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 (1<sup>st</sup>. 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*, 3<sup>rd</sup>. 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 challenges to affidavit.**

*State v. Groves*, 10<sup>th</sup>. 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*, 8<sup>th</sup>. 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 (5<sup>th</sup>. 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.<sup>16</sup>

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*, 9<sup>th</sup>. 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, (10<sup>th</sup>. 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 (9<sup>th</sup>. 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,

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<sup>16</sup> 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*, 8<sup>th</sup>. 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).<sup>17</sup> 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*, 6<sup>th</sup>.Dist. Wood, No.WD-19-087, 2020-Ohio-5292. Clerical errors resulting in factual inconsistencies 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 inconsistencies 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 (1<sup>st</sup>. 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*, 7<sup>th</sup>. 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) Procedural challenges to search warrant.**

*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

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<sup>17</sup> 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 (5th 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*, 3<sup>rd</sup>. 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*, 10<sup>th</sup>. 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*, 5<sup>th</sup>. 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*, 2<sup>nd</sup>. 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*, 8<sup>th</sup>. 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*, 8<sup>th</sup>. 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*, 2<sup>nd</sup>. 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*, 4<sup>th</sup>. 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*, 4<sup>th</sup>. Dist. Vinton No. 92 CA 485 (June 18, 1993).

*State v. Byrd*, 2025-Ohio-1045 (9<sup>th</sup>. 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 (6<sup>th</sup> 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 (9<sup>th</sup> Dist.).

**A) Persons. Crim. R. 41(C) (1).**

*State v. Gordon*, 2<sup>nd</sup>. 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*, 2<sup>nd</sup>. 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*, 2<sup>nd</sup>. 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*, 5<sup>th</sup>. 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*, 5<sup>th</sup>. Dist. Richland, No. 95 CA 55, (July 22, 1996).

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

*State v. Hobbs*, 4<sup>th</sup>. 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*, 8<sup>th</sup>. 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*, 1<sup>st</sup>. 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*, 10<sup>th</sup>. 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 (6<sup>th</sup>. 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(5<sup>th</sup>. 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*, 6<sup>th</sup>. 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*, 8<sup>th</sup>. 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*, 9<sup>th</sup>. 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 describes 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*, 8<sup>th</sup>. 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 (1<sup>st</sup>. 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*, 10<sup>th</sup>. 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*, 2<sup>nd</sup>. 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*, 2<sup>nd</sup>. 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*, 6<sup>th</sup>. Dist. Lucas, No. L-10-1012, 2010-Ohio-4720 at par. 13.

*State v. Kolle*, 4<sup>th</sup>. 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*, 5<sup>th</sup>. 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*, 3<sup>rd</sup>. 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. Halczynszak*, 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*, 8<sup>th</sup>. 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*, 11<sup>th</sup>. 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*, 8<sup>th</sup>. 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*, 11<sup>th</sup>. 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*, 3<sup>rd</sup>. 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 (1<sup>st</sup>. 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*, 2<sup>nd</sup>. 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*, 3<sup>rd</sup>. 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*, 6<sup>th</sup>. 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*, 6<sup>th</sup>. 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) Computers and electronic devices.**

*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*, 10<sup>th</sup>. 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*, 11<sup>th</sup>. 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 (6<sup>th</sup>. 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*, 6<sup>th</sup>. 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 (5<sup>th</sup>. 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 (12<sup>th</sup>. 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.<sup>18</sup>

*State v. Grace*, 5<sup>th</sup>. 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

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<sup>18</sup> 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*, 12<sup>th</sup>. 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*, 12<sup>th</sup>. 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*, 5<sup>th</sup>. 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 (8<sup>th</sup>. 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*, 12<sup>th</sup>. 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*, 11<sup>th</sup>. 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*, 2<sup>nd</sup>. 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*, 10<sup>th</sup>. 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*, 2<sup>nd</sup>. 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 (9<sup>th</sup>. 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*, 11<sup>th</sup>. 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).<sup>19</sup>**

*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. (8<sup>th</sup>. *Paragraph of the syllabus of the court*).

*State v. Miley*, 8<sup>th</sup>. 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.

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<sup>19</sup> See also, R.C. 2933.241 which also governs procedures for return of inventory.

### **C) Inventory. Crim. R. 41(D).**

*State v. Scruggs*, 10<sup>th</sup>. 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*, 11<sup>th</sup>. 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, (6<sup>th</sup>. 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, (9<sup>th</sup>. 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*, 12<sup>th</sup>. 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*, 5<sup>th</sup>. 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*, 10<sup>th</sup>. 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 (6<sup>th</sup>. 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*, 11<sup>th</sup>. 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*, 5<sup>th</sup>. 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*, 8<sup>th</sup>. 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*, 5<sup>th</sup>. 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. Scruggs*, 10<sup>th</sup>. 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 (6<sup>th</sup>. 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) Public records.**

*State v. Lawson*, 11<sup>th</sup>. 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*, 10<sup>th</sup>. 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).<sup>20</sup>

**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.<sup>21</sup> 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.<sup>22</sup> 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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<sup>20</sup> 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.

<sup>21</sup> 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.

<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup>

#### Search warrants and subpoenas.

*State v. Leibold*, 2<sup>nd</sup>. 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*, 2<sup>nd</sup>. 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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<sup>23</sup> Cell phones and the services they provide are such a pervasive and insistent part of daily life that carrying one is indispensable 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).

<sup>24</sup> 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*, 8<sup>th</sup>. 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*, 6<sup>th</sup>. 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.

#### R.C. 2935.23, Investigatory subpoenas

- 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, (10<sup>th</sup>. 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 (12<sup>th</sup>. 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 (10<sup>th</sup> 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 (10<sup>th</sup> 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.<sup>25</sup> 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.<sup>26</sup> The Court recognized the validity of a statute to authorize law enforcement to obtain certain

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<sup>25</sup> 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.

<sup>26</sup> 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 *Carpenter* 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*, 12<sup>th</sup>. 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.<sup>27</sup>

*State v. Haygood*, 8<sup>th</sup>. 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*, 8<sup>th</sup>. 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

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<sup>27</sup> 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*, 8<sup>th</sup>. 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*, 8<sup>th</sup>. 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*, 8<sup>th</sup>. 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.<sup>28</sup>

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 (9<sup>th</sup>. 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*, 1<sup>st</sup>. 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*, 12<sup>th</sup>. 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*, 6<sup>th</sup>. 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.

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<sup>28</sup> 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.<sup>29</sup>

*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 [2317.022](#) of 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.

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<sup>29</sup> 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 *State v. Eads*, 1<sup>st</sup>. 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 more 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*, 9<sup>th</sup>. 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*, 5<sup>th</sup>. Dist. Morrow, No. 17CA0001, 201-Ohio-7348 and *State v. Eads*, 1<sup>st</sup>. 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 invalidated 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*. 10<sup>th</sup>. 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*, 6<sup>th</sup>. 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*, 8<sup>th</sup>. 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*, 8<sup>th</sup>. 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.<sup>30</sup> 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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<sup>30</sup> 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**

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

### **Search Warrant not required**

- 8<sup>th</sup>. Dist.      *Cleveland v. Khamies*, 8<sup>th</sup>. Dist. Cuyahoga, No. 111661, 2023-Ohio-812.<sup>31</sup>

### **Unclear if search warrant required.**

- 2<sup>nd</sup>. 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.)
- 12<sup>th</sup>. Dist.     *State v. Perry*, 12<sup>th</sup>. 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.**

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<sup>31</sup> In *State v. Harper*, 8<sup>th</sup>. 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.<sup>32</sup>
- 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 or state law.

*State v. Pippin*, 10<sup>th</sup>. Dist. Franklin, No. 15AP-137, 2020-Ohio-503 An 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*, 6<sup>th</sup>. 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

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<sup>32</sup> 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*, 5<sup>th</sup>. 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*, 11<sup>th</sup>. 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*, 11<sup>th</sup>. 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*, 7<sup>th</sup>. 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*, 5<sup>th</sup>. 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 device 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.<sup>33</sup>

*State v. Stock*, 8<sup>th</sup>. 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 (11<sup>th</sup>. 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.

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<sup>33</sup> 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 if 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.<sup>34</sup>

*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<sup>35</sup> and 2) real time location of suspect.

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<sup>34</sup> 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*, 9<sup>th</sup>. 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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<sup>35</sup> 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. 5<sup>th</sup>. 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)<sup>36</sup>, 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.<sup>37</sup>

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.

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<sup>36</sup> This case is a magistrate's report which was approved and adopted as the judgment of the court on March 12, 2021.

<sup>37</sup> Both Ohio Criminal Rule 4 (probable cause for warrant) and Rule 41 have similar recording requirements.

*Bd of Trustees, Blanchard Township v. Simon*, 3<sup>rd</sup>. 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 (12<sup>th</sup>. 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*, 9<sup>th</sup>. 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*, 5<sup>th</sup>. 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 (6<sup>th</sup>. 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*, 5<sup>th</sup>. Dist. Muskingum, Nos. 2010-CA-40 & 2010-CA-41, 2011-Ohio-1776, citing *State v.*

*Birdsall*, 6<sup>th</sup>. 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 (6<sup>th</sup>. 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 blanche 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.<sup>38</sup>

- 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*, 5<sup>th</sup>. 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;

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<sup>38</sup> 14 CFR 107, et seq. sets out federal regulations and limitations on 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. Ciriaco*, 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 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.**<sup>39</sup>

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*, 8<sup>th</sup>. 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*, 2<sup>nd</sup>. 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.).

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<sup>39</sup> 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*, 6<sup>th</sup>. 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*, 6<sup>th</sup>. 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*, 2<sup>nd</sup>. 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*, 8<sup>th</sup>. 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*, 8<sup>th</sup>. 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 (5<sup>th</sup>. 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*, 12<sup>th</sup>. 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*, 4<sup>th</sup>. 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 resending 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*, 1<sup>st</sup>. 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*, 4<sup>th</sup>. 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, 7<sup>th</sup>. 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*, 3<sup>rd</sup>. 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*, 4<sup>th</sup>. 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**

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# EVIDENCE & TRIAL ISSUES

## NEW JUDGES ORIENTATION: PART I

SUPREME COURT *of* OHIO  
JUDICIAL COLLEGE  
December 9, 2025

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Lorain County Court of Common Pleas  
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# HYPOTHESIS #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?"

# HYPOTHESIS #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*, 8<sup>th</sup> Dist., 2009-Ohio-5966, ¶ 8.

The trial court has broad discretion in the admission of evidence, including expert testimony. *Knowlton v. Schultz*, 1<sup>st</sup> 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*, 9<sup>th</sup> Dist., 2004-Ohio-1071, ¶ 8.

# HYPOTHESIS #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*, 8<sup>th</sup> Dist. 2023-Ohio-3715, at ¶ 47.

NOTE: Don't worry about citing criminal cases in civil matters (and vice-versa) if they support an evidentiary position.

## HYPOTHESIS #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 (7<sup>th</sup> 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).

## **HYPOTHESIS #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?

## HYPOTHESIS #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, (9<sup>th</sup> 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.*

## HYPOTHESIS #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, (2<sup>nd</sup> 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.

# HYPOTHESIS #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.

# HYPOTHESIS #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 10<sup>th</sup> 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*, 10<sup>th</sup> Dist., 2004-Ohio-2644, at ¶ 27-31.

SO, DOES ANY OF THIS ANALYSIS CHANGE IF COUNSEL IS PRIVATELY RETAINED?

# HYPOTHESIS #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*, 3<sup>rd</sup> 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*, 11<sup>th</sup> Dist., 2016-A-0021, ¶ 34; *State v. Wilson*, 3<sup>rd</sup> 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?

# HYPOTHESIS #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 1/2 YEARS?

# DISCUSSION

If you are in the 8<sup>th</sup> 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 (8<sup>th</sup> Dist.), ¶ 22.

If you are in the 12<sup>th</sup> 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 (12<sup>th</sup> 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 12<sup>TH</sup> 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?

## HYPOTHESIS #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 (1<sup>ST</sup> 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.

## HYP0 #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 exist, 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 (8<sup>th</sup> Dist.), ¶ 9, citing *Capital One Bank N.A. v. Essex*, 2014-Ohio-4274 (2<sup>nd</sup> 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 (8<sup>th</sup> Dist.), ¶ 16, emphasis added.

## HYPOTHESIS #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 (9<sup>th</sup> 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

## **HYPOTHESIS #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 (9<sup>th</sup> 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*, 9<sup>th</sup> 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.

# HYPOTHESIS #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”

# HYPOTHESIS #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 section 4511.19 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:

2<sup>nd</sup> *State v. Kirchgessner*, 2<sup>nd</sup> Dist. Miami No. 2022-CA-1, 2022-Ohio-3499

8<sup>th</sup> *State v. Kelley*, 8<sup>th</sup> Dist. Cuyahoga No. 97389, 2012-Ohio-2309

10<sup>th</sup> *State v. Small*, 10<sup>th</sup> Dist. Franklin No. 14AP-659, 2015-Ohio-3640.

Since I am from the 9<sup>th</sup>, and there is no Supreme Court case on point I can find, I routinely waive mandatory fines in OVI cases.

# HYPOTHESIS #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 (9<sup>th</sup> 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 4<sup>th</sup> or 5<sup>th</sup> 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).

# HYPOTHESIS #19

*PRO SE* (SELF-REPRESENTED) LITIGANTS – TO HELP OR NOT TO HELP

HOW MUCH IS 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

# HYPOTHESIS #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.

# Domestic Violence

**Hon. Thomas A. Januzzi**  
*Oberlin Municipal Court*



# Domestic Violence

By: Judge Thomas A. Januzzi  
Oberlin Municipal Court  
New Judge Orientation 12/09/25

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## Congratulations Now what?

Euphoria of Victory  
Honeymoon period: Attorneys; Staff; Police; Everyone else  
– Everyone loves you – all the love you received during the campaign [the courtship]– feeling that it will last forever  
As long as you do what they want – love will last- you will find out those that support and respect you when you must disagree with them [you wronged him];  
Words of advice/caution: Enjoy the moment; Enjoy the Now; but be on guard- some/most/many admire you solely because of the robe- don't be Saint-Exupery's conceited man

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## Marsy's Law

Ohio Supreme Court Home Page  
Click Link:

**MARSY'S LAW RESOURCES** to assist crime victims. **Forms to request notification and apply for restitution are here.**

Link:  
**Marsy's Law and Crime Victim Rights**

Links:  
**Understanding Marsy's Law Judicial Guide to Protecting the Rights of Crime Victims (2024)**

**Understanding Marsy's Law Quick Reference Guide for Judges (2024)**  
**Victim Rights Request Form**

Ohio Judicial Conference Website

Member Log In  
[It should say Welcome Judge]

Resources  
Tools and Bench Aids  
Marsy's Law and Crime Victims Rights  
Takes you to same link as Ohio Supreme Court link **Marsy's Law and Crime Victim Rights**

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## Ohio Supreme Court Bench Cards, Guides and Toolkits

- Ohio Supreme Court Website
- Link: Judicial Officers Judges
- Bench Cards, Guides and Toolkits
- Municipal and County Courts
- > Domestic Violence & Firearms Prohibition
- > Domestic Violence in Later Life
- > Non-Fatal Strangulation/Suffocation: Four Common Myths (2025)
- > Non-Fatal Strangulation/Suffocation: What Every Judge Should Know (2025)
- > Protection Orders Overview Card (2018)
- > Protection Orders: Statutes & Rules Reference Chart (2019)
- > Understanding Marsy's Law Judicial Guide to Protecting the Rights of Crime Victims (2024)
- > Understanding Marsy's Law Quick Reference Guide for Judges (2024)
- > Victims Rights Poster (2018)

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### Ohio Supreme Court's Website - News from the Supreme Court of Ohio **IN DEPTH**

**New Options for Domestic Violence Victims**  
*Among the latest advances are laws that take domestic violence more seriously and give victims a greater voice. And services include a self-help website for seeking protection through courts and finding in-person legal guidance.*

By **Kathleen Maloney** | November 2023

<https://www.courtnewsOhio.gov/inDepth/2023/November/default.asp>

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## Ohio Supreme Court Website

- **Laws & Rules**
- **Local Rules of Court**
- **Ohio Constitution**
- **Ohio Revised Code**
- **Ohio Administrative Code**
- **Ohio Rules of Court**
- **Proposed Rule Amendments**
- **U.S. Constitution**

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## What is Domestic Violence Hopefully for many of you – a Review

Behavioral Definition:

“A pattern of assaultive and coercive behaviors, including physical, sexual, and psychological attacks, as well as economic coercion, that adults or adolescents use against their intimate partners.”

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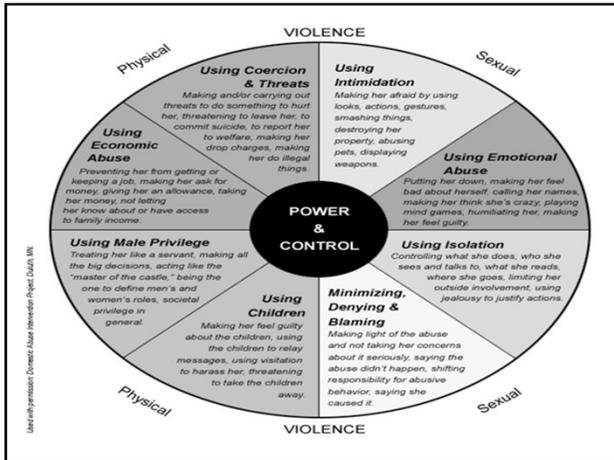
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## Ohio Supreme Court

- The General Assembly “recognized the special nature DV
- Assault involving FHM deserves further protection than an assault on a stranger.” *State v Williams*, 79 Ohio St.3d 459.

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## Legal Definition of Domestic Violence

Legal Definition- Much broader than the Behavioral Definition

- R.C. 2919.25(A)
- R.C. 2919.25(B)
- R.C. 2919.25(C)
- (A) No person shall knowingly harm or attempt to harm a family or household member (FHM)
- (C) (B) No person shall recklessly cause *serious physical harm* [2901.01(A)(5)] to a FHM
- No person by threat of force, shall knowingly cause a FHM to believe that the offender will cause imminent physical harm to the FHM

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## Family or Household Member

- R.C. 2919.25(F)(1)(a)  
Any of the following who is residing or has resided with the offender:
  - i. A spouse, a person living as a spouse, or a former spouse of the offender;
  - ii. A parent, a foster parent, or a child of the offender, or another person related by consanguinity or affinity to the offender;
  - iii. A parent or a child of a spouse, person living as a spouse, or former spouse of the offender, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the offender
- R.C. 2919.25(F)(1)(b)  
The natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent

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## Ohio Supreme Court

We have also acknowledged the desire of the legislature to “protect persons from violence by close family members or residents of the same household” and “to offer protections to a wide class of persons.” *State v. Carswell*, 114 Ohio St.3d 210, 2007-Ohio-3723, 871 N.E.2d 547, ¶ 32, 36.

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## Cohabiting

- Statutory Definition – 2919.25(F)(2) “...a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the...act in question.”
- Common Law Marriage abolished prospectively as of October 10, 1991 [still recognize CLM existing on October 10, 1991]
- What is cohabiting?

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## Cohabitation – Living together in Romantic Relationship is enough

State v. McGlothan, 2014-Ohio-85, ¶ 13 (2014)

State v. Joubert, 2024-Ohio-5052

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### State v Williams 79 Ohio St. 3d 459, 683 N.E.2d 1126 (1997)

“...the essential elements of “cohabitation” are (1) sharing of familial or financial responsibilities and (2) consortium. Possible factors establishing shared familial or financial responsibilities might include provisions for shelter, food, clothing, utilities, and/or commingled assets.

Factors that might establish consortium include mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations.

- Factors unique to each case
- Don't need to look at these facts if romantic relationship and living together

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## Williams

As these studies show, the offense of domestic violence arises out of the relationship itself, not the fact that the parties happen to share one address...“Domestic violence is an unusual outgrowth of an intimate relationship between a man and a woman. It has certain inherent characteristics which place the victim in a position of being extremely susceptible to violence at any given time and/or place.”

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## Degree of Crime – M-1

- R.C. 2919.25(A)  
Knowingly cause or attempt to cause physical harm M-1
- R.C. 2919.25(B)  
Recklessly cause serious physical harm to a FHM M-1

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## Degree of Crime – M-4

R.C. 2919.25(C)- By threat of force, knowingly cause a FHM to believe that the offender will cause *imminent physical harm* to the FHM M-4

Compare R.C. 2903.22 – Menacing: No person shall knowingly cause another to believe that the offender will cause *physical harm* to the person

[Same consequence without having to prove the imminent element]

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## Aggravated Menacing – M-1

R.C. 2903.21 – Aggravated Menacing – Threat of Serious Physical Harm – M-1

No person shall knowingly cause another to believe that the offender will cause serious physical harm...”

[Threat to break jaw?]



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## Degree of Crime – Prior Offense

R.C. 2919.25(D)(3) – If the offender previously pleaded guilty to or was convicted of domestic violence or a violation of another predicate offense involving FHM→ then the degree of the crime is elevated

- 2903.14 Negligent Assault
- 2909.06 Criminal Damaging
- Criminal Mischief 2909.07
- Burglary 2911.12
- Aggravated Trespass 2911.21
- Child Endangering 2919.22
- Any offense of violence [defined in 2901.01(A)(9)][Menacing and Agg Menacing are OOV]
- Includes Attempts!

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## Predicate offenses- Degree of Offense

One prior predicate offense

- M-1 offense becomes an F-4

- M-4 offense becomes an M-2

Two or more predicate offenses

- M-1 offense becomes an F-3

- M-4 offense becomes an M-1

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**Victim Pregnant**

**[Special status – more serious consequences]**

- If the offender knew ... the victim was pregnant ... – mandatory sentence of at least 6 months
- If serious physical harm to an unborn or causes termination of pregnancy – 12 months mandatory



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**Strangulation statute effective  
April 4, 2023**

“Strangulation or suffocation” means any act that impedes the normal breathing or circulation of the blood by applying pressure to the throat or neck, or by covering the nose and mouth.

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- (B) No person shall knowingly do any of the following:
- (1) Cause serious physical harm to another by means of strangulation or suffocation;
  - (2) Create a substantial risk of serious physical harm to another by means of strangulation or suffocation;
  - (3) Cause or create a substantial risk of physical harm to another by means of strangulation or suffocation.

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## Physical Harm

R.C. 2901.01(A)(3)  
“Physical harm to persons” means any injury, illness, or other physiological impairment, regardless of its gravity or duration.



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## Penalties - Strangulation

(C) Whoever violates this section is guilty of strangulation.  
(1) A violation of division (B)(1)[caused serious physical harm] of this section is a felony of the second degree.  
(2) A violation of division (B)(2) [substantial risk of physical harm] of this section is a felony of the third degree.

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(3) A violation of division (B)(3) [substantial risk of physical harm] is a felony of the fifth degree. If the victim ...is a FHM, or ...dating relationship, ...[F-4]. If ...offender previously ...convicted ...of felony offense of violence, or if the offender knew ...victim ...was pregnant ...felony of the third degree.

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## Uncounseled Plea or Conviction

What if the Defendant did not have an attorney in a prior case?

Does the conviction still count as a predicate offense?

It depends...

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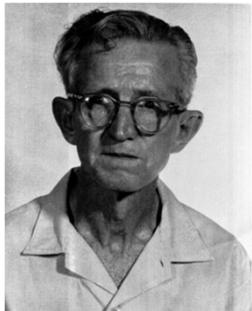
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## Uncounseled Plea/Conviction ≠ Uncounseled Plea/Conviction

An "uncounseled" conviction for purposes of not a predicate offense where:

1. Defendant was not represented by counsel; and
2. *Defendant did not validly waive his right to counsel* and;
3. Defendant was subject to incarceration

State v Thompson 121 Ohio St.3d 250, 903 N.E.2d 618, 2009 -Ohio- 314



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## Proof of Prior Convictions

The charge is R.C. 2919.25(C) M-1 because of 2 prior convictions under R.C. 2919.25(A)

The prior convictions are an element of the crime

The defense wants to stipulate to the prior convictions **and not have the jury instructed on the prior convictions.** The State agrees to stipulate but wants the jury to be instructed on the stipulation.

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**State v. Rodriguez, 9<sup>th</sup> Dist. Case No.26858,  
2014-Ohio-911**

To prove its case, the State was required to produce proof that Mr. Rodriguez had [prior] convictions. Absent an instruction to the jury as to the stipulation or admission of the journal entries, the State would not have met its burden of proof that the convictions were part of the class of offenses sufficient to elevate the degree of the domestic violence

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**Judicial Notice of Prior Convictions**

Can the court take judicial notice of a prior conviction?

No - You need testimony, exhibit or a stipulation

It is well established in Ohio that trial courts may not take judicial notice of their own proceedings in other cases even when the cases involve the same parties. *State ex rel. Crow v. Weygandt (1959), 170 Ohio St. 81. State v. LeValley, 2010-Ohio-288*

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**Can the Defendant enter a plea to only one element of the crime?  
[The prior conviction?]**

In domestic violence prosecution, it was error to allow defendant to enter a plea to the prior-conviction element of the indicted offense which elevated the degree of the offense and then to grant defendant's motion in limine to preclude reference to the plea in jury trial; allowing plea to fewer than all elements of offense is prohibited, Crim.R. 11, R.C. 2943.03  
State v. Bibler 2014-Ohio-3375 (3rd Appellate District)

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## Victim has recanted – Are victim's out of court statements admissible?

Two issues:

1. Must be a hearsay exception [most common- excited utterance]
2. Statement must be non-testimonial



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## Testimonial v Non-Testimonial

If it is deemed testimonial it cannot be used even if there is a hearsay exception

“An assertion is testimonial evidence whether made out of court or in court, if it is offered with a view to persuading the tribunal of the matter asserted.”

John H. Wigmore, A Students' Textbook of the Law of Evidence 120 (1935)

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## State v Smith 2024-Ohio-5745

Please read this case!!! Also see:

- Statements made to police after the accused left the scene were testimonial [no longer investigating a threat]
  - Statements made to EMS not testimonial – made for medical treatment
- State v Oatneal [not a typo] 2025-Ohio-2357
- State v Horton – Oberlin Municipal Court 24CRB00413

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## Dismissal Rules

- RC 2930.06(A)
- Criminal Rule 48

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### If the victim requests a dismissal can the court grant the request?

No

R.C. 2930.06(A)(4) provides in part: A court shall not dismiss a criminal complaint...solely at the request of the victim...

Why?

1. It's the law
2. The victim is presumed to be under duress
3. The victim is not the complainant-complainant is the person who signed the complaint, almost always the law enforcement officer

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### Can the prosecutor dismiss a case without permission of the court?

No

2941.33 - The prosecuting attorney shall not enter a nolle prosequi in any cause without leave of the court, on good cause shown, in open court. A nolle prosequi entered contrary to this section is invalid.

Crim. R. 48(A) - The state may by leave of court and in open court file an entry of dismissal of a complaint and the prosecution shall thereupon terminate

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**Can the court dismiss a complaint [case] over objection of the prosecutor**

Yes

Crim. R. 48(B) – If the court over the objection of the state dismisses a complaint, it shall state on the record its findings of fact and reasons

Why would you do this?  
[Hopefully you will never have to worry about this]  
Safeguard for circumstances where someone is being prosecuted and you find they should not be prosecuted [a victim for example]

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**Filing the Complaint**

VICTIM SHALL NOT BE REQUIRED TO SIGN OR FILE THE COMPLAINT

2935.03(B)(3)(e)(i)

“A peace officer...shall not require, as a prerequisite to arresting or charging a person who has committed the offense of domestic violence or the offense of violating a protection order, that the victim of the offense specifically consent to the filing of charges...or sign a complaint against the person who has committed the offense”

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**A word about sentencing**

Can't just accept a plea agreement that includes a sentence without considering sentencing criteria - even if the victim is in agreement with the sentence

Why Not?

In *State v Kerney* 1999 WL 239890 the court noted and held:  
“The trial court, in a criminal case, is charged with the responsibility of establishing an appropriate sentence for the particular defendant before the court, considering [their] particular criminal conduct in light of the statutory sentencing limitations. \*\*\*The judge's decision to impose a sentence other than that recommended by the prosecutor is not a function of plea negotiations - it is a judicial function, reserved for the judge.”

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## Bond and the Protection Order

### Statutes

R.C. 2937.011 [Replaces Crim. R. 46]

R.C. 2919.251

R.C. 2919.26

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## R.C. 2937.011 [replaced Crim. R. 46 on June 30, 2023]- Bond in General

- Types of Bond
- Conditions of Bond [GPS and Alcohol Monitors]
- Factors
- Amendments
- Right to Speak

[Almost identical to Crim. R. 46 Except safety of the public or specific persons must be considered]

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R.C. 2937.011(A) Unless the court orders the defendant detained pursuant to section 2937.222 of the Revised Code ...the court shall release the defendant on the least restrictive conditions that, in the discretion of the court, will reasonably assure the defendant's appearance in court, the protection or safety of any person or the community, and that the defendant will not obstruct the criminal justice process.

If the court orders financial conditions of release, those financial conditions shall be related to public safety, the defendant's risk of nonappearance in court, the seriousness of the offense, and the criminal record of the defendant.

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## Financial Conditions rules

R.C. 2937.011(B) Any financial conditions shall be in an amount and type that are least costly to the defendant while also sufficient to reasonably assure the defendant's... appearance in court.



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(A) Unless the court orders the defendant detained pursuant to section 2937.222 of the Revised Code or other applicable law, the court shall release the defendant on the least restrictive conditions that, in the discretion of the court, will reasonably assure the defendant's appearance in court, the protection or safety of any person or the community, and that the defendant will not obstruct the criminal justice process. If the court orders financial conditions of release, those financial conditions shall be related to public safety, the defendant's risk of nonappearance in court, the seriousness of the offense, and the previous criminal record of the defendant.

(B) Any financial conditions shall be in an amount and type that are least costly to the defendant while also sufficient to reasonably assure the defendant's future appearance in court.

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## R.C. 2937.222- Denial of Bond

Applies to F-2 or higher and Felony OVI

Detailed procedure set forth in the statute - You should read and be familiar with it

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### **Bond criteria and factors**

R.C. 2937.011(E)

- 1) Nature and circumstances of offense including weapons use or access
- 2) Weight of evidence and ID of Defendant
- 3) Family ties, mental condition, employment, financial resources, length of residence, convictions, appearance in court
- 4) Probation, Community Control, Parole, other conditions of bond

R.C. 2919.251  
(next slide)

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### **R.C. 2919.251**

(B) To the extent that information about any of the following is available to the court, the court shall consider ...notwithstanding 2937.011

- (1) Whether there is a history of DV or violent acts;
- (2) ... mental health;
- (3) ...history of violating court orders;
- (4) ...potential threat to any person;
- (5) ...access to or a history of using deadly weapons;

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### **Protection Orders and Post Conviction No Contact Orders**

YOU NEED TO KNOW THE DIFFERENCE

THEY ARE NOT THE SAME

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## Protection Orders [not protective orders]

- Domestic Violence Criminal Protection Orders – R.C. 2919.26
- Criminal Protection Orders– R.C. 2903.213
- Stalking or Sexual Offense Protection Orders – R.C. 2903.214
- Civil Protection Orders – R.C. 3113.31

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### Domestic Violence Protection Order [DVTPO]

Person is a Family or Household Member

Family or Household Member

R.C. 2919.25(F)

### Criminal Protection Order [CRPO]

Person is not a Family or Household Member

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## Domestic Violence Criminal Protection Order - DVTPO

R.C. 2919.26(A)(1) – “Upon ... filing ... complaint involving FHM for violation of:

- 2909.06 Criminal Damaging
- Criminal Mischief 2909.07
- Burglary 2911.12
- Aggravated Trespass 2911.211
- Any offense of violence [Offense of Violence – R.C. 2901.01(A)(9) includes R.C. 2919.25 – Domestic Violence]-... a petition may be filed requesting a protection order



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### Who may file?

R.C. 2919.26 (A)(1)

- The complainant - typically the police officer
- The alleged victim
- FHM of alleged victim
- If the alleged victim unable to file due to an emergency - person who made the arrest may file on behalf of the alleged victim

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### What is the standard used to determine if a protection order should be granted?

R.C. 2919.26(C)(1):

The court must find that the safety and protection of the complainant, alleged victim, or any other family or household member of the alleged victim *may be impaired* by the continued presence of the alleged offender

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### Who may be protected?

R.C. 2919.26(C)(1):

If the court finds that the safety and protection standard is met the court may issue a TPO for:

- Complainant
- Alleged Victim
- Family or Household Member(s)

Note: R.C. 2903.214 does not include other family or household members as protected persons - they would need to seek a 3113.31 protection order

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### When may it be filed?

- Sometimes filed with the complaint
- Can be filed at *any time after the filing of the complaint*



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### Where does the person obtain the form?

R.C. 2919.26(B):  
The motion shall be prepared on a form that is provided by the clerk of the court



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### Is there a cost?

R.C. 2919.26  
(J) Notwithstanding any provision of law to the contrary ...no court ...shall charge for the filing of a [PO] or for obtaining a certified copy of a protection order or consent agreement.



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## When is the hearing scheduled?

- R.C. 2919.26(C) – As soon as possible after the filing but not later than 24 hours after the filing
- Compare R.C. 2903.213(C)(1) – As soon as possible but not later than the next day court is in session
- What if it is the weekend? Is the Clerk open to accept the filing?



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## Who must attend the hearing? Who may attend the hearing?

- Must appear  
R.C. 2919.26(C) provides that the person who filed the motion shall appear before the court
- May appear  
R.C. 2919.26(A)(2) Victim may be accompanied by a victim advocate or another person to provide support as provided in Chapter 2930

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## Issuing a Protection Order on the Court's own Motion

Can I do that?



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## Yes, you can

R.C. 2919.26(D)(1)

When a court acts on its own motion, it means the judge is initiating the action voluntarily, on their own initiative, because they perceive an issue that needs addressing to ensure fairness, maintain order, or uphold the law, even if the parties have not raised it.

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## Termination of TPO/CRPO

R.C. 2919.25(E)(2)

- a) The disposition of the case
- b) Issuance of a CPO arising out of same facts and circumstances



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## Can a TPO be modified by a Municipal/County Court Judge

Januzzi reading [probably minority view]:

No [except-next slide]

R.C. 2919.26 only permits modification for a violation of TPO by [any] court or it may be modified under R.C. 2919.26(D)(4) "...if bound over to...common pleas...common pleas has exclusive jurisdiction to modify the order..."

