IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

STATE OF OHIO,	)	CASE NOS. 95-CR-696
	)	96-CR-599
Plaintiff	)	
	)	JUDGE JOHN M. STUARD
vs.	)	
	)	
ANTHONY CIOFFI, JR.,	)	MOTION TO SET ASIDE JUDGMENT OF
	)	CONVICTION AND TO WITHDRAW
Defendant	)	PLEAS OF GUILTY
	)	(Evidentiary Hearing Requested)

Now comes the defendant, Anthony Cioffi, Jr., by and through undersigned counsel, and pursuant to Rule 32.1 of the Ohio Rules of Criminal Procedure, hereby respectfully moves this Honorable Court to issue an order setting aside the judgments of conviction entered in the above-captioned cases and permitting him to withdraw his pleas of guilty.

The grounds for this requested relief are that defendant's pleas were not knowingly, voluntarily, and intelligently made.

Defendant asserts that where he relied upon the counsel of a lawyer who failed to properly investigate and evaluate the charges against him, his pleas could not have been knowingly, voluntarily, and intelligently entered. Accordingly, defendant asserts that manifest injustice is presented herein and respectfully requests remedial action from this Court.

A brief in support is attached hereto and incorporated by reference as if fully rewritten herein.

Respectfully submitted,

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BRIEF IN SUPPORT

I. INTRODUCTION

Defendant, Anthony Cioffi, Jr., is presently serving a ten (10) to twenty-five (25) year prison term at the Trumbull Correctional Institution pursuant to sentences imposed by this Court.

At this time, defendant seeks remedial relief from his sentence on the ground that his trial counsel was wholly unprepared to advise him at the time of his pleas. A subsequent investigation conducted by current counsel for the defendant has revealed that on the date defendant entered his pleas, his trial counsel had not yet properly evaluated nor commenced trial preparation regarding rape charges which were resolved as part of a plea bargain package entered into on the date of trial. As such, defendant asserts that his pleas were not knowingly, voluntarily and intelligently made.

For the reasons stated herein, defendant requests an evidentiary hearing.

II. STATEMENT OF THE CASE

On November 17, 1995, an indictment in Case No. 95-CR-696 was returned by the Trumbull County Grand Jury charging the defendant with two (2) counts of Gross Sexual Imposition, R.C. 2907.05(A)(4), felonies of the third degree and one count of Kidnapping, R.C. 2905.01(A)(2), an aggravated felony of the second degree.

The offense conduct regarding the two (2) counts of Gross Sexual Imposition stemmed from an allegation that defendant had fondled the genitalia of Megan McKelvey (DOB: 12-29-86), the daughter of defendant's then girlfriend, Sheila Schreckengost.

The offense conduct regarding the count of Kidnapping stemmed from an allegation that defendant restrained his then girlfriend, Sheila Schreckengost, of her liberty to facilitate his flight

The offense conduct regarding this second case stemmed from allegations that defendant had engaged in sexual activity with his natural children years prior to the allegations lodged by Megan McKelvey.[2]

Again, Attorney Zena entered his appearance as counsel for the defendant.

In connection with pretrial investigation of those allegations (involving his natural children) it is undisputed that Attorney Zena failed to conduct even a minimal investigation and/or even begin preparation of a defense on the defendant's behalf. Attorney Zena failed to secure and/or review educational, medical and/or psychological records relative to defendant's natural children -- records which were in existence and which documented extensive psychological histories of the children including significant behavior and emotional problems and denials of sexual abuse at the hands of the defendant. Attorney Zena conducted no interviews nor sought the assistance of any expert. As a result, defense counsel was in no position to render advice and/or a professional opinion regarding the relevant issues of that criminal indictment including an evaluation as to merits of proceeding with trial versus accepting a plea bargain agreement. Attorney Zena nevertheless counseled the defendant relative to plea resolution notwithstanding Zena's failure to conduct even a minimal investigation as to the veracity of these allegations.

