

## APPENDIX

# The Supreme Court of Ohio

State of Ohio

v.

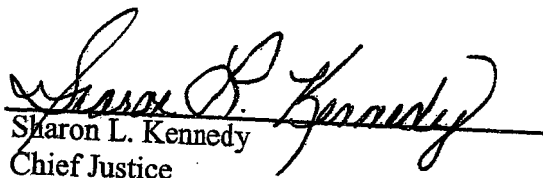
Edward Smith

Case No. 2026-0189

ENTRY

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

(Hamilton County Court of Appeals; No. C-250290)

  
Sharon L. Kennedy  
Chief Justice

1a

The Official Case Announcement can be found at <http://www.supremecourt.ohio.gov/ROD/docs/>

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,

Plaintiff-Appellee,

vs.

EDWARD SMITH,

Defendant-Appellant.

APPEAL NO. C-250290  
TRIAL NO. B-9609928

*JUDGMENT ENTRY*

**NESTOR, Judge.**

This court sua sponte removes this cause from the regular calendar and places it on the court's accelerated calendar, and this judgment entry is not an opinion of the court. See Rep.Op.R. 3.1; App.R. 11.1(E); Loc.R. 11.1.

Defendant-appellant Edward Smith appeals the judgment of the Hamilton County Court of Common Pleas denying his motion for leave to file a motion for a new trial based on newly discovered evidence. Because Smith did not demonstrate that he was unavoidably prevented from discovering the new evidence upon which his motion for a new trial relies, we affirm the lower court's judgment.

In 1998, following Smith's conviction for murder, this court reversed the trial court's judgment and ordered a new trial. See *State v. Smith*, 130 Ohio App.3d 360 (1st Dist. 1998) (reversing defendant's conviction based on prosecutorial misconduct during closing argument). On remand, a jury once again found Smith guilty of murder and an accompanying firearm specification, and he received a 15-year-to-life sentence on the murder charge and a three-year sentence on the specification. Smith

## OHIO FIRST DISTRICT COURT OF APPEALS

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subsequently appealed his conviction, which this court affirmed. *See State v. Smith*, 2000 Ohio App. LEXIS 5082 (1st Dist. Nov. 3, 2000).

At Smith's trial, the State presented the testimony of Randall Rozier, the victim's cousin and an FBI agent based out of New York. Agent Rozier testified at trial that he had been visiting family in Cincinnati during the time the victim was shot and killed. Upon learning that Smith had recently had an argument with the victim over the amount of money the victim owed Smith for masonry work, Rozier spoke with one of Smith's employees and asked him for help locating Smith. The employee drove with Rozier to a storage unit used by Smith to house tools for his business. There, they found Smith parked inside the storage unit. The employee spoke with Smith and Rozier stayed in his car, although he explained that he did draw his gun after seeing a "look" on Smith's face as the employee approached him. Eventually, Rozier and the employee left, and, upon driving away, they observed Smith exit from the storage unit and drive away in the opposite direction. Finally, Rozier testified that after that incident, he asked the local police chief as well as his FBI supervisor if he could help with the investigation, but he was not given permission to do so.

Nearly 25 years after the trial, Smith sought leave under Crim.R. 33(B) to file a motion for a new trial based on his recent discovery of federal regulations, often referred to as *Touhy* regulations, which govern a federal employee's testimony in cases where the United States is not a party. *See* 28 C.F.R. § 16.21 et seq. Smith contends that the State suppressed the fact that Agent Rozier investigated Smith and testified against him in contravention of the *Touhy* regulations. Smith asserts that the suppression of this evidence deprived him of the opportunity to challenge Agent Rozier's credibility during cross-examination. He argues that the jury might have

questioned Rozier's testimony had they been aware of his failure to follow federal protocols.

The common pleas court denied Smith's motion without an evidentiary hearing, concluding that the *Touhy* regulations were in existence and available for Smith's use at the time of his trial and that his new-trial motion was meritless.

