No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD P. HOMRIGHAUSEN,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED:

In United States v. Powell, 469 U.S. 57 (1984), the Court recognized an exception to the general rule that inconsistent verdicts in a criminal case are not subject to review, in cases, "where a defendant is convicted of two crimes, where a guilty verdict on one count logically excludes a finding of guilt on the other." Id. at 69, n. 8. While citing an example of a case where two separate guilty verdicts were logically inconsistent, the Court did not provide any guidance on how to determine whether a guilty verdict on one count logically excludes a finding of guilt on the other. In addition, the Court specifically reserved the question of what to do in a case presenting logically inconsistent guilty verdicts Id. This case, therefore, presents the following questions:

I. Is a criminal defendant denied his constitutional right to due process of law and trial by jury when he is convicted of two crimes, where a guilty verdict on one count logically excludes a finding of guilt on the other, regardless of whether the statutory elements of those crimes are per se mutually exclusive?

II. What remedy should a reviewing court apply if it determines that a criminal defendant's constitutional right to due process of law and trial by jury were violated because the jury returned guilty verdicts that are logically inconsistent?

PROCEEDINGS BELOW

On April 30, 2024, the Ohio Supreme Court, in State of Ohio v. Richard P. Homrighausen, Case No. 2024-0239, declined jurisdiction of Petitioner's appeal pursuant to Ohio Supreme Court Rule 7.08(B)(4)(a), constituting a determination that the appeal did not involve a substantial constitutional question and should be dismissed. App. 1-2. On July 9, 2024, the Ohio Supreme Court denied reconsideration of that decision. App. at 3-4.

On January 2, 2024, the Court of Appeals for Tuscawaras County, Ohio, Fifth Appellate District in State of Ohio v. Richard P. Homrighausen, No. 2023AP020008, 2024-Ohio-6 (Ohio Ct. App. 5th Dist. 2024) issued its judgment entry and opinion affirming Petitioner's convictions and sentence. App. at 5-33.

On January 17, 2023, the Tuscawaras County, Ohio, Court of Common Pleas issued its Judgment Entry of Conviction and Sentence in State of Ohio v. Richard P. Homrighausen, Stark County Court of Common Pleas Case No. 2022 CR 03 0072. App. at 34-40.

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PETITION FOR A WRIT OF CERTIORARI

Richard P. Homrighausen, Petitioner, petitions for a Writ of Certiorari to review the judgment of the Ohio Supreme Court.

CITATIONS OF OPINIONS AND ORDERS BELOW

State v. Homrighausen, Case No. 2023AP020008, 2024-Ohio-6 (Ohio Ct. App. 5th Dist. 2024), appeal not allowed, 173 Ohio St. 3d 1476, 232 N.E.3d 822 (2024), reconsideration denied, 174 Ohio St. 3d 1540, 237 N.E.3d 236 (2024).

JURISDICTION

The judgment entry of the Ohio Supreme Court declining to accept jurisdiction was entered on April 30, 2024. App. at 1. The Ohio Supreme Court's judgment denying petitioner's motion for reconsideration was entered on July 9, 2024. App. at 3. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS AND STATUTES, INVOLVED

The Fifth, Sixth and Fourteenth Amendments to the United States Constitution are reprinted in the Appendix. App. at 41-44.

The sections of the Ohio Revised Code involved in this case are as follows: R.C. 2921.41 (Theft In Office); R.C. 2921.43 (Soliciting Improper Compensation); R.C. 2921.44 (Dereliction of Duty); R.C. 2913.01 (Theft and

Fraud General Definitions); R.C. 2913.02 (Theft); R.C. 705.25 (Disposition of Fees and Perquisites); R.C. 733.40 (Disposition of Fines and other Monies); R.C. 3101.08 (Who May Solemnize Marriages).

The pertinent text of those statutes are reprinted in the Appendix to the Petition at 45-78.

STATEMENT OF THE CASE

Petitioner, Richard P. Homrighausen, served as the Mayor of the City of Dover for nearly thirty years.

In that capacity, citizens of Dover would ask Petitioner if he would officiate their wedding ceremony. As a mayor for a city in the State of Ohio, Petitioner possessed the authority to solemnize weddings at his discretion. See R.C. 3101.08.

From 2014-2021, Appellant officiated approximately 231 weddings for Dover citizens, including a member of City council. He performed these weddings in City hall, public square, county fairs, churches, country clubs and other locations around Dover and Tuscawaras County. Some weddings were even documented in the local newspaper.

Petitioner accepted money for officiating at weddings. On average, he received approximately $40 per wedding. He made sure each payment was accounted for and meticulously documented with receipts and maintained as public records.

No City ordinance prohibited the Mayor from accepting money for officiating weddings. Nor was there any ordinance that set forth procedures for a

mayor to pay over money to the city treasury upon receipt of such fees. And there was no ordinance that set a specific "fee" to have a mayor officiate a wedding.

As one would imagine, officiating weddings and receiving relatively small amounts of money was an extremely small part of serving as a chief executive officer of a city. And for 28 years, no one in Dover took issue with this practice.

In 2020, while Petitioner was experiencing health problems, his political opponents launched an investigation into his performance and conduct. At the behest of Petitioner's chief political rival, the City Law Director, the investigation was initially conducted by a private law firm, which cost over $175,000 of tax payer money.

After receiving a tip from another of Petitioner's political rivals, the Ohio State Auditor's Office began to conduct its own investigation into the matter.

The investigations failed to uncover anything that was not already well-known throughout the City of Dover and meticulously documented in publicly available receipts, wedding certificates and related documents–namely that Petitioner accepted monies for officiating weddings.

The matter was then referred to the grand jury and criminal charges were ultimately brought.

The relevant charges can be grouped into two

categories.[1]

The first group includes Count One and Count Seven, both of which required a finding that the money Petitioner received for solemnizing marriages were governmental fees that belonged to the City of Dover.

The second group includes Counts Three through Six, all of which required a finding that the wedding money was Petitioner's compensation and was per se unlawful for him to solicit or accept.

A. Group One Offenses: Alleging The Wedding Money Belonged To The City And Petitioner Failed To Pay It Over.

Count One of the Indictment alleged Petitioner committed Theft In Office, in violation of R.C. 2921.41(A)(1). That offense states, in relevant part:

> No public official or party official shall commit any theft offense, as defined in division (K) of section 2913.01 of the Revised Code, when either of the following applies:
>
> (1)The offender uses the offender's office in aid of committing the offense or permits or assents to its use in aid of committing the offense.
> ***

Beyond proving the elements in R.C. 2921.41(A)(1), the State was required to prove that a theft offense

[1] Counts Two, Eight, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen and Fifteen are not pertinent here, as they were either dismissed prior to trial or resulted in Petitioner's acquittal at trial.

occurred under R.C. 2913.02 (as referenced in R.C. 2913.01(K)). The statute states the following: "No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways * * *." Id. (Emphasis added).

The State's Bill of Particulars alleged that the wedding monies were "fees" that Petitioner was required to deposit into the City's treasury pursuant to R.C. 733.40.[2]

R.C. 733.40 provides as follows, in relevant part:

> Except as otherwise provided in section 4511.193 of the Revised Code, all fines, forfeitures, and costs in ordinance cases and all fees that are collected by the mayor, that in any manner come into the mayor's hands...shall be paid by the mayor into the treasury of the municipal corporation on the first Monday of each month. ***

Id. (Emphasis added).

Because the total amount allegedly stolen was over

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[2] The State had also alleged that Petitioner was required to deposit the money pursuant to R.C. 705.25. However, R.C. 705.25 only imposes duties on officials of cities with charters, and therefore did not apply to Petitioner, who undisputedly served as the mayor of a non-chartered city. (Tr. Vol. III at 369.) Indeed, Count Eight of the Indictment alleged that Petitioner violated R.C. 2921.44 for failing to deposit the money into the city treasury pursuant to that statute. The trial court granted Petitioner's motion for acquittal at trial on that count because R.C. 705.25 did not apply to Petitioner. Id.

$7,500 but less than $150,000, the offense charged was a felony of the third degree. See R.C. 2921.41(B).

In Count Seven, the State alleged that Petitioner committed Dereliction Of Duty, R.C. 2921.44(E), a misdemeanor of the second degree. More specifically, the State alleged Petitioner failed to fulfill his duty pursuant to R.C. 733.40 to pay over the money he received from performing weddings to the City Treasury.

Consistent with its charging documents, the State's theory at trial on these counts was that the wedding money belonged to the City as a fee for Petitioner performing a service in his official capacity as Mayor. For example, the State submitted to the jury in closing argument:

> And when you read the instructions, or you hear the instructions from the Judge, you'll find I believe beyond a reasonable doubt that these all were in fact fees charged by the Mayor, received by the Mayor, in his role as the Mayor and therefore were required to be turned over to the City. That will apply to the dereliction of duty statute, but it also tells you whose money it was. It was the City's money.

Tr. Vol. III at p. 425. See also Tr. Vol. III at 394-395.

Under this theory, it was lawful for Petitioner to solicit and accept the money and only became a crime when he failed to pay it over to the City. Indeed, according to the State, a mayor's charging and accepting money for officiating weddings only becomes a crime, "when you take that fee money and convert it

to your own personal use. When you take the money that was supposed to go to the City and you put it in your pocket." Tr. Vol. III at 394-395. See also id. at 421.

By way of contrast, the State's theory on Counts Three through Six, alleging Soliciting Improper Compensation, was that it was unlawful for Petitioner to accept or solicit the money in the first place because it was his compensation, above and beyond his salary as set by ordinance.

B. Group Two Offenses: Alleging The Money Was Petitioner's Compensation And It Was Unlawful For Him To Solicit Or Receive It.

Counts Three through Six alleged that with regard to four of the 231 weddings at issue, Petitioner committed Soliciting Improper Compensation, in violation of R.C. 2921.43(A)(1).

Ohio Rev. Code 2921.43(A), provides:

> (A) No public servant shall knowingly solicit or accept, and no person shall knowingly promise or give to a public servant, either of the following:
>
> (1) Any compensation, other than as allowed by divisions (G), (H), and (I) of section 102.03 of the Revised Code or other provisions of law, to perform the public servant's official duties, to perform any other act or service in the public servant's public capacity, for the general performance of the duties of the public servant's public office or public employment, or as a supplement to the public servant's public

> compensation;
>
> (2) Additional or greater fees or costs than are allowed by law to perform the public servant's official duties.

Id. (Emphasis added).

Notably, on its face, the Soliciting Improper Compensation statute draws a distinction between compensation and fees. Subsection (1) prohibits receiving compensation other than what is allowed by law, while subsection (2) prohibits receiving "additional or greater fees" than what are allowed by law. Thus, the statute does not prohibit a city official from soliciting or receiving fees that he is allowed to collect.

At trial, the State's theory on these counts was that by accepting money from residents to officiate their weddings, Petitioner's compensation needled above what was permitted by law. It argued to the jury in summation:

> In other words, [he] accepted more than his salary to perform his official duties, to perform any other act or service in his public capacity, or as a supplement to his public compensation. You heard he got his full salary. He was not entitled to anything more. He performed all these marriages within his role as Mayor. That's the only way he could have performed the, the marriages was as Mayor.

Tr. Vol. III at 427-28.

C. Petitioner's Arguments In The Courts Below Concerning Inconsistent Verdicts On Groups One And Two.

At trial, after the close of the State's case, Petitioner moved for judgment of acquittal on all counts pursuant to Ohio Criminal Rule 29, arguing that the State failed to prove the elements of each offense beyond a reasonable doubt. App. at 108-113. Counsel argued, inter alia, that the Soliciting Improper Compensation charges required the State to prove that the wedding monies were Petitioner's compensation, above and beyond his salary. In contrast, under the other charges (Count One, Theft In Office, and Count Seven, Dereliction of Duty) the State needed to prove that the monies were "fees" belonging to the City. Id.

Thus, Petitioner's counsel submitted that the charges were "irreconcilable" and "incompatible" and convictions on both groups of charges would lead to "inconsistent and improper verdicts." Id. at 112-113.

The trial court denied Petitioner's motion with respect to those counts.

The jury found Petitioner guilty of Count One, Theft In Office, but it did not find him guilty of theft in the amount of $9,295, a felony of the third degree, as alleged in the Indictment. Instead, it found him guilty of theft in an amount less than $1,000 dollars, a felony of the fifth degree, the lowest degree possible for a violation of R.C. 2921.41. The jury also found Petitioner guilty of Dereliction of Duty as alleged in Count Seven.

The jury also found Petitioner guilty of four misdemeanors, Soliciting Improper Compensation, as alleged in Counts Three through Six, with an aggregate amount of $240.00.

On November 30, 2022, Petitioner filed a post-verdict motion for judgment of acquittal or, in the alternative, a new trial. The motion was based, in part, on Petitioner's argument that the jury's guilty verdicts on Theft In Office and Dereliction of Duty were logically inconsistent with and mutually exclusive from the jury's guilty verdicts on Soliciting Improper Compensation, in violation of Petitioner's constitutional right to due process of law. App. At 79-86. He argued that the inconsistency "means that the prosecution necessarily failed to prove at least one element of each offense beyond a reasonable doubt." App. at 80.

On January 12, 2023, the trial court denied that motion concluding that it was not "persuaded by the Defendant's argument that the verdicts in this case are mutually exclusive." App. at 96.

At sentencing on January 17, 2023, the trial court fined Petitioner $2,500.00 on Count One, $500.00 each on Counts Three through Six, and $750.00 on Count Seven, Dereliction of Duty.

On appeal, Petitioner raised four assignments of error. Relevant here, in his second assignment of error, Petitioner submitted that the trial court erred in overruling his motions for an acquittal and a new trial where the verdicts on Counts One and Seven were mutually exclusive of the verdicts on Counts Three through Six, in violation of Petitioner's constitutional

rights to due process of law and trial by jury secured under Fifth, Sixth and Fourteenth Amendments. App. at 13.

In a 2-1 decision, the Ohio Court of Appeals for the Fifth Appellate District affirmed the trial court and concluded that there was sufficient evidence to support Petitioner's convictions and that the verdicts were not mutually exclusive. App. at 14-26. One judge dissented from the court's conclusion that there was sufficient evidence to prove that Petitioner committed Theft In Office on Count One. App. at 27-33.

In connection with Petitioner's argument concerning mutually exclusive verdicts, the court appeals concluded, "the verdicts in the instant case are not mutually exclusive: Petitioner committed theft in office when he deprived the City of the wedding fees; he committed dereliction of duty when he failed to deposit the fees into the treasury as required; and he committed solicitation of improper compensation in asking couples to pay him to perform a duty under color of his public office." App. at 20.

Petitioner then filed a notice of appeal and memorandum in support of jurisdiction to the Ohio Supreme Court. In his second proposition of law, Petitioner submitted that "a criminal defendant is denied due process of law and is entitled to a new trial when a jury finds him guilty of an offense that requires a finding that logically excludes a finding necessary to another guilty verdict." App. at 99-107.

On April 30, 2024, pursuant to Rule 7.08(B)(4), the Ohio Supreme Court declined to accept the appeal. Two justices dissented from that decision. App. at 2. On

July 9, 2024, the Ohio Supreme Court denied reconsideration of that decision over the dissent of one justice. App. at 3-4.

EXPLANATION OF REASONS FOR ALLOWING THE WRIT

I. An Important Question Is Presented, On Whether a Criminal Defendant Is Denied His Constitutional Right To Due Process Of Law To Have The Prosecution Prove Each And Every Element Of The Offense Beyond A Reasonable Doubt When He Is Convicted Of Two Crimes Where A Guilty Verdict On One Count Logically Excludes A Finding Of Guilty On The Other.

This Court has long held that the Constitution protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 363 (1970). See also Sullivan v. Louisiana, 508 U.S. 275, 277–278 (1993) ("[t]he prosecution bears the burden of proving all elements of the offense charged and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements."). The State's burden to prove each element of a charged offense beyond reasonable doubt is embedded within the Fifth and Fourteenth Amendments' due process protections and the Sixth Amendment's right to trial by jury. Id.

At Petitioner's trial, the jury made two positive findings of fact, each necessary to its guilty verdicts, that cannot logically coexist. The question before this Court is whether those resulting guilty verdicts violate Petitioner's right to due process of law and trial by

jury.

A. This Court Has Considered The Constitutional Implications Of Inconsistent Verdicts With Respect To Inconsistencies Between Guilty And Not-Guilty Verdicts But Has Not Squarely Addressed Inconsistencies Between Two Separate Guilty Verdicts.

The Court has considered the issue of inconsistent verdicts in three separate contexts, all involving cases where it was argued that acquittals were inconsistent with guilty verdicts on others.

First, in Dunn v. United States, 284 U.S. 390 (1932) the issue arose in the context of inconsistency between guilty and not-guilty verdicts on separate counts of the indictment. The defendant argued that the court should overturn his conviction on count one because it was inconsistent with his acquittal on counts two and three. Id. at 392. This Court rejected the defendant's argument, explaining that "[c]onsistency in the verdict is not necessary." Id. at 393. The Court recognized that a "verdict may have been the result of compromise, or of a mistake on the part of the jury," but that "verdicts cannot be upset by speculation or inquiry into such matters." Id. at 394.

Second, in United States v. Dotterweich, 320 U.S. 277 (1943), the Court considered the issue in the context of inconsistency between guilty and not-guilty verdicts on different defendants. There, the Court found a verdict permissible in a joint trial, which found the corporation's president guilty while simultaneously finding the corporation not guilty. Id. at 278–79. The Court, citing Dunn, explained, "Whether the jury's verdict was the result of carelessness or compromise or

a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries." Id.

