

IN THE SUPREME COURT OF OHIO

State of Ohio, : Case Nos. 2008-1942 and 2008-2170
 :
 Plaintiff-Appellant, : On Appeal and Certified Conflict from
 : the Union County Court of Appeals,
 v. : Third Appellate District, No. 14-07-20
 :
 Raynell Robinson, : **Expedited Review Requested,**
 : **Oral Argument Scheduled**
 Defendant-Appellee. : **for June 3, 2009.**

**Motion of Appellee Raynell Robinson to Reschedule Oral Argument,
 Appoint Counsel, and to Set a Deadline for Appellee to file a Jurisdictional
 Memorandum and/or a Merit Brief**

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FILED
 MAY 21 2009
 CLERK OF COURT
 SUPREME COURT OF OHIO

**Motion of Appellee Raynell Robinson to Reschedule Oral Argument,
Appoint Counsel, and to Set a Deadline for Appellee to file a Jurisdictional
Memorandum and/or a Merit Brief**

I. Introduction

Mr. Robinson is without counsel in this Court. All parties and amici served his court of appeals lawyer based on the incorrect assumption that she was Mr. Robinson's lawyer. Accordingly, no party or amici has served, in compliance with this Court's rules, any document from the notice of appeal until today on Mr. Robinson.

Pursuant to S.Ct.Prac.R. XIV, §2(D)(2),¹ this Court should cancel the oral argument scheduled for June 3, 2009, appoint counsel, vacate the order accepting this case, and set a deadline for Mr. Robinson to file a memorandum opposing jurisdiction and, if he chooses, a notice of discretionary cross-appeal. In the alternative, this Court should cancel the oral argument, appoint counsel, and set a deadline for Mr. Robinson to file a merit brief.

II. 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 evidence. *Id.* at ¶2, 4. The State's witnesses testified that Mr. Robinson

¹ "If the Supreme Court determines that service was not made as required by this rule, it may strike the document or, if the interests of justice warrant, order that the document be served and impose a new deadline for filing any responsive document. If the Supreme Court determines that service was made as required by this rule or that service was not made but the movant was not adversely affected, it may deny the motion."

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.

Two days after the court of appeals released its decision, Mr. Robinson's court of appeals attorney wrote him to tell him that the court had reversed one of his convictions but affirmed the other. Affidavit of Robinson, at ¶ 2, Exhibit 1. That letter was the last communication from Ms. Boggs to Mr. Robinson. *Id.* at ¶ 3.

This State filed a discretionary appeal and certified conflict, serving them only on Mr. Robinson's court of appeals counsel, who did not inform Mr. Robinson of the State's appeal. *Id.* On or about November 10, 2008, undersigned counsel, a staff attorney at the Ohio Public Defender's Office, discovered the case when searching this Court's dockets for unaccepted certified conflicts. Affidavit of Hardwick, at ¶2, Exhibit 3. On November 13, 2009, the Ohio Public Defender filed an amicus motion to dismiss based on the failure to serve the Public Defender. This Court denied the motion and accepted the cases.

III. Role of the Public Defender

When a prosecuting attorney serves the public defender with a notice of appeal to this Court, the supervising attorney of Intake and Prison Legal

Services contacts the defendant's appellate attorney to confirm that the defendant has representation in this Court. Affidavit of Macke, at ¶5, Exhibit 2. The supervising attorney then makes an initial determination as to whether the case requires involvement as amicus curiae. Id.

The supervising attorney is responsible for the opening and closing of thousands of cases each year, so he has to depend on many policies and procedures to manage the case flow. Id., at ¶¶ 1-2. Because this case came to him from a staff attorney, the policy of contacting appellate counsel upon receipt of a notice of appeal was not triggered. Id. at ¶7. The staff attorney determined that the case did not merit an amicus brief, but that staff attorney (undersigned counsel) also did not call appellate counsel to affirmatively verify that she remained as counsel in this case. Affidavit of Hardwick, at ¶4, Exhibit 3. The OPD has now put in place a policy to fill this gap. Affidavit of Macke, at ¶10, Exhibit 2.

