

IN THE SUPREME COURT OF OHIO  
2005

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

MICHAEL WITHERS,

Defendant-Appellant.

Case No. 2008-1776

On Appeal from the  
Franklin County Court  
of Appeals, Tenth  
Appellate District

Court of Appeals  
Case Nos. 08AP-39, 08AP-40

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING MOTION FOR  
LEAVE TO FILE DELAYED APPEAL

RON O'BRIEN 0017245  
Franklin County Prosecuting Attorney  
373 South High Street-13<sup>th</sup> Fl.  
Columbus, Ohio 43215  
614/462-3555

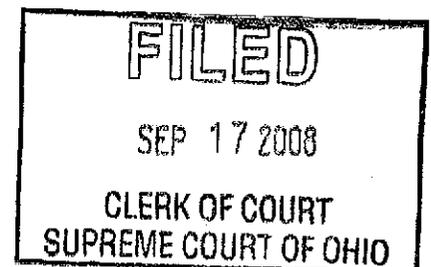
And

KIMBERLY M. BOND 0076203  
(Counsel of Record)  
Assistant Prosecuting Attorney

COUNSEL FOR PLAINTIFF-APPELLEE

MICHAEL WITHERS  
*Pro se*  
Ross Correctional Institution  
P. O. Box 7010  
Chillicothe, Ohio 45601

DEFENDANT-APPELLANT



## MEMORANDUM

Defendant has filed a motion for leave to file a delayed appeal pursuant to S. Ct. Prac. R. II, Section 2(A)(4). The State of Ohio opposes the motion, and asserts that defendant has not set forth adequate reasons for the delayed filing.

In Franklin County criminal case 03CR-31, defendant pleaded guilty to four counts of rape, each a first-degree felony, and one count of pandering, a second-degree felony. Defendant also pleaded guilty to one count of pandering, a second degree felony, in criminal case 03CR-3368. The victims of these offenses were defendant's step-children. The court imposed eight year sentences for each of the first degree rape convictions to run consecutively and a consecutive two year sentence for the pandering conviction in 03CR-31. The court imposed a two year sentence for the pandering conviction in 03CR-3368 to run concurrently to the sentences in 03CR-31.

In three appeals, defendant has challenged his sentences. During the first appeal, the Tenth District Court remanded for resentencing as the trial court failed to make the then-mandatory statutory findings. *State v. Withers*, 10<sup>th</sup> Dist. Nos. 05AP-458/459, 2006-Ohio-285. At the resentencing hearing on February 15, 2006, the trial court imposed the same sentences and made the requisite findings.

During the pendency of his second appeal, this Court issued its decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. Following *Foster*, the Tenth District remanded the case for resentencing. *State v. Withers*, 10<sup>th</sup> Dist. Nos. 06AP-302, 2006-Ohio-6989. At the resentencing hearing, defendant argued that the trial court was required to impose minimum concurrent sentences. The trial court rejected that argument and again imposed the same sentences. On June 26, 2008, the Tenth District also rejected

defendant's arguments and affirmed his sentences. *State v. Withers*, 10<sup>th</sup> Dist. Nos. 80AP-39, 08AP-40, 2008-Ohio-3175.

As defendant's appeal was journalized on June 26, 2008, defendant had until August 11, 2008, to timely file his notice of appeal. Defendant argues that he was unable to timely file a notice of appeal because he did not have sufficient funds to mail his documents. Defendant also admits that the notice he submitted to the Clerk did not comply with this Court's rules. Almost a month later, on September 8, 2008, defendant filed a motion for leave to file a delayed appeal pursuant to App.R. 5(A).

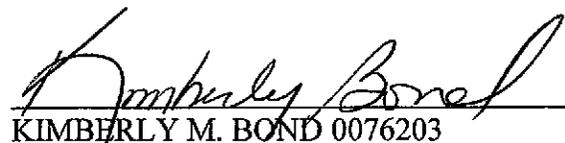
The State submits that defendant has not provided sufficient grounds for granting a motion for delayed appeal. Defendant had it well within his power to comply with this Court's rules, and he was not diligent in doing so. Defendant's motion for delayed appeal should be denied.

#### CONCLUSION

The State of Ohio urges this Court to deny the motion for leave to file a delayed appeal.

Respectfully submitted,

RON O'BRIEN 0017245  
Prosecuting Attorney



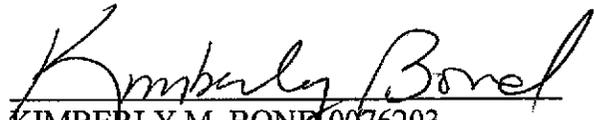
KIMBERLY M. BOND 0076203

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373 South High Street-13<sup>th</sup> Fl.  
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Counsel for Plaintiff-Appellee

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Memorandum Opposing Motion for Leave to File Delayed Appeal was sent by regular U.S. Mail, this day, September 17, 2008, to MICHAEL WITHERS, #495-457, Ross Correctional Institution, P. O. Box 7010, Chillicothe, Ohio 45601; Defendant-Appellant, *pro se*.

  
KIMBERLY M. BONE 0076203  
Assistant Prosecuting Attorney