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R.C. 2919.26(H) "Upon a violation of TPO...court may issue another TPO...that modifies the terms of the order that was violated."

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**Post Conviction No Contact Order  
[Not limited to DV]**

What it is

What it isn't

Condition of Suspended Sentence  
Condition of Community Control [Probation]

Protection Order  
Separate criminal offense  
Condition of Bond

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**Procedure to implement a  
No Contact Order**

Include reference in the Sentencing Entry  
Attach or incorporate by reference the Order  
The Form is in the Rules of Superintendence

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## Enforcement – No Contact Order [The arrest]

R.C. 2951.08(A)(4) During ...community control, any peace officer may **arrest** ... without a warrant if reasonable ground to believe the person has violated :

(4) A condition that prohibits the person from contacting or communicating with any specified individual;

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## Post Arrest Procedure

Within 3 business days after ...**arrest** ...the **arresting** ...officer, ... or the department or agency of the **arresting** officer shall notify the chief P.O. or ...of the **arrest**.

Within thirty days of being notified that ... officer has made an **arrest** ...the chief probation officer ... *promptly* shall bring the person ... before the judge or magistrate ...

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## Marsy's Law

Be familiar with:

- Section 10a. Rights of Crime Victims. Effective February 5, 2018[Self-Executing]
- HB 343 Effective 04-06-23[Chapter 2930]
- Criminal Rules of Procedure that reference Marsy's Law:



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## A word about Marsy's Law

Marsy's Law:

Courtesy; Concern; Caring, Common Sense

Simple: Ask the prosecutor "Has there been victim notification and will the victim be present and participating in this proceeding?"

If yes - fine

If no - why not?

You can also ask "Does the victim wish to have any input?"

That's Marsy's Law

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## Court's Duty to Inquire

R.C. 2930.09(A)(2)(a) If the victim or victim's representative is not present at a court proceeding in which a right of the victim is at issue, the court shall ask the prosecutor all of the following:



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(i) Whether the victim and victim's representative, if the victim or victim's representative requested notifications, were notified of the time, place, and purpose of the court proceeding;

(ii) To disclose to the court any and all attempts made to give ... notice;

(iii) Whether the victim or victim representative were advised that the victim and victim's representative had a right to be heard at the court proceeding;

(iv) Whether the victim and victim representative were conferred with ...

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(b) If the court determines that

- [timely] notice was not given to the victim ...;
- or that the victim ...not adequately informed of the nature of the court proceeding,
- or that the prosecutor failed to confer with the victim and victim's representative as required by law

THEN...

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Then:

the court shall not rule on any substantive issue that implicates a victim's right, accept a plea, or impose a sentence;  
and shall continue the court proceeding for the time necessary to notify the victim ...of the time, place, and nature of the court proceeding.

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## **IT DOES NOT NEED TO BE COMPLICATED**

Marsy's Law:

Courtesy; Concern; Caring, Common Sense

Simple: Ask the prosecutor "Has there been victim notification and will the victim be present and participating in this proceeding?"

That's Marsy's Law

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## CALL ME OR ANOTHER JUDGE

Don't do this alone	Tom Januzzi
Take care of yourself	Cell [24/7/365]
Take breaks whenever feasible	440-787-5989
Don't let them wear you down	Direct Dial Desk until December 31, 2025
Some will [try] to wear you down and take advantage of you - beware	440-775-7226
	I have fought many battles. I am happy to share them with you.

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# Know Your Rights

## *Crime Victim Rights Information*

Victims of crime have constitutionally protected rights. This form provides important information about your rights as a victim of a criminal offense or delinquent act. You will be asked to complete and sign this form so that criminal justice officials know which rights you wish to exercise. The criminal justice official will also sign the form and provide you with a copy of the completed form. You or your victim's representative may request additional copies of the completed form at any time.

### **WHAT IS A VICTIM?**

A victim is a person against whom the criminal offense or delinquent act is committed OR someone who has been directly and proximately harmed by the commission of a criminal offense/delinquent act.<sup>i</sup>

A criminal offense means an alleged act or omission that is punishable by incarceration and is not eligible to be disposed of by the Traffic Violations Bureau.<sup>ii</sup> A delinquent act is a criminal offense committed by a person under the age of 18.<sup>iii</sup>

### **WHAT IS A VICTIM'S REPRESENTATIVE?**

You can designate a victim's representative to exercise your rights as a victim for you or with you. A victim's representative can be anyone you choose other than the person who is alleged to have committed the criminal offense or delinquent act. If the victim is a minor, incapacitated, incompetent, or deceased, the victim's representative can be a member of the victim's family or a victim advocate.<sup>iv</sup>

You must tell law enforcement, the prosecutor, or the court if you are going to name a victim's representative. You can designate a victim's representative on this form now. You can also designate a victim's representative later or change or remove a victim's representative at any time by notifying law enforcement, the prosecutor, or the court.<sup>v</sup>

### **WHAT IS A VICTIM ADVOCATE?**

A victim advocate is a person who will support you and assist you with the court proceedings related to the criminal offense/delinquent act.

### **WHAT ARE MY RIGHTS AS A VICTIM?**

You have rights as a victim. Some rights you are automatically entitled to and some rights you must request. You can choose to exercise all, some, or none of your rights, and you can change your selections at any time.



AUTOMATIC RIGHTS	RIGHTS THAT MUST BE REQUESTED
<p>You are automatically entitled to:</p> <ul style="list-style-type: none"> <li>• Be informed of your rights;</li> <li>• Be treated with fairness and respect for your safety, dignity, and privacy;</li> <li>• Reasonable protection from the accused or any person acting on behalf of the accused;</li> <li>• Receive information about the status of the case;</li> <li>• Refuse a defense interview, deposition, or other discovery request unless ordered by the court;</li> <li>• Object to defense requests for access to your confidential information, including medical, counseling, school, or employment records, access to your personal devices, online accounts, or other personal information;</li> <li>• Be present at all public proceedings;</li> <li>• Have a support person with you during proceedings;</li> <li>• Tell the court your opinion in public proceedings involving release, plea, sentencing, disposition, parole, and any other hearing that involves victims' rights;</li> <li>• Object to unreasonable delays; and</li> <li>• Full and timely restitution from the offender.</li> </ul>	<p>You must REQUEST the right to:</p> <ul style="list-style-type: none"> <li>• Receive notice of the arrest, escape, or release of the offender;</li> <li>• Reasonable and timely notice of all public court proceedings;</li> <li>• Confer with the prosecutor assigned to the case;</li> <li>• Be notified of subpoenas, motions, or other requests to access any of your personal information;</li> <li>• Appoint a Victim's Representative.</li> </ul>

Of the rights that must be requested, you will be asked to select on this form which rights you want to exercise. If you cannot or do not decide when law enforcement first contacts you, then you will be treated as if you chose to exercise all of your rights. **You can change your mind at any time about which rights you choose to exercise.**

Once a prosecutor contacts you about the case, if you have not done so already, you will have to choose which of the rights that are not automatically granted that you want to exercise, or it will then be treated as if you chose not to exercise (waived) those rights. **You can change your mind at any time about which rights you choose to exercise.**

**HOW DO I CHANGE THE RIGHTS I WANT TO EXERCISE?**

If you did not choose to exercise some or all of your rights that are not automatically granted to you, you or your victim's representative can request those rights at any time. However, if you choose not to exercise some rights and then request them later, you may give up some rights that only apply during certain stages of the case.



To change the rights you wish to exercise, you must complete a [new Victim's Rights Request Form](#) or make a request in writing and return it to the appropriate criminal justice official.

### **WHAT TO DO IF THERE ARE CHANGES TO MY CONTACT INFORMATION?**

If you have changes to your contact information, you have a responsibility to inform the appropriate criminal justice official of these changes. You must complete a [new "Victim Contact Information" page of the Victim's Rights Request Form](#).

### **CAN I HIRE AN ATTORNEY?**

You have the right to hire an attorney to represent you in court. Your attorney will receive notices about court hearings and meetings that involve your rights in order to represent you.

### **WHAT HAPPENS IF MY RIGHTS ARE DENIED?**

If any of your rights are denied, you may ask the prosecutor to help, hire an attorney, request free legal assistance from Ohio Crime Victim Justice Center at [www.ocvjc.org/request-for-assistance](http://www.ocvjc.org/request-for-assistance) or (614) 848-8500, or represent yourself.

### **CAN I GET AN INTERPRETER?**

Yes. If you are in need of a foreign language or American Sign Language (ASL) interpreter, you have the right to an interpreter at all court proceedings, meetings with the prosecutor, and all investigative proceedings at no cost to you.<sup>vi</sup> You can indicate on this form that you need one and ask the criminal justice official you are working with to help get the interpreter at any time.

### **CAN I KEEP MY PERSONAL INFORMATION PRIVATE?**

Yes, you may register for the Ohio Secretary of State's "Safe at Home" program to keep your home address private. Participants receive a "safe" mailing address to use official documents. Information is available at [www.ohiosos.gov/secretary-office/office-initiatives/safe-at-home/survivors/](http://www.ohiosos.gov/secretary-office/office-initiatives/safe-at-home/survivors/) or (614) 995-2255.

To keep your identifying information private, you or your victim's representative must make a written request for redaction to any law enforcement agency, prosecutor, or court that has your personal information as part of their official duties. For more information on how to do this, contact a victim advocate in your area or the Ohio Crime Victim Justice Center at [www.ocvjc.org/request-for-assistance](http://www.ocvjc.org/request-for-assistance) or (614) 848-8500. These requests should be made as soon as possible to keep your personal information private.

### **HOW CAN I ADDRESS SAFETY CONCERNS REGARDING THE DEFENDANT?**

If you have concerns about your safety and keeping your information private, you have the following options:

- Seek a protection order if you are eligible. The investigating officer will provide resources in your area to assist with requesting a protection order.
- Receive texts, calls, or emails to receive notice of a defendant or offender's release or escape from jail or prison. Register at: [www.vinelink.com/#state-selection](http://www.vinelink.com/#state-selection) or (866) 277-7477.



You do NOT have to talk to, provide information, or provide materials to the defendant, defendant's attorney, or anyone else acting on behalf of the defendant unless it has been ordered by the court. You should contact the prosecutor immediately to let them know you have been contacted.

### **WHAT IS AN ARRAIGNMENT AND HOW IS IT IMPORTANT TO MY RIGHTS?**

An arraignment is a hearing that can happen within a couple days after the defendant is charged with a crime. The judge will decide whether or not to release the defendant on bond, set any bond conditions, and whether or not to issue a protection order.

You have the right to attend the arraignment and tell the judge about any safety concerns and your opinion regarding the defendant's release, bond conditions, and whether or not you would like a protection order.

Law enforcement will notify you of the defendant's arrest and give you a phone number for the clerk of the court where you can get information on the date, time, and location of the arraignment proceeding.

### **CAN I BE COMPENSATED FOR MY LOSSES?**

You have the right to reimbursement for certain financial losses relating to your victimization.

You may be eligible for financial assistance through the Crime Victim's Compensation Fund for expenses such as medical counseling bills, work loss, and funeral expenses even if the suspect has not been arrested or convicted. For more information and to apply, visit [www.ohioattorneygeneral.gov/individuals-and-families/victims/apply-for-victims-compensation](http://www.ohioattorneygeneral.gov/individuals-and-families/victims/apply-for-victims-compensation) or (800) 582-2877.

If the defendant is convicted, you are eligible for restitution. This means the court orders the offender to pay you for certain financial losses relating to your victimization. It is important to keep a record of all expenses incurred as a result of the crime (receipts, invoices, estimates, etc.). The court will use this information to determine what costs are properly included in the amount of the restitution order. *See separate Restitution Information Sheet.*

### **FOR MORE INFORMATION**

- *Crime Victims' Rights*, Ohio Attorney General's Office available at <https://www.ohioattorneygeneral.gov/Files/Publications-Files/Publications-for-Victims/Crime-Victims-Bill-of-Rights> or (614) 466-5610.
- General resources for crime victims: Ohio Attorney General's Office, Services for Victims available at [www.ohioattorneygeneral.gov/individuals-and-families/victims](http://www.ohioattorneygeneral.gov/individuals-and-families/victims).
- *Victim's Rights Toolkit*, Ohio Crime Victim Justice Center available at [www.ocvjc.org/victims-rights-toolkit](http://www.ocvjc.org/victims-rights-toolkit).

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<sup>i</sup> Ohio Constitution Article I, Section 10a(D)



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- ii R.C. 2930.01(A)
  - iii R.C. 2930.01(O)
  - iv R.C. 2930.02(A)
  - v R.C. 2930.02(A) and (D)
  - vi R.C. 2930.041





# Ohio Victim Rights Request Form

This form is required to be given to a victim of a criminal offense or delinquent act by the law enforcement agency investigating the offense pursuant to R.C. 2930.04 and reviewed with the victim by the prosecutor within seven days of the beginning of the prosecution.

As a victim of a criminal offense or delinquent act, I understand the following:

- I am entitled to certain rights as a victim. Some rights are granted to me automatically and other rights I must request.
- I can change my mind at any time about the rights I wish to exercise that are not automatically granted to me.
- If I change my mind about which rights I wish to exercise, I must complete a Victim's Rights Form or make the request in writing and return it to the appropriate criminal justice official.
- I must notify the law enforcement agency, prosecutor, court, or custodial agency anytime my contact information changes.
- I am to receive a copy of this form.



## FOR LAW ENFORCEMENT USE ONLY

<b>AT THE TIME OF FIRST CONTACT</b>	Date: _____
<p>At the first time of contact, the VICTIM</p> <p><input type="checkbox"/> Did not make an election as to which rights they wanted to exercise.</p> <p><input type="checkbox"/> Was unable to complete the Victim's Rights Request Form</p> <p>If either of the two boxes below are checked, the victim is considered to have requested all rights not automatically granted to them until the prosecutor first contacts the victim.</p> <p>[R.C. 2930.06]</p>	
<b>SUBSEQUENT CONTACT</b>	Date: _____
<p><input type="checkbox"/> The victim/victim's representative initiated a change in the rights that are requested.</p> <p><input type="checkbox"/> The victim/victim's representative changed their contact information.</p>	



## *To be completed by law enforcement or the prosecutor:*

Reporting Agency: \_\_\_\_\_

County: \_\_\_\_\_ Agency Phone Number: \_\_\_\_\_

Reporting Officer: \_\_\_\_\_ Badge Number: \_\_\_\_\_

Incident/Report Number: \_\_\_\_\_ Case Number: \_\_\_\_\_

Date and location of arraignment (if known): \_\_\_\_\_

Prosecutor: \_\_\_\_\_ Prosecutor Phone Number: \_\_\_\_\_



## VICTIM'S RIGHTS REQUESTS

You have rights as a victim. Some rights you are automatically entitled to **and some rights you must request. You can use this form to choose to exercise all, some, or none of your rights.** You can change your selections at any time.

### IMPORTANT

The below information can be **completed by the victim or the victim's representative** if one has been designated. Any acknowledgement, election of rights, or affirmative statement made by the victim's representative shall be treated as if the victim made the statement.

### VICTIM STATUS

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I acknowledge that I am a victim because I am:

- A person against whom a criminal offense or delinquent act was committed; or
- A person directly or proximately harmed by the commission of a criminal offense or delinquent act.

### DESIGNATION OF VICTIM'S REPRESENTATIVE

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You may designate a victim's representative to exercise your rights for you or with you. You may choose, change, or remove your representative at any time. You must complete a new Victim's Rights Request Form or make a request in writing and return it to the appropriate official depending on the stage of your case.

- I do not wish to designate a victim's representative at this time.
- I would like to designate the following individual as my victim's representative.

Name of Victim's Representative: \_\_\_\_\_

*If a victim's representative has been designated, please include their contact information on the page above.*

*You may change or remove your victim's representative at any time by completing a new Victim's Rights Request Form and return it to the criminal justice official.*

### ELECTION OF YOUR VICTIM'S RIGHTS

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As a victim, you are automatically entitled to:

- Be informed of your rights;
- Be treated with fairness and respect for your safety, dignity, and privacy;
- Reasonable protection from the accused or any person acting on behalf of the accused;
- Receive information about the status of the case;
- Refuse a defense interview, deposition, or other discovery request;
- Object to defense requests for access to your confidential information, including medical, counseling, school, or employment records, access to your personal devices, online accounts, or other personal information;



- Be present at all public proceedings;
- Have a support person with you during proceedings;
- Tell the court your opinion in public proceedings involving release, plea, sentencing, disposition, parole, and any other hearing that involves your rights;
- Object to unreasonable delays; and
- Full and timely restitution from the offender.

**I want to exercise ALL of my rights (the automatic rights and those that require me to request to exercise them, outlined below).**

Below are rights that you must request in order to exercise. **You may choose some, none, or all of them.**

**I want to exercise the following rights:**

- Receive notice of the arrest, escape, or release of the offender;
- Reasonable and timely notice of all public court proceedings;
- Confer with the prosecutor assigned to the case;
- Be notified of subpoenas, motions, or other requests to access any of my personal information; and
- Appoint a Victim's Representative (if you check this, please fill out the information above).

**You may change these rights at any time by completing a new Victim's Right Request Form and returning it to the appropriate criminal justice official.**

## **REQUEST FOR AN INTERPRETER**

I would like to request:

- A foreign language interpreter in \_\_\_\_\_ language
- An American Sign Language (ASL) Interpreter
- I do not need an interpreter



## VICTIM CONTACT INFORMATION

*Personal identifying information listed on this form shall be filed with the court on a separate page and is not a public record under Ohio Revised Code 149.43.*

### WHO CAN SEE THIS INFORMATION?

- The victim, victim's representative, and the prosecutor may receive unredacted copies of this form.
- The defendant, alleged delinquent child, or their attorney may see the victim's name and completed form without the victim's and victim's representative's address, phone number, email, and other identifying information unless directed by the court. [R.C. 2930.07]

### VICTIM INFORMATION *(Required)*

Victim Name: \_\_\_\_\_

Address\*: \_\_\_\_\_

City/State/Zip: \_\_\_\_\_

Email address: \_\_\_\_\_

Phone Number: \_\_\_\_\_ Is it okay to text you?  Yes  No

Alternate Contact Name: \_\_\_\_\_ Relationship to you: \_\_\_\_\_

Email address: \_\_\_\_\_

Phone Number: \_\_\_\_\_ Is it okay to text them?  Yes  No

\_\_\_\_\_  
Victim's Signature

\_\_\_\_\_  
Date

### VICTIM'S REPRESENTATIVE INFORMATION *(Optional)*

Victim's Representative Name: \_\_\_\_\_

Address\*: \_\_\_\_\_

City/State/Zip: \_\_\_\_\_

Email address: \_\_\_\_\_

Phone Number: \_\_\_\_\_ Is it okay to text you?  Yes  No

\_\_\_\_\_  
Victim's Representative Signature

\_\_\_\_\_  
Date

*(\*) If you participate in the Secretary of State's Address Confidentiality Program "Safe at Home", please use the post office box address given to you. For more information call (877) 767-6446.*

.....



**ACKNOWLEDGEMENT OF COMPLETED FORM**

***A copy of the completed form shall be given to the victim or victim's representative.***

On \_\_\_\_\_ (Date), a copy of this form was given to the:

Victim: \_\_\_\_\_ (Name)

Victim's Representative \_\_\_\_\_ (Name)

Official's Name: \_\_\_\_\_

Official's Title & Agency: \_\_\_\_\_

Email Address: \_\_\_\_\_ Phone Number: \_\_\_\_\_

\_\_\_\_\_  
Official's Signature

\_\_\_\_\_  
Date

I, \_\_\_\_\_, (Victim/Victim's Representative) acknowledge that I was given this form on \_\_\_\_\_ (Date) by the individual listed above.



**FOR PROSECUTION USE ONLY**

**POST-CONVICTION NOTIFICATION** *(Complete if applicable)*

I, \_\_\_\_\_ (Name) have informed \_\_\_\_\_, the custodial agency of the victim's/victim's representative name and identifying information, to allow the custodial agency to notify the victim/victim's representative of the victim's post-conviction rights and related post-conviction information.

\_\_\_\_\_  
Prosecutor's Signature

\_\_\_\_\_  
Date



Baldwin's Ohio Revised Code Annotated
Constitution of the State of Ohio
Article I. Bill of Rights (Refs & Annos)

OH Const. Art. I, § 10a

O Const I Sec. 10a Rights of victims of crimes

Currentness

(A) To secure for victims justice and due process throughout the criminal and juvenile justice systems, a victim shall have the following rights, which shall be protected in a manner no less vigorous than the rights afforded to the accused:

- (1) to be treated with fairness and respect for the victim's safety, dignity and privacy;
- (2) upon request, to reasonable and timely notice of all public proceedings involving the criminal offense or delinquent act against the victim, and to be present at all such proceedings;
- (3) to be heard in any public proceeding involving release, plea, sentencing, disposition, or parole, or in any public proceeding in which a right of the victim is implicated;
- (4) to reasonable protection from the accused or any person acting on behalf of the accused;
- (5) upon request, to reasonable notice of any release or escape of the accused;
- (6) except as authorized by [section 10 of Article I of this constitution](#), to refuse an interview, deposition, or other discovery request made by the accused or any person acting on behalf of the accused;
- (7) to full and timely restitution from the person who committed the criminal offense or delinquent act against the victim;
- (8) to proceedings free from unreasonable delay and a prompt conclusion of the case;

(9) upon request, to confer with the attorney for the government; and

(10) to be informed, in writing, of all rights enumerated in this section.

(B) The victim, the attorney for the government upon request of the victim, or the victim's other lawful representative, in any proceeding involving the criminal offense or delinquent act against the victim or in which the victim's rights are implicated, may assert the rights enumerated in this section and any other right afforded to the victim by law. If the relief sought is denied, the victim or the victim's lawful representative may petition the court of appeals for the applicable district, which shall promptly consider and decide the petition.

(C) This section does not create any cause of action for damages or compensation against the state, any political subdivision of the state, any officer, employee, or agent of the state or of any political subdivision, or any officer of the court.

(D) As used in this section, "victim" means a person against whom the criminal offense or delinquent act is committed or who is directly and proximately harmed by the commission of the offense or act. The term "victim" does not include the accused or a person whom the court finds would not act in the best interests of a deceased, incompetent, minor, or incapacitated victim.

(E) All provisions of this section shall be self-executing and severable, and shall supersede all conflicting state laws.

(F) This section shall take effect ninety days after the election at which it was approved.

### CREDIT(S)

(Adopted by initiative petition, eff. 2-5-18)

[Notes of Decisions \(21\)](#)

Const. Art. I, § 10a, OH CONST Art. I, § 10a  
Current through File 12 of the 135th General Assembly (2023-2024).

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**OBERLIN MUNICIPAL COURT  
OBERLIN, OHIO**

STATE OF OHIO  
PLAINTIFF

VS.

BRITTNEY E. BENNETT

DEFENDANT

CASE NO. 23CRB00369

NOTICE OF FILING: MOTION TO  
MODIFY TEMPORARY  
PROTECTION ORDER

---

November 30, 2023

Defendant filed a Motion to Modify Temporary Protection Order. A Temporary Protection Order was issued on September 6, 2023, by a judge assigned for that date by the Ohio Supreme Court. The judge found that the safety and protection of the alleged victim and a juvenile may be impaired by the presence of the Defendant.

The motion is silent as to citations of authority as set forth in the Criminal Rules of Procedure. Pursuant to Criminal Rule 47 a motion must state with particularity the grounds upon which it is made and shall set forth the relief or order sought. ***It shall also be supported by a memorandum containing citations of authority.***

The participants in this case will take notice of the following with regard to the duration of a protection order:

R.C. 2919.26 provides in part that (E)(2) a protection order is effective until the occurrence of either of the following: (a) The disposition of the case or (b) The issuance of a protection order or the approval of a consent agreement under R.C. 3113.31 arising out of the same “activities” as those that were the basis of the complaint upon which the order is based.

There is no mention in R.C. 2919.26 of authority given the municipal court to modify or terminate the protection order other than for the reasons set forth above.

The state legislature has provided for modification of the protection order by the Common Pleas Court after a case has been bound over to the Common Pleas Court but has not provided the same authority to the Municipal Court. R.C. 2919.26(D)(4) specifically permits the Common Pleas Court to modify the order.

The legislature has also made provision for modification of Civil Protection Orders. R.C. 3113.31(E)(8) provides that a civil protection order may be modified and the statute provides guidelines for the Common Pleas Court to modify the order in 3113.31(E)(8)(c)(i)-(xii).

:

The state legislature has made a provision for the modification of the terms of a protection order by the Common Pleas Court. The state legislature has provided that a protected person may petition the Common Pleas Court for a protection order or consent agreement thus permitting the participants to cause the termination of a protection order in the municipal court. The Common Pleas Court is equipped with staff [Magistrates] and resources to properly address issues regarding visitation and varying degrees of contact with protected persons and jurisdiction up to 5 years.

The Municipal Court jurisdiction is limited to the life of the case in the Municipal Court which should almost never exceed 6 months according to the Ohio Rules of Superintendence. There appears no provision in the Revised Code to modify or terminate a Domestic Violence Protection Order.

This case is scheduled for telephone pretrial on February 22, 2024. The court would consider advancing the pretrial date and the trial date to bring the case to conclusion at an earlier date. When the case is concluded the protection order terminates by law.

In the alternative, if the parties are interested in “modifying” the protection order they may approach the Common Pleas Court for a consent agreement and if that protection order issued due to the same “activities” as those that were the basis of the complaint upon which the order in this case is based, the protection order in this case will terminate by law.

---

JUDGE

Copy to Prosecutor \_\_\_\_\_  
Copy to Legal Advocate \_\_\_\_\_  
Copy to Attorney for Defendant \_\_\_\_\_

Oberlin Municipal Court  
Oberlin, Ohio

Case No.16CRB00929

State of Ohio

Plaintiff

vs.

DENISE D. COLLINS

Defendant

Decision and Entry

---

A bench trial was held on February 8, 2017. The Defendant Denise D. Collins was charged with Domestic Violence, Resisting Arrest and Obstructing Official Business. The alleged victim is Randy Feakins who is Ms. Collins' live in boyfriend. Mr. Feakins and Ms. Collins reside together in a house that is owned by both of them.

The facts of the case are unusual. The Sheriff was not called to the scene but to a location off-site. Both Mr. Feakins and Ms. Collins testified. A Lorain County Sheriff Deputy also testified. The court finds the testimony of Denise Collins credible. The court finds the testimony of Randy Feakins not credible. Mr. Feakins' testimony on the witness stand was substantially and markedly inconsistent with his written statement and the court also finds based upon his appearance upon the stand; his manner of testifying; the reasonableness of the testimony; the opportunity he had to see, hear and know the things concerning which he testified; his accuracy of memory; frankness or lack of it; intelligence; interest and bias, if any; together with all the facts and circumstances surrounding the testimony that his testimony is not credible and the court gives little weight to most of his testimony.

Mr. Feakins alleged in a written statement to the Lorain County Sheriff that "We were in the sun room about 5 feet apart. She came at me like she was going to hit me. I grabbed [her] wrist. She was yelling very loud. At some point we were on the floor. I tried to calm her and restrain her at the same time. At some point she cut my lip and left ear. There was blood running down my face on her and myself. She calmed enough. I let her go. I

went to the bathroom, cleaned myself up, took pictures and left the house, went down the street and called 911.”

Mr. Feakins testimony on the stand under oath was that Mr. Collins came after him and scratched him and only then did he take her to the ground. Mr. Feakins is 6’4” tall [his weight was not described in testimony but observing him in the courtroom he is not slightly built]. Ms. Collins is 5’5” [her weight was not described in testimony but observing her in the courtroom she is slightly built].

Mr. Feakins testified that he is friends with many members of law enforcement. Mr. Feakins is a firefighter for Carlisle Township, Ohio. Apparently he knows a sheriff deputy so well that he was able to contact the deputy while the deputy was engaged in his duties making a traffic stop and the deputy answered Mr. Feakins’ call while engaged in his duties. The deputy apparently advised Mr. Feakins to call 911. After calling 911 Mr. Feakins met with a Lorain County Sheriff deputy and the deputy proceeded to the jointly owned house.

When the deputy arrived at the house the deputy and another deputy attempted to gain entry into the house to speak with Ms. Collins. Ms. Collins was apprehensive in opening the door for the deputies and attempted to have a conversation with the deputies while she remained in the house. This was not satisfactory with the deputies and they continued to seek entry into the house. While speaking with Ms. Collins through the door Ms. Collins told the deputies that she had been hit in the face. The deputies did not engage in any conversation with Ms. Collins about her injury and instead continued to attempt to gain entry to the house.

After their efforts to gain entry to the house were frustrated the deputies called Mr. Feakins to assist them in gaining entry into the house. Mr. Feakins arrived and Ms. Collins had dead-bolted herself in the home. With armed deputies and the person who had punched her in the head [Mr. Feakins] attempting to gain entry Ms. Collins continued to stand her ground and not open the door.

The deputy then telephoned the deputy’s supervisor and asked if they could [should] break the door down. The supervisor did not approve of the deputies breaking the door down [there is no evidence or indication that a warrant was requested or obtained and no evidence of exigent circumstances] and a discussion was then had with the supervisor if it would be okay if Mr. Feakins would break the door down to make an arrest since Mr. Feakins is an owner of the house. It was determined that would be the course of action.

Mr. Feakins then broke the door down and the deputies without a warrant entered and Ms. Collins was immediately placed under arrest without discussion or conversation about Ms. Collins' side to the story. Ms. Collins was taken to jail on a no bond hold. Pictures of Ms. Collins while in her jail uniform clearly show a bruise to Ms. Collins face consistent with her testimony that she had been punched or struck in the face. After she was arrested Ms. Collins was never asked by the deputy to make a statement or explain her side of the story. It is unclear whether jail staff tended to Ms. Collins' injury. When asked why Ms. Collins was never given an opportunity to tell her side of the story after she was in custody the deputy testified to the effect that "usually once a person is given Miranda they do not want to say anything."

The court finds that the more likely scenario is that Mr. Feakins and Ms. Collins were having an argument. During the course of the argument Mr. Feakins pinned Ms. Collins on the floor. Ms. Collins also sustained a large bruise to her side near her abdomen which further bolsters Ms. Collins' testimony that Mr. Feakins had her pinned down with the knee of his 6'4" frame on her 5'5" body. In self defense Ms. Collins scratched Mr. Feakins in an attempt to break loose. As soon as Mr. Feakins realized that he was bleeding he "let her go" and tended to his own injury. At some time during the argument Mr. Feakins punched or smacked Ms. Collins in the face causing injury to her face. Mr. Feakins then left the house, went to an off-site location and called his deputy friend for advice. The deputy and Mr. Feakins discussed the course of action to take which resulted in calling 911 and pursuing the arrest of Ms. Collins.

With regard to each charge the court finds as follows:

#### Domestic Violence

The court finds any injury sustained by Mr. Feakins was a result of self-defense by Ms. Collins. Ms. Collins is found not guilty of the charge of Domestic Violence.

#### Resisting Arrest

The testimony of Ms. Collins is credible. Ms. Collins was in a small kitchen area in her home. The door of the home was kicked down by the person who earlier that day had punched her in the face. Ms. Collins was fearful, isolated and alone. The officers were armed and trained. Ms. Collins is 5'5" and of slight build and had just suffered an injury to her face. The court finds Ms. Collins not guilty of the charge of Resisting Arrest.

Obstructing Official Business

The court is uncertain what the basis is for the Obstructing Official Business charge. A review of Ohio law makes it clear that the general rule is that refusing to open a door for a police officer is not obstructing official business. See *State v Vitantonio* 2013-Ohio-4100. The court can find no evidence in the record to support this charge. Ms. Collins is found not guilty of the charge of Obstructing Official Business.

February 9, 2017

\_\_\_\_\_  
Judge

Copy to Prosecutor \_\_\_\_\_

Copy to Attorney Walsh \_\_\_\_\_

 KeyCite Blue-Striped Flag  
Petition for Certiorari Docketed by [OHIO v. GARRY SMITH](#), U.S.,  
March 14, 2025

2024 WL 5049116  
Supreme Court of Ohio.

The STATE of Ohio, Appellant,  
v.  
SMITH, Appellee.

No. 2023-1289

Submitted July 24, 2024

Decided December 10, 2024

### Synopsis

**Background:** In two trials tried jointly from the bench, defendant was convicted in the Court of Common Pleas, Cuyahoga County, No. CR-20-651674-A of two counts of domestic violence, and convicted in the Court of Common Pleas, CR-20-655568-A, of two counts of domestic violence and one count of felonious assault. Defendant appealed. The Court of Appeals,  [209 N.E.3d 883](#), affirmed in part, reversed in part, and remanded. The State sought reconsideration, which was denied. The State appealed.

**Holdings:** The Supreme Court, Fischer, J., held that:

[1] the primary purpose of victim's statements to responding police officer was to tell her account of incident, and not to aid in an ongoing emergency, and thus the statements were testimonial in nature, and

[2] the primary purpose of victim's statements to emergency medical technicians (EMTs) was to receive medical care, and thus the statements were nontestimonial in nature.

Reversed and remanded.

Deters, J., filed an opinion concurring in part and dissenting in part in which Kennedy, C.J., and [DeWine](#), J., joined.

**Procedural Posture(s):** Appellate Review; Pre-Trial

Hearing Motion.

West Headnotes (8)

[1] **Criminal Law**  Out-of-court statements and hearsay in general

The key question for determining whether a Confrontation Clause violation has occurred is whether an out-of-court statement is testimonial; if a statement is testimonial, its admission into evidence will violate the defendant's right to confrontation if the defendant does not have an opportunity to cross-examine the declarant. [U.S. Const. Amend. 6](#).

[2] **Criminal Law**  Out-of-court statements and hearsay in general

Statements are nontestimonial for Confrontation Clause purposes when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. [U.S. Const. Amend. 6](#).

[3] **Criminal Law**  Out-of-court statements and hearsay in general

Statements are testimonial for Confrontation Clause purposes when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. [U.S. Const. Amend. 6](#).

[4] **Criminal Law** ⚖️ Out-of-court statements and hearsay in general

When determining whether statements made during an interrogation were testimonial or nontestimonial under the Confrontation Clause, the most important factor in informing the primary purpose of an interrogation in a domestic-violence case is whether the statement was made during an ongoing emergency, or whether there was a continuing threat to the victim. [U.S. Const. Amend. 6](#).

