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Motion of the State of Ohio for Judgment on the Pleadings, Hearing Requested

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY

ALAN DAVIS, EXECUTOR,	:	CASE NO. 312322
	:	
Plaintiff	:	
	:	JUDGE RONALD SUSTER
v.	:	
	:	<u>1) MOTION OF THE STATE OF OHIO FOR</u>
STATE OF OHIO,	:	<u>JUDGMENT ON THE PLEADINGS</u>
	:	
Defendant	:	<u>2) HEARING REQUESTED</u>
	:	
	:	
	:	

Defendant, State of Ohio, by and through counsel, Stephanie Tubbs Jones, Prosecuting Attorney for Cuyahoga County, and Assistant Prosecuting Attorneys, Marilyn Barkley Cassidy and Patrick Murphy, hereby moves this Honorable Court for judgment on the pleadings pursuant to Ohio Civil Rule 12 (C). The grounds for this motion are that the State of Ohio is entitled to judgment as a matter of law as is set forth more fully in the brief attached hereto and expressly incorporated herein by reference.

Respectfully Submitted,

STEPHANIE TUBBS JONES, PROSECUTING
ATTORNEY FOR CUYAHOGA COUNTY


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ATTORNEYS FOR THE STATE OF OHIO

BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

Alan J. Davis, Special Administrator of the Estate of Samuel Sheppard, through counsel, has requested the Cuyahoga County Court of Common Pleas, by way of petition, to make a determination that he is a wrongfully incarcerated individual pursuant to Ohio Revised Code Sections 2305.02 and 2743.48. The State of Ohio asserts that, pursuant to Ohio Civil Rule 12 (C) the court should enter judgment as a matter of law on behalf of the state. This court has no jurisdiction to hear the within case inasmuch as the plaintiff, Alan Davis fails to meet the explicit jurisdictional requirements of R.C. §2305.02 and §2743.48.

Moreover, the State of Ohio is entitled to judgment as a matter of law by operation of the doctrine of laches, the applicable statutes of limitation. Additionally, a claim of wrongful incarceration is a personal claim which an estate has no standing to pursue. Finally, any claim which may have been lawfully asserted by Samuel Sheppard has abated with his death, the passage of time, and his failure to pursue the claim at or near the time of his acquittal.

FACTS

Dr. Samuel Sheppard was indicted for murder in the first degree on August 17, 1954, in connection with the death of his wife, Marilyn Sheppard. (Complaint Paragraph 1). His trial ended

with a verdict of guilty of murder in the second degree on December 21, 1954, and on January 3, 1955 he was sentenced to life imprisonment. (Complaint, paragraph 2). After a lengthy appeals process, the United States Supreme Court in 1964, reversed the conviction and ordered a new trial based on the unfairness of the trial and the prejudicial role of the media. (Complaint, paragraph 3). On November 16, 1966, Dr. Sheppard was subject to a re-trial and found not guilty of the murder. (Complaint paragraph 4). Dr. Sheppard was incarcerated for nearly ten years in Ohio prisons. (Complaint, paragraph 5).

Dr. Sheppard died on April 6, 1970. (Complaint, paragraph 6). The action at bar was filed by the Special Administrator to the Estate of Samuel Sheppard in October, 1995, nearly thirty years after Dr. Sheppard's acquittal.

LAW AND ARGUMENT

A. JUDGMENT ON THE PLEADINGS IS BOTH PROPER AND PERMISSIBLE

Ohio Civil Rule 12 (C) provides:

"After the pleadings are closed but within such time as not to delay trial, any party may move for judgment on the pleadings."