Smith now appeals, asserting in two assignments of error that the common pleas court abused its discretion by denying his motion for leave to file a new-trial motion without a hearing and for addressing the merits of his new-trial motion without first determining that he was unavoidably prevented from discovering the new evidence upon which he relies to support his new-trial motion. We review the denial of a Crim.R. 33(B) motion for abuse of discretion. *State v. Smith*, 2023-Ohio-3954, ¶ 6 (1st Dist.), citing *State v. Hatton*, 2022-Ohio-3991, ¶ 29.

A motion for a new trial based on newly discovered evidence must be filed within 120 days of the verdict. To obtain leave to file a delayed motion for a new trial based on newly discovered evidence, a defendant must demonstrate by "clear and convincing proof" that he was unavoidably prevented from discovering the evidence upon which the motion is based within the 120-day timeframe. Crim.R. 33(B). A defendant is unavoidably prevented from discovering new evidence if he had no knowledge of the existence of the new evidence and, in the exercise of reasonable diligence, could not have learned of its existence within the time prescribed for filing a motion for a new trial. *State v. Ojile*, 2021-Ohio-2955, ¶ 15 (1st Dist.). A defendant may also satisfy the "unavoidably prevented" requirement by showing that the State suppressed the evidence on which the defendant would rely when seeking a new trial. *State v. McNeal*, 2022-Ohio-2703, ¶ 2. Finally, a defendant is only entitled to a hearing on a motion for leave to file an untimely motion for a new trial if the defendant submits

documents that “on their face” support his claim that he was unavoidably prevented from timely discovering the grounds for the motion. *State v. Smith*, 2020-Ohio-6718, ¶ 17 (1st Dist.), citing *State v. Carusone*, 2013-Ohio-5034, ¶ 4, 33 (1st Dist.).

Although the lower court did not explicitly use the term “unavoidably prevented” in its denial of Smith’s Crim.R. 33(B) motion, the statements within the court’s entry support a determination of unavoidable prevention. These statements can reasonably be interpreted to mean that Smith was not unavoidably prevented from discovering the existence of the *Touhy* regulations.

To the extent that Smith asserts that the *Touhy* regulations constitute new evidence for his new-trial motion, he has failed to demonstrate that he could not have discovered their existence through reasonable diligence at the time of trial or within 120 days following the jury’s verdict. The *Touhy* regulations were in existence at the time of Smith’s trial and had been since the 1950s. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467-468 (1951). To the extent that Smith is arguing that he recently discovered that Rozier lacked permission to testify at trial in contravention of the *Touhy* regulations and that the State suppressed this evidence, he has not provided any evidence to substantiate this claim. The State did not conceal Rozier’s employment as an FBI agent; Rozier himself testified to this fact at trial and stated that he did not have permission to assist local police with the murder investigation.

Because Smith cannot demonstrate that he was unavoidably prevented from discovering the *Touhy* regulations or that the State suppressed Rozier’s alleged violation of those regulations, the common pleas court did not abuse its discretion by denying his Crim.R. 33(B) motion for leave to file a new-trial motion without an evidentiary hearing.

**OHIO FIRST DISTRICT COURT OF APPEALS**

Lastly, while the common pleas court should not have discussed the merits of the new-trial motion without first finding that Smith had been unavoidably prevented from discovering the evidence upon which his new-trial motion relies, Smith has not shown any prejudicial error resulting from this action. See App.R. 12(D). The denial of Smith's Crim.R. 33(B) motion was not based on the merits of his new-trial motion, but on the determination that the newly discovered evidence—the *Touhy* regulations—were available and discoverable at the time of his trial.

Accordingly, Smith's two assignments of error are overruled, and the judgment of the common pleas court is affirmed.

The court further orders that 1) a copy of this Judgment constitutes the mandate, 2) the mandate be sent to the trial court for execution under App.R. 27, and 3) costs shall be taxed under App.R. 24.

BOCK, P.J., and MOORE, J., concur.