[5] **Criminal Law** ⚖️ Out-of-court statements and hearsay in general

A conversation that begins as an interrogation to determine the need for emergency services, which would be nontestimonial in nature under the Confrontation Clause, may evolve into a testimonial statement once the purpose of rendering emergency assistance has been achieved. [U.S. Const. Amend. 6](#).

[6] **Criminal Law** ⚖️ Out-of-court statements and hearsay in general

When a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the primary purpose of the interrogation by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs. [U.S. Const. Amend. 6](#).

[7] **Criminal Law** ⚖️ Out-of-court statements and hearsay in general

The primary purpose of victim's statements to responding police officer, in which victim identified defendant as her assailant and described what he had done, was to tell her account of incident, and not to aid in an ongoing emergency, and thus the statements were testimonial in nature and admission of the statements through the playing of officer's body camera footage, without an opportunity to cross-examine victim, violated the Confrontation Clause, in prosecution for domestic violence; by the time police began questioning victim she was no longer acting to secure protection or medical care, as she was already in an ambulance and was receiving medical care, the scene was calm, and officer's questions were directed to investigating what had happened and were not necessary to be able to resolve a present emergency. [U.S. Const. Amend. 6](#); [Ohio Rev. Code Ann. § 2919.25](#).

[8] **Criminal Law** ⚖️ Out-of-court statements and hearsay in general

The primary purpose of victim's statements to emergency medical technicians (EMTs), in which victim identified defendant as her assailant and described what he had done, was to receive medical care, and thus the statements were nontestimonial in nature and admission of the statements through the playing of officer's body camera footage, without an opportunity to cross-examine victim, did not violate the Confrontation Clause, during domestic violence prosecution; victim was actively receiving medical care when her statements were captured by officer's body camera, and every statement victim made in response to questioning from EMTs was for the primary purpose of receiving medical care and not for creating a record for use at trial. [U.S. Const. Amend. 6](#); [Ohio Rev. Code Ann. § 2919.25](#).

APPEAL from the Court of Appeals for Cuyahoga County, No. 111274, 2023-Ohio-603.

### Attorneys and Law Firms

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Kristen Hatcher and Daniel T. Van, Assistant Prosecuting Attorneys, for appellant.

Cullen Sweeney, Cuyahoga County Public Defender, and Michael Wilhelm and John T. Martin, Assistant Public Defenders, for appellee.

Steven L. Taylor, urging reversal for amicus curiae Ohio Prosecuting Attorneys Association.

Alexandria M. Ruden, Cleveland, and Tonya Whitsett, urging reversal for amici curiae Legal Aid Society of Cleveland, Alliance for HOPE International, and Ohio Domestic Violence Network.

Calfee, Halter & Griswold, L.L.P., Jason J. Blake, Columbus, and Gretchen L. Whaling, Columbus, urging reversal for amici curiae AEquitas and Joyful Heart Foundation.

### Opinion

Fischer, J., authored the opinion of the court, which Donnelly, Stewart, and Brunner, JJ., joined. Deters, J., concurred in part and dissented in part, with an opinion joined by Kennedy, C.J., and DeWine, J.

Fischer, J.

\*1 { ¶ 1 } We examine in this case whether the admission at trial of statements made by a domestic-violence victim, B.B., that were captured by a law-enforcement officer's body camera violated appellee Garry Smith's right to confrontation. As explained below, we conclude that B.B.'s statements made to EMTs that were captured on the body-camera video were nontestimonial; however, we conclude that all B.B.'s statements made to Police Officer Brian Soucek were testimonial because those statements were not given to assist the officer in responding to an ongoing emergency situation but rather, to further the officer's investigation of a crime that had already occurred. We therefore reverse the judgment of the Eighth District Court of Appeals as it pertains to Smith's convictions for the March 21, 2020 incident, and we remand the case to the Eighth District to determine whether any of the statements B.B. made in response to

the EMTs' questions (i.e., the nontestimonial statements) were inadmissible hearsay, to conduct a harmless-error analysis, and to address Smith's third, fourth, and fifth assignments of error relating to the March 21, 2020 incident, as necessary.

## I. BACKGROUND

### A. Pre-Trial

{ ¶ 2 } In November 2020, Smith was indicted on two counts of domestic violence in violation of R.C. 2919.25(A), a fourth-degree felony, with one pregnant-victim specification under R.C. 2941.1423, for an incident that occurred on March 21, 2020, in which Smith allegedly assaulted his pregnant fiancé, B.B. See *State v. Smith*, Cuyahoga C.P. No. CR-20-651674-A. Smith pleaded not guilty to the charges.

{ ¶ 3 } Smith filed a motion in limine seeking to preclude the State from introducing B.B.'s statements that were recorded by police officers' body cameras without having B.B. testify at his criminal trial. Smith argued that such evidence would constitute hearsay and prevent him from being able to cross-examine B.B., thus violating his right to confrontation. The State informed the trial court that it had subpoenaed B.B. and intended to call her as a witness. The State acknowledged that if B.B. failed to appear at trial, then there could be hearsay and confrontation issues concerning B.B.'s statements that were recorded by the officers' body cameras, but the State argued that B.B.'s statements would fall under various hearsay exceptions. The trial court initially denied Smith's motion in limine but reserved its final ruling until the evidence was introduced at trial.

### B. Trial

{ ¶ 4 } Smith waived his right to a jury trial and the matter proceeded to a bench trial.<sup>1</sup> B.B. failed to appear, and the State tried its case without her.

#### 1. The State's Case-in-Chief

\*2 { ¶ 5 } The State called two witnesses to testify about

the March 21, 2020 incident: Detective William Cunningham and Officer Soucek, both of the Cleveland Division of Police. Detective Cunningham investigated the incident. He tried numerous times to speak with B.B. about the incident but was unable to get in touch with her. Detective Cunningham identified B.B.'s medical records and photos of B.B.'s injuries that were taken while she was being treated at the hospital as the ones he had obtained using a search warrant.

{ ¶ 6} Officer Soucek was the responding officer to the call for an assaulted female, and his body camera captured B.B.'s statements and demeanor on the night of the incident. Before Officer Soucek testified, Smith challenged the admission of the officer's body-camera video into evidence on confrontation grounds. The trial court acknowledged the objection but did not rule on it at that time.

{ ¶ 7} The State proceeded to examine Officer Soucek, who at the time of trial had been a patrol officer for 11 years. He testified that on the evening of March 21, 2020, he and his partner received a dispatch call to a home "for a female assaulted." He activated his body camera and arrived at the scene within a few minutes of the dispatch.

{ ¶ 8} The State then played Officer Soucek's body-camera video, starting it at the 12-second mark, which showed Officer Soucek arriving on the scene. Smith renewed his objection to the State's use of the body-camera video, on the ground that it violated his right to confrontation. The trial court again noted the objection but did not rule on it.

{ ¶ 9} The State skipped to the 1:02 mark of the body-camera video, which showed Officer Soucek entering an ambulance. The footage between the 12-second mark and the 1:02 mark captured a relatively calm scene. As Officer Soucek arrived, two EMTs walked with a woman from the front porch of a house to an ambulance. And as Officer Soucek approached the ambulance, a witness spoke to Officer Soucek's partner outside the ambulance; the witness was explaining that she had "called EMS because [B.B.] came on [her] doorstep."

{ ¶ 10} Officer Soucek entered the ambulance and saw a woman, whom he identified as the victim, B.B., being treated by two EMTs. Officer Soucek asked B.B., "So what happened?" Over Smith's objection, Officer Soucek testified about B.B.'s statement, relaying that B.B. told him that her fiancé had beaten her up because she had had an argument with his niece and that her fiancé had ripped out her hair.

{ ¶ 11} The State asked Officer Soucek, "Specifically, what else?" But then the State immediately said, "That's all right, I'll just hit play."

{ ¶ 12} On the body-camera video, Officer Soucek next asked B.B., "Do you live with him?" B.B. replied, "We do live together." One of the EMTs then asked B.B., "Is this your niece here? She said you're five months pregnant? Does that sound about right? Did you take any kicks or punches or anything to the stomach?" B.B. answered, "To my knee, to my chest, to my stomach. I no longer feel my baby moving."

{ ¶ 13} While an EMT was asking B.B. questions concerning her physical condition, Officer Soucek had a conversation with his partner, who was standing to his left, outside the ambulance and off camera. Officer Soucek asked his partner, "Did it happen here?" His partner responded, "The niece said that [B.B.] wouldn't tell her anything, she just showed up at her house and knocked on her door and that [B.B.] lives in East Cleveland and that [the niece] doesn't know him at all." Upon receiving this information, Officer Soucek initiated the following exchange:

\*3 Officer: Where did this happen at?

B.B.: Outside.

Officer: Outside where?

EMT: In front of this house here?

B.B.: It happened there down the street.

Officer: On the street?

B.B.: Yeah.

Officer: Do you live over here?

B.B.: No. We were on our way to her house, but it didn't happen in her house.

Officer: But it happened down the street here?

B.B.: We had an argument and, you know, we were all, we were drinking. I'm not even supposed to be drinking.

Officer: So, it happened in the car?

B.B.: Outside the car.

Officer: So, is he still in the area, or did he drive away?

B.B.: No. He drove way. He left.

Following that exchange, Officer Soucek asked B.B. for her Social Security number, her name, and her date of birth.

{ ¶ 14} The State paused the video at the 3:04 mark, and Officer Soucek testified about B.B.'s injuries, noting her swollen face and eye and "little spots of blood and glue" where her hair had been ripped out. He described B.B.'s clothing as disheveled, ripped, and dirty and stated that it appeared to him "that she [had been] in a fight."

{ ¶ 15} The State continued to play the body-camera video. On the video, Officer Soucek asked B.B. for her fiancé's name. B.B. answered, "Garry Smith ... two r's." During this exchange, the EMTs told B.B. that she could keep talking but that they needed her to lie down on the gurney. While the EMTs moved B.B. from her seated position in the ambulance to lie down on the gurney, Officer Soucek continued questioning B.B., and she provided him with Smith's date of birth and the address where she lived with Smith. Officer Soucek told his partner to "call the boss for photos."

{ ¶ 16} Meanwhile, the EMTs continued to provide care to B.B. One EMT asked B.B. whether Smith had ripped out her hair, and B.B. confirmed that he had. The other EMT told B.B. that he was going to put her on a heart-rate monitor because her heart was beating so fast.

{ ¶ 17} After B.B. answered an EMT's question concerning her health insurance, Officer Soucek asked B.B. how far along she was in her pregnancy. B.B. responded that she was five months pregnant and that Smith was the father. One EMT followed up Officer Soucek's question by asking B.B. the due date of her baby. She told him that her baby was due in July. Officer Soucek then asked B.B. whether she and Smith had other children together. B.B. responded that they did not.

{ ¶ 18} After a discussion between the officers and the EMTs concerning where B.B. would be transported to receive further medical care, one EMT tried to confirm with B.B. that she had said she had been smoking and drinking; as the EMT proceeded to ask B.B. a follow-up question about her reported substance use, she shushed him. The EMT who asked B.B. those questions looked at Officer Soucek and B.B. shushed him again. The EMT then asked B.B. whether she had taken any drugs. B.B., in a hushed tone, replied, "I snorted cocaine. ... When he beat me up, I... I snorted a couple lines of cocaine." The EMT explained that the question was asked to better understand why her heart rate was so high.

\*4 { ¶ 19} While one EMT prepared the equipment to monitor B.B.'s heart rate, the other EMT asked B.B. how many times she had been pregnant, and B.B. responded to his questions. Officer Soucek then inquired more about the incident:

Officer: Can you tell me exactly what he did at the car?

B.B.: He punched me in my face and other people were trying to break it up and he pushed everybody away. He threatened to shoot me and said he would kill me. He was also intoxicated. Very intoxicated.

Officer: And he ripped out your hair?

B.B.: He ripped out my hair. This is what he did to me. He kned me to the face, the chest, stomach.

The EMT who had prepared the heart-rate-monitoring equipment interrupted B.B. to connect the equipment to her, but he informed B.B. that she could keep talking to Officer Soucek. The officer then continued questioning B.B.:

Officer: He kned you in the stomach?

B.B.: Yes.

EMT: You're feeling no movement from the baby, right?

B.B.: No movement. And it was moving until this incident happened.

{ ¶ 20} The State played the body-camera video until the end of this exchange, stopping it at the 6:42 mark. The State did not play the remainder of the video for "judicial economy" reasons. The remainder of the video shows the EMTs continuing to provide B.B. with medical care and Officer Soucek asking B.B. for a phone number where he could reach her. Officer Soucek left the ambulance to speak with B.B.'s family member who had called 9-1-1, telling her that B.B.'s assailant had "beat her up pretty good." As the ambulance drove away, Officer Soucek's partner informed him that their boss was coming to the scene to take photographs but that since the ambulance had left, they would all meet at the hospital. At trial, Officer Soucek confirmed that his body-camera video was a fair and accurate depiction of what he saw that night.

{ ¶ 21} Officer Soucek testified that he and his supervisor met B.B. at the hospital to take photographs for "the domestic violence part of the report." Over Smith's objection, the State asked Officer Soucek whether B.B. had "indicated on the body cam footage that [Smith had] threatened to kill her, threatened to shoot her," to

which Officer Soucek replied, “Yes.” Officer Soucek further testified, again over Smith’s objection, that B.B. had told him that Smith possessed a weapon and that Smith had assaulted her previously.

{ ¶ 22} At the close of the evidence, Smith’s counsel again objected to admission of the body-camera video into evidence, on the ground it violated Smith’s right to confrontation. The trial court overruled the objection, explaining that B.B.’s statements on the video were nontestimonial and were being “admitted under an excited utterance hearsay exception.”

## 2. The Defense

{ ¶ 23} Smith testified in his own defense at trial. Regarding the March 21, 2020 incident, he denied hitting B.B. He maintained that when he left home that night, B.B. was “fine.” And he suggested that B.B. had accused him of attacking her as a means of getting back at him because she thought he had cheated on her.

{ ¶ 24} During cross-examination, Smith acknowledged that he and B.B. had children together. Smith testified, “We say we married because we been together so long. We been together since 2002.”

\*5 { ¶ 25} At the trial’s conclusion, the court found Smith guilty as charged and sentenced him accordingly.

## C. Appeal to the Eighth District Court of Appeals

{ ¶ 26}  Smith appealed his convictions to the Eighth District. 2023-Ohio-603, 209 N.E.3d 883, ¶ 71 (8th Dist.). He argued that the admission of Officer Soucek’s body-camera video into evidence violated his right to confront witnesses against him and that the statements made in the video were inadmissible hearsay. Smith also challenged the manifest weight of the evidence of his conviction.

{ ¶ 27} The State argued that B.B.’s statements captured on Officer Soucek’s body-camera video should be considered nontestimonial and admissible hearsay because they were made during a police interrogation under circumstances that indicated that the primary purpose of the interrogation was to respond to an ongoing emergency. The State argued that the statements captured on the body-camera video were admissible as

present-sense impressions or as excited utterances.

{ ¶ 28} The appellate court concluded that the totality of the circumstances surrounding Officer Soucek’s interrogation of B.B. demonstrated that the primary purpose of B.B.’s statements to the police—statements in which B.B. identified Smith as her assailant and described what he had done to her—was to provide an account of the assault that had allegedly occurred (i.e., to document past events for purposes of a later criminal investigation or prosecution) and that the statements were therefore testimonial.  *Id.* at ¶ 93. The appellate court thus concluded that the admission of all B.B.’s statements that were captured on the body-camera video violated Smith’s confrontation rights.  *Id.* at ¶ 101.

{ ¶ 29} Because its decision regarding Smith’s confrontation-rights challenge was dispositive, the court of appeals did not consider Smith’s challenge to the trial court’s admission of B.B.’s statements on hearsay grounds or his challenge regarding the weight of the evidence for the March 2020 offenses.<sup>2</sup>  159 Ohio St.3d 150, 2020-Ohio-603, 149 N.E.3d 469 at ¶ 112 (8th Dist.). The court of appeals reversed the trial court’s judgment as to the March 2020 incident, vacated Smith’s convictions related to that incident, and remanded the case to the trial court for a new trial on the charges in Cuyahoga C.P. No. CR-20-651674-A.  159 Ohio St.3d 150, 2020-Ohio-603, 149 N.E.3d 469 at ¶ 143 (8th Dist.).

\*6 { ¶ 30} The State moved for reconsideration and en banc consideration. The Eighth District denied the State’s motions.

## D. The State’s Appeal to this Court

{ ¶ 31} The State appealed to this court. We accepted jurisdiction over the State’s sole proposition of law:

The primary purpose of the statements from a domestic violence victim were not intended as substitutes for trial testimony but rather to meet an ongoing emergency. The arrival of the police and the fact that the suspect was not on scene did not render the victim’s statements testimonial.

See 2024-Ohio-163.

## II. LAW

{ ¶ 32} We consider whether the admission at Smith’s criminal trial of B.B.’s statements made to the EMTs and to Officer Soucek as captured on Officer Soucek’s body-camera video violated Smith’s rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution. We review this issue of law de novo. See [State v. McKelton](#), 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 172.

<sup>11</sup>{ ¶ 33} The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” In [Crawford v. Washington](#), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court explained that the key question for determining whether a Confrontation Clause violation has occurred is whether an out-of-court statement is “testimonial.” [Id.](#) at 59, 68, 124 S.Ct. 1354. If a statement is testimonial, its admission into evidence will violate the defendant’s right to confrontation if the defendant does not have an opportunity to cross-examine the declarant. [Id.](#) at 53-56, 124 S.Ct. 1354.

<sup>12</sup> <sup>13</sup>{ ¶ 34} To determine whether a statement is testimonial, courts must look to post-[Crawford](#) decisions to ascertain whether the statement bears indicia of certain factors that would make it testimonial. “Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” [Davis v. Washington](#), 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). Statements are “testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” [Id.](#) For example, the primary purpose of a testimonial statement is to create an out-of-court substitute for trial testimony. [Ohio v. Clark](#), 576 U.S. 237, 245, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015). That primary purpose must be measured objectively by the trial court, accounting for the perspectives of the interrogator and the declarant. [Michigan v. Bryant](#), 562 U.S. 344, 367-368, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011).

<sup>14</sup> <sup>15</sup>{ ¶ 35} The most important factor in informing the primary purpose of an interrogation in a domestic-violence case is whether the statement was made during an ongoing emergency, i.e., whether there was a continuing threat to the victim. See [id.](#) at 363, 131 S.Ct. 1143. This is because domestic-violence cases “often have a narrower zone of potential victims than cases involving threats to public safety.” [Id.](#) A conversation that begins as an interrogation to determine the need for emergency services may evolve into a testimonial statement once the purpose of rendering emergency assistance has been achieved. [Davis](#) at 828, 126 S.Ct. 2266.

\*7 { ¶ 36} Examining two domestic-violence cases in [Davis](#), the United States Supreme Court held that the statements the victim in [Davis](#) made to police during a 9-1-1 call were nontestimonial on several grounds, including that the victim “was ‘speaking about events *as they were actually happening*, rather than “describ[ing] past events,” ’ that there was an ongoing emergency, that the ‘elicited statements were necessary to be able to resolve the present emergency,’ and that the statements were not formal.” (Emphasis and brackets added in [Davis](#).) [Bryant](#) at 356-357, 131 S.Ct. 1143, quoting [Davis](#) at 827, 126 S.Ct. 2266, quoting [Lilly v. Virginia](#), 527 U.S. 116, 137, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999) (plurality opinion). And in [Indiana v. Hammon](#), the second domestic-violence case resolved in [Davis](#), the Supreme Court held that statements the victim made to police from inside her home while her abuser was still present but was relegated to another room were “ ‘part of an investigation into possibly criminal past conduct.’ ” [Bryant](#) at 357, 131 S.Ct. 1143, quoting [Davis](#) at 829, 126 S.Ct. 2266. The Supreme Court found that there was “ ‘no emergency in progress,’ ” because the officer questioning the victim “ ‘was not seeking to determine ... “what is happening,” but rather “what happened.” ’ ” [Id.](#), quoting [Davis](#) at 830, 126 S.Ct. 2266. Because the victim’s statements “ ‘were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation,’ ” the Supreme Court held that those statements were testimonial. [Id.](#), quoting [Davis](#) at 832, 126 S.Ct. 2266.

{ ¶ 37} And in examining a case concerning a mortally wounded victim in [Bryant](#), the United States Supreme Court reiterated the importance of ascertaining whether the statements were made during an ongoing emergency:

“The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than ‘prov[ing] past events potentially relevant to later criminal prosecution’ ” (brackets added in [Bryant](#)), [id.](#), 562 U.S. at 361, 131 S.Ct. 1143, quoting [Davis](#), 547 U.S. at 822, 126 S.Ct. 2266. The Court emphasized that the existence of an ongoing emergency must be “objectively assessed from the perspectives of the parties to the interrogation at the time” and “not with the benefit of hindsight.” [Id.](#) at 361, fn. 8, 131 S.Ct. 1143.

{ ¶ 38} Another factor that should be considered is the degree of formality of the interrogation. [Id.](#) at 366, 131 S.Ct. 1143. The Supreme Court noted that the questioning in [Bryant](#) occurred in a public area before emergency services arrived, as opposed to at police headquarters. [Id.](#) “The informality suggests that the interrogators’ primary purpose was simply to address what they perceived to be an ongoing emergency, and the circumstances lacked any formality that would have alerted [the witness] to or focused him on the possible future prosecutorial use of his statements.” [Id.](#) at 377, 131 S.Ct. 1143.

{ ¶ 39} Additionally, courts should consider the “statements and actions of both the declarant and interrogators.” [Id.](#) at 367, 131 S.Ct. 1143. The interaction between the interrogators and the witness provides insight into how the witness believes his or her statements will be used. See [id.](#) at 368-378, 131 S.Ct. 1143; see also [id.](#) at 378-379, 131 S.Ct. 1143 (Thomas, J., concurring in the judgment); [id.](#) at 379-395, 131 S.Ct. 1143 (Scalia, J., dissenting); [id.](#) at 395-396, 131 S.Ct. 1143 (Ginsburg, J., dissenting).

<sup>61</sup>{ ¶ 40} Thus, “when a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the ‘primary purpose of the interrogation’ by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs.” [Bryant](#), 562 U.S. at 370, 131 S.Ct. 1143.

### III. ANALYSIS

#### A. B.B.’s Statements to Officer Soucek Were Testimonial

<sup>71</sup>{ ¶ 41} To properly analyze the Confrontation Clause issue presented here, we must look at the situation from both Officer Soucek’s and B.B.’s perspectives to determine whether the primary purpose of the officer’s interrogation of the victim was to enable police to respond to an ongoing emergency. See [Bryant](#) at 361, fn. 8, 131 S.Ct. 1143 (“The existence of an ongoing emergency must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight.”) Reviewing the facts of this case from Officer Soucek’s perspective, we find no evidence of an ongoing emergency when B.B. was responding to Officer Soucek’s questions.

\*8 { ¶ 42} Officer Soucek testified at trial that he had received a dispatch call to respond to a female who had been assaulted and that “as [he] arrived on the scene, the female was already being escorted into the EMS wagon.” Additionally, Officer Soucek’s body camera captured a witness explaining to Officer Soucek’s partner that she had “called EMS because [B.B.] came on [her] doorstep.” The body-camera video captured a relatively calm scene with one witness speaking to Officer Soucek’s partner outside the ambulance and two EMTs walking with a woman to an ambulance; there was no shouting, arguing, or overall commotion. See [Davis](#), 547 U.S. at 830, 126 S.Ct. 2266. So before his interrogation of B.B. began, Officer Soucek (1) knew from his dispatcher that a female had been assaulted, (2) heard from a witness that the victim had arrived at the 9-1-1 caller’s home already battered, and (3) observed the victim walk with EMTs to the ambulance where she began receiving medical care. An objective assessment of this information demonstrates that Officer Soucek knew that any active threat against the victim, B.B., had been eliminated and that he was investigating a situation in which a female *had been assaulted*.

{ ¶ 43} It is true that “[a]n assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue,” [Bryant](#), 562 U.S. at 363, 131 S.Ct. 1143. And generally, such an assessment could not have occurred until Officer Soucek ascertained what had happened to B.B. However, Officer Soucek’s approach to interrogating B.B. confirms that he did not believe that he was responding to an ongoing emergency.

{ ¶ 44} At trial, Officer Soucek testified that he “began

to interview [B.B.] about the incident,” and he did so by asking, “So what happened?” After B.B. confirmed that she had been assaulted by her fiancé, whom she later identified as Smith, Officer Soucek did not follow up with questions that would allow him to further assess the situation or determine whether Smith presented any possible threat to his own safety or the safety of others, such as by asking B.B. questions about Smith, where the incident occurred, or whether Smith had a weapon. Instead, Officer Soucek asked B.B., “Do you live with him?”

{ ¶ 45} This follow-up question did nothing to establish whether Smith presented a danger to others. And Officer Soucek did not need to eliminate Smith as an ongoing threat to B.B., because she was safe with Officer Soucek and the EMTs in the ambulance. This question is relevant only when an officer is considering whether to pursue an arrest warrant or seek prosecution against a person, *see* R.C. 2935.09, since a person can be charged with domestic violence only if the victim is a family or household member, *see* R.C. 2919.25. This question had no bearing, at least in this case, on whether there was an ongoing emergency.

{ ¶ 46} And while Officer Soucek eventually questioned B.B. about Smith and the location of the attack, he did so only after he received information from his partner that the assault had not occurred inside the home from which B.B. had just exited. There is no evidence in the record that Officer Soucek or his partner sought more information about Smith to ensure that he was not a threat to others. Indeed, there is no evidence that Officer Soucek or his partner called for backup or ordered a search for Smith while B.B. was receiving medical care in the ambulance. As demonstrated in the body-camera video, no other officers arrived on the scene, and Officer Soucek told his partner to call their supervisor only to photograph B.B.’s injuries.

{ ¶ 47} The facts of this case demonstrate that Officer Soucek had information that he was responding to a female who had been assaulted and was being treated by EMTs prior to his arrival at the scene, and his actions demonstrate that he did not treat the assault on B.B. as an ongoing emergency but rather, as an investigation into past criminal conduct of B.B.’s assailant. As the United States Supreme Court has stated, “the emergency is relevant to the ‘primary purpose of the interrogation’ because of the effect it has on the parties’ purpose, not because of its actual existence,” *Bryant*, 562 U.S. at 361, fn. 8, 131 S.Ct. 1143.

\*9 { ¶ 48} And B.B. did not treat the situation as an

ongoing emergency, as demonstrated by her own statements and actions. B.B. knew she was pregnant at the time of the incident. She knew that Smith had hit her, ripped out her hair, then drove away, leaving her near a family member’s home. And after the fight, B.B. snorted “a couple lines of cocaine” before her family member called 9-1-1.

{ ¶ 49} The body-camera video demonstrates that B.B. sought assistance from her family member and medical attention from the EMTs before the police interrogation began inside the ambulance. At no time does the body-camera video show B.B. actively calling for help or providing police with information that would indicate that Smith was a continued threat to her or others. *See* *Davis*, 547 U.S. at 828-832, 126 S.Ct. 2266. And while B.B. had not informed Officer Soucek of the full extent of the situation prior to the interrogation, it is apparent that she or her family member had already discussed the situation with the EMTs, given the extent of their questions during the first few minutes of the body-camera video.

{ ¶ 50} B.B. knew that Smith was not a threat to her at the time of the police interrogation. The body-camera video shows that B.B. spoke to Officer Soucek about the incident without reservation and that she was much more hesitant to answer questions when it came to her own criminal activity: B.B. shushed an EMT when he asked her about the extent of her drug use. B.B.’s selective disclosure of information and hesitancy to admit her own criminal activity in front of a police officer demonstrates that she had testimonial intent when she made statements to the officer concerning the assault. *See* *Davis* at 830, 126 S.Ct. 2266 (“statements [made during] an official interrogation are an obvious substitute for live testimony because they do precisely *what a witness does* on direct examination” [emphasis in original]). These facts demonstrate that B.B.’s purpose in answering Officer Soucek’s questions was not to aid in the officer’s response to an ongoing emergency but rather, to tell her account of the incident.

{ ¶ 51} Additionally, the formality of the encounter between Officer Soucek and B.B. is far from the hurried 9-1-1 call that was at issue in *Davis*. The interaction between Officer Soucek and B.B. in this case more closely resembles the interrogation in *Hammon*, in which the officer interviewed the victim inside her home while she was separated from her husband, questioned her about what had happened, and had her sign a battery affidavit. *See* *Davis* at 819-820, 830, 126 S.Ct. 2266.

{ ¶ 52} Officer Soucek’s interrogation of B.B. was not conducted at the police station; B.B. spoke to Officer Soucek in the back of an ambulance where she was being attended by EMTs—away from any witnesses to the assault and safely away from her attacker. And while Officer Soucek did not ask B.B. for a signed affidavit, his body camera recorded the entire exchange. Officer Soucek’s body camera recorded him actively taking handwritten notes of B.B.’s answers. And as discussed above, B.B. freely spoke with Officer Soucek about the incident but was hesitant to answer questions when it came to her own criminal activity.

{ ¶ 53} Reviewing these facts objectively from both Officer Soucek’s and B.B.’s perspectives, and considering the formality of the interrogation, we do not find that the primary purpose of Officer Soucek’s interrogation of B.B. in the ambulance was to respond to an ongoing emergency. Rather, the primary purpose of the interrogation was to establish or prove past events potentially relevant to later criminal prosecution of B.B.’s assailant. We therefore conclude that B.B.’s statements to Officer Soucek captured by the officer’s body camera were testimonial in nature and that their admission into evidence at Smith’s criminal trial violated Smith’s right to confrontation.

#### B. B.B.’s Statements to the EMTs Were Nontestimonial

\*10 <sup>181</sup>{ ¶ 54} Officer Soucek’s body camera recorded not only B.B.’s responses to his questions but also B.B.’s responses to the EMTs’ questions concerning her medical history. We have held that statements made for purposes of medical diagnosis and treatment are nontestimonial and that their admission into evidence at trial does not violate the Confrontation Clause. [State v. Arnold](#), 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775, ¶ 41.

{ ¶ 55} B.B. was actively receiving medical care when her statements were captured by Officer Soucek’s body camera. Every statement B.B. made in response to the EMTs’ questions was for the primary purpose of receiving medical care, not creating a record for use at trial. So those statements were nontestimonial and the admission of those statements at Smith’s trial did not violate Smith’s right to confrontation.

#### IV. REVERSE AND REMAND TO THE EIGHTH

#### DISTRICT

{ ¶ 56} We conclude that the Eighth District Court of Appeals erred in its determination that all statements made by B.B. that were captured by Officer Soucek’s body camera while B.B. was in the ambulance must be excluded on constitutional grounds. Only those statements that B.B. made in response to Officer Soucek’s questions should have been excluded on that basis. We therefore reverse the judgment of the court of appeals as it pertains to Smith’s convictions for the March 21, 2020 incident.

{ ¶ 57} Because this appeal is limited solely to the Confrontation Clause issue, we decline to address admissibility issues pertaining to B.B.’s statements under the Ohio Rules of Evidence. Instead, we remand the case to the Eighth District. On remand, the court of appeals must determine whether any of the statements B.B. made in response to the EMTs’ questions (i.e., the nontestimonial statements) were inadmissible hearsay, thereby addressing Smith’s second assignment of error. After making that determination, the Eighth District must revisit its harmless-error determination and address Smith’s third, fourth, and fifth assignments of error relating to the March 21, 2020 incident, as necessary.

Judgment reversed

and cause remanded.

Deters, J., joined by Kennedy, C.J., and DeWine, J., concurring in part and dissenting in part.

{ ¶ 58} The majority correctly concludes that B.B.’s statements to the EMTs that were captured by a police officer’s body camera were nontestimonial and that the Eighth District Court of Appeals erred when it held that those statements should have been excluded from evidence in appellee Garry Smith’s criminal trial. And the majority is correct that the case needs to be remanded to the court of appeals for a determination whether B.B.’s nontestimonial statements were inadmissible hearsay. Where the majority goes astray is in its conclusion that all B.B.’s statements to Police Officer Brian Soucek should have been excluded from evidence because they were testimonial. I therefore respectfully concur in part and dissent in part.

### The Confrontation Clause and statements made by unavailable witnesses

{ ¶ 59} The Sixth Amendment to the United States Constitution guarantees an accused the right “to be confronted with the witnesses against him.” “The ‘primary object’ of this provision is to prevent unchallenged testimony from being used to convict an accused ....” [State v. Carter](#), 174 Ohio St.3d 619, 2024-Ohio-1247, 238 N.E.3d 87, ¶ 27, citing [Mattox v. United States](#), 156 U.S. 237, 242, 15 S.Ct. 337, 39 L.Ed. 409 (1895), and [Crawford v. Washington](#), 541 U.S. 36, 53, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In [Crawford](#), the United States Supreme Court reviewed the history of the Confrontation Clause with respect to unavailable witnesses. The guiding principle gleaned from that history is this: “Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine,” [Crawford](#) at 59, 124 S.Ct. 1354. The Court “[left] for another day any effort to spell out a comprehensive definition of ‘testimonial.’ ” [Id.](#) at 68, 124 S.Ct. 1354. But the Court did instruct that “[w]hatever the term [‘testimonial’] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” [Id.](#)

\*11 { ¶ 60} In later cases, the Court described more fully the contours of the term. In [Davis v. Washington](#), 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the Court considered two cases that had been consolidated for decision involving the admission of out-of-court statements made by witnesses who did not appear at trial. In the first case, [Davis v. Washington](#), the recording of a 9-1-1 call was admitted at trial. On the recording, the victim told the operator that her boyfriend was assaulting her. In response to questions from the operator, the victim identified her attacker as Adrian Davis. When the victim told the operator that her boyfriend had left the residence, the operator continued to question the victim, obtaining more information about Davis and a description of the events leading up to the attack. The trial court admitted the recording over Davis’s objection that doing so violated his confrontation rights. The Washington Court of Appeals and the Washington Supreme Court affirmed the trial court’s judgment. [Id.](#) at 819, 126 S.Ct. 2266.

{ ¶ 61} In the second case, [Hammon v. Indiana](#), police responded to a domestic disturbance and found the victim alone on the porch appearing somewhat frightened. The

victim told police that nothing was wrong, but after being questioned by officers, she described to them what had happened and attested in an affidavit that her husband had shoved her to the floor, hit her in the chest, and attacked her daughter. The trial court admitted the victim’s statements as testified to by the officer as an excited utterance and admitted the statements contained in the affidavit as a present-sense impression. The Indiana Supreme Court concluded that the victim’s verbal statements were nontestimonial and admissible as an excited utterance. [Davis](#) at ¶ 821. However, the Indiana Supreme Court concluded that the statements in the affidavit signed by the victim were testimonial and had been wrongly admitted into evidence but that the affidavit’s admission was harmless beyond a reasonable doubt. [Id.](#)

{ ¶ 62} The United States Supreme Court set forth what would become known as the “primary purpose test”:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

[Davis](#) at 822, 126 S.Ct. 2266. The Court reserved for another day the question “whether and when statements made to someone other than law enforcement personnel are ‘testimonial.’ ” [Id.](#) at 823, fn. 2, 126 S.Ct. 2266.