It is well established in Ohio that after reviewing pleadings, if a court finds that there exist no material issues of fact and the moving party is entitled to judgment as a matter of law, the moving party's motion for judgment on the pleadings should be granted. Mc Comb v. Suburban Natural Gas Co. (1993) 85 Ohio App. 3d

397. Determination of a motion for judgment on the pleadings is restricted solely to allegations in the pleadings, and all material allegations in the complaint, with all reasonable inferences to be drawn therefrom are to be construed in favor of the non-moving party. Flanagan v. Williams, (1993) 87 Ohio App. 3d 768. Moreover, consideration of a motion for judgment on the pleadings is squarely within the discretion of the court. "Whether the motion constitutes a delay of trial is within the discretion of the court; however, if it seems clear that the motion may effectively dispose of the case, the court should permit it regardless of any delay its consideration may cause." Fischer v. Morales, 38 Ohio App. 3d 110 (1987).

Judgment on the pleadings is the appropriate, expeditious outcome for the case at bar. The operative facts as stated are undisputed. As will be shown below in greater depth, this court is completely devoid of jurisdiction to hear this case. Alternatively, the State of Ohio is materially prejudiced by having to defend a claim some thirty years after it accrued. Additionally, the legislative history relevant to R.C. §2743.48 together with its specific language demonstrate that the intent of the legislature was and continues to be compensation of individuals, not their representatives, heirs and assigns.

Finally, the Sheppard estate advances a so-called "new" theory of the crime as a part of its petition. Even assuming those conclusory theories to be true for the purpose of ruling upon this motion under Civil Rule 12 (C), those facts have no relevance to

the issue at bar in light of the jurisdictional defect, statutes of limitation and the doctrines of laches and standing which have been raised by the State of Ohio.

B. THIS COURT LACKS JURISDICTION TO HEAR OR ENTER JUDGMENT IN THE ACTION PENDING

An action for wrongful incarceration is purely statutory. Accordingly, all requisites set forth in R.C. §2305.02 and R.C. §2743.48 must be met. The language in R.C. §2305.02 is explicitly jurisdictional:

2305.02 Jurisdiction to hear action for wrongful imprisonment.

"A Court of Common Pleas has exclusive, original jurisdiction to hear and determine an action or proceeding that is commenced by an individual who satisfies divisions (A) (1) to (4) of Section 2743.48 of the Revised Code and that seeks a determination by the court that the offense of which he was found guilty, including all lesser-included offenses, either was not committed by him or was not committed by any person.. (Emphasis Added)

R.C. §2743.48 sets forth detailed requirements defining who is a "wrongfully imprisoned individual":

2743.48 Civil Action against state for wrongful imprisonment

(A) As used in this section, a wrongfully imprisoned individual" means an individual who satisfies each of the following:

(1) He was charged with a violation of a section of the Revised Code by an indictment or information prior to, or on or after, September 24, 1986, and the violation charged was an aggravated felony or felony.

(2) He was found guilty of, but did not plead guilty to, the particular charge or a lesser-included offense by the court or jury involved, and the offense of which he was found guilty was an aggravated felony or

felony.

(3) He was sentenced to an indefinite or definite term of imprisonment in a state penal or reformatory institution for the offense of which he was found guilty.

(4) The individual's conviction was vacated or was dismissed, or reversed on appeal, . . .

(5) Subsequent to his sentencing and during or subsequent to his imprisonment, it was determined by a court of common pleas that the offense of which he was found guilty, including all lesser included offenses, either was not committed by him or was not committed by any person . . .

The plaintiff in this action fails to meet the explicit jurisdictional requirements of the statutes. Alan Davis, the executor of the Sheppard estate, is arguably an individual. However, he is not an individual who satisfies divisions (A) (1) through (4) of R.C. §2743.48. Specifically, Alan Davis was not charged with a felony. Alan Davis was not found guilty of the felony at issue. Alan Davis was not sentenced to imprisonment, nor did he serve time for the offense at issue. The conviction appealed was not that of Alan Davis. The statutory scheme was designed to preclude exactly the type of case at bar. Inasmuch as the plaintiff herein patently fails to meet the jurisdictional requirements of the statute, the court cannot exercise jurisdiction over the parties and must dismiss the case.