To the clerk:

Enter upon the journal of the court on 12/11/2025 per order of the court.

By: *Jennifer C. Tinsley*  
Administrative Judge

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,

Plaintiff-Appellee,

vs.

EDWARD SMITH,

Defendant-Appellant.

APPEAL NO. C-250290

**ENTRY DENYING APP.R.  
26(A) APPLICATION FOR  
RECONSIDERATION**

This cause is before the court on defendant-appellant Edward Smith's App.R. 26(A) application for reconsideration filed on December 22, 2025.

We deny Smith's application for reconsideration because he has not called to our attention an obvious error in our decision or an issue that the court did not, or did not fully, consider. *State v. Black*, 78 Ohio App.3d 130, 132 (1st Dist. 1991), citing *Matthews v. Matthews*, 5 Ohio App.3d 140, 143 (10th Dist. 1981).

Accordingly, the court finds the application is not well taken and denies the same.

BOCK, P.J., NESTOR and MOORE, JJ.

To the clerk:

Enter upon the journal of the court on JAN 09 2026

By:



Judge

(Copies sent to all counsel)

FILED  
MAY 07 2025

ENTERED

MAY 06 2025

THE STATE OF OHIO, HAMILTON COUNTY

COURT OF COMMON PLEAS

CRIMINAL DIVISION

HON. WENDE C. CROSS

STATE OF OHIO,

Plaintiff,

vs.

EDWARD SMITH,

Defendant.

: NO. B9609928

: JUDGE CROSS

: ENTRY DENYING MOTION FOR  
: LEAVE TO FILE MOTION FOR NEW  
: TRIAL BASED ON NEWLY  
: DISCOVERED EVIDENCE

This matter is before the Court upon the defendant's pleading entitled, "motion for leave to file motion for new trial based on newly discovered evidence pursuant to Crim. R. 33(B)."

The basis of the motion is that an FBI agent testified at defendant's 1999 trial in violation of the *Touhy* regulations.

Any claim that a witness testified in violation of the *Touhy* regulations is not "new" evidence. That information was easily available at the time of the trial. Further, the Ohio Supreme Court recently ruled that a violation of the *Touhy* regulations is not a basis to suppress testimony. *State v. Sheckles*, 176 Ohio St.3d 665, 2024-Ohio-3339. The defendant's motion for leave to file a new trial is denied. Further, the claim raised by defendant lacks merit under the authority of *Sheckles*, supra.

Accordingly, the defendant's motion for leave to file a motion for a new trial is DENIED, and the Court further finds that Smith's new trial motion fails on the merits.

*Wende C. Cross*

Wende Cross, Judge

Hamilton County Court of Common Pleas

date: 09/01/99  
code: GJEI  
judge: 146

COURT OF COMMON PLEAS

Entered  
Date: 9-1-99  
Image: 215

*[Signature]*  
Judge: ANN MARIE TRACEY

NO: B 960928

STATE OF OHIO  
VS.  
EDWARD SMITH

JUDGMENT ENTRY: SENTENCE:  
INCARCERATION

Defendant was present in open Court with Counsel WILLIAM P WHALEN on the 1st day of September 1999 for sentence.

~~that the court informed the defendant that as the defendant well knew, after defendant~~  
entering a plea of not guilty and after trial by jury, the defendant has been found  
guilty of the offense(s) of:  
count 1: MURDER, 2903-02/ORCN, FI

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.

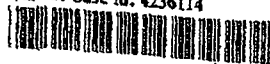
Defendant is sentenced to be imprisoned as follows:

count 1: CONFINEMENT: 15 Yrs - LIFE IN PRISON, Credit 978 Days DEPARTMENT OF  
CORRECTIONS TO BE SERVED CONSECUTIVE TO SPECIFICATION.  
CONFINEMENT ON SPECIFICATION: 3 Yrs DEPARTMENT OF CORRECTIONS  
TO BE SERVED PRIOR TO COUNT 1. CREDIT INCLUDES TOTAL TIME  
INCARCERATED SINCE DAY OF ARREST, INCLUDING  
PRISON TIME.