{ ¶ 63} The Court in [Davis](#) also recognized the fluidity of interrogations involving ongoing emergencies: “This is not to say that conversation which begins as an interrogation to determine the need for emergency assistance cannot ... ‘evolve into testimonial statements,’ ... once that purpose has been achieved.” [Id.](#), 547 U.S. at 828, 126 S.Ct. 2266. The Court explained that it was

for trial courts to determine whether portions of statements are testimonial and to exclude those portions.

 *Id.* Applying these principles, the Court affirmed the Washington Supreme Court’s judgment in  *Davis v. Washington* and reversed the Indiana Supreme Court’s judgment in *Hammon v. Indiana*, remanding that matter for further proceedings.  *Davis* at 834, 126 S.Ct. 2266.

{ ¶ 64} The United States Supreme Court refined its explanation of what constitutes a testimonial statement in  *Michigan v. Bryant*, 562 U.S. 344, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011). In that case, the Court considered statements made to police officers by a mortally wounded victim. The officers found the victim at a gas station. When they asked what had happened, the victim identified the person who had shot him, and he told officers where the shooting had occurred. The victim died shortly after the police found him. The Michigan Supreme Court held that admission of the victim’s statements into evidence violated the defendant’s confrontation rights because there was not an ongoing emergency at the gas station when he made the statements and because the police officers’ questions were directed at determining what had already happened.  *Id.* at 351, 131 S.Ct. 1143.

\*12 { ¶ 65} The United States Supreme Court vacated the Michigan court’s judgment and remanded the case for further proceedings.  *Id.* at 378, 131 S.Ct. 1143. In doing so, the Court provided guidance on how courts should determine whether statements are testimonial.

{ ¶ 66} The Court reiterated the importance of ascertaining whether the statements were made during an ongoing emergency: “The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than ‘prov[ing] past events potentially relevant to later criminal prosecution.’” (Brackets added in  *Bryant*.)  *Id.* at 361, 131 S.Ct. 1143, quoting  *Davis*, 547 U.S. at 822, 126 S.Ct. 2266. Relevant to the case before us is the Court’s note that

[t]he existence of an ongoing emergency must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight. If the information the parties knew at the time of the encounter would lead a reasonable

person to believe that there was an emergency, even if that belief was later proved incorrect, that is sufficient for purposes of the Confrontation Clause. The emergency is relevant to the “primary purpose of the interrogation” because of the effect it has on the parties’ purpose, not because of its actual existence.

 *Id.* at 361, fn. 8, 131 S.Ct. 1143.

{ ¶ 67} Although the existence of an ongoing emergency is important to the inquiry whether a statement is testimonial, it is not the sole factor to be considered. “[W]hether an ongoing emergency exists is simply one factor—albeit an important factor—that informs the ultimate inquiry regarding the ‘primary purpose’ of an interrogation.”  *Bryant*, 562 U.S. at 366, 131 S.Ct. 1143.

{ ¶ 68} Other factors that should be considered are the degree of formality of the interrogation,  *id.*, and “statements and actions of both the declarant and interrogators,”  *id.* at 367, 131 S.Ct. 1143. Regarding the former factor, the Court noted that the questioning in  *Bryant* occurred in a public area before emergency services arrived, as opposed to at police headquarters.  *Id.* at 366, 131 S.Ct. 1143. “The informality suggests that the interrogators’ primary purpose was simply to address what they perceived to be an ongoing emergency, and the circumstances lacked any formality that would have alerted [the witness] to or focused him on the possible future prosecutorial use of his statements.”  *Id.* at 377, 131 S.Ct. 1143. As to the latter factor, the interaction between the interrogators and the witness also provides insight into how the witness believes his or her statements will be used. See  *id.* at 368-378, 131 S.Ct. 1143; see also  *id.* at 378-379, 131 S.Ct. 1143 (Thomas, J., concurring in the judgment);  *id.* at 379-395, 131 S.Ct. 1143 (Scalia, J., dissenting);  *id.* at 395-396, 131 S.Ct. 1143 (Ginsburg, J., dissenting).

{ ¶ 69} In short, “when a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the ‘primary purpose of the interrogation’ by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation

occurs.”  *Id.* at 370, 131 S.Ct. 1143.

### Where the majority gets it wrong

{ ¶ 70} Keeping these principles in mind, I will explain where the majority goes wrong in its decision.

{ ¶ 71} First, the majority ignores the United States Supreme Court’s directive in  *Bryant* that whether an ongoing emergency existed at the time of police questioning is but one factor to be considered when determining whether a witness’s statements are testimonial. See  *Bryant*, 562 U.S. at 366, 131 S.Ct. 1143. That “there was no shouting, arguing, or overall commotion” occurring while B.B. spoke with Officer Soucek, majority opinion, ¶ 42, is important, but it is not the only consideration in determining whether B.B.’s statements to the officer were testimonial. Seemingly discounted by the majority is that Officer Soucek questioned B.B. in an ambulance while she was receiving medical care. Other than the fact that a police officer was asking the questions, the encounter had no trappings of a formal interrogation at police headquarters.

\*13 { ¶ 72} More troublingly, the majority makes the same mistake as did the Eighth District by using hindsight to inform its determination whether B.B.’s statements to Officer Soucek were testimonial, rather than focusing on what the parties knew at the time of the questioning. The majority attaches great weight to Officer Soucek’s testimony that he was responding to a call reporting “a female assaulted.” The majority emphasizes that the report of the assault was made in the past tense, stressing that “a female *had been assaulted*.” (Emphasis in original.) *Id.* Presumably the argument propounded by the majority is that because the 9-1-1 caller did not report that a female was currently being assaulted, Officer Soucek knew there was no ongoing emergency when he began questioning B.B.

{ ¶ 73} While we know now, having the benefit of Officer Soucek’s investigation, that there was no ongoing emergency while B.B. was being questioned in the ambulance, Officer Soucek could not have known that until he ascertained from B.B. that her assailant, whom she identified as Smith, had left the area. Had Smith remained in the area, Officer Soucek could reasonably have had concerns that Smith—who had allegedly just

beaten a pregnant woman—posed a continuing threat not only to B.B. but also to Officer Soucek, people who lived at the home with Smith and B.B., and others in the area. And only after B.B. told Officer Soucek that Smith had left the area did the officer know there was no ongoing emergency. I would conclude that up to that point, B.B.’s statements captured by the officer’s body camera were nontestimonial.

### Where the majority gets it right

{ ¶ 74} As discussed above, the United States Supreme Court has cautioned that interrogations can evolve as the need to respond to an ongoing emergency is eliminated. Therefore, each statement in such situations must be considered separately to determine its purpose.

{ ¶ 75} After B.B. told Officer Soucek that her attacker had left the scene, the purpose of her statements evolved. There was no longer a question of a continuing threat to B.B.: she was in the ambulance, and Smith had left the scene. Moreover, because there was no indication that Smith was armed or that the incident went beyond a domestic-violence attack, Smith did not present a threat to the public. Officer Soucek’s request for B.B.’s Social Security number marked the turning point when his questioning was directed toward creating a record for trial. He asked B.B. how many children she and Smith had together—a question relevant for a domestic-violence prosecution. And he asked what “exactly” occurred during the attack. That question and the response it elicited were not primarily for a nontestimonial purpose. I agree with the majority that B.B.’s statements after Officer Soucek asked for her Social Security number were testimonial and should have been excluded from evidence at Smith’s trial.

{ ¶ 76} The majority gets it right on another point too. B.B.’s statements to the EMTs differ from those she made to Officer Soucek. B.B. was acting to receive medical care when her statements to the EMTs were captured by Officer Soucek’s body camera. Thus, all the statements she made in response to the EMTs’ questions were for the primary purpose of receiving medical care, not creating a record for use at trial. So those statements were nontestimonial. However, they are still subject to review for admissibility under the Ohio Rules of Evidence.

early in her encounter with Officer Soucek were not made with the primary purpose of creating a record for trial and so were nontestimonial. I therefore respectfully concur in part and dissent in part.

### Conclusion

{ ¶ 77} The majority’s review of B.B.’s statements to Officer Soucek with a hindsight perspective is flawed. Considered “in light of the circumstances in which the interrogation occur[red],”  *Bryant*, 562 U.S. at 370, 131 S.Ct. 1143, some of the statements made by B.B.

### All Citations

--- N.E.3d ----, 2024 WL 5049116, 2024-Ohio-5745

### Footnotes

<sup>1</sup> In January 2021, Smith was indicted on two counts of felonious assault, in violation of  R.C. 2903.11(A)(2), and one count of domestic violence, in violation of  R.C. 2919.25(A), with at least one accompanying firearm specification for each count, for assaulting B.B. on December 26, 2020. *See State v. Smith*, Cuyahoga C.P. No. CR-20-655568-A. On the State’s motion, the trial court consolidated Cuyahoga C.P. No. CR-20-655568-A and Cuyahoga C.P. No. CR-20-651674-A, and the cases were tried together. Smith was convicted of all counts in Cuyahoga C.P. No. CR-20-655568-A. However, because Smith’s convictions in Cuyahoga C.P. No. CR-20-655568-A are not at issue here, we do not discuss the facts relevant to that case.

<sup>2</sup> The Eighth District’s approach to analyzing Smith’s challenge to the admission of Officer Soucek’s body-camera video as a violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution before addressing whether the video was admissible under the Ohio Rules of Evidence was reasonable. Such an analysis is consistent with our approach to these types of challenges: “Because certain testimonial statements are barred by the Confrontation Clause of the Sixth Amendment to the United States Constitution irrespective of their admissibility under the Rules of Evidence, we undertake the constitutional inquiry first.” *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 136; *see State v. Wilcox*, 2024-Ohio-5719, — N.E.3d —, ¶ 17, fn. 1 (lead opinion). We have applied this same analytical approach to combined evidentiary and Confrontation Clause arguments in other cases. *See, e.g., State v. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, 140 N.E.3d 616, ¶ 212-215;  *State v. Hood*, 135 Ohio St.3d 137, 2012-Ohio-6208, 984 N.E.2d 1057, ¶ 31-39.

## DOMESTIC VIOLENCE NJO DECEMBER 9, 2025

When I ran for judge in 2001 – there were 11 people that ran for the position. One of the candidates made a statement that the job of Municipal Court Judge was a job that could be done by his 8-year-old son.

Others that were running were running because they had been in public employment all their lives and the way the public employment retirement system is set up your retirement is based on the highest 3 or so years of salary and so it would be in their economic best interests to be elected for that purpose.

The sitting judge at the time told some of the candidates that the job of Municipal Court Judge was an easy job.

Needless to say those statements and reasons for running for such an important position are inappropriate and inaccurate.

You will find that Domestic Violence cases can be:

1. Complicated
2. Stressful
3. Sometimes rewarding
4. Sometimes gut wrenching
5. Sometimes frustrating

But never easy.

It is by far the most difficult part in our job description as Municipal Court Judge.

The time allotted that we have together to talk about this complex subject is nowhere near the amount of time needed to train you for the task of handling these cases. I encourage you to become a student of the law in this area. Read the green book cases as they come out and when in doubt, ask questions and seek the advice and opinion of other judges – you can contact me at any time – on my cell phone – 440-787-5989.

I have been an attorney almost 45 years and a judge for the past almost 24 years. Today I am going to share with you some of my experience and knowledge which will hopefully give insight and awareness of some of the issues you may expect to encounter with Domestic Violence cases by looking at the DV case from the perspective of various participants in the case.

In order to do your job effectively it is important to understand the participants in the case.

### **The Domestic Violence Defendant**

#### **The first-time offender rightly accused**

Could be [usually] younger person –either no involvement w/ criminal justice system or may have other non-violent offenses (e.g. OVI, Disorderly Conduct –not reduced from DV). This person is usually looking to have her/his case reduced. No one wants to have a DV on her/his record. Attorney will argue

isolated incident, needs some type of treatment, and/or parties are having marital difficulties and want to get back together. Victim many times just wants the person to get help or be better, etc.

Be aware that the attorneys will come up with plea bargains to avoid the DV conviction. They include:

1. Diversion and dismissal [we don't offer that – my experience is that DV is such a serious matter that diversion is rarely appropriate and so we do not offer diversion].
2. Reduction of the offense to another offense:
  - (a) Most common in my experience is the dreaded DCP 2917.11(E) – Takes away the stigma of a DV and can be sealed. You have to decide if you want to go along with DCP plea. Do the facts really support the charge? Is it a fiction? Is it in the best interests of the victim and/or the defendant? DCP also is not a predicate offense for enhancement of future charge of DV.
  - (b) The prosecutor [or you] may not want an offense that is not a predicate offense. A compromise might be a predicate offense that is not a DV is 2919.25(D)(3) sets forth the predicate offenses – including any offense of violence.
  - (c) The defense may go along with this as long as the offense is not an M-1 because M-1 offense of violence cannot be sealed but other degrees [M-2, M-3, M-4] can be sealed even if offense of violence. But note that an M-1 Assault can be sealed.

Whether you go along with a reduction or DV plea **always** have the case finished **on the record** and include:

- Victim participation or if not a representation by the prosecutor that the victim has been notified of the proceedings and the State wishes to go forward without the presence of the victim.
- Have a discussion with the defendant about serious nature of DV. Include the right of every person to have a safe place to live and to be treated with dignity and respect. It is never acceptable to touch another person, especially a family member other than gently with love and kindness. Not acceptable. The person would protect their home from an intruder. Sometimes we become the intruder in our own home because of a vice or other personal issue we are experiencing. Home is supposed to be a safe place, board game analogy.

### **The first-time alleged offender wrongly accused**

Yes, there are people wrongfully accused and misidentified as the offender especially in domestic violence cases. The police have the difficult task of identifying the “primary aggressor” in the field. This is not always an easy task. Some police officers are better than others at making this call in the field. My experience is that the police most times get it right but when they get it wrong it can be devastating.

In the materials is a case that you should read – State v Denise Collins. This was a bench trial in our court. It will be disturbing to you. Do not be naïve. Most police officers perform their duties in good faith, but they are human and make mistakes and sometimes can be influenced by bias, lack of training, or other factors. Do not assume that the police always get it right. It is not our job to rubber stamp the police.

We are the third branch of government that provides a check and balance on the executive branch. No one likes to disagree with a police officer but sometimes it is our duty.

Some things to watch for:

- The scratch rule
- The disparity in size
- The supposed impaired offender
- Is there a history
- Did both parties have an opportunity to make a written statement
- Who called the police [beware of the first horse to the trough gets the water]

### **The drug abuser**

You will find circumstances where the police are called to an incident where [usually a 20-30 year old drug abuser] is having a dispute with the family about her/his drug use. The family member approaches them and a physical confrontation ensues, usually just a push or other brief and otherwise uneventful physical encounter. The family calls the police because they want the drug abuser to get help and stop using drugs. The police many times will use this opportunity to arrest the drug user. The DV case is probably not going anywhere and many times the family does not even want the person arrested. These will be cases that could result in a dismissal.

Be aware of Criminal Rule 48 – Rules for Dismissal.

### **The first-time repeat offender**

This could be the person who had the dreaded DCP the first time around the block or they could have been convicted of some other reduced crime or it could be a straight 2<sup>nd</sup> offense.

What to look for:

- Sometimes the facts of the case are not strong but because the person has a history the police will automatically arrest and charge based not on the facts of the case but the history. This could be a difficult case.
- It may be a case where there is a history not only of the prior conviction but unreported or uncharged incidents.
- If a person is appearing for a 2<sup>nd</sup> time, there is likely some underlying reason.
- You may not want to accept a plea bargain that includes an agreed sentence. Consider a PSI if there is a plea or conviction. You need to be comfortable with the consequence, especially when a repeat offender is involved.

### **The recalcitrant offender- usually Felony**

In a way this will be the easiest [if that word can be used for a DV case] case. The person has a history with one of more serious DV crimes and the facts [should] support probable cause to provide an appropriate bond with conditions.

What options for conditions:

- Protection Order

- [High] bond
- GPS monitoring
- Other conditions
- TPO Compare to NO CONTACT ORDER – NOT THE SAME – REPEAT – NO CONTACT ORDER IS NOT THE SAME AS A TPO!

Protection Orders are put into the Crime Computer System and a violation of Protection Order is a separate crime – No Contact Orders do not have this force and effect

NEW LAW EFFECTIVE APRIL 15, 2021, REGARDING POST CONVICTION NO CONTACT ORDERS – NOW A FORM IN SUPERINTENDENCE RULES JUST LIKE PRECONVICTION TPO

GPS [R.C. 2937.011]

Horror story: Defendant smarter than the technology

OTHER CONDITIONS [R.C. 2937.011]

**The dangerous or allegedly dangerous offender – sometimes no record**

This could be a first-time offender. You should know when you have this case. The prosecutor and/or police will [should] in no uncertain terms let you know or you will know from the circumstances (e.g. serious injuries, bizarre threats or behavior etc.)

Same options or conditions as above.

**The dreaded double charge DV [both parties charged-UGH]**

Years ago in our court this used to be commonplace. The police would arrive at a DV scene, notice injuries on both parties or no injuries on either party or both parties smelled of alcohol and lock them both up, charge them both with DV and let it play out in court.

What problems does this create?

- Prosecutor will not speak to either “victim” because they have the right to remain silent and therefore have no evidence to prosecute the case
- Both parties, after retaining counsel, claim the 5<sup>th</sup> amendment. No evidence to prosecute the case
- The victim advocate is reluctant to get involved because both claim to be a victim

**The Domestic Violence Victim**

Victim Rights

Marsy’s law

Statutory Law

Be aware of:

1. Marsy’s law and statutory law implementing Marsy’s law

## 2. The Reluctant Victim

Don't take the attitude that if the victim does not want to pursue the charge that the case should be dismissed or reduced. It can be a factor but make sure it is not because the victim is being pressured into the decision. The victim is a victim for a reason. **Domestic violence victim** means any person who has been victimized by an imbalance of power in an intimate relationship where power and control have been used to force and/or coerce a partner through the use of emotional, psychological, economic, physical and/or sexual abuse, or through stalking, to do something they do not wish to do or to stop them from doing something they wish to do.

Do not participate in re-victimizing the victim or taking the path of least resistance scapegoating the victim.

## 3. The Vindictive Victim

There is a divorce pending with or without a child custody issue [UGH] Many times the vindictive victim is the squeaky wheel that gets the oil when the reluctant victim needs the most oil but is afraid to squeak.

The trick is in every case trying to know which category the victim is in. This is not easy. You will find it very frustrating. Do not fall into the trap of assuming the alleged victim is in one category or the other. You will not get it right every time. Just do the best you can. But always do the best you can.

## 4. ALWAYS INCLUDE THE VICTIM

## 5. ALWAYS INCLUDE THE VICTIM

Yes 4 and 5 are the same. It's like Mom's refrigerator sign. Rule number 1 – Mom is always right Rule number 2 – See Rule number 1.

How?

Although it is mainly the police and the prosecutor's duty, you will be blamed if the victim is not notified. I promise you. You will be blamed. You will find that everyone [police, court staff, attorneys etc.] wants to place all the heavy burdens on you: "The judge said". They justify it in their minds for two reasons: You have judicial immunity, and you get paid "the big bucks". Don't be naïve. This is happening. You are not imagining

And so, this is the standard question EVERY TIME THERE IS A HEARING IN OPEN COURT: "Prosecutor, has the victim been notified? Will the victim be appearing? If not, do you wish to go forward without the presence of the victim?"

And so, this is the standard language in EVERY entry when there is a victim: "The prosecutor shall provide victim notification pursuant to law".

Will this work every time? No. Just do the best you can. But always do the best you can. If you think there is a problem, then there is a problem. Use your gut. Don't sign a dismissal or a reduction or any other substantive entry without assuring yourself that there has been victim notification or an opportunity for participation.

### **The defense attorney**

Some attorneys think it is their number one priority that their client be found not guilty. [I have had attorneys blatantly lie to me on the bench] Some attorneys think it their number one duty to protect their client's rights. Some attorneys think the process is about the attorneys and judges [Judge, you have to reduce this – I have to be able to show my client that I am doing something for her/him] [Judge, this is the reason we elected you].

What ever happened to: "There is a fundamental tension in the profession. It is zealously protecting your client while acknowledging your duty to the judicial system. The ability to tolerate and balance this tension differentiates the average lawyer from the exceptional lawyer. An exceptional lawyer has the fortitude and self-confidence to convince a client not to misuse the system." William Raleigh

Thomas More Utopia:

"They have very few laws, because, with their social system, very few laws are required. Indeed, one of their great complaints against other countries is that, although they've already got books and books of laws and interpretations of laws, they never seem to have enough. For, according to the Utopians, it's quite unjust for anyone to be bound by a legal code which is too long for an ordinary person to read right through, or too difficult to understand.

What's more, they have no barristers to be over-ingenious about individual cases and points of law. They think it better for each person to plead her/his own cause, and tell the judge the same story as she'd/he'd otherwise tell the lawyer. Under such conditions, the point at issue is less likely to be obscured, and it's easier to get at the truth – for, if nobody's telling the sort of lies that one learns from lawyers, the judge can apply her/his shrewdness to weighing the facts of the case, and protecting simple-minded characters against the unscrupulous attacks of clever ones."

### **The Domestic Violence police officer**

Probably the toughest job. They have to make either split second decisions, or at least decisions without reflection. Many times sets the tone for the entire case.

- The charge now and ask questions later
- The "scratch rule"
- Bias to one gender or the other
- The officer that uses good discretion to consult the prosecutor before charging
- The "drop them off at the door" aka "let the judge worry about it"

Don't be naïve – officers have good and bad days just like we do. They don't like DV cases more than we don't like DV cases. They are even in some respects more complicated for the police officer.

### **The Domestic Violence prosecutor**

Also a tough job. Must decide when to prosecute a case. Must weigh and balance wants, needs and desires of victim and sometimes the police versus safety of victim and justice in the case.

It is tempting for the prosecutor to take the path of least resistance, the plea bargain at all costs – usually ending up in the dreaded DCP.

Code of Professional Responsibility Section RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR The prosecutor in a criminal case shall not do any of the following: (a) pursue or prosecute a charge that the prosecutor knows is not supported by probable cause; Comment: [1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded justice and that guilt is decided upon the basis of sufficient evidence. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4. A prosecutor also is subject to other applicable rules such as Rules 3.6, 4.2, 4.3, 5.1, and 5.3.

Be wary of a part-time prosecutor who has two masters. I have had prosecutors tell me that their primary allegiance is not to the public but to their private interests and that their private law firm has instructed them to spend as little time as possible on the public cases because the public cases do not make the firm any [additional] money.

### **The Domestic Violence judge- What should the judge do?**

More's Utopia – not going to happen

Stakes are high

- No one wants a DV on their record
- DV M-1 cannot be sealed
- Misdemeanors less than M-1 can be sealed 2953 and 2901.01(a)(9)
- The [true] victim needs to be protected
- The DV case becomes a high-profile public interest case when something goes wrong. It is a hot potato. It is the largest bomb in the minefield of cases that could cost you your job or worse yet someone's life

Follow these rules:

- Put everything on the record – Do not let anyone say that you said something in chambers or had an ex parte conversation
- Hold everyone accountable for their role, including and especially yourself

The police and prosecutor are supposed to provide you with information. Call time out and make them do this. Some will do it because they understand their role. [If you have police officers or prosecutors who do this without you asking – cherish them and be thankful for them] For those that are not that ambitious or worse yet always look to do as little as possible to get

by [I can get that information if the court needs it – UGH- no counselor the court does not need it the law demands it – CR 46] Can you make good decisions without information? I can't.

- Use all available tools to provide for the safety and protection of all involved and to safeguard the rights of the accused
- Be kind and patient [these cases will test the very fabric of your being since the stakes are so high – the higher the stakes the more temptation by the participants to not be forthcoming with the truth – OVI cases also] Be wary of this

Other General Rules:

“To us this may be just another day at the office. For the participants it is perhaps the single most important event in their life. Endeavor to treat every case with the utmost care and attention whether a simple traffic violation or a serious allegation of wrongdoing, whether a small claim or a claim for the maximum monetary jurisdiction of this Court.”

Thomas A. Januzzi, Judge Oberlin  
Municipal Court

“This is not any angry Place. We are not angry with you and you should not be angry with us.



Thomas A. Januzzi, Judge Oberlin  
Municipal Court

Please treat the staff with respect. They are just nice people doing their job.”

Thomas A. Januzzi, Judge Oberlin  
Municipal Court

“If there are pieces of your past that are weighing you down, it's time to leave them behind. You are not what has happened to you. You are someone unimaginably greater than you have ever considered, and maybe it's time to consider all the possibilities that are within you.”

Matthew Kelley

“There is no right way to do something wrong”

Anonymous

“What is right is not always easy and what is easy is hardly ever right, but the right choice today will improve your life tomorrow. Take control of your life. Choose wisely.

Michael Josephson

“It is not our abilities that show what we truly are. It is our choices.”

Albus Dumbledore

# Civil Law and Procedure

**Hon. Courtney A. Worley**  
*Brown County Municipal Court*





## CIVIL LAW AND PROCEDURE

Judge Courtney A. Worley  
Brown County Municipal Court  
New Judges Orientation - December 9, 2025

THE SUPREME COURT of OHIO

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### How do we exist?

- The Ohio Constitution gives the General Assembly the authority to create additional courts.
- In exercise of that authority, Municipal Courts are created through the enactment of Chapter 1901 of the Ohio Revised Code.

THE SUPREME COURT of OHIO

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### JURISDICTION

- Jurisdiction is the power to hear and determine a controversy and complete when both parties are properly before the Court. *State ex Rel Baker v. Toledo State Hosp.*, 88 Ohio App. 345, (6<sup>th</sup>. Dist. 1951).
- The jurisdiction of a Municipal Court is determined by statute, not consent of the parties. The issue of a party's consent to the jurisdiction of a municipal court is unnecessary and irrelevant. *State v. Matthews*, 2<sup>nd</sup>. Dist. Greene, No. 2015-CA-73, 2016-Ohio-5055.

THE SUPREME COURT of OHIO

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## THREE TYPES OF JURISDICTION

1. Subject matter jurisdiction
2. Territorial jurisdiction
3. Personal jurisdiction

THE SUPREME COURT of OHIO

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## SUBJECT MATTER JURISDICTION



- R.C. 1901.17:
  - Civil cases in which the amount claimed does not exceed **\$15,000**
  - Exceptions:
    - Any cases brought in **housing or environmental** divisions of municipal court.
    - If amount in **excess** of \$15,000 consists of **interest, damages for the detention of personal property or cost accrued after case was filed.**
- R.C. 1925.02: **Small claims** jurisdictional limit is **\$6,000**

THE SUPREME COURT of OHIO

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## AMOUNT ALLEGED IN COMPLAINT

- The jurisdictional amount of Plaintiff's claim under R.C. 1901.17 is based on the **amount alleged in the complaint**, not the evidence at trial. *Miami Valley Constr. Grp., LLC, v. Thompson*, 12th. Dist. 2021-Ohio-4358.
- If initial pleadings seek relief beyond statutory limit, **dismissal** is required. *Miami Valley Constr. Group v. Thompson*, 12<sup>th</sup>. Dist. 2021-Ohio-4358, quoting *State ex. Rel. Natl. Emp. Benefit Servs. v. Court of Common Pleas of Cuyahoga County*, 49 Ohio St.3d 49 (1990).

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EXCEPTION TO DISMISSAL RULE

- **Replevin** R.C. 1901.22(C) and 1907.06(B).
  - In any action for the recovery of personal property, the appraised value of which exceeds the jurisdictional amount, the judge, upon the return of the appraisal prior to judgment, **shall certify the proceedings in the case to the court of common pleas.**

THE SUPREME COURT of OHIO

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TRANSFER OF COUNTERCLAIM IN EXCESS OF JURISDICTIONAL AMOUNT

- R.C. 1925.10 if a counterclaim **exceeds** the **small claims** monetary jurisdiction, the trial court is **required to transfer** the case to the court's **regular civil docket.**
- Civil Rule 13(J) provides for the **transfer of a counterclaim in excess** of the monetary jurisdiction to the **common pleas court.** The transfer is self self-executing and does not require a motion by the party filing the counterclaim. *Mustafa v. Al-Bayer*, 12<sup>th</sup>. Dist., 2020-Ohio-1315.
- **Once transferred** to common pleas court, there is **no authority** for the common pleas court to **transfer the case back to the municipal court** if the counterclaim is dismissed. *Yousef v. Yousef*, 8<sup>th</sup>. Dist., 2019-Ohio-3656. *See also, Liberty Retirement Community of Middleton v. Hurston*, 12<sup>th</sup>. Dist., 2013-Ohio-4979. *Hall v. Silver*, 9<sup>th</sup>. Dist., 2020-Ohio-2810.

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R.C. 1901.18 - SPECIFIC TYPES OF CIVIL CASES

- General to all municipal courts
  - civil actions concurrent with county courts
  - recovery of money or personal property
  - breach of contract
  - sale of personal property
  - enforcement of collection of judgment
  - Interpleader
  - Replevin
  - forcible entry and detainer
  - issuance or enforcement of temporary protective orders
  - Breach of rental agreement for manufactured home park enforcement of local building, housing, air pollution, sanitation, health, fire, zoning or safety code, ordinance or regulation or abatement of nuisance.

THE SUPREME COURT of OHIO

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### TERRITORIAL JURISDICTION

- Territorial means the geographical areas within which a municipal court has jurisdiction. R.C. Sec. 1901.03 (A).
- Because municipal courts are statutory courts of limited jurisdiction, the court's **territorial jurisdiction cannot be waived** by the parties. A municipal court may take judicial notice of the limits of its jurisdiction and the extent of the territory included therein. *State v. Scott*, 3 Ohio App. 2d. 239 (11th. 1965).
- A **forum selection clause, by itself, is not sufficient** to vest a municipal court with subject matter jurisdiction when there is no other territorial connection with that court.
- Note: *State v. Dulaney*, 3rd. Dist. Paulding No. 11-12-04, 2013-Ohio-3985. County court is limited to a **search warrant** within its territorial jurisdiction.

THE SUPREME COURT of OHIO

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### PERSONAL JURISDICTION

- Unlike subject matter and territorial jurisdiction, personal jurisdiction is not set out by any specific statute. Personal jurisdiction involves **service of the summons and complaint upon a defendant**. It is based upon the right of due process.
- Personal jurisdiction **may be waived**. Defendant is required to raise any defect in the complaint on its service by pretrial motion. Civ. R. 12(B). Failure to timely do so constitutes a waiver of any such defects.
- **Distinguish:**
  - Personal jurisdiction **waived if** not timely raised in an answer or by responsive motion.
  - Personal jurisdiction **not waived if** an answer or responsive motion was not filed, such as with default judgment.
  - Thus, if there was **no appearance**, personal jurisdiction is **not waived**.

THE SUPREME COURT of OHIO

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### THREE METHODS FOR A COURT TO ACQUIRE PERSONAL JURISDICTION OVER DEFENDANT

1. Proper service of process;
2. The defendant's voluntary appearance and submission to the court's jurisdiction; and
3. Acts by the defendant or the defendant's counsel that involuntarily subject the defendant to the court's jurisdiction.

*Columbus, Div. of Income Tax v. Yockey*, 10<sup>th</sup>. Dist., 2020-Ohio-3290.

THE SUPREME COURT of OHIO

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### LONG ARM STATUTE AND MINIMUM CONTACTS

- *Door On-Line v. Chandra*, 3d. Dist., 2023-Ohio-2018. When deciding whether an **out-of-state defendant is subject to personal jurisdiction** in an Ohio court, a **two-part inquiry** is applied.
  1. The court must first determine whether the defendant's conduct falls within Ohio's long-arm statute or the applicable civil rule.
  2. If it does, the court must then consider whether the assertion of jurisdiction over the nonresident defendant would deprive the defendant of due process of law under the Fourteenth Amendment to the United States Constitution.
- Once a **defendant moves to dismiss** a complaint for lack of personal jurisdiction under Civil Rule 12(B)(2), the **burden shifts to the plaintiff** to establish jurisdiction over the nonresident defendant.

THE SUPREME COURT of OHIO

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### LONG ARM STATUTE AND MINIMUM CONTACTS, CONTINUED



- Although an out of state defendant may submit to the Ohio court's jurisdiction by **"transacting any business in this state"** under R.C. 2307.382, the determination is based on the facts of each case. "Transacting" is broader than creating a contract between the parties. Other factors include which party initiated the contact. Transacting business within the State of Ohio may also include internet contracts.

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### THREE REQUIREMENTS TO ESTABLISH JURISDICTION OVER AN OUT-OF-STATE RESIDENT

1. The defendant must **purposely avail** himself of the privilege of **acting** in the forum state or **causing a consequence** in the forum state;
2. The claim must **arise** from the defendant's **activities** there; and
3. The acts of the defendant or consequence caused by the defendant must have a **substantial enough connection** with the forum state to make the **exercise of jurisdiction** over the defendant **reasonable**.

The **first two requirements** establish a defendant's **'minimum contacts'** with the forum.

The **last requires** the court to determine if exercise of jurisdiction over the defendant comports with the ideas of **fair play and substantial justice**. *State ex rel. DeWine v. 9150 Group, L.P.*, 9th Dist., 2012-Ohio-3339.

THE SUPREME COURT of OHIO

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### VENUE – CIVIL RULE 3(B)

- *Nicholson v. Landis*, 27 Ohio App.3d 107, (10<sup>th</sup>. Dist. 1985). Issue of venue **waived if not timely raised** by motion to dismiss or responsive pleading Civ. R. 12(H).
- *Morrison v. Steiner*, 32 Ohio St.2d. 86 (1972). Subject-matter jurisdiction of a court connotes the power to hear and decide a case upon its merits and defines the competency of a court to render a valid judgment in a particular action. Venue connotes the locality where the case should be heard. *See also, Pallat & Sons Insurance Agency v. Smith*, 8<sup>th</sup>. Dist. Cuyahoga No. 34406, (December 18, 1975). Venue merely defines where the action may be brought while jurisdiction determines whether the action may be heard at all.
- *Fuller v. Fuller*, 32 Ohio App.2d. 303, (10<sup>th</sup>. Dist.1972). The transfer of a case, not dismissal, is remedy for improper venue.

