

**MOTION OF THE OHIO PUBLIC DEFENDER
TO STRIKE NOTICE OF APPEAL AND DISMISS CASE**

I. Introduction

The Ohio Public Defender respectfully moves this Court to strike Plaintiff-Appellant State of Ohio's notice of appeal and dismiss the case for its failure to serve the notice of appeal on the Ohio Public Defender. S.Ct.Prac.R. XIV(2)(A)(3).¹ In felony appeals filed by the State of Ohio, S.Ct.Prac.R. XIV(2)(A)(3) requires that the appellant State of Ohio serve a copy of the notice of appeal or order of certified conflict upon the Ohio Public Defender. That rule further demands that the State record its service of the notice of appeal upon the Ohio Public Defender in an attached certificate of service. As the certificate of service attached to the State's notice of appeal demonstrates, the Plaintiff-Appellant State of Ohio failed to serve the Ohio Public Defender with a copy of the notice. See attached Exhibit 1.

As demonstrated below, the State's lack of compliance with S.Ct.Prac.R. XIV(2)(D)(1) is a recurring problem. Furthermore, this Court should opt to strike the State's notice of appeal in this case, as the alternative option of requiring service and imposing a new deadline for the Ohio Public Defender to respond, is not an adequate remedy. The State filed its notice of appeal in this case on July 24, 2008, and on December 3, 2008, this Court entered judgment accepting the State's appeal for review on the merits. Because the Ohio Public Defender has an interest in this Court's adjudication of the merits of this felony appeal, and because the Ohio Public Defender was not provided with the required service, this Court should strike the State's notice of appeal and dismiss the case. S.Ct.Prac.R. XIV(2)(D)(1).

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."

II. Procedural History

Cleveland Cargile was tried by a jury in the Cuyahoga County Court of Common Pleas for two counts of robbery and one count of illegal conveyance of a controlled substance into a detention facility. The jury found Cargile not guilty of both robbery counts, but found him guilty of the illegal conveyance. Cargile was thus convicted of the illegal conveyance and for that crime, the trial court sentenced him to two years in prison. On direct appeal, Cargile's conviction was overturned and vacated on the grounds that the State had failed to present sufficient evidence of every element of the offense. *State v. Cargile*, Cuyahoga App. No. 89964, 2008-Ohio-2783, at ¶¶ 17-18.

Subsequently, the State filed a discretionary appeal in this Court, urging it to accept jurisdiction over the case and determine whether a criminal defendant "knowingly conveys" in violation of R.C. § 2921.36 when, by nature of their arrest, they convey prohibited items into a detention facility." See, State's Memorandum in Support of Jurisdiction, p. 3. The State failed to serve a copy of its notice of appeal upon the Ohio Public Defender, as it is required to do under S.Ct.Prac.R. XIV(2)(A)(3). However, on December 3, 2008, this Court entered judgment accepting jurisdiction over this appeal for a determination of the question presented.

The deadline by which the Ohio Public Defender could have filed a memorandum in opposition to the State's memorandum in support of jurisdiction had long since passed before the Ohio Public Defender was aware of this case. Indeed, the Ohio Public Defender only just discovered this case on December 4, 2008, when the undersigned reviewed this Court's December 4, 2008 announcements of cases accepted for review.

III. Argument

1. Lack of compliance with Rule XIV(2)(A)(3) is a recurring problem.

Dismissal is the appropriate remedy in this case because the State's failure to effect service of its notices of appeal on the Ohio Public Defender as required is a significant and recurring problem. For instance, as far back as 2002, the Ohio Public Defender sought to enforce this rule through dismissal, after discovering that this Court had accepted jurisdiction over a case in which the defendant-appellee had never been made aware. That case was briefed and argued, despite the defendant-appellee having not been made aware of its pendency. This Court heard oral arguments in that case before the Ohio Public Defender discovered it was pending. *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). In addition, earlier this year, this Court granted the Ohio Public Defender leave to file an amicus brief out-of-rule in a pending felony appeal where the State failed to comply with the rule. *State v. Sanchez*, 118 Ohio St.3d 1528, 2008-Ohio-3627.

2. Less drastic steps have not proven effective.

The Ohio Public Defender has taken less formal and less drastic steps in order to make county prosecutors aware of their mandated duty under that rule. In some instances where this Court had accepted a State's felony appeal, and service of the notice of appeal had not been provided to the Ohio Public Defender, a supervising attorney from the Office of the Ohio Public Defender contacted the offending county prosecutor by telephone to request service in future cases. Earlier this year, Assistant State Public Defender Stephen P. Hardwick spoke over the telephone with an elected county prosecutor who, at upon request,

said that he would use a listserv for prosecutors to remind them of the requirements of the rule. Attorneys with the Office of the Ohio Public Defender have also pursued informal measures with many of the county prosecutors who typically serve as opposing counsel on state appeals. Yet violations persist and the State therefore shows no commitment to remedying this type of violation. The instant case is an ideal case for this Court to use to send a message to county prosecutors all over Ohio that they must comply with the rule, because here the lack of notice prejudiced the Ohio Public Defender.

3. Enforcement of the rule helps the Ohio Public Defender ensure that this Court has before it all the necessary information and arguments required to decide felony appeals.

The rule requiring service upon the Ohio Public Defender has no function if it cannot be enforced. This Court recognized the Ohio Public Defender's unique role in informing this Court of the perspective of indigent defendants when it required prosecutors to provide service of its notices of appeal and certified conflicts to the Ohio Public Defender. S.Ct.Prac.R. XIV(2)(A)(3). Further, because many court appointments end once the state court of appeals enters judgment in a case, the Ohio Public Defender must strive to ensure that this Court has the perspective of effective counsel at all stage of review of a felony appeal.

The Ohio Public Defender takes its role seriously. When it receives a notice of certified conflict or appeal from a prosecutor, the Ohio Public Defender conducts a supervisory-level review of the case to determine whether the defendant has counsel, and whether the case contains legal issues that warrant amicus assistance. The State short-circuits that procedure each time it fails to comply with the express rule. By routinely failing to serve notices of appeal and certified conflicts upon the Ohio Public Defender, as

required under this Court's practice rules, county prosecutors are tempting this Court to condone their negligence of this Court's own rules. In order to ensure compliance with court rules in future felony appeals, this Court should strike the State's notice of appeal and dismiss this case, and thereby give effect to this Court's expectations of the standards of practice.

IV. Conclusion

This Court should enforce its rules of practice, and specifically this Court should enforce this rule requiring service of State felony appeals on the Ohio Public Defender. For all the foregoing reasons, and to ensure that county prosecutors understand that compliance with this Court's rules is not optional, the Court should strike the State's notice of appeal and dismiss this case. No more effective message can be communicated.

Respectfully submitted,

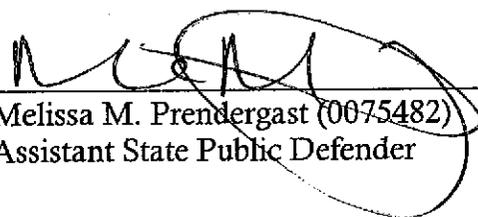
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CERTIFICATE OF SERVICE

I certify that on December 12, 2008, a copy of the foregoing **Motion of the Ohio Public Defender to Strike Notice of Appeal and Dismiss Case** was served via regular U.S. Mail to Kristen L. Sobieski, Assistant Prosecuting Attorney, The Justice Center - 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113, and to Jerome Emoff, Dworken & Bernstein Co., L.P.A., 60 South Park Place, Painesville, OH 44077.



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