C. THIS ACTION IS BARRED BY THE STATUTE OF LIMITATIONS

This action illustrates precisely the reason that legislatures

enact statutes which render lawsuits time barred. It is said that sound public policy justifies a limitation for commencement of actions because of the difficulty of preserving evidence, the frailty of the memory, and the contingency of the death of witnesses. Statutes of limitations are statutes of repose. They are designed to secure the peace of society and are enacted to prevent delay in asserting claims. The object and purpose of the statutes of limitation are to encourage diligence in the enforcement of demands and the speedy adjudication of the rights of parties. See generally, 66 O Jur 3d Section 2, p. 129.

"Statutes of limitation are vital to the welfare of society and are favored in the law. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights they supply its place by a presumption which renders proof unnecessary. Mere delay extending to the limit prescribed is itself a conclusive bar. The bane and the antidote go together. "Wood v. Carpenter, 101 US 135, 25 Led 807, quoted in Lamkin v. Robinson, 10 ONP NS 1, 21 O Dec 13.

The bulk of the Wrongful Imprisonment statute appears in Chapter 2743. However, R.C. Section 2305.02 provides that the Court of Common Pleas has original jurisdiction over the first stage of the bifurcated proceeding. The Ohio Supreme Court has ruled that wrongful imprisonment actions are civil actions. See State of Ohio v. Neil S. Jackson, 1994 Ohio App. Lexis 1737 (April 20, 1994). See also, State of Ohio v. Lary Smith, 1989 Ohio App. Lexis 2019 (9th Appellate District). Accordingly, the general statutes of limitation contained in R.C. Chapter 2305 apply to such actions.

R.C. 2305.07

" Except as provided in sections 126.301 and 1302.98 of the Revised Code, 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 years after the cause thereof accrued." (Emphasis added)

R.C. §2743.48 is a remedial, not a penal statute, as at least one court has noted. Wright v. State, 69 Ohio App. 3d 775, 591 N.E.2d 1279 (1990).

"For purposes of statutory construction, 'penal statute' is one which imposes penalty or creates forfeiture, while 'remedial statute' is enacted to correct past defects, to redress existing wrong, or to promote public good... In this regard 2743.48 is a remedial statute in that it addresses an existing wrong. The General Assembly determined that it was patently wrong to deny a person compensation when the judicial system failed to adequately safeguard his rights, under the circumstances set forth in the statute...It does not appear the legislature intended the remedy to penal..."
Wright v. State, supra, at 779.

The proceeding at bar is a statutory one. Petitioner seeks to recover damages upon a liability created by statute. Absent the statute, no liability would exist on the part of the State of Ohio by virtue of sovereign immunity. As a matter of public policy, the legislature could not have intended that there exist no time limit upon an individual's right to seek recovery for wrongful incarceration. As a matter of law, the six year limitation set forth in R.C. §2305.07 applies. The action can be said to have accrued, most conservatively speaking, no later than the effective date of the statute, September 24, 1986. As the petitioner in this action did not file until October 19, 1995, the commencement of the action falls outside the six year limitation period of §2305.07.

R.C. 2305.09 "Four Years; certain torts"

An action for any of the following causes shall be brought within four years after the cause thereof accrued;

- (A) For trespassing upon real property;
- (B) For the recovery of personal property, or for taking or detaining it;
- (C) For relief on the ground of fraud;
- (D) **For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 2305.10 to 2305.12 2305.14 and 1304.34 of the Revised Code . . .**

R.C. §2305.10 applies to Bodily injury or injury to personal property; §2305.11 deals with libel, slander malicious prosecution, false imprisonment and malpractice; R.C. §1304.34 applies to commercial transactions. Thus, any rights of the petitioner, herein, fall under section (D) of R.C. §2305.09. A liberal interpretation of accrual yields the date the wrongful incarceration statute became effective, September 24, 1986. Thus, assuming for the purpose of this motion that petitioner in fact has a claim, the statute of limitations ran in September of 1990, and this claim is time barred.