Third, in United States v. Powell, 469 U.S. 57 (1984), the Court considered the issue in the context of inconsistency between guilty and not-guilty verdicts on predicate and compound offenses. In Powell, the government indicted the defendant on 15 counts of violations of federal law related to her involvement in a drug distribution operation. Id. at 59. The jury convicted the defendant of using the telephone in "committing and in causing and facilitating" the "conspiracy to possess with intent to distribute and possession with the intent to distribute cocaine," but acquitted her of conspiring with others to knowingly and intentionally possess with intent to distribute cocaine and possession of a specific quantity of cocaine with the intent to distribute. Id. at 59-60

The defendant argued that the Court should reverse her telephone facilitation convictions because the verdicts were inconsistent. Id. at 60. The Court rejected this argument and reasoned, "it is unclear whose ox has been gored" by the inconsistency because it was impossible to say whether the split verdict inured to the defendant's benefit or prejudice. Id

But the Powell Court also contemplated a different situation: one where two guilty verdicts were inconsistent. In footnote eight of its opinion, the Court wrote:

Nothing in this opinion is intended to decide the

> proper resolution of a situation where a defendant is convicted of two crimes, where a guilty verdict on one count logically excludes a finding of guilt on the other. Cf. United States v. Daigle, 149 F.Supp. 409 (DC), aff'd per curiam, 101 U.S.App.D.C. 286, 248 F.2d 608 (1957), cert. denied, 355 U.S. 913, 78 S.Ct. 344, 2 L.Ed.2d 274 (1958).

Id.

Unlike a split verdict where "it is unclear whose ox has been gored," when a defendant has been convicted of two crimes and guilty verdict on one count logically excludes a finding of guilt on the other, it is clear that the defendant was prejudiced. As Justice Alito explained, while a judge for Third Circuit Court of Appeals, "[s]uch a result would be patently unjust because a defendant would be convicted of two crimes, at least one which he could not have committed." Buehl v. Vaughn, 166 F.3d 163, 177–81 (3d Cir.1999), citing United States v. Gross, 961 F.2d 1097, 1107 (3rd Cir. 1991), cert. denied, 506 U.S. 965 (1992).

That is because a guilty verdict is a specific finding, encompassing all the elements of the crime. An acquittal is not. In other words, while an acquittal may have various explanations, a guilty verdict has but one. People v. Delgado, 450 P.3d 703, 707 (Col. 2019).

The Powell Court's citation to Daigle provides one example of where a guilty verdict on one count logically excludes a guilty finding on the other. In that case, the jury returned verdicts of guilty on charges of both embezzlement and larceny based on the same underlying conduct. A conviction for embezzlement

required the jury to find that the defendant had unlawfully converted property owned by another but which was lawfully in the defendant's "possession or custody by virtue of his employment or office." Id. at 412 (Emphasis added).

However, in order to convict the defendant of larceny, the jury was required to find that the defendant had unlawfully taken property owned by another that defendant had no right to possess, i.e., the traditional notion of "stealing." Id. at 414. (Emphasis added). Therefore, by finding the defendant guilty of both charges, the jury necessarily made the affirmative and contradictory findings that the defendant came into his initial possession or custody of the property at issue both lawfully (embezzlement) and unlawfully (larceny). The court held those verdict could not stand. Id.

While citing Daigle with approval, this Court is yet to directly confront a case where a defendant has been defendant is convicted of two crimes, where a guilty verdict on one count logically excludes a finding of guilt on the other.

B. This Court Has Not Provided Guidance On How Reviewing Courts Are To Determine If Guilty Verdicts Are Logically Inconsistent.

The test employed by the court in Daigle, in concluding that the two verdicts in that case were logically inconsistent, was as follows: "where a guilty verdict on one count negatives some fact essential to a finding of guilty on a second count, two guilty verdicts may not stand." Daigle, 149 F.Supp. at 417 citing Fulton v. United States, 45 App.D.C. 27, 41 (D.C. Cir.

1916); Davis v. United States, 37 App.D.C. 126, 133 (D.C. Cir. 1911).

While citing to Daigle, the Powell Court did not subscribe to any particular test to determine whether a "a guilty verdict on one count logically excludes a finding of guilt on the other." Powell, 468 U.S. at 60, n. 8.

The Supreme Court of Tennessee has explained that in the aftermath of Powell, "the United States Supreme Court has not issued an opinion addressing specifically the fate of these so-called mutually exclusive verdicts." State v. Davis, 466 S.W. 3d 49, 73 (2015). It then noted that many state courts which have addressed the issue, "appear to struggle with both defining and applying the concept." Id. at 75.

Some courts believe it is necessary to examine the facts and theories at trial. Others believe the analysis involves only an examination of the statutory elements of the offenses.[3]

For example, the Supreme Court of Connecticut, in considering this issue has explained that courts reviewing claims of inconsistent guilty verdicts "must closely examine the record to determine whether there is any plausible theory under which the jury reasonably could have found the defendant guilty of both offenses." State v. Nash, 316 Conn. 651, 663

[3] Citing the lack of clarity in this area, the Tennessee Supreme Court stated it was "disinclined to open the door to the increased confusion and increased litigation" and held a defendant was not entitled to relief on the basis of inconsistent guilty verdicts. Davis, 466 S.W. 3d at 77.

(2015). See also Masoner v. Thurman, 996 F.2d 1003 (9th Cir. 1993) ("a due process challenge to a jury verdict on the ground that convictions of multiple counts are inconsistent with one another will not be considered if the defendant cannot demonstrate that the challenged verdicts are necessarily logically inconsistent. If based on evidence presented to the jury any rational fact finder could have found a consistent set of facts supporting both convictions, due process does not require that the convictions be vacated.") (Emphasis added). Accord United States v. Williams, No. 21-10357, unreported, (9th Cir. 2023) (applying test from Masoner).

The Connecticut Supreme Court has further explained that "the legal consistency of the verdict must be considered in light of the state's theory of the case trial." State v. Alicea, 339 Conn. 385, 400 (2021). The state's theory at trial, "is embedded in the legal inconsistency analysis to the extent necessary to tether the state to the factual theory it presented to the jury." Id.

Notably, just this past term, this Court emphasized that, on appeal, the government must strictly adhere to the theories and facts it offered at trial. Ciminelli v. United States, 598 U.S. 306, 316 (2023). That rule is critical to protect the defendant's right to a fair opportunity to contest those theories and facts.

Other courts, however, examine only the statutory elements of the offenses of conviction to determine whether the elements necessarily exclude each other. See e.g., Buehl, supra 166 F.3d at 177–81 ("[a]n examination of the statutory definitions of first degree murder, third degree murder, and involuntary

manslaughter does not reveal any apparent logical inconsistency in the verdicts."); Middleton v. State, 309 Ga. 337, 343 (Ga. 2020) (examining the statutory elements and concluding that guilty verdicts on charges of "hijacking a motor vehicle" and "theft by receiving" were mutually exclusive because the former offense required a finding that the defendant was the principal thief of the car, whereas the latter required a finding that another person was the principal thief); People v. Delgado, 450 P.3d 703, 707-08 (Col. 2019) ("So, due process prevents a defendant from being convicted of crimes with mutually exclusive elements. But to analyze whether the verdicts are mutually exclusive, we need to look to the elements of both crimes that the state alleged."); State v. Speckman, 326 N.C. 576, 580 (N.C. 1990) (examining elements of the crimes of conviction to determine whether the jury's verdicts were mutually exclusive).

While a purely statutory analysis may lead to the correct result in certain cases, it is incomplete. See generally State v. Williams, 308 Kan. 1439, 1450 (Kan. 2019) (noting that the defendant argued that the court of appeals erred by "applying an elements test as the sole test" but concluding it did not need to consider the possibility that the Powell exception was broader than that because the jury's factual findings in that case were not inconsistent).

The problem with a purely elemental approach is that it ignores the factual findings necessary for the State to prove the essential elements of each offense that were offered at trial. See Daigle, 149 F.Supp. at 414 (inconsistent guilty verdicts cannot stand "where a guilty verdict on one count negatives some fact essential to a finding of guilty on a second count");

accord Apprendi v. New Jersey, 530 U.S. 466, 483 (2000) ("But practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt."); Sullivan, supra, 508 U.S. at 277–278 ("[t]he prosecution bears the burden of proving all elements of the offense charged and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements.").

This case exemplifies the need for guidance and why simply looking at the statutory elements of an offense is insufficient to protect a criminal defendant's right to due process of law and trial by jury. In its consideration of the issue, the Ohio Court of Appeals merely stated, "the verdicts in the instant case are not mutually exclusive: Petitioner committed theft in office when he deprived the City of the wedding fees; he committed dereliction of duty when he failed to deposit the fees into the treasury as required; and he committed solicitation of improper compensation in asking couples to pay him to perform a duty under color of his public office." App. at 20.

But in order for the jury to find Petitioner guilty of Theft In Office and Dereliction of Duty, the State had to prove beyond a reasonable doubt that the wedding money was the property of the City of Dover. That is an inescapable fact necessary to each of those offenses as charged.

A guilty verdict on those counts, therefore, "negatives" an essential fact necessary to find Petitioner guilty of Counts Three through Six–that the wedding money was unlawfully solicited compensation.

See Daigle, 149 F. Supp. at 414. Indeed, the City would have no claim to money that its mayor unlawfully solicited or accepted in the first place.

That is true regardless of whether the elements of Theft In Office and Dereliction of Duty are, on their face, mutually exclusive of the elements of Soliciting Improper Compensation.

Based upon the charging documents, the State's evidence and argument at trial, and the verdicts themselves, there is no way to know whether the jury found beyond a reasonable doubt that Petitioner deprived the City of its fees or whether Petitioner unlawfully solicited compensation from residents.

This case presents an ideal vehicle for review because of its similarities to Daigle, which this Court specifically relied on in recognizing the problem with logically inconsistent, mutually exclusive guilty verdicts. Indeed, both cases involve conflicting means in which the defendant was alleged to have come into possession of money, one lawfully and the other unlawfully. In addition, the issue was raised in the first instance at the Petitioner's trial as well as in his post-trial briefing, and there are no issues of waiver, plain error review, or ineffectiveness claims that often infect cases presenting similar questions.

II. An Important Question Is Presented, On What Remedy A Reviewing Court Should Apply If It Determines That A Criminal Defendant's Constitutional Right To Due Process Of Law Was Violated Because Two Guilty Verdicts Are Logically Inconsistent.

There is no consensus as to what the appropriate remedy is for a defendant who has been found guilty of logically inconsistent verdicts.

In Daigle, the district court concluded that it had the authority to direct a verdict of acquittal on the charge carrying the more severe penalty. It reasoned that the defendant would not be prejudiced by allowing the less burdensome conviction to stand. See, e.g., Daigle, 149 F. Supp. at 414.

While citing to Daigle as an example of inconsistent guilty verdicts, this Court has explicitly reserved the question of what to do in a case presenting logically inconsistent convictions. See Powell, 469 U.S. at 69 n.8 (1984) ("Nothing in this opinion is intended to decide the proper resolution of a situation where a defendant is convicted of two crimes, where a guilty verdict on one count logically excludes a finding of guilt on the other.") (Emphasis added).But cf. Milanovich v. United States, 365 U.S. 551, 555-56 (1961) (reversing on both counts when the trial court erred in failing to instruct the jury that it could not convict a defendant of both larceny and receiving stolen property).

The majority of recent cases, however, have automatically reversed all of the inconsistent convictions, not just the most burdensome. The Colorado Supreme Court explained that a retrial is the appropriate remedy because it "avoids trying to peer into the minds of the jurors to determine what they could have meant by conflicting verdicts." People v. Delgado, supra, 450 P. 3d at 710. Indeed, "there simply is no way for a reviewing court to know which verdict the jury found to be supported." State v. Chyung, 325 Conn. 236, 259 (2017); see also Middleton v. State,

supra, 337 Ga. at 343 (proper remedy for mutually exclusive verdicts is retrial on those counts); Speckman, 326 N.C. at 580 (same).

CONCLUSION AND PRAYER FOR RELIEF

Based upon all of the foregoing, Petitioner respectfully urges this Court to grant certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX (cont'd)

THE SUPREME COURT OF OHIO

FILED
APRIL 30 2024
CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio	∫∫	
	∫∫	Case No. 2024-0239
v.	∫∫	
	∫∫	ENTRY
Richard P. Homrighausen	∫∫	
	∫∫	

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Tuscarawas County Court of Appeals; No. 2023AP020008)

/s/ Sharon L. Kennedy
Sharon L. Kennedy
Chief Justice

App. 2

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

April 30, 2024

[Cite as 04/30/2024 Case Announcements, 2024-Ohio-1577.]

APPEALS NOT ACCEPTED FOR REVIEW

2024-0239. State v. Homrighausen.
Tuscarawas App. No. 2023AP020008, 2024-Ohio-6.

Fischer, J., dissents and would accept the appeal on proposition of law No. I.

Brunner, J., dissents.

App. 3

THE SUPREME COURT OF OHIO

FILED

JULY 9 2024
CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio	∫∫	
	∫∫	Case No. 2024-0239
v.	∫∫	
	∫∫	RECONSIDERATION
Richard P. Homrighausen	∫∫	ENTRY
	∫∫	

It is ordered by the court that the motion for reconsideration in this case is denied.

(Tuscarawas County Court of Appeals; No. 2023AP020008)

/s/ Sharon L. Kennedy
Sharon L. Kennedy
Chief Justice

App. 4

The Supreme Court of Ohio

CASE ANNOUNCEMENTS

July 9, 2024

[Cite as 07/09/2024 Case Announcements, 2024-Ohio-2576.]

RECONSIDERATION OF PRIOR DECISIONS

2024-0239. State v. Homrighausen.
Tuscarawas App. No. 2023AP020008, 2024-Ohio-6. Reported at 2024-Ohio-1577. On motion for reconsideration. Motion denied.

Brunner, J., dissents.

IN THE COURT OF APPEALS
FOR TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	JUDGMENT ENTRY
	:	
-vs-	:	
	:	
RICHARD P. HOMRIGHAUSEN	:	Case No. 2023AP020008
	:	
	:	
Defendant-Appellant	:	

For the reasons stated in our accompanying Opinion on file, the judgment of the Tuscarawas County Court of Common Pleas is affirmed. Costs assessed to appellant.

/s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

/s/ John W. Wise
HON. JOHN W. WISE

HON. ANDREW J. KING

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	: JUDGES:
	:
Plaintiff-Appellee	: Hon. John W. Wise, P.J.
	: Hon. Patricia A. Delaney, J
-vs-	: Hon. Andrew J. King, J
	:
RICHARD P. HOMRIGHAUSEN	: Case No. 2023AP020008
	:
	:
Defendant-Appellant	: O P I N IO N

CHARACTER OF PROCEEDINGS: Appeal from the Tuscarawas County Court of Common Pleas, Case No. 2022CR030072

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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Delaney, J.

{¶1} Appellant Richard P. Homrighausen appeals from the January 19, 2023 Judgment of Sentencing of the Tuscarawas County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} This case arose in 2021 when an investigation into the mayor of the City of Dover uncovered irregularities with fees paid to the mayor to perform weddings.[1] Appellee asserted appellant used City resources and charged a fee for the weddings, but pocketed the fees for himself instead of turning them over to the City treasury.

{¶3} Appellant was elected mayor in 1992. From 2014 through 2021, appellant officiated approximately

[1] The City's investigation included additional matters which are not relevant to the instant appeal because appellant was acquitted on those counts. This appeal solely involves the "wedding fees."

231 weddings as mayor. His executive assistants included Vickie Voorhees and Eva Newsome; the latter was hired and trained when Voorhees, retired. Newsome's training included the procedure to follow when couples asked to be married by appellant in his capacity as mayor.

{¶4} When couples inquired about weddings by telephone or email, appellant forwarded the inquiries to his assistant to obtain further information. The assistant scheduled the wedding and prepared paperwork on City time, including vows on appellant's official letterhead and license paperwork for appellant's signature. The assistant charged couples pursuant to a sliding "fee schedule" posted in appellant's office. The amount of the fee depended on the timing and location of the ceremony; weekday weddings in the office had a lower fee than holiday or weekend weddings at an outside location. Couples received a receipt for the fee paid; the receipts came from the City receipt book kept for City business. If the prospective married couple could not afford the fee, appellant did not perform the wedding.

{¶5} Documentation of the weddings was meticulously maintained; appellant's assistant was able to provide the receipts, vows, licenses, and any related paperwork for the weddings performed by appellant.

{¶6} Appellant officiated weddings in his office, throughout City Hall, in the public square, at churches, and at countless other locations throughout the City and Tuscarawas County.

{¶7} Appellant's assistant was required to charge

a "wedding fee" to be paid by check made payable to appellant personally or by cash. A fee schedule was posted in appellant's office as follows:

a. Weekdays at my office $35
b. Weekdays at other location $50
c. Friday night and Saturday night at my office $50
d. Friday night and Saturday night at other location $65
e. Sundays at my office $75
f. Sundays at other location $90
g. Holidays at my office $150
h. Holidays at other location $175

{¶8} Appellant instructed his assistant to take down the posted wedding-fee schedule when State Auditors were present in the building conducting an audit of the City.

{¶9} Receipts for wedding fees were provided from the City's receipt book, the same receipt book used for other City services including civil service payments for police and fire exams and ambulance services.

{¶10} The payments received as "wedding fees" were personally given to appellant by the couples he married. Several persons married by appellant testified at trial; all were told of the applicable fee, to be paid by cash or check payable to appellant. Before the service, appellant provided the couples with manila envelopes containing the wedding vows, a wedding certificate, and a receipt for the fee. The vows were drafted on City letterhead containing the City's address and the Mayor's office contact information. Wedding vows and licenses identified appellant as the officiant in his official capacity as Mayor.