IV. Discussion

A. Denying this motion would deny Mr. Robinson his right to the effective assistance of counsel.

Proceeding without giving Mr. Robinson the opportunity to defend his position through counsel would violate his constitutional right to counsel in this "critical stage" of the proceedings against him. United States v. Cronic (1984) 466 U.S. 648, 654 (denial of counsel at a critical stage violates the Sixth and Fourteenth Amendments to the United States Constitution); Griffin v. Illinois, 351 U.S. 12 (1956) (right to counsel at state expense on initial appeal). Although a discretionary appeal would not generally be a "critical stage,"

Murray v. Giarratano (1989), 492 U.S. 1, 7, quoting Ross v. Moffitt (1974), 417 U.S. 610, 610-611, it is a critical stage in this case because the State has appealed a loss from the trial court. Because the State is attempting to reverse the dismissal of the charges against Mr. Robinson, he needs an attorney “as a shield to protect him against being haled into court by the State. . . .” Murray at 7, internal citation and quotation marks omitted. If he loses this appeal, his conviction will be reinstated.

Even at this seemingly late stage, Mr. Robinson is entitled to appointed counsel under the plain meaning of this Court’s rules:

If the Supreme Court grants leave to appeal in a discretionary appeal involving a felony and an unrepresented party to the appeal is indigent, the Supreme Court will appoint the Ohio Public Defender or other counsel to represent the indigent party or order the court of appeals to appoint counsel as provided in S. Ct. Prac. R. II, Section 2(D)(2).

S. Ct. Prac. R. III, §7. This appeal involves a felony, and Mr. Robinson has demonstrated his indigency. Robinson Indigency Affidavit, filed May 21, 2009; Entry of Appointment of Counsel, Exhibit 4. This Court’s rule does not include a time limitation. Mr. Robinson is as entitled to counsel now as he was when this Court agreed to hear the case.

B. The lack of notice and counsel would make a decision adverse to Mr. Robinson unenforceable and would delay the final resolution of this case.

This Court should appoint counsel and give Mr. Robinson an opportunity to be heard because any other action would delay the final resolution of this case. If Mr. Robinson has neither counsel nor an opportunity to be heard, a

decision adverse to him would be unenforceable against him, putting this case in a legal limbo that would take extensive litigation to resolve.

1. Service on Mr. Robinson's court of appeals lawyer was insufficient under this Court's rules because she had terminated the representation.

The State and all amici served Mr. Robinson's court of appeals counsel with notices, but such service did not satisfy this Court's rule that service must be made on parties. Under S. Ct. Prac. R. XIV, §2(A)(1), parties must be served directly unless they are represented by counsel:

When a party or an *amicus curiae* files any document with the Clerk, . . . that party or *amicus curiae* shall also serve a copy of the document on all parties to the case. Service on a party represented by counsel shall be made on counsel of record.

Parties and amici all labored under the misunderstanding that Alison Boggs represented Mr. Robinson in this Court. But, as Mr. Robinson's affidavit demonstrates, Ms. Boggs had terminated the representation on August 20, 2008, two days after the court of appeals ruled. Accordingly, Mr. Robinson was pro se in this Court, and this Court's rules required that he be served directly.

2. Due process requires notice.

The failure to properly serve the notice of appeal and all subsequent documents on an attorney actually representing Mr. Robinson violates his due process right to notice of the proceedings against him. As a result, a ruling by this Court against the unrepresented Mr. Robinson on the merits would violate his Fifth, Sixth and Fourteenth Amendment rights to due process, notice of proceedings against him, and counsel.

“The fundamental requisite of due process of law is the opportunity to be heard.” Grannis v. Ordean (1914), 234 U.S. 385, 394. All litigants, civil and criminal, have a Fourteenth Amendment due process right to notice of the proceedings against them. Further, “the Due Process Clause requires every method of service to provide ‘notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” Volkswagenwerk Aktiengesellschaft v. Schlunk (1988), 486 U.S. 694, 707, quoting Mullane v. Central Hanover Bank & Trust Co. (1950), 339 U.S. 306, 314. A judgment cannot be final if adequate notices is not provided. Greene v. Lindsey (1982), 456 U.S. 444, 449-50, 453-4 (due process prevents finality of judgment when the facts of the case demonstrate that the notice was not a reliable way of informing a party of a proceeding), citing Mullane at 314.