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### LIMITATIONS IN COLLECTION CASES

- Federal Law
  - Fair Debt Collection Practices Act, 15 U.S.C. 1692, imposes a special venue restriction for credit cards and other consumer collection actions.
  - **Sec. 811. Legal actions by debt collectors**
    - A. Any **debt collector** who brings any legal action on a debt against any consumer **shall**
      1. in the case of an action to enforce an **interest in real property** securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or
      2. in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity
        - a. in which such consumer signed the contract sued upon; or
        - b. in which such consumer resides at the commencement of the action.
    - B. Nothing in this title shall be construed to authorize the bringing of legal actions by debt collectors.

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### CREDITOR



**Creditor means** any person who offers or extends credit creating a debt or to whom a debt is owed.

- *Capital One Bank v. Reese*, 11<sup>th</sup>. Dist., 2015-Ohio-4023. Originator of loan is **not** a debt collector.
- *Capital One Bank v. Rhoades*, 8<sup>th</sup>. Dist., 2010-Ohio-5127. As **original creditor** that issued credit card to the defendant, the bank was **not a debt collector** as defined by the Fair Debt Collections Practices Act, 15 U.S.C. Sec. 1692, and therefore, could not be in violation of the Fair Debt Collections Practices Act.

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### DEBT COLLECTOR



**Debt Collector** means any person whose **principal business** is the **collection** of debts on behalf of a third party.  
– *CACH v. Alderman*, 10<sup>th</sup>. Dist., 2017-Ohio-5597. **R.C. 1319.12 applies to a collection agency.** A collection agency is an entity that seeks to recover debts on behalf of other agencies. An entity that purchases the debt is collecting its own debt and is not a collection agency, even if it was not the original creditor.

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### LIMITATIONS IN COLLECTION CASES CONTINUED

- R.C. 1319.12. effective 1/1/2007. Restrictions on collection of assignment of debt by collection agency.
  - **R.C. 1319.12(C).** Imposes **provisions for assignment** of debt for collection.
  - **R.C. 1319.12(D).** Limits collection to a court of competent jurisdiction where the **debtor resides**, or if co-debtors, the **county in which at least one debtor resides**.

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### FAIR DEBT COLLECTION PRACTICES ACT 15 U.S.C. 1692 et. seq.

- Congress passed the FDCPA to address the widespread and serious national problem of debt collection abuse by unscrupulous debt collectors. The Act prohibits a wide array of specific conduct, but it also prohibits, in general terms, any harassing, unfair, or deceptive debt collection practice, which enables "the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed."
- **Jurisdiction:** An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction. 15 U.S.C. §1692k.

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FAIR DEBT COLLECTION PRACTICES ACT  
15 U.S.C. 1692 et. seq., CONTINUED

- **Statute of limitation:** Within one (1) year from the date on which the violation occurs. 15 U.S.C. §1692k(d).
- The **elements** to establish a prima facie case for **violation of the Fair Debt Collection Practices Act** are:
  1. The **plaintiff** is a natural person who is **harmed** by violations of the FDCPA, or is a **"consumer"** within the meaning of 15 U.S.C.A. §§ 1692a(3), 1692(d) for purposes of a cause of action, 15 U.S.C.A. § 1692c or 15 U.S.C.A. § 1692e(11);
  2. The **"debt" arises** out of a transaction entered **primarily for personal, family, or household purposes**, 15 U.S.C.A. § 1692a(5);
  3. The **defendant collecting the debt is a "debt collector"** within the meaning of 15 U.S.C.A. § 1692a(6); and
  4. The **defendant has violated**, by act or omission, a provision of the FDCPA, 15 U.S.C.A § 1692a—1692o; 15 U.S.C.A § 1692a; 15 U.S.C.A § 1692k.
- "The absence of any one of the four essential elements is **fatal** to a FDCPA lawsuit." *Whittiker v. Deutsche Bank Natl. Trust Co.*, 605 F. Supp. 2d 914 (N.D.Ohio 2009).

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"DEBT COLLECTOR" FOR PURPOSES OF  
FAIR DEBT COLLECTION PRACTICES ACT

- **Includes:**
  1. Debt buyers if the debt was in default at the time the debt was purchased.
  2. Collection agencies.
  3. Attorneys or law firms who regularly attempt to collect debts.
  4. Collection agencies.
- **Does NOT include:**
  1. Original creditor.
  2. Debt buyers if the debt was not in default at the time the debt was purchased.
  3. Government officials if they are collecting a debt as part of their official duty.
  4. Repossession agencies or other organizations whose primary purpose is the enforcement of a security interest.
  5. Mortgage or other debt servicers.

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JUDICIAL POWER AND AUTHORITY



- Judicial power is the authority to decide and pronounce judgment in cases and carry that judgment into effect in controversies between two or more parties who by right bring the case before the court for decision. *State v. Wilson*, 102 Ohio App. 3d 467, (2d. Dist. 1995).
- Power and authority are set out in R.C. Sections 1901.13 and 1901.19.
- R.C. 1901.131 sets out additional powers for a judge of the housing or environmental division of a municipal court.

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### ARE WE A COURT OF EQUITY?

- While municipal courts **generally are not courts of equity**, municipal courts have limited equitable power. R. C. 1901.18 (A) (3); 1901.19(A) (3). See also, *Colquett v. Byrd*, 59 Ohio Misc. 45 (Mun. Ct. 1979).
- As a general rule, municipal courts **do not have subject matter jurisdiction** to hear and decide equitable claims. *Williamsburg Assn. v. White*, 6<sup>th</sup> Dist. Wood No. WD-97-046; (1998), *Averiette v. Cook*, 9<sup>th</sup> Dist. Summit No. 18172 (1997).
- Rather, any such **equitable power is only incidental to the case**. *Johnson v. Middleton*, 66 Ohio App. 3d 783, 786, (3d. Dist. 1989).
- **CUYAHOGA COUNTY ONLY:** Municipal courts in Cuyahoga County have a specific grant of ancillary equitable authority once the court's subject matter jurisdiction is invoked. R. C. Sec. 1901.13 (B). By comparison, a housing or environmental division of a municipal court has equitable jurisdiction. This statutory authorization permits a housing or environment court to issue temporary restraining orders and permanent injunctions. R.C. 1901.131.

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### ASSIGNED/ACTING JUDGE

- **R.C. 1901.121** provides the presiding judge with the authority to appoint an acting judge or apply to the Supreme Court of Ohio for an assignment of a retired judge or a judge of another court when there is no other judge available to perform the duties of the judge for that Court.
- **R.C. 1907.141** provides the authority to appoint or apply for assignment for **county courts**.
- *Lakewood v. Suleymanov*, 2010-Ohio-5963. A **magistrate** of the court **may serve as an acting judge** of the same court if the magistrate:
  1. Meets all the statutory requirements to be an acting judge, and
  2. Takes an unpaid leave of absence as magistrate while serving as an acting judge.
- When a magistrate is appointed as an acting judge, the **requirements of Criminal Rule 19(C)(1)(h) requiring unanimous consent** of the parties either in writing or in open court **does not apply**.

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### AUTHORITY OF ACTING JUDGE R.C. 1901.121(E) AND R.C. 1907.141(D)

- An acting judge has all of the adjudicatory powers conferred upon the judge of that court.
- Effective 3/23/2023:
  - an acting judge may be a **resident** of the municipal court **territorial jurisdiction**;
  - OR
  - territorial jurisdiction of **contiguous municipal court**.

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**Affirmative duty** to inquire into potential conflicts of interest when the trial court knows or has reason to know of a possible conflict.

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**JURISDICTIONAL POWERS**  
R.C. 1901.19



1. Compel attendance of witnesses
2. Execute and enforce collection of its own judgments
3. Issue and enforce orders of attachment and garnishment.
4. Take other specified actions to enforce its own judgments.

**Note:** By statute, these jurisdictional powers are not limited by territorial jurisdiction.

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**DECLARATORY JUDGMENT R.C. CHAPTER 2721**

- R.C. 2721.02
  - “Courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for under this chapter. The declaration may be either affirmative or negative in form and effect. The declaration has the effect of a final judgment or decree.”
- Municipal and county courts, however, are courts of limited, not general civil jurisdiction.
  - Municipal and county courts may hear and determine a claim for **declaratory judgment** if the court otherwise has **subject matter jurisdiction**.
  - A municipal or county court **may be required** to determine the **validity of an ordinance or statute** when raised in a **motion to suppress** or **as a defense to a criminal charge**.

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**NO JURISDICTION**

- Quiet Title Actions
- Civil Rights Violation Claims
- Post Conviction Relief under R.C. 2953.21

THE SUPREME COURT of OHIO

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**ACTIONS AGAINST MUNICIPALITIES AND OTHER GOVERNMENTAL ENTITIES**

Actions brought under R.C. Chapter 2744:

- Municipal and county courts are limited to our **monetary jurisdictional limit.**



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**LIMITED APPELLATE JURISDICTION OF ADMINISTRATIVE ISSUES – DOG DESIGNATION**

- Municipal and county courts have the authority to review an administrative decision concerning the designation of the dog as a nuisance dog, dangerous dog, or vicious dog.
  - R.C. 955.222(A), R.C. 1901.18(A)(13), & R.C. 1907.031 (A)(7).
- At the hearing the person who designated the dog as a nuisance dog, dangerous dog, or vicious dog has the burden of proving, by **clear and convincing evidence**, that the dog is a nuisance dog, dangerous dog, or vicious dog. R.C. 955.222(C).
  - The statute is **not clear if additional evidence may be presented** to the court for review **or if the court is limited as an appellate court to the record in the administrative hearing.** It would appear, however that because R.C. 955.222(C) imposes the burden of proof on the person who designated the dog to prove by clear and convincing evidence that the dog is a nuisance dog, dangerous dog, or vicious dog, **additional evidence could be presented.**

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### TRAFFIC CAMERA DISPUTES



- *City of Dayton v. Siff*, 2023-Ohio-4685 (2d. Dist.).
  - This case arose out of a photo enforcement notice of liability to the defendant as the registered owner of a vehicle that was speeding. The notice set out a fine and a thirty-day time period to dispute the citation. The dispute provisions included the actual speed or to identify someone else who was driving the defendant's vehicle, which the defendant declined to do. The court found the dispute hearing provisions under R.C. 4511.099 was a special statutory proceeding and therefore, the methods of service, notice, and the time limits in the Civil Rules were clearly inapplicable. Civ. R. 1(C)(8).
- **Note:** This case provides an excellent explanation of the statutory history and procedures when a traffic camera violation is disputed.

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### CRIMINAL JURISDICTION



- Misdemeanor offenses that occur within its territorial jurisdiction.
- Municipal court has the discretion to transfer the misdemeanor charges with a related felony charge or retain jurisdiction of the misdemeanor charges.
- Exclusive jurisdiction over noncriminal traffic law adjudications and a municipality has no jurisdiction to conduct quasi-judicial proceedings for traffic violations.
  - *State ex. Rel. Magsig v. City of Toledo*, 2020-Ohio-3416. and R.C. 1901.20

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### SEARCH WARRANTS



- Can only be signed by a judge.
- Magistrates cannot sign search warrants under Ohio law.

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### JURY TRIAL

- Right to a jury trial when the penalty involves either a possible jail sentence or a fine more than \$1,000.  
–R.C. 2945.17

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### SENTENCING ISSUES

- *State v. Harris*, 132 Ohio St.3d 318, 2012-Ohio-1908. **Omission of mandatory license suspension** was grounds for **reversal**.
- *State v. Hall*, 8<sup>th</sup>. Dist. Cuyahoga, No. 103517, 2016-Ohio-2844. R.C. 2929.24 sets out a **maximum of 180 days, not six (6) months**, of incarceration for a first degree misdemeanor. Imposition of six (6) months in jail on a first degree misdemeanor is **reversible error**.  
–See also, *State v. Hariston*, 8<sup>th</sup>. Dist. Cuyahoga, No. 102606, 2015-Ohio-4500, *State v. Polus*, 6<sup>th</sup>. Dist. Lucas, Nos. L-13-119 & 120, 2014-Ohio-2321, *State v. Phippen*, 4<sup>th</sup>. Dist. No. 12CA3256, 2013-Ohio-2239.

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### SENTENCING ISSUES, CONTINUED

- *State v. Skaggs*, 3<sup>rd</sup>. Dist. Crawford, Nos. 3-21-005 & 006, 2021-Ohio-3639. A **jury verdict is not a judgment**. The **verdict must be journalized** by the trial judge and **entered as the judgment** of the court. In this case, the jury returned guilty verdicts on numerous misdemeanor charges, but **did not enter the conviction in the sentencing order**. The **defendant was sentence** to four, first-degree misdemeanors for a total of twenty-four **(24) months**. Although the case was **dismissed for lack of a final appealable order** due to defects in the judgment entry, the appellate court noted the **sentence exceeded the maximum eighteen (18) month sentence** set out in R.C. 2929.41(B).

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## OVERLAPPING COMMUNITY CONTROL SUPERVISION/PROBATION

R.C. 2951.022

- When a defendant is on community control supervision by **two** separate courts, the defendant **shall be supervised** by the court that imposed the **longest possible sentence of incarceration**.
- Courts may, by **agreement or local rule**, provide for **concurrent** supervision of a defendant.

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## Pro se Litigants



- A party proceeding *pro se* is "**presumed to have knowledge** of the **law** and of correct **legal procedure** and [is] held to the **same standard** as all other litigants." *Harris v. City of Akron*, 9<sup>th</sup> Dist. Summit No. 21197, 2003-Ohio-724. "*Pro se* litigants are **not** to be accorded **greater rights** and must accept the results of their own mistakes." *Id.* Moreover, a magistrate must be an impartial arbitrator and **may not afford a pro se litigant greater leeway** than any other litigant. See *Kilroy v. B. H. Lakeshore Co.*, 111 Ohio App. 3d 357, (8<sup>th</sup> Dist. 1996).

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## SMALL CLAIMS



- Goal is to provide fast and fair adjudication as an alternative to traditional judicial proceedings.
- Designed to be simple, informal, and geared to allowing individuals to resolve uncomplicated disputes quickly and inexpensively.
- *Pro se* activity is assumed and encouraged.
- Small claims are exempt from the requirements of the Civil Rules and Rules of Evidence because it is designed to be a layman's forum.
- R.C. 1925.01(D) - Attorneys are permitted, but not required.

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### SMALL CLAIMS - ROLE OF JUDGE

- Impartial
- Relaxed traditional legal procedures
- Judges and magistrates are afforded more discretion in their use and acceptance of the evidence presented.
- Evid. R. 611(A) provides that the trial court has discretion to control the flow of trial including the questioning of witnesses.
- Evid. R. 614(B) permits the trial court to interrogate witnesses in an impartial manner. . . .
  - A trial court’s questioning of a witness is not deemed partial for purposes of Evid. R. 614(B) merely because the evidence elicited during the interrogation was damaging to one of the parties. *In Re Gray*, 8<sup>th</sup>. Dist. Cuyahoga Nos. 75984 & 75985, (2000).

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### SMALL CLAIMS MONETARY LIMITATIONS

- Limits civil actions to recovery of **taxes and money damages** only **not exceeding \$6,000**. (Note: The jurisdictional limit for small claims cases was increase as of September 28, 2016, from \$3,000 to \$6,000).
  - R.C. 1925.02(A)(1)

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### SMALL CLAIMS - CHARACTERISTICS & OTHER LIMITATIONS

- R.C. 1925.02(A)(2) - Punitive damages not available.
- R.C. 1925.04(A) - No right to jury trial.
- R.C. 1925.04(B) - Trial to be held 15 to 40 days after commencement of action.
- R.C. 1925.05 - Default may be entered against defendant for non-appearance at trial.
- R.C. 1925.09 - No depositions or interrogatories permitted except by leave of court.
- R.C. 1925.12 - Court may dismiss case or enter judgment for defendant if plaintiff does not appear for hearing. Accord, Civ.R. 41(B).
- R.C. 1925.17 - Officer or salaried employee of corporation may present claim or defense without counsel, but may not engage in cross-examination, argument or other acts of advocacy.
- Evid. R. 101(C)(8) - Ohio Rules of Evidence, other than privilege, do not apply.
- Civ.R. 1(C) - Ohio Rules of Civil Procedure, to the extent they are clearly inapplicable to statutory proceedings, do not apply. R.C. 1925.16 also adopts this standard.

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SMALL CLAIMS  
SUBJECT MATTER  
JURISDICTION LIMITS

- No jurisdiction for libel, slander, replevin, malicious prosecution or abuse of process.  
–R.C. 1925.02(A)(2)

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SMALL CLAIMS - ANSWER OR RESPONSIVE PLEADINGS

- The small claims statutes, R.C. Chap. 1925, do **not require an answer** to be filed in response to the plaintiff's complaint.
- *Miller v. McStay*, 9<sup>th</sup>. Dist., 2007-Ohio-369. **Default judgment** affirmed when **defendant failed to appear** at the small claims hearing even though the **defendant filed an answer** to the plaintiff's complaint. Statutory procedures for small claims do not provide for an answer to a complaint.
- *Holmes v. Cobblestone Grove*, 12<sup>th</sup>. Dist., 2017-Ohio-55. Although R.C. 1925.02(C) requires a defendant at least seven days prior to the hearing, the **court has discretion to allow an untimely counterclaim**. In this case the trial court did not abuse its discretion to permit an untimely amended counterclaim when the plaintiff refused a continuance offered by the court.
- *Sheaff v. Conese*, 12<sup>th</sup>. Dist., 2002-Ohio-5607. A **default judgment** was upheld against the **defendant who failed to appear** at the hearing even though the **defendant filed a motion for judgment** on the pleadings. Civil Rules 12(D) and 55 held to be inapplicable to small claims cases in accordance with R.C. Chapter 1925.

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SMALL CLAIMS - CIVIL RULES NOT APPLICABLE

- Even though Civil Rule 8(D) does not apply to small claims cases, under R.C. 1925.04 the complaint must still give notice to the defendant of the nature of the claim and the amount of damages sought.
- The statutory provisions contained in R.C. Chap. 1925 supersedes the civil pleading rules. The time limit for trial is between 15 and 40 days under R. C. 1925.04, and therefore, the twenty-eight-day period to respond to the complaint is not applicable. The procedures under R.C. Chap. 1925 do not require an answer to be filed in response to a complaint.
- Because a defendant is not required to file an answer in a small claims case, Civil Rule 55, regarding default judgments, is not applicable to small claims cases.
- A default in small claims case is failure to appear at trial, not failure to respond to complaint. When defendant does not appear for hearing, the proceeding is an *ex parte* trial, not a default hearing.
- R.C. 1925.05(A), which provides that if a defendant does not appear for trial, a judgment *may* be entered against the defendant. (emphasis added). The use of the word "may" in the statute gave the court discretion to decide the case on its merits, instead of by default judgment.

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**SMALL CLAIMS  
CIVIL RULES APPLICABLE**

- R.C. 1925.16 applies the Ohio Rules of Civil Procedure to small claims cases unless inconsistent with small claims proceedings.
- Courts have found the following rules consistent with small claims proceedings:
  - **Civil Rule 41(A)** regarding **notice of dismissal**, applies to small claims cases. *Jeffers v. Bumgardner*, 7<sup>th</sup>, Dist., 2016-Ohio-4655.
  - **Civil Rule 52** regarding **findings of fact and conclusions of law** apply to small claims cases. *Falkiewicz v. Blackburn*, 15<sup>th</sup> Ohio App 3d 562, (2d, Dist. 2003).
  - **Civil Rule 54(C)** regarding **claim for damages**, applies to small claims cases. *Simon v. Durham*, 98 Ohio App.3d 828, (8<sup>th</sup>, Dist. 1994).
  - **Civil Rule 53(E)(3)** requiring **timely objections** of magistrate's report to trial court in order to preserve error on appeal is not clearly inapplicable to small claims proceedings. *Thomas v. Early*, 10<sup>th</sup>, Dist., 2005-Ohio-4551.
  - **Civil Rule 53(D)(2)** requiring the **recording of proceedings** before a magistrate. *All Occasion Limousine v. HMP Events*, 11<sup>th</sup>, Dist., 2004-Ohio-5116.
  - **Civil Rule 56 summary judgment procedure**. *Norwalk MK v. McCormick*, 6<sup>th</sup>, Dist. 2006-Ohio-4640.
  - **Civil Rule 60(B) Motion for relief from judgment**. R.C. 1925.14, which provides that small claims judgments may be vacated in the same manner as other civil actions, effectively incorporates Civil Rule 60(B). *Frampton v. Sekula*, 7<sup>th</sup>, Dist., 2007-Ohio-5039.

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**SMALL CLAIMS  
CIVIL RULE 13(A) – COMPULSORY COUNTERCLAIM**

- *O'Connor v. Moore*, 4<sup>th</sup>, Dist. Adams No. 92-CA-525, (1993). Since compliance with Civil Rule 13(A) governing compulsory counterclaims would be impracticable because there is no required responsive pleading in a small claims case, there can be **no compulsory counterclaims in a small claims case. Permissive counterclaims** pursuant to Civil Rule 13(B) **may be raised** in small claims case.
- But see, *Thiron v. Tutoki*, 94 Ohio Misc. 2d 77 (Mun.Ct. 1998), holding that the amendment to R.C. 1925.05 (Amended effective June 23, 1992), with statutory language in a small claims complaint regarding counterclaims, makes compulsory counterclaims applicable to small claims cases.
  - **Note:** The court in *O'Connor* also cautioned its opinion on a later statutory amendment which mandates the following language in a small claims complaint.
    - *"If you believe you have a claim against the plaintiff, you must file a counterclaim with the court and must serve the plaintiff and all other parties with a copy of the counterclaim at least seven days prior to the date of the trial of the plaintiff's claim."*

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**SMALL CLAIMS - HEARSAY EVIDENCE**

- The rules of evidence do not apply in a small claims case and the judge has the **obligation to determine reliability, credibility, and admissibility** of the evidence.
- *Watkins v. Alwishah*, 7<sup>th</sup>, Dist., 2021-Ohio-3589. The **vehicle inspection report** was admissible to show the defendant was aware and did not disclose defects to the car sold to the plaintiff. Although the court noted the **report was hearsay**, the court noted that **requiring the plaintiff to hire an expert witness to testify about the inspection and condition of the car would run afoul of the goals of small claims** court to have a "layman's" forum with a less formalistic application of the rules of evidence.
- See also, *Lauderbaugh v. Gellasch*, 8<sup>th</sup>, Dist., 2006-Ohio-2877. Rejection by magistrate in small claims case of 1) plaintiff's **statements of other veterinarian** about treatment given by defendant to plaintiff's dog and 2) **letter by veterinarian** of breach of standard of care was **reversible error**.
- *Diliman v. B&B RV Service*, 8<sup>th</sup>, Dist. Cuyahoga No. 76457, (2000). In claim for **defective repair of vehicle**, plaintiff was **not required to present expert testimony**, but could support claim with **written findings of other mechanics** who told her the work was unacceptable along with written invoices and estimates. The court also noted that the procedures for small claims cases are inconsistent with imposing an undue burden on the pro se plaintiff to subpoena an expert witness.

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SMALL CLAIMS - TRANSFER TO  
REGULAR CIVIL DOCKET

R.C. 1925.10

- A. By trial court at any stage of civil action.
- B. By filing of counterclaim or cross-claim in excess of \$6,000.
- C. By motion of defending party
  - 1. Accompanied by affidavit stating:
    - a. existence of good defense to claim,
    - b. grounds for the defense, and
    - c. compliance with any terms set by trial court.
  - 2. In exercise of discretion of trial court.

THE SUPREME COURT of OHIO

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SMALL CLAIMS  
CORPORATE PARTY WITHOUT ATTORNEY

- *Cleveland Bar Assn. v. Pearlman*, 2005-Ohio-4107.
  - The Ohio Supreme Court recognizes an exception, albeit a narrow one, to the general rule that corporations may be represented only by licensed attorneys. R.C. 1925.17 limits what a corporate representative may do. In small claims cases, when no special legal skill is needed, and where proceedings are factual, non adversarial, and expected to move quickly, **attorneys are not necessary**. The Court declines to require corporations to hire attorneys to represent them in small claims courts.
  - The Ohio Supreme Court holds that a layperson who presents a claim or defense and appears in small claims court on behalf of a limited liability company as a company officer does not engage in the unauthorized practice of law, provided that the layperson does not engage in cross-examination, argument, or other acts of advocacy.

THE SUPREME COURT of OHIO

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SMALL CLAIMS CORPORATE PARTY  
WITHOUT ATTORNEY, CONTINUED

- *Blank v. Butler*, 7<sup>th</sup>. Dist., 2007-Ohio-1112. The **proper corporate representative can appear** and **provide** his or her own **testimony** and **present exhibits** to support that testimony. That **representative cannot engage in argument, cross-examination or other acts of advocacy**. Under *Pearlman*, however, the representative clearly can appear on behalf of the corporation in order to avoid dismissal for lack of prosecution and can testify as an agent.
  - See also, *Watkins v. Alwishah*, 7<sup>th</sup>. Dist., 2021-Ohio-3589. R.C. 1923.17 permits an officer or an employee to provide a defense in a small claims action.

THE SUPREME COURT of OHIO

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SERVICE OF SUMMONS AND COMPLAINT  
CIVIL RULE 4.1 – METHODS OF SERVICE

- All methods of service within this state, except service by publication as provided in Civ.R. 4.4(A), are described in this rule. Methods of out-of-state service and for service in a foreign country are described in Civ.R. 4.3 and 4.5. Provisions for waiver of service are described in Civ.R. 4.7.

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SERVICE OF SUMMONS AND COMPLAINT SERVICE BY CLERK

1. Methods of service:

- a) **Service by United States certified or express mail.** Evidenced by return receipt signed by any person accepting delivery, service of any process accepting delivery shall be by United States certified or express mail unless otherwise permitted by these rules. The clerk shall deliver a copy of the process and complaint or other document to be served to the United States Postal Service for mailing at the address set forth in the caption or at the address set forth in written instructions furnished to the clerk as certified or express mail return receipt requested, with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered.
- b) **Service by commercial carrier service.** Unless the serving party furnishes written instructions to the clerk that service be made pursuant to Civ.R. 4.1 (A)(1)(a), the clerk may make service of any process by a commercial carrier service utilizing any form of delivery requiring a signed receipt. The clerk shall deliver a copy of the process and complaint or other document to be served to a commercial carrier service for delivery at the address set forth in the caption or at the address set forth in written instructions furnished to the clerk, with instructions to the carrier to return a signed receipt showing to whom delivered, date of delivery, and address where delivered.

THE SUPREME COURT of OHIO

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SERVICE OF SUMMONS AND COMPLAINT  
SERVICE BY CLERK, CONTINUED

2. **Docket entries; return.** The clerk shall forthwith enter on the appearance docket the fact of delivery to the United States Postal Service for mailing or the fact of delivery to a specified commercial carrier service for delivery, and make a similar entry when the return receipt is received. If the return shows failure of delivery, the clerk shall forthwith notify the attorney of record or, if there is no attorney of record, the party at whose instance process was issued and enter the fact and method of notification on the appearance docket. The clerk shall file the return receipt or returned envelope in the records of the action.

3. **Costs.** All postage and commercial carrier service fees shall be charged to costs. If the parties to be served are numerous and the clerk determines there is insufficient security for costs, the clerk may require the party requesting service to advance an amount estimated by the clerk to be sufficient to pay the costs of delivery.

THE SUPREME COURT of OHIO

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SERVICE OF SUMMONS AND COMPLAINT  
PERSONAL SERVICE

**(B) Personal service.** When the plaintiff files a written request with the clerk for personal service, service of process shall be made by that method.

- 1. Civil process server; general.** When process issued from the Supreme Court, a court of appeals, a court of common pleas, or a county court is to be served personally under this division, the clerk of the court shall deliver the process and sufficient copies of the process and complaint, or other document to be served, to the sheriff of the county in which the party to be served resides or may be found. When process issues from the municipal court, delivery shall be to the bailiff of the court for service on all defendants who reside or may be found within the county or counties in which that court has territorial jurisdiction and to the sheriff of any other county in this state for service upon a defendant who resides in or may be found in that other county. In the alternative, process issuing from any of these courts may be delivered by the clerk to a person designated by court order to serve civil process under division (E) of this rule.

THE SUPREME COURT of OHIO

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SERVICE OF SUMMONS AND COMPLAINT PERSONAL SERVICE, CONT.

**2. Civil process server; procedure**

- The person serving process shall locate the person to be served and shall tender a copy of the process and accompanying documents to the person to be served. When the copy of the process has been served, the person serving process shall endorse that fact on the process and return it to the clerk, who shall make the appropriate entry on the appearance docket.
- When the person serving process is unable to serve a copy of the process within twenty-eight days, the person shall endorse that fact and the reasons therefor on the process and return the process and copies to the clerk who shall make the appropriate entry on the appearance docket. In the event of failure of service, the clerk shall follow the notification procedure set forth in division (A)(2) of this rule. Failure to make service within the twenty-eight-day period and failure to make proof of service do not affect the validity of the service.

THE SUPREME COURT of OHIO

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SERVICE OF SUMMONS AND COMPLAINT - RESIDENCE SERVICE

**(C) Residence service.** When the plaintiff files a written request with the clerk for residence service, service of process shall be made by that method.

- 1. Civil process server; general.** When process is to be served under this division, deliver the process and sufficient copies of the process and complaint, or other document to be served, to the sheriff of the county in which the party to be served resides or may be found. When process issues from the municipal court, delivery shall be to the bailiff of the court for service on all defendants who reside or may be found within the county or counties in which that court has territorial jurisdiction and to the sheriff of any other county in this state for service upon a defendant who resides in or may be found in that county. In the alternative, process may be delivered by the clerk to a person designated by court order to serve civil process under division (E) of this rule.

THE SUPREME COURT of OHIO

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SERVICE OF SUMMONS AND COMPLAINT - RESIDENCE SERVICE, CONT.

**(2) Civil process server; procedure**

- a) The person serving process shall effect service by leaving a copy of the process and the complaint, or other document to be served, at the usual place of residence of the person to be served with some person of suitable age and discretion then residing therein. When the copy of the process has been served, the person serving process shall endorse that fact on the process and return it to the clerk, who shall make the appropriate entry on the appearance docket.
- b) When the person serving process is unable to serve a copy of the process within twenty-eight days, the person shall endorse that fact and the reasons therefor on the process, and return the process and copies to the clerk, who shall make the appropriate entry on the appearance docket. In the event of failure of service, the clerk shall follow the notification procedure set forth in division (A)(2) of this rule. Failure to make service within the twenty-eight-day period and failure to make proof of service do not affect the validity of service.

THE SUPREME COURT of OHIO

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SERVICE OF SUMMONS AND COMPLAINT - CIVIL PROCESS SERVER

**Applicant Requirements.** To qualify as a civil process server for personal or residence service under divisions (B) or (C) of this rule, an applicant shall certify the applicant satisfies each of the following requirements:

- 1. Not less than eighteen years of age;
- 2. Not a party to the proceeding, related to a party to the proceeding, or having a financial interest in the outcome of the proceeding;
- 3. A United States citizen or a legal resident of the United States;
- 4. Hold a valid government-issued identification card, passport, or driver's license;
- 5. Not convicted in the last ten years of any felony, offense of violence, or offense involving dishonesty or false statement, and not currently under community control sanctions, probation, post-release control, or parole;
- 6. Not currently a respondent under any civil protection order;
- 7. Familiar with the required procedure for service of process;
- 8. Will conduct themselves in a professional manner.

THE SUPREME COURT of OHIO

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SERVICE OF SUMMONS AND COMPLAINT  
ORDER FOR PROCESS SERVER

Upon application and certification by an applicant under oath or affirmation that the applicant satisfies the requirements of division (D) of this rule, the court may designate that person by court order to make personal or residence service of process under divisions (B) or (C) of this rule for a period up to one year. The order shall provide that if the appointed person fails to satisfy the requirements set forth under division (D) of this rule during the period of appointment, the authority to serve process under the order shall cease. Continued appointment beyond one year shall require reapplication as set forth in this rule.

THE SUPREME COURT of OHIO

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CERTIFIED MAIL SERVICE RETURNED - CIVIL RULE 4.6

- Civil Rule 4.6(C) - **Service refused.**  
– Upon instructions by plaintiff, may be sent by ordinary mail. Answer date is twenty-eight days from date of mailing.
- Civil Rule 4.6(D) - **Service unclaimed.**  
– Upon instructions by plaintiff, may be sent by ordinary mail. Answer date is twenty-eight days from date of mailing, unless the envelope is returned showing a failure of delivery. The plaintiff must then attempt some other method of delivery or different address.
- For **ordinary mail service**, the mailing shall be evidenced by a certificate of mailing which shall be completed and filed by the clerk.
- Civil Rule 4.6(E) **Responsibility of plaintiff/ attorney** of record to determine service was timely made.

THE SUPREME COURT of OHIO

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TIME REQUIREMENTS FOR SERVICE

- Civil Rule 3(A) - An action is commenced upon service **within one year** of the complaint being filed. Lack of service within one-year results in a **dismissal without prejudice** for failure to commence.
- Civil Rule 4(E) **permits** the court to **dismiss** the complaint **if service is not made within six months of the filing** of the complaint **and** the plaintiff **cannot show good cause** why such service was not made within that period. Generally, notice is required upon return of service.

THE SUPREME COURT of OHIO

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SERVICE

- As a general rule, when the summons and complaint are served by **ordinary mail after unclaimed or refused certified mail, and not returned**, there is a **rebuttable presumption of valid service**.
  - The **burden is on the defendant to rebut the presumption** by affidavit or testimony that service was never completed, i.e. evidence that the defendant did not reside, nor received mail, at the address to which such ordinary mail service was addressed.
- Service by **publication** is permitted when the plaintiff has made diligent attempts to find the defendant's address Civ.R. 4.4.
  - R.C. 2703.14 permits service by publication when the defendant is a resident of the state and departs from the county with intent to avoid service of summons.

THE SUPREME COURT of OHIO

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### SERVICE BY ORDINARY MAIL

- Service of the summons and complaint by ordinary mail is **only** permitted **after** return of service by certified mail.
- Service by **ordinary mail is complete when mailed**, even if the summons is returned as **refused**. Civil Rule 4.6(C).
- Service by **ordinary mail is not complete** if the summons is returned as **unclaimed**. Civil Rule 4.6(D).