{¶11} Appellant received the cash and checks payable to himself, which he endorsed. He kept the fees· for his personal use and did not deliver the fees to the City Auditor for deposit in City accounts. The City Auditor testified she was unaware of the collection of wedding .fees until the investigation began in 2021. The Auditor acknowledged none of the "wedding fees" collected by appellant and his office were deposited into City accounts.

{¶12} Appellant's compensation was determined by City Council and was set by three City Ordinances for the period from January 1, 2014 to January 4, 2021. The Ordinances do not authorize wedding fees to be paid to appellant.

{¶13} The investigation into these matters began when City Council was alerted to issues in the mayor's office, including failure to address various administrative tasks. City Council requested an investigation which led to discovery of the wedding-fee issue, to wit: appellant collected fees to perform weddings and kept the fees for himself.

{¶14} Appellee's evidence at trial indicated appellant changed his practices during the investigation; in September 2021, he emailed a couple who enquired about a wedding service as follows: "Harley I am sending you this email to inform you that I'm not accepting gratuity in cash, check, or goods for the performance of marriage ceremonies. Mayor Rick."

{¶15} The State Auditor's Special Investigations Unit conducted a special audit including a review of the City's duplicate receipt book and determined that during the period of January 1, 2014 through January

4, 2021, appellant received $9,295 for "wedding fees" and did not deposit any of that amount into City accounts.

{¶16} Appellant was charged by indictment as follows: one count of theft in office pursuant to R.C. 2921.41(A)(1) and R.C. 2921.41(B), a felony of the third degree [Count I]; one count of having an unlawful interest in a public contract pursuant to R.C. 2921.42(A)(1) and R.C. 2921.42(E), a felony of the fourth degree [Count II]; four counts of soliciting improper compensation pursuant to R.C. 2921.43(A)(1) and R.C. 2921.43(D), all misdemeanors of the first degree [Counts Ill through VI]; two counts of dereliction of duty pursuant to R.C. 2921.44(E) and R.C. 2921.44(F), both misdemeanors of the second degree [Counts VII and VIII]; six counts of filing incomplete, false and fraudulent returns pursuant to R.C. 5747.19, all felonies of the fifth degree [Counts IX through XIV]; and one count of representation by public official or employee pursuant to R.C. 0102.03(D), a misdemeanor of the first degree [Count XV].

{¶17} Appellant entered pleas of not guilty.

{¶18} On July 28, 2022, appellee dismissed each of the counts of filing incomplete, false, and fraudulent returns [Counts IX through XIV].

{¶19} The matter proceeded to trial by jury on the remaining counts. At the close of appellee's evidence, appellant moved for a judgment of acquittal pursuant to Crim.R. 29(A) and the trial court granted the motion as to one count of dereliction of duty and the single count of representation by public official or employee [Counts VIII and XV]. The trial proceeded with

presentation of appellant's evidence. Appellant was found guilty of the single count of theft in office in an amount less than $1,000; of the four counts of soliciting improper compensation; and of the remaining count of dereliction of duty. Appellant was found not guilty of the single count of having an unlawful interest in a public contract.

{¶20} The trial court ordered preparation of a pre-sentence investigation (P.S.I.).

{¶21} On November 30, 2022, appellant filed a motion for judgment of acquittal as to the counts of theft in office and dereliction of duty. Appellee filed a memorandum in opposition and appellant replied. The trial court overruled the motion for acquittal by judgment entry dated January 12, 2023.

{¶22} Appellant appeared for sentencing on January 17, 2023, and was fined a total of $5,250. Appellant was also ordered to make restitution to the City in the amount of $9,295.

{¶23} Appellant now appeals from the trial court's judgment entry of conviction and sentence.

{¶24} Appellant raises five assignments of error:

ASSIGNMENTS OF ERROR

{¶25} "I. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTIONS FOR AN ACQUITTAL ON COUNTS ONE AND SEVEN, IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TRIAL BY JURY SECURED UNDER THE FIFTH, SIXTH, AND

FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

{¶26} "II. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTIONS FOR AN ACQUITTAL AND MOTION FOR A NEW TRIAL WHERE THE VERDICTS ON COUNTS ONE AND SEVEN WERE MUTUALLY EXCLUSIVE OF THE VERDICTS ON COUNTS THREE THROUGH SIX, IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW AND TRIAL BY JURY SECURED UNDER FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION."

{¶27} "III. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN PROHIBITING DEFENSE COUNSEL FROM QUESTIONING WITNESSES REGARDING A PUBLIC RECORD THAT INCLUDED A RECOMMENDATION THAT THE CITY OF DOVER ADOPT ORDINANCES GOVERNING A MAYOR RECEIVING MONEY FOR OFFICIATING WEDDINGS AND PROCEDURES TO DEPOSIT THOSE MONIES INTO THE TREASURY."

{¶28} "IV. THE TRIAL COURT'S SENTENCE WAS CONTRARY TO LAW BECAUSE IT ERRED IN FAILING TO MERGE COUNTS AT SENTENCING."

{¶29} "V. THE TRIAL COURT ERRED IN ORDERING RESTITUTION IN THE AMOUNT OF $9,295 WHEN THE JURY FOUND APPELLANT GUILTY ON COUNT ONE IN AN AMOUNT LESS THAN $1,000."

ANALYSIS

I., II.

{¶30} Appellant's first and second assignments of error will be addressed together because both challenge his convictions upon Counts I and VII. Appellant argues the trial court should have granted his motion for acquittal upon Counts I and VII [theft in office and dereliction of duty]. We disagree.

A. Standard of Review

{¶31} Appellant argues that the trial court erred when it denied his Crim.R. 29 motion for acquittal. Pursuant to Crim.R. 29(A), a court "shall order the entry of the judgment of acquittal of one or more offenses * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." Because a Crim.R. 29 motion questions the sufficiency of the evidence, "[w]e apply the same standard of review to Crim.R. 29 motions as we use in reviewing the sufficiency of the evidence."

{¶32} "Whether the evidence is legally sufficient to sustain a verdict is a question of law." Id. at ¶ 38, citing State v. Thompkins, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "Sufficiency is a test of adequacy." Id. "We construe the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt." Id., citing State v. Jenks, 61 Ohio St.3d 259,574 N.E.2d 492 (1991), paragraph two of the syllabus.

B. The Offenses

Count I: Theft in office pursuant to R.C. 2921.41(A)(1) and (b)

{¶33} In Count I, appellant was charged with one count of theft in office pursuant to R.C. 2921.41 (A)(1) and (B), a felony of the third degree. Those sections state the following:

> (A) No public official or party official shall commit any theft offense, as defined in division (K) of section 2913.01 of the Revised Code, when either of the following applies:
>
> (1) The offender uses the offender's office in aid of committing the offense or permits or assents to its use in aid of committing the offense[.]
>
> * * * *
>
> (B) Whoever violates this section is guilty of theft in office. Except as otherwise provided in this division, theft in office is a felony of the fifth degree. If the value of property or services stolen is one thousand dollars or more and is less than seven thousand five hundred dollars, theft in office is a felony of the fourth degree. If the value of property or services stolen is seven thousand five hundred dollars or more and is less than one hundred fifty thousand dollars, theft in office is a felony of the third degree. If the value of property or services stolen is one hundred fifty thousand dollars or more and is less than seven hundred fifty thousand dollars, theft in office is a felony of the second degree. If the value of property or services stolen is

> seven hundred fifty thousand dollars or more, theft in office is a felony of the first degree.

{¶34} The indictment specifies appellant committed Count I "on or about January 1, 2014 to January 4, 2021, in Tuscarawas County * * *." Appellee's bill of particulars filed June 30, 2022, states in Count I, appellant is alleged to have committed theft over the period of the dates in the indictment, "[appellant] used his office in aid of committing the offense through his authority to perform weddings as mayor * * * pursuant to Ohio Revised Code section 3101.08. [Appellant] was required to remit to the City*** the fees or emoluments for the weddings*** [pursuant to R.C. 733.40 and 705.25]."

Count VII: Dereliction of duty pursuant to R.C. 2921.44(E) and (F)

{¶35} In Count VII, appellant was charged with one count of dereliction of duty pursuant to R.C. 2921.44(E) and (F). Those ,sections state:

> (E) No public servant shall recklessly fail to perform a duty expressly imposed by law with respect to the public servant's office, or recklessly do any act expressly forbidden by law with respect to the public servant's office.
>
> (F) Whoever violates this section is guilty of dereliction of duty, a misdemeanor of the second degree.

{¶36} The indictment states appellant failed to remit to the City fees collected by him, as Mayor of the City of Dover, on the first Monday of each month, as

required by section 733.40 of the Revised Code. Appellee's bill of particulars notes as Mayor, appellant was charged with the duty of reporting all fees collected by him that come into his hands by any manner, and to pay those fees into the City treasury.

C. Appellant's arguments regarding "fees"

{¶37} Appellant first argues his convictions upon--- Counts I and VII must be reversed because the wedding fees collected by appellant and at his direction are not "fees" within the purview of R. C. 733.40.[2] That section states in pertinent part:

> * * * *[A]II fines, forfeitures, and costs in ordinance cases and all fees that are collected by the mayor, that in any manner come into the mayor's hands, or that are due the mayor or a marshal, chief of police, or other officer of the municipal corporation, any other fees and expenses that have been advanced out of the treasury of the municipal corporation, and all money received by the mayor for the use of the municipal corporation shall be paid by the mayor into the treasury of the municipal corporation on the first Monday of each month.****. (Emphasis added).

{¶38} Appellant argues, "* * * [Appellee] could only make its case on Counts One and Seven, if [appellant] accepted 'fees,' as set forth in R.C. 733.40, which

---

[2] The trial court dismissed Count VIII, dereliction of duty, because that Count relied upon appellant's failure to deposit "emoluments" as required by R.C. 705.25, but that section applies only to officials of charter cities and Dover is a non-chartered City.

belonged to the City, and that he failed to deposit them." Brief, 13. Appellant then argues that the term "fees" as used in R.C. 733.40 does not apply to the "wedding fees" appellant collected. First, appellant argues he had no power to collect "fees" as such because control of the City's finances is solely within the control of the municipal legislature pursuant to R.C. 731.47. This argument is misplaced because regardless of terminology, the uncontroverted evidence established appellant solicited and accepted a "fee" or "gratuity" or "payment" or any other term describing an amount of money charged by appellant in his capacity as mayor of the City of Dover to perform weddings, and appellant kept those fees or gratuities or payments, i.e. the money, for himself.

{¶39} Nor are we persuaded by appellant's assertion that R.C. 733.40 applies only to "money related to local court cases." Our reading of the plain language of the statute, supra, does not lend to any such restriction.

D. Appellant's arguments regarding mens rea

{¶40} Appellant next argues there is no evidence to prove he acted "with purpose to deprive [the City] of property" in Count I, theft in office. Appellant fully acknowledges he personally determined the amount to charge to officiate a wedding and the money was paid to him personally; he performed the weddings "sometimes with great fanfare" and kept meticulous receipts. Brief, 21. Appellant's implication that somehow he failed to realize it was unlawful to accept money in his capacity as Mayor, to perform a function under full color of his office as Mayor, supported by his office as Mayor both literally and metaphorically, is disingenuous. The evidence at trial established

appellant removed the "fee schedule" when State Auditors were in the building and was careful to change his wedding procedure after the investigation was launched, supporting the inevitable conclusion appellant knew full well he was not entitled to keep money accepted as "wedding fees" for officiating ceremonies as Mayor of the City of Dover.

E. Appellant's arguments regarding "mutually exclusive verdicts"

{¶41} Appellant further argues that the jury's guilty verdicts upon Counts I and VII are inconsistent with verdicts upon Counts Ill through VI, soliciting improper compensation, because the "wedding fees" cannot simultaneously function as "fees" for Counts I and VII and "compensation" for Counts Ill through VI.

{¶42} Appellant argues his convictions upon Counts and VII are mutually exclusive of his convictions upon Counts 111 through VI. "Mutually exclusive" verdicts are a subset of inconsistent verdicts. Inconsistent verdicts in a criminal case generally are not reviewable. United States v. Smith, 749 F.3d 465, 498 (6th Cir.2014). There are two exceptions. United States v. Randolph, 794 F .3d 602, 610. First, where jury verdicts "are marked by such inconsistency as to indicate arbitrariness or irrationality," we have opined that "relief may be warranted." Id., citing United States v. Lawrence, 555 F.3d 254, 263 (6th Cir.2009). Second, in a situation "where a guilty verdict on one count necessarily excludes a finding of guilt on another," i.e. a "mutually exclusive" verdict, [an appellate court] can review the defendant's challenge to the verdict. United States v. Ruiz, 386 Fed.Appx. 530, 533 (6th Cir.2010) (citing Powell, 469 U.S. at 69,

n. 8,105 S.Ct. 471); see also United States v. Ashraf, 628 F.3d 813, 823-24 (6th Cir.2011) (recognizing two exceptions to general rule that inconsistent verdicts are not reviewable).

{¶43} Appellant's premise is that Counts I and VII depend upon the payments he collected being "fees" and Counts Ill through VI depend upon the payments he collected being compensation. Again, we find appellant's semantics to create a distinction without a difference. The verdicts in the instant case are not mutually exclusive: appellant committed theft in office when he deprived the City of the wedding fees; he committed dereliction of duty when he failed to deposit the fees into the treasury as required; and he committed solicitation of improper compensation in asking couples to pay him to perform a duty under color of his public office.

{¶44} The verdicts in the instant case are not mutually exclusive.

{¶45} Construing the evidence in a light most favorable to appellee, the jury could have found the essential elements of the charged offenses proven beyond a reasonable doubt; therefore, the trial court did not err in overruling appellant's motion for acquittal. Appellant's first and second assignments of error are overruled.

III.

{¶46} In his third assignment of error, appellant argues defense trial counsel should have been permitted to question two witnesses about a "management letter" provided to the City. We disagree.

{¶47} "A trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." Rigby v. Lake Cty., 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991). An abuse of discretion is more than a mere error in judgment; it is a "perversity of will, passion, prejudice, partiality, or moral delinquency." Pons v. Ohio State Med. Bd. 66 Ohio St.3d 619,621,614 N.E.2d 748 (1993). When applying an abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. Id. Absent an abuse of discretion resulting in material prejudice to the defendant, a reviewing court should be reluctant to interfere with a trial court's decision in this regard. State v. Hymore, 9 Ohio St.2d 122,128,224 N.E.2d 126 (1967).

{¶48} Appellant's counsel attempted to question two witnesses about a management letter prepared by an independent auditor that recommended the City develop a formal procedure for dealing with wedding fees. Appellant argued the document was a public record which established there were no City policies regarding wedding fees; appellee objected and argued the letter was an opinion by someone not identified as an expert and not called as a trial witness. The trial court sustained appellee's objection but allowed appellant's counsel to ask the witnesses whether the City had policies or ordinances regarding wedding fees.

{¶49} We fail to perceive, and appellant does not point out, how he was prejudiced by the trial court's decision disallowing the letter. We find no abuse of discretion and the third assignment of error is overruled.

IV.

{¶50} In his fourth assignment of error, appellant argues Counts I and VII should have merged for purposes of sentencing. We disagree.

{¶51} Appellate review of an allied-offense question is de novo. State v. Miku, 5th Dist. No. 2017 CA 00057, 2018-Ohio-1584, ¶ 70, appeal not allowed, 154 Ohio St.3d 1479, 2019-Ohio-173, 114 N.E.3d 1207 (2019), quoting State v. Williams, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 12.

{¶52} R.C. 2941.25 states:

> Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain Counts for all such offenses, but the defendant may be convicted of only one.
>
> Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain Counts for all such offenses, and the defendant may be convicted of all of them.

{¶53} The application of R.C. 2941.25 requires a review of the subjective facts of the case in addition to the elements of the offenses charged. State v. Hughes, 5th Dist. Coshocton No. 15CA0008, 2016-Ohio-880, ¶ 21. In a plurality opinion, the Ohio Supreme Court modified the test for determining whether offenses are

allied offenses of similar import. State v. Johnson, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. The Court directed us to look at the elements of the offenses in question and determine "whether it is possible to commit one offense and commit the other with the same conduct." (Emphasis sic). Id. at ¶ 48. If the answer to such question is in the affirmative, the court must then determine whether or not the offenses were committed by the same conduct. Id. at ¶ 49. If the answer to the above two questions is yes, then the offenses are allied offenses of similar import and will be merged. Id. at ¶ 50. If, however, the court determines that commission of one offense will never result in the commission of the other, or if there is a separate animus for each offense, then the offenses will not merge. Id. at ¶ 51.

{¶54} Johnson's rationale has been described by the Court as "incomplete." State v. Earley, 145 Ohio St.3d 281, 2015-Ohio-4615, 49 N.E.3d 266, ¶ 11. The Supreme Court of Ohio has further instructed us to ask three questions when a defendant's conduct supports multiple offenses: "(1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered." State v. Ruff, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, ¶ 31.

{¶55} We need not engage in lengthy analysis as it is clear that these offenses are separate and do not merge. State v. Lipkins, 5th Dist. Stark No. 2022CA00053, 2023-Ohio-1192, ¶ 86, appeal not allowed, 170 Ohio St.3d 1508, 2023-Ohio-2664, 213

N.E.3d713. In the instant case, appellant argues Count I, theft in office, should merge with Count VII, dereliction of duty, because the harm was the same: the City did not receive the wedding fees. Appellant also argues the four counts of soliciting improper compensation should have merged.

{¶56} The evidence established appellant solicited wedding fees from four separate individuals; the act of solicitation was complete when appellant requested the compensation for his official acts. We agree with appellee that the separate crime of theft in office was not complete until appellant kept the money for his own personal use. Moreover, the failure to deposit the money into the City treasury was a separate offense, dereliction of duty.

{¶57} The offenses constituted separate offenses of dissimilar import and appellant was properly sentenced upon each count.

