IN THE SUPREME COURT OF OHIO

State of Ohio,	:	
	:	Case Numbers 2008-1942 and
Plaintiff-Appellant,	:	2008-2170
	:	
v.	:	On Appeal and Certified Conflict
	:	from the Union County Court of
Raynell Robinson,	:	Appeals, Third Appellate District,
	:	Case No. 14-07-20
Defendant-Appellee	:	

The Ohio Public Defender's Motion to Strike Notice of Appeal and Notice of Certified Conflict and to Dismiss Both Cases

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Union County Prosecutor

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Raynell Robinson

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FILED
NOV 13 2008
CLERK OF COURT
SUPREME COURT OF OHIO

The Ohio Public Defender's Motion to Strike Notice of Appeal and Notice of Certified Conflict and to Dismiss Both Cases

The Ohio Public Defender asks this Court to dismiss the State's appeal and certified conflict because the State failed to serve its notice of appeal and notice of certified conflict on the Public Defender as required by S.Ct.Prac.R. XIV(2)(A)(3).[1] That rule requires the State to serve the Ohio Public Defender with any notice of certified conflict or notice of appeal to this Court. The rule also requires the State to note service to the Public Defender on the certificate of service. As the State's certificates of service demonstrates, the State served only counsel for the defendant. Exhibits 1 and 2.[2]

As demonstrated below, the failure to serve the Public Defender is a recurring problem, and an extension to file a response is not an adequate remedy. Accordingly, this Court should strike the notice of appeal and notice of certified conflict and dismiss both cases. S.Ct.Prac.R. XIV(2)(D)(1).

Procedural history

Raynell Robinson was tried and convicted on charges of witness intimidation (F-3) and disruption of public services (F-3). State v. Robinson, 3rd Dist. No. 14-07-20, 2008-Ohio-4160, at ¶14. The State initially charged Mr. Robinson with felonious assault, but dismissed the charges claiming a lack of

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[1] "In a case involving a felony, when a county prosecutor files a notice of appeal under S.Ct.Prac.R. II or an order certifying a conflict under S.Ct.Prac.R. IV, the county prosecutor shall also serve a copy of the notice or order on the Ohio Public Defender."

[2] The lengthy exhibits to the notice of certified conflict are excluded due to their bulk.

evidence. Id. at ¶2, 4. The State's witnesses testified that Mr. Robinson threatened them for calling the police and destroyed one cell phone while the caller was in the process of speaking to a 9-1-1 dispatcher. Id. at ¶6. The court of appeals found that the State produced sufficient evidence to prove witness intimidation, Id. at ¶37, but that the General Assembly did not intend that disruption of public services, R.C. 2909.04, would include the destruction of private telephones or cell phones. Id. at 29.

The State filed a discretionary appeal to this Court, and a motion to certify a conflict with the court of appeals. The court of appeals certified the conflict, and the State filed a notice of certified conflict with this Court. The State failed to serve either notice on the Public Defender as required by S.Ct.Prac.R. XIV(2)(A)(3).

The Public Defender was unaware of this case until after the deadline for filing a response to the State's memorandum in support. This office only discovered the case on November 10, 2008, when undersigned counsel searched this Court's online docket for pending conflict cases.

Obtaining service is a recurring problem

Dismissal is the appropriate remedy because this is a recurring problem. In 2002, the Public Defender sought to enforce the rule through dismissal after the Public Defender discovered that this Court had heard oral argument in a case in which the defendant/appellee never knew that he had a case in this Court. State v. Martello, 96 Ohio St.3d 1482, 2002-Ohio-4448 (counsel appointed and leave to file an appellee's brief allowed); 96 Ohio St.3d 1509,

2002-Ohio-4950 (second oral argument granted). Earlier this year, this Court granted the Public Defender leave to file a brief that normally would have been out of time because the State had not served the Public Defender. State v. Sanchez, 118 Ohio St.3d 1528, 2008-Ohio-3627.

Less drastic steps have not been sufficiently effective

The Public Defender has taken less formal and less drastic steps to make prosecutors aware of the rule. When this Court accepts a State's appeals that does not include notice to the Public Defender, a supervising attorney calls the offending prosecutor to request service in future cases. Earlier this year, undersigned counsel spoke with an elected prosecutor who, at counsel's request, said that he would use a listserv for prosecutors to remind them of the rule. Undersigned counsel has also spoken informally with many of his regular opposing counsel. Yet violations persist. This is an ideal case to use to send a message to Ohio prosecutors because the lack of notice prejudiced the public defender and because dismissal will result in little or no prejudice to the State.