On December 3, 1996, defendant was scheduled to proceed with trial by jury before this Court in Case No. 95-CR-696. Prior to commencing trial, this Court had ordered that records regarding past allegations lodged against third parties by Megan McKelvey and/or Sheila Schreckengost and in possession of the Trumbull County Children Services, as well as psychological records regarding the aforementioned be delivered to the Court for possible

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[2]This case was commenced during a visitation dispute between defendant and the mother of defendant's children.

disclosure and use at trial. While waiting for the records to be delivered for inspection and before commencing with jury selection, Attorney Zena presented the defendant with a plea bargain resolution concerning both cases.[3]

On the date of the scheduled trial, Attorney Zena counseled the defendant relative to a plea bargain agreement resolving both indictments. Attorney Zena rendered his advice and professional opinion notwithstanding the fact that he had failed to inspect Children Services records which may have been highly exculpatory and/or, at a minimum, relevant to the defense in Case No. 95-CR-696; had failed to conduct even a minimal independent investigation nor had he engaged in any trial preparation on the case involving the allegations lodged by defendant's natural children. The defendant relied upon the advice and professional opinions of his counsel in entering into the following plea agreement:

Case No. 95-CR-696: Pleas of guilty to Count One (1), Gross Sexual Imposition and to Count Three (3), Kidnapping. One (1) year imprisonment on Count One (1) to run concurrent to three (3) to fifteen (15) years of imprisonment on Count Three (3). Sentences to run concurrent to sentence imposed in Case No. 96-CR-599.

Case No. 96-CR-599: Pleas of guilty to Counts One (1) through Three (3), Rape without life specification and to Counts Four (4) through Six (6) Gross Sexual Imposition. Ten (10) to Twenty-Five (25) years of imprisonment on the first three (3) counts to run concurrently with each other and to run concurrently with one (1) year imprisonment on counts Four (4) through Six (6) which were to run concurrently with each other.

Defendant was presented with written plea forms memorializing the above. He signed same and plead as outlined before this Court.[4]

After accepting the defendant's pleas, this Court imposed sentence on the defendant on December 6, 1996. Defendant has been incarcerated since that time.

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[3]Attorney Zena insists that it was defendant who requested resolution by means of a plea. Assuming that to be the case, there is no dispute that Attorney Zena, an experienced criminal defense attorney, recognized that he was resolving charges and cases which he had limited knowledge and information.

While serving his sentence, the defendant secured the services of undersigned counsel to examine these matters including the conduct of Attorney Zena. As part of that undertaking a significant effort has been made relative to securing relevant documentation, defendant's files from Attorney Zena[5] and facts regarding pretrial investigation and advice provided by trial counsel.

On October 12, 1998, a sworn statement of Attorney Zena was taken by undersigned counsel. That statement is attached hereto and incorporated herein by reference in support of defendant's motion.

A review of that statement supports the conclusion that defendant plead guilty before this Court while relying on the representation of an attorney who was wholly unprepared to resolve both cases as he had advised; who had failed to review subpoenaed records which may have significantly impacted upon the defense of Case No. 95-CR-696; and who had categorically failed to conduct an independent investigation of the allegations lodged by defendant's natural children (trial in that case was scheduled to commence immediately after the first trial). Present counsel asserts that Attorney Zena could not have possibly counseled this defendant within the meaning and spirit of the Sixth Amendment. As such, defendant could not have entered his pleas with an appropriate base of knowledge.

III. STATEMENT OF FACTS

At all times relevant to this proceeding, defendant relied upon the skill and expertise of his retained trial counsel. This is particularly true given the fact that defendant is a man of low

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[4]This Court accepted the transfer of Case No. 96-CR-599 from Judge Shaker's docket for purposes of disposing of both cases in one hearing.

[5]A complete file which Attorney Zena, to this day, has yet to produce.

intelligence having been classified throughout his life as developmentally disabled and only nominally literate. See reports attached hereto.