{¶58} The fourth assignment of error is overruled.

V.

{¶59} In the fifth assignment of error, appellant argues the trial court could not order restitution in the amount of $9,295 when appellant was convicted in Count I, theft in office, of theft in an amount less than $1,000. We disagree.

{¶60} An order of restitution must be supported by competent, credible evidence in the record. State v. Charles, 11th Dist. Ashtabula No. 98-A-0043, 1999 WL 1073674, *3, citing State v. Warner, 55 Ohio St.3d 31, 51-53, 564 N. E.2d 18 (1990) [restitution order for

conviction of dereliction of duty must be supported by competent, credible evidence in the record]. Moreover, restitution can be ordered only for those acts that constitute the crime for which the defendant was convicted and sentenced. Id., citing State v. Friend, 68 Ohio App.3d 241, 243, 587 N.E.2d 975 (10th Dist.1990).

{¶61} R.C. 2929.18(A) governs a sentencing court's authority to order restitution and provides that a trial court imposing a sentence for a felony conviction may sentence the offender to any financial sanction or combination of financial sanctions authorized by law. R.C. 2929.18(A)(1) further provides in pertinent part: "Financial sanctions that may be imposed pursuant to this section include, but are not limited to * * * [r]estitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss.****."

{¶62} Under these provisions, restitution is limited to the economic loss caused by the defendant's illegal conduct for which he was convicted. State v. Kenily, 5th Dist. Muskingum No. CT 2007 0040, 2008-Ohio-4096, ¶ 24, citing State v. Brumback, 109 Ohio App.3d 65, 82, 671 N.E.2d 1064 (9th Dist.1996). Thus, restitution can be ordered only for those acts that constitute the crime for which the defendant was convicted and sentenced. Id. , citing State v. Friend, 68 Ohio App.3d 241, 243, 587 N.E.2d 975 (10th Dist. 1990). Moreover, there must be sufficient evidence in the record from which the court can ascertain the amount of restitution to a reasonable degree of certainty. Brumback at 83. We have previously held that when a defendant is convicted of dereliction of duty, the trial court may only order restitution in an amount representing the loss from the conduct

constituting the offense. Kenily, supra, 2008-Ohio-4096, ¶ 27. In the instant case, appellant was convicted of one count of dereliction of duty for his failure to deposit the $9,295 collected from wedding fees into the City treasury. The trial court ordered restitution in the amount of $9,295, an amount which is exhaustively documented throughout, the record of the case.

{¶63} The trial court's restitution order is supported by competent, credible evidence and is not an abuse of discretion. Appellant's fifth assignment , of error is overruled.

CONCLUSION

{¶64} Appellant's five assignments of error are overruled and the judgment of the Tuscarawas County Court of Common Pleas is affirmed.

By: Delaney, J.,

Wise, P.J. concur and

King, J., concurs in part and dissents in part.

/s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

/s/ John W. Wise
HON. JOHN W. WISE

HON. ANDREW J. KING

King, J. concurs in part and dissents in part,

{¶65} I agree with the majority and concur in much of its reasoning. Where dissent is regarding the first assignment of error, which relates to the theft in office charge. I do not dispute that the former mayor misused his office by soliciting and receiving improper compensation and was convicted of the same. Moreover, it may well be true that the former mayor was uncooperative and combative with the investigators from the State Auditor's office. Although the former mayor's conduct was illicit and condemnable, it was not a theft in office.

{¶66} By benefit of his office as a mayor, Homrighausen was entitled to solemnize marriages. R.C. 3101.08. The state agrees that he was allowed to charge and receive a fee for performing this service. The state argues that the theft occurred when he failed to pay those fees over to the city's treasury under R.C. 733.40. This is because, the state argues, Homrighausen was charging these fees under the color of his office. The state points to the fact he used the city website, offices, and employees while providing this service. While that is necessary under R.C. 2921.41 (A)(1), it does not automatically mean this conduct sufficiently proves all the elements of a theft offense.

{¶67} Consider either of the following. If Homrighausen had used all the same resources to solemnize marriages but had not charged a fee, then it appears the state would have not charged him with theft in office. Similarly, if he had established a clearer fire wall between his official duties discharged on behalf of the city and his use of his powers incident of his office

to perform marriage ceremonies, then there would be no theft in office because the state concedes he was allowed to charge a fee for this service.

{¶68} Beyond proving the elements in R.C. 2921.41 (A)(1), the state was required to prove that a theft offense occurred under R.C. 2913.02. The statute states the following: "No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways * * *."

{¶69} R.C. 2913.01(D) defines owner this way: "'Owner' means, unless the context requires a different meaning, any person, other than the actor, who is the owner of, who has possession or control of, or who has any license or interest in property or services, even though the ownership, possession, control, license, or interest is unlawful."

{¶70} With regard to the state's argument that the fees properly belonged to the city, I conclude that because the city was not the "owner" of those fees, thus there was no theft from the city. In my view, the former mayor retained discretion on what amount, if any to charge for the fee, and the power he exercised was never on behalf of the city.

{¶71} The power to solemnize marriages is incident to the office of mayor under R.C. Title 31—it is not a power inherent in or belonging to municipal government under R.C. Title 7. So, as a general proposition, solemnizing marriages is not a power the mayor is discharging as an agent for the municipality. In contrast, there are numerous instances in local government where an executive official is required to

assess and collect a fee related to the receipt of a government permit or license, such as a sheriff collecting a concealed handgun permit, a zoning official collecting a fee for a zoning permit, or a transient vendor receiving a vendor permit. In these cases, the local government which these officers serve is the ultimate source of the grant of privilege arising from the permit. It then follows that for purposes of R.C. 2913.01, the local government issuing a permit related to governmental services is the "owner" of that fee charged.

{¶72} Certainly, mayors do have statutory obligations under R.C. 733.40 to ensure that "all fees that are collected by the mayor, that in any manner come into the mayor's hands * * * for the use of the municipal corporation shall be paid by the mayor into the treasury of the municipal corporation on the first Monday of each month." But, as explained above, the city must have some authority for charging the fees and actually assess the fee in exchange for a municipal service for any mayor to be obligated to make such a deposit.

{¶73} This conclusion is bolstered by how R.C. 733.30 sets forth the mayor's duties: "The major [sic] shall perform all the duties prescribed by the bylaws and ordinances of the municipal corporation.*** He shall sign all commissions, licenses, and permits granted by such legislative authority, or authorized by Title VII of the Revised Code, and such other instruments as by law or ordinances require his certificate." There is no dispute there was no municipal ordinance on how a mayor must solemnize marriages or what fees to charge. And, as noted above, the mayor's power here does not arise from R.C. Title 7,

which further diminishes the argument they were fees owed to the city.

{¶74} To be sure, the evidence at trial supports the state's argument that by using city resources in the manner and to the extent Homrighausen did, it arguably created an appearance this was a municipal service being offered. And to that end, the state argues he used his apparent authority to collect these fees, and he should, in essence, be estopped from disclaiming that authority here. Despite whatever appeal that argument may have, there is no authority for reinterpreting the statutory offense and its definitions
that way.

{¶75} When reviewing statutory interpretations, this court does so de novo. State v. Hollingshead, 5th Dist. Muskingum No. CT2022-0031, 2023-Ohio-1714, 214 N. E.3d 1233, ¶ 10. Our obligation is to apply the ordinary meaning of the statute and apply it faithfully. Look Ahead America v. Stark County Board of Elections, 5th Dist. Stark No. 2022-CA-00152, 2023-Ohio-249, 221 N.E.3d 896, ¶ 21. Whenever doing so, we must be mindful to consider the entire statute in context, rather than selectively parsing the text and thereby overriding the legislature's intent. See Hollingshead, ¶ 15.

{¶76} Accepting the state's argument would redefine theft offenses in such a way to impute ownership into people and entities that had no apparent expectation of ownership. So, they would not only be surprised to discover that they were the victim of theft, but also the owner of the stolen property in the first instance. What would otherwise be a tragedy is

turned into a windfall for the imputed owner. Such a change must come from the General Assembly—not the courts, if it were to come at all. Thus, I conclude that to interpose judicially created rules of apparent authority and estoppel is inconsistent with both the ordinary meaning of the words and phrases used and the legislative intent of this offense.

{¶77} Aside from that, applying the doctrine of "apparent authority" without clear boundaries is likely to ensnare borderline but otherwise not illegal conduct. For example, Homrighausen was entitled to use his title of mayor and use areas owned by the city open to the public when performing his ceremonies. Would conducting ceremonies under these circumstances be sufficient to give rise to apparent authority, requiring any similarly situated mayors to deposit fees into the municipal treasury? The state's theory would suggest the answer would be yes. Another prosecuting attorney may reasonably conclude otherwise, because in borderline cases, individuals can reasonably differ about which side of the line the borderline case falls into. The line drawing necessary here should be left to policymaking through the legislature; therefore, I would reject the apparent authority argument used to sustain the conviction.

{¶ 78} In its brief, the state also argued that it was possible to sustain the conviction here because the couples seeking marriage services were the victims of theft. Although at oral argument the state wished to focus on other arguments, it did not withdraw this argument. So, it is appropriate and necessary to address it.

{¶79} Here too this theory encounters difficulty

with the statutory definitions, but this time with "deprive." R.C. 2913.01 (C) sets forth this definition:

> (C) "Deprive" means to do any of the following:
>
> (1) Withhold property of another permanently, or for a period that appropriates a substantial portion of its value or use, or with purpose to restore it only upon payment of a reward or other consideration;
>
> (2) Dispose of property so as to make it unlikely that the owner will recover it;
>
> (3) Accept, use, or appropriate money, property, or services, with purpose not to give proper consideration in return for the money, property, or services, and without reasonable justification or excuse for not giving proper consideration.

{80} Neither of the first two situations apply to the state's alternative theory of the newlyweds as victims of theft. But so too does the third aspect of this definition run into difficulty. Plainly the couples were seeking services from the former mayor, and Homrighausen performed those services in return for the money he collected. Based on the facts below, I do not see how the state proved it was the former mayor's "purpose not to give proper consideration in return for the money" the couples paid him.

{81} At oral argument, the state suggested there was possibly a coercive effect in the mayor requesting any fee in a seemingly official way. The implication was that the couples would not feel free to bargain or reject the fee sought for services. First, there is scant

evidence, if any, to support that in the record. Second, unlike a permit required under municipal authority, the couples were free to find another officiant. In that circumstance here, we should not conclude or infer that the money exchanged for services was not "proper consideration."

{¶82} Finally, also at oral argument, the state raised the possibility that it could have proceeded on the theory that the theft against the city was due to the misappropriation of its employees, equipment, and property by the former mayor to further his wedding seryices. The facts below suggest that the manner in which the former mayor provided the services was open and tacitly accepted for years by city officials. In such a case, there may well be additional arguments Homrighausen could have made in response to that theory. But because this argument was raised for the first time during oral argument, the proper thing to do is to decline to address it. Andreyko v. Cincinnati, 153 Ohio App.3d 108, 2003-Ohio-2759, 791 N.E.2d 1025, 1f 20 (1st Dist.).

{¶83} Although Homrighausen's conduct resulted in convictions related to soliciting improper compensation, his conduct is not also a theft in office. In my view, the city was not the "owner" of the fees he collected. I also conclude that the newlyweds appeared to receive proper consideration for their fees and were not unlawfully deprived of their property. For these reasons, I dissent from my colleagues regarding the first assignment of error.

/s/ Andrew J. King
Hon. Andrew J. King

IN THE COURT OF COMMON PLEAS
TUSCARAWAS COUNTY, OHIO
GENERAL DIVISION

FILED
COURT OF COMMON PLEAS
TUSCARAWAS COUNTY, OHIO
2023 JAN 19 PH 12:24
JEANNE M. STEPHEN
CLERK OF COURT

STATE OF OHIO	:	
	:	
Plaintiff	:	Case No. 2022 CR 03 0072
	:	
-vs-	:	Judge Elizabeth Lehigh
	:	Thomakos
RICHARD P.	:	
HOMRIGHAUSEN	:	JUDGMENT ENTRY ON
D.O.B.:07-03-48	:	SENTENCING
S.S.N.: xxx-xx-6216	:	
	:	
Defendant	:	

This matter came on for Sentencing this 17th day of January, 2023, upon the Defendant's conviction for One Count Theft in Office, in violation of R.C. 2921.41, a felony of the fifth degree; Four Counts Soliciting Improper Compensation, violations of R.C. 2921.43, misdemeanors of the first degree; and One Count Dereliction of Duty, in violation of R. C. 2921.44, a misdemeanor of the second degree.

The conviction was based upon the jury verdict of

guilty to these charges. The Judgment Entry filed herein on the 18th day of November, 2022, is incorporated by reference as if fully rewritten herein.

The State of Ohio was represented in Court by Special Prosecutors Robert F. Smith and Samuel J. Kirk. The Defendant, Richard P. Homrighausen, was present in Court represented by Attorney Mark R. DeVan.

The Court has considered the record, oral statements, a victim impact statement from Eva Newsome, Dave Douglas and Gerry Mroczkowski, and presentence reports prepared, as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12, with consideration for the use of resources. The Court inquired of the Defendant whether he had anything to say prior to pronouncement of sentence. The Defendant did not make a statement on his behalf.

The Court finds the Defendant has been convicted of One Count Theft in Office, in violation of R.C. 2921.41, a felony of the fifth degree; Four Counts Soliciting Improper Compensation, violations of R.C. 2921.43, misdemeanors of the first degree; and One Count Dereliction of Duty, in violation of R.C. 2921.44, a misdemeanor of the second degree.

Pursuant to the factors in R.C. 2929.12 and the presumptions in R.C. 2929.13(D) of the Revised Code, the Court considered the following matters in determining an appropriate sentence:

1. the offender held a public office and the offense

was related to that office;

2. the offender's professional office facilitated the offense;

3. the offender has not been adjudicated delinquent;

4. the offender has no prior criminal convictions;

5. the offender has been law abiding for a significant number of years; and

6. the offender's ORAS score is 8 (low risk).

The applicable factors under R.C. 2929.12 indicating that recidivism is less likely outweigh those indicating that recidivism is mote likely. The factors under R.C. 2929.12 increasing seriousness outweigh those decreasing seriousness. The Court finds that, after considering the factors set forth in R.C. 2929.12, a prison term or a community control sanction is not consistent with the purposes and ptit1ciples of sentencing set forth in R.C. 2929.11.

It is hereby ORDERED that the Defendant shall pay a fine in the amount of Two Thousand Five Hundred Dollars ($2,500.00) for the offense contained in Count One, One Count Theft in Office, in violation of R.C. 2921.41, a felony of the fifth degree.

It is further ORDERED that the Defendant shall pay fines in the amount of Five Hundred Dollars ($500.00) for the offense contained in Count Three, One Count Soliciting Improper Compensation, in violation of R.C. 2921.43, a misdemeanor of the first degree; Five Hundred Dollars ($500.00) for the offense contained in

Count Four, One Count Soliciting Improper Compensation, in violation of R.C. 2921.43, a misdemeanor of the first degree; Five Hundred Dollars ($500.00) for the offense contained in Count Five, One Count Soliciting Improper Compensation, in violation of R.C. 2921.43, a misdemeanor of the first degree; Five Hundred Dollars ($500.00) for the offense contained in Count Six, One Count Soliciting Improper Compensation, in violation of R.C. 2921.43, a misdemeanor of the first degree; and Seven Hundred Fifty Dollars ($750.00) for the offense contained in Count Seven, One Count Dereliction of Duty, in violation of R.C. 2921.44, a misdemeanor of the second degree.

It is further ORDERED that the Defendant shall repay restitution in the amount of $9,295.00 to the City of Dover, 110 East Third Street, Dover, Ohio 44622.

It is further ORDERED that the Defendant shall repay restitution for the cost of the audit, pursuant to R.C. 2921.41(C)(2)(a)(ii), in the amount of $2,665.00. This amount shall be divided with $963.50 payable to the City of Dover, 110 East Third Street, Dover, Ohio 44622 and$1,701.50 payable to the Auditor of State, c/o Kim Eckert, 88 East Broad Street, 4th Floor, Columbus, Ohio 43215.

It is further ORDERED that, pursuant to R.C. 2921.41(C)(1), the Defendant shall be forever disqualified from holding any public office, employment, or position of trust in this state.

It is further ORDERED that, pursuant to R.C. 2921.43(E), the Defendant shall be disqualified from holding any public office, employment, or position of

trust in this state for seven years.

It is further ORDERED that Count Two, One Count Having Unlawful Interest in a Public Contact, in violation of R.C. 2921.42, a felony of the fourth degree, shall be dismissed.

The Defendant has submitted to D.N.A. registration according to Ohio law.

The Defendant shall be entitled to -o- days jail credit.

The Defendant is ORDERED to pay Court costs in this matter.

It is further ORDERED that any and all Court costs, restitution or fines in this matter be paid through the Office of the Tuscarawas County Clerk of Courts. Restitution is to be paid first and foremost, followed by the Court costs, and then the fines.

The costs of this action shall be rendered against the Defendant. The Defendant is advised, pursuant to R.C. §2947.23, that failure to pay the judgment rendered against him for costs or failure to make timely payments towards that judgment under a payment schedule approved by the Court may result in an order for the Defendant to perform community service in an amount of not more than forty (40) hours per month until the judgment is paid or until the Court is satisfied that the Defendant is in compliance with the approved payment schedule. If the Defendant is ordered to perform community service for said failure to pay, the Defendant will receive credit upon the judgment at the specified hourly credit rate per hour of

community service performed, and each hour of community service performed will reduce the judgment by that amount. Community service hours ordered by the Court as a term and condition of supervision, apart from an imposition of hours under R.C. §2947.23, shall not be credited against the payment of Court costs.