Little or no prejudice to the State

This is a good case for this Court to enforce the rule requiring service of State's appeals to the Ohio Public Defender because the State will suffer little or no prejudice. Mr. Robinson is serving his fifteen-month prison term for disruption of a public service concurrently with a two-year prison term for intimidation of a witness. State v. Robinson, 3rd Dist. No. 14-07-20, 2008-Ohio-4160, at ¶14. Even if the charge were reinstated, Mr. Robinson would not serve an additional day in prison. While this decision might affect other

prosecutions in the Third District, the State can seek and prove additional charges for other unlawful acts. If the State is correct that the destruction of a phone usually occurs in the context of other threats or assaults, the State can prosecute those threats or assaults, which is exactly what the State did in this case. Thus, the State needs not fear the loss of its authority to prosecute lawbreakers.

Service helps the Public Defender make sure this Court has the information it needs to decide criminal appeals

The rule requiring service upon the Public Defender has no function if it cannot be enforced. This Court recognized the Public Defender's unique role in informing this Court of the perspective of indigent defendants when it required prosecutors to serve the Public Defender with appeals and certified conflicts. S.Ct.Prac.R. XIV(2)(A)(3). Further, because many court appointments end when the court of appeals enters judgment, the Public Defender strives to make sure that this Court has the perspective of counsel when deciding whether to accept a discretionary appeal that the State has filed.

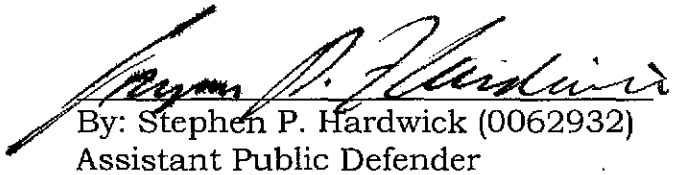
The Public Defender takes its role seriously. When it receives a notice of certified conflict or appeal from a prosecutor, the Public Defender conducts a supervisory-level review of the case to determine if the defendant has counsel, and whether the case merits amicus assistance. The State short-circuited that procedure by failing to serve its notice of appeal and certified conflict as required by this Court's rule. This Court should dismiss the State's notice of appeal and notice of certified conflict.

Conclusion

This Court should enforce its rule requiring service of State appeals on the Ohio Public Defender. Accordingly, this Court should strike the State's notice of appeal and notice of certified conflict and dismiss both cases.

Respectfully submitted,

Office of the Ohio Public Defender



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Assistant Public Defender

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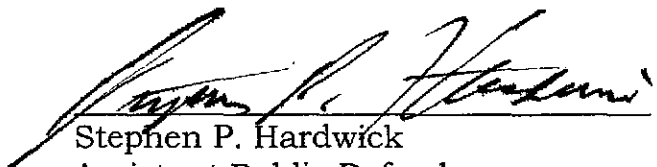
Counsel for Amicus
Ohio Public Defender's

Certificate of Service

I certify that on November 12, 2008, a copy of the foregoing was served via regular U.S. Mail to Melissa A. Chase, Assistant Prosecuting Attorney, 221 West Fifth Street, Suite 333, Marysville, Ohio 43040 and to Alison Boggs, 240 West Fifth Street, Suite A, Marysville, Ohio 43040.



Stephen P. Hardwick
Assistant Public Defender

Counsel for Amicus
Ohio Public Defender's

#289475

In the

Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 08-1942
Plaintiff-Appellant	:	On Appeal from the Union County Court of Appeals Third Appellate District C.A. Case No. 14-07-20
vs.	:	
RAYNELL ROBINSON,	:	
Defendant-Appellee.	:	

NOTICE OF APPEAL OF PLAINTIFF-APPELLANT STATE OF OHIO

Melissa A. Chase, Esq. (0042508)
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For Plaintiff-Appellant State of Ohio

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For Appellee Raynell Robinson

FILED
OCT 02 2008
CLERK OF COURT
SUPREME COURT OF OHIO

EXHIBIT
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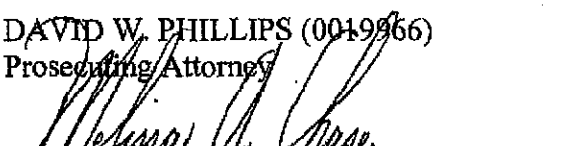
NOTICE OF APPEAL OF PLAINTIFF-APPELLANT STATE OF OHIO

Plaintiff-Appellant, the State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Union County Court of Appeals, Third Appellate District, entered in *State of Ohio v. Raynell Robinson*, 3rd Dist. No. 14-07-20, on August 18, 2008.