D. THIS ACTION FOR WRONGFUL INCARCERATION IS BARRED BY THE DOCTRINE OF LACHES

In order to successfully prosecute a claim of laches, the person asserting the claim must show that he has been materially prejudiced by the delay of the adverse party in asserting his rights." Smith v. Smith, 169 Ohio St. 447, 455, 156, N.E. 2d 113, 119 (1959). The elements of laches are: delay or lapse of time in asserting a right, absence of excuse for such delay, knowledge,

actual or constructive, of injury or wrong, and prejudice to the other party. Kennedy v. City of Cleveland, (1984) 16 Ohio App 3d 399, 476 N.E. 2d 683. Delay in asserting a right does not of itself constitute laches and in order to successfully invoke the equitable doctrine of laches, it must be shown that the person for whose benefit the doctrine will operate has been materially prejudiced by the delay of person asserting his claim. Thirty Four Corp. V. Sixty Seven Corp, (1984) 15 Ohio St. 3d 350, 474 N.E. 2d. 299. Laches is an omission to assert a right for an unreasonable and unexplained length of time under circumstances prejudicial to the adverse party; it signifies delay independent of limitations in statutes, and it is lodged principally in equity jurisprudence. Cunnin v. Bailey (1984) 15 Ohio St. 3d. 34, 472 N.E.2d. 328.

It is readily ascertainable from the face of the pleadings in the case at bar, that an overwhelmingly prejudicial lapse in time has occurred between the acquittal of Samuel Sheppard and the filing of this claim. In the intervening thirty years since the acquittal and the near forty-two years since the crime occurred, events have transpired which preclude the State of Ohio from presenting its complete case; not the least of which is the death of the individual alleged to have been wrongfully incarcerated. (Petition, paragraph 6). Claimant's representatives conducted witness interviews between the years 1990 and 1995; nearly thirty years after the crime, when memories have undeniably faded.

Moreover, prior to the enactment of R.C. §2743.48 and R.C. §2305.02 recourse for wrongful incarceration existed in the form of

moral claims. Since as early as 1923, consideration was given to a fault in the justice system which allowed an innocent individual to fall through its grips and land in a correctional institution. "Wrongful Incarceration In Ohio: Should There be More than A Moral Obligation to Compensate? 12 Cap Univ. Law Rev 230. "Inherently defective convictions are usually initiated by witnesses/testimony and the circumstantial evidence admitted during trial. ...:the 1923 court was accurate in its analysis of such occurrences as not being attributable to any fault in the law; actually, the convictions are due to a mixture of human perceptive errors, not legal ones. These errors are consequences of variables such as a witness/ or victim's reactions to the crime, the level of disturbance in the emotional balance of an individual in response to both physical and mental stress.

Generally, the faulty convictions were not acknowledged until the true guilty party was ascertained. Thereupon, the legislature may feel a moral obligation to rectify state infliction of injury upon an individual. Certain requirements must be met before the legislature so acted:

"First, a cause of action against the state must not exist for the individual in a court of law ... Second there must be a moral obligation to make amends. A moral obligation is one which is not enforceable by action, but is binding on the party who has the obligation in conscience and according to natural justice. The obligation is viewed as a duty which would be enforceable if not for a rule, such as sovereign immunity, which exempts the party from legal liability. The extent to which moral obligations are to be recognized has been deemed to be a determination properly remaining in the hands of the legislature. Finally, there must be no dispute as to the facts of the particular case.

"Wrongful Incarceration in Ohio: Should there Be More Than A Moral Obligation to Compensate?" 12 Capital University Law Review 265 (1982).

Clearly Samuel Sheppard, himself, could have sought redress at or near the time of his acquittal through the moral claims process. He failed to do so. Since Sheppard's demise in 1970, only the administrator of his estate, whose standing is questionable and will be further examined below, is left to initiate the claim. The petitioner has set forth no explanation as to why no recourse has been sought until now. While events which have transpired over the passage of time have materially prejudiced the State of Ohio, the face of the pleadings reveal that Samuel Sheppard is unavailable to testify at his own trial. Accordingly, the State's motion should be granted.