Of particular significance to the defense of charges in Case No. 95-CR-696, defendant relied upon Attorney Zena to investigate whether Megan McKelvey and/or Sheila Schreckengost had lodged similar false allegations in the past against other third parties. A court order was issued compelling the production of these records to the Court prior to trial. The records were to be produced on the date of trial and would have been available for inspection. Unfortunately, Attorney Zena failed to inspect the records and instead proceeded to counsel the defendant relative to plea resolution. Hence, neither Attorney Zena nor the defendant were aware that these records contained potentially highly exculpatory information. Specifically, these records contained information that Megan McKelvey (an alleged victim) had provided a written statement on September 18, 1995, to an investigator of the Trumbull County Children's Board wherein she denied ever having been touched in a "bad way" in the past. See Oral Examination Exhibit 3. These records may have established that the alleged victim had lodged previous false allegations. Insofar as there existed no physical or medical evidence to corroborate the allegations the credibility of the alleged victim would be a central issue at trial. Evidence of a prior false allegation would be both highly probative and damaging as to the issue of credibility.[6] Based upon this information alone, the defendant now asserts that his decision to enter a plea of guilty could not have been entered knowingly and intelligently within the meaning and spirit of Due Process considerations.

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[6]Had these records been reviewed and had they memorialized a past false allegation, same could have been used for impeachment purposes. See, State v. Boggs (1992), 63 Ohio St. 3d 418. Had these records been reviewed and had they memorialized a past allegation (substantiated or not), Megan's statement of September 18, 1995, would have presented the defense with a prior inconsistent statement for impeachment purposes.

In fact, there was other significant information unavailable to the defendant at the time of the plea bargain agreement due to the neglect of his trial counsel.

Defendant relied upon Attorney Zena to investigate whether Megan McKelvey had ever lodged an accusation of abuse against her natural father. During Attorney Zena's oral examination conducted on October 12, 1998, by present counsel, he testified that he never attempted to interview Megan's natural father. See Oral Examination at Tr. 33. Furthermore, it is undisputed that he never reviewed the records ordered by the Court for production prior to trial. Id. at Tr. 30. Yet, in a letter written in response to a Bar complaint filed with the Supreme Court against Attorney Zena by the defendant, Attorney Zena claims to have "investigated" these accusations such that "[at trial] we would have been able to make some claims against credibility regarding that matter. We intended to call the father and cross-examine the young lady regarding those issues." See Attorney Zena letter dated March 16, 1998, at page 2.[7]

Finally, in connection with the defense of charges in Case No. 95-CR-696, the defendant relied upon Attorney Zena to secure psychological records of Megan McKelvey and Sheila Schreckengost for impeachment purposes. These records were never secured nor reviewed.[8] This is particularly significant insofar as the State intended to present no physical evidence to support the allegations. The issue of credibility was therefore paramount.

It is significant to note that trial by jury in Case No. 96-CR-599, was scheduled to commence immediately after trial in Case No. 95-CR-696. Attorney Zena had failed to prepare that case for trial. Attorney Zena admitted as much at the oral examination of October 12, 1998,

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[7]It cannot be rationally disputed that Attorney Zena's oral statement is categorically inconsistent with his written explanation provided to the Bar's investigator.

[8]During Attorney Zena's oral examination he acknowledged that Ohio law authorizes cross-examination of a victim as to psychiatric treatment to test credibility. See Oral Examination at 25. See also State v. Riffle (1982), 3 Ohio App. 3d 202.

wherein he stated that "the second case was not of a trial preparedness status by any means." Id. at Tr. 47, emphasis added. When asked what he meant by not being in a "trial preparedness" state, Attorney Zena responded:

> That means, well, to me, you know something about the case, you are proceeding on the case, you have done some interviewing, some investigating, you have reviewed some discovery. But hopefully, you know what I mean, I am assuming that you have been down it too, you get to a point where you put things off, you table things, and I was only concentrating on one case because I was getting ready for trial and I was not there.

Id. at Tr. 49, emphasis added.

It is paradoxical that Attorney Zena counseled this defendant to enter into a plea agreement when he testified during oral examination that he believed the allegations were extremely defensible:

Q. But you were dealing with the second case, by your own admission, with having a limited factual insight?
A. That's why I said what I said.