A TRUE COPY OF THE ORIGINAL  
ENTERED 9-1-99 IMAGE 215  
ATTEST JAMES CISELL  
CLERK.  
BY *S. Mullins*  
DEPUTY

Defendant was notified of the right to appeal as required by Crim. R. 12(A)(2) DATE 9-3-99

Parent Case Id: 4236114



Page 1

CMSG306

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,  
PLAINTIFF-APPELLEE,

APPEAL NO. C-250290  
TRIAL NO. B-9609928

V.

EDWARD SMITH,  
DEFENDANT-APPELLANT.

*ENTRY GRANTING IN PART  
APPELLANT'S MOTION TO TRANSMIT  
THE RECORD AND DENYING MOTION  
TO PROCEED IN FORMA PAUPERIS AS  
MOOT*

This case is before the Court on appellant's motion to proceed in forma pauperis, filed on May 20, 2025, and his motion to order and transmit the record, filed on July 15, 2025 and supplemented on July 18, 2025.

Regarding the record for this appeal, the transcript of docket and journal entries was filed on July 3, 2025, and includes all filings in the trial court case from March 23, 2001 forward. Documents pre-dating March 23, 2001 are only partially available as part of a case scan performed by the Clerk of Courts' office in connection with its document retention and destruction schedule. The case scan was filed as part of the transcript of docket and journal entries.

As to transcripts of proceedings, the transcripts from appellant's 1999 re-trial were also scanned as part of the Clerk of Courts document retention and destruction schedule. The transcripts have not been filed in this appeal. The Court, therefore, orders the Clerk of Courts to certify and file the transcripts of proceedings from the 1999 re-trial in this appeal, on or before August 29, 2025. With the filing of the transcripts, the Court will have the complete record necessary for determining this appeal.

Regarding the motion to proceed in forma pauperis, appellant has previously been determined to be indigent and was, therefore, not charged a filing fee in this case. The motion is, therefore, denied as moot.

CROUSE, P.J., BOCK and MOORE, JJ.

**OHIO FIRST DISTRICT COURT OF APPEALS**

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**To the clerk:**

**Enter upon the journal of the court on** AUG 21 2025.

**By:**  **(Copies sent to all counsel)**  
Presiding Judge

COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO

STATE OF OHIO,

PLAINTIFF.

vs.

No. C-990689  
B-9609928

EDWARD SMITH

DEFENDANT.

TRANSCRIPT OF PROCEEDINGS  
JURY TRIAL  
FOR APPEAL  
VOLUME III of V

APPEARANCES:

Gus A. Leon, Esq.  
Anne Flanagan, Esq.  
On behalf of the State.

John H. Burlew, Esq.  
On behalf of the Defendants.

BE IT REMEMBERED that upon the Trial of this  
cause, in the Court of Common Pleas, before the Honorable  
Ann Marie Tracey, one of the judges of said Court, on the  
dates hereinafter indicated, the following proceedings  
were had, to wit:



A TRUE COPY ATTEST  
CLERK OF THE HAMILTON COUNTY  
COURT, HAMILTON COUNTY, OHIO  
DEPUTY

FBI AGENT ROZIER: "SWORN TESTIMONY"  
(TR. PGS. 446-470)

12(a)

|                                          |        |
|------------------------------------------|--------|
| Gregory Donnell White (by deposition)    |        |
| Direct Examination by Ms. Flanagan ..... | 404, 5 |