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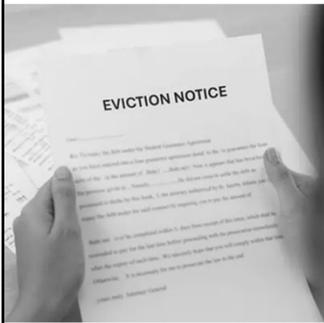
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### FORCIBLE ENTRY AND DETAINER - R.C. 1923.06

- A claim for forcible entry and detainer is a **statutory proceeding** in which the Rules of Civil Procedure may apply is not clearly inapplicable. Civ.R. 1(C)(3).
- R.C. 1923.06 sets out the **procedure for serving a complaint** for forcible entry and detainer and therefore, Civil Rule 4, governing service of summons in a civil action is clearly inapplicable.

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### FORCIBLE ENTRY AND DETAINER CONTENT OF SUMMONS

1. Specific statutory language of notice of eviction is required. - R.C. 1923.06(A).
2. Time, date and place of hearing.

THE SUPREME COURT of OHIO

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FORCIBLE ENTRY AND DETAINER  
METHOD OF SERVICE

1. **Ordinary mail required** and by instructions from plaintiff, either:

**A. Personal or residential service.**

- a) Personal delivery to the tenant; **OR**
- b) Delivery to person of suitable age and discretion at rental premises if tenant is not available; **OR**
- c) Posted at premises in conspicuous place if tenant or other person of suitable age and discretion is not at premises.

**OR**

**B. Certified mail.**

THE SUPREME COURT of OHIO

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SERVICE OF SUMMONS FOR EVICTION

- *Amherst Village Management v. Vestel*, 6<sup>th</sup>. Dist., (2000). Service of summons for eviction by posting on tenant's door and ordinary mail was complete and complied with R.C. 1923.06, even though the ordinary mail summons was returned as undeliverable. (Specific statutory method for service of summons in eviction case made service by Civil Rules clearly inapplicable under Civil Rule 1(C).  
- See also, *G.K.G. Builders v. Burgess*, 6<sup>th</sup>. Dist. Lucas, No. L-13-1228, 2014-Ohio-2431.
- *Timber Top Apartments v. Klinkiewicz*, 9<sup>th</sup>. Dist., 2018-Ohio-1608, finding that unreturned ordinary mail and posting of complaint at conspicuous place at rental premises complied with the service requirements of R.C. 1923.06, even though the tenant claimed she never received service of the summons and complaint.

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SERVICE OF SUMMONS FOR  
MONETARY DAMAGES

- A claim for monetary damages in an eviction case, known as a "second cause" is a civil claim, is governed by the Ohio Rules of Civil Procedure and statutorily permitted to be attached to a complaint for eviction by R.C. 1923.081.
- A claim for either unpaid rent or damage to the rental premises, however, is a claim for relief in a civil action governed by the Ohio Rules of Civil Procedure.
- Claim for damages to proceed like any other civil action.

THE SUPREME COURT of OHIO

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DEFAULT JUDGMENT AND LACK OF SERVICE

- Must have proper service in order to grant default judgment.
- Compliance with Civil Rule 4.1 creates a rebuttable presumption of service, but may be rebutted by the defendant with sufficient evidence of lack of service. Courts will presume service is proper when the plaintiff complies with the Rules of Civil Procedure unless the defendant rebuts this presumption with sufficient evidence of nonservice.
  - *Treasurer of Lucas Cnty. v. Mt. Airy Investments Ltd.*, 2019-Ohio-3932 (6th Dist.); *Cavalry Invest., L.L.C. v. Clevenger*, 2005-Ohio-7003 (6th Dist.).
  - *Hook v. Collins*, 8<sup>th</sup>. Dist., 2017-Ohio-976.

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PLEADINGS  
CIVIL RULE 8(A)

- Civil Rule 8(A): A pleading that sets forth a claim for relief shall contain:
  1. A short and plain statement of the claim showing that the party is entitled to relief; and
  2. A demand for judgment for the relief to which the party claims to be entitled.
- The statement of the claim **must** give the **defendant fair notice** of the plaintiff's claim and the grounds upon which it is based. See, *Montgomery v. Ohio State Univ.*, 10<sup>th</sup> Dist., 2012-Ohio-5489, (stating that "to constitute fair notice, the complaint **must** allege **sufficient underlying facts** that relate to and support the alleged claim; the complaint may **not** simply state legal conclusions").

THE SUPREME COURT of OHIO

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MOTION TO DISMISS – CIVIL RULE 12(B)(6)

- The trial court is limited to allegations in the complaint.
- A motion to dismiss for **failure to state a claim** upon which relief can be granted **tests the sufficiency of the complaint**. The **factual allegations** of the complaint and items properly incorporated therein **must be accepted as true** and the plaintiff must be **afforded all reasonable inferences** possibly derived therefrom. It must appear beyond doubt that plaintiff can prove **no** set of facts entitling her to relief. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d. 242 (1975). See also, *York v. Ohio State Highway Patrol*, 60 Ohio St.3d 143, 144-45 (1991), finding that as long as there is a set of facts, consistent with the pleading, which would allow the party to recover, the court may not grant a Civil Rule 12(B)(6) motion to dismiss.
- *Mitchell v. Lawson Milk Co.*, 40 Ohio St. 3d 190 (1988). When ruling on a motion to dismiss a complaint under Civil Rule 12(B)(6), the trial court must presume that all factual allegations in the complaint are true and **draw all reasonable inferences in favor of the nonmoving party**. Unsupported legal conclusions, however, are not accepted as true for purposes of a motion to dismiss. See, *Schulman v. Cleveland*, 30 Ohio St.2d 196 (1972).

THE SUPREME COURT of OHIO

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COURT MAY DISMISS ON OWN MOTION  
FOR FAILURE TO STATE A CLAIM  
CIVIL RULE 12(B)(6)

*Schmaltz v. DK Hardware Supply*, 2023-Ohio-4084 (12<sup>th</sup> Dist.). In general, a court **may dismiss** a complaint on its **own motion** pursuant to Civil Rule 12(B)(6) for failure to state a claim upon which relief can be granted, **only after** the parties are given **notice** of the court's intention to dismiss **and an opportunity to respond.**"

THE SUPREME COURT of OHIO

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TIME TO RESPOND TO  
DISPOSITIVE MOTION

Civil Rule 6(C): General time to respond to any motion within **fourteen (14) days** of service of the motion, unless the specific rule provides for a different time for response. Civil Rule 6(C) also provides that the time for response may be enlarged or shortened by local rule of court or specific court order.

- Civil Rule 6(D): When the motion is served by U.S. mail or other commercial carrier, an **additional three (3) days** is added to the response time.

THE SUPREME COURT of OHIO

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WHAT CAN THE COURT  
CONSIDER FOR MOTION TO  
DISMISS?



- Complaint
- **Evid.R. 201(B)**. The Court may take **judicial notice** of adjudicative facts that are not subject to reasonable dispute in that they are either:
  1. generally known within the territorial jurisdiction of the trial court; or
  2. capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

THE SUPREME COURT of OHIO

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CONVERSION OF MOTION TO DISMISS TO MOTION FOR SUMMARY JUDGMENT

- Civ.R. 12(B)(6). If motion to dismiss includes matters outside of the pleadings, the court may:
1. Exclude outside matters; or
2. Treat motion as motion for summary judgment after notice to parties.
- Petrey v. Simon, 4 Ohio St.3d 154(1983). When a court treats a motion to dismiss as a motion for summary judgment, notice to do so must be given to the parties at least fourteen (14) days before time fixed for hearing.
- State ex. Rel. Baran v. Fuerst, 55 Ohio St.3d 94 (1990). Failure to notify parties of conversion of motion to dismiss to consider outside matters on motion to dismiss is reversible error.
- State ex Rel. The V. Companies v. Marshall, 81 Ohio St.3d 467, 473 (1998). When a motion to dismiss is converted to a motion for summary judgment, the court is limited to outside matters specifically enumerated in Civ.R. 56(C).

Note: If outside matter attached to motion to dismiss is not considered, judgment entry should specifically reflect basis for decision.

THE SUPREME COURT of OHIO

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MORE DEFINITE STATEMENT - CIVIL RULE 12(E)

- Point Rental Company v. Posani, 52 Ohio App.2d. 183, (10th. Dist. 1976). Civil Rule 12(E) motion for more definite statement is proper remedy for failure to attach written instrument to complaint.
• LVNV Funding v. Tanevski, 10th. Dist., 2014-Ohio-1741. Failure to file a motion for more definite statement waives any objection to plaintiff's failure to attach documents to complaint under Civil Rule 10 (D).
• Fontain v. H & R Cincy. Proprs. LLC, 12th. Dist., 2022-Ohio-1000. Although the remedy for an order for more definite statement under Civil Rule 12(E) is to file an amended complaint, dismissal may be appropriate under Civil Rule 41(B)(1) [Failure to Prosecute] when the plaintiff with the court order to file an amended complaint. In this case the trial court characterized the allegations in the plaintiff's complaint as "voluminous" and "nonsensical," but permitted the plaintiff to amend the complaint. The plaintiff's assertion that he would be required to fabricate charges to comply with the court's order was effectively a concession that he lacked any legitimate claims against the defendants.
• Hecht v. Equity Trust Co., 8th. Dist., 2022-Ohio-198. When a plaintiff does not attach a copy of the written agreement or account upon which the claim is based as required by Civil Rule 10(D), the appropriate responsive motion is for a more definite statement under Civil Rule 12(E), not dismissal under Civil Rule 12(B)(6).

THE SUPREME COURT of OHIO

Horizontal lines for notes or additional text.

JUDGMENT ON THE PLEADINGS - CIVIL RULE 12(C)

- After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.
• Standard: A motion for judgment on the pleadings is limited to the allegations and statements in the pleadings and presents only questions of law. The motion may be granted only when no material factual issue exists and the movant is entitled to judgment as a matter of law. Burnside v. Leimbach 71 Ohio App.3d 399, (10th. Dist. 1991).
• Graham v. Perkins, 6th. Dist., 2015-Ohio-3943. A motion for judgment on the pleadings essentially tests the sufficiency of the complaint as written. The court's review is limited to the face of the complaint and the court may not consider any matters beyond the complaint. In order to prevail on a motion for judgment on the pleadings pursuant to Civil Rule 12 (C) it must appear beyond doubt that the non-moving party can prove no set of facts warranting relief, after all factual allegations of the complaint are presumed true and all reasonable inferences are made in the non-moving party's favor.

THE SUPREME COURT of OHIO

Horizontal lines for notes or additional text.

JUDGMENT ON THE PLEADINGS - CIVIL RULE 12(C), CON'T.

- *Portfolio Recovery Assoc. v. Vanleeuwen*, 2<sup>nd</sup>. Dist., 2016-Ohio-2962. A motion for judgment on the pleadings is **limited to the allegations in the pleadings and any documents attached to the complaint**. (Note: The failure of the defendant to deny assignment is not sufficient to prove standing or valid assignment of account.)
- *Cool v. Frenchco*, 10th Dist., 2022-Ohio-3747. When a motion for judgment on the pleadings under Civil Rule 12(C) is **filed before the defendant files an answer**, the motion is **treated as a motion to dismiss under Civil Rule 12(B)(6)** to test the legal sufficiency of the plaintiff's complaint.
- *Quality Car & Truck Leasing v. Pertuset*, 4<sup>th</sup>. Dist., 2013-Ohio-1964. A motion for judgment on the pleadings **does not require** supporting affidavits or other documents or a hearing.
- *Discover Bank v. Swartz*, 2<sup>nd</sup>. Dist., 2016-Ohio-2751. A motion for judgment on the pleadings **may not be supplemented** with an affidavit or other materials that were not filed with the complaint.

THE SUPREME COURT of OHIO

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JUDGMENT ON THE PLEADINGS - CIVIL RULE 12(C)  
VS.  
MOTION TO DISMISS - CIVIL RULE 12(B)(6)

*Amrhein v. Telb*, 6<sup>th</sup>. Dist., 2006-Ohio-5107. "It is well established that a trial court's approach in reviewing a Civil Rule 12(C) motion for judgment on the pleadings is **substantively analogous** to the approach taken on a Civil Rule 12(B)(6) motion for failure to state a claim upon which relief can be granted. The **same standard of review is applied equally to both types of motions**." "A motion for judgment on the pleadings is decided by the trial court under the same standards that control a motion to dismiss for failure to state a claim." *Gore v. Mohanod*, 10th Dist., 2022-Ohio-2227, ¶ 22. "A Civil Rule 12(C) motion for judgment on the pleadings has been characterized as a belated Civil Rule 12(B)(6) belated motion to dismiss, and the same standard of review is applied, both at the trial and appellate levels." *Rushford v. Caines*, 10th Dist. Franklin, No. 00AP-1072, 2001 Ohio App. LEXIS 1512 (March 30, 2001).

THE SUPREME COURT of OHIO

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DEFAULT JUDGMENT - CIVIL RULE 55

- *Ohio Valley Radiology v. Ohio Valley Hospital Assoc.*, 28 Ohio St.3d 118 (1986). Default, under both pre-Civil Rule decisions and under Civ. R. 55(A), is a clearly defined concept. A default judgment is a judgment entered against a defendant who has failed to timely plead in response to an affirmative pleading. *McCabe v. Tom*, 35 Ohio App. 73, (6<sup>th</sup>. Dist. 1929). A default by the defendant . . . arises only when the defendant has failed to contest the allegations raised in the complaint and it is thus proper to render a default judgment against the defendant as liability has been admitted or confessed by the omission of statements refuting the plaintiff's claims. 28 Ohio St.3d at 121.
- *Reese v. Proppe*, 3 Ohio App.3d 103 (8<sup>th</sup>. Dist.1981). A default judgment is proper when and only when a defendant has not contested the plaintiff's allegations by pleading or otherwise defending such that no issues are present in the case.
- *Smith v. Summerville*, 7<sup>th</sup>. Dist., 2015-Ohio-4153. Trial court did not err by overruling motion for default judgment for failure to file an answer to an amended complaint when defendant filed answer to original complaint, engaged in discovery and actively defended case.

THE SUPREME COURT of OHIO

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**DEFAULT JUDGMENT – CIVIL RULE 55  
NOTICE AND SERVICE ON DEFENDANT**

- **Civil Rule 55(A).** Regarding default judgment requires a hearing with a **minimum seven (7) day notice** to a defendant who has appeared in the case.
- *W.A.F.P., inc. v. Sky Fuel Inc.*, 2024-Ohio-3297 (8<sup>th</sup> Dist.). When a defendant does not enter an appearance in the case after having been personally served with summons and a copy of the summons and complaint, the defendant is not entitled to the seven-day notice requirement under Civil Rule 55(A) before the court can rule on the default judgment motion. *Sexton v. Sugar Creek Packing Co.*, 37 Ohio St.2d 58, 59, 307 N.E.2d 541 (1974). In this case the trial court vacated its prior dismissal order for want of prosecution and entered the default judgment the same day on the pending motion.
- **Civil Rule 8(D).** **Failure to deny** an allegation in a pleading, other than amount of damages, **is an admission.**
- **Civil Rule 5(A).** **Service is not required** on parties in default for failure to appear **except** a pleading **asserting new or additional claims or additional damages.**

THE SUPREME COURT of OHIO

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**DEFAULT JUDGMENT – CIVIL RULE 55  
SCOPE OF HEARING AND VALIDITY OF CLAIM**

Civil Rule 55 provides the trial court has discretion to conduct hearing on default motion to determine validity of claim.

*Neiswinter v. Nationwide Mut. Fire Ins. Co.*, 9<sup>th</sup> Dist., 2008-Ohio-37. A default judgment **cannot** be entered upon a complaint that fails to state a claim upon which relief may be granted.

THE SUPREME COURT of OHIO

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**WHEN CAN THE COURT  
GRANT DEFAULT  
JUDGMENT**

A **default judgment** may not be filed until completed service of the summons and complaint and the default actually occurs (**after the expiration of the 28 days to respond**).

THE SUPREME COURT of OHIO

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APPEARANCES IN CIVIL CASES

- *Medina Supply Co. v. Dig it Foundations*, 9<sup>th</sup>. Dist. Medina No. 20685 2002-Ohio-1500. An appearance is ordinarily made when a party comes into court by some overt act of that party that submits a presentation to the court.
  - Such acts generally include:
    1. filing an answer to the complaint;
    2. motion to extend time to respond to complaint;
    3. other acts on behalf of defendant in the trial court.
- A party must also clearly express an intention and purpose to defend the suit in order to make an appearance within the meaning of Civil Rule 55(A).

THE SUPREME COURT of OHIO

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APPEARANCES IN CIVIL CASES ON RECORD

- Physical appearance in court.
- Filing an Answer- both timely and untimely.
- Request for mediation in response to a complaint.
- Motion for Change of Venue.
- Motion to Strike Complaint.
- Motion for Reconsideration.
- Motion for Extension to Plead.

THE SUPREME COURT of OHIO

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APPEARANCES IN CIVIL CASES - OFF RECORD

- *Progressive Casualty Ins. Co. v. Kreiner & Peters*, 10<sup>th</sup>. Dist. Franklin, No. 93AP-1088, (1993). The term "appearance" is not necessarily limited to formal appearances and may be reasonably construed to reach informal contacts or correspondence between the parties which show a clear purpose to defend the action.
- *AMCA International v. Carlton*, 10 Ohio St.3d 88 (1984). Telephone conversations between counsel for parties after complaint filed and express intention by defendant's counsel to file answer and defend claim, even though no answer was filed, was an appearance.
- *Miami Systems Corp. v. Dry Cleaning Computer Systems*, 90 Ohio App.3d 181, (1<sup>st</sup>. Dist. 1993). Telephone conversation between counsel with understanding that an answer would not need to be filed as long as negotiations continued was an appearance. See also, *Baines v. Harwood*, 87 Ohio App.3d 345 (12<sup>th</sup>. Dist. 1993).

THE SUPREME COURT of OHIO

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APPEARANCES IN CIVIL CASES - NO APPEARANCE

- *Oeder v. Bower*, 9<sup>th</sup>. Dist., 2007-Ohio-7032. **Answer filed after time limit, without leave of court**, and after motion for default judgment was filed, but prior to entry of default judgment was not an appearance for purpose of notice of hearing pursuant to Civil Rule 55(A).
- *Sylvester v. Keister*, 5<sup>th</sup>. Dist., 5<sup>th</sup>. Dist., 2010-Ohio-178. A telephone conversation between plaintiff's attorney and defendant, as well as settlement discussions between plaintiff's attorney and insurance adjuster was **not sufficient** to show **intent to defend** to establish an appearance for purposes of notice of motion for default judgment. In this case plaintiff's attorney gave a copy of the complaint to the insurance adjuster after the case was filed.
- *Wells Fargo Bank v. Myers*, 6<sup>th</sup>. Dist., 2015-Ohio-4212. Although an appearance for purposes of a default judgment is liberally construed, there **must be some overt intent to defend**. Defendant's phone call to tell plaintiff's counsel after complaint was filed that the defendant was proceeding with loan modification was not an appearance in the civil action.

THE SUPREME COURT of OHIO

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ISSUES REGARDING LLCs



A limited liability company exists as a **separate legal entity** and may be represented in court **only by a licensed attorney**. *Disciplinary Counsel v. Kafele*, 108 Ohio St.3d 283, 2006-Ohio-904, *relying on Union Sav. Assn. v. Home Owners Aid*, 23 Ohio St. 2d 60, 64 (1970).

**EXCEPTION:** Small claims cases permit appearances and participation by corporate officers or salaried employees. R.C. 1925.17.

THE SUPREME COURT of OHIO

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CREDIT CARDS, ATTACHMENT OF ACCOUNTS, AND ASSIGNMENT

Civil Rule 10 Form of Pleadings.

- **Civ.R. 10(C) Adoption by reference; exhibits.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument attached to a pleading is a part of the pleading for all purposes.
- **Civ.R. 10(D) Attachments to pleadings.**
  1. Account or written instrument. When any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading. If the account or written instrument is not attached, the reason for the omission must be stated in the pleading.

THE SUPREME COURT of OHIO

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ATTACHMENT OF ACCOUNTS - PROCEDURAL ISSUES

- *Asset Acquisitions v. Gettis*, 2d. Dist. 2010-Ohio-950. The purpose of the attachment requirement of Civ. R. 10(D) is to exemplify the basis of the particular claim for relief alleged. The court noted that the written instrument or account is the best evidence of the transaction between the parties.
- *Oxford Systems v. Smith-Boughan*, 2d. Dist. 2005-Ohio-210. Attachment of written instrument accomplishes goal of clarity in pleadings as the copy of the written instrument is more comprehensive than a description of the instrument in the pleadings.
- *Ohio Receivables, LLC v. Dallariva*, 10<sup>th</sup>. Dist., 2012-Ohio-3165. The lack of an account is not jurisdictional in nature and failure to timely raise the lack of an account attached to the complaint is a waiver of this requirement.

THE SUPREME COURT of OHIO

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CREDIT CARDS  
PROCEDURAL ISSUES

*Harvest Credit Mgmt. VII, v. Ryan*, 10<sup>th</sup>. Dist., 2010-Ohio-5260.

**Statute of frauds**, R.C. 1335.05, does **not** apply to an **action on a credit card account** as an agreement that cannot be performed within one year. Credit card account to be paid on a monthly basis.

THE SUPREME COURT of OHIO

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ASSIGNMENT - PROCEDURAL ISSUES

- *LVNV Funding v. Tanevski*, 10<sup>th</sup>. Dist., 2014-Ohio-1741. An assignee that brings an action in its own name must plead and prove the assignment. **Proof of assignment is required to protect defendant from multiple claims.** Affidavit by assignee's employee that account was assigned is not sufficient to prove assignment of account. This case, three (3) monthly statements which do not show ongoing balance was not sufficient to prove account. **Assignee of account must allege and prove the assignment. Failure of plaintiff to submit bill of sale of account was grounds to deny summary judgment.**
- *Premier Capital, LLC v. Baker*, 11<sup>th</sup>. Dist. Portage No. 2011-P-0041, 2012-Ohio-2834. **Every assignment in the chain of title must be proved.**

THE SUPREME COURT of OHIO

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ARBITRATION CLAUSE

• *EMCC Investment Ventures, LLC v. Rowe*, 11<sup>th</sup>. Dist., 2012-Ohio-4462. Mandatory arbitration clause **may be waived** if not timely enforced.

- **Factors to consider include:**

1. the time lapsed from commencement of litigation to request arbitration;
2. the amount of litigation, including pleadings, pretrial motions and discovery; and
3. proof of actual prejudice including taking advantage of discovery that would not have been available if the case had gone to arbitration.

THE SUPREME COURT of OHIO

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ARBITRATION CLAUSE, CONTINUED

• *LVNV Funding LLC v. Altahtamoni*, 2024-Ohio-2082 (10<sup>th</sup>. Dist.). The **defendant invoked the arbitration clause** in the credit card contract and the **trial court stayed the civil action and referred to case to arbitration**. The defendant took **no other action** for over five months and on motion of the plaintiff, the case was returned to the court's docket. **A right to arbitration, like any other contractual provision, may be waived if not timely raised or delayed.** *Griffith v. Linton*, 130 Ohio App.3d 746 (10th Dist.1998). In this case, the order of reference to arbitration did not identify which party should initiate the arbitration process. Although the defendant thought the plaintiff would do so, the defendant could also initiate arbitration under the court's order. The court distinguished *Wells Fargo Fin. Nat'l Bank v. Douglas*, 2011-Ohio-3739 (2d. Dist.), which reversed a waiver of arbitration order against the defendant for not timely initiating the process when the trial court order expressly imposed the responsibility on the plaintiff to do so.

• The court noted an order of reference to arbitration is an appealable order under R.C. 2711.02(C) and it the defendant disagreed with the court order on the responsibility to initiate arbitration, the defendant had an obligation to file a timely appeal.

THE SUPREME COURT of OHIO

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ATTACHMENT IN COMPLIANCE WITH CIVIL RULE 10(D)

In addressing the requirements to comply with Civil Rule 10(D), the court in *Asset Acceptance Corp., v. Proctor*, 4<sup>th</sup>. Dist. 2004-Ohio-623, stated:

- [i]n order to adequately plead and prove an account:

1. "[a]n **account must show the name of the party charged**."
2. It begins with a balance, preferably at zero, or with a sum recited that can qualify as an account stated, but at least the balance should be a provable sum.
3. Following the balance, the item or items, dated and identifiable by number or otherwise, representing charges, or debits, and credits, should appear.
4. Summarization is necessary showing a running or developing balance or an arrangement which permits the calculation of the balance claimed to be due."

quoting *Brown v. Columbus Stamping & Mfg. Co.* 9 Ohio App.2d. 123, 126, (10<sup>th</sup>. Dist.1967) and approved in *Capital One Bank v. Nolan*, 4<sup>th</sup>. Dist. 2008-Ohio-1850.

THE SUPREME COURT of OHIO

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REASONS FOR NOT ATTACHING ACCOUNT TO COMPLAINT

- 1. Not in possession of plaintiff's counsel;
- 2. Records are voluminous and will be presented if possible upon request;
- 3. Records already in defendant's possession.

THE SUPREME COURT of OHIO

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CREDIT CARD – SUMMARY JUDGMENT ISSUES

- *Hudson & Keyes v. Carson*, 10<sup>th</sup>. Dist., 2008-Ohio-2570. Although a copy of the account was not required to be attached to the complaint if the complaint alleged the account, trial court erred in overruling motion for more definite statement when **complaint or supporting affidavit failed to provide particular information about the account or its assignment**. In arriving at this conclusion, the court of appeals **distinguished** between allegations to assert a claim and evidence sufficient to prove the claim. (Summary judgment reversed.)
- *Capital One Bank v. Ryan*, 10<sup>th</sup>. Dist., 2014-Ohio-3932. A **signed copy of the credit card agreement is not required** when there is **proof that the credit card was issued to and used by the defendant**. In this case, one year of credit card statements, identifying the defendant as the cardholder as well as the beginning balance, debits and credits, was sufficient to support claim. Account **does not** have to show every transaction as long as it **establishes a provable sum**. Failure of the defendant to timely object to each monthly credit card statement when received may be considered as implied assent.

THE SUPREME COURT of OHIO

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CREDIT CARD – SUMMARY JUDGMENT ISSUES, CON'T.

- *Citibank v. Hyslop*, 10<sup>th</sup>. Dist., 2014-Ohio-844. Signed credit card application is not required to prevail on claim. **Proof of use** of credit card **establishes a binding agreement** between the parties. See also, *Ohio Receivables v. Dallariva*, 10<sup>th</sup>. Dist., 2012-Ohio-3165 & *Citibank v. Ebbing*, 12<sup>th</sup>. Dist., 12<sup>th</sup>. Dist. 2013-Ohio-4761.
  - Requirements of Civil Rule 10(D) are met, even though not strictly an account, with credit card statements identifying the account.
  - In summary judgment proceeding, unsubstantiated, self-serving statements, unsupported by evidentiary materials is not sufficient to raise genuine issue off material fact.

THE SUPREME COURT of OHIO

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CREDIT CARD – DETERMINATION OF DAMAGES

- *Hudson & Keyes v. Carson*, 10<sup>th</sup>. Dist., 2008-Ohio-2570. Plaintiff is not required to show every transaction to prove balance due on an account.
- *Whittle v. Davis*, 12<sup>th</sup>. Dist., 2013-Ohio-1950. **Failure** to attach written instrument, contract or account **does not bar default judgment** on the issue of liability, but is necessary for the court's review on issue of damages. Although the decision by the court to conduct a hearing on damages in a default situation is **permissive, not mandatory**, the court **abuses its discretion** not to conduct a hearing when the determination of damages **requires consideration of information outside of the documents attached to the complaint or motion for default judgment**.
- *Bank of America v. Truax*, 7<sup>th</sup>. Dist., 2018-Ohio-3101. An **amount alleged in a complaint due and unpaid** on a promissory note is **not a claim for damages and is admitted if not denied** in a responsive pleading. A specific amount claimed on an account is not an allegation of damages and Civil Rule 8(D) does not apply. *Relying on Discover Bank v. Hicks*.
  - **Note:** This is a claim in an account, not contract. The plaintiff attached documents to show an amount due on the account of \$5,603.92, but the trial court entered damages of \$0.00. The court of appeals found that the damage award was effectively a dismissal of the complaint.

THE SUPREME COURT of OHIO

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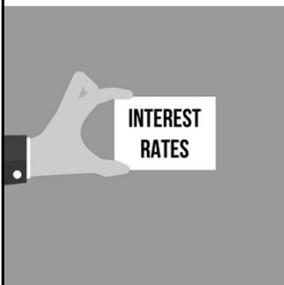
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STATUTORY & CONTRACTUAL RATES OF INTEREST



**R.C. 1343.03. Statutory rate of interest** applies **unless a written contract** provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract.

THE SUPREME COURT of OHIO

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PROOF OF CONTRACTUAL RATE OF INTEREST

- As the court noted in *Citibank v. Hine*, 4<sup>th</sup>. Dist., 2019-Ohio-464, to obtain a rate of interest to be charged different from the statutory rate of interest set out in R.C. 1343.03(A), the plaintiff must prove:
  1. A written contract between the parties, and
  2. The contract must provide a rate of interest for any money that becomes due and payable.
- *Yeager Materials, Inc. v. Marietta Indus. Ent., Inc.*, 116 Ohio App.3d 233 (4<sup>th</sup>. Dist. 1996). See also, *P. & W. F. Inc. v. C.S.A. Pizza, Inc.*, 91 Ohio App.3d 727 (8<sup>th</sup>. Dist. 1993).
- If the creditor is not able to produce a written, signed contract showing the defendant's agreement to the contractual rate of interest, the creditor is limited to the statutory rate of interest. A statement on an invoice or bill to which the other party has not assented does not meet the requirement under R.C. 1343.03(A) of an agreement of a contractual rate of interest between the parties. *relying on Yeager Materials Inc. v. Marietta Indus. Ent., Inc.*

THE SUPREME COURT of OHIO

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PREJUDGMENT INTEREST - R.C. 1343.03

- *Ginn v. Stonecreek Dental Care*, 12<sup>th</sup>. Dist., 2019-Ohio-3229. Prejudgment interest under R.C. 1343.03(A) is ordinarily limited to interest accruing on a breach of contract claim. R.C. 1343.03 does not create a right to prejudgment interest. R.C. 1343.03 merely provides that interest begins to accrue when money becomes due and payable. Unless specified by contract, interest generally runs from the date of judgment.
- *But see, Capital One Bank v. Brown*, 8<sup>th</sup>. Dist., 2009-Ohio-3074. For credit card collection case based upon breach of contract, the trial court was required to award prejudgment interest on a default judgment even when a copy of the written contract is not attached to the complaint. The existence of a written contract is admitted when the defendant does not file an answer or otherwise challenge the allegations in the complaint.
  - The appellate court noted, however, that the trial court does have the authority under Civil Rule 55(A) to conduct a hearing if deemed necessary to establish the truth of any allegation in a complaint.

THE SUPREME COURT of OHIO

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PREJUDGMENT INTEREST - R.C. 1343.03, CONT.

*Portfolio Recovery Assoc. v. Vanleeuwen*, 2<sup>nd</sup>. Dist., 2016-Ohio-2962. Complaint for collection of credit card debt should set out the date of default to show:

1. Accrual of prejudgment interest, and
2. That the claim is not barred by the statute of limitations.

- When the right to prejudgment interest is a matter of law, a court has no discretion but to award prejudgment interest under R.C.1343.03(A), which allows for the recovery of interest at the contract rate, from the date the money becomes due and payable.

THE SUPREME COURT of OHIO

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STATUTE OF LIMITATIONS CONTRACT IN WRITING

R.C. 2305.06 **Contract in writing.**

- An action upon an agreement, contract, or promise **in writing** shall be brought within **eight (8) years** after the cause of action accrued.
- **(Note:** R.C. 2305.06 was amended, effective September 28, 2012, to reduce the limitation of action from fifteen (15) to eight (8) years.)

THE SUPREME COURT of OHIO

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STATUTE OF LIMITATIONS  
CONTRACT  
**NOT**  
IN WRITING

**R.C. 2305.07 Contracts not in writing**

- An action upon a contract **not in writing**, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought **within six (6) years** after the cause thereof accrued.

THE SUPREME COURT of OHIO

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STATUTE OF LIMITATIONS FOR  
CONTRACT FOR SALES

**R.C. 1302.98 Contract for Sales.**

- An action for breach of any contract for sale must be commenced **within four years** after the cause of action has accrued.
- By the original agreement the parties **may reduce** the period of limitation to **not less than one year but may not extend it**.

THE SUPREME COURT of OHIO

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BORROWING STATUTE – R.C. 2305.03(B)

- No civil action that is based upon a cause of action that accrued in any other state, territory, district, or foreign jurisdiction may be commenced and maintained in this state if the period of limitation that applies to that action under the laws of that other state, territory, district, or foreign jurisdiction has expired or the period of limitation that applies to that action under the laws of this state has expired. Effective 04-07-2005.
- *Walker, Plaintiff-Appellant, v. Nationwide Mutual Insurance Co.*, 10<sup>th</sup> Dist., 2015-Ohio-5371. A **borrowing statute is a legislative exception** from the general rule that the forum always applies its statute of limitation. It is meant to prevent forum shopping by a plaintiff whose claims have otherwise expired. Ohio's borrowing statute does not clarify how to determine where a cause of action accrues.

THE SUPREME COURT of OHIO

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BORROWING STATUTE – R.C. 2305.03(B), CON'T.

- “Since Ohio is the forum state of this case, **Ohio law determines the statute of limitations**. But Ohio has a borrowing statute, which is a legislative exception to the general rule that a forum state always applies its own statute-of-limitations law. *Combs v. Internatl. Ins. Co.*, 354 F.3d 568, 578 (6th Cir. 2004). In essence, a borrowing statute directs a forum court to ‘borrow’ the limitation period of another state if the cause of action accrued in that foreign state and that state’s limitation period is shorter than the forum state’s limitation period.” (Citations omitted). *Taylor v. First Resolution Invest. Corp.*, 2016-Ohio 3444.