E. THE ESTATE OF SAMUEL SHEPPARD LACKS STANDING TO BRING A CLAIM FOR WRONGFUL INCARCERATION

The adoption of Ohio Constitution, Art. IV Section 4, in its present form in 1968 made justiciability a constitutional requirement, expressly adopting the view which had long been taken by the Ohio Supreme Court. Fortner v. Thomas (1970) 22 Ohio St. 2d. 13 (concurring opinion of Duncan, J.).

"It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect. It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon

potential controversies." Fortner v. Thomas, supra, at 13.

Even before the enactment of the constitutional requirement of justiciability, Ohio Courts had never permitted their jurisdiction to be invoked for the determination of abstract declarations or for the consideration of anything other than actual controversies between the actual parties litigant. For example, in Stewart v. Southard, 17 Ohio 402 (1848), the court held:

"It is our duty to decide such questions only as become necessary to ascertain the rights of the parties litigant, and are legitimately presented upon the record, and we cannot admit that parties have the power to call for an opinion on a matter not thus presented, which is out of the case. . . ." Stewart , supra, at 406.

The question of jus tertii standing has been examined most fully in federal courts. As the Supreme Court stated in Valley Forge Christian College v. Americans United for Separation of Church and State, Inc. 454 U.S. 464 (1982):

"The term 'standing' subsumes a blend of constitutional requirements and prudential considerations ... [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.' Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 99 (1979), and that the injury 'fairly can be traced to the challenged action and is likely to be redressed by a favorable decision,' Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976). In this manner does Article III limit the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.' Flast v. Cohen, 392 U.S. 83, 97 (1968)"

Thus, the standing doctrine can be organized into a three-

factor test: (1) injury in fact; (2) causation; and (3) redressability. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 3136 (1992).

In the case at bar, factors one (injury in fact) and three (redressability) are not met. The individual who is alleged to have been wrongfully incarcerated is deceased. As is discussed above, there is no provision under law for an estate to seek recovery in a representative capacity. Moreover, as will be discussed in greater depth below, the statute at issue, R.C. 2743.48 applies only to individuals, NOT their representatives, heirs and assigns. Additionally, there is no allegation in the petition as to any injury by virtue of wrongful incarceration to anyone except the deceased, Samuel Sheppard. Finally, assuming some injury in fact did occur to Samuel Sheppard, money damages to the estate cannot redress those injuries. It is clear that the Estate of Samuel Sheppard has failed to set forth the constitutionally requisite case and controversy to invoke the jurisdiction of the court.

F. R.C. §2743.48 CAN BE CONSTRUED ONLY TO AFFORD REDRESS TO WRONGFULLY INCARCERATED INDIVIDUALS, NOT THEIR HEIRS, REPRESENTATIVES AND ASSIGNS.

The state has waived its immunity from liability and consented to be sued in the Court of Claims by virtue of R.C. §2743.02 (A), which provides, as follows:

"The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set

forth in this chapter."

The state's waiver of its sovereign immunity from liability has not opened up the public coffers to all who may seek recompense but, rather permits the liability of the state to be determined in accordance with the rules of law applicable to suits between private parties, no new claim for relief or right of action being created by the waiver of immunity. R.C. §2743.02 (A) merely permits actions against the state to be brought which were previously barred by the doctrine of sovereign immunity, but such actions must be predicated upon previously recognized claims for relief, for which the state would have been liable except for sovereign immunity. Smith v. Wait, (1975) 46 Ohio App 2d. 281 at 283.

The Court of Claims Act did not authorize a new claim allowing a civil action against the state for wrongful imprisonment. That action became viable only upon the adoption of R.C. §2743.48 by the General Assembly. R.C. §2743.48 created duties, rights, and obligations of a substantive nature. Smith v. Wait, supra. The scope of remediation is clearly limited to the individual by the statutory language.