Here, the State, amici, and this Court sent notices to an attorney who was not acting as Mr. Robinson’s lawyer. Service on an attorney who does not represent a litigant does not meet the requirement for service to be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Mullane, 339 U.S. at 314. Ms. Boggs took no action to serve as appellate counsel in this case. She did not file a single document in either the court of appeals or this Court. Mr. Robinson was *pro se*.

V. Conclusion

Raynell Robinson is entitled to counsel under the rules of this Court and the United States Constitution. Pursuant to S.Ct.Prac.R. XIV, §2(D)(1), this Court should cancel the oral argument scheduled for June 3, 2009, appoint counsel, vacate the order accepting this case, and set a deadline for Mr. Robinson to file a memorandum opposing jurisdiction and, if he chooses, a notice of discretionary cross-appeal. In the alternative, this Court should cancel the oral argument, appoint counsel, and set a deadline for Mr. Robinson to file a merit brief.

Respectfully submitted,

Office of the Ohio Public Defender



By: Stephen P. Hardwick (0062932)
Assistant Public Defender

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 (Fax)

Counsel for Raynell Robinson

Certificate of Service

I certify that on May 21, 2009, a copy of the foregoing was served via fax and email to Melissa A. Chase, Assistant Prosecuting Attorney, 937-645-4191 and mchase@co.union.oh.us; and via email to Benjamin C. Mizer, Solicitor General, bmizer@ag.state.oh.us. A courtesy copy was mailed to Mr. Robinson's court of appeals counsel, Alison Boggs, 240 West Fifth Street, Suite A, Marysville, Ohio 43040.


Stephen P. Hardwick

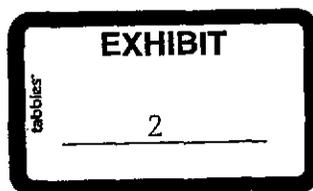
IN THE SUPREME COURT OF OHIO

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

County of Franklin)
)
 State of Ohio)

I, Jason A. Macke, swear that the following is true:

1. I am the Intake and Prison Legal Services Supervising Attorney in the Office of the Ohio Public Defender, and in that capacity I oversee the processing of several thousand cases each year.
2. Because of the large volume of cases that I review each year, I have many informal polices and procedures that I follow relating to case flow.
3. In August 2008, Mr. Robinson asked the Ohio Public Defender to represent him a discretionary appeal to this Court of an issue he lost in the court of appeals. This office declined to represent him pursuant to R.C. 120.06, and notified Mr. Robinson of this fact.
4. S. Ct. Prac. R. XIV Sec. 2(a) provides that “[i]n 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.”
5. When our office is properly served with a notice or order it is my responsibility, under normal office policies and procedures, to contact the defendant’s appellate attorney to confirm that the defendant has representation in the Ohio Supreme Court, and to make an initial determination whether the case requires the involvement of our office as amicus curiae.
6. Our office was not served with a Notice of Appeal in *State v. Robinson*, No. 2008-1942, or an Order Certifying a Conflict in *State v. Robinson*, No. 2008-2170.



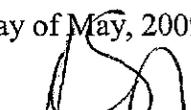
7. Because our office was not properly served, I did not contact the defendant's appellate attorney in either of those named cases.
8. When an attorney in our office discovered that the cases were pending in the Ohio Supreme Court, that attorney filed motions to dismiss in both cases based upon the county prosecutor's failure to comply with S. Ct. Prac. R. XIV, but did so as a representative of the Ohio Public Defender and not as attorney for the defendant.
9. This Court subsequently denied those motions.
10. Because the confusion of the defendant's appellate attorney has apparently resulted in the denial of counsel to the defendant, I have altered the informal policies and procedures described above to prevent this denial of counsel from occurring in future cases.
11. On May 14, 2009, Attorney Alison Boggs left me a voice mail message asking why she was being served with documents from the State's appeal in the Ohio Supreme Court. In that message she stated that she thought this office represented Mr. Robinson. That message was the first contact I had with Ms. Boggs about Mr. Robinson's case.
12. Prior to May 14, 2009, no one requested this office to consider representing Mr. Robinson to defend against the State's appeal in this case, and this office had never previously considered representing Mr. Robinson in that capacity.
13. As a direct result of Ms. Boggs' May 14, 2009 call, the office contacted Mr. Robinson offered him representation.

