ORIGINAL

In the
Supreme Court of Ohio

MICHAEL DEAN SCOTT,	:	Case No. 2009-1369
Petitioner,	:	
v.	:	On Review of Certified Question from The United States District Court for the Northern District of Ohio
MARK HOUK, WARDEN	:	
Respondent.	:	U.S. District Court Case No. 4:07-cv-00753-JRA

MOTION OF RESPONDENT MARK HOUK, WARDEN, TO WITHDRAW MOTION TO DISMISS FOR LACK OF PROSECUTION AND TO TREAT RESPONDENT'S PRELIMINARY MEMORANDUM AS RESUBMITTED

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FILED
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CLERK OF COURT
SUPREME COURT OF OHIO

RESPONDENT'S MOTION TO WITHDRAW MOTION TO DISMISS FOR LACK OF PROSECUTION AND TO TREAT RESPONDENT'S PRELIMINARY MEMORANDUM AS RESUBMITTED

Respondent Mark Houk, Warden, moves this Court to allow withdrawal of his motion to dismiss for lack of prosecution, filed on August 19, 2009. Respondent further moves this Court to treat his preliminary memorandum, filed on August 18, 2009, as resubmitted in response to the second certified copy of the district court's order certifying a question of state law, filed on September 3, 2009.

On July 29, 2009, the United States District Court for the Northern District of Ohio granted Petitioner Michael Dean Scott's motion to certify a question of state law to this Court. Certification Order in *Scott v. Houk* (N.D. Ohio, July 21, 2009), Case No. 4:07-CV-0753, at 6. Rule XVIII, Section 6 of the Rules of Practice of the Supreme Court of Ohio provides that "[w]ithin 20 days after a certification order is filed with the Supreme Court, each party *shall* file a memorandum" addressing the certified question. S.Ct. R. XVIII, § 6 (emphasis added). The twenty-day time limit expired on August 18, 2009. Respondent Mark Houk, Warden, timely filed his required memorandum, but Petitioner Michael Dean Scott did not. On August 19, 2009, Respondent filed a motion to dismiss the case for want of prosecution.

On September 1, 2009, the Northern District ordered the submission of a second certified copy of its order certifying a question of state law to this Court. Certification Order in *Scott v. Houk* (N.D. Ohio, Sept. 1, 2009), Case No. 4:07-CV-0753. In this order, the Northern District explained that it had "inadvertently failed to place copies of the Court's certification order in the mail to counsel to signal to them that the Supreme Court of Ohio would shortly be in receipt of the order" and directed the district court clerk "to re-issue the certification order to the Ohio Supreme Court and place this order on the docket, including a certificate of service." *Id.* at 1. The district court clerk complied and this Court docketed a second copy of the certification order

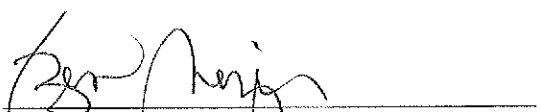
on September 3, 2009. In light of these developments, Respondent moves this Court to allow withdrawal of its motion to dismiss for lack of prosecution.

Under Supreme Court Rule XVIII, Section 6, each party must file a preliminary memorandum addressing the certified question in the second copy of the Northern District's certification order by September 23, 2009. As explained above, Respondent filed a memorandum in response to the initial copy of the Northern District's certification order, in compliance with Rule XVIII, Section 6, on August 18, 2009. Because the substance of the district court's first and second certification orders is identical, Respondent moves this Court to treat its August 18, 2009, memorandum as resubmitted in response to the Northern District's second copy of the certification order.

On September 4, 2009, Petitioner filed a motion to strike the Northern District's initial certification order, filed on July 29, 2009. Respondent does not object to the motion to strike.

Respectfully submitted,

RICHARD CORDRAY (0038034)
Attorney General of Ohio



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Mark Houk, Warden

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion of Respondent Mark Houk, Warden, to Withdraw Motion to Dismiss for Lack of Prosecution and to Treat Respondent's Preliminary Memorandum as Resubmitted was served by U.S. mail this 8th day of September, 2009, upon the following counsel:

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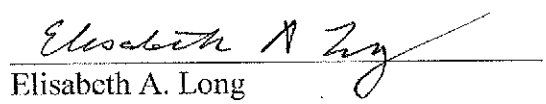

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