Q. Quite frankly, this was the face of a case that was extremely defensible; agreed?

A. The face of a case that was defensible, yes.

Q. Extremely defensible.

A. Well, yes, extremely defensible.

Id. at Tr. 62.

Considering that defendant was charged with engaging in anal intercourse with his minor son, defendant relied upon Attorney Zena to secure medical/pediatric records which may have provided insight or physical proof exonerating the defendant. Again no records were requested nor reviewed. See Id. at Tr. 60-61.

In summary, and by the admission of Attorney Zena himself set forth below, the counseling provided to this defendant at the time of the plea left much to be desired considering

his lack of insight and preparation: "You can only make a judgment at that time on what you know existed then. It was far from the ideal situation." Id. at Tr. 64, emphasis added.

III. LAW AND ARGUMENT

A. CRIMINAL RULE 32.1 PERMITS AN INDIVIDUAL TO WITHDRAW A PLEA POST - SENTENCE TO CORRECT A MANIFEST INJUSTICE

A motion to withdraw a plea of guilty is governed by the standards set forth in Crim. R. 32.1 which states as follows:

> A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed or imposition of sentence is suspended, but to correct manifest injustice the Court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

In State v. Smith (1977) 49 Ohio St. 2d 261, the Ohio Supreme Court stated that the burden of demonstrating "manifest injustice" rests with the defendant; that the decision whether to grant such a motion rests within the sound discretion of the trial court; and, that in exercising that discretion, the trial court is empowered to resolve issues of credibility and the weight of the defendant's assertions.

Ohio case law supports the fact that the extraordinary circumstances existing herein rise to the level of "manifest justice" as required under Crim. R. 32.1 thereby justifying setting aside defendant's judgment of conviction and permitting him to withdraw his guilty pleas.

B. MANIFEST INJUSTICE IS PRESENTED WHERE, AS HERE DEFENDANT'S GUILTY PLEAS WERE PREDICATED UPON THE ADVICE OF COUNSEL WHO FAILED TO PROPERLY INVESTIGATE AND PREPARE THE CASES FOR TRIAL

The case of State v. Hamed (1989) 63 Ohio App. 3d 5, 577 NE 2d 1111, is directly on point.

In Hamed, the defendant appealed from his conviction for trafficking in food stamps assigning as error the trial court's failure to afford him a hearing on his post sentence motion to withdraw his plea of "no contest". The Court of Appeals reversed the trial court's ruling and held that Hamed was entitled to a hearing on his post-sentence motion to withdraw his plea of no contest where his specific allegations as set forth in his motion would have entitled him to a plea withdrawal if shown to be true.

The Hamed Court specifically distinguished that case from others wherein movants merely set forth broad based ineffective assistance of counsel claims. In this regard the Hamed Court noted that:

> ...[w]hile the defendant in this case makes a similar allegation he further cites specific instances where his counsel failed to make even minimal efforts to 1) assess the merits of his case, 2) investigate and assess potentially exculpatory evidence, 3) inform him of the consequences of his plea, 4) discuss the merits of alternative strategies and 5) present mitigating evidence.

Id. at 8.

During the oral examination under oath, Attorney Zena admitted to the failures identified by the Court in Hamed thus constituting the factual and legal foundation in support of the within motion. Specifically, Attorney Zena admitted that he had put the second case on the "back burner" such that he was unprepared and unaware of the relevant issues. Necessarily, he was not in an position to discuss alternative strategies. Moreover, he failed to review records which may have significantly impacted on the defendant's defense prior to counseling the defendant relative to plea resolution -- records which were to be delivered to the Court per order. Necessarily, he failed to assess potentially exculpatory evidence. In sum, Attorney Zena's conduct is analogous to a doctor rendering a diagnosis and administering treatment without having first having conducted a thorough examination of his patient.

immediately after she claimed to have discovered that defendant had engaged in sexual activity with her daughter.