The Court advised the Defendant of his right to appeal the conviction and sentence. The Defendant is further advised of the following rights relating to said appeal:

1. If you are unable to pay the cost of an appeal, you have the right to appeal without payment;

2. If you are unable to obtain counsel for an appeal, counsel will be appointed without cost;

3. If you are unable to pay the costs of documents necessary to appeal, such documents will be provided without cost; and

4. You have a right to have a notice of appeal timely filed on your behalf.

The Defendant is hereby advised that, upon the Defendant's request, this Court will immediately appoint counsel for appeal. The Defendant moved for a Stay of Execution pending appeal, pursuant to App. R. 8.

It is hereby ORDERED that a Stay of Execution is granted, but will expire if no timely Notice of Appeal is filed.

IT IS SO ORDERED.

/s/ Elizabeth L. Thomakos
Judge Elizabeth Lehigh Thomakos

Dated: January 18, 2023

cc: Robert F. Smith, Special Prosecuting Attorney
Samuel J. Kirk, Special Prosecuting Attorney
Mark R. DeVan, Esq. & William C. Livingston, Esq.
Defendant
Community Corrections
Court Administrator

United States Const., Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Const., Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Const., Amend. XIV

Section 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.
Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.
No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously

taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.
The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.
The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Ohio Revised Code § 2921.41 - Theft in office.

(A) No public official or party official shall commit any theft offense, as defined in division (K) of section 2913.01 of the Revised Code, when either of the following applies:

(1) The offender uses the offender's office in aid of committing the offense or permits or assents to its use in aid of committing the offense;

(2) The property or service involved is owned by this state, any other state, the United States, a county, a municipal corporation, a township, or any political subdivision, department, or agency of any of them, is owned by a political party, or is part of a political campaign fund.

(B) Whoever violates this section is guilty of theft in office. Except as otherwise provided in this division, theft in office is a felony of the fifth degree. If the value of property or services stolen is one thousand dollars or more and is less than seven thousand five hundred dollars, theft in office is a felony of the fourth degree. If the value of property or services stolen is seven thousand five hundred dollars or more and is less than one hundred fifty thousand dollars, theft in office is a felony of the third degree. If the value of property or services stolen is one hundred fifty thousand dollars or more and is less than seven hundred fifty thousand dollars, theft in office is a felony of the second degree. If the value of property or services stolen is seven hundred fifty thousand dollars or more, theft in office is a felony of the first degree.

(C)(1) A public official or party official who pleads

guilty to theft in office and whose plea is accepted by the court or a public official or party official against whom a verdict or finding of guilt for committing theft in office is returned is forever disqualified from holding any public office, employment, or position of trust in this state.

(2)(a)(i) A court that imposes sentence for a violation of this section based on conduct described in division (A)(2) of this section shall require the public official or party official who is convicted of or pleads guilty to the offense to make restitution for all of the property or the service that is the subject of the offense, in addition to the term of imprisonment and any fine imposed. The total amount of restitution imposed under this division shall include costs of auditing the public entities specified in division (A)(2) of this section that own the property or service involved in the conduct described in that division that is a violation of this section, but, except as otherwise provided in a negotiated plea agreement, shall not exceed the amount of the restitution imposed for all of the property or the service that is the subject of the offense.

(ii) A court that imposes sentence for a violation of this section based on conduct described in division (A)(1) of this section and that determines at trial that this state or a political subdivision of this state if the offender is a public official, or a political party in the United States or this state if the offender is a party official, suffered actual loss as a result of the offense shall require the offender to make restitution to the state, political subdivision, or political party for all of the actual loss experienced, in addition to the term of imprisonment and any fine imposed. The total amount of restitution imposed under this division shall include

costs of auditing the state, political subdivision, or political party that suffered the actual loss based on conduct described in that division that is a violation of this section, but, except as otherwise provided in a negotiated plea agreement, shall not exceed the amount of the restitution imposed for all of the actual loss suffered.

(b)(i) In any case in which a sentencing court is required to order restitution under division (C)(2)(a) of this section and in which the offender, at the time of the commission of the offense or at any other time, was a member of the public employees retirement system, the Ohio police and fire pension fund, the state teachers retirement system, the school employees retirement system, or the state highway patrol retirement system; was an electing employee, as defined in section 3305.01 of the Revised Code, participating in an alternative retirement plan provided pursuant to Chapter 3305. of the Revised Code; was a participating employee or continuing member, as defined in section 148.01 of the Revised Code, in a deferred compensation program offered by the Ohio public employees deferred compensation board; was an officer or employee of a municipal corporation who was a participant in a deferred compensation program offered by that municipal corporation; was an officer or employee of a government unit, as defined in section 148.06 of the Revised Code, who was a participant in a deferred compensation program offered by that government unit, or was a participating employee, continuing member, or participant in any deferred compensation program described in this division and a member of a retirement system specified in this division or a retirement system of a municipal corporation, the

entity to which restitution is to be made may file a motion with the sentencing court specifying any retirement system, any provider as defined in section 3305.01 of the Revised Code, and any deferred compensation program of which the offender was a member, electing employee, participating employee, continuing member, or participant and requesting the court to issue an order requiring the specified retirement system, the specified provider under the alternative retirement plan, or the specified deferred compensation program, or, if more than one is specified in the motion, the applicable combination of these, to withhold the amount required as restitution from any payment that is to be made under a pension, annuity, or allowance, under an option in the alternative retirement plan, under a participant account, as defined in section 148.01 of the Revised Code, or under any other type of benefit, other than a survivorship benefit, that has been or is in the future granted to the offender, from any payment of accumulated employee contributions standing to the offender's credit with that retirement system, that provider of the option under the alternative retirement plan, or that deferred compensation program, or, if more than one is specified in the motion, the applicable combination of these, and from any payment of any other amounts to be paid to the offender upon the offender's withdrawal of the offender's contributions pursuant to Chapter 145., 148., 742., 3307., 3309., or 5505. of the Revised Code. A motion described in this division may be filed at any time subsequent to the conviction of the offender or entry of a guilty plea. Upon the filing of the motion, the clerk of the court in which the motion is filed shall notify the offender, the specified retirement system, the specified provider under the alternative retirement plan, or the specified deferred compensation program,

or, if more than one is specified in the motion, the applicable combination of these, in writing, of all of the following: that the motion was filed; that the offender will be granted a hearing on the issuance of the requested order if the offender files a written request for a hearing with the clerk prior to the expiration of thirty days after the offender receives the notice; that, if a hearing is requested, the court will schedule a hearing as soon as possible and notify the offender, any specified retirement system, any specified provider under an alternative retirement plan, and any specified deferred compensation program of the date, time, and place of the hearing; that, if a hearing is conducted, it will be limited only to a consideration of whether the offender can show good cause why the requested order should not be issued; that, if a hearing is conducted, the court will not issue the requested order if the court determines, based on evidence presented at the hearing by the offender, that there is good cause for the requested order not to be issued; that the court will issue the requested order if a hearing is not requested or if a hearing is conducted but the court does not determine, based on evidence presented at the hearing by the offender, that there is good cause for the requested order not to be issued; and that, if the requested order is issued, any retirement system, any provider under an alternative retirement plan, and any deferred compensation program specified in the motion will be required to withhold the amount required as restitution from payments to the offender.

(ii) In any case in which a sentencing court is required to order restitution under division (C)(2)(a) of this section and in which a motion requesting the issuance of a withholding order as described in division (C)(2)(b)(i) of this section is filed, the offender may

receive a hearing on the motion by delivering a written request for a hearing to the court prior to the expiration of thirty days after the offender's receipt of the notice provided pursuant to division (C)(2)(b)(i) of this section. If a request for a hearing is made by the offender within the prescribed time, the court shall schedule a hearing as soon as possible after the request is made and shall notify the offender, the specified retirement system, the specified provider under the alternative retirement plan, or the specified deferred compensation program, or, if more than one is specified in the motion, the applicable combination of these, of the date, time, and place of the hearing. A hearing scheduled under this division shall be limited to a consideration of whether there is good cause, based on evidence presented by the offender, for the requested order not to be issued. If the court determines, based on evidence presented by the offender, that there is good cause for the order not to be issued, the court shall deny the motion and shall not issue the requested order. If the offender does not request a hearing within the prescribed time or if the court conducts a hearing but does not determine, based on evidence presented by the offender, that there is good cause for the order not to be issued, the court shall order the specified retirement system, the specified provider under the alternative retirement plan, or the specified deferred compensation program, or, if more than one is specified in the motion, the applicable combination of these, to withhold the amount required as restitution under division (C)(2)(a) of this section from any payments to be made under a pension, annuity, or allowance, under a participant account, as defined in section 148.01 of the Revised Code, under an option in the alternative retirement plan, or under any other type of benefit, other than a survivorship benefit, that has been or is in

the future granted to the offender, from any payment of accumulated employee contributions standing to the offender's credit with that retirement system, that provider under the alternative retirement plan, or that deferred compensation program, or, if more than one is specified in the motion, the applicable combination of these, and from any payment of any other amounts to be paid to the offender upon the offender's withdrawal of the offender's contributions pursuant to Chapter 145., 148., 742., 3307., 3309., or 5505. of the Revised Code, and to continue the withholding for that purpose, in accordance with the order, out of each payment to be made on or after the date of issuance of the order, until further order of the court. Upon receipt of an order issued under this division, the public employees retirement system, the Ohio police and fire pension fund, the state teachers retirement system, the school employees retirement system, the state highway patrol retirement system, a municipal corporation retirement system, the provider under the alternative retirement plan, and the deferred compensation program offered by the Ohio public employees deferred compensation board, a municipal corporation, or a government unit, as defined in section 148.06 of the Revised Code, whichever are applicable, shall withhold the amount required as restitution, in accordance with the order, from any such payments and immediately shall forward the amount withheld to the clerk of the court in which the order was issued for payment to the entity to which restitution is to be made.

(iii) Service of a notice required by division (C)(2)(b)(i) or (ii) of this section shall be effected in the same manner as provided in the Rules of Civil Procedure for the service of process.

(c) Consistent with the ruling of the supreme court of the United States in Kelly v. Robinson, 479 U.S. 36 (1986), restitution imposed under division (C)(2)(a) of this section is not dischargeable under Chapter 7 of the United States Bankruptcy Code pursuant to 11 U.S.C. 523, as amended.

(D) Upon the filing of charges against a person under this section, the prosecutor, as defined in section 2935.01 of the Revised Code, who is assigned the case shall send written notice that charges have been filed against that person to the public employees retirement system, the Ohio police and fire pension fund, the state teachers retirement system, the school employees retirement system, the state highway patrol retirement system, the provider under an alternative retirement plan, any municipal corporation retirement system in this state, and the deferred compensation program offered by the Ohio public employees deferred compensation board, a municipal corporation, or a government unit, as defined in section 148.06 of the Revised Code. The written notice shall specifically identify the person charged.

Ohio Revised Code § 2921.43 - Soliciting or accepting improper compensation.

(A) No public servant shall knowingly solicit or accept, and no person shall knowingly promise or give to a public servant, either of the following:

(1) Any compensation, other than as allowed by divisions (G), (H), and (I) of section 102.03 of the Revised Code or other provisions of law, to perform the public servant's official duties, to perform any other act or service in the public servant's public capacity, for the general performance of the duties of the public servant's public office or public employment, or as a supplement to the public servant's public compensation;

(2) Additional or greater fees or costs than are allowed by law to perform the public servant's official duties.

(B) No public servant for the public servant's own personal or business use, and no person for the person's own personal or business use or for the personal or business use of a public servant or party official, shall solicit or accept anything of value in consideration of either of the following:

(1) Appointing or securing, maintaining, or renewing the appointment of any person to any public office, employment, or agency;

(2) Preferring, or maintaining the status of, any public employee with respect to compensation, duties, placement, location, promotion, or other material aspects of employment.

(C) No person for the benefit of a political party, campaign committee, legislative campaign fund, political action committee, or political contributing entity shall coerce any contribution in consideration of either of the following:

(1) Appointing or securing, maintaining, or renewing the appointment of any person to any public office, employment, or agency;

(2) Preferring, or maintaining the status of, any public employee with respect to compensation, duties, placement, location, promotion, or other material aspects of employment.

(D) Whoever violates this section is guilty of soliciting improper compensation, a misdemeanor of the first degree.

(E) A public servant who is convicted of a violation of this section is disqualified from holding any public office, employment, or position of trust in this state for a period of seven years from the date of conviction.

(F) Divisions (A), (B), and (C) of this section do not prohibit a person from making voluntary contributions to a political party, campaign committee, legislative campaign fund, political action committee, or political contributing entity or prohibit a political party, campaign committee, legislative campaign fund, political action committee, or political contributing entity from accepting voluntary contributions.

Ohio Revised Code § 2921.44 - Dereliction of duty.

(A) No law enforcement officer shall negligently do any of the following:

(1) Fail to serve a lawful warrant without delay;

(2) Fail to prevent or halt the commission of an offense or to apprehend an offender, when it is in the law enforcement officer's power to do so alone or with available assistance.

(B) No law enforcement, ministerial, or judicial officer shall negligently fail to perform a lawful duty in a criminal case or proceeding.

(C) No officer, having charge of a detention facility, shall negligently do any of the following:

(1) Allow the detention facility to become littered or unsanitary;

(2) Fail to provide persons confined in the detention facility with adequate food, clothing, bedding, shelter, and medical attention;

(3) Fail to control an unruly prisoner, or to prevent intimidation of or physical harm to a prisoner by another;

(4) Allow a prisoner to escape;

(5) Fail to observe any lawful and reasonable regulation for the management of the detention facility.

(D) No public official of the state shall recklessly create

a deficiency, incur a liability, or expend a greater sum than is appropriated by the general assembly for the use in any one year of the department, agency, or institution of the state with which the public official is connected.

(E) No public servant shall recklessly fail to perform a duty expressly imposed by law with respect to the public servant's office, or recklessly do any act expressly forbidden by law with respect to the public servant's office.

(F) Whoever violates this section is guilty of dereliction of duty, a misdemeanor of the second degree.

(G) Except as otherwise provided by law, a public servant who is a county treasurer; county auditor; township fiscal officer; city auditor; city treasurer; village fiscal officer; village clerk-treasurer; village clerk; in the case of a municipal corporation having a charter that designates an officer who, by virtue of the charter, has duties and functions similar to those of the city or village officers referred to in this section, the officer so designated by the charter; school district treasurer; fiscal officer of a community school established under Chapter 3314. of the Revised Code; treasurer of a science, technology, engineering, and mathematics school established under Chapter 3326. of the Revised Code; or fiscal officer of a college-preparatory boarding school established under Chapter 3328. of the Revised Code and is convicted of or pleads guilty to dereliction of duty is disqualified from holding any public office, employment, or position of trust in this state for four years following the date of conviction or of entry of the plea, and is not entitled to hold any public office until any repayment or

restitution required by the court is satisfied.

(H) As used in this section, "public servant" includes the following:

(1) An officer or employee of a contractor as defined in section 9.08 of the Revised Code;

(2) A fiscal officer employed by the operator of a community school established under Chapter 3314. of the Revised Code or by the operator of a college-preparatory boarding school established under Chapter 3328. of the Revised Code.

Ohio Revised Code § 2913.01 - Theft and fraud general definitions.

As used in this chapter, unless the context requires that a term be given a different meaning:

(A) "Deception" means knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.

(B) "Defraud" means to knowingly obtain, by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another.

(C) "Deprive" means to do any of the following:

(1) Withhold property of another permanently, or for a period that appropriates a substantial portion of its value or use, or with purpose to restore it only upon payment of a reward or other consideration;

(2) Dispose of property so as to make it unlikely that the owner will recover it;

(3) Accept, use, or appropriate money, property, or services, with purpose not to give proper consideration in return for the money, property, or services, and without reasonable justification or excuse for not giving proper consideration.

(D) "Owner" means, unless the context requires a

different meaning, any person, other than the actor, who is the owner of, who has possession or control of, or who has any license or interest in property or services, even though the ownership, possession, control, license, or interest is unlawful.

(E) "Services" include labor, personal services, professional services, rental services, public utility services including wireless service as defined in division (F)(1) of section 128.01 of the Revised Code, common carrier services, and food, drink, transportation, entertainment, and cable television services and, for purposes of section 2913.04 of the Revised Code, include cable services as defined in that section.

(F) "Writing" means any computer software, document, letter, memorandum, note, paper, plate, data, film, or other thing having in or upon it any written, typewritten, or printed matter, and any token, stamp, seal, credit card, badge, trademark, label, or other symbol of value, right, privilege, license, or identification.

(G) "Forge" means to fabricate or create, in whole or in part and by any means, any spurious writing, or to make, execute, alter, complete, reproduce, or otherwise purport to authenticate any writing, when the writing in fact is not authenticated by that conduct.

(H) "Utter" means to issue, publish, transfer, use, put or send into circulation, deliver, or display.

(I) "Coin machine" means any mechanical or electronic device designed to do both of the following:

(1) Receive a coin, bill, or token made for that purpose;

(2) In return for the insertion or deposit of a coin, bill, or token, automatically dispense property, provide a service, or grant a license.

(J) "Slug" means an object that, by virtue of its size, shape, composition, or other quality, is capable of being inserted or deposited in a coin machine as an improper substitute for a genuine coin, bill, or token made for that purpose.