THE SUPREME COURT of OHIO

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ASSIGNMENT OF ACCOUNT EVIDENTIARY ISSUES

- *Matrix Acquisitions, LLC v. Hooks*, 5<sup>th</sup>. Dist., 2011-Ohio-3033. **Affidavit of unidentified individual** as evidence of chain of title was **not sufficient** to show sale of account. In this case the affidavit was not part of the record on appeal. In addition, the appellate court questions whether plaintiff’s affidavit was competent to law foundation for transfer of account from original creditor to second holder who transferred the account to the plaintiff.
- The court in *Midland Funding v. Coleman*, 6<sup>th</sup>. Dist., 2019-Ohio-432, relying on *EMCC Invest. Ventures, LLC, v. Rowe*, 11<sup>th</sup>. Dist., 2012-Ohio-4462 stated that an **affidavit of an employee** stating that the assignee had acquired all rights, title and interest in the account was **insufficient** to establish a chain of title **without a bill of sale or other, similar document detailing the terms of the assignment**. In this case, the court in *Coleman* held that a statement in an affidavit was not sufficient by itself to meet the requirement of a valid assignment of the account. The court in *Coleman* also held that a statement in an affidavit in support of summary judgment stating the amount due, without the entire account submitted to the court, was insufficient to prevail in a motion for summary judgment.

THE SUPREME COURT of OHIO

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ASSIGNMENT OF ACCOUNT  
ISSUE OF BUSINESS RECORDS

- *Citibank v. Ebbing*, 12<sup>th</sup>. Dist., 2013-Ohio-4761. Evid. Rule 803(6), as the business records exception to the hearsay rule, requires the witness or affiant to have **personal knowledge of regularity and reliability of business activity**, but **not** personal knowledge of each transaction in the business records.
- *CACH, LLC v. Potts*, 11<sup>th</sup>., 2016-Ohio-4742. An affiant for a business record does not have to show firsthand knowledge of the transactions, but must show:
  1. The affiant is **sufficiently familiar** with the operation of the business, and
  2. The **circumstances of the record’s preparation and maintenance** to be able to testify what the document purports to be and that it is kept in the ordinary course of business.

THE SUPREME COURT of OHIO

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### LEAVE TO PLEAD

- *Miller v. Lint*, 62 Ohio St. 2d. 209 (1980). A trial court has broad discretion to grant or deny a motion to file an untimely answer under Civil Rule 6(B). The discretion is not, however, unlimited and requires a determination that the neglect to timely file the answer was excusable or inexcusable.
- *Lengacher Holdings, LLC v. Witmer*, 3<sup>rd</sup>. Dist., 2022-Ohio-4147. Although Civil Rule 6(B) permits a late filing of a responsive pleading, the movant is still required to provide an **adequate explanation** for the untimely motion or pleading.
  - See also, *Rosenberger v. Paduchik*, 10<sup>th</sup>. Dist., 2023-Ohio-3898, finding that a motion for leave to amend a pleading is not automatic and the moving party must provide a valid reason for amendment, not just quote the language of Civil Rule 15.
- *Suki v. Blume*, 9 Ohio App.3d 289, (8<sup>th</sup>. Dist. 1983). Default judgment should not be entered when a party files an untimely answer without leave to plead as long as answer is proper in form and substance. Motion to strike answer is required before default judgment could be entered.

THE SUPREME COURT of OHIO

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### SUMMARY JUDGMENT CIVIL RULE 56

- Summary Judgment. Trial court **may** consider exhibits and documents outside of the pleadings.
- **Standard:** Summary judgment is appropriate if:
  1. no genuine issue of any material fact remains;
  2. the moving party is entitled to judgment as a matter of law; and
  3. it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made.

*Temple v. Wean United, inc.*, 50 Ohio St.2d. 317 (1977).

THE SUPREME COURT of OHIO

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### TIME FOR SUMMARY JUDGMENT CIVIL RULE 56(A) & (B)

- A. By plaintiff/cross claimant.**
  1. After expiration of time for responsive motion or pleading.
    1. 28 days after service of complaint.
    2. 14 days after ruling on Civ.R. 12(B) motion.
  2. After service of summary judgment motion by adverse party.
- B. By defendant/defending party.**
  1. Any time after service of complaint/counterclaim.
  2. Leave of court required if trial or pretrial conference has been set.
- C. Leave of court.**
  - *Ramos v. Khawli*, 181 Ohio App.3d 176, 7<sup>th</sup>. Dist. 2009-Ohio-798. Motion for summary judgment may be filed with motion for leave, but time to respond does not begin to run until motion for leave is granted.
  - *Brinkman v. Toledo*, 81 Ohio App.3d 429, 432 (6<sup>th</sup>. Dist. 1992). Motion for leave to file summary judgment motion is discretionary with the trial court. No abuse of discretion to give leave to file motion for summary judgment when trial would not be delayed.

THE SUPREME COURT of OHIO

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TIME TO RESPOND FOR SUMMARY JUDGMENT  
CIVIL RULE 56(C)

- Civil Rule 56(C) provides that the adverse party may serve responsive arguments and opposing affidavits **within twenty-eight days** after service of the motion, and the **movant may serve reply arguments within fourteen days** after service of the adverse party's response.
  - **Note:** This schedule was added to Civil Rule 56 effective July 1, 2015.
- This schedule may be changed by the trial court by:
  - court order, or
  - local rule of court.

THE SUPREME COURT of OHIO

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BURDEN OF PROOF FOR SUMMARY JUDGMENT

- *Dresher v. Burt*, 75 Ohio St. 3d 280 (1996). Moving party bears initial responsibility of informing the trial court of the basis of the motion and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of a non-moving party's claim. *relying on Celotex Corp. v. Catrett*, 106 S.Ct. 2548, (1986).
1. While a motion for summary judgment may or may not be supported by outside materials, moving party's burden is **not** met by conclusory statement that non-moving party has no evidence to prove its case.
  2. Moving party does not have to produce evidence to show absence of evidence in support of a claim, but is required to specifically point to some evidence in the record of the type listed in Civil Rule 56(C) which affirmatively demonstrates that the non-moving party has no evidence to prove its case.
    - a) If the moving party fails to satisfy its initial burden, the motion for summary judgment is denied.
    - b) If the moving party satisfies its initial burden, the non-moving party has a reciprocal burden to show that there is a genuine issue of material fact.
  3. *Morris v. Ohio Cas. Ins Co.*, 35 Ohio St.3d 45 (1988). Even though the **defendant did not respond** to plaintiff's motion for summary judgment, **plaintiff is still required to show that summary judgment is appropriate.**

THE SUPREME COURT of OHIO

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BURDEN OF PROOF  
AFFIRMATIVE DEFENSES FOR SUMMARY JUDGMENT

- *Todd Development Co. v. Morgan*, 2008-Ohio-880.
1. A plaintiff or counterclaimant moving for summary judgment does not bear initial burden of addressing the non-moving party's affirmative defenses.
  2. Civil Rule 56 does not require a moving party to prove its own case and disprove the opposing party's case.
  3. Non-moving party does not have to prove affirmative defense, but only produce enough evidence to show that there is a genuine issue of material fact.
  4. Requiring a moving party to offer evidence on every defense raised by the non-moving party would increase litigation expenses and effectively reduce summary judgment procedures.

THE SUPREME COURT of OHIO

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MATERIALS TO BE CONSIDERED FOR SUMMARY JUDGMENT – CIVIL RULE 56(C)

- The following may be considered:
  1. Pleadings;
  2. Depositions;
  3. Answers to interrogatories;
  4. Written admissions;
  5. Affidavits;
  6. Transcripts of evidence;
  7. Written stipulations of fact.
- No evidence or stipulation may be considered except as stated in Civil Rule 56(C).

THE SUPREME COURT of OHIO

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MOTION FOR RELIEF FROM JUDGMENT CIVIL RULE 60(B)

- Civ.R. 60(B)(1). Mistake, inadvertence, surprise or excusable neglect
- Civ.R. 60(B)(2). Newly discovered evidence
- Civ.R. 60(B)(3). Fraud, misrepresentation, or other misconduct of an adverse party;
- Civ.R. 60(B)(4). Satisfied, released, discharged, reversed or vacated judgment.
- Civ.R. 60(B)(5). Any other reason justifying relief from the judgment.

THE SUPREME COURT of OHIO

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MOTION FOR RELIEF FROM JUDGMENT - CIVIL RULE 60(B) - STANDARD OF REVIEW

- *GTE Automatic Elec. Inc. v. Industries, Inc.*, 47 Ohio St. 3d. 146 (1976). To prevail on a motion for relief from judgment, the movant must demonstrate:
  1. A meritorious defense or claim to present if relief is granted,
  2. Grounds under Civil Rule 60(B)(1)-(5),
  3. Timeliness of motion.
- *Twymon v. Eagle Auto Parts, Inc.* 8<sup>th</sup>. Dist., 2020-Ohio-2360. Civil Rule 60(B) is "a remedial rule to be liberally construed so that the ends of justice may be served." *Kay v. Marc Glassman*, 76 Ohio St.3d 18, 20, 1996-Ohio-430, citing *Colley v. Bazill*, 64 Ohio St.2d 243, 249 (1980).

THE SUPREME COURT of OHIO

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MOTION FOR RELIEF FROM JUDGMENT - CIVIL RULE 60(B) - STANDARD OF REVIEW, CONT.

- A motion for relief from judgment cannot be used as a substitute for objections to a magistrate's report and recommendation.
- A hearing on a motion for relief from judgment under Civil Rule 60 (B) is not required unless the motion contains operative facts which the court must hear evidence to verify those factual allegations. See also, *Custom Pro Logistics, LLC v. Penn Logistics, LLC*, 1<sup>st</sup>. Dist. Hamilton, No. C-210422. A trial court is not required to conduct a hearing on a motion for relief from judgment unless the movant alleges operative facts in the motion sufficient to show that it will prevail on the motion, relying on *PHH Mtge. Corp. v. Northup*, 4<sup>th</sup>. Dist., 2011-Ohio-6814.

THE SUPREME COURT of OHIO

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MOTION FOR RELIEF FROM JUDGMENT  
CIVIL RULE 60(B)  
TIMELINESS

- Motion shall be made **within a reasonable time**, and for reasons (1), (2), and (3) **not more than one year** after the judgment, order or proceeding was entered or taken.
- A 60(B) motion does not affect the finality of a judgment or suspend its operation.

THE SUPREME COURT of OHIO

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VOID JUDGMENTS

- *Patton v. Diemer*, 35 Ohio St. 3d 68 (1988). Trial court has inherent power to vacate a void judgment. In the case of a void judgment, the requirements of Civil Rule 60(B) do not apply.
- *Owners Inc. v. Blakemore*, 6<sup>th</sup>. Dist., 2002-Ohio-239. When incorrect party was served with the summons and complaint, the judgment was void due to lack of jurisdiction over the defendant. As a void judgment, the defendant was not required to comply with the requirements of Civil Rule 60(B). See also, *Custom Pro Logistics, LLC v. Penn Logistics, LLC*, 1<sup>st</sup>. Dist. Hamilton, No. C-210422. A judgment without personal jurisdiction is a void judgment. A trial court has inherent authority to vacate a void judgment independent from Civil Rule 60(B).

THE SUPREME COURT of OHIO

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VOLUNTARY DISMISSALS - CIVIL RULE 41(A)

- A. By plaintiff by notice prior to commencement of trial unless pending counterclaim without independent jurisdiction.
  - B. By stipulation of the parties.
    - **Note:** Voluntary dismissal by notice or stipulation is **without prejudice** unless prior dismissal by plaintiff.
  - C. By court order 1) upon terms set by the court and 2) unless objection by defendant with pending counterclaim without independent jurisdiction.
    - **Note:**
      - 1) Dismissal by court order is without prejudice unless otherwise specified by the court.
      - 2) If case is filed a second time based upon or including same claim or defendant, the court may order payment of court costs on previous case and stay action until compliance. Ohio R. Civ. P. 41(D).
- A notice of dismissal is self executing and does not require any court action.

THE SUPREME COURT of OHIO

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INVOLUNTARY DISMISSALS  
CIVIL RULE 41(B)

- Failure to prosecute or failure to comply with court rules or orders.
- Motion of defendant or court's own motion, and
  - Notice to the plaintiff or counsel.

THE SUPREME COURT of OHIO

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LIMITATION OF NOTICE OF DISMISSAL

• *Schwering v. TRW Vehicle Safety System*, 2012-Ohio-1841. **Once the trial has commenced**, however, the dismissal **may only** be done by court order or stipulation of the parties. In this case the trial began, but ended in a mistrial. After the order of mistrial, the plaintiff voluntarily dismissed the case and re-filed in federal court. The Ohio Supreme Court held that once the trial began, even though it ended with mistrial, the right of the plaintiff to dismiss without court intervention ended.

THE SUPREME COURT of OHIO

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FINDINGS OF FACT AND CONCLUSIONS OF LAW  
CIVIL RULE 52

- Mandatory if timely requested by a party.
- Tolls the time for:
  - Objections to magistrate's report, and
  - appeal from judgment.
- **Note:** specific findings of fact and conclusions of law are **not required** when the case is **tried to the judge without a jury** and the judge issues a **judgment entry that addresses the factual and legal issues** in the case. A trial court may substantially comply with Civil Rule 52 when its judgment adequately explains the basis for the decision. *Truex v. Truex*, 5<sup>th</sup>. Dist. 2008-Ohio-5609. See also, *Strah v. Lake Cty. Humane Soc*, 90 Ohio App.3d 822 (11<sup>th</sup>. Dist. 1993).

THE SUPREME COURT of OHIO

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JUDGMENTS - CIVIL RULES 54 & 58

- A Judgment means a written entry ordering or declining to order a form of relief, signed by a judge, and journalized on the docket of the court.
- *Peters v. Arbaugh*, 50 Ohio App.2d. 30, (10<sup>th</sup>. Dist. 1976). The Civil Rules do not require a judgment to be written in any particular form, if it complies with Civil Rule 54 and discloses the trial court's intention to terminate the parties' dispute
- A decision and judgment do not need to be separate documents as long as document contains the intention of finality necessary for a judgment.
- The label or title placed on a document is not by itself determinative that the document is, in fact, a judgment entry. A judgment is determined by whether the trial court in the document clearly declares its intention to enter a final decision in the case

THE SUPREME COURT of OHIO

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FINAL JUDGMENT - CIVIL RULE 54(B)

- When there are multiple claims or multiple parties, a determination of some, but not all of the claims is not a final judgment unless the court includes the language that there is no just reason for delay.
- **General Rule:** If you intend to have the court order be a judgment, it must be clear from the language of the order.
  - **Critical Language:**
    - It is the judgment of the court...
    - Judgment is hereby entered...
    - It is ordered, adjudged, and decreed...
- Magistrate cannot enter final judgment.

THE SUPREME COURT of OHIO

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## FINAL JUDGMENT FOR EVICTION

- *Acosta v. Rubalcava*, 11<sup>th</sup>. Dist., 2023-Ohio-1794. A **claim for forcible entry and detainer** is a special proceeding and a judgment for eviction is **immediately appealable** even though all claims have not been adjudicated. As such, the language of Civil Rule 54(B) for no just reason for delay is not required or applicable to an order of eviction.

THE SUPREME COURT of OHIO

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## "NO JUST REASON FOR DELAY" - CIVIL RULE 54(B)

- *State ex rel. Scruggs v. Sadler*, 97 Ohio St.3d 78, 2002 Ohio 5315. Civ. R. 54(B) requires that a court make an **express determination that there is no just reason for delay in order to make appealable an order adjudicating fewer than all the claims or the rights of fewer than all the parties**. See also, *Poirier v. Process Equip. Co. of Tipp City*, 2d. Dist. Montgomery, No. 27697, 2018-Ohio-1945, finding that certification of a final order is not effective without reference to civil rule 54(B) and the required language, "no just reason for delay."
- *Kinzel v. Ebner*, 6<sup>th</sup>. Dist., 2020-Ohio-4165. Civil Rule 54(B) is merely a procedural device and cannot transform a nonfinal order into an appealable order. *Internatl. Managed Care Strategies v. Franciscan Health Partnership*, 1<sup>st</sup>. Dist., 2002-Ohio-4801. In this case the trial court granted **summary judgment on the issue of liability** and scheduled the case for **trial on the issue of damages**. A claim, however, includes issues of both liability and damages. **When only liability is decided, Civil Rule 54(B) does not apply because only part of a claim has been determined.**
  - Civil Rule 54(B) is limited to determination of separate claims, not partial determination of a single claim. A determination of liability only is not a final appealable order, even if the trial court includes the "no just reason for delay" language from Civil Rule 54(B).

THE SUPREME COURT of OHIO

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## SIGNING THE JUDGMENT - RUBBER STAMP

- *Miller v. Nelson-Miller*, 2012-Ohio-2845. A judgment signed with judge's name and **initialed by magistrate** is a **voidable** judgment.
- *In re Mitchell*, 93 Ohio App.3d 153, (8<sup>th</sup>. Dist.1994). A **rubber stamp** signature in lieu of judge's signature **does not comply with Civil Rule 58** to enter a valid final judgment. Accord, *Flores v. Porter*, 3rd Dist. No. 2006-CA-42, 2007-Ohio-481. *But see, Platt v. Lander*, 2d. Dist. No. 12371, (1991). Although a rubber stamp of a judge's signature violates Civil Rule 58, the final order bearing the stamp is **voidable, not void**.
- *Boulder Capital Group v. Lawson*, 2<sup>nd</sup>. Dist., 2013-Ohio-3270. A judgment entry signed by rubber stamp instead of handwritten signature of the judge was **not a final appealable order**.
- *State v. Dewitt*, 3<sup>rd</sup>. Dist., 2014-Ohio-162. Declaration of forfeiture of driver's license is not a ministerial act which may be delegated to the clerk of court. The **statute requires a court order signed by the judge in accordance with Civil Rule 58(A)**.

THE SUPREME COURT of OHIO

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**SIGNING THE JUDGMENT - ELECTRONIC SIGNATURE**

- Rules of Practice of the Supreme Court of Ohio. Rule 3.08(B)  
–A document that is filed by e-mail or through the E-Filing Portal pursuant to S.Ct.Prac.R. 3.02 shall include a scanned version of the person's original signature or a signature line with a forward slash followed by an "s" followed by the person's name in print (e.g., /s "John T. Smith").
- *State v. Nicholson*, 8<sup>th</sup>. Dist. Cuyahoga No. 91652, 2009-Ohio-3592. Journal entry signed by electronic signature in accordance with local rule of court was valid.

THE SUPREME COURT of OHIO

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**SERVICE OF JUDGMENT**

- Procedure for service of judgment is **governed by Civil Rule 58, incorporating Civil Rule 5(B)**, which provides for service by **regular mail** at the parties' last known address, **not** by Civil Rule 4 regarding service of a summons and complaint.
- *Paradise 4U Properties v. Clark*, 10<sup>th</sup>. Dist., 2016-Ohio-3269. Mailing of judgment entry to defendant/tenants' last known address was valid, even though the defendants did not receive the judgment entry when the defendants were aware of the case and failed to notify the clerk of court of a change of address.
  - It is the parties' responsibility to notify of a change of address.

THE SUPREME COURT of OHIO

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**POST JUDGMENT MOTIONS - ATTORNEYS FEES**

- Rule 1.5 (A) of the Ohio Rules of Professional Conduct. The **factors** to be considered in **determining the reasonableness** of a fee include:
  1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
  2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
  3. The fee customarily charged in the locality for similar legal services;
  4. The amount involved and the results obtained;
  5. The time limitations imposed by the client or by the circumstances;
  6. The nature and length of the professional relationship with the client;
  7. The experience, reputation, and ability of the lawyer or lawyers performing the services;
  8. Whether the fee is fixed or contingent.

THE SUPREME COURT of OHIO

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POST JUDGMENT MOTIONS  
BANRUPTCY ISSUES

- *Fifth Third Bank v. L & A Investments*, 2d. Dist., 2010-Ohio-3769. The **automatic stay** created by 11 U.S.C. Sec. 362(a) normally applies **only to the bankrupt debtor, not to other co-defendants**. If a co-defendant seeks to have the stay of proceedings apply to all defendants in a case, the co-defendant must apply to the U.S. Bankruptcy Court to extend the stay, not the state court where the case is pending.

THE SUPREME COURT of OHIO

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POST JUDGMENT MOTIONS  
DORMANT JUDGMENT

- General Judgments: A judgment will become dormant within five (5) years of the later:
  1. Date of judgment.
  2. Date of issuance of last execution.
  3. Date of issuance and filing of certificate of judgment lien.
- *Thompson v. Slone*, 68 Ohio App.3d 575, (10<sup>th</sup>. Dist. 1991). The terms "dormant" and "revivor" imply that a judgment is sleeping and then awakened, not destroyed and recreated. 68 Ohio App.3d at 578.

THE SUPREME COURT of OHIO

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POST JUDGMENT MOTIONS  
JUDGMENTS SUBJECT TO REVIVOR

1. Monetary judgments
2. Finding for money in equitable proceeding
3. Court costs in criminal cases.
4. Out-of-state judgments. *Tube City v. Haliashak*, 8<sup>th</sup>. Dist. Cuyahoga No.91440, 2008- Ohio- 6951 (permitting revivor of Pennsylvania judgment that was transferred to Ohio for collection)

THE SUPREME COURT of OHIO

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POST JUDGMENT MOTIONS  
JUDGMENTS **NOT** SUBJECT TO REVIVOR

1. Installment support orders.
2. Judgments concerning ownership rights in real property. *Poss v. Morris*, 11<sup>th</sup>. Dist., 2006-Ohio-1441.

THE SUPREME COURT of OHIO

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POST JUDGMENT MOTIONS - OBJECTIONS TO REVIVOR

• An objection to a motion to revive a dormant judgment is **limited to the revivor, not** the underlying **merits** of the judgment. Objections to a dormant judgment cannot be used as a substitute for a motion for relief from judgment. Similarly, objections to a motion for revivor cannot be used to collaterally attack the validity of the judgment, raise any defenses, or re-litigate issues that existed prior to the entry of judgment. *Walsh v. Patitucci*, 8<sup>th</sup>. Dist., 2009-Ohio-6829. See also, *Heselden Plumbing Co. v. Justice*, 10<sup>th</sup>. Dist. Franklin, No. 85AP733 (March 13, 1986). As such, the grounds for objection are generally limited to:

1. Jurisdiction of the court to enter a valid judgment.
2. Payment
3. Satisfaction
4. Statute of limitations
5. Discharge in Bankruptcy
6. Judgments not subject to revivor.

THE SUPREME COURT of OHIO

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POST JUDGMENT MOTIONS  
SERVICE OF REVIVOR

• Ohio R. Civ. P. 4(F) requires the motion to revive a dormant judgment **“shall be in the same form and served in the same manner as provided in these rules for service of summons and complaint. . .”** The clear intent of this rule is initial service by certified mail, with service by ordinary mail if the prior certified mail is returned as “unclaimed” or “refused.”

THE SUPREME COURT of OHIO

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SERVICE MEMBERS' CIVIL RELIEF ACT

- **Statutory Authority:** 50 U.S.C. 501 et seq. Servicemembers Civil Relief Act.
- **Effective:** December 19, 2003, replacing Soldiers and Sailors' Civil Relief Act of 1940.
- **Application:** Applies to all state and federal courts and administrative agencies. 50 U.S.C. 511(5).

THE SUPREME COURT of OHIO

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SERVICE MEMBERS' CIVIL RELIEF ACT - DEFAULT JUDGMENT PROCEEDINGS

- **No appearance entered.** 50 U.S.C. 521
  1. Military **affidavit is required** to show whether or not the defendant is in the military service.
  2. If the court determines that the defendant is in the military service, **judgment may not be entered until the court appoints counsel.**
  3. Failure to appoint counsel makes judgment **voidable.**
  4. Duty is imposed on court to inquire or order opposing party to inquire through **Department of Defense Data Center of military status** of the defendant.
  5. Trial Court **may stay** the proceedings for **90 days** upon **determination of either:**
    - a) Valid **defense** to claim that **cannot** be presented **without** defendant; **or**
    - b) After **due diligence**, counsel is unable to contact defendant **or** determine that a meritorious defense exists.

THE SUPREME COURT of OHIO

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SERVICE MEMBERS' CIVIL RELIEF ACT STAY OF PROCEEDINGS

- **Defendant entered appearance.** 50 U.S.C. 522
  1. If the defendant is in military service, or 90 days after termination from military service
    - a) Upon knowledge of court, or
    - b) Application by the defendant with:
      - Explanation of why military service effects ability to appear or defend,
      - Date of availability, and
      - Letter from commanding officer.
  2. Initial period of stay is 90 days.
  3. After 90 days, the court may either:
    - a) Continue stay of proceedings, or
    - b) If proceedings not stayed, appoint counsel for defendant.

THE SUPREME COURT of OHIO

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**SERVICE MEMBERS' CIVIL RELIEF ACT  
RELIEF FROM DEFAULT JUDGMENT**

- 50 U.S.C. 521(g).
  1. Applies to default judgment if judgment was entered when:
    - Defendant was in the military service, or
    - 60 days after defendant's termination of military service.
  2. Application for relief by defendant within 90 days of termination from military service.
  3. Application for relief from judgment must show:
    - Meritorious defense, and
    - Defense could not be presented due to military service.

THE SUPREME COURT of OHIO

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**SERVICE MEMBERS' CIVIL RELIEF ACT  
ADDITIONAL RESOURCES**

1. A Judge's Guide to the Servicemembers' Civil Relief Act.  
- <https://www.nclamp.gov/media/425665/jdg-guide.pdf>
2. Ohio Guide to Servicemembers Civil Relief Act, Ohio State Bar Association.  
Note: This guide can be found at the Ohio Judicial Conference Website under the "Resource" heading at the top of the website.
3. U.S. Department of Justice  
- <https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-skra>
4. Military status of the defendant verification. - Defense Manpower Data Center  
- <https://scra.dmdc.osd.mil/scra/#/home>

THE SUPREME COURT of OHIO

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Judge Courtney Worley  
Brown County Municipal Court  
[cworley@browncountyohio.gov](mailto:cworley@browncountyohio.gov)  
513-515-7492

THE SUPREME COURT of OHIO

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# Arraignments, Pleas, Initial Appearances and Pretrial Release and Detention

**Hon. Terri L. Stupica**  
*Chardon Municipal Court*





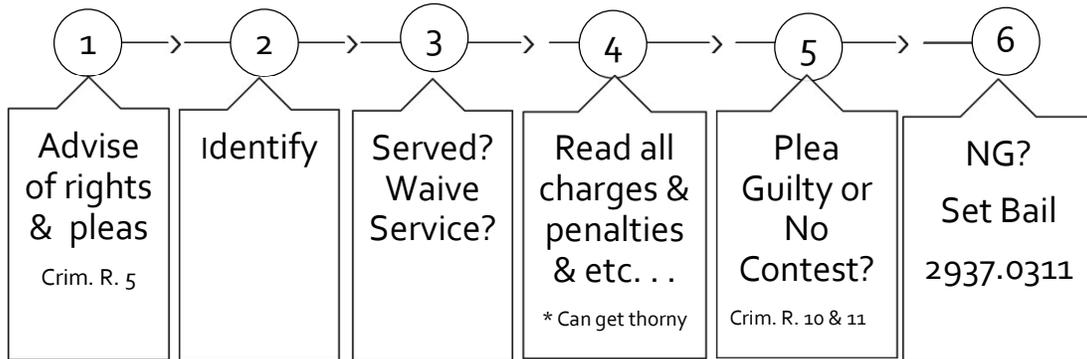
## ARRAIGNMENTS, INITIAL APPEARANCES, PLEAS, AND PRETRIAL RELEASE

**KEEP IN MIND...YOU ARE SETTING THE STAGE FOR  
THE REST OF THE CASE!!**

- Use Technology—create a rights video with Spanish subtitles
- Remember the Marsy's Law! Request for Protection order?
- Slow Down. . Take your time
  - Make a good record
- Make it easy for pro se litigants
  - Use props
  - Avoid legalese

A small, low-resolution image of a legal document or table, possibly a checklist or a table of contents, located to the right of the list items.

## IN A NUTSHELL . . .



## RIGHTS LIST—CRIM. R. 5(A)

- Right to receive copy of complaint
- Right to be informed of nature of complaint
- Right to counsel, appointed counsel if jailable and eligible
- Right to continuance to get counsel

# PLEA INSTRUCTION FORM

**You will be asked to enter one of three pleas. The possible pleas are:**

1. **NOT GUILTY:** This plea is a denial of guilt. If you enter this plea, your case will be set for pre-trial or trial at a later date when we can hear the case properly.
2. **GUILTY:** This plea is a complete admission of guilt. If you enter this plea and are found guilty, you will be permitted to make a statement prior to sentencing. In most cases, sentencing will occur at the same time and day that you enter a Guilty plea
3. **NO CONTEST:** This plea is not an admission of guilt but is an admission of the truth of the facts alleged in the COMPLAINT. This plea cannot be used against you in any other legal proceeding such as an automobile accident. If you enter this plea and are found Guilty, you will be permitted to make a statement prior to sentencing. If you refuse to enter any of the above pleas, the Court will enter a plea of Not Guilty on your behalf, and your case will be set for trial.

## RIGHTS LIST:

**Before accepting your plea, the Court must inform you that you have the following rights:**

1. The right to know and understand the charge or charges against you, and the maximum penalties for the charged offenses.
2. The right to remain silent and make no statement at any point in the proceeding. Any statement made may be used against you.
3. The right to counsel.
4. The right to a reasonable continuance to secure counsel.
5. The right to have counsel assigned to you without cost if you are "indigent" and if jail is a possible sentence. An application for court appointed counsel may be requested to determine if you qualify for an attorney,
6. The right to a Jury Trial in any case where a jail sentence is possible. A
7. demand for Jury Trial must be in writing and filed with the Clerk not less than ten days before Trial. Failure to properly demand a Jury Trial will result in your case being tried before a Judge.
8. The right to bail.
9. If you are convicted of a traffic violation, a record of the conviction will be sent to the Bureau of Motor Vehicles and become a part of your driving record.
10. If you are not a citizen of the United States, you should be advised that a conviction may result in deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

# BOND CONDITIONS (FORM)

- CONDITIONS OF BOND**
- ONLY THE CONDITIONS CHECKED APPLY TO YOUR BOND.
1.  I obey all local, state, and federal laws and ordinances.
  2.  I will **NOT** permanently leave the state of Ohio without Court permission and will **ALWAYS** keep the Chardon Municipal Court informed of my address, telephone number, place of employment and if going out of town/state.
  3.  I will not consume alcohol or possess, use, purchase, or have under my control any narcotic drug, mind altering substance, or other controlled substance, including any instrument device or other object used to administer drugs or to prepare them for administration unless it is lawfully prescribed for me by a licensed physician. I agree to not abuse any over-the-counter medication. Upon request I will **submit** to a random breath, urine, or blood test to detect the presence of alcohol or drugs in my body. Positive results will be reported to the Court and may result in the bond being revoked.
  4.  **RANDOM TESTING:** Upon request I will **submit** to a random breath, urine, or blood test to detect the presence of alcohol or drugs in my body and pay all required fees. The Chardon Municipal Court can call me at random to submit to an alcohol or drug test. I understand I have one (1) hour to report to the Chardon Municipal Court to submit to a test. Any positive results may result in the bond being revoked. Also, my failure to appear when requested, will result in a warrant for my arrest and the bond being revoked. I acknowledge that the use of marijuana, medical marijuana and CBD products which is legal in Ohio, is **PROHIBITED** while on probation/pre-trial and use therefore constitutes a violation. Any attempt at providing an adulterated urine sample will constitute a violation of bond.
  5.  If consumption of Alcohol and/or Drugs is suspected, I **MUST** submit to a breath, blood, or urine testing device by a Police, Probation Officer or agent of this Court.
  6.  No contact with \_\_\_\_\_
  7.  No Bars EXCEPT work purposes only.
  8.  **COUNSELING:** I will schedule as directed for an in-person/remote evaluation and/or treatment for items checked below and abide by all recommendations.
 

<input type="checkbox"/> Substance Abuse	Ravenwood Health: 440.285.3568
<input type="checkbox"/> Mental Health	Lake-Geauga Recovery: 440.205.2670
<input type="checkbox"/> Risk Assessment	Catholic Charities
<input type="checkbox"/> Family Violence Intervention/Anger Management Program	440.285.3537 Family Phone: 440.285.1553 Other Court Approved Program
- I will submit proof of my initial in-person/remote appointment with the appropriate agency by \_\_\_\_\_ either via email to [probation@chardonohio.gov](mailto:probation@chardonohio.gov) or by calling the Probation Office at 440.286.2500 or the Pretrial Office at 440.279.1221. I shall take medication as prescribed by my physician, authorize release of information from my physician, any private counseling agency, sober living, halfway house and/or treatment center to the Probation Department and pay the costs.
9.  **CURFEW:** I have a curfew and I may not be away from my home or residence after \_\_\_\_\_ I may be checked on randomly after that hour.
  10.  I will not purchase, possess, own, use, or control, any firearms, ammunition, dangerous ordinance or weapons, including chemical agents, electronic devices used to immobilize, pyrotechnics and/or explosive devices.
  11.  Defendant permitted **ONE** entry to the residence to retrieve personal hygiene and other items. Defendant must be in the company of a uniformed law enforcement officer. A call to \_\_\_\_\_ by law enforcement is required to facilitate the exchange.
  12.  **Electronic Monitoring**  **HOUSE ARREST**  **GPS**  **ALCOHOL MONITORING** OR  **HOUSE ARREST AND ALCOHOL**
  13. **MONITORING** ankle bracelet for \_\_\_\_\_ days to be equipped all residence or prior to release from the jail commencing on \_\_\_\_\_ and pay all Required fees.
  14.  Required fees.
  15. Other: \_\_\_\_\_

I hereby acknowledge that I have read (or had read to me) the above conditions of bond and any special conditions ordered by the Court. Until such terms are modified, they shall remain in effect as written above. I understand and acknowledge that failure to obey any term or any Court imposed condition, may cause the bond to be revoked and I could be held in jail until the conclusion of this case.