Further affiant sayeth not.



Jason A. Macke

Signed and sworn before me this 21st day of May, 2009.



Notary Public



AMANDA J. POWELL, Attorney At Law
NOTARY PUBLIC, STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.

IN THE SUPREME COURT OF OHIO

State of Ohio, : Case Nos. 2008-1942 and 2008-2170
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 Plaintiff-Appellant, : On Appeal and Certified Conflict from
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 :
 Raynell Robinson, : **Affidavit of Attorney**
 : **Stephen Hardwick**
 Defendant-Appellee :

County of Franklin)
) ss:
 State of Ohio)

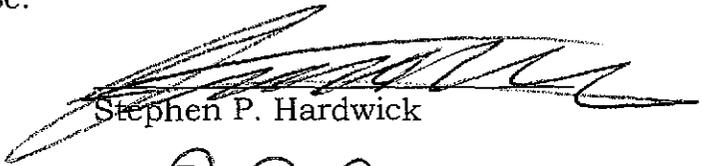
I, Stephen P. Hardwick, swear that the following is true based on my personal knowledge:

1. I am an assistant public defender at the Ohio Public Defender's Office.
2. On or about November 10, 2008, I reviewed this Court's electronic docket to look for certified conflicts that had not yet been accepted. While doing that, I discovered that the State had filed a certified conflict and discretionary appeal in this case.
3. I brought the case to the attention of management, and we decided to file an amicus motion to strike, challenging the State's failure to serve this Office as required by this Court's rules.
4. I served the motion on Alison Boggs, mistakenly believing that she was Mr. Robinson's counsel. I did not send the service copy to Mr. Robinson directly. I did not call Ms. Boggs to verify that she was serving as counsel in this Court.
5. When this Court denied the motion to strike, I determined that the office should not file an amicus on the merits, so I took no further action on the case until May, 20, 2009.
6. On May 20, 2009, supervising attorneys asked me to file a motion to appoint counsel and for leave to file a merit brief in this case.
7. On May 20, 2009, I called the offices of counsel of record for the State and for amicus, the Office of the Ohio Attorney General. I left a message for counsel for the State to call me. I spoke with the Solicitor General

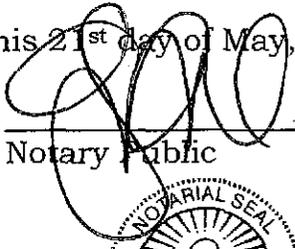
EXHIBIT

and told him that I intended to file a motion to cancel oral argument and to participate in the case.

8. I immediately tried to contact Mr. Robinson, and spoke to him by phone on the morning of May 21, 2009. He told me that he wanted my office to represent him in this case.


Stephen P. Hardwick

Signed and sworn before me this 21st day of May, 2009.



Notary Public



ELIZABETH R. MILLER
ATTORNEY AT LAW
Notary Public, State of Ohio
My Commission Has No Expiration Date
Section 147.03 ORC

IN THE COURT OF COMMON PLEAS, UNION COUNTY, OHIO

COURT OF COMMON PLEAS
UNION COUNTY
2007 APR 30 AM 8:42
COURT OF COMMON PLEAS
CLERK
2007 APR 30 AM 8:43
CLERK

STATE OF OHIO

-VS-

RAYNELL ROBINSON,

CASE NO. 06-CR-0192

DEFENDANT

JOURNAL ENTRY

The Court, upon Motion of the Defendant and Affidavit of Indigency filed herein, hereby finds the Defendant indigent and it is therefore ORDERED that the Criminal Defense Lawyers of Union County be and hereby is appointed counsel in this case for the purpose of representation of the Defendant in all matters pertaining to the appeal of the Defendant of arraignment, scheduling conference and sentencing.

Defendant has further requested a transcript of the proceedings, which is Ordered be prepared and furnished Defendant's attorney forthwith.

RICHARD E. PARROTT, JUDGE

IMAGE

EXHIBIT
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