(K) "Theft offense" means any of the following:

(1) A violation of section 2911.01, 2911.02, 2911.11, 2911.12, 2911.13, 2911.31, 2911.32, 2913.02, 2913.03, 2913.04, 2913.041, 2913.05, 2913.06, 2913.11, 2913.21, 2913.31, 2913.32, 2913.33, 2913.34, 2913.40, 2913.42, 2913.43, 2913.44, 2913.45, 2913.47, 2913.48, former section 2913.47 or 2913.48, or section 2913.51, 2915.05, or 2921.41 of the Revised Code;

(2) A violation of an existing or former municipal ordinance or law of this or any other state, or of the United States, substantially equivalent to any section listed in division (K)(1) of this section or a violation of section 2913.41, 2913.81, or 2915.06 of the Revised Code as it existed prior to July 1, 1996;

(3) An offense under an existing or former municipal ordinance or law of this or any other state, or of the United States, involving robbery, burglary, breaking and entering, theft, embezzlement, wrongful conversion, forgery, counterfeiting, deceit, or fraud;

(4) A conspiracy or attempt to commit, or complicity in

committing, any offense under division (K)(1), (2), or (3) of this section.

(L) "Computer services" includes, but is not limited to, the use of a computer system, computer network, computer program, data that is prepared for computer use, or data that is contained within a computer system or computer network.

(M) "Computer" means an electronic device that performs logical, arithmetic, and memory functions by the manipulation of electronic or magnetic impulses. "Computer" includes, but is not limited to, all input, output, processing, storage, computer program, or communication facilities that are connected, or related, in a computer system or network to an electronic device of that nature.

(N) "Computer system" means a computer and related devices, whether connected or unconnected, including, but not limited to, data input, output, and storage devices, data communications links, and computer programs and data that make the system capable of performing specified special purpose data processing tasks.

(O) "Computer network" means a set of related and remotely connected computers and communication facilities that includes more than one computer system that has the capability to transmit among the connected computers and communication facilities through the use of computer facilities.

(P) "Computer program" means an ordered set of data representing coded instructions or statements that, when executed by a computer, cause the computer to

process data.

(Q) "Computer software" means computer programs, procedures, and other documentation associated with the operation of a computer system.

(R) "Data" means a representation of information, knowledge, facts, concepts, or instructions that are being or have been prepared in a formalized manner and that are intended for use in a computer, computer system, or computer network. For purposes of section 2913.47 of the Revised Code, "data" has the additional meaning set forth in division (A) of that section.

(S) "Cable television service" means any services provided by or through the facilities of any cable television system or other similar closed circuit coaxial cable communications system, or any microwave or similar transmission service used in connection with any cable television system or other similar closed circuit coaxial cable communications system.

(T) "Gain access" means to approach, instruct, communicate with, store data in, retrieve data from, or otherwise make use of any resources of a computer, computer system, or computer network, or any cable service or cable system both as defined in section 2913.04 of the Revised Code.

(U) "Credit card" includes, but is not limited to, a card, code, device, or other means of access to a customer's account for the purpose of obtaining money, property, labor, or services on credit, or for initiating an electronic fund transfer at a point-of-sale terminal, an automated teller machine, or a cash dispensing machine. It also includes a county procurement card

issued under section 301.29 of the Revised Code.

(V) "Electronic fund transfer" has the same meaning as in 92 Stat. 3728, 15 U.S.C.A. 1693a, as amended.

(W) "Rented property" means personal property in which the right of possession and use of the property is for a short and possibly indeterminate term in return for consideration; the rentee generally controls the duration of possession of the property, within any applicable minimum or maximum term; and the amount of consideration generally is determined by the duration of possession of the property.

(X) "Telecommunication" means the origination, emission, dissemination, transmission, or reception of data, images, signals, sounds, or other intelligence or equivalence of intelligence of any nature over any communications system by any method, including, but not limited to, a fiber optic, electronic, magnetic, optical, digital, or analog method.

(Y) "Telecommunications device" means any instrument, equipment, machine, or other device that facilitates telecommunication, including, but not limited to, a computer, computer network, computer chip, computer circuit, scanner, telephone, cellular telephone, pager, personal communications device, transponder, receiver, radio, modem, or device that enables the use of a modem.

(Z) "Telecommunications service" means the providing, allowing, facilitating, or generating of any form of telecommunication through the use of a telecommunications device over a telecommunications system.

(AA) "Counterfeit telecommunications device" means a telecommunications device that, alone or with another telecommunications device, has been altered, constructed, manufactured, or programmed to acquire, intercept, receive, or otherwise facilitate the use of a telecommunications service or information service without the authority or consent of the provider of the telecommunications service or information service. "Counterfeit telecommunications device" includes, but is not limited to, a clone telephone, clone microchip, tumbler telephone, or tumbler microchip; a wireless scanning device capable of acquiring, intercepting, receiving, or otherwise facilitating the use of telecommunications service or information service without immediate detection; or a device, equipment, hardware, or software designed for, or capable of, altering or changing the electronic serial number in a wireless telephone.

(BB)(1) "Information service" means, subject to division (BB)(2) of this section, the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, including, but not limited to, electronic publishing.

(2) "Information service" does not include any use of a capability of a type described in division (BB)(1) of this section for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

(CC) "Elderly person" means a person who is sixty-five years of age or older.

(DD) "Disabled adult" means a person who is eighteen

years of age or older and has some impairment of body or mind that makes the person unable to work at any substantially remunerative employment that the person otherwise would be able to perform and that will, with reasonable probability, continue for a period of at least twelve months without any present indication of recovery from the impairment, or who is eighteen years of age or older and has been certified as permanently and totally disabled by an agency of this state or the United States that has the function of so classifying persons.

(EE) "Firearm" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(FF) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

(GG) "Dangerous drug" has the same meaning as in section 4729.01 of the Revised Code.

(HH) "Drug abuse offense" has the same meaning as in section 2925.01 of the Revised Code.

(II)(1) "Computer hacking" means any of the following:

(a) Gaining access or attempting to gain access to all or part of a computer, computer system, or a computer network without express or implied authorization with the intent to defraud or with intent to commit a crime;

(b) Misusing computer or network services including, but not limited to, mail transfer programs, file transfer programs, proxy servers, and web servers by performing functions not authorized by the owner of

the computer, computer system, or computer network or other person authorized to give consent. As used in this division, "misuse of computer and network services" includes, but is not limited to, the unauthorized use of any of the following:

(i) Mail transfer programs to send mail to persons other than the authorized users of that computer or computer network;

(ii) File transfer program proxy services or proxy servers to access other computers, computer systems, or computer networks;

(iii) Web servers to redirect users to other web pages or web servers.

(c)(i) Subject to division (II)(1)(c)(ii) of this section, using a group of computer programs commonly known as "port scanners" or "probes" to intentionally access any computer, computer system, or computer network without the permission of the owner of the computer, computer system, or computer network or other person authorized to give consent. The group of computer programs referred to in this division includes, but is not limited to, those computer programs that use a computer network to access a computer, computer system, or another computer network to determine any of the following: the presence or types of computers or computer systems on a network; the computer network's facilities and capabilities; the availability of computer or network services; the presence or versions of computer software including, but not limited to, operating systems, computer services, or computer contaminants; the presence of a known computer software deficiency that can be used to gain

unauthorized access to a computer, computer system, or computer network; or any other information about a computer, computer system, or computer network not necessary for the normal and lawful operation of the computer initiating the access.

(ii) The group of computer programs referred to in division (II)(1)(c)(i) of this section does not include standard computer software used for the normal operation, administration, management, and test of a computer, computer system, or computer network including, but not limited to, domain name services, mail transfer services, and other operating system services, computer programs commonly called "ping," "tcpdump," and "traceroute" and other network monitoring and management computer software, and computer programs commonly known as "nslookup" and "whois" and other systems administration computer software.

(d) The intentional use of a computer, computer system, or a computer network in a manner that exceeds any right or permission granted by the owner of the computer, computer system, or computer network or other person authorized to give consent.

(2) "Computer hacking" does not include the introduction of a computer contaminant, as defined in section 2909.01 of the Revised Code, into a computer, computer system, computer program, or computer network.

(JJ) "Police dog or horse" has the same meaning as in section 2921.321 of the Revised Code.

(KK) "Anhydrous ammonia" is a compound formed by

the combination of two gaseous elements, nitrogen and hydrogen, in the manner described in this division. Anhydrous ammonia is one part nitrogen to three parts hydrogen (NH3). Anhydrous ammonia by weight is fourteen parts nitrogen to three parts hydrogen, which is approximately eighty-two per cent nitrogen to eighteen per cent hydrogen.

(LL) "Assistance dog" has the same meaning as in section 955.011 of the Revised Code.

(MM) "Federally licensed firearms dealer" has the same meaning as in section 5502.63 of the Revised Code.

(NN) "Active duty service member" means any member of the armed forces of the United States performing active duty under title 10 of the United States Code.

Ohio Revised Code § 2913.02 - Theft.

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

(1) Without the consent of the owner or person authorized to give consent;

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

(3) By deception;

(4) By threat;

(5) By intimidation.

(B)(1) Whoever violates this section is guilty of theft.

(2) Except as otherwise provided in this division or division (B)(3), (4), (5), (6), (7), (8), or (9) of this section, a violation of this section is misdemeanor theft, a misdemeanor of the first degree. If the value of the property or services stolen is one thousand dollars or more and is less than seven thousand five hundred dollars or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, a violation of this section is theft, a felony of the fifth degree. If the value of the property or services stolen is seven thousand five hundred dollars or more and is less than one hundred fifty thousand dollars, a violation of this section is grand theft, a felony of the fourth degree. If the value of the property or services stolen is one hundred fifty thousand dollars or more

and is less than seven hundred fifty thousand dollars, a violation of this section is aggravated theft, a felony of the third degree. If the value of the property or services is seven hundred fifty thousand dollars or more and is less than one million five hundred thousand dollars, a violation of this section is aggravated theft, a felony of the second degree. If the value of the property or services stolen is one million five hundred thousand dollars or more, a violation of this section is aggravated theft of one million five hundred thousand dollars or more, a felony of the first degree.

(3) Except as otherwise provided in division (B)(4), (5), (6), (7), (8), or (9) of this section, if the victim of the offense is an elderly person, disabled adult, active duty service member, or spouse of an active duty service member, a violation of this section is theft from a person in a protected class, and division (B)(3) of this section applies. Except as otherwise provided in this division, theft from a person in a protected class is a felony of the fifth degree. If the value of the property or services stolen is one thousand dollars or more and is less than seven thousand five hundred dollars, theft from a person in a protected class is a felony of the fourth degree. If the value of the property or services stolen is seven thousand five hundred dollars or more and is less than thirty-seven thousand five hundred dollars, theft from a person in a protected class is a felony of the third degree. If the value of the property or services stolen is thirty-seven thousand five hundred dollars or more and is less than one hundred fifty thousand dollars, theft from a person in a protected class is a felony of the second degree. If the value of the property or services stolen is one hundred fifty thousand dollars or more, theft from a person in a

protected class is a felony of the first degree. If the victim of the offense is an elderly person, in addition to any other penalty imposed for the offense, the offender shall be required to pay full restitution to the victim and to pay a fine of up to fifty thousand dollars. The clerk of court shall forward all fines collected under division (B)(3) of this section to the county department of job and family services to be used for the reporting and investigation of elder abuse, neglect, and exploitation or for the provision or arrangement of protective services under sections 5101.61 to 5101.71 of the Revised Code.

(4) If the property stolen is a firearm or dangerous ordnance, a violation of this section is grand theft. Except as otherwise provided in this division, grand theft when the property stolen is a firearm or dangerous ordnance is a felony of the third degree, and there is a presumption in favor of the court imposing a prison term for the offense. If the firearm or dangerous ordnance was stolen from a federally licensed firearms dealer, grand theft when the property stolen is a firearm or dangerous ordnance is a felony of the first degree. The offender shall serve a prison term imposed for grand theft when the property stolen is a firearm or dangerous ordnance consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(5) If the property stolen is a motor vehicle, a violation of this section is grand theft of a motor vehicle, a felony of the fourth degree.

(6) If the property stolen is any dangerous drug, a violation of this section is theft of drugs, a felony of the fourth degree, or, if the offender previously has been

convicted of a felony drug abuse offense, a felony of the third degree.

(7) If the property stolen is a police dog or horse or an assistance dog and the offender knows or should know that the property stolen is a police dog or horse or an assistance dog, a violation of this section is theft of a police dog or horse or an assistance dog, a felony of the third degree.

(8) If the property stolen is anhydrous ammonia, a violation of this section is theft of anhydrous ammonia, a felony of the third degree.

(9) Except as provided in division (B)(2) of this section with respect to property with a value of seven thousand five hundred dollars or more and division (B)(3) of this section with respect to property with a value of one thousand dollars or more, if the property stolen is a special purpose article as defined in section 4737.04 of the Revised Code or is a bulk merchandise container as defined in section 4737.012 of the Revised Code, a violation of this section is theft of a special purpose article or articles or theft of a bulk merchandise container or containers, a felony of the fifth degree.

(10) In addition to the penalties described in division (B)(2) of this section, if the offender committed the violation by causing a motor vehicle to leave the premises of an establishment at which gasoline is offered for retail sale without the offender making full payment for gasoline that was dispensed into the fuel tank of the motor vehicle or into another container, the court may do one of the following:

(a) Unless division (B)(10)(b) of this section applies,

suspend for not more than six months the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege;

(b) If the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege has previously been suspended pursuant to division (B)(10)(a) of this section, impose a class seven suspension of the offender's license, permit, or privilege from the range specified in division (A)(7) of section 4510.02 of the Revised Code, provided that the suspension shall be for at least six months.

(c) The court, in lieu of suspending the offender's driver's or commercial driver's license, probationary driver's license, temporary instruction permit, or nonresident operating privilege pursuant to division (B)(10)(a) or (b) of this section, instead may require the offender to perform community service for a number of hours determined by the court.

(11) In addition to the penalties described in division (B)(2) of this section, if the offender committed the violation by stealing rented property or rental services, the court may order that the offender make restitution pursuant to section 2929.18 or 2929.28 of the Revised Code. Restitution may include, but is not limited to, the cost of repairing or replacing the stolen property, or the cost of repairing the stolen property and any loss of revenue resulting from deprivation of the property due to theft of rental services that is less than or equal to the actual value of the property at the time it was rented. Evidence of intent to commit theft of rented property or rental services shall be determined

pursuant to the provisions of section 2913.72 of the Revised Code.

(C) The sentencing court that suspends an offender's license, permit, or nonresident operating privilege under division (B)(10) of this section may grant the offender limited driving privileges during the period of the suspension in accordance with Chapter 4510. of the Revised Code.

Ohio Revised Code § 705.25 - Disposition of fees and perquisites.

The salary of an elective officer shall not be changed during the term for which such officer was elected.

All fees and perquisites appertaining to any municipal office or officer shall be paid into the treasury of the municipal corporation, and shall be credited to the general fund. No officer or employee of the municipal corporation shall receive otherwise than as the representative of the municipal corporation and for the purpose of paying it into such treasury any fee, present, gift, or emolument, or share therein, for official services, other than his regular salary or compensation. Any officer violating this section shall thereby forfeit his office. No member of the legislative authority or other officer or employee thereof shall receive compensation for services rendered in any other department of the municipal corporation, nor shall they or any other officer, clerk, or employee of the municipal corporation act as agent or attorney for any person, company, or corporation, in relation to any matter to be affected by action of the legislative or any other department, or by the action of any officer of the municipal corporation. The violation of this section is cause for removal.

Ohio Revised Code § 733.40 - Disposition of fines and other moneys.

Except as otherwise provided in section 4511.193 of the Revised Code, all fines, forfeitures, and costs in ordinance cases and all fees that are collected by the mayor, that in any manner come into the mayor's hands, or that are due the mayor or a marshal, chief of police, or other officer of the municipal corporation, any other fees and expenses that have been advanced out of the treasury of the municipal corporation, and all money received by the mayor for the use of the municipal corporation shall be paid by the mayor into the treasury of the municipal corporation on the first Monday of each month. At the first regular meeting of the legislative authority each month, the mayor shall submit a full statement of all money received, from whom and for what purposes received, and when paid into the treasury. Except as otherwise provided by section 307.515 or 4511.19 of the Revised Code, all fines, and forfeitures collected by the mayor in state cases, together with all fees and expenses collected that have been advanced out of the county treasury, shall be paid by the mayor to the county treasury on the first business day of each month. Except as otherwise provided by section 307.515 or 4511.19 of the Revised Code, the mayor shall pay all court costs and fees collected by the mayor in state cases into the municipal treasury on the first business day of each month.

This section does not apply to fines collected by a mayor's court for violations of division (B) of section 4513.263 of the Revised Code, or for violations of any municipal ordinance that is substantively comparable to that division, all of which shall be forwarded to the treasurer of state as provided in division (E) of section

4513.263 of the Revised Code.

Ohio Revised Code § 3101.08 - Who may solemnize marriages.

An ordained or licensed minister of any religious society or congregation within this state who is licensed to solemnize marriages, a judge of a county court in accordance with section 1907.18 of the Revised Code, a judge of a municipal court in accordance with section 1901.14 of the Revised Code, a probate judge in accordance with section 2101.27 of the Revised Code, the mayor of a municipal corporation anywhere within this state, the superintendent of Ohio deaf and blind education services, or any religious society in conformity with the rules of its church, may join together as husband and wife any persons who are not prohibited by law from being joined in marriage.

IN THE COURT OF COMMON PLEAS
TUSCARAWAS COUNTY, OHIO
GENERAL TRIAL DIVISION

STATE OF OHIO,	) CASE NO. 2022 CR 03 0072
	)
Plaintiff,	)
	) JUDGE ELIZABETH
v.	) LEHIGH THOMAKOS
	)
RICHARD P.	) BRIEF IN SUPPORT OF
HOMRIGHAUSEN,	) MOTION FOR
	) JUDGMENT OF
Defendant.	) ACQUITTAL OR IN THE
	) ALTERNATIVE, MOTION
	) FOR A NEW TRIAL

RELEVANT FACTS

The defendant was convicted at trial of Count One, Theft in Office, in an amount less than $1,000, in violation of R.C. 2921.41(A)(1), a felony of the fifth degree; Counts Three through Six, Soliciting Improper Compensation, in violation of R.C. 2921.43(A)(1), misdemeanors of the first degree; and, Count Seven, Dereliction of Duty, in violation of R.C. 2921.44(E), a misdemeanor of the second degree. Each count of conviction was predicated on allegations that the defendant accepted money for officiating weddings as the Mayor of Dover.