VOLUME III  
AUGUST 4, 1999

|                                            |         |
|--------------------------------------------|---------|
| Gregory White                              |         |
| Direct Examination by MS. FLANAGAN .....   | 413, 1  |
| Cross-Examination by MR. BURLEW .....      | 426, 17 |
| Randall Rozier                             |         |
| Direct Examination by MR. LEON .....       | 446, 8  |
| Cross-Examination by MR. BURLEW .....      | 461, 13 |
| Redirect Examination by MR. LEON .....     | 470, 6  |
| Robert Gipson                              |         |
| Direct Examination by MS. FLANAGAN .....   | 472, 17 |
| Cross-Examination by MR. BURLEW .....      | 496, 20 |
| Lee Ferguson                               |         |
| Direct Examination by MS. FLANAGAN .....   | 504, 18 |
| Cross-Examination by MR. BURLEW .....      | 519, 21 |
| Redirect Examination by MS. FLANAGAN ..... | 533, 5  |
| Chief Ernest McCowen, Junior               |         |
| Direct Examination by MS. FLANAGAN .....   | 536, 20 |
| Cross-Examination by MR. BURLEW .....      | 554, 18 |

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AUGUST 9, 1999

|                                            |         |
|--------------------------------------------|---------|
| Ken Adkins                                 |         |
| Direct Examination by MS. FLANAGAN .....   | 578, 4  |
| Cross-Examination by MR. BURLEW .....      | 587, 22 |
| Redirect Examination by MS. FLANAGAN ..... | 594, 13 |
| Sergeant Sandra Stevenson                  |         |
| Direct Examination by MS. FLANAGAN .....   | 595, 20 |
| Cross-Examination by MR. BURLEW .....      | 643, 20 |
| Michael Trimpe                             |         |
| Direct Examination by MS. FLANAGAN .....   | 665, 17 |
| Cross-Examination by MR. BURLEW .....      | 677, 16 |
| Redirect Examination by MS. FLANAGAN ..... | 684, 13 |
| Recross-Examination by MR. BURLEW .....    | 685, 1  |
| Dr. Robert Pfalzgraf                       |         |
| Direct Examination by MS. FLANAGAN .....   | 687, 1  |
| Voir Dire by MR. BURLEW .....              | 702, 1  |
| Direct Examination (cont'd) .....          | 706, 1  |



ATRUE COPY ATTEST  
CLERK OF THE HAMILTON COUNTY  
SHERIFF, HAMILTON COUNTY, OHIO  
DEPUTY



1 RANDALL MARCELLUS ROZIER  
2 having been first duly sworn, was examined and testified  
3 as follows:

4 THE COURT: Good morning.

5 THE WITNESS: Good morning.

6 THE COURT: Speak into the mike, please.

7 ~~Keep your voice up. Go ahead.~~

8 DIRECT EXAMINATION

9 BY MR. LEON:

10 Q. State your name, and spell your last  
11 name.

12 A. Randall Marcellus Rozier, R-o-z-i-e-r.

13 Q. How are you employed?

14 A. Special agent, Federal Bureau of  
15 Investigation.

16 Q. And you work for the FBI now?

17 A. I do.

18 Q. Where are you stationed? Where do you  
19 work?

20 A. I'm assigned to the New York division.

21 Q. You work in where?

22 A. New Rochelle, New York.

23 Q. New Rochelle?

24 A. Yes.

25 Q. How long have you been with the FBI?



1 corruption; that's about it.

2 Q. Okay. And have you done -- been involved  
3 in undercover situations that involve dangers?

4 THE COURT: Can we move this along?

5 MR. LEON: This is my last question.

6 THE COURT: I don't know the relevancy.

7 MR. LEON: I'll tie it up.

8 THE COURT: Let me see you at sidebar,  
9 please.

10 (The following proceedings were had at  
11 sidebar conference.)

12 MR. LEON: What?

13 THE COURT: What's the relevancy? Is he  
14 an expert witness or something?

15 MR. LEON: He will be testifying that  
16 when he came upon the situation, that he was --  
17 basically, his training and his experience as a  
18 police officer, he was frightened enough to pull  
19 his firearm when he saw what was happening between  
20 Spikner and the defendant. He's a trained --

21 THE COURT: What's the relevancy?

22 MR. LEON: There's a dispute here about  
23 whether or not the defendant had a gun. This  
24 witness will testify that Spikner told him that he  
25 had a gun. He withdrew his weapon when they came



1 on the scene because of his fear, based on his  
2 training. That gives relevance to his actions.