**IT IS SO ORDERED**

ATTORNEY \_\_\_\_\_

DEFENDANT \_\_\_\_\_

TERRI L. STUPICA, JUDGE

Cc: Defendant  
Probation  
Attorney  
COPD  
Victim Advocate  
Pretrial Release

## RIGHTS LIST...

- Right to remain silent...
- Right to bail
- Right to trial, bench or jury
- If felony, right to preliminary hearing

# WAIVER OF RIGHT TO COUNSEL...

IN THE CHARDON MUNICIPAL COURT GEauga COUNTY, OHIO

State of Ohio,	)	Case No.
Plaintiff,	)	Judge Terri L. Stupica
	)	Advisement of Right to Counsel,
V.	)	Waiver, and Order
	)	
Defendant,	)	
	)	

- Initials \_\_\_\_\_
1. You have the right to retain counsel even if you intend to plead guilty. You have the right to a reasonable continuance in the proceedings to secure counsel. You have the right to have counsel assigned without cost to you if you are unable to employ counsel, and if you are charged with a felony or any misdemeanor for which the penalty prescribed by law includes possible confinement for more than six months.
  2. After being fully advised of your right to retained and/or assigned counsel, you have the right to knowingly, intelligently, and voluntarily waive your right to counsel and choose self-representation.
  3. Self-representation is filled with perils and proceeding without the assistance of counsel at any stage of a criminal or traffic case is filled with perils. To be valid, a waiver of counsel and a decision to engage in self-representation must be made with an apprehension of the nature of the charge or charges. The status of the offenses included within the charge or charges, the range of allowable punishments, possible defenses to the charge or charges, and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. Depending on the particular facts involved, examples of possible defenses to the charge or charges, and circumstances in mitigation thereof, may include entrapment, self-defense, duress, insanity, intoxication, blackout, necessity, sudden passion, fit of rage, reasonable parental discipline, personal use, abandonment, renunciation, termination, alibi, accident, double jeopardy, statute of limitations, and others.
  4. If you choose self-representation, you are further advised as follows. You will be held to the same rules of evidence and procedure that a lawyer must follow. Your lack of knowledge of the rules of evidence and procedure will not prevent the court from enforcing the rules. The court will not function as your lawyer. The court will not give you any assistance.

**Waiver of Right to Counsel**

**After having read the foregoing, and after fully understanding the foregoing, and after having discussed what the court to my full satisfaction any questions I have regarding the foregoing, the undersigned defendant knowingly, intelligently, and voluntarily waives his/her rights to counsel.**

Date \_\_\_\_\_ Defendant \_\_\_\_\_

Order

The court finds defendant has knowingly, intelligently, and voluntarily waived in writing his/her right to counsel.

Date \_\_\_\_\_ Terri L. Stupica, Judge

# ADVISEMENT OF RIGHTS, WAIVER & ORDER:

IN THE CHARDON MUNICIPAL COURT GEauga COUNTY, OHIO

State of Ohio,		Case No. _____
Plaintiff,		Judge Terri L. Stupica
V.		Advisement of Rights,
		Waiver, and Order
Defendant,		

- Initials \_\_\_\_\_
1. You are presumed innocent, and you have the right to a jury trial at which the state would be required to prove beyond reasonable doubt an element of any offense with which you are charged in order for you to be found guilty of that offense. At trial you have the following rights: a) the right to challenge the state's case and evidence, including confronting and cross-examining the witnesses against you; b) at your sole discretion, the right to present a case and evidence in defense, and to use the court's subpoena power to secure the attendance of witnesses to testify on your behalf; c) at your sole discretion, the right to testify or not testify yourself (that is, I remain silent). You are not required to present a case or evidence in defense, or to testify yourself and your failure to do any of these, things cannot be used as evidence of guilt on your part.
  2. A plea of not guilty is a complete denial of your guilt. A plea of guilty is a complete admission of your guilt. A plea of no contest is not an admission of your guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against you in any subsequent civil or criminal proceeding. If you enter a plea of guilty, you give up your right to file an appeal.
  3. If you are convicted of one or more violations of a law, ordinance, or regulation governing the operation and use of vehicles conduct of pedestrians in relation to vehicles, or weight, dimension, loads, or equipment, or vehicles drawn or moved on highways and bridges a record of the conviction will be sent to the Bureau of Motor Vehicles and become a part of your driving record.
  4. If you are convicted of any offense, and if your sentence includes a period of community control or probation, you are advised that a violation of any of the terms of your community control or probation may result in any of the following: a) revocation of your community control or probation; b) imposition of any part of your sentence which was suspended; c) modification of the terms of your community control or probation to more restrictive sanctions; and d) extension of the period of time your community control or probation is in effect. In a proceeding to determine if a violation of the terms of your community control or probation has occurred, the rules of evidence do not apply, and proof of a violation needs be established only by a preponderance of the evidence.
  5. 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 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.

**Waiver of Rights**

**After having read the foregoing, and after fully understanding the foregoing and after having discussed with the court to my full satisfaction any questions I have regarding the foregoing, the undersigned defendant knowingly, intelligently, and voluntarily waives his/her rights described above.**

Date \_\_\_\_\_ Defendant \_\_\_\_\_

Order

The court finds defendant has knowingly, intelligently, and voluntarily waived in writing his/her rights described above.

Date \_\_\_\_\_ Terri L. Stupica, Judge

## TYPES OF PLEAS—GUIDE YOUR ACTIONS

### ▪ Standard

- Guilty
- Not Guilty
- No Contest—can be tricky

### ▪ Special Pleas

- NGRI—must be in writing
- Can be joined with NG plea

## PLEAS—CRIMINAL RULES 10 & 11

Explain the different pleas in Plain Language

**YOU** can enter “Not Guilty” Plea for “problem Defendant”—Crim. R. 10(A)

## MAKE YOUR FORMS USER-FRIENDLY & AVOID LEGALESE. . . . .

- **Attorney.** I have the right to an attorney; time to find an attorney; and if I cannot pay for an attorney and could be sentenced to jail, I have the right to a court-appointed attorney.
- **Bail.** I have the right to have a reasonable bail set by the Court.
- **Statements.** I do not have to say anything about the case, and anything I do say can be used against me.
- **Sentences.** If I plead guilty or no contest, the Court may sentence me to jail, pay fines/costs, and/or community service.
- **Citizenship.** A non-citizen's conviction may lead to deportation, exclusion from admission, or denial of naturalization.
- **Traffic Cases.** If convicted, I understand my driver's license may be suspended and/or points added to my license.
- **Trial Rights.** If my case goes to trial, I have the right to demand a jury trial (if I face potential jail), confront witnesses against me, request subpoenas to require witnesses to testify, have the prosecutor prove guilt beyond a reasonable doubt, and not be required to testify against myself.
- **Explanation.** I have the right to have these rights explained to me in open court and to have the explanation recorded.

## PLEAS—CRIM. R. 10 & 11 MECHANICS—YOUR ROLE



Confirm	Confirm Defendant received complaint(s)
Confirm	Confirm Defendant understands rights (not just watched the video), <b>including trial rights — HAVE A FORM in court</b>
Highlight	Highlight right to counsel
Get	Pro se? Get waiver of counsel in writing
Confirm	Confirm Defendant understands effect of G or NC

## PLEAS—GUILTY OR NO CONTEST PLEAS... MORE MECHANICS...YOUR ROLE



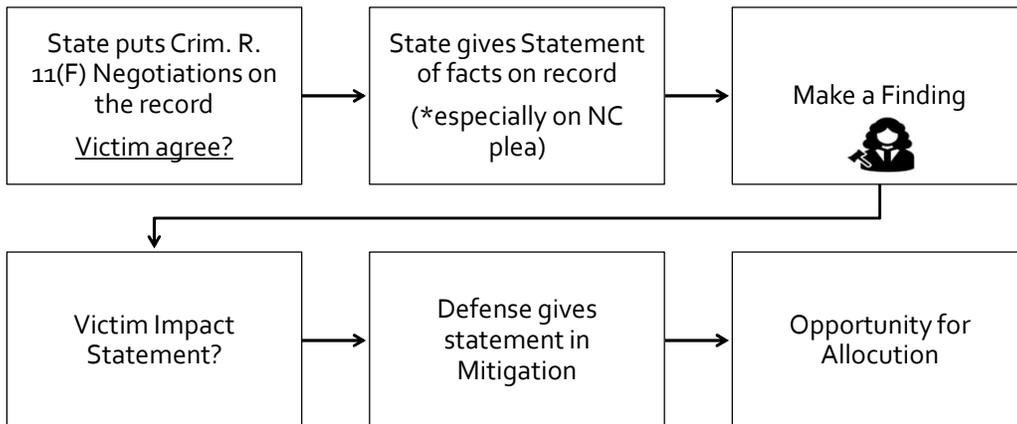
Confirm	Confirm defendant understands maximum penalty-- <b>gets thorny!!</b>
Confirm	Confirm defendant understands that sentencing is up to judge
Confirm	Confirm defendant understands effects on citizenship
Confirm	Confirm defendant NOT under duress/coerced
Confirm	Confirm defendant NOT under influence of alcohol or drugs

## THORNY ISSUES.....



- Escalating misdemeanor?
- Benefits?
- Citizenship?
- Registration offense?
- 2<sup>nd</sup> Amendment rights?
- CDL?
- BMV points?
- Hunting/Fishing License?

## PLEAS—MECHANICS



DO YOU HAVE TO ACCEPT  
PLEA NEGOTIATIONS OR  
ACCEPT A PLEA?

## NO CONTEST PLEA—R.C. 2937.07

- Must have an explanation of circumstances in all cases except minor misdemeanors
- R.C.2937.07 is a substantive right
- A “No Contest” plea may not be the basis for a guilty finding without an explanation of circumstances

## PLEAS—PRACTICAL CONSIDERATIONS

- Not Guilty?
  - Try to get a time waiver
    - Explain the speedy trial deadlines—nobody wants to come back to court in two weeks!!!!!! Especially during the holidays...
  - Have time waiver forms in the Courtroom



If a Felony. . .Crim. R. 5(B)

Advice of Right to...

- Preliminary Hearing within 10 days from arrest if in jail/15 days if not in jail
- Waiver of Preliminary Hearing IN WRITING
- Possibility of Direct Indictment
- Must have probable cause to believe felony committed **and** that Defendant is the culprit

FELONY—  
DIFFERENT SCRIPT



PRETRIAL RELEASE—

“Everything old  
is new again.”

-Thomas Swift

RC §2937.011

Codifies Crim. R. 46

Requires release on "least restrictive sanctions"  
that will assure:

Defendant's  
appearance in court

Protection or safety of  
person/community,  
and

Defendant will not  
obstruct the criminal  
justice process

RC 2937.011: TIMING="48-HOUR RULE"

Initial bail hearing can not be later than 2<sup>nd</sup> court day after arrest

If no counsel or bail not made at initial bail hearing, 2<sup>nd</sup> bail  
hearing must be held on 2<sup>nd</sup> court day after initial bail hearing

Requires appointed counsel at 2<sup>nd</sup> bail hearing

## FINANCIAL CONDITIONS OF RELEASE

\$\$



Must be related to public safety, risk of nonappearance, seriousness of offense, and previous criminal record

\$\$



Must be an amount and type least costly to defendant while also sufficient to reasonably assure defendant's future appearance in court



## NON-FINANCIAL CONDITIONS OF BAIL

### Remember

- Victim's rights—Protection Order in place?

### DV? Use R.C. 2919.251(B)

- History of DV? History of violent acts?
- Severity of offense?
- Access to weapons? History of using weapons?
- Mental health history?
- Poses a threat to any person?

### HAVE

- GPS/SCRAM on call--Find \$\$ for GPS



## BOND SCHEDULES. . .

- Have one
- Update it
- Send to Supreme Court in January of even years!!



## PASS THE GAVEL

Common Scenarios in Court

**THANK YOU!**

Judge Terri L. Stupica  
Chardon Municipal Court  
440.286.2670  
[tstupica@co.geauga.oh.us](mailto:tstupica@co.geauga.oh.us)



You will be asked to enter one of three pleas. The possible pleas are:

1. NOT GUILTY: This plea is a denial of guilt. If you enter this plea, your case will be set for pre-trial or trial at a later date when we can hear the case properly.
2. GUILTY: This plea is a complete admission of guilt. If you enter this plea and are found guilty, you will be permitted to make a statement prior to sentencing. In most cases, sentencing will occur at the same time and day that you enter a Guilty plea
3. NO CONTEST: This plea is not an admission of guilt but is an admission of the truth of the facts alleged in the COMPLAINT. This plea cannot be used against you in any other legal proceeding such as an automobile accident. If you enter this plea and are found Guilty, you will be permitted to make a statement prior to sentencing.

If you refuse to enter any of the above pleas, the Court will enter a plea of Not Guilty on your behalf, and your case will be set for trial.

Before accepting your plea, the Court must inform you that you have the following rights:

1. The right to know and understand the charge or charges against you, and the maximum penalties for the charged offenses.
2. The right to remain silent and make no statement at any point in the proceeding. Any statement made may be used against you.
3. The right to counsel.
4. The right to a reasonable continuance to secure counsel.
5. The right to have counsel assigned to you without cost if you are "indigent" and if jail is a possible sentence. An application for court- appointed counsel may be requested to determine if you qualify for an attorney,
6. The right to a Jury Trial in any case where a jail sentence is possible. A demand for Jury Trial must be in writing and filed with the Clerk not less than ten days before Trial. Failure to properly demand a Jury Trial will result in your case being tried before a Judge.
7. The right to bail.
8. If you are convicted of a traffic violation, a record of the conviction will be sent to the Bureau of Motor Vehicles and become a part of your driving record.
9. If you are not a citizen of the United States, you should be advised that a conviction may result in deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

CONDITIONS OF BOND

ONLY THE CONDITIONS CHECKED APPLY TO YOUR BOND:

- 1. Obey all local, state, and federal laws and ordinances
2. I will NOT permanently leave the state of Ohio without Court permission and will ALWAYS keep the Chardon Municipal Court informed of my address, telephone number, place of employment and if going out of town/state.
3. I will not consume alcohol or possess, use, purchase, or have under my control any narcotic drug, mind altering substance, or other controlled substance...
4. RANDOM TESTING. Upon request I will submit to a random breath, urine, or blood test to detect the presence of alcohol or drugs in my body and pay all required fees.
5. If consumption of Alcohol and/or Drugs is suspected - MUST submit to a breath, blood, or urine testing device by a Police, Probation Officer or agent of this Court.
6. No contact with
7. No Bars EXCEPT work purposes only.
8. COUNSELING: I will schedule as directed for an in-person/remote evaluation and/or treatment for items checked below and abide by all recommendations.
9. CURFEW: I have a curfew and I may not be away from my home or residence after
10. I will not purchase, possess, own, use, or control, any firearms, ammunition, dangerous ordinance or weapons, including chemical agents, electronic devices used to immobilize, pyrotechnics and/or explosive devices.
11. Defendant permitted ONE entry to the residence to retrieve personal hygiene and other items.
12. Electronic Monitoring HOUSE ARREST GPS ALCOHOL MONITORING OR HOUSE ARREST AND ALCOHOL
13. MONITORING ankle bracelet for days to be equipped all residence or prior to release from the Jail commencing on and pay all
14. Required fees.
15. Other:

Ravenwood Health: 440.285.3568
Lake-Geauga Recovery: 440.205.2670
Catholic Charities:
440.285.3537 Family
Pride: 440.286.1553 Other
Court Approved Program

will submit proof of my initial in-person/remote appointment With the appropriate agency by either via email to muniprobation@co.geauga.oh.us or by calling the Probation Office at 440,286.2649 or the Pretrial Office at 440.279.1321, I shall take medication as prescribed by my physician, authorize release of Information from my physician. any private counseling agency, sober living, halfway house and/or treatment center to the Probation Department and pay the costs.

I hereby acknowledge that I have read (or had read to me) the above conditions of bond and any special conditions ordered by the Court. Until such terms are modified, they shall remain in effect as written above. I understand and acknowledge that failure to obey any term or any Court imposed condition, may cause the Bond to be revoked and I could be held in jail until the conclusion of this case.

IT IS SO ORDERED

ATTORNEY

DEFENDANT

TERRI L STUPICA, JUDGE

Cc: Defendant
Probation
Attorney
GCSD
Victim Advocate
Pretrial Release

IN THE CHARDON MUNICIPAL COURT GEAUGA COUNTY, OHIO

State of Ohio,	)	Case No.
Plaintiff,	)	Judge Terri L. Stupica
	)	
V.	)	Advisement of Right to Counsel,
	)	Waiver, and Order
_____	)	
Defendant.	)	
Initials	)	

- \_\_\_\_\_ 1. You have the right to retain counsel even if you intend to plead guilty. You have the right to a reasonable continuance in the proceedings to secure counsel. You have the right to have counsel assigned without cost to you if you are unable to employ counsel, and if you are charged with a felony or any misdemeanor for which the penalty prescribed by law includes possible confinement for more than six months
- \_\_\_\_\_ 2. After being fully advised of your right to retained and/or assigned counsel, you have the right to knowingly, intelligently, and voluntarily waive your right to counsel and choose self-representation.
- \_\_\_\_\_ 3. Self-representation is filled with perils and proceeding without the assistance of counsel at any stage of a criminal or traffic case is filled with perils. To be valid, a waiver of counsel and a decision to engage in self-representation must be made with an apprehension of the nature of the charge or charges. The status of the offenses included within the charge or charges, the range of allowable punishments, possible defenses to the charge or charges, and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. Depending on the particular facts involved, examples of possible defenses to the charge or charges, and circumstances in mitigation thereof, may include entrapment, self-defense, duress, insanity, intoxication, blackout, necessity, sudden passion, fit of rage, reasonable parental discipline, personal use, abandonment, renunciation, termination, alibi, accident, double jeopardy, statute of limitations, and others.
- \_\_\_\_\_ 4. If you choose self-representation, you are further advised as follows. You will be held to the same rules of evidence and procedure that a lawyer must follow. Your lack of knowledge of the rules of evidence and procedure will not prevent the court from enforcing the rules. The court will not function as your lawyer. The court will not give you any assistance.

Waiver of Right to Counsel

**After having read the foregoing, and after fully understanding the foregoing, and after having discussed what the court to my full satisfaction any questions I have regarding the foregoing, the undersigned defendant knowingly, intelligently, and voluntarily waives his/her rights to counsel.**

\_\_\_\_\_ Date

\_\_\_\_\_ Defendant

Order

The court finds defendant has knowingly, intelligently, and voluntarily waived in writing his/her right to counsel.

\_\_\_\_\_ Date

\_\_\_\_\_ Terri L. Stupica, Judge

IN THE CHARDON MUNICIPAL COURT GEauga COUNTY, OHIO

State of Ohio,  
Plaintiff,  
V,

|| Case No. \_\_\_\_\_  
||  
|| Judge Terri L. Stupica  
||  
|| Advisement of Rights,  
!! Waiver, and Order

\_\_\_\_\_  
Defendant.

Initials

\_\_\_\_\_

1. You are presumed innocent, and you have the right to a fair trial at which the state would be required to prove beyond reasonable doubt an element of any offense with which *you* are charged in order for you to be found guilty of that offense. At trial you have the following rights: a) the right to challenge the state's case and evidence, including confronting and cross-examining the witnesses against you; b) at your sole discretion, the right to present a case and evidence in defense, and to use the court's subpoena power to secure the attendance of witnesses to testify on your behalf; c) at your sole discretion, the right to testify or not testify yourself (that is, to remain silent). You are not required to present a case or evidence in defense, or to testify yourself and your failure to do any of these things cannot be used as evidence of guilt on your part
2. A plea of not guilty is a complete denial of your guilt. A plea of guilty is a complete admission of your guilt. A plea of no contest is not an admission of your guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against you in any subsequent civil or criminal proceeding. If you enter a plea of guilty, you give up your right to file an appeal.
3. If you are convicted of one or more violations of a law, ordinance, or regulation governing the operation and use of vehicles or conduct of pedestrians in relation to vehicles, or weight, dimension, loads, or equipment, or vehicles drawn or moved on highways and bridges a record of the conviction will be sent to the Bureau of Motor Vehicles and become a part of your driving record.
4. If you are convicted of any offense, and if your sentence includes a period of community control or probation, you are advised that a violation of any of the terms of your community control or probation may result in any of the following: a) revocation of your community control or probation; b) imposition of any part of your sentence which was suspended; c) modification of the terms of your community control or probation to more restrictive sanctions; and d) extension of the period of time your community control or probation is in effect. In a proceeding to determine if a violation of the terms of your community control or probation has occurred, the rules of evidence do not apply, and proof of a violation needs to be established only by a preponderance of the evidence
5. 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 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.

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**Waiver of Rights**

**After having read the foregoing, and after fully understanding the foregoing, and after having discussed with the court to my full satisfaction any questions I have regarding the foregoing, the undersigned defendant knowingly, intelligently, and voluntarily waives his/her rights described above.**

\_\_\_\_\_  
Date

\_\_\_\_\_  
Defendant

**Order**

The court finds defendant has knowingly, intelligently, and voluntarily waived in writing his/her rights described above

\_\_\_\_\_  
Date

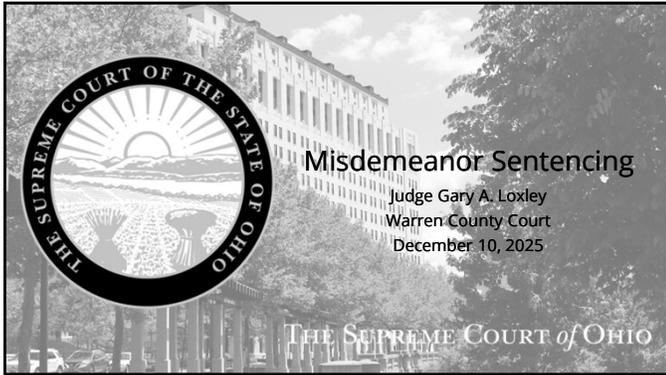
\_\_\_\_\_  
Terri L. Stupica, Judge



# Sentencing

**Hon. Gary A. Loxley**  
*Warren County Court*





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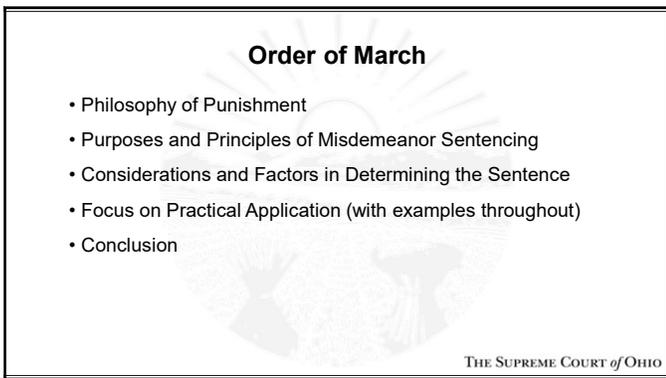
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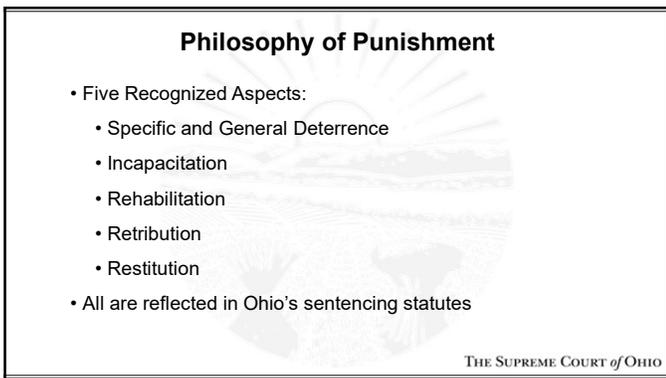
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### Sentencing Hearing

#### Crim. Rule 32

- No unnecessary delay
- Pending sentence, court may commit offender or continue/modify bail
- Allocution by offender's counsel and offender
- Statement(s) by prosecutor and victim, pursuant to law

THE SUPREME COURT of OHIO

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### Misdemeanor Sentencing

#### Philosophy and Structure

- Purposes – ultimate goals of the sentence
- Principals – generally, how to achieve the purposes
- Considerations – requirements to take into account when making sentencing decisions
- Factors – specific items to structure the sentence

THE SUPREME COURT of OHIO

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### Purposes of Sentencing

#### R.C. 2929.21(A)

- To protect the public from future crime by the offender and others
- To punish the offender

THE SUPREME COURT of OHIO

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### Principals of Sentencing

R.C. 2929.21(B)

#### The 3 "Cs"

- Sentence is reasonably Calculated to achieve the purposes of sentencing
- Commensurate to
  - Seriousness of the conduct
  - Impact on the victim
- Consistent with similar offenses

THE SUPREME COURT of OHIO

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### Judge is Required to Consider

R.C. 2929.21(A)

- Impact of the offense on the victim
- Need for:
  - Changing the offender's behavior
  - Rehabilitating the offender
  - Restitution

THE SUPREME COURT of OHIO

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### Broad Discretion

- Unless a specific sanction is required or is precluded, the court
  - has discretion to determine the most effective way to achieve purposes and principals, and
  - may impose any sanction or combination set forth in R.C. 2929.24 – 2929.28

THE SUPREME COURT of OHIO

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### Limitations on Discretion

- Must impose mandatory sentences set forth in Revised Code
- Traffic Law mandatory minimums
- Shall not impose an "unnecessary burden" on local government resources

THE SUPREME COURT of OHIO

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### Sentencing Factors

R.C. 2929.22(B)

- Nature and circumstances of the offense
- History of persistent criminal activity & substantial risk the offender will commit another offense
- Whether the offender will endanger others
- A pattern of repetitive, compulsive or aggressive behavior with heedless indifference to the consequences

THE SUPREME COURT of OHIO

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### Sentencing Factors (cont.)

- Whether victim's youth, age, disability -
  - Made the victim particularly vulnerable to the offenseor
  - Made the impact of the offense more serious;

THE SUPREME COURT of OHIO

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### Sentencing Factors (cont.)

- Whether the offender has an emotional, mental, or physical condition that is traceable to the offender's service in the armed forces
- Offender's military service record

THE SUPREME COURT of OHIO

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### Sentencing Factors (cont.)

- Likelihood of recidivism
- Any other factor relevant to achieving the purposes and principles of sentencing

THE SUPREME COURT of OHIO

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### Sentencing Considerations

R.C. 2929.22(D)(1)

- Court shall consider any relevant oral or written statement made by:
  - Victim
  - Defendant
  - Defense Attorney
  - Prosecuting Authority

THE SUPREME COURT of OHIO

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**Sentencing Considerations**

R.C. 2929.22(D)(2)

- Court shall notify the victim of the victim's right to file an application for an award of reparations
- Reparations are discussed in R.C. 2743.51 to R.C. 2743.72

THE SUPREME COURT of OHIO

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**Victim Rights**

Constitutional – “Marsy’s Law”  
Statutory – R.C. Chapter 2930  
Rule – Crim. Rule 37

- Rights to be informed of Victim Rights
- Right to be treated with fairness and respect
- Right to notice of all proceedings
- Right to be present at all proceedings

THE SUPREME COURT of OHIO

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**Victim Rights (cont.)**

- Right to be heard at proceedings involving release, plea, sentencing, and disposition
- Right to confer with prosecutor
- Right to designate a representative
- Right to proceedings without unnecessary delay
- Right to full and timely restitution

THE SUPREME COURT of OHIO

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### Continuum of Sanctions

- Jail
- Non-jail residential
- Non-residential
- Financial

THE SUPREME COURT of OHIO

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### Jail

- M-1 = not more than 180 days
- M-2 = not more than 90 days
- M-3 = not more than 60 days
- M-4 = not more than 30 days
- Unclassified Misdemeanors = statutory range contained in law
- Jail is concurrent unless specifically ordered. R.C. 2929.41

THE SUPREME COURT of OHIO

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### Jail (cont.)

- Only includes a county/city jail as defined by R.C. 307.93, 341.01, and 753.16
- All mandatory sentences must be served in a county/city jail
- Required to take into consideration the availability of resources and first look to non-jail sanctions. R.C. 2929.22(C)

THE SUPREME COURT of OHIO

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**Jail (cont.)**

- Unless jail term is mandatory, may permit intermittent confinement or release for employment/education. R.C. 2929.24(B)(1)
- Modification of jail terms may require notice to prosecutor and a hearing. R.C. 2929.24(B)(2)
- Court retains jurisdiction to modify the jail sentence, but shall not reduce any mandatory jail term. R.C. 2929.24(B)(1)

THE SUPREME COURT of OHIO

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**Non-Jail Residential**

R.C. 2929.26

- No mandatory sentences except if an alternative is provided by statute
- Includes:
  - Halfway house
  - Community-based correctional facility
  - Community alternative sentencing center
  - District community alternative sentencing center

THE SUPREME COURT of OHIO

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**Non-Jail Residential (cont.)**

- Term may not exceed the longest jail term available for the offense
- Political subdivision may enter into contract for use of halfway house to house misdemeanor offenders

THE SUPREME COURT of OHIO

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### Non-Jail Residential Sanctions

- Non-residential sanction or sanctions can be imposed, except for cases with mandatory jail sentence
- Non-exclusive examples are listed in R.C. 2929.27(A)
- "Catch-All" – Any unique sanction intended to deter and is reasonable related to purposes and principals of sentencing R.C. 2929.27(C)

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### House Arrest

R.C. 2929.27(A)(2)

- Includes:
  - House arrest with electronic monitoring
  - House arrest with continuous alcohol monitoring
  - House arrest with both electronic & continuous alcohol monitoring
  - Electronic monitoring or continuous alcohol monitoring w/o house arrest
  - House arrest w/o electronic or continuous alcohol monitoring

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### Community Service

R.C. 2929.27(A)(3)

- Term
  - M-1 = up to 500 hours
  - M-2, M-3, or M-4 = up to 200 hours
- Programs are established by the local court

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### Financial Sanctions

- Local court costs, R.C. 2949.111(A)(1)
- State fines and costs, R.C. 2929.28(A)(2)(b) & 2949.111
- Restitution, R.C. 2929.28(A)(1)
- Fines, R.C. 2929.28(A)(2)
- Reimbursement, R.C. 2929.28(A)(3) & 2929.29

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### Local Court Costs

R.C. 2949.111(A)(1)

- Court may charge any assessment that it requires to defray the costs of operating the court
- Established by Local Court Rules

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### State Fines and Costs

R.C. 2949.111

- Set by statute
- Includes:
  - Victims of Crime Reparations Fund
  - Indigent Defense Support Fund
  - Law Library Association

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**Restitution**

R.C. 2929.28(A)(1)

- Must consider the request at sentencing
- Amount is based upon "economic loss" by agreement or after a hearing
- Must order a specific amount to a specific person
- May charge up to 5% surcharge to cover costs of collection
- Restitution also constitutes a civil judgment

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**Restitution Hearing**

R.C. 2929.28(A)(1)

- Court shall hold an evidentiary hearing to determine the amount of restitution if the amount requested is in dispute
- Standard is a preponderance of the evidence

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**Fines**

R.C. 2929.28(A)(2)

- Range
  - M-1 = not more than \$1000
  - M-2 = not more than \$750
  - M-3 = not more than \$500
  - M-4 = not more than \$250
  - MM = not more than \$150
- May suspend any amount EXCEPT mandatory fines

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**Reimbursement**

R.C. 2929.28(A)(3) & 2929.29

- Reimbursement by the offender of any or all of the costs of sanctions incurred by the government
- Amount awarded shall not exceed
  - Offender's ability to pay
  - Actual cost of the sanctions

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**Disbursement of Financial Sanctions**

- Order set by statute unless the court orders otherwise
  - Local Court Rules
  - State fines and costs
  - Restitution
  - Fines
  - Reimbursement

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**Sentence for Sexually Oriented Misdemeanor**

- Follow sentencing and notice requirements of the statutes
  - R.C. 2929.23 & Chapter 2950
- Most offenses are felonies, but there are two misdemeanors:
  - Voyeurism, R.C. 2907.08
  - Sexual Imposition, R.C. 2907.06

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### Review of Sentencing Decision

- Whether the court followed the applicable laws and rules
- Misdemeanor sentencing court is not required to make judicial fact-finding for maximum sentence
- Standard of review on appeal is abuse of discretion
  - Unreasonable, arbitrary, unconscionable decision

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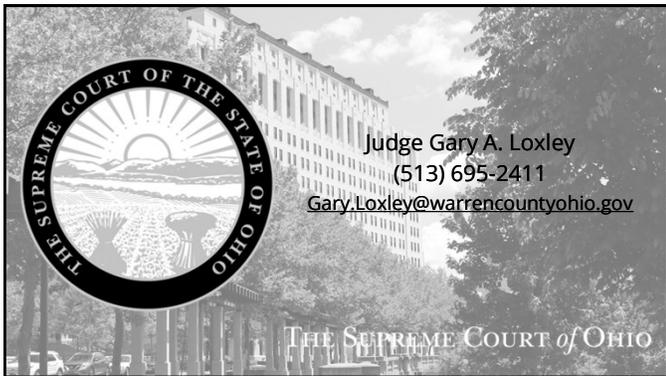
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# **Trial Skills Workshop**

**Hon. Todd L. Grace**  
*Athens Municipal Court*

**Hon. Thomas M. Hanna, Retired**  
*Kettering Municipal Court*



# Ohio Judicial College Trial Skills Workshop

Trial Skills Problems:

Problem One .....	Pre-trial Conferences (Ground Rules)
Problem Two.....	Jury Issues
Problem Three.....	Motions in Limine
Problem Four .....	Witness Sequestration
Problem Five .....	Scope of Direct and Cross Examinations
Problem Six.....	Common Objections
Problem Seven .....	Witness Problems
Problem Eight .....	Motions Frequently Made at Trial
Problem Nine .....	Miscellaneous Issues Relating To Demonstrative Evidence, Jury Views, Note Taking, and Juror Questions
Problem Ten.....	Maintaining Professionalism
Problem Eleven.....	Closing Arguments
Problem Twelve .....	Jury Instructions
Problem Thirteen .....	Jury Deliberation
Problem Fourteen.....	Concluding Trials



## 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 petit 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 OVI trial?”

**Leader:**            [Hands gavel to student judge.]

**(Criminal Rule 24)**

**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 OVI 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 OVI. The jury has a right to know he’s lying. I should be able to introduce evidence of that prior OVI. 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 OVI. 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 Driving Under the Influence of Alcoholic Beverages. 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 OVI manslaughter rather than a common 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 6C**

**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 or 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 include 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:**            In fact, Ms. Easy, haven’t you slept with my client’s best friend and his  
*(continues)*                    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 spouse battery. 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 30<sup>th</sup> but the evidence has shown the crime actually occurred in the early morning hours of December 31<sup>st</sup>. The information should read December 31<sup>st</sup>.”
- 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 OVI)*

**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 OVI and the same shirt he had on the last time I arrested him for OVI.”

**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. Bud Wiser, did you perform poorly on the road side sobriety test?”

**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 Judge 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                      HYPOTHETICAL 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.  
If there is no objection, when/should trial court intervene so as to preserve the fairness of the proceeding?

**PROBLEM 11                      HYPOTHETICAL 11I**

*(Criminal Case—Marijuana possession—during closing argument Prosecutor states: )*

**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?”  
*(Chaplinsky 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.]**







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