LAW AND ARGUMENT

Rule 29(C) of the Ohio Rules of Criminal Procedure provides that, "If a jury returns a verdict of guilty… a motion for judgment of acquittal may be made or

renewed within fourteen days after the jury is discharged…If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal." Id. In addition, pursuant to Rule 33 of the Ohio Rules of Criminal Procedure, within that same time frame, a new trial may be granted on motion of the defendant where, among other things, the verdict is contrary to law.

I. THE VERDICTS ON COUNTS ONE AND SEVEN ARE MUTUALLY EXCLUSIVE OF THE VERDICTS ON COUNTS THREE THROUGH SIX.

A. Mutually Exclusive Verdicts Occur Where a Finding as to One Charge Logically Excludes a Finding on Another.

While inconsistent verdicts in a criminal case are generally not subject to review, an exception exists for "mutually exclusive verdicts." United States v. Ruiz, 386 Fed. Appx. 530, 531 (6th Cir. 2010) citing United States v. Powell, 469 U.S. 57 (1984).

The Supreme Court of the United States crafted this exception for specific situations "in which a defendant receives two guilty verdicts that are logically inconsistent." Id. at fn 8. This occurs, for instance, where a finding as to one charge logically excludes a necessary finding on another charge. Such verdicts fly in the face of due process because each offense includes an element that negates an element of the other offense, which means that the prosecution necessarily failed to prove at least one element of each offense beyond a reasonable doubt.

In Powell, the Supreme Court cited, with approval, United States v. Daigle, 149 F. Supp. 409, 414 (D. D.C. 1957) aff'd per curiam, 101 U.S. App. D.C. 286, 248 F.2d 608 (1957), cert. denied, 355 U.S. 913, 78 S.Ct. 344, 2 L.Ed.2d 274 (1958), as an example of mutually exclusive verdicts. See Powell, at fn. 8.

In Daigle, the jury returned verdicts of guilty on charges of both embezzlement and larceny based on the same underlying conduct. A conviction for embezzlement required the jury to find that the defendant had unlawfully converted property owned by another but that was lawfully in the defendant's "possession or custody by virtue of his employment or office." Id. at 412. However, in order to convict the defendant of larceny, the jury was required to find that the defendant had unlawfully taken property owned by another that defendant had no right to possess, i.e., the traditional notion of "stealing." Id. at 414. Therefore, by finding the defendant guilty of both charges, the jury necessarily made the affirmative and contradictory findings that the defendant came into his initial possession or custody of the property at issue both lawfully (embezzlement) and unlawfully (larceny). On the defendant's post-verdict motion for acquittal, the district court acquitted the defendant of the crime of larceny, as it carried a more severe penalty than the crime of embezzlement and concluded the defendant would not suffer prejudice as the to the election of that count. Id. at 415.

Case law on the subject of mutually exclusive verdicts often concerns convictions of theft and similar offenses that require findings of how the defendant came into the property at issue. For example, in Middleton v. State, 309 Ga. 337 (2020), the Supreme

Court of Georgia concluded that guilty verdicts on charges of hijacking a motor vehicle and theft by receiving that same motor vehicle were mutually exclusive. The court reasoned that a conviction for hijacking a motor vehicle required a finding that the defendant was the principal thief of the car, whereas a conviction for theft by receiving entailed a finding that someone other than the defendant was the principal thief. Id. at 348.

Likewise, in People v. Delgado, 450 P.3d 703 (2019), the Colorado Supreme Court held that guilty verdicts for robbery and theft vis-à-vis a single taking were mutually exclusive and could not be upheld. Id. at 704. The court noted that it was impossible for the defendant to have unlawfully taken items from the victim by force, as required by the robbery statute, and also without force, as required by the theft statute. Id. at 707- 08; see also State v. Speckman, 326 N.C. 576, 391 S.E.2d 165, 166–167 (1990) (North Carolina Supreme Court concluding verdicts of guilt for both embezzlement, which requires that a defendant initially obtain property lawfully, and false pretenses, which requires that the property be initially obtained unlawfully were mutually exclusive).[1]

B. Counts One and Seven Required a Finding that the Wedding Monies Accepted by the Mayor were "Fees" that Belonged to the City Whereas Counts Three Through Six Required a Finding that the Wedding

[1] In each of those cases, the state supreme courts decided that the proper remedy for mutually exclusive verdicts was retrial on those counts. Middleton, 309 Ga. 337 at 348; Delgado, 450 P. 3d at 710; Speckman, 326 N.C. at 580.

Monies Were "Compensation."

Count One charged the defendant with theft in office under R.C. 2921.41(A)(1). That statute provides, in relevant part: "[n]o public official or party official shall commit any theft offense when...The offender uses the offender's office in aid of committing the offense or permits or assents to its use in aid of committing the offense." Id.

In turn, R.C. 2913.02 defines a theft offense, in relevant part, as follows: "No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways... (emphasis added). Id.

Thus, the State needed to prove beyond a reasonable doubt on Count One that the defendant, as Mayor, deprived the City of monies that belonged to it. To prove that the money belonged to the City, the State advanced the claim that the Mayor was required to remit all fees from weddings collected by him to the treasury of the City of Dover. Indeed, Count Seven of the Indictment charged the mayor with dereliction of duty, R.C. 2921.44, for failing to remit fees into the treasury as purportedly required by R.C. 733.40.[2]

---

[2] A motion for acquittal on Count 8 which charged the defendant with Dereliction of Duty for failing to remit "any fee, present, gift or emolument" into the treasury as required by R.C. 705.25 was granted at the close of the State's case as the Court found that the statute had no applicability to City of Dover officials.

By the same token, if the money was not a fee due the City, R.C. 733.40 would have no application to the monies collected by the defendant for officiating weddings. Thus, the defendant would not be required to remit them to the treasury and the City would have no claim to them.

Counts Three through Six of the Indictment charged the defendant with soliciting improper compensation under R.C. 2921.43(A). That statute provides:

> (A) No public servant shall knowingly solicit or accept, and no person shall knowingly promise or give to a public servant, either of the following:
>
> (1) Any compensation, other than as allowed by divisions (G), (H), and (I) of section 102.03 of the Revised Code or other provisions of law, to perform the public servant's official duties, to perform any other act or service in the public servant's public capacity, for the general performance of the duties of the public servant's public office or public employment, or as a supplement to the public servant's public compensation;
>
> (2) Additional or greater fees or costs than are allowed by law to perform the public servant's official duties.

Id.

Thus, the State needed to prove beyond a reasonable doubt on Counts Three through Six that the

defendant solicited or accepted compensation for performing an act in his public capacity, above and beyond what was permitted by law. On that statute's face, it plainly prohibits a public official from soliciting or receiving additional payment for doing his job. In an effort to make its case, the State submitted evidence of the defendant's salary that was established by ordinance and argued that any wedding monies he received above that, amounted to receiving compensation that was prohibited.

But, whether prohibited or not, receiving additional compensation is not theft of funds that belong to the City. Rather, that money is simply additional compensation.

It is equally clear that the statute does not prohibit the mayor from collecting fees on behalf of the city. In fact, the law expressly allows him to do so and subsection (2) of that statute proves that point as it only prohibits him from collecting "additional or greater fees" than what is otherwise permitted. See R.C. 2941.43(A)(2). Of course, there is no allegation in this case that the Mayor accepted "additional or greater fees."[3]

Thus, a conviction under R.C. 2921.43 required a finding that the defendant solicited or received money that was above what the law permitted him to accept as his compensation. In contrast, convictions under R.C. 2921.41 and R.C. 2921.44(E) (premised on a duty imposed under R.C. 733.40) necessarily required a

[3] Rather, it was the state's theory, as it repeatedly argued to the jury, that the Mayor was permitted to charge a fee but he was required to remit the fee to the City.

finding that the monies he received were fees that belonged to the City.

Simply put, if the defendant was soliciting or receiving compensation for performing his job then, by definition, he was not accepting fees that belonged to the City and stealing from it by retaining them. Conversely, if the defendant was receiving fees for weddings on behalf of the City, then by definition, he was not receiving compensation.

As a result, those verdicts are mutually exclusive and cannot stand. This Court should enter an order acquitting the defendant of Counts One and Seven, as Count One carries the most severe penalty, see Daigle, 149 F. Supp. at 414, or order a new trial as to all counts on these grounds. See Middleton, 309 Ga. 337 at 348; Delgado, 450 P. 3d at 710; Speckman, 326 N.C. at 580.

IN THE COURT OF COMMON PLEAS
TUSCARAWAS COUNTY, OHIO
GENERAL DIVISION

STATE OF OHIO	:	
	:	
Plaintiff	:	Case No. 2022 CR 03 0072
	:	
-vs-	:	Judge Elizabeth Lehigh
	:	Thomakos
RICHARD P.	:	
HOMRIGHAUSEN	:	JUDGMENT ENTRY
	:	
Defendant	:	

This matter came before the Court on December 12, 2022, for non-oral consideration.

The matter was placed before the Court for consideration of Defendant's Motion for Judgment of Acquittal or in the Alternative, Motion for a New Trial filed on November 30, 2022. The Court has reviewed Defendant's Brief in Support of Motion for Judgment of Acquittal or in the Alternative, Motion for a New Trial filed November 30, 2022; the State's Response Opposing Defendant's Motion for Judgment of Acquittal or for a New Trial filed December 9, 2022; and Defendant's Reply Brief in Support ofhis Motion

for Judgment of Acquittal or in the Alternative, Motion for a New Trial filed December 9, 2022.

A Jury Trial commenced in this case on November 8, 2022, and the jury returned the verdict forms on all counts on November 16, 2022. The jury found the Defendant guilty of Count One, Theft in Office, and issued a verdict on the Additional Finding that the value of the property or services stolen was less than $1,000.00, thereby determining that the Theft in Office was a felony of the fifth degree, in violation of R.C. 2921.41(A)(1). The jury found Defendant guilty of Counts Three, Four, Five, and Six, Soliciting Improper Compensation,

in violation of R.C. 2921.43, misdemeanors of the first degree. The jury found Defendant guilty of Count Seven, Dereliction of Duty, in violation of R.C. 2921.44, a misdemeanor of the second degree. Defendant was found not guilty of Count Two. Additionally, Counts Nine, Ten, Eleven, Twelve, Thirteen and Fourteen of the Indictment were dismissed; and Defendant was acquitted of Counts Eight and Fifteen of the Indictment.

Defendant requests an order setting aside the verdict of guilty as to Counts One and Seven, and a judgment of acquittal on the grounds that those verdicts are mutually exclusive of the verdicts in Counts Three through Six. In the alternative, Defendant requests an order granting a new trial on all counts of conviction if the Court concludes that mutually exclusive verdicts are void. Defendant argues that the verdicts are mutually exclusive because Counts One and Seven required a finding that the wedding monies accepted by the Mayor were "fees" that

belonged to the City, whereas Counts Three through Six required a finding that the wedding monies were "compensation." Defendant argues that, whether prohibited or not, receiving additional compensation is not theft of funds that belong to the City, but rather that money is simply additional compensation. Defendant argues that the Court should enter an order acquitting the Defendant of Counts One and Seven, as Count One carries the most severe penalty, or order a new trial as to all counts on these grounds. Defendant also argues that the guilty verdicts on Counts One and Seven should be set aside, and Defendant should be acquitted of those charges, because there was insufficient evidence at trial that Defendant received monies he was required to deposit into the City treasury under R.C. 733.40. Defendant argues that the fact that he was accepting monies for officiating weddings does not constitute a "fee" as set forth in R.C. 733.40. Defendant argues that there is no reasonable interpretation of R.C. 733.40 that requires a mayor to pay over money he receives outside of that which comes into his hands through court cases.

The State opposes Defendant's motion. The State argues that the independent crimes of theft in office, dereliction of duty, and soliciting or accepting improper compensation do not conflict, and their elements are not mutually exclusive. The State argues that the jury was convinced beyond a reasonable doubt that all of the elements of these independent crimes were satisfied by sufficient evidence, and the crimes were not mutually exclusive. The State argues that the legal precedent does not support the Defendant's position. The State argues that the same money can be both solicited as improper compensation and rightfully belong to the City of Dover. The State argues that R.C.

733.40 applies to all fees and money collected by the Mayor. The State argues, that viewing the evidence in a light most favorable to the State, the Defendant has failed to show that there is insufficient evidence as a matter oflaw to support the jury's verdict. The State requests that the Court deny the Defendant's motion and permit this case to proceed to sentencing.

In response, Defendant argues that it is well settled that mutually exclusive verdicts cannot stand. Defendant argues that, under any application of the doctrine against mutually exclusive verdicts, Counts One and Seven cannot be reconciled with Counts Three through Six. Defendant argues that there is no logical way to conclude that the money belonged to both the Defendant and the City.

Relevant Law

Crim. R. 29(C) provides as follows:

(C) Motion After Verdict or Discharge of Jury. If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If the evidence shows the defendant is not guilty of the degree of crime for which the defendant was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly and shall pass sentence on such verdict or finding as modified. If no verdict is returned, the court may enter

judgment of acquittal. It shall not be a prerequisite to the making of such motion that a similar motion has been made prior to the submission of the case to the jury.

Crim.R. 33(A) provides as follows:

(A) Grounds. A new trial may be granted on motion of the defendant for any of the following causes affecting materially the defendant's substantial rights:

(1) Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;

(2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) That the verdict is contrary to law;

(5) Error oflaw occurring at the trial;

(6) When new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length

of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

Unless an exception applies, "inconsistent jury verdicts in a criminal case are unreviewable." United States v. Lucas, 2021 WL 4099241, *5, cert. denied sub nom. Titington v. United States, 211 L.Ed.2d 310, 142 S.Ct. 520, and cert. denied sub nom. Darden v. United States, 211 L.Ed.2d 520,142 S.Ct. 841. Generally, "[i]nconsistent verdicts on different counts of a multi-count indictment do not justify overturning a verdict of guilt." State v. Hicks, 43 Ohio St.3d 72, 78, 538 N.E.2d 1030, 1037 (1989), citing United States v. Powell, 469 U.S. 57, 68, 83 L.Ed.2d 461,105 S.Ct. 471, 478-479 (1984). "The several counts of an indictment containing more than one count are not interdependent and an inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count." State v. Lovejoy, 79 Ohio St.3d 440,446,683 N.E.2d 1112, 1117 (1997), citing Browning v. State, 120 Ohio St. 62,165 N.E. 566, at paragraph two of the syllabus (1929).

However, where a guilty verdict on one count negates a fact essential to a finding of guilt on a second count, courts have found that two guilty verdicts may not stand. United States v. Daigle, 149 F.Supp. 409, 414 (D.D.C 1957), affd, 248 F.2d 608 (D.C.Cir.1957), citing Fulton v. United States, 45App.D.C. 27, 41 (D.C.Cir.1916); Lucas, 2021 WL4099241, *5, citing United States v. Ruiz, 386 F. App'x 530, 533 (6th Cir. 2010); See also United States v. Powell, 469 U.S. 57, 69, 83 L.Ed.2d 461, 105 S.Ct. 471,479, fn 8

(19"84)("Nothing in this opinion is intended to decide the proper resolution of a situation where a defendant is convicted of two crimes, where a guilty verdict on one count logically excludes a finding of guilt on the other."). For example, if two co-defendants are charged with aggravated burglary (R.C. 2911.11) and tried in a joint jury trial, and the jury finds one guilty of burglary (R.C. 2911.12) and the other guilty of breaking and entering (R.C. 2911.13), the verdicts are inconsistent because the jury found the same premises occupied as to one defendant but unoccupied as to the co-defendant. See State v. Huntley, 30 Ohio App.3d 29, 505 N.E.2d 1007 (1st Dist.1986).

Some courts have further concluded that where it is legally and logically impossible to convict on two counts because they are mutually exclusive, a new trial should be ordered. Middleton v. State, 309 Ga. 337, 339, 846 S.E.2d 73, 77, citing McElrath v. State, 308 Ga. 104, 110(2)(b), 839 S.E.2d 573, 578(2)(b) (2020).

R.C. 2913.02(A) and (B)(1) provide that:

> (A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:
>
> (1) Without the consent of the owner or person authorized to give consent;
>
> (2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;
>
> (3) By deception;

(4) By threat;

(5) By intimidation.

(B)(1) Whoever violates this section is guilty of theft.

R.C. 2921.43(A) provides as follows:

(A) No public servant shall knowingly solicit or accept, and no person shall knowingly promise or give to a public servant, either of the following:

(1) Any compensation, other than as allowed by divisions (G), (H), and (I) of section 102.03 of the Revised Code or other provisions of law, to perform the public servant's official duties, to perform any other act or service in the public servant's public capacity, for the general performance of the duties of the public servant's public office or public employment, or as a supplement to the public servant's public compensation;

(2) Additional or greater fees or costs than are allowed by law to perform the public servant's official duties.

R.C. 2921.44(E) provides that "[n]o public servant shall recklessly fail to perform a duty expressly imposed by law with respect to the public servant's office, or recklessly do any act expressly forbidden by law with respect to the public servant's office.'"