3 MR. BURLEW: Spikner never testified to  
4 that.

5 THE COURT: Spikner never said he saw a  
6 gun. You don't object?

7 MR. BURLEW: I do object.

8 MR. LEON: He's going to testify --

9 THE COURT: No. Are you trying to  
10 impeach your own witness?

11 MR. LEON: No.

12 THE COURT: Then I'm not allowing it.  
13 Thank you.

14 (The following proceedings were had in  
15 open court, in the presence of the jury.)

16 BY MR. LEON:

17 Q. On December the 27th, 1956, were you in  
18 Lincoln Heights?

19 A. I was.

20 Q. And you were here for what reason?

21 A. I was on vacation.

22 Q. You are related or were related to the  
23 victim in this case, Eugene Jenkins?

24 A. That's correct.

25 Q. What was your relationship?



1 A. Yes.

2 Q. Did you call police or anything after  
3 that?

4 A. Yes. I called 911, Cincinnati Police,  
5 gave them a description of Mr. Smith, the vehicle. And I  
6 believe they put out a broadcast.

7 Q. When you went to the scene where  
8 Mr. Jenkins had been killed, did you go into Mr. Jenkins'  
9 truck or touch it or anything of that nature?

10 A. No, I did not.

11 MR. LEON: Your witness.

12 THE COURT: Mr. Burlew?

13 CROSS-EXAMINATION

14 BY MR. BURLEW:

15 Q. Mr. Rozier, at the time of the homicide,  
16 where were you stationed?

17 A. My office of assignment was New York.

18 Q. And who was the agent in charge of that  
19 office, your boss?

20 A. In charge of New York office, we've  
21 changed three times since then.

22 Q. Well, let me ask you --

23 A. I believe it was Calstrum.

24 Q. Do you need authorization to get involved  
25 in a local matter?



- 1 A. Mr. Calstrum did not know.
- 2 Q. Did any of the agents involved give
- 3 permission for you to assist?
- 4 A. No.
- 5 Q. You asked to get involved, you weren't
- 6 asked; you wanted to get involved in this matter, correct?
- 7 A. You asked me two questions.
- 8 Q. You asked the chief if you could get
- 9 involved, correct?
- 10 A. I asked if I could assist them, yes, sir.
- 11 Q. I believe you asked if you could get
- 12 involved. As a matter of fact, you asked him if he would
- 13 mind if you assisted, did you not?
- 14 A. I think we're saying the same thing, sir.
- 15 Q. Just to be clear, you went to the chief
- 16 and asked if he would mind if you assisted, correct?
- 17 A. That is correct.
- 18 Q. Now, at the time you got involved, you
- 19 were not a sworn Cincinnati police officer, correct?
- 20 A. I was not a Cincinnati police officer.
- 21 Q. And what is the FBI protocol when you get
- 22 involved in an investigative matter in a foreign
- 23 jurisdiction, are you required to notify your agent in
- 24 charge?
- 25 A. You asked me two questions there, sir.



2. Are you required to notify the agent in charge, or his representative, if you get involved in a criminal investigation in another jurisdiction?

A. That is correct.

Q. And that's why your agent in charge was in New York, and he was the only -- and that's where geographical limits were, unless he authorized you to travel outside those limits or be involved in an investigation outside of those limits, is it not?

A. That is not the FBI protocol, sir.

Q. So you can go where you want?

A. Would you like for me to explain the protocol to you?

Q. I'd like the answer to my question. Can you go where you want?

A. No, you cannot go where you want.

Q. Can you volunteer to assist any department that you want to get involved in?

A. I can volunteer, that is correct.

Q. And you need no prior permission?

A. With permission, yes, sir.

Q. Did you have permission?

A. I did not.

Q. Now, when you went with Mr. Spikner to this garage, how did you know that that was Ed Smith's



1 garage?