It is a cardinal rule that the court must first look to language of a statute itself to determine legislative intent. Courts do not have authority to ignore plain and unambiguous language of statute under guise of statutory interpretation, but must give effect to words used; in other words, courts may not delete words used or insert words not used. In re Collier (Athens 1993) 85 Ohio App. 3d 232. In interpreting a statute words must be

taken in their usual, normal or customary meaning. Love v. Motorists Mut. Ins. Co. (Athens 1993) 86 Ohio App 3d 394.

In Ohio, the specific inclusion by the legislature of items in a statute implies the exclusion of others. Kirsheman v. Paulin (1951) 155 Ohio St. 137, 146, Theobald v. Fugman, 64 Ohio St. 473. See also Investors Reit One v. Jacobs (1989) 46 Ohio St. 3d 176

It is significant that the drafters of this legislation chose the word "individual". An individual, as defined by Websters Dictionary is:

- "1. a single human being, as distinguished from a group.
2. a person. 3. a distinct, indivisible entity; a single thing, being, instance or item. . ."

The use of the word individual, as opposed to the word person, which has undergone extensive legal interpretation, expresses a clear, unambiguous intent to limit compensation to an individual.

Further evidence of the legislature's intent to limit eligibility for compensation under R.C. §2743.48 can be found in subsection (B) (1):

" When a court of common pleas determines, . . . that a person is a wrongfully imprisoned individual, the court shall provide the person with a copy of this section and orally inform him and his attorney of his rights under this section. . . (Emphasis Added)

Such language demonstrates a clear contemplation that the litigant himself be present. Moreover, as a matter of public policy it is logical that a remedy be available to those wrongfully incarcerated, but that state coffers NOT be opened to the families of deceased individuals who decide to pursue a claim after the fact.

Finally, had the legislature wished to include the representatives, heirs and assigns of wrongfully imprisoned individuals as compensable under the statute, it would have included specific language to so indicate, as it did, for example, in R.C. §2125.02 (Wrongful Death Statute). It is not within the authority of the court to extend clear and unambiguous language to areas that very language was designed to exclude.

G. AN ACTION FOR WRONGFUL INCARCERATION ABATED WITH THE DEATH OF SAMUEL SHEPPARD

Section 2311.21 of the Ohio Revised Code provides for abatement by death of a party. Specifically, the section states:

"Unless otherwise provided, no action or proceeding pending in any court shall abate by the death of either or both of the parties thereto, except actions for libel, slander, malicious prosecution, for a nuisance or against a judge of a county court for misconduct in office, which shall abate by the death of either party."

Section 2305.21, Ohio Revised Code, determines those causes which survive and provides:

"[i]n addition to the causes of action which survive at common law, causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto."

"In order for an action to survive under R.C. §2305.21, the action must be one for injuries to the person and that term means physical injuries." Village of Oakwood v. Makar, 11 Ohio App 3d 46, 47, (1983). At least one court has held" injuries to the person does not encompass injuries to character or reputation: Flynn v.

Relic, 41404 (8th District. Ohio) (June 26, 1980).


An action for wrongful imprisonment, thus, is not an action for physical injuries and does not survive pursuant to R.C. §2305.21. Accordingly, pursuant to the "unless otherwise provided" language in R.C. §2311.21, the action is subject to abatement.

CONCLUSION

In light of the foregoing facts and principles of law, the State of Ohio respectfully requests a full hearing on these issues; that the action be dismissed for lack of jurisdiction. Alternatively, defendant respectfully requests that the court enter judgment on its behalf.

Respectfully Submitted,

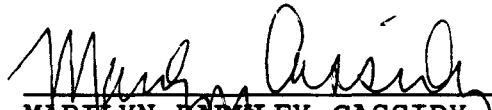
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ATTORNEYS FOR THE STATE OF OHIO

CERTIFICATE OF SERVICE

A copy of the foregoing Motion has been sent by regular U.S. mail, postage prepaid, on this 7 day of May, 1997, to Terry Gilbert, 1700 Standard Building, 1370 Ontario Street, Cleveland, OH 44113.



MARILYN BARKLEY CASSIDY
Assistant Prosecuting Attorney