R.C. 733.40 provides as follows:

Except as otherwise provided in section 4511.193 of the Revised Code, all fines, forfeitures, and costs in ordinance cases and all fees that are collected by the mayor, that in any manner come into the mayor's hands, or that are due the mayor or a marshal, chief of police, or other officer of the municipal corporation, any other fees and expenses that have been advanced out of the treasury of the municipal corporation, and all money received by the mayor for the use of the municipal corporation shall be paid by the mayor into the treasury of the municipal corporation on the first Monday of each month. At the first regular meeting of the legislative authority each month, the mayor shall submit a full statement of all money received, from whom and for what purposes received, and when paid into the treasury. Except as otherwise provided by section 307.515 or 4511.19 of the Revised Code, all fines, and forfeitures collected by the mayor in state cases, together with all fees and expenses collected that have been advanced out of the county treasury, shall be paid by the mayor to the county treasury on the first business day of each month. Except as otherwise provided by section 307.515 or 4511.19 of the Revised Code, the mayor shall pay all court costs and fees collected by the mayor in state cases into the municipal treasury on the first business day of each month.

This section does not apply to fines collected by a mayor's court for violations of division (B) of section 4513.263 of the Revised Code, or for

> violations of any municipal ordinance that is substantively comparable to that division, all of which shall be forwarded to the treasurer of state as provided in division (E) of section 4513.263 of the Revised Code.

Compensation has been defined as money, a thing of value or a financial benefit. See R.C. 101.01(A).

The term "fee" has been defined as "'[a] recompense for an official or professional service or a charge or emolument or compensation for a particular act or service. A fixed charge or perquisite charged as recompense for labor; reward, compensation, or wage given to a person for performance of services or something done or to be done.'" See Progressive Max Ins. Co. v. Matta, 7th Dist. Mahoning No. 07 MA 30, 2008-Ohio-1112, ¶ 22, citing Black's Law Dictionary (6 Ed.1990) (Emphasis added).

When reviewing the sufficiency of the evidence and determining whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S.Ct. 2781, 2789 (1979).

Upon review, the Court FINDS that it is not persuaded by Defendant's argument that the verdicts in this case are mutually exclusive.

The Court FINDS that a finding in Counts One and Seven that the wedding monies accepted by Defendant

were "fees" that rightfully belong to the City of Dover did not negate a finding that the same money was instead retained by Defendant as "compensation."

Upon review of the plain meaning of the terms "fees" and "compensation," the Court FINDS that Defendant has not shown that the same money cannot legally or logically be both a "fee" and "compensation."

The Court further FINDS that the crimes of theft in office, dereliction of duty, and soliciting or accepting improper compensation do not conflict, and their elements are not mutually exclusive.

Upon review, the Court further FINDS that there was sufficient evidence in the record from which a rational trier of fact could have found all of the essential elements of the independent crimes of theft in office, dereliction of duty and soliciting or accepting improper compensation beyond a reasonable doubt.

The Court FINDS, therefore, that the Defendant has failed to show that there is insufficient evidence to support the jury's verdict.

The Court further FINDS that it is not persuaded by Defendant's argument that R.C. 733.40 only applies to money received by a mayor through court cases.

The Court FINDS, therefore, that Defendant's Motion for Judgment of Acquittal or in the Alternative, Motion for a New Trial is not well taken and should be denied.

Decision

It is therefore ORDERED that Defendant's Motion for Judgment of Acquittal or in the Alternative, Motion for a New Trial is denied.

IT IS SO ORDERED.

/s/ Elizabeth Lehigh Thomakos
Judge Elizabeth Lehigh Thomakos

Dated: January 11, 2023

cc: Special Prosecuting Attorneys Robert F. Smith & Samuel J. Kirk, III
Attorneys Mark R. De Van & William C. Livingston
Defendant
Court Administrator

IN THE SUPREME COURT OF OHIO

FILED
FEBRUARY 14, 2024
SUPREME COURT OF OHIO
CLERK OF COURT
CASE NO. 2024-0239

STATE OF OHIO,	Ohio Supreme Court Case No.
Plaintiff-Appellee,	
vs.	On Appeal from the Tuscarawas County Court of Appeals, Fifth Judicial District
RICHARD P. HOMRIGHAUSEN,	
Defendant-Appellant.	Court of Appeals Case No. 2023-AP-02-0008

APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION OF RICHARD P. HOMRIGHAUSEN

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PROPOSITION OF LAW AND
ARGUMENT IN SUPPORT

PROPOSITION OF LAW II:

> A criminal defendant is denied due process of law and is entitled to a new trial when a jury finds him guilty of an offense that requires a finding that logically excludes a finding necessary to another guilty verdict.

A. Mutually Exclusive Verdicts

While inconsistent verdicts in a criminal case are generally not subject to review, an exception exists for "mutually exclusive verdicts." United States v. Ruiz, 386 Fed. Appx. 530, 531 (6th Cir. 2010) citing United States v. Powell, 469 U.S. 57 (1984). Mutually exclusive verdicts occur "where a guilty verdict on one count necessarily excludes a finding of guilty on

another count." United States v. Randolph, 794 F.3d 602, 611 (2011) (internal citations omitted). Thus, a defendant's Fifth and Fourteenth Amendment Right to due process of law and his Sixth Amendment right to trial by jury are implicated by mutually exclusive verdicts.

The United States Court of Appeals for Sixth Circuit Court has explained that:

> In crafting the exception, the [Supreme] Court contemplated a situation in which a defendant receives two guilty verdicts that are logically inconsistent, for example if a jury convicted a defendant of both larceny and embezzlement based on the same underlying conduct. See United States v. Daigle, 149 F. Supp. 409, 414 (D.D.C.1957), cited in Powell, 469 U.S. at 69 n. 8, 105 S.Ct. 471.

United States v. Ruiz, 386 Fed. Appx. at 532.

This Court has never directly confronted the issue of mutually exclusive verdicts. However, courts which have applied this doctrine often do so when considering separate convictions that each require a finding as to how a defendant came into possession of certain property.

Indeed, in Daigle, supra, cited by the Supreme Court in crafting the exception for mutually exclusive verdicts, the jury returned verdicts of guilty on charges of both embezzlement and larceny based on the same underlying conduct. A conviction for embezzlement required the jury to find that the defendant had unlawfully converted property owned by another but

which was lawfully in the defendant's "possession or custody by virtue of his employment or office." Id. at 412.

However, in order to convict the defendant of larceny, the jury was required to find that the defendant had unlawfully taken property owned by another that defendant had no right to possess, i.e., the traditional notion of "stealing." Id. at 414 (emphasis added).

Therefore, by finding the defendant guilty of both charges, the jury necessarily made the affirmative and contradictory findings that the defendant came into his initial possession or custody of the property at issue both lawfully (embezzlement) and unlawfully (larceny). The court held those verdicts could not stand. Id.

Likewise, in Middleton v. State, 309 Ga. 337 (2020), the Supreme Court of Georgia concluded that guilty verdicts on charges of "hijacking a motor vehicle" and "theft by receiving" were mutually exclusive. The former offense required a finding that the defendant was the principal thief of the car, whereas "theft by receiving" required a finding that another person was the principal thief. Id. at 348. See also People v. Delgado, 450 P.3d 703 (2019) (Colorado Supreme Court holding that guilty verdicts for robbery, requiring theft by force, and simple theft, requiring taking without force, were mutually exclusive and must be reversed); State v. Speckman, 326 N.C. 576, 391 S.E.2d 165, 166–167 (1990) (North Carolina Supreme Court concluding verdicts of guilt for both embezzlement, which requires that a defendant initially obtain property lawfully, and false pretenses, which requires that the property be initially obtained unlawfully, were

mutually exclusive).[4]

B. The Verdicts On Counts One and Seven Are Mutually Exclusive Of Counts Three through Six.

In this case, the jury made the contradictory findings that Mr. Homrighausen came into his initial possession of the wedding monies both lawfully (Count One- theft in office and Count Seven- dereliction of duty) and unlawfully (Counts Three through Six - soliciting improper compensation).

Recall that under Count One, theft in office, the state was required to prove beyond a reasonable doubt that Mr. Homrighausen, as Mayor, deprived the City of property of which it was the owner. See R.C. 2921.41(A)(1); R.C. 2913.02(A).

To prove that the money belonged to the City, the state claimed that Mr. Homrighausen was required to remit all fees from weddings collected by him to the treasury of the City of Dover under R.C. 733.40. That also formed the predicate for Count Seven (charging that Mr. Homrighausen had to deposit the wedding

[4] Generally, the proper remedy when a defendant is convicted of mutually exclusive verdicts is retrial on those counts. See Middleton, 309 Ga. 337 at 348; Delgado, 450 P. 3d at 710; Speckman, 326 N.C. at 580. Moreover, in the event that it is determined that there was insufficient evidence to sustain Mr. Homrighausen's convictions on Counts One and Seven, he would still be entitled to a new trial on Counts Three through Six as the jury's finding that he was permitted to accept the money on Counts One and Seven contradicted its finding that he was not allowed to solicit or accept the money in the first place on Counts Three through Six.

monies into the treasury under R.C. 733.40 and was derelict in that duty).

By the same token, if the money was not a governmental fee that he had to pay over to the City treasury, the City would have no claim to that money and Mr. Homrighausen did not deprive the City of money belonging to it. Thus, the state's case on Counts One and Seven hinged on a finding that the money belonged to the City and needed to be deposited into the treasury.

In contrast, Counts Three through Six of the Indictment charged Mr. Homrighausen with soliciting improper compensation under R.C. 2921.43(A)(1). Ohio Rev. Code 2921.43(A), provides "[n]o public servant shall knowingly solicit or accept... either of the following:"

> (1) Any compensation, other than as allowed by divisions (G), (H), and (I) of section 102.03 of the Revised Code or other provisions of law, to perform the public servant's official duties, to perform any other act or service in the public servant's public capacity, for the general performance of the duties of the public servant's public office or public employment, or as a supplement to the public servant's public compensation;
>
> (2) Additional or greater fees or costs than are allowed by law to perform the public servant's official duties.

Id. (emphasis added).

On its face, the statute draws a distinction between compensation and fees. Paragraph (A) (1) prohibits receiving compensation other than what is allowed by law while paragraph (A)(2) prohibits receiving "additional or greater fees" than what are allowed by law. Thus, the statute does not prohibit a city official from soliciting or receiving fees that he is otherwise permitted to collect.[5]

Because the state charged Mr. Homrighausen under R.C. 2921.43(A)(1), it was required to prove beyond a reasonable doubt on Counts Three through Six that Mr. Homrighausen solicited or accepted compensation, above and beyond his salary, to perform an act in his public capacity.

But soliciting or accepting money for performing an entirely discretionary act, regardless of whether it is permitted or not under R.C. 2921.43(A)(1), is not theft of money that belongs to the City. The City had no valid claim to those funds. Conversely, if the money belonged to the City, as the state has asserted, then Mr. Homrighausen committed no crime by soliciting or accepting them.

In other words, Counts One and Seven required a finding that Mr. Homrighausen lawfully received

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[5] It was the state's position throughout trial that Mr. Homrighausen was permitted to charge and collect fees for officiating weddings but that he had to pay those fees over to the City. According to the state, charging and accepting fees only becomes a crime, "when you take that fee money and convert it to your own personal use. When you take the money that was supposed to go to the City and you put it in your pocket." Tr. Vol. III at 394-395. See also id. at 421.

monies on behalf of the City whereas Counts Three through Six required a contrary finding that Mr. Homrighausen unlawfully solicited/received money on his own behalf.

While acknowledging the doctrine of mutually exclusive verdicts, the Court of Appeals gave short shrift to its application in this manner. Opinion at ¶43. It simply stated, "the verdicts in the instant case are not mutually exclusive: appellant committed theft in office when he deprived the City of the wedding fees; he committed dereliction of duty when he failed to deposit the fees into the treasury as required; and he committed solicitation of improper compensation in asking couples to pay him to perform a duty under color of his public office." Id.

But that conclusory statement only proves Mr. Homrighausen's point. If the crime of soliciting improper compensation was complete upon the soliciting or accepting money for officiating weddings then under no set of circumstances was the money lawful to receive. It follows that the money was not lawfully accepted on behalf of the City. Simply put, at the time the money was received by Mr. Homrighausen, it was either legal or illegal for him to accept.

Under the decision below, if Mr. Homrighausen accepted the money and later deposited it into the treasury his conduct would not amount to theft in office but it would still amount to soliciting improper compensation even though the money was properly sitting in the treasury of the City of Dover, its rightful owner.

Thus, the jury findings in Counts Three through Six negate findings necessary to support convictions in Counts One and Seven and vice versa.

IN THE COURT OF COMMON PLEAS
TUSCARAWAS COUNTY, OHIO
GENERAL TRIAL DIVISION

STATE OF OHIO	:	
	:	Case No. 2022 CR 03 0072
Plaintiff	:	
	:	Appellate Case No.
-vs-	:	2023 AP 02 0008
	:	
RICHARD P.	:	Judge Elizabeth Lehigh
HOMRIGHAUSEN	:	Thomakos
	:	
Defendant	:	

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Transcript of Day Four of the Jury Trial
Held on November 15, 2022
before Judge Elizabeth Lehigh Thomakos

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Appearances by:

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Transcript of Motion for Acquttial at Trial Pursuant to Ohio Criminal Rule 29

MR. LIVINGSTON: Okay. Well Judge we would at this time move for an acquittal of all charges pursuant to Rule 29. And I have some specific arguments I would like to make pertaining to each count. So if I could, I could start with count fifteen and sort of work my way back through the indictment. So that count charges the Mayor with violating Revised Code 102.03(D) which contains three essential elements. The second of those elements is to secure a thing of value. And so the indictment and bill of particulars in this case makes clear that the allegations in connection with this offense are set forth on February sixteenth of twenty-sixteen. The Mayor sat on and ruled upon a grievance involving his son. The evidence in this case is undisputed that the Mayor denied that grievance. So Ohio law defines a thing of value in this context as a tangible or intangible benefit, pursuant to 102.01(G), and given the fact that there has been no securing of a thing value in this case because he denied the benefit, we submit no reasonable juror could conclude that

denying a grievance is securing a thing of value under Ohio law and he must be acquitted of this charge. Would you like me to go through each count or do you want to hear from the State?

THE COURT: Yeah go ahead through each count. I'm sorry, I'm just flipping to the indictment.

MR. LIVINGSTON: Okay. So count eight involves dereliction of duty for violating Revised Code 705.25. And the duty at issue as set forth in the indictment is failing to remit monies, whether fees or in the form of gifts for official services to the treasury pursuant to, to that statute. The problem with that Judge is that Ohio Revised Code 705.25 does not apply to officials within the City of Dover. Chapter 705 of the Revised Code only governs municipalities and their officials who have been organized under any one of three specific plans of government set forth in that chapter. That's known as the city manager plan, the commission plan, or the federal plan. Once you adopt one of those plans, that becomes the charter for the municipality. 705.07 demonstrates that the statute at issue here, section 705.25 only applies to one of those three specific plans of government. The City of Dover has not adopted any one of those plans. There's been no evidence in this case that they have done so. It's always been a non-chartered city and so for that reason 705.25 does not apply. The Mayor did not have a duty pursuant to that statute and that count fails as a matter of law.

THE COURT: You said a non-chartered city?

MR. LMNGSTON: Correct. Okay. Pursuant to the next count of the indictment, count seven, dereliction of duty for violating 733.40. That section states that all

fines, forfeitures and costs in ordinance cases and all fees that are collected by the Mayor or that any way come to the Mayor's hands shall be paid into the treasury of the municipal corporation. So at least in this statute, 733 does apply to the City of Dover, unlike 705. But this statute refers to fines, forfeitures, costs in ordinance cases and the fees associated with that. So that statute is not a broad prohibition on fees generally, but on fees related to and associated with ordinance cases. If you look at the rest of the statute, that becomes clear because the interpretation discusses fines, forfeitures and fees collected in state cases as well, so. A case I wanted to bring to the Court's attention is Ward v. Village of Monroeville, Ohio. It's a United States Supreme Court case from 1972, it's 409 U.S. 57. In that case it also noted that a major part of the village's income came from fines, costs and forfeitures and fees imposed by the mayor from the mayor court. So we think that statute really deals with mayor court fines and fines that could come in through, or fees that could come into his hands that way. It does not have anything to do with wedding fees or fees that could be considered in addition to his salary. That statute is I think 731.07 if any, but he has not been charged under that statute. Counts three and six, or three, three through six, soliciting improper compensation. Those charges are premised on the idea that he was accepting, the Defendant was accepting compensation for performing any act in his public capacity. Those charges can't be reconciled with the State's theory on the remainder of the indictment. The State must prove beyond a reasonable doubt on counts three through six that he accepted compensation for performing weddings as the Mayor. So the statute is a prohibition against the Mayor from personally accepting money as compensation for official services.

The balance of the indictment the State is pursuing a theory that he's accepting fees, but soliciting improper compensation in the statute 2921.43 has nothing to do with accepting fees. If you look at subsection (2) of that statute, it prohibits a mayor from accepting additional or greater fees or costs. So the implication is that (A)(1) under which the Mayor's been charged does not prohibit a mayor from accepting fees generally.

THE COURT: Wait, (A)(1) of which, of 29 - -

MR. LIVINGSTON: Of 2921.43(A). So it's incompatible for the State to claim in this case that it is compensation in counts three through six, but then say it's a fee in the remaining charges because the Mayor's allowed to accept a fee. So we submit there's insufficient evidence with respect to counts three through six for that reason as well.

THE COURT: You say, let me look at the code section, or the indictment. You're drawing a distinction between collecting it as a compensation versus a fee?

MR. LIVINGSTON: Correct your honor, because if you look at (A)(2) of 2921.43, it specifically prohibits a mayor from accepting additional or greater fees. So the implication being is that he's certainly allowed to accept fees.

THE COURT: Okay.

MR. LIVINGSTON: And so it's incompatible with the rest of the indictment and I think it could lead to inconsistent and improper verdicts.

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