2 A. Mr. Spikner told me it was his.

3 Q. He told you that it was Ed. Smith's  
4 garage?

5 A. He told me that's where he stored the  
6 tools, yes, sir.

7 Q. Where was your warrant to go inside?

8 MR. LEON: Objection.

9 THE COURT: Overruled.

10 A. I had no warrant.

11 Q. You had no authority to go inside,  
12 correct?

13 MR. LEON: Objection.

14 THE COURT: Overruled.

15 A. I did not have a warrant, no, sir.

16 Q. As a matter of fact, the police chief you  
17 talked to was the chief of Lincoln Heights?

18 A. Yes.

19 Q. He had no authority to police the streets  
20 of the City of Cincinnati, did he?

21 MR. LEON: Objection.

22 THE COURT: Sustained.

23 Q. Did you ever ask him if you were  
24 permitted to go into the City of Cincinnati?

25 MR. LEON: Objection.



1 THE COURT: Overruled. You may answer.

2 A. No, sir, I did not.

3 Q. Now, what could have happened is that you  
4 could have endangered a private citizen by going into  
5 property that is not authorized to go into, for which you  
6 had no warrant, correct? 45  
46

7 MR. LEON: Objection.

8 THE COURT: Overruled.

9 MR. LEON: Can we approach?

10 THE COURT: Yes.

11 (The following proceedings were had at  
12 sidebar conference.)

13 MR. LEON: Judge, the insinuation that a  
14 warrant was somehow required is something -- it's  
15 a legal conclusion. The jury needs to know and  
16 understand that a warrant's not required for the  
17 employee of the defendant to go into the garage  
18 that he works in. This is misleading the jury.

19 THE COURT: Well, go ahead, Mr. Burlew.

20 MR. BURLEW: Judge, I'm not misleading  
21 the jury. I think the State went into all of this  
22 and tried to qualify him as an expert law  
23 enforcement officer. He violated his own  
24 protocol. And that's just a fact, that he had no  
25 warrant, no authority. I'm not attacking the



1 search, we've done that pretrial.

2 MR. LEON: Exactly. That's my point.

3 MR. BURLEW: I'm not trying to suppress  
4 anything.

5 MR. LEON: I don't have a problem with  
6 the questions, necessarily, other than the fact  
7 that the insinuation here is that he violated a  
8 duty to get a warrant when, in fact, it wasn't  
9 necessary. And, you know, it's a legal  
10 conclusion. It's not a whole lot different than  
11 having a statement with a motion to suppress, and  
12 then in trial attacking the propriety of taking  
13 the statement. It's a pretrial decision we're  
14 talking about.

15 THE COURT: Actually, with respect to a  
16 statement, it's both a trial and a pretrial. So I  
17 disagree on that point. I understand the point  
18 you're trying to make, though.

19 MR. BURLEW: I'm not attacking the  
20 search, but you can't hold him up as the world's  
21 greatest policeman, and have him violate rules.  
22 It's disingenuous.

23 MR. LEON: But he did not violate a rule  
24 about a warrant, and that's the implication  
25 because he went to a garage that this employee had.



access to.

THE COURT: The reason I permitted -- I take all this as seeking my explanation as to the reason for my ruling. And the reason I permitted it is that number one, a law enforcement officer cannot direct somebody to do something and make it a permissible search, number one. So I disagree with your legal conclusion that the officer can direct a private citizen to enter a private space and obviate the need for a warrant.

Number two, there's no basis for a contention that this person, Mr. Spikner, had the authority. I have heard no testimony that he had the authority to consent to a search. So I disagree with your overall premises.

Number two, what -- you set him up as probably the most experienced law enforcement officer that's going to be testifying in this trial. And, certainly, if he's circumventing a procedure, that's something that Mr. Burlaw's entitled to bring to the jury's attention.