The State of Ohio invokes the jurisdiction of the Supreme Court on the grounds that the case presents questions of public or great general interest, is in conflict with at least three other appellate districts, involves a felony and warrants the granting of leave to appeal.

Respectfully submitted,

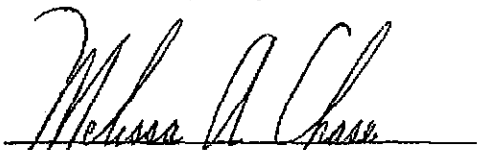
DAVID W. PHILLIPS (0019966)
Prosecuting Attorney



Melissa A. Chase (0042508)
Assistant Prosecuting Attorney
Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. mail on this 2nd day of October, 2008, to Alison Boggs, Esq., 240 West Fifth Street, Marysville, Ohio 43040, counsel for Defendant-Appellee.



Melissa A. Chase (0042508)
Assistant Prosecuting Attorney

NO. 08-2170

IN THE SUPREME COURT OF OHIO

APPEAL FROM

THE COURT OF APPEALS OF THE THIRD
APPELLATE JUDICIAL DISTRICT OF OHIO
UNION COUNTY - NO. 14-07-20

STATE OF OHIO

Plaintiff-Appellant

vs.

RAYNELL ROBINSON

Defendant-Appellee

NOTICE OF CERTIFIED CONFLICT

Counsel for Plaintiff-Appellant

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UNION COUNTY PROSECUTOR

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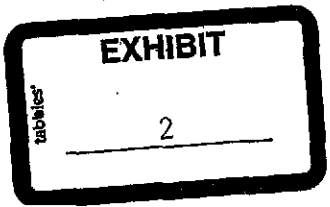
SUPREME COURT OF OHIO



Notice of Certified Conflict

Appellant, State of Ohio, gives notice of a certified conflict to the Ohio Supreme Court from the Union County Court of Common Pleas, Third Appellate District, Case Number 14-07-20 decided on August 18, 2008. The Third District has certified the following question to this Court:

> Does the damaging of a single, private telephone or cellular telephone disrupt "public services" sufficiently to constitute a violation of R.C. 2909.04(A)(3)?

The Third Appellate District has declared that its decision in *State v. Robinson* is in conflict with the judgments rendered in *State v. Yoakum*, 5th Dist. No. 01CA0005, 2002-Ohio-249; *State v. Thomas*, 2nd Dist. No. 19435, 2003-Ohio-5746; *State v. Johnson*, 8th Dist. Nos. 81692 and 81693, 2003-Ohio-3241; and *State v. Brown* (1994), 97 Ohio App. 3d 293.

Under Sup.Ct.R. IV Section 1, a copy of the Third District's order certifying the conflict and copies of all decisions determined to be in conflict are attached in the accompanying appendix.

Respectfully Submitted,

DAVID W. PHILLIPS (0019966)
UNION COUNTY PROSECUTOR

Melissa A. Chase

Melissa A. Chase (0042508)
Assistant Prosecuting Attorney
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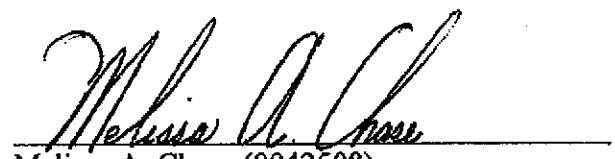
Telephone No.: (937) 645-4190
Facsimile No.: (937) 645-4191

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Certified Conflict was served upon Alison Boggs, Legal Counsel for the Defendant-Appellee at her business address of 240 West Fifth Street, Suite A, Marysville, Ohio 43040 by ordinary U.S. Mail, postage prepaid, this 7th day of November, 2008.



Melissa A. Chase (0042508)
Assistant Prosecuting Attorney