In connection with his legal defense, defendant secured the services of Boardman attorney, Thomas E. Zena (hereinafter referred to as "Attorney Zena").[1]

There is some dispute as to the amount of time Attorney Zena spent with the defendant in discussing this case, including the nature of the evidence as well as issues of investigatory and trial strategies. Specifically, the defendant maintains that defense counsel failed to spend more than minimal time discussing relevant issues concerning the merits of the allegations as well as possible defenses. Nevertheless, there is no dispute as to the following facts:

1. No physical evidence existed to support the allegations of sexual activity;

2. Information existed that Megan McKelvey and/or Sheila Schreckengost had lodged similar unfounded allegations in the past against other third parties and that same had been the subject of an investigation by Trumbull County Children Services; and,

3. Information existed that Megan McKelvey and/or Sheila Schreckengost had been previously counseled by mental health care professionals for emotional problems.

While Case No. 95-CR-696 remained pending before this Court, a second indictment in Case No. 96-CR-599, was returned by the Trumbull County Grand Jury on September 27, 1996, charging the defendant with three (3) counts of Rape, R.C. 2907.02(A)(1)(b)(2), aggravated felonies of the first degree (with life specifications), and three (3) counts of Gross Sexual Imposition, R.C. 2907.05(A)(4), felonies of the third degree. That case was assigned to Judge Mitchell F. Shaker.

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[1] Attorney Zena had previously provided legal representation to defendant in connection with a domestic relations case. As such, Attorney Zena presumably had some knowledge of defendant's background and life history including the fact that defendant has been classified as developmentally disabled. See infra, supporting documentation.

In reversing the trial court's denial of Hamed's post-sentence Crim. R. 32.1 motion and remanding same for an evidentiary hearing the Court noted:

> Accordingly, this case is distinguishable from previous cases in that the defendant claims that his counsel's failure to adequately prepare his case precluded him from entering his no contest plea knowingly, voluntarily, and intelligently. He does not merely claim that his counsel inaccurately predicted the trial court's sentence, he claims that his counsel failed to make minimal efforts to represent him. Since the defendant sufficiently alleges a case of ineffective assistance of counsel, this court should remand his case for a hearing to determine the truth of his allegations.
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> Accordingly, we reverse the trial court's denial of his motion to withdraw his plea and remand this case for an evidentiary hearing...

Id. at 8-9.

The defendant asserts that the information presented herein establishes prima facie "manifest injustice" such that an evidentiary hearing should be conducted to allow this Honorable Court to evaluate the merits of defendant's claims.[9]

C. DEFENDANT'S GUILTY PLEAS CANNOT BE DEEMED TO HAVE BEEN KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY MADE INSOFAR AS TRIAL COUNSEL COMPLETELY FAILED TO INVESTIGATE AND PREPARE DEFENDANT'S CASES.

Guilty pleas are governed by Crim. R. 11, which provides in pertinent part:

"(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally" and:

"(a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation."

"(b) Informing him of and determining that he understands the effect of his plea of guilty or no contest, and that the court upon acceptance of the plea may proceed with judgment and sentence."

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[9]Under decisions of federal courts which are applicable to Ohio Crim. R. 32.1, State v. Smith, supra at 261, it is clear that if the movant "alleges facts which, if true, would entitle him to relief, the Court must hold a ...hearing". United States v. Fournier (1st Cir. 1979), 594 F.2d 276, 279. See: e.g. State v. Blatnik (1984), 17 Ohio App. 3d 201 (relying on Fournier analysis).

> "(c) Informing him and determining that he understands that by his plea he is waiving his rights to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself."

Before accepting a guilty plea the trial court must inform the defendant that by pleading guilty, he is waiving the rights enunciated in 11(C)(2). In determining whether the trial court has met its duties, reviewing courts have distinguished nonconstitutional and constitutional rights. State v. Gibson (1986) 34 Ohio App. 3d 146, 147.