Number three, I permitted that last question, and that's what I think brought us all up here, because he's testified that he took certain actions to protect the safety of a private



1 citizen. And the last question, I believe,  
2 Mr. Burlew just asked, was what he was doing  
3 actually endangering Mr. Spikner, so that would  
4 contradict his previous testimony. So that's why  
5 I permitted that question.

6 (The following proceedings were had in  
7 open court, in the presence of the jury.)

8 MR. BURLEW: Would you read the last  
9 question back.

10 (The pending question was read back by  
11 the court reporter.)

12 THE COURT: Sir, go ahead and answer.

13 A. That is correct.

14 Q. Now, you talked about your training, what  
15 is your homicide training?

16 A. I worked approximately seven homicide --

17 Q. When was that?

18 A. I worked five in Lincoln Heights.

19 Q. How many years ago was that?

20 A. That was in 1972 through '78.

21 Q. Okay.

22 A. And I worked two in Woodlawn.

23 Q. Any with the FBI?

24 A. Homicides? No.

25 Q. So your training insofar as homicide or



1 homicide investigation was limited to what was available  
2 to you in Lincoln Heights and Woodlawn, right?

3 A. That's correct.

4 Q. You're not claiming that you're an expert  
5 homicide investigator, are you?

6 A. No, sir.

7 MR. BURLEW: Just one moment, Your Honor.

8 THE COURT: Yes.

9 MR. BURLEW: One other question. Sorry.

10 THE COURT: That's okay.

11 Q. You indicated that you drew your weapon,  
12 correct?

13 A. Yes. Yes, sir.

14 Q. And you're trained by the FBI, correct?

15 A. Yes, sir.

16 Q. You only draw your weapon when you're  
17 ready to kill, correct?

18 A. In preparation thereof, yes, sir.

19 Q. You are not to draw your weapon unless  
20 you're prepared to fire it and kill, correct?

21 A. That is correct.

22 Q. You're not trained to shoot to wound or  
23 to pull that weapon to scare, intimidate, or frighten, but  
24 to kill?

25 A. That is correct.

1 Q. So with no homicide investigation,  
2 without notifying the agent in charge, you took a private  
3 citizen to the scene, and you were prepared to kill?

4 A. That is correct.

5 MR. BURLEW: Thank you.

6 REDIRECT EXAMINATION

7 BY MR. LEON:

8 Q. Did you -- did you force Mr. Spikner to  
9 take you to the storage area?

10 A. He volunteered. He wanted to check to  
11 see -- he was supposed to work that day, he wanted to  
12 check to see if the tools were there.

13 MR. BURLEW: Objection.

14 THE COURT: I'll permit it.

15 MR. LEON: Nothing further.

16 THE COURT: Anything further?

17 MR. BURLEW: Nothing further.

18 THE COURT: May I excuse this witness?

19 MR. LEON: Yes, ma'am.

20 MR. BURLEW: No objection.

21 THE COURT: You are free to go about your  
22 business.

23 (Witness excused.)

24 THE COURT: Is this a good time for a  
25 break? Let's take our break, till twenty minutes



AT TRUE COPY ATTEST  
CLERK OF THE HAMILTON COUNTY  
COURT, HAMILTON COUNTY, OHIO

DEPUTY

## C-E-R-T-I-F-I-C-A-T-E

I, Barbara Moss, an official shorthand reporter for the Court of Common Pleas, duly appointed by the Court to report the proceedings in this cause, do hereby certify that the foregoing 940 pages constitute a true and complete transcription of my notes, taken in stenotype, in the proceedings in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand at Cincinnati, Ohio this 1st day of March, 2000.



Barbara Moss, RPR  
Official Court Reporters  
Court of Common Pleas  
Hamilton County, Ohio



ATTEST  
CLERK OF THE HAMILTON COUNTY  
COURT, HAMILTON COUNTY, OHIO

DEPUTY

**CERTIFIED COURT REPORTER:**  
**"BARBARA MOSS"**  
(Tr. P. 941)