For rights not protected by the Constitution, reviewing courts consider whether the trial court substantially complied with the requirement of Crim. R. 11(C)(2) and the defendant subjectively understood the implications of his plea and the nature of the rights he was waiving. State v. Nero (1990), 56 Ohio St. 3d 106, 108. For a waiver of constitutional rights to be valid under the Due Process Clause, there must be an intentional relinquishment or abandonment of a known right or privilege. State v. Buchanan (1974), 43 Ohio App. 2d 93, 96. In Buchanan, supra, the Court of Appeals stated:

> The waiver must be voluntarily, intelligently and knowingly made and the defendant must understand the nature of the charges against him and the consequences of his plea of guilty. Otherwise it is in violation of due process and is therefore void.

Id. at 96. Accord State v. Kelley (1991), 57 Ohio St. 3d 127, 129.

In State v. Mikulic (1996), 116 Ohio App 3d 787, the Court, after noting the foregoing, considered the issue of whether failure to advise a defendant about the general defense of insanity precluded a knowing, voluntary and intelligent guilty plea to a robbery charge. The Mikulic Court in deciding that the defendant's plea was not knowingly, voluntarily or intelligently made noted that:

> [w]here it is manifest that the plea is premised upon incorrect legal advice, the plea is in violation of the defendant's right to due process and is not voluntary.

In Mikulic the Court proceeded to explain the basis for its conclusion in stating:

> In this instance, the record compels the conclusion that defendant did not knowingly, voluntarily, and intelligently plead guilty to the robbery charges, since he was not given correct information regarding the defense of insanity. That is, although the defense attorney and the trial court correctly noted that, for an otherwise sane individual, the voluntary ingestion of drugs did not give rise to the defense of insanity, see, e.g., State v. Wolons (1989), 44 Ohio St. 3d 64, 68, 541 N.E. 2d 443, 446-447, there is a general defense of insanity that defendant was not advised upon.
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> * * *
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> This omission, coupled with defendant's extensive psychiatric history, including psychiatric hospitalizations within days of the alleged offenses, compel us to conclude that under the facts of this mater, defendant's guilty pleas were not knowingly, intelligently, and voluntarily made.

Id. at 790-791.

Defendant respectfully submits that his case is legally analogous to Mikulic and that defendant's guilty pleas likewise cannot possibly be deemed to have been knowingly, voluntarily and intelligently made. However, defendant submits that the circumstances existing in his case are even more egregious. This contention is premised upon the fact that whereas Mikulic was merely not advised of the "general defense of insanity", defendant herein was not advised of any available potential defense in a meaningful sense. To the contrary, notwithstanding Attorney Zena's opinion that the kidnapping charge in the first case may have been legally deficient and the second case was highly defensible he provided counsel to the defendant which culminated in plea resolution. See Oral Examination at Tr. 52, 62. When questioned at the oral examination under oath, Attorney Zena acknowledged that he failed to share with his client his opinion that the case was highly defensible or that pleading, under the circumstances, was unwise. Id. at Tr. 54, 62. Attorney Zena's failure to advise defendant of defense/trial strategies or his evaluation of the cases in a meaningful sense was attributable to the fact that counsel did no pretrial or trial

investigation or preparation and was essentially engaging in speculation, conjecture and hypothesis relative to counseling the defendant at the time of plea. This obvious haphazard manner of providing counsel to a criminally accused, particularly one who is developmentally handicapped and nominally literate, defies the bounds of competence and is tantamount to a complete breach of the obligations of a criminal defense lawyer.

IV. CONCLUSION

When defendant entered pleas before this Court, he did so based on very limited information. As a practical manner, while he stood before the Court with Attorney Zena on the date of trial, he lacked a meaningful understanding of his cases, defenses, strategies and options. While he may have responded to questions such that the Court satisfied itself that the pleas were knowingly, voluntarily and intelligently entered, the fact is Anthony Cioffi, Jr. never was in a position to waive his rights within the meaning and spirit of Due Process considerations due to no fault of his own. Remedial action by this Court is therefore warranted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Motion was sent by regular U.S. mail this 30 day of July, 1999 to Thomas C. Wrenn, Assistant Trumbull County Prosecuting Attorney, 160 High Street, N.W., Third Floor, Administration Building, Warren, Ohio 44481.

MARK